



**CALIFORNIA SUPREME COURT
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CJEO Oral Advice Summary 2020-032

[Issued May 26, 2020]

**JUDICIAL OBLIGATIONS REGARDING WITNESS FACE MASKS DURING
THE COVID-19 PANDEMIC**

I. Question

In anticipation of courts reopening and participants in civil and criminal trials being asked or required to wear masks because of continued concerns arising from the COVID-19 pandemic, a judge asks whether judges may ethically require a witness or party who has expressed a fear of uncovering his or her face to remove a partially obscuring mask while testifying.

II. Oral Advice Provided

While judges have an obligation under the Code of Judicial Ethics¹ to maintain their courtrooms in a manner that provides litigants the opportunity to have their matters fairly adjudicated in accordance with the law (canon 3B(8)), what the law accords in any particular matter is a legal question rather than a judicial ethics question. The California Supreme Court Committee on Judicial Ethics Opinions (CJEO) is without authority to offer advice about legal questions concerning balancing individual due process and other rights with individual health and safety measures.

III. Discussion

The judicial branch has undertaken a series of significant actions in response to the emergence of the novel coronavirus and the potentially catastrophic public health threats posed by the COVID-19 pandemic. In order to protect the health and safety of the public, courts have been partially or completely physically closed, most documents are now required to be filed and served in electronic form, and most judicial proceedings and court operations are currently conducted by employing video, audio, and telephonic means for remote appearances and by using remote interpreting, reporting and recording to make the official record of actions and proceedings. (Cal. Rules of Court, appen. I, *Emergency Rules Related to COVID-19*, rule 3.) These emergency procedures can be expected to relax somewhat as conditions permit courts to eventually reopen. Inevitably, though, the way that courts conduct their business will be changed for the foreseeable future to reduce the risk of continued spread of the novel coronavirus.

Among the expected changes to court procedures are new policies that permit or require individuals to wear masks when participating in court proceedings, including in civil and

¹ All further references to canons and the code are to the California Code of Judicial Ethics unless otherwise indicated.

criminal trials. Having witnesses provide testimony while a portion of their face is covered by a mask would represent a significant departure from the face-to-face engagements that were the norm in pre-pandemic times. It may also implicate constitutional considerations under the Sixth Amendment's confrontation clause, the Fourteenth Amendment's due process clause, and the parallel protections of the right to confront and to due process guaranteed by article I, sections 7 and 15 of the California Constitution. On the other hand, protecting litigants' constitutional rights by requiring witnesses to remove their masks when testifying might risk the health not only of the witness but also of everyone else in the courtroom. CJEO has been asked to provide advice as to whether a judge may ethically require a witness who has expressed a fear of uncovering his or her face to remove a protective mask when testifying.

The Supreme Court established CJEO to provide ethics advice to judicial officers and candidates for judicial office. (Cal. Rules of Court, rule 9.80(e).) To help CJEO fulfill its mandate, judges and candidates are encouraged to seek ethics advice from CJEO, and CJEO endeavors to provide them with guidance for complying with the canons. CJEO is not limited to issuing advice solely under the code, but may also advise on proper judicial conduct under the California Constitution, statutes, and "any other authority deemed appropriate" by CJEO. (Cal. Rules of Court, rule 9.80(e)(1).) This necessarily limits the committee's advice to matters of judicial ethics. As an advisory body, CJEO has no authority to resolve legal disputes or provide an opinion on legal issues. (CJEO Oral Advice Summary 2019-028 (2019), *Service on a Civil Liberties Program Advisory Panel for the State Library*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 1-2 [CJEO has no authority to provide legal advice and declines to do so; citing CJEO Oral Advice Summary 2015-010 (2015), *Service by an Appellate Justice as a Compliance Officer*, Cal. Supreme Ct. Com. Jud. Ethics Opns., pp. 1-2].)

Although the question presented does implicate a judge's ethical obligations to provide fairness in judicial proceedings under canon 3B(8),² the primary issues it presents are legal in nature and not ethical. The question of whether a witness may be compelled to remove a mask

² Canon 3B(8) states in full: "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."

is likely to be resolved by a balancing of the legal rights of the witness against the litigants' rights of confrontation and due process under the Sixth Amendment, Fourteenth Amendment and article I of the California Constitution. (*People v. Murphy* (2003) 107 Cal.App.4th 1150, 1155 [a defendant's right to confront accusatory witnesses may be satisfied absent a full face-to-face confrontation at trial where (1) denial of such confrontation " 'is necessary' "; (2) it " 'further[s] an important public policy' "; and (3) " 'the reliability of the testimony is otherwise assured' "], quoting *Maryland v. Craig* (1990) 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666; *People v. Williams* (2002) 102 Cal.App.4th 995, 1009 [due process requires that any limitation on face-to-face testimony comport with fundamental fairness].) Such legal issues fall outside the purview of CJEO, which has no authority to provide advice on questions of law. (Cal. Rules of Court, rule 9.80(e)).



This oral advice summary is advisory only. (Cal. Rules of Court, rule 9.80(a), (e); Cal. Supreme Ct. Com. Jud. Ethics Opns. (CJEO), Internal Operating Rules & Proc. rule 1(a), (b).) It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rules 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)). The conclusions expressed in this summary are those of the committee and do not necessarily reflect the views of the California Supreme Court or any other entity. (Cal. Rules of Court, rule 9.80(b); CJEO rule 1(a).)