



# California ABC Regulatory Enforcement Clashes with Winery Social Media Use

Ted Rieger

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**SOME OF THE BIGGEST** buzz generated from wine industry posts on social media this past year was not about the actual subject of the Tweets and **Facebook** entries but instead over the legal problems that resulted for the wineries involved. The issue is an example of how common actions by winery personnel using modern technology can clash with alcoholic beverage regulations that originate from Prohibition.

The **California Department of Alcoholic Beverage Control** (ABC) oversees licensing and enforcement issues related to producers, distributors and retailers of alcoholic beverages. Longstanding “tied-house” laws under the California Business and Professions Code, in general, prohibit wine producers from giving financial assistance to retailers and prohibit giving a “thing of value” or “free goods” in connection with the sale of alcoholic beverages. In the case of the targeted Tweets and Facebook posts, these were interpreted by ABC enforcement as improperly providing “free advertising” by wine producer licensees for the retailer licensee they mentioned.

## Case Specifics

ABC actions involving winery social media became an issue in connection with an annual wine and beer tasting event, “The Save Mart Grape Escape” held in Sacramento in June 2014. **Save Mart**, a California supermarket chain and an ABC retail licensee, was mentioned in online Tweets, or retweets on **Twitter** and Facebook posts by at least 11 of the 45 Grape Escape participating wineries, prior to and during the event, to promote attendance among social media followers.

The issue became news in the wine industry and among its legal consultants after an article appeared in *The Sacramento Bee* in November 2014 when cases were being settled between the ABC and winery licensees. To date, ABC has taken disciplinary actions and closed cases involving 10 licensee California wineries who participated in the Grape Escape: two based in Sacramento, two from Lodi, four from El Dorado County, one from Calaveras County and one from Placer County. One case was similarly closed involving a Sacramento-based craft brewery.

ABC spokesperson **John Carr** provided excerpts from enforcement reports for several cases that characterized the winery violations similar to the

following example: “The facts which constitute the basis for suspension or revocation are as follows: On or about June 7, 2014, respondent-licensee(s), by or through its officer(s), agent(s), or employee(s), did give a thing of value to wit: free advertising on social media for the benefit of Save Mart supermarket, who is engaged in operating, owning, or maintaining off-sale licensed premises in the State of California, in violation of Business and Professions Code Section 25502(a)(2).”

Because Save Mart was a title sponsor of the event, it was problematic because social media users were simply stating the event’s complete name, which happened to contain an ABC retail licensee, thus they inadvertently provided “free goods” for Save Mart. It doesn’t matter if the winery’s products are even sold by the retailer mentioned. In this case, many of the wineries who mentioned Save Mart do not have their wines sold by the supermarket.

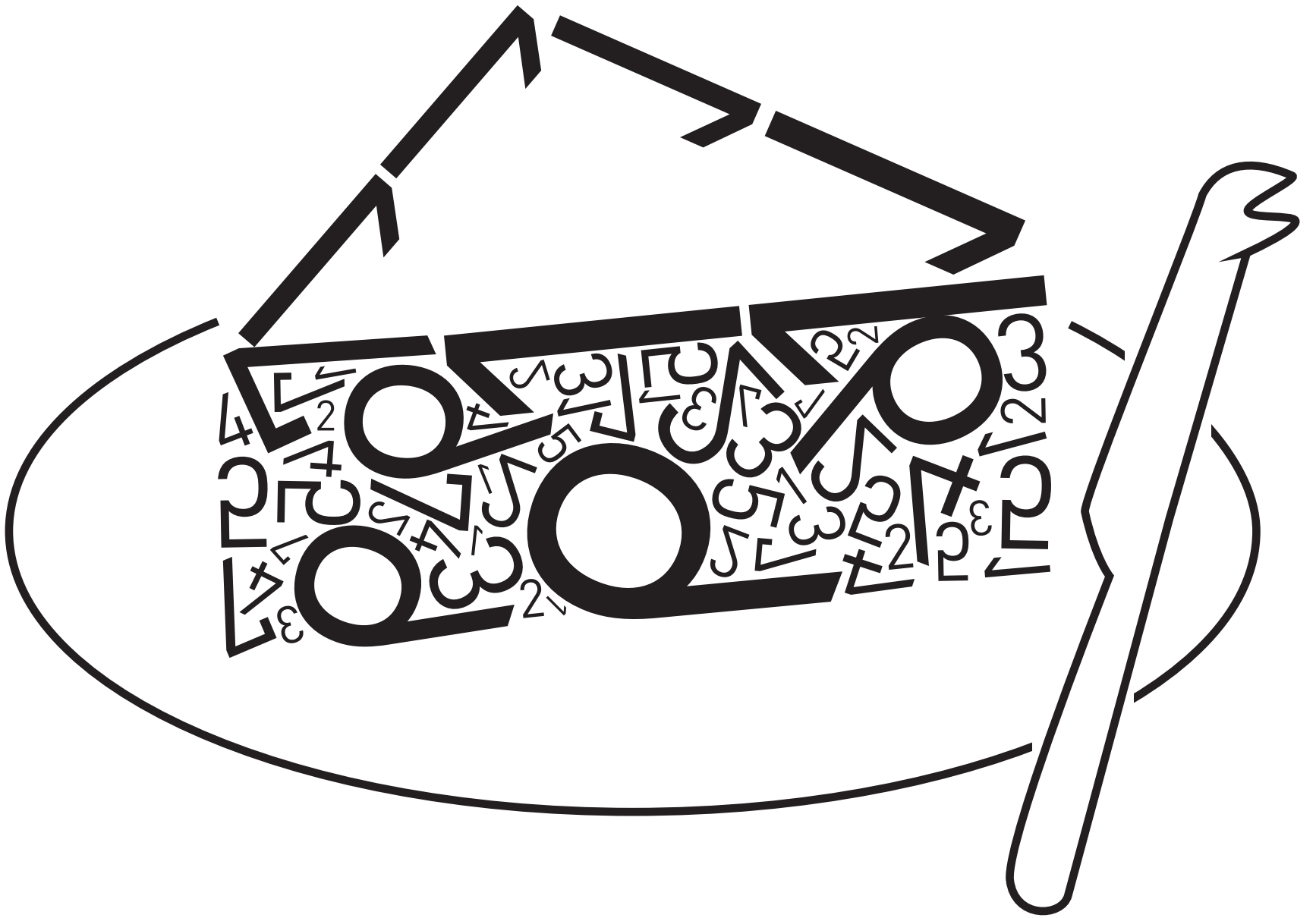
It was reported that **Revolution Wines** of Sacramento was in violation as a result of a tasting room employee posting a retweet from the **Sacramento Convention and Visitors Bureau**, that organized and promoted the event.

Licensees disciplined to date signed stipulation and waiver agreements to accept a penalty of one-year probation, for admitting to the offense, and a 10-day license suspension was stayed in each case. None of the wineries had to pay a fine, nor did any receive a license suspension, which would have resulted in lost wine sales for 10 days. The wineries had no prior disciplinary actions on their ABC license records.

## Challenging ABC Enforcement

At least one case is being contested. The law firm of **Hinman & Carmichael**, based in San Francisco, is defending a winery client against the ABC accusation. The firm’s senior counsel, **John W. Edwards**, characterized ABC enforcement action as a violation of First Amendment rights involving commercial free speech.

Edwards cited two U.S. Supreme Court decisions relevant to the case. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980) found that commercial speech that is truthful and non-deceptive is entitled to First Amendment protection unless the government can identify a substantial interest that is being advanced by its free speech restriction and



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show that this restriction is not more extensive than necessary to serve the government interest. In another case, 44 *Liquor Mart, Inc. v. State of Rhode Island* (1996), the court basically found that the First Amendment trumps the Twenty-first Amendment power that the government might try to claim to regulate alcoholic beverages. More detailed discussion of the case law can be found on the Hinman & Carmichael website blog at [www.beveragelaw.com/booze-rules](http://www.beveragelaw.com/booze-rules).

Edwards summarized: “Our client had a First Amendment right to post on a social media page a truthful disclosure of where it was pouring its wine. Unless ABC can meet the burden of proof of the Central Hudson test, then it cannot legitimately penalize our client.” At press time for this article, an ABC Administrative Hearing on the case was expected to occur in late April. ABC has its own hearing and appeals system that begins with an Administrative Hearing before an administrative law judge, who then issues a proposed decision, decides whether each charge in the accusation is shown as proved or unproved, and can issue a proposed penalty. The ABC director can adopt or reject the proposed decision. If unresolved, the case can later be appealed to the ABC Appeals Board and, after that, could be appealed to the **California District Court of Appeal**.

As attorney **John Hinman** pointed out on his firm’s Booze Rules Blog, one risk in settling with ABC, even if there is no fine or suspension, is that a violation “. . . becomes a permanent part of the licensee’s record and is reportable to every other alcoholic beverage agency in the United States.” This includes the federal **Alcohol, Tobacco Tax and Trade Bureau** (TTB) and regulatory agencies in every state the winery may do business. Whenever updated applications, new direct-to-consumer permits or out-of-state shipper filings need to be submitted, those application and filing forms require disclosures about alcohol-related violations. The consequences of failing to disclose the violation is a felony charge of perjury. Thus, other legal problems could arise related to disclosure violations, including loss of license privileges to operate the winery’s business. In addition, violations appear permanently on the winery’s ABC license, which can be viewed by anyone via record query on the ABC website.

## Navigating Regulations in an Evolving Industry

ABC general counsel **Matthew Botting**, who speaks at alcoholic beverage industry legal seminars, repeatedly reminds producers and sellers, “What licensees need to keep in mind is that the alcoholic beverage industry is a highly regulated industry and licensees need to learn what they can and cannot do.” However, Botting and other industry legal experts admit that understanding and interpreting regulations is not a simple task.

The ABC regulations under the California Business and Professions (B&P) Code contain many specific exceptions and exemptions, some obtained by special interest legislation to apply only to specific acts or, in some cases, for the benefit of a specific company, a specific licensee or location. In addition, new technology and digital media have created previously unseen issues. The wine industry and its employees have adopted and employed digital and social media for marketing and other purposes. There has been significant growth in the number of new wineries and new people in the industry in recent years. Winery personnel, in general, are more familiar with social media than with ABC license regulations.

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The ABC must enforce the regulations as they currently exist and as currently written. Botting emphasized, “We’re not out scouring the Internet for this type of activity; but when it comes to our attention, we have to address it.” A majority of ABC investigations are initiated based on complaints received from another law enforcement agency, the general public, and other ABC licensees and their employees. *The Sacramento Bee* reported that a “large-scale producer” had reported the Save Mart social media posts to the ABC. ABC has closed at least one other social media-related violation separate from the Save Mart cases. In November 2014, a Lodi winery received a stay of a 10-day suspension and one-year probation related to three different Twitter posts in May and June 2014. Each post separately mentioned a different retail licensee that included: **Beverages & More**, a California bar/restaurant and a theater that sells alcohol for on-premise consumption.

In early 2015, representatives of **The Wine Institute**, other industry stakeholders and legal representatives began meeting with ABC staff with the goal of drafting a clear set of guidelines regarding social media use and ABC enforcement. Botting said this effort is still in progress and that no time frame and no definite format have been determined, but it will be something the industry can use for guidance along the lines of a “Frequently Asked Questions” publication. Botting also clarified that the issue is bigger than just social media. “It’s about what non-retail licensees can do in the events they conduct and participate in, and what they can do in terms of advertising in relation to events and in relation to retailers, and in that sense, it’s a bigger issue and broader-based and not limited to social media,” Botting explained.

## Avoiding Problems

Winery licensees can avoid problems through better education and training of employees about regulations, including educating all personnel with access to social media under the winery’s brand. A number of law firms specialize in beverage law. Wineries should use legal counsel for guidance and to assist with training for employees. Legal counsel can advise on and review online and social media content to avoid problems.

Following the Save Mart case, the Wine Institute issued a member advisory on “Retailer Mentions in Social Media.” Within this advisory, two notable exceptions to the general rule were discussed and are summarized below.

**Retailer Locator Lists:** Wine Institute previously obtained legislation that allows wineries to provide retailer locator lists to consumers of where their wines can be purchased. Under current statute, these will not be interpreted by ABC as prohibited or considered “a thing of value.” Wineries that publish these lists, typically on their websites, or provide them to consumers upon request in either electronic or printed form, must follow the statute carefully to remain within the statutory exception. This includes listing more than one retailer and not promoting or favoring one retailer over others.

**Advertising Instructional Events at On-Sale Retail Premises:** California B&P Code Section 25503.4 allows wineries to participate in winemaker dinner events at on-sale premises under certain conditions. In addition, this section allows wineries to advertise the event in advance, list the name and address of the retailer, the names of the wines featured, and the time, date and location of the event, as long as the ad does not contain the retail price of the wines, the retailer’s name is “relatively inconspicuous,” and there are

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no pictures, illustrations or laudatory references to the retailer in the ad. B&P Code Sections 25503.5 and 25503.56 allow wineries to offer wine tastes at on-sale and off-sale retailers, and 25503.56 imposes similar limitations on advertising about retailers in these situations.

Wine Institute further advises that situations outside of the above cases that involve winery activity on social media in which retailers are mentioned would generally be considered by ABC as advertisements that must conform to existing laws. For example, a mention of a winery owner or winemaker appearing at a retail location, when the appearance is outside the context of B&P Section 25503.4, could be considered “free advertising” and a violation of law. In addition, user posts on Facebook or Twitter that mention retailers could be considered violations since the winery has control over social media content and allows such posts to remain on the newsfeed. Wineries that regularly monitor their social media posts for inappropriate content would be viewed more favorably than those that do not monitor content. Wine Institute guidelines recommend that user-generated content that appears on a site or web page controlled by the winery brand advertiser be monitored each business day or, at a minimum, every five business days. When content is determined to be inappropriate, it should be removed promptly.

Based on information provided by ABC, the statute of limitations for filing accusations of “free goods” violations is generally one year, and it is generally three years for “tied-house” restrictions. Wineries who wish to reduce their legal risk may want to review their social media sites and remove existing questionable posts that could be interpreted as ABC violations. Botting said it is unlikely ABC would randomly review social media accounts of older posts for violations; however, if a winery is being investigated for another related accusation, such posts could play a role in the case decision and disciplinary process.

The Wine Institute previously issued Digital Marketing Guidelines ([www.wineinstitute.org/files/Digital\\_Marketing\\_Guidelines\\_FINAL.pdf](http://www.wineinstitute.org/files/Digital_Marketing_Guidelines_FINAL.pdf)) in January 2014 that provide guidance on social media use to prevent wine-related product postings being seen by minors. The TTB issued a social media advertising circular in 2013 ([www.ttb.gov/industry\\_circulars/archives/2013/13-01.html](http://www.ttb.gov/industry_circulars/archives/2013/13-01.html)) with guidelines for U.S. bonded wineries on what are considered ads and, thus, must include mandatory statements and conform to appropriate TTB advertising requirements.

Citing another common issue, Botting advises wineries with direct sales and shipping to customers to never promote such sales with the phrase “free shipping,” either online or in printed materials. Botting explained, “If the winery is offering ‘free shipping,’ that’s a violation. But if shipping is included as part of the sale, that’s not a violation.” Botting further explained: “Some of this may seem like semantics; but when you look at the underlying reason behind the regulation, it makes sense. The goal is to discourage promotion of the sale and consumption of alcohol through the act of giving away free items or goods.”





## About California ABC

California ABC is headquartered in Sacramento and has 22 district offices throughout the state. The agency issues over 87,000 licenses annually with over 75 different license types to alcoholic beverage producers, wholesalers, importers, brokers and retailers in off-sale and on-sale categories. Most wineries/wine producers hold a “Type 02 Winegrower” license, of which 5,257 active licenses were issued as of June 30, 2014. The agency employs over 120 peace officers and conducted 4,859 enforcement investigations during Fiscal Year 2013-14.

ABC’s primary enforcement concerns involve action against illegal practices such as: the sale and serving of alcohol by licensed retailers and bars to minors, serving intoxicated persons, and licensing violations by retailers and bars for illegal activity on their premises. Winery licensees represent a small percentage of overall ABC enforcement activity. In recent years, ABC enforcement officers have increased attention on attending events and music festivals where alcohol is served and where service to minors and public intoxication are concerns.

Although wineries in states outside of California are not subject to enforcement actions by the California ABC, “tied-house” regulations related to separation of producers, wholesalers and retailers in the three-tier system are still an issue. Individual U.S. states have an alcoholic beverage control agency that interprets and enforces state regulations pertaining to state licensees. Wineries with licenses in states outside California should consult their local authorities and their legal counsels for advice on operation within their states.

## Wineries Disciplined for 2013 BottleRock Event

Another situation involving ABC enforcement was the first **BottleRock** Napa Valley music festival in 2013. ABC filed accusations and disciplined 32 licensees, mostly wineries that participated in the event and were in violation under B&P Code sections 25500(a)(1)(2). These were “tied-house” violations related to the promoters and organizers of the 2013 event, who also held an ownership interest in a retail licensee. The promoters’ licensed retail location hosted VIP receptions during the course of the BottleRock event. Wineries who participated in and poured wines at BottleRock were considered event sponsors. As a result of part of their sponsorship dollars helping pay for the VIP functions at the promoters’ retailer location, this constituted an unlawful interaction between the winery licensees and the retailer licensee even though in this situation there was no way the wineries would have known that the promoters had a retail license.

The BottleRock cases, some not closed until late 2014, had a range of outcomes, depending on each individual case. Some wineries received a stay of either a 10-day or 15-day license suspension, some received a 10-day license suspension, and some paid \$10,000 as a Payment of Offer in Compromise (POIC) to avoid loss of wine sales during a license suspension period. **WBM**



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