

July 29, 2021 Public Hearing Transcript
OAL Notice File Number: Z2021-0615-05

Sean O’Dowd: Good morning, I am Sean O’Dowd, Attorney III for the Alcoholic Beverage Control Appeals Board.

It is 9:03 a.m. on Thursday, July 29, 2021, and we are here on Zoom to receive public comments on a proposed rulemaking action by the ABC Appeals Board. The Board regulations we are concerned with today are contained in OAL (Office of Administrative Law) Notice File Number Z2021-0615-05.

Under the rulemaking provisions of the California Administrative Procedure Act, also referred to as the “APA,” this is the time and place set for the presentation of oral statements, arguments, and contentions for or against changes in the Board’s regulations. Notice for this public hearing has previously been published and sent by mail or email to interested parties. Please note that written comments, arguments, and contentions may still be submitted to the Board until 5:00 p.m. PST on August 10, 2021. If you have written comments to submit, please email them to abcboard@abcappeals.ca.gov.

The purpose of this hearing is only to obtain public comment on the Board’s proposed regulations. The Board will not respond to comments at this hearing, nor will the Board engage in a discussion about regulations at this hearing, other than to seek clarification of comments presented. The Board will take all comments received at this hearing under submission to allow the Board to thoroughly and thoughtfully evaluate to determine how the Board wishes to respond. In accordance with the APA, the Board will respond to all comments in writing in the Final Statement of Reasons, which will be made available to the public once its completed.

This entire APA rulemaking hearing will be recorded. The recording, along with the exhibits and evidence presented during the hearing, if any, will be made part of the rulemaking record.

If you wish to make comments during this hearing, please provide your full name and affiliation, if any. You may also provide your mailing or email address so the Board can notify you if any substantive changes to these regulations are made or if any new material is relied upon in proposing these regulations prior to the Board’s adoption of said regulations. Any such notice will be sent (1) to everyone who submits written comments during the written comment period; (2) to everyone who testifies today, and; (3) to everyone who asks for such a notification. While no one may be excluded from participating in these hearings, these proceedings for failing to identify themselves, the Board will and can only send notices to the names and addresses it receives. You may also provide your name and address utilizing the Zoom chat feature.

We will listen to oral comments in the order of appearance. After we hear from everyone who appears, we will hear from any latecomers or anyone else who wishes to be heard.

I believe that we only have two non-ABC Appeals Board members. I'll go ahead and introduce members of the ABC Appeals Board, I am again Sean O'Dowd as I stated, I'm an Attorney III with the Board. We have Ms. Taryn Kinney, who's the Executive Officer for the Board.

Taryn Kinney: Good morning everybody.

Sean O'Dowd: We have our legal secretary, Ms. Maria Sevilla.

At this point, the rulemaking record includes several items, including the notice of the proposed action, which was published in the California Regulatory Notice Register on June 25, 2021, the express terms of the proposed action, using underline to indicate the additions to, and strikeout to indicate deletions from, the California Code of Regulations, the initial statement of reasons for the proposed rules, and the Standard Form 399 required by the Department of Finance.

These regulations were duly noticed on June 25, 2021, 45 days before the close of the written comment period on August 10, 2021. Copies of the notice again were mailed to all interested parties who had requested rulemaking notices. The initial statement of reasons, originally proposed text, and all other rulemaking documents were made available on the Board's website and upon request. Initially, the Board did not schedule a public hearing. However, the Board received a written request for a public hearing on June 29, 2021. In response, the Board issued a notice of this public hearing today on July 8, 2021.

We will now take oral comments on the proposed regulations. In the interest of time, if you agree with any comments made by a prior speaker, simply state that fact and add any new information you feel is pertinent. If you wish to speak, please introduce yourself and state your affiliation, again if any. Also, you may use the "raise hand" feature on the Zoom tool bar or indicate that you wish to make comments in the chat feature.

Mr. Diamond, I believe that you are on the line, and you have comments to make so sir if you are ready go ahead and proceed.

Roger Diamond: Yes, thank you very much. My name is Roger R-O-G-E-R Diamond D-I-A-M-O-N-D. I am an attorney with an office in Santa Monica, California. And I on occasion appear before the Department in connection with hearings involving suspensions, accusations, and so forth. And also, every so often, I have a matter before the Appeals Board.

It just struck me that the Appeals Board seems to be too cozy with the Department in terms of regulations in general, and more specifically with respect to making of policy.

Indeed, the whole hearing today is difficult to deal with, I'm here at my home in Southern California. I'm on my phone. The reason I'm on this hearing is I was able to phone in and I appreciate Mr. O'Dowd getting the arrangements set for my ability to telephone in to make these few comments.

But the whole thing looks like it's put up by the Department to get the Appeals Board to adopt new regulations. Didn't seem like there was really any necessity for doing that. And we were wondering and I'm wondering, my clients wonder, what was the impetus for the policy changes or additions or comments or modifications. There's no explanation for why there was some need for the rules now. Especially since we're dealing in the pandemic stage, it's much more inconvenient to have to deal with the phone, calling in. Why not just continue the public hearings until there's an opportunity for people such as myself and others who deal with the ABC and the Appeals Board to appear in person or on a different platform? I just think that it's inconvenient and not necessary to handle it the Board has done it. It just seems like some insider got to the Board for some reason. Appeal Boards don't ordinarily just decide at the last moment to pass a proposed regulation. So, the background from which this proposed regulation exists is kind of murky. Anyway, I'm just interested to know why this had to go today. Why it couldn't wait until the Appeals Board can meet in a normal session with a full stack of appeals attorneys. I don't even know who's on the Board, I don't know whether there are three Board Members in the audience or two, so if anybody can straighten that out and eliminate some of the confusion it would be appreciated. Right now, there is deep suspicion among some people as to why the Board at any particular time decides out of the blue to come up with a proposed regulation. That is the sum and substance of my comments.

I know you can't respond so the whole thing seems like an exercise in futility. I would assume there are a number of ex-parte communications when the Board is discussing business. The Board obviously based in, I'm not sure if they're based in Sacramento or someplace else. I know they have to have members in different districts. Anyway, if you could answer those questions I would appreciate it very much and again I want to thank you for your attention.

Sean O'Dowd: Thank you, sir. This is Mr. O'Dowd again and I will hold off on responding to any regulatory related comments until the Board drafts it's final statement of reasons. However, for your edification I will advise you that we have three Board members now: one in Sacramento County, one in Los Angeles County, and one in San Francisco County and all that information can be found on our website which is abcab.ca.gov.

At this moment in time, we have no other individuals in the hearing who wish to speak concerning the Board's proposed regulations—

Roger Diamond: I do have a question if that is appropriate. What prompted the rules to be considered, changed, or amended this time? There's no indication in your comments don't indicate why at this particular time, particular rules were promulgated. It creates the impression that there's a close connection between the Appeals Board and the ABC and we think that's inappropriate. Because it's the job of the Appeals Board to review the actions of the Department and if the relationship is very cozy there would be a

reluctance, an institutional reluctance, in my opinion, for the Appeals Board to disapprove of conduct of the Department. Say for example, there's an issue whether a license should be revoked or suspended or whatever, the Appeals Board is sitting to review the Department, theoretically sitting to review the Department, but if they institutionalize and have basically the meetings between the Board and the Department it doesn't appear to me that we're going to get neutral adjudication, we're going to get instead favoritism, favoritism toward the Department. It can't help but be that. If all the Department - I'm sorry - if the Appeals Board only hears cases involving the Department, it's a one-sided presentation and I don't know whether anybody has ever kept track to see what percentage of the Department's decisions are reversed on appeal. Seems to me it's like an incestuous relationship between the Appeals Board and the Department as to whether the Department's decisions are adequately reviewed by the Appeals Board. The system depends on the Appeals Board being strict with respect to the Department as opposed to harshly dealing with licensees. Right now, the licensees feel like they're getting the short end of the stick here. Anyway, I went beyond my time I apologize, and I want to thank Mr. O'Dowd giving me some leeway as he is done to let me speak. Thank you very much.

Sean O'Dowd: You're welcome sir. And I will just point out that we have in our initial statement of reasons, we state that our impetus for creating these new rules which are entirely procedural in nature. The last time our regulations were promulgated were in the 1950s, the Board obviously does business different these days and so we made changes to our regulations in order to bring those in with the times, procedurally. So, you know, I would encourage you to go back and read the initial statement of reasons, for more information on that, on the reasons why these new proposed regulations have been drafted.

Roger Diamond: But who thought of doing that, when did, why did it come up at a particular time? What was the motivation this time to do something? It could've been done a year ago and it could've been done a year from now. Why now, and it looks to us like the, there's some effort being made on procedure to help the Appeals Board affirm decisions of the Department. It's an unusual situation where one party to the appellate litigations always appearing before the Appeals Board, there develops a relationship between the two that is not healthy, and so it would be better to look at that situation as opposed to some other change that really doesn't accomplish anything.

Sean O'Dowd: Sir, is there a specific provision in the new proposed regulations which you believe creates the appearance of favoritism to the Department?

Roger Diamond: Well, in terms of the briefs that are due, it looked like the regulations that are being promulgated are extremely harsh in terms of length of briefs, timing of the filing of the briefs, whether an extension will be granted. All these things don't need to be put in, and it seems like its reaction to either Department policy or there is some other reason for these regulations to be proposed. But there was no reason to do it a particular time and there's no explanation as to why it was done, but it looks to the neutral observer that there's some harshness and hostility blended into the proposed

new rules that indicates some bias, probably a hidden bias, that the regulations are designed to establish. Anyway, I understand you're telling me that all these regulations can be observed or read at some other location, and I'll try to track them down so I do appreciate that heads up.

Sean O'Dowd: Yes sir, they are on our website, abcab.ca.gov. You can download the entire rulemaking file and if you want to provide, I know there was an issue with your mailing address, if you want to provide your mailing address to Ms. Sevilla, she will make sure that you receive a hard copy of our rulemaking file.

Roger Diamond: My address is 2530 Wilshire Boulevard, Second Floor, Santa Monica, California. There's an issue as to whether the Department served, and it's an issue standing before you in a related case, a contested case, it's on appeal from the Department and the question was whether or not my client was served with the initial accusation because he was closed during the pandemic. The Department admits that my client's business was closed for almost a year and yet the Department claims that he was properly served with the accusation when the whole business was closed, and nobody got a copy of the accusation and we've been fighting all this time with the Department as to whether the hearing should've proceeded as a default. My client was defaulted when there would've been no reason for him had he received adequate notice--

Julie Weng-Gutierrez: Mr. O'Dowd, I don't believe that this content is appropriate for the public hearing on the regulatory process.

Sean O'Dowd: Yes ma'am, Mr. Diamond were going to go ahead and save those arguments for the Board's upcoming hearing.

Roger Diamond: Well, how can we get a fair hearing though? That's the problem.

Sean O'Dowd: Well, the rules as promulgated are not in effect at this point so the proposed regulations will not affect your upcoming hearing.

Roger Diamond: Well, there's a possibility that it might. People are just human and when they know there is hostility between the Department and the licensee, the natural inclination is to go with the Department since the Appeals Board deals with the Department all the time. They would not want to be ridiculed or held in a certain way, so we do have this problem that has to be dealt with.

Sean O'Dowd: Well, I appreciate your concern, Sir but were going to limit the scope of this hearing to the proposed regulations. There are no further speakers present at this time so in order to ensure that there are no late-comers, we will take an approximate 20-minute recess to see if anyone else makes an appearance.

[Break taken at 9:21 a.m.]

[Hearing resumes at 9:41 a.m.]

[wait for comments]

Okay, it is now 9:41 a.m. and following a 20-minute recess, are there any newcomers who wish to comment on the Board's proposed regulations?

[wait for comments]

Hearing no requests, I hereby close this oral hearing. Thank you to those who have attended this hearing or submitted written comments. We appreciate your assistance in developing these regulations. If anyone would like to be on the Board's rulemaking list, but are not now, please give your name and address in the chat box or again send an email to abcboard@abcappeals.ca.gov.

[The meeting was adjourned at 9:42 a.m.]