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Balancing Administrative Efficiency and Fairness: Restrictions on Local Hearing Advisors Post-*Nightlife Partners, Ltd. v. City of Beverly Hills*

By Kelli Shope*

I. INTRODUCTION

Imagine this: you own a successful local tavern, with an impeccable track record for adherence to city codes, and the city denies the application to renew your liquor license. The Assistant City Attorney, smug, explains that your application was incomplete, the deadline has expired, and the city will not reconsider under any circumstances. You promptly request a hearing and, in the meantime, learn that the city has been planning to oust every "morally bankrupt" institution in your neighborhood. Eager to present your case to a neutral hearing officer, you approach your hearing with optimism. The hearing officer introduces himself, a self-proclaimed "first-timer," and announces the advisor who will be assisting him throughout the process. In a fleeting moment, your optimism disappears; your old friend, the City Attorney, is now advising this first time hearing officer.

Could it be that an individual who advocated for the denial of your license renewal is allowed to serve at your so-called fair hearing as the decision-maker's advisor? Is the guarantee of a fair hearing compromised by this apparent impartiality? You cannot help but

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wonder whether a few additional administrative safeguards would protect your right to a fair hearing. Logic follows that additional administrative protections would undoubtedly offer assurances of fairness; but logic fails to account for the competing demands of efficiency and fairness at the local level.

The longstanding concern over the combination of functions in local adjudication provides the context of *Nightlife Partners, Ltd. v. City of Beverly Hills* ("*Nightlife*").[1] The *Nightlife* decision sends a strong message regarding minimum due process procedures in local adjudication and the applicability of the separation of functions doctrine to local hearing advisors.[2]

This note examines the *Nightlife* decision and its relevance to administrative adjudication at the local level. Section II explores the historical roots of the legal principles relevant to the *Nightlife* decision. Section III sets forth the facts of the case and analyzes the opinion, emphasizing the basis of support for the court's decision. In Section IV, the probable impact of *Nightlife* on administrative law in California and beyond will be discussed. Part V concludes the discussion of *Nightlife* and the constitutional issues related to the separation of functions doctrine.

II. HISTORICAL BACKGROUND

A. Due Process in Administrative Adjudication

The due process clause of the Fifth Amendment to the United States Constitution sets forth the guarantee of basic fairness before a tribunal for all citizens.[3] Although the exact contours of the clause remain fluid and contextual, "due process is a hallmark of the American legal system."[4] At its threshold, the Supreme Court has

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1. Nightlife Partners, Ltd. v. City of Beverly Hills, 133 Cal. Rptr. 2d 234 (Cal. Ct. App. 2003).

2. *See id.*

3. U.S. CONST. amend. V. The pertinent text of the Fifth Amendment provides that no citizen shall be "deprived of life, liberty, or property, without due process of law . . . ." *Id.* The Fifth Amendment is applicable to the states through the Fourteenth Amendment: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend XIV.

4. JUDGE HAROLD E. KAHN & ROBERT D. LINKS, ESQ., CALIFORNIA CIVIL PRACTICE § 7.27 (2003).

recognized that "a fair trial in a fair tribunal is a basic requirement of due process."[5] Although due process originally and primarily applied to the judicial court system, its applicability to administrative proceedings has been clearly established.[6] Accordingly, for an administrative proceeding to comport with minimum due process requirements, an impartial, unbiased decision-maker is fundamental.[7] A less definitive issue, and one of ongoing controversy, is the inherent appearance of unfairness in the routine combination of investigative, prosecutorial, and adjudicative functions within a single governmental unit in administrative law; an even more controversial scenario arises when the combination of these functions lies in the job description of a single governmental employee.[8] In

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5. In re Murchison, 349 U.S. 133, 136 (1955).

6. *See* Goldberg v. Kelly, 397 U.S. 254, 265 (1954); Richardson v. Perales, 402 U.S. 389, 401 (1971). However, procedures required in courts under due process are different than those required in the administrative context. KAHN, *supra* note 4, § 7.27. "There is a vast difference between the due process required in administrative hearings as opposed to formal court trials." *Id.* For instance, in the formal court system, the independence of judges is of utmost concern while in the administrative context, it is not necessarily a due process violation for a decision-maker to have participated in the investigation stage leading to the action. *Id.*

7. *See Goldberg*, 397 U.S. at 271 (stating that "an impartial decision maker is essential.").

8. Withrow v. Larkin, 421 U.S. 35, 51 (1975). "The issue is substantial, it is not new . . . and [those] concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached." *Id.* The combination of investigatory, prosecutorial, and adjudicative functions, the "hallmark" of administrative law, has historically raised due process concerns particularly related to bias and conflict of interest. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 8.1, at 200, § 8.5.4, at 247-48 (1998) [hereinafter AMAN & MAYTON]. "Whether an independent and impartial adjudication is possible in such an environment of combined power has been a long-standing concern of administrative law." *Id.* § 5.2.2, at 133 (citing Wong Yang Sung v. McGrath, 339 U.S. 33 (1950)). In his article on evolving statutory protections for regulated parties, Michael Asimow effectively depicts the challenges inherent in the combination of functions:

> A historic administrative law dilemma concerns the combination of conflicting functions within the same agency. Many agencies adopt regulations, investigate violations of statute or regulations, prosecute alleged violators, adjudicate the issue of whether a

local administrative adjudication, challenges based on this system allowing for the combination of functions are subject to review under due process;[9] the following summarizes the history of the separation of functions doctrine and related due process considerations.

B. Separation of Functions

As a natural consequence of limited resources in local government, administrative procedures at the local level have traditionally been relaxed and often scrutinized.[10] Of notable concern

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> violation occurred and prescribe the appropriate penalty. Combining all these functions in the same agency may well serve the causes of efficiency and accuracy, but regulated parties generally find the combination unfair and objectionable.

Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297, 314 (Winter 1996).

Presidential Committees and Congress throughout the last century have had various solutions and recommendations aimed at ensuring judicial independence and fairness. *See* AMAN & MAYTON, § 5.2.2 at 133-34. Recommendations include complete separation of the judicial function whereby a neutral body would take over in the decision-making phase. *Id.* at 133. Many presidential commissions have suggested that the judicial function be entirely taken away from agencies. *Id.* at 134. This structure has been justified, however, by the primary goals of administrative law: efficiency and effectiveness. *Id.* § 8.5.4, at 247. Instead of stripping agencies of their adjudicative function, Congress has responded to the combination of functions concern through an "internal separation of functions" as dictated by adjudicative safeguards found within the Administrative Procedure Act. *Id.* § 5.2.2, at 134. "The case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . ." MICHAEL ASIMOW, ET.AL., STATE AND FEDERAL ADMINISTRATIVE LAW § 3.3, at 120 (2d ed. 1998) (*quoting* Withrow, 421 U.S. at 52) [hereinafter "ASIMOW, STATE AND FEDERAL"].

9. Michael Asimow, *News From the States: Due Process and the Choice of a Local Government Hearing Officer*, 24 ADMIN. & REG. L. NEWS 9 (Spring 1999).

10. Courts have implied that questionable procedures at the local level are inexcusable considering the vast number of proceedings at that level and consequently the number of individuals affected by the outcomes of these proceedings. *See e.g.*, Nightlife Partners, Ltd. v. City of Beverly Hills, 133 Cal. Rptr. 2d 234, 242-43 (Cal. Ct. App. 2003). The Supreme Court has approached the issue from a practicality standpoint; it validated concerns about the combination of functions but concluded that "the variety and complexity of administrative processes defies simple doctrinaire solution." *See* CHARLES H. KOCH JR., ADMIN. L. & PRAC., § 6.11 (2d ed. 2003).

is the lenient combination of functions and the ensuing appearance of unfairness in local proceedings.[11] Admittedly, the combination of functions "carries a risk that the decision will be biased," but practical complexities of administrative law have required that the otherwise efficient structure remain intact.[12] In *Withrow v. Larkin*, the leading case on due process considerations related to the combination of functions, the Supreme Court upheld the constitutionality of the administrative structure which combines functions within an administrative unit and held that the mere combination of investigative and adjudicative functions in administrative proceedings, absent actual bias,[13] does not violate due process.[14] Further, a due process challenge based on the separation of functions doctrine must "overcome a presumption of honesty and integrity in those serving as adjudicators . . . ."[15] The ruling allowed for some discretion, however, where a court determines in "the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high."[16] This judicial discretion appears to align with an historical, flexible notion of due process as presented by Justice Frankfurter: due process, "unlike some legal

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11. Asimow, *supra* note 9. "Local adjudication is the black hole of administrative law. Local agencies can generally select any procedure they want to use, subject only to due process requirements." *Id.* at 9. As a consequence, parties involved in local adjudication rarely have successful challenges against the process in their administrative proceeding. *Id.*

12. KOCH, *supra* note 10, § 6.11.

13. The showing of actual bias pertains to challenges based on separation of functions, however those seeking to remove hearing officers for pecuniary interest need not establish actual bias. *See* Haas v. County of San Bernardino, 119 Cal. Rptr. 2d 341 (Cal. 2002). "While adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for financial interest have not." *Id.* at 347 (citing Withrow, 421 U.S. at at 47; Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 820 (1986)).

14. *See* Withrow v. Larkin, 421 U.S. 35 (1975). *See also* JOANNE CONSTANTINO, ET. AL, 2 Am. Jur. 2d, Administrative Law § 313. The Court has consistently upheld the constitutionality of the administrative law structure. *Id.* *Withrow* validated the combination of investigative and adjudicatory functions within a single agency, but a more "alarming" combination may be that of the prosecutorial and adjudicative functions. *See* AMAN & MAYTON, *supra* note 8, at 248.

15. *Withrow*, 421 U.S. at 47.

16. *Id.* at 58.

rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . 'due process' is compounded of history, reason, the past course of decisions and stout confidence in the strength of the democratic faith which we profess . . . ."[17] Still, the sentiment of *Withrow* is that, generally speaking, "[d]ue process violations must turn on 'a risk of *actual* bias or prejudgment'"[18] where separation of functions challenges question the constitutionality of agency structure.[19]

Building on the holding of *Withrow*, some states have granted plaintiffs additional protection, such as allowing for an "appearance of bias" standard.[20] In 1981, California's leading case on bias required a showing of actual bias for successful due process challenges;[21] the plurality explained that "a party's unilateral perception of an appearance of bias cannot be a ground for disqualification [of a hearing officer] unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals."[22] However a decision in 2002 established that, at least in some circumstances, an *appearance* of bias is sufficient grounds for a bias

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17. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (concurring opinion).

18. AMAN & MAYTON, *supra* note 8, at 249 (quoting *Withrow*, 421 U.S. at 47).

19. *Id.*

20. ASIMOW, STATE AND FEDERAL, *supra* note 8, at 120.

21. Asimow, *supra* note 9. *See also* Andrews v. Agric. Labor Relations Bd., 171 Cal. Rptr. 590 (Cal. 1981) (holding actual bias was required to invalidate a hearing officer's decision.). The dissent in *Andrews* argued that an appearance of bias standard would more adequately protect the due process rights of aggrieved parties. *Id.* at 601 (Clark, J. dissenting). Justice Clark argued that "the appearance of bias . . . is not only a sufficient but a compelling ground for disqualification . . . [and the standard] is essential to the stability of the adjudicative process . . ." because it protects the petitioner's right to a fair hearing and the integrity of the administrative system is validated. *Id.* Clark was one step ahead in recognizing the "invisible influence" of bias and pleaded: "[I]s it not better to err on the side of justice rather than to impose the risk that in an instance of actual but unprovable bias the prejudiced party will be without remedy?" *Id.* at 602. Judicial ears may have listened to Clark; in 2002, the California Supreme Court applied an appearance of bias standard in striking down a county's hearing officer selection process. *See* Haas v. County of San Bernardino, 119 Cal. Rptr. 2d 341 (Cal. 2002).

22. *Andrews*, 171 Cal. Rptr. at 590, 596.

claim.[23] *Haas v. County of San Bernardino* broadened the scope of challenges based on bias; the California Supreme Court held that when the County was permitted to hire the presiding hearing officer, the plaintiff was deprived of due process.[24] The hearing officer had never met the plaintiff or counsel representing the county, and there was no indication that she was biased in any regard.[25] An administrative scholar commented that the *Haas* decision provided "rare and valuable protection for parties embroiled in local government adjudication"[26] in light of *Andrews* and the traditional deference afforded to local governments' selection of procedures.[27]

Courts have also been more willing to accept a less exacting measure of bias where an individual employee within an agency performs conflicting tasks.[28] Serious due process issues arise when the same individual serves in dual functions in the same proceeding.[29] States have afforded additional protections including the broader showing of an appearance of bias.[30] In *Walker v. City of Berkeley,*[31] the ninth circuit relied on and narrowed the *Withrow* ruling, holding that the City of Berkeley's combination of functions violated the plaintiff's due process rights by allowing the same individual to serve simultaneously as advocate for one party and

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23. *See generally* Asimow, *supra* note 9. *See also Haas*, 119 Cal. Rptr. 2d at 341.

24. *See Haas*, 119 Cal. Rptr. 2d at 341. In *Haas*, a business owner defended against license revocation by the county. *Id.* The prosecutor for the county chose the hearing officer presiding over the hearing. *Id.* Haas argued that he was denied due process when those pushing for revocation were allowed to select the decision-maker. *Id.* The hearing officer was a first time hearing officer and had never met either party. Despite an absence of any showing of bias on the part of the decision-maker, the court held that Haas was denied due process of law. *Id.* The impact *Haas* left for local governments is the requirement that permanent hearing officers must be hired, or at minimum, someone other than an advocate involved in a dispute must select the decision-maker. *See id.*; Asimow, *supra* note 9, at 9. Essentially, "due process constrains the county's choice of a hearing officer." *Id.*

25. *Haas*, 119 Cal. Rptr. 2d 341.

26. Asimow, *supra* note 9 at 9.

27. *Id.*

28. ASIMOW, STATE AND FEDERAL, *supra* note 8, at 118.

29. *Id.*

30. *Id.* at 120.

31. Walker v. City of Berkeley, 951 F.2d 182 (9th Cir. 1991).

decision-maker in the same matter.[32] The court affirmed the constitutionality of agency structure but contended that *Withrow* distinguished the scenario where the same employee within the agency performs conflicting functions.[33] As such, in *Walker*, "the fatal defect was in allowing the same person to serve both as decision maker and as advocate for the party that benefited from the decision."[34] Here, the ninth circuit officially recognized and carved out different standards for individual versus structural bias.[35]

Many states have afforded constitutional protections beyond those in *Walker* by precluding an advocate for one party from serving as the hearing advisor in the same or factually related proceeding.[36] In California, relatively few cases have considered the separation of functions doctrine as applied to the role of hearing advisor, and, among those, courts have reached varying outcomes.[37] A notable California case flatly rejected the applicability of the separation of functions doctrine to hearing advisors serving in other capacities.[38] The court reasoned that a lawyer representing one side could advise the decision-making body because "by the very nature of the administrative process the agency or one of its agents or representatives is bound to be involved in the initiation and prosecution of charges."[39] *Howitt v. Superior Court*[40] marked a shift

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32. *Id.*

33. *Id.*

34. *Id.* at 185.

35. *Id.*

36. *See, e.g.*, People *ex rel.* Woodard v. Brown, 770 P.2d 1373 (Colo. Ct. App. 1989) (holding that due process precludes an advocate from advising the decision-making body in the same matter).

37. *See* B.E. WITKIN ET AL., WITKIN SUMMARY OF CALIFORNIA LAW § 527 at 397 (9th ed. 2003) (citing Chosick v. Reilly, 270 P.2d 547 (Cal. Ct. App. 1954); Ford v. Civil Serv. Comm. of Los Angeles, 327 P.2d 148 (Cal. Ct. App. 1958)).

38. Greer v. Bd. of Educ., 121 Cal. Rptr. 542 (Cal. Ct. App. 1975). *See also Ford*, 327 P.2d at 148; *Chosick*, 270 P.2d at 547.

39. *Greer*, 121 Cal. Rptr. at 556. This statement reflects the historically lenient standards allowable at the local level. One year later, however, a California court faced a similar case and an opposite holding. In *Midstate Theatres Inc. v. County of Stanislaus*, the court held that a lawyer could not represent one party and advise the hearing officer in the same proceeding. 128 Cal. Rptr. 54 (Cal. Ct. App. 1976). The court relied on a statute in its ruling but also on due process principles. *Id.*

of sorts in California; the court considered whether due process precluded an advocate for the County from serving as the hearing officer's advisor in the same proceeding against a county deputy.[41] The court held that an advocate from the county counsel office could advise the decision-maker so long as adequate screening procedures prevent that advisor from inappropriate communications with the county advocate serving in a prosecutorial function at the proceeding.[42] In other words, under *Howitt*, an attorney advocating for one party would be precluded from advising the hearing officer in the same proceeding.[43]

C. *Statutory Protections: The Role of the APA*

State and federal Administrative Procedure Acts offer additional protections in adjudication beyond the minimum constitutional safeguards.[44] For instance, the federal APA places stricter burdens

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40. In *Howitt v. Superior Court*, a county deputy sheriff was suspended for inappropriate conduct and transferred by the sheriff's department. 5 Cal. Rptr. 2d 196 (Cal. Ct. App. 1992). The plaintiff sought review to determine whether the deputy city counsel representing county could serve as the decision-making board's advisor in the same proceeding. *Id.*

41. Prior to the decision in *Withrow*, upholding the administrative structure, two cases addressed separation of functions as applied to hearing advisors. *See Chosick*, 125 Cal.App.2d 547 (holding that the Board did not violate individual's due process rights by having prosecution staff assist Board in decision-making); *see also Ford*, 161 Cal.App.2d 692, 697 (holding that staff from county counsel's office opposing the plaintiff could serve as advisor to the decision-maker because there was "no evidence that the deputy county counsel who advised the commission did anything other than that which was wholly proper.") The court in *Ford* went on to state that "under our law, the administrative agency can even be both the prosecutor and judge in the same manner." *Ford*, 161 Cal. App. 2d at 697.

42. *Howitt*, 5 Cal. Rptr. 2d 196.

43. *Id.*

44. The federal APA was established in 1946 as a means of addressing agency structure and its potential for conflicts of interest and impartiality in decision-making. AMAN & MAYTON, *supra* note 8, at 200. The provisions dealing with the separation of functions, Sections 554, 556 and 557, attempt to "establish at least a modicum of judicial independence on the part of the ALJs who hear cases at the trial level of the agency proceedings." *Id.* at 202. However, these protections are only triggered when specific language requiring formal APA procedures is clearly found in the agency's Enabling Act. *Id.* at 202-03. If the language "on the record after opportunity for an agency hearing" is not within the Act, §§554, 556 and 557

on agency procedure; despite the constitutionality of agency structure, the APA mandates internal separation of functions to prevent bias and promote judicial independence.[45] The APA provides that "while agencies may perform a variety of functions, individual employees may not."[46] More specifically, under section 554(d), an agency employee engaged in investigatory and prosecutorial tasks is prohibited from serving as a decision-maker or even advising a decision-maker in the same case.[47]

D. The Interrelation Between Statutory and Constitutional Protections

Two Supreme Court cases examine the interrelation between procedures required under Due Process and those required by the

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do not apply to the adjudication. *Id.* The protections also do not apply to administrative proceedings at the local level.

At the state level, the Model State Administrative Procedure Act provides additional protections for agency adjudications. ASIMOW, STATE AND FEDERAL, *supra* note 8, § 3.1.2, at 93. Although only a few states have adopted the MSAPA in its entirety, most states have created their own similar Acts, partly based on the MSAPA. *Id.*, § 3.1, at 83-84. To get a sense of protections offered by states, MSAPA § 4-214 provides the following regarding separation of functions:

> A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding. A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

ASIMOW, STATE AND FEDERAL, *supra* note 8, at 760.

45. AMAN & MAYTON, *supra* note 8, at 248. The APA has adopted a system of internal separation of functions to avoid bias or the appearance of bias. *Id.* at 200. Further, the APA requires the use of Administrative Law Judges in formal hearings to prevent judicial influence. *Id.* § 8.5.2, at 242-44.

46. *Id.* at 248.

47. *Id.* at 248. *See also* 5 U.S.C. § 554 (d) (West, WESTLAW through 2004 legislation). "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decisions, recommended decision, or agency review . . . ." *Id.*

APA. In *Wong Yang Sung v. McGrath*, the Court faced the issue of whether the APA's formal adjudication requirements were triggered in the context of a deportation hearing.[48] In an atypical decision, the Court held that the APA's formal procedures were required despite the absence of language triggering the procedures in the Immigration Act.[49] Effectively, this decision interpreted the APA's requirement of formal procedures "in every case required by statute to be determined on the record"[50] as encompassing the Constitution in addition to Enabling Acts.[51] The Court "erroneously equated the procedural requirements of the Due Process Clause with those set forth in the APA."[52] As such, the minimum procedures were insufficient since they did not meet the requirements set forth in the APA.[53] While this holding was only applicable in the immigration context, it led to an examination of the relationship between due process and the APA.[54]

Five years later, the Court revisited the implications of *Wong Yang Sung* in *Marcello v. Bonds*, another case involving deportation in which an alien argued that formal APA requirements were required and not followed in his case.[55] Justice Clark took this opportunity to reject *Wong Yang Sung* and clarify that "[s]imply because the Constitution may require a hearing does not mean that

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48. *See* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). *See also* AMAN & MAYTON, *supra* note 8, at 203. The government contended that the APA requirements did not apply because they were not specifically called for in the Immigration Act of 1917. *Id.* It further argued that although the hearing did not adhere to the APA procedures, the procedures met due process standards. *Id.* However, the court sided with the plaintiff, holding that due process clearly required a hearing. *Id.*

49. *Id.*

50. 5 U.S.C § 554 (a) (West, WESTLAW through 2004 legislation).

51. *Id.*; AMAN & MAYTON, *supra* note 8, at 203.

52. AMAN & MAYTON, *supra* note 8, at 203.

53. *Id.*

54. *Id.* at 204. As a result of *Wong Yang Sung*, "there was a constitutional basis for a formal APA adjudicatory hearing . . . ." *Id.* This broad interpretation of APA §554 (a) was ultimately rejected by the Court. *See* Marcello v. Bonds, 349 U.S. 302 (1955).

55. *See* Marcello v. Bonds, 349 U.S. 302 (1955). *See also* AMAN & MAYTON, *supra* note 8, at 204.

this hearing must be an APA adjudicatory hearing."[56] In other words, the Court recognized that due process requirements are "separate and distinct from the statutory procedural requirements of the APA."[57] Due process represents the "constitutional floor" of procedures required; statutes including the APA provide additional protections for parties involved in adjudication, with the exception of local adjudication where claimants may only resort to the protections afforded under due process.[58]

While state and federal Administrative Procedure Acts were adopted to supplement threshold due process requirements as applied to state and federal agencies, the APAs do not apply to administrative proceedings at the local level.[59] Due process review governs local administrative adjudications and "authorizes a much broader combination of functions than does the APA."[60] Generally, due process under the federal constitution sets forth guidelines for local administrative action, although due process under state constitutions may afford additional protections beyond those granted federally.[61] In reality, due process affords little protection for parties engaged in disputes before local administrative bodies.[62] But, as disenchanted parties continue to challenge local procedure, little by little the contours of due process are revealed and refined.

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56. *Id.* at 205.

57. *Id.* at 204. *See also Marcello*, 349 U.S. 302.

58. ASIMOW, STATE AND FEDERAL, *supra* note 8, at 83.

59. *Id.* The APA exempts agency heads from this restriction, however the Model State APA contains no such exemption. *Id.* at 122.

60. AMAN & MAYTON, *supra* note 8, at 249. Adjudication at the local level has been called the "black hole of administrative law." Asimow, *supra* note 9. Local government can choose any procedure, restricted only by due process. *Id.*

61. ASIMOW, STATE AND FEDERAL, *supra* note 8, § 2, at 18 ("State constitutions also provide for due process and may provide greater (but not lesser) protection than the federal Constitution"); *see also* Lyness v. State Bd. of Med., 605 A.2d 1204 (Pa. 1992). In Pennsylvania, the State granted protections beyond those under *Withrow* holding that agency heads may not engage in prosecutorial and decision-making functions. *See id.* And, in Colorado, due process "precludes counsel who performs as an advocate in a given case from advising the decision-making body in the same case." Woodard v. Brown 770 P.2d 1373, 1376 (Colo. Ct. App. 1989) (citing Weissman v. Bd. of Ed., 547 P.2d 1267 (Colo. 1976)).

62. KOCH, *supra* note 10.

III. ANALYSIS OF OPINION

A. Nightlife Partners: The Facts

The operators of an adult cabaret (collectively "Petitioners") in Beverly Hills, California sought to renew their permit pursuant to the city's municipal code.[63] Petitioners initially faced obstacles getting the appropriate forms from the city but ultimately turned in their application on time.[64] City of Beverly Hills ("City") reviewed the application, and City's Assistant Attorney Terrence Boga determined that it was incomplete.[65] City, through Boga and official letters, informed Petitioners that renewal applicants were required to submit the same documents as those required for initial permit applications.[66] Petitioners argued that the additional requirement was absent from the municipal code and from the application itself.[67] Regardless, City's finance director denied the permit renewal application based on incompleteness and informed the company that the renewal would have failed anyway due to noncompliance with design and performance standards in the city's code.[68] Petitioners requested and received an administrative hearing to review the decision to deny their permit renewal.[69] The administrative appeal process granted to the cabaret owners was the basis for the ensuing appeal.[70]

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63. Nightlife Partners, Ltd. v. City of Beverly Hills, 133 Cal. Rptr. 2d 234, 237 (Cal. Ct. App. 2003). Petitioners include: Nightlife Partners Ltd.; Entertainment Associates of L.A., Inc.; Deja Vu Showgirls of Beverly Hills, LLC; and Deja Vu Consulting Inc. *Id.* The municipal code required permit renewals every two years. *Id.*

64. *Id.* at 238. Initially, Petitioners were told that there were no separate forms for adult entertainment permit renewals. *Id.* Instead, City offered renewal forms for "private clubs/public dancing." *Id.* This was the renewal form Petitioner submitted to City, prior to the applicable deadline. *Id.*

65. *Id.*

66. *Id.* Boga informed Petitioners that additional documents such as site plans and letters were required. *Id.*

67. *Id.*

68. *Id.* at 238.

69. *Id.*

70. *Id.* It is worth noting that "[a]t all times relevant to this appeal, Petitioners and City were engaged in federal litigation . . . related to City's regulation of adult

David Holmquist, City's risk manager and an attorney, served as the hearing officer at Petitioner's administrative appeal.[71] Holmquist informed the parties that he had never before served in this capacity and proceeded to introduce an individual charged with the duties of advising and assisting; the hearing advisor was Terrence Boga, the City Assistant Attorney involved in the initial decision to deny Petitioner's renewal application.[72] The City had appointed an attorney for the review of the denial,[73] while Boga assisted the hearing officer.[74] Throughout the proceeding, Holmquist and advisor Boga discussed what appeared to be legal principles related to the case.[75] Among Holmquist's decisions were two major rulings in affirming the City's denial of Petitioner's permit renewal: 1) the fact that City provided forms without complete instructions detailing the requirement of additional documents was irrelevant and 2) Nightlife was not permitted to introduce evidence suggesting purposeful discrimination by City toward adult businesses.[76]

After Holmquist's decision to deny Petitioner's appeal, the company petitioned for a writ of administrative mandate.[77] The mandate urged: 1) that City set aside the denial of their permit and 2) that City approve the application for renewal.[78] Petitioners primarily alleged violations of procedural due process.[79] The petition set forth the following allegations: 1) the administrative hearing was generally unfair, 2) Holmquist wrongly decided evidentiary issues,

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entertainment." *Id.* at 237 (citation omitted). Terrence Boga was among two others listed as attorneys representing the City of Beverly Hills. *Id.*

71. *Id.* at 238.

72. *Id.*

73. *Id.* City's new attorney William Litvak had no prior involvement in this matter. *Id.*

74. *Id.* Petitioners objected to the hearing officer's status as a city employee and to the selection of Boga as the advisor. *Id.* Both challenges failed. *Id.*

75. *Id.* The reporter at the hearing did not transcribe the conversations between the two. *Id.*

76. *Id.* Petitioners had wanted to show evidence indicating discrimination, such as the fact that the only type of business subject to additional application procedures was the adult entertainment business and that Petitioners are the only business of this type in the city. *Id.*

77. *Id.* at 239.

78. *Id.*

79. *Id.*

and 3) hearing procedures violated Petitioner's due process rights.[80] Holmquist argued, in response to the petition, that his opinion was made independently, without the help of any city employee, and denied that he was biased because of his role as City's risk manager.[81] Holmquist's opposition to the petition failed to address Petitioner's contention that Boga advised and assisted with determining legal matters and evidentiary issues at the hearing.[82] The reviewing trial court did not admit Holmquist's written opposition, considering it inadmissible in an administrative review of his decision.[83]

The trial court held that Petitioner's procedural due process rights were violated and that Boga's assistance during the administrative review constituted actual bias.[84] The court ordered a new hearing.[85] City appealed the decision arguing that the court's finding of actual bias was without merit.[86] Further, it argued that Boga's role was constitutionally and legally permissible and that Petitioner's hearing met the due process standard of fairness.[87]

The California Court of Appeal limited the issue on appeal: the court explained that the issue was whether the hearing comported with minimum due process requirements, not whether the circumstances surrounding the administrative appeal amounted to actual bias.[88]

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* The court concluded that Boga took an active role in Petitioner's application process and that, in a review of that process, Boga in fact advised and assisted the hearing officer. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

B. Analysis

Justice Croskey delivered the opinion for the California Court of Appeal.[89] He began the analysis by settling the only factual dispute in the record- whether Boga actively assisted and served in an advisory capacity during the proceeding.[90] The court noted City's contention that the record does not detail any actual involvement but took judicial notice of the fact that communications on legal issues between hearing officers and staff are typically not reported.[91] Further, Holmquist's own introduction of Boga, on the record, as an assistant who would function as an advisor/assistant, was enough to conclude that Boga did advise and assist.[92] The court pointed out that in Holmquist's opposition to Nightlife's petition, he omitted reference to Boga's participation, suggesting that Boga did in fact advise and assist during the proceeding.[93] The court disagreed with the lower court regarding the admissibility of Holmquist's written opposition; admission of extrinsic evidence is allowable where the issue is whether an administrative hearing was fair and where the independent judgment test applies.[94] For these reasons, the court presumed that Boga did in fact advise and assist.[95]

The court proceeded to determine whether the administrative hearing violated the petitioner's due process rights.[96] Through supportive caselaw, the court set forth the general rule that procedural due process applies in administrative law[97] and requires, at minimum, a "fair hearing before a neutral or unbiased decision-maker."[98] Further, comparing administrative law proceedings to judicial proceedings, the court explained that due process requires

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89. *Id.* at 237.

90. *Id.* at 240.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 241. Here, both of these elements were met, therefore the court admitted Holmquist's declaration. *Id.*

95. *Id.* at 240.

96. *Id.* at 242.

97. *Id.* (citing Richardson v. Perales, 402 U.S. 389, 401 (1971)).

98. *Id.* (citing Bracy v. Gramley, 520 U.S. 899, 904-05 (1997); Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

"an appearance of fairness and the absence of even a probability of outside influence on adjudication."[99] The court recognized that the broad impact of administrative proceedings on the rights of countless individuals and businesses necessitates the guarantee of fairness.[100] In the quest for fairness in administrative adjudications, hearing officers are the "pivotal, first level of judicial review."[101] To demonstrate its concern over the significance of an impartial hearing officer, the court referred to articles that examine the role of the ALJ[102] and propose the adoption of a uniform code of conduct for

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99. *Nightlife*, 133 Cal. Rptr. 2d at 242, 243 (emphasis in original). Interestingly, the court cites no sources for this contention. However, further in its analysis, the court states that the basic tenet of the APA and the MSAPA is to "promote both the appearance of fairness and the absence of even a probability of outside influence on administrative hearings" through the separation of functions. *Id.* at 243, (citing CONSTANTINO, *supra* note 14, § 313). The court's use of the APAs as sources for what constitutes a fair hearing under due process was not entirely persuasive; the acts do not apply to local hearings and the acts provide more protection than the threshold due process requirements for a fair hearing.

100. *Nightlife,* 133 Cal. Rptr. 2d at 243. *See also* W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 95, 113 (2000) (commenting on the importance of the administrative law judge and issues related to judicial independence in the administrative setting. Gillette explains, "[I]nescapably, administrative law and the administrative state impinge on the public more and more often . . . .").

101. *Nightlife,* 133 Cal. Rptr. 2d at 243, (quoting Gillette, *supra* note 100 at 113). *See also* Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7-8 & n 3 (2002) (advocating adoption of a uniform code of conduct for all administrative judges within in each state)). *See also* Gillette, *supra* note 100 at 95, 113. The court's emphasis on administrative law's increasingly broad effect on citizens' lives, and inclusion of materials on reforming the administrative judiciary, suggests a policy argument of which the court granted credibility. *Nightlife*, 133 Cal. Rptr. 2d at 243. The court conceded that Salkin's article primarily pertains to state and not local hearing officers but suggested that local agencies have the "same potential of impacting significant rights and of being the first level of adjudicatory review." *Id.* The discussion related to judicial ethics and a uniform code requirement seems to be slightly displaced and a questionable source on which this court relies. Possibly presented as a corollary argument, it likely represents a matter of policy of which the court considered persuasive and relevant to a general discussion of bias and the underlying concern over judicial independence.

102. *Nightlife*, 133 Cal. Rptr. 2d at 243. *See also* GILLETTE, *supra* note 100 at 113; SALKIN, *supra* note 101 at 7-8 & n 3.

administrative law judges.[103] The court also referred to an ABA resolution urging local governments to mandate uniform procedures for judiciary members in the field of administrative law.[104]

The court then explored the impact of state and federal APAs on local hearings.[105] It conceded that the APA does not apply to administrative hearings at the local level but urged that the APA is helpful insight into what the Legislature considers elements of fair procedure in administrative proceedings.[106] As such, the court explained that, in attempt to address fairness concerns, the APA

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103. *Nightlife*, 133 Cal. Rptr. 2d at 243. In her article advocating statewide judicial codes of ethics for ALJs, Patricia E. Salkin argued that concerns over fairness in administrative law decision-making need to be put to rest once and for all: "[a]fter almost a quarter of a century of attention to various aspects of ethical considerations for ALJs, including independence, bias and ex parte communications, it is time for all of the states to exercise leadership in adopting statewide uniform codes of ethics for ALJs." Salkin, *supra* note 101 at 7. While admitting that requiring court judges and hearing officers to adhere to the same code of conduct is controversial, Salkin points out that administrative judges are increasingly considered "'comparable in function to trial judges'". *Id.* at 23 (*quoting* Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need For Regulated Ethics*, 94 DICK L. REV. 929, 946 (1990)).

104. *Nightlife*, 133 Cal. Rptr. 2d at 243; (citing Salkin, *supra* note 101, at 10). The court refers to Resolution 101B, approved at the 2001 Annual Meeting of the American Bar Association, "urging state and local governments to require that members of the administrative judiciary be accountable under provisions similar to the ABA Model Code of Judicial Conduct." *Id.* In her article, Salkin pointed out that the resolution would protect the public and give credibility to administrative proceedings at all levels. SALKIN, *supra* note 101, at 10. Reference to a resolution for administrative law judges seems to be overreaching since the case at issue mainly involves the conflict of functions by a hearing advisor at the local level. However, Salkin's article does suggest that a uniform code of ethics should apply to administrative judges at the local level as well: "[t]he public deserves fair and impartial hearings no matter who conducts them, and this resolution better ensures that this will be a reality." *Id.* at 11.

105. *Nightlife*, 133 Cal. Rptr. 2d at 243.

106. *Id.* (*citing* Tucker v. San Francisco Unified Sch. Dist., 245 P.2d 597 (Cal. Ct. App. 1952)). Reliance on the APA as an indicator of what process is due under the constitution is a curious choice by the court. First, the APA does not apply to administrative proceedings at the local level. *Id.* As the Supreme Court held in *Marcello*, the requirements of due process and the APA are separate and distinct. Marcello v. Bonds, 349 U.S. 302, 318-19. Further, due process requirements generally amount to threshold requirements, with the APA stepping in to add additional procedures for state and federal agencies beyond that which due process requires. *Nightlife*, 133 Cal. Rptr. 2d at 243.

mandates adequate separation of prosecutorial and adjudicatory functions within an agency.[107] The court emphasized that the separation of prosecutorial and adjudicatory functions is of particular concern and cited caselaw in support of the notion that counsel advocating for a particular party is generally prohibited from advising the decision-maker in the same case.[108] The federal APA, the MSAPA, many state APAs, and California's APA prohibit an individual involved in a prosecutorial capacity for an agency from advising or participating in the decision-making process in the same case.[109] Further, the federal APA and California's APA prohibit an employee engaged in a prosecutorial function from supervising or directing a hearing officer.[110] Holmquist was in fact "subject to the direction of Boga,"[111] indicating a violation under the California APA model.[112] According to the court, another violation, under the California APA,[113] occurred when the communications between the two went unreported.[114] That the requirements and procedures mandated by the various APAs do not apply to local hearings was

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107. *Id.*

108. *Id.* at 244 (citing CONSTANTINO, *supra* note 14, § 313, fn. 57, 58. The rule the court refers to derives from case law in Colorado and Pennsylvania. *See* Shah v. State Bd. of Med., 589 A. 2d 783 (Pa. Commw. Ct. 1991); People *ex. rel.* Woodard v. Brown, 770 P.2d 1373 (Colo. Ct. App. 1989). Also referenced by this court is *Rhee v. El Camino Hospital Dist. Nightlife*, 133 Cal. Rptr. 2d at 244 (citing Rhee v. El Camino Hosp. Dist., 247 Cal. Rptr. 244, 257 (Cal Ct. App. 1988)). *Rhee* supports the notion that due process prevents an advocate for one party from serving as decision-maker in the same case. *Id.* However, unlike the Colorado and Pennsylvania decisions, *Rhee* was not decided based on due process procedures related to the role of advisor to the decision-maker. *Rhee*, 247 Cal. Rptr. at 251-53.

109. *Nightlife*, 133 Cal. Rptr. 2d at 244. *See also* 5 U.S.C § 554(d)(West, WESTLAW through 2004 legislation); CAL. GOV'T. CODE § 11425.30 (West 2004).

110. *Nightlife*, 133 Cal. Rptr. 2d at 244; *see also* 5 U.S.C § 554 (d)(2); CAL. GOV'T. CODE § 11425.30.

111. *Nightlife*, 133 Cal. Rptr. 2d at 245 n 5.

112. *Id.* The court argues that as City's advocate, Boga was precluded from advising, supervising or giving direction to Holmquist under this model. *Id.* n. 5.

113. *Id.*

114. *Id.*

reiterated by the court.[115]

The court went on to address relevant California case law involving due process and the separation of functions doctrine.[116] In *Howitt v. Superior Court* ("*Howitt*"), a deputy county counsel representing the county at a hearing planned to advise the decision-maker and prepare the written decision in the same hearing.[117] The court explained that county counsel was precluded from serving as advisor to the hearing officer in the same matter.[118] The court relied on *Howitt* to establish the rule that in California it is "improper for the same attorney who prosecutes the case to also serve as an adviser

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115. *Id.* It should be noted that despite the court's analysis and attention to the APA, it repeated that the state and federal APAs did not apply to this hearing. *Id.* However, for not applying to the case at hand, the court allotted a great deal of its analysis to the APA suggesting that it regarded the APA as influential.

116. *Nightlife*, 133 Cal. Rptr. 2d at 245. The sole California case the court relied on in support of its holding was *Howitt v. Superior Court. Id* (citing Howitt v. Superior Court, 5 Cal. Rptr. 2d 196 (Cal. Ct. App. 1992)). Prior to *Howitt*, few cases dealt with the role of advisor and the separation of functions doctrine. *See* Ford v. Civil Serv. Comm. of Los Angeles, 327 P.2d 148 (Cal. Ct. App. 1958); Chosick v. Reilley, 270 P.2d 547 (Cal. Ct. App. 1954). No clear rule was established or followed. WITKIN, *supra* note 37 § 527.

117. *See Howitt*, 5 Cal. Rptr. 2d. at 197-98.

118. *Id. Howitt* can be distinguished from the present case to some degree. In *Howitt*, the county counsel was serving in an advocacy role at the same time as serving an advisory function. *Id.* at 196. Here, an attorney from another firm was appointed for the administrative appeal; in his prosecutorial capacity, Boga was involved in the initial decision to deny the renewal. Boga was not advocate for City while serving as advisor to the decision-maker. *Nightlife*, 133 Cal. Rptr. 2d at 238-39. In fact, some argue that Boga's advocacy role was routine, limited, and non-partisan- that he merely recommended that a petition be denied for incompleteness- and that non-partisan public employees rendering assistance should not be precluded from advising the hearing officer. Letter from Alisa Fong, Deputy General Counsel, League of California Cities, to the California Supreme Court, (June 27, 2003), *available at* http://www.cacities.org/recentfilings.htm. [hereinafter League of Cal. Cities]. Further, making "routine administrative determinations does not constitute an 'advocacy' function." *Id.* In *Nightlife* the court was unclear on what specific tasks made Boga's initial participation in the denial prosecutorial in nature. *Nightlife*, 133 Cal. Rptr. 2d at 248. It suggested that Boga's *position* regarding the denial was influential. *Id.* Perhaps the court was also convinced by Boga's representation of City in the federal litigation. Further, the court's discussion on what constitutes prosecutorial or advocacy functions would have helped clear up the residual uncertainties.

to the decision-maker."[119] However, the court noted that *Howitt* did allow for the combination of prosecutorial and adjudicative functions under certain circumstances.[120] The court then recited a hypothetical from *Howitt* to emphasize the concern over combining advocacy and adjudicatory roles.[121] The hypothetical depicts a hearing at which an agency[122] advocate objects during the hearing and then leaves the council table to advise the hearing officer on whether to sustain her own objection.[123] Although the court acknowledged that a different attorney served as advocate at the time Boga served as advisor, it made clear that Boga's participation in the review of the denial violated Nightlife's due process rights.[124] Boga's advocacy for the city's *position* and subsequent advisory role was a sufficient conflict under this decision.[125] The court analogized Boga's participation to that of "trial counsel acting as an appellate court's adviser during the appellate court's review of the propriety of a lower court's judgment in favor of that counsel's client."[126] Relying on principles established in *Howitt*, the court affirmed the trial court's findings-

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119. *Nightlife*, 133 Cal. Rptr. 2d at 245 (citing *Howitt*, 5 Cal. Rptr. 2d at 204).

120. *Id.* at 245. In dicta, the *Howitt* court imagined scenarios where advising the decision-maker and prosecuting would be allowed. *Id* at 200. For instance, two lawyers employed by the same firm could serve in conflicting functions: one could prosecute the case while the other advised the decision-maker. In this situation, the court suggested that adequate screening procedures would likely be required. *Id.* Language from *Howitt* left the door open to a degree: "[t]he mere fact that the decision-maker or its staff is a more active participant in the factfinding process...will not render an administrative procedure unconstitutional." *Id.* at 200.

121. *Id.*

122. In the context of this case, it would be easier to envision "City" instead of agency because state and federal agencies are subject to APAs that clearly prohibit the interaction in the hypothetical.

123. *Id.*

124. *Id.* at 246.

125. *Id.*

126. *Id.* To drive its point home, the court went on to say that "[i]t requires no citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that Boga's role as advisor to the decision maker violated petitioner's right to due process." *Id.* Interestingly, this analogy is another indication that the court supports the notion of uniformity in the rules for judicial and administrative judges. In reality, hearing officers are not held to the same standard as court judges, making the anecdote less impactful.

that the participation did in fact violate procedural due process, based significantly on "a clear *appearance* of unfairness and bias."[127]

Finally, the court distinguished caselaw presented by City.[128] Noting the factual dissimilarity of the cases, the court denied the applicability of the City's support because the cases did not involve the same partisan attorney acting in advocacy and advisory roles in the same matter.[129] The *Nightlife* court determined that Boga's partisan involvement and conflicting roles went beyond that which was held acceptable in cases presented by City.[130] Further, the cases

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127. *Id.* (emphasis in original). The court reiterated this fundamental tenet of the APA in support of finding a due process violation. *Id.* Further, it offhandedly conceded a lack of case law directly on point, but justified its holding: "It requires no citation of authority exactly on all fours to justify the conclusion that Boga's role as advisor to the decision-maker violated petitioner's right to due process." *Id.* This statement reflects the court's recognition of the flexible nature of due process.

128. *Nightlife,* 133 Cal. Rptr. 2d 234, 246-49 (citing 12319 Corp. v. Bus. License Comm'n., 137 Cal. App. 3d 54 (1982)); BreakZone Billiards v. City of Torrance, 97 Cal. Rptr. 2d 467 (Cal. Ct. App. 2000); Kloepfer v. Comm'n on Judicial Performance, 49 Cal. 3d 826, 833 (Cal. 1989).

129. *Nightlife*, 133 Cal. Rptr. 2d at 246. In *12319 Corp. v. Business License Commission*, the advisor to the business license commission did not serve as advocate for either party during the initial license revocation or the review of the revocation process. 186 Cal. Rptr. 726. The advisor did at one point assist the license commission with evidentiary matters in the case; he was instructed to verify that a sufficient foundation was in place to admit specific evidence favorable to the defendant. *See generally Id.* The court determined that helping to examine a witness did not jeopardize his position as neutral counsel to the commission absent some showing that other members from county counsel's office were not insulated from his advisory role. *Id.* The court ultimately upheld the revocation, primarily because the plaintiff did not present facts in support of its bias claim and the court determined that the assistance did not rise to the level of a prosecutorial function. *Id.* Incidentally, in *Nightlife*, the court held that Boga's involvement did rise to the level of a prosecutorial function which conflicted with his advisory function. *Nightlife*, 133 Cal. Rptr. 2d at 247. Addressing these opposing cases would have been an opportunity for the court to have clearly presented what constituted a prosecutorial role. In *BreakZone Billiards v. City of Torrance*, a city attorney representing the city counsel in the denial of a conditional use permit, did not create procedural due process concerns because he presented evidence for and against the denial in a non-partisan manner. 97 Cal. Rptr. 2d 467. Finally, the court distinguished *Kloepfer v. Commission on Judicial Performance* based on a lack of any alleged combination of advocacy and adjudicatory roles in the same administrative unit or in the same individual. 49 Cal.3d. 826, 833 (1989).

130. *Nightlife*, 133 Cal. Rptr. 2d at 247-48.

reflected the presence of insulation between the conflicting functions and the use of screening measures to prevent unfairness.[131] Yet another distinction involved a procedural safeguard that prevented the hearing officer's ruling from being the final decision.[132] Here, the court points out, no procedural feature prevented the hearing officer's ruling from being final.[133]

The majority opinion[134] determined that there was substantial evidence to uphold the trial court's decision to order a new hearing.[135] The court held that Boga's conflicting advisory and advocacy roles in the same matter denied the petitioners procedural due process.[136] The court modified the trial court's ruling by requiring an additional procedural safeguard: the presiding hearing officer and advisor in the new proceeding must not have had previous involvement as City's advocate in this or any factually related matter.[137]

IV. IMPACT

The implications of the *Nightlife* decision extend far beyond the facts of this case. A letter from the League of California Cities to the California Supreme Court, requesting depublication of the *Nightlife* opinion, is indicative of the decision's potential impact.[138] Although the outcome of the depublication request remains

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131. *Id.* at 248.

132. *Id.* In *Kloepfer*, procedural safeguards were in place to ensure that the commission's decision was never the final decision. *Id.* The California Supreme Court reviewed the commission's recommendation before making the final determination. *Id.*

133. *Id.*

134. Two justices concurred without writing separate opinions, and there were no dissenting opinions.

135. *Id.*

136. *Id.*

137. *Id.* at 249.

138. The League of California Cities is "an association of all 477 California cities united in promoting the general welfare of cities and their citizens." League of Cal. Cities, *supra* note 118 at n 1. Attorneys from all over the state make up the Legal Advocacy Committee, a group that "monitors appellate litigation affecting municipalities and identifies those that are of statewide significance." *Id.* It singled out *Nightlife* as a case of particular interest to those it represents. *Id.*

uncertain, the conceivable impact of *Nightlife* has created a sense of unease.

A. Nightlife: The New Standard for Due Process Claims

Case law has already reflected the significance of *Nightlife* as setting the standard for bias claims based on the combination of functions.[139] On December 23, 2003, a California appellate court, relying primarily on *Nightlife,* held that a prosecuting attorney's ongoing relationship with the personnel board on other matters was sufficient to suggest potential bias, despite a lack of showing that the attorney actually served as an advisor in the case at issue or in any related matter.[140] This appearance of bias denied the petitioner due process.[141] The petitioner did not argue that the city attorney advised the board and advocated for the defendant in the same or related case.[142] However, the court determined that "the totality of the circumstances" suggested that the attorney's advisory role in other matters "create[d] the substantial risk that the Board's judgment in the case before it w[ould] be skewed in favor of the prosecution."[143] Essentially, the *Quintero* court interpreted *Nightlife* to prohibit the city advocate from advising or representing the decision-making body on other matters while appearing before the board as a partisan advocate for other parties in other cases.[144] The *Nightlife* decision appears to have sent a message that lax commingling of functions

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139. In *Quintero v. City of Santa Ana*, the court relied primarily on the analysis of the *Nightlife* court. *See generally* Quintero v. City of Santa Ana, 7 Cal. Rptr. 3d 896 (Cal. Ct. App. 2003).

140. *Id.*

141. *Id.*

142. *Id.* In fact, the court stated that "other interactions with the Board give the appearance of bias and unfairness and suggest the probability of his influence on the Board." *Id.* at 899. Further, "[h]ere, there is no evidence that [the attorney] acted as both the Board's legal advisor and in a prosecutory function in *this* case." *Id.*

143. *Id.* at 900. The court conceded that the relationship and contact between the attorney and the board alone was insufficient to suggest potential for bias but that the totality of the circumstances and the relationship was created an appearance of bias. *Id.*

144. *Id.*

across the board will meet with tougher judicial scrutiny.[145] Applying the separation of functions doctrine to hearing advisors – even those not technically serving dual roles in the same proceeding-[146] extended the degree to which a plaintiff can allege due process violations. *Nightlife* was the bridge the plaintiffs in *Quintero* needed to invalidate a hearing advisor's involvement based on his involvement with the decision-making board in unrelated cases.[147]

B. Financial and Administrative Impact on Local Government

A corollary issue to *Quintero* is the financial burden local entities could face because of the potential for increased litigation. Once considered difficult to obtain, constitutional challenges to local proceedings might lose their elusiveness: "[t]he [*Nightlife*] opinion encourages applicants to file claims against public entities for due

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145. Prior to this case, California law was unclear about the scope of the separation of functions doctrine as applied to hearing advisors at the local level. KAHN, *supra* note 4, § 7.2. California Civil Practice referred to the significance of the precedent *Nightlife* left behind: "[o]ne thing the courts have made clear is that it is improper for an agency to allow its "prosecuting attorney" to give legal advice to the decisionmaker in a given case." *Id.* This assessment of *Nightlife* tends to downplay the scope of the case - even non-prosecuting attorneys are subject to the separation of functions doctrine. Apparently even those who are not involved in dual functions in the same or related case may be prevented from advisory roles.

146. Unlike the previous California case on separation of functions, *Howitt* v. *Superior Court*, the advisor in *Nightlife* served in some capacity as advocate in the initial denial but not in the proceeding in question or simultaneously while engaged in an advisory role; Boga was not the prosecuting attorney in the same proceeding in which he advised. *Nightlife*, 133 Cal. Rptr. 2d at 94. He was involved, as Assistant City Attorney, in the initial decision which led to the proceeding at issue. *Id.* at 86. Some believe that this broad interpretation of the separation of functions doctrine may lead to confusion and increased litigation. *See* League of California Cities, *supra* note 118. Advocates for the depublishing of *Nightlife* believe that "[t]he opinion makes a negative contribution to legal literature by erroneously characterizing an attorney's routine provision of advice to city staff regarding an administrative determination as a prosecutorial or 'advocacy' function." *Id.*

147. *Quintero* is particularly shocking in light of California's decision to reject a due process challenge by plaintiffs based on the fact that the presiding hearing officer "seemed ideologically and financially aligned with one of the parties." *See* Asimow, *supra* note 9. *See also* Andrews v. Agricultural Labor Relations Bd., 171 Cal. Rptr. 590 (Cal. 1981). It seems that due process more closely restrains the choice of hearing advisors compared to hearing officers.

process violations."[148] *Quintero* is but one example of a litigant reaping the benefits of this decision.[149] Petitioners angered by the local adjudication process have renewed hope as a result of *Nightlife*, which begs the question: will this ruling be heralded as rare protection for plaintiffs, reminiscent of another significant California case that at least one administrative law scholar predicted could be depublished?[150]

Administrative law professor and scholar Michael Asimow referred to California's decision in *Haas* as a rare safeguard for plaintiffs in local adjudication, adding that "local government agencies concerned about the case would undoubtedly petition the Supreme Court to depublish the decision."[151] Ultimately, the California Supreme Court heard the case, eliminating any chance for local government to request decertification of the opinion.[152] But *Haas* is regarded as a shocking decision favoring plaintiffs in California because, although allowing the County advocate to select the hearing officer intuitively seems unfair, constitutional challenges to local procedure rarely succeed.[153] Likewise, in *Nightlife*, the court constrained the local government's choice of a hearing advisor, affording rare protection to the plaintiff.[154] If limitations on selecting hearing officers seemed controversial post-*Haas*, the ensuing fear within local government after *Nightlife* is only logical.[155] The potential impact of *Nightlife* has already caused financially strapped municipalities to take action.

The potential burden on local government in light of this decision has led representatives for municipalities to request that the California Supreme Court depublish the *Nightlife* opinion.[156] Of particular concern is the belief that the decision will "place an

148. League of Cal. Cities, *supra* note 118, at 3.

149. *Id.* "Allowing *Nightlife* Partners to remain published will turn applicants into litigants." *Id.*

150. Asimow, *supra* note 9. *See also Haas*, 119 Cal. Rptr. 2d 341.

151. *Id.*

152. *See Haas*, 119 Cal. Rptr. 2d 341.

153. KOCH, *supra* note 10.

154. Nightlife Partners, Ltd. v. City of Beverly Hills, 133 Cal. Rptr. 2d at 234 (Cal. Ct. App. 2003).

155. *See* League of Cal. Cities, *supra* note 118.

156. *Id.*

enormous financial burden on and paralyze routine functions of local governments."[157] Each day, local governments across California conduct hundreds of proceedings, typically licensing hearings.[158] Cities have routinely performed these proceedings according to established ordinance procedures; but *Nightlife's* narrowing of the separation of functions doctrine may require thorough review of these procedures for compliance with the new constitutional standard.[159] Such a review would likely reveal procedural violations: roughly half of the state's cities have fewer than 25,000 residents, demonstrating the limited resources and employer pool that lead to combination of functions scenarios.[160] Cities with only part-time or one full-time city attorney may find themselves with the "logistical burden of having to screen and coordinate the participation of their attorneys at different levels of the administrative process to avoid the appearance of bias."[161] Although it remains to be seen how many constitutional challenges will be pursued, it is clear that local governments may have to prepare for and allocate resources toward preventing and defending against such claims. Consequently, California's cities are seeking preventative measures before revamping their administrative structure: "Decertification from publication will avoid the expenditure of precious public resources, and allow local governments to continue to function efficiently without compromising applicants' constitutional due process rights to a fair hearing."[162]

C. Impact on the Administrative Reformist Movement

1. Judicial vs. Administrative Courts: Closing the Gap

The *Nightlife* decision may lend credibility to the movement pressing for the use of central panels and uniform codes for judges at

157. *Id.* at 3.
158. *Id.*
159. *Id.*
160. *Id.*
161. League of Cal. Cities, *supra* note 118, at 3.
162. *Id.*

all levels.[163] As courts continue to recognize the significant impact of administrative adjudication on a growing number of citizens, procedural requirements have become more inflexible and more similar to the procedures required in judicial courts. In their decisions, judges even compare the administrative process to their own process, despite the fact that different rules apply.[164] The gap between the judicial court system and administrative system may be drawing closer and closer, case by case.

2. Reliance on the APA

The gap between procedures required under due process and those required under the APA may be narrowing as well: consider the *Nightlife* court's reliance on the APA and the subsequent reliance on the Act in *Quintero.*[165] The previous California case on the separation of functions doctrine and due process made no reference to the Act.[166] *Nightlife* may have established a new trend in due process challenges- referring to administrative procedure acts as good authorities for determining elements of fair procedure-[167] even though the Supreme Court already decided that the APA and due process are separate and distinct.[168] The extent to which the APA is relied upon to guarantee fairness could ultimately have serious institutional effects. For instance, the APA requires the use of administrative law judges- could this be where local adjudication is

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163. *See* Salkin, *supra* note 101. An article on administrative law reform at the state and local level highlighted the central panel system as the most promising and viable administrative reform. Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 Admin. L. Rev. 395, 398-99 (2001) (explaining that the presiding hearing officer over administrative proceedings is vastly important to millions of people every year and therefore must be free of bias and independent.) The article left open the question whether central panels should be applied at the local level but revealed that the adoption of a central panel system has taken off in many states and large cities. *Id.* at 399.

164. *Nightlife*, 133 Cal. Rptr. 2d at 245; *Howitt,* 5 Cal. Rptr. 2d at 196.

165. *Nightlife*, 133 Cal. Rptr. 2d at 243; *Quintero*, 7 Cal. Rptr. 3d at 896, 898-901.

166. *Howitt*, 5 Cal. Rptr. 196.

167. *See Nightlife*, 133 Cal. Rptr. 2d at 243.

168. Marcello v. Bonds, 349 U.S. 302 (1955).

headed? If so, administrative law reformists would urge that local ALJs should fall within the central panel system as well, which brings us back to the reality of limited resources at the local level.[169]

To summarize this point, the ongoing judicial dialogue related to APA guidelines, judicial codes of ethics, and comparisons of court and administrative procedures is apparently infectious and strongly suggests an underlying push for some type of larger administrative reform.

D. Societal Impact

Expanding due process protections through the judicial process inevitably leads to a broad societal impact. Increasing protections for individuals involves tangible effects on municipalities including labor and other administrative costs.[170] "These costs are collectively borne."[171] The additional costs must be extracted from the consistently limited local government budgets, becoming an "intolerable drain" on the system.[172] The effects trickle down and ultimately affect some of the very individuals that administrative units are designed to protect: local citizens, beneficiaries of social programs, and government employees- to name a few.[173] Yet increasing protections for citizens legitimizes the process, improves upon the appearance and guarantee of fairness, and could ultimately prevent litigation stemming from the unfair combination of functions in hearings.

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169. AMAN & MAYTON, *supra* note 8, at 243.

170. *Id.* at 191. It seems that notice to local government and clarity in court decisions would help alleviate the financial strains. If municipalities have a clear understanding of the requirements, the amount of litigation would likely subside. It seems that the years of uncertainty in California enabled a system that relied on few personnel restrictions at the local level.

171. *Id.*

172. *Id.* (quoting Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, C.J. dissenting)).

173. *Id.* at 191.

V. CONCLUSION

The implications of the California Court of Appeals' decision in *Nightlife* reach far beyond the walls of California's cabarets. In California, due process prevents the overlapping of advisory and advocacy roles where an appearance of bias is demonstrated. Local governments across the state must conform to a heightened constitutional standard in the selection of hearing advisors to ensure fair process. An increase in litigation often follows an increase in procedures, and the local administrative system will have to respond accordingly. Likewise, an increase in cost certainly follows an increase in litigation, and the financial strain will flow through the local government system, extracting resources from programs affecting the lives of every citizen. Fundamentally, this decision drives home a recurring theme in administrative law: striking a balance between the competing goals of efficiency and fairness.[174] The government's interest in effectuating an efficient system will be compromised to some degree, while the citizens' interest in fairness will be vindicated. Whether one goal outweighs the other is purely subjective; but perhaps both parties have gained something. The aggrieved party has recaptured that fleeting optimism surrounding fair process, and the local government has another chance to achieve and restore legitimacy in the eyes of those it serves. If it is true that protection of the individual "against arbitrary action of government" is the "'touchstone' of due process," perhaps additional procedural safeguards require little justification.[175]

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174. ASIMOW, STATE AND FEDERAL, *supra* note 8, § 2, at 19, § 1.6, at 10.

175. AMAN & MAYTON, *supra* note 8, at 196 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).