

Study N-111

May 23, 1996

Memorandum 96-36**Ethical Standards for Administrative Law Judges: Comments on Tentative Recommendation**

The Commission in February 1996 circulated for comment its tentative recommendation to adopt ethical standards for administrative law judges based on the new California Code of Judicial Ethics. This memorandum analyzes the comments we have received on the tentative recommendation. Our objective is to make any revisions necessary to approve the proposal for submission to the Legislature as a Commission recommendation.

We have received comments from the following:

Commenter	Exhibit Pages
Douglas Gallop (ALRB)	1-2
Carole W. Harper (DSS)	3-4
State Board of Equalization	5-6
ACSA	7-8
State Bar Committee on Administration of Justice	9-10
Department of Health Services	11-13

General Observations

Most of the comments focus on details of the proposed Code of Ethics, particularly restrictions relating to political and other extrajudicial activities. The detailed comments are analyzed below.

Two commentators expressed general approval of the proposal. Carole W. Harper, an Administrative Law Judge with the Department of Social Services, believes that "in general, the proposed standards seem appropriate and positive." Exhibit p. 3. The State Bar Committee on Administration of Justice "applauds the efforts" of the Commission and agrees that "the proposed recommendation will help maintain the competence and integrity of California's system of administrative adjudication." Exhibit pp. 9-10.

On the other hand, Douglas Gallop, an Administrative Law Judge with the Agricultural Labor Relations Board, wonders "if, given the existing safeguards in

place against improper conduct, this proposal merits the expenditure of public funds required for enforcement.” Exhibit p. 2.

Application to Administrative Law Judges

This proposal is intended to apply only to professional administrative law judges, and not to other persons who may preside in an adjudicative proceeding, such as a lay hearing officer, part-time attorney, or the agency head. Proposed Section 11475.10(c) states, “This article does not apply to a presiding officer other than an administrative law judge.”

The State Board of Equalization points out that the term “administrative law judge” is not defined, but should be for proper application of the statute. Exhibit pp. 5-6. **The staff agrees and would add a provision along the following lines:**

As used in this article, “administrative law judge” means an incumbent of that classification as defined by the California State Personnel Board.

In this connection, the Department of Health Services (Exhibit pp. 11-13) would make clear that the Code of Ethics applies not only to the administrative law judge who presides at the hearing but also to “any supervisory or management level administrative law judge or chief administrative law judge whose function relates directly or indirectly to the adjudicative process.” **The staff would adopt this proposal.**

Administrative Responsibilities

Code of Judicial Ethics, Canon 3C(4), provides that:

A judge shall not make unnecessary court appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees above the reasonable value of services rendered.

The Department of Health Services points out that this provision is inappropriate for administrative law judges, who are governed by the civil service system. Exhibit p. 12.

The staff agrees with this assessment, although it is a question whether the provision needs to be expressly excepted from application to administrative law judges, since the provision is irrelevant anyway. **The staff would simply add language to the Comment to proposed Section 11475.30 (provisions of Code**

excepted from application) to the effect that, “Some provisions of the Code of Judicial Ethics, although not excepted by this section, may be minimally relevant to an administrative law judge. See, e.g., Canon 3C(4) (administrative responsibilities).”

Governmental, Civic, or Charitable Activities

Code of Judicial Ethics, Canon 4C, limits the right of a judge to engage in governmental, civic, and charitable activities:

(1) A judge shall not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, the administration of justice, or in matters involving the judge’s private economic or personal interests.

(2) A 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, serve in the military reserve or represent a national, state, or local government on ceremonial occasions or in connection with historical, educational, or cultural activities.

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

(a) a judge may serve as an officer, director, trustee, or nonlegal 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 nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for profit.

....

The tentative recommendation makes clear that this Canon does not preclude an administrative law judge from holding public office within the meaning of the constitutional prohibition on judges holding public office. The commentators have pointed out, however, other activities of administrative law judges the Canon should not preclude, including:

Membership on municipal or other local boards and commissions (Gallop, Exhibit p. 1; ACSA, Exhibit p. 7)

Exercise of first amendment and other constitutional rights
(Gallop, Exhibit p. 2; ACSA, Exhibit p. 8)
Union activities (ACSA, Exhibit p. 7)

The staff believes that they make a good argument when they point out that administrative law judges, unlike court judges, have a narrow range of issues that may come before them, and that the broad limitations on governmental, civic, and charitable activities of judges should not apply to administrative law judges. The general canons of ethical conduct and avoidance of conflict of interest are sufficient limitations on activities of administrative law judges without the necessity of these types of detailed prohibition. See, e.g., Canon 4A (extrajudicial activities in general):

A judge shall conduct all of the judge's extrajudicial activities so that they do not:

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

The staff would revise proposed Section 11475.30 to read:

The following provisions of the Code of Judicial Ethics do not apply under this article:

...

(c) ~~Canon 4C, to the extent it prohibits service in a position that constitutes a public office within the meaning of Article VI, Section 17 of the Constitution.~~

...

Comment. ...

~~Subdivision (c) excepts the portion of Canon 4C that prohibits service by a judge in a position that constitutes a public office within the meaning of California Constitution, Article VI, § 17. The presiding officer in an administrative adjudication proceeding is an executive branch, not a judicial branch, employee. , relating to governmental, civic, or charitable activities. An administrative law judge is not precluded from engaging in activities of this type, except to the extent the activities may conflict with general limitations on the administrative law judge's conduct. See, e.g., Canon 4A (extrajudicial activities in general).~~

...

This revision would also eliminate the concern expressed by the Department of Health Services that Canon 4C(1) could be construed improperly to restrict

administrative law judge extrajudicial consultation with agency personnel. See Exhibit pp. 12-13.

Fiduciary Activities

Code of Judicial Ethics, Canon 4E(1), limits the ability of a judge to serve in a fiduciary capacity outside the judge's family:

A 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.

The Department of Health Services points out that, while a judge may be called upon to make probate decisions, an administrative law judge does not serve this function. "Allowing an Administrative Law Judge to serve as an executor or administrator for the estate of a friend, where this is done without compensation beyond expenses, would not appear to present even the appearance of impropriety." Exhibit p. 13 **The staff agrees, and would except Canon 4E(1) for administrative law judges.**

The following provisions of the Code of Judicial Ethics do not apply under this article:

...

(d) Canons 4F 4E(1), 4F, and 4G.

...

Comment. ...

Subdivision (d) excepts Canons 4F 4E(1), 4F, and 4G, relating to fiduciary activities, private employment in alternative dispute resolution or , and the practice of law. These matters are the subject of the employing agency's incompatible activity statement pursuant to Section 19990.

...

Political Activities

Code of Judicial Ethics, Canon 5, restricts political activities of judges. The tentative recommendation excepts this canon for administrative law judges because, unlike judicial office, the office of administrative law judge is an appointive rather than an elective position. Douglas Gallop (Exhibit p. 2) and Carole W. Harper (Exhibit pp. 3-4) agree that Canon 5 should not be applied to

administrative law judges, noting that the state *Hatch Act* already acts as a restriction on political activities of state employees.

The State Bar Committee on Administration of Justice, on the other hand, does not agree that Canon 5 is irrelevant to administrative law judges, except for the portions of it relating to candidates for judicial office. “Indeed, the Committee concluded that the principles set forth in the preamble to Canon 5 — that judges should avoid engaging in political activity which may create the appearance of political bias or impropriety to preserve judicial independence and impartiality — are essential to preserving the integrity of the system of administrative adjudication as well.”

The staff believes the public policy of the state concerning political activities of state employees is clear and is expressed in the state’s *Hatch Act*, the provisions of which are intended to supersede all provisions on the subject in the general law of the state. Gov’t Code § 3201. No restrictions may be imposed on political activities of state employees except as provided in the Act, which prohibits a state employee from using the employee’s position to influence political office. Gov’t Code §§ 3203, 3204. “Except as provided in Section 19990 [agency incompatible activity statements], the limitations set forth in this chapter shall be the only restrictions on the political activities of state employees.” Gov’t Code § 3207.

Given this rather clear statement of public policy concerning political activity, the staff is not intrigued by the prospect of eroding this policy in the case of administrative law judges. **The staff would not change the tentative recommendation on this point, except to supplement it by making specific reference to the state *Hatch Act* and noting that agency incompatible activity statements may address the matter.** The general rules on extrajudicial activities (Canon 4A) should be sufficient to ensure that an administrative law judge avoids political activity that may create the appearance of bias or impropriety.

Enforcement

Douglas Gallop believes it is unclear what the sanctions are for violating the canons, who would enforce them, and what procedure would be used. “Please advise the public of your intentions in this regard.” Exhibit p. 2.

Our intention is that violation of the canons is grounds for disciplinary action against the employee. This is elaborated in the Comment to proposed Section 11475.40 (enforcement):

Under Section 19572, a violation of an applicable provision of the Code of Judicial Ethics is grounds for disciplinary action by the employing agency against a presiding officer in an adjudicative proceeding. Appropriate discipline is the responsibility of the agency that employs the presiding officer. Thus if an administrative law judge employed by the Office of Administrative Hearings violates the code of ethics in a hearing conducted for another agency, the Office of Administrative Hearings is the disciplining entity, and not the other agency. An agency may apply appropriate disciplinary procedures. See, e.g., 8 Cal. Code Regs. §§ 9720.1-9723 (enforcement of ethical standards of workers' compensation referees).

A violation of the code of ethics by the presiding officer is not per se grounds for disqualification, or reversal of a decision, of the presiding officer. But the violation may be indicative of the presiding officer's violation of other procedural requirements. See, e.g., Section 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

In light of Mr. Gallop's remarks, the staff believes it would be useful to include a reference in the body of the statute:

11475.40. (a) The presiding officer in an adjudicative proceeding shall comply with the applicable provisions of the Code of Judicial Ethics.

(b) A violation of an applicable provision of the Code of Judicial Ethics by the presiding officer in an adjudicative proceeding is cause for discipline by the employing agency pursuant to Section 19572.

In response to a comment of the Department of Health Services (Exhibit p. 12), **we would add a cross-reference in the Comment** to the effect that "The requirement that the presiding officer comply with the applicable provisions of the Code of Judicial Ethics is limited to a presiding officer who is an administrative law judge. See Section 11475.10(c) (application of Code of Judicial Ethics)."

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Law Revision Commission
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MAR 1 1 1996

File: _____

Agricultural Labor Relations Board
915 Capitol Mall - Third Floor
Sacramento, California 95814

March 8, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Commission Members:

Pursuant to your request for comments regarding the Tentative Recommendation to enact Ethical Standards for Administrative Law Judges, I am submitting the following opposition to portions of the proposed legislation, citations being to the California Code of Judicial Ethics:

CANON 4(C)(1) AND (2):

This is an overly broad and unnecessary limitation on free speech and association which is particularly inappropriate for administrative law judges who, for the most part, adjudicate cases involving very narrow segments of society. Clearly, if an administrative law judge publicly advocates a position or holds office related to the area of law in his field, or involving persons or entities potentially involved in litigation before the judge's agency, conflict of interest problems may arise. Such problems are resolved by other ethical rules, such as disqualification from hearing cases.

As worded, adoption of this Canon would appear to prohibit Administrative Law Judges from volunteering for municipal commissions whose functions are wholly unrelated to the judges' official duties. For example, judges would be prohibited from serving on municipal arts and leisure committees. Clearly, if such positions would likely create conflicts, judges should avoid them. For example, a judge hearing cases before the Public Utilities Commission might be an inappropriate candidate for a municipal cable television commission. Such conflicts, however, are rare, particularly given the specialized nature of quasi-judicial agency cases. In addition to the free speech and association issues, it should be kept in mind that there are frequently shortages of individuals willing to serve in a public capacity, and the proposed sections will eliminate a source of public-minded civic participants.

Canon (C)(1) is vague in that it does not explain what is meant by "appearing" at public hearings, or "consulting" with legislative bodies or public officials. It also fails to define what is meant by the exception involving the "judge's private

economic or personal interests." Limitations on free speech and association should be spelled out, and not left to speculation. This section is unnecessary and subject to abuse against administrative law judges who exercise their individual rights. Other ethical rules adequately cover the rare situation where such activity would conflict with the specialized duties of most administrative law judges.

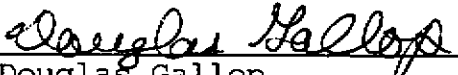
CANON 5:

Federal and State employees have long opposed the Hatch Act and its state equivalents as unjustified intrusions on their basic political rights. To the extent California law already deprives administrative law judges of basic and fundamental freedoms, as State employees, this Canon is duplicative and unnecessary.

Unless there is some apparent connection between political activity and the judge's administrative law functions, the limitations in this section are unjust. Why should elected officials be permitted to endorse each other, and judges be prohibited from endorsing candidates? Does public alliance with or support for a political party reasonably imply bias in specialized administrative proceedings? Exactly how does the donation or solicitation of political funds impede a judge's performance? In cases where the political activity involves potential litigants, other ethical rules would limit political activity, without limiting political freedom in such a broadstroke manner. These provisions should be scrapped, with the only possible exception being a prohibition on a judge representing or implying that he is speaking on behalf of the employing agency when engaging in political activity.

It is also unclear, based on the Tentative Recommendation, what the sanctions are for violating these Canons, who would enforce them, and what procedure would be utilized. Please advise the public of your intentions in this regard. It is assumed that some sort of hearing would be involved, and one wonders if, given the existing safeguards in place against improper conduct, this proposal merits the expenditure of public funds required for enforcement.

Very truly yours,


Douglas Gallop
Administrative Law Judge
Agricultural Labor
Relations Board

DEPARTMENT OF SOCIAL SERVICES
ADMINISTRATIVE ADJUDICATIONS DIVISION
LOS ANGELES REGIONAL OFFICE
MEMORANDUM

To: California Law Revision Commission

From: Carole W. Harper, ALJ

Date: May 8, 1996

Subject: Proposed Ethical Standards for ALJs

A copy of the tentative ethical standards for all State Administrative Law Judges has been circulated to us from our Sacramento office. I would like to offer the following comments:

In general the proposed standards seem appropriate and positive.

The section on political activity, however, appears to me uniquely appropriate to a judge within the state court system and inappropriate, in part, for administrative law judges.

Court judges are highly visible and very public figures, appointed and/or elected in proceedings which receive media attention. Because of the highly visible nature of their office, their participation in political activity is very sensitive. Court judges also typically deal with a wide variety of cases, ranging from murder to contracts to traffic violations, and have no way of knowing what issues or persons may appear before them at some future date.

Administrative law judges, in contrast, are chosen through a civil service process which does not receive media attention, and it is rare indeed that an ALJ is featured in a media story. Ours is a less public function, and the range of cases and persons that appear before us is sharply delimited by our department's responsibility. Some of us see only unemployment insurance denial cases; some of us see only public utilities issues; some of us, including myself, see only recipients of public assistance. It is not difficult to know what issues or persons might appear before us.

Therefore I object to the proposed restrictions in Canon 5A, C and D as inappropriate for administrative law judges and an unnecessary restriction upon our lives as citizens. I have been politically active since high school, and looking back, I can think of only one campaign in which I was involved which could have been considered an inappropriate activity had I then been in my present profession, and that was the campaign to defeat Proposition 14 in the early 1980's. I would consider reasonable an ethical restriction on public participation in a political issue which directly affected the department.

In the course of my political activity, I have only once been publicly identified as a member of my profession, and on all other occasions simply worked for the cause or person I supported as a private citizen. I want to continue to do so.

I see no conflict of interest or inappropriateness in my serving, for example, as precinct captain for my political party in an election campaign, something which I have done many times, or in speaking at a political gathering on the subject of U.S. foreign policy (something I have done many times) so long as I do not identify myself as a state ALJ or allow any public use of my title in connection with my activity.

In addition I would like to point out that we are already covered by the Hatch Act, which prohibits all state employees from using their state position to influence any political process. I believe this restriction is sufficient for state ALJs.

I would like to request that the commission rewrite proposed Canon 5A to permit ALJs to take part in normal political activities as citizens, under the restrictions of the Hatch Act.

Thank you.



STATE BOARD OF EQUALIZATION

OFFICE OF THE EXECUTIVE DIRECTOR
450 N STREET, SACRAMENTO, CALIFORNIA
(P. O. BOX 942879, SACRAMENTO, CA 94279-0073)
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JOHAN KLEHS
First District, Hayward

DEAN F. ANDAL
Second District, Stockton

ERNEST J. DRONENBURG, JR.
Third District, San Diego

BRAD SHERMAN
Fourth District, Los Angeles

KATHLEEN CONNELL
Controller, Sacramento

E. L. SORENSEN, JR.
Executive Director

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SENT VIA FAX (415) 494-1827 AND MAIL

May 10, 1996

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-3739

Dear Mr. Sterling:

The California Law Revision Commission has asked for comment with respect to its Tentative Recommendation in regard to "Ethical Standards for Administrative Law Judges," dated February 1996.

The California State Board of Equalization has reviewed the Tentative Recommendation and, in particular, proposed new Government Code section 11475.10. Consistent with analytical material contained in the Tentative Recommendation, section 11475.10(c) provides that "[T]his article does not apply to a presiding officer other than an administrative law judge." While the administrative law judge terminology is generally recognized within the California civil service system as denoting persons serving in positions classified as administrative law judge or its equivalent, the term is not defined in your proposed new Article 16, "Administrative Adjudication Code of Ethics," or in other sections of the Administrative Procedure Act.

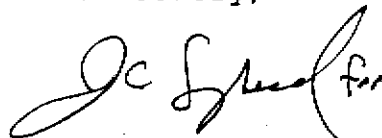
The State Board of Equalization would request that the use of the term "administrative law judge" be clarified in the statute. It is our understanding that the term would not include elected constitutional officers nor would it include clerical personnel, or attorneys classified as Staff Counsel or its equivalent.

Mr. Nathaniel Sterling
May 10, 1996
Page 2

As you know, the State Board of Equalization consists of five elected constitutional officers. A constitutional officer of the State of California has never been regarded as an administrative law judge in any context. Further, the State Board of Equalization does not use the administrative law judge classification. It would thus be appropriate to make it clear that attorneys and others who do not serve as administrative law judges are not subject to the special ethical standards of conduct appropriate to persons who actually function as administrative law judges. Employees excluded from the administrative law judge classification would remain subject to disciplinary action under the general provisions of the Government Code.

The Commission has recently recognized the basic distinction between the taxing power of the state--where judicial review takes place on a de novo basis in the Supreme Court--and the regulatory power of the state--where judicial review is upon the record of the administrative proceeding. It is in the latter context where the administrative law judge performs a surrogate judicial-like function.

Sincerely,



E. L. Sorensen, Jr.
Executive Director

ELS:sr

cc: Honorable Johan Klehs
Honorable Ernest J. Dronenburg, Jr.
Honorable Dean Andal
Honorable Brad Sherman
Honorable Kathleen Connell
Ms. Helen Shepherd - Controller's Office
Mr. Rex Halverson - Controller's Office
Ms. Joan Armenta-Roberts - MIC:78



ASSOCIATION OF CALIFORNIA STATE ATTORNEYS
AND ADMINISTRATIVE LAW JUDGES

May 9, 1996

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MAY 10 1996

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Nathaniel Sterling, Executive Secretary
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Proposed Ethical Standards for ALJs

Dear Mr. ~~Sterling~~ *Nat*:

After further reading the revised proposed Ethical Standards for Administrative Law Judges, ACSA has the following recommendations for application of these standards to state employee administrative law judges (ALJs).

Administrative law judges currently are active members of the community and of this labor organization. Some of the language contained in the proposed Canons would arguably prohibit ALJs from participating in union activities, or being a member of ACSA's Board of Directors or various committees, a local school board, or a homeowners' association. Additionally, administrative law judges elected by the membership of ACSA could participate in ACSA's Political Action Committee and thus authorize financial contributions to legislators, constitutional officers and others. Thus, the language of the proposed Canons should be modified in order not to preclude ALJs from performing these functions, or in the alternative, include the following language in Canon 4B:

"State employee administrative law judges' participating in union activities related to the union in which they are a member shall be exempted from any provision of these Canons which conflicts with that union activity. If an ALJ is a member of any organization which is a party to an administrative hearing scheduled to be presided over by that ALJ, that ALJ shall recuse him/ herself from such hearing."

Canon 4B should also include language guaranteeing each ALJ the continued freedom found in both our State and Federal Constitutions. We suggest the following language:

7

Headquarters	660 J Street, Suite 480	Sacramento, California 95814	(916) 442-2272
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San Francisco	1390 Market Street, Suite 925	San Francisco, California 94102	(415) 861-5960

Telefax: Headquarters: (916) 442-4182

Los Angeles: (818) 247-2348

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Proposed Ethical Standards for ALJs
May 9, 1996
Page 2

"The application of these Ethnical Standards and Canons shall in no way abridge the ALJs' right to exercise their freedom of speech, religion or political preference, or any other right or freedom guaranteed under the California and/or United States Constitution."

If you wish any further information on this matter, please let me know and I will attend the next Law Revision Commission meeting when this topic is discussed and address the commission on these points.

Sincerely,

A handwritten signature in cursive script, reading "John E. Sikora".

John E. Sikora
Labor Relations Consultant

DEWEY BALLANTINE

333 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA 90071
TELEPHONE 213 626-3399, FACSIMILE 213 625-0562

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LEE SMALLEY EDMON
213 617-6512

May 10, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739
Attention: Mr. Nat Sterling, Executive Secretary

Dear Ladies and Gentlemen:

The Committee on Administration of Justice of the California State Bar has reviewed the California Law Revision Commission's (the "Commission") recommendation that the Government Code be modified to provide that the California Code of Judicial Ethics govern the hearing and nonhearing conduct of state administrative law judges. The Committee agrees with the Commission that the proposed recommendation will help maintain the competence and integrity of California's system of administrative adjudication, and supports the proposed recommendation, with one proposed amendment. Specifically, the Committee believes that Canon 5, which provides that judges and judicial candidates should refrain from inappropriate political activity should also apply to administrative law judges (with the exception of Paragraphs B and C which specifically relate to appropriate conduct for candidates for judicial office). The Committee does not agree that Canon 5 is irrelevant to administrative law judges. Indeed, the Committee concluded that the principles set forth in the preamble to Canon 5 -- that judges should avoid engaging in political activity which may create the appearance of political bias or impropriety to preserve judicial independence and impartiality -- are essential to preserving the integrity of the system of administrative adjudication as well.

If you have any questions, or have any further communications to send out with respect to the proposed recommendation, you can contact me as the Committee member responsible for this matter, at the following address:

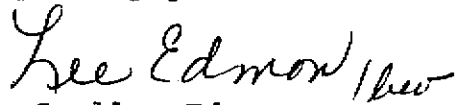
Lee Smalley Edmon
Dewey Ballantine
333 S. Hope Street, 30th Floor
Los Angeles, CA 90071
Phone: (213) 617-6512
Fax: (213) 625-0562

May 10, 1996

Page 2

The Committee on Administration of Justice applauds the efforts of the Commission with respect to this project and appreciates the opportunity to comment on the proposed recommendation.

Very truly yours,


Lee Smalley Edmon

cc: Jo Ellen Allen
Eileen Kurahashi
Ann M. Ravel
Pauline A. Weaver
Diane C. Yu
Monroe Baer
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David C. Long
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145878L.1

DEPARTMENT OF HEALTH SERVICES
OFFICE OF ADMINISTRATIVE HEARINGS AND APPEALS
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May 10, 1996

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Subject: Comments of Department of Health Services, Office of
Administrative Hearings and Appeals, on the tentative
recommendation entitled "Ethical Standards for
Administrative Law Judges".

Dear Mr. Sterling:

Attached are comments for your consideration, as described
in the caption.

Because of the imminence of the due date, they are being
faxed as well as submitted by mail.

As always, we appreciate your and the Commission's courteous
consideration of our views.

Very truly yours,

Elisabeth C. Brandt
Chief Administrative Law Judge

COMMENTS OF DEPARTMENT OF HEALTH SERVICES, OFFICE OF
ADMINISTRATIVE HEARINGS AND APPEALS, ON THE TENTATIVE
RECOMMENDATION ENTITLED "ETHICAL STANDARDS FOR
ADMINISTRATIVE LAW JUDGES".

Sections 11475.10 and 11475.40: These sections seem to contradict each other, although this is clearly not the intent. I would suggest that section 11475.40 be clarified by adding the underscored language:

"Except as otherwise provided in subdivision (c) of section 11475.10, the presiding officer in an adjudicative proceeding shall comply with the applicable provisions of the Code of Judicial Ethics."

Section 11475.20: Defining the term "judge" as the presiding officer in an adjudicative proceeding may be unduly narrow. Several agencies have supervising Administrative Law Judges (ALJs) and/or a Chief ALJ, whose functions may not actually include presiding at hearings. Such individuals, however, may, and usually do, perform a variety of "judicial" functions including making orders to the parties and writing decisions based on the record created before another ALJ. It does not seem appropriate to apply the ethical standards to the line ALJs but not to their supervisors and Chief Judges. Since it seems to be the desire of the Law Revision Commission to make the language of this statute general, so that presiding officers other than ALJs could eventually be included in its coverage by amending section 11475.10, I suggest the following language:

"(c) 'Judge' means the presiding officer in an adjudicative proceeding as well as any supervisory or management level Administrative Law Judge or Chief Administrative Law Judge whose function relates directly or indirectly to the adjudicative process."

Canon 3(c)(4): This subdivision appears inappropriate for Administrative Law Judges who are part of a civil service system. Line Administrative Law Judges normally don't have any appointing authority. To the extent a supervising or Chief Administrative Law Judge has the power to appoint staff, it should be limited by the civil service system, not by the Canons of Ethics. The provision relating to compensation of appointees is particularly inappropriate to the civil service.

Canon 4(C)(1): Read strictly, this provision would prohibit normal and appropriate interaction between an Administrative Law Judge and the management of the agency for whom he or she sits. Contrary to the situation of a court judge, where the entire hierarchy he or she deals with is within the judicial system, an Administrative Law Judge, particularly one in a management position, must interact with the "executive body" or "public official" for whom he or she conducts adjudications.

To remedy this problem, I would suggest an additional exception for this subdivision, limiting the exception to consultation with the public agency or official for whom the judge acts, to the extent such consultation does not violate any prohibition on ex parte communications.

Canon 4(E)(1): This restriction is appropriate for judges who have or may have a probate function. It seems excessively restrictive for Administrative Law Judges who never have any function in the probate area. Allowing an Administrative Law Judge to serve as an executor or administrator for the estate of a friend, where this is done without compensation beyond expenses, would not appear to present even the appearance of impropriety. It may be that ability to act as a more general representative or fiduciary should be restricted even for an Administrative Law Judge, but the provision as it reads seems to be overbroad.