

1 **BEFORE THE COMMISSION ON JUDICIAL CONDUCT**
2 **OF THE STATE OF WASHINGTON**

FILED

JUL 15 2002

COMMISSION ON JUDICIAL CONDUCT

3
4 In re the Matter of

5 The HONORABLE STEVEN MICHELS
6 Judge Pro Tempore,
7 Toppenish Municipal Court and
8 Judge, Sunnyside Municipal Court
9 Yakima County, Washington

Respondent.

No. 2969-F-92

COMMISSION DECISION

10 On April 26, 2002, this matter came on for a fact-finding hearing before the
11 Commission on Judicial Conduct sitting in Yakima, Washington. The Commission
12 members participating as the fact-finding panel for this matter were: Sherry Appleton;
13 Vivian Caver; Harold D. Clarke III; Antonio P. Cube, Sr.; Gregory R. Dallaire; Lorraine Lee;
14 John A. Schultheis; Todd K. Whitrock; and Dale B. Ramerman, Presiding Officer.

15 Ernest D. Greco of Spokane appeared as Disciplinary Counsel; Respondent was
16 present and represented by Lou V. DeLorie, Jr.

17 The Commission heard and considered the testimony of witnesses, the stipulation
18 of the parties regarding admissions, the exhibits admitted into evidence, and the briefs and
19 arguments of counsel.

20 By an order filed February 7, 2002, in a ruling on motions for summary judgment
21 and dismissal brought by Disciplinary Counsel and the Respondent, the Commission
22 dismissed certain affirmative defenses as a matter of law.

23 At the commencement of the fact-finding hearing, the Commission accepted into the
24 record a "Stipulation re: Admissions as to Allegations in Amended Statement of Charges."
25 In addition to stipulating to the admissibility of certain evidence, this stipulation provided
26 that the allegations set forth in paragraphs II.I (a) through(I) and paragraph II.II on page 6,
27 were established by clear, cogent and convincing evidence.

28 Post-hearing, Respondent moved to strike two portions of the argument of

1 Disciplinary Counsel. The Commission, acting through the presiding officer, struck the
2 portion of the argument referring to a Bar complaint, and denied the balance of the motion.

3 The burden of proof is on Disciplinary Counsel to prove a violation by clear, cogent
4 and convincing evidence.

5 Since 1986, Respondent has been an appointed, part-time, municipal court judge
6 in Sunnyside, Washington. For about ten years, until these charges were filed, he also
7 served as the judge pro tempore for the Toppenish Municipal Court. He served in the latter
8 capacity, on a part-time but regular basis without pay, in exchange for similar services by
9 the part-time Toppenish Municipal Court judge in the Sunnyside Municipal Court. During
10 the time period he was sitting as the judge pro tempore in Toppenish, Respondent, as a
11 lawyer in private practice, also held a contract as the part-time Toppenish public defender.

12 Respondent is charged by an Amended Statement of Charges with two patterns of
13 practice, in his service as the judge pro tempore of the Toppenish Court, that are alleged
14 to constitute violations of the Code of Judicial Conduct. With respect to both alleged
15 patterns of practice, Respondent has stipulated that there is clear, cogent and convincing
16 evidence regarding the conduct giving rise to the charges as set forth in paragraphs II.I (a)
17 through (l) and II.II of the Amended Statement of Charges.

18 **I. FIRST ALLEGED VIOLATION-DUAL ROLE CONDUCT**

19 The first allegation is that Respondent violated Canons 1, 2(A) and 3(D)(1)(b) by
20 presiding as judge in numerous criminal cases in which he also appeared on behalf of the
21 defendant as a lawyer. The record establishes by clear, cogent and convincing evidence
22 that over a three year period of time, in more than twelve cases, Respondent made
23 discretionary decisions while presiding as the judge in cases where he had previously
24 appeared as attorney of record for the defendant.

25 Canon 3(D) (1) provides in part:

26 Judges should disqualify themselves in a proceeding in which their
27 impartiality might reasonably be questioned, including but not limited
28 to instances in which:

...

1 (b) the judge previously served as a lawyer

2 Neither transcripts nor tapes are available for some of the cases cited in the first
3 allegation of the Amended Statement of Charges. But the dockets in each of these cases
4 reflect Respondent was appointed as counsel for the defendant and later acted as judge
5 in the same case. None of the dockets suggest Respondent had withdrawn or been
6 replaced as counsel.

7 The discretionary actions taken by Respondent in these cases in which he
8 previously served as a lawyer varied. In Toppenish v. Aileen H. Jimmy, C00005051, he
9 was appointed counsel for the defendant in August of 1998. About a year later, without
10 having withdrawn as counsel, Respondent, as the judge pro tempore for the Toppenish
11 Municipal Court, cleared a warrant for the arrest of the defendant and ordered the warrant
12 recalled.

13 In other cases, Respondent's actions as judge where he also was counsel of record
14 for the defendant were even more substantive. For example, in the three cases of
15 Toppenish v. Santos Rivas, C00006564, C00006565, and C00006566, Respondent was
16 appointed as attorney for defendant on August 17, 1999. Less than a month later, on
17 September 13, 1999, while sitting as a judge pro tempore on these same cases,
18 Respondent presided at a hearing at which he entered findings of guilt on two counts in
19 each case, sentenced the defendant to a total of 540 days in jail, with all but twelve days
20 suspended, fined defendant \$4560 and then suspended \$2300 of this amount. Exhibit 7;
21 exhibits 22 and 23.

22 In the Rivas case the defendant, four weeks before his sentencing by Respondent,
23 had qualified for an attorney at public expense, and Respondent Michels was appointed
24 to represent him. On the date of his sentencing, so far as the record reflects, he still
25 qualified for a public defender. The record does not show that Respondent Michels had
26 withdrawn as his attorney of record, and Respondent does not contend he had withdrawn.
27 Rather, Respondent contends he was discharged by the defendant when Respondent
28 appeared as the judge in the case.

1 The hearing, which ended with Respondent sentencing Mr. Rivas, began as an
2 arraignment of Mr. Rivas on a new charge. Respondent advised the defendant that he was
3 subject to a \$1000 fine; asked defendant if he wanted to enter a plea of guilty or not guilty;
4 and inquired whether defendant wished to be represented by an attorney. At that point the
5 defendant raised the issue of other charges that were pending against him:

6 *The defendant:* "I'm not sure at this point. Is this all I'm here for?"

7 *Judge Michels:* "I believe so. Are you being held on something else?"

8 *The defendant answered in part:* "Uh, you guys don't know, I, I sort of know
9 but I don't really know what, what's going on, what charges or how many,
10 cause I got a number of 'em that, uh, I don't have the paperwork on right
11 now...."

12 *A short time later Judge Michels says:* "These other ones I actually
13 represent you on, so there's nothing I can do on those until Judge Reid gets
14 back and (inaudible)"

15 *Defendant:* "Well, remember I was trying to get in here and get it over with,
16 get, plead guilty, I told you right here and then they shoved me on out there
17 and I've been, and you said well I'll talk to the judge and, and I've been in
18 here, but I was ready to plead guilty on all that."

19 *Judge Michels:* "Do you want to plead guilty on those now?"

20 *Defendant:* "I'm just gonna go ahead and plead guilty to everything as soon
21 as possible."

22 *Judge Michels:* "Do you wish to proceed without an attorney representing
23 you?"

24 *Defendant:* "I'm pleading guilty to everything, get it over with, and, uh, that's
25 ..."

26 *Judge Michels:* "Do you wish to proceed without an attorney?"

27 *Defendant:* "Yeh, I just want to get it over with."

28 *Judge Michels:* "I was appointed to represent you. Do you mind if I
(inaudible) listening to this as judge?"

Defendant: "I don't mind, uh-uh, I just, I've been in here since the 11th. I've
been trying to talk to somebody, trying to get to you, can't get on the phone
to you so, uh, like I said since the 11th I've mailed in kites, filed, uh, filed
some legal documents and I just want to get it out of the way."

Judge Michels: "Do you wish to proceed without being represented by an
attorney?"

Defendant: "Right, a plea of guilty on everything."

1 Exhibit 7.

2 This dialog between Respondent and the defendant Rivas raises several serious
3 concerns for the Commission. Rivas had been in jail for two days and had been attempting
4 to contact his lawyer, Respondent Michels. When he did get into court, his lawyer was
5 presiding as the judge. At that point the judge repeatedly pressed him about whether he
6 wanted to proceed without a lawyer, or go back to jail and wait indefinitely for another
7 judge. Respondent did not offer the alternative of appointing another lawyer for him, or
8 remind him of his right to counsel. At no point does the record reflect Respondent asking
9 the prosecutor whether he objects to Respondent proceeding. Indeed, the prosecutor
10 probably was not present. The record does not reflect the prosecutor was there.

11 The Code of Judicial Conduct prohibits a judge from acting as a judge in a case
12 where the judge previously appeared as a lawyer. Canon 3(D)(1)(b). Although this
13 prohibition is worded in the terms "should disqualify," the obligation of a judge to disqualify
14 when he or she has previously acted as a lawyer in the case is mandatory. Judicial
15 Conduct and Ethics, §4.16 (3rd ed, 2000). Thus, while under 3(E) other bases for
16 disqualification such as having a economic interest in the case, may in some
17 circumstances be waived as a basis for disqualification, the disqualification based on
18 previously having acted as an attorney is not listed as a conflict that can be waived.

19 The Application section of the Code makes all of the Code of Judicial Conduct
20 applicable to all judges, with certain narrow exceptions for part-time judges (judges who
21 serve on a continuing or periodic basis but who are permitted to devote time to some other
22 profession) and for pro tempore judges (persons appointed to act temporarily as judges).
23 The Code sections Respondent is alleged to have violated apply to both part-time judges
24 and pro tempore judges.

25 In each of the matters cited in the Section II.I of the Amended Statement of
26 Charges, Respondent, as he has admitted, violated the Code of Judicial Conduct by acting
27 as judge in cases where he had previously acted as counsel. By acting as both lawyer and
28 judge in the same case, he violated Canon 1 by failing to maintain and enforce high

standards of judicial conduct; he violated Canon 2(a) by failing to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and he violated Canon 3(D) by failing to disqualify himself in cases where he had previously served as a lawyer.

II. SECOND ALLEGED VIOLATION-IMPROPER GUILTY PLEAS

The second allegation is that Respondent violated the Code of Judicial Conduct Canons 1, 2(A) and 3(A)(1) by engaging in a pattern and practice of accepting guilty pleas without obtaining proper written plea statements from the defendants. Eight cases heard by Respondent as a judge pro tempore in Toppenish are cited. Respondent admits these events happened and that they constituted violations of the requirements for a guilty plea and violations of the Code of Judicial Conduct.

Courts of Limited Jurisdiction Criminal Rule (CrRLJ) 4.2 requires that when a defendant pleads guilty, the defendant shall sign a guilty plea form that substantially complies with the plea form set forth in the rule. The plea form used by Respondent in the Toppenish Municipal Court, contrary to the requirements of the court rule, did not advise defendants of their right to be represented by a lawyer and to be represented at public expense if they cannot afford a lawyer, of the elements of the crime charged, of their rights to a speedy and public trial before an impartial jury, of their right to remain silent and not testify against themselves, of their right to testify and call witnesses to testify, of their right to an appeal, of the prosecuting attorney's recommendation, or of the court's right to assess court costs. Respondent admits that he did not orally advise defendants of these rights. Exhibit 1, Deposition of Respondent, page 108. Also in violation of the rule, the plea form used by Respondent in Toppenish did not include defendant's statement of what he or she had done that makes them guilty and did not contain representations by the defendant that they were acting freely and voluntarily without threats or promises. In some of the pleas taken by Respondent, the blanks for the minimum and maximum terms that could be imposed were omitted; in several cases no written plea form was used. The plea forms used by Respondent did not list the elements of the crime, and Respondent did not

1 orally advise defendants of the elements. Exhibit 1, Deposition of Respondent, page 100;
2 107. These omissions were substantive deviations from the requirements of the court rule.
3 Even if Respondent orally advised defendants of some of the information and rights
4 required in the form, this would not make up for omissions from the plea forms. To ensure
5 pleas of guilty are both knowing and voluntary, the rule requires the defendant to
6 acknowledge in writing that prior to the hearing the defendant has either read, or had the
7 plea read to him.

8 The content of the form required by CrRLJ 4.2(g) is dictated by the constitutional
9 requirement that guilty pleas be knowingly, intelligently and voluntarily made. In re
10 Hammermaster, 139 Wn.2d 211, 235-236 (1999). A judge has a duty to ensure that a
11 guilty plea is constitutionally valid. Boykin v. Alabama, 395 U.S. 238 (1969). The court in
12 Hammermaster held that denying a defendant basic due process in taking guilty pleas is
13 a serious violation of Canon 3(A)(1).

14 Respondent's conduct in taking guilty pleas as the pro tempore judge in the
15 Toppenish Municipal Court constituted a pattern and practice of conduct that violated
16 defendants' constitutional rights and violated the Code of Judicial Conduct. Specifically,
17 this conduct violated Canon 1 by failing to enforce high standards of judicial conduct,
18 violated Canon 2(A) by failing to act to promote public confidence in the integrity and
19 impartiality of the judiciary, and violated Canon 3(A)(1) by failing to be faithful to the law
20 and maintain professional competence in it.

21 III. SANCTIONS FOR VIOLATIONS

22 Under both the Rules of the Commission and case law, there are ten non-exclusive
23 factors the Commission must consider in determining the appropriate sanction for a
24 violation of the Code of Judicial Conduct.

25 1. Whether the conduct was an isolated event or a part of a pattern of 26 conduct.

27 With respect to both alleged violations, there were many instances where violations
28 occurred. The violations were not isolated incidents, but rather were recurring events that

1 were predictable.

2 Respondent contends regarding the allegation that he appeared as a lawyer and
3 acted as a judge in the same case, that he tried to avoid this situation by instructing the
4 clerk, when he was scheduled to act as a judge pro tempore, to reschedule cases where
5 he had appeared as a lawyer to a time when the regular judge would be present, and that
6 these violations occurred when defendants he represented would appear unexpectedly on
7 the calendar because they had been taken into custody.

8 But the record establishes that defendants Respondent represented who were not
9 in custody also appeared before him when he was functioning as judge. Respondent
10 testified in his deposition that, notwithstanding his request that his clients not be put on
11 calendars that he would hear as a judge, this sometimes did happen. Exhibit 1, Deposition
12 of Respondent, page 45. He also testified that it was a surprise when one of his clients
13 showed up before him when he was presiding as judge. Transcript of Proceedings, page
14 69, lines 20-25.

15 The Commission finds that Respondent knew or should have known that the
16 circumstance presented in these cases was a recurring circumstance that was created by
17 Respondent's decision to both hold the public defender contract and to serve as the judge
18 pro tempore. Even if cases where he was the defendant's lawyer were usually
19 rescheduled, the record shows that regularly his clients appeared before him when he was
20 acting as judge. The proper solution was not to ignore the problem and continue to place
21 defendants in the position of choosing between their right to counsel and their right to a
22 prompt resolution of their cases. Rather, Respondent should have either dropped the
23 public defender contract or stopped serving as the judge pro tempore. By electing to
24 continue to do both, he knew or should have known that he would continue to function as
25 judge in the same cases in which he had already appeared as counsel for the defendant,
26 and that he would continue to violate the Code of Judicial Conduct.

27 With respect to the guilty plea cases, the Commission can infer from the record that
28 in every case Respondent used a plea form that was not in substantial compliance with the

1 court rules and that he did not properly advise the defendants of the rights they were giving
2 up.

3 **2. The nature, extent, and frequency of the occurrence of the acts of**
4 **misconduct.**

5 The dual role violations involved a breach of an explicit canon prohibition on
6 numerous occasions. The violation goes to the heart of both the fundamental right to an
7 impartial judiciary, a right of both defendants and the State, and the constitutional right of
8 a defendant in a criminal proceeding to be represented by counsel.

9 Respondent contends that he was relying on a statute and that he had misread the
10 Code of Judicial Conduct prohibition. This statute, RCW 2.28.030, in subdivision 4
11 prohibits a person from acting as a judicial officer in a case where he or she has acted as
12 an attorney. The statute goes on to provide:

13 In the cases specified in subdivision 3 and 4, the disqualification may be
14 waived by the parties, and except in the Supreme Court and the Court of
15 Appeals, shall be deemed to be waived, unless an application for the change
of place of the trial be made as provided by law.

16 It is the Code of Judicial Conduct, however, not this statute, that governs the ethical
17 conduct of judges. The Supreme Court has the final say on ethical conduct of judges; what
18 it has prohibited by the adoption of the Code of Judicial Conduct, the legislature cannot
19 authorize. The statute relied on was adopted in 1891 and was amended once, in 1971,
20 to add a reference to the Court of Appeals. The Supreme Court adopted the Code of
21 Judicial Conduct in 1974; the present version of the Code was adopted in 1995. Moreover,
22 the Constitution of Washington was amended in 1980 to create the Commission on
23 Judicial Conduct, giving the Commission authority to determine whether a judge "has
24 violated a rule of judicial conduct." Thus the Constitution adopts the Code of Judicial
25 Conduct by reference. In re Discipline of Turco, 137 Wn.2d 227, 238 (1999). Having
26 constitutional stature, the Code of Judicial Conduct necessarily supersedes any statutory
27 provisions.

28 As for the argument he had misread the Code of Judicial Conduct 3(D)(1), a

1 mistaken belief about the law is not a substantial mitigating factor. Respondent's
2 explanation of his misreading was as follows:

3 Q. (By Respondent's Counsel): What about the canons, Canon 3(D)(1)?
4 The way it is presented up there, 3(D)(1) to me looks pretty black and
white.

5 A. And that is black and white. And I think that is correct. However, at
6 the time, I was going ahead and reading a little bit farther in that
7 canon, and the canon goes on to section E. . . . I was looking at
8 section E. which basically says that you can have disclosure and
9 agreement of the parties, of everyone who is there, of the defendant,
if there's an attorney, prosecutor, if there's an agreement then you
can go ahead and sit as judge even though you may have had a legal
relationship with the defendant. So I felt as long as I put it on the
record, as long as everyone agreed that that was the thing to do.

10 Transcript of Proceedings, page 75, line 23 to page 76, line 13.

11 This is a blatant misreading of 3(E), which provides as follows:

12 (E) Remittal of Disqualification. A judge disqualified by the terms of
13 Canon 3(D)(1)(c) or Canon 3(D)(1)(d) may, instead of withdrawing
14 from the proceeding, disclose on the record the basis of the
15 disqualification. If, based on such disclosure, the parties and lawyers,
16 independently of the judge's participation, all agree in writing or on the
17 record that the judge's relationship is immaterial or that the judge's
economic interest is de minimis, the judge is no longer disqualified
and may participate in the proceeding. When a party is not
immediately available, the judge may proceed on the assurance of the
lawyer that the party's consent will subsequently be given.

18 By listing the subparts to which this exception applies, the exception implicitly does
19 not apply to the subparts not listed, including the subpart at issue in this case. Moreover,
20 there is no evidence in the transcripts that are available that Respondent attempted to get
21 the consent of both the defendant and the prosecutor. In the Rivas case, for example, the
22 record does not reflect that Respondent obtained the consent of the prosecutor. Third, for
23 this exception to apply, the parties must "independently of the judge's participation" agree
24 in writing or on the record. Defendants were forced by Respondent's appearance as a
25 judge on their case to decide between a timely hearing and their right to counsel. They
26 had no opportunity to consider what to do independently of the judge's participation. In
27 Rivas Respondent's questioning about whether defendant wanted to proceed without a
28 lawyer was persistent, even though polite. Exhibit 11, Tape of proceedings for 9/13/99.

1 Finally, the required findings that must be in writing or on the record under Code of Judicial
2 Conduct 3(E) were not made, and obviously have no relevance to the disqualification
3 based on a prior appearance as counsel.

4 Respondent's contention that he proceeded as he did because he misread Canon
5 3, is not credible. Rather, it is an excuse presented in an attempt to justify a pattern of
6 conduct that was an obvious violation of the Code of Judicial Conduct.

7 Another contention of Respondent is that he always announced that if he had
8 represented any of the defendants who were appearing before him, their cases would have
9 to be rescheduled. His statements were not so categorical. For example, in the Rivas
10 case, Respondent made the following introductory announcement:

11 Some of you who are in the courtroom I represent, or have
12 represented. And, if that's the case, we can do whatever Judge Reid
13 would do were he here, I would try to go ahead and do that. If it
14 creates any type of conflict, I'll have to reset the case so that Judge
Reid would hear your case. Don't hesitate to ask me if you have any
questions concerning that. I am Judge Steve Michels and Judge
Reid is not here today. I am sitting as Judge Pro Tem.

15 Exhibit 12.

16 In another case Respondent announced:

17 Some of you I represent or have represented in the past. If there's
18 anything I can do on the case, we'll try to do it, otherwise I'll have to
19 reset it for Judge Reid, but we'll take a look. Sometimes you're just
here for a hearing or an alcohol review or something like that. We
can do that, [inaudible] we can do that.

20 Exhibit 16.

21 Respondent contends that by going ahead and acting in these cases, he was doing
22 the defendants a favor. Unless he went ahead and ruled as judge on their cases, the
23 defendants would have had to sit in jail until the regular judge returned, which could be
24 several weeks. This is essentially a necessity defense: no other judicial officer was
25 available who could act.

26 He testified:

27 Also, the problem that we kind of run into in sitting like that is we have
28 these rules that we need to follow, but the rules also say that we need
to protect the defendant's rights, sitting as a pro tem, we need to

1 defend and protect the defendant's rights. Well, I had people in front
2 of me who would be out of jail if they could be sentenced right then.
3 They were going to have to wait another two weeks for another judge.
4 And I thought that's cruel and unusual punishment for them to have
to do that. So what we end up having is really a conflict. We kind of
have conflict in what these canons are providing when we have this
situation. So that's the problem I was faced with.

5 Transcript of Proceedings, page 76 line 14 to page 77 line 2.

6
7 Necessity has been recognized as a defense in dual role cases. See generally,
8 Judicial Conduct and Ethics §4.03. But while the Commission finds that this may have
9 been the immediate motive of Respondent, necessity is neither a defense nor a viable
10 argument in mitigation under the facts of this case. The reason is that the "necessity" was
11 created by Respondent's decision to continue to act both as the public defender and as a
12 pro tem judge. Had he recognized he could not fulfill both rules in a manner consistent
13 with his ethical obligations as a lawyer and as a judge, defendants would not have been
14 faced with choosing between the right to counsel and a timely court process.

15 Respondent also contends the record reflects he had, in effect, withdrawn as
16 counsel or that the defendants elected to discharge him as counsel and waive their right
17 to counsel. If Respondent had withdrawn, he would have had the duty as a withdrawing
18 attorney to take whatever practical steps he could to protect the client. RPC 1.15(d). At
19 a minimum this would include advising the client of his or her right to a new attorney.
20 Similarly, as a judge with a duty to protect the Constitutional rights of defendants appearing
21 before him, he would have had the duty to advise the defendant that since his or her
22 attorney was withdrawing, the defendant had a right to appointment of new counsel. As
23 the transcript in Hivas reflects, Mr. Rivas wanted to proceed without counsel because he
24 wanted to get out of jail and the first judge he appears before is also his attorney. At this
25 hearing he was not advised of his right to be represented by an attorney, nor was he
26 advised of any other constitutional right. Exhibit 1, Deposition of Respondent, page 69.
27 The defendant in these circumstances stating that he just wanted to go ahead with the
28 hearing is hardly making a knowing and voluntary choice to waive the right to counsel.

1 Respondent has also contended that all he did in these hearings was continue the
2 cases for the regular judge. Thus, he argues that on sentence compliance hearings, he
3 did what the regular judge would have done, and set them for another hearing. But this
4 is clearly not what Respondent always did, since he also testified he considered whether
5 they were in compliance, and would then set the matter over for another hearing in 30 or
6 60 days. Transcript of proceedings, page 76 through page 78, line 13. This involved
7 exercising judicial discretion involving defendants Respondent was representing.
8 Respondent repeatedly made discretionary decisions, sometimes involving loss of liberty,
9 for defendants who obviously were deprived of their right to counsel.

10 Respondent offered the testimony of a witness, the City Attorney for the City of
11 Toppenish, who testified that he had never known Respondent to do something as a judge
12 pro tempore that was inconsistent with what the regular judge would have done. This at
13 best is speculation and even if accurate not a defense.

14 Finally, in testifying about his acting in a dual capacity, Respondent testified that he
15 never deviated from the prosecutor's recommendations. Transcript of proceedings, page
16 76, lines 10–12. His point seemed to be that for this reason, the State was not prejudiced
17 or deprived of an impartial judge. But all parties are entitled to an independent, unbiased
18 judge. This defense at best suggests he might have been favoring the State to avoid
19 appearing to favor his own client.

20 With respect to Respondent's procedure for taking guilty pleas and the forms he
21 used, and specifically the omission of the elements of the crime from the guilty plea forms,
22 Respondent testified that if the elements of the crime were not in the police report, he
23 would not find the defendant guilty, that most of the crimes with which defendants are
24 charged contained in their title the elements of the crime charged. Even if true, this would
25 not show that the defendant understood what the elements of the crime were.

26 Finally, Respondent testified that everyone thought his plea forms were in
27 substantial compliance. This is not a defense.

1 **3. Whether the misconduct occurred in or out of the courtroom.**

2 In every case, the misconduct occurred in the courtroom in cases where the
3 defendant's liberty was at stake.

4 **4. Whether the misconduct occurred in the judge's official capacity or his**
5 **private life.**

6 It occurred in his official capacity.

7 **5. Whether the judge has acknowledged or recognized that the acts occurred.**

8 By the time of the hearing Respondent acknowledged that the acts occurred and
9 that he had violated the Code of Judicial Conduct.

10 In response to the initial statement of allegations, however, Respondent responded
11 in part as follows:

12 I categorically deny that I have violated Canons 1, 2A, or 3D.
13 I am insulted that any impropriety has been suggested. I have
14 yet to serve as judge in any proceeding in which I feel my
 impartiality might reasonably be questioned.

15 These "allegations" border on the ridiculous

16 . . .

17 As I have noted, these allegations, even though ridiculous, do take up
18 time and energy. This impedes the judicial system by continually
19 tying up judges' attention, time and energy answering complaints
20 rather than doing their jobs. Continual harassment prevents good
 judges from being objective. The goal of preserving judicial objectivity
 and fairness must be the top priority. Your commission is the
 preserver of that, not the prosecutor for false and improper
 allegations.

21 Exhibit 23, pages 2-4.

22 On June 29, 2001 he again wrote the Commission denying any violation of the Code
23 of Judicial Conduct. He concluded by alleging:

24 The only mistake I have made was to publicly criticize the local District
25 Court Judges who closed down the Lower Valley district Courts 3
26 years ago. One in particular did not like that criticism and it is my
27 contention that he is using your Commission to make huge numbers
 of false accusations against me and other judges similarly situated.
 You need to stop this political retaliation or at least protect those of us
 who are its victims.

28 Exhibit 22.

1 During the pendency of the proceedings, Respondent denied requests for admission
2 about his conduct; he later admitted that all of the requests for admission were true. His
3 attorney argued that he was not really familiar with civil practice and discovery.
4 Respondent, however, testified that he did do some "civil litigation in terms of discovery
5 practice and rules regarding discovery practice." Transcript of Proceedings, page 62, lines
6 15-17.

7 On November 9, 2001, after the Statement of Charges was served, Respondent
8 stated to the press: "the tapes [of court hearings] clearly explain what happened in the
9 courtroom in each of the cases. I told defendants I couldn't sentence them. They fired me
10 as their attorney and the prosecutors urged me to proceed with sentencing." Exhibit 34.

11 The record reflects he was discharged because the defendant was faced with
12 substantial additional time in jail if they kept Respondent as their attorney, and there is no
13 evidence the prosecutors urged him to proceed or consented.

14 **6. Whether the judge has evidenced an effort to change or modify his**
15 **conduct.**

16 By the time of the hearing Respondent had stopped serving as a judge pro tempore
17 in Toppenish.

18 With respect to the use of improper plea forms, Respondent argues that he was only
19 the pro tempore judge using the forms provided by the appointed judge. The Commission
20 recognizes that this might be a mitigating factor. Although a pro tempore judge must
21 comply with the court rules, it would be unusual for a pro tempore judge to rewrite the
22 forms for a court in which he or she was sitting as a judge pro tempore. But Respondent
23 was also sitting as a judge in his own court, and he sat as a judge pro tempore for about
24 ten years. It also must be noted that the plea forms used by Respondent in his own court
25 in Sunnyside also did not comply with the requirements of the Court rule.

26 **7. The length of service on the bench.**

27 Respondent has served for 15 years as a judge. The length of service may be
28 either a mitigating or exacerbating factor, depending on the nature of the Code violation.

1 In this case, length of service would not be a mitigating factor, in that ignorance of legal
2 requirements and the Code of Judicial Conduct seems to be a defense put forward by
3 Respondent.

4 **8. Whether there have been prior complaints against the judge.**

5 There is one prior public complaint involving an improper political contribution. As
6 a part of the resolution of that complaint, Respondent agreed that he would not again
7 violate the Code of Judicial Conduct.

8 **9. The effect the misconduct has upon the integrity of and respect for the**
9 **judiciary.**

10 Acting as the judge in a case where one has appeared as a lawyer violates common
11 sense notions of fairness. Respondent's violations in this regard were not obscure. And
12 they were done in court. They raise the question of what the public in the courtroom would
13 think about the judicial process if the defendant's attorney suddenly puts on a robe and
14 becomes the judge. The effect of his violations was to deprive defendants of their
15 constitutional right to representation of counsel, and to undermine public confidence in the
16 judiciary and the court process. Similarly, the cases involving improper guilty plea forms
17 were handled in open court and involved the constitutional rights of defendants. The
18 inadequate form that was not compensated for by an adequate dialog between the court
19 and defendant creates the impression of a mechanical process that undercut the public's
20 respect for the judiciary.

21 **10. The extent to which the judge exploited his position to satisfy personal**
22 **desires.**

23 Respondent did hold the public defender contract, for which he was paid, and
24 served, as pro tempore judge for the same court. He was not paid for his pro tempore
25 duties because of the arrangement he had with the appointed judge of Toppenish to serve
26 as the pro tempore judge of the Sunnyside Municipal Court when Respondent needed
27 coverage. While there is a degree of self interest that was being served, the Commission
28 cannot find that monetary factors led Respondent to continue to play both roles.

1 Considering all of the mitigating and exacerbating factors, the Commission must
2 determine the appropriate sanction.

3 Although the Commission has had cases where a judge sat as a judge on cases
4 where he had previously acted as a lawyer but was no longer doing so, it has not had a
5 case like the present one where the Respondent made discretionary judicial decisions in
6 cases where he was still appearing of record as counsel for the defendant. The sequential
7 cases did not act to deprive the defendant of his right to counsel. Nor was the conflict
8 inherent in the dual role, the conflict that undercuts confidence in the judiciary and court
9 process, so obvious. In the sequential cases, the Commission issued admonishments.

10 In another case where a part time judge used improper plea forms (the part-time
11 judge in the same court using the same plea forms used by Respondent), the Commission
12 approved a stipulation for an admonishment. In that case, however, the judge admitted
13 the violation and cooperated with the Commission. Respondent's lack of cooperation and
14 acknowledgment until shortly before the hearing stand in sharp contrast.

15 As noted, Respondent has a prior violation which was resolved with a stipulation in
16 which Respondent stipulated he would not violate any Code provision in the future.

17 The Commission concludes that censure and suspension from office for 120 days
18 is required in this case in view of the extent and nature of the violations, exacerbating and
19 mitigating factors, and discipline imposed in other cases.

20 Censure is appropriate in view of three aspects of this case which are particularly
21 significant with respect to the dual role violation. First, this was a recurring event.
22 Notwithstanding an effort not to schedule Respondent's clients when Respondent was
23 hearing the calendar, Respondent still had his clients appear before him. This happened
24 often enough that Respondent would give a standard announcement about this possibility
25 when he began court. It also happened when Respondent's clients who were in custody
26 on a new charge appeared on the first appearance calendar. How many times over ten
27 years we do not know. But Disciplinary Counsel was able to find and produce evidence
28 of more than twelve cases over three years. Second, Respondent's decision to go forward

1 when the client said he or she just wanted to get it over with, had the effect of depriving the
2 client of legal counsel at a critical juncture of the proceedings when their liberty was at
3 stake. Third, a judge acting in a case where he has represented the defendant, would
4 appear wrong to any court observer, because it brings into question the objectivity of the
5 judge and the court process. The obvious question for a court observer would be, "What
6 kind of court is this?" Respondent's actions in this regard was detrimental to the integrity
7 of the judiciary and undermined public confidence in the judiciary.

8 Both of the violations reflect Respondent's lack of understanding of the judicial role
9 and duties as well as a lack of understanding of the fundamentals of judicial ethics.
10 Respondent has never attended a course at the national judicial college, which the
11 Commission believes should be done before he resumes judicial duties. Respondent's
12 misunderstanding of or disregard of the requirements of the Code of Judicial Conduct and
13 court rules are so serious that completion of a concentrated education course is the
14 minimum that should be required before he resumes the bench.

15 [Two points raised by the dissent call for comment. First, the Commission did not
16 consider Respondent's denial of the allegations of the Statement of Charges to be an
17 aggravating factor. Whether the judge has acknowledged or recognized that the acts
18 occurred may be a mitigating factor. The Commission commented on the manner in which
19 respondent conducted his defense, including a blanket denial of requests for admissions
20 that he later admitted in full, and newspaper statements as set forth above, only in the
21 context of whether this mitigating factor was present.

22 The dissent argues: "...the Commission offered to settle this matter by having the
23 Respondent agree to a 90-day suspension, which was refused by the Respondent. I have
24 great difficulty in agreeing with the Commission to now impose a greater suspension
25 merely because the Respondent elected to exercise his right to a hearing." This argument
26 mischaracterizes the position of the Commission, when Respondent and Disciplinary
27 Counsel submitted a proposed stipulated resolution, which the Commission rejected. To
28 facilitate a better understanding on the part of the parties and further discussions about an

1 agreed resolution, the Commission indicated, when it rejected the proposed stipulated
2 resolution, that if proposed stipulated facts were the only facts available to the
3 Commission, then a 90 day suspension would be appropriate. The facts available to the
4 Commission after the fact-finding hearing (including thousands of pages of exhibits plus
5 additional stipulated evidence) were far different from the very limited facts in the proposed
6 stipulation.^{1]}

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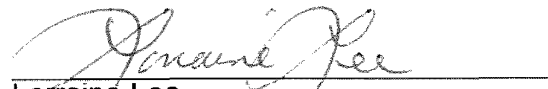
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28 ¹ Member Lorraine Lee was not available to participate in this bracketed addendum to the majority opinion.

1 Accordingly, the Commission will censure the Honorable Steven Michels, and will
2 recommend to the Supreme Court that he be suspended without pay for 120 days and that
3 he not be allowed to resume judicial duties in any court until he has completed, at his own
4 expense, a course, approved by the Commission, for judges in limited jurisdiction courts.
5 This course must include, or Judge Michels must separately complete, a course in judicial
6 ethics.

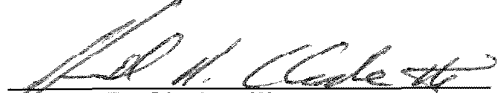
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8 Dated July 15, 2002

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10
11 
12 Sherry Appleton



Lorraine Lee


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14 Vivian Caver

See dissent
John Schultheis

15 
16 Harold D. Clarke, III


Dale B. Ramerman

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18 Antonio P. Cube, Sr.


Todd K. Whitrock

19 
20 Gregory Dallaire

1 **BEFORE THE COMMISSION ON JUDICIAL CONDUCT**
2 **OF THE STATE OF WASHINGTON**
3
4

5 In re the Matter of:)

6 The HONORABLE STEVEN MICHELS)
7 Judge Pro Tempore,)
8 Toppenish Municipal Court and)
9 Judge, Sunnyside Municipal Court)
10 Yakima County, Washington)

11 Respondent)
12 _____

No. 2969-F-92

DISSENTING OPINION

11 Respondent, prior to the hearing conducted April 26, 2002, and during the
12 hearing itself, acknowledged that the actions complained of had occurred, and that
13 he had violated the Code of Judicial Conduct.

14 The Commission failed to consider that the Respondent was sitting as a
15 Judge Pro Tempore in a poor rural community, without pay, to assist the regular
16 judge who was not available to conduct judicial proceedings. Although the actions
17 that are the subject of this hearing were in violation of the Code of Judicial
18 Conduct, they were not done out of malice, or to benefit the Respondent in any
19 way. They were performed in an effort to assist the neighboring community, and
20 the people who appeared before the Respondent.

21 The majority finds fault with the Respondent for denying the allegations
22 raised by the Commission, until shortly before the hearing. I do not agree that the
23 exercise of one's rights, by requiring the Commission to prove the allegations,
24 should be considered an aggravating factor when determining what sanctions, if
25 any, should be imposed.

26 Further, prior to the hearing, the Commission offered to settle this matter by
27 having the Respondent agree to a 90-day suspension, which was refused by the
28 Respondent. I have great difficulty in agreeing with the Commission to now impose

1 a greater suspension merely because the Respondent elected to exercise his right
2 to a hearing.

3 The Respondent has taken the steps necessary to correct the conduct and
4 actions that are the subject of this Amended Statement of Charges, and I believe
5 that the appropriate discipline should be a censure, without suspension or removal
6 from office.

7 Accordingly, I dissent.

8
9 Dated July 15, 2002

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13 John A. Schultheis
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