

**TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION**

**SERIES 13
CODE OF CONDUCT FOR ADMINISTRATIVE LAW JUDGES**

§158-13-1. General.

1.1. Scope. -- This legislative rule establishes a code of conduct for state administrative law judges.

1.2. Authority. -- W. Va. Code §6B-2-5a.

1.3. Filing Date. -- April 14, 2006.

1.4. Effective Date. -- April 20, 2006.

§158-13-2. Interpretation.

2.1. This rule is taken, in part, from the National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges (1999) (Appendix A) and the American Bar Association Model Code of Conduct for State Administrative Law Judges (1995) (Appendix B).

§158-13-3. Definitions.

3.1. "Compensation" means any money, thing of value or financial benefit. The term "compensation" does not include reimbursement for actual reasonable and necessary expenses incurred in the performance of one's official duties.

3.2. "De minimis" means an insignificant interest that could not raise reasonable question as to an administrative law judge's impartiality.

3.3. "Degree of relationship" means the calculation authorized by the civil law system.

3.4. "Fiduciary" means such relationships as executor, administrator, trustee and guardian.

3.5. "Financial interest" means ownership of

more than a *de minimis* legal or equitable interest, however small, or a relationship as director, advisor or other active participant in the affairs of a party, except that:

3.5.a. ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the state administrative law judge participates in the management of the fund;

3.5.b. an office in an educational, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization;

3.5.c. the proprietary interest of a policyholder in a mutual insurance company or a depositor in a mutual savings association or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

3.5.d. ownership of government securities is a "financial interest" in the issue only if the outcome of the proceeding could substantially affect the value of the securities;

3.6. "Member of the family residing in the household" means any relative of the administrative law judge by blood or marriage, or a person treated by a judge as a member of the family, who resides in the household.

3.7. "Organization which practices invidious discrimination" means any organization which arbitrarily excludes persons from membership upon the basis of race, gender, religion, or national origin. However, "organization" shall not include an association of individuals dedicated to the preservation of religious, ethnic, historical, or

cultural values of legitimate common interest to its members; or an intimate, distinctly private association of persons whose membership limitations would be entitled to constitutional protection.

3.8. "Political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

3.9. "Proceeding" includes pre-hearing or other stages of litigation.

3.10. "State administrative law judge," "administrative law judge" or "judge" means any public employee, public officer, or contractor functioning as a hearing officer, referee, trial examiner or other position in state government to whom the authority to conduct an administrative adjudication has been delegated by an agency or by statute, and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes or rules, but does not include any person whose conduct is subject to the code of judicial conduct promulgated by the West Virginia supreme court of appeals.

§158-13-4. Standards of Conduct.

4.1. A state administrative law judge shall uphold the integrity and independence of the administrative judiciary.

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

4.1.b. The fact that an administrative law judge rules in favor of the agency by which he or

she is employed or serves under contract, standing alone, does not establish a lack of independence.

4.1.c. The compensation of an administrative law judge may not be conditioned upon the outcome of a proceeding before that judge.

4.1.d. No provision in this rule prohibits an agency or administrative judiciary, in the interest of uniformity and consistency, from establishing policies interpreting case law, statutory law, and legislative rules, or from establishing operational policies.

4.2. A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities.

4.2.a. An 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.

4.2.b. An administrative law judge shall not allow family, social, political, employment or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position of influence. A judge shall not testify voluntarily as a character witness.

4.2.c. An administrative law judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion, or national origin.

4.3. A state administrative law judge shall perform the duties of the office impartially and diligently.

4.3.a. The judicial duties of an administrative law judge take precedence over all other activities. Judicial duties include all the duties of the office prescribed by law. In the performance of these duties, the following standards apply:

4.3.b. Adjudicative responsibilities.

4.3.b.1. An administrative law judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, employment status or fear of criticism.

4.3.b.2. An administrative law judge shall maintain order and decorum in proceedings.

4.3.b.3. An administrative law judge shall be patient, dignified, and courteous to litigants, witnesses, lawyers and others with whom the judge deals in an official capacity and shall require similar conduct of lawyers or other representatives, staff members and others subject to the judge's direction and control.

4.3.b.4. An administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law. An administrative law judge shall not initiate, permit or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

4.3.b.4.A. Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

4.3.b.4.A.1. the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

4.3.b.4.A.2. the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

4.3.b.4.B. A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and

affords the parties reasonable opportunity to respond.

4.3.b.4.C. A judge may consult other judges and support personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

4.3.b.4.D. A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

4.3.b.4.E. Decisions of an administrative law judge shall clearly identify the person or persons responsible for holding the hearing and issuing the final order or decision, and shall be based exclusively on evidence in the record of the proceeding, material that has been officially noticed, and material which agency policy or applicable statutes ordinarily permit consideration or reference.

4.3.b.5. An administrative law judge shall require participants in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This provision does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

4.3.b.6. An administrative law judge shall not, while a proceeding is pending or impending, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair hearing. The judge shall require similar abstention on the part of agency personnel subject to the judge's direction and control. This provision does not prohibit an administrative law judge from making public statements in the course of their official duties or from explaining for public information the procedures of the agency. Further, this provision does not apply to proceedings in which the judge is a litigant in a personal capacity.

4.3.b.7. An administrative law judge shall not disclose or use, for any purpose unrelated to judicial duties, information acquired in a judicial capacity that by law is not available to the general public.

4.3.b.8. An administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge.

4.3.b.9. An administrative law judge shall not be subject to undue or improper influence from the head of an agency whose decision is being reviewed.

4.3.c. Administrative responsibilities.

4.3.c.1. An administrative law judge shall diligently discharge assigned administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and facilitate the performance of the administrative responsibilities of other state administrative law judges.

4.3.c.2. An administrative law judge shall require staff and other persons subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.

4.3.c.3. An administrative law judge shall take appropriate action or initiate appropriate disciplinary measures against a state administrative law judge, lawyer, representative or others for unprofessional conduct of which the judge may become aware. Appropriate action may include communication with the state administrative law judge, lawyer or representative, who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority, or other agency or body.

4.3.d. Disqualification.

4.3.d.1. An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might

reasonably be questioned, including but not limited to instances where:

4.3.d.1.A. the administrative law judge has a personal bias or prejudice concerning a party or a party's lawyer or other representative involved in the proceeding;

4.3.d.1.B. the administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. Ordinarily, a lawyer in a governmental agency is not considered to have an association with other lawyers employed by that agency within the meaning of this provision;

4.3.d.1.C. the administrative law judge has served in other governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

4.3.d.1.D. the administrative law judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a more than de minimis financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

4.3.d.1.E. the administrative law judge or the judge's spouse or a person within the third degree of relationship to either of them or the spouse of such a person:

4.3.d.1.E.1. is a party to the proceeding, or an officer, director or trustee of a party;

4.3.d.1.E.2. is acting as a lawyer or representative in the proceeding;

4.3.d.1.E.3. is known by the judge to have an interest that could be substantially affected by the outcome of the

proceeding;

4.3.d.1.E.4. is to the judge's knowledge likely to be a material witness in the proceeding.

4.3.d.2. An administrative law judge should be aware of his or her personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of his or her spouse and minor children residing in the judge's household.

4.3.e. Remittal of disqualification.

4.3.e.1. An administrative law judge disqualified by the means of §4.3.d may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers or representatives, independently of the judge's participation, all agree that the judge should not be disqualified and the judge is willing, the administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

4.4. A state administrative law judge may engage in activities to improve the law, the legal system, and the administration of justice.

4.4.a. An administrative law judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so doubt is not cast on the capacity to decide impartially any issue that may come before the judge:

4.4.a.1. Speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice.

4.4.a.2. May appear at a hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, unless otherwise

prohibited by law.

4.4.a.3. May serve as a member, officer or director of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice. An administrative law judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

4.5. A state administrative law judge shall regulate the judge's extra-judicial activities to minimize the risk of conflict with judicial duties.

4.5.a. Extra-judicial activities in general.

4.5.a.1. An administrative law judge shall conduct all of the judge's extra-judicial activities so that they do not:

4.5.a.1.A. cast reasonable doubt on the judge's capacity to act impartially as a judge;

4.5.a.1.B. demean the judge's office; or

4.5.a.1.C. interfere with the proper performance of the judge's duties.

4.5.b. Avocational activities.

4.5.b.1. An administrative law judge may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational activities.

4.5.c. Civic and charitable activities.

4.5.c.1. An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee

or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

4.5.c.1.A. An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.

4.5.c.1.B. An administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization.

4.5.d. Financial activities.

4.5.d.1. An administrative law judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's official position or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.

4.5.d.2. Subject to the requirements in subsection 4.5.d.1 of this rule, an administrative law judge may hold and manage personal investments, including real estate, and engage in other remunerative activity.

4.5.d.3. An 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 judges can do so without serious financial detriment, judges shall divest themselves of investments and other financial interests that might require frequent disqualification.

4.5.d.4. Neither an administrative law judge nor a member of the family residing in the judge's household should accept a gift, bequest, favor or loan from anyone except as follows:

4.5.d.4.A. An administrative law judge may accept a gift incident to a public testimonial to the judge, books supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse to attend a function or activity devoted to the improvement of the law, the legal system or the administration of justice;

4.5.d.4.B. An administrative law judge or a member of the family residing in the household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative or close personal friend; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not administrative law judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

4.5.d.4.C. An administrative law judge or a member of the family residing in the household may accept any other gift, bequest, favor or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, or the gift is otherwise consistent with relevant agency rules and is reported to the extent required by such rules and other applicable laws.

4.5.d.5. An administrative law judge is not required by this rule to disclose income, debts or investments, except as provided by law.

4.5.d.6. Information acquired by administrative law judges in their judicial capacity shall not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

4.5.e. Fiduciary activities.

4.5.e.1. An 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. While acting as a fiduciary, an administrative law judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

4.5.f. Arbitration.

4.5.f.1. An administrative law judge may act as an arbitrator or mediator if such activity does not affect the independent professional judgment of the judge or the conduct of his official duties. An administrative law judge shall not be an arbitrator or mediator over a matter which the judge may later preside.

4.5.g. Practice of law.

4.5.g.1. Subject to applicable law and relevant agency rules, an administrative law judge may practice law if such activity would neither affect the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties. An attorney who is an administrative law judge shall not accept the representation of a client who is a litigant before the tribunal for whom the administrative law judge serves or if there is a likelihood that such person will appear before the judge. An administrative law judge shall not practice law before the administrative tribunal for which the judge serves.

4.5.h. Extra-judicial appointments.

4.5.h.1. An administrative law judge may accept appointment to a governmental committee, commission or other position that is concerned with issues of policy on matters which may come before the judge if such appointment neither affects the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties.

4.6. A state administrative law judge shall limit compensation received for quasi-judicial and extra-judicial duties.

4.6.a. An administrative law judge may receive compensation and reimbursement of

expenses for the quasi-judicial and extra-judicial activities permitted by this rule, if the source of such payments does not give the appearance of influencing the judge in the judge's official duties or otherwise give the appearance of impropriety, subject to the following restrictions:

4.6.a.1. Compensation.

4.6.a.1.A. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not an administrative law judge would receive for the same activity.

4.6.a.2. Expense reimbursement.

4.6.a.2.A. Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the 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.

4.7. A state administrative law judge shall refrain from political activity inappropriate to the office.

4.7.a. Consistent with applicable statutes and relevant agency rules, an administrative law judge shall not:

4.7.a.1. publicly display any campaign paraphernalia in any area where judicial activities are conducted or knowingly permit any such display;

4.7.a.2. personally solicit funds for a political organization or political candidate; Provided, That the provisions of this paragraph do not apply to part-time state administrative law judges;

4.7.a.3. be compelled to pay an assessment to a political organization or candidate or purchase tickets for political dinners or other similar functions.

4.7.b. A full-time administrative law judge shall either resign from office or take an

approved leave of absence prior to becoming a candidate in either a party primary or a general election for any elected public office, or serving in any elected public office.

4.7.b.1. For purposes of this rule, a full-time administrative law judge becomes a candidate for an elected public office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support.

4.7.b.2. This rule does not prohibit a part-time administrative law judge from seeking election to or serving in any elected public office.

4.7.c. An administrative law judge may engage in political activity on behalf of measures to improve the law, the legal system, or the administration of justice, or as expressly authorized by law.

§158-13-5. Advisory Opinions.

5.1. The chairman of the West Virginia Ethics Commission shall appoint from the membership of the commission a committee of three persons designated as the West Virginia Ethics Commission Committee on Standards of Conduct for Administrative Law Judges. The chairman shall designate one of the persons to chair the committee. In addition to the three members of the committee, two additional members of the commission shall be designated to serve as alternate members of the committee.

5.2. In appointing the committee, the chairman of the commission shall not appoint all members of the same political affiliation.

5.3. Any person whose conduct is governed by the provisions of this code of conduct may make application for an advisory opinion from the commission's Committee on Standards of Conduct for Administrative Law Judges. All applications for advisory opinions shall be in writing and be directed to the committee at 1207 Quarrier Street, Suite 407, Charleston, West Virginia 25301.

5.4. All applications for advisory opinions must contain the name, address and telephone number of the requester in the event additional information is needed.

5.5. All applications for advisory opinions should fully describe the applicant's official position, employment, or status under this rule.

5.6. All applications for advisory opinions should contain an explanation or paragraph summarizing the conduct for which the application is being made.

5.7. The committee shall respond in writing and in an expeditious manner to a request for an advisory opinion.

5.8. All advisory opinions issued pursuant to this rule will be submitted to the Secretary of State for publication and indexing in the Code of State Rules.

5.9. Before an advisory opinion is made public, any material which may identify the person who is the subject of the opinion, shall to the fullest extent possible, be deleted and the identity of the person shall not be revealed.

5.10. A person subject to the provisions of this rule may rely upon an advisory opinion of the committee, and any person acting in good faith reliance on any such opinion shall be immune from the sanctions provided in this rule.

§158-13-6. Complaints.

6.1. The procedures for filing and adjudicating a complaint against a state administrative law judge for violating the standards of conduct contained in this rule are governed by the West Virginia Ethics Commission's procedural rule, Adjudicating Complaints Relating to Conduct of State Administrative Law Judges, 158 C.S.R. 5. The commission shall supply a copy of this procedural rule to any person upon request and without charge.

6.2. The code of conduct established by this

rule shall apply to conduct which occurs on and after the first day of July, two thousand five. Any complaint alleging a violation of this rule shall be filed within two years after the date on which the alleged violation took place.

§158-13-7. Immunity Absent Malicious or Fraudulent Complaints.

7.1. Any person, official, or agency who in good faith files a verified complaint pursuant to this rule shall be immune from any civil liability that otherwise might result by reason of such actions.

7.1.a. In the event a person files a verified complaint which is determined by the committee to have been made maliciously or fraudulently, either knowing that the statements contained therein were not true, or in reckless disregard to the truth or falsity of material allegations contained in the complaint, the committee may impose one or more of the following sanctions on the complainant:

7.1.a.1. Make reimbursement to the respondent for reasonable actual costs incurred by the respondent;

7.1.a.2. Pay reasonable attorney fees incurred by the respondent;

7.1.a.3. Make reimbursement to the commission for the reasonable actual costs of investigation;

7.1.a.4. Decline to process any further complaints from the same individual until all monetary sanctions have been satisfied.

§158-13-8. Sanctions.

8.1. If the commission finds by clear and convincing evidence that one or more charges are true and constitute a material violation of this rule, it may impose one or more of the following sanctions:

8.1.a. a written admonishment;

8.1.b. a cease and desist order;

8.1.c. an order of restitution of money, thing of value, or services taken or received in violation of this rule; and,

8.1.d. fines not to exceed one thousand dollars for each violation.

8.2. The commission may institute civil proceedings in the circuit court of the county wherein a violation occurred for the enforcement of sanctions imposed in its final decision.

8.3. In addition to the foregoing sanctions, the commission may recommend to the appropriate governmental body that the respondent be suspended or terminated from employment, removed from office, or disqualified from serving in the capacity of an administrative law judge either permanently or until such time as the respondent has completed an approved course of remedial training.

§158-13-9. Conciliation Agreements.

9.1. At any stage of the proceedings, the commission may enter into a conciliation agreement with a respondent if such agreement is deemed by a majority of the members of the commission to be in the best interest of the state and the respondent.

9.2. Any conciliation agreement must be disclosed to the public.

9.3. Upon acceptance of a conciliation agreement, a majority of the members of the commission may elect to impose one or more of the sanctions provided in the preceding section.

§158-13-10. Appeal.

10.1. The respondent may appeal final decisions of the commission involving the issuance of sanctions to the circuit court of Kanawha County, West Virginia, only upon grounds set forth in W. Va. Code §29A-5-4.

§158-13-11. Agency Code of Conduct.

11.1. Any agency may develop a code of conduct for its own administrative law judges, which shall supersede this rule, provided that the Ethics Commission determines that such agency code of conduct substantially complies with the objective of this rule.

11.1.a. If the commission grants a waiver authorizing an agency to develop its own code of conduct in accordance with this provision, a copy of any such code shall be retained in the commission's offices and be made available to the public.