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**Development of the Model Code of
Judicial Conduct for State Administrative Law Judges**

Stanley J. Cygan¹

Ethical and impartial conduct by state administrative law judges has long been a principal interest of the National Association of Administrative Law Judges (NAALJ). In the Preamble of its *Constitution and Bylaws*, the NAALJ identifies the establishment of fair and impartial tribunals and the maintenance of judicial decorum as dominant topics of concern for its members. Article I, Section 2 of the same document establishes as one of NAALJ's primary objectives the establishment of a code of ethics. In 1993, the NAALJ accomplished this objective and adopted the *Model Code of Judicial Conduct for State Administrative Law Judges* (State ALJ Code).

A major problem in developing the State ALJ Code was the great diversity in administrative law judges. Administrative law judges are affiliated with the executive branch of government rather than the judicial branch. While trial and appellate judges are universally independent and typically perform no function other than adjudication, administrative decision makers are usually employed by the very agency whose decisions they review and many have responsibilities, such as rule making or law enforcement and prosecution, which may be inconsistent with their judicial function. Also, trial and appellate judges are almost always attorneys and are typically employed on a full time basis by their jurisdictions. State administrative law judges, however, are often employed on a part-time basis and are often not legally trained, depending on the state and agency for which they perform service. This diversity inhibits a consensual design of a codes of ethics for state administrative law judges.

As a consequence, there are often no rules governing the judicial conduct of those who preside over state administrative tribunals. Typically, codes of judicial conduct designed for trial and appellate judges and codes of professional responsibility designed for attorneys are used as rough guidelines

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for administrative law judge conduct on a case by case basis.² However, there are substantial discrepancies and the Board of Governors of the NAALJ did not believe that these codes provided an adequate solution .

In 1989, the National Conference of Administrative Law Judges (NCALJ) of the American Bar Association (ABA) adopted a *Model Code of Judicial Conduct for Federal Administrative Law Judges* (Federal ALJ Code).³ (While membership in the NAALJ is open to all administrative law judges, both state and federal, NAALJ's members are employed primarily by state administrative agencies. As a consequence, NAALJ often defers to the NCALJ and associations of federal administrative law judges, such as the Federal Administrative Law Judges Conference, on issues dealing with the federal administrative judiciary). This Federal ALJ Code was viewed by the Board of Governors of the NAALJ as a possible model for a code of ethics for state administrative law judges and a code of ethics committee was established by the NAALJ to develop such a code. This committee consisted of the author, the Honorable James W. Deese of Kentucky, and later, the Honorable John J. Matuszak of Illinois.

The Federal ALJ Code is based upon the 1972 *Model Code of Judicial Conduct* of the American Bar Association (ABA Code) which, at the time of adoption of the Federal ALJ Code, was last amended in 1982. As a consequence, the Federal ALJ Code approved the judicial model for administrative adjudication, a position the NAALJ Code of Ethics Committee (NAALJ Committee) endorsed.⁴

² See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1522 (1986) holding that the applicability of the Model Code of Judicial Conduct of the American Bar Association to state administrative law judges "depends upon the facts of the particular case." See also ABA MODEL CODE OF JUDICIAL CONDUCT (1990) which states that its applicability to administrative law judges should be determined by each adopting jurisdiction considering the unique characteristics of particular administrative law judge positions.

³ This code notes that it was not adapted to apply to state administrative law judges because of the wide variations in the nature of those positions.

⁴ See K. Davis, *Administrative Law Treatise*, §17.1 (2d ed. 1980) for a discussion of "judicial" and "institutional" models of administrative adjudication.

However, the Federal ALJ Code is designed for a comparatively well paid,⁵ full time, and specialized group of judges who operated primarily under the federal Administrative Procedure Act (APA).⁶ While there are many similarities between state and federal administrative law judges, there are many discrepancies which justified special consideration. Moreover, the NAALJ Committee believed that the Federal ALJ Code is not strict enough in its language concerning judicial conduct. For example, Canon 1 of the Federal ALJ Code reads as follows:

An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge *should* participate in establishing, maintaining, and enforcing, and *should* observe, high standards of conduct so that the integrity and independence of the administrative judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. *(Emphasis added)*.

Canon 2 (A) of the Federal ALJ Code states:

- A. An administrative law judge *should* respect and comply with the law and *should* act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary. *(Emphasis added)*.

Similar uses of the advisory word *should* permeate throughout the Federal ALJ Code. It was the opinion of the NAALJ Committee that the primary focus should be on the regulation of the judicial conduct of state administrative law judges and that the use of the mandatory word *shall* is more appropriate in such contexts.

Because federal administrative law judges are comparatively well paid and employed full time in judicial duties, the Federal ALJ Code imposes strict restrictions on

⁵ It is not uncommon for federal administrative law judges to be paid twice as much as some state administrative law judges who perform comparable duties.

⁶ 5 U.S.C. §551 *et seq.*

non-judicial duties and activities. Based upon the ABA Code, the Federal ALJ Code assumed *per se* conflicts of interest or bias for federal administrative law judges where none in fact may exist.⁷ It was the belief of the NAALJ Committee, based upon, in part, strong input received from NAALJ members including members of its Board of Governors, that private and constitutional rights of state administrative law judges should be protected and not be unnecessarily infringed. To achieve that purpose, and yet insure the impartiality of the state administrative judiciary, *per se* declarations of conflicts of interest and bias involving private activities were scrutinized by a modified standard of conduct to determine whether such activities would significantly affect the independent professional judgment of the state administrative law judges or the conduct of their official duties.⁸

In this context, the ABA Code was very helpful to the NAALJ Committee. That code, which was substantially revised in 1990, was viewed by the NAALJ Committee as an excellent model for the proper judicial conduct of state administrative law judges. The ABA Code, while primarily designed for comparatively well paid and full-time state and federal trial and appellate judges, contains appropriate exceptions from restrictions on private conduct for part-time judges.⁹ The NAALJ Committee believed that if it was ethical for a part-time judicial branch judge to engage in certain conduct then it probably is ethical for state administrative law judges to engage in the same activities as long as they neither affect the independent professional judgment of the state administrative law judges nor the conduct of their official duties.

It was also the opinion of the NAALJ Committee that if a state jurisdiction desires to place such broad restrictions on private business, political and other activity

⁷ For example, the practice of law or acting as an arbitrator or mediator is prohibited, even if done on one's own time away from work and on matters and for clients that would not come before the administrative law judge.

⁸ See generally Canons 5, 6 and 7 of the State Code. This modified standard of conduct generally governs all extra-judicial duties or activities.

⁹ See ABA MODEL CODE Application of the Code of Judicial Conduct (1990)

that does not substantially affect judicial duties, the state should not do so without providing substantial compensation to justify the sacrifice of the private and constitutional rights of state administrative law judges.

As a consequence, the NAALJ Committee decided to modify the Federal ALJ Code's extra-judicial restrictions using the ABA Code's exceptions for part-time judges and apply them to all state administrative law judges using the modified standard of conduct. This decision solved another substantial problem for the NAALJ Committee. By applying this same standard to all state administrative law judges, the NAALJ Committee avoided the nearly hopeless task of designing the State ALJ Code for every class or type of administrative law judge without the use of confusing exceptions and variables.

Despite its thoroughness, the NAALJ Committee thought the new 1990 ABA Code was too long and in some cases redundant.¹⁰ Also because substantial work was already performed analyzing the Federal ALJ Code, it was decided to be the principal model for the State ALJ Code. However, the State ALJ Code would be substantially updated using the 1990 ABA Code, especially those provisions dealing with sexual discrimination and harassment. A preliminary draft of the State ALJ Code was distributed for comment to the NAALJ Board of Governors and its members at the 1992 annual NAALJ meeting at the National Judicial College in Reno, Nevada.¹¹ Based upon comments received at that meeting, the draft of the State ALJ Code was significantly amended for presentation at the 1993 NAALJ annual meeting in St. Louis, Missouri.

¹⁰ The working copy of the ABA MODEL CODE OF JUDICIAL CONDUCT (1990) used by the NAALJ Committee was 27 pages in length in small type. It was believed that a State ALJ Code of similar length and complexity would inhibit its publication and distribution.

¹¹ Included in the commentators were L. Harold Levinson, professor of law, Vanderbilt University School of Law. Professor Levinson was the co-reporter for the National Conference of Commissioners on Uniform State Laws concerning the 1981 Model State Administrative Procedure Act.

Besides concerns over the unwarranted restrictions on the exercise of private rights, several major ethical interests of state administrative law judges were identified.¹²

These are:

1. Exclusivity of the record.
2. Ex parte communications.
3. Command influence.
4. Separation of functions.
5. Disqualification of the state administrative law judge for bias or other cause.
6. Duty of state administrative law judges to report ethical violations.

One might believe that the principle of record exclusivity, or that the decision of the state administrative law judge must be solely based upon the evidence that has introduced in the proceeding, would not be controversial.¹³ However, off the record communications and investigations are a recurrent problem with administrative adjudication. The problems seem to originate from conflicts between legally stated desires to provide for the independence of judgment of state administrative law judges and the desire of administrative agencies to control its policy and regulate the "quality" performance of its state administrative law judges. Despite averments by state administrative agencies that they are neutral, the NAALJ Committee believed that agencies are typically "interested" in the outcome of its administrative proceedings.¹⁴

¹² Many of these issues were identified through a report prepared January 7, 1991, by Michael Asimow, professor of law, UCLA Law School, on administrative adjudication in California.

¹³ See *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) where the Court said "Finally, the decision maker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing."

¹⁴ Improper attempts to influence administrative decisions include such subtleties as managerial or legislative status inquiries directed to the state administrative law judge or attempts to achieve "consistency" or "uniformity" of decisions without using rule making to control policy determinations.

In Canon 3 A. 4 of the State ALJ Code are strong statements that decisions of state administrative law judges shall be based exclusively on the record and that off the record communications concerning substantive matters affecting a proceeding are prohibited except to the extent authorized by rule or law. The commentary notes that the prohibitions were not intended to preclude consultation by the state administrative law judge with other judges or with *subordinate* personnel whose function it is to aid the judges in carrying out their duties. If other communications concerning the substance of proceedings are desired within state agencies, it was the opinion of the NAALJ Committee that those exceptions should be provided by rule or by law. Otherwise, such unregulated communications to the state administrative law judge are considered unnecessary, dangerous and unethical.

Related to these issues are the questions of separation of functions and command influence. Unlike their judicial branch brethren, state administrative law judges often combine prosecutorial and judicial functions or are managed by those who prosecute the cases before them or who handled the initial investigation. Such a situation demands unfairness and bias because it is unlikely that state administrative law judges would adjudicate a case by rejecting as unpersuasive their own arguments, investigations or initial adjudications, or that of their superiors or their subordinates. At the very least, such conduct indicates a real, and not perceived, appearance of impropriety. Moreover, such conduct would violate the exclusive record principle because such prosecutors and investigators might rely on off the record material which the adversary knows or suspects, but which did not come into evidence at the proceeding. Such an administrative law judge is not an impartial and neutral arbiter.

Canon 3 A. 10 of the State ALJ Code provides that a state administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge or in its pre-adjudicative stage. Canon 3 A. 4 limits communications concerning substantive matters of a proceeding, including those within an agency, to those on the record or

otherwise provided by rule or law.¹⁵ Canon 3 C. 1 requires the disqualification of state administrative law judges where their impartiality may reasonably be questioned, where the state administrative law judges have served as a advocate, adviser or adversary in the matter in controversy or expressed an opinion concerning the particular matter in controversy. Canon 7 attempts to insulate state administrative law judges from improper political influence.

A state administrative law judge who is disqualified by Canon 3 may continue in the proceeding if the judge discloses the basis of the disqualification and the parties agree on the record that the judge may continue in the proceeding.¹⁶ This section differs from a like provision contained in the Federal ALJ Code because it does not require a written agreement but only one contained on the record. A written agreement was viewed by the NAALJ Committee as needlessly cumbersome where the waiver is contained on the record. This procedure conforms more closely with the 1990 ABA Code.

Canon 3 B. of the State ALJ Code requires a state administrative law judge to demand that staff and others subject to the state administrative law judge's control conform to the standards set forth in the State ALJ Code. That Canon also requires that state administrative law judges must take appropriate action when they become aware of unethical or unprofessional conduct including the reporting of such conduct to appropriate authorities and the initiation of disciplinary proceedings.

Besides those otherwise mentioned, the State ALJ Code contains certain other significant differences from the Federal ALJ Code and the ABA Code. In Canon 3 A. 6, the State ALJ Code retains concerns about broadcasting, televising, recording and photographing proceedings that are contained within the Federal ALJ Code but which were deleted in the 1990 ABA Code. If a state jurisdiction desires to allow such conduct, which the NAALJ Committee believes

¹⁵ Again, *ex parte* communication with other judges or subordinate personnel whose function it is to assist the state administrative law judge is not deemed unethical.

¹⁶ See Canon 3 D.

tends to interfere with the administration of justice and unduly influence the decorum, conduct and outcome of proceedings, it should adopt rules and procedures to regulate such conduct. Otherwise, state administrative law judges are advised to prohibit such unregulated activity.

Also consistent with the Federal ALJ Code, but not with the ABA Code, is Canon 4 B. which allows a state administrative law judge to consult or appear before executive and legislative bodies or officials unless otherwise prohibited by law.¹⁷ Of course, such conduct might raise the possibility of disqualification under another provision of the State ALJ Code, but such activity was not thought unethical per se if the conduct did not affect the independence of the state administrative law judge or interfere with the conduct of the judge's duties.

Canon 5 differs from both the Federal ALJ Code and the ABA Code in that it allows a state administrative law judge to engage in limited business and fiduciary activity, including the practice of law, if the activity would neither affect the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties.¹⁸ State administrative law judges are not allowed by the State ALJ Code to practice law before the administrative tribunal in which they serve and are not allowed to represent clients who are litigants before the agency for which the judge serves or are likely to be litigants in the future. State administrative law judges are also allowed in the State ALJ Code, unlike the Federal ALJ and the ABA Code, to act as mediators or arbitrators unless otherwise prohibited by law.¹⁹

¹⁷ The ABA Code allows part-time judges to engage in such activity.

¹⁸ The ABA Code allows part-time judges to engage in such activities.

¹⁹ Many administrative law judges in Illinois, for example, arbitrate, on their own time, cases for the Circuit Court of Cook County in an alternative dispute resolution program. No ethical conflict was identified for this commendable conduct. Part-time judges are not prohibited from such conduct in the ABA Code.

Like the Federal ALJ Code but unlike the ABA Code, the State ALJ Code allows the state administrative law judge to participate in limited political activity.²⁰ Such activity was viewed by the NAALJ Committee to be a constitutional right of every citizen. However, prohibitions against holding partisan offices or being a candidate in a partisan election are retained. Also included is a prohibition that the state administrative law judge shall not solicit funds for or be compelled to pay an involuntary assessment to a political organization or candidate. The state administrative law judge also shall not be compelled to purchase tickets for political dinners and other like functions.

After distribution and a presentation at the 1993 NAALJ annual meeting and some further comments and revisions, *the Model Code of Judicial Conduct for State Administrative Law Judges* was unanimously approved by the NAALJ Board of Governors in November, 1993. It should be especially noted that this model code is intended to be a fluid document, adaptable to the changing demands of administrative justice and the reasoned comments of its critics. Suggestions for the improvement of *the Model Code for State Administrative Law Judges* should be directed to the President of the NAALJ at :

President

National Association of Administrative Law Judges

c/o National Center for the State Courts

300 Newport Avenue

Williamsburg, VA 23187-8798

²⁰ The ABA Code allows far broader political activity for part-time judges than either the Federal ALJ Code or the State ALJ Code.