Chapter 3: California Law Applicable to a Judge's Ethical Duties in Dealing With Self-Represented Litigants

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Introduction

California law—case law, ethical opinions, and judicial discipline decisions—supports the concepts outlined in chapter 2. Moreover, it provides a variety of concrete examples of appropriate behavior and underlines the breadth of discretion granted a trial judge.

I. Overview—the Ethical Rules Support Access and Neutrality

Judges dealing with self-represented litigants in the courtroom are subject to two ethical duties that may appear at first glance to conflict. Canon 3B(7) of California's Code of Judicial Ethics requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." Canon 2A requires the judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." These canons follow those of the American Bar Association's Model Code of Judicial Conduct.

Many judges fear that the actions required to ensure a self-represented litigant's "right to be heard" might be viewed as violating the court's duty of impartiality, and they feel that the duty of impartiality must trump the duty to ensure a litigant's right to be heard.

However, the American Bar Association Standards Relating to Trial Courts, standard 2.23, takes a very different view, finding no inherent conflict between the two duties; rather, both may be met at the same time:

Conduct of Cases Where Litigants Appear Without Counsel. When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.

Commentary

The duty of the courts to make their procedures fair is not limited to appointing counsel for eligible persons who request representation. In many instances, persons who cannot afford counsel are ineligible for appointed counsel; in other cases, persons who can afford counsel, or who are eligible to be provided with counsel, refuse to be represented. . . .

All such situations present great difficulties for the court because the court's essential role as an impartial arbiter cannot be performed with the usual confidence that the merits of the case will be fully disclosed through the litigant's presentations. These difficulties are compounded when, as can often be the case, the litigant's capacity even as a lay participant appears limited by gross ignorance, inarticulateness, naivete, or mental disorder. They are especially great when one party is represented by counsel and the other is not, for intervention by the court introduces not only ambiguity and potential conflict in the court's role but also consequent ambiguity in the role of counsel for the party who is represented. *Yet it is ultimately the judge's responsibility to see that the merits of a controversy are resolved fairly and justly. Fulfilling that responsibility may require that the court, while remaining neutral in consideration of the merits, assume more than a merely passive role in assuring that the merits are adequately presented.*

The proper scope of the court's responsibility is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula. . . . *Where litigants represent themselves, the court in the interest of fair determination of the merits should ask such questions and suggest the production of such evidence as may be necessary to supplement or clarify the litigants' presentation of the case.* (Italics added.)

In 2007 the American Bar Association took the first steps to further clarify this lack of inconsistency by changing the commentary to the

Model Code of Judicial Conduct itself. It amended comment 3 on rule 2.06 (previously canon 2A on impartiality) to read as follows:

> *To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show favoritism to anyone.* ***It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.*** *(New text in* ***bold****)*

That the changes were not for new language in a rule, but for an expansion of a comment, emphasizes that this does not represent a departure or change in underlying law.

Effective January 1, 2008, California amended Canon 3B(8) of the Code of Judicial Ethics to state:

> (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.** (New text in **bold**)
>
> *ADVISORY COMMITTEE COMMENTARY:*
>
> *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. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the court… (New text in* ***bold****)*

While California appellate decisions do not generally deal with the issue in the explicit context of the judge's formal ethical obligations, the

general literature on this topic (on which this chapter has drawn heavily) does do so.[18]

II. General Principles from California Case Law

A self-represented litigant in California has the right "to appear and conduct his own case." *Gray v. Justice's Court of Williams Judicial Township* (1937) 18 Cal.App.2d 420 [63 P.2d 1160].

The court has a general duty to treat a person representing himself or herself in the same manner as a person represented by counsel:

> A lay person, who is not indigent, and who exercised the privilege of trying his own case must expect and receive the same treatment as if represented by an attorney—no different, no better, and no worse. *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855].[19]

This principle's application is straightforward and obvious as it applies to the basic substantive legal principles governing the right to legal relief. The elements required to obtain a judgment and the burden of proof are the same for a self-represented litigant as for a litigant represented by counsel. All persons are equal in the eyes of the law.

California case law also applies the principle of same treatment to the rules of evidence and procedure:

> A litigant has a right to act as his own attorney . . . but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise ignorance is unjustly rewarded. *Doran v. Dreyer* (1956) 143 Cal.App.2d 289, 290, 299 [P.2d 6611].

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[18] C. Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (Des Moines, IA: American Judicature Society, 2005); Zorza, p. 423; Albrecht et al., p. 16; *Minnesota Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants* (reprinted in Albrecht et al.).

[19] This language was taken originally from a 1932 Arizona Supreme Court decision, *Ackerman v. Southern Arizona Bank & Trust Co.* (1932) 39 Ariz. 484 [7 P.2d 944]. Only one subsequent case, *Monastero v. Los Angeles Transit Company* (1955) 131 Cal.App.2d 156, 280 [P.2d 187], discusses whether a self-represented litigant had the means to retain counsel. It is fair to say, therefore, that the principle is not limited to self-represented litigants with means but applies to all self-represented litigants—indigent as well as wealthy.

This rule's application is also straightforward—in part. Inadmissible evidence cannot serve as the basis for awarding relief to a self-represented litigant, and a self-represented litigant must follow the requirements of the rules of procedure.

However, there are also four[20] important related principles that California trial judges must also take into account.

The first is the judiciary's preference to resolve matters on their merits rather than by procedural default.

> It has always been the policy of the courts in California to resolve a dispute on the merits of the case rather than allowing a dismissal on technicality. *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1061 [223 Cal.Rptr. 329] (Acting P.J. Liu, dissenting).
>
> The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. *Simon v. City and County of San Francisco* (1947) 79 Cal.App.2d 590, 600 [180 P2d.398], cited by *Adams v. Murakami* (1991) 54 Cal.3d 105,120.

This principle requires the judge not to allow procedural irregularities to serve as the basis for precluding a self-represented litigant from presenting relevant evidence or presenting a potentially valid defense.

The second is the trial judge's duty to avoid a miscarriage of justice.

> The trial judge has a "duty to see that a miscarriage of justice does not occur through inadvertence." *Lombardi v. Citizens Nat. Trust & Sav. Bank* (1951) 137 Cal App.2d 206, 209, [289 P.2d 8231].

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[20] The California Supreme Court, in *Rappleyea v. Campbell*, 8 Cal.4th 975, 884, P.2d 126, 35 Cal.Rptr.2d 669 (1994), greatly curtailed the existence of a fifth exception established in *Pete v. Henderson*, 124 Cal.App.2d 487, 491, 269 P.2d 78 (1st Dist. Div. 1, 1954), that when trial judges have discretion in applying procedural rules, the court is required to take into account a litigant's self-represented status in exercising that discretion. In *Rappelyea*, Justice Mosk, writing for the majority, stated that this rule "should very rarely, if ever, be followed." "We make it clear that mere self-representation is not a ground for exceptionally lenient treatment." *Supra,* at 985.

> In the United States we have what is often called an "adversarial system" of justice. . . . However, because it is adversarial—as distinct from "inquisitorial"—it is sometimes easy to forget that the purpose of the system is not to hold a contest for its own sake. The purpose of our system of justice is still, in Justice Traynor's phrase, "the orderly ascertainment of the truth" (Jones v. Superior Court (1962) 58 Cal.2d 56, 60 . . .) and the application of the law to that truth. Just because a court must rely on fallible litigants to present competent evidence does not vitiate the fundamental purpose of the proceeding, which is most assuredly not to have a contest but to establish what actually happened. The adversarial system works not because it is a contest to see who has the cleverest lawyer but because allowing two or more sides to present evidence to a neutral decision maker is an epistemologically sophisticated way to get at the truth. And while certain aspects of the law, namely the fact that there are fixed rules and outcomes, allow it to be analogized to a game, it is most definitely not a spectator sport. . . .

The third is that treatment equal to that of a represented party requires the court to "make sure that verbal instructions given in court and written notices are clear and understandable by a layperson." *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [111 Cal. Rptr.2d 439, 445]. The court explained this requirement in the following paragraph of its opinion:

> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. . . . Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. *Id.* at 1285, pp. 445–446.

The fourth is that the "same treatment" principle does not prevent trial judges from providing assistance to self-represented litigants to enable them to comply with the rules of evidence and procedure.

In *Monastero v. Los Angeles Transit Company* (1955) 131 Cal.App.2d 156 [280 P.2d 187], the trial judge "labored long and patiently to convince plaintiff of the folly of conducting a jury case in person, she being untrained in the law. He offered to arrange a continuance in order to enable her to get an attorney for the trial but she was insistent upon her right to represent herself." At the close of the testimony (during which the plaintiff thoroughly discredited her own case), the judge ordered opposing counsel to hand "to Miss Monastero instructions that ordinarily would be requested in conjunction with matters of this kind." According to the Court of Appeal, the judge "continued throughout the trial to assist plaintiff in the presentation of her case, guiding her as to peremptory challenges, assisting her in examining jurors as to cause for challenge, advising her of the right to examine [the defendant], advising efforts to compromise, emphasizing the duty of defendant to exercise the highest degree of care and carefully scrutinizing all proffered instructions." On appeal from the court's judgment rendered on the basis of the jury's verdict in favor of the defendant, plaintiff (at this point represented by counsel) contested the propriety of the court's requiring defendant's attorney to assist plaintiff in preparing instructions.

The Court of Appeal held that plaintiff was in no way prejudiced by the manner in which the instructions were prepared, the appellate court noting that the trial judge prepared and gave two additional instructions on his own motion, both of which were intended to clarify the plaintiff's rights. The Court of Appeal did not find fault with the court's extensive assistance to the plaintiff. Rather, it refers to those efforts with approval, calling the plaintiff's arguments on appeal that the court had erred in requiring defendant's counsel to assist the plaintiff as "startling."

California appellate courts often recite the principal of same treatment in affirming a trial judge's discretionary decisions not to provide specific assistance. However, the courts in the same opinions recite, with apparent approval, the steps the trial judge *did take* to accommodate the special needs of the self-represented litigant—treating him or her differently than the court would have, or did, treat a party represented by counsel. The cases are summarized below.

III. A Summary of the General State of the Law

California appellate decisions and disciplinary actions can therefore be summarized as follows:

1. The trial judge has broad discretion to adjust procedures to make sure a self-represented litigant can be heard, or to refuse to make such adjustment.

2. The judge will always be affirmed if he or she makes these adjustments without prejudicing the rights of the opposing party to have the case decided on the facts and the law.

3. The judge will usually be affirmed if he or she refuses to make a specific adjustment, unless such refusal is manifestly unreasonable and unfair.

Future development of the law will likely focus on the boundaries of the judge's discretion—those circumstances in which a judge must make adjustments in order to permit a self-represented litigant to be heard and those circumstances in which a judge is viewed as acting with prejudice to the rights of the other party to have its case decided on the facts and the law.

The current boundaries can be discerned from the caselaw and disciplinary decisions summarized briefly below.

IV. The Current Boundaries of Judicial Discretion Established by California Appellate and Disciplinary Decisions

A. What Judges Can Do

Listed below are actions of trial judges assisting self-represented litigants upheld on appeal and additional actions recited in appellate opinions with apparent approval.

Liberally construing documents filed

California courts generally construe filings in the manner most favorable to self-represented litigants and overlook technical mistakes they may make in pleading.

In *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623 [178 Cal.Rptr. 167], the Court of Appeal noted that the appellant erroneously stated that he appealed from the verdict and notice of entry of judgment. The court construed the appeal from the notice of entry of judgment as taken from the judgment and dismissed the purported appeal from the verdict.[21]

In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 884 P.2d 126 [35 Cal.Rptr.2d 669], the Supreme Court ruled that the trial court erred in refusing to vacate a default judgment when shown that the clerk of the court had given self-represented defendants who lived out-of-state erroneous information about the required filing fee, leading to rejection of a timely filed answer. The defendants had filed a motion for relief from default before the default judgment was entered.

In *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [111 Cal.Rptr.2d 439, 445], the Court of Appeal reversed the trial court's refusal to vacate its dismissal of the complaint, finding that the court abused its discretion in not providing the self-represented litigant—who lived in South Dakota, who was permanently disabled from an accident that shattered a disk in her neck, and whose attorney had withdrawn from the case—a further opportunity to prosecute her case despite her procedural defaults, which appeared to arise from her misunderstanding of court correspondence and court procedures.

In *Baske v. Burke* (1981) 125 Cal.App.3d 38 [177 Cal.Rptr. 794], the self-represented defendant sent several handwritten letters to the clerk of the superior court. Though the letters contained statements sufficient to constitute an answer to the complaint, the clerk merely placed them in the court record without bringing them to the judge's attention. Even though the defendant's motion to set aside the default judgment was filed over six months after entry of the judgment, the trial court granted the motion to set aside. The Court of Appeal affirmed that decision, ruling that the clerk's failure constituted extrinsic mistake providing a ground for the trial court to vacate the judgment.

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[21] *Nelson*, *supra*, 125 Cal.App.3d at p. 629, fn. 1.

Allowing liberal opportunity to amend

In *Harding v. Collazo*, *supra*, the Court of Appeal noted with apparent approval the court's giving a self-represented litigant multiple opportunities to amend his complaint to state facts sufficient to constitute a valid claim for relief.

Assisting the parties to settle the case

In *Monastero v. Los Angeles Transit Company*, *supra*, the Court of Appeal noted with apparent approval the trial court's advising the parties on efforts to compromise the case.

Granting a continuance sua sponte on behalf of the self-represented litigant

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's granting a continuance to allow the self-represented litigant an opportunity to obtain counsel. In *Taylor v. Bell, supra,* the Court of Appeal affirmed the trial court's sua sponte vacating the submission of a case following trial and setting the matter for further hearing to allow the self-represented litigant to call a witness.

Explaining how to subpoena witnesses

In *Taylor v. Bell, supra,* the Court of Appeal noted with apparent approval the trial court's advising the self-represented litigant of her right to subpoena witnesses.

Explaining how to question jurors and exercise peremptory challenges and challenges for cause

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's instructing the self-represented litigant about the use of peremptory challenges and the examination of potential jurors to identify cause for challenges.

Explaining the legal elements required to obtain relief

In *Pete v. Henderson*, *supra* note 3, in a portion of its opinion not disapproved by the Supreme Court, the Court of Appeal noted that "one of the chief objects subserved by a motion for nonsuit is to point

out the oversights and defects in plaintiff's proofs, so he can supply if possible the specified deficiencies." (P. 491.)

Explaining how to introduce evidence

In *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* the Court of Appeal expressed approval of the "customary practice" of the trial judge's making suggestions to assist a self-represented litigant in the introduction of evidence. In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's explaining the proper procedure for admission of evidence, in the jury's presence. The trial judge in that case also met with the self-represented litigant and opposing counsel each day prior to the seating of the jury to discuss anticipated testimony and evidence, and any objections that might be appropriate.

Explaining how to object to the introduction of evidence

In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's explaining the proper procedure for objecting to opposing counsel's introduction of evidence.

Explaining the right to cross-examine witnesses presented by the opposing party

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's advising the self-represented litigant about her right to question opposing witnesses.

Calling witnesses and asking questions of them

In *Taylor v. Bell, supra,* the Court of Appeal noted with apparent approval the trial judge's calling the self-represented litigant as a witness and posing questions to her.

Sua sponte admonishing the jury on behalf of a self-represented litigant to disregard statements of witnesses

In *Nelson v. Gaunt, supra,* the Court of Appeal noted with apparent approval the trial judge's sua sponte admonitions to the jury.

Preparing jury instructions for a self-represented litigant or requiring opposing counsel to do so

In *Monastero v. Los Angeles Transit Company, supra,* the Court of Appeal noted with apparent approval the trial court's preparation of instructions for the self-represented litigant. It explicitly affirmed the trial court's requiring opposing counsel to provide the litigant with the jury instructions that would usually be submitted by the plaintiff.

B. What Judges Are Required to Do: Procedural Accommodations That a Trial Judge Must Provide to a Self-Represented Litigant

The federal courts and some state courts recognize affirmative duties on the part of trial judges to accommodate the needs of self-represented litigants, such as a duty to inform a litigant how to respond to a motion for summary judgment. *Hudson v. Hardy* (D.C. Circuit 1968) 412 F.2d 1091; *Breck v. Ulmer* (Alaska 1987) 745 P.2d 66.[22]

California's appellate courts have only recently begun, commencing with *Ross v. Figueroa* discussed below, to articulate any such affirmative duties. Past cases have considered all such actions to fall within the trial judge's discretion and have consistently affirmed a trial judge's refusal to exercise such discretion to provide assistance to a self-represented litigant in the courtroom.

In *Ross v. Figueroa* (2006) 139 Cal.App.4th 856; 43 Cal. Rptr. 3d 289, the Court of Appeal articulated an affirmative duty of accommodation—advice from the judge of the litigant's right to present oral testimony—in narrow circumstances arising in a domestic violence proceeding.

> After his request for continuance had been denied and it was revealed Figueroa had a written statement but had not served it

[22] The Supreme Court of the United States has decided two cases raising the issue of a federal trial judge's affirmative duty to provide information to a self-represented litigant, imposing such a duty in *Castro v. United States* (2003) 124 U.S. 786 and refusing to impose a duty in *Pliler v. Ford* (2004) 124 U.S. 2441. In *Castro* the Court held that a federal district judge must inform a prison inmate when the judge proposes to recharacterize a Fed. R. Crim. P. 33 motion (which is not cognizable) as a motion under 28 USC section 2255 (which is cognizable, but would cause any future section 2255 motion to be subject to the restrictions on "second or subsequent" such motions) and give the litigant the opportunity to withdraw or amend the motion. In *Pliler* the Court held that a federal district judge does not have a duty to inform a habeas corpus petitioner of all the options available before dismissing a petition that included both exhausted and unexhausted claims (claims in which the petitioner had and had not exhausted all available state court remedies).

> on Ross, he asked the referee if he nevertheless could present this evidence. The referee merely answered “no,” and proceeded to rule, granting a permanent injunction for the maximum period of three years.
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> At that point, especially in a proceeding largely used by pro pers and in which Figueroa was in fact participating on a pro per basis, the referee should have advised Figueroa he could provide oral testimony, even though he would not be permitted to file the written statement he had failed to timely serve on Ross. It is true Figueroa had mentioned his witnesses were not present and thus he was in no position to offer their oral testimony. But he certainly could have testified himself and raised questions to be posed to Ross, had the referee advised him of his right to do so. The role of a judicial officer sitting in such a court, which has many attributes of an inquisitorial as opposed to an adversarial process, is different than when sitting in a purely adversarial court where the parties are presumed to be “well counseled” by skilled and knowledgeable lawyers.
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> In 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. . . . Accordingly, here it was incumbent on the referee to apprise Figueroa it was his right to present oral testimony when Figueroa indicated he wanted to put on a defense by asking whether he could tender the written evidence he had prepared but not served. *Ross v. Figueroa* (2006) 139 Cal.App.4th 856; 866 (footnotes deleted).

This reasoning has been followed in *Gonzalez v. Munoz* (2007) 156 Cal. App. 4th 413 which noted that

> Court procedures, however well intentioned, should not be imposed at the expense of the parties' basic rights to have their matters fairly adjudicated: "That a procedure is efficient and moves cases through the system is admirable, but even more important is for the courts to provide fair and accessible justice." (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1366 [invalidating local court rules that improperly interfered with

statutory rights to present evidence at hearings in attempt to streamline proceedings].) …

While we hesitate to be overly critical of the efforts made by bench officers operating under heavy workloads and without the assistance of lawyers trained to assist in the formulation of their clients' needs, the Legislature has been particularly diligent in clearly specifying the court's responsibilities in administering the DVPA. Even more, in light of the vulnerability of the targeted population (largely unrepresented women and their minor children), bench officers are "necessarily expected to play a far more active role in developing the facts, before then making the decision whether or not to issue the requested permanent protective order." (*Ross, supra*, 139 Cal.App.4th at p. 861.) *Gonzalez v. Munoz* (2007) 156 Cal. App. 4th 413; 423.

C. What Judges Need Not Do: Instances in Which Judges Have Been Affirmed for Failing to Make Specific Accommodations for Self-Represented Litigants

The Court of Appeal has upheld a trial judge's refusing to advise a self-represented litigant how to introduce evidence in the face of the "dead man's statute" in the following case: *Lombardi v. Citizens National Trust and Savings Bank of Los Angeles, supra,* refusing to advise whether the litigant had a right to depose a witness; *Taylor v. Bell supra* and *Nelson v. Gaunt, supra* failing to prevent opposing counsel from committing prejudicial misconduct in his arguments to the jury;, failing to grant a third opportunity to amend a complaint, *Harding v. Collazo, supra.*

D. What Judges Cannot Do: Judicial Actions Deemed Inconsistent With Judicial Neutrality

In effect acting as counsel for self-represented litigants

A judge "is not required to act as counsel" for a party conducting an action in propria persona, *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1009 [98 Cal.Rptr. 855], and is not allowed to do so. *Inquiry Concerning Judge D. Ronald Hyde, No. 166* (Commission on Judicial Performance 1973).

One count in the commission's removal of Judge Hyde from office described an incident in which the judge became the advocate for a party. The judge observed a defendant gesturing to his wife, who was sitting in the audience, that he was going to slit her throat. The judge ordered the man, who was in court for arraignment on a misdemeanor domestic violence case, removed from the courtroom. On the date of his next court appearance, the judge spoke with the wife, who told him that she was filing for dissolution of the marriage and wanted to serve her husband that day. The judge went with the wife to the clerk's office, assisted her in filling out a fee waiver application, went to the office of the commissioner responsible for reviewing such applications and ensured that it got immediate attention, carried the signed fee waiver order to the clerk's office where the dissolution petition was filed and a summons issued, and took the summons and petition to his own deputy, who served them on the husband before he was transported back to the jail. The commission concluded that the judge's behavior had "embroiled" him in the matter, evidenced a lack of impartiality, and constituted prejudicial misconduct.

In *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 754 P.2d 724 [247 Cal.Rptr. 378], the Supreme Court upheld the removal from office of a judge, among other reasons, for "conducting his own investigation" of an evidentiary matter during a criminal jury trial involving a hit-and-run accident. The judge directed his bailiff to contact a local auto dealer's parts manager to inquire about a rear light lens for the type of vehicle driven by the defendant, so that he could compare the lens with trial evidence. On his lunch break, the judge sought out the parts manager with the lens and determined that the lens matched the defendant's car. Back in court, the judge interrupted the defense case and called the parts manager as the court's own witness. The judge did this with minimal notice to the parties and over objection from both sides. The defendant's resulting conviction was later set aside by the appellate department of the superior court because of the judge's misconduct. The appellate department, *People v. Handcock,* (1983) 145 Cal.App.3d Supp. 25, 193 Cal. Rptr. 397, held that although a judge may call and examine witnesses (Evid. Code § 775), the manner in which Judge Ryan placed his own witness on the stand (by interrupting the defendant's testimony) seriously prejudiced the defendant.

Wegner v. Commission on Judicial Performance (1981) 29 Cal.3d 615, 175 Cal.Rptr. 420, 630 P.2d 954 involved the same issue. Judge Wegner, suspecting that one of the parties made false statements in briefing the case, conducted his own investigation. The Supreme Court

stated, “By undertaking a collateral investigation [the judge] abdicated his responsibility for deciding the parties’ dispute on pleadings and evidence properly brought before him.” 29 Cal.3d 615, at 632.

Denying rights of self-represented litigants

The Supreme Court and the Commission on Judicial Performance have, on numerous occasions, disciplined judges or removed them from office for their denial of the rights of unrepresented litigants appearing before them.

In *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 787 P.2d 591 [267 Cal.Rptr. 293], the Supreme Court removed a judge from office for, among other things, rudeness to pro per litigants in criminal cases.

In *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512, 526 P.2d 268 [116 Cal.Rptr. 260], the court censured a judge for, among other things, bullying and badgering pro per criminal defendants.

In *Inquiry Concerning Judge Fred L. Heene, Jr., No. 153* (Commission on Judicial Performance 1999), the commission censured a judge for, among other things, not allowing an unrepresented defendant in a traffic case to cross-examine the police officer and failing, in several cases, to respect the rights of unrepresented litigants.

In *Inquiry Concerning a Judge, No. 133* (Commission on Judicial Performance 1996), the commission censured a judge for, among other things, pressuring self-represented litigants to plead guilty, penalizing a self-represented litigant who exercised his right to trial, and conducting a demeaning examination of an unrepresented litigant.

A trial judge may not deny the parties their procedural due process rights by preempting their ability to present their case. In *Inquiry Concerning Judge Howard R. Boardman, No. 145* (Commission on Judicial Performance 1999), the commission concluded that Judge Boardman committed willful misconduct by depriving the parties of their procedural rights in *King v. Wood.* The case, filed by a self-represented litigant, involved a quiet title action concerning a home. The counsel for the opposing party was trying his first case. Judge Boardman called the case for trial and, telling the parties that he was proceeding “off the record” and without swearing the parties, asked them to tell him what the case was about. The self-represented litigant

spoke, followed by the lawyer's opening statement and his client's statement. The judge alternated asking the parties questions. He reviewed documents presented to him. After asking if either party had anything else to add, he announced that he was taking the case under submission and asked the attorney to prepare a statement of decision and judgment, which the judge later signed. The commission concluded that Judge Boardman, on his own initiative and without notice to or consent by the parties, followed an "alternative order" in a "misplaced effort to conserve judicial resources." It noted that the parties were denied their rights to present and cross-examine witnesses and to present evidence.

Limitations on a trial judge's accommodation of a self-represented litigant

What accommodation might be inappropriate for a trial judge to make? The limitation articulated in federal case law is whether the accommodation would cause "prejudice" to the opposing side. However, it appears that prejudice is confined strictly to instances in which the judge's actions led to a decision contrary to that dictated by the facts and the law of the case. For instance, a judge's helping a party to introduce evidence essential for recovery would not be prejudicial to the other side, since the judge's action resulted in evidence showing that the other side was not entitled to prevail.

An informal ethics opinion by the California Judge's Association (2001-2002 Informal Response #62 (Gutierrez) Nov. 30, 2001 addresses the issue of whether, in a small claims court proceeding, it is proper for a judge to suggest that the plaintiff may want to ask for medical costs or other damages in addition to the requested compensation for vehicle damages. "Section 1.3 of the Judges Benchbook describes the judge's role during small claims proceedings. Specifically the benchbook states: 'the judge cannot sit back and be a passive arbiter. . . . The judge should see that, when appropriate, issues such as the statute of frauds and limitations or other special statutory requirements are raised even though the parties fail to do so. This is particularly true of statutes designed to protect consumers, because litigants are often not aware of them.' Additionally, the benchbook and benchguide [34, Small Claims Court] note that the judge has the discretion to investigate the facts personally." The opinion concludes that notwithstanding this active role, making a suggestion regarding additional damages would be improper because it goes beyond statutes or issues of which litigants are often unaware. "Instead, the suggestion is partisan, not impartial, and amounts to advocacy."

E. What Judges are Protected from: A Self-Represented Litigant Will Not Be Allowed to Contest the Propriety of Judicial Accommodations That He or She Requested

In a criminal case, *People v. Morgan* (1956) 140 Cal.App.2d 796, 296 P.2d 75, the trial court ruled that only the judgment and stay of execution from the court file related to a prior conviction would be admitted into evidence. The defendant then moved to introduce the entire file into evidence. The judge advised him that "there are matters in that file that are very detrimental to you." The defendant nonetheless insisted that the entire file be introduced into evidence. The court did so. On appeal, the defendant claimed that admission of the entire file was reversible error. The Court of Appeal quoted *People v. Clark*:[23]

> But by electing to appear *in propria persona* a defendant cannot secure material advantages denied to other litigants. Certainly one appearing *in propria persona* cannot consent at the trial to the introduction of evidence, after first introducing the subject matter himself, and thus invite the introduction of evidence to rebut the inference he was trying to create, and then be permitted on appeal to complain that his invitation was accepted.

Note that the Court of Appeal did not criticize the judge's advice to the defendant that the file contained information detrimental to his case.

Conclusion

The broad range of discretion granted to California judges in their handling of cases involving self-represented litigants allows them to manage their courtroom in a manner that addresses concerns about procedural as well as substantive justice.

[23] 122 Cal.App.2d 342, 349, 265 P.2d 43.