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**ADMINISTRATIVE LAW JUDGES
DESERVE CLEAR RULES**

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Administrative Law Judges Deserve Clear Rules

Patricia E. Salkin



For hundreds of full-time and part-time administrative law judges (ALJs) hearing officers and referees serving the administrative judiciary in the Executive Branch, there is a lack of clear guidance as to appropriate ethical standards and conduct. The one notable exception is the code of conduct adopted by regulation specifically for the ALJs who serve the Workers' Compensation Board.

As Executive Branch employees, ALJs are subject to the Public Officers' law. However, due to the special nature of their role, the power of the administrative judiciary and the structure of the administrative judiciary within individual government agencies, additional ethical and professional considerations are warranted. Judges in the constitutional courts are subject to a code of conduct, and yet the decisions of ALJs touch the lives of many more individual citizens on a daily basis. Referred to often as the "hidden judiciary" because unlike high profile trials and hearings in constitutional courts, media attention is rarely focused on administrative hearings resulting in little public knowledge of workings of this system, and there is no "beat reporter" assigned to cover the hearings for any one state agency. Rarely is anyone outside of government observing, monitoring and analyzing what occurs in the administrative hearing room.

ALJs who also happen to be lawyers (this is not a requirement in most state agencies) should consult the Code of Professional Responsibility for guidance when acting in an attorney capacity, yet it is unclear whether the code applies in their administrative role. There are conflicting bar association opinions and case law as to whether and how the Code of Judicial (CJC)

applies to ALJs in New York. A separation of powers analysis would conclude that although some might deem it appropriate for the Code of Judicial Conduct (CJC) to apply to ALJs, the enforcement and interpretation of the Code for the executive branch judiciary should not rest with the judicial branch's Commission on Judicial Conduct. With the exception of individual state agencies, no one ethics entity (including the New York State Bar Association, the Commission on Judicial Conduct and the State Ethics Commission) has complete jurisdiction over statewide ALJ ethical matters.

New York must separate the ethics issues of ALJ independence and bias from being inextricably intertwined with the movement towards a central panel or centralized hearing office. Legislative efforts to enact a central panel in New York failed in the late 1980s and in the early 1990s. This should not excuse the need for attention to the ethical dilemmas faced by the administrative judiciary. New York should focus on adopting a uniform code of ethics for ALJs and save the central panel debate for another day.

During the 2001 Annual meeting of the American Bar Association (ABA), Resolution 101B was passed, urging state and local governments to require that members of the administrative judiciary be accountable under provisions similar to the ABA CJC. This action follows recently endorsed codes of ethical conduct for ALJs by the National Association of Administrative Law Judges and by the National Conference of Administrative Law Judges. During the last decade a number of states including Colorado, Georgia, Iowa,

Minnesota and South Carolina have expressed either by statute, regulation or policy that ALJs in the state would be subject to the CJC. Other states, including Kentucky, Missouri, North Carolina, North Dakota and Oregon have set forth other codes of ethical conduct specifically for ALJs. Following the recommendations of its Law Revision Commission, California opted to adopt most of the CJC, making exception for certain provisions that should not be specifically applied to ALJs.

New York should create a commission to study and recommend an appropriate code of judicial conduct for ALJs that would be uniform for all state agencies. When deciding on where to appropriately place authority for enforcement and opinions, the State Ethics Commission, an executive branch agency with ethics expertise, should be given significant consideration.

Otherwise ALJs are left with seeking ethical advice from the very agencies they serve where oftentimes ethical dilemmas may directly involve these agencies. Furthermore, adoption of a uniform code would suffer without the ability to consistently interpret its provisions and develop a body of statewide standards. Expanding the Ethics Commission's jurisdiction to include ALJ ethics would come at a small cost for taxpayers (perhaps a staff person and small training budget) but a big pay-off for increasing the appearance of independence and for promoting high ethical standards for the administrative judiciary. A statewide code of judicial conduct for ALJs is overdue.