

Memorandum 93-21

Subject: Study N-100 - Administrative Adjudication--Implementation of
Decisions on Revised Draft of Statute

Implementation of Prior Decisions

Attached to this memorandum as Exhibit pp. 1-5 are redrafted sections and Comments to implement Commission decisions on the first half of the administrative adjudication statute. See Memorandum 92-70.

Disqualification Issues

The Commission asked to see a draft of the disqualification standards that (1) omits the "appearance of bias" test (in favor of a listing in the Comment of specific types of bias) and (2) expands the matters that are not grounds for disqualification to reflect ordinary agency experience. A draft is set out below.

§ 643.210. Grounds for disqualification of presiding officer 1/29/93

643.210. (a) The presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this part ~~, or if a person aware of the facts might reasonably entertain a doubt that the presiding officer would be able to be impartial.~~

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of or has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(4) Has served as, or is subject to the authority, direction, or discretion of or is assisted or advised by a person who has served as, investigator, prosecutor, or advocate in the proceeding, to the extent those circumstances are not prohibited by Article 3 (commencing with Section 643.310) (separation of functions).

(c) By regulation an agency may provide for peremptory challenge of the presiding officer.

Comment. Section 643.210 supersedes former Section 11512(c). Section 643.210 applies whether the presiding officer serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 648.550 (disqualification of presiding officer). For separation of functions requirements, see Section 643.320. This provision also applies to the reviewing authority. Section 649.230 (review procedure).

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b). ~~It adds as a ground for disqualification that a person might reasonably doubt the ability of the presiding officer to be impartial. This standard is drawn from Code of Civil Procedure Section 170.1(a)(6)(C) (disqualification of judges).~~ Under subdivision (a), grounds for disqualification might include such matters as:

- (1) Personal knowledge of disputed evidentiary facts.
- (2) Financial interest in proceeding or party.
- (3) Relative of party.
- (4) Relative of attorney.
- (5) Permanent or temporary physical impairment.
- (6) Personal bias or prejudice against party.

~~Subdivision (b) is~~ Subdivisions (b)(1)-(3) are drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Subdivision (b)(2) is expanded in recognition of the fact that in administrative proceedings, the presiding officer's experience, technical competence, and specialized knowledge may be useful or even necessary to a proper determination of the matter. Cf. Section 649.120(c) (presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence).

Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the presiding officer under Section 643.210, disqualification in such a situation might occur under Section 643.320 (separation of functions). But if the situation is not ground for disqualification under separation of functions requirements, the situation is not alone or in itself ground for disqualification under this section. Subdivision (b)(4).

Subdivision (c) codifies existing practice. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

The Commission also asked to see the Model Code of Judicial Conduct for Administrative Law Judges of State Central Panels. Judge Dash of the Office of Administrative Hearings has provided us a copy, attached as Exhibit pp. 6-23. The Model Code follows closely the Code of Judicial Conduct applicable in California.

Peremptory Challenge

There is one other issue that has been raised in connection with the disqualification section--a suggestion that the peremptory challenge be made a matter of right. See Section 643.210(c). The argument is that it is difficult to disqualify an administrative law judge, particularly with the ALJ making the decision on the ALJ's own disqualification; moreover, to challenge an administrative law judge is foolhardy, since there will be prejudice thereafter against the challenger.

When the Commission considered this matter in the past, it was persuaded against it by the argument that a peremptory challenge may create difficult problems for a small agency that does not have a large number of hearing officers available.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

EXHIBIT

§ 613.220. Mail or other delivery

9/11/92

Comment. Section 613.220 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail). Failure of a person to receive notice of a hearing sent under this section is prima facie evidence of good cause for failure to attend the hearing. Section 648.130(c) (default). Proof of service by mail may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

§ 613.320. Representation by attorney

5/21/92

Comment. Section 613.320 generalizes a provision of former Sections 11500(f)(3) and 11509. Qualification and discipline of attorneys that practice before administrative agencies is governed by the State Bar of California and not by the agencies. It should be noted, however, that an agency may seek the contempt sanction for misconduct by a participant in a hearing and may impose monetary sanctions on a party or attorney for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Sections 648.610 to 648.630 (enforcement of orders and sanctions).

§ 615.150. Assignment of administrative law judges

1/29/93

615.150. (a) The director shall assign an administrative law judge employed by the office for an adjudicative proceeding ~~required by statute to~~ other than a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(b) ~~On request from an agency, the director may assign an administrative law judge employed by the office for an adjudicative proceeding not required by statute to~~ that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge employed by the office or other employee assigned under this section is considered an employee of the office and not of the agency to which the administrative law judge or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge employed by the office may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 615.180.

Comment. Subdivision (a) of Section 615.150 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings ~~required by statute to~~ exempted by statute from the requirement that they be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

~~{(1) A proceeding required to be conducted under the Administrative Procedure Act, Gov't Code § 11502.}~~

~~{(2) A proceeding arising under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code on request of a public prosecutor, Bus. & Prof. Code § 22460.5.}~~

[to be drafted]

Subdivision (b) restates the second part of the third sentence of former Section 11370.3.

Subdivision (c) restates the third part of the third sentence of former Section 11370.3.

Subdivision (d) restates the fifth sentence of former Section 11370.3.

Subdivision (e) restates the sixth sentence of former Section 11370.3.

Staff Note. Conforming changes will be made throughout the administrative procedure act. Conforming changes also will be made in other statutes to exempt hearings not now required to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Article 2. Declaratory Decision

Comment. Article 2 (commencing with Section 641.210) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

It should be noted that an agency not governed by this article nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Gov't Code §§ 11347-11347.1.

§ 641.240. Applicability of rules governing administrative
adjudication

3/12/92

Comment. Section 641.240 is drawn from 1981 Model State APA § 2-103(d). It makes clear that persons must be allowed to intervene in a declaratory decision proceeding to the same extent they are allowed to intervene in other adjudicative proceedings under this part. It also makes clear that all the other specific procedural requirements for adjudications imposed by this part on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 641.210. The reason for exempting a declaratory decision from usual procedural requirements for adjudications provided in this part is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to unproven facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part.

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions. See, e.g., Sections 6250-6268 (California Public Records Act). A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions. See Sections 649.310-649.340 (precedent decisions).

§ 641.250. Action of agency

1/29/93

641.250. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

- (1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.
- (2) Set the matter for specified proceedings.
- (3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision ~~, stating the reasons for its action .~~ Agency action under this paragraph is not subject to administrative or judicial review.

(b) A copy of the agency's action under subdivision (a) shall be served promptly on the applicant and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of an application for a declaratory decision, the agency is considered to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 641.250 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other means to the respondent's last known address. Sections 613.210 (service) and 613.220 (mail).

~~Under subdivision (a)(4), when the agency declines to issue a declaratory decision it must also include a statement of the precise grounds for the disposition. The statement of reasons will help to ensure that the agency carefully considers the propriety of the denial of a declaratory decision in the circumstances. The decision by an agency whether or not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable.~~
Subdivision (a)(4).

§ 642.360. Amended and supplemental pleadings 10/7/92

Comment. Section 642.360 supersedes former Sections 11507 and Section 11516. It is broadened to permit amendment of responsive pleadings as well as initial pleadings, but is narrowed ~~to subject amendments~~ so that an amendment is subject to the presiding officer's discretion after commencement of the hearing. Cf. Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading).

§ 642.440. Notice of hearing 10/7/92

Comment. Section 642.440 is drawn from former Sections 11509 and 11505, with an increase in time from 10 to 15 days. If notice of hearing is sent by mail or other means, it must be sent at least 20 days before the hearing date. Section 613.230 (extension of time). Proof of service by mail may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ. Proc. § 1013a.

The respondent may be represented by an attorney or, in some circumstances, another authorized representative. See Sections 613.310-613.330 (representation of parties).

For limitations on procedures in a conference adjudicative hearing, see Section 647.120 (procedure for conference adjudicative hearing).

PREAMBLE

The Model Code of Judicial Conduct for Administrative Law Judges of State Central Panels is intended to establish basic ethical conduct standards for administrative law judges or any other hearing officials, whatever their title, in any state with a central panel administrative hearing system. The Code is intended to govern the conduct of these administrative law judges and to provide guidance to assist state central panel judges in establishing and maintaining high standards of judicial and personal conduct. This Code is based upon the Model Code of Judicial Conduct as adopted by the ABA on August 7, 1990 and the February 1989 Model Code of Judicial Conduct for Federal Administrative Law Judges.

The text of the Canons is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions. The terms administrative law judge or judge are intended to include all hearing officers in any central panel state.

The Canons 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 not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to administrative law judges and to provide a structure for regulating conduct. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the administrative system. The Code is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

CANON 1

AN 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. An administrative law judge should participate in establishing, maintaining, and enforcing, high standards of conduct, and shall personally observe those standards so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary: Deference to the judgments and rulings of administrative proceedings depends upon public confidence in the integrity and independence of administrative law judges. The integrity and independence of administrative law judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the administrative judiciary is maintained by the adherence of each administrative law judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the administrative judiciary and thereby does injury to the system of government under law.

CANON 2

AN ADMINISTRATIVE LAW JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

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

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

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is

not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by administrative law judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the administrative law judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

See also Commentary under Canon 2C.

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

Commentary: Maintaining the prestige of the administrative judiciary is essential to a system of government in which the administrative judiciary must to the maximum extent possible, function independently of the executive and legislative branches. Respect for the office facilitates the orderly conduct of legitimate administrative judicial functions. 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 an administrative law judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, official letterhead must not be used for conducting an administrative law judge's personal business.

An administrative law judge must avoid lending the prestige of the office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family.

Although an administrative law judge should be sensitive to possible abuse of the prestige of the office, an administrative law judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

An administrative law judge must not testify voluntarily as a character witness because to do so may lend the prestige of the office in support of the party for whom the administrative law judge testifies. Moreover, when an administrative law judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. An administrative law judge may, however, testify

when properly summoned. Except in unusual circumstances where the demands of justice require, an administrative law judge should discourage a party from requiring the judge to testify as a character witness.

C. An 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 judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership of an administrative law judge in an organization that practices invidious discrimination may give rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. 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 how the organization selects members and other relevant factors, such as, that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such 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. See New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L. Ed. 2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L. Ed. 2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, an administrative law judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Canon 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Canon 2A for an administrative law judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by an administrative law judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the administrative judiciary, in violation of Canon 2A.

When a person who is an administrative law judge at the time this Code becomes effective [in the jurisdiction in which the person is a judge]¹ learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canon 2 and Canon 2A, the administrative law judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but the judge is required to suspend participation in any 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 administrative law judge is required to resign immediately from the organization.

CANON 3

AN ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of an 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) An administrative law judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
- (2) An administrative law judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.
- (3) An administrative law judge shall maintain order and decorum in proceedings before the judge.
- (4) An administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, representatives, and others with whom the judge deals in an official capacity, and shall require similar conduct of 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 dispose promptly of the business of the judge. Judges can be efficient and

¹ The language within the brackets should be deleted when the jurisdiction adopts this provision.

businesslike while being patient and deliberate.

(5) An administrative law judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff and others subject to the judge's direction and control to do so.

Commentary: A 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. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, the media, and others an appearance of bias. A judge must be alert to avoid behavior that may be perceived as prejudice.

(6) An administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representative, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications as to substantive matters concerning a pending or impending proceeding. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, by *amicus curiae* or as otherwise authorized by law, if the judge affords the parties reasonable opportunity to respond. 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. A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding except as authorized by law, but does not preclude a judge from consulting with other judges or subordinate personnel whose function is to aid the judges in carrying out adjudicative responsibilities. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

(7) An administrative law judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary: In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues

resolved without unnecessary cost or delay. Prompt disposition of the 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 representatives cooperate with the judge to that end.

(8) An administrative law judge shall abstain from public comment about a pending or impending proceeding before any judge in the administrative process 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 trial or hearing and shall require similar abstention on the part of personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the hearing procedures of agencies.

Commentary: "Agency personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by rules of professional conduct. This subsection is not intended to preclude participation in an association of judges merely because such association makes public comments about a pending or impending proceeding in the administrative process. The subsection is directed primarily at public comments by a judge concerning a proceeding before another judge.

(9) An administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

B. Administrative responsibilities:

(1) An administrative law judge shall diligently discharge assigned administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other administrative law judges.

(2) An 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) An administrative law judge shall take or initiate appropriate disciplinary measures against a judge or a lawyer for unprofessional conduct of which the judge may become aware.

(4) An administrative law judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

Commentary: Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body. Internal agency procedure which routes the complaint can be utilized as long as the judge remains responsible for initiation of the action.

C. Disqualification:

(1) An 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:

Commentary: By decisional law, the rule of necessity may supersede the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

- (a) the judge has a personal bias or prejudice concerning the proceeding;**
- (b) in private practice the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously 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 judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;**
- (d) the judge knows that he or she, individually or as a fiduciary, or his or her spouse or child wherever residing, or any other member of the judge's family or a person treated by the judge as a member of the judge's family 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 more than *de minimis* interest that could be substantially affected by the outcome of the proceeding;**
- (e) the 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 other representative 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 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 3C(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 3C(1)(d)(iii) may require the judge's disqualification.

- (iii) is known by the judge to have a more than *de minimis* 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.

(2) A judge shall inform himself or herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

(3) For the purposes of this Code 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 judge if the judge's or his or her spouse's parent, grandparent, uncle or aunt, brother or sister, or niece or her husband, nephew or his wife were a party or lawyer in the proceeding, but would not disqualify the judge if a cousin were a party or lawyer in the proceeding.

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

(c) "financial interest" means ownership of a more than *de minimis* legal or equitable interest, 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 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 policy holder 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 prehearing or other stages of litigation.

D. Remittal of disqualification:

An administrative law judge disqualified by the means of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and representatives, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and representatives, shall be incorporated in the record of the proceeding.

Commentary: Canon 3D is derived from the ABA model code with amendments conforming to 28 U.S.C. 455. The procedure is designed to minimize the chance that a party or representative will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his or her party's consent will be subsequently filed.

CANON 4

AN ADMINISTRATIVE LAW JUDGE SHALL REGULATE EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES

A. Extra-judicial activities in general:

An 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 judicial office; or
- (3) interfere with the proper performance of judicial duties.

Commentary: Complete separation of a judge from extra-judicial activities is neither possible nor wise; a 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, 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:

An administrative law judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code.

Commentary: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including the 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 conference, or other organization dedicated to the improvement of the law.

C. Governmental, civic, and charitable activities:

(1) An administrative law judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system, or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests.

Commentary: The judge has a professional obligation to avoid improper influence.

(2) An administrative law judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Commentary: Canon 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice. The appropriateness of accepting extra-judicial assignments must be assessed in light of the

demands on judicial resources created by crowded dockets and the need to protect the judge from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the administrative judiciary.

(3) An 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 non-legal advisor of an educational, religious, charitable, fraternal, or civil organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(a) A judge shall 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 the central panel 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 to reexamine regularly the activities of each organization with which he or she is affiliated to determine if it is proper to continue his or her relationship with that organization.

(b) An administrative law judge as an officer, director, trustee or non-legal advisor, or as a member, or otherwise:

- (i) may assist such an organization in planning fund-raising and may participate in the management and investments of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory authority;**
- (ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system, or the administration of justice;**
- (iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;**
- (iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.**

Commentary: An administrative law judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system, or the administration of justice or a nonprofit educational, religious, charitable, fraternal, or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the central panel on which the judge serves, and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Canon 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

D. Financial activities:

(1) An administrative law judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in transactions or continuing business relationships with those lawyers or other persons likely to come before the central panel on which the judge serves.

Commentary: A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's central panel. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position or involve those family members in frequent transactions or continuing business relationships with persons likely to come before the judge. This rule is necessary to avoid creating an

appearance of exploitation of office or favoritism and to minimize the potential for disqualification.

(2) An administrative law judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) An administrative law judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

- (a) a business closely-held by the judge or members of the judge's family, or
- (b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

Commentary: Subject to the requirement of this Code, a judge may participate in a business that is closely-held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Canon 4D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's central panel or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of the judicial office.

(4) An 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 the judge can do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) An administrative law judge shall not accept, and shall urge members of the judge's family or a person treated by the judge as a member of the judge's family residing in the judge's household not to accept a gift, bequest, favor, or loan from anyone except for:

Commentary: Because a gift, bequest, favor, or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot,

however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

(a) a gift incident to a public testimonial, books, tapes, and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary: A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required.

(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification;

(f) 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;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor, or loan only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

Commentary: Canon 4D(5)(h) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

E. Fiduciary activities:

(1) An administrative law judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney in fact, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) An administrative law judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary 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 the central panel on which the judge serves.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary: The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Canon 4D(4).

F. Service as arbitrator or mediator.

An administrative law judge may act as an arbitrator or mediator provided there is no conflict with the judge's official duties.

G. Practice of Law.

A full-time administrative law judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family. A member of the judge's family denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

Commentary: This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge

must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

An administrative law judge may perform pro bono legal services provided there is no conflict with the judge's official duties and the proceedings will not take place in the central panel in which the judge is a member.

H. Compensation and reimbursement.

An administrative law judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(1) Compensation shall not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

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

I. Disclosure.

Disclosure of an administrative law judge's income, debts, investments, or other assets is required only to the extent provided by law.

Commentary: A judge has the right of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

CANON 5

AN ADMINISTRATIVE LAW JUDGE SHALL REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO THE JUDICIAL OFFICE

Commentary: Administrative law judges retain the right to participate in the political process as voters. Administrative law judges, depending upon their employment status, may engage in other appropriate political activity.

It is generally inappropriate, however, for any full-time administrative law judge to act as a leader or hold office in a political organization or make speeches on behalf of a political organization. While it may be inappropriate to publicly endorse or publicly

oppose a candidate for public office, a full-time administrative law judge is not prohibited from privately expressing his or her views on candidates for public office.

A candidate for reappointment to an administrative law judge position or an administrative law judge seeking another governmental office should not engage in political activity to secure the appointment. Such persons may communicate with the appointing authority and any entity or person designated to screen candidates, or seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office.

A full-time administrative law judge shall resign from office when the judge becomes a candidate either in a party primary or in a general election for an elective public office.