Campbell Law Review

Volume 41
Issue 2 *Spring 2019*

Article 10

2019

The Adoption of a Model Code of Conduct for State Administrative Law Judges: Resolution 113

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M/F: MALE/FEMALE SPEAKER

Mann: Well, I invite you to continue to enjoy that fine lunch while I make a few remarks. They've given me a full hour; I'm not certain that we can wake up that many people after a full hour of listening to me, so continue to eat, and I'll try not to fall asleep during the presentation, as well. I do really expressly want to thank Logan Shipman and Taylor McCallman and all of those that are responsible for putting on the Silent Machine, and the sponsors, Owens & Miller, we're appreciative of them, as well. Anyone here from that group? Well, we thanked them last night, and we certainly thank them again.

I go back in time, walking around and looking at portraits of the deans and how far the Campbell Law School has gone since it originated. When I did my first clerkship, years ago, I clerked with Larry Davis, who remained a lifelong mentor and a lifelong friend of mine, and I can remember, after clerking with him—you know, that was an experience all in itself. He was a little more detail-oriented than I was. Talking about the Campbell Law School and how it was kind of struck off in his imagination. And here we are today, many years ago, although he's not with us any longer—I'm sure he's here in spirit, at what this law school has accomplished.

Another friend and mentor was Willis Whichard, who had a good deal—along with Melissa Essary—responsibility of moving the law school to Raleigh, and how much it has meant to the bar here in Raleigh, and hopefully how much the bar has meant to the law school. So it is a real experience in growth. I look at the number of the graduates of this law school who are members of the judiciary now, and it's an incredible number. And it's incredible how this law school has worked itself into the fabric of Wake County and the City of Raleigh, and how much this law school has meant to

* Speaker made edits to this transcript.

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us, and the visionaries that got it to the point where it is now, I think, would be pleased.

I can't remember not knowing Dean Leonard. I don't know if he's here or not. If he's here, I won't say anything nice about him, but if he's not here, you just need to know how fortunate you are to have someone of his caliber and his standing, as you've had with many of the deans of this law school. He's really the Energizer Bunny that has just—constant source of energy and a constant source of new developments, and I think it's quite appropriate when he asked what exactly can be done to make administrative law more relevant in your curriculum.

It seems to me that just being in the capital city, which most is the center of administrative law, that it can be so relevant, because you just kind of step outside—it's like Anna Choi said, you just kind of step outside, and you're in the middle of it all the time. So it's appropriate that this law school, of all the law schools, is right here and prepared to enter the administrative law practice, and it's no—it's no mystery. Once you learn how to try a case, and once you learn how to try—be a bench trial, that's pretty much administrative law. So it's not so much what you have to learn about the actual trial, it's the kind of the other things that surround it that are somewhat different, and I intend to speak a little bit to that point.

There are many people in this room that I have learned from. One of them is walking out—I hope he's not leaving. Judge Abe Jones, who's a great practitioner and turned to an administrative law judge and Superior Court judge. We are proud to have him as a graduate of OAH, and along with some others. I know that Fred Morrison is here; I always learn from Fred, and if you ever really want to settle a case, get Judge Morrison to mediate your case, because it will be settled. Jack Nichols is here, Don Overby is here. I don't think Nick Fountain is here, but he's certainly one that I recognize.

I want to also recognize Caroline Martin, who has assisted me in this preparation, and if my voice gives out, she says she would be glad to come forward and complete—she's shaking her head; I think that means "yes." So—but she is clerking with us from UNC this semester, and she has provided a lot of valuable experience. And as I was telling her, that a good presentation essentially involves telling people what you're going to say, saying it, and then telling them what you've said.

So, I'll give you just a little bit of where I'm going with this way-too-long lecture, and if you nod off, I certainly understand it, because that's the nature of administrative law, but just try to change administrative law—try to change the APA, and you will see it's like changing the revenue code. You'll find everybody comes out of the woodwork to challenge you. So it

may be boring in substance, but everybody's accustomed to it, and everybody has their own little view of it.

My talk really is going to end with the ABA model code of ethics for state administrative law judges and where that came from, because it's been a development that has been very long in the—in its history and its process, but it's also come to culmination this last August, in the ABA Convention—at their annual meeting. But it basically has arisen from the destruction that ex parte communications do in to administrative law. So we're going to talk a little bit about that history, a little bit about the developments of state administrative law, through Goldberg and Mathews—most of you are aware of those—and the updates to what North Carolina has, which is a central hearing agency or a central panel, and then a little bit more about the history of the model code.

So let me begin—I don't want to leave anybody out, but I want to be sure that I've recognized everyone. I want to begin with talking about a very early case that I think was the real precursor to the evils of ex parte communications, and it's *Morgan v. The United States*.[1] It's a 1938 United States Supreme Court case, and it evolved—it involved a struggle by the appellate courts, and that struggle by courts to come to grips with the bureaucratic state, or as Justice Jackson said, the fourth branch of government.

And you can see the judiciary in the early cases trying to do just that, and it involved the Department of Agriculture. It didn't involve Justice Morgan, who is here today, but same name, and some pretty egregious ex parte communications that came up from an act—in 1921, Congress authorized the Secretary of Agriculture to specify maximum just and reasonable charges that stockyard operators could set for their services, and they instructed the secretary to set those after a full hearing, and that was going to be a full administrative hearing, and what the court believed should be a full hearing and what the secretary believed should be a full hearing were not the same. They were two different things, and the new secretary that came in had stepped in the shoes of the previous secretary, and there was a lot of data and information that was given to be considered at the hearing.

And what the secretary decided was, there should be no hearing, and really went to the agency attorneys and the agency folks to say, "Well, what does all this mean? You tell me what it means, you write the decision. We'll kind of bypass the hearing, and we'll enter a decision." And of course when the decision was entered, the other side knew very little about it, had no input in it whatsoever, and that went up on appeal, ultimately making it to the United States Supreme Court.

1. Morgan v. United States, 304 U.S. 1 (1938).

Immediately, the court begins to apply a judicial overlay to what is a bureaucratic administrative hearing. And we're saying, by example in an equity case, a special master of the trial judge permitted the plaintiffs' attorney to formulate the findings upon the evidence conferred ex parte with the plaintiffs' attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing.

They went to another analogy in the judicial branch and said, "If this had happened in the judicial branch, it would be a no-brainer. This is not fair, this is not according to law, and it was filled with ex parte communications." And so the Supreme Court of the United States reversed the secretary and sent the case back, but it was all based on ex parte communications. And here we are, little bit less than 100 years later, still trying to come to grips with the prohibition on ex parte communications.

From *Morgan*, the American Bar Association began to realize that something needed to be done to provide some procedures to the—to these—to administrative procedures, and they got together, and there were two views, that ultimately the latter view prevailed by FDR, that—during the Roosevelt years and the New Deal, to not throw all of this into the judiciary, but to create a separate body to—separate area of law in the executive branch, because quite frankly, the judiciary had been tampering with FDR's New Deal programs, even to the point that he was thinking about adding two new Supreme Court justices to the United States Supreme Court.

Roscoe Pound, on behalf of the ABA—the famous dean of the Harvard Law School—came out absolutely opposed to the APA, and anything that would prevent it going through the judicial process. He wrote extensively about his objections to it. And then you had those in the administration—Kenneth Culp Davis and some others—who immediately said, "No, we can't have that process." And intervening in there was the World War II, it went up and back. To make a long story short, FDR prevailed, and the federal administrative law, APA, was put in place that provided some of the judicial independence that Roscoe Pound was looking for, but nothing like what he found.

It was this struggle among those that are in the judiciary to try to bring fairness and due process and the standards that are applied in judicial branch hearings into administrative law. Those, like back in *Morgan*, and Roscoe Pound, looked at it from the protection of a citizen's right, constitutional rights, and the APA and the executive and the President of the United States was looking at it more about entitlements in protecting the agencies from interference by the courts.

So all of this continued to develop. There was not much going on in the state level. There was—our APA goes back to the 1940s and primarily dealt with professional licensing issues. But nothing really happened until two United States Supreme Court cases were decided. One was *Goldberg v. Kelly*[2]—involved food stamps, right to a fair and impartial food stamp hearing. And *Goldberg* was decided in 1970 by Justice Brennan, and in that case, they were trying to, again, grapple with how do we look at this, from the perspective of the citizen, or do we look at it from the perspective of the agency? And Brennan did an astounding thing when he said that the right to food stamps was a property interest just like real estate or an automobile or tangible/intangible property, was exactly—was property and deserved protections under the Fifth Amendment and applied to the State of New York under the 14th Amendment.

So we suddenly had the Constitution flying right in the middle of administrative law in a state administrative law hearing, and what due process was required? They said it wasn't—you didn't have to have the requirement of a full judicial hearing, but you had to have notice, the recipient had to have timely and adequate notice, they had to have—this was a pre-termination hearing—the right to confront adverse witnesses and presenting evidence, and last—and of course they said, "An impartial decision maker is essential."

I think it is at that time that they were looking at, well, if this is true in the State of New York and this is the 14th Amendment being applied to an administrative hearing, every time we take a property interest such as this, are we going to have to be tested on the administrative procedures? And the answer is, well, yes, that potential is out there. So then we begin to make great strides in the 1970s in North Carolina and in other states, on coming up with a uniform state Administrative Procedure Act that would capture all administrative hearings under the same procedures. And this is my thought—you're not going to find this in a law review article much anywhere, unless I've written it, and I'm not sure everybody agrees that—with my assessment of this.

And then they went on and they decided the next case, *Mathews v. Eldridge*,[3] and determined with federal disability, Social Security disability rights, you did not have to have a pre-termination hearing as you—as was required in Goldberg, so you had this kind of mix of United States Supreme Court decisions as to exactly what due process was required. And they came up with a test that you had to look at the interests that will be affected; a risk of an erroneous deprivation; probable value, if any, of additional or substitute

2. Goldberg v. Kelly, 397 U.S. 254 (1970).

3. Mathews v. Eldridge, 424 U.S. 319 (1975).

procedural standards; and the government's interest in including the function and exactly how much all of this would cost. I think it was a retreat by the Supreme Court, six years later after Goldberg, that made it a little bit more confusing. But by this time, I think the APAs were all ready to go, and it ultimately, I think, turned out for the best. But whenever you are in an administrative hearing and you feel like those fundamental property interests are not being protected, you can still contest those procedures just as they were originally protested in 1970.

We then move later in our state APA to the creation of the central panel or the Office of Administrative Hearings—North Carolina was 13th in the nation to create this independent cadre of administrative law judges who do not work for the agency that investigated and prosecuted, but were taken out and because of economies of scale and other reasons for impartiality, this has become quite a new approach to administrative hearings, where at least you remove the perception of bias, perception of unfairness. In many states, this has been a slow process. The ABA has been working with the Appleseed for Justice of Chicago in a study that Malcolm Rich, the director there, has been doing, which has had a great influence on the State of Illinois, which was the last state to provide a central hearing agency. And he had done original study of the original seven central panels back in 1980, did a study by the American Judicature Society, and then all these years later, he just came out in 2019 with an upgrade of that study, including all 30 jurisdictions in the United States—not all the states, but the City of Chicago, City of New York, Washington, D.C., and Cook County all have a central hearing agency now. So there was a lot to be studied, and he concluded that this was the most efficient way to conduct state administrative hearings.

So we've gone full circle, and as I was preparing for this, and Ms. Martin was a little bit confused when I told her to look at the State of Illinois and their new legislation, and she kept telling me there was no new legislation, and I said, "Well, I know there is," and I tricked her, because it was the State of Indiana she was looking for, and she couldn't read my mind. I don't know why that was, but we came up with the most recent enactment, with the State of Indiana, has one of their houses last week passing legislation creating a state central panel in Indiana.

I had gone out to Indiana in a law school symposium very similar to this in 2002, where they were considering and debating whether Indiana should create a central panel, and there was a lot of very positive work being done there until we went to lunch—much like we're having lunch right now, and one of the Supreme Court justices of Indiana came forward and said, "I've read a law review article by a professor in South Carolina, who will remain unnamed, and he's told us all the reasons why we should not create a central panel, and I will be adamantly opposed to any legislation to create

a central panel in Indiana." That was the end of that. We had an afternoon program, but I don't believe many people showed up for it after the air went out of the tire.

So I was surprised that Indiana had gone this far in now creating a central panel, and it was preceded by a study, and it looks to be with the appropriate exemptions from—that all of the—these statutes seem to have agencies that are exempt or not going to be subject to the jurisdiction of the central panel. Once that got resolved, I feel fairly confident that Indiana Senate will pass this bill and they will be the addition. So that will be 31 and 32.

Now, let's see where we go here. The ex parte communication aspect of this, and we have referred to it slightly—we've got this concern by many litigants and others about the effect of control that may be exercised over someone that is in the agency hearing the contested cases. The federal APA ensured a great deal of judicial independence by the federal administrative law judges, until the most recent Supreme Court decision in *Lucia*.[4] And *Lucia* essentially said that all of the protections that are provided to the federal administrative law judges and how they get to their job, which is essentially from civil service and an exam, is now not the correct way, because the President of the United States, through the Appointments Clause,[5] gets to appoint the federal administrative law judges as inferior officers—not ones that have to be confirmed by Congress, but they have to be appointed by the president directly or by someone that the president appoints. And so the civil service protections that had offered a great deal of protection to the federal administrative law judges are now up in the air. And it's not just that they have to be, or can be, appointed by the agency heads as opposed to civil service, but that they may be removed by the appointing authority, which would seem—well, the law is unsettled. It doesn't seem to be very clear that the Appointments Clause doesn't preclude protections for federal administrative law judges from removal, but it's unclear, until the next United States Supreme Court decides this.

So, how would you like to go into traffic court and the judge being an employee of the chief of police, and the chief of police sits there and looks and decides, "Well, let's see how this judge handles this particular case, and if I don't like it, then I'll get another employee up there to hear the case." That's kind of a gross exaggeration, but the removal aspects under the appointments clause add some instability to the whole process. Right now, no federal administrative law judge I know is planning to apply to go to a different agency, because if they are where they are now, there's some

4. Lucia v. Securities and Exchange Commission, __ U.S. __, 138 S. Ct. 2044 (2018).

5. Art, II, Sec. 2, Clause 2

protections that they believe they have by way of tenure, and it only applies to the new appointments. So no federal administrative law judges that I know are searching to go from Social Security to the Department of Labor or the Securities Exchange Commission.

We need to be following this very carefully, and one of the reasons I'm talking about this in the discussion is, there was an attempt in the 1990s to create a central hearing agency on the federal level. It was called the federal corps bill, and it was shepherded by Howell Heflin, who was a former Chief Justice of the Supreme Court of Alabama that had turned to the United States Senate and decided that these protections were necessary. And he was very successful in moving his bill through the United States Senate, and it passed there, and he also moved it through the United States House of Representatives—just not in the same session. And it never made law. There was a lot of opposition to it, and it go—went back to that philosophy about, are we doing a judicial role in an administrative hearing, or are we looking at it more from a policy perspective and the agency's perspective. And it did not pass.

It then died with him. He died at the end of the 1990s, and with him pretty much this federal corps bill, which is now being looked at again—very seriously, in my opinion. Had the federal government gone to the corps bill, so many of the headaches that they're now being experienced in the federal APA would not be present. So we'll see whether that—what happens to that, but that's a little bit of the history and where we're going with that.

Now, we've got this—the history of this model code and what has happened to it. North Carolina, very early, in the late 1990s, decided—with a few pushes here and there—that the administrative law judges and the Office of Administrative Hearings needed to be subject to a code of ethics. The American Bar Association, in 1995, created a model code of judicial conduct for state administrative law judges, reflecting very long efforts at creating it. It was through NCALJ—that's the National Conference of the Administrative Law Judiciary in the ABA; the state practices committee, chaired by Ed Felter, then the chief administrative law judge in the State of Colorado; the NCALJ committee on ethics and responsibility, which was chaired by Ronnie Yoder, who's a federal administrative law judge; and Judge Felter. I participated somewhat in that in the late 1990s. along with John Hardwick, the chief administrative law judge in Maryland. A lot of effort went into that, and through the push that Ed Felter gave to it, the National Conference of the Administrative Law Judiciary created a model code of ethics for state administrative law judges, and that is the one that is presently incorporated in our statute that regulates the state administrative law judges in the Office of Administrative Hearings.

Well, as time went by, that code became slightly obsolete, particularly when the American Bar Association in 2007 adopted a new code of ethics for the judicial branch judges, not the administrative law judges. And that changed a little bit of the predecessor codes. So Ed Felter and I worked together in 2017 and 2016 to try to bring this code up to what it is today. He was assisted by Lorraine Lee, who was the chief administrative law judge in the State of Washington, and John Allen, who was the chief administrative law judge for Cook County. They came up with this code, and we then shopped it around and tried to get approval of different bodies in the ABA.

We ran into a little bit of a buzz saw when we got to the administrative law and regulatory practice section of the ABA, and they again went immediately to the ex parte communications prohibitions in the model code, saying, "You can't have this kind of—you can't silence this kind of communication that goes on in agencies," and we basically said, "Well, yes we can, and we really want to be sure that we have even more strenuous prohibitions against ex parte communications."

Well, we reached a compromise with them, and what they said is that that will apply to the state administrative law judges, but it will not apply to the directors who are making the final decisions, or who are those that are consulting. So with that exception, you'll see right in the very first tier that—in that preamble, it says very clearly that those directors are not covered by this. Nobody is covered by this model act until it is adopted in the jurisdiction. This is a model and a model only.

So we go—with that prohibition, North Carolina, we went to the House of Delegates with that compromise in 2018, and the House of Delegates of the American Bar Association adopted it without dissent, and it was part of, I think, a response to what some of the lawyers were seeing in the ABA from *Lucia*. There was a concern about that, and so we were successful, and this—the difference in this ABA model and the previous NCALJ model is that NCALJ is a conference in the judicial division of the ABA, and the only entity that had approved the previous model was NCALJ. So, we got the approval of the entire judicial division of the ABA, and then we got the entire approval of the House of Delegates, which made it an ABA model code.

This has become significantly important because it not only has this extensive prohibition on ex parte communications, but it affects the integrity of judicial independence. These canons read individually and in totality are—contain a great deal of prohibitions about what judges cannot do, and in that it protects the impartiality of the judge and it protects the judge's—not only their judicial conduct on the bench, but their nonjudicial conduct. Again, these only apply to the judges and the hearing officers that adopt them. If they're not adopted, these do not apply.

So, if you look at the first canon here, an administrative law judge shall uphold and promote the independence, integrity, and impartiality of the administrative law judiciary and avoid the appearance of impropriety. That is kind of a general statement. There are comments that further refine all of that, but the judges are to promote public confidence in the independence, integrity, and impartiality of the administrative law judiciary, and shall avoid impropriety and the appearance of impropriety, which sometimes is difficult for that ALJ that is embedded in the agency. But as you can see, I am promoting, today, confidence in the administrative law judiciary, and I'm doing it because Canon 1 says I have to. Okay. [LAUGHTER]

An administrative law judge shall perform the duties of the office impartially, competently, and diligently. It is this last part here that I became very interested in several years ago, and how long it would take to get a case to go through the Office of Administrative Hearings. This is reflective of the judicial canon as well. Judges in the judicial branch have to be concerned about the diligent disposition of their cases. Literally, justice delayed is justice denied. Bless you.

An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially; 2.3, the administrative law judge shall avoid bias, prejudice, and harassment. What external influences should be avoided by judicial conduct? If you don't think there is clamor in the administrative law arena—of course all you have to do is look at what happened in the Board of Elections yesterday and the day before and the day before that. You didn't even have to watch Spectrum News. I mean, you could watch any national news network and there it was.

And what about the public clamor or fear of criticism that would have been embedded in those judges, and with Judge Morrison—I don't know if he's still here or not, but he's—he may not be, but his case involved the death penalty and a challenge to the Council of State's approval of the type of drugs that could be used in capital punishment. There was a great deal of clamor and fear of criticism, and we from time—and I know that Judge Overby was going to make somebody in one section of the state very happy with his water transfer and another section quite unhappy. He may not have known—he probably only heard from the people that were happy. I happened to hear from a lot of people who were unhappy, but it's—these cases can be quite significant, and they can involve a great deal of public concern.

Competence, diligence, and cooperation: an ALJ shall perform judicial and administrative duties competently and diligently, cooperate with legal professionals and other officials in the administration of official business. If these sound familiar to you, they are. These are the same, almost the identical canons that are—govern the judicial, that are in the model code of judicial conduct for the judicial branch judges.

Responsibility to decide: they shall hear and decide matters assigned to the ALJ, except upon disqualification. If you're ever in that place where you have to, you know, make an unpopular decision, your motive is to procrastinate. You think, "Oh, no, I don't want to do this," but you have to decide. And I know that Judge Leonard, when he was on the bench, occasionally got in those same dilemmas.

Ex parte communications—here they are. Now, there's two things that govern ex parte communication. We have the provisions in Rule 2.9: an ALJ shall not initiate, permit, or consider ex parte communications, or consider other communications made to the ALJ outside the presence of the parties or their lawyers considering a pending or impending matter, including communications from an agency litigant, except with these minor exceptions. And those are pretty-well-accepted exceptions in the judicial branch.

We also have, compatible with this section in the canons, G.S. 150B-35[6]: unless required for disposition of an ex parte matter authorized by law, the ALJ assigned to a contested case may not communicate directly or indirectly in connection with any issue of fact or question of law, with any person or party or its representative, except on notice and on opportunity for all parties to participate. You can't do it.

And if there's one person that will be mentioned and honored next week, Sammie Chess, who has already been—you've already been told that he was the first African American admin—Superior Court judge appointed as a special Superior Court judge, way back in the '60s or early '70s. Ask him, when he was practicing law, in the early times of civil rights—he was a great civil rights lawyer and then was a really terrific Superior Court judge, just like Abe Jones and Justice Morgan—but it wasn't uncommon for someone that was in a minority to walk into a scene where the adversary was in speaking with the judge ex parte. It happened, according to Judge Chess, time and again. And if you want to know his feelings about the prohibition on ex parte communication, all you have to do is ask him and be prepared to listen for about an hour, why this is important.

So, I think we've gone a long way since the *Morgan* case was decided and the egregious ex parte communications that were stopped by the Supreme Court, but the issue is still alive on the federal level, and there's that tension between a judicial hearing protecting a citizen and an agency's right to make policy. And the ex parte communications seem to follow whatever direction you side with in that controversy.

It goes on and further defines statements on pending and impending cases. It talks about disqualification, where a judge has a conflict of

6. N.C. GEN. STAT. § 150B-35 (2017).

interest—mostly financial, where you own—you have stocks and other property interests, or relationships, that would prevent you from making a fair and unbiased decision. Now, when you go into these agencies and places where those are not covered by these model rules, there is no prohibition, and you may not ever know about them. But a judge that is under these canons is not only being asked when someone confronts them; they have to make this analysis themselves while they're on the bench. And if they see anything in here that creates a conflict for them, they are to put that on the record and make the decision about it.

And not only does this apply to the judge, it applies to those that the judge supervises in 2.12. Extrajudicial activities in general, what judges can do off the bench, is also subject to bias. Appearances before governmental agencies in consultation with governmental officials—and there's a lot in the weeds here. You've got to be—read these things carefully, because you can find as a judge violating some of this without ever really knowing that you are.

So it's very important, and one of the things that Indiana did, and I'll read to you what—where they went with their new legislation. Section 10 of the new legislation. The director shall do the following: adopt rules establishing a code of judicial conduct for administrative law judges. The code of judicial conduct for administrative law judges applies to each person acting as an administrative law judge in the Office of Administrative Hearings.

Next, receive complaints alleging violations of the code of judicial conduct, investigate the complaints, and take administrative or disciplinary action as deemed appropriate. Seven, next one: provide and coordinate education for administrative law judges on the code of judicial conduct for administrative law judges, professionalism, administrative practices, and other subjects necessary to carry out the purpose of this chapter. Render advisory opinions to administrative law judging concerning the code of judicial conduct, information/advice contained in an advisory opinion or considered specific to the person who requests, in confidential—point I'm making with this is there's a good deal of focus, out of the directions given to the director, in creating this new office. I would say at least 30% of them are just addressed to a code of judicial conduct.

So, in our office we've had one meeting of our administrative law judges on this issue. We have legal counsel that can advise our judges on how this works, and we are going to master all of what is required of us in these new canons. So I think Judge Overby can now address all of these questions that we're about to be asked. Now, we're still struggling.

My time's about to expire, and I want to give you an opportunity to ask any questions, and I greatly appreciate you not going to sleep while I was talking. [LAUGHTER] Yes?

M: What do you see as one of the major differences between this model code of conduct for administrative law judges and the one for other judges?

Mann: They are almost identical. I haven't gone through the 2007, but the 2007 ABA model was an overlay. It's almost precisely and exactly the same. There's a few comments that we had to remove from the 2007 code because it did not apply to the state administrative law judges, and of course the big difference was the ex parte communications are not prevented by the final decision maker or the ones advising the final decision maker. So I guess we've come full circle back to *Morgan*, because the *Morgan* case dealt with a secretary of agriculture, so I'm not sure we've gone—come that far in helping that problem, but those that are actually conducting the hearing as a judge, those prohibitions are very clear. Yes?

M: I have a question about the character witness limitation right there. It strikes me that there could be many situations where ALJs could be good character witnesses and it could be really important for, you know, maybe even just due process purposes. And we have—we allow many other people with important positions where people sort of give weight to their positions in doing their—in assessing their character determinations. And I wonder sort of why was it sort of—why was the decision made to go in that direction and to require a subpoena and sort of, you know, have a sort of, a little bit hostile environment, right? It's a cost—it's a compulsory environment, when there's a lot of sort of upsides to being able to have character witnesses.

Mann: I'm trying to get to that one because there is a comment under it.

M: Yeah, it was Rule 3.1, I think. Or not 3.1, sorry. It's 3-something. It was the last slide you were on; there it is, 3.3.

Mann: Okay. ALJs shall not testify as character witnesses in a judicial administrative or other judicatory proceedings, or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned—you can do it under a subpoena. An ALJ who, without being subpoenaed, testifies as a character witness, abuses the prestige of the ALJ's office to advance the interest of another; see Rule 1.3, except in unusual circumstances where the demands of justice require an ALJ, should discourage a party from requiring the ALJ to testify as a character witness.

What little I know about this is—you got someone that does have the answer? Okay. What little I know about it—it came from the judicial code, and I think it was in our previous NCALJ code, as well, and I have been called to be a character witness in a case that I really wanted to present myself as a character witness, and I couldn't do it because of this prohibition. And

I had the same question: why is it that I can't do it? I guess it would bear, in a judicial setting, where one judge would come in, like a justice of the Supreme Court would come before a Superior Court judge and testify as a character witness, that might put an inordinate amount of influence on that witness. Anybody else have an answer to that professor's questions?

Well, I'll close with this. I probably shouldn't read this, but since our professor talked about it last night, Jeff Rosen is—was a previous chair of the administrative law and regulatory section of the ABA, and he was—he had some views about *Chevron*,[7] and he is now being considered to being the deputy attorney general of the United States. And when he retired, when he stepped off as the chair, you're supposed to write him a little note, and this is what I wrote him. And I've never read this to anybody else, and it's only funny to me because I'm certain it wasn't funny to him.

"In light of the extraordinary service that Jeff Rosen has given to the administrative law and regulatory practice section, I highly recommend that we immediately purchase for Jeff a brand-new *Chevron*."[8] [LAUGHTER] "*Chevron* at its height of popularity was a simple model, but now many describe the current model as overly complex, with equally complex competitors, such as the hour. The only real consumers are scholars and others who practice who drive us into the darkness where our practitioners fear to tread. Notwithstanding that in many parts of the country, the new *Chevron* is flourishing; in others, it may be vanishing, but certainly we dare not say vanishing in our nation's capital, the hotbed of Chevronism, where Jeff is an esteemed practitioner of administrative law."

This was back when one house of Congress had condemned *Chevron*. "One house of Congress has condemned *Chevron* as unsafe for our democracy, so we must act quickly before the other chamber has its say. Since time is of the essence, I move the immediate purchase of a new *Chevron* for Jeff as a lasting token of our esteem; alas, before our *Chevron* goes the way of the Edsel." [LAUGHTER]

So, that will conclude. I may be the only one thought it was funny, and I'm certain that Jeff did not think it was funny.

[END RECORDING]

7. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1983).
8. *Id.*