

## MEMORANDUM

TO: All CJA Members

FROM: Nicole Virga Bautista  
Executive Director & CEO

DATE: December 2018

SUBJECT: **Formal Ethics Opinion No. 76**

The Judicial Ethics Committee of the California Judges Association has issued the following formal opinions:

### **Opinion No. 76**

*ETHICAL ISSUES FOR JUDGES WHEN SELF-REPRESENTED  
LITIGANTS APPEAR IN COURT (CANONS 3B & 2A)*

Judges may direct questions on the Code of Judicial Ethics to the current 2017/18 Ethics Committee by writing or calling the CJA office or any Ethics Committee member. The Ethics Committee, as a matter of policy, does not answer inquiries which are moot or raise issues of law. Nor does the Committee respond to questions that involve matters pending before the Commission on Judicial Performance.

All opinions of the committee are advisory only.

Special thanks to Ethics Committee member Judge Leonard Edwards, Santa Clara Superior Court, Retired, for preparing this Opinion.

NVB:jmg

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# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### Opinion No. 76

#### **ETHICAL ISSUES FOR JUDGES WHEN SELF-REPRESENTED LITIGANTS APPEAR IN COURT (CANONS 3B & 2A)**

Many self-represented litigants (SRLs) appear in our courts on a daily basis. Most are not trained in the law and do not understand legal rules and procedures. When one or both litigants are unrepresented, ethical issues arise regarding judicial participation and management of the proceedings. This opinion will address some of the ethical issues facing judges in a variety of situations involving self-represented litigants.

Some judges take the position that the job of the judge is to call the balls and strikes, not to throw the pitches. Is this an accurate statement of the role of the judge? Not necessarily. The judge may make reasonable procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard. Fundamental justice should not be sacrificed to procedural rules and cases should be decided on their merits. Exercising discretion – not just calling balls and strikes – is the nature of judging, from granting motions for extensions of time to handing out sentences.

Frequently, there is tension between the represented party and the self-represented litigant. One side is ready to proceed, has done the legal work, and would like to complete the proceeding as soon as possible. The self-represented litigant often is struggling with legal terms, time limits, and court procedures. The judge must decide what reasonable accommodation is proper and when it is unreasonable. Judges may grant continuances, explain legal terms, refer a litigant to self-help services or the library, or refer him or her to the local bar association for a low-cost meeting with an attorney. Whether the judge should take any of these or other steps is a matter of judicial discretion.

This opinion takes the position that under the Code of Judicial Ethics, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide to a diligent self-represented litigant acting in good faith, the opportunity to have his or her case fairly heard. In other words, judges should understand the difficulties encountered by self-represented litigants and that it is ethical to exercise discretion to treat them differently. The judge may provide reasonable accommodations, affording latitude, being lenient and solicitous, making allowances, applying less stringent standards, and give self-represented litigants leeway and consideration. As one appellate court wrote:

*The fundamental tenet that the rules of procedure should work to do substantial justice,... commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules....Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.<sup>1</sup>*

## **THE LAW:**

### **CANON 2A: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES**

**A. Promoting Public Confidence** - A 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 judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

### **CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY**

(1) A judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the full right to be heard according to law.

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

**ADVISORY COMMITTEE COMMENTARY:** Canon 3B(8) The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons to enable the litigant to be heard. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

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<sup>1</sup> *Blair v Maryland*, 3224 S.E. 2d 391 (West Virginia, 1984).

## CASE LAW:

*Turner v Rogers*, 131 S. Ct. 2507 (2011)  
*Monastero v. Los Angeles Transit Company*, 131 Cal. App. 2d (1955)  
*Taylor v. Bell*, 21 Cal. App. 3d 1002 (1971)  
*McCartney v Commission on Judicial Qualifications*, 12 Cal. 3d 512 (1974).  
*Estelle v. Williams*, 425 U.S. 501, 512, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976)  
*Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L.Ed.2d 468. (1978)  
*Nelson v. Gaunt*, 125 Cal. App. 3d 623 (1981)  
*Commonwealth v Sapoznik*, 549 N.E. 2d 116 (1990). Accord Indiana Supreme Court: *Grubbs v State*, 265 N.E. 2d 40 (1970)  
*Gamet v. Blanchard*, 91 Cal. App. 4th 1276 (2001)  
*Ross v Figueroa*, 139 Cal. App. 4th 856 (2006)  
*Gonzalez v. Munoz*, 156 Cal. App. 4th 413 (2007)  
*Petrosyan v. Prince Corporation*, 223 Cal. App. 4th 587 (2013)  
*Holloway v. Quetel*, 242 Cal. App. 4th 1425 (2015)  
*People v. Garton* 4 Cal. 5th 485, 499–500 (2018)  
*Morgan v. Ransom*, 95 Cal. App. 3d 664 (1979)  
*Rappleyea v. Campbell*, 8 Cal. 4th 975 (1994)

## OTHER AUTHORITY:

(*Inquiry Concerning Judge D. Ronald Hyde, No. 166* (Commission of Judicial Performance, 2003)).

## HYPOTHETICAL SITUATIONS:

1. *An unrepresented plaintiff files a suit for damages against a store where the plaintiff slipped and fell. At the close of the plaintiff's case, the plaintiff makes no specific claim for damages. May the judge ask the plaintiff, "Are you asking for damages in this case? If so, what is the amount you are asking for? And why are you asking for this amount?"*

*Is it ethical for the judge to ask these questions?*

Yes: "The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law, and the canons, to enable the litigant to be heard." ADVISORY COMMITTEE COMMENTARY: Canon 3B(8).

2. *At a domestic violence proceeding, the respondent (R), a self-represented litigant, asked for a continuance which the trial court denied. It was discovered that R had a statement written out, but R had not served it on the moving party (P). R asked if R could read the statement, but the trial court said “no.” The trial court entered judgment for P without informing R that R could present oral testimony.*

*Would it have been ethical for the judge to inform R that R could present oral testimony?*

Yes, and not to do so was reversible error. “...here it was incumbent on the referee to apprise Figueroa it was his right to present oral testimony when [R] indicated he wanted to put on a defense by asking whether he could tender the written evidence he has prepared but not served.” See *Ross v Figueroa*, 139 Cal. App. 4th 856, 867 (2006)

3. *The judge observed a defendant/husband (D) in the courtroom gesturing to his wife (P) that he was going to slit her throat. At the next court hearing, the judge spoke to P (a self-represented litigant) who asked the judge for assistance. The judge went with P to the clerk’s office, helped her file a fee waiver application, went to the commissioner so that it got immediate attention, carried the application/order to the clerk’s office where the dissolution petition was filed and a summons issued, and took the summons and petition to the judge’s deputy, who served them on the D before he was transported back to jail.*

*Was the judge’s conduct ethical?*

No. The judge’s behavior “embroiled” the judge in the matter, evidenced by a lack of impartiality, and constituted prejudicial conduct. The judge essentially became P’s attorney. (Inquiry Concerning Judge D. Ronald Hyde, No. 166 (Commission of Judicial Performance, 2003).

4. *In a domestic violence restraining order hearing, the judge did not permit a support person to accompany the moving party, a self-represented litigant, to counsel table, stating that only the parties could appear.*

*Was this unethical?*

Probably not, but contrary to law. The judge should have allowed the support person to accompany the moving party. “...[I]n a purely adversarial setting, it is reasonable for the judge to sit back and expect a party’s lawyer to know about and either assert or by silence forfeit even the most fundamental of the party’s constitutional and statutory procedural rights. But not so in a judicial forum, such as this domestic violence court, which can expect most of those appearing before the court to be unrepresented. To that end, the code specifically allows a party in such a proceeding to be as-

sisted by a nonlawyer “support person” who is permitted to sit with the litigant at counsel table unless that litigant has a lawyer.” See *Ross v Figueroa*, 139 Cal. App. 4th 856, 867 (2006).

5. *The self-represented litigant (SRL) filed a civil suit for damages against an auto repair shop (D) for faulty work on the SRL’s car. During the presentation of evidence, the SRL testified that another repair shop told her that D’s work on the car was faulty and caused the engine to break down. D’s lawyer objected to the evidence as hearsay. The judge sustained the objection and after the SRL had no further evidence, dismissed the case stating to the SLR that she should have hired a lawyer.*

*Was J’s conduct ethical?*

Yes, but it would not have been unethical for the judge to have exercised discretion and asked SRL if she wanted to have a continuance to bring the witness into court.

6. *Self-Represented Litigant (SRL) Plaintiff sued Defendant (D) for unpaid wages at a car wash where SRL worked. During the jury trial, SRL testified about an agreement to purchase the car wash. D objected pointing out that the probative value of this information was outweighed by the prejudice to D. The court agreed and advised SRL not to mention the agreement again. When SRL referred to the agreement again, D objected and requested a mistrial. J granted the motion. In a subsequent jury trial, J warned SRL not to mention the agreement or prior lawsuits. Nevertheless, SRL testified that the Labor Board awarded him \$12,000. After objection, the court declared a mistrial and dismissed the case.*

*Was J’s conduct unethical?*

Probably not. However, J could have simply instructed the jury to disregard the testimony and continued with the trial. Citing the California Code of Judicial Ethics, an appellate court reviewing this factual situation noted that judges may take reasonable steps to enable a self-represented litigant to be heard. “For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law ... and the canons, to enable the litigant to be heard.” (Advisory Com. com., Cal. Code Jud. Ethics, Canon 3B(8).) *Petrosyan v. Prince Corporation*, 223 Cal. App. 4th 587 (2013).

7. *At the outset of a civil case where one litigant was unrepresented by counsel and the other was represented, the judge explained how the proceedings would be conducted. The explanation included explaining that the party bringing the action has the burden to present evidence in support of the relief sought, the kind of evidence that may be presented, and the kind*

*of evidence that cannot be considered. The judge also explained how to respond to a motion for summary judgment. The judge made these explanations in a neutral way, not as an advocate.*

*Was this conduct ethical?*

Yes. These explanations do not raise reasonable questions about a judge's impartiality. Refer to Advisory Committee Commentary to Canon 3B(8).

8. *During a trial with one side unrepresented by counsel, the judge asked several questions of witnesses to clarify testimony and develop facts. The judge asked the questions in a neutral fashion, not as an advocate.*

*Was this conduct ethical?*

Yes. "Because questioning is within a judge's discretion, questioning is only likely to be considered inappropriate if it is done in the manner of an advocate, casts aspersions or ridicule upon a witness, or is on matters collateral or entirely irrelevant to the case." (*McCartney v Commission on Judicial Qualifications*, 12 Cal. 3d 512, 533-4 (1974).

9. *In a criminal trial for possession for sale of heroin, the prosecution introduced a prior drug -related arrest and information about the factual basis justifying the search of the defendant's room. Both of these offers were clearly prejudicial in that they supported the police officer's testimony and entered on the record information that was more prejudicial than probative. The self-represented defendant did not object to these admissions and the jury found the defendant guilty of one of the charges. After the trial, the defendant asked for a mistrial based on the admission of the prior drug-related arrest. The judge denied the motion stating that "...there was no objection."*

*Would it have been ethical for the judge, recognizing that the prosecutor engaged in improper tactics to take advantage of defendant's unrepresented status, to not permit the testimony to be admitted at trial?*

Yes. The trial judge could have recognized that the prosecutor engaged in improper tactics to take advantage of defendant's unrepresented status and not permitted the testimony to be admitted at trial. As an out-of-state appellate court wrote in reversing a conviction based on these facts: "We are not ruling that a judge must become a lawyer for an unrepresented defendant. In this case, however, the judge should have recognized very early in the trial that the prosecutor was engaging in improper tactics and taking advantage of the defendant's unrepresented status. The judge should have promptly intervened, not to be of assistance to the defendant, but to assert a judge's traditional role of making sure that all the parties receive

a fair trial.” (*Commonwealth v Sapoznik*, 28 Mass. App. Ct. 236, 248. Another appellate court found that the judge’s failure to protect the defendant in these circumstances denied him a fair trial. (Indiana Supreme Court: *Grubbs v State*, 265 N.E. 2d 40 (1970).

10. *In a domestic violence case, the self-represented plaintiff sought to introduce hospital records showing her injuries, treatment, and expenses. She failed to lay a foundation for the records’ admissibility as required by the business records exception to the hearsay rule. Following the defense lawyer’s objection, the judge ruled the records inadmissible.*

*Was the judge’s ruling ethical?*

Yes. However, the judge had the discretion to give the plaintiff a short continuance in order to learn about the relevant rules of evidence and the procedural requirements to lay a foundation for the admission of records. (Sheldon, Murray, “Rethinking the Rules of Evidentiary Admissibility in Non-Jury trials,” 86 *Judicature* 227 (AJS March-April 2003) and Gray, Cynthia, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, SJI, American Judicature Society, 2005, at p. 36-39.

11. *The parties in a civil suit approached the judge with a settlement agreement resolving the case. The attorney for one party prepared the document while the other party (unrepresented) signed it.*

*Is it ethical for the judge simply to sign the document and return it to the parties?*

Yes, but the best practice is to ask the parties if they understand the contents of the document and inquire of the unrepresented party if he/she understands his/her responsibilities under the agreement.

12. *In a small claim’s proceeding in which the plaintiff did not ask for costs or damages, the judge suggested that the plaintiff “may want to ask for medical costs or other damages in addition to the requested compensation for vehicle damages.”*

*Was this action by the judge ethical?*

No. While the SRL Benchbook describes the active role of a judge in small claim’s proceedings, in this situation the judge’s suggestion goes beyond statutes or issues of which litigants are unaware. Instead, the suggestion is partisan, not impartial, and amounts to advocacy, particularly when the plaintiff’s moving papers did not request costs or damages and the defendant had no notice that this issue would be raised.

13. *When a judge learns that a self-represented litigant has filed a complaint about the judge to the Commission on Judicial Performance, do ethics require the judge to recuse?*

No; it is ethical for the judge to remain on the case so long as the judge believes the judge can be fair and impartial. This is the same rule for represented parties.

14. *In a criminal trial, the self-represented litigant (SLR) was in custody. SLR made a request to have clothing provided so that it would not be evident that he was in custody. The judge denied the request stating that the judge did not know if such clothing was available.*

*Was it ethical for the judge to deny the SRL defendant the right to be dressed in non-jail clothing?*

No. The judge had a duty to inquire about the availability of clothing for the SLR. The United States Supreme Court has declared “that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.” (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L.Ed.2d 468.) In particular, “the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes.” *Estelle v. Williams* (1976) 425 U.S. 501, 512, 96 S. Ct. 1691, 48 L.Ed.2d 126. See also *People v. Garton* (2018)4 Cal. 5th 485, 499–500.

15. *Plaintiff (P), an incarcerated and self-represented litigant, sued two tenants for unpaid rent and damages to P’s apartment. P filed a number of documents in an effort to obtain a default judgment. Each was returned by the court for a variety of reasons including using the incorrect forms and failure to sign the declarations under penalty of perjury. The trial court gave P incorrect advice relating to the forms P should file. The trial court finally dismissed P’s case stating that P had failed to meet his burden of proof and judgment was entered for the defendants.*

*Would it have been ethical for the judge to take reasonable steps to allow P to obtain a judgment?*

Yes. The trial judge had shown great discretion in granting P a number of opportunities to obtain a default judgment. However, the trial judge inaccurately informed P about the steps P should take to obtain a default judgment. The trial judge failed to exercise its discretion to give neutral (and accurate) guidance to P about the requirements for an entry of a default judgment – “reasonable steps, appropriate under the circumstances...

to enable the litigant to be heard.” (Cf. *Austin v. Valverde* (2012) 211 Cal. App.4th 546, 550). (“Failure to exercise discretion is an abuse of discretion.”) See *Holloway v. Quetel*, 242 Cal. App. 4th 1425 (2015).

## **CONCLUSION:**

Judges are required to adhere to the concept of impartiality. However, the canons and Advisory Committee Commentary indicate that the judge “has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.” The case law indicates that many judges are doing this without significant concerns being raised about their impartiality.

The adversary system is not embedded in the Code of Judicial Ethics, nor is it the primary purpose of the code to protect the formalities of the adversary system. Reasonable procedural accommodations for self-represented litigants do not change the facts, the law, or the burden of proof, nor do they ensure a victory for the unrepresented. Such accommodations simply mean that both sides will have a fair opportunity to tell their stories.

There is a delicate balance between providing too much assistance to a self-represented litigant to the detriment of the other party and the appropriate use of discretion to allow an SRL access to justice. Reasonable accommodations include liberally construing pleadings, explaining the bases for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general legal matters such as the burden of proof and what types of evidence may and may not be presented.



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