

Arizona Supreme Court
Judicial Ethics Advisory Committee

OPINION 20-01

(Issued December 28, 2020)

**JUDICIAL ACCOMMODATIONS FOR DISABLED INDIVIDUALS AND
UNREPRESENTED JUVENILE LITIGANTS**

The Judicial Ethics Advisory Committee (“JEAC”) is authorized to “render advisory opinions on proper judicial conduct with respect to the provisions of the Code of Judicial Conduct, any financial reporting requirements, or any other requirement of law applicable to judges.” Rule 82(b)(1), Rules of the Supreme Court.

This opinion addresses four specific questions that have been posed to the JEAC regarding a judge’s ethical obligations to disabled persons or juveniles not represented by counsel. We address each issue in turn, followed by a more general discussion of relevant provisions of the Arizona Code of Judicial Conduct (“Code”).

Applicable Code Provisions

A judge shall perform the duties of judicial office impartially, competently, and diligently. Code, Canon 2.

Rule 2.2. Impartiality and Fairness. “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Cmt. 4: “It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.”

Rule 2.3. Bias, Prejudice and Harassment. (A) “A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias . . . based upon . . . disability. . . .”

Rule 2.5. Competence, Diligence and Cooperation. (A) “A judge shall perform judicial and administrative duties competently, diligently, and promptly.” Cmt. 4: “In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay.”

Rule 2.6. Ensuring the Right to Be Heard. (A) “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” Cmt. 1: “The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.”

Issue 1

Does the Americans with Disabilities Act (“ADA”) require a judge to allow non-lawyers to represent disabled litigants in court, notwithstanding the prohibitions set forth in Rule 31, Arizona Rules of the Supreme Court?

Answer

No. The court is not required to permit persons not authorized to practice law to provide representation to disabled persons in legal proceedings. However, accommodations that do not conflict with rules prohibiting the unauthorized practice of law, such as allowing an individual to sit with a self-represented litigant for emotional support, are permissible.

In Arizona, non-attorneys are not allowed to represent individuals or entities in judicial proceedings except in specifically enumerated contexts. Ariz. R. Sup. Ct. 31(a)(2)(A)(3). There is no exception to Rule 31’s prohibition against the practice of law by non-attorneys that applies to disabled litigants in judicial proceedings. *See* Rule 31(d).¹ The prohibition on non-attorneys representing others in judicial proceedings goes to the “very core of the practice of law” in an adversarial process. *Hackin v. State*, 102 Ariz. 218, 221 (1967) (allowing a non-attorney to file an application for a writ of habeas corpus on behalf of another but not to argue the merits in court); *Encinas v. Mangum*, 203 Ariz. 357, ¶ 9, (App. 2002) (party with limited English and partial hearing loss could not be represented by her non-attorney son; no violation of due process because she could represent herself or hire a lawyer).

The ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Title II of the ADA protects a qualified individual’s “fundamental right of access to the courts.” *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004).

¹ The Arizona Supreme Court recently adopted changes to Rule 31, effective January 1, 2021, to permit licensed legal paraprofessionals to provide limited representation in legal matters. Our opinion, which cites the rule’s current version, is intended to be read as permitting representation by such licensed persons to the extent permitted by the amended rule, once it takes effect.

Such access requires reasonable accommodations that do not fundamentally alter the nature of the service provided. *Id.* at 532; 28 C.F.R. § 35.130(b)(7)(i); 28 C.F.R. § 35.164. For example, a state court must provide an alternative that allows a disabled person to communicate as effectively as a non-disabled person. *See* 28 C.F.R. § 35.160(a)(1). It does not require, however, that a state “employ any and all means to make judicial services accessible to persons with disabilities.” *Lane*, 541 U.S. at 531-532.

Federal regulations clarify what might constitute a reasonable accommodation under the ADA for disabled litigants. Communication through qualified interpreters or qualified readers, and recourse to braille materials and displays are considered “reasonable accommodations” as auxiliary aids and services. 28 C.F.R. §§ 35.160(a)(1), (b)(1); 35.104(1)-(4). But the ADA’s guarantee of recourse to aids and services that enhance communication does not extend to allowing a disabled litigant to be represented by a non-attorney. *Goldblatt v. Geiger*, 867 F. Supp. 2d 201, 210 (concluding the ADA does not provide a litigant with PTSD the right to representation by a non-attorney); *Thomas v. Thomas*, 2012 WL 628777 (W.D. Wash.) (disallowing an “ADA advocate” to represent the plaintiff). This is especially true if the requested accommodation would trump a state law governing the subject. *Goldblatt*, 867 F. Supp. 2d at 210; *Bedford v. Michigan*, 722 Fed.Appx. 515, 520 (6th Cir. 2018) (ADA does not require a state family court to approve an accommodation allowing for a “disability advocate” to represent a party when Michigan law prohibits non-lawyers representing others in court); *Huffer v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, WL 6090947 n.1 (Nev. 2012) (disability advocate has no authority to serve as a party’s representative where Nevada does not permit non-attorneys to appear on behalf of others in judicial proceedings).

Issue 2

May a court disallow a request for a reasonable accommodation under the ADA if the court’s procedural guidelines are not satisfied?

Answer

It depends. If granting a request for accommodation would circumvent a procedural guideline that is essential to the nature of the court’s services, programs, or activities, the proposed accommodation is not “reasonable,” and the court may deny the request. If a modification would fundamentally alter the nature of a public entity’s services, programs, or activities, it is not required.

If, however, granting a request for a reasonable accommodation will ensure a self-represented litigant the opportunity to have their matter fairly heard, and failure to adhere to the procedural guideline will not fundamentally alter the nature of the court proceeding, the Code provides no basis for denying the request. *See* Code, Rule 2.2(4)

("It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.").

Issue 3

May a court encourage a litigant with a disability to seek assistance, and, if so, to what extent?

Answer

A court may encourage a litigant with a disability to seek assistance. However, litigants with disabilities are not required to accept accommodations if they choose not to do so. 28 CFR Part 35, §35.130(e)(1). A court may not exclude a litigant with a disability from participation in, or deny the qualified litigant of, the services, programs, or activities of the court because the litigant chooses not to seek assistance. See Rule 2.3 (B) (requiring a judge to perform duties free from bias based on disability).

Issue 4

May parents or guardians assist juveniles in non-criminal proceedings?

Answer

Arizona's prohibition on non-attorneys representing third parties applies to the representation of juveniles by their parents or guardians. Although judges cannot ethically permit such representation, they may explain to juveniles and their parents the risks of self-representation. Moreover, provided they do not convey the impression of bias toward one party, judges may take additional steps, such as explaining procedures in simplified terms, to ensure that juveniles have a meaningful opportunity to be heard, or may permit a parent to sit with a self-represented juvenile for emotional support.

Reasonable Accommodations Under the ADA and Non-Discrimination Under the Code

The ADA and the Code are complementary because the Code directs a judge to uphold a party's right to be heard, free from bias based on a person's disability, and allows for reasonable accommodations for self-represented litigants.

Rule 2.2

A judge may act fairly and impartially, while also facilitating reasonable accommodations to ensure that both disabled and non-disabled litigants can be heard. See Code, Rule 2.2, cmt 4. Comment 4 was added to the ABA's Model Code of Judicial Conduct in 2007 and was subsequently incorporated into Arizona's Code. Az. Sup. Ct. Order R-09-0007. It is intended to ensure that pro se litigants receive a fair hearing by "leveling the playing field." Reporters' Notes to the Model Code of Judicial Conduct,

2007. The ADA's mandate is similar: "reasonable accommodations" are necessary in order to "level the playing field." *Felix v. New York City Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003).

Rule 2.3

Judges must perform their duties without bias based on disability. Code, Rule 2.3. Rule 2.3's mandate against bias is in step with the ADA's stated goal of prohibiting discrimination based on disability. Providing reasonable accommodations for disabled litigants where there is a nexus between the disability and the accommodation comports with Rule 2.3's prohibition against bias based on disability.

Rule 2.5

"In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay." Code, Rule 2.5, cmt. 4. Nonetheless, "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Lane*, 541 U.S. at 533. Necessary and reasonable accommodations should be considered costs of operating a judicial system that offers equal access to disabled individuals.

Rule 2.6

"The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." Code, Rule 2.6, cmt. 1. The ADA's mandate for reasonable accommodations in state court proceedings protects the substantive rights of litigants in accordance with Rule 2.6.

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