

# CALIFORNIA JUDGES ASSOCIATION

## Judicial Ethics Committee

### SUPPLEMENTAL DISCUSSION RELATING TO CJA ETHICS OPINION #76

#### **Hypothetical #4 of CJA Formal Ethics Opinion No. 76 reads as follows:**

*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 assisted 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 (2006).

A question has arisen. Is a judge’s failure to follow the law an ethical violation? Canon 2A reads in part:

*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.*

The answer is that “it depends.” In the *Ross v Figueroa*, the Temporary Judge and Commissioner apparently did not know the law. The appellate court noted few attorneys appeared in domestic violence restraining order cases and that

*“...the judge necessarily (is) 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....In such a hearing, the judge cannot rely on the pro per litigants to know each of the procedural steps, to raise objections, to ask all of the relevant questions of witnesses, and to otherwise protect their due process rights.”<sup>1</sup>*

The California Supreme Court has addressed a similar issue in the case of *Oberholzer v Commission on Judicial Performance (CJP)*.<sup>2</sup> In that case the CJP sent Judge Oberholzer an advisory letter critical of the judge’s dismissal of a

criminal case when the prosecution was unprepared to proceed on the day of trial and had failed to file a motion for a continuance two days before the trial date as required by Penal Code section 1050. The Supreme Court affirmed the CJP's right to issue such a letter based upon a perceived legal error, but only if the error convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty. The court wrote:

*Mere legal error, without more, ...is insufficient to support a finding that a judge has violated the Code of Judicial Ethics and thus should be disciplined.*<sup>3</sup>

The Supreme Court ruled that the CJP advisory letter was improperly sent since the judge's ruling "dismissing the case, even if legally incorrect, fails to 'raise concerns' regarding 'a reckless disregard of the law,...bias, or a lack of impartiality,' as suggested by the Commission in its advisory letter."<sup>4</sup> The court commented that "[v]iewed against the backdrop of the prosecution's recalcitrance to proceed, petitioner's order dismissing the case, even if legally incorrect, fails to "raise concerns' regarding "a reckless disregard of the law, ...bias, or lack of impartiality," as suggested by the Commission in its advisory letter.

The Ethics Committee concludes that the legal error described in Hypothetical #4 does not reflect a disregard of the law, bias, or lack of impartiality and, therefore, is not an ethical violation.

#### **Endnotes:**

1 139 Cal. App. 4th 856, at 862.

2 20 Cal.4th 371 (1999)

3 *Id.* at p. 398.

4 *Id.*