

# D.C. Association of Administrative Law Judiciary

Summer 2011

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## President Paul Handy's Comments

Maintaining judicial independence is one of the biggest challenges of the administrative law judiciary. Particularly as budgets shrink, and stakeholders fight over resources, we find ourselves facing pressures on many fronts that challenge our independence. For example, there can be pressure to rule in favor of agencies whose actions generate revenue for the government. There can be pressure to uphold an agency's priority, or to rule favorably for a powerful constituent. This pressure can be acutely felt, when the interested party has control over the purse strings of the adjudicating body. How do we resist this kind of pressure?

U.S. Administrative Judge Ann Marshall Young gave us a powerful presentation on this subject on April 21, 2011. Judge Young pointed out that administrative adjudicators can often successfully resist these pressures by relying on ethical boundaries set up by the ABA Model Judicial Codes and by the ethical codes of the administrative adjudicative bodies. If a judge finds that she or he is threatened with discipline or termination for ruling in a certain way, reliance upon ethical codes can give fortitude to the judge's position and perhaps save the judge from peril. Judge Young will present an expanded presentation on this problem at the NAALJ conference in Santa Fe, New Mexico, September 18-21, 2011.

We continue to expand our seminar presentations. If you have any suggestions for topics you would like addressed, please contact me at [paul.handy@dc.gov](mailto:paul.handy@dc.gov). ☐

## Judicial Ethics and Independence

*By Judge Ann Marshall Young*

*Judge Young, a long-time member of NAALJ and a member of DCAALJ since its founding, has served as a state central panel ALJ in Tennessee and is currently an administrative judge with the U.S. Nuclear Regulatory Commission. Her comments in this article summarize a program presented to DCAALJ members on April 21, 2011, reflect solely her own opinions, and are not necessarily those of her employer*

In February 2007 the American Bar Association adopted an updated Model Code of Judicial Conduct, which for the first time explicitly states that it applies not only to judicial branch judges, but also to "anyone who is authorized to perform judicial functions, including . . . [a] member of the administrative law judiciary."<sup>1</sup> When adopted, it was made clear that this definition "is meant to apply to the broadest possible range of individuals, and would not, therefore, permit the exclusion of a judicial officer whose official title does not make reference to administrative 'law.'"<sup>2</sup> Thus, whether we are called "administrative law judges," "administrative judges," "hearing officers," "hearing examiners," or the like, if we perform judicial functions, we are intended to be covered.

This is important, for at least three reasons: First, the ABA Model Code of Judicial Conduct serves as a model for states in adopting their own codes, and is also referred to by federal courts in ruling on judicial ethics issues. Thus, whether or not our particular

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jurisdictions have individual codes, when questions arise, the Model Code may be referred to for guidance.<sup>3</sup>

Second, the application of the code to the administrative law judiciary is important with specific regard to judicial independence, because the first canon of the code provides that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary . . . .”<sup>4</sup> Thus, as judges covered by the code, we are *ethically required* to uphold and promote judicial independence, which reasonably also requires that we *practice* judicial independence.

Third, by clearly providing that the administrative law judiciary is covered by the code, it may now also be said to provide some protection to us in the event inappropriate influences are brought to bear on our decision-making as judges.

Judicial “independence” is defined in the Model Code as “a judge’s freedom from influence or controls other than those established by law.”<sup>5</sup> And, as indicated in Canon 1, integrally tied to judicial independence are “integrity,” defined as “probity, fairness, honesty, uprightness, and soundness of character,” and “impartiality,” defined as “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”<sup>6</sup>

Thus, while “independence” means “freedom” from inappropriate influences or controls, it also involves *responsibility* to do our work free from such influences – including both external and internal influences. Indeed, Canon 2 of the Code requires that we “perform the duties of judicial office *impartially, competently, and diligently.*”<sup>7</sup>

While we may have little control over some *external* influences (such as job security and working conditions), we

may minimize and counteract the impact of any inappropriate attempts to influence that occur, through compliance with the Code. For example, because most external influences reach us through *ex parte* communications (be they direct or indirect, wrongfully or innocently intended, written, spoken, or electronic), we can look to the *ex parte* rule to address such communications, through disclosure and providing opportunity for parties to respond.<sup>8</sup>

Compliance may be difficult in an actual occurrence – for example, disclosing a communication from an agency official who may have some power over salaries, etc. But following the rule will accomplish both (1) doing the thing that is lawful and fair to the parties, and (2) being ethically beyond reproach on one’s own part. Of course, some backbone may be required!

We must also take seriously our responsibility to perform our duties as free as possible of inappropriate *internal* biases and preferences. This means learning ways to become aware of and combat such predilections, which are not always obvious on the surface, even to ourselves.

Judicial independence does *not* mean just doing what an individual judge thinks is right. Rulings must be based solely on the law and the facts, as analyzed “impartially, competently, and diligently,” and if they are based instead on our own personal views, they do not comply with the Code.

Nor is judicial independence a mere “perk” of office for ourselves. Rather, it exists for the purpose of protecting the rights of parties to fair and impartial proceedings and decisions. By becoming familiar with, and conscientiously following, the Code of Judicial Conduct we can better serve this purpose, and also better protect ourselves from any possible adverse consequences if we are ever confronted with inappropriate attempts to influence us in the performance of our duties.

<sup>1</sup>ABA Model Code of Judicial Conduct [hereinafter “Model Code”], Application section. The Code may be found at [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA\\_M\\_CJC\\_approved.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_M_CJC_approved.authcheckdam.pdf); *see also*

[http://www.americanbar.org/groups/professional\\_responsibility/publications/mo del\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/mo del_code_of_judicial_conduct.html).

<sup>2</sup>Housekeeping Revisions to the 2007 Model Code (found at [http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA\\_M\\_CJC\\_Housekeeping\\_Revisions.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_M_CJC_Housekeeping_Revisions.authcheckdam.pdf)).

<sup>3</sup>*See* Model Code, Scope section.

<sup>4</sup>Model Code, Canon 1. The Model Code contains four canons, which state “overarching principles of judicial ethics that all judges must observe.” Under each canon are rules, which spell out specific requirements for fulfilling the principles stated in the canons. Violation of rules may lead to discipline of a judge. There are also in the Code: a Preamble; Scope, Terminology, and Application sections; and comments throughout that provide helpful guidance on interpreting the rules.

<sup>5</sup>Model Code, Terminology section.

<sup>6</sup>*Id.*

<sup>7</sup>Model Code, Canon 2 (emphasis added).

<sup>8</sup>*See* Model Code, Rule 2.9. This rule also defines in detail the sorts of communications that must be avoided or disclosed, exactly how to proceed with “administrative matters,” and related issues.▯



# Mid-Year NAALJ Conference Explores Challenges for ALJs

By Judge Nicholas H. Cobbs

The NAALJ Mid-Year Conference in Atlanta, Georgia, on May 3 and May 4, 2011, featured provocative presentations on issues of concern to administrative law judges. DCAALJ members Beverly Sherman Nash, Mary Masulla, and Nick Cobbs attended the conference.

Academics took the stage on the first day of the conference. Professor Paul S. Milich, of Georgia State University College of Law discussed problems in Advanced Evidence. Prof. Linda Jellum, of Mercer University School of Law, presented a Step-by-Step Approach to Statutory Interpretation, with pointers on when and how to use various techniques to determine what a statute means and how it applies in particular situations. Following a catered lunch, Instructor Kendall Kerew, of Georgia State University College of Law, presented a PowerPoint on advanced legal writing supplemented by examples for groups of judges to discuss and revise.

Judges who opted to attend an Atlanta Braves game on the evening of May 3 were disappointed. The game was rained out in a torrential downpour. Most of the judges opted instead for dinner at a local watering hole famous for an abundant variety of beers.

The presentations on May 4, the second day of the conference, focused on the practical problems judges face in their hearings. Lawyer Ken Kendrick discussed the issues that judges face when they serve as mediators, especially when they try mediate their own cases. A panel of administrative law judges talked about the problem of

managing self-represented litigants and vexatious counsel and techniques for maintaining control in the courtroom. Two Georgia jurists who had served as advisors in Iraq described the challenges involved in establishing a court system based on western models in a country with a different legal and cultural tradition.

The final presentation of the conference was one of the most interesting. Steve Duncan, an investigator for the Georgia State Patrol, talked about how to evaluate witness credibility by observing how the witness behaves. While acknowledging the pitfalls of visual credibility determinations, including the cultural factors involved, Mr. Duncan maintained that it is possible to spot the liar by observing his body language and listening to how he answers questions. One example: The witness who vehemently asserts “No!” while shaking his head “yes.”

The NAALJ Annual Conference this year will be in Santa Fe, New Mexico, at the La Fonda on the Plaza Hotel. The theme is Evidence, Ethics and Experts in the Land of Enchantment, with a variety of judges and law professors as speakers. Details and registration are available on the NAALJ web site, [www.naalj.org](http://www.naalj.org) (Conferences). ☐



## Upcoming Events

***Evidence, Ethics, and Experts in the Land of Enchantment***

***NAALJ Annual Meeting and Conference***

**September 18 – 21, 2011**

Come hear your fellow DCAALJ members Judge Ann Marshall Young and Administrative Appeals Judge Melissa Lin Jones speak!

***National Association of Hearing Officers Conference***

**November 13 – 15, 2011**

**Santa Fe, New Mexico**

Enjoy, speeches, seminars and scholarship with ample opportunities for networking, sight-seeing and fun both as a group and on your own. For more information go to [www.naho.org](http://www.naho.org).

# Do Not Wait to Be a Victim

Reports of threats against the judiciary are on the rise and need to be taken seriously. On June 29, 2011, Deputy Chief Bennie Williams of the United States Marshals Service delivered an informative presentation about professional and personal safety for administrative law judges.

On a daily basis, administrative law judges face upset individuals, and the possibility of an adverse ruling may result in a dangerous situation. As professional adjudicators, always take advantage of your judicial demeanor because a calming voice and soothing manner will deescalate many situations. If, however, poor behavior passes the point of control, you must consider how to extricate yourself from the situation to safety; gracefulness is not an issue, just get out. "Don't wait too late."



Even in the absence of a security protocol, there are steps you can take to protect yourself at work:

- Report any and all inappropriate communications and threats in the jurisdiction in which the communication or threat was made.
- Be aware of your surroundings and your situations so you can respond to them.
- In the hearing room, create a barrier between you and the parties with you closest to the door.
- Remove from public spaces objects that may become weapons.
- Do not defeat the security measures that are in place; keep doors closed and locked.

What do Judge Vance, Judge Daronco, and Judge Wood have in common? All three were murdered by assailants they knew from cases, and all three were murdered at home.

Your safety efforts must continue outside of the agency. Try to make yourself anonymous:

- Have an unlisted telephone number.
- Get a post office box.
- Do not broadcast your judicial status.

The duty of protection is not yours alone. You need to talk to your family about safety:

- Everyone needs to understand that unexpected "gifts" and packages can pose threats.
- A home security system is an early warning at a time when seconds can mean the difference between life and death.

The U.S. Marshalls Protective Service is tasked with developing and refining protective strategies for the federal judiciary. With the limited resources of the administrative judiciary, Deputy Chief Williams offered a captivated audience helpful suggestions for awareness and activity to make sure you do not wait to be a victim. Melissa Lin Jones

## Challenge Grants Awarded

Judge Fred D. Carney, Jr. (Department of Employment Services) has been awarded the registration fee for the NAALJ's September 2011 Annual Conference in enchanting Santa Fe, New Mexico.

Judge Claudia Barber (Office of Administrative Hearings) has been awarded \$500 which will be presented at the conference.

## Membership Drive

**Help us double our membership this year.  
Recruit a Friend!**

Everyone referring a new member who gets in good standing is eligible to win a prize in the year end raffle. Each new member earns you one entry in the raffle. Time is running out.

Don't miss out on next year's events. Renew your membership today.

An Application is Included in this Newsletter!



# District of Columbia Association of Administrative Law Judiciary, Inc.

AN AFFILIATE OF THE NATIONAL  
ASSOCIATION OF ADMINISTRATIVE LAW JUDICIARY

## 2010 - 2011 MEMBERSHIP APPLICATION AND DUES INVOICE

Dues for **DCAALJ/NAALJ** membership year 2010 – 2011 are now payable for the period from October 1, 2010 - September 30, 2011. Please remit your payment as soon as possible. The annual payment of \$50.00 includes membership dues for both the **DCAALJ and NAALJ**. (\$100.00 for sustaining member.)

NAME: \_\_\_\_\_

Last Name

First Name

Middle Name

HOME ADDRESS: \_\_\_\_\_

CITY, STATE, ZIP CODE: \_\_\_\_\_

HOME PHONE: ( ) \_\_\_\_\_ WORK PHONE: ( ) \_\_\_\_\_

AGENCY NAME: \_\_\_\_\_

BUSINESS ADDRESS: \_\_\_\_\_

PLEASE SEND MAIL TO:    HOME    WORK

EMAIL ADDRESS(ES): \_\_\_\_\_

ARE YOU AN ATTORNEY?:    YES    NO

REFERRED BY: \_\_\_\_\_

ARE YOU INTERESTED IN SERVING ON AN **DCAALJ** OR **NAALJ** COMMITTEE SUCH AS MEMBERSHIP, PROGRAM DEVELOPMENT, LOGISTICS, CONTINUING EDUCATION, COMMUNICATIONS OR CHARTER REVIEW?

YES    I AM INTERESTED IN: \_\_\_\_\_

No

SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

### THANKS FOR YOUR INTEREST!

Send Payment to:

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