

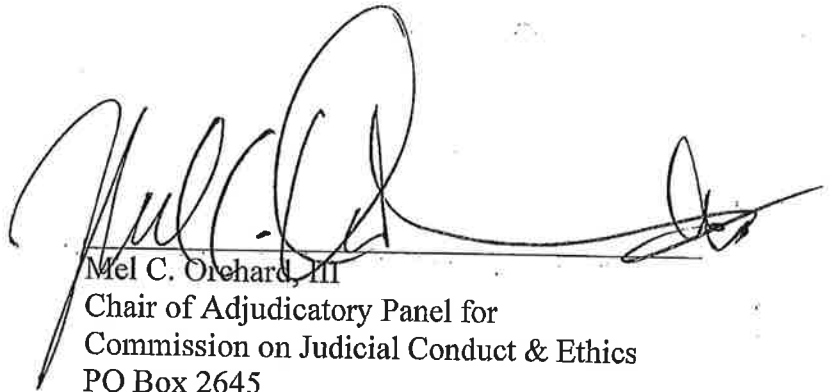
CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of September, 2015, I served the foregoing ORDER ON THE MOTION FOR PROTECTIVE ORDER by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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Mel C. Orchard, III  
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**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING**

An inquiry concerning  
The Honorable Ruth Neely  
Municipal Court Judge and  
Circuit Court Magistrate  
Ninth Judicial District  
Pinedale, Sublette County

) COMMISSION ON JUDICIAL  
) CONDUCT AND ETHICS  
) COMMISSION ON JUDICIAL CONDUCT  
) No. 2014-27 AND ETHICS  
) Official Record  
) FILED  
) Date: 9/17/15  
) *Wendy J. Soto*  
Wendy J. Soto

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**THE HONORABLE RUTH NEELY'S MOTION TO DISMISS THE NEW CLAIMS IN  
THE COMMISSION'S AMENDED NOTICE OF COMMENCEMENT OF FORMAL  
PROCEEDINGS**

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The Honorable Ruth Neely respectfully requests that the Commission dismiss the new claims in the Amended Notice of Commencement of Formal Proceedings ("Amended Notice")—that is, the claims that Judge Neely violated Rules 2.4 and 3.6 of the Wyoming Code of Judicial Conduct by her choice of counsel in this matter.<sup>1</sup>

By adding these claims to the Amended Notice, the Commission on Judicial Conduct and Ethics (the "Commission") threatens fundamental constitutional rights, including the rights of citizens to hire counsel of their choosing, to associate with groups of their choosing, and to live consistent with their sincerely held religious convictions. After the Commission initiated these

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<sup>1</sup> Concurrent with this Motion to Dismiss, Respondent files her Verified Answer to the Amended Notice. Because the governing rules do not clearly explain the relationship between a Motion to Dismiss and a Verified Answer, Respondent is exercising caution and filing her Verified Answer now, even though the Commission has yet to rule on this Motion to Dismiss. It is Respondent's intent that if there is a conflict between her filing of the Motion to Dismiss and the Verified Answer, the Motion to Dismiss should take precedence, and that she will file an updated Verified Answer once the Commission resolves her Motion to Dismiss.

proceedings alleging that Judge Ruth Neely violated the Code of Judicial Conduct by expressing her religious beliefs about marriage and her inability to perform same-sex marriages, Judge Neely retained Herb Doby and Alliance Defending Freedom (“ADF”) as counsel to defend her. ADF is a nationwide, nonprofit, nonpartisan legal organization that specializes in constitutional law, provides free legal defense in civil-rights cases, and has won four cases before the United States Supreme Court over the last five years alone.<sup>2</sup>

After Judge Neely made her selection of counsel, the Commission amended its Notice of Commencement of Formal Proceedings to allege that Judge Neely violated the Code of Judicial Conduct merely by retaining ADF as her legal representative. While all the claims in the Amended Notice lack merit and violate Judge Neely’s constitutional rights, the new claims attack Judge Neely’s chosen means of defending herself in this matter and therefore jeopardize the fairness of these proceedings moving forward. As a result, these new claims necessitate this motion and require swift action from this tribunal.

#### Standard

A complaint must be dismissed when, accepting “the facts stated in the complaint as true and view[ing] them in the light most favorable to the plaintiff,” the relief may not be granted. *Accelerated Receivable Solutions v. Hauf*, 2015 WY 71, ¶ 10, 350 P.3d 731, 734 (Wyo. 2015).<sup>3</sup> Furthermore, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”

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<sup>2</sup> See e.g. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF’s client’s free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burden’s on ADF’s client’s free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state’s tuition tax credit program defended by a faith-based tuition organization represented by ADF).

<sup>3</sup> In applying this standard, Judge Neely does not admit any facts or conclusions pled by the Commission, but deems those facts to be true for purposes of this motion only.

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).<sup>4</sup>

#### Argument

**I. The Rule 2.4 and 3.6 Claims Should be Dismissed Because They Violate Judge Neely’s Constitutional Rights to Counsel, to Associate, and to Exercise her Religion.**

**a. The Rule 2.4 and 3.6 Claims Violate Judge Neely’s Right to Counsel.**

For over 100 years, courts have recognized that the Constitution protects the right to counsel of one’s choosing in both criminal and civil litigation—indeed, this right is protected by many constitutional provisions, including the First Amendment.<sup>5</sup> As the Tenth Circuit has summarized, “[t]he right to retain and consult with an attorney . . . implicates . . . clearly established First Amendment rights of association and free speech.” *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

This right to counsel extends beyond retaining an attorney. It protects the right to retain the attorney a party wants. “The right to counsel, safeguarded by the constitutional guarantee of due process of law, includes the right to choose the lawyer who will provide that representation.” *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir. 1983). And the government cannot override that choice unless it establishes “compelling reasons” to do so. *Id.* at 1263.

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<sup>4</sup> “Because the Wyoming Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, federal court interpretations of their rules are highly persuasive in [Wyoming courts’] interpretation of the corresponding Wyoming rules.” *Lamar Outdoor Advert. v. Farmers Co-Op Oil Co. of Sheridan*, 2009 WY 112, ¶ 12, 215 P.3d 296, 301 (Wyo. 2009); see also *Graus v. OK Investments, Inc.*, 2014 WY 166, ¶ 14, 342 P.3d 365, 369 (Wyo. 2014) (similar).

<sup>5</sup> *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (identifying cases that ground the right to access courts and the right to counsel in Article IV Privileges and Immunities Clause, First Amendment Petition Clause, Fifth Amendment Due Process Clause, and Fourteenth Amendment Equal Protection and Due Process Clauses); *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 221-22 (1967) (grounding the right to counsel in “the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments”); *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002) (grounding the right to counsel in the right to intimate association in the Fourteenth Amendment Due Process Clause).

Moreover, in this case, the right to counsel has particular force because constitutional defenses are at issue. In a long line of decisions, the United States Supreme Court has established the First Amendment right of groups to provide free legal defense vindicating civil rights and the corresponding constitutional right of individuals to employ these groups' legal service.<sup>6</sup> "Underlying [these cases] was the Court's concern that [members of the public] receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977). "This concern applies with at least as much force to aggrieved individuals as it does to groups." *Id.*

As the Supreme Court said when invalidating a constraint on employing an ACLU attorney, restrictions on groups that engage "in the defense of unpopular causes and unpopular defendants" and that represent "individuals in litigation" defining "the scope of constitutional protection" must overcome "exacting scrutiny." *Primus*, 436 U.S. at 427-28, 432 (concluding that a reprimand of an ACLU attorney by the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina violated the First Amendment).

Under these principles, the Commission's Rule 2.4 and 3.6 claims must also overcome exacting scrutiny because they fault Judge Neely for her "engagement of . . . the Alliance Defending Freedom Organization." (Amended Notice, ¶ B.2). In other words, the Commission alleges that Judge Neely violated ethical rules by retaining ADF as counsel, and through these claims, the Commission tries to sever Judge Neely's attorney-client relationship with ADF. But

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<sup>6</sup> See, e.g., *In re Primus*, 436 U.S. 412, 414 (1978) (protecting the ACLU's right to give legal advice and solicit for lawsuits); *United Mine Workers*, 389 U.S. at 221-22 (1967) (protecting union members' right to hire an attorney to collectively assist them in asserting their legal claims); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (protecting the NAACP's right to advise litigants to seek and pay for assistance of certain attorneys). See also *Owens v. Rush*, 654 F.2d 1370, 1379 (10th Cir. 1981) (protecting the right to assist in "litigation vindicating civil rights," to "attend[] meetings on necessary legal steps," and to "associat[e] for the purpose of assisting persons seeking legal redress").

just like the ACLU and NAACP, ADF is a nonprofit legal advocacy group that seeks to protect constitutional rights through free legal representation. By demanding that Judge Neely stop receiving this representation, the Commission's Rule 2.4 and 3.6 claims not only impair Judge Neely's First Amendment right to select her counsel, they also impair her First Amendment right to participate in collective legal action that seeks to vindicate constitutional freedoms.

Even worse, the Commission's Rule 2.4 and 3.6 claims smack of bad faith, for the Commission dragged Judge Neely into this legal proceeding and now tries to eliminate her legal defense. Without ADF, Judge Neely may be unable to obtain free civil-rights legal defense from another organization, much less one with significant constitutional expertise. Indeed, not many (if any) constitutional-law specialists offer the free legal defense that ADF provides, particularly in Wyoming's relatively small legal community. So if the Rule 2.4 and 3.6 claims succeeded, they would weaken, if not extinguish, Judge Neely's legal defense.

The harm inflicted by the Commission's Rule 2.4 and 3.6 claims are not confined to Judge Neely. Under the Commission's logic, no judge could hire a legal organization that advocates against the state's chosen ideology. The state could thus target any legal group it dislikes in an effort to hinder its mission and prevent its clients from vindicating their constitutional rights. Red states could target liberal groups like the ACLU, and blue states could target conservative groups like the NRA. But in the end, litigants' rights and our adversarial system of justice would lose. Thankfully, though, the Constitution does not permit this result, for it protects the right to offer and access civil-rights defense regardless of the "political or religious affiliation of the members of the group which invokes its shield, or . . . the truth, popularity, or social utility of the ideas and beliefs which are offered." *Button*, 371 U.S. at 444-45.

The chilling effect of the Commission's position is not limited to clients who retain nonprofit legal advocacy groups as their attorneys; it would also threaten the constitutional liberties of individuals who hire solo practitioners and private firms. In the Amended Notice, the Commission specifically references three of Judge Neely's counsel by name. (Amended Notice, ¶¶ A.9, B.2). Supposedly, Judge Neely cannot retain these attorneys because of the legal positions that they have advocated about same-sex marriage. (*Id.* at ¶ A.10). But crediting that claim would mean that neither could a judge retain Chief Justice John G. Roberts, or any of the three other United States Supreme Court Justices who, like him, dissented from the Supreme Court's recent same-sex marriage ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should one of them step down from the bench and enter private practice. Yet the mere fact that an attorney has taken a legal position that the state dislikes does not deprive a judge of her right to retain that attorney as counsel. If the law were otherwise, a judge's right to choose not only nonprofit legal groups, but also countless attorneys in private practice would be infringed. Therefore, the Commission's claims seeking to remove Judge Neely's counsel are inherently suspect and deserve the strictest constitutional scrutiny.

**b. The Rule 2.4 and 3.6 Claims Violate Judge Neely's Right to Freely Associate.**

Besides attacking Judge Neely's right to counsel, the Rule 2.4 and 3.6 claims allege that she violated the Code of Judicial Conduct by her "affiliation with the Alliance Defending Freedom Organization." (Amended Notice, ¶ B.2). The Amended Notice does not specify how Judge Neely affiliated with ADF, but this motion will accept the Commission's vague allegation as true. Even so, this allegation still fails because the Commission cannot penalize Judge Neely for affiliating with ADF. That violates her First Amendment right to free association.

The First Amendment protects the right of citizens “to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Thus, the government may not “impose penalties or withhold benefits from individuals because of their membership in a disfavored group” unless the government satisfies the most stringent form of constitutional review. *Id.* at 622-23.

In the legal context, this means that the state cannot deny an attorney “admission to the Bar solely because of his membership in an organization.” *Application of Stolar*, 401 U.S. 23, 28 (1971). Nor can the state bar judges from associating with political parties. *Republican Party of Minnesota v. White*, 416 F.3d 738, 754 (8th Cir. 2005) (invalidating Minnesota judicial cannon barring partisan activities). Because it is well established that the state cannot bar judicial association with a political party—the most partisan entity imaginable—it necessarily follows that the Commission cannot forbid Judge Neely from associating with a nonpartisan public-interest group like ADF.

To be sure, First Amendment protections do not allow judges to do anything they please. The state can mandate that judges recuse themselves in particular cases where they lack impartiality. *Id.* at 755. Yet the Commission does not seek case-by-case recusal, but a blanket removal of Judge Neely for associating with a nonpartisan legal organization.

Once again, the Commission’s claims reach too far and impinge too much on personal liberty. If those claims are allowed to proceed, the government could seek to remove judges for associating with any group (like the Catholic Church, the Mormon Church, various Muslim sects, local Boy Scout troops, and even the Republican Party) that believes in, or advocates for, the time-honored understanding of marriage as a relationship that unites a man and a woman for life and thereby connects children to both their mother and father. Even worse, the Commission’s



logic empowers the Commission to penalize judges for associating with *any* group whose views or advocacy it dislikes. Such unchecked power is subject to abuse even against those who currently wield it.

The Commission would do better to respect a diversity of associations and beliefs than to punish judges for affiliating with particular groups. “The freedom to associate applies” not only “to the beliefs we share,” but also “to those we consider reprehensible.” *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Accordingly, protecting that right “tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.” *Id.* Because the Commission’s Rule 2.4 and 3.6 claims imperil this freedom, they are subject to strict scrutiny.

**c. The Rule 2.4 and 3.6 Claims Create an Impermissible Religious Test and Violate Judge Neely’s Right to Exercise Her Religious Beliefs.**

The United States and Wyoming Constitutions forbid the Commission’s newfound prohibition on judges’ engaging legal counsel that hold certain religious beliefs about marriage. In no uncertain terms, the Wyoming Constitution states that “no person shall be rendered incompetent to hold any office of trust . . . because of his opinion on any matter of religious belief whatever.” Wyo. Const. art. I, § 18; *see also* U.S. Const. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).<sup>7</sup> Here, the Commission maintains that a judge must be removed if she affiliates with an organization that holds and advocates for particular religious views about marriage. Yet the Constitution permits no such religious test for judges.

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<sup>7</sup> The Commission cannot successfully argue that the absence of a right to government employment means that there is no burden on Judge Neely’s constitutional rights. In a case such as this, “[t]he fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.” *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).

In *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399 (9th Cir. 1995), a party sought recusal of a federal circuit judge based on his affiliation with the Catholic Church and its religious belief about abortion. The motion to recuse was denied because it would impose a religious test on judges. As the published opinion explained: "The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases. The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary." *Id.* at 401. Notably, the plaintiffs in that case sought only recusal from a particular case, and not "disqualification . . . from all judicial office." *Id.* at 400. The constitutional concerns are thus far greater here, for while the plaintiffs there sought a religious test that would have *curtailed* a judge's role, the Commission here seeks a religious test that would *eliminate* a judge's position.

Similarly, in *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 433, 51 Cal. Rptr. 3d 575, 600 (2006), the plaintiffs claimed that the City of San Diego violated the Establishment Clause by retaining an attorney affiliated with a faith-based public-interest legal organization. The California Court of Appeals rejected the claim, explaining that "we are troubled by the proposition that a government entity or any individual appearing as an attorney before a court, on any issue, may first be screened for their sectarian or nonsectarian background or motives before being allowed to appear as an advocate." The very inquiry into such a claim "lead[s] the judicial system into claims of hostility to religion and potential violations of the proviso that no religious test may ever be required of any individual to an office or public trust. (U.S. Const., art. VI, clause 3.)" *Id.*

Not only do the constitutional prohibitions on religious tests forbid the Commission's Rule 2.4 and 3.6 claims, the Free Exercise and Establishment Clause provisions of the United

States and Wyoming Constitutions do so as well. Those constitutional protections unequivocally prohibit the Commission from targeting religious beliefs. For decades, the United States Supreme Court has consistently affirmed that the Establishment Clause forbids state action that “disapprove[s],” “inhibit[s],” or evinces “hostility” toward religion. See *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (forbidding “disapprov[al]” of religion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“affirmatively mandat[ing] accommodation, not merely tolerance, of all religions, and forbid[ing] hostility toward any”); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (forbidding laws that “inhibi[t]” religion). State action must be careful not to “foster[] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995). In addition, free-exercise principles similarly forbid the government from targeting religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (striking down a law that targeted a particular religious practice); *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (explaining that the government cannot impose “special disabilities on the basis of religious views”).

The Commission’s Rule 2.4 and 3.6 claims contravene these constitutional principles. The Commission has alleged that a judge violates the Code of Judicial Conduct merely by retaining a faith-based legal group that exists “to keep the doors open for the Gospel by advocating for religious liberty, the sanctity of life, and marriage and family.” (Amended Notice, ¶ A.10). Such unabashed hostility toward, and targeting of, religion runs directly counter to the religious protections guaranteed in the federal and state constitution.

**II. The Commission's Rule 2.4 and 3.6 Claims Fail Strict Scrutiny.**

Government action that burden foundational constitutional rights “must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546 (noting that “the compelling interest standard that we apply . . . is not watered down but really means what it says”) (quotation marks and alterations omitted). The compelling-interest test “look[s] beyond broadly formulated interests justifying the general applicability of government mandates” and determines whether strict scrutiny “is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also Burwell*, 134 S. Ct. at 2779. Thus, the relevant government interest here is not a generic interest in the integrity of the judiciary; it is the Commission’s specific interest in prohibiting Judge Neely from retaining ADF as her counsel. But the Commission has no compelling interest in intruding itself into Judge Neely’s choice of counsel in this way.

Neither can the Commission satisfy the narrow-tailoring requirement of strict-scrutiny analysis. The Commission has a number of other means to pursue its asserted interests in maintaining judicial integrity without violating Judge Neely’s constitutional rights. For example, the Commission could require judges to recuse themselves from matters that involve legal organizations with whom the judges are affiliated. Notably, Code of Judicial Conduct Rule 2.11 already empowers the Commission to require recusal under these circumstances. And a lack of

narrow tailoring exists where the government can adequately protect its interests through already-existing means.<sup>8</sup> Accordingly, the Commission cannot satisfy strict scrutiny here.

### III. The Commission Fails to State a Claim under Rule 2.4 or 3.6.

In addition to the constitutional violations discussed above, the Commission has also failed to state a claim under Rule 2.4 or 3.6. Rule 2.4 prohibits a judge from being “swayed by public clamor or fear of criticism” or permitting “family, social, political, financial, or other interests or relationships to influence [her] judicial conduct or judgment.” But in its Amended Notice, the Commission has not pled any specific facts that allege a violation of this rule. *See Twombly*, 550 U.S. at 555. Moreover, the Amended Notice also fails to plead sufficient facts that, if proven, would establish a violation of Rule 3.6. A mere allegation of discriminatory association is not enough. “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* The Commission’s allegations do not rise above the mere recitation of the elements of a claim under Rule 3.6.

Furthermore, there is no indication that Rule 3.6 was intended to implicate a judge’s choice of counsel. The comments to Rule 3.6 make it clear that the Rule is primarily concerned with a judge’s *membership* (ADF does not have members) in an invidiously discriminatory organization that could impair public confidence in the integrity and impartiality of the

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<sup>8</sup> *See, e.g., Boardley v. U.S. Dep’t of Interior*, 615 F.3d 508, 524 (D.C. Cir. 2010) (finding that an “all-encompassing” speech restriction was not narrowly tailored where “the [government] could simply prohibit and punish conduct that . . . creates security or accessibility hazards”); *Berger v. City of Seattle*, 569 F.3d 1029, 1043 (9th Cir. 2009) (en banc) (finding that a speech restriction was not narrowly tailored where the government could have simply “enforce[d] its existing rules against those who actually exhibit unwanted behavior”); *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (finding that a speech restriction was not narrowly tailored where “[l]here exist[ed] specific sections of the Administrative Code which . . . already achieve the[] [government’s] ends without such a drastic effect”).

judiciary.<sup>9</sup> There is no indication that Rule 3.6 was crafted to prohibit a judge from retaining the ACLU, NAACP, ADF, or any other nonprofit public-interest legal group based on the nature of its legal advocacy on hotly contested issues.

Finally, it is untenable to suggest, as the Commission does, that ADF engages in “invidious discrimination” by championing the idea that marriage is the unique, presumptively procreative relationship that unites one man and one woman for life. (Amended Notice, ¶¶ A.10, B.1). In fact, the Supreme Court’s recent decision mandating same-sex marriage nationwide forecloses that baseless argument by recognizing that “[t]his view [of marriage] long has been held—and continues to be held—in *good faith by reasonable and sincere people* here and throughout the world.” *Obergefell*, 135 S. Ct. at 2594; *see also id.* at 2602 (“Many who deem same-sex marriage to be wrong reach that conclusion based on *decent and honorable religious or philosophical premises*, and neither they nor their beliefs are disparaged here.”). Thus, the Commission’s attempt to transform this good-faith and reasonable view of marriage into irrational discrimination must be summarily rejected.

The Commission has thus failed to state a claim that Judge Neely violated Rule 2.4 or 3.6.

#### Conclusion

For the foregoing reasons, the Presiding Officer of the Adjudicatory Panel should dismiss the Commission’s claims under Rule 2.4 and 3.6.

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<sup>9</sup> Even if ADF were a religious membership organization, Comment 4 to Rule 3.6 provides that “[a] judge’s membership in a religious organization . . . is not a violation of th[e] Rule.”

Dated: September 16, 2015

*Ken Connelly / ja*  
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*Attorneys for Respondent*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of September, 2015, I served the foregoing Motion by electronic mail on the following:

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Kenneth J. Connelly



**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING**

An inquiry concerning	)	COMMISSION ON JUDICIAL
The Honorable Ruth Neely	)	CONDUCT AND ETHICS
	)	COMMISSION ON JUDICIAL CONDUCT
	)	AND ETHICS
Municipal Court Judge and	)	No. 2014-37
Circuit Court Magistrate	)	Official Record
Ninth Judicial District	)	FILED
Pinedale, Sublette County	)	Date: 9/17/15
	)	<i>Wendy J. Soto</i>
	)	Wendy J. Soto

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**VERIFIED ANSWER TO AMENDED NOTICE OF  
COMMENCEMENT OF FORMAL PROCEEDINGS**

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The Honorable Ruth Neely, Respondent, for her Verified Answer to the Amended Notice of Commencement of Formal Proceedings (the "Amended Notice") filed by the Commission on Judicial Conduct and Ethics (the "Commission"), states and alleges as follows:<sup>1</sup>

1. Except as expressly admitted or otherwise specifically pleaded herein, Respondent denies each and every allegation in the Amended Notice and puts the Commission to its strict proof thereof.
2. Respondent admits the allegations contained in Section A, Paragraph 1 of the Amended Notice.

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<sup>1</sup> Concurrent with this Verified Answer, Respondent files a Motion to Dismiss the claims that the Commission added to the Amended Notice (but not the claims that the Commission alleged in the original Notice). Because the governing rules do not clearly explain the relationship between a Motion to Dismiss and a Verified Answer, Respondent is exercising caution and filing this Verified Answer now, even though the Commission has yet to rule on the Motion to Dismiss. It is Respondent's intent that if there is a conflict between her filing of the Motion to Dismiss and the Verified Answer, the Motion to Dismiss should take precedence, and that she will file an updated Verified Answer once the Commission resolves her Motion to Dismiss.

3. With respect to the allegations contained in Section A, Paragraph 2 of the Amended Notice:
  - a. Respondent admits that former Circuit Court Judge John Crow appointed her as a Circuit Court Magistrate with the authority to perform marriages;
  - b. Respondent admits that, upon his appointment to the bench, Circuit Court Judge Curt A. Haws appointed Respondent as a Circuit Court Magistrate;
  - c. Respondent admits that since her initial appointment in or around 2001, she has performed numerous civil marriage ceremonies as a Circuit Court Magistrate; and
  - d. Respondent denies each and every remaining allegation contained in Section A, Paragraph 2.
4. With respect to the allegations contained in Section A, Paragraph 3 of the Amended Notice:
  - a. Respondent states that the case of *Guzzo v. Mead*, 2014 WL 5317797 (D. Wyo. 2014), speaks for itself; and
  - b. Respondent states that the remaining allegations contained in Section A, Paragraph 3 do not call for a response, but to the extent that a response is deemed necessary, Respondent denies those allegations in their entirety.
5. With respect to the allegations contained in Section A, Paragraph 4 of the Amended Notice:
  - a. Respondent admits that she was contacted by reporter Ned Donovan in December 2014;
  - b. Respondent admits that Ned Donovan made inquiries of her regarding the topic of same-sex marriage;

- c. Respondent admits that she informed Ned Donovan that solemnizing same-sex marriages would violate her religious beliefs;
  - d. Respondent admits that she was quoted by Ned Donovan as saying: "When law and religion conflict, choices have to be made. I have not yet been asked to perform a same sex marriage"; and
  - e. Respondent denies each and every remaining allegation contained in Section A, Paragraph 4.
6. With respect to the allegations contained in Section A, Paragraph 5 of the Amended Notice:
  - a. Respondent admits that an article authored by Ned Donovan appeared in the Sublette Examiner on December 11, 2014;
  - b. Respondent admits that the article included the language that is quoted in Section A, Paragraph 4 of the Amended Notice;
  - c. Respondent admits that similar reports may have appeared in other local publications; and
  - d. Respondent is without sufficient information to respond to the remaining allegations contained in Section A, Paragraph 5 of the Amended Notice and therefore denies those allegations.
7. With respect to the allegations contained in Section A, Paragraph 6 of the Amended Notice:
  - a. Respondent admits that on or about January 15, 2015, Judge Haws suspended her from performing marriage ceremonies; and

- b. Respondent denies each and every remaining allegation contained in Section A, Paragraph 6.
8. With respect to the allegations contained in Section A, Paragraph 7 of the Amended Notice:
- a. Respondent admits that she voluntarily refrained from performing marriage ceremonies before Judge Haws suspended her from performing them;
  - b. Respondent states that the last marriage ceremony she performed occurred on December 31, 2014; and
  - c. Respondent denies each and every remaining allegation contained in Section A, Paragraph 7.
9. With respect to the allegations contained in Section A, Paragraph 8 of the Amended Notice:
- a. Respondent admits that, in response to an inquiry from the Commission, she cited her First Amendment rights and reiterated that solemnizing same-sex marriages would violate her religious beliefs; and
  - b. Respondent denies each and every remaining allegation contained in Section A, Paragraph 8.
10. Respondent admits the allegations contained in Section A, Paragraph 9 of the Amended Notice.
11. With respect to the allegations contained in Section A, Paragraph 10 of the Amended Notice:

- a. Respondent admits that Alliance Defending Freedom (“ADF”) describes itself on its website as “an alliance-building legal organization that advocates for the right of people to freely live out their faith”;
  - b. Respondent admits that ADF’s mission statement, as stated on its website, is “[t]o keep the doors open for the Gospel by advocating for religious liberty, the sanctity of life, and marriage and family”; and
  - c. Respondent denies each and every remaining allegation contained in Section A, Paragraph 10.
12. Respondent denies each and every allegation contained in Section B, Paragraph 1 of the Amended Notice.
  13. Respondent denies each and every allegation contained in Section B, Paragraph 2 of the Amended Notice.
  14. Section C, Paragraph 1 of the Amended Notice does not call for a response.
  15. Section D, Paragraph 1 of the Amended Notice does not call for a response.

**First Affirmative Defense**

The Amended Notice fails to state a claim upon which relief can be granted.

**Second Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent’s freedom-of-expression rights protected by the First Amendment to the United States Constitution.

**Third Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's freedom-of-expression rights protected by Article 1, Sections 20 and 21 of the Wyoming Constitution.

**Fourth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to the free exercise of religion protected by the First Amendment to the United States Constitution.

**Fifth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to the free exercise of religion protected by Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

**Sixth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, constitute a religious test in violation of Article VI, Clause 3 of the United States Constitution.

**Seventh Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, constitute a

religious test in violation of Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

**Eighth Affirmative Defense**

The provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice are vague and overbroad in violation of the First Amendment and the Fourteenth Amendment to the United States Constitution.

**Ninth Affirmative Defense**

The provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice are vague and overbroad in violation of Article 1, Sections 6, 7, and 20 of the Wyoming Constitution.

**Tenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

**Eleventh Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to equal protection of the law under Article 1, Sections 2, 3, and 34 of the Wyoming Constitution.

**Twelfth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate the Establishment Clause of the First Amendment to the United States Constitution.

**Thirteenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate the state constitutional provisions that address the establishment of religion, including Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

**Fourteenth Affirmative Defense**

These proceedings violate Respondent's right to due process protected by the Fourteenth Amendment to the United States Constitution.

**Fifteenth Affirmative Defense**

These proceedings violate Respondent's right to due process protected by Article 1, Sections 6 and 7 of the Wyoming Constitution.

**Sixteenth Affirmative Defense**

These proceedings and the Rules Governing the Commission violate the separation of governmental powers required by Article 2, Section 1 of the Wyoming Constitution.

**Seventeenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to freedom of association protected by the First Amendment to the United States Constitution.



**Eighteenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to freedom of association protected by Article 1, Sections 2, 6, 7, 21, and 36 of the Wyoming Constitution.

**Nineteenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to counsel protected by the First, Sixth, and Fourteenth Amendments to the United States Constitution.

**Twentieth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, violate Respondent's right to counsel protected by Article 1, Sections 6, 7, and 36 of the Wyoming Constitution.

**Twenty-First Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Amended Notice would, under these circumstances, constitute unlawful retaliation in response to Respondent's exercise of the constitutional rights referenced in the prior affirmative defenses, including but not limited to Respondent's rights protected under the First and Fourteenth Amendments to the United States Constitution.

DATED this 16th day of September, 2015.

Respectfully Submitted,

By:

  
Kenneth J. Connelly\*

James A. Campbell\*  
Kenneth J. Connelly\*  
Douglas G. Wardlow\*  
Alliance Defending Freedom  
15100 N. 90th Street  
Scottsdale, AZ 85260  
jcampbell@alliancedefendingfreedom.org  
kconnelly@alliancedefendingfreedom.org  
dwardlow@alliancedefendingfreedom.org  
(480) 444-0020 Fax: (480) 444-0028

Herbert K. Doby  
WSB # 5-2252  
P.O. Box 130  
Torrington, WY 82240  
dobyaw@embarqmail.com  
(307) 532-2700 Fax: (307) 532-2706

*Attorneys for Respondent*  
*\*Admitted Pro Hac Vice*

VERIFICATION OF ANSWER

I, Ruth Neely, the undersigned, do hereby swear and affirm, under penalty of perjury, that the information contained in my Verified Answer to the Amended Notice of Commencement of Formal Proceedings of the Commission on Judicial Conduct and Ethics is true and accurate.

Dated this 15<sup>th</sup> day of September, 2015

Ruth Neely  
Signature

INSTRUCTIONS TO NOTARY

This form must be the product of an oath, not merely an acknowledgment. Before the verification is signed you must:

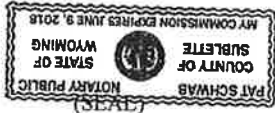
1. Place the affiant under oath;
2. Ensure that the affiant understands that all assertions are sworn to as accurate and that the affiant is subject to the penalty of perjury for any false statement; and
3. Have the verification signed in your presence.

STATE OF WYOMING )  
COUNTY OF Sublette ) ss

Subscribed and sworn to me this 15<sup>th</sup> day of September, 2015.

By RUTH NEELY

Pat Schwab  
Notary Public




My Commission Expires: 6-9-18

**CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of September, 2015, I served the foregoing Verified Answer by electronic mail on the following:

Patrick Dixon, Esq.  
Dixon & Dixon, LLP  
104 South Wolcott Street, Suite 600  
Casper, WY 82601  
pdixn@aol.com

Wendy J. Soto  
Executive Director  
Commission on Judicial Conduct & Ethics  
P.O. Box 2645  
Cheyenne, WY 82003  
wendy.soto@wyoboards.gov

  
Kenneth J. Connelly

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

An inquiry concerning )  
The Honorable Ruth Neely )  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
No. 2014-27 Official Record

FILED

Date: 9/30/15

Wendy J. Soto  
Wendy J. Soto

**NOTICE OF CONFESSION OF MOTION TO DISMISS**

WHEREAS, on or about August 28, 2015 the Commission on Judicial Conduct and Ethics filed an *Amended Notice of Commencement of Formal Proceedings*; and said Amended Notice set forth additional factual allegations in Paragraph 10 and the footnote to Paragraph 10 and alleged the additional violation of Rule 2.4 and Canon III, Rule 3.6 of the Wyoming Code of Judicial Conduction;

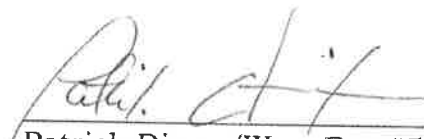
WHEREAS on or about September 16, 2015 the Honorable Ruth Neely filed a motion to dismiss the Amended Notice; and

WHEREAS, the parties are in agreement that the Commission on Judicial Conduct and Ethics may withdraw these additional allegations.

COMES NOW the undersigned counsel for the Commission on Judicial Conduct and Ethics and hereby concedes THE HONORABLE RUTH NEELY'S MOTION TO DISMISS THE NEW CLAIMS IN THE COMMISSION'S AMENDED NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS. In so doing, counsel represents to the Hearing Officer that the parties have conferred and are in agreement that the matter may proceed to disposition upon the

Commission's *Notice of Commencement of Formal Proceedings*. Accordingly, upon entry of the ORDER DISMISSING AMENDED CLAIMS, Judge Neely will file an Amended Answer to the Notice of Commencement of Formal Proceedings.

DATED this 28 day of September, 2015.

  
Patrick Dixon (Wyo. Bar #5-1504)  
104 S. Wolcott, Suite 600  
Casper, Wyoming 82601  
(307) 234-7321  
(307) 234-0677 (facsimile)  
Disciplinary Counsel

**CERTIFICATE OF SERVICE**

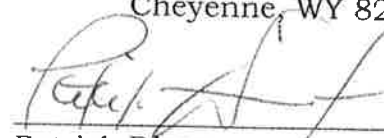
I, Patrick Dixon, do hereby certify that on the 28 day of September, 2015, I served the above and foregoing **Notice of Confession of Motion to Dismiss** via email or U.S. mail, postage prepaid, as noted below:

**VIA EMAIL**  
**dobylaw@embarqmail.com**  
Herbert K. Doby  
Attorney at Law  
P.O. Box 130  
Torrington, Wyoming 82240

**VIA EMAIL kconnelly@adflegal.org**  
James A. Campbell  
Kenneth J. Connelly  
Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, Arizona 85260

**VIA EMAIL**  
**orchard@spencelawyers.com**  
Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
The Spence Law Firm, LLC  
Spence & McCalla  
P.O. Box 548  
Jackson, Wyoming 83001-0548

**VIA U.S. MAIL**  
Wendy Soto, Executive Director  
Commission on Judicial Conduct  
and Ethics  
P.O. Box 2645  
Cheyenne, WY 82003

  
Patrick Dixon

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

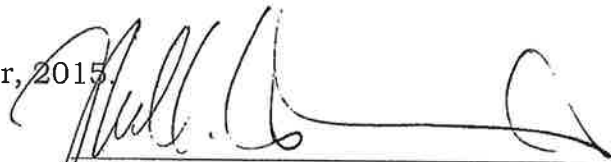
An inquiry concerning )  
The Honorable Ruth Neely ) No. 2014-27  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

**ORDER DISMISSING AMENDED CLAIMS**

The matter having come on for hearing upon the motion of counsel for Judge Neely, and being advised that the parties are in substantial agreement with regard to the motion, the Hearing Officer hereby finds as follows:

**NOW THEREFORE IT IS ORDERED** that THE HONORABLE RUTH NEELY'S MOTION TO DISMISS THE NEW CLAIMS IN THE COMMISSION'S AMENDED NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS be and hereby is granted, that the new claims asserted in the August 28, 2015 AMENDED NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS are dismissed and that the matter shall proceed to disposition upon the Commission's original NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS.

DATED this <sup>5<sup>th</sup></sup> day of October, 2015.



Melvin C. Orchard, III  
Presiding Officer/Hearing Officer

cc: Patrick Dixon  
Herbert K. Doby  
Kenneth J. Connelly  
Wendy Soto, Executive Director

**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING**

An inquiry concerning	)	COMMISSION ON JUDICIAL
	)	CONDUCT AND ETHICS
The Honorable Ruth Neely	)	
	)	COMMISSION ON JUDICIAL CONDUCT
Municipal Court Judge and	)	AND ETHICS
Circuit Court Magistrate	)	Official Record
Ninth Judicial District	)	FILED
Pinedale, Sublette County	)	Date: 10/8/15
	)	<i>Wendy J. Soto</i>
	)	Wendy J. Soto

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**NOTICE OF MOTION AND MOTION TO CONTINUE HEARING**

---

NOTICE IS HEREBY GIVEN that, as soon as the matter may be heard by the Presiding Officer of the Adjudicatory Panel, Respondent Honorable Ruth Neely will, and hereby does, move for an order continuing the hearing in this case to a date to be determined by the Presiding Officer after consultation with the parties. This motion is made upon the grounds that, under the current schedule, there will be insufficient time to fully brief and decide Respondent's contemplated motion for summary judgment while simultaneously allowing Respondent adequate time to prepare for the hearing.

Counsel for Respondent contacted counsel for the Commission, informed him that Respondent intends to file a motion for summary judgment, and conferred



about extending the date for the hearing to allow sufficient time to brief and decide Respondent's motion for summary judgment prior to the hearing date. Counsel for the Commission would not agree to seek an extension jointly, compelling Respondent to file this motion.

Under the current scheduling order, Respondent's motion for summary judgment is due on October 30, 2015. Under Wyoming Rule of Civil Procedure 6(c), the Commission will have 20 days after service of Respondent's summary-judgment motion to serve a response, after which Respondent will have 15 days to serve her reply. Respondent believes that the full amount of time allowed by the default briefing schedule is necessary given the gravity and complexity of the constitutional issues presented by this case, as well as the fact that the Commission is attempting to remove Respondent from the bench. Respondent anticipates filing her motion for summary judgment on the dispositive-motion filing deadline of October 30. Accordingly, the motion will not be fully briefed until December 4, which would be the second day of the hearing as currently scheduled. The Presiding Officer would thus not be able to rule on the motion before the hearing.

This would deny Respondent the opportunity to resolve this matter in the "just, speedy and inexpensive" manner afforded by the summary-judgment process. Wy. R. Civ. P. 1; *see also* Wy. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not

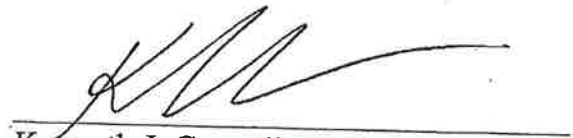
as a disfavored procedural shortcut, but rather as an integral . . . to secure the just, speedy and inexpensive determination of every action.”) (internal quotation marks and citation omitted); *Iberlin v. TCI Cablevision of Wyoming, Inc.*, 855 P.2d 716, 719 (Wyo. 1993) (“A summary judgment is appropriate when the only issue is the resolution of a question of law based upon a settled set of facts”). Indeed, Respondent believes that this matter can be resolved through her summary-judgment motion, and if she is correct, that would eliminate the expense and inconvenience of holding a hearing and compelling the attendance of witnesses from across the state at that hearing. Respondent wants to ensure that she has a full opportunity to brief, and that the Adjudicatory Panel has a full opportunity to consider, her motion for summary judgment.

Moreover, even if a shorter briefing schedule were possible, and even if the Adjudicatory Panel ruled on the summary-judgment motion expeditiously, the motion would at best be resolved just a few days before the hearing. Thus, counsel for Respondent would still need to prepare for a formal hearing in this matter—which, among other things, will entail subpoenaing multiple witnesses, coordinating witness travel to the place of the hearing, compiling exhibit and witness lists, and potentially filing motions in limine. Not only would Respondent’s counsel need to do this while simultaneously completing the

summary-judgment process, counsel would need to prepare for a hearing without even knowing whether the hearing will be necessary.

In sum, counsel for Respondent is proceeding diligently to prepare not only its motion for summary judgment but also for the potential of a hearing. Given the current timeline, counsel believes that good cause exists to continue the hearing date so that the Adjudicatory Panel or Presiding Officer can fully consider Respondent's motion for summary judgment, which Respondent believes should result in dismissal of the case without the need for a hearing.

Dated: October 8, 2015



---

Kenneth J. Connelly\*

James A. Campbell\*  
Kenneth J. Connelly\*  
Douglas G. Wardlow\*  
Alliance Defending Freedom  
15100 N. 90th Street  
Scottsdale, Arizona 85260  
jcampbell@ADFlegal.org  
kconnelly@ADFlegal.org  
dwardlow@ADFlegal.org  
(480) 444-0020 Fax: (480) 444-0028

Herbert K. Doby  
WSB#5-2252  
P.O. Box 130  
dobyLaw@embarqmail.com  
Torrington, WY 82240  
(307) 532-2700 Fax: (307) 532-2706

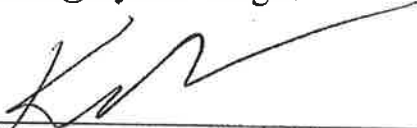
*Attorneys for Respondent*  
*\*Out-of-State Certification Obtained*

## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2015, I served the foregoing Motion by electronic mail on the following:

Patrick Dixon, Esq.  
Dixon & Dixon, LLP  
104 South Wolcott Street, Suite 600  
Casper, WY 82601  
pdixn@aol.com

Wendy J. Soto  
Executive Director  
Commission on Judicial Conduct &  
Ethics  
P.O. Box 2645  
Cheyenne, WY 82003  
wendy.soto@wyboards.gov



---

Kenneth J. Connelly

**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING**

An inquiry concerning	)	COMMISSION ON JUDICIAL
	)	CONDUCT AND ETHICS
The Honorable Ruth Neely	)	
	)	No. 2014-27
Municipal Court Judge and	)	
Circuit Court Magistrate	)	
Ninth Judicial District	)	
Pinedale, Sublette County	)	
	)	

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**ORDER GRANTING MOTION TO CONTINUE HEARING**

---

The matter having come on for hearing upon the motion of counsel for Respondent Honorable Judge Neely; and a telephonic hearing having been held on the matter on October \_\_\_\_, 2015,

The following dates and deadlines will apply to further proceedings in this matter:

1. The current discovery and dispositive motion deadline shall remain in place. Accordingly, Counsel shall serve and file any dispositive motion on or before **October 30, 2015**.
2. Counsel shall serve and file any responses to dispositive motions by **November 19, 2015**.
3. Counsel shall file any replies to dispositive motions by **December 4, 2015**.
4. Counsel shall exchange all exhibit and witness information, including providing any exhibit or witness list in the format similar to that required by the federal court, on or before \_\_\_\_\_ (2 weeks prior to hearing date).

5. The adjudicatory hearing will commence on \_\_\_\_\_ (first day of hearing) at 9:00 a.m. and continue as necessary through \_\_\_\_\_ (final day of hearing) in \_\_\_\_\_ (location of hearing), at \_\_\_\_\_ (address for the location of hearing).

SO ORDERED this \_\_\_\_\_ day of October, 2015.

\_\_\_\_\_  
Mel C. Orchard III  
Presiding Officer/Hearing Officer

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

An inquiry concerning )  
The Honorable Ruth Neely )  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
No. 2014-27 Official Record  
FILED  
Date: 10/9/15  
*Wendy J. Soto*  
Wendy J. Soto

**NOTICE OF OPPOSITION TO MOTION TO CONTINUE**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its attorney Patrick Dixon and hereby gives notice of its opposition to Judge Neely's NOTICE OF MOTION AND MOTION TO CONTINUE HEARING.

This opposition is for the following reasons:

1. The matter is currently scheduled for hearing on December 3, 2015. The hearing date was established by HEARING ORDER dated June 19, 2015. The conduct which gives rise to the Commission's NOTICE OF COMMENCEMENT OF FORMAL PROCEEDINGS occurred on or about December 11, 2014. Thus, even if the hearing proceeds as scheduled it will take at least a year after the alleged violations have occurred for the Commission to take formal action. Because of the highly public nature of the alleged ethical violations, the Commission has a compelling interest in achieving resolution of the matter as soon as reasonably possible.

2. The HEARING ORDER which established the hearing date also established a briefing and discovery schedule. Counsel for Judge Neely, like counsel for the Commission, were given a full and complete opportunity to



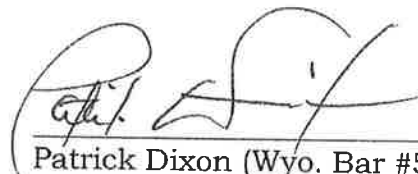
provide input on the schedule. Had counsel for Judge Neely believed that the date established for the filing of dispositive motions did not leave adequate time prior to the hearing, counsel should have raised that concern at the time of the scheduling conference.

3. Again, counsel for Judge Neely have known of the date for filing of motions since at least June 19, 2015. Nothing in the order precludes counsel from filing their motions prior to October 30, 2015.

4. A continuance of the hearing date will inconvenience the A-panel members and unreasonably delay the proceedings.

WHEREFORE the Commission requests that the MOTION TO CONTINUE HEARING be denied and that the matter proceed to hearing as scheduled.

DATED this 9 day of October, 2015.



Patrick Dixon (Wyo. Bar #5-1504)  
104 S. Wolcott, Suite 600  
Casper, Wyoming 82601  
(307) 234-7321  
(307) 234-0677 (facsimile)  
Disciplinary Counsel

**CERTIFICATE OF SERVICE**

I, Patrick Dixon, do hereby certify that on the 9 day of October, 2015, I served the above and foregoing ***Notice of Opposition to Motion to Continue*** via email or U.S. mail, postage prepaid, as noted below:

**VIA EMAIL**

**dobylaw@embarqmail.com**

Herbert K. Doby  
Attorney at Law  
P.O. Box 130  
Torrington, Wyoming 82240

**VIA EMAIL kconnelly@adflegal.org**

James A. Campbell  
Kenneth J. Connelly  
Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, Arizona 85260

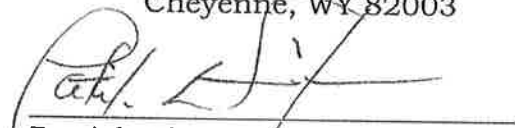
**VIA EMAIL**

**orchard@spencelawyers.com**

Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
The Spence Law Firm, LLC  
Spence & McCalla  
P.O. Box 548  
Jackson, Wyoming 83001-0548

**VIA U.S. MAIL**

Wendy Soto, Executive Director  
Commission on Judicial Conduct  
and Ethics  
P.O. Box 2645  
Cheyenne, WY 82003

  
Patrick Dixon

**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING**

An inquiry concerning  
The Honorable Ruth Neely  
Municipal Court Judge and  
Circuit Court Magistrate  
Ninth Judicial District  
Pinedale, Sublette County

) COMMISSION ON JUDICIAL  
) CONDUCT AND ETHICS  
) AND ETHICS  
No. 2014-27 Official Record

FILED  
Date: 10/9/15  
*Wendy J. Soto*  
Wendy J. Soto

---

**VERIFIED AMENDED ANSWER TO NOTICE OF  
COMMENCEMENT OF FORMAL PROCEEDINGS**

---

The Honorable Ruth Neely, Respondent, for her Verified Amended Answer to the Notice of Commencement of Formal Proceedings (the "Notice") filed by the Commission on Judicial Conduct and Ethics (the "Commission"), states and alleges as follows:

1. Except as expressly admitted or otherwise specifically pleaded herein, Respondent denies each and every allegation in the Notice and puts the Commission to its strict proof thereof.
2. Respondent admits the allegations contained in Section A, Paragraph 1 of the Notice.
3. With respect to the allegations contained in Section A, Paragraph 2 of the Notice:
  - a. Respondent admits that former Circuit Court Judge John Crow appointed her as a Circuit Court Magistrate with the authority to perform marriages;
  - b. Respondent admits that, upon his appointment to the bench, Circuit Court Judge Curt A. Haws appointed Respondent as a Circuit Court Magistrate;

- c. Respondent admits that since her initial appointment in or around 2001, she has performed numerous civil marriage ceremonies as a Circuit Court Magistrate; and
  - d. Respondent denies each and every remaining allegation contained in Section A, Paragraph 2.
4. With respect to the allegations contained in Section A, Paragraph 3 of the Notice:
  - a. Respondent states that the case of *Guzzo v. Mead*, 2014 WL 5317797 (D. Wyo. 2014), speaks for itself; and
  - b. Respondent states that the remaining allegations contained in Section A, Paragraph 3 do not call for a response, but to the extent that a response is deemed necessary, Respondent denies those allegations in their entirety.
5. With respect to the allegations contained in Section A, Paragraph 4 of the Notice:
  - a. Respondent admits that she was contacted by reporter Ned Donovan in December 2014;
  - b. Respondent admits that Ned Donovan made inquiries of her regarding the topic of same-sex marriage;
  - c. Respondent admits that she informed Ned Donovan that solemnizing same-sex marriages would violate her religious beliefs;
  - d. Respondent admits that she was quoted by Ned Donovan as saying: "When law and religion conflict, choices have to be made. I have not yet been asked to perform a same sex marriage"; and
  - e. Respondent denies each and every remaining allegation contained in Section A, Paragraph 4.
6. With respect to the allegations contained in Section A, Paragraph 5 of the Notice:

- a. Respondent admits that an article authored by Ned Donovan appeared in the Sublette Examiner on December 11, 2014;
  - b. Respondent admits that the article included the language that is quoted in Section A, Paragraph 4 of the Notice;
  - c. Respondent admits that similar reports may have appeared in other local publications; and
  - d. Respondent is without sufficient information to respond to the remaining allegations contained in Section A, Paragraph 5 of the Notice and therefore denies those allegations.
7. With respect to the allegations contained in Section A, Paragraph 6 of the Notice:
- a. Respondent admits that on or about January 15, 2015, Judge Haws suspended her from performing marriage ceremonies; and
  - b. Respondent denies each and every remaining allegation contained in Section A, Paragraph 6.
8. With respect to the allegations contained in Section A, Paragraph 7 of the Notice:
- a. Respondent admits that she voluntarily refrained from performing marriage ceremonies before Judge Haws suspended her from performing them;
  - b. Respondent states that the last marriage ceremony she performed occurred on December 31, 2014; and
  - c. Respondent denies each and every remaining allegation contained in Section A, Paragraph 7.
9. With respect to the allegations contained in Section A, Paragraph 8 of the Notice:

- a. Respondent admits that, in response to an inquiry from the Commission, she cited her First Amendment rights and reiterated that solemnizing same-sex marriages would violate her religious beliefs; and
  - b. Respondent denies each and every remaining allegation contained in Section A, Paragraph 8.
10. Respondent denies each and every allegation contained in Section B, Paragraph 1 of the Notice.
  11. Respondent denies each and every allegation contained in Section B, Paragraph 2 of the Notice.
  12. Section C, Paragraph 1 of the Notice does not call for a response.
  13. Section D, Paragraph 1 of the Notice does not call for a response.

**First Affirmative Defense**

The Notice fails to state a claim upon which relief can be granted.

**Second Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's freedom-of-expression rights protected by the First Amendment to the United States Constitution.

**Third Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's freedom-of-expression rights protected by Article 1, Sections 20 and 21 of the Wyoming Constitution.

**Fourth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's right to the free exercise of religion protected by the First Amendment to the United States Constitution.

**Fifth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's right to the free exercise of religion protected by Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

**Sixth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, constitute a religious test in violation of Article VI, Clause 3 of the United States Constitution.

**Seventh Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, constitute a religious test in violation of Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.

**Eighth Affirmative Defense**

The provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice are vague and overbroad in violation of the First Amendment and the Fourteenth Amendment to the United States Constitution.

#### **Ninth Affirmative Defense**

The provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice are vague and overbroad in violation of Article 1, Sections 6, 7, and 20 of the Wyoming Constitution.

#### **Tenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

#### **Eleventh Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate Respondent's right to equal protection of the law under Article 1, Sections 2, 3, and 34 of the Wyoming Constitution.

#### **Twelfth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate the Establishment Clause of the First Amendment to the United States Constitution.

#### **Thirteen Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, violate the state constitutional provisions that address the establishment of religion, including Article 1, Section 18 and Article 21, Section 25 of the Wyoming Constitution.



**Fourteenth Affirmative Defense**

These proceedings and the Rules Governing the Commission violate Respondent's right to due process protected by the Fourteenth Amendment to the United States Constitution.

**Fifteenth Affirmative Defense**

These proceedings and the Rules Governing the Commission violate Respondent's right to due process protected by Article 1, Sections 6 and 7 of the Wyoming Constitution.

**Sixteenth Affirmative Defense**

These proceedings and the Rules Governing the Commission violate the separation of governmental powers required by Article 2, Section 1 of the Wyoming Constitution.

**Seventeenth Affirmative Defense**

Applying the provisions of the Wyoming Code of Judicial Conduct that the Commission cites in Section B of the Notice would, under these circumstances, constitute unlawful retaliation for Respondent's exercise of the constitutional rights referenced in the prior affirmative defenses, including but not limited to Respondent's rights protected under the First and Fourteenth Amendments to the United States Constitution.

DATED this 9th day of October, 2015.

Respectfully Submitted,

By:

  
Kenneth J. Connelly\*

James A. Campbell\*  
Kenneth J. Connelly\*  
Douglas G. Wardlow\*  
Alliance Defending Freedom  
15100 N. 90th Street  
Scottsdale, AZ 85260  
jcampbell@alliancedefendingfreedom.org  
kconnelly@alliancedefendingfreedom.org  
dwardlow@alliancedefendingfreedom.org  
(480) 444-0020 Fax: (480) 444-0028

Herbert K. Doby  
WSB # 5-2252  
P.O. Box 130  
Torrington, WY 82240  
dobyLaw@embarqmail.com  
(307) 532-2700 Fax: (307) 532-2706

*Attorneys for Respondent*  
*\*Admitted Pro Hac Vice*

**VERIFICATION OF ANSWER**

I, Ruth Neely, the undersigned, do hereby swear and affirm, under penalty of perjury, that the information contained in my Verified Amended Answer to the Notice of Commencement of Formal Proceedings of the Commission on Judicial Conduct and Ethics is true and accurate.

Dated this 30<sup>th</sup> day of September, 2015  
Ruth Neely  
Signature

**INSTRUCTIONS TO NOTARY**

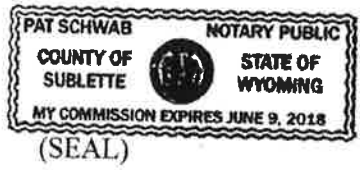
This form must be the product of an oath, not merely an acknowledgment. Before the verification is signed you must:

1. Place the affiant under oath;
2. Ensure that the affiant understands that all assertions are sworn to as accurate and that the affiant is subject to the penalty of perjury for any false statement; and
3. Have the verification signed in your presence.

STATE OF WYOMING )  
 )  
COUNTY OF Sublette ) ss  
 )

Subscribed and sworn to me this 30<sup>th</sup> day of September, 2015.  
By RUTH NEELY

Pat Schwab  
Notary Public



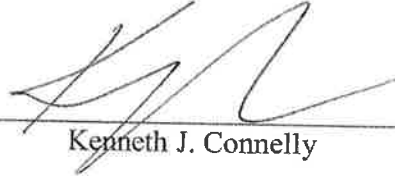
My Commission Expires: 6-9-18

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9th day of October, 2015, I served the foregoing Verified Amended Answer by electronic mail on the following:

Patrick Dixon, Esq.  
Dixon & Dixon, LLP  
104 South Wolcott Street, Suite 600  
Casper, WY 82601  
pdixn@aol.com

Wendy J. Soto  
Executive Director  
Commission on Judicial Conduct & Ethics  
P.O. Box 2645  
Cheyenne, WY 82003  
wendy.soto@wyboards.gov



---

Kenneth J. Connelly

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING

An Inquiry Concerning )  
The Honorable Ruth Neely )  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

No. 2014-27

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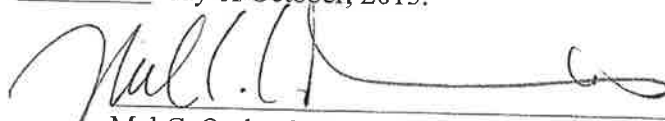
**ORDER GRANTING MOTION TO CONTINUE AND RESETTING DEADLINES**

---

This matter having come before the Presiding Officer on the Motion to Continue Hearing, and the Presiding Officer, having reviewed the motion and the Opposition to the Motion to Continue and having heard the arguments of the parties in a telephonic hearing on October 9, 2015, the Presiding Officer hereby grants the Motion to Continue Hearing. The schedule in this matter is reset as follows:

1. Counsel shall file any dispositive motions on or before October 30, 2015.
2. Counsel shall file responses to dispositive motions on or before November 19, 2015.
3. Counsel shall reply on or before December 2, 2015.
4. A Motion Hearing will commence on December 4, 2015 at 8:30 a.m. in the large courtroom, 2<sup>nd</sup> floor, at 200 North Center Street, Casper, Wyoming.
5. Counsel shall exchange all exhibit and witness information, including providing an exhibit and witness list in the format similar to that required by the federal court, (see attached), on or before December 28, 2015.
6. The adjudicatory hearing will commence on January 11, 2016, at 8:30 a.m. and continue as necessary through January 12, 2016, in Room 217 Strausner Hall, Casper College, 125 College Drive, Casper, Wyoming.

SO ORDERED this 27<sup>th</sup> day of October, 2015.

  
\_\_\_\_\_  
Mel C. Orchard III,  
Presiding Officer/Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on the <sup>10/28</sup> 28<sup>th</sup> day of October, 2015, I served the foregoing HEARING ORDER by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

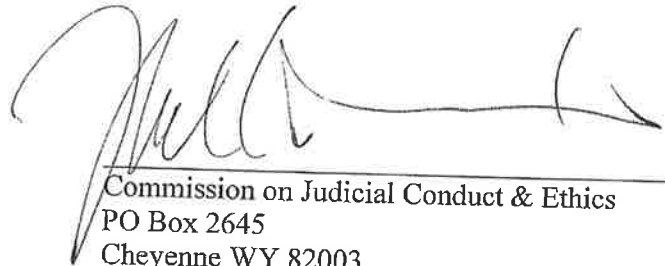
Herbert K. Doby  
P.O. Box 130  
Torrington WY 82240

Patrick Dixon, Esq  
Dixon & Dixon, LLP  
104 South Wolcott, Suite 600  
Casper WY 82601

James A Campbell  
Kenneth J. Connelly  
Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale AZ 85260

Merrilyn Walz  
Walz Reporting  
3560 Gannett St.  
Casper WY 82609

Cindy Brooks  
Brooks Reporting  
PO Box 52128  
Casper WY 82605



Commission on Judicial Conduct & Ethics  
PO Box 2645  
Cheyenne WY 82003  
Phone: 307-778-7792

cc: Adjudicatory Panel

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

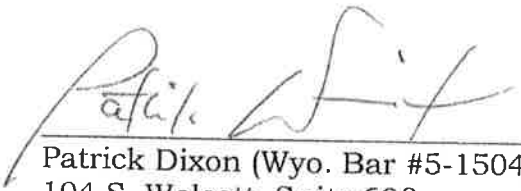
STATE OF WYOMING

An inquiry concerning	)	COMMISSION ON JUDICIAL CONDUCT
	)	AND ETHICS
The Honorable Ruth Neely	)	No. 2014-27 Official Record
	)	FILED
Municipal Court Judge and	)	Date 10/30/15
Circuit Court Magistrate	)	<i>Wendy J. Soto</i>
Ninth Judicial District	)	Wendy J. Soto
Pinedale, Sublette County	)	

**CJCE'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its disciplinary counsel, Patrick Dixon, and hereby moves the Adjudicatory Panel for partial summary judgment on the issues of whether Judge Neely has violated Canon I and Rules 1.1 and 1.2 and Canon II and Rules 2.2 and 2.3 of the Wyoming Code of Judicial Conduct. This motion is on the grounds and for the reasons that there exist no genuine issues of material fact and that the CJCE is entitled to a determination on these issues, as a matter of law. This motion is based upon the pleadings of records, counsel's Memorandum in Support of Motion for Partial Summary Judgment and discovery materials appended thereto.

DATED this 30 day of October, 2015.

  
Patrick Dixon (Wyo. Bar #5-1504)  
104 S. Wolcott, Suite 600  
Casper, Wyoming 82601  
(307) 234-7321  
(307) 234-0677 (facsimile)  
Disciplinary Counsel

**CERTIFICATE OF SERVICE**

I, Patrick Dixon, do hereby certify that on the 30 day of October, 2015, I served the above and foregoing ***CJCE's Motion for Partial Summary Judgment*** via email or U.S. mail, postage prepaid, as noted below:

**VIA EMAIL**

**dobylaw@embarqmail.com**

Herbert K. Doby  
Attorney at Law  
P.O. Box 130  
Torrington, Wyoming 82240

**VIA EMAIL kconnelly@adflegal.org**

James A. Campbell  
Kenneth J. Connelly  
Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, Arizona 85260

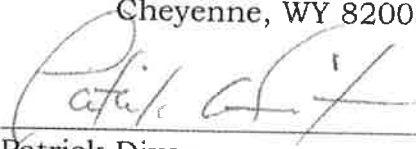
**VIA EMAIL**

**orchard@spencelawyers.com**

Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
The Spence Law Firm, LLC  
Spence & McCalla  
P.O. Box 548  
Jackson, Wyoming 83001-0548

**VIA U.S. MAIL**

Wendy Soto, Executive Director  
Commission on Judicial Conduct  
and Ethics  
P.O. Box 2645  
Cheyenne, WY 82003

  
Patrick Dixon



BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

An inquiry concerning )  
The Honorable Ruth Neely )  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
No. 2014-27  
Official's and  
Date: 10/30/15  
Wendy L. Soto

**STATEMENT OF UNDISPUTED FACTS**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its attorney Patrick Dixon, and hereby submits the Statement of Undisputed Facts.

1. The Honorable Ruth Neely serves in two judicial capacities. She sits as Municipal Court Judge for the Town of Pinedale pursuant to appointment by the Town Mayor and approval of the Town Council. She also serves as a Circuit Court Commissioner, pursuant to appointment by the Honorable Curt Haws.

2. Her most recent and current magisterial appointment is a general appointment. Although Judge Neely can and, occasionally does perform other duties as a Circuit Court Magistrate, the primary purpose for her appointment is to perform civil marriage ceremonies.

3. Sometime around December 8, 2014, Judge Neely received a call from Ned Donovan, a reporter for the Pinedale Roundup. In the course of the conversation, Judge Neely told Mr. Donovan that her religious beliefs and

opinions regarding same sex marriage precluded her from performing same sex marriages

4. This conversation and two additional conversations with Mr. Donovan on the same day resulted in the publication in the Sublette Examiner on December 11, 2014 of an article identified as Deposition Exhibit 4.

5. In the article, Mr. Donovan quotes Judge Neely as making the following statements:

“I will not be able to do them,” Neely told the Examiner. “We have at least one magistrate who will do same sex marriages but I will not be able to.”

...

“When law and religion conflict, choices have to be made. I have not yet been asked to perform a same sex marriage,” Neely said.

Donovan also explained that Judge Neely’s inability to perform same sex marriages was not based upon her schedule, but on her religious beliefs.

7. Judge Neely agrees that she was accurately quoted in the article by Mr. Donovan.

8. The Donovan article, in one form or another appeared in three other publications in Sublette County and generated at least two subsequent editorials.

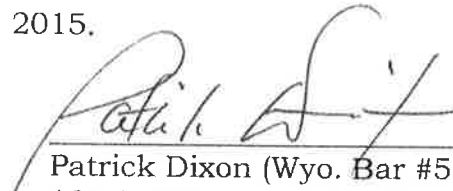
9. Judge Neely continued to perform traditional ceremonies until December 31, 2014.

10. As a result of these publications, on January 15, 2015 Judge Haws suspended Judge Neely from her magisterial duties in Circuit Court.

Judge Neely continues to serve in her capacity as a Municipal Court Judge for the Town of Pinedale.

11. On October 17, 2014, United States District Court Judge Scott Skavdahl rendered his decision in the case of *Guzzo v. Mead*, 2014 WL 5317797 (Wyo.2014). The effect of *Guzzo* was to legalize same sex marriage in the state of Wyoming.

DATED this 30 day of October, 2015.

  
Patrick Dixon (Wyo. Bar #5-1504)  
104 S. Wolcott, Suite 600  
Casper, Wyoming 82601  
(307) 234-7321  
(307) 234-0677 (facsimile)  
Disciplinary Counsel

#### **CERTIFICATE OF SERVICE**

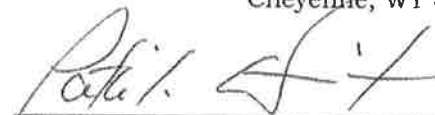
I, Patrick Dixon, do hereby certify that on the 30 day of October, 2015, I served the above and foregoing **Statement of Undisputed Facts** by placing a true and correct copy in the United States mail, duly postmarked and addressed to:

**VIA EMAIL [dobylaw@embarqmail.com](mailto:dobylaw@embarqmail.com)**  
Herbert K. Doby  
Attorney at Law  
P.O. Box 130  
Torrington, Wyoming 82240

**VIA EMAIL [kconnelly@adfllegal.org](mailto:kconnelly@adfllegal.org)**  
James A. Campbell  
Kenneth J. Connelly  
Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, Arizona 85260

**VIA [orchard@spencelawyers.com](mailto:orchard@spencelawyers.com)**  
Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
The Spence Law Firm, LLC  
Spence & McCalla  
P.O. Box 548  
Jackson, Wyoming 83001-0548

**VIA U.S. MAIL**  
Wendy Soto, Executive Director  
Commission on Judicial Conduct and  
Ethics  
P.O. Box 2645  
Cheyenne, WY 82003

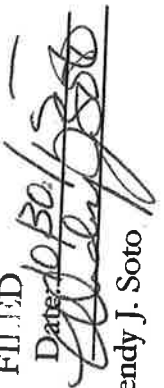
  
Patrick Dixon

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

An inquiry concerning	)	
	)	
The Honorable Ruth Neely	)	No. 2014-27
	)	
Municipal Court Judge and	)	
Circuit Court Magistrate	)	
Ninth Judicial District	)	
Pinedale, Sublette County	)	

COMMISSION ON JUDICIAL CONDUCT  
 AND ETHICS  
 Official Record

FILED  
 Date: 10/30/15  
  
 Wendy J. Soto

**MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its disciplinary counsel, Patrick Dixon, and submits the following in support of the Commission's Motion for Partial Summary Judgment:

A. *Statement of the Facts.*

The Honorable Ruth Neely serves in two judicial capacities. She sits as Municipal Court Judge for the Town of Pinedale pursuant to appointment by the Town Mayor and approval of the Town Council. *Neely Deposition, pp. 14-17.* She also serves as a Circuit Court Commissioner, pursuant to appointment by the Honorable Curt Haws. *Neely Deposition, pp. 17-18; Haws Deposition, pp. 123-126, Deposition Exhibits 42, 38.* Her most recent and current magisterial appointment is a general appointment. Although Judge Neely can and, occasionally does perform other duties as a Circuit Court Magistrate, the primary purpose for her appointment is to perform civil marriage ceremonies. *Neely Deposition, pp. 39-43.* In the words of Judge

Haws, her "primary function" was to perform wedding ceremonies. *Haws Deposition, p. 61.*

On October 17, 2014, United States District Court Judge Scott Skavdahl rendered his decision in the case of *Guzzo v. Mead*, 2014 WL 5317797 (Wyo.2014). Following Tenth Circuit precedent, the effect of *Guzzo* was to legalize same sex marriage in the state of Wyoming.

Shortly after the *Guzzo* opinion came down, Magistrate Neely requested a meeting with Judge Haws. The meeting took place sometime in late October. In the course of the meeting Judge Neely informed Judge Haws that she had serious religious convictions regarding same sex marriage and that she would be unable to perform same sex ceremonies. At that time, Judge Haws informed her that he felt that performing these types of ceremonies was an essential function of her position. Judge Haws further advised Judge Neely that, pending further guidance on the issue, she should "keep your head down and your mouth shut." *Haws Deposition, pp. 81-89.*

In fact, Judge Neely did not keep her head down nor her mouth shut. Some time around December 8, 2014, Judge Neely received a call from Ned Donovan, an individual who identified himself as a reporter for the Pinedale Roundup. Mr. Donovan began the conversation by asking Judge Neely if she was excited about the prospect of performing gay marriages. Judge Neely told him that she was not and then proceeded to tell him about her religious beliefs and opinions regarding same sex marriage. *Neely Deposition, pp. 82-92.*

This conversation and two additional conversations with Mr. Donovan on the same day resulted in the publication in the Sublette Examiner on December 11, 2014 of an article identified as Deposition Exhibit 4. In the article, Mr. Donovan quotes Judge Neely as making the following statements:

“I will not be able to do them,” Neely told the Examiner. “We have at least one magistrate who will do same sex marriages but I will not be able to.”

...

“When law and religion conflict, choices have to be made. I have not yet been asked to perform a same sex marriage,” Neely said.

Donovan also explained that Judge Neely’s inability to perform same sex marriages was not based upon her schedule, but on her religious beliefs. Deposition Exhibit 4. Judge Neely agrees that she was accurately quoted in the article by Mr. Donovan. *Neely Deposition, pp. 88-89; see also Verified Amended Answer to Notice of Commencement of Formal Proceedings, ¶5.* The Donovan article, in one form or another appeared in three other publications in Sublette County and generated at least two subsequent editorials. *Neely Deposition, pp. 33-34.*

Notwithstanding her position on same sex marriage, Judge Neely continued to perform traditional ceremonies until December 31, 2014. *Neely Deposition, p. 100, Verified Amended Answer, paragraph 8.b.* As a result of these publications, on January 15, 2015 Judge Haws suspended Judge Neely from her magisterial duties in Circuit Court. *Haws Deposition, pp. 106-108,*

126-127. Judge Neely continues to serve in her capacity as a Municipal Court Judge for the Town of Pinedale.

B. *Statement of Issues.*

In view of Judge Neely's Answer to the Notice of Commencement of Formal Proceedings and the testimony elicited in discovery, there are no material questions of fact. The sole issue for resolution on this motion is whether the position Judge Neely has taken with respect to the performance of same sex marriages and the comments which she has made in the press constitute the violation of Canon I, Rules 1.1 and/or 1.2 and/or Canon II, Rules 2.2 and/or 2.3. The Commission contends that both Canons and all four Rules are implicated by Judge Neely's conduct and that, as a matter of law she should be held to have violated her ethical obligations.

C. *Statement of the Argument.*

1. **Standard of Review.** Rule 9(a) of the Rules Governing the Commission on Judicial Conduct and Ethics specifically adopts Rule 56 of the Wyoming Rules of Civil Procedure. Rule 56, W.R. Civ. P., of course, governs motions for summary judgment. By implication the adoption of Rule 56, W.R. Civ. P. also adopts Wyoming case law which construes and interprets it.

In its most recent discussion of Rule 56, W.R. Civ. P., the Wyoming Supreme Court has explained the standard of review on such a motion as follows:

Summary judgment is proper only when there are no genuine issues of material fact, and the prevailing party is entitled to judgment as a matter of law. .... *Uinta County v. Pennington*, 2012 WY 129, ¶ 11, 286 P.3d 138, 141-42 (Wyo.2012). ... The party

requesting summary judgment bears the initial burden of establishing a prima facie case that no genuine issue of material fact exists and that summary judgment should be granted as a matter of law. W.R.C.P. 56(c); *Throckmartin v. Century 21 Top Realty*, 2010 WY 23, ¶ 12, 226 P.3d 793, 798 (Wyo.2010). ... Once a prima facie showing is made, the burden shifts to the party opposing the motion to present evidence showing that there are genuine issues of material fact. *Boehm v. Cody Cntry. Chamber of Commerce*, 748 P.2d 704, 710 (Wyo.1987) (citing *England v. Simmons*, 728 P.2d 1137, 1140-41 (Wyo.1986)). The party opposing the motion must present specific facts; relying on conclusory statements or mere opinion will not satisfy that burden, nor will relying solely upon allegations and pleadings. *Boehm*, 748 P.2d at 710. However, the facts presented are considered from the vantage point most favorable to the party opposing the motion, and that party is given the benefit of all favorable inferences that may fairly be drawn from the record. *Caballo Coal Co.*, ¶ 12, 246 P.3d at 871.

*Amos v. Lincoln Cnty. Sch. Dist. No. 2*, \_ P.3d \_, 2015 WY 115, ¶15 (Wyo. Aug. 21, 2015).

## 2. **Judicial Construction of the Code of Judicial Ethics.**

At least at point in time, no appellate court has addressed the exact question presented in this disciplinary proceeding. However, the Courts have had some occasion to interpret and construe the Code of Judicial Ethics. A brief discussion and analysis of the Courts interpretation of the Code may be of assistance to the A Panel in understanding the operation and effect of the Cannons and Rules involved here<sup>1</sup>.

Cannon 1 of the Wyoming Code of Judicial Conduct provides as follows:

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<sup>1</sup> Disclaimer: the cases cited below are all distinguishable from the facts of this case. In most instances they involve multiple ethical violations. They are not intended to be persuasive on this question, but illustrative of the operation of the Code.



**Cannon 1. A Judge Shall Uphold the Integrity of the Judiciary.**

A Judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

Cannon 1 is supported by three rules, of which Rules 1.1 and 1.2 are implicated in this proceeding. Rule 1.1 provides as follows:

**Rule 1.1. Compliance with the Law.**

A Judge shall comply with the law, including the Code of Judicial Conduct.

While this rule is generally applied in instances where a Judge violates some law, such as assault and battery, tax evasion, etc. it is also found to be applicable where a Judge fails to follow the law in connection with a Court proceeding. See for example *In re Jacobi*, 715 N.E.2d 873, 875 (Ind. 1999), in which the Judge was sanctioned for a Cannon I violation where he failed to follow proper legal procedures in granting a temporary restraining order; *Mississippi Com'n on Judicial Performance v. Wells*, 794 S.2d 1030, 1033-34 (Miss. 2004), in which the Judge found a Defendant guilty based on Affidavits, thus depriving him the opportunity to present a defense and where the Mississippi Supreme Court found this to be a Cannon I violation and observed that it was conduct prejudicial to the administration of justice, bringing the Judicial office into disrepute; and *In re Jones*, 55 S.W.3d 243, 249, (Tex. Spec. Ct. Rev. 2000), in which the Judge was publicly admonished for failing to follow the proper process in issuing Writs of Attachment.

Subsequent to the District Court's decision in *Guzzo*, same sex marriage became the law of the jurisdiction. Judge Neely's failure to follow and apply that law is a violation of Rule 1.1.

Rule 1.2 echoes Canon 1. It provides as follows:

**Rule 1.2. Promoting Confidence in the Judiciary.**

A Judge shall act at all times in a manner that promotes confidence in the independence, integrity, and impartiality of the Judiciary, and shall avoid impropriety and the appearance of impropriety.

Thus, there are four concepts implicated by Rule 1.2: independence, integrity and impartiality of the judiciary and impropriety or the appearance of impropriety. The Comments to Rule 1.2 are somewhat lengthy but instructive and are attached. Particularly germane to this issue is Comment 2:

[2] A Judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

As with cases discussed under Rule 1.1, cases interpreting Rule 1.2 hold that the failure to comply with law or legal process is an ethical violation. See *Matter of Inquiry Concerning Judge No. 94-70*, 454 S.E.2d 780 (Geo. 1995), in which the Judge was removed from office. See also *In re Dixon*, 559 S.E.2d 576 (S.C. 2002).

Closer to the question at hand, Judges have been sanctioned under Rule 1.2 for attempting to impose their own moral views on litigants. In *Miss. Comm'n on Jud. Performance v. A Mun. Ct. J.*, 755 S.2d 1062 (Miss. 2000), a municipal court Judge was sanctioned for requiring, as a condition of probation that three litigants marry, ostensibly because he disapproved of unmarried couples living together. Although not an ethics opinion, in *State v. Pattno*, 579 N.W.2d 503 (Neb. 1998), the Judge read a passage from the Bible disapproving of homosexual conduct in the course of sentencing the

Defendant. The Nebraska Supreme Court, citing Cannon I and rules comparable to Rule 1.2, observed that the Judge violated the Canons of Judicial Ethics and reversed and remanded the case for re-sentencing by a different Judge. Observing that Judges are held to a "higher standard of conduct than is expected of lawyers and other persons in society", another Nebraska court found the distribution of religious materials to jurors to be a violation of Cannon I. *In re Empson*, 562 N.W.2d 817, 830 (Neb. 1997). Similarly, the use of racial slurs or ethnic epithets has been found to warrant removal from office under Rule 1.2. *In re Malory*, 731 N.E.2d 120 (N.Y. 2000).

The second Cannon implicated in this proceeding is Cannon II which reads as follows:

**Cannon II. A Judge Shall Perform the Duties of Judicial Office.**

A Judge shall perform the duties of judicial office impartially, competently, and diligently.

Under Cannon II, the Commission has alleged the violation of Rules 2.2 and 2.3. Rule 2.2 reads as follows:

**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.

This Rule addresses two interrelated concepts. First, the Judge is ethically obligated both to uphold and apply the law, the law in this instance being *Guzzo*. Second, the Judge must perform her duties fairly and impartially.

Again, the Comments to Rule 2.2 are instructive, Comment 2 in particular:

[2] Although each judge comes to the bench with a unique background and personal philosophy, a Judge must interpret and

apply the law without regard to whether the Judge approves or disapproves of the law in question.

In this regard, Appellate Courts have consistently held that a Judge's nonfeasance, or a failure to follow or apply the law may constitute ethical violations. *Annotated Model Code of Judicial Conduct, 2nd Edition (2011) at 109-111.*

While the Rules of Judicial Conduct discussed above are important, the crux of this matter lies in Rule 2.3. In material part, that Rule provides as follows:

**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 or prejudice, or engage in harassment including, but not limited to bias, prejudice or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, **sexual orientation**, marital status, socio-economic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the Judge's direction and control to do so...(emphasis added).

Comment 1 to the Rule recites that a Judge who manifest bias or prejudice "brings the Judiciary into disrepute."

Appellate courts have consistently held that a Judge's speech, both on and off the bench can constitute a violation of Rule 2.3. See for example *In re Nelson*, 532 S.E.2d 609, 612 (S.C. 2000) where the Judge's comments regarding his low opinion of the police department violated provisions similar to Rule 2.3; In *Dodds v. Comm'n on Jud. Performance*, 906 P.2d 1260, 1266 (Cal.

1996) a Judge's joke about a chiropractor in the course of a settlement conference was found, among other things, to be a manifestation of bias.

Rule 2.3 could not be more clear. It expressly prohibits a Judge from manifesting bias or prejudice based upon sexual orientation. Judge Neely's comments, as published in the Sublette Examiner clearly manifest a bias, based upon religious belief, against the LGBT community. Her comments could not be reasonably be taken otherwise and constitute the violation of the Wyoming Code of Judicial Conduct.

3. **Ethical Considerations in the Wake of *Guzzo v. Mead* and *Obergefell v. Hodges*.** As noted above, the decision in *Guzzo v. Mead* legalized same sex marriage in Wyoming. The following June, the U.S. Supreme Court in the case of *Obergefell v. Hodges*, 135 S.Ct. 2584, 2015 WL 2473451 (2015) made same sex marriage the law of the land. There, the U.S. Supreme Court expressly ruled that laws restricting same sex marriage are "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."

While, there is no guiding judicial precedence on this exact question. However, the question of the Judge's role in relation to same sex marriage has been on the radar of judicial supervisory and advisory commissions for some time. A number of advisory opinions have issued which do provide guidance.

The first such opinion came from the New York Judicial Supervisory Commission on December 8, 2011, designated as New York Advisory Opinion

11-87. The Commission essentially ducked the question by concluding that it was a legal question. Thus, its opinion is of limited help.

On September 13, 2013, the Commission on Judicial Conduct of the State of Washington published a STIPULATION, AGREEMENT AND ORDER OF ADMONISHMENT in a disciplinary proceeding captioned *In re the Matter of: The Honorable Gary Taber, Thurston County Superior Court Judge*, CJC No. 7251-F-158. In response to the legalization of same sex marriage by public referendum, Judge Taber announced an unwillingness to perform same sex marriage based upon religious beliefs, which announcement was widely publicized. In a stipulated disposition, the Washington Commission concluded that Judge Taber's public statements had created the appearance of impropriety and had violated Rules 1.1, 1.2 and 3.1(c).<sup>2</sup>

Although the Washington opinion does not specifically refer to a Code provision similar to Rule 2.3, the Commission concluded that Judge Taber's comments "appear to express a discriminatory intent against a statutorily protected class of people thereby undermining public confidence in his impartiality." *Id.* at p. 3. The Washington Commission further observed quoting the comments to the Rules: "a judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions of the Code." *Id.* at p. 4. This is a theme we heard above, and which will be repeated in other advisory opinions.

---

<sup>2</sup> All of the Advisory Opinions discussed herein apply Canons and Rules of Judicial Ethics which are, if not identical to, at least comparable to those of Wyoming. For the purposes of this brief, in hopes of avoiding confusion, citations will be to the Wyoming Code and not the Code of the jurisdiction issuing the Advisory Opinion.

In the summer of 2014 the Judicial Conduct Board of Pennsylvania issued a lengthy analysis of, among others, Canon I, Rules 1.1 and 1.2, Canon II, Rules 2.3. *Pennsylvania Judicial Conduct Board Newsletter*, 3. *Summer 2014*. The Pennsylvania Judicial Conduct Board concluded that in declining to perform same sex marriage, a judge violated rules 1.1 and 1.2 by demonstrating a lack of impartiality and giving the appearance of impropriety. The opinion observed that this would have the effect of undermining public confidence in the judiciary. The board also found this to be a violation of Rule 2.3 stating as follows:

“Both rules (including Rule 3.1) prohibit discriminatory conduct by a judge. A reasonable person is likely to perceive that a Judge who agrees to perform wedding ceremonies for one particular class of people, heterosexual individuals, and refuses to do the same for another class of people, gay and lesbian individuals, may be acting out of prejudice or bias based on sexual orientation.”

*Id.* at pg 5.

The Arizona Supreme Court Judicial Ethics Advisory Committee released revised Advisory Opinion 15-01 on March 9, 2015. It concluded that a Judge may not ethically decline to perform same-sex marriages, although he or she may choose to conduct marriage ceremonies only for friends and relatives, so concluding with a “qualified yes”. In its opinion, the Arizona committee said this:

At the core of the JEAC’s response below is the principal that a Judge who chooses to perform marriages may not discriminate between marriages based on the Judge’s opposition to the concept of same sex marriage.

It concluded that refusal to perform same-sex marriage “based on the participant’s sexual orientation manifests bias or prejudice” and violates Rule 2.3(b).

*Nebraska Judicial Ethics Opinion 15-1* was issued on June 29, 2015, concluding that a Judge may not refuse to perform same sex marriages without violating the Code of Ethics, although he or she may refuse to perform any ceremonies, except for those of close friends or relatives. The Nebraska Committee concluded that refusal to perform same sex marriages violated Rules 1.1 and 1.2 and specifically concluded that refusal to perform a ceremony by referring to another Judge would manifest bias in violation of Rule 2.3. In so doing it observed this:

Comment [2] acknowledges that while each Judge comes to the bench with a unique background and personal philosophy, “A judge must interpret and apply the law without regard to whether the Judge approves or disapproves of the law in question”

*Id* page 2 of 3.

*Supreme Court of Wisconsin Judicial Conduct Advisory Committee Opinion No. 15-1*, issued on August 18, 2015 is consistent with the preceding opinions in concluding that the refusal to perform same sex marriage is a violation of Rules 1.1, 1.2 and 2.3. The opinion is thoughtful and addresses the question at the heart of this proceeding, whether Judge Neely should continue to serve in any capacity as a judge in Wyoming:

Expressions of bias or prejudice by a Judge, even outside of their judicial activities may cast reasonable doubt on their capacity to act impartially as a Judge. The Committee concludes that if officiating at marriages is considered an extra judicial activity, a



refusal to perform same sex marriages based on a couple's sexual orientation would manifest bias or prejudice and would cast reasonable doubt on a Judge's capacity to act impartially and properly perform his or her judicial duties under SCR 60.05(1).

*Id* at Pg. 4.

Finally, the Panel is directed to the *Supreme Court of Ohio Board of Professional Conduct Opinion 2015-1*, issued on August 7, 2015. Like the preceding advisory positions, the Ohio Board concludes that the refusal to perform same sex marriages is a violation of the rules implicated in this proceeding. Unlike the other opinions, the Ohio Board recognizes that the problem may not be resolved by the Judge simply refusing to perform all wedding ceremonies. Simply stated, the Ohio Board concludes that *Guzzo* and *Obergefell* constitute the law of the land and that a Judge in compliance with her ethical obligations may not opt out of following and applying that law:

A Judge's unilateral decision not to perform same sex marriages based on his or her own personal, religious, or moral beliefs ignores the holding in *Obergefell* and thus directly contravenes the oath of office.

*Id* at page 3. The Board notes that a judge is not only required to comply with the law but has a "higher duty than ordinary citizens" to comply with the law. *Id* at 3. Continuing on this theme, the Ohio Board writes:

In satisfying this responsibility, a Judge "must accept the restrictions imposed by the Code" (JUD. COND. R. 1.2, Comment[2]), including provisions that require a Judge to set aside his or her own personal, moral and religious beliefs, in the fair, impartial and unbiased performance of judicial duties.

*Id* at page 3. The opinion further states:

A Judge who publicly states or implies a personal objection to performing same-sex marriages and reacts by ceasing to perform all marriages acts contrary to the mandate to avoid impropriety and the appearance of impropriety. The Ohio Board observes that a Judge's decision to perform some or all marriages "may reflect adversely on perceptions regarding the Judge's performance of other judicial duties."

*Id* at page 5. Finally, the Ohio Board concludes by observing that the principals set forth in the Advisory Opinion are not novel but are a restatement of the "core tenants that have long governed judicial conduct." *Id* at 6.

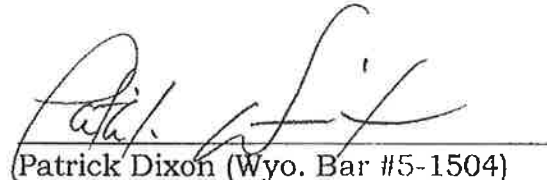
The opinions referred to above are attached hereto. Collectively, they uniformly, and without exception, support the Commissions position in this proceeding that Judge Neely's conduct and statements violate each of the ethical principals alleged in the Notice of Commencement of Formal Proceedings.

D. *Conclusion*

The Commission anticipates that Judge Neely will respond to this motion as asserting her Constitutional rights as alleged in her Affirmative Defenses. While Judge Neely certainly enjoys those constitutional rights, there is no such right to be a Judge. To hold the offices of Municipal Court Judge and Circuit Court Magistrate is a privilege. As both the courts and various advisory committees have noted, Judges are held to a higher standard than ordinary citizens. In order to exercise the privilege of Judicial Office, a Judge must adhere to the Code of Judicial Conduct. The Code makes no exceptions based upon religious belief. To the contrary, it holds that a Judge must subordinate her beliefs to her ethical obligations.

In this instance, there is no material question of fact as to Judge Neely's conduct and words. Applying the Code to her conduct as a matter of law, she has violated multiple provisions. Summary Judgment is appropriate.

DATED this 30 day of October, 2015.



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**CERTIFICATE OF SERVICE**

I, Patrick Dixon, do hereby certify that on the 30 day of October, 2015, I served the above and foregoing ***Memorandum in Support of Motion for Partial Summary Judgment*** via email or U.S. mail, postage prepaid, as noted below:

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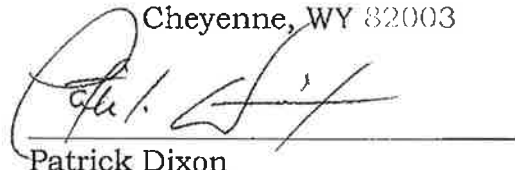
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Patrick Dixon

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## Top Stories

### Pinedale judge will not marry same-sex couples

Modified: Thursday, Dec 11th, 2014  
 BY: Ned Donovan

PINEDALE - Since Oct. 21, following a judicial ruling in Laramie that brought equal marriage to the "Equality State," same-sex couples in Wyoming have been able to get married. As a result, marriage licenses were issued around the state, and this weekend Sublette County will have its first wedding under the new rules. Municipal Judge Ruth Neely, Pinedale town judge for more than 20 years, however, has indicated she will be unable to perform same-sex marriages if asked.



"I will not be able to do them," Neely told the Examiner. "We have at least one magistrate who will do same-sex marriages but I will not be able to."

All judges are required to marry those who meet the legal requirements, unless there is a scheduling conflict or other problem. In those cases, prospective couples will be referred to other magistrates.

But Neely's inability to perform the marriages has nothing to do with her schedule but, rather, her religious beliefs.

"When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage," Neely said.

Neely's role as a magistrate who can perform marriages is separate from her position as the Pinedale municipal judge, according to Pinedale Mayor Bob Jones.

"As the town judge, she does not perform marriages, that is not part of the description of the work of a town judge ... [Performing marriages] is something she took on herself years ago to try and ... provide more services to the town," Jones told the Examiner. "In terms of whether she will do that as the town judge, which is what

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before the council but not before that bc

"Until we have a problem I don't see any point in creating a problem," Jones said.

So far, according to Neely and Jones, no requests have been made, but a citizen may bring up the issue in a Pinedale Town Council public meeting.

"If there's one person that I know would swallow hard and do what the law said, it would be Ruth Neely," Jones said. "I want to be very clear I have all the faith in the world that if a case unrelated to this ... came before her, [and] ... she did not think she could be morally fair, I have every, every expectation, as well as I know her, that she would recuse herself before taking that case and enforcing her morals."

According to the National Center for Lesbian Rights (NCLR), who represented plaintiffs in the Wyoming equal marriage case, a judge refusing to marry a same-sex couple could become a constitutional problem.

"Public officials should serve all members of the public, and they shouldn't discriminate against couples based on their personal beliefs," NCLR senior staff attorney Chris Stoll told the Examiner. "If a public official selectively chooses not to marry a particular group of people, that potentially raises constitutional concerns under the equal protection clause."

Neely, however, was clear that this does not stop any same-sex couple in Pinedale from getting married in the town.

"All magistrates are required to perform weddings," Neely said. "And any couple, regardless of gender, can call any magistrate and any judge and see if that judge can fit them into their personal schedule."

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# COMMENTS TO RULE 1.2

**Rule 1.1. Compliance with the Law.**

A judge shall comply with the law,\* including the Code of Judicial Conduct.

Am. Jur. 2d, ALR and C.J.S. references.  
— 48A C.J.S. Judges §§ 11, 75.

**Rule 1.2. Promoting Confidence in the Judiciary.**

A judge shall act at all times in a manner that promotes public confidence in the independence,\* integrity,\* and impartiality\* of the judiciary, and shall avoid impropriety\* and the appearance of impropriety.\*

*Comment.* — [1] *Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.*

[2] *A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.*

[3] *Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.*

[4] *Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.*

[5] *Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.*

[6] *A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.*

**Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office.**

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests\* of the judge or others, or knowingly\* allow others to do so.

*Comment.* — [1] *It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.*

[2] *A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.*

[3] *Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from*

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# ADVISORY OPINIONS

## Opinion 11-87

December 8, 2011

Digest: (1) Unless a judge is required by law to perform marriages, a judge may adopt a policy of performing marriages for friends and relatives only or may decline to perform all marriages. (2) Whether a judge may adopt a policy with respect to performing marriages that distinguishes between same-sex and opposite-sex couples raises primarily legal questions; however, if a judge acts in conformity with governing law the judge will not violate the Rules Governing Judicial Conduct.

Rules: Marriage Equality Act (L 2011, ch 95 as amended by L 2011, ch 96 [effective July 24, 2011]); Domestic Relations Law §§10-a(1), 11(3); Judiciary Law §212(2)(l); *Hernandez v Robles*, 7 NY3d 338 (2006); 22 NYCRR 101.1; 100.2; 100.2(A); 100.2(D); 100.3(A); 100.3(B)(1), (4); 100.4(A)(1); Opinions 09-34; 92-106 (Vol. X); Joint Opinion 04-38/04-39.

Opinion:

In reference to the Marriage Equality Act (L 2011, ch 95 as amended by L 2011, ch 96 [effective July 24, 2011]), a judge writes, "Given my personal religious beliefs, I am currently unwilling to conduct same sex marriages, despite the New York State Law." The judge asks for ethics advice in response to the following questions:

- 1) May I ethically refuse to conduct same sex marriages?
- 2) If I continue to perform male/female marriages, may I ethically refuse to conduct same sex marriages?
- 3) May I refuse to conduct all marriages?
- 4) May I refuse to conduct same sex marriages if I provide the contact information of others (including judges or civil officers) who are willing to conduct same sex marriages?
- 5) May I limit weddings that I conduct to those people who are friends or relatives?

Preliminarily, the Committee notes that it has not been asked to, nor can it, evaluate the merits of same-sex marriage; weigh any potentially competing constitutional interests such as those relating to separation of church and state, free exercise of religion, and rights of expressive association; or opine on issues of constitutional or statutory interpretation (see Judiciary Law §212[2][l]; 22 NYCRR 101.1).

THE RULES GOVERNING JUDICIAL CONDUCT

A judge must always avoid even the appearance of impropriety (see 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (see 22 NYCRR 100.2[A]). A judge must "respect and comply" with the law (*id.*) and "be faithful to the law and maintain professional competence in it" (22 NYCRR 100.3[B][1]). In the performance of judicial duties, a judge must not, by words or conduct, manifest bias or prejudice based on numerous factors, including sexual orientation (see 22 NYCRR

100.3[B][4]).

A judge's judicial duties take precedence over all the judge's other activities (*see* 22 NYCRR 100.3[A]), and thus a judge must not engage in extra-judicial activities that will cast reasonable doubt on the judge's capacity to act impartially as a judge (*see* 22 NYCRR 100.4 [A][1]). Therefore, a judge must not hold membership in any organization that "practices invidious discrimination on the basis of ... sexual orientation," although this provision "does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members" (22 NYCRR 100.2[D]).

### DECLINING TO CONDUCT MARRIAGES ON A NEUTRAL BASIS

#### Questions 3 and 5

In Questions 3 and 5, the judge asks whether it is ethically permissible to decline to perform some or all marriages on a facially neutral basis that has no apparent connection to sexual orientation or any protected class.

In the Committee's view, the Rules Governing Judicial Conduct do not, by their terms, require judges to perform marriages. Accordingly, unless a judge is required by law to perform marriages, the Committee sees no impropriety if a judge declines to conduct all marriages. Similarly, it is permissible for a judge to consistently decline to conduct marriages for anyone who is not a friend or relative as such a policy honors the judge's time constraints and does not raise reasonable questions about invidious discrimination, bias or prejudice.

### DISTINGUISHING BETWEEN SAME-SEX AND OPPOSITE-SEX COUPLES

#### Questions 1, 2, and 4

In Questions 1, 2 and 4, the judge asks whether it is ethically permissible to distinguish between same-sex and opposite-sex couples, in certain ways, when considering a request to perform a marriage.

Until this year, New York law limited marriage to persons of the opposite sex, a limitation which the Court of Appeals held did not violate the New York Constitution and was consistent with opinions of the Supreme Court of the United States (*see Hernandez v Robles*, 7 NY3d 338 [2006]). The new Marriage Equality Act declares that "Marriage is a fundamental human right" (L 2011, ch 95 §2 and amends the Domestic Relations Law to provide that "a marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex" (DRL 10-a[1]; *see also* L 2011, ch 95 §3). The overall statutory scheme continues to provide, as it did before, that "No marriage shall be valid unless solemnized by" one of a list of public officials, including, among others, "a justice or judge of a court of the unified court system" (Domestic Relations Law §11[3]).

In the Committee's view, Questions 1, 2 and 4 raise serious legal issues relating to

statutory and constitutional interpretation, questions which are both unsettled and highly controversial. The Committee is not empowered to answer such questions (see Judiciary Law §212[2][1]; 22 NYCRR 101.1; see also e.g. Opinion 09-34 [no authority to respond to the question whether a judge may refer a juvenile delinquent to a faith-based organization, because the question “involves the separation of church and state,” which is a question of law]; Joint Opinion 04-38/04-39 [no authority to answer legal questions regarding same-sex marriage]; Opinion 92-106 [Vol. X] [no authority to construe the New York Constitution]).

Therefore, with respect to Questions 1, 2 and 4, the Committee can state only that if the inquiring judge acts in conformity with the governing constitutional and statutory law concerning same-sex marriage and sexual orientation, the judge will not violate the Rules Governing Judicial Conduct (see Joint Opinion 04-38/04-39). These legal issues, to the extent unsettled, must be raised and addressed by persons with standing in the appropriate legal venue.

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COMMISSION ON JUDICIAL CONDUCT

BEFORE THE COMMISSION ON JUDICIAL CONDUCT  
OF THE STATE OF WASHINGTON

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In Re the Matter of:

The Honorable Gary Tabor,  
Thurston County Superior Court Judge

CJC No. 7251-F-158

**STIPULATION, AGREEMENT  
AND ORDER OF ADMONISHMENT**

The Commission on Judicial Conduct and Gary R. Tabor, Judge of the Thurston County Superior Court, stipulate and agree as provided herein. This stipulation is submitted pursuant to Article IV, Section 31 of the Washington Constitution and Rule 23 of the Commission's Rules of Procedure and shall not become effective until approved by the Washington Commission on Judicial Conduct.

**I. STIPULATED FACTS**

1. Judge Gary Tabor (Respondent) is now, and was at all times referred to in this document, a judge of the Thurston County Superior Court. Respondent has served in that capacity since 1997.

2. On November 6, 2012, the people of the State of Washington passed Referendum Measure 74. This vote approved same-sex marriages in the State of Washington as previously authorized by legislation passed by the Washington legislature and signed by the governor. The effective date of this change in the law was December 6, 2012. Interested persons could apply for a marriage license beginning on that date.

3. Shortly before Referendum 74 was to take effect, during an administrative meeting attended only by judges and some court personnel, Respondent informed those present that he felt "uncomfortable" performing same-sex marriages and asked his colleagues who did

1 not have similar personal objections to officiate in his stead over such marriages at the  
2 courthouse.<sup>1</sup>

3 4. Respondent's statement that he felt uncomfortable performing same-sex  
4 marriages was broadly publicized after reporters learned about his position from an  
5 unidentified source. After the publication of several newspaper articles and related online  
6 comments, Respondent responded to press inquiries in order to clarify his position. He stated  
7 that his decision not to marry same-sex couples was a very personal one, based on his religious  
8 views. Respondent reasoned that since judges are not required, but are only permitted, to  
9 perform marriages, he believed he was within his rights to personally decline to perform same-  
10 sex marriages, so long as those seeking to have their marriages solemnized had access to  
11 another judge without delay.

12 5. The Commission contacted Respondent on March 2, 2013, after receiving  
13 complaints following publicity about Respondent's position. Respondent timely answered the  
14 Commission's Statement of Allegations on March 18, 2013. Following contact by the  
15 Commission, of his own volition, Respondent ceased performing all marriages in his judicial  
16 capacity.

17 6. Between December 6, 2012 (when Washington's Marriage Equality Act became  
18 effective) and when Judge Tabor ceased performing all marriages in his judicial capacity, he  
19 solemnized approximately ten weddings, all involving opposite-sex couples. He was not given  
20 the option to perform a same-sex marriage ceremony during that time and did not expressly  
21 decline to solemnize any specific same-sex marriage. (The Commission's investigation,  
22 however, indicates a court employee aware of Judge Tabor's position redirected a same-sex  
23 couple scheduled to be married during Judge Tabor's regular wedding rotation to another  
24

25 <sup>1</sup> At that time, each of the eight Thurston County Superior Court judges had agreed to take weekly turns  
26 being the "on-call" judge to perform civil wedding ceremonies after court hours for people who request to be  
married by a judge.

1 judicial officer at the courthouse. Neither the couple nor Judge Tabor were told of the  
2 substitution of judges.)

## 3 4 II. AGREEMENT

5 1. Respondent accepts the Commission's determination that he created an  
6 appearance of impropriety in contravention of Canon 1 (Rules 1.1 and 1.2) and Canon 3 (Rule  
7 3.1(C)) of the Code of Judicial Conduct by publically stating he would not perform same-sex  
8 marriages in his judicial capacity while continuing to perform opposite-sex marriages.

9 2. Rules 1.1, 1.2 and 3.1(C) of the Code oblige judges to avoid impropriety and the  
10 appearance of impropriety by acting at all times in a manner that promotes public confidence in  
11 their independence, integrity and impartiality.<sup>2</sup>

12 3. Washington State's law against discrimination, RCW 49.60, sets forth classes of  
13 people protected by law against discrimination. Sexual orientation is included in the classes of  
14 people protected. Respondent accepts the Commission's determination that, by announcing he  
15 would not solemnize same-sex marriages due to his philosophical and religious concerns while  
16 continuing to solemnize opposite-sex marriages, he appeared to express a discriminatory intent  
17 against a statutorily protected class of people thereby undermining public confidence in his  
18 impartiality. As a comment to Rule 3.1 of the Code explains: "Discriminatory actions and  
19 expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions,  
20 are likely to appear to a reasonable person to call into question the judge's integrity and  
21 impartiality."

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23  
24 <sup>2</sup> Canon 1, Rule 1.1 provides, "A judge shall comply with the law, including the Code of Judicial  
25 Conduct"; Canon 1, Rule 1.2 provides, "A judge shall act at all times in a manner that promotes public confidence  
26 in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of  
impropriety"; and Canon 3, Rule 3.1(C) states, "A judge may engage in extrajudicial activities, except as  
prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not participate  
in activities that would undermine the judge's independence, integrity or impartiality."

1           4.    Respondent is not required as a judicial officer to solemnize marriages.<sup>3</sup> Having  
2 chosen to make himself available to solemnize some weddings, however, he is bound by the  
3 Code of Judicial Conduct to do so in a way that does not discriminate or appear to discriminate  
4 against a statutorily-protected class of people.

5           5.    The Code of Judicial Conduct imposes on judicial officers a specific,  
6 enforceable obligation to avoid bias and the appearance of bias. These obligations go beyond  
7 those imposed on others who serve the general public, reflecting the unique and integral role  
8 judicial officers play in our constitutional scheme of justice honoring the rule of law.<sup>4</sup> Judges  
9 must not only be impartial, but must also be perceived as impartial, in order to properly fulfill  
10 that role. Thus, as set forth in a comment to Rule 1.2 of the Code of Judicial Conduct, "A  
11 judge should expect to be the subject of public scrutiny that might be viewed as burdensome if  
12 applied to other citizens, and must accept the restrictions of the Code."

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### III. IMPOSITION OF SANCTION

15           1.    The sanction imposed by the Commission must be commensurate to the level of  
16 Respondent's culpability, sufficient to restore and maintain the public's confidence in the  
17 integrity of the judiciary, and sufficient to deter similar acts of misconduct in the future. In  
18 determining the appropriate level of discipline to impose, the Commission must consider the  
19 non-exclusive factors set out in Rule 6(c) of its Rules of Procedure.

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21

22                     <sup>3</sup> Solemnizing marriages is an "extra judicial activity," it is not a required duty of the office. It is done in  
23 the judge's official capacity, however – judges are granted the authority by the state to solemnize marriages  
precisely because of their judicial position. See RCW 26.04.050.

24                     <sup>4</sup> In this regard, it is noteworthy that Washington's Marriage Equality Act specifically exempts religious  
25 officials and religious organizations from the requirements of the Act, but not judicial officers. In fact, the  
26 legislature considered and rejected proposed amendments to the bill that would have exempted judicial officers  
from being required to solemnize any marriage that was contrary to the judicial officer's sincerely-held religious  
beliefs.



1 (A) Characteristics of the Misconduct

2 (1) *Whether the misconduct is an isolated instance or evidence of a pattern of*  
3 *conduct.* Though Respondent repeated his position several times and continued to solemnize  
4 opposite-sex marriages for several months, the conduct at issue was singular and uniquely  
5 isolated to the circumstances covered by this stipulation. Respondent amended his conduct  
6 when the issue was brought to his attention. This does not, under these facts, amount to a  
7 pattern of misconduct.

8 (2) *The nature, extent, and frequency of occurrence of the acts of misconduct.*  
9 Respondent's decision to perform only opposite-sex marriages discriminated against a  
10 protected class of people. Discriminatory behavior undermines public confidence in the  
11 integrity and impartiality of the judiciary. At the time Respondent originally announced his  
12 position, he stated he believed it would be an internal, administrative matter, and that he did  
13 not intend to make a public statement, but to act consistently with his personal, sincere  
14 religious beliefs, without depriving citizens of their statutory right to marry. Despite his  
15 intention, his decision was widely publicized, whereupon Respondent stated he made the  
16 decision to address it publicly trying to alleviate concerns about impartiality. He voluntarily  
17 removed himself from the superior court's marriage rotation to further alleviate those concerns.

18 (3) *Whether the misconduct occurred in or out of the courtroom.* The conduct  
19 occurred in the courthouse and in Respondent's capacity as a judge, but not while engaging in  
20 official judicial duties.

21 (4) *Whether Respondent flagrantly and intentionally violated the oath of office.*  
22 Respondent did not flagrantly or intentionally violate his oath of office. He indicates he  
23 initially concluded, in good faith, that he could ethically decline to perform same-sex weddings  
24 based upon his personal religious views so long as same-sex couples were accommodated by  
25 having access to another judge without delay. Respondent now recognizes his analysis did not  
26 adequately take into account the unique and integral role judicial officers play in our

1 constitutional scheme of justice, and how a judge must not only be impartial, but must also be  
2 perceived as impartial, in order to properly fulfill that role.

3 Both the right to be free from discrimination and the First Amendment right to free  
4 exercise of religion are significant and weighty. The Code acknowledges that judges are  
5 individuals with personal rights and beliefs. Ultimately, the Code requires that judges conform  
6 their conduct in their judicial capacity to the Code of Judicial Conduct and other law. For  
7 example, (while Respondent is not charged with violating this Rule), Comment 2 to Rule 2.2  
8 states "Although each judge comes to the bench with a unique background and personal  
9 philosophy, a judge must interpret and apply the law without regard to whether the judge  
10 approves or disapproves of the law in question."

11 (5) *The effect the misconduct has upon the integrity of and respect for the*  
12 *judiciary.* In order to maintain the public's confidence in judicial decisions, a judge must not  
13 only be, but appear to be, free from bias and prepared to rule based strictly on the law and facts  
14 that come before the court, regardless of the extraneous characteristics of the parties. By even  
15 temporarily acting in a discriminatory fashion toward gay men and lesbians, in stating that he  
16 would not solemnize their marriages when he continued to solemnize heterosexual marriages,  
17 and by commenting on that decision publicly, a reasonable person could objectively conclude  
18 that he might act in a discriminatory fashion toward gay or lesbian litigants, lawyers, or  
19 witnesses. The Commission's investigation has shown no indication that Respondent is in fact  
20 biased in the manner in which he conducts his judicial duties, and he has a reputation for being  
21 a scrupulous and well-informed, hard-working judge.

22 (6) *Nature and extent to which the acts of misconduct have been injurious to*  
23 *other persons.* The injury is to public confidence in Respondent's impartiality on issues that  
24 may come before him involving same-sex couples or even toward gay or lesbian lawyers,  
25 litigants, or witnesses. In addition, marriages sometimes lead to litigation and Respondent  
26 could well have created the impression he might be less than fair to a lesbian or gay person in a

1 dissolution or custody dispute matter. Respondent has credibly stated, and his conduct toward  
2 this proceeding has demonstrated, that he takes very seriously his responsibility to avoid the  
3 appearance of impropriety, and that he has deep respect for the institution of the court and its  
4 reputation for impartiality.

5           (7) *The extent to which Respondent exploited his official capacity to satisfy*  
6 *personal desires.* There is no indication Respondent exploited his position to satisfy personal  
7 desires. Respondent has stated that his position was a personal one, and that he had no  
8 intention to politicize or publicize it.

9           **(B) Service and Demeanor of the Judge**

10           (1) *Whether Respondent has acknowledged or recognized that the acts*  
11 *occurred.* Respondent has acknowledged and recognized that the acts occurred and has shown  
12 a clear and sincere understanding of the concerns of the Commission regarding his actions and  
13 the Code.

14           (2) *Whether Respondent has evidenced an effort to change or modify the*  
15 *conduct.* On his own volition, Respondent stopped solemnizing marriages in his capacity as  
16 judge.

17           (3) *Respondent's length of service in a judicial capacity.* Respondent has been  
18 an elected superior court judge for over 16 years. The Commission's investigation has shown  
19 he has a reputation for being a fair and impartial jurist, and one who is hard-working and well-  
20 informed in law.

21           (4) *Whether there has been prior disciplinary action concerning Respondent.*  
22 There has been no prior disciplinary action involving Respondent.

23           (5) *Whether Respondent cooperated with the Commission's investigation and*  
24 *proceeding.* Respondent has cooperated with the Commission investigation and has conducted  
25 himself in a highly professional manner in all respects concerning this proceeding.  
26

1                   (6) *Respondent's compliance with an ethics advisory opinion, if any.* The  
2 conduct covered by this stipulation took place at a time of change, when longstanding law was  
3 just changed, after an extended campaign and a challenge to the legislature's and governor's  
4 passage of a new same-sex marriage law. The views of the majority of the population are  
5 plainly in flux, and this set of circumstances has not previously been squarely set before the  
6 court or a judicial ethics advisory body. Respondent recognizes that part of the purpose of  
7 Commission action is to inform other judges and the public of the meaning of the Code, and in  
8 that way to serve an education function.

9           2.       Based upon the stipulated facts, upon consideration and balancing of the above  
10 factors, Respondent and the Commission agree that the imposition of an admonishment is  
11 appropriate in this matter. An "admonishment" is a written action of the Commission of an  
12 advisory nature that cautions a respondent not to engage in certain proscribed behavior and  
13 may include a requirement that the respondent follow a specified corrective course of action.  
14 An "admonishment" is the least severe disciplinary action available to the Commission.

15           3.       Respondent agrees that he will not repeat such conduct in the future, mindful of  
16 the potential threat any repetition of his conduct poses to public confidence in the integrity and  
17 impartiality of the judiciary and to the administration of justice.

18           4.       Respondent agrees he will promptly read and familiarize himself with the Code  
19 of Judicial Conduct in its entirety.

20                               Standard Additional Terms and Conditions

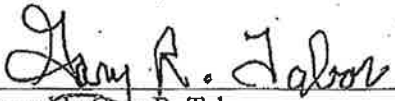
21           5.       Respondent agrees that by entering into this stipulation and agreement, he  
22 waives his procedural rights and appeal rights in this proceeding pursuant to the Commission  
23 on Judicial Conduct Rules of Procedure and Article IV, Section 31 of the Washington State  
24 Constitution.

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6. Respondent acknowledges and represents that he either consulted or has had an opportunity to consult with counsel of his choosing regarding this stipulation and proceeding. Respondent represents he voluntarily enters into this stipulation and agreement.

7. Respondent further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

  
\_\_\_\_\_  
Honorable Gary R. Tabor  
Thurston County Superior Court Judge

Sept. 13, 2013  
Date

  
\_\_\_\_\_  
J. Reiko Callner  
Executive Director  
Commission on Judicial Conduct


9-16-13  
Date

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**IV. ORDER OF ADMONISHMENT**

Based on the above Stipulation and Agreement, the Commission on Judicial Conduct hereby orders Respondent, Judge Gary R. Tabor, ADMONISHED for violating Canon 1, Rules 1.1 and 1.2, and Canon 3, Rule 3.1 of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future and shall fulfill all of the terms of the Stipulation and Agreement as set forth therein.

DATED this 4 day of October, 2013.

  
\_\_\_\_\_  
Joseph G. Bell, Acting Chair  
Commission on Judicial Conduct

# JUDICIAL CONDUCT BOARD OF PENNSYLVANIA

## NEWSLETTER

No. 3 Summer 2014

### *Message from the Chair*

We're a few weeks away from the 2014 general election at which time the Commonwealth's electorate will vote for our next Governor, members of Congress, all members of the State House and half of the State Senate. Since judges are precluded from partisan political activity, the election would not typically be a topic of discussion in a Newsletter directed to the Commonwealth's judiciary. But, under the New Code of Judicial Conduct which we highlighted in our Spring Newsletter, campaigning for judicial offices that will be on next year's ballot may begin on November 5, 2014, the day after the general election. This new start point for judicial electioneering was borrowed from the Rules Governing Standards of Conduct of Magisterial District Judges which were amended a number of years ago to establish this new start date. This year, the first day for campaigning will be the same for all judicial candidates; however, for 2014 only, the start date for fundraising will differ. Because the New Rules Governing Standards of Conduct of Magisterial District Judges do not go into effect until December 1, 2014, MDJ candidates must wait until that date to begin their fundraising efforts.

This is but one of the new changes brought about by the adoption of the New Code and New Rules Governing Standards of Conduct of Magisterial District Judges. There are several other important changes impacting campaign conduct, some of which will soon take effect for magisterial district judge candidates, including incumbents seeking reelection. These changes are discussed in an article, *Campaigning for Judicial Office*, authored by Board Chief Counsel Robert A. Graci.

Another timely topic for discussion results from the decision earlier this year by the federal district court declaring Pennsylvania's ban on same-sex marriages unconstitutional. This begs the question, must all judges officiate at such weddings if requested to do so. The rules binding all of the Commonwealth's judicial officers require that judges be and appear to be impartial. A decision to perform weddings ... or not to perform them ... may implicate the duty of impartiality. Board Deputy Counsel Elizabeth A. Flaherty addresses the conduct issues that may arise from a judge's decisions in this area in an article entitled, *Impartiality in Solemnizing Marriages*.

Finally, it is my honor to introduce the Bench to the Board's newest member: James C. Schwartzman, Esquire. Jim was appointed to the Board in August by the Supreme Court. Jim is a lawyer with Stevens & Lee with a background representing judges and lawyers in ethics matters.

As I have noted previously, I hope that the matters discussed in the Board's Newsletter are informative and helpful to you and that you will provide feedback to the information that we provide.

With best personal and professional regards, I am

Most respectfully,  
**Anne**

Anne E. Lazarus  
Chair, Judicial Conduct Board

## ***Impartiality in Solemnizing Marriages***

**By**

**Elizabeth A. Flaherty, Deputy Counsel, Judicial Conduct Board**

On May 20, 2014, Federal District Court Judge John E. Jones III held that Pennsylvania laws banning same-sex marriage "violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution." *Whitewood v. Wolf*, 992 F.Supp.2d 410, 431 (M.D. Pa. 2014). The following day, Pennsylvania Governor Thomas W. Corbett announced that he would not appeal the decision. Accordingly, the Commonwealth must permit same-sex couples to marry and must recognize prior same-sex marriages as legal. *Id.*

In response to the new ruling, a few Pennsylvania judicial officers have spoken out publicly, stating that they are not willing to perform same-sex weddings because of their personal or religious beliefs. The purpose of this article is to examine the judicial conduct issues that may arise when a judge declines to perform some or all wedding ceremonies.

As a preliminary matter, in Pennsylvania, there is no statutory requirement that judges perform wedding ceremonies. The Domestic Relations Code provides that justices, judges, magisterial district judges (MDJs) and other enumerated persons "are authorized to solemnize marriages between persons that produce a marriage license." 42 Pa.C.S.A. § 1503(a)(1). The jurisdiction of these members of the judiciary is set forth in the Judicial Code (42 Pa.C.S.A. § 101 *et seq.*), yet the performance of wedding ceremonies is not listed as a jurisdictional matter. See, e.g., 42 Pa.C.S.A. § 1515(a) (list of jurisdictional matters for MDJs does not include solemnizing marriages). Therefore, the authorization for judges to solemnize marriages is permissive and not mandatory.

Typically, when a couple requests that a Pennsylvania judicial officer officiate at their wedding, it is a MDJ who performs the ceremony. Some judges and justices officiate at weddings on a less frequent basis. It has been suggested that the existence of a statutorily imposed "cost to be charged" by a MDJ for the performance of a wedding (42 Pa.C.S.A. § 1725.1(c)(2)), coupled with the absence of a statutorily imposed cost to be charged by justices and judges, is proof that MDJs are obligated to officiate at wedding ceremonies upon the request of a betrothed couple. However, the mere existence of a cost assigned to a ceremony performed by a MDJ does not transform the authorization to solemnize weddings into a requirement.<sup>1</sup>

Persuasively, in Washington State, judges are authorized by statute to solemnize weddings (RCW 26.04.050) and may charge a fee. For example, the Seattle Municipal Court posts its fee schedule for the performance of a wedding

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<sup>1</sup> As will be expressed below, it does not matter if the performance of wedding ceremonies is mandatory or permissive because in either case a judge who acts in a discriminatory matter toward a same sex couple, who requests that the judge perform their wedding ceremony, could be subject to discipline.



ceremony by a judge. <http://www.seattle.gov/courts/judgemag/marriage.htm>. Yet, the Commission on Judicial Conduct of the State of Washington determined in a recent case, submitted by stipulation, that judicial officers are not required to perform wedding ceremonies. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158 (Wash. Comm. on Judicial Conduct 2013). So too under Pennsylvania law, it appears that justices, judges and MDJs have discretion as to whether they choose to perform wedding ceremonies.

This discussion refers to the New Code of Judicial Conduct (New Code), effective July 1, 2014 and the New Rules Governing Standards of Conduct for Magisterial District Judges (New MDJ Rules), effective December 1, 2014. Additionally, the analogous Rules from the current MDJ Rules (Old MDJ Rules) are cited in the footnotes as a reminder that those Rules govern and similarly restrict a MDJ's conduct concerning the performance of same-sex marriages at the present time and up to the December 1, 2014 effective date of the New MDJ Rules.

The pertinent issues include the following:

1. Whether a judge may perform wedding ceremonies for opposite-sex couples but refuse to officiate at wedding ceremonies for same-sex couples?
2. Whether, a judge who stopped performing all wedding ceremonies after *Whitewood*, because of personal or religious beliefs, may officiate at future opposite-sex weddings of family or friends that the judge committed to prior to *Whitewood*?
3. Whether, after *Whitewood*, a judge's decision to stop performing all wedding ceremonies provides the basis for disqualification or recusal of the judge from deciding the legal matters of a gay or lesbian litigant who appears before the judge?

The questions implicate Canon 1, Rules 1.1 and 1.2, Canon 2, Rules 2.3, 2.7 and 2.11, and Canon 3, Rule 3.1(C) of both the New Code and the New MDJ Rules. For purposes of simplicity, this article quotes the Rules from the New Code but also includes bracketed words to indicate where the New MDJ Rules differ slightly from the New Code.

In accord with Canon 1, Rule 1.2 of the New Code, a judge who decides not to perform wedding ceremonies for same-sex couples must opt out of officiating at *all* wedding ceremonies.

#### **Rule 1.2 Promoting Confidence in the Judiciary**

Rule 1.2 provides:

A judge [magisterial district judge] shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

New Code, Canon 1, Rule 1.2.<sup>2</sup> Impartiality is defined as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties." New Code, Terminology, "Impartial, impartiality, impartially." If a judge agrees to officiate at weddings of opposite-sex couples, but declines to officiate at weddings of same-sex couples, then the judge is *not* impartial because s/he acts in favor of a "class of parties," heterosexuals, and against another "class of parties," homosexuals. It is irrelevant that the engaged couple is not a "party" appearing in court because Rule 1.2 controls a judge's conduct "at all times."

By demonstrating partiality for opposite-sex couples and against gay and lesbian couples seeking to marry, a judge's conduct is necessarily improper and gives the appearance of impropriety in violation of Canon 1, Rule 1.2.<sup>3</sup> Impropriety includes "conduct that undermines a judge's independence, integrity, or impartiality." New Code, Terminology, "Impropriety." Appearance of impropriety is evident when a judge's conduct "create[s] in reasonable minds a perception that the judge [magisterial district judge] violated this Code [these Conduct Rules] or engaged in other conduct that reflects adversely on the judge's [magisterial district judge's] honesty, impartiality, temperament, or fitness to serve as a judge [magisterial district judge]." New Code, Canon 1, Rule 1.2 cmt. [5].

In this same hypothetical, the preferential treatment of heterosexual couples versus homosexual couples is improper and gives the appearance of impropriety which, under the New Code, is a chargeable offense, even if the misconduct did not violate another part of the New Code. Such conduct undermines the public confidence of the judiciary in violation of Canon 1, Rule 1.2 and may subject the judge to sanction by the Court of Judicial Discipline.

An example of a similar set of facts occurred in Washington soon after the December 6, 2012 legalization of same sex marriage in that state. Judge Gary Tabor publicly announced that he would refuse to perform same-sex wedding ceremonies based on his religious beliefs, but continue to officiate at opposite-sex weddings. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158. When the Commission on Judicial Conduct of the State of Washington contacted Judge Tabor about his announcement, he ceased voluntarily the performance of all wedding ceremonies. Following investigation, the Commission determined that the judge's conduct of refusing to perform same-sex weddings, while still solemnizing opposite-sex marriages, gave the appearance of impropriety and adversely reflected on the impartiality of the judiciary in violation of Canon 1, Rules 1.1 and 1.2 and Canon 3, Rule 3.1(C) of the Washington Code of Judicial Conduct. *Id.* Ultimately, the Commission admonished Judge Tabor for his misconduct. *Id.*

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<sup>2</sup> Old MDJ Rule No. 2A provides: "Magisterial district judges shall . . . conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

<sup>3</sup> The Note to Old MDJ Rule 2 states: "Magisterial district judges must avoid all impropriety and the appearance of impropriety. They must expect to be the subject of constant public scrutiny. They must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

After *Whitewood*, the conduct of a Pennsylvania judge who declines to perform wedding ceremonies for same-sex couples, but continues to perform them for opposite-sex couples, may violate other Rules. When a judge chooses to conduct a wedding ceremony, s/he acts in an official judicial capacity, authorized by statute. 42 Pa.C.S.A. § 1503(a)(1). However, it is unclear if the unrequired but agreed to performance of the ceremony is a judicial duty or an extrajudicial activity. If it is viewed as a judicial duty, then Canon 2, Rule 2.3(B) of the New Code applies.

### **Rule 2.3 Bias, Prejudice, and Harassment**

Rule 2.3 (B) provides:

A judge [magisterial district judge] shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status . . .

Comment [2] states:

A judge [magisterial district judge] must avoid conduct that may reasonably be perceived as prejudiced or biased.

New Code, Canon 2, Rule 2.3(B) & cmt. [2].<sup>4</sup> Whereas, if the performance of a wedding ceremony is viewed as an extrajudicial activity, the judge who refuses to solemnize same-sex marriages but continues to do so for opposite-sex couples is still in violation of the New Code under Canon 3, Rule 3.1(C).

### **Rule 3.1(C) Extrajudicial Activities in General**

Rule 3.1(C) provides:

Judges [magisterial district judges] shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all the provisions of this Canon. However, a judge [magisterial district judge] shall not:

(C) Participate in activities that would reasonably appear to undermine the judge's [magisterial district judge's] independence, integrity, or impartiality.

Comment [3] states:

Discriminatory actions and expressions of bias or prejudice by a judge [magisterial district judge], even outside of the judge's [magisterial district judge's] official or judicial actions, are likely to appear to a reasonable person to call into question the judge's [magisterial district judge's] integrity and impartiality.

<sup>4</sup> Old MDJ Rule No. 8A(1) refers to bias or prejudice as a basis for disqualification.

New Code, Canon 3, Rule 3.1(C) & cmt. [3].<sup>5</sup>

Both Rules prohibit discriminatory conduct by a judge. A reasonable person is likely to perceive that a judge who agrees to perform wedding ceremonies for one particular class of people, heterosexual individuals, and refuses to do the same for another class of people, gay and lesbian individuals, may be acting out of prejudice or bias based on sexual orientation.

The Washington Commission on Judicial Conduct considered the act of solemnizing a marriage to be an extrajudicial activity. *In Re the Matter of: The Honorable Gary Tabor*, CJC No. 7251-F-158. Pennsylvania has yet to determine if the act of performing a wedding ceremony is a judicial duty or an extrajudicial activity. Regardless of the classification of the act of solemnizing a marriage, a judge may not act in a discriminatory, biased and prejudiced manner toward a same-sex couple regarding the solemnization of a wedding ceremony. If substantiated, such conduct would be a violation of either Canon 2, Rule 2.3(B) or Canon 3, Rule 3.1(C) and subject the judge to the disciplinary process before the Judicial Conduct Board and the Court of Judicial Discipline.

The second issue concerns whether a judge, who stopped performing all wedding ceremonies after the legalization of same-sex marriage, is permitted to officiate at the post-*Whitewood* weddings of friends who scheduled their weddings prior to the change in law: Neither the scheduling of the wedding nor the relationship between the judge and his or her friends alter the duty of the judge to be impartial in the performance of all wedding ceremonies. For example, on May 19, 2014, a judge's friend and her fiancé, an opposite-sex couple, ask the judge to perform their wedding ceremony on November 1, 2014. The judge agrees to officiate and marks the commitment on the court calendar. On May 20, 2014, Judge Jones issued his opinion in *Whitewood* and legalized same-sex marriage. Subsequently, the judge in this hypothetical announces that s/he is not comfortable performing same-sex marriages and, in an effort to avoid misconduct, stops performing all wedding ceremonies.

If that same judge makes an exception for his friend and her fiancé and presides over their November 1, 2014 wedding, the judge's solemnization of that opposite-sex marriage may trigger a complaint that the judge failed to act impartially and that his conduct was improper and gave the appearance of impropriety in violation of Canon 1, Rules 1.2 and Canon 2, Rule 2.3 as set forth above. Importantly, it is not the timing of the request for and scheduling of the wedding, but the actual performance of the ceremony in relation to the *Whitewood* decision that matters. After *Whitewood*, a judge, who demonstrates preferential treatment to an opposite-sex couple, and denies equal treatment to a same-sex couple, runs the risk of violating the Canons and Rules. Such conduct could result in a complaint before the Judicial Conduct Board and, if proven by clear and convincing evidence, possible sanction by the Court of Judicial Discipline.

The third issue is whether, after *Whitewood*, a judge's decision to stop performing all wedding ceremonies provides the basis for disqualification or recusal

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<sup>5</sup> Although Canon 3 of the Old Code encompassed extrajudicial activities, the Old MDJ Rules did not specifically address this issue.

of the judge from deciding the legal matters of a gay or lesbian litigant who appears before the judge. The Rules that govern this issue are Canon 2, Rules 2.7 and 2.11.

### **Rule 2.7 Responsibility to Decide**

Rule 2.7 states:

A judge [magisterial district judge] shall hear and decide matters assigned to the judge [magisterial district judge], except where the judge [magisterial district judge] has recused himself or herself or when disqualification is required by Rule 2.11 or other law.

### **Rule 2.11 Disqualification**

Rule 2.11 (A)(1) provides:

(A) A judge [magisterial district judge] shall disqualify himself or herself in any proceeding in which the judge's [magisterial district judge's] impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge [magisterial district judge] has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

New Code, Canon 2, Rules 2.7<sup>6</sup> & 2.11(A)(1).<sup>7</sup> A gay or lesbian litigant may suspect that a judge is acting out of bias and prejudice against homosexuals, based on their sexual orientation, if s/he is aware that the judge previously performed wedding ceremonies for heterosexual couples but stopped officiating at all wedding ceremonies after *Whitewood*. This suspicion may cause that same litigant to question the ability of the judge to decide impartially the litigant's substantive case because of perceived bias or prejudice against gays and lesbians generally. As a result, the gay or lesbian litigant or his or her counsel may decide to make a motion for the judge's recusal or for a change in venue.

In the alternative, if a judge, who announced publicly that s/he will not perform wedding ceremonies for same-sex couples, knows for a fact that a litigant is gay or lesbian, then the judge should disclose from the bench his or her decision not to officiate at all weddings. Comment [3] to Rule 2.7 provides:

A judge [magisterial district judge] should disclose information that the judge [magisterial district judge] believes the parties or their

<sup>6</sup> Old MDJ Rule No. 9A provides: "Magisterial district judges disqualified by Rule 8A(3) or (4) may, instead of withdrawing from the proceeding, disclose the basis for disqualification."

<sup>7</sup> Old MDJ Rule No. 8A(1) states: "Magisterial district judges shall disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: (1) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge [magisterial district judge] believes there is no proper basis for disqualification or recusal.

New Code, Canon 2, Rule 2.7 cmt. [3]. For instance, when a judge knows that the landlord appearing before him in a landlord and tenant matter is gay or lesbian, and the judge publicly declared his views about solemnizing weddings, the judge has an affirmative duty to disclose his change in position about performing wedding ceremonies because it may be perceived as relevant to the judge's ability to rule impartially on those cases. The burden then shifts to the gay or lesbian litigant, or his or her counsel, to seek clarification about the judge's ability to adjudicate the case without bias or prejudice.

The judge should then explain to the gay or lesbian party and his or her attorney that the judge's discomfort about solemnizing same-sex marriages arises solely from religious beliefs, not out of animus based on sexual orientation. If the judge believes that s/he can decide the landlord and tenant matter impartially, free of personal bias and prejudice, then the judge should make a statement to that effect.<sup>8</sup> Still, the litigant may proceed to make a motion for disqualification or recusal. At that point, the judge must decide whether the requested disqualification or recusal is necessary.

Finally, whenever a judge violates a Rule within the New Code, the judge necessarily violates Canon 1, Rule 1.1.

#### **Rule 1.1 Compliance with the Law**

A judge [magisterial district judge] shall comply with the law, including the Code of Judicial Conduct [Rules Governing Standards of Conduct of Magisterial District Judges].

New Code, Canon 1, Rule 1.1.<sup>9</sup> Therefore, if the Court of Judicial Discipline determines that a judge violated any of the Rules, the Court may also find, as an

<sup>8</sup> In those instances where a court reporter is transcribing the proceedings, the judge should make a disclosure statement on the record. Neither PA district courts nor appellate courts are courts of record. Therefore, the disclosure statement should be memorialized in a writing.

<sup>9</sup> Old MDJ Rule No. 2A provides: "Magisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Since the October 30, 2013 Pennsylvania Supreme Court decision in *Carney*, a justice, judge or magisterial district judge whose conduct fails to comply with the law is subject to discipline, whether or not such conduct implicates the judicial decision making process. *In re Carney* 79 A3d, 490 (Pa. 2013). See Robert A. Graci & Elizabeth A. Flaherty, *Judges Must "Respect and Comply with the Law"*, Judicial Conduct Board of Pennsylvania Newsletter No. 1 (Winter 2014).

automatic derivative, that the judge violated Rule 1.1 by failing to comply with the New Code of Judicial Conduct or the New MDJ Rules.

In sum, same-sex marriage and the recognition of prior same-sex marriages is now the law in Pennsylvania. As a result, justices, judges and MDJs must carefully weigh their individual decisions about whether or not to perform wedding ceremonies for opposite-sex and same-sex couples. To steer clear of claims of judicial misconduct involving impartiality, bias and prejudice, a judge may decide to stop officiating at all weddings. Even if a judge decides not to perform any weddings, the judge's change in conduct may be interpreted by some individuals as an indication of bias and prejudice against homosexuals as a class. Furthermore, following a judge's decision to stop presiding at weddings, disqualification and recusal problems may arise in substantive cases involving gay and lesbian parties who appear before the judge. The New Code, the Old MDJ Rules and the New MDJ Rules, specifically provide for each of these issues and serve as a guide to judges who must now consider the importance of impartiality in the solemnization of marriages.

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*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

REVISED ADVISORY OPINION 15-01  
(March 9, 2015)

**JUDICIAL OBLIGATION TO PERFORM SAME-SEX MARRIAGES**

**Overview**

The Judicial Ethics Advisory Committee (JEAC) has received an inquiry containing a series of questions centered on whether a judge who performs opposite-sex marriages may decline to perform same-sex marriages. Below are the questions asked, with brief answers, followed by a discussion of the applicable provisions of the Arizona Code of Judicial Conduct.

**Questions and Brief Answers**

1. May a judge distinguish between same-sex and opposite-sex couples when determining whether to perform a marriage ceremony?

**No.**

2. May a judge decline to perform same-sex marriage ceremonies if the individuals with a marriage license are referred to another court or individual?

**No.**

3. May a judge decline to perform same-sex marriages if the judge performs other marriages in a court facility?

**No.**

4. May a judge decline to perform same-sex marriages if the judge conducts all opposite-sex wedding ceremonies at locations that are not at a court facility?

**No.**

5. Do the answers to questions 1 through 4 change if the judge's decision to not conduct same-sex marriages is based upon the judge's sincerely held religious belief that marriage is the union of one man and one woman?

**No.**



6. Do the answers to questions 1 through 4 change if the judge's decision to not conduct same-sex marriages is based upon a personal belief rather than a sincerely held religious belief?

No.

7. May a judge choose to conduct marriage ceremonies only for friends and relatives?

A qualified yes.

### Discussion

Same-sex marriages are now legal in Arizona. *See Majors v. Horne*, 14 F.Supp.3d 1313 (D. Ariz. 2014). Although still the subject of debate and continuing litigation, same-sex couples have been marrying in Arizona since October 2014. The JEAC received a multi-question inquiry regarding the obligation of judicial officers to perform same-sex marriages. At the core of the JEAC's response below is the principle that a judge who chooses to perform marriages may not discriminate between marriages based on the judge's opposition to the concept of same-sex marriage.

Rule 2.3(B) of the Arizona Code of Judicial Conduct provides that a judge shall not, "in the performance of judicial duties," manifest bias or prejudice based upon sexual orientation. Although the performance of a marriage by a judge is a "discretionary function" rather than a mandatory function under Rule 3.16 of the Code, it is based on statutory authority granted by the legislature. Because of this specific grant of authority, the JEAC concludes that the performance of a marriage by a judicial officer is performance of a "judicial duty" as contemplated by the Code.

Because performing a marriage is a discretionary function, a judge may, consistent with the Code, decline to perform any marriages whatsoever. *Cf.* Rule 3.6(C) (recognizing a judge's right to exercise freedom of religion). But because performing a marriage is a judicial duty within the scope of Rule 2.3(B), a judge cannot refuse to perform same-sex marriages if the judge is willing to perform opposite-sex marriages. This principle resolves questions 1 through 6 above. It makes no difference whether the judge refers same-sex couples to another judicial officer (question 2), where the judge performs the marriages (questions 3 and 4), or on what principle the judge has declined to perform a same-sex marriage (questions 5 and 6). If a judge chooses to perform marriages, refusing to perform a same-sex marriage

based on the participants' sexual orientation manifests bias or prejudice and violates Rule 2.3(B).

Refusing to perform same-sex marriages, while agreeing to perform opposite-sex marriages, also violates Rule 2.2 of the Code which provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

The issue raised in question 7 is more nuanced. The JEAC concludes that a judge may choose for various reasons not to conduct any marriages at all because performing marriages is a discretionary, not mandatory, function. A judge may also choose to conduct marriages only for friends and relatives to the exclusion of all others. Such a choice would not run afoul of Rule 2.3(B) because it is not based on sexual orientation. Of course, a judge who performs marriages only for friends and relatives would violate Rule 2.3(B) if the judge refuses to perform marriages for same-sex friends and relatives.

The JEAC recognizes the potential misuse of any accepted limitation on the categories of marriages a judicial officer is willing to perform. For example, broadly defining "friends" as all members of a social club or a church would seem to create a pathway for a judicial officer to perform marriages yet still decline to perform same-sex marriages. This practice likely would undermine a judge's ability to assert a non-discriminatory intent and the protection of this opinion in defense of a misconduct charge.

However, the JEAC does not believe that this potential misuse of a narrow category of marriages that a judge may perform justifies an all or nothing approach, where a judge either must accept every request, or perform no marriages at all. Instead, the JEAC believes that the question of whether a judge truly has a non-discriminatory reason for declining to perform a same-sex marriage must be determined on a case-by-case basis.

# Nebraska Judicial Ethics Committee Opinion 15-1

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## *Question Presented--*

May a judge or clerk magistrate: refuse to perform marriages for same-sex couples; refuse to perform marriages for same-sex couples if the couple can be referred to another judge willing to perform the ceremony; refuse to perform same-sex marriages if based on a personal or sincerely held religious belief that marriage is between one man and one woman; refuse to conduct all marriages; or limit performing marriage ceremonies to only close friends and relatives?

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## **Conclusion**

With limited exceptions, the Nebraska Revised Code of Judicial Conduct does not permit a judge or clerk magistrate to refuse to perform same-sex marriages.

## **Statement of Facts**

On June 26, 2015, the U.S. Supreme Court ruled that the 14th Amendment requires a state to license a marriage between two people of the same sex. See *Obergefell v. Hodges*, Nos. 14-55b, 14-562, 14-571, 14-574, 2015 WL 2473451 (U.S. June 26, 2015). The U.S. Supreme Court held that state laws restricting same-sex marriage are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at \*4. The Administrative Office of the Courts has sought an advisory opinion with regard to a number of anticipated questions, as set forth above, now that Nebraska’s prohibition on same-sex marriage has been invalidated by the high court.

## **Applicable Code Sections**

Neb. Rev. Code of Judicial Conduct, Canon 1 and §§ 5-301.0, 5-301.1, 5-301.2

Neb. Rev. Code of Judicial Conduct, Canon 2 and §§ 5-302.0, 5-302.2, 5-302.3

Neb. Rev. Code of Judicial Conduct, Canon 3 and §§ 5-303.01, 5-303.16

## **References in Addition to Nebraska Revised Code of Judicial Conduct**

Neb. Rev. Stat. § 42-108 (Reissue 2008).

## **Discussion**

Although the performance of marriage ceremonies is not a mandatory function for a judge or clerk magistrate, the Legislature has limited the authority to conduct such ceremonies to clergy, judges, retired judges, clerk magistrates, and retired clerk magistrates. See Neb. Rev. Stat. § 42-108 (Reissue 2008); Neb. Rev. Code of Judicial Conduct § 5-303.16. Because of this narrow and specific grant of authority, the Committee concludes that the performance of a marriage ceremony by a judge or clerk magistrate is performance of a judicial function under the Code.

Section 5-302.3(A) and (B) requires a judge to perform the duties of judicial office “without bias or prejudice,” and, specifically, to not manifest bias or prejudice based on sexual

orientation. If a judge is willing to perform traditional marriages, his or her refusal to perform same-sex marriages would be a manifestation of bias or prejudice based on sexual orientation when a valid law permits such couples to marry, even if the judge states that the reason is based on sincerely held religious beliefs or upon a personal belief. Section 5-302.2 provides that “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Comment [2] acknowledges that while each judge comes to the bench with a unique background and personal philosophy, “a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.” Thus, a refusal to perform a marriage based on the couple’s sexual orientation manifests bias or prejudice, and violates §§ 5-302.2 and 5-302.3.

While § 5-303.16 lists the performance of a marriage ceremony as an extrajudicial activity, Canon 3 states that “[a] judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.” When engaging in extrajudicial activities, a judge shall not “participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” § 5-303.1(C).

Most basically, § 5-301.1 requires that “[a] judge shall comply with the law, including the Code of Judicial Conduct.” Section 5-301.2 states that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Comment [5] sets forth a test for appearance of impropriety as “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.” Because the U.S. Supreme Court has invalidated prohibitions against same-sex marriage, the refusal to perform such marriages while performing opposite-sex marriages would constitute a refusal to follow the law, a violation of § 5-301.1. In addition, a refusal to perform a same-sex marriage would question the integrity and impartiality of the judiciary as well as giving the appearance of impropriety, a violation of § 5-301.2.

In summary, the Committee concludes that when the U.S. Supreme Court’s decision in *Obergefell* takes effect, a judge or clerk magistrate may not refuse to perform a same-sex marriage notwithstanding the judge’s or clerk’s personal or sincerely held religious belief that marriage is between one man and one woman. A refusal to perform the ceremony but providing a referral to another judge willing to perform a same-sex marriage similarly manifests bias or prejudice based on a couple’s sexual orientation and is prohibited. A judge or clerk magistrate may avoid such personal or religious conflicts by refusing to perform all marriages, because the performance of marriage ceremonies is an extrajudicial activity and not a mandatory duty. While a judge or clerk magistrate who chooses to only perform marriage ceremonies for close friends and relatives is not obligated to perform ceremonies for those who are not close friends and relatives, as such a practice is not based on a discriminatory intent, a judge or clerk magistrate who performs marriages only for close friends or relatives may not refuse to perform same-sex marriages for close friends or relatives.

**Disclaimer**

*This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Revised Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.*

APPROVED AND ADOPTED BY THE COMMITTEE  
ON JUNE 29, 2015

*Judge John F. Irwin  
Judge J Russell Derr  
Judge Linda S. Caster Senff  
Judge Max J. Kelch  
Judge Edward D. Steenburg  
Judge Vicky L. Johnson  
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# The Supreme Court of Ohio

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### OPINION 2015-1

Issued August 7, 2015

### Judicial Performance of Civil Marriages of Same-Sex Couples

**SYLLABUS:** A judge who exercises the authority to perform civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages. A judge may not decline to perform all marriages in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs.

**QUESTIONS PRESENTED:** The Board of Professional Conduct received inquiries from judges and a judicial association on behalf of its members seeking guidance concerning the obligation of a judge to perform same-sex civil marriages: 1) whether a judge who is authorized to perform marriages may refuse to marry same-sex couples based on personal, moral, or religious beliefs, but continue to marry opposite-sex couples; 2) whether a judge may decline to perform all marriages to avoid marrying same-sex couples.

**APPLICABLE RULES:** Jud. Cond. R. 1.1, 1.2, 2.2, 2.3, 2.4, 2.11, and Prof. Cond. R. 8.4(g).

### OPINION:

#### *Background*

On June 26, 2015, the U.S. Supreme Court found the right to marry the person of one's choice to be a fundamental right under the Fourteenth Amendment of the United States Constitution. The laws of several jurisdictions, including Ohio that restricted marriage to only opposite-sex couples were declared unconstitutional. *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 35 S. Ct. 2584, 192 L.Ed.2d 609 (2015). The Supreme Court specifically held that state laws restricting same-sex marriage are "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Id.*

*Obergefell* is considered the law of the land and applies equally across all jurisdictions. See *Marbury v. Madison*, 5 U.S. 137, 180 2 L.Ed. 60 (1803).

In Ohio, municipal, county, and probate judges are specifically authorized by statute to perform civil marriage ceremonies. R.C. 1907.18(C), 1901.14(A)(1), 2101.27, and 3101.08. Whether judges are mandated or authorized by the Ohio Revised Code to perform civil marriages is a legal question and beyond the scope of the advisory opinion authority granted to the Board by the Supreme Court of Ohio. Gov. Bar R. V, Section 2(D), BPC Reg. 15(B)(1).<sup>1</sup> However, the General Assembly has granted judges the authority to perform marriages because of the unique public office that they hold. When a judge performs a civil marriage ceremony, the Board concludes that the judge is performing a judicial duty and thus is required to follow the Code of Judicial Conduct in the performance of that duty.

### *Judicial Oath of Office*

Every judge is required to take an oath prior to each term of office in a form prescribed by R.C. 3.23:

I, (name), do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all of the duties incumbent upon me as a judge according to the best of my ability and understanding. [This I do as I shall answer unto God.]

The oath represents the judge's solemn and personal vow that he or she will impartially perform all duties incumbent on the office and do so without regard to the status or class of persons or parties who come before the court. The oath is a reflection of the self-evident principle that the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty. When a judge takes the oath of office, "he or she yields the prerogative of executing the responsibilities of the office on any basis other than the fair and impartial and competent application of the law...." *Mississippi Judicial Performance Com'n v. Hopkins*, 590 So.2d 857, 862 (Miss. 1991).

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<sup>1</sup> The Board may only issue nonbinding advisory opinions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Code of Judicial Conduct, or the Attorney's Oath of Office.

A judge's oath to support the constitutions of the United States and the State of Ohio requires the judge to recognize and adhere to binding court interpretations of the same. A judge's unilateral decision to refuse to perform same-sex marriages based on his or her own personal, religious, or moral beliefs ignores the holding in *Obergefell* and thus, directly contravenes the oath of office.

### *Code of Judicial Conduct*

#### *Jud. Cond. R. 1.1—Compliance with the law*

Jud. Cond. R. 1.1 requires a judge to comply with the law. A judge is always required to comply with the law and has a higher duty than ordinary citizens to comply. *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902. The definition of "law" encompasses court rules, the Code of Judicial Conduct, the Rules of Professional Conduct, statutes, constitutional provisions, and decisional law. Jud. Cond. R., *Terminology*. Consequently, a judge is required to comply with the U.S. Constitution and binding decisional law interpreting its provisions. A judge's refusal to marry same-sex couples, while continuing to marry opposite-sex couples, is contrary to the holding in *Obergefell*, and thus not in accord with the judge's obligation to comply with the law.

#### *Jud. Cond. R. 1.2—Independence, integrity, and impartiality of the judiciary*

Jud. Cond. R. 1.2 requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. . . ." This requirement applies to all professional and personal conduct of a judge. Jud. Cond. R. 1.2, Comment [1]. In satisfying this responsibility, a judge "must accept the restrictions imposed by the Code" (Jud. Cond. R. 1.2, Comment [2]), including provisions that require a judge to set aside his or her own personal, moral, and religious beliefs in the fair, impartial, and unbiased performance of judicial duties. Public confidence in the independence of the judiciary is undermined when a judge allows his or her beliefs concerning the societal or religious acceptance or validity of same-sex marriage to affect the performance of a judicial function or duty.

Jud. Cond. R. 1.2 also requires a judge to "avoid impropriety and the appearance of impropriety." An act of impropriety occurs when a judge violates the law or provisions of the Code of Judicial Conduct. Jud. Cond. R. 1.2, Comment [5]. A judge who publicly states or implies a personal objection to performing same-sex marriages and reacts by ceasing to perform all marriages acts contrary to the mandate to avoid impropriety and the appearance of impropriety. See, e.g., *In re Tabor*, Case No. 7251-F-158, Wash. St. Comm. on Jud. Cond. (October 4, 2013) (judge was publicly admonished for creating an appearance of



impropriety by stating opposition to same-sex marriages and subsequently refusing to perform all marriages under a discretionary state statute.) A determination by a judge that he or she will marry only opposite-sex couples undermines the holding in *Obergefell* and runs counter to the requirement of Jud. Cond. R. 1.2 to avoid impropriety and the appearance of impropriety.

*Jud. Cond. R. 2.2—Impartiality and fairness*

A judge is required to “perform all duties of judicial office fairly and impartially” and “apply the law without regard to whether the judge approves or disapproves of the law in question.” Jud. Cond. R. 2.2, Comment [2]. In *Cleveland Bar Ass’n. v. Cleary*, 93 Ohio St.3d 193, 2001-Ohio-1326, a judge was suspended for six months after she denied a pregnant defendant’s post-conviction motion for probation and continued her prison sentence in order to prevent the defendant from having an abortion. The Supreme Court reasoned that the judge had revealed bias toward the defendant based on conduct she thought was morally inappropriate. The Court found that the judge improperly used the sentencing proceeding to enforce her personal beliefs against abortion in violation of former Canon 3(B)(5). The provisions of the former rule are now found in Jud. Cond. R. 2.2 and 2.3.

“A judge is free to hold his or her own personal beliefs, so long as those attitudes, prejudices, or beliefs are not translated into action or inaction that results in a violation of the Code of Judicial Conduct or of law.” *Cleary* at 201 citing *In re Inquiry Concerning a Judge*, 357 So.2d 172, 177-178 (Fla.1978). A judge who displays disapproval of statutory or decisional law by refusing to enforce or follow the law because of personal, moral, and religious beliefs demonstrates a lack of the fairness and impartiality required by Jud. Cond. R. 2.2 and the judge’s oath of office.

*Jud. Cond. R. 2.3—Manifesting bias and prejudice*

Jud. Cond. R. 2.3(A) requires a judge to “perform the duties of judicial office, including administrative duties, without bias or prejudice.” A judge should avoid all conduct that “may reasonably be perceived as prejudiced or biased.” Jud. Cond. R. 2.3, Comment [2]. Jud. Cond. R. 2.3(B) prohibits a judge from exhibiting bias or prejudice based upon a number of enumerated traits or characteristics, including sexual orientation. If a judge manifests bias or prejudice in any proceeding, he or she may bring disrepute to their office and to the judiciary as a whole. Jud. Cond. R. 2.3, Comment [1].

These provisions bear directly on a judge’s decision to perform same-sex marriages. A judge who is willing to perform marriages of only opposite-sex couples because of his or

her personal, moral, or religious beliefs, may be viewed as possessing a bias or prejudice against a specific class or group of people based on sexual orientation. Exhibiting bias or prejudice in the performance of judicial duties is antithetical to a core tenet of judicial office and erodes the public's confidence in the independence, integrity, and impartiality of the judiciary. In addition, a judge's conduct may run afoul of Prof. Cond. R. 8.4(g), which prohibits any lawyer from engaging in discrimination prohibited by law.

In *State v. Arnett*, 88 Ohio St.3d 208, 2000-Ohio-302, the Supreme Court considered a case in which the trial judge quoted from the Bible during the sentencing of a defendant. The Court ultimately concluded that the biblical quote and other references did not form the basis for the sentence and thus did not result in reversible error. However, the Court issued a cautionary reminder that similar comments made by judges could represent a manifestation of bias and prejudice contrary to the mandates of the Code of Judicial Conduct.

*Jud. Cond. R. 2.4—External influences on judicial conduct*

Jud. Cond. R. 2.4(A) and (B) require a judge to avoid being swayed “by public clamor or fear of criticism” in the performance of his or her judicial duties and to avoid permitting outside interests and relationships to influence the judge's conduct or judgment. This mandate reflects another tenet essential to an independent judiciary—that a judge is obligated to follow and apply the law without regard to whether the law is “popular or unpopular with the public, the media, government officials, or the judge's friends or family.” Jud. Cond. R. 2.4, Comment [1]. A judge who permits these external factors to influence his or her execution of a judicial function erodes public confidence in the judiciary. *Id.*

*Impact on other functions or duties of judicial office*

A judge's decision to decline to perform some or all marriage ceremonies, when grounded on the judge's personal beliefs, may reflect adversely on perceptions regarding the judge's performance of other judicial duties. A judge is required to “disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned” and specifically where the judge has a personal bias or prejudice concerning a party. Jud. Cond. R. 2.11(A) and (A)(1). A judge may reasonably be perceived as having a personal bias or prejudice based on sexual orientation if he or she elects to perform opposite-sex marriages, but declines to perform same-sex marriages. Even if a judge decides not to perform any marriages, but does so only after *Obergefell*, the judge may face the prospect of disqualification in matters where the sexual orientation of the parties is at issue.

For example, if a judge who has declined to perform same-sex marriages is later assigned to hear a misdemeanor domestic violence charge involving a same-sex couple, the judge's ability to follow the law and impartially apply the domestic violence laws could reasonably be questioned. This same result obtains if a judge has maintained a position that he or she will perform only opposite-sex marriages. Under either scenario, if the judge's refusal to marry same-sex couples equates to the judge possessing or appearing to possess a personal bias or prejudice toward persons based on sexual orientation, he or she is required under Jud. Cond. R. 2.11 to disqualify himself or herself from the proceeding. As such, a judge's decision to decline to perform some or all marriage ceremonies, when grounded on the judge's personal beliefs, may reflect adversely on perceptions regarding the judge's performance of other judicial functions and duties.

A judge should further be mindful of the requirement under Jud. Cond. R. 2.3(A) to perform administrative duties without bias or prejudice despite the judge's personal, moral, and religious beliefs. A judge may not allow sexual orientation to affect employment decisions (Jud. Cond. R. 2.13) or the judge's treatment of court personnel, court officials, attorneys, and jurors, despite the judge's personal beliefs about sexual orientation. Jud. Cond. R. 2.3(B). Likewise, a judge must never permit court staff or court officials under his or her direction or control to engage in discriminatory conduct based on sexual orientation or act in a manner inconsistent with the judge's obligations under the Code. Jud. Cond. R. 2.3(B). A judge must be aware of the impact that his or her own conduct or perceptions concerning same-sex couples may have on the manner in which court employees conduct their job responsibilities.

Finally, a judge should be cognizant of the impact a decision to decline to perform all civil marriage ceremonies has on the public's perception of the judiciary. Regardless of whether the statutes authorizing the performance of civil marriages are deemed mandatory or permissive, the statutes reflect the legislative intent to grant citizens the opportunity to obtain a civil marriage from designated public officials. When all judges in a jurisdiction decline to perform civil marriages, regardless of the reason for their decisions, the public's access to a fundamental right may be foreclosed or significantly limited. These decisions may reflect adversely on the judiciary as a whole.

The principles set forth in this advisory opinion are not novel. Rather, they are a restatement of core tenets that have long governed judicial conduct and continue to guide the proper and ethical performance of a judge's constitutional and statutory obligations. Ethics authorities in other jurisdictions that have analyzed the same questions presented to this Board have reached similar conclusions: Neb. Adv. Op. 2015-1 (June 29, 2015) (the refusal to marry a same-sex couple based upon sexual orientation manifests bias and

prejudice and is prohibited under the Code of Judicial Conduct); Az. Adv. Op. 2015-1 (March 9, 2015) (the performance of a marriage is a discretionary duty for Arizona judges, but a judge may not decline to perform a same-sex marriage, while continuing to perform opposite-sex marriages without violating Rules 2.2 and 2.3(B) of the Code of Judicial Conduct); La. Comm. on Jud. Ethics (July 14, 2015) (judge may not refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages and a judge may not recuse him/herself from matters ancillary to same-sex marriages based on sincerely held beliefs); Pa. Jud. Comm., *Newsletter* (Summer, 2014) (a judge may not act in a discriminatory, biased, and prejudiced manner toward a same-sex couple regarding the performance of a marriage. If a judge decides not to perform any marriages, a change from past conduct may be interpreted as bias and prejudice against a specific class.)

**CONCLUSION:** A judge who performs civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages, based upon his or her personal, moral, and religious beliefs, acts contrary to the judicial oath of office and Jud. Cond. R. 1.1, 1.2, 2.2, 2.3, 2.4, 2.11, and Prof. Cond. R. 8.4(g).

A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class. The judge's decision also may raise reasonable questions about his or her impartiality in legal proceedings where sexual orientation is at issue and consequently would require disqualification under Jud. Cond. R. 2.11.<sup>2</sup>

**Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**

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<sup>2</sup> The Board declines to address questions concerning the recommended case management procedures or requirements for the assignment or rotation of judges conducting marriages at a court. See fn. 1, *supra*.

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**ISSUES**

1. May a judicial officer, because of his or her own religious or personal beliefs, decline to be the “officiating person” at the marriage of two persons of the same sex?

**ANSWER**

No.

2. If a judicial officer cannot decline because of his or her own religious or personal beliefs to be the “officiating person” at the marriage of two persons of the same sex, may he or she decline to perform marriages at all, regardless of whether the parties seeking to be married are of the same or opposite gender?

**ANSWER**

Yes.

**FACTS**

The U.S. Supreme Court on June 26, 2015, ruled that the 14<sup>th</sup> Amendment requires a state to license a marriage between two people of the same sex. See *bergefell v. Hodges*, Nos. 14-55b, 14-562, 14-571, 14-574, 2015 WL 2473451 (U.S. June 26, 2015). The U.S. Supreme Court held that state laws restricting same-sex marriage are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at \*4

Wis. Stats. Section 765.16(1m) in part provides as follows:

**Marriage contract, how made; officiating person. (1m)** Marriage may be validly solemnized and contracted in this state only after a marriage license has been issued therefor, and only by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband and wife, made before an authorized officiating person and in the presence of at least 2 competent adult witnesses other than the officiating person. The following are authorized to be officiating persons:

- ...
- (d) Any judge of a court of record or a reserve judge appointed under s. 753.075.
  - (e) Any circuit court commissioner appointed under SCR 75.02 (1) or supplemental court commissioner appointed under s. 757.675 (1).
  - (f) Any municipal judge.

For purposes of this opinion, a “judicial officer” includes any judge of a court of record, a reserve judge, any circuit court commissioner, any supplemental court commissioner or any municipal judge defined in WSS 765.16 (1m).

#### DISCUSSION

The Committee concludes that both issues presented are governed by the provisions of several Wisconsin Supreme Court Rules. SCR 60.04(1)(e) provides as follows:

**A judge shall perform the duties of judicial office impartially and diligently.**

The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law.

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

- ...
- (e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and other subject to the judge’s direction and control to do so.

SCR 60.03(1) provides as follows:

**SCR 60.03 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**

(1) 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.

Finally, SCR 60.05(1) provides as follows:

**A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.**

(1) Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do none of the following:

(a) Cast reasonable doubt on the judge's capacity to act impartially as judge.

(b) Demean the judicial office.

(c) Interfere with the proper performance of judicial duties.

As WSS 765.16(1m) provides, judicial officers in Wisconsin may act as authorized officiating persons for marriages in this state. This authority is granted by the Wisconsin legislature and judicial officers who do so are performing a judicial duty or function. Under the statute, the performance of marriages is a discretionary function rather than a mandatory function of judicial officers by virtue of the legislature's use of the word "may".

SCR 60.04(1)(e) provides that judges must perform their judicial duties fairly and impartially. Judges shall perform those duties without bias or prejudice based on a number of listed bases, one specifically including sexual orientation. Judges must be alert to avoid behavior that can be perceived as prejudicial. The Committee concludes that a judicial officer's refusal to perform same-sex marriages based on a couple's sexual orientation would manifest bias or prejudice under SCR 60.04(1)(e).

Prior to taking office judicial officers in Wisconsin take an oath. Under that oath, those officers solemnly swear that they will support the constitution of the United States and the constitution of the state of Wisconsin. See WSS 757.02(1). In *Obergefell*, the U.S. Supreme Court has ruled that the 14<sup>th</sup> Amendment to the U.S. Constitution requires states to license same-sex marriages. That is now the law of the land which judicial officers in Wisconsin under their oath have sworn to support.

Under SCR 60.03(1), judges must avoid impropriety and the appearance of impropriety in all their activities. Included under that rule is an obligation to respect and comply with the law. Under that rule, the test for the appearance of impropriety is whether the conduct of the judge would create in reasonable minds the perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

In *Obergefell*, the U.S. Supreme Court has invalidated prohibitions against same-sex marriage. The Committee concludes that a refusal by a judicial officer to perform same-sex marriages for any reason, including religious or personal beliefs, while being willing to perform opposite-sex marriages would constitute a refusal to follow the law and would draw into question the integrity and impartiality of the judiciary under SCR 60.03(1).

If it were perceived that a judicial officer's officiating at marriages is not a judicial duty but is an extra-judicial activity, SCR 60.05(1) would apply. That rule provides that a judge shall conduct all of his or her extra-judicial activities so as to not cast reasonable doubt on their capacity to be impartial or interfere with the proper performance of their judicial duties. Expressions of bias or prejudice by a judge even outside of their judicial activities may cast reasonable doubt on their capacity to act impartially as a judge. The Committee concludes that if officiating at marriages is considered an extra-judicial activity, a refusal to perform same-sex marriages based on a couple's sexual orientation would manifest bias or prejudice and would cast reasonable doubt on a judge's capacity to act impartially and properly perform his or her judicial duties under SCR 60.05(1).

The Committee further concludes that judicial officers in Wisconsin may decline to officiate at marriages, regardless of whether the parties are same-sex or opposite-sex couples. As has already been summarized in this opinion, WSS 765.16(1m) provides that judicial officers may officiate at marriages in this state, but it does not mandate that they do so. As such, the performance of marriage ceremonies by judicial officers is a discretionary versus mandatory duty of those officers.

#### CONCLUSION

The Committee concludes that judicial officers in Wisconsin based upon their religious or personal beliefs may not decline to officiate at marriages in this state for same-sex couples if they chose to officiate at marriages of opposite-sex couples. The Committee further concludes that judicial officers in Wisconsin may



decline to act as an officiant at marriages generally because it is a discretionary and not a mandatory duty under WSS 765.16(1m).

#### APPLICABILITY

This opinion is advisory only. It is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to the questions arising under the Supreme Court Rules, Chapter 60, *Code of Judicial Conduct*. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 15-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 18th day of August, 2015.

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The Honorable D. Todd Ehlers  
Chair



CHIEF JUSTICE  
BERNARD E. JOHNSON  
JUDICIAL ADMINISTRATOR  
SANDRA A. VUINOVICH

# Supreme Court

STATE OF LOUISIANA  
400 ROYAL STREET  
SUITE 1100  
New Orleans  
70130-0101

July 14, 2015

TELEPHONE: (504) 310-2000  
FAX: (504) 310-2807

Personal and Confidential

*Re: Opinion of the Louisiana Supreme Court Committee on Judicial Ethics*

Dear

Please be advised that on its own motion, the Louisiana Supreme Court Committee on Judicial Ethics has carefully considered the following issues and a majority of the Committee finds:

### ISSUE 1

Is it ethically permissible for a judge of a court of record to refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages?

No. Although performance of marriage ceremonies is not a mandatory judicial function, refusing to perform same-sex marriages while continuing to perform opposite-sex marriages shows bias or prejudice, in violation of Canon 3A(4). Additionally, such refusal could be seen as a violation of Canon 1's mandate to uphold the integrity and independence of the judiciary, as well as Canon 2's imperative that judges respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Judges should be mindful of the fact that if they once performed marriages and now choose not to, they could then receive motions to recuse from gay or lesbian individuals who perceive such refusal as indicative of animus.

### ISSUE 2

Is it ethically permissible for a justice of the peace to refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages?


No. Although performance of marriage ceremonies is not a mandatory judicial function, refusing to perform same-sex marriages while continuing to perform opposite-sex marriages shows bias or prejudice, in violation of Canon 3A(4). Additionally, such refusal could be seen as a violation of Canon 1's mandate to uphold the integrity and independence of the judiciary, as well as Canon 2's imperative that justices of the peace respect and comply with the law and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Justices of the peace should be mindful of the fact that if they once performed marriages and now choose not to, they could then receive motions to recuse from gay or lesbian individuals who perceive such refusal as indicative of animus.

**ISSUE 3**

Is it ethically permissible for a judge, as defined in the Code of Judicial Conduct, to recuse him/herself from matters ancillary to same-sex marriage, including but not limited to child custody or adoption matters, based on a sincerely held belief that marriage is the union of one man and one woman?

No. Judges must perform judicial functions without bias or prejudice. A judge's inability to adjudicate a child custody or adoption case based on the involvement of same-sex spouses is indicative of bias or prejudice against a class of individuals. Refusal to sit on matters involving same-sex spouses is a direct violation of the Code of Judicial Conduct and could open a judge to a recommendation of sanction or removal by the Judiciary Commission.

Sincerely,



Sandra A. Vujnovich, J.D.  
Secretary and Member  
Supreme Court Committee on Judicial Ethics

SAV/bkb

cc: Chair and Members, Supreme Court Committee on Judicial Ethics  
Associate Justices of the Supreme Court of Louisiana

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS  
STATE OF WYOMING

An inquiry concerning )  
 )  
The Honorable Ruth Neely ) No. 2014-27  
 )  
Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
Official Record

FILED  
Date 12/30/15  
Wendy J. Soto

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THE HONORABLE RUTH NEELY'S NOTICE OF MOTION AND  
MOTION FOR SUMMARY JUDGMENT

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**PLEASE TAKE NOTICE** that on December 4, 2015, at 8:30 a.m. in the large courtroom, second floor, at 200 North Center Street, Casper, Wyoming, Respondent the Honorable Ruth Neely will and hereby does respectfully move the Adjudicatory Panel, pursuant to Wyoming Rule of Civil Procedure 56, as incorporated by Rule 9(a) of the Rules Governing the Commission on Judicial Conduct and Ethics, for summary judgment in her favor and against the Commission on Judicial Conduct and Ethics.

This Motion is made on the grounds that there is no genuine issue as to any material fact, that Judge Neely is entitled to judgment as a matter of law, and that these proceedings and the Commission's proposed application of the Wyoming Code of Judicial Conduct violates Judge Neely's rights under the Wyoming and United States Constitutions.

This Motion is based on this Notice of Motion and Motion and all the supporting papers filed herewith, which include the Memorandum of Law in Support of the Honorable Ruth Neely's Motion for Summary Judgment, Statement of Undisputed Material Facts in Support of the Honorable Ruth Neely's Motion for Summary Judgment, Affidavit of Kenneth J. Connelly

(and all exhibits thereto), Affidavit of Ruth Neely (and all exhibits thereto), Affidavit of Bob Jones, Affidavit of Miriam Carlson, Affidavit of Ralph E. Wood, Affidavit of Sue Eversull, Affidavit of Sharon Stevens, Affidavit of Kathryn Anderson, Affidavit of Reverend Kevin Rose, Affidavit of Stephen Crane, and proposed order. This Motion is also based on the pleadings and papers on file in this action, and on such other and further evidence as may be presented prior to, and at, the hearing on this Motion.

Dated: October 30, 2015



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*\*Out-of-State Certification Obtained*