

NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON ATTORNEYS IN PUBLIC SERVICE
SUBCOMMITTEE ON THE ADMINISTRATIVE LAW JUDICIARY

MODEL CODE OF JUDICIAL CONDUCT FOR
STATE ADMINISTRATIVE LAW JUDGES

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**COMMITTEE ON ATTORNEYS IN PUBLIC SERVICE
SUBCOMMITTEE ON THE ADMINISTRATIVE LAW JUDICIARY**

**COMMITTEE ON MODEL CODE OF JUDICIAL CONDUCT
FOR STATE ADMINISTRATIVE LAW JUDGES***

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**MODEL CODE OF JUDICIAL CONDUCT FOR
STATE ADMINISTRATIVE LAW JUDGES**

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PREAMBLE

New York State's administrative legal system is based on the principle that an independent, fair and competent administrative judiciary will interpret and apply the laws and regulations that govern consistently with American concepts of justice. Intrinsic to all sections of this Code are precepts that state administrative law judges, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. State administrative law judges decide questions of fact and law for the resolution of disputes and are a highly visible symbol of government under the rule of law.

The Model Code of Judicial Conduct for State Administrative Law Judges is intended to identify standards for ethical conduct for state administrative law judges, and to provide comprehensive and centralized guidance for judges in dealing with the ethical dilemmas that arise in the course of their duties. The Code of Professional Responsibility for Attorneys provides no such guidance, because state administrative law judges act in a quasi-judicial capacity rather than as advocates for clients. Further, not all state administrative law judges in New York State are attorneys. The New York State Code of Judicial Conduct (CJC) specifically excludes state administrative law judges from coverage. Both the American Bar Association (ABA) and the National Association for the Administrative Law Judiciary (NAALJ) have issued model codes for administrative law judges, but those codes make no reference to specific provisions in New York law that address state administrative law judges. Provisions in the State Administrative Procedure Act (SAPA), the New York Public Officers Law and Executive Order No. 131 provide some standards that cover state administrative law judges, but nothing comprehensive. In instances in which SAPA, the Public Officers Law or Executive Order No. 131 set a standard for certain conduct that the Code addresses, the Code reflects and refers to those pre-existing standards. In this way, the Code provides a single reference document for state administrative law judges in seeking ethical guidance. The Code also seeks to do more than merely impose standards of conduct. The Code seeks to provide protection for the independence of state administrative law judges and, thus, enhance confidence our legal system.

The Code consists of broad statements called Canons, specific rules set forth in Sections under each Canon, and Commentary. The Code also contains a Terminology Section and an Application Section. The text of the Canons and Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not meant as additional rules.

When the Code uses "shall or "shall not," it is intended to impose binding obligations. When the Code uses "should" or "should not," the statement is intended as hortatory and as a statement of what is or is not appropriate conduct, rather than as a binding rule. When the Code uses "may," the text denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The term state administrative law judge includes all hearing officers, administrative officers, hearing examiners, impartial hearing officers, referees or any other person whom a state agency has designated and empowered to conduct administrative adjudicatory proceedings. The

Code is intended to apply to all such quasi-judicial administrative officials, whether the persons serving that function are attorneys or not, and whether they are employed full time or part time, or retained on a contract or per diem basis while acting in their capacity as administrative adjudicators.

Except where modified, the Code follows the language of the New York State Code of Judicial Conduct. The Canons and Sections contained in this Code governing state administrative judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, regulations, administrative rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of state administrative law judges in making judicial decisions.

The Code is designed to provide guidance to state administrative law judges and may provide a structure for regulating conduct if adopted by any agency. The Code is not designed or intended as a basis for civil liability or criminal prosecution.

The Code is intended to govern conduct of state administrative law judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the administrative judicial system.

The Code is not intended as an exhaustive guide for conduct. Strict adherence to this Code would not exempt a state administrative law judge from applying other ethical standards that apply to any person. However, as noted above, this Code is designed to reconcile, encompass and expand upon the aspects of professional conduct addressed by the CJC and the ABA and NAALJ Model Codes for State Administrative Law Judges, as well as, where relevant, SAPA, Public Officers Law, and Executive Order No. 131, in order to provide a single source of guidance for state administrative law judges in the subject areas addressed here.

TERMINOLOGY

The following terms used in this Code are defined as follows:

(A) A “candidate” is a person seeking selection for or retention in public office by any public election, including primary and general elections and including partisan and nonpartisan elections. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) The “degree of relationship” is calculated according to the civil law system. That is, where the state administrative law judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the state administrative law judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(C) “Economic interest” denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, provided that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the state administrative law judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a state administrative law judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the state administrative law judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the state administrative law judge could substantially affect the value of the securities;

(5) “de minimis” denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

- (D) An “ex parte communication” is a communication that concerns a pending or impending proceeding before a state administrative law judge and occurs, directly or indirectly, between the judge and a party, or a representative of a party, to the proceeding without notice to and outside the presence of one or more other parties to the proceeding.
- (E) “Fiduciary” includes such relationships as executor, administrator, trustee, and guardian.
- (F) “Impartial” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the state administrative law judge.
- (G) An “impending proceeding” is one that is reasonably foreseeable but has not yet been commenced.
- (H) An “independent” administrative judiciary is one free of outside influences or control.
- (I) “Integrity” denotes probity, fairness, honesty, uprightness and soundness of character. Integrity also includes a firm adherence to this Code or its standard of values.
- (J) To “know” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (K) “Law” includes regulations as well as statutes, constitutional provisions and decisional law.
- (L) “Member of the state administrative law judge's family” denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.
- (M) “Member of the state administrative law judge's family residing in the judge's household” denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.
- (N) “Non-judicial personnel” does not include the lawyers or representatives of parties in a proceeding before a state administrative law judge.
- (O) “Nonpublic information” denotes confidential information of which a state administrative law judge become aware as a result of his or her judicial duties and which is not otherwise available to the public.
- (P) A “pending proceeding” is one that has begun but not yet reached its final disposition.
- (Q) “Political organization” denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(R) “Primarily employed by the state” means employed on a full-time basis or the equivalent or regularly scheduled to work the equivalent of 20 hours per week at one or more state agencies.

(S) “Public election” includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(T) “Require.” The rules prescribing that a state administrative law judge “require” certain conduct of others, like all of the rules in this Code, are rules of reason. The use of the term “require” in that context means a state administrative law judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(U) A “state administrative law judge” is an administrative law judge, hearing officer, administrative officer, hearing examiner, impartial hearing officer, referee or any other person whom a state agency has designated and empowered to conduct administrative adjudicatory proceedings. The term “state administrative law judge” does not include the head of an agency or the members of a state board or commission.

CANON 1

A STATE ADMINISTRATIVE LAW JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE ADMINISTRATIVE JUDICIARY.

An independent and honorable administrative judiciary is indispensable to justice in our society. A state administrative law judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the administrative judiciary is preserved. The provisions of this code shall be construed and applied to further that objective.

Commentary:

[1.1] Deference to the judgments and rulings of administrative judiciaries depends upon public confidence in the integrity and independence of state administrative law judges. The integrity and independence of state administrative law judges depends in turn upon their acting without fear or favor. Although state administrative law judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the administrative judiciary is maintained by the adherence of each state administrative law judge to this responsibility. Conversely, violation of this code diminishes public confidence in the administrative judiciary and thereby does injury to the system of government under law.

[1.2] To the extent that this code conflicts with applicable statutes, regulations, or codes, including but not limited to the Public Officers Law, State Administrative Procedure Act, Executive Order No. 131 (9 NYCRR 4.131), and any codes adopted by individual agencies, the more restrictive rule will govern.

CANON 2

A STATE ADMINISTRATIVE LAW JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

(A) A state administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

Commentary:

[2.1][2A] Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by state administrative law judges. A state administrative law judge must avoid all impropriety and appearance of impropriety. A state administrative law judge must expect to be the subject of constant public scrutiny. Such a state administrative law judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the

ordinary citizen and should do so freely and willingly.

[2.2][2A] The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a state administrative law judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by state administrative law judges that is harmful although not specifically mentioned in the Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the state administrative law judge's ability to carry out administrative judicial responsibilities with integrity, impartiality and competence is impaired.

[2.3][2A] See also Commentary under 2C.

(B) A state administrative law judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A state administrative law judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a state administrative law judge convey or permit others to convey the impression that they are in a special position to influence the judge. A state administrative law judge shall not testify voluntarily as a character witness.

Commentary:

[2.4][2C] Maintaining the prestige of administrative judicial office is essential to a system of government in which the administrative judiciary must to the maximum extent possible function independently. Respect for the office facilitates the orderly conduct of legitimate administrative judicial functions. State administrative law judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a state administrative law judge to allude to his or her administrative judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, administrative judicial letterhead must not be used for conducting a state administrative law judge's personal business. A state administrative law judge who is authorized to practice law may not use or permit the use of a title or honorific such as "judge" or "honorable" in connection with his or her law practice.

[2.5][2C] A state administrative law judge must avoid lending the prestige of administrative judicial office for the advancement of the private interests of others. For example, a state administrative law judge must not use his or her administrative judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of the state administrative law judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(4)(a) and Commentary.

[2.6][2C] Although a state administrative law judge should be sensitive to possible abuse of the prestige of office, such a judge may, based upon the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

[2.7][2C] *State administrative law judges may participate in the process of selection of members of the judiciary and administrative judiciary by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judicial position. See also Canon 5 regarding use of a state administrative law judge's name in political activities.*

[2.8][2C] *A state administrative law judge must not testify voluntarily as a character witness because to do so may lend the prestige of the administrative judicial office in support of the party for whom the judge testifies. Moreover, when a state administrative law judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A state administrative law judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a state administrative law judge should discourage a party from requiring the judge to testify as a character witness.*

(D) A state administrative law judge shall not hold membership in any organization that practices invidious discrimination on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law. This provision does not prohibit a state administrative law judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

Commentary:

[2.9][2D] *Membership of a state administrative law judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2D refers to the current practice of the organization. Whether an organization practices invidious discrimination is often a complex question to which state administrative law judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, persons who would otherwise be admitted to membership. See New York State Club Assn. Inc. v City of New York, 487 US 1, 108 S Ct 2225, 101 L Ed 2d 1 (1988); Board of Directors of Rotary Intl. v Rotary Club of Duarte, 481 US 537, 107 S Ct 1940, 95 L Ed 2d 474 (1987); Roberts v United States Jaycees, 468 US 609, 104 S Ct 3244, 82 L Ed 2d 462 (1984).*

[2.10][2D] *Although Section 2D relates only to membership in organizations that invidiously discriminate on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, a state administrative law judge's membership in an organization that engages in any*

discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a state administrative law judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a state administrative law judge of the judge's knowing approval of invidious discrimination on any actual or perceived basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the administrative judiciary, in violation of Section 2A.

[2.11][2D] When a person who is a state administrative law judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2D or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practice as promptly as possible (and in all events within a year of the state administrative law judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 3

A STATE ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF ADMINISTRATIVE JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

(A) Administrative judicial duties in general. The administrative judicial duties of a state administrative law judge take precedence over all the judge's other activities. The state administrative law judge's administrative judicial duties include all the duties of the judge's office prescribed by law. The standards below apply to the performance of these duties.

(B) Adjudicative responsibilities.

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

(2) A state administrative law judge shall require order and decorum in proceedings before the judge.

(3) A state administrative law judge shall be patient, dignified and courteous to parties, witnesses, lawyers, representatives and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, representatives, staff members and others subject to the judge's direction and control.

Commentary:

[3.1][3B(3)] The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the state administrative law judge. State administrative law judges can be efficient and businesslike while being patient and deliberate.

(4) A state administrative law judge shall perform administrative judicial duties without bias or prejudice against or in favor of any person. A state administrative law judge in the performance of administrative judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, or any other protected status enumerated by law, and shall require staff and others subject to the judge's direction and control to refrain from such words or conduct.

Commentary:

[3.2][3B(4)] A state administrative law judge must perform judicial duties impartially and fairly. A state administrative law judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the

proceeding, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. Prejudicial behavior may include (1) being overly deferential to one person, such as addressing a party, attorney, or representative by an honorific title such as “judge”; (2) being overly familiar with a person, such as referring to a party, attorney, or representative by his or her first name; or (3) being disrespectful or demeaning to a person. A state administrative law judge can also engage in prejudicial behavior by tolerating such conduct by a party, attorney, or representative, such as allowing an attorney to address a witness disrespectfully as “Smith” rather than “Mr. Smith.” This rule does not prohibit addressing a party, attorney or representative appearing in his or her capacity as a public official by the title of the office, addressing a party or a witness by a professional title such as “Doctor,” or addressing a member of the clergy by a title such as “Reverend.”

[3.3][3B(4)] A state administrative law judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment of any kind, including sexual harassment and harassment against any protected class member, among others. The judge must require the same standard of conduct of others subject to the judge's direction and control.

(5) A state administrative law judge shall require participants in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, or any other protected status enumerated by law, against parties, representatives or others. This paragraph does not preclude legitimate advocacy when age, race, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, any other protected status enumerated by law, or other similar factors, are issues in the proceeding.

(6) A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their lawyers or representatives, full right to be heard according to law. Unless otherwise authorized by law and except as provided in paragraphs (a) through (e) below, a state administrative law judge shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending or impending before the judge with any person except upon notice and opportunity for all parties to participate.

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided:

(i) the state administrative law judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the state administrative law judge, insofar as practical and appropriate, makes provision for prompt notification of other parties, or their lawyers or representatives of the substance of the ex parte

communication and allows an opportunity to respond.

(b) A state administrative law judge may consult on questions of law with supervisors, agency attorneys or other state administrative law judges, provided that such supervisors, state administrative law judges or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) A state administrative law judge may consult with supervisors, other state administrative law judges, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing.

(d) Unless otherwise prohibited by law, a state administrative law judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(e) A state administrative law judge, with the consent of the parties, may confer separately with the parties and their lawyers or representatives on agreed-upon matters.

(f) A state administrative law judge may initiate or consider any *ex parte* communications when authorized by law to do so.

(g) Decisions of a state administrative law judge shall be based exclusively on evidence in the record of the proceeding and material that has been officially noticed.

Commentary:

[3.4][3B(6)] The ex parte communication rule contained herein is adapted from Executive Order No. 131 (see 9 NYCRR 4.131), which was continued by Governor David A. Paterson on June 18, 2008 (see Executive Order No. 9). The ex parte communication rule contained in Executive Order No. 131 is more limited than the rule contained in State Administrative Procedure Act (SAPA) § 307(2). Executive Order No. 131 applies to state administrative law judges; it does not apply to agency heads or boards acting in an adjudicatory capacity. Agency heads and boards remain subject to SAPA § 307(2). To the extent statutes or regulations applicable to a particular state administrative law judge impose limitations on ex parte communications that are more stringent than Executive Order No. 131, such statutes or regulations should be followed.

[3.5][3B(6)] The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

[3.6][3B(6)] To the extent reasonably possible, all parties or their lawyers or other representatives shall be included in communications with a state administrative law judge.

[3.7][3B(6)] Whenever presence of a party or notice to a party is required by Section 3B(6), it is the party's lawyer or other representative, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

[3.8][3B(6)] Certain ex parte communication is approved by Section 3B(6) to facilitate scheduling, other administrative purposes, or emergencies. In general, however, a state administrative law judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(6) are clearly met. A state administrative law judge must disclose to all parties all ex parte communications described in Section 3B(6)(a) regarding a proceeding pending or impending before the judge.

[3.9][3B(6)] Executive Order No. 131, as well as this Code, would allow a state administrative law judge to consult on questions of law with an agency attorney outside of the administrative tribunal or hearings office who is not otherwise involved in the matter before the judge or a factually related matter. Moreover, Executive Order No. 131 does not require a state administrative law judge to report such consultations with agency attorneys outside the administrative tribunal or hearings office, to the parties to the proceeding before the judge. Consistent with the provision concerning consultations with disinterested legal experts, the better practice is to give notice to the parties of the agency attorney consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and afford the parties a reasonable opportunity to respond.

Note that Section 3B(6)(b) does not apply when the administrative tribunal or hearings office is a separate, independent agency from the administrative agency whose actions are under review. In that context, communications with involved agency attorneys employed outside the administrative tribunal or hearings office are governed by Section 3B(6)(d).

[3.10][3B(6)] An appropriate and often desirable procedure for a state administrative law judge to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

[3.11][3B(6)] A state administrative law judge must not independently investigate facts in a case, unless authorized by law, and must consider only the evidence presented.

[3.12][3B(6)] A state administrative law judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

[3.13][3B(6)] A state administrative law judge may delegate the responsibilities of the judge under Section 3B(6) to a member of the judge's staff. A state administrative law judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(6) is not violated through law clerks or other personnel on the judge's staff. This provision does not prohibit the judge or the judge's staff from informing all parties individually of scheduling or administrative decisions.

[3.14][3B(6)] The ex parte communication rule applies primarily in adjudicatory proceedings

where the state administrative law judge is presiding as an impartial decision maker in a quasi-judicial role. The ex parte communication rule may be modified in other administrative proceedings presided over by a state administrative law judge, such as legislative or rule making proceedings, depending on the requirements and necessities of such hearings, and any applicable law and regulations.

(7) A state administrative law judge shall be attentive to language barriers that may affect parties or witnesses, and provide such qualified interpreter services as are available or otherwise required by law to provide meaningful access and participation in administrative proceedings.

Commentary:

[3.15] [3B(7)] A State agency may be under an affirmative obligation pursuant to Title VI of the Civil Rights Act of 1964 to provide language services to limited English proficient (LEP) individuals participating in administrative proceedings. In such cases, the state administrative law judge may be required to take further action to assure that interpretive services are provided. Absent such a statutory obligation, however, a state administrative law judge nonetheless should be continually attentive to the issue whether parties who may not be proficient in English are afforded a full and fair opportunity to be heard. The obligation to provide such interpretive services as are available applies whether a party or witness is represented or not.

(8) A state administrative law judge shall take appropriate steps to ensure that any party not represented by an attorney or other relevant professional has the opportunity to have his or her case fully heard on all relevant points.

(a) Where the state administrative law judge deems it necessary to advance the ability of a litigant not represented by an attorney or other relevant professional to be fully heard, the judge may, or, where required by law, the judge shall:

- (i) liberally construe and allow amendment of papers that a party not represented by an attorney has prepared;
- (ii) provide brief information concerning statutory procedures and substantive law, including but not limited to charges and defenses;
- (iii) provide brief information about the nature of the hearing, who else is participating in the hearing and how the hearing will be conducted;
- (iv) provide brief information about what types of evidence that may be presented;
- (v) question witnesses to elicit general information and to obtain clarification;

- (vi) modify the traditional order of taking evidence;
- (vii) minimize the use of complex legal terms;
- (viii) explain the basis for a ruling when made during the hearing or when made after the hearing in writing;
- (ix) make referrals to resources that may be available to assist the party in the preparation of the case.

(b) A state administrative law judge shall ensure that any steps taken in fulfillment of the obligations of this paragraph are reflected in the record of the proceeding. A communication between a state administrative law judge and a litigant made in fulfillment of the obligations of this paragraph remains subject to the restrictions on ex parte communications contained in the preceding paragraph.

Commentary:

[3.16][3B(8)] In contrast to court proceedings, administrative proceedings often involve pro se litigants and non-attorney representatives. See Matter of Board of Educ. of Union-Endicott Cent. School Dist. v New York State Pub. Empl. Relations Bd., 233 AD2d 602 (3d Dept 1996). Some agency regulations impose an affirmative duty on state administrative law judges to ensure a complete record and to provide non-attorney litigants with certain basic information about the hearing process (see, e.g., 18 NYCRR 358-5.6[b]). A state administrative law judge should conduct hearings with pro se and non-attorney litigants in a manner that is fair to both parties, that assures the efficient conduct of administrative justice, that ensures the rights of the litigants, and that equalizes the field for the parties. This Section provides specific guidance to state administrative law judges in dealing with these issues.

(9) A state administrative law judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

[3.17][3B(9)] In disposing of matters promptly, efficiently and fairly, a state administrative law judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A state administrative law judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A state administrative law judge should encourage and seek to facilitate settlement, but the judge should not take any action or make any comment that might reasonably be interpreted by any party or its counsel as (a) coercion to settle, or (b) impairing the party's right to have the controversy resolved by the administrative tribunal in a fair and impartial manner in the event settlement negotiations are unsuccessful. In matters that will be tried before the state administrative law judge without a separate fact finder, a judge who seeks to facilitate settlement should exercise extreme care to

avoid prejudging or giving the appearance of prejudging the case.

[3.18][3B(9)] Prompt disposition of the state administrative law judge's business requires a judge to devote adequate time to judicial duties, to be punctual in attending hearings and expeditious in determining matters under submission, and to insist that personnel subject to the judge's direction and control, litigants and their lawyers cooperate with the judge to that end.

(10) A state administrative law judge shall not make any public comment about a pending or impending proceeding before any: (i) state administrative agency, or (ii) court within the United States or its territories, concerning a matter which originated within the agency. The state administrative law judge shall require similar abstention on the part of agency personnel subject to the judge's direction and control. This paragraph does not prohibit state administrative law judges from making public statements in the course of their official duties or from explaining for public information the procedures of the administrative judiciary. This paragraph does not apply to proceedings in which the state administrative law judge is a litigant or representative in a personal capacity.

Commentary:

[3.19][3B(10)] The requirement that state administrative law judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. A state administrative law judge should not be influenced by the potential for personal publicity when making decisions in pending cases. Release of decisions to the media or notifying the media that the decision is available before counsel or representatives for the parties have been notified may be embarrassing or prejudicial to the private rights of the litigants. This Section does not prohibit a state administrative law judge from commenting on proceedings in which the judge is a litigant in a personal capacity. "Agency personnel" does not include the lawyers in a proceeding before a state administrative law judge. The conduct of lawyers relating to trial publicity is governed by DR 7-107 of the Code of Professional Responsibility.

[3.20][3B(10)] This Section is not intended to preclude participation in an association of state administrative law judges merely because such association makes public comments about a pending or impending proceeding in the administrative process. The Section is directed primarily at public comments by a state administrative law judge concerning a proceeding before another judge.

(11) A state administrative law judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the tribunal, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(12) A state administrative law judge shall not disclose or use, for any purpose unrelated to administrative judicial duties, nonpublic information acquired in an administrative judicial capacity.

(C) Administrative responsibilities.

(1) A state administrative law judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in administrative judicial administration and cooperate with other judges and non-judicial personnel in the administration of judicial business.

(2) A state administrative law judge shall require staff, hearing officials, non-judicial personnel and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official administrative duties.

(D) Disciplinary responsibilities.

(1) A state administrative law judge who receives information indicating a substantial likelihood that another state administrative law judge has committed a substantial violation of this Code shall take appropriate action.

(2) A state administrative law judge who receives information indicating a substantial likelihood that a lawyer or other representative has engaged in unprofessional conduct shall take appropriate action.

(3) Acts of a state administrative law judge in the discharge of disciplinary responsibilities are part of the judge's administrative judicial duties.

Commentary:

[3.21][3D] Referral of a state administrative law judge or lawyer to a substance abuse treatment agency is "appropriate" action under paragraphs (1) and (2).

[3.22][3D] Appropriate action may include direct communication with the state administrative law judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body. Internal agency procedure which routes the complaint can be utilized.

(E) Disqualification.

(1) A state administrative law judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a)
 - (i) the state administrative law judge has a personal bias or prejudice concerning a party, or
 - (ii) the state administrative law judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
- (b) the state administrative law judge knows that:
 - (i) the state administrative law judge served as a lawyer in the matter in controversy, or
 - (ii) a lawyer with whom the state administrative law judge previously practiced law served during such association as a lawyer concerning the matter, or
 - (iii) the state administrative law judge has been a material witness concerning it;
- (c) the state administrative law judge knows that he or she, individually or as a fiduciary, or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding;
 - (ii) is an officer, director or trustee of a party;
 - (iii) has an economic interest in the subject matter in controversy;
 - (iv) has any other interest that could be substantially affected by the proceeding; or
 - (v) is likely to be a material witness in the proceeding; or
- (d) the state administrative law judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.
- (e) Notwithstanding the provisions of subparagraph (c) above, if a state administrative law judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person has an economic interest in a party to the proceeding, disqualification is not required if the state administrative law judge, spouse or other relevant person, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A state administrative law judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interest of the judge's spouse and minor children residing in the judge's household.

Commentary:

[3.23][3E(1)] Under this rule, a state administrative law judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.

[3.24][3E(1)] A state administrative law judge should disclose on the record information that the judge believes the parties or their lawyers or representatives might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

[3.25][3E(1)] By decisional law, the rule of necessity may override the rule of disqualification. For example, a state administrative law judge might be required to participate in judicial review of a matter where no other forum is available to decide the matter and no provision is available for delegating the authority to hear the matter to another adjudicator. Or, a state administrative law judge might be the only judge available in a matter requiring immediate judicial action. In the latter case, the state administrative law judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

[3.26][3E(1)(b)] A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b). A state administrative law judge formerly employed as agency counsel, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association. See NY St Bar Assn Comm on Prof Ethics Op 617 (1991).

[3.27][3E(1)(d)] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the state administrative law judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the state administrative law judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the proceeding" under Section 3E(1)(c)(iv) may require that judge's disqualification.

(F) Remittal of disqualification.

(1) A state administrative law judge disqualified by the terms of subdivision (E) above may disclose on the record the basis for his or her disqualification. Thereafter, subject to paragraph (2) below, if the parties who have appeared and not defaulted and their representatives, without participation by the state administrative law judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the state administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

(2) Notwithstanding paragraph (1) above, disqualification of a state administrative law judge shall not be remitted if participation in the proceeding by the judge would violate this Code or if the basis for disqualification is that:

(a) the state administrative law judge has a personal bias or prejudice concerning a party;

(b) the state administrative law judge, while in private practice, served as a lawyer in the matter in controversy;

(c) the state administrative law judge has been or will be a material witness concerning the matter in controversy; or

(d) the state administrative law judge or his or her spouse is a party to the proceeding or is an officer, director or trustee of a party to the proceeding.

Commentary:

[3.28][3F] A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification in the event a remittal is available under the Section. To assure that consideration of the question of remittal is made independently of the state administrative law judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a state administrative law judge may wish to have all parties and their lawyers or representatives sign the remittal agreement.

CANON 4

A STATE ADMINISTRATIVE LAW JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

(A) Extra-judicial activities in general. A state administrative law judge shall conduct all of his or her extra-judicial activities so that they:

- (1) do not cast reasonable doubt on the state administrative law judge's capacity to act impartially as a state administrative law judge;
- (2) do not detract from the dignity of judicial office;
- (3) do not interfere with the proper performance of judicial duties; and
- (4) are not incompatible with judicial office.

Commentary:

[4.1][4A] *Complete separation of a state administrative law judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.*

[4.2][4A] *Expressions of bias or prejudice by a state administrative law judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status. See Section 2D and accompanying Commentary.*

(B) Avocational activities. A state administrative law judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Code.

Commentary:

[4.3][4B] *In this and other Sections of Canon 4, lists of permissible activities are intended to be illustrative and not exclusive.*

[4.4][4B] *As a judicial officer and person specially learned in the law, a state administrative law judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revisions of substantive and procedural law. To the extent that time permits, a state administrative law judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization*

dedicated to the improvement of the law. State administrative law judges may participate in efforts to promote the fair administration of justice, the independence of the administrative judiciary and the integrity of the legal profession.

[4.5][4B] In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a state administrative law judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

[4.6][4B] See Section 2B regarding the obligation to avoid improper influence.

(C) Governmental, civic, or charitable activities.

(1) A state administrative law judge shall not appear at a public hearing before an executive or legislative body or official if doing so would cast doubt on his or her ability to decide impartially regarding any issue or party that with reasonable foreseeability might come before him or her unless the issue or party is one with respect to which the state administrative law judge would in any event be disqualified under this Code or any other provision of law.

(2) A state administrative law judge shall not accept:

(a) appointment to a governmental committee or commission or other governmental position if his or her activity in such capacity would cast doubt on his or her ability to decide impartially regarding any issue or party that with reasonable foreseeability might come before him or her; or

(b) appointment or employment as a peace officer or police officer, as those terms are defined in Criminal Procedure Law §§ 1.20 and 2.10, unless he or she is a member of the uniformed force of the police department exercising adjudicative duties.

Commentary:

[4.7][4C(2)] The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the administrative judiciary from involvement in extra-judicial matters that may prove to be controversial. State administrative law judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the administrative tribunal on which the judge serves.

(3) Unless otherwise prohibited by law, a state administrative law judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic

organization not conducted for profit subject to the following limitations and the other requirements of this Code.

(a) A state administrative law judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

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

(ii) will be regularly engaged in adversary proceedings before the agency in which the state administrative law judge serves.

(b) In connection with civic or charitable activities, a state administrative law judge may participate in fund-raising or solicitation for membership if:

(i) the state administrative law judge does not use or permit use of the prestige of judicial office for fund-raising or solicitation for membership;

(ii) the fund-raising or solicitation for membership is not directed at persons who have appeared, are appearing or are foreseeably likely to appear before the state administrative law judge;

(iii) the state administrative law judge's participation in the fund-raising or solicitation for membership would not detract from the dignity of judicial office or interfere with the proper performance of judicial duties or be incompatible with judicial office; and

(iv) the fund-raising or solicitation for membership is not otherwise prohibited by law.

Commentary:

[4.8][4C(3)] See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a state administrative law judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Section 2D or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

[4.9][4C(3)] Service by a state administrative law judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a state administrative law judge is prohibited by Section 4G from appearing on behalf of a civic or charitable organization in matters before the agency in which the judge serves.

[4.10][4C(3)(a)] The changing nature of some organizations and of their relationship to the

law makes it necessary for a state administrative law judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the relationship to that organization.

[4.11][4C(3)(b)] Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the state administrative law judge's name and office or other position in the organization and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

(4) Unless otherwise proscribed by law or agency regulation, a state administrative law judge may accept duty assignments in addition to serving as a state administrative law judge provided that (i) such duties do not conflict with the state administrative law judge's responsibilities as a state administrative law judge, and (ii) such duties do not involve functions related to prosecutions or adversarial presentations of agency positions. State administrative law judges may be assigned to conduct investigatory hearings provided that the standards of independence and objectivity specified in this Code are adhered to.

Commentary:

[4.12][4C(4)] Section 4C(4) is derived from paragraph IIIB(2)(a) of Executive Order No. 131 (see 9 NYCRR 4.131[III][B][2][a]).

(D) Financial activities.

(1) A state administrative law judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to reflect adversely on the state administrative law judge's impartiality or exploit his or her judicial position;

(b) involve the state administrative law judge with any business, organization or activity that ordinarily will come before the judge; or

(c) involve the state administrative law judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the agency in which the judge serves.

(2) A state administrative law judge, subject to the requirements of this Code, may hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A state administrative law judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon

as the state administrative law judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(4) Consistent with state law and agency regulation, a state administrative law judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) a gift which is customary on family and social occasions;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3(E) of this Code;

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

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

(h) any other gift, bequest, favor or loan, only if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge, and if the gift is required by law to be reported, the judge shall do so.

Commentary:

[4.13][4D] The specific prohibition contained in the Code of Judicial Conduct against a

judge's services as an officer, director, manager, advisor or an employee of any business (which has sometimes been interpreted to bar such participation in a family business) has been deleted, because the general prohibitions in Canon 3(C)(1) and statutes or rules prohibiting such activities by state administrative law judges involving agencies wherein they serve render the specific prohibition somewhat superfluous and because generic prohibition of involvement in a family business is regarded as unnecessary and undesirable. Involvement in a business that neither affects the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties is not prohibited.

[4.14][4D] When a state administrative law judge acquires in a judicial capacity information, such as materials contained in filings with the administrative tribunal, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

[4.15][4D] A state administrative law judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's administrative tribunal. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of a state administrative law judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

[4.16][4D] Participation by a state administrative law judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2C against the misuse of the prestige of judicial office. In addition, a state administrative law judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

[4.17][4D(2)] This Section provides that, subject to the requirements of this Code, a state administrative law judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

[4.18][4D(4)] Section 4D(4) does not apply to contributions to a state administrative law judge's campaign for judicial office, a matter governed by Canon 5.

[4.19][4D(4)] Because a gift, bequest, favor or loan to a member of the state administrative law judge's family residing in the judge's household might be viewed as intended to influence the

judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

[4.20][4(D)(4)(a)] Acceptance of an invitation to a law-related function is governed by Section 4D(4)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(4)(h).

[4.21][4(D)(4)(a)] A state administrative law judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

[4.22][4D(4)(d)] A gift to a state administrative law judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(4)(e).

[4.23][4D(4)(h)] Section 4D(4)(h) prohibits state administrative law judges from accepting any gifts, favors, bequests or loans not otherwise enumerated in Section 4D(4) from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

(E) Fiduciary activities.

(1) A state administrative law judge shall not serve as an executor, administrator, trustee, guardian or other fiduciary if such service will interfere with the proper performance of judicial duties or if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in an agency in which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a state administrative law judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

Commentary:

[4.24][4E(2)] The restrictions imposed by this Canon may conflict with the state administrative law judge's obligation as a fiduciary. For example, a state administrative law judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(3).

(F) Service as arbitrator, mediator or hearing officer. Unless otherwise prohibited by law or

agency regulation, a state administrative law judge may act as an arbitrator or mediator or otherwise perform judicial functions independent of his or her administrative judicial duties, so long as such activity affects neither the independent professional judgment of the state administrative law judge nor the conduct of his or her official duties.

Commentary:

[4.25][4F] Service as an arbitrator or mediator as part of a state administrative law judge's official duties is not covered by this provision.

[4.26][4F] This Code does not prohibit state administrative law judges from acting as arbitrators or mediators in capacities outside their official administrative judicial duties and in circumstances where it is unlikely that their decisions as arbitrators or mediators will be submitted to their agency for administrative review. In considering whether to adopt this Code, the agency should consider whether it is appropriate to prohibit its staff from acting as arbitrators or mediators in capacities outside official agency proceedings, consistent with substantive law and the needs of the agency (see NY St Bar Assn Comm on Prof Ethics Op 594 [1988]).

(G) Practice of law.

(1) Consistent with all other provisions of this Code, and with any applicable agency regulations and with all other provisions of law, a state administrative law judge may practice law, as long as such activity affects neither the independent professional judgment of the judge nor the conduct of his or her official duties.

(2) A state administrative law judge shall not represent or appear on behalf of private interests before the agency in which he or she serves.

(3) A state administrative law judge primarily employed by the state shall not represent or appear on behalf of private interests before any state administrative tribunal or agency.

(4) A state administrative law judge shall not be associated or affiliated with any firm, company or organization that regularly represents or appears on behalf of private interests before the agency in which he or she serves.

Commentary:

[4.27][4G] This Section does not prohibit a state administrative law judge from engaging in the private practice of law. However, consistent with ethics opinions, and the general principles underlying this Code, this Section does prohibit a state administrative law judge or members of the judge's law firm from appearing in a representative capacity before the agency in which the

judge serves (see NY St Bar Assn Comm on Prof Ethics Op 543 [1982]; NY St Bar Assn Comm on Prof Ethics Op 365 [1974]).

[4.28][4G] This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A state administrative law judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a state administrative law judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2C.

[4.29][4G] A state administrative law judge who maintains a private legal practice should use letterhead for matters involving official administrative judicial duties that is separate and distinct from the letterhead for matters in private practice. The letterhead for private practice shall omit any reference to the person's status as a state administrative law judge.

(H) Compensation and reimbursement. Consistent with applicable law and regulation, a state administrative law judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a state administrative law judge would receive for the same activity.

(2) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the state administrative law judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

Commentary:

[4.30][4H(2)] See Section 4D(4) regarding reporting of gifts, bequests and loans.

[4.31][4H(2)] The Code does not prohibit a state administrative law judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A state administrative law judge should ensure, however, that no conflicts are created by the arrangement. A state administrative law judge must not appear to trade on the judicial position for personal advantage. Nor should a state administrative law judge spend significant time away from judicial duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the state administrative law judge's ability or willingness to be impartial.

(I) Financial disclosure. A state administrative law judge shall disclose income, debts, investments, or other assets to the extent required by law.

Commentary:

[4.32][4I] A state administrative law judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

CANON 5

A STATE ADMINISTRATIVE LAW JUDGE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

(A) Political activities in general.

A state administrative law judge shall not directly or indirectly engage in any political activity that detracts from, or reduces public confidence in, the fairness, impartiality or dignity of his or her office or the tribunal he or she serves. In addition, a state administrative law judge shall not permit his or her title or position to be used to promote any activity of a political organization. Prohibited political activity shall include the following:

(1) A state administrative law judge shall not act as a leader, committee member, or an officer in any political party or organization.

(2) A state administrative law judge shall not publicly endorse or publicly oppose (other than by running against) another candidate for public office in a way that allows for identification of the state administrative law judge as such.

(3) A state administrative law judge shall not make speeches on behalf of a political organization or other candidate.

(4) A state administrative law judge shall not solicit funds for or contributions to a political organization or candidate.

(B) State administrative law judge as candidate for nonjudicial office. A state administrative law judge shall resign or, if authorized by law, take a leave of absence from administrative judicial office, and withdraw his or her name from any roster for assignment or employment as a state administrative law judge upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the state administrative law judge may continue to hold administrative judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) State administrative law judge as candidate for judicial office. A state administrative law judge who is a candidate for elective judicial office shall comply with the Rules of the Chief Administrator of the Courts for the State of New York governing the conduct of such candidates, 22 NYCRR 100.5. A determination by the State Commission on Judicial Conduct, a court of the State of New York or any other authorized entity that a state administrative law judge has violated those Rules shall constitute misconduct and a violation of this Code.

Commentary:

[5.1][5A] In two opinions from the 1970s, the Committee on Professional Ethics of the New York State Bar Association has taken the position that as quasi-judicial officers, state administrative law judges are subject to the same constraints against political activity as judges

in the judicial branch (see NY St Bar Assn Comm on Prof Ethics Op 337 [1974]; NY St Bar Assn Comm on Prof Ethics Op 327 [1974]; see also Code of Judicial Conduct Commentary 6.1). The drafters of this Model Code, however, conclude that the strict application of Canon 5 of the Code of Judicial Conduct (“CJC”), in particular section 5A(1), to state administrative law judges is unduly and unnecessarily restrictive. Divergence from the strict application of CJC Canon 5 is warranted for several reasons.

First, although state administrative law judges are quasi-judicial officers responsible for unbiased and independent decision making within the agency context and, thus, function as a limited check on agency power, state administrative law judges do not serve the same separation of powers function as judges in the third branch. Specifically, while state administrative law judges have the authority to rule on as-applied constitutional challenges to agency action, they lack the authority to strike as facially invalid an act of the Legislature. Second, in contrast to most judicial offices in New York, state administrative law judges are appointed and, therefore, are not required to engage in partisan political campaigns to achieve judicial office. Given the path by which most third branch judges obtain judicial office, and the significant power they exercise once in office, the heightened restrictions against political activities imposed upon third-branch judges by CJC Canon 5 are warranted to avoid even the mere appearance of improper political influence. Such considerations are less compelling in the context of state administrative law judges.

Moreover, courts have recently concluded that proscriptions against political speech by even third-branch judicial officers are subject to First Amendment limitations (see Republican Party of Minnesota v White, 536 US 765, 122 S Ct 2528, 153 L Ed 2d 694 [2002]). Thus, the strict application of each section of CJC Canon 5 to state administrative law judges does not appear justified.

Nevertheless, because of their role as quasi-judicial officers, some of the specific restrictions on political activities contained in CJC Canon 5 are applicable to state administrative law judges. Under Section 2B, a state administrative law judge should not allow political considerations to influence the judge’s judicial conduct or judgment. The public political activities prohibited by section 5A of this Code are justified to eliminate suspicion that a judge’s judgment is affected by such political influences.

Any State agencies considering the adoption of this Code should consider whether the limitations imposed herein, or those applied by CJC Canon 5, are appropriate and apply those limitations on political activity most consistent with the characteristics of the particular agency and state administrative law judges employed by such agency.

[5.2][5A] A state administrative law judge retains the right to participate in the political process as a voter, to be enrolled as a member of a political party, to make private and voluntary contributions to political campaigns and candidates, and to participate in non-fund raising activities on behalf of candidates. The activities prohibited by Section 5A are those public displays of political endorsement that raise the suspicion that a state administrative law judge’s judgment is affected by political influences, or that the prestige of judicial office is being used to advance political interests.

The specific prohibitions set forth in Section 5A are to be interpreted in light of the general language of that section which prohibits the state administrative law judge from lending his or her status as a judge to political activities. The goal is to permit the state administrative law judge to exercise as much political freedom as possible as a private citizen within this constraint, while recognizing that few political activities are truly private. In complying with this section, state administrative law judges must exercise discretion so that their role in political activities is relatively anonymous, “low-profile,” and divorced from their professional status. Thus, for example, it might be appropriate for a state administrative law judge to make non-fund raising phone calls or to circulate petitions on behalf of a candidate for office if the judge is identified only by a first name. Similarly, a state administrative law judge might appropriately attend a political gathering where the judge is not otherwise well-known and does not wear a name tag, or does not wear a name tag identifying the judicial office. In contrast, it would not be appropriate to sit at a head table or to be publicly recognized and welcomed by a master of ceremonies. Application in particular circumstances will depend upon such factors as the size of the community, the notoriety of a particular state administrative law judge, the size of the event or scope of the particular activity, and the publicity likely to attend a given event or activity, among other considerations.

[5.3][5A(1)] The restrictions in this Code concerning political activity do not prohibit a state administrative law judge from membership in a union or other non-political organization, merely because the organization has an associated political action committee (“PAC”) that endorses political candidates. With respect to PAC-related activities, however, the provisions of Section 5A apply.

Other provisions of this Code, however, might bar membership in some non-political organizations. For example, Section 2D bars a state administrative law judge outright from membership in an organization that practices invidious discrimination. Otherwise, a state administrative law judge must remain and appear impartial at all times. Under the provisions in Section 4A, a state administrative law judge must be sensitive to whether any extra-judicial activities, including political activity, raise questions about the judge’s capacity to act impartially.

[5.4][5A(2)] Section 5A(2) does not prohibit a state administrative law judge from privately expressing his or her views on judicial candidates or other candidates for public office.

[5.5][5A(4)] Section 5A(4) does not prohibit a state administrative law judge from making contributions to a political campaign. However, such contributions must be private and voluntary. A state administrative law judge may make contributions to political campaigns as a private citizen only and, unless otherwise required by law, should not reference the judge’s judicial office when making such contributions. A state administrative law judge should make reasonable efforts to prevent the recipient of a political contribution from using the prestige of the judge’s office or otherwise publicizing the judge’s contribution. A state administrative law judge should not be compelled to make political contributions, including the purchase of tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

[5.6][5B] Section 5B requires a state administrative law judge to resign from office or take a leave of absence, if allowed by law and subject to the appointing authority's approval, when the judge become a candidate for non-judicial office. Section 5B does not require a state administrative law judge to resign from office or take a leave of absence when the judge becomes a candidate for judicial office.

APPLICATION OF THE CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

(A) Effective date of compliance. A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

(B) Application to Agency Heads, to Members of a State Board or Commission, or to Other Officers or Tribunals Serving an Administrative Appellate Function. The provisions of this Code are not applicable to the head of an agency, to members of a State board or commission, or to other State officers or tribunals serving an administrative appellate function, unless adopted by the rules of the employing agency.

Commentary:

[6.1][6B] If an agency chooses to apply the provisions of the Model Code of Judicial Conduct for State Administrative Law Judges to an agency head, members of a State board or commission, or other officers or tribunals serving an administrative appellate function, it should do so with due regard to the different role and function performed by such officers as compared to the role and function performed by state administrative law judges. Due to their role as the initial finders of fact in the administrative adjudicatory process, state administrative law judges are subject to stricter limitations than agency heads, members of a State board or commission, or other State officers or tribunals serving an administrative appellate function (see, e.g., Executive Order No. 131 [9 NYCRR 4.131]). In general, however, the provisions addressing partiality, conflicts of interest and disqualification may be applicable to persons performing quasi-judicial administrative appellate functions.