

FILED
MAR - 9 2018
COMMISSION ON JUDICIAL CONDUCT

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

In Re the Matter of:)
)
The Honorable Joely A. O'Rourke) CJC No. 8521-F-175
Judge of the Lewis County Superior Court)
) **STIPULATION, AGREEMENT**
) **AND ORDER OF ADMONISHMENT**
_____)

The Commission on Judicial Conduct and Lewis County Superior Court Judge Joely A. O'Rourke do hereby stipulate and agree as provided for herein. This stipulation is entered pursuant to Rule 23 of the Commission on Judicial Conduct Rules of Procedure.

The Commission has been represented in these proceedings by its Executive Director, J. Reiko Callner, and Judge O'Rourke represented herself.

I. STIPULATED FACTS

A. Judge Joely A. O'Rourke ("Respondent") was elected judge of the Lewis County Superior Court in the November 8, 2016 general election. Respondent was sworn in on January 9, 2017.

B. From October of 2014 to December of 2016, prior to becoming a judicial officer, Respondent was a lawyer in private practice and served as the "attorney of the day" representing defendants at first appearance in district and superior court in Lewis County. The duties of the attorney of the day are limited, and include meeting with each defendant to confirm their name and address, informing them of the charges and their constitutional rights, determining whether the defendant qualifies for a public defender, and appearing with them in court to address bail. The attorney of the day does not enter a plea on behalf of the defendant, nor do they file a notice of appearance or receive discovery.

C. On November 28, 2016, Respondent, in her capacity as attorney of the day, appeared

in court as the defendant's attorney for the preliminary hearing in Lewis County Superior Court Case No. 16-1-699-21.

D. On February 22, 2017, Respondent, as a judicial officer, accepted the defendant's guilty plea in that same case. The defendant was represented by a different attorney.

E. On March 8, 2017, Respondent presided over the sentencing hearing in that same case. During that hearing, Respondent felt she recognized the defendant and inquired whether she had represented the defendant at his first hearing. Upon confirming that she had, Respondent then asked whether "either party" had "any problem" with her imposing sentence. There was no objection. After hearing from both sides, and before imposing sentence, Respondent said, "Well, I actually – I remember [this defendant], and I remember thinking he was different than most of the people that I dealt with when I was defense attorney. I remember telling the judge that I felt like it was outside of his character for him to do something like this. In my dealings with him he was a very respectful young man." Respondent then proceeded to sentence him in accordance with the agreed recommendation of the parties.

II. AGREEMENT

A. *Grounds for discipline.*

1. Based upon the above stipulated facts, Respondent agrees that her conduct described above violated Canon 1 (Rules 1.1 and 1.2) and Canon 2 (Rules 2.2 and 2.11(A)(6)(a)) of the Code of Judicial Conduct.

2. Rules 1.1 and 1.2 require judges to respect and comply with the law and to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and to avoid impropriety and the appearance of impropriety. Rule 2.2 requires a judge to perform all duties of judicial office fairly and impartially. Rule 2.11(A)(6)(a) requires that a judge shall disqualify himself or herself in any proceeding in which the judge served as a lawyer in the matter.

3. Prior to contact from the Commission, Respondent mistakenly believed that

disclosing her past representation and recusing herself upon request was sufficient to cure this conflict. Respondent asserted that she had done some research on the issue and had spoken to other, more senior, judges about her situation, including inquiring informally following a presentation on judicial ethics, and concluded, based on the limited nature of her prior representation and the potential disruption to the court if she were unable to preside over criminal cases, that disclosure was the appropriate remedy.¹ Respondent now realizes that the conflict described in Rule 2.11(A)(6)(a) is a mandatory disqualification that cannot be waived by the parties. The apparent confusion regarding application of this rule evidences a need for the Commission to clarify that a judge cannot preside over a case in which the judge previously acted as an attorney, and that disqualification cannot be waived by the agreement of the parties.² The appearance of impropriety created by a judge ruling in a case where she had previously represented a party negatively affects perception of the integrity and independence of the judiciary in general, beyond the immediate concerns of those involved in the case.

Additionally, Respondent now realizes that her comments attesting to the defendant's character may have reasonably given the impression that she was not impartial in the matter, even though she followed the agreed recommendation of the parties.

B. Sanction.

1. In accepting this stipulation, the Commission takes into account those mitigating and aggravating factors listed in CJCRP 6(c). Investigation showed the misconduct was not isolated. During her employment as public defender for the day, and prior to becoming a judge

¹ There is an ethics advisory body available to Washington State judicial officers which not all judges are familiar with. Shortly after the establishment of the Commission in 1980, the State Supreme Court created the Ethics Advisory Committee, whose primary function is to give advice to judicial officers on the application of the Code of Judicial Conduct. Any full, part-time, or pro-tem judicial officer may avail themselves of this resource.

² Rule 2.11(C) permits that a judge disqualified by Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose the basis of the conflict and remain on the case if the parties agree to the judge's continued participation. No such disclosure and waiver exception is provided for conflicts arising under Rule 2.11(A)(6)(a).

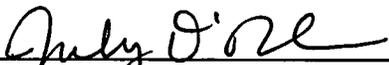
in 2017, Respondent represented virtually every person charged with a crime in Lewis County at their preliminary appearance. Therefore, this conflict arose in the majority of criminal cases charged in 2016 in which she presided over as judge. While attorneys and judges are both essential players in the criminal justice system, the role of attorney as advocate and representative is fundamentally and intrinsically at odds with the neutrality and independence required of a judicial officer. The nature of the misconduct was to give the appearance that a criminal defendant may be at an advantage in a proceeding, or might not face an impartial arbiter, thus undermining public confidence in the impartiality of the judiciary. The incident took place on the bench; not in Respondent's private life. There is no evidence Respondent exploited her official capacity to satisfy personal desires. Though earlier reaching the wrong conclusion that such conflicts could be waived, Respondent took steps to consider the ethical ramifications of the situation, inquired of the parties whether they had concerns, and proceeded in a way that was most efficient for the administration of the court calendar. Respondent has acknowledged that her prior understanding of Rule 2.11(A)(6)(a) was in error and has taken steps to ensure that the misconduct is not repeated. Respondent, who was very new to the bench when this misconduct occurred, has no prior disciplinary history, and has been entirely cooperative with the Commission proceeding. Additionally, it should be noted that others in the local legal community contacted as part of the Commission's investigation were operating under the mistaken belief that Respondent's disclosure of prior representation was sufficient and that, when a party requested Respondent disqualify herself from a case, Respondent did so without hesitation and immediately transferred the matter to another judicial officer.

2. Weighing and balancing the above factors, Respondent and the Commission agree that an admonishment is the appropriate level of sanction to impose in this matter. An "admonishment" is a written action of the Commission of an advisory nature that cautions a respondent not to engage in certain proscribed behavior. Admonishment is the least severe disciplinary action available to the Commission, and in this instance, serves to clarify to the

judiciary and the public that this kind of a conflict of interest may not be waived, under the Code of Judicial Conduct.

3. Respondent agrees to certify to the Commission, in writing, that she has carefully reviewed the Code of Judicial Conduct in its entirety within 30 days of entry of this stipulation.

4. Respondent has represented herself in these proceedings. She affirms that she has had an opportunity to consult with an attorney and voluntarily chooses to represent herself in this matter and enter into this agreement. Respondent agrees that she will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter. Respondent further affirms that she will not repeat such conduct in the future.



Honorable Joely A. O'Rourke
Lewis County Superior Court

2/28/18
Date



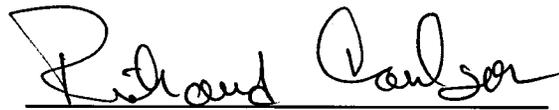
J. Reiko Callner
Executive Director
Commission on Judicial Conduct

3/5/18
Date

ORDER OF ADMONISHMENT

Based upon the above stipulation and agreement, the Commission on Judicial Conduct hereby orders Respondent Joely A. O'Rourke ADMONISHED for violating Canon 1 (Rules 1.1 and 1.2) and Canon 2 (Rules 2.2 and 2.11(A)(6)(a)) of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future and shall fulfill the terms of the agreement as set forth above.

DATED this 9th day of March, 2018.



Richard Carlson, Chair
Commission on Judicial Conduct