

Memorandum 95-37

Administrative Adjudication: Issues on SB 523 (Kopp)

This memorandum discusses issues that have arisen concerning SB 523 since the June 29-30 Commission meeting. The bill was last amended on July 28 to make technical changes and coordinate it with other bills in the current legislative session. It is set for hearing in the fiscal committee in the second house on August 16.

State Board of Equalization

The State Board of Equalization took a position in opposition to the bill unless exempted from it. The basis of the position is that the Board needs to be able to function informally, including receiving ex parte communications, in order to resolve cases. The Board is different from other adjudicating bodies in that it does not need to create a record for judicial review — judicial review in tax cases takes the form of a de novo court trial, rather than a review of the administrative record.

The Board was supported in its position by the California Taxpayers Association (an association of the largest taxpaying entities) and the Republican Caucus, whose consultant took the position that the bill is “unfriendly to taxpayers”. A copy of the consultant’s analysis is attached as Exhibit pp. 1-2.

At the hearing in the Assembly Committee on Consumer Protection, Governmental Efficiency & Economic Development, a motion to exempt the Board of Equalization was resisted by Senator Kopp, who received strong support on the committee from Assembly Member Isenberg. Nonetheless, the Committee amended the bill to remove State Board of Equalization proceedings on a 7-6 vote. All Republican committee members voted for the amendment and all Democrat committee members voted against the amendment. As thus amended, the bill was approved by a vote of 7-2, the Republican members voting for the bill and the Democrat members withholding their approval.

Code of Ethics for Administrative Law Judges

The Office of Administrative Hearings has suggested it would be beneficial to authorize promulgation of a Code of Ethics for administrative law judges. The staff forwarded that suggestion to the Association of California Attorneys and Administrative Law Judges. ACSA is the collective bargaining unit for state administrative law judges.

ACSA believes a code of ethics would be useful, but believes it should not be done on an agency-by-agency basis. "If each agency is allowed to develop its own particular code of conduct, this would create levels of conduct or acceptable behavior in one agency where the same conduct may not be acceptable in another. This confusing situation should be avoided." Exhibit p. 3-4. They suggest that the California Code of Judicial Conduct promulgated by the California Judges Association be applied to administrative law judges throughout state service. A copy is attached as Exhibit pp. 5-16. It currently applies to workers compensation referees pursuant to Labor Code Section 123.6.

The staff notes that the Supreme Court, as of March 1995, is required to promulgate a Code of Judicial Ethics. Cal. Const. Art. VI, § 18. Currently, a Supreme Court committee is working on an interim code; its first report is scheduled for January 1, 1996. This may be a more appropriate code of ethics to incorporate than the California Judges Association's Code, since the CJA is not a governmental body. Also, it may be worth taking a look at the ABA Model Code of Judicial Conduct for Administrative Law Judges, which is adapted for administrative law judges and may eliminate material that has less relevance to administrative law judges than judicial branch judges. See Exhibit pp. 17-40.

The staff proposes to work with ACSA and OAH on this to develop a workable provision for followup legislation in 1996, if possible.

Finality of ALJ Decision

In connection with the provision in SB 523 enabling an agency that conducts an adjudicative proceeding to provide to provide for preemptory challenge of the presiding officer, the Association of California State Attorneys and Administrative Law Judges has suggested that as a quid pro quo the decision of the administrative law judge should be a final decision (not subject to review by the agency head).

The staff notes that there is pending legislation to make the decision of the administrative law judge final. See AB 1069 (Hauser), attached as Exhibit pp. 41-

46. The bill has passed the Assembly and has had an informational hearing in the Senate Judiciary Committee. We have been informed by the author's office that this will be a two-year bill.

The issue is a controversial one. We have been battling the agencies and the Attorney General on the modest proposal to give the administrative law judge's credibility determinations great weight, let alone the concept of giving the ALJ's decision finality. The staff recommends against jumping into the fray at this point. AB 1069 presents the issue clearly for legislative resolution. Whatever the resolution is on that bill will be part of the Administrative Procedure Act.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

**ASSEMBLY CONSUMER PROTECTION, GOVERNMENTAL
EFFICIENCY AND ECONOMIC DEVELOPMENT COMMITTEE
REPUBLICAN ANALYSIS**

SB 523 (Kopp) -- ADMINISTRATIVE PROCEDURE.

Version: 5/3/95

Vice-Chairman: Jim Morrissey

Analyzed: 6/20/95

Vote: Majority

Recommendation: Oppose unless Amended

SUMMARY: Revises the procedures for administrative adjudications by expanding the hearing procedure options available to state agencies and by including additional due process and public policy requirements. Expands adjudication provisions over all state administrative hearings regardless of whether or not they are covered by the Administrative Procedures Act. **FISCAL EFFECT:** Unknown.

TAX OR FEE INCREASE: None.

POTENTIAL EFFECTS: Unfriendly to taxpayers. Formalizes all protest procedures brought against state government, even those currently handled on an informal basis. Would require individuals to hire attorneys to handle procedures they could handle on their own now without fear.

SUPPORT: CA Law Revision Commission (source)

OPPOSITION: Board of Equalization; Attorney General; Cal-Tax; State and Consumer Services Agency; CA Coastal Commission.

NEUTRAL: State Personnel Board; Dept. of Finance.

GOVERNOR'S POSITION: Unknown

COMMENTS:

- o **Background.** SB 523 is the product of a four-year Commission study pertaining to administrative adjudication by state agencies. Contained in SB 523 is an administrative adjudication "bill of rights" which the proponents claim will protect citizens and improve agency ability to adjudicate efficiently.
- o **Board of Equalization concerns.** Currently, the BOE handles protests in an informal manner to put taxpayers at ease in discussing their situation. They have found this to be a beneficial way to conduct business. They are concerned that formalizing this process will result in taxpayers avoiding the system, and that those who do utilize the process will be forced to be represented by counsel, since these records could be used in court proceedings.
- o **Administrative Hearings and BOE protests are not equivalent.** One of the primary concerns with this revision is that the individuals selected to perform the review had no knowledge of the existing processes before they began. This measure places heavy emphasis on the production of a record and written decision, suitable for judicial review. Hearings that the BOE conducts with regard to taxpayers are not seeking judgement but rather amicable resolution. These hearings may be closed since they deal with an individual's private affairs such as private

financial records, trade secrets or other data, which if disclosed would be damaging to the individual taxpayer.

- o **Removes the Board of Equalization's primary purpose.** Currently, the BOE is there to assist taxpayers. This measure would prohibit BOE Members or their staffs to discuss any pending case with a taxpayer or any other "interested party" outside the hearing proceeding, without disclosing the discussion as a part of the record of the proceeding.
- o **The more formal the process the greater opportunity for attorneys to exploit the process.** Involving a procedural record suitable for judicial hearing for taxpayers will open a new market to attorneys. Will we be opening the door for state to be brought into still more litigation?
- o **Administrative Adjudication Bill of Rights** includes the following provisions: each party must be given notice and an opportunity to be heard; the agency must make procedures available; open public hearings; adjudication must be wholly separate from investigative units of the agency; any decision must be in written form and backed by both legal and factual evidence; the agency must provide language assistance to the extent required by law.
- o **Suggested Amendment.** Provide that these formalized procedures only apply to hearings conducted by agencies without an elected official or elected body as the head of the agency or department.

Senate Republican Floor vote -- 5/11/95 -- CONSENT CALENDAR

(37-0) Ayes: All Republicans

Assembly Republican Committee vote

CP, GE & ED -- 6/27/95

(>) Ayes: >
Noes: >
Abs.: >
N.V.: >

Consultant: Peter Renevitz



ASSOCIATION OF CALIFORNIA STATE ATTORNEYS
AND ADMINISTRATIVE LAW JUDGES

Law Revision Commission
RECEIVED

June 19, 1995

JUL 15 1995

File: _____

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94202-4739

RE: Amendments to SB 523

Dear Mr. Sterling:

The following is ACSA's response to your inquiry regarding amending a code of ethics for administrative law judges, and peremptory challenges into Senate Bill 523.

The California Code of Judicial Conduct prescribes formal standards of conduct for judicial officers. In California there are a number of state agencies which employ civil service administrative law judges who perform a function designed to provide due process to the citizens of California and at the same time help unclog the courtrooms of California. The administrative law judges in California are trained professionals, licensed by the State of California, and are fully versed in the intricacies of the agency for which the hearings are being conducted. These administrative law judges already conduct themselves in a manner consistent with the California Code of Judicial Conduct. One group of these judges, the workers' compensation judges/referees are bound by the California Code of Judicial Conduct pursuant to Labor Code §123.6. There is no such legal requirement for any of the other administrative law judges to be bound by the same code.

The question of whether such a code, or an authorization for agencies to develop their own code, should be included in SB 523 was discussed. If each agency is allowed to develop its own particular code of conduct, this would create levels of conduct or acceptable behavior in one agency where the same conduct may not be acceptable in another. This confusing situation should be avoided. If a Code of Judicial Conduct is to apply to all administrative law judges (ALJs), there should be one such code and that should be the California Code of Judicial Conduct as adopted by the California Judges Association. This Code of Judicial Conduct should apply to all triers of fact who are referred to or classified as "administrative law judges." If an agency wishes this code of conduct to apply to their triers of

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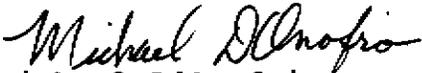
Nathaniel Sterling
June 19, 1995
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fact, they need only convert the title from i.e., hearing officer, workers' compensation judge/referee, etc., to that of "administrative law judge." One Code of Judicial Conduct would apply to all ALJs. ACSA would be supportive of such a change and would be willing to meet and confer over the impact of any such code of conduct applicable to any of the represented ALJs.

The Commission has requested ACSA's input regarding peremptory challenges. The citizens of California and the practitioners before the Office of Administrative Hearings should have the ability to exercise one peremptory challenge if they feel the need. However, along with the ability to exercise such a challenge, the quid pro quo should include the ALJ's finality of decision. If a party is allowed to excuse a particular judge, the judge ultimately assigned to the case should be authorized to render a final decision. Once that final decision has been issued, the matter, if necessary, is ripe for judicial review. This would conform the administrative hearing process with the recognized judicial process, would eliminate an expenditure of time and money rewriting decisions or conducting new hearings, and make the system "user friendly" to the public. This concept is not entirely inconsistent with opinions expressed in discussions with commission members already. Therefore, ACSA recommends that if peremptory challenges are authorized by the revised Administrative Procedure Act as expressed in Senate Bill 523, there should also be a corresponding provision which specifies the finality of decision by the ALJ as the trier-of-fact and law.

I trust this letter will be copied to the Commission members prior to the June 29 meeting in San Diego. At the present time, our staff consultant will be on vacation and unable to attend that meeting. However, he will be available to address the Commission members and respond to inquiries at the following meeting of the California Law Revision Commission.

Sincerely,


Michael D'Onofrio
Administrative Law Adjudication Ad Hoc Committee

c: Senator Quentin Kopp
Aaron Read
Steve Baker

DIVISION II. CALIFORNIA CODE
OF JUDICIAL CONDUCT

Adopted by the California Judges Association
October 5, 1992

Research Note

Judicial conduct annotations are in West's Annotated California Codes, Volume 23, Part 2.

Use WESTLAW to find cases citing a specific canon. In addition, use WESTLAW to search for specific terms or to update a canon; see the CA-RULES and CA-ORDERS Scope Screens for further information.*

Amendments to these canons are published, as received, in the California Reporter 2d advance sheets.

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Canon

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PREFACE

Formal standards of judicial conduct have existed for more than fifty years. The original Canons of Judicial Ethics were modified and adopted in 1949 for application in California by the Conference of California Judges (now the California Judges Association).

In 1969, the American Bar Association determined that current needs and problems warranted revision of the Canons. In the revision process, a special American Bar Association committee, headed by former California Chief Justice Roger Traynor, sought and considered the views of the bench and bar and other interested persons. The American Bar Association Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association August 16, 1972.

The California Judges Association then drafted a new California Code of Judicial Conduct adapted from

the ABA 1972 Model Code. The new version was adopted by the membership at the Annual Meeting in September 1974, and became effective January 5, 1975. The California Code was recast in gender-neutral form in 1986.

In 1990, a third generation of the American Bar Association Model Code was approved by the House of Delegates after a lengthy study. The California Judges Association began review of the 1990 Model Code later that year, culminating in the adoption of a revised California Code of Judicial Conduct on October 5, 1992.

Revisions of the Code are made by vote of the membership of the California Judges Association by plebiscite or at its Annual Business Meeting. This edition includes all revisions made through the Association's 1992 Annual Meeting.

Adopted, Oct. 5, 1992.

CODE OF JUDICIAL CONDUCT

PREAMBLE

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

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in sections under each Canon, a Terminology section, a Compliance section and Commentary. The text of the Canons and the sections, including the Terminology and Compliance sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and sections. The Commentary is not intended as a statement of additional rules.

The use of the word "should" throughout the text does not relieve judges of the obligation to comply with this Code.

The Canons and sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court 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 judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution.

The text of the Canons and sections is intended to govern conduct of judges and to be binding upon them. 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 judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their 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 judges in establishing and maintaining high standards of judicial and personal conduct. Adopted, Oct. 5, 1992.

TERMINOLOGY

Terms explained below are noted with an asterisk (*) in the Canons where they appear. In addition, the Canons where terms appear are cited after the explanation of each term below.

"Appropriate authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Commentary to Canon 3D.

"Candidate." A candidate is a person seeking election for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election to non-judicial office, unless on leave of absence. See Preamble and Canons 2B, 5A, 5B, 5C, and 6D.

"Court personnel" does not include the lawyers in a proceeding before a judge. See Canons 3B(7)(b) and 3B(9).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Canons 4E and 6E.

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Canons 1, 2A, 2C, 3A, 3B(2), 3B(7), 3E, 4B, 4C, 4D(4), 4F, and 5D.

"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. See Canons 2B, 4D(1), 4D(2), 4E, 4G and 5A.

"Member of the judge's family residing in the judge's household" denotes those persons who reside in the judge's household who are relatives of the judge within the third degree of relationship (i.e., a great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece) or by marriage, or persons treated by the judge as a member of the judge's family. See Canons 4D(4) and 4D(5).

"Nonpublic information" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases or psychiatric reports. See Canon 3B(11).

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to nonjudicial office. See Canon 5A(3).

"Pro tempore judge." ("Temporary Judge") A pro tempore judge is an active or inactive member of the bar who serves or expects to serve as a judge once, sporadically, or regularly on a part-time basis under a separate appointment for each period of service or for each case heard. See Canon 6C.

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Canons 3B(3), 3B(4), 3B(6), 3B(8), 3B(9) and 3C(2).

Adopted, Oct. 5, 1992.

CANON 1. A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the 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 courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law and the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violations of this Code diminish public confidence in the judiciary and thereby does injury to the system of government under law.*

A judicial decision or administrative act later determined to be incorrect legally is not in itself a violation of this Code. The basic function of an independent and honorable judiciary is to maintain the utmost integrity in decision-making, and this Code should be read and interpreted with that function in mind.

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

CANON 2. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge should respect and comply with the law* and should act at all times in a manner that

promotes public confidence in the integrity and impartiality of the judiciary.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the 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.

The test for the appearance of impropriety is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.

See also Commentary under Canon 2C.

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

Commentary

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. 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 a judge to use his or her position to gain a personal advantage, such as preferential treatment when stopped by a police officer for a traffic offense, or to use judicial letterhead to gain favor or special treatment.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judicial position to gain advantage in a civil suit involving a member of the judge's family. As to the use of a judge's title to identify a judge's role in the presentation and/or creation of legal education programs and materials, see Commentary to Canon 4B. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Canon 4D(4)(a) and Commentary.*

Judges may participate in the process of judicial selection by serving on and cooperating with screening and appointing committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship, and by providing

letters of recommendation relating to the character of the candidate*.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation of a factual nature. Writing general character recommendations in areas involving the administration of justice is consistent with the purposes of Canon 4B. A judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer, but may provide to such persons information for the record in response to a formal request from such persons.

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

This Canon, however, does not afford judges a privilege against testifying in response to an official summons.

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. This Canon does not apply to membership in a religious organization.

Commentary

Membership of a judge in an organization that practices invidious discrimination gives rise to a perception 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 whether the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or whether 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.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by law* 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 a judge to arrange a meeting at a club that the judge knows practices such invidious discrimination or for the judge to regularly use such a club. Moreover, public manifestation by a 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 judiciary, in violation of Canon 2A.

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge should hear and decide all matters assigned to the judge except those in which he or she is disqualified.

Commentary

This Canon 3B(1) is based upon the affirmative obligation contained in the Code of Civil Procedure.

(2) A judge should be faithful to the law* and maintain professional competence in it. A judge should not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge should require* order and decorum in proceedings before the judge.

(4) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge should perform judicial duties without bias or prejudice. A judge should 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.

Commentary

A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment.

(6) A judge should require* lawyers 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 Canon 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.

(7) A judge should accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law*. A judge should 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 as follows:

(a) A judge may obtain the advice of a disinterested expert on the law * applicable to a 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.

(b) A judge may consult with court personnel * whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) 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.

(d) A judge may initiate or consider any ex parte communication 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 to the limited extent permitted by the exceptions noted in this Canon SB(7).

This Canon does not prohibit a judge from initiating or considering an ex parte communication when authorized to do so by stipulation of the parties.

This Canon does not prohibit court staff from communicating scheduling information or carrying out similar administrative functions.

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

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

(8) A judge should dispose of all judicial matters fairly, promptly, and efficiently.

Commentary

The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge should not make any public comment about a pending or impending proceeding in any court, and should not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge should require * similar abstention on the part of court personnel * subject to the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials cases and issues pending in appellate courts.

(10) A judge should not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge should not disclose or use, for any purpose unrelated to judicial duties, nonpublic information * acquired in a judicial capacity.

Commentary

This Canon makes it clear that judges cannot make use of information from affidavits, jury results, or court rulings, before they become public information, in order to gain personal advantage.

C. Administrative Responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other

judges and court officials in the administration of court business.

(2) A judge should require * staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status in the performance of their official duties.

Commentary

*A judge should require * staff, court officials, and others subject to the judge's direction and control to refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment.*

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge should not make unnecessary appointments. A judge should exercise the power of appointment impartially and on the basis of merit. A judge should avoid nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Canon 3C(4).

D. Disciplinary Responsibilities. A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Commentary

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency or body. Judges should note that in addition to the action required by Canon 3D, California law imposes additional reporting requirements regarding lawyers, such as those contained in the Business & Professions Code.

E. Disqualification. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, or in a proceeding in which disqualification is required by law *.

Commentary

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, or

whenever required by the disqualification provisions of the Code of Civil Procedure.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

The rule of necessity may override 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 judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must timely 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 judge should observe the provisions of the Code of Civil Procedure concerning remittal of disqualification.

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

CANON 4. A JUDGE SHOULD SO CONDUCT THE JUDGE'S QUASI-JUDICIAL AND OTHER EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

A. Extra-Judicial Activities in General. A judge should 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, 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 a classification such as their race, sex, religion, sexual orientation or national origin. See Canon 2C and accompanying Commentary.

B. Quasi-Judicial and Avocational Activities. A 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 revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law.

In order to improve the law, the legal system and the administration of justice through a judge's participation in and creation of legal education programs and materials, it may be necessary to promote such programs and materials, in part, by identifying the creator and/or participant by judicial title. This is permissible, provided such use of the judicial title does not contravene Canon 2A.

In this and other sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Canons of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

C. Governmental, Civic or Charitable Activities.

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

Commentary

See Canon 2B regarding the obligation to avoid improper influence.

(2) A judge should 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 as authorized by Canon 4C(3). The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts 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 judiciary, or which constitute a public office within the meaning of California Constitution, Article VI, Section 17. But this Canon does not apply to positions in federal or state military units.

Canon 4C(2) does not govern a judge's service in a nongovernmental position. See Canon 4C(3) permitting service by a judge with organizations devoted to the improvement of the law*, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Canon 4C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Canon 4C(3).

(3) Subject to the following limitations and the other requirements of this Code,

(a) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law*, the legal system or the administration of justice provided that such position does not constitute a public office within the meaning of the California Constitution, Article VI, Section 17.

(b) A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal or civic organization not conducted for profit.

Commentary

Canon 4C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law*, the legal system or the administration of justice; see Canon 4C(2).

See Commentary to Canon 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Canon 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Canon 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Canon 4C. For example, a judge is prohibited by Canon 4G from serving as a legal advisor to a civic or charitable organization.

Service on the board of a homeowners' association or a neighborhood protective group is proper if it is related to the protection of the judge's own economic interests. See Canons 4D(2) and 4D(3). See Canon 2B regarding the obligation to avoid improper use of the prestige of a judge's office.

(c) A judge should not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary

The changing nature of some organizations and of their relationship to the law * makes it necessary for the judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in some jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(d) A 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 investment of the organizations' funds, but should not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may privately solicit funds for such an organization from other judges (excluding court commissioners, referees, and temporary judges);

(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) should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Canon 4C(3)(d)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) should not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary

A 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 other judges (excluding court commissioners, referees and temporary judges), for funds or memberships; 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 court 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)(d), 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, court officials 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.

A judge must not be a principal speaker, or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.

D. Financial Activities.

(1) A judge should 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 frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary

The Time for Compliance provision of this Code (Canon 6E) postpones the time for compliance with certain provisions of this Canon in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Canon 2B; see also Canon 3B(11).

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 court. 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.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Canon 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary to Canon 4B regarding use of the phrase "subject to the requirements of this Code."

As to the use of a judge's title to identify a judge's role in the presentation and/or creation of legal education programs and materials, see Commentary to Canon 4B.

(2) A judge may, subject to the requirements of this Code, hold and/or manage investments of the judge and members of the judge's family *, including real estate, and engage in other remunerative activities, but should not participate in, nor permit the judge's name to be used in connection with, any business venture or commercial advertising program, with or without compensation, in such a way as would justify a reasonable inference that the power or prestige of the office is being utilized to promote a business or commercial product. A judge should not serve as an officer, director, manager or employee of a business affected with a public interest, including, without limitation, a financial institution, insurance company, or public utility.

Commentary

Although participation by a judge in business activities might otherwise be permitted by Canon 4D(2), 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 court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in any business activity if the judge's participation would involve misuse of the prestige of judicial office. See Canon 2B.

(3) A judge should manage personal investments and other financial interests to minimize the number of cases in which there can be disqualification. As soon as possible to do so without serious financial detriment, the judge should divest himself or herself of investments and other financial interests that might require frequent disqualification.

(4) A judge should not accept, and should urge members 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

Canon 4D(4) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5.

*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 incidental 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;

Commentary

Acceptance of an invitation to a law-related function is governed by Canon 4D(4)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Canons 4D(4)(c) and 4D(5).

(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 for a special occasion from a relative or friend, 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. See, however, Canon 4D(4)(e).*

(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 under Canon 3E;

(f) a loan in the regular course of business on the same terms generally available to persons who are not judges;

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

(5) Except as otherwise permitted in Canon 4D(4), a judge should not accept, and should urge members of the judge's family residing in the judge's household * not to accept, a gift, bequest, favor or loan if the donor or lender is a party or other person who has come or is likely to come, or a person whose interests have come or are likely to come before the judge.

Commentary

Canon 4D(5) 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.

Although Canon 4D(4)(c) does not preclude ordinary social hospitality between members of the bench and bar, a judge should carefully weigh acceptance of such hospitality to avoid any appearance of bias. See Canon 2B.

E. Fiduciary Activities.

(1) A judge should 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) A judge should 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 court on which the judge serves or one under its appellate jurisdiction.

(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 Time for Compliance provision of this Code (Canon 6E) postpones the time for compliance with certain provisions of this Canon in some cases.

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(3).*

F. Service as Arbitrator or Mediator. A judge should not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law *.

Commentary

Canon 4F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

G. Practice of Law. A judge should not practice law.

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 *. See Canon 2B.*

H. Compensation and Reimbursement. A 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 should 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 should be limited to the actual cost of travel, food, lodging and other costs 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.

Commentary

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to exploit the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

As to the use of a judge's title to identify a judge's role in the presentation and/or creation of legal education programs and materials, see Commentary to Canon 4B.

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

CANON 5. A JUDGE OR JUDICIAL CANDIDATE SHOULD REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They should avoid political activity which may give rise to a suspicion of political bias or impropriety.

A. Judges and candidates * for judicial office should not:

(1) act as leaders or hold any office in a political organization *;

(2) make speeches for a political organization * or candidate * for non-judicial office or publicly endorse or publicly oppose a candidate for non-judicial office;

(3) personally solicit funds for or pay an assessment to a political organization * or non-judicial candidate *; make contributions to a political party or organization or to a non-judicial candidate in excess of five hundred dollars in any calendar year per political party or organization or candidate, or in excess of an aggregate of one thousand dollars in any calendar year for all political parties or organizations or non-judicial candidates.

Commentary

The term "political activity" should not be construed so narrowly as to prevent private comment.

This provision does not prohibit a judge from signing a petition to qualify a measure for the ballot without the use of the judge's official title.

In judicial elections, judges are neither required to shield themselves from campaign contributions nor are they prohibited from soliciting contributions from anyone including attorneys. Nevertheless, there are necessary limits on judges facing election if the appearance of impropriety is to be avoided. It is not possible for judges to do the same sort of fund raising as an ordinary politician and at the same time maintain the dignity and respect necessary for an independent judiciary. Although it is improper for a judge to receive a gift from an attorney subject to exceptions noted in Canon 4D(4), a judge's campaign may receive attorney contributions.

Although attendance at political gatherings is not prohibited, any such attendance should be restricted so that it would not constitute a public endorsement of a cause or candidate * otherwise prohibited by this Canon.

Subject to the monetary limitation herein to political contributions, a judge may purchase tickets for political dinners or other similar dinner functions. Any admission price to such a political dinner or function in excess of the actual cost of the meal should be considered a political contribution. The prohibition in Canon 5A(3) does not preclude judges from contributing to a campaign fund for distribution among judges who are candidates for reelection or retention, nor does it apply to contributions to any judge or candidate * for judicial office.

Under this Canon, a judge may publicly endorse another judicial candidate *.

Although family members * of the judge are not subject to the provisions of this Code, a judge should not avoid compliance with this Code by making contributions through a spouse or other family member.

B. Judicial independence and impartiality should dictate the conduct of judicial candidates.* A candidate for election or appointment to judicial office should not make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the courts. This provision does not apply to statements made in the course of judicial proceedings.

C. Candidates * for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

D. Except as otherwise permitted in this Code, judges should not engage in any political activity, other than on behalf of measures to improve the law *, the legal system or the administration of justice.

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

CANON 6. COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

A. Judges. Anyone who is an officer of the state judicial system and who performs judicial functions,

including, but not limited to, an officer such as a magistrate, court commissioner, judge of the State Bar Court, part-time judge, special master or referee, is a judge within the meaning of this Code. All judges should comply with this Code except as provided below.

Commentary

For the purposes of this Canon, as long as a retired judge is available for assignment the judge is considered to "perform judicial functions." Because retired judges who are privately retained may perform judicial functions, their conduct while performing those functions should be guided by this Code.

B. Retired Judge Available for Assignment. A retired judge available for assignment to judicial service, and during such service, should comply with all provisions of this Code, except for the following:

- 4C(2) (appointment to governmental positions)
- 4D(2) (participation in business entities and managing investments)
- 4E (fiduciary * activities)
- 4F (service as arbitrator)

Commentary

In California, Article VI section 6 of the California Constitution provides that a "retired judge who consents may be assigned to any court" by the Chief Justice. Retired judges who are available for assignment pursuant to the above provision are bound by the above section B of Canon 6, including the requirement of section 4G barring the practice of law. Other provisions of California law further define the limitations on who is eligible for assignment.

C. A Pro Tempore Judge (Temporary Judge). A pro tempore judge * while sitting as such, should comply with all provisions of this Code, except for the following:

- 4C(2) (appointment to governmental positions)
- 4C(3)(a) (leadership in organizations devoted to law *)
- 4C(3)(b) (leadership in civic/charitable organizations)
- 4D(1)(b) (transactions with persons likely to come before the court)
- 4D(2) (participation in business entities and managing investments)
- 4D(3) (managing financial interests to minimize disqualifications)
- 4D(4) (acceptance of gifts, bequests, favors and loans)
- 4E (fiduciary * activities)
- 4F (service as arbitrator)
- 4G (practice of law)
- 4H (compensation for extrajudicial activities)
- 5A (political activity)

A person who has been a pro tempore judge * should not act as a lawyer in a proceeding in which

the judge has served as a judge or in any other proceeding related thereto except as otherwise permitted by Rule 3-310 of the Rules of Professional Conduct.

D. Judicial Candidate. A candidate * for judicial office should comply with the provisions of Canon 5.

E. Time for Compliance. A person to whom this Code becomes applicable should comply immediately with all provisions of this Code except Canons 4D(2) and 4E and should comply with these Canons as soon as reasonably possible and should do so in any event within the period of one year.

Commentary

*If serving as a fiduciary * when selected as a judge, a new judge may, notwithstanding the prohibitions in Canon 4E, continue to serve as fiduciary but only for that period of time necessary to avoid adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Canon 4D(2), continue in that activity for a reasonable period but in no event longer than one year.*

Adopted, Oct. 5, 1992.

* [Pub. Note: This term is explained in the section titled "Terminology", supra.]

A MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

AMERICAN BAR ASSOCIATION

PREAMBLE

The Model Code of Judicial Conduct for State Administrative Law Judges is intended to establish basic ethical standards for administrative law judges or any other hearing officials, whatever their title, in any state. The Code is intended to govern the conduct of these administrative law judges and to provide guidance to assist state administrative law 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; the February 1989 Model Code of Judicial Conduct Federal Administrative Law Judges; The Model Code of Judicial Conduct for State Administrative Law Judges adopted by the National Association of Administrative Law Judges; and, the Model of Code of Judicial Conduct for State Central Panel 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, commissioners, referees, trial examiners or any other person to whom the authority to conduct an administrative adjudication has been delegated by the agency or by statute. Such

person exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact, conclusions of law in accordance with the applicable statutes or agency rules. These reports or decisions are not subject to amendment, modification, supplementation or reversal and are binding on all parties to the action, including the agency, unless amended, modified, supplemented or reversed by the agency as authorized by law. An Administrative Law Judge is not subject to any disciplinary or retaliatory action by the agency in response to any such exercise of independent judgment.

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 I

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. 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 judgements 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 shall 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

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 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 shall avoid all impropriety and appearance of impropriety. An administrative law judge shall expect to be the subject of public scrutiny. An administrative law judge shall 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. A state 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 shall to the maximum extent possible, function independently. 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 shall not be used for conducting an administrative law judge's personal business.

A state administrative law judge shall avoid lending the prestige of the office for the advancement of the private interests of others. For example, a judge shall 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.

A state administrative law judge shall 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. 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 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 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 a state administrative law judge at the time this Code becomes effective [in the jurisdiction in which the person is a judge] 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.

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

CANON 3

A STATE 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) A state administrative law judge shall hear and decide matters assigned to the judge except those in which disqualification is required.
- (2) A state 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) A state administrative law judge shall maintain order and decorum in proceedings before the judge.
- (4) A state 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 businesslike while being patient and deliberate.

(5) A state 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 shall refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and shall 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 parties or lawyers in the proceeding, the media, and others an appearance of bias. A judge shall be alert to avoid behavior that may be perceived as prejudice.

(6) A state 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. *Ex parte* communications are prohibited, except where expressly authorized by law.

Commentary: The proscription against communications concerning a proceeding include 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) A state administrative law judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary: In disposing of matters promptly, efficiently, and fairly, a judge shall 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) A state 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 proceeding 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) A state 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) A state 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) 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 or initiate appropriate disciplinary measures against a judge or a lawyer for unprofessional conduct of which the judge may become aware.

(4) A state 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) 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:

Commentary: By a 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 a immediate judicial action. In the latter case, the judge shall 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 more than a *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 more than a *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 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 more than a *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:

A state administrative law judge disqualified by 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 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 2D is derived from the ABA Model Code. 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

A STATE ADMINISTRATIVE LAW JUDGE SHALL REGULATE 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 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:

A state 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) A state 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) A state 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 shall 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) 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 non-legal 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:

(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 adversarial proceedings before the 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 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) A state 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 shall 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 agency in 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 shall 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) 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 A.B.A. Code against a judge's services as an officer, director, manager, advisor or an 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 is

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 an 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.

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 shall 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 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.

- (c) 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;
- (d) 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;
- (e) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
- (f) 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) A state 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) A state 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 agency in 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.

A state 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 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 him. 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. Compensation and reimbursement.

A state 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 a state 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

A STATE 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 to the office. A state administrative law judge shall not solicit funds, in the office where the judge is employed, for any political candidates.

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, other than a judicial office.

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code become applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

ASSEMBLY BILL

No. 1069

Introduced by Assembly Member Hauser

February 23, 1995

An act to amend Sections 11517, 11519, and 11523 of, and to repeal Section 11521 of, the Government Code, relating to administrative hearings.

LEGISLATIVE COUNSEL'S DIGEST

AB 1069, as introduced, Hauser. Administrative hearings.

The Administrative Procedure Act contains provisions relating to the preparation of decisions by administrative law judges in contested cases, the adoption of these decisions by agencies, and procedures relating to reconsideration of these decisions. The act requires an administrative law judge to submit to an agency a proposed decision for review and possible adoption by the agency in accordance with specified procedures.

This bill would require that a decision by an administrative law judge be deemed to be adopted by an agency unless the agency files a petition for judicial review within a specified period of time, and would eliminate procedures for reconsideration of a decision by an administrative law judge or an agency.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11517 of the Government Code
2 is amended to read:

3 11517. (a) If a contested case is heard before an
4 agency itself, the administrative law judge who presided
5 at the hearing shall be present during the consideration
6 of the case and, if requested, shall assist and advise the
7 agency. Where a contested case is heard before an agency
8 itself, no member thereof who did not hear the evidence
9 shall vote on the decision.

10 (b) If a contested case is heard by an administrative
11 law judge alone, he or she shall prepare within 30 days
12 after the case is submitted a ~~proposed~~ decision in such a
13 form that it may be adopted as the decision in the case.
14 ~~The agency itself may adopt the proposed decision in its~~
15 ~~entirety, or may reduce the proposed penalty and adopt~~
16 ~~the balance of the proposed decision.~~

17 ~~Thirty days after~~ Upon receipt of the ~~proposed~~
18 decision, a copy of the ~~proposed~~ decision shall be filed by
19 the agency as a public record and a copy shall be served
20 by the agency on each party and his or her attorney.

21 ~~(c) If the proposed decision is not adopted as provided~~
22 ~~in subdivision (b), the agency itself may decide the case~~
23 ~~upon the record, including the transcript, with or without~~
24 ~~taking additional evidence, or may refer the case to the~~
25 ~~same administrative law judge to take additional~~
26 ~~evidence. By stipulation of the parties, the agency may~~
27 ~~decide the case upon the record without including the~~
28 ~~transcript. If the case is assigned to an administrative law~~
29 ~~judge he or she shall prepare a proposed decision as~~
30 ~~provided in subdivision (b) upon the additional evidence~~
31 ~~and the transcript and other papers which are part of the~~
32 ~~record of the prior hearing. A copy of the proposed~~
33 ~~decision shall be furnished to each party and his or her~~
34 ~~attorney as prescribed in subdivision (b). The agency~~
35 ~~itself shall decide no case provided for in this subdivision~~
36 ~~without affording the parties the opportunity to present~~
37 ~~either oral or written argument before the agency itself.~~
38 ~~If additional oral evidence is introduced before the~~

1 agency itself; no agency member may vote unless the
2 member heard the additional oral evidence.

3 ~~(d)~~

4 (c) The proposed decision shall be deemed adopted by
5 the agency 100 days after delivery to the agency by the
6 Office of Administrative Hearings, unless within that
7 time the agency commences proceedings to decide the
8 case upon the record, including the transcript, or without
9 the transcript where the parties have so stipulated; or the
10 agency refers the case to the administrative law judge to
11 take additional evidence for judicial review pursuant to
12 Section 11523. In a case where the agency itself hears the
13 case, the agency shall issue its decision within 100 days of
14 submission of the case. In a case where the agency has
15 ordered a transcript of the proceedings, the 100-day
16 period shall begin upon delivery of the transcript. If the
17 agency finds that a further delay is required by special
18 circumstances, it shall issue an order delaying the decision
19 for no more than 30 days and specifying the reasons
20 therefor. The order shall be subject to judicial review
21 pursuant to Section 11523.

22 (e) The decision of the agency shall be filed
23 immediately by the agency as a public record and a copy
24 shall be served by the agency on each party and his or her
25 attorney.

26 SEC. 2. Section 11519 of the Government Code is
27 amended to read:

28 11519. (a) The decision shall become effective 30
29 days after it is delivered or mailed to respondent unless:
30 a reconsideration is ordered within that time; or the
31 agency itself orders that the decision shall become
32 effective sooner, or a stay of execution is granted.

33 (b) A stay of execution may be included in the decision
34 or if not included therein may be granted by the agency
35 at any time before the decision becomes effective. The
36 stay of execution provided herein may be accompanied
37 by an express condition that respondent comply with
38 specified terms of probation; provided, however, that if
39 the terms of probation shall be are just and reasonable in
40 the light of the findings and decision.

1 (c) If respondent was required to register with any
2 public officer, a notification of any suspension or
3 revocation shall be sent to ~~such~~ *the* officer after the
4 decision has become effective.

5 (d) As used in subdivision (b), specified terms of
6 probation may include an order of restitution which
7 requires the party or parties to a contract against whom
8 the decision is rendered to compensate the other party or
9 parties to a contract damaged as a result of a breach of
10 contract by the party against whom the decision is
11 rendered. In ~~such~~ *this* case, the decision shall include
12 findings that a breach of contract has occurred and shall
13 specify the amount of actual damages sustained as a result
14 of ~~such~~ *the* breach. Where restitution is ordered and paid
15 pursuant to ~~the provisions~~ of this subdivision, ~~such~~ *the*
16 amount paid shall be credited to any subsequent
17 judgment in a civil action based on the same breach of
18 contract.

19 SEC. 3. Section 11521 of the Government Code is
20 repealed.

21 ~~11521.~~ (a) The agency itself may order a
22 reconsideration of all or part of the case on its own motion
23 or on petition of any party. The power to order a
24 reconsideration shall expire 30 days after the delivery or
25 mailing of a decision to respondent, or on the date set by
26 the agency itself as the effective date of the decision if
27 that date occurs prior to the expiration of the 30-day
28 period or at the termination of a stay of not to exceed 30
29 days which the agency may grant for the purpose of filing
30 an application for reconsideration. If additional time is
31 needed to evaluate a petition for reconsideration filed
32 prior to the expiration of any of the applicable periods, an
33 agency may grant a stay of that expiration for no more
34 than 10 days, solely for the purpose of considering the
35 petition. If no action is taken on a petition within the time
36 allowed for ordering reconsideration, the petition shall be
37 deemed denied.

38 (b) The case may be reconsidered by the agency itself
39 on all the pertinent parts of the record and such
40 additional evidence and argument as may be permitted,

1 or may be assigned to an administrative law judge. A
2 reconsideration assigned to an administrative law judge
3 shall be subject to the procedure provided in Section
4 11517. If oral evidence is introduced before the agency
5 itself, no agency member may vote unless he or she heard
6 the evidence.

7 SEC. 4. Section 11523 of the Government Code is
8 amended to read:

9 11523. Judicial review may be had by filing a petition
10 for a writ of mandate in accordance with the provisions
11 of the Code of Civil Procedure, subject, however, to the
12 statutes relating to the particular agency. Except as
13 otherwise provided in this section, the petition shall be
14 filed within 30 days after the last day on which
15 reconsideration can be ordered. ~~The right to petition shall~~
16 ~~not be affected by the failure to seek reconsideration~~
17 ~~before the agency the decision is adopted by the agency,~~
18 ~~or within 100 days after the decision is delivered to the~~
19 ~~agency by the Office of Administrative Hearings or~~
20 ~~served by the agency on each party and his or her~~
21 ~~attorney, in accordance with Section 11513.~~ The complete
22 record of the proceedings, or the parts thereof as are
23 designated by the petitioner, shall be prepared by the
24 Office of Administrative Hearings or the agency and shall
25 be delivered to petitioner, within 30 days, which time
26 shall be extended for good cause shown, after a request
27 therefor by him or her, upon the payment of the fee
28 specified in Section 69950 as now or hereinafter amended
29 for the transcript, the cost of preparation of other portions
30 of the record and for certification thereof. Thereafter, the
31 remaining balance of any costs or charges for the
32 preparation of the record shall be assessed against the
33 petitioner whenever the agency prevails on judicial
34 review following trial of the cause. These costs or charges
35 constitute a debt of the petitioner which is collectible by
36 the agency in the same manner as in the case of an
37 obligation under a contract, and no license shall be
38 renewed or reinstated where the petitioner has failed to
39 pay all of these costs or charges. The complete record
40 includes the pleadings, all notices and orders issued by the

1 agency, any proposed decision by an administrative law
2 judge, the final decision, a transcript of all proceedings,
3 the exhibits admitted or rejected, the written evidence
4 and any other papers in the case. Where petitioner,
5 within 10 days after the last day on which reconsideration
6 can be ordered, requests the agency to prepare all or any
7 part of the record the time within which a petition may
8 be filed shall be extended until 30 days after its delivery
9 to him or her. The agency may file with the court the
10 original of any document in the record in lieu of a copy
11 thereof. In the event that the petitioner prevails in
12 overturning the administrative decision following
13 judicial review, the agency shall reimburse the petitioner
14 for all costs of transcript preparation, compilation of the
15 record, and certification.