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JUDGING ETHICS FOR ADMINISTRATIVE LAW JUDGES:
ADOPTION OF A UNIFORM CODE OF JUDICIAL CONDUCT
FOR THE ADMINISTRATIVE JUDICIARY

Patricia E. Salkin*

I. INTRODUCTION

It seems too simple, even to a child. When starting a new game a child asks, "How do you play? What are the rules?" For thousands of administrative law judges (ALJs) who deal with the public on a daily basis, however, the rules governing ethical conduct often are not written down for all to read before the work begins. The executive branch administrative judiciary deserve more from state government. After almost a quarter century of attention to various aspects of ethical considerations for ALJs, including independence, bias and ex parte communications, it is time for all of the states to exercise leadership in adopting statewide uniform codes of ethics for ALJs.

Public servants are routinely held to high standards of ethical conduct as they strive to promote trust and integrity in government. Following on the heels of Watergate, states reexamined their codes of ethics and standards of conduct for government employees. It is now the norm for these codes to address a wide range of issues, including prohibited conflicts of interest, restrictions on giving and receiving of gifts, and post-employment restrictions. As one leading contemporary ethicist notes,

[i]t is of paramount importance that governmental ethics be constantly evaluated and reexamined as long as we view public office as a public trust In addition, [public servants] must find ways to establish clear, *internal* codes of conduct and police themselves for violations of such codes in advance of and not simply in reaction to scandal.¹

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¹ John D. Feerick, *Ethics, Lawyers and the Public Sector: A Historic*

As executive branch employees, ALJs² are covered by the various state ethics laws that govern all public employees, but because of the special nature of the role and power of the administrative judiciary,³ additional ethical and professional considerations are warranted. After all, judges in the constitutional courts are subject to a code of ethics;⁴ yet the decisions of ALJs touch the lives of many more individual citizens on a daily basis.⁵ Furthermore, the conduct of hearings, trials, and other proceedings in a constitutional court often attracts local media attention, shining light on the judicial process and on the performance of constitutional court judges. It is rare that reporters are

Overview, ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS 1, 10 (1999). John D. Feerick is Dean of Fordham Law School and served as Chair of the New York State Commission on Government Integrity.

² For purposes of this article, the term "administrative law judge" is intended to be as broad as possible and includes hearing officer, per diem hearing officer, referee, compensation judge, and other descriptive titles for members of the administrative judiciary. It encompasses all who preside over administrative hearings and who make decisions in a judicial capacity in evidentiary proceedings.

³ "[T]he decisions of ALJs 'permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth.'" Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: An Emerging Framework to Increase "Judicialization" in Pennsylvania*, 5 WIDENER J. PUB. L. 297, 297 (1996) (quoting Victor W. Palmer & Edwin S. Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673, 674 (1984) (quoting message of President John F. Kennedy, H.R. Doc. No. 135, 87th Cong. 1st Sess. (1961)). See also W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 95, 113 (2000). The author cogently points out,

[i]nescapably, administrative law and the administrative state impinge on the public more and more often[.] When driver's licenses, house remodeling, vacations at the beach or the mountains, clean air and water, and cigarettes are all impacted by administrative regulations, the high likelihood is that . . . [the] administrative law judge . . . [is] going to be the person who is conducting that pivotal, first level of judicial review[.]

Id.

⁴ See ABA MODEL CODE OF JUDICIAL CONDUCT (1990).

⁵ While it is true that the decisions of ALJs may be the subject of judicial review, their decisions are only reviewed if challenged. See Gillette, *supra* note 3, at 99.

assigned to cover administrative proceedings; yet, "[t]he state administrative law judge decides questions of fact and law for the resolution of disputes and is a highly visible symbol of government under the rule of law."⁶ For many Americans, appearing before an ALJ may be the citizen's only day in court in pursuit of the requested relief.⁷ Perhaps because the administrative judiciary remains largely invisible,⁸ or because it has escaped without accusations of major public scandal, government has not been called upon to provide guidance for the ethical conduct of these hidden decision-makers. This is no excuse, however, for the failure of states to enact uniform statewide standards of ethics for ALJs.⁹

⁶ See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1999) (adopted by the Board of Governors of the National Association of Administrative Law Judges), available at <http://firms.findlaw.com/IAALJ/memo25.htm> (last visited July 29, 2002).

⁷ Hon. Lori Kyle Endris & Hon. Wayne E. Penrod, *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*, 12 ST. JOHN'S J. LEGAL COMMENT. 125, 126 (1996). In addition to the title of Administrative Law Judge, there are approximately 5,500 state hearing officers. Ronnie A. Yoder & John Hardwicke, *Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 75, 76 (1997). At the federal level, in addition to approximately 1,400 ALJs, there are approximately 2,000 others "with titles such as presiding officer . . . or examiner[.]" Hon. Ann Marshall Young, *Judicial Independence Resolution Passes 279 to 2*, 5 A.B.A. JUD. DIV. REC. 15, 18 (Fall 2001) (citing Judith Resnick, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925, 953-54 nn.101-02 (1999)).

⁸ L. Hope O'Keefe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 591 (1986) (citing Jeffery S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981); Thomas C. Mans, *Selecting the "Hidden Judiciary": How the Merit Process Works in Choosing Administrative Law Judges (Part I)*, 63 JUDICATURE 60 (1979)).

⁹ See Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929 (1990). Lewis points out that ethical standards are necessary for ALJs due to the public perception that ALJs may not be unbiased or free from agency influence since in many states the ALJ works for the hiring/firing agency. *Id.* at 930-31.

During the 2001 Annual Meeting of the American Bar Association (ABA), the ABA's House of Delegates passed Resolution 101B, urging state and local governments to require that members of the administrative judiciary be accountable under provisions similar to the ABA Model Code of Judicial Conduct.¹⁰ The report accompanying the resolution revealed the significant problem that "practitioners and experts in administrative law do not all agree on whether and to what degree there should be exceptions to provisions of the ABA Model Code in various contexts."¹¹ Speaking in support of the resolution, Judge Ed Felter, immediate Past Chair of the National Conference of Administrative Law Judges, stated,

[t]his resolution should greatly serve the public interest in fair hearings in the administrative adjudication arena, with decisions based solely on the facts and relevant regulatory and other law, without fear or favor. Since it is not limited to proceedings strictly governed by administrative procedure

¹⁰ Many Bar organizations, including key sponsorship from the ABA Conference on Administrative Law Judges and the ABA Judicial Division, supported the resolution, which was "adopted by an overwhelming majority of 279 to 2[.]" Steve Rissberger, *ABA Resolution Favors Decisional Independence, Ethical Standards*, OFF THE RECORD (Newsletter of the Or. Ass'n of Admin. Law Judges), Winter 2001, available at <http://www.oalj.org/news.htm> (last visited July 29, 2002). In addition, the Standing Committee on Judicial Independence, the Section of Administrative and Regulatory Practice, the Dispute Resolution Section, the Real Property, Probate and Trust Law Section, the Government and Public Sector Lawyer's Division, and the Senior Lawyer's Division co-sponsored the resolution. See Young, *supra* note 7, at 15. The resolution was also sponsored by the Colorado, Denver, New York State, and Tennessee Bar Associations. *Id.*

¹¹ Hon. Ed Felter, *Resolution 101B: Concerning the Public's Right to an Independent Administrative Judiciary*, 5 A.B.A. JUD. DIV. REC. 1, 21 (Fall 2001). In fact, the report pointed out,

[t]he resolution is not intended to address non-disciplinary actions such as reductions in force or the abolition of an agency, nor would it prohibit an action to remove and place on administrative leave a member of the administrative judiciary against whom serious allegations have been made, pending a hearing. *Nor should the resolution be interpreted to advocate in any way that members of the administrative judiciary should not follow and apply agency policy that has been appropriately adopted and communicated to the public.*

Id. (emphasis added).

acts, it has the potential for addressing areas that have not previously been given the attention they deserve. The public deserves fair and impartial hearings no matter who conducts them, and this resolution better ensures that this will be a reality.¹²

Part II of this article provides a national overview of the current ethical framework within which ALJs and hearing officers operate. This part examines how the adoption and enforcement of codes of ethics work in central panel states, as well as in states without central panels. Part II also explores codes of ethical conduct that are statewide in application, as well as codes that are applicable to specific agencies. Part III discusses the various model codes of ethics/conduct for ALJs that have been endorsed or adopted by national organizations. Part IV examines why many states have failed to address ALJ ethics. In addition, Part IV proposes alternative frameworks for state governments to consider so that states can more effectively address the administration of a specific statewide code of ethics for ALJs.

II. NATIONAL OVERVIEW

A. The State of Ethics for Administrative Law Judges

Unlike constitutional court judges, who function within the judicial branch of government, ALJs serve in both quasi-legislative and quasi-judicial capacities. A code of ethics must take the dual nature of the job into consideration. Stringent application of the Code of Judicial Conduct (CJC) to ALJs could cause undue hardship for a judiciary that typically earns lower salaries than their constitutional court brethren.¹³ Additionally, certain provisions of the CJC, such as

¹² Young, *supra* note 7, at 18. The support amassed for this resolution was an impressive array of ABA leadership that included: "ABA Past President Jerry Shestack, ABA President-Elect A.P. Carlton, Jr., Administrative Law and Regulatory Delegate Ron Cass, Senior Lawyer Delegate Ted Kolb, Tort and Insurance Practice Section Delegate Hugh Reynolds, Section of Dispute Resolution Delegate Jose Feliciano, and, Board of Governors member John Vittone." Felter, *supra* note 11, at 20.

¹³ For example, prohibitions on outside employment are typically included in state CJs.

the prohibition on holding another elective office, could be unduly restrictive for ALJs.¹⁴ Furthermore, model codes of ethics that have been promulgated specifically for ALJs encourage the use of mediation and arbitration, which may be prohibited under some CJs.

In 1983, the United States General Services Administration became the first federal agency to adopt a code of ethics for ALJs.¹⁵ Analysis of the administration of ethics issues and procedures for ALJs has presented challenges, as approximately half of the states continue to maintain ALJs within individual state agencies rather than merging these individuals into a central office of hearings or a central panel.¹⁶ As ALJs remain scattered across various agencies, unique dilemmas arise with respect to governing codes of ethics and determining the appropriate government agency having oversight or jurisdiction for rendering ethics opinions to ALJs to ensure independence and establish precedence.¹⁷ Although, as time passes,

¹⁴ While it makes sense that a trial court judge ought not hold another public office, since such office could conflict with potential court duties, it does not follow that all ALJs in all agencies should be prohibited from seeking to serve on the local school board, or the local planning and zoning board, to name some examples.

¹⁵ Deborah Jeon, *First Conduct Code Adopted for Administrative Judges*, LEGAL TIMES, August 8, 1983, at 3. Adopted to ensure integrity, impartiality, and fairness of administrative law judges, the code was similar to the ABA's Code of Judicial Conduct. *Id.*

¹⁶ This article does not address the arguments that favor a central panel or centralized office of administrative hearings. Rather, it focuses on the need for a clear code of ethics and professionalism for ALJs in states where no such centralized office exists.

¹⁷ Professor Harold Levinson explains that with respect to codes of judicial conduct and whether they apply to ALJs,

[t]he answer is, in some states they do, in other states they do not. In most states, a code of judicial conduct, based more or less on the ABA model code, is promulgated by the state supreme court, for the judicial branch of government. In most states, the supreme court has no authority to impose a code of judicial conduct on administrative judges. In some states, the legislature has done so by reference to the judicial code. In other states, the director of the central panel has done so, by administrative regulation. And some agency regulations themselves pick up the code of judicial conduct.

Yoder & Hardwicke, *supra* note 7, at 87-88.

more states are adopting the central panel approach,¹⁸ the political will in significant states, such as New York and Pennsylvania, has decided that this framework has not yet presented a "good fit."¹⁹

A number of states made the same code of judicial conduct applicable to judicial branch judges and members of the administrative judiciary.²⁰ Upon adoption of the Code by the Minnesota Legislature in 2000, the Chief ALJ remarked, "[t]his is an important change. It means the public can be confident they will receive a fair and impartial hearing whether they appear before a judge in the judicial branch or a judge serving in the executive branch of government."²¹ The Chief

¹⁸ Central panel states include: Arizona (1995), California (1945), Colorado (1976), Florida (1974), Georgia (1994), Hawaii (1990), Iowa (1986), Kentucky (1994), Louisiana (1996), Maryland (1989), Massachusetts (1974), Minnesota (1975), Missouri (1978), New Jersey (1979), North Carolina (1988), North Dakota (1991), Oregon (1999), South Carolina (1993), South Dakota (1993), Tennessee (1974), Texas (1991), Washington (1981), Wisconsin (1983), Wyoming (1992). See Endris & Penrod, *supra* note 7, at 128 n. 14.

¹⁹ For a discussion of the need for a central panel in Pennsylvania, see Ruth, *supra* note 3, at 332-34; Jeffrey G. Cokin & Jonathan Mallamud, *Hearing Officers in Pennsylvania: Recommendation for an Independent Central Office*, 15 DUQ. L. REV. 605, 626 (1977).

²⁰ The following three states are examples: Colorado, Georgia, and Minnesota. See Report, *Resolution 101B*, 5 A.B.A. JUD. DIV. REC. 20, 21 (Fall 2001).

²¹ George A. Beck, *Stronger Ethics Standards to Govern Minn. ALJs*, available at <http://www.naalj.org/News%20articles/Ethics%20MN.htm> (last visited July 29, 2002) (quoting Chief ALJ Ken Nickolai). The Chief Judge further stated, "While these limitations will require our judges to make adjustments in their personal matters, having the legislature apply the Code is also an important guarantee of our decisional independence of the administrative judiciary. . . . While the Code places limits on us, it is also a shield[,] which can safeguard decisional independence of the administrative judiciary." *Id.* The effective date of the Judicial Code was set for December 31, 2000 in order to give ALJs "time to adjust their personal lives to conform to Code requirements." *Id.* Among the changes are these: ALJs were forced to "end private law or mediation practices" (under the State Ethics law this outside employment was permitted), ALJs have to refrain from "direct fund raising on behalf of social or charitable organizations to which they may belong[.]" ALJs are required to "forego any partisan political activity on behalf of candidates or parties[.]" and ALJs are now "restricted from participating on committees or groups considering public policy issues." *Id.*

ALJ of the Central Office of Administrative Hearings is responsible for applying the Code of Judicial Conduct to ALJs.²²

B. Codes of Conduct From the Central Panel States

Adopting and enforcing a code of ethics for ALJs is easier in states where there is a central panel. This is because the central hearing office is led by a Chief ALJ, who is typically vested with the authority to adopt rules and regulations governing the conduct of ALJs (although in many central panel states the state legislature has mandated applicability of a code of ethics for ALJs), charged with conducting ethics training, and perhaps most important, has authority for the enforcement of the applicable ethics laws. An identifiable independent "ethics officer," with jurisdiction for interpretation of ethical rules and regulations that govern the conduct of ALJs, is often a missing piece of the ethics puzzle for ALJs.

1. Codes of Ethics Drafted Specifically for ALJs

In 1998, the California Legislature adopted the recommendation of the Law Revision Commission to adopt a Code of Judicial Conduct specifically applicable to ALJs in the state.²³ The Commission estimated that "at least 95% of the state's [ALJs] and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative Hearings."²⁴

The North Dakota Office of Administrative Hearings adopted a Code of Judicial Conduct for Administrative Law Judges in 1999.²⁵

²² *Id.*

²³ A.B. 2164, 1998 Leg., Reg. Sess. (Cal. 1998), *codified at* CAL. GOV'T CODE §§ 11475-11475.70 (West Supp. 2002). The law also clarifies that the workers' compensation referees, who were subject to the California Code of Judicial Conduct adopted by the Conference of California Judges, would now be subject to the Code of Judicial Ethics adopted by the California Supreme Court. *Id.*

²⁴ *Ethical Standards for Administrative Law Judges*, 24 CAL. L. REVISION COMM'N REPORTS 335, 339 n.2 (1996).

²⁵ N.D. Office of Administrative Hearings, CODE OF JUDICIAL CONDUCT FOR ADMIN. LAW JUDGES §§ 1-10 (1999), *available at*

The code is the adopted policy of the Office of Administrative Hearings and is interpreted by the director of the office or his/her designee. While violations of the code may result in disciplinary action or termination, the code is not intended as a basis for civil liability or criminal prosecution.²⁶ When the Oregon Central Panel became operational in January 2000,²⁷ the panel began to work closely with the Oregon Association of Administrative Law Judges to develop and adopt a common code of ethics.²⁸ While the Oregon Workers' Compensation Board's Hearing Section and the Hearing Officer Panel adopted codes of ethics that are based upon the ABA Model Code of Judicial Conduct, the code adopted by the Panel "is considered 'aspirational,' and not fully binding . . . [upon] ALJs, due to possible conflicts between some provisions of the ethics code and union contracts."²⁹ In North Carolina, certain articles of the CJC were adopted for ALJs based upon the Model CJC for State Administrative Law Judges, which was adopted by the National Association of Administrative Law Judges.³⁰

2. States That Have Opted to Apply the Code of Judicial Conduct to ALJs

In Minnesota, ALJs and workers' compensation judges are subject to the Code of Judicial Conduct.³¹ The Chief ALJ is vested

<http://www.state.nd.us/oah/Ethics.htm> (last visited July 29, 2002).

²⁶ *Id.* § 2A.

²⁷ H.B. 2525, 70th Leg., 1999 Reg. Sess. (Or. 2000).

²⁸ Thomas E. Ewing, *Oregon's New Central Panel Takes Shape*, http://www.naalj.org/News%20articles/ornew_central.htm (last visited Jan. 19, 2002). The Act creating the central panel directs the chief hearing officer, working in coordination with the attorney general, to establish "an ethical code for persons serving as hearing officers on the panel" among other things. *See* Or. H.B. 2525, at § 19(a).

²⁹ Rissberger, *supra* note 10.

³⁰ *See* N.C. GEN. STAT. § 7A-754 (1999). According to Chief Judge Mann, there is very little procedure articulated to provide guidance, and in November 2001 the Office is dealing with their first ethics issue. Telephone interview with Judge Julian Mann, III, Director and Chief Administrative Law Judge, Office of Administrative Hearings, North Carolina.

³¹ MINN. STAT. § 14.48(3)(d) (West Supp.2002). The statute also provides

with the responsibility and authority to apply the provisions of the code to those covered.³²

Most recently, in May 2001, Governor Owens issued an executive order designed to strengthen Colorado's administrative justice system by, among other things, making all ALJs subject to the Colorado Code of Judicial Conduct.³³ The executive order was designed "[t]o ensure the decisional independence of administrative adjudicative personnel and to protect the rights of Colorado citizens[.]"³⁴ Regardless of whether the administrative adjudicative personnel is housed within the Division of Administrative Hearings, the executive order further directs officials of all affected agencies to cooperate in "ensur[ing] that the standards of conduct are enforced with respect to both the administrative adjudicative personnel and personnel responsible for the development and implementation of substantive agency policies."³⁵ Effective July 1, 2001, the Colorado CJC is applicable to central panel ALJs.³⁶

ALJs in the Iowa Administrative Hearings Division are required to follow a code of administrative conduct "similar in function and substantially equivalent to the Iowa Code of [J]udicial [C]onduct[.]"³⁷ In Maine, the state model ABA CJC was not formally adopted by the Division of Administrative Hearings, but it is used for guidance.³⁸

The State Office of Administrative Hearings in Georgia listed as a program goal for Fiscal Year 1999 the desire "[t]o administer the hearing process in accordance with all requirements of the Georgia Code of Judicial Conduct[.]"³⁹ The Kentucky Association of

that "[o]nly [ALJs] serving as temporary judges under a written contract are considered to be part-time judges for purposes of the code." *Id.*

³² *Id.*

³³ Exec. Order No. D 008 01 (Colo. May 29, 2001). In addition, the order directs the Division of Administrative Hearings to provide training on the Code and to develop similar standards of conduct for hearing officers and other administrative adjudicative personnel. *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ COLO. REV. STAT. ANN. § 24-30-1003(4)(a) (West 2001).

³⁷ IOWA CODE ANN. § 10A.801 (7)(d) (West 2001).

³⁸ Interview with Allan A. Toubman, Chief Administrative Hearing Officer, Division of Administrative Hearings (Nov. 13, 2001).

³⁹ Office of State Administrative Hearings, *Agency Program - Fiscal Year*

Administrative Adjudicators has invited comments on a proposed Code of Judicial Conduct for Hearing Officers.⁴⁰

In 1998, the Judicial Council of South Carolina asked Professor James F. Flanagan to review the State's Administrative Law Judge Division statute to examine, among other things, the enforcement of the Code of Judicial Conduct for ALJs.⁴¹ The South Carolina legislature made ALJs subject to the Code of Judicial Conduct⁴² and granted jurisdiction of enforcement to the State Ethics Commission, the same body charged with enforcing the state's Ethics Reform Act for all public officials, including ALJs.⁴³ Although not yet confronted with a specific instances, the Commission suggested "that in the event of a conflict between the Code of Judicial Conduct and the Ethics Reform Act, ALJs should adhere to the more stringent standard."⁴⁴ The Report to the Judicial Council concluded with a summary of enforcement issues that centered on how to implement the Judicial Code of Conduct with respect to ALJs. Specifically, the report noted that since ALJs and circuit court judges are subject to the same code of judicial conduct, but circuit court judges are not subject to the State Ethics Act (as the judicial branch is specifically exempted), logic

1999, available at <http://www.ganet.org/osah/agencyprog.html> (on file at the WIDENER JOURNAL OF PUBLIC LAW).

⁴⁰ Kentucky Association of Administrative Adjudicators, *Proposed Code of Judicial Conduct for Hearing Officers*, available at <http://www.kyaaa.org/CodeforHOs.htm> (last visited July 29, 2002). The Code "is based on the Kentucky Code of Judicial Conduct" and the preamble states that the proposed Code "should be interpreted when appropriate in accordance with the opinions and commentary for the Kentucky Code of Judicial Conduct." *Id.*

⁴¹ James F. Flanagan, *Report to the Judicial Council on the Administrative Law Judge Statute*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 371, 372 (1998).

⁴² S.C. CODE ANN. § 1-23-560 (Law. Co-op. 2001).

⁴³ Notwithstanding that the law creating the Administrative Law Judge Division requires that ALJs be subject to the Code of Judicial Conduct. *See* S.C. CODE ANN. § 1-23-560 (Law. Co-op. 2001). The General Assembly did not intend for ALJs to be members of the judicial branch of government, and therefore ALJs "are 'public officials' under the Ethics Reform Act of 1991 and are subject to the Act's requirements." South Carolina State Ethics Commission, *Applicability of Ethics Reform Act to Administrative Law Judges*, SEC A095-007 (Jan. 18, 1995), available at <http://www.state.sc.us/ethics/ao95-007.htm> (last visited July 29, 2002).

⁴⁴ *Id.* SEC A095-007.

would dictate that if the two types of judges are treated the same for purposes of the Code of Judicial Conduct, then ALJs, like the circuit court judges, "should not be subject to two sets of rules for the same conduct."⁴⁵ Furthermore, the report recommended that the issuance of sanctions for violations of the Code of Judicial Conduct be reviewed, because sanctions under the Ethics Act, "applicable to ALJs for violations of the Judicial Code, [are] different from the sanctions" for Code of Judicial Conduct violations for judicial branch judges.⁴⁶

C. Other Adopted Codes

Some states, such as Illinois, while providing guidance to all state agencies, require the individual agencies to "adopt rules establishing procedures for contested case hearings."⁴⁷ While containing no specific code of ethics or conduct, the Illinois Administrative Procedure Act states that the agencies should provide rules for disqualification of an ALJ for bias or conflict of interest and minimum rules for addressing ex parte communications.⁴⁸ In Missouri, the chief ALJ in each agency is responsible for protecting the decisional independence of each ALJ, as well as establishing and implementing standards and specialized training programs for ALJs.⁴⁹

Many agencies responsible for handling workers' compensation cases have, either by statute or through agency rulemaking, adopted codes of ethics and professionalism for their ALJs.⁵⁰ In 2001, the

⁴⁵ Flanagan, *supra* note 41, at 394-95.

⁴⁶ *Id.* at 395.

⁴⁷ 5 ILL. COMP. STAT. 100/10-5 (1993).

⁴⁸ *Id.* at 100/10-30, 100/10-60. It is common for state administrative procedure acts to briefly address the topic of ex parte communications. *See, e.g.*, NEB. REV. STAT. ANN. § 84-901(4) (Michie 2000).

⁴⁹ S.B. 270, 91st Gen. Assem., 1st Reg. Sess. (Mo. 2001), available at <http://www.senate.state.mo.us/01info/billtext/tat/SB270.htm> (last visited Jan. 22, 2002).

⁵⁰ *See, e.g.*, N.H. REV. STAT. ANN. § 281-A:42-b (1999). In New Hampshire, the statute provides that "[t]he commissioner shall . . . develop a code of ethics for hearings and hearing officers[.]" *Id.* In Missouri, the Workers' Compensation Board adopted a Code of Judicial Conduct for Workers' Compensation Administrative Law Judges and Legal Advisors entitled: "Performance Standards for Administrative Law Judges and Legal Advisors." MO. CODE REGS. ANN. tit.

Massachusetts General Assembly failed to enact a legislative proposal requiring that ALJs in workers' compensation cases be subject to the Code of Judicial Conduct.⁵¹

In a number of states judicial codes of conduct are applied to ALJs by caselaw or opinion of the bar associations or other formal grievance bodies.⁵² However, codes of judicial conduct have not been held automatically applicable to ALJs in Connecticut,⁵³ Michigan,⁵⁴ or New York.⁵⁵ In Pennsylvania, the Public Utilities Commission, by regulation, requires ALJs to comply with the commission's Code of Ethics, as well as with other relevant codes of conduct.⁵⁶ The

8, § 50-2.060 (2001). In California, the Workers' Compensation referees must adhere to the California Code of Judicial Conduct. CAL. LAB. CODE § 123.6 (West Supp. 2002). In New York the Workers' Compensation Board is the only state agency that has adopted a code of ethics specific to agency ALJs. N.Y. PUB. OFF. LAW § 74 (Consol. 2001).

⁵¹ H.B. 2648, 182d Gen. Ct., Reg. Sess. (Mass. 2001).

⁵² See, e.g., *James v. James*, 656 N.E.2d 399, 403 (Ohio Ct. App. 1995) (citing *In re Reiner*, 598 N.E.2d 768, 772 (Ohio Ct. App. 1991) (holding "[r]eferees who perform judicial functions are bound to adhere to the Judicial Code of Conduct")).

⁵³ See *Bostrom v. Comm'r of Motor Vehicles*, No. CV 960564639, 1997 Conn. Super. LEXIS 1153, at *3 (Conn. Super. Ct. 1997) ("[t]he canons of judicial ethics for disqualifying a judge for bias or prejudgment do not apply to administrative hearing officers").

⁵⁴ Mich. Comm'n. on Prof'l and Judicial Ethics, Informal Op. CI-351 (1988) (concluding that the applicability of the CJC to ALJs depends upon the facts in each situation).

⁵⁵ In 1996, the New York Advisory Committee on Judicial Ethics said that it was not authorized to answer a question about an ALJ, because the agency in question had not adopted the Code of Judicial Conduct. N.Y. Advisory Comm'n on Judicial Ethics, Formal Op. 96-47 (1996). A 1988 opinion of the State Bar Association Committee on Professional Ethics also held that the Code of Judicial Conduct should not apply to ALJs. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 594 (1988). However, there are other opinions in the State that concluded that the Code of Judicial Conduct did apply to ALJs. For example, a 1991 opinion of the Bar Association's Committee on Professional Ethics stated that an ALJ is subject to Canon 3(c)(1) of the Code of Judicial Conduct. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 617 (1991). One court determined that it "appears" as though the Code of Judicial Conduct applies to ALJs. *Crosson v. Newman*, 576 N.Y.S.2d 950, 951 (N.Y. App. Div. 1991).

⁵⁶ See Pa. Public Util. Comm'n, Office of Administrative Law Judge, Operating Procedures Manual, § 1.2, see also 66 PA. CONS. STAT. § 319 (1999).

Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility stated on a number of occasions that it is not clear whether the Code of Judicial Conduct (CJC) applies to ALJs or referees.⁵⁷ The Committee noted, however, that "at least one Pennsylvania case decided that [ALJs] are not governed by the [CJC],"⁵⁸ and with respect to the ALJs at the Pennsylvania Public Utility Commission, an opinion of the Bar Association's Ethics Committee stated that the CJC is applicable by analogy rather than directly.⁵⁹ In some states, the ALJ is left with the responsibility of maintaining his or her own independence and professionalism.⁶⁰

D. Enforcement of a Code of Ethics for ALJs

A state commission on judicial conduct is typically charged with the responsibility of investigating allegations of judicial misconduct and imposing discipline upon judges. These commissions, created by state constitution or statute, have jurisdiction over constitutional court

⁵⁷ After reviewing several ethics opinions on the subject, a Committee member concluded that "although the matter was not a settled one, there was sufficient authority applying the Code of Judicial Conduct directly or by analogy. . . as governing the conduct of workers' compensation referees. I concur[.]" Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 92-43 (1992). "We believe our system of justice requires that all decision makers operate under principles of neutrality and integrity such as those found [in] the CJC. Thus, if a referee is the equivalent of a trial judge, then the CJC should apply directly, if not by analogy." Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 89-86 (1989). *See also*, Pa. Bar Ass'n Legal Ethics Comm'n, Informal Op. 88-138 (1989) (part-time domestic relations special masters and hearing officers are subject to the CJC); Philadelphia Bar Ass'n. Prof'l Guidance Comm., Formal Op. 87-20 (1987) (CJC would apply to part-time member of the Workers' Compensation Appeal Board).

⁵⁸ Pa. Bar Ass'n. Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 89-86 (1989).

⁵⁹ *Id.*

⁶⁰ For example, the Nevada Department of Motor Vehicles Office of Administrative Hearings explains to the public, "[a]lthough the Office of Administrative Hearings is part of the Department, the judges have a legal and ethical responsibility to maintain their independence and professionalism." *See* Nev. Dep't of Motor Vehicles, Office of Admin. Hearings, at <http://nevadadmvt.state.nv.us/admlaw.htm> (last visited July 29, 2002).

judges in the judicial branch of government, but not over ALJs in the executive branch. While some commissions make this authority clear upfront,⁶¹ others do not. Although the New York State Commission on Judicial Conduct does not have jurisdiction over non-judges, which by definition includes ALJs, the commission will review complaints filed against non-judges to determine whether they should be referred to another agency.⁶² In Kentucky, the Judicial Ethics Committee declined to apply the Code of Judicial Conduct to a hearing examiner, since the examiner was not employed in the judicial branch of government.⁶³

III. MODEL CODES

A variety of model codes of ethics for ALJs are now available, and states can select relevant approaches as they craft a code that will fit the unique needs of the systems in each state.⁶⁴ Regardless of whether a state chooses to adopt a central panel approach for administrative hearings, at a minimum, the public deserves to know that ALJs and hearing officers are bound to follow an articulated code

⁶¹ The Tex. State Commission on Judicial Conduct explains, "[i]t does not include administrative hearing officers for state agencies or the State Office of Administrative Hearings[.]" Tex. State Comm. on Judicial Conduct, Overview, at <http://www.courts.state.tx.us/links/scojc/Overview.htm> (last visited Jan. 18, 2002).

⁶² N.Y. State Comm. on Judicial Conduct, 2001 Annual Report, available at <http://www.scjc.state.ny.us/annual.htm> (last visited July 29, 2002).

⁶³ Ky. Bar Ass'n Judicial Ethics Comm., Advisory Ethics Op. KBA E-398 (1997).

⁶⁴ *E.g.*, ABA MODEL CODE OF JUDICIAL CONDUCT (1990) (amended 1997, 1999); MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES (Nat'l Conference of Admin. Law Judges, 1989); MODEL CODE OF JUDICIAL CONDUCT FOR ADMIN. LAW JUDGES OF STATE CENT. PANELS (N.J. Office of Admin. Hearings, 1991); ABA MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Conference of Admin. Law Judges 1995); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999), available at <http://firms.findlaw.com/IAALJ/memo25.htm> (last visited Oct. 21, 2001). One scholar notes, "[i]t is common knowledge that there is no one-model-fits-all procedure in administrative adjudication." K. G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 118 (1995). So too is there no one model for an appropriate code of conduct, ethics, or professionalism for ALJs.

of conduct and professionalism. Furthermore, ALJs "must expect to be held to the highest professional and ethical standards by the executive branch, the courts, their peers, and the public."⁶⁵

Whether it is appropriate to apply the same code of judicial conduct to constitutional court judges, ALJs, and hearing officers is a matter of considerable debate.⁶⁶ One argument advanced against the application of the code of judicial conduct considers that, since ALJs may be viewed as

nothing more than employees whose job it is to help the agency make decisions with respect to individual cases arising under statutes and regulations over which the agency has charge, either by making decisions on the agency's behalf or by gathering and reporting facts and recommending a result to those who make the agency's decisions [Their] function is not much, if any, more judicial than state employees who administer driving tests.⁶⁷

This perspective leads to the conclusion "that a consideration of the need for administrative law judge independence does not take on the same gravity as that for judicial independence in the courts."⁶⁸ On the other hand, state trends indicate that ALJ qualifications have been systematically upgraded and that as the stature of ALJs has increased.

⁶⁵ R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. LAW JUDGES 1, 12 (1999). See also *Ethical Standards for Administrative Law Judges*, 26 CAL L. REVISION COMM'N REPORTS 335 (1996). The recommendation states, "[i]t is important for the integrity of the state's administrative adjudication system that its administrative law judges adhere to high ethical standards of conduct." *Id.* at 339.

⁶⁶ See, e.g., Pillai, *supra* note 64. The author points out that to fully answer the question of whether the administrative adjudication process is akin to the judicial process in terms of functional comparability it depends upon the characteristics of the model of a particular administrative adjudicative function. *Id.* at 118. The author also remarks that "[n]aturally, the ALJs would like to think of themselves as judges or the functional equivalent of federal judges." *Id.* at 123.

⁶⁷ Harders, *supra* note 65, at 4.

⁶⁸ *Id.* at 5 (Noting that "[t]he different place and overall role of administrative adjudicators from that of judges in the judicial branch are what make the contemplation of their independence and accountability a thornier issue").

ALJs are now being perceived as more "comparable in function to trial judges[.]"⁶⁹

The California Law Revision Commission conducted a comprehensive analysis of the applicability of the California Code of Judicial Ethics to ALJs and determined that, while the code should generally apply to ALJs, there were a number of provisions of the code that would be inappropriate if applied to ALJs.⁷⁰

A. The Model Codes of Conduct for ALJs

The Model Codes of Conduct for ALJs endorsed by the American Bar Association's National Council on ALJs (NCALJ),⁷¹ the National

⁶⁹ Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICK. L. REV. 929, 946 (1990).

⁷⁰ *Ethical Standards for Administrative Law Judges*, 26 CAL. LAW REVISION COMM'N REPORTS 335 (1996). The commission identified the following six provisions in the California Code of Judicial Ethics that should not be applied to ALJs:

- Canon 3B(7) provides rules for ex parte communications; the Administrative Procedure Act already covers the matter in some detail.
- Canon 3B(10) relates to juries, which are not used in administrative adjudication.
- Canon 4C limits the right to engage in governmental, civic, and charitable activities; however, administrative law judges are executive branch rather than judicial branch employees, and the range of issues that may come before them is narrowly circumscribed.
- Canon 4E(1), 4F, and 4G prohibit fiduciary activities, private employment in alternative dispute resolution or the practice of law; these matters are the subject of each employing agency's incompatible activity rules adopted pursuant to Government Code Section 19990.
- Canons 5A-5D contain specific restrictions on political activities of judges that have limited relevance to administrative law judges; Canon 5's general injunction to 'avoid political activity that may create the appearance of political bias or impropriety' is sufficient.
- Canon 6 concerns enforcement of and compliance with the code of ethics; adaptation to executive branch as opposed to judicial branch implementation and enforcement is required.

Id. at 341-42 (footnote omitted).

⁷¹ MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Conference of Admin. Law Judges, 1995).

Association for Administrative Law Judges (NAALJ),⁷² and the State Central Panel Directors (SCP),⁷³ while very similar, have a few notable differences, which focus more on the desire to emphasize certain concepts and less on major substantive discrepancies. Both the NCALJ and SCP Model Codes offer five canons, while the NAALJ provides eight canons, yet key concepts contained in the additional NAALJ canons are found within the details and commentary of the other canons.⁷⁴

⁷² MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999), *available at* <http://www.firms.findlaw.com/IAALJ/memo25.htm> (last visited July 29, 2002).

⁷³ MODEL CODE OF JUDICIAL CONDUCT FOR ADMIN. LAW JUDGES OF STATE CENT. PANELS (N.J. Office of Administrative Hearings, 1991).

⁷⁴ See PROPOSED CODE OF JUDICIAL CONDUCT FOR HEARING OFFICERS (KY. ASS'N OF ADMIN. ADJUDICATORS, 2000), *available at* <http://www.kyaaa.org/CodeforHOs.htm> (last visited July 29, 2002); *Cf.* MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999), *available at* <http://www.firms.findlaw.com/IAALJ/memo25.htm> (last visited Jan. 21, 2002). The following five canons are common to the NCALJ and SCP Model Codes:

1. A [state ALJ] hearing officer shall uphold the integrity and independence of the administrative judiciary.
2. A [state ALJ] hearing officer shall avoid impropriety and the appearance of impropriety in all . . . activities.
3. A [state ALJ] hearing officer shall perform the duties of office impartially and diligently.
4. A [state ALJ] hearing officer shall so conduct [regulate] the [judge's] hearing officer's extra-judicial activities as to minimize the risk of conflict with judicial obligation [duties].
5. A [state ALJ] hearing officer shall refrain from inappropriate political activity.

Proposed Code of Judicial Conduct for Hearing Officers, (Ky. Ass'n of Admin. Adjudicators, 2000), *available at* <http://www.kyaaa.org/CodeforHOs.htm> (last visited July 29, 2002); *cf.* MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999), *available at* <http://www.firms.findlaw.com/IAALJ/memo25.htm> (last visited July 29, 2002). The NAALJ code does not provide a canon for the last enumerated item but does offer the following additional canons:

1. Canon 4: A State [ALJ] May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice[.]
2. Canon 6: A State [ALJ] Shall Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities[.]

The NAALJ Code elevates the importance of the ability of ALJs to engage in activities to improve the law, the legal system, and the administration of justice by providing affirmative authority for such actions in the form of a canon.⁷⁵ Both the NCALJ Model Code and the code endorsed by the State Central Panels allow for such conduct but, in commentary to the canon, state ALJs are required to regulate extraterritorial activities to minimize the risk of conflict with judicial activities.⁷⁶

Another difference appears in the area of compensation for extra-judicial activities. The NAALJ model code offers a canon directing ALJs to limit compensation received for quasi-judicial and extra-judicial activities, and the Model Code specifically authorizes the receipt of reasonable "outside" compensation and actual cost reimbursement.⁷⁷ This concept, while not rising to the level of a canon, is contained in the NCALJ Model Code under Canon 4.⁷⁸

3. Canon 8: Compliance with the Code of Judicial Conduct[.]

MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999).

⁷⁵ See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999), *available at* <http://www.firm.findlaw.com/IAALJ/memo25.htm> (last visited July 29, 2002). Canon 4 is entitled "A State Administrative Law Judge May Engage in Activities to Improve the Law, the Legal System and the Administration of Justice." *Id.*

⁷⁶ *Id.* Canon 5 of this model code is entitled "A State Administrative Law Judge Shall Regulate The Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties." *Id.* Canon 4A addresses vocational activities and provides that "[a] state administrative law judge . . . may . . . [s]peak, write, lecture, teach and participate in other [extra-judicial] activities concerning the law, the legal system[,] and the administration of justice." *Id.* Canon 4A. The language in the State Central Panel Code is identical. MODEL CODE OF JUDICIAL CONDUCT FOR ADMIN. LAW JUDGES OF STATE CENT. PANELS (N.J. Office of Administrative Hearings, 1991).

⁷⁷ See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Ass'n of Admin. Law Judges, 1999) Canon 6, *available at* <http://www.firm.findlaw.com/IAAJ/memo25.htm> (last visited July. 29, 2002).

⁷⁸ *Id.* Canon 6, entitled "A State [ALJ] Shall Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities," provides that, "[a] state administrative law judge may receive compensation and reimbursement of expenses for . . . extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the . . . judge's [performance of judicial duties] or otherwise give the appearance of

In a divergence from the ABA Model Code of Judicial Conduct for federal ALJs, both the NAALJ and NCALJ model codes permit ALJs, within limitations, to engage in the practice of law and to serve as mediators or arbitrators.⁷⁹ The NCALJ Model Code simply states that "[a] state administrative law judge may act as an arbitrator or mediator provided there is no conflict with the judge's official duties."⁸⁰ The NAALJ Model Code is more limiting in scope and states that an ALJ "may act as an arbitrator or mediator if such activity does not affect the independent professional judgment of the administrative law judge or the conduct of his official duties."⁸¹ The NAALJ provision further cautions that an ALJ should not serve in these capacities over a matter in which he or she may later preside.⁸² With respect to the practice of law, both codes cite lower compensation rates for state ALJs than for their federal counterparts as a reason for permitting state ALJs to engage in the outside practice of law.⁸³ In addition, both codes indicate that the model codes are

impropriety[.]" *Id.*

⁷⁹ See ABA MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES (1989); MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 4F and 4G (Nat'l Conference of Admin. Law Judges, 1995) at Canon 4 F and G; MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 5F and G (Nat'l Ass'n of Admin. Law Judges, 1999).

⁸⁰ MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 4F (Nat'l Conference of Admin. Law Judges, 1995).

⁸¹ MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 5 F (Nat'l Ass'n of Admin. Law Judges, 1999).

⁸² *Id.*

⁸³ Both codes provide:

A state administrative law judge may practice law if such activity would neither affect the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties. An attorney who is a state administrative law judge shall not accept the representation of a client who is a litigant before the tribunal [or agency] for whom the state administrative law judge serves or if there is a likelihood that [the client] will appear before [him or her]. A state administrative law judge shall not practice law before the administrative tribunal [or agency] for which the judge serves.

See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 5G (Nat'l Ass'n of Admin. Law Judges, 1999). Almost identical language is found in the NCALJ Model Code. MODEL CODE OF JUDICIAL CONDUCT FOR STATE

intended to apply to part-time ALJs who typically maintain a law practice.⁸⁴ While these model codes permit such outside activities, applicable state ethics laws, whether under the jurisdiction of a state ethics agency or regulations adopted by the employing agency, may prohibit or more severely restrict the "moonlighting" or outside activities of full-time state employees.

B. Additional Approaches to Addressing Ethical Conduct of ALJs

Codes of ethics have been adopted by each of the states to cover public employees. These cover ALJs in their capacity as public employees.⁸⁵ In addition, ALJs who are also lawyers would be subject

ADMIN. LAW JUDGES (Nat'l Conference of Admin. Law Judges, 1995) at Canon 4G.

⁸⁴ See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 5G cmt. (Nat'l Ass'n of Admin. Law Judges, 1999). The comment to Canon 5G provides, in pertinent part,

it is common for state administrative law judges to be hired on a part-time or as needed basis while maintaining a legal practice. Also, state administrative law judges are compensated at a much lower level than federal administrative law judges. As long as the professional judgment of the administrative law judge is not impaired by such unrelated activities, then conflicts should not normally occur.

Id. With respect to the applicability of the model codes to part-time ALJs, the NCALJ Code does not state on its face that it applies to part-time ALJs, although such an interpretation can be easily inferred from the Model Code's preamble and commentary. See MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES (Nat'l Conference of Admin. Law Judges 1995). The NAALJ Model Code, on the other hand, provides a canon that addresses how to comply with the Code of Judicial Conduct for state ALJs and offers in the commentary that "[t]he ABA Code of Judicial Conduct was changed so that the Model Code would apply fully to part-time, *pro tempore* and retired judges." MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 8cmt. (Nat'l Ass'n of Admin. Law Judges, 1999) (emphasis added).

⁸⁵ The South Carolina Ethics Commission issued an advisory opinion ruling that ALJs are "'public officials' under the [state's] Ethics Reform Act of 1991 and, thus, are subject to the Act's requirements." See Applicability of Ethics Reform Act to Admin. Law Judges, S.C. State Ethics Comm'n, SEC AO95-007 (Jan. 18, 1995), available at <http://www.state.sc.us/ethics/ao95-007.htm> (last visited Jan. 21, 2002). Similarly, the Connecticut Ethics Commission found that hearing officers in the Department of Motor Vehicles were public officials subject to Code

to the applicable code or rules of professional responsibility in that state.

Another approach advanced to ensure ethical conduct by ALJs, absent a centralized system to address "[b]ias, prejudice, and other pernicious conduct[.]" is to permit personal liability against ALJs as a method of promoting accountability.⁸⁶ This approach has been applied in New York.

In 1989, in response to a legislative request for a central panel in New York, Governor Mario Cuomo issued an executive order designed to demonstrate that there could be decisional independence by ALJs without removal of the judges from the individual agencies.⁸⁷ Subsequently, by vetoing annual legislative attempts to create a central Office of Administrative Hearings, Governor Cuomo required the adoption and submission of administrative adjudication plans by the agencies. This ensured that ALJs would no longer have to report to functions that relate to the merits of the adjudicatory proceedings, such as any agency official other than the head of the agency, a supervisor of the ALJ, or the general counsel. The order required that the plans address, "wherever practical," how the ALJs would be organized in a separate administrative unit within the agency.⁸⁸ This included physically separating the ALJ offices from other agency personnel.⁸⁹

Codes of ethics for ALJs may be formal and detailed, such as the model codes discussed in Part II A, or they can be set forth in a shorter format with key concepts highlighted for ALJs and the public to understand. For example, the Office of Administrative Hearings in

of Ethics for Public Officials. Application of the Code to DMV Hearing Officers, Conn. Ethics Comm'n, Adv. Op. 2001-15, *available at* http://www.ethics.state.ct.us/Advisory_Options/2001_15.htm (on file at THE WIDENER JOURNAL OF PUBLIC LAW).

⁸⁶ Pillai, *supra* note 64, at 130. Commenting that Justice Scalia once observed, with respect to federal ALJs in the Social Security Administration, that "there are no career adjudicators in the American system who are given as little scrutiny before and during their tenure as the ALJs." *Id.* at 129 (citing Antonin Scalia, *The ALJ Fiasco--A Reprise*, 47 U. CHI. L. REV. 57 (1979)).

⁸⁷ N.Y. COMP. CODES R. & REGS. tit. 9, § 4.131 (1989).

⁸⁸ *Id.*

⁸⁹ *Id.*

the state of Washington adopted a code of ethics for ALJs as part of the administrative policies and procedures of the office.⁹⁰ This code has no canons and no commentary but provides a list of issues appropriate for ethical conduct and professionalism with a short description under each heading of how ALJs are expected to perform.⁹¹

IV. EXAMINATION AND CONSIDERATION

Assuming that many of the remaining non-central panel states have determined that, at least for the near future, there will be no centralized Office of Administrative Hearings, the ethics debate must move to a different level. Certainly, an independent centralized office could handle the adoption and enforcement of a code of ethics for administrative law judges. The fact that such an agency does not exist, however, is no excuse for a state to fail to adopt a code of ethics for the administrative judiciary.

The question of an articulated code of ethics for ALJs is not inextricably intertwined with the central panel debate. If such has been the interpretation, that there should be a push to create more central panels, this has been an unfortunate misunderstanding. A code of judicial conduct is relevant to ALJs, as wisely articulated in some jurisdictions. At least it can be viewed as a "'model' in the generic sense for [ALJs] to observe."⁹² It offers "guidelines by which to assess the propriety of [an ALJ's] behavior."⁹³

⁹⁰ See Washington State Office of Administrative Hearings, CODE OF ETHICS FOR ADMIN. LAW JUDGES (April 1, 1993).

⁹¹ *Id.* The following topics are contained in the three and one half page code: The Public Interest, Constitutional Obligations, Avoidance of Impropriety, Essential Conduct, Promptness, Diligence, Courtesy and Civility, Unprofessional Conduct of Attorneys and Representatives, Kinship or Influence, Independence, Conduct of Hearing, Ex Parte Communications, Public Comment, Continuances, Decisions, Idiosyncracies and Inconsistencies, Inconsistent Obligations, Civic and Charitable Activities, Personal Investments and Relations, Self-Interest, and Gifts and Favors. *Id.*

⁹² See MORELL E. MULLINS, MANUAL FOR ADMIN. LAW JUDGES 87 (3d ed. 1993) (Chap. VII).

⁹³ *Id.*

State governments that have not yet clearly spoken by statute to the code of conduct or ethics for ALJs must do so. This can occur with little, if any, political cost, as well as minimal, if any, taxpayer cost. The most efficient manner of achieving ethics reform is to designate a committee or commission to study the issue, examine the options (typically the model codes and the activities in other states), and charge the committee with making a recommendation for the state. These committees or commissions may be created by executive order, an act of the legislature, or it may come from outside of the government through involvement of the state bar association or a state chapter of the National Association of Administrative Law Judges. Like any political campaign, the constituency for ALJ ethics must be identified, and this group must join in the reform effort. The natural constituencies are the ALJs themselves who deserve clear direction in terms of expectations, members of the bar who appear before these judges, and the good government groups (e.g., League of Women Voters, Common Cause, Public Interest Research Groups, etc.) who arguably represent the public interest.

A key to accomplishing government reform is anticipating what roadblocks or challenges may stand in the way of achievement. It becomes critical to drop the central panel connection that has failed to work in so many states. These states either have not wanted an additional layer or level of bureaucracy, have determined that the centralized office would cost more money, or have determined that they simply do not wish to remove the ALJs from the individual agencies.

For central panel states, the ethics enforcement entity for ALJs is the Office of Administrative Hearings. Non-central panel states that adopt a uniform code of ethics for ALJs should expand the jurisdiction of the existing state ethics commission to include the code of judicial conduct for ALJs. By so doing, the state is able to charge an independent executive branch agency with oversight, guaranteeing uniform opinions and interpretations of the code. This would also remove the ability of the employing agency to intervene in the resolution of ethical dilemmas for ALJs who may very well have an ethics issue by virtue of certain agency actions or circumstances. It would further allow for an ethics system where ALJs and the public can rely on the advice given and its precedential value through more

formal mechanisms utilized by state ethics offices, such as the publication of opinions and advice. Additionally, by tapping into the existing state ethics commission, the state obviates the need to create and staff a new entity, which would come at a more easily defined cost. Lastly, by selecting the state ethics commission over the commission on judicial ethics, the separation of powers argument need not be reached.⁹⁴

V. CONCLUSION

With the increasing volume of administrative litigation, the adoption of a uniquely applicable code of ethics for ALJs and hearing officers is a necessary reform that would ensure the "upgrading" of the administrative judicial system. This "upgrading" would perform the essential task of finally meeting the expectations of the administrative adjudicatory system.⁹⁵ This is a no-cost or, at worst, very low-cost good government reform initiative that is essential to the maintenance of the public trust.

⁹⁴ Typically, the judicial ethics commissions in the state are established by the judicial branch of government.

⁹⁵ See Harders, *supra* note 65.

