

# **Making Objective Decisions in a Subjective World:**

## **How to Resist Pressure to Be Partial**

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# ABA MODEL CODE OF JUDICIAL CONDUCT FOR STATE ALJs

## PREAMBLE

Our state administrative legal system is based on the principle that an independent, fair and competent administrative judiciary will interpret and apply the laws that govern consistent with American concepts of justice. Intrinsic to all sections of this Code are the precepts that state administrative law judges, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. The state administrative law judge decides questions of fact and law for the resolution of disputes and is a highly visible symbol of government under the rule of law.

This Code of Judicial Conduct for State Administrative Law Judges is intended to establish standards for ethical conduct. The Canons and Sections contained in this code are rules of reason. They should be applied consistent with constitutional requirements, statutes, administrative rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as to not impinge on the essential independence of the state administrative law judge in making judicial decisions.

The Code of Judicial Conduct for State Administrative Law Judges is not intended as an exhaustive guide for the conduct of state administrative law judges. They should also be governed in their official judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist such judges in establishing and maintaining high standards of judicial and personal conduct.

Except where modified, this Code follows the language of the American Bar Association Model Code of Judicial Conduct for Federal Administrative Law Judges. This Code is also based upon the American Bar Association Model Code of Judicial Conduct (1990). The American Bar Association's codes are copyrighted by the American Bar Association and are used with permission.

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### **CANON 1: A State Administrative Law Judge Shall Uphold the Integrity and Independence of the Administrative Judiciary**

An independent and honorable administrative judiciary is indispensable to justice in our society. A state administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code should be construed and applied to further that objective.

### **CANON 2: A State Administrative Law Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities**

**A.** A state administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

**B.** A state administrative law judge shall not allow family, social, political or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position of influence. A judge shall not testify voluntarily as a character witness.

## COMMENTARY

*Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by state administrative law judges. Judges must avoid all impropriety and appearance of impropriety. Judges must expect to be the subject of constant public scrutiny. Judges must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely or willingly.*

*State administrative law judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for judges to allude to their office to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial or official letterhead must not be used for conducting a judge's personal business.*

*The testimony of a state administrative law judge as a character witness injects the prestige of the judge's office into the proceeding in which the judge testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford the judge a privilege against testifying in response to an official summons.*

**C.** A state administrative law judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

## COMMENTARY

*It is inappropriate for a state administrative law judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership.*

*When a person who is a state administrative law judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.*

### **CANON 3: A State Administrative Law Judge Shall Perform the Duties of the Office Impartially and Diligently**

The judicial duties of a state administrative law judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

#### **A. ADJUDICATIVE RESPONSIBILITIES**

1. A state administrative law judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
2. A state administrative law judge shall maintain order and decorum in proceedings.

3. A state administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers or other representatives, staff members and others subject to the judge's direction and control.

*COMMENTARY*

*The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to promptly dispose of the business of the state administrative law judge. Judges can be efficient and businesslike while being patient and deliberate.*

*A state administrative law judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.*

4. A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law. A state administrative law judge shall not initiate, permit or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

a. Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

i. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

ii. the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

b. A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

c. A judge may consult other judges and support personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

d. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

e. A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

f. Decisions of a state administrative law judge shall be based exclusively on evidence in the record of the proceeding and material that has been officially noticed.

*COMMENTARY*

*This provision is in conformity with the American Bar Association Model Code of Judicial Conduct of 1990. The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited extent permitted.*

*To the extent reasonably possible, all parties and their lawyers shall be included in communications with a judge.*

*Whenever presence of a party or notice to that party is required by Canon 3 A. 4, it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.*

*An appropriate and often desirable procedure for a judge to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.*

*Certain ex parte communication is approved by Canon 3 A. 4 to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communications and allow it only if all criteria stated in Canon 3 A. 4 are clearly met. A judge must disclose to all parties all ex parte communications described in Canon 3 A. 4 a and 3 A. 4 b regarding a proceeding pending or impending before the judge.*

*A judge must not independently investigate facts in a case, unless authorized by law, and must consider only the evidence presented.*

*A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.*

*A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3 A. 4 is not violated through law clerks or other personnel on the judge's staff.*

*If communication between the judge and the appellate tribunal with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.*

5. A state administrative law judge shall dispose of all judicial matters promptly, officially and fairly.

#### COMMENTARY

*Prompt disposition of the state administrative law judge's business requires a judge to devote adequate time to his or her duties, to be punctual in attending hearings and expeditious in determining matters under submission, and to insist that other subordinate officials, litigants and their lawyers or representatives cooperate with the judge to that end.*

6. A state administrative law judge should prohibit broadcasting, televising, recording or photographing in hearing rooms and areas immediately adjacent to the hearing rooms during hearings or recesses between hearings, except that under rules prescribed by an appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of proceedings in hearing rooms and areas immediately adjacent thereto consistent with the right of the parties to a fair hearing and subject to express conditions, limitations and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the hearing participants and will not otherwise interfere with the administration of justice.

7. A state administrative law judge shall require participants in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

#### COMMENTARY

*A state administrative law judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the administrative judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give the parties, lawyers or*

*representatives in the proceeding, and others an appearance of bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.*

8. A state administrative law judge shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair hearing. The judge shall require similar abstention on the part of agency personnel subject to the judge's direction and control. This Section does not prohibit state administrative law judges from making public statements in the course of their official duties or from explaining for public information the procedures of the agency. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

#### **COMMENTARY**

*This subsection is not intended to preclude participation in an association of state administrative law judges merely because such an association makes public comments about a pending or impending proceeding in an agency where the judge serves. The subsection is directed primarily at public comments by a state administrative law judge concerning a proceeding before another judge in an agency where the commenting judge serves.*

9. A state administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

10. A state administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge or in its pre-adjudicative stage.

### **B. ADMINISTRATIVE RESPONSIBILITIES**

1. A state administrative law judge shall diligently discharge assigned administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and facilitate the performance of the administrative responsibilities of other state administrative law judges.

2. A state administrative law judge shall require staff and other persons subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

3. A state administrative law judge shall take appropriate action or initiate appropriate disciplinary measures against a state administrative law judge, lawyer, representative or others for unprofessional conduct of which the judge may become aware.

#### **COMMENTARY**

*Appropriate action may include communication with the state administrative law judge, lawyer or representative, who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority, or other agency or body.*

### **C. DISQUALIFICATION**

1. A state administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

a. the state administrative law judge has a personal bias or prejudice concerning a party or a party's lawyer or other representative involved in the proceeding;

b. the state administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

#### COMMENTARY

*A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection.*

c. the state administrative law judge has served in other governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

d. the state administrative law judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a more than de minimis financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

e. the state administrative law judge or the judge's spouse or a person within the third degree of relationship to either of them or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer or representative in the proceeding.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

#### COMMENTARY

*The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the state administrative law judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Canon 3 C.1. or that the lawyer-relative known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3 C.1.(e)(iii) may require the judge's disqualification. A de minimis interest is an insignificant interest that would neither affect the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties.*

2. State administrative law judges should be aware of their personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of their spouse and minor children residing in the judges' households.

3. For the purposes of this section, the following words or phrases shall have the meaning indicated:

a. the degree of relationship is calculated according to the civil law system;

#### COMMENTARY

*According to the civil law system, the third degree of relationship test would, for example, disqualify the state administrative law judge if the judge's or judge's spouse's father, grandfather, uncle, brother or niece's husband were a party or representative in the proceeding but would not disqualify the judge if a cousin were a party or representative lawyer in the proceeding.*

b. "fiduciary" includes such relationships as executor, administrator, trustee and guardian;

c. "financial interest" means ownership of more than a de minimis legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the state administrative law judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

d. "proceeding" includes pre-hearing or other stages of litigation.

#### **D. REMITTAL OF DISQUALIFICATION**

A state administrative law judge disqualified by the means of Canon 3 C. may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers or representatives, independently of the judge's participation, all agree that the judge should not be disqualified and the judge is willing, the state administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

#### *COMMENTARY*

*A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the state administrative law judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the parties jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties sign the remittal agreement.*

#### **CANON 4: A State Administrative Law Judge May Engage in Activities to Improve the Law, the Legal System and the Administration of Justice**

A state administrative law judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so doubt is not cast on the capacity to decide impartially any issue that may come before the judge:

**A.** Speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice.



**B.** May appear at a hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, unless otherwise prohibited by law.

*COMMENTARY*

*Canon 4 C. of the Model ABA Code was modified to permit state administrative law judges to appear at public hearings and consult with executive and legislative bodies and officials, if not prohibited by law, e.g., the federal Hatch Act or other similar laws, and no doubt is cast on the judge's ability to decide impartially any issue that may come before the judge.*

**C.** May serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. A state administrative law judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

*COMMENTARY*

*As a judicial officer and person specifically learned in the law, a state administrative law judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, including revision of substantive and procedural law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial association or other organization dedicated to the improvement of the law.*

*Extra-judicial activities are governed by Canon 5.*

**CANON 5: A State Administrative Law Judge Shall Regulate the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties**

**A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL**

A state administrative law judge shall conduct all of the judge's extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge's capacity to act impartially as a judge;
2. demean the judge's office; or
3. interfere with the proper performance of the judge's duties.

*COMMENTARY*

*The complete separation of a state administrative law judge from extra judicial activities is neither possible nor wise. A state administrative law judge should not become isolated from the community in which the judge lives.*

*Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.*

## **B. AVOCATIONAL ACTIVITIES**

A state administrative law judge may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational activities.

## **C. CIVIC AND CHARITABLE ACTIVITIES**

A state administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

1. A state administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.

### *COMMENTARY*

*The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which he or she is affiliated to determine if it is proper to continue the judge's relationship with it.*

2. A state administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization. The judge should not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events.

### *COMMENTARY*

*This subsection is not intended to discourage participation in the identified organizations or preclude the use of a judge's name on stationary or other material used to solicit contributions, provided the judge's name and office are in no way selectively emphasized. The language of the Model ABA Code was modified to permit judges to solicit funds for charitable and other named organizations if they do not use the prestige of office in doing so.*

*A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.*

## **D. FINANCIAL ACTIVITIES**

1. A state administrative law judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's official position or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.

2. Subject to the requirements of subsection (1), a state administrative law judge may hold and manage personal investments, including real estate, and engage in other remunerative activity.

### *COMMENTARY*

*The specific prohibition contained in the Model ABA Code against a judge's service as an officer, director, manager, advisor or employee of any business (which has sometimes been interpreted to bar such participation in a family business) has been deleted, because the general prohibitions in Canon 3 C.1. and statutes or rules prohibiting such activities by judges involving agencies wherein they serve render the specific prohibition somewhat*

*superfluous and because generic prohibition of involvement in a family business was regarded as unnecessary and undesirable. Involvement in a business that neither affects the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties is not prohibited.*

3. A state administrative law judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as judges can do so without serious financial detriment, judges shall divest themselves of investments and other financial interests that might require frequent disqualification.

4. Neither a state administrative law judge nor a member of the family residing in the judge's household should accept a gift, bequest, favor or loan from anyone except as follows:

a. A state administrative law judge may accept a gift incident to a public testimonial to the judge, books supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse to attend a function or activity devoted to the improvement of the law, the legal system or the administration of justice.

b. A state administrative law judge or a member of the family residing in the household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative or close personal friend; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not administrative law judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

c. A state administrative law judge or a member of the family residing in the household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, or the gift is otherwise consistent with relevant agency rules and is reported to the extent required by such rules and other applicable laws.

#### *COMMENTARY*

*The ABA Model Code of Judicial Conduct was modified to permit the acceptance of gifts permitted by agency rules.*

5. For purposes of this section "member of the family residing in the household" means any relative of the state administrative law judge by blood or marriage, or a person treated by a judge as a member of the family, who resides in the household.

6. A state administrative law judge is not required by this Code to disclose income, debts or investments, except as provided by law.

#### *COMMENTARY*

*Canon 3 requires a judge to disqualify himself or herself in any proceeding in which the judge has a significant financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's official duties. A judge has the rights of an ordinary citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of the judge's duties.*

7. Information acquired by state administrative law judges in their judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

## **E. FIDUCIARY ACTIVITIES.**

A state administrative law judge shall not serve as an executor, administrator, trustee, guardian or other fiduciary if such service will interfere with the proper performance of judicial duties or if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in an agency in which the judge serves or one under its appellate jurisdiction. While acting as a fiduciary, a state administrative law judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

### *COMMENTARY*

*A judge's obligation under this Canon and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust or divest it of holdings whose retention would place the judge in violation of Canon 5 D. 3. The specific prohibitions contained in the ABA Code of Judicial Conduct against a judge's service as executor, administrator, trustee, guardian or other fiduciary were deleted, because the general prohibition in Canon 5 C. and 5 D., and statutes or rules regulating conflicting activities in agencies where a judge serves, render such provisions somewhat superfluous and because a generic prohibition of service in such fiduciary capacities was regarded as unnecessary and undesirable.*

## **F. ARBITRATION.**

A state administrative law judge may act as an arbitrator or mediator if such activity does not affect the independent professional judgment of the administrative law judge or the conduct of his official duties. A state administrative law judge shall not be an arbitrator or mediator over a matter which the administrative law judge may later preside.

## **G. PRACTICE OF LAW.**

A state administrative law judge may practice law if such activity would neither affect the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties. An attorney who is a state administrative law judge shall not accept the representation of a client who is a litigant before the tribunal for whom the state administrative law judge serves or if there is a likelihood that such person will appear before the judge. A state administrative law judge shall not practice law before the administrative tribunal for which the judge serves.

### *COMMENTARY*

*The American Bar Association Model Code of Judicial Conduct for Federal Administrative Law Judges states that a federal administrative law judge should not practice law or act as an arbitrator or mediator. However, it is common for state administrative law judges to be hired on a part-time or as needed basis while maintaining a legal practice. Also, state administrative law judges are compensated at a much lower level than federal administrative law judges. As long as the professional judgment of the administrative law judge is not impaired by such unrelated activities, then conflicts should not normally occur. The provisions of this Code have been modified accordingly.*

## **H. EXTRA-JUDICIAL APPOINTMENTS.**

A state administrative law judge may accept appointment to a governmental committee, commission or other position that is concerned with issues of policy on matters which may come before the judge if such appointment neither affects the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties.

## COMMENTARY

*Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on state administrative law judges must be assessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect judges from involvement in matters that may prove to be controversial and which may affect the judge's impartiality. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the administrative judiciary. State administrative law judges may be disqualified from particular cases due to Canons 3 A.4. and 3 C.1.c. The ABA Code of Judicial Conduct was modified to permit judges to accept appointments to appropriate organizations which do not appear before the agency they serve.*

### **CANON 6: A State Administrative Law Judge Shall Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities**

A state administrative law judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the judge's official duties or otherwise give the appearance of impropriety, subject to the following restrictions:

#### **A. COMPENSATION.**

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a state administrative law judge would receive for the same activity.

#### **B. EXPENSE REIMBURSEMENT.**

Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the state administrative law judge and where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

### **CANON 7: A State Administrative Law Judge Shall Refrain from Political Activity Inappropriate to the Judicial Office**

#### **POLITICAL CONDUCT IN GENERAL.**

1. A state administrative law judge shall not act as a leader or hold an office in a political organization or party, the principal purpose of which is to further the election or appointment of candidates to political office.
2. A state administrative law judge shall not solicit funds for or be compelled to pay an assessment to a political organization or candidate or purchase tickets for political dinners or other similar functions.

## COMMENTARY

*Prohibitions in the ABA Code were deleted which were considered to be inappropriately and unnecessarily more restrictive than the federal Hatch Act provisions applicable to some state administrative law judges. Participation in political activities is a right of every person. Unless specified in this canon or otherwise prohibited by law, political activity that neither affects the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties is not prohibited.*

3. A state administrative law judge shall resign from judicial office when the judge becomes a candidate either in a party primary or in a partisan general election except that the judge may continue to hold office, while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law to do so.

4. A state administrative law judge should not engage in any other partisan political activity except with the intent to improve the law, the legal system or the administration of justice.

**CANON 8: Compliance with the Code of Judicial Conduct for State Administrative Law Judges**

Anyone employed by a state governmental agency or an instrumentality of a state or municipal corporation, who is empowered to preside over statutory or regulatory fact-finding hearings or appellate proceedings arising within, among or before public agencies, is a state administrative law judge for the purposes of this Code.

# **National Association of Hearing Officials**

## **Model Code of Ethics**

The National Association of Hearing Officials has adopted the following Model Code of Ethics.

### **Section I: Scope**

This Code of Ethics is a guide to ethical behavior for hearing officials. Hearing officials include persons who conduct or review administrative hearings or who supervise hearing officials. NAHO had adopted this model code in recognition of the importance of the integrity of hearing officials. It is intended to supplement but not overrule any existing statutes, codes, policies or regulations setting out ethical requirements for hearing officials and public employees in a particular agency or jurisdiction.

### **Section II: Competence**

Hearing officials should know the substantive and procedural law, including the principles of due process, to be applied in the hearings over which they preside, and should understand the principles of its application and interpretation. Hearing officials should be skilled in conducting hearings efficiently and fairly. Hearing officials should be skilled in discerning the facts of the cases presented to them. Hearing officials should be clear and fair-minded in their application of the law to the facts of each case, and should communicate their decisions completely and clearly. Hearing officials should regularly participate in continuing education to improve their competence and to stay current in their knowledge of the law.

### **Section III: Impartiality**

Hearing officials should always strive to assure all persons involved that the proceedings will be conducted and decided impartially. "All persons involved" includes the appealing or petitioning parties and their representatives, the agency, agency staff or representatives, witnesses, interpreters, intervenors, observers, and any other person who appears before the hearing official, whether in person, in writing, or by electronic means.

Hearing officials should act in such a way that no one could reasonably believe that any person or agency could improperly influence them in the performance of their duties. Hearing officials should not conduct or participate in deciding the outcome of any proceeding in which their impartiality might be reasonably questioned. Personal knowledge of the facts in a case is an appropriate ground for disqualification of the hearing official. Hearing officials should promptly disclose to the parties any prior personal knowledge of or involvement in the matter. Hearing officials should always withdraw from any proceeding in which their impartiality becomes compromised for any reason. However, the hearing official should not withdraw from a proceeding if the hearing officials' impartiality is challenged solely on the basis that the hearing officials are employed by an agency appearing in the proceeding. The parties may agree to allow the hearing official to preside after full disclosure has been made. Hearing officials should preside without bias or prejudice and without discrimination on any prohibited basis against any person involved in the proceeding, and should control the proceedings to prevent such discriminatory behavior by any other person involved.

#### **Section IV: Independence**

The administrative hearing process requires re-examination and reappraisal of determinations made by an administrative agency. Regardless of the hearing official's employment relationship with a party agency, the hearing official should exercise independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct result in a case, maintaining decisional independence from agency management and programs. Supervisors may provide consultation to hearing officials, except as prohibited by law, but may not alter the hearing officials' decisions or substitute their judgment for that of the hearing officials.

#### **Section V: Ex Parte Communication**

Hearing officials should have a strong working knowledge of their jurisdiction's definitions and restrictions on ex parte contact. Generally, "ex parte" refers to communication between a hearing official and fewer than all parties to an administrative hearing. Hearing officials should not receive information from any party without sharing that information with all parties. If hearing officials are authorized to consult with an expert, the nature of the consultation and the substance of the expert's advice must be disclosed to all parties. Hearing officials should also give all parties an opportunity to respond.

#### **Section VI: Dignity and Decorum of the Forum**

Hearing officials should promote the dignity and decorum of the administrative hearing process and tribunal. Hearing officials should exercise their lawful authority in any proceeding to ensure that all persons involved conduct themselves with the proper decorum.

#### **Section VII: Professional Conduct**

Hearing officials should: always act in a manner that promotes public confidence in the integrity, impartiality and efficiency of the hearing process; maintain high standards of professional conduct and encourage other hearing officials to do the same; be temperate and dignified; be courteous to all in the performance of their duties; follow procedural formalities, making exceptions only in the interest of fairness; and punctually fulfill their professional commitments.

#### **Section VIII: Personal Conduct**

Hearing officials should refrain from all illegal or ethically reprehensible conduct. Hearing officials should not accept any gifts or favors from parties to any proceeding before them. Hearing officials should not engage in activities which may bring their own personal or professional interests into conflict with the performance of their official duties. Hearing officials should not give the impression that any party is in a special position to personally influence them, nor should they permit anyone, including friends and relatives, to convey such an impression to others. Hearing officials should treat all participants with equal courtesy and dignity and require the same treatment of the hearing officials by participants. For example, before, during and after a hearing, hearing officials should restrict their contacts regarding the matter such as social conversation, with agency staff or representatives, and should address agency participants as they would address any other hearing participant, using last



names and courtesy or professional titles. During the hearing process, hearing officials should politely discourage all participants from referring to a hearing official on a first name or casual basis.

### **Section IX: Confidentiality**

Hearing officials should not disclose confidential or private information obtained by reason of official position or authority except as required by law. Hearing officials should never seek to use such confidential information to further their personal interests. Hearing officials should follow their agency's rules or policies regarding media contacts. In any permitted contact with the media, hearing officials should limit the sharing of information to that which does not identify individuals and should never discuss the merits of any specific case. Hearing officials should avoid ex parte communications about a case with anyone (including family, friends and agency staff and associates) unless authorized by statute or agency regulations. However, hearing officials may in confidence discuss cases with other hearing officials.

### **Section X: Compliance with Ethical Rules**

Hearing officials must comply with all applicable statutes, administrative rules, codes of conduct, policies, and ordinances regarding ethics in their jurisdiction, and work to ensure that persons involved in the proceedings also comply. Hearing officials have a duty to report ethical violations.

## Summary of Pertinent Cases

### **Regarding ex parte contact and right to be heard by an impartial hearing officer:**

*Kerry Asmussen v. Commissioner, New Hampshire Department of Safety, Division of Motor Vehicles*, 145 N.H. 578, 766 A.2d 678 (2000): The Assistant Commissioner who oversaw the Bureau of Hearings reminded the hearing officers for whom they worked and instructed them to help the arresting officers develop the record in contravention of rulemaking procedures. The Court held that these actions constituted improper command influence and supervision as well as ex parte communications.

### **Regarding ex parte contact:**

1. *State v. Dussault*, 245 P.3d 436(Alaska App. 2011): Defendant requested conditional release from Alaska Psychiatric Institute which resulted in several hearings. State filed motion to disqualify judge alleging that he engaged in improper ex parte communication with Commissioner of Department of Health and Social Service during the conditional release hearings. Court reversed judge holding communications were not authorized by law and created appearance of partiality.
2. *State Farm Insurance v. Workers' Compensation Appeals Board*, 192 Cal.App.4<sup>th</sup> 51, 120 Cal.Rptr.3d 395 (Cal.App. 2<sup>nd</sup> Dist. 2011): After on the job injury, disabled applicant received 24-hour-a-day attendant care at the rate of \$30 per hour. Employer's insurer filed petitioner for writ of review. Court held applicant's prohibited ex parte communications with appointed medical examiner required that examiner's written report and testimony be stricken. Decision annulled and remanded with directions.
3. *Commission v. Dearman*, 66 So.3d 112 (Miss. 2011): Judge was publicly reprimanded, suspended for 30 days without pay and charged costs in part because she initiated and invited ex parte communication. Defendant was charged with felony larceny for stealing property, including a camera. Judge told defendant if camera was returned by a certain date, felony charges would be dropped. Judge learned through an ex parte contact that camera had been returned and reduced charge to a misdemeanor.

### **Regarding right to be hearing by an impartial hearing officer:**

1. A party attacking a judge's impartiality must demonstrate that the alleged bias stemmed from an extrajudicial source and resulted in an opinion reached on a basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

2. *Cinderella Career and Finishing Schools, Inc., v. Federal Trade Commission*, 425 F.2d 583, 138 U.S.App.D.C. 152 (1970). FTC Chairman should have recused himself from participating in review of the Hearing Examiner's initial decision because he'd made public statements indicating prejudgment.
3. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). An administrative agency is a neutral fact-finding body when it is neither an adversary nor an advocate of a party.
4. An ALJ had lunch with counsel for one side and one witness for that same side. It created such an appearance of partiality as to taint the entire proceedings. *Wells v. Del Norte School Dist. C-7*, 735 P.2d 770 (Colo. Ct. App. 1987).
5. *Texaco Refining v. Board of Appeals of the City of Delaware City*, 579 A.2d 1137 (1989). In a tax assessment appeal, the city's attorney simultaneously represented the city as an advocate and acted as an advisor to the Board on legal matters which arose during Texaco's appeal. The appellate court held that when advocacy and advisory functions are combined, it violates the principles of due process.
6. There is a presumption that government officials will perform their function without bias. *State of Alabama ex rel Siegelman v. U.S.E.P.A.*, 911 F.2d 499 (11<sup>th</sup> Cir. 1990).
7. *Beer Garden Inc. v. State Liquor Authority of the State of New York*, 568 N.Y.S.2d 25 (1991). Petitioner's liquor license was revoked by state liquor authority (SLA). Counsel to SLA during investigation and prosecution was subsequently appointed commissioner to SLA. She did not recuse herself from voting on outcome of Petitioner's hearing. Appellate court annulled and remanded matter back to the SLA for new hearing from which this commissioner must recuse. Acting as counsel for the board and as commissioner during the course of the same proceeding blurred the separate and distinct functions of prosecution and adjudication.
8. *Davenport Pastures, LP, v. Morris County Board of County Commissioners*, 291 Kan. 132, 238 P.3d 731 (2010): Rancher applied for damages due to board's decision to vacate two roads that provided ranch access. District Court Judge awarded \$30,000. Board appealed and awarded \$4,050 on remand. Rancher appealed. Attorney for board was legal advisor to board, recommended appraiser that board hired as sole expert witness, examined the 3 board members during hearing, advised board members to agree on one damage figure, represented board at all court proceedings against rancher, board agreed on damage amount recommended by expert attorney recommended, and drafted board's report without knowledge of or input by rancher. Rancher's due process rights were violated as multiple roles played by attorney for board created probability of bias that rose to an unconstitutional level.
9. *Absmeier v. Simi Valley Unified School District*, 196 Cal.App.4<sup>th</sup> 311, 126 Cal.Rptr.3d 237 (2011): District's personnel director was dismissed and challenged termination. School board appointed hearing officer to hear challenge "to ensure impartiality." Hearing officer subsequently moved from area "terminated all work and further consideration of the matter." Board hired law firm to review record transcript and exhibits and provide Board with a report and

recommendation. Law firm filed 46-page decision which contained findings of fact. Law firm weighed evidence and resolved conflicts in testimony in favor of the district and ruled dismissal should be upheld. Court held law firm had conflict of interest in dual roles as legal counsel and substitute ALJ and could not balance its duty of loyalty to the board with the obligation to be a neutral fact finder. Due process was violated due to law firms bias in favor of board.

10. By interposing *sua sponte* objections and severely limiting scope of cross examination, hearing officer left impression of bias. She went beyond role of fact-finder by extensively questioning witnesses and answering questions for witnesses. Hearing officer abused her discretion when she participated to the point of interposing objections to relevancy and instructing witnesses not to answer questions. *DHSMV v. Pitts*, 815 So.2d 738, 27 Fla. L. Weekly D999 (2002).

11. Hearing officer impermissibly acted as advocate for DHSMV; recessed hearing to locate registration certificate for machine used for motorist's breath test and then entered it as evidence violating due process rights. *Griffin v. DHSMV*, 909 So.2d 538, 30 Fla. L. Weekly D2065 (2005).

12. Terminated college faculty member requested hearing. College appointed hearing officer to hear case that was one of the board members that voted to fire him. Faculty member filed for writ of prohibition to challenge refusal to disqualify herself from hearing. Writ was granted. *Jones v. Florida Keys Community College*, 984 So.2d 556, 33 Fla. L. Weekly D1294 (2008).

13. Hearing officer is not subject to bias disqualification because of preliminary ruling on an issue. *Dooley v. Florida Keys Community College*, 908 So.2d 1139, 30 Fla. L. Weekly D1919 (2005).

14. Pelham signed the notice of violation, was in charge of the attorneys prosecuting the violations, was the Department's only witness, reviewed the hearing officer's findings and issued the final order. "Thus, Pelham was prosecutor, witness, and ultimate judge of the facts and law. Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions, this can hardly be characterized as an unbiased, critical review." *Ridgewood Properties v. Dept. of Community Affairs*, 562 So.2d 322, 15 Fla. L. Weekly S367 ('90).

15. Hearing officer was disqualified from presiding over formal administrative proceeding by various statements she made, which objectively demonstrated bias and prejudice against one party. *World Transp. Inc., v. Central Florida Regional Transportation*, 641 So.2d 913, Fla.App.5.Dist. (1994).