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Chasing the Atticus Code - Preserving Adjudication Integrity in Local Administrative Hearings

Michael N. Widener

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Chasing the Atticus Code – Preserving Adjudication Integrity in Local Administrative Hearings

By Michael N. Widener*

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I. INTRODUCTION

The official apparatus in each American law jurisdiction for governance of attorney conduct is that state's, commonwealth's, or territory's supreme judicial courts.¹ In this Article, I argue that these apparatuses largely fail to offer ethical guidance or direction to lawyers serving in local government official capacities, but holding neither elected nor judicial positions. Citizens support the notion of external codes of professional responsibility for such persons, not necessarily because they believe that "lawyering rules" are well constructed or properly enforced, but because they doubt lawyers truly are self-governing in ways promoting fairness or basic cultural values.² The failure of the attorney regulatory process is acutely felt in the local government realm. There, attorneys adjudicate through administrative hearing processes while serving as unelected and temporary decision-makers. The public is intimately acquainted with those processes as direct participants.

There are thousands of local governments in America, with estimates ranging to upwards of 90,000 jurisdictions.³ Substantial numbers of attorneys act as hearing officers in those communities in a variety of roles.⁴ Some are independent contractors,⁵ while

* All rights reserved © 2011 by the author, counsel to Bonnett, Fairbourn, Friedman & Balint, P.C.; Zoning Adjustment Hearing Officer, City of Phoenix (2010 present) and Associate Faculty, University of Phoenix School of Business. My colleague Kevin R. Hanger, Esq. gave useful insights into an earlier version of this paper, and I thank him. This essay is dedicated to Mary Widener, my earliest integrity guide. The first step in deciphering the Atticus Code is to review the definitions in the Appendix to this paper.

¹ DANIEL R. COUILLETTE, REAL ETHICS FOR REAL LAWYERS 4 (2005).

² See *infra* notes 82 and 102.

³ There are purportedly more than 19,000 municipal governments, more than 16,000 town or township governments, more than three thousand county governments, more than 13,000 school districts and more than 35,000 special district governments; the precise figures and their categories are described at the WEBSITE FOR THE NATIONAL LEAGUE OF CITIES, <http://www.nlc.org> (last visited Oct. 12, 2011).

⁴ For example, the City of Chicago employs private attorneys to serve as hearing officers in parking violations controversies, and in election board candidate eligibility disputes. See *Van Harken v. City of Chicago*, 713 N.E.2d 754, 758-60

others volunteer their services. Irrespective of compensation, I argue that in a “non-counselor” role, Atticus is essentially ungoverned by codes of attorney professional conduct. Thus, potential for mischief abides, which is a circumstance worsened by the failure of many communities to impose standards of ethical behavior on these contractors or volunteers. I argue that in many instances the lone governing ethic affecting such lawyers’ behavior, as they fulfill their hearing officers’ roles, is their oaths of admission⁶ to practice before the bar. These oaths, sworn at the commencement of bar admission, are marginalized if not ignored altogether⁷ in discussions of appropriate lawyer professional conduct where the representation of clients is not implicated.

The recent spate of local government administrative adjudications concerning implementing medical marijuana enterprises illustrates certain dilemmas arising when lawyers hear

(Ill. App. Ct. 1999); Tammy Webber, *Hearing Officer: Emanuel Can Run for Chicago Mayor*, YAHOO!NEWS (Dec. 23, 2010), <http://news.yahoo.com/chicago-panel-ready-decide-emanuel-ballot-20101222-141704-400.html>. In the District of Columbia, private attorneys are hired as special education hearing officers. See *Request for Quotation (RFQ) DCGD-2009-R0046*, http://app.ocp.dc.gov/pdf/DCGD-2009-R-0046_M.pdf (last visited Oct. 12, 2011). In Minnesota, the use of private attorneys as hearing officers in local governments has been that jurisdiction’s custom. See Raymond Krause, *Minnesota’s OAH: 30 Years of Innovation in Administrative Review*, 63 *Bench & B. of Minn.* 2 (Feb. 2006), available at http://www2.mnbar.org/benchandbar/2006/feb06/mn_oah.htm. Naturally, not all local hearing officers are licensed attorneys, retired attorneys or persons with law degrees. “Atticus” is therefore carefully defined in the Appendix.

⁵ See *Haas v. County of San Bernadino*, 45 P.3d 280 (Cal. 2002).

⁶ Views on the genesis and history of oaths of admission, and their distortion of purpose commingled with loyalty oaths, are contained in Carol Rice Andrews, *The Lawyer’s Oath: Both Ancient and Modern*, 22 *GEO. J. LEGAL ETHICS* 3 (2009), and in Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, 30 *CARDOZO L. REV.* 1843, 1847-51 (2009). Andrews points out that while the admissions oath continues to serve regulatory and ethical functions, both functions “can be enhanced,” and an oath “would better serve the profession if it more accurately and clearly stated the essential ethical maxims by which lawyers swear to abide.” Andrews, *supra* note 6, at 57. Perhaps this lack of clarity explains certain behaviors of attorneys engaged in positions of public trust at all levels of government.

⁷ See Andrews, *supra* note 6, at 44. In the Arizona State Bar ethics opinion, *infra* note 8, the attorney’s oath of admission goes unmentioned and, as explained further, *infra* text accompanying notes 25-26, a rule of court unambiguously imposing an attorney obligation to support federal law is disregarded.

local permit applications. Recent ethics opinions from state bar associations,⁸ advising lawyers on subjects addressing questionable legality, further suggest the “out of touch” nature of the legal profession’s ethical governance role. While community governments appear to have little capacity to dictate lawyer behavior, they largely have performed dismally to the extent their authority exists. State supreme courts, with input from the administrative law bench and bar associations can, and must, determine whether they prefer to have Atticus seek his own way or afford him a map and compass to navigate the thin space separating public service from abuse of public office. If they will not choose, then communities must incorporate the lawyers who are deciders into the coverage of codes of ethical behavior currently governing local elected officials and full-time employed adjudicators.

This Article is organized as follows. Part II summarizes the status of medical marijuana regulation in states that welcome such operations. It describes local government adjudications regulating these vendors of goods and services and focuses on the zoning realm in Phoenix, Arizona as backdrop to Atticus’s ethical conundrum. Part III examines the legal and professional responsibility issues confronting Atticus in a community adjudication role, focusing on this elemental question: should Atticus convene hearings determining matters surrounding medicinal *Cannabis* enterprises – and ethically, what are his options? Part IV recapitulates the paucity of written standards applying to Atticus’s conduct as decider; here, the need of state supreme courts or local governments to fill the gap involving ethical performance expectations is illustrated. Part V serves two functions: first, anticipating Atticus’s unpredictable decider performance resulting from the lack of applicable ethical standards, and second, reminding the reader that current public attitudes toward unregulated lawyers erode confidence in the administrative state. Part VI suggests how communities and state

⁸ See, e.g., State Bar of Ariz., Ethics Op. 11-01 (2011), available at <http://www.myazbar.org/Ethics/opinionview.cfm?id=710>; Me. Prof’l Ethics Comm’n, Op. #199 (2010).

supreme courts can implement standards appropriate for Atticus's role and concurrently satisfy public expectations for the local adjudicative process.

II. CURRENT MEDICAL MARIJUANA REGULATION IN AMERICAN JURISDICTIONS

Sixteen states and the District of Columbia have approved the sale to licensed patients of ingestible versions of *Cannabis*.⁹ Another six states' legislatures have proposed legislation permitting medicinal *Cannabis* use as of March 1, 2011.¹⁰ It appears that, if the federal law enforcement community maintains its present posture, retailing to prescription holders will remain entrenched. Uncertainty persists about the federal posture on enforcement of the Controlled Substances Act of 1970,¹¹ the

⁸ For a detailed list of the affected jurisdictions together with the dates and manner of passage of legalization, see *16 Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Oct. 25, 2011). The sixteen jurisdictions with medical marijuana laws (parenthetically, with dates of authorization) are Alaska (1998); Arizona (2010); California (1996); Colorado (2000); District of Columbia (2010); Hawaii (2000); Maine (1999); Michigan (2008); Montana (2004); Nevada (2000); New Jersey (2010); New Mexico (2007); Oregon (1998); Rhode Island (2006); Vermont (2004); and Washington (1998). *Id.*

¹⁰ For a comprehensive chart of status of pending legislation in the six states as of August 4, 2011, see *6 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481> (last updated Sept. 19, 2011).

¹¹ Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (2006). *Cannabis* is a "Schedule I" substance, a category reserved for the supposedly most dangerous and addictive substances that possess no medicinal value. Marijuana specifically is excluded from the Food, Drug and Cosmetic Act by 21 U.S.C. § 321(v)(3) (2006). On April 20, 2006, the FDA declared that "no sound scientific studies" supported the medicinal use of smoked marijuana. See Gardiner Harris, *FDA Dismisses Medical Benefit from Marijuana*, N.Y. TIMES, April 21, 2006, <http://www.nytimes.com/2006/04/21/health/21marijuana.html>. In mid-2007, the Drug Enforcement Administration's Los Angeles and San Francisco offices reminded landlords that, California law notwithstanding, the federal government could seize owners' property in response to illegal marijuana co-op and dispensary operations. See Cameron Scott, *Pot Clinics Fight the Feds*, CAL. LAWYER, Mar. 2009, available at <http://www.callawyer.com/story.cfm?eid=899964&evid=1>. No asset forfeitures resulted in the immediately following months.

federal act scheduling *Cannabis* as a drug that cannot be sold, transported or possessed (whether or not for sale) without the actor having felony liability. In October 2009, the Justice Department issued a letter¹² stating the Obama Administration's preference that U.S. District Attorneys not prosecute purveyors and users of *Cannabis* acting in clear compliance with the requirements of state law. In February 2011, however, the U.S. District Attorney for the District of Northern California advised the Oakland City Attorney and the California Attorney General that it would not tolerate that city's licensing of commercial (*i.e.*, unattached to a dispensary or collective operation, and growing in bulk) cultivators.¹³ Even in the face of ambiguity about federal government enforcement policy,¹⁴ the fundamental fact that *Cannabis* possession and sale is illegal under federal law has not changed.¹⁵

¹² U.S. Deputy Attorney General David Ogden, in an October 19, 2009 letter to federal prosecutors, cautioned the use of limited federal resources in prosecuting individuals who complied with state medical marijuana laws. See Memorandum from the United States Department of Justice for Selected United States Attorneys (Oct. 19, 2009) (on file with author) (the "Ogden Memorandum"). But the memo does not ban all such prosecutions. See Tracy Russo, *Memorandum for Selected United State Attorneys on Investigations and Prosecutions on States Authorizing the Medical Use of Marijuana*, THE JUSTICE BLOG (Oct. 19, 2009), <http://blogs.usdoj.gov/blog/archives/192>. Instead, it served as a "guide to the exercise of investigative and prosecutorial discretion." *Id.* The printed text of the Ogden Memorandum is available in Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y. REV. 633, 667-68, app. (2011). The Ogden Memorandum notes that prosecution of "commercial enterprises that unlawfully market and sell marijuana for profit" continues to be an enforcement priority. Ogden Memorandum, *supra*. The Department warned that "claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws." *Id.* Furthermore, the Ogden Memorandum notes that federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations, and compliance with state law does not create a legal defense to a violation of the Controlled Substances Act. *Id.*

¹³ See Letter from Melinda Haag, United States Attorney for the Northern District of California, to John Russo, Oakland's City Attorney (Feb. 1, 2011) (on file with author). In that letter, U.S. Attorney Haag announced her office's intention to enforce the Controlled Substances Act's prohibitions against "manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law." *Id.*

¹⁴ See Mikos, *supra* note 12, at 640-46. An apparent advocate for the "legalization" of marijuana for all purposes, Mikos opines that the Department of

A comprehensive analysis of each state (or applicable local) government's rules for establishing and monitoring medical marijuana entrepreneurs is beyond the scope of this Article. It is sufficient to point out that a number of administrative procedures on the state and local levels are implicated in the licensing of a

Justice ("DOJ") will have difficulty ensuring that federal prosecutors cooperate in the "hold your fire" guideline of non-enforcement pronounced in the Ogden Memorandum. *Id.* at 634, 640-41, 645. Mikos' view is supported by the raft of advisory memoranda issued by other government agencies immediately following the DOJ's 2009 letter. For instance, the Office of National Drug Control Policy issued a statement stressing that the DOJ guidelines should not be interpreted as the federal government's approval of the medicinal use of *Cannabis*. [Web page no longer available]. The Drug Enforcement Administration ("DEA") issued a similar statement. See DEA Statement on New Department of Justice Marijuana Guidelines, U.S. DRUG ENFORCEMENT ADMIN. (Oct. 22, 2009), www.justice.gov/dea/pubs/pressrel/pr102209.html. The federal Department of Transportation also issued a statement clarifying that the DOJ's guidelines do not impact the DOT's drug testing program. See Jim L. Sawrt, *DOT Office of Drug and Alcohol Policy and Compliance Notice*, DOT.GOV (Oct. 22, 2009), www.fmcsa.dot.gov/documents/Medical-Marijuana-Notice.pdf. For the DEA Position on Marijuana, see *The DEA Position on Marijuana*, JUSTICE.GOV (Jan. 2011), http://www.justice.gov/dea/marijuana_position.pdf. After the State of Arizona filed a declaratory judgment lawsuit against the United States for clarification of the enforceability of Arizona Proposition 203, Congressman Frank of Massachusetts and Polis of Colorado requested, in a June 20, 2011 letter, that Attorney General Eric Holder reaffirm the DOJ's apparent intentions not to prosecute in federal court as suggested by the Ogden Memorandum, leaving enforcement of Controlled Substances Act violations to the states. See Mike Lillis, *Reps. Frank, Polis urge DOJ to leave medical marijuana to states*, The Hill (June 21, 2011, 11:00 AM), <http://thehill.com/blogs/healthwatch/state-issues/167537-reps-frank-polis-urge-doj-to-leave-medical-marijuana-to-states>. Arizona's declaratory judgment action against the United States is found at *Arizona v. United States*, No. CV11-1072-PHX-SRB (D. Ariz. May 27, 2011) (Justia.com).

¹⁵ See, e.g., *U.S. v. Stacy*, 696 F. Supp. 2d 1141, 1145 (S.D. Cal. 2010) (citing *Raich v. Gonzales*, 500 F. 3d 850, 867 n. 17 (9th Cir. 2007)) (defendant's argument that federal enforcement of the Controlled Substances Act against individuals who are in compliance with California law violates the Tenth Amendment rejected by court). *Stacy* concludes that "the federal government may criminalize behavior that is not criminalized under state law." *Id.* In a later order in the *Stacy* proceedings, the court stated: "A reasonable belief that one will not be prosecuted is not the same thing as a reasonable belief that one's actions do not violate federal law." Order Denying Defendant's Motion to Present Certain Defenses and Granting United States' Motions in Limine to Preclude Defenses, *U.S. v. Stacy*, 696 F. Supp. 2d 1141 (Jul. 12, 2010) (No. 09cr3695 BTM), available at http://americansforsafeaccess.org/downloads/Stacy_Ruling.pdf.

medical marijuana dispensary or cultivation site.¹⁶ In the City of Phoenix, applicants for licensure as a dispensary or cultivation site must receive a use permit for its location. The approval of particular uses of land, under a so-called “special exception” or “use permit” contemplated by a specific zoning district, but not permitted as a matter of right, may occur following an administrative hearing by the Zoning Administrator or his designated hearing officer.¹⁷ In many urban communities, the Zoning Administrator’s burden is lightened because hearing officers often conduct initial hearings. As a first-line adjudicator, the hearing officer’s determination on a variance or use permit is subject to intermediate appeal to the board of zoning adjustment or the municipal council.¹⁸

III. ATTICUS MEETS *CANNABIS*

Arizona’s participating local jurisdictions, like those in other states, adopted ordinance amendments addressing the passage of the “medical marijuana” initiative on the State’s November 2, 2010 ballot.¹⁹ Then on December 15, 2010,²⁰ Phoenix adopted a text

¹⁶ Among these administrative procedures in Arizona is the requirement for State Department of Health Services’ approval of dispensary registration certificates, for licensure of cultivation facilities (by law dispensaries must cultivate 70% of their own product), for County Health Department approval if the dispensary operators are making food products, and for city zoning adjustments (such as use permits) and site plan approvals. ARIZ. REV. STAT. § 36-2801 *et seq.* (2007).

¹⁷ The hearing officer, in granting a special exception, must find in the circumstances that the proposed use does not implicate significant additional traffic, noise, vibration, light, odors or other noxious impacts in the surroundings and will not lead to the decline in neighboring property values. See, PHOENIX CITY CODE, ZONING ORDINANCE §307(A) (2011) (citations hereafter abbreviated “PZO”).

¹⁸ See, e.g. ARIZ. REV. STAT. ANN. §§ 9-462.06(I), 11-816(D) (2010). In most jurisdictions, the post-citizens’ board level of appeal of an adverse adjustment determination is to the inferior or trial court level of the state’s judiciary. See, e.g., ARK. CODE ANN. §14-56-425 (1987); CAL. CIV. PROC. CODE §1094.5 (2009).

¹⁹ I-04-2010, unofficially “Proposition 203” on the ballot, passed by 4,340 votes. See *Statewide Results: November 2, 2010 General Election*, STATE OF ARIZONA, <http://results.enr.clarityelections.com/AZ/22333/40707/en/summary.html> (last updated Nov. 23, 2010, 3:38:28 PM).

²⁰ See *Staff Report: Zoning Ordinance Text Amendment Application No. Z-TA-10-10*, PHOENIX.GOV (Dec. 8, 2010), <http://phoenix.gov/PLANNING/Z-TA-10-10.pdf>.

amendment to its Zoning Ordinance that requires the City's grant of a use permit for the operation of a *Cannabis* dispensary and dispensary-related cultivation. The federal Controlled Substances Act of 1970 schedules *Cannabis* as a substance the sale or possession of which is a criminal offense.²¹ This process unavoidably implicates "conflict preemption,"²² insofar as the decider granting a use permit participates in the community's sanctioning possession and sale of a substance (a Schedule I drug),

²¹See, e.g., *People v. Finney*, No. 09-4081-FH-L (Midland Cnty. Cir. Ct. June 8, 2011), available at <http://www.co.midland.mi.us/files/1305.pdf> (positive conflict exists between the Controlled Substances Act and Michigan's Medical Marihuana Act; the latter is an obstacle to fulfillment of Congress's objectives and therefore is unconstitutional). See also 21 U.S.C. §844(a) (simple possession of a Schedule I controlled substance is unlawful). U.S. Deputy Attorney General David Ogden, in an October 19, 2009 memo to federal prosecutors, cautioned the use of limited federal resources in prosecuting individuals complying with state medical marijuana laws. See Ogden Memorandum at 1. See also *supra* note 13. Local governments' prerogatives of consultation and approval for these medical marijuana operations implicate the areas of zoning, business licensure, sales tax, cultivation (agriculture) and food handling (comestible products), among others, potentially subject to local public hearings.

²² See generally Michelle Patton, *The Legalization of Marijuana: A Dead-end or the High Road to Fiscal Solvency?*, 15 BERKELEY J. CRIM. L. 163, 179-84 (2010) (discussing preemption issues in the marijuana arena). Conflict preemption dictating supersession of federal drug law over state regulation of Schedule I drugs (i.e., those with addictive properties that possess no medicinal value according to federal regulators) purportedly prescribed for medical purposes, is established under *Gonzales v. Raich*, 545 U.S. at 14 (2005). The Court's opinion asserts that precedents "firmly established" Congress' Commerce Clause power to regulate purely local activities forming part of a "class of activities" substantially affecting interstate commerce, where that class of activities is the national marijuana market. *Id.* at 8. Local use affected supply and demand in this national marijuana market justifies the "essential" regulation of intrastate use of a drug's national market. The United States Supreme Court has taken a more moderate view of "essential regulation" of Schedule II drugs. See *Gonzales v. Oregon*, 546 U.S. 243, 272-73 (2006) (the Controlled Substances Act did not grant expansive federal authority to regulate medicine by defining the scope of legitimate medical practice but merely prevented doctors from participating in illicit recreational drug dealing). The Food and Drug Administration on April 20, 2006 declared that no reliable science supported the medical efficacy of smoked marijuana. See Gardiner Harris, *FDA Contradicts Panel, Says Marijuana Has No Medical Value* (April 21, 2006), available at <http://www.deseretnews.com/article/print/635201354/FDA-contradicts-panel-says-marijuana-has-no-medicinal-value>.

the possession and sale of which are illegal under the Controlled Substances Act.²³

A local government's administrative department directors decide who adjudicates *Cannabis* dispensary and cultivator licensing applications, but many are unaware of the risks of involving Atticus in that process. The first risk is that Atticus routinely denies use permit applications, in apparent discharge of his lawyer's obligations to support federal law.²⁴ The second risk, should Atticus proceed to act as a decider granting an MME application, is that he may be subject to bar complaints from persons disapproving of attorneys who disregard controlling federal criminal statutes. But the fundamental issue for Atticus is this – must he recuse himself from hearing such an application at all? The not obvious response is affirmative, due to standards governing conduct apart from Rules of Professional Conduct.

As noted above, possession and sale of *Cannabis* today are statutory crimes. In Arizona, that fact terminates Atticus's inquiry, but not owing to local official governmental ethics rules prohibiting engagement with medicinal *Cannabis* enterprises. In Arizona, all that stands between Atticus's errant involvements in the hearing processes are the Oath of Admission to the Arizona Bar ("Oath") and Rule 41(b) of the Arizona Supreme Court Rules ("Court Rules"). The initial paragraph of the Oath requires each admittee to avow that "I will support the Constitution of the United States," while Rule 41(b) obligates members of the bar to "support the constitution and the laws of the United States and of this state."²⁵ The Oath occupies an honored place as a small-font note

²³ This act is Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, and is codified at 21 U.S.C. §801 *et seq.*

²⁴ In communities with ordinances like Phoenix's (before a January, 2011 amendment), the Zoning Administrator's required findings, in a special exception case involving a medical marijuana establishment applicant, were textually impossible to make. Previously, PZO § 307(A)(7)(b) required a finding by the hearing officer that the use permit will be "in compliance with all provisions" of the laws of Phoenix and the United States. Since 21 U.S.C. §844(a) criminalizes possession of *Cannabis*, Atticus grants a use permit in Arizona, in violation of his sworn oath to "support the Constitution of the United States" and a rule of the Supreme Court of Arizona obligating an attorney support the "laws of the United States." See ARIZ. SUP. CT. R. 41(b).

²⁵ *Id.* Arizona is not alone in requiring attorney support of the laws of the United States. See, e.g., CAL. BUS. & PROF. CODE §608(a) ("support the Constitution

following Rule 41 of the Court Rules, a provision primarily addressing exceptions to the “unauthorized practice” of law. Rule 41 lies outside the voluminous catalog of the Arizona Rules of Professional Conduct known as Rule 42. It seems likely that neither is much consulted or even recalled.²⁶ And it is ironic that such short expressions of “support” afford all the effective attorney-conduct standards in these circumstances.²⁷ Fortuitously, “support” is far less ambiguous than “acknowledge” or “observe.” “Support” connotes affirmative action beyond a mere nod to regulations in effect. Even if the interpretation that support means “uphold” is unsatisfactory to the rational mind, such a mind must acknowledge the proposition that support of, and undermining the force of, a statute are logically incompatible.²⁸ Atticus undermines

and the laws of the United States and of this State”); IND. CODE § 33-43-1-3, 3(1) (“support the Constitution and laws of the United States and of Indiana”). Andrews, *supra* note 6 at 48, asserts that twenty one states’ oaths of admissions require a lawyer to swear to support to “the relevant laws and constitution.”

²⁶ See Andrews, *supra* note 6. *But see, e.g.*, Alan P. Bayham, Jr., *Esquire – Have You Earned Your Title?* 47 ARIZ. ATT’Y. 6 (2010) (professional responsibility rules apply to attorneys at all times; and the solemn oath attorneys take requires assuming “a special role when it comes to the law”). Bayham’s reverie recalls a time when bar disciplinary proceedings cited the attorneys’ oath of office as evidence of unacceptably substandard honesty and integrity. *See, e.g., In re Holovachka*, 198 N.E. 2d 381, 390-91 (Ind. 1964) (prosecutor’s disbarment); *State ex rel. Nebraska State Bar Assn. v. Wiebusch*, 45 N.W. 2d 583, 586-89 (Neb. 1951) (judge disbarred). There is no reference to Rule 41(b) or the Oath of Admissions in Arizona State Bar Ethics Committee Opinion (11-01) (Feb. 2011) on the propriety of Arizona attorneys advising medical marijuana enterprises, and the Opinion concludes that limited types of counsel to clients (advising clients about “complying with” the state’s medical marijuana act [“Act”] and formally representing clients before a governmental agency regarding licensing and certification issues) are acceptable if the client “wishes to proceed with a course of action specifically authorized by the Act.” Ethics Op., *supra* note 8.

²⁷ The irony stems from the fact that the oath is a condition on the right to practice a lawyer’s profession, yet in many jurisdictions the oath itself does not trigger discipline of the attorney, since the modern rules of professional conduct address in far greater detail commonly committed offenses. Andrews, *supra* note 6, at 50, 54-55. *But see* ARIZ. SUP. CT. R. 31(a)(2)(E) (unprofessional conduct means “substantial or repeated violations of the Oath of Admission to the Bar”). When the lawyer knows that a particular vow does not subject him or her to discipline, the value of the whole oath is diminished – indeed, when any portion of the oath is disregarded, the entire oath is endangered. *See* Andrews, *supra* note 6, at 59.

²⁸ Subadjacent support and undermining are diametrically opposed property concepts when subsidence of adjacent land from excavation is concerned. *See* STEPHEN MARTIN LEAKE, A DIGEST OF THE LAW OF USES AND PROFITS OF LAND 243

federal statutory efficacy in approving local medical marijuana applications or permits in blatant disregard of law. He must stand down.

IV. ATTICUS'S GOVERNANCE IN *AD HOC* HEARING OFFICER ROLES

A. State Supreme Court Regulations

Rule 42 of the Court Rules catalogs the Arizona Rules of Professional Conduct (“RPC”) for Arizona attorneys, which govern the behavior of practicing lawyers in pursuit of their livelihoods.²⁹ The RPC is based upon the ABA Model Code of Professional Responsibility.³⁰ Judges employed in the judicial branch of state government in Arizona are governed in the performance of their duties and certain extra-judicial conduct by the Arizona Code of Judicial Conduct.³¹ Like similar codes in every American jurisdiction, the RPC is based on the ABA Model Code of Judicial Conduct (“CJC”).³² The State of Arizona has not extended the ALJ Code to govern admitted attorneys serving as administrative law judges, hearing officers, or referees working in the state.³³ Nor has Arizona’s legislature statutorily applied any analogous code of professional standards³⁴ pertaining to the performance of such administrative law functions. The Arizona Supreme Court has declined to extend its version of the CJC to

(1888) (owners of adjacent tenements are presumptively entitled to such support from the other as will preserve the tenements in their natural state).

²⁹ See ARIZ. SUP. CT. R. 42.

³⁰ MODEL CODE OF PROF’L. RESPONSIBILITY (1980).

³¹ See ARIZ. SUP. CT. R. 81.

³² MODEL CODE OF JUDICIAL CONDUCT (1990).

³³ Indeed, as of this writing, only about ten American states have adopted the ALJ Code or something based on it. See *infra* note 94. The New York State Bar adopted its Model Code of Judicial Conduct for Administrative Law Judges in April 2009, *available at* <http://www.nysba.org/Content/ContentFolders/SubstantiveReports/ModelALJCode4409>.

³⁴ See, e.g., Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7, 18-23 (2002) (identifying options for governance).

non-judicial branch adjudicators,³⁵ despite the 2007 American Bar Association amendment to that code's model, which expanded the meaning of "judge" to include members of the "administrative law judiciary."³⁶ In Arizona, local attorney adjudicators, except those bound by community-adopted public employee ethical codes incorporating the law, have no moorings.³⁷

Seeking guidance in these matters from the American Bar Association's Model Rules of Professional Responsibility³⁸ is futile. ER 1.11 of the RPC disqualifies "public officers" from participating in [adjudicating or hearing] any matter in which the lawyer engaged prior to acting in a governance capacity of any sort. But the comment to that rule addresses the lawyer's exploitation of the office for the advantage of a private client. The closest comment affording any guidance to lawyer hearing officers in Arizona on the issue of fidelity to existing law is a RPC comment to ER 3.9. The 2003 amendment to that ethical rule, in comment 2, addresses advocating in non-adjudicative proceedings, stating that the lawyer must conform to provisions of other ERs. It finds that lawyers in such environments are subject "to regulations inapplicable to advocates who are not lawyers. However,

³⁵ *Id.* at 13 (catalogs states extending the CJC to administrative law judges prior to its 2007 ABA revision).

³⁶ See MODEL CODE OF JUDICIAL CONDUCT, Application I(B), n. 1; see also MODEL CODE OF JUDICIAL CONDUCT at 4 (Reporter's Explanation of Changes to "Scope"), *available at* <http://www.ajs.org/ethics/pdfs/ABA2007modelcodeapproved.pdf> (last visited Nov. 14, 2010). Each jurisdiction is urged to consider characteristics of the judging function in deciding whether to adopt or adapt the CJC for its administrative law judiciary.

³⁷ This issue is not peculiar to Arizona local hearing officers where, as the author argues, no City of Phoenix or State of Arizona statutes, regulations, or codes govern their behavior unless they are City employees. See, e.g., Cheri Ruch, *What Ethical Code Governs a \$54 Million Pair of Pants in Idaho?* 53 THE ADVOCATE 15 (2010) (the author, an Idaho attorney and Industrial Commission Hearing Officer, indicates that Idaho has no relevant codes of conduct for administrative hearing officers, and Idaho's code of ethics for attorneys has no relevant provisions addressing the issues of the role of attorneys as hearing officers). These ethical issues are more widely dispersed than in just two jurisdictions. *Id.*

³⁸ Rule 42 of the RPC states: "The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association, adopted August 2, 1983, as amended by this court and adopted as the Arizona Rules of Professional Conduct." ARIZ. SUP. CT. R. 42.

legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.”³⁹

B. Administrative Adjudicatory Codes

In 1995, the ABA Model Code of Judicial Conduct for State Administrative Law Judges⁴⁰ was endorsed by the Executive Committee of the National Conference of the Administrative Law Judiciary of the Judicial Division of the American Bar Association.⁴¹ Four years later, a similar code of conduct for state administrative law judges was endorsed by the Board of Governors of the National Association of Administrative Law Judiciary.⁴²

³⁹ ARIZ. SUP. CT. R. 42, E.R. 3.9, comment 2. The comment begs the question whether applicants seeking zoning adjustment or any other local government permissions deserve less deference than their community’s public institutions. Does the role of “advocate” require higher ethical standards than apply to attorneys acting as public servants that are not advocating while purporting to uphold the public interest? The last question’s answer appears to be “sure.” After all, adjustment hearings clearly do not pose dilemmas stemming from advocacy or communications with a tribunal when the attorney hearing officer *is* the tribunal’s designee. Cf. John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 11 J. DUPAGE CO. B. ASSN. 29 (2007) (observing that the Ethical Standards of Professional Responsibility of the Society of Professionals in Dispute Resolution make a passing reference to duties a mediator owes to parties, the profession and themselves and prescribes that mediators should be honest without explaining what “honest” means, and that MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990) gives no guidance regarding a judge’s duty to be truthful to others – thus, nothing proscribes the use of deception by a neutral during the mediation process).

⁴⁰ NAT’L CONFERENCE OF THE ADMIN. LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (1995).

⁴¹ *Id.* at *Preface*. This Code’s Preamble defines “administrative law judge” to include:

all hearing officers, referees, trial examiners or any other person holding non-partisan office to whom the authority to conduct an administrative adjudication has been delegated by the agency or by statute and who exercises independent and impartial judgment . . . in accordance with the applicable statutes or agency rules . . . *Id.*

⁴² NAT’L ASS’N. OF ADMIN. LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (1999), available at http://www.naalj.org/assets/documents/publications/naalj_%20model_code_of_judicial_conduct_for_state_aljs.pdf (last visited Nov. 22, 2010). This code, in Canon 8, recites: “Anyone employed by a state governmental agency or an instrumentality of a state or municipal corporation, who is empowered to preside over statutory or

Inasmuch as the two codes essentially have identical application where appointed municipal hearing officers are concerned,⁴³ I refer to them in this Article interchangeably as the “ALJ Code.”

In some states, ethical guidance for lawyers is afforded through the Administrative Procedures Act (APA).⁴⁴ Often state APA acts are based upon the Model State Administrative Procedures Act.⁴⁵ In other states, however, the APA does not apply to officers serving outside of state agencies, so these standards of conduct do not address adherence to the law.⁴⁶ Municipalities often govern certain behaviors of persons acting as public officials through a code of ethics. In the City of Phoenix, employees and “officials, whether elected, appointed or hired,”⁴⁷

regulatory fact-finding hearings” is included in the definition of a state administrative law judge subject to its terms. *Id.*

⁴³ Compare note 40 with note 42, *supra*.

⁴⁴ See Edward J. Felter, Jr., *Administrative Law Adjudication for the 21st Century*, 24 COLO. LAW. 993 (1995).

⁴⁵ See REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010), available at http://www.law.upenn.edu/bll/archives/ulc/msapa/2010_final.htm. In 1981, the National Conference of Commissioners on Uniform State Laws revised its 1961 Model State Administrative Procedures Act; most states have adopted one form or the other of the model act through state legislation. *Id.* In July, 2010, that Conference adopted the Revised Model State Administrative Procedures Act (RMSAP). *Id.*

⁴⁶ In the State of Arizona, the APA recites that it does not apply to persons acting under the auspices of “political subdivisions” of the State. See ARIZ. REV. STAT. ANN. § 41-1001(1) (“agency” does not include a political subdivision of this state or any of the administrative units of a political subdivision, and political subdivision includes cities and towns). See *Hernandez v. Frohmiller*, 204 P.2d 854 (Ariz. 1949). Consequently, hearing officers appointed by the cities are not within the ambit of any strictures of Arizona’s APA. This is not a circumstance unique to Arizona. See, e.g., *Nightlife Partners, Ltd., et al. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 91 (2003) (California’s APA [CAL. GOV’T CODE §§ 11340-14529] does not apply to hearings before local administrative agencies; however, those provisions should influence discussion of what constitutes fair procedures for use in local administrative hearings).

⁴⁷ See CITY OF PHOENIX ETHICS HANDBOOK 1 (Section I) (last modified June 20, 2000), available at icma.org/en/icma/knowledge_network/documents/kn/Document/4871/Ethics_Handbook_City_of_Phoenix_Arizona. The Handbook requires all City employees and members of boards, commissions, committees, and the City Council to maintain the utmost standards of personal integrity, truthfulness, honesty, and fairness in carrying out their public duties. *Id.* The City adopted the Handbook policies as a City ordinance, and thus “all City

are subject to ethical standards, but deciders who are volunteers or independent contractors are exempt.⁴⁸ Indeed, whether deciders are governed by rules of judicial conduct for lawyers promulgated by a legislature or the state bar (or Supreme Court) in any state is driven by political geography.⁴⁹

C. The Limited Utility of Professional Responsibility Commentary

Deference to reputable commentary on the subject of hearing officer attorneys offers one conventional source for gleaning proper conduct standards, together with state bars' ethics opinions.⁵⁰ The Lawyers' Manual on Professional Conduct,⁵¹ the

employees and members of City boards, commissions and committees, and the City Council," are charged to obey those policies. *Id.*

⁴⁸ *Id.* Neither an independent contractor nor an uncompensated hearing officer (since, acting alone, neither would be a member of a board, commission, committee nor City Council) is bound by Phoenix's Handbook, unless one adopts the notion that, since the Zoning Administrator is an employee, her non-employee deputies must likewise be subject to the policies of the Handbook applicable to employees, a questionable argument from a reasonable reading of the text's language. *Id.* Regardless, nowhere does the Handbook say that a covered person must follow the law in effect, except as one may infer that obligation from the requirement of maintaining "utmost standards" of honesty and fairness, two terms not defined. "Neglect" of coverage by codes of volunteers and independent contractors is not unusual among municipal bodies. *See, e.g.,* Robert Wechsler, *Who is Covered by an Ethics Code's Provisions*, CITYETHICS.ORG BLOG (Jan. 31, 2009 10:17 AM) <http://www.cityethics.org/node/629> (sometimes there is discussion about whether volunteers should be covered; too often individuals and bodies not central to local government are ignored, and among those groups often missed in a local ethics code are "consultants, professionals hired to do specific jobs or work on specific projects.") Wechsler, Director of Research with City Ethics, further notes that in ethics codes with a separate provision listing those covered by the code, "this provision is usually limited to officials and employees, excluding, for example, volunteers." *Id.*

⁴⁹ For example, in the State of California, hearing officers are deemed quasi-judicial functionaries, and are therefore subject to the State's Code of Judicial Conduct. *See* CAL GOV'T. CODE §§11475-11475.70 (West Supp. 2006). But in the State of Arizona, the Judicial Ethics Advisory Committee issued an advisory opinion excluding anyone acting as a hearing officer from the reach of that State's Code of Judicial Conduct. *See* AZ Jud. Adv. Comm., Op. 92-03, at 1-2 (Jan. 1992), available at http://www.supreme.state.az.us/ethics/ethics_opinions/1992/92-03.pdf (Code of Judicial Conduct does not apply to administrative law judges).

⁵⁰ Regrettably, bar ethics opinions typically are tailored to specific requests for advice in practice conundrums. For example, in Opinion 11-01, the State Bar of Arizona opined on the ethics of assisting a client in legal matters permissible under

Restatement Third, The Law Governing Lawyers,⁵² and Hazard and Hodes' *The Law of Lawyering*,⁵³ while leading secondary authorities, afford few useful answers to the ethical dilemmas facing private attorneys serving as local hearing officers.⁵⁴ The Restatement Third, the Law Governing Lawyers ("Restatement") is similarly unavailing; it, too, fails to address Atticus's obligation, as an attorney, to support the law.⁵⁵ The Restatement recites only one principle helpful to this Article's themes, relating to the

the Arizona Medical Marijuana Act "despite the fact that such conduct potentially may violate applicable federal law." AZ Jud. Adv. Op. 11-01 (Feb. 2011), *available at* <http://www.myazbar.org/Ethics/opinionview.cfm?id=710>. A more interesting opinion would have addressed whether a lawyer could simultaneously represent a client in a matter governed by the state act and comply with Arizona Supreme Court Rule 41(b).

⁵¹ ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* (2003) (hereinafter "Lawyers' Manual").

⁵² *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000) ("R3LGL").

⁵³ GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (3d ed. 2010).

⁵⁴ The Lawyers' Manual states, in §01:3024, that the applicability of the Model Code of Judicial Conduct to administrative law judges should be determined by each adopting jurisdiction. Lawyers' Manual, *supra* note 51, at n. 10. The ABA's Judicial Administration Division urges each jurisdiction to "consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying and enforcing the Code [CJC] for the administrative law judiciary." CHARLES E. GEYH & W. WILLIAM HODES, *REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 15-16* (2009). As to the R3LGL's inapplicability, see Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 *GEO. J. LEGAL ETHICS* 631, 633-34, 657 (1997).

⁵⁵ Topic 1, §1, comment b of the R3LGL observes that "lawyer codes particularize some general legal rules in the particular *occupational* situation of lawyers . . ." *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS*, Topic 1, § 1, cmt. b at 8 (2000) (emphasis added). The commentary seems to recognize that the codes deal with the context of lawyer as advocate and a lawyer's communications with clients and tribunals, not with the instance where a lawyer serves as a part of the tribunal, that being, one supposes, the bailiwick of rules governing the ethical behavior of judges. Indeed, that comment reminds the reader that as regards the claims of non-clients, a lawyer is generally immune from liability for harm caused unintentionally except in limited circumstances. *Id.* at cmt. f. See also Menkel-Meadow, *supra* note 55, at 633-34. Since applicants for relief from Regulations are non-clients, this would seem to absolve (except in those limited circumstances appearing in Section 51 of the R3LGL) the attorney from any culpability under the R3LGL for his acts affecting non-clients.

separation of powers between judicial and legislative branches of government.⁵⁶ The comments to Restatement § 1 indicate that, so long as a legislative body adopts behavioral standards applying to attorneys that do not “substantially differ from similar regulation applicable to members of other professions,” such a code will not violate the separation of powers.⁵⁷ Consequently, a state legislature or municipal council is not precluded on constitutional grounds from imposing standards of ethical conduct for use by Atticus, and some have chosen to do so.⁵⁸

State supreme courts and bar associations have declined to address the “Atticus code” in local jurisdiction adjudication. Absent an association of administrative law officials’, or a local government’s, adoption of standards for ethical conduct, Atticus is ungoverned by formal, uniform professional responsibility rules. If a public servant attorney is not an officer of the court⁵⁹ or a

⁵⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000).

⁵⁷ See R3LGL, Chapter 1, §1, Reporter’s Note to Comment c., at 12 (2000). The same note refers to court decisions that “courts will share the power to regulate lawyers with other branches of government so long as this poses no threat to the continued vitality of the judicial branch.” *Id.* at 13.

⁵⁸ See, e.g., City of Murfreesboro, Tennessee “Request for Qualifications for Attorneys,” available at <http://www.rccbba.org/qualifications.html> (last visited Nov. 11, 2010). The City of Murfreesboro sought attorneys interested in serving as a Hearing Officer for the City’s Disciplinary Review Board to submit their qualifications. This citizen board considers employee appeals of city job terminations. This job posting noted that:

The following canons of the Judicial Code shall be applicable to Hearing Officers: Canon 1. A Hearing Officer shall uphold the integrity and independence of the Position of Hearing Officer. Canon 2. A Hearing Officer shall avoid impropriety and the appearances of impropriety in all of the Hearing Officer’s activities. Canon 3. A Hearing Officer shall perform the duties of Hearing Officer impartially and diligently. A violation shall constitute grounds for dismissal by the City Council, upon recommendation of the Disciplinary Review Board which shall afford the Hearing Officer the right to a hearing.

Id. Murfreesboro deftly incorporates by reference the first three canons of the CJC, while creating an enforcement process that assures public confidence in the administrative hearing process without offending the judicial branch of Tennessee government.

⁵⁹ See, e.g., *Ex Parte Garland*, 71 U.S. 333, 378-79 (1866) (“Attorneys and counselors are not officers of the United States. They are officers of the court, admitted as such by its order upon evidence of their possessing sufficient legal

judge,⁶⁰ and adjudicates unchecked by ethical restraints, is the public well served? Is a vacuum in governing codes of judicial or professional responsibility likely to aid or to hinder Atticus in upholding applicable community law? Such local adjudicators have fallen into a fissure, that thin space between professional regulation and governmental inattention to Atticus's obligations surrounding his unique public office.

V. ATTICUS UNBOUND

A. *The Cautionary Tale*

This anecdote illustrates how free-wheeling Atticus can do harm, immersed in the murky depths of indeterminate local administrative policy. The Phoenix Zoning Ordinance's section on signs contains the City's regulation scheme for billboards, commonly called "outdoor advertising structures" ("OAS").⁶¹ The pertinent code section designates, unambiguously, the locales in which OAS are permitted, separated into two categories.⁶² The first category is arterial streets as indicated on the City's (typically)

learning and fair private character"); *In re Wren*, 285 P.2d 761, 763 (Cal. Ct. App. 1995).

⁶⁰ Judges are subject to a Code of Judicial Conduct in every state. *See* Salkin, *supra* note 34, at 21; *see also supra* note 25. In State Bar of Arizona Ethics Opinion 89-01, the State Bar Ethics Committee notes in one comment to Ethical Rule 1.12(b) that attorney hearing officers satisfy the definition of "adjudicative officer." *See* AZ Jud. Adv., Op. 89-01, at 2 (Mar. 1989). The opinion only discussed, however, the propriety of that official's negotiating for employment with law firms appearing before the hearing officer. Moreover, in Advisory Opinion 92-03, the Arizona Supreme Court Judicial Ethics Advisory Committee held that an administrative law judge is not governed as to her or his conduct by the Arizona Code of Judicial Conduct because of the lack of independence of the hearing officer from the "interference and control" of the heads of the administrative agencies and departments for which hearing officers work. *See supra* note 49. These opinions aid little in resolving the issue, since the latter negates guidance as to appropriate conduct while the former addresses conduct of a former adjudicative officer, not a sitting one. One must guess who—if anyone—will accept jurisdiction in the circumstances of alleged malfeasance by an Arizona attorney acting as hearing officer, unless a municipality has a public officials' code of ethics applicable to persons serving as independent contractors or volunteer hearing officers.

⁶¹ PZO § 705(2)(A).

⁶² PZO § 705(2)(A)(15).

annually-updated street classification map.⁶³ The second category is tracts located within 300 feet of the mainline, within the city limits, of certain portions of two highways incorporated in the federal interstate system.⁶⁴ Excluded, by default, from this short list of OAS-permitted locations are portions of one interstate route and three state expressways servicing the Phoenix conurbation that lie within the City's boundaries.⁶⁵ These expressways are limited access routes but receive separate funding from the federal interstate system and have lower speed limits than their federal counterparts. Only a weak argument can be made that the expressways are no different from the interstate highways. This argument is undermined by a statement in the same chapter of the Phoenix Zoning Ordinance: "Any use that is not specifically permitted or analogous to those specifically permitted is hereby declared to be a prohibited use *and unlawful*."⁶⁶

In 2011, a national outdoor advertising company pursued a variance under the Phoenix Zoning Ordinance from the location limitations described in the code's subpart (A)(15).⁶⁷ It did not initially seek an opinion from the City Attorney's Office on the legitimacy of this request. Reviewing the application for the OAS adjustment, the zoning hearing officer recognized two

⁶³ This map currently is designated Resolution No. 20882 (Jan. 20, 2010), available at <http://phoenix.gov/planning/stclass.pdf>.

⁶⁴ These are Interstate Highways 10 and 17. The "mainline" is the term used to exclude land improved with access ramps to the interstates. In addition, outdoor advertising structures may be located only in C-3, A-1, or A-2 zoning districts, the least restrictive (of intensive uses) zoning districts. See PZO § 705(2)(A)(15).

⁶⁵ None of these expressways extends beyond the boundaries of Maricopa County, so by definition they are not "interstates."

⁶⁶ PZO § 701, Preamble (emphasis added). While the applicant may argue that a higher-than surface street speed limit makes an expressway analogous to an interstate highway, there is a difference in the scenic character of these parkways that travel through residential areas that distinguishes them from interstate corridors.

⁶⁷ Variances adjust the realities of community land use circumstances in ways that strict interpretations of Regulations would not permit. Variances allow deviations from physical standards like floor-area ratios for buildings and off-street parking burdens. In effect, variances are constitutional safety valves, affording relief from the black-and-white application of a code provision producing a unique hardship to an owner that resembles confiscation. See DANIEL J. CURTIN, JR. & CECILY T. TALBERT, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 44 (2001).

complexities. First, he realized that the City's planning administration had no fixed policy on the use of the variance process along limited access highways.⁶⁸ Second, he was aware that, unfettered by local ethical constraints, Atticus might elect to hear, on their "merits," such billboard adjustment applications, and to grant variances enduring the appeals process involving the City's Board of Adjustment (composed of citizens who would pay little heed to the narrowly-drawn text of the billboard ordinance) and the Arizona Superior Court. Here was Atticus's moment – an opportunity to approve an unprincipled but adjudication-derived ordinance text amendment expanding the parameters of OAS-permitted sites within the City. Atticus might assert quasi-judicial authority in a public hearing, usurping the legislative act of amending a zoning ordinance's text following public input. Instead, the appropriate course of action was taken, acknowledging Atticus's lack of jurisdiction, thereby avoiding a "use variance"⁶⁹ – the method by which the applicant sought to alter the explicit text of the Phoenix Zoning Ordinance pertaining to permitted OAS locations. The decider asserted under the separation of powers doctrine and under the "unlawful" code text that he lacked the power to hear the adjustment request at all.⁷⁰ The decider's

⁶⁸ The Phoenix Planning Department was accepting applications for variances in this situation when it ought not to have done so, given the PZO's description of the unlawful nature of using any other location for an OAS.

⁶⁹ See *Nicolai v. Bd. of Adjustment*, 101 P.2d 199, 201 (Ariz. 1940). Prohibiting use variances is codified in ARIZ. REV. STAT. ANN. §9-462.06(H)(1) (Board of Adjustment cannot change permitted uses set forth for zoning districts or other zoning classifications). Factually, it appeared there was no plausible argument that the state road, known as the Piestewa Freeway, having a 55 mph limit, was an arterial surface street on the City's street classification map or an interstate highway under the zoning classification.

⁷⁰ See Minutes of hearing ZA-234-10-2 (Feb. 24, 2011), available at <http://phoenix.gov/pubmeetr/1027.html> (copy of written findings available at the Planning Department, City of Phoenix, contact via electronic mail at zoning@phoenix.gov). See also Michael Clancy, *Phoenix board to consider Piestewa/Bell electronic billboard*, ARIZONA REPUBLIC (Apr. 6, 2011, 08:34 AM), <http://www.azcentral.com/community/nephoenix/articles/2011/04/06/20110406phoenix-hearing-set-piestewabell-billboard-request.html>. Another OAS company applied for "unlawful" structure variances but continued them, awaiting the disposition of the preceding applicant's request referred to the City Board of Adjustment by the hearing officer. On April 7, 2011, that Board determined that it had jurisdiction to

response recognized the division of authority between the City Council (empowered to approve text amendments) and the Board of Adjustment (empowered to adjudicate modifications to required development standards in appropriate situations).

This narrative reveals nothing about the integrity of a community's bureaucracy. Those lacking legal training do not focus on issues of professional responsibility. These matters are not part of their portfolio or experience. The story instead reveals the narrow straits separating Atticus's performance of public service from Atticus's abuse of public office. Granted, zoning regulation has a particularly sullied reputation for opportunistic conduct in public officialdom.⁷¹ However, zoning is hardly the lone source of questionable execution of duties in the public interest within a community.

A. Community Expectations

Agency and government administrators may succeed in vetting for decider positions all but the cleverest of rascals. Should community personnel invest scarce resources to speculate about which decider will find that, since an ordinance or similar regulation is not to his taste, he will adjudicate by personal intention instead? Will a particular decider dispense "rough justice" or apply a "nullification"⁷² norm? Decisional

hear the applicant's request on the merits. See *Public Meeting Results*, phoenix.gov (Apr. 7, 2011), <http://phoenix.gov/pubmeet/index.html>.

⁷¹ See, e.g., Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U. J.L. & POL'Y 195, 206 (2000) (land use law has a "battle-scarred complexion," as abusive public agencies have undermined land use planning and regulation and as a result, the political, moral and financial support for essential public interest programs); Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 168 (1989) (uncontrolled decision-making potentially interferes with broader public land use goals).

⁷² Nullification is ably illustrated by Captain Hector Barbossa, the undead pirate (portrayed by Geoffrey Rush) who, in considering his prisoner Elizabeth Swann's invoking the right of *parlay* from the Pirate Code, deems the latter to be "more what you'd call 'guidelines' than actual rules." See *Pirates of the Caribbean: Curse of the Black Pearl*, sc. 7 (2003). Barbossa is a consequentialist, holding that rules can be interpreted via other norms than legal constructs in special circumstances, where the social need is sufficiently worthy. *Id.* Furthermore, despite Swann's possessing a pirate medallion, procedurally Barbossa rules that Swann lacks standing – she is not a pirate. *Id.* See also WILLIAM H. SIMON, THE

independence allows local deciders to uphold the rule of law.⁷³ Without the influence of externally-imposed standards of conduct, however, that same independence enables disregard for precedent, logic, incontrovertible evidence, or codified law in favor of implementing personal agendas on mere whims.⁷⁴

If an attorney's legal education and orientation to ethics in practice has been meaningful and, assuming further that a decider is not sociopathic, written standards of ethical conduct as a polestar in Atticus's role ought to be superfluous.⁷⁵ Mr. Finch, for one, distinguished "just purpose" from "unjust behavior" and steadfastly followed his convictions about that distinction, disregarding hostile public opinion while maintaining his personal integrity. That Finch's personal code was all-sufficient guidance for ethical attorney conduct is summarized by one community figure: "Whether Maycomb knows it or not, we're paying the highest tribute we can pay a man. We trust him to do right. It's

PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 84-93 (1998) (discusses arguments undergirding nullification as a mode to accommodate formal law to practical circumstances, such as where wrongdoing is inferentially ratified by officials who decline to impose sanctions for violations).

⁷³ Professor Epstein encapsulates the conundrum of the "administrative state." See Richard A. Epstein, *Government by Waiver*, 7 NAT'L AFF. 39, 39-40 (2011), available at <http://www.nationalaffairs.com/publications/detail/government-by-waiver> (the law involves the public administration of rules by "a wide range of elected and appointed officials in an endless array of circumstances," maintaining a just legal order challenges government to limit "the discretion of these officials so that they do not undermine the rule of law, while also allowing them enough leeway to perform their essential roles." Epstein notes the vagaries of statutory language, together with delegation of interpretation to government officials, permits the latter, effectively, to "make the rules up as they go along." *Id.*

⁷⁴ See, e.g., *In re Hague*, 315 N.W.2d 524, 533 (Mich. 1982) (willful disregard for law constituted interference with proper administration of justice; Article III judge sanctioned under Canon 2(B) of the Michigan Code of Judicial Conduct).

⁷⁵ See, e.g., John D. Feerick, *Ethics, Lawyers and the Public Sector: A Historic Overview*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS 1, 10 (1999) (public servants "must find ways to establish clear, *internal* codes of conduct . . ."). But see M. Neil Browne, Carrie M. Williamson & Linda L. Barkacs, *The Purported Rigidity of an Attorney's Personality: Can Legal Ethics be Acquired?*, 30 J. LEGAL PROF. 55 (2006) (describes debate regarding the capacity of lawyers to receive moral instruction based upon whether personality traits such as propensity for honesty are ingrained or evolve under the environmental influence of the legal profession).

that simple.”⁷⁶ Perhaps as a practical matter, consciousness of the “golden rule”⁷⁷ (or maybe, the principle of payback) ought to curb Atticus’s temptation to abuse his office, particularly if he represents clients before another community’s administrative adjudicators.

But for twenty-first century local government servants, one’s compass functions optimally with reference to charts and navigational benchmarks. Maycomb and public trust are largely vestiges of the past. This author finds no joy in discovery or exploitation of gaps in the application of ethical codes to Atticus, however much a lawyer’s training may inspire such endeavors.⁷⁸ Departure from the administrative realm of Finch-like public servants in adjudication settings is lamentable – if such a bygone day ever existed. Alas, in today’s communities, external controls are the sensible solution to curbing decider potential abuses. State judiciaries and bar associations have a role to play here, to remove the onus from communities by implementing conduct standards expressly applying to Atticus in local government roles. Notably, Americans generally expect that law will address ethics in public life in a holistic, not a piecemeal, manner.⁷⁹

Four basic arguments support imposing governing standards for all deciders. First, upholding an ethical obligation of fairness sustains public confidence in the local government’s adjudicative

⁷⁶ HARPER LEE, *TO KILL A MOCKINGBIRD* 236 (1960).

⁷⁷ “Therefore all things whatsoever ye would that men should do to you, do ye even so to them.” *Matthew* 7:12 (King James).

⁷⁸ See, e.g., WALTER BENNETT, *THE LAWYER’S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION* 18 (2001) (Bennett recounts an episode during his time in practice when he searched his state’s rules of professional conduct; his quest was to devise a plausible argument that certain rules in question did not apply and his delight that his ability to think like a lawyer had allowed him to maneuver “deftly around the potential ethical roadblock.” *Id.* Reflecting later upon this episode, Bennett states that “[t]here were no moral questions beyond the plausible bounds of the Rules of Professional Conduct. There were no higher principles to consult or personal standards to bring into play. There was no conscience.” *Id.* at 19; see also Jane B. Baron & Richard K. Greenspan, *Constructing the Field of Professional Responsibility*, 15 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 37, 38-39, 77 (2001) (arguing that in the traditional law school curriculum, students learn to think of professional responsibility as detached from moral considerations, lawyers being instead governed by a “specialized law of lawyering”).

⁷⁹ See Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 *SETON HALL L. REV.* 715, 724 (2006).

process.⁸⁰ Second, uniform ethical standards further “upgrade” local adjudicative systems to meet public expectations.⁸¹ Third, emphasizing local government ethics builds momentum towards elevated standards of ethical conduct at senior levels of government.⁸² The final argument addresses Atticus the decider rather than the community. The American public today rejects the notion that persons trained in the law are sustainably self-regulated by ethical norms.⁸³ A significant fraction of that public believes instead that, left to his own devices, the attorney is untrustworthy. The American media does little to dissuade consumers of this belief.⁸⁴ Thus, American confidence in the adjudicative process is enhanced when guidelines discourage Atticus from acting irresponsibly in his decider role.⁸⁵

⁸⁰ Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 22 GEO. J. LEGAL ETHICS 863, 871 (2009).

⁸¹ Salkin, *supra* note 34, at 31. Salkin asserts that the administrative judiciary has not received enough adverse exposure to compel governments to provide guidance for their relatively “low profile” adjudicators. *Id.* at 7. *See also* Johnson, *supra* note 79, at 723 (the American public and media support enacting ethical standards).

⁸² *See id.* at 718. Johnson argues that rising expectations and public demands for ethics will migrate upward as the public is increasingly satisfied with local government ethical standards. *Id.*

⁸³ *See, e.g., Honesty/Ethics in Professions*, GALLUP (Nov. 19-21, 2009), <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (13% of sample believed lawyer integrity was above average, while 40% of sample believed integrity of lawyers to be “low” or “very low”); Eugene Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 695 n.2 (2006) (identifies a variety of polls pertaining to attorney honesty and ethics, reporting negative results). For this reason, attorney discipline is viewed as imposed in the service of the public and the legal system generally, as well as to protect the legal profession from “unprofessional conduct.” *See In re White-Steiner*, 198 P.3d 1195, 1197 (Ariz. 2009).

⁸⁴ Even “establishment” print publications enjoy jabbing at lawyers’ imperfections of character, especially on integrity issues. *See, e.g.,* 54 AMERICAN HERITAGE 14 (Nov./Dec. 2003) (the derivation of “shyster” is the German word [*scheisse*] for excrement).

⁸⁵ Salkin, *supra* note 34, at 31. An additional consequence of governance of local hearing officers under ethical standards is the likelihood of elimination of state bar complaints by disgruntled citizens who discover the hearing officer is a private attorney, or alternatively, the dismissal of such complaints by the bar on the basis that another governance standard, not the jurisdiction’s rules of attorney professional responsibility, is applicable under the circumstances grieved.

It is surprisingly unchallenging to steer Atticus, where support for applicable law is concerned. A few direct expressions of local government intention suffice, for example: “The Zoning Officer shall administer the Zoning Ordinance in accordance with its literal terms . . .”⁸⁶ or, “A city administrative law judge must follow the law.”⁸⁷ Yet these *ad hoc* solutions to a pervasive problem will yield to a more effective and global approach, which is addressed next.

VI. ADOPTING THE ATTICUS CODE

Fundamentally, there are four approaches allowing communities, with the aid of state supreme courts or legislatures, to address the lack of applicable ethical standards. First is to urge amendment of the state’s judicial conduct code to include administrative law judges, hearing officers, umpires, masters, referees and others who perform community adjudicative roles upon considering evidence and hearing testimony.⁸⁸ A second approach, via agency rulemaking or legislation, is to seek the adoption of a statewide code of ethics or professionalism applicable to adjudicators at every level in all branches of government.⁸⁹ A third approach is to amend public employees’

⁸⁶ TAYLOR BOROUGH, PA., ZONING ORDINANCE § 9.140, initial clause, available at <http://taylorborough.com/wp-content/uploads/2011/09/article9-zo.pdf>.

⁸⁷ RULES OF CONDUCT FOR ADMIN. LAW JUDGES & HEARING OFFICERS OF THE CITY OF NEW YORK CITY § 103(A)(1) (2009); see also § 102(A) (“shall respect and comply with the law”). Compare North Dakota’s faithfulness to law formulation, *infra* note 94.

⁸⁸ See, e.g., COLO. REV. STAT. §24-30-1003(4)(a) (2008); MINN. STAT. ANN. §§ 14.48(2) & (3)(d) (2007). Salkin, *supra* note 34, at 22, notes that legitimate arguments exist not to apply Article III judges’ ethical standards to persons who are essentially employees of an agency, making decisions on the agency’s behalf. This argument is less persuasive in a “central panel” jurisdiction, where the hearing officers are employed by a government department that is tasked with supplying other agencies with adjudicators; the latter agencies do not control retention or compensation of the hearing officer.

⁸⁹ See e.g., PA. CONS. STAT. §1102 (a public official is any person appointed in any branch of state government “or any political subdivision thereof,” excluding advisory board members lacking authority to “exercise the power of the State or any political subdivision thereof”); WASH. CODE OF ETHICS FOR ADMIN. L. JUDGES (April 1, 1993); CAL. GOV’T CODE §§ 11475-11475.70 (2009) (§11475.40 describes which

codes of ethics so as unambiguously to include administrative law judges and deciders of all types in local governments, incorporating the broadest definition of “employees” or “officials,” whether or not the adjudicators are independent contractors or volunteers in their roles occupied.⁹⁰ Finally, a community may convince the state to adopt a model code specifically for non-Article III adjudicators, which extends to a community’s administrative law judges, hearing officers, and like officials.⁹¹

There are a number of sources of standards to guide the behavior of Atticus that can be adopted in jurisdictions currently lacking applicable codes or statutory standards of conduct. In August 1995, the National Conference of Administrative Law Judges endorsed the ALJ Code.⁹² Four years later, the Judicial Administrative Division of the American Bar Association adopted its own version of the Model Code for Administrative Law Judges.⁹³ One version or the other of this model code has been adopted wholly or partially in several American jurisdictions.⁹⁴ It

Canons of the State’s Code of Judicial Ethics do not apply to administrative law judges).

⁹⁰ See Johnson, *supra* note 79, at 727-28; see, e.g., S.C. State Ethics Comn., Adv. Op. 95-007, at 1-2 (Jan. 18, 1995) available at ethics.sc.gov/AOs/AO95007.NEW.doc. One code that describes adjudicators steeping themselves in law and adhering to its guidance is the American Society for Public Administration’s Code of Ethics, available at http://www.aspanet.org/scriptcontent/index_codeofethics.cfm/. For a description of efforts to transform mere conduct guidelines into ethical behavior standards in public administration, see James S. Bowman, *From Codes of Conduct to Codes of Ethics: The ASPA Case*, in TERRY L. COOPER, ED. HANDBOOK OF ADMINISTRATIVE ETHICS 335-354 (2001).

⁹¹ See Salkin, *supra* note 34, text at notes 23-50 (summarized each type of approach and identifies states that have pursued these approaches prior to the 2007 ABA revision of the Model Judicial Code of Conduct.)

⁹² See *supra* notes 35-37 and accompanying text.

⁹³ The preamble to the ALJ Model Code defines “administrative law judge or judge . . . to include all hearing officers, referees, trial examiners or any other person holding non-partisan office to whom the authority to conduct an administrative adjudication has been delegated by the agency or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law” *Id.* at 2.

⁹⁴ The ALJ Model Code was adopted in 1999 in North Dakota, available at <http://www.deontologie-judiciaire.umontreal.ca/fr/magistrature/documents/north-dakota-code-of-judicial-conduct.pdf>. Its Part 2, “Applicability,” states that it reaches

provides guidance on limited ethical fronts on issues confronting hearing officers; one example is the circumstance of part-time state agency adjudicators.⁹⁵ The ALJ Model Code does not itself provide for an entity charged with issuing formal or informal interpretations of the strictures of the code; as such, its strictures seem aspirational rather than obligatory.⁹⁶ Regardless, where a direct expression of standards of ethical conduct is desirable, the ALJ Model Code awaits local government extension to its deciders, likely without risk of challenge by the jurisdiction's state's government. The ALJ Model Code defines "administrative law judge" to include "all hearing officers, referees, trial examiners or any other person holding non-partisan office to whom the authority to conduct an administrative adjudication has been delegated by the agency or by statute"⁹⁷ In Canon 2(A), that code states the judge "shall respect and comply with the law."⁹⁸ The Commentary to that Canon defines improprieties to include

"temporary contract administrative law judges." Canon 2A requires administrative law judges to "respect and comply with the law" and the commentary to the canon emphasizes the compliance obligation. N.D. CODE OF JUDICIAL CONDUCT CANNON 2A. North Carolina adopted its version of the code in 2000. *See* N.C. GEN STAT. §7A-754 (1999) (adopted all but Canon 5). In 2009, the New York State Bar Association adopted its code version. *See supra* note 34. In addition, the Department of Industrial Accidents of the Commonwealth of Massachusetts has adopted the ALJ Model Code. Most uniquely, a professional association, the Oregon Association of Administrative Law Judges, adopted its own Code of Conduct for administrative law judges, *available at* http://www.oregon.gov/OAH/Code_of_Ethics.shtml, which requires an administrative law judge to "be faithful to the law" and prescribes that the adjudicator "shall decide . . . on the basis of facts and applicable law." OR. CODE OF ETHICS FOR ADMIN. L. JUDGES §2-105.

⁹⁵ *See* MODEL CODE OF JUDICIAL CONDUCT CANNON 5(G), comment. (contemplates part-time hires of administrative law judges who maintain a law practice).

⁹⁶ *But see* W. VA. CODE OF JUDICIAL CONDUCT (2005). Section 6B-2-5a of the West Virginia Code provides that the West Virginia Ethics Commission Committee on Standards of Conduct for Administrative Law Judges has the prerogative to issue advisory opinions, investigate complaints of violations, and enforce its provisions. *Id.* at § 6B-2-5a. In West Virginia, "any public employee, public officer, referee or trial examiner" is subject to the code, other than those persons whose conduct is subject to the State's Code of Judicial Conduct. *Id.* at 5a(a). Ruch, *supra* note 2, at 17, states that this model of establishing an enforceable code is the exception, not the rule.

⁹⁷ *See* MODEL CODE OF JUDICIAL CONDUCT preamble.

⁹⁸ *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2(A), at 3.

violations “of law, court rules or other specific provisions of this code.”⁹⁹ Similarly, Canon 3(A) states that “a state administrative law judge shall be faithful to the law and maintain professional competence in it.”¹⁰⁰ Alternatively, the appropriate state authority can adopt the 2007 version of the Code of Judicial Conduct, extending it to members of the administrative law judiciary.

While supreme courts and state legislatures are not racing to fill voids in standards of performance for local hearing officers, endeavors to address egregious breaches of behavioral norms have been undertaken occasionally. For instance, the Washington State Office of Administrative Hearings addresses complaints of improper conduct by administrative law judges, with investigation and discipline being handled internally.¹⁰¹ Finally, a community can retool its code of employees’ ethics to govern any person, including independent contractors and volunteers engaged in adjudication, thereby reminding Atticus to seek out, interpret, and apply with integrity the existing state and local laws, ordinances, and regulations.¹⁰²

VII. CONCLUSION

Professor Fred Zacharias, in a 2009 article entitled *The Myth of Self-Regulation*,¹⁰³ argues that the term “self-regulation” trumpeted by American lawyers and judges creates the “patently false”¹⁰⁴ public image of lawyers unilaterally governing the conduct of their peers.¹⁰⁵ As a consequence of that image,

⁹⁹ MODEL CODE OF JUDICIAL CONDUCT, at 4.

¹⁰⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(2), at 7.

¹⁰¹ See WASH. REV. CODE § § 34.05.202 & 34.12.030.99-20-115 (2008); WASH. ADMIN. CODE § 10-16-010 (2008).

¹⁰² Direction to follow applicable adjudicative standards needs to be accompanied by local administrative management systems and processes that supervise, educate and mentor ad hoc temporary hearing officers, no less those who are bar admittees. Given the stakes in adjudication, continuing training in that field is equally important to continuing education for those in private law practice.

¹⁰³ Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

¹⁰⁴ *Id.* at 1188.

¹⁰⁵ *Id.*

Zacharias contends that an external regulator of conduct¹⁰⁶ can be led to assume other regulators' deference to the bar,¹⁰⁷ thereby inviting inadequate exercise of its own authority to constrain lawyer conduct.¹⁰⁸ This Article has argued that Zacharias's observations can be seriously problematic in circumstances involving the collective failure of governments and institutions to afford adequate guidance to Atticus. Perhaps nowhere does the unhappy result of a commonly held belief that "I thought *you* were handling the ethics piece!" manifest itself more profoundly than in local government settings.

Consequently, a local government's adoption of an Atticus Code will entail some coordination between the community and the state supreme court. When Atticus convenes a hearing, will there be a clear delineation of applicable conduct standards to his temporary office? Does Atticus ever (or always) serve two regimes concurrently? Otherwise stated, is Atticus forever the lawyer – and will explicit external guidelines for ethical conduct broaden or limit his obligations in his adjudicator's role?¹⁰⁹

Professional administrators and citizens alike acknowledge that the administrative state, dependent as it is upon the adjudicative function, is "indispensable" to American

¹⁰⁶ Zacharias explains that administrative agencies, federal and state legislators and courts individually are external regulators of attorney conduct. *Id.* at 1147-48, 1154.

¹⁰⁷ *Id.* at 1154 (with the regulator thereby undervaluing the "deferring" regulator's acts).

¹⁰⁸ *Id.*

¹⁰⁹ See Johnson, *supra* note 79, at 726-27. Mere articulation of standards of conduct does not, of course, ensure that attorneys will receive clear guidance. Indeed, as Baron & Greenstein, *supra* note 78, point out, ethical rules are both under- and over-inclusive as to application, prohibiting some "right" conduct and allowing some "wrong" conduct. *Id.* at 78. Since rules are variable in meaning and open-textured, when an ethical rule must be interpreted, disparate "construction rules" inform the interpretation, for instance giving the rule its plain (here, English-language dictionary) meaning, applying the meaning intended by its author, or applying the meaning that best carries out the rule's purpose; and, to the extent meanings generated by interpretation are in conflict, this compromises the ability of any rule to guide behavior with a high degree of certainty. *Id.* at 77-79. That conclusion, and the skepticism of scholars about such codes' capacity to provide clear answers, ought not convince communities to abandon endeavors to guide otherwise unfettered private attorneys serving temporarily as local hearing officers. *Id.* at 84-85.

governance.¹¹⁰ That belief mandates efforts to articulate and impose the highest standards of ethical conduct governing *ad hoc* adjudicators for the ultimate benefit of institutions and to uplift public trust. Although adopting a code integrating moral precepts with mandatory conduct standards may seem daunting work, in a government's transaction of its business – the people's business – public confidence flourishes where articulated ethical standards steer Atticus.

¹¹⁰ See Gillis, *supra* note 80, at 869.

APPENDIX

For the sake of uniformity and to avoid the reader forming irrelevant (and false) impressions of hierarchy or like matters of heft, I frequently have used in this essay three terms defined below: “Atticus,” “community,” and “decider.”

“Atticus” means the person who serves the community as a decider who also is a member in good standing of the bar in the jurisdiction of his domicile and public service.

“Community” means the jurisdiction convening public administrative hearings presided over by deciders. Community includes cities, towns, villages, boroughs, burgs, wards, counties, parishes, and all manner of special districts such as school districts, regional transportation authorities, utilities’ districts, water and sewer districts, community facilities’ districts and special assessment and taxing districts to the extent these are local (*i.e.*, not state agency) bodies.

“Decider” describes a person who presides over an administrative adjudicative proceeding in a community; provided, a decider is not (i) elected, (ii) appointed permanently or for a significant-length fixed term, (iii) hired as an employee of the community, (iv) an administrative law judge as defined by a Model Code for Judicial Conduct for Administrative Law Judges, or (v) an “Article III” type judge. Deciders include hearing officers, masters, referees, umpires and other quasi-neutral decision-makers who rule following the public presentation of evidence and testimony. Deciders may or may not be attorneys.