

**BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS**

**STATE OF WYOMING**

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

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**CERTIFIED RECORD  
VOLUME 5**

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COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
Official Record  
FILED  
Date: 10/31/15  
Wendy J. Soto

Wendy J. Soto

CERTIFICATE OF SERVICE

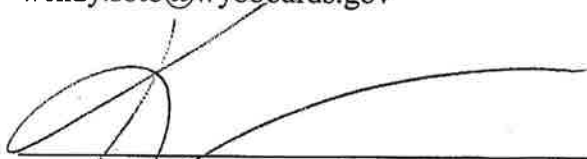
I, Kenneth J. Connelly, hereby certify that on the 30th day of October, 2015, the documents accompanying this Certificate of Service, which include:

- The Honorable Ruth Neely's Notice of Motion and Motion for Summary Judgment;
- 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;
- Affidavit of Ruth Neely;
- 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,

were served by electronic mail on the following persons at the email addresses listed below:

Patrick Dixon, Esq.  
Dixon & Dixon, LLP  
104 South Wolcott Street, Suite 600  
Casper, WY 82601  
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Wendy J. Soto  
Executive Director  
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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 )  
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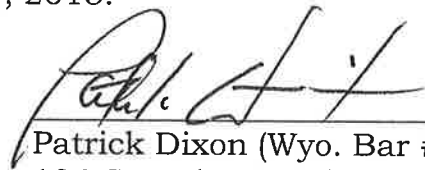
No. 2014-27

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS  
Official Record  
FILED  
Date: 11/3/15  
Wendy J. Soto

**FILING OF ADDITIONAL SUPPORTING DOCUMENTS IN SUPPORT OF  
CJCE'S 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 additional documents in support of the CJCE's *Memorandum in Support of Motion for Partial Summary Judgment*.

DATED this 3 day of November, 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 3 day of ~~October~~<sup>November</sup>, 2015, I served the above and foregoing *Filing of Additional Supporting Documents in Support of CJCE's Memorandum in Support of Motion for Partial Summary Judgment* by placing a true and correct copy in the United States mail, duly postmarked and addressed to:

**VIA EMAIL**

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**VIA orchard@spencelawyers.com**

Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
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**VIA U.S. MAIL**

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

  
Patrick Dixon

EXCERPT FROM DEPOSITION OF THE  
HONORABLE RUTH NEELY  
9/18/15

1 BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

2 STATE OF WYOMING

3

4

5 An inquiry concerning ) Commission on Judicial  
6 ) Conduct and Ethics

7 The Honorable Ruth Neely ) No. 2014-27

8 Municipal Court Judge and )

9 Circuit Court Magistrate )

10 Ninth Judicial District )

11 Pinedale, Sublette County )

12

13

14

15

DEPOSITION OF

16

THE HONORABLE RUTH NEELY  
Friday, September 18, 2015

17

18

19

TAKEN AT

Sublette County Library Board Room  
Pinedale, Wyoming

20

21

22

23

COURT REPORTER:  
Michelle L. Cunningham  
Deputy and Freelance Reporter  
Notary Public

24

25

*Jackson Hole Court Reporting Service (307) 733-2637*

1 did you work here?  
 2 A. Yes.  
 3 Q. And what kind of jobs did you do here?  
 4 A. I did many. I cleaned motel rooms for  
 5 about four-and-a-half months. I worked for  
 6 the Chamber of Commerce. I worked for the  
 7 local veterinary clinic. I worked for the  
 8 *Pinedale Roundup*. I worked for a CPA and  
 9 justice of the peace.  
 10 Q. Okay.  
 11 A. And I worked for the Sublette County  
 12 Court, and then the Town of Pinedale, and  
 13 that's where I am.  
 14 Q. All right.  
 15 Now, I -- I -- well, I know that -- you to  
 16 be a municipal court judge here in Pinedale.  
 17 When did you -- you begin that job?  
 18 A. May 1994.  
 19 Q. Okay.  
 20 And how did you get that job?  
 21 A. The mayor at the time was Miriam  
 22 Carlson. She came to me and asked me if I  
 23 would be willing to serve as the municipal  
 24 judge for the Town of Pinedale because the  
 25 prior municipal judge resigned so that he

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1 MR. DIXON: I think that's a reasonable  
 2 request, Counsel. I've had some witnesses  
 3 where that wasn't the case.  
 4 Q. (By Mr. Dixon) Okay. So you were asked  
 5 by the mayor to serve. And then I'm guessing  
 6 you were appointed by the Town Council;  
 7 correct?  
 8 A. The municipal judge for the Town of  
 9 Pinedale is appointed by the mayor with the  
 10 consent of the Town Council.  
 11 Q. Right. Right.  
 12 A. And that happened, yes.  
 13 Q. Okay. And it's not an elective office;  
 14 correct?  
 15 A. Yes.  
 16 Q. You don't -- I was correct; you don't run  
 17 for that office?  
 18 A. That's correct.  
 19 Q. Okay.  
 20 And -- and as you understand it, is it  
 21 a partisan or nonpartisan position?  
 22 A. It is nonpartisan.  
 23 Q. So your affiliation as a Republican,  
 24 Democrat, Independent, whatever party, is not  
 25 a consideration in that job; is that right?

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1 could run for county commissioner.  
 2 Q. Okay.  
 3 Who was that?  
 4 A. Who was who?  
 5 Q. Oh, never mind. It's not important  
 6 anyway.  
 7 A. I didn't -- didn't know who "who" was.  
 8 Q. I was gonna ask who -- who you succeeded;  
 9 who the other municipal judge was that you --  
 10 that you --  
 11 A. William Cramer.  
 12 Q. Okay.  
 13 So that -- the then-mayor asked you to  
 14 take this position; is that right?  
 15 A. That's correct.  
 16 Q. And it's not an elected position; is that  
 17 true?  
 18 A. Yes. Yes.  
 19 Q. I'm sorry. I got old ears, you know?  
 20 A. It's okay. I'm dry, so I'm drinking.  
 21 Q. All right. All right. We'll get there.  
 22 MR. CAMPBELL: And just let the record  
 23 reflect, Ruth was referring to drinking  
 24 water.  
 25 THE WITNESS: Oh, sorry. Sorry.

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1 A. Yes.  
 2 Q. Okay.  
 3 When -- when you took the job, did you  
 4 receive any kind of training, education,  
 5 orientation, training to -- to -- as to your  
 6 duties and responsibilities?  
 7 A. Every year there is a judges  
 8 conference -- judges and clerks conference  
 9 back then. I attended those.  
 10 Prior to my appointment as the Town  
 11 judge, I had worked for several years in  
 12 the court system and was aware of what all  
 13 was necessary to do a good job.  
 14 Q. So you had a fundamental understanding of  
 15 how courts work?  
 16 A. Yes, I do -- did.  
 17 Q. Okay.  
 18 But just for example, I understand that  
 19 when a circuit court or district court judge  
 20 is appointed here in Wyoming, they ship them  
 21 off to Reno, Nevada, to the judges college.  
 22 Did you go to any kind of a training like  
 23 that?  
 24 A. No.  
 25 Q. You also hold the position of circuit

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1 court magistrate; is that true?  
 2 A. Yes.  
 3 Q. And when were you first appointed in that  
 4 capacity?  
 5 A. In the early 2000s --  
 6 Q. Okay.  
 7 A. -- 2001, maybe.  
 8 Q. Have you got any -- any orders or -- or  
 9 records that confirm that original  
 10 appointment?  
 11 A. No.  
 12 Q. All right.  
 13 When you -- and -- and who appointed  
 14 you to that position?  
 15 A. John Crow.  
 16 Q. Okay. He was the -- the then-sitting  
 17 circuit court judge?  
 18 A. At that time, he was a county court  
 19 judge, yes.  
 20 Q. That's right. That was before they  
 21 changed to circuit courts?  
 22 A. Correct. Yes.  
 23 Q. Okay.  
 24 When you received that appointment, did  
 25 you get any formal training?

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19

1 A. No.  
 2 Q. And I -- well, I'll just make sure I know  
 3 this: When you're appointed on the municipal  
 4 court, do you have a term of office?  
 5 A. Yes.  
 6 Q. What is that?  
 7 A. The appointment is for whatever the  
 8 mayor makes it to be. My appointments have  
 9 all been four years at a time.  
 10 Q. Okay. Is it a fair statement that you  
 11 serve at the will of the mayor?  
 12 MR. CAMPBELL: Objection. Vague.  
 13 Q. (By Mr. Dixon) Or at the pleasure of the  
 14 mayor?  
 15 Can the mayor limit your term or remove  
 16 you from office, as you understand?  
 17 A. At the -- at the time of appointment,  
 18 the mayor can make the appointment be  
 19 one year, two years, three or four, and the  
 20 only way that I can be removed -- the  
 21 municipal judge can be removed from office  
 22 is for cause.  
 23 Q. Okay. Why do you understand that to be  
 24 the case? Where -- where do you think that  
 25 authority is?

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20

1 A. That is in our Town ordinances.  
 2 Q. All right.  
 3 A. And I believe it's also in the State  
 4 statutes.  
 5 Q. So that's at least pursuant to Town  
 6 ordinance?  
 7 A. Yes.  
 8 Q. And have you been -- so your -- so your  
 9 first term of appointment was -- in -- in '94  
 10 was for how long?  
 11 I don't always listen good. I thought you  
 12 said all your appointments were four years?  
 13 A. Well, they are from -- they are, but  
 14 this one was a midterm appointment --  
 15 Q. Okay.  
 16 A. -- because he -- because the prior  
 17 judge resigned, and I won't be able to tell  
 18 you if that was --  
 19 Q. Fair.  
 20 A. -- if there was one year left of his  
 21 term or two.  
 22 I don't -- I don't recall.  
 23 Q. Okay.  
 24 Have -- have -- other than the first  
 25 initial appointment, have all of your

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1 appointments been coincident with the term  
 2 of office of the mayor?  
 3 A. Yes.  
 4 Q. And -- and in Pinedale, the mayor serves  
 5 how many years?  
 6 A. Four.  
 7 Q. Four.  
 8 So after each succeeding four years,  
 9 you've always been reappointed?  
 10 A. Yes.  
 11 Q. And there's never been a time there was a  
 12 gap in your service?  
 13 A. That's correct.  
 14 Q. Very good.  
 15 Now, you indicated that you went  
 16 annually to judicial conferences; is that  
 17 true?  
 18 A. Yes.  
 19 Q. And -- and who holds those conferences?  
 20 A. The Wyoming Conference of Municipal  
 21 Courts now.  
 22 Q. Okay.  
 23 A. And --  
 24 Q. And -- and who goes to those conferences?  
 25 A. Municipal judges and clerks statewide.

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1 A. -- is where the things come from that I  
 2 receive --  
 3 Q. Okay.  
 4 A. -- where they come from prior to that,  
 5 I don't know.  
 6 Q. Let me restate my question.  
 7 A. Thank you.  
 8 Q. So from -- from the National Center for  
 9 State Courts, have you seen any literature or  
 10 guidance on the subject of same-sex marriage?  
 11 A. Yes.  
 12 Q. And when and where? Tell me the  
 13 circumstances.  
 14 A. On -- from things that Wendy has sent.  
 15 Q. Okay.  
 16 A. And I may have read one or two.  
 17 Q. All right. Before or after December 8th,  
 18 2014?  
 19 A. Before.  
 20 Q. Before.  
 21 And do you recall what you read on that  
 22 topic?  
 23 A. Not in detail, no, I don't.  
 24 Q. Do you remember what kind of ethical  
 25 guidance was put out by the National Center  
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1 articles were more in the line of -- of --  
 2 of misconduct on the bench.  
 3 Q. Yeah. Most of the articles that come in  
 4 that publication do deal with misconduct on  
 5 the bench or off the bench in private lives  
 6 or that sort of thing.  
 7 Were there any articles that you saw that  
 8 addressed the ethics of refusing to perform  
 9 same-sex marriages?  
 10 A. No.  
 11 Q. Okay.  
 12 We are here today for -- what has  
 13 precipitated this proceeding was an article  
 14 in the *Sublette Examiner* on December 11,  
 15 2014, which has been marked as Exhibit 4.  
 16 Are you familiar with that?  
 17 (Indicating.)  
 18 A. (Reviewing document.)  
 19 Generally, yes.  
 20 Q. Okay.  
 21 And -- and did you, at that time, in  
 22 December of 2014, state your position with  
 23 regard to the performance of same-sex  
 24 ceremonies?  
 25 A. Yes.  
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1 for State Courts?  
 2 A. I have never seen ethical guidance from  
 3 the National Center for State Courts.  
 4 Q. Okay. Maybe I'm -- maybe I'm  
 5 misunderstanding.  
 6 You said you had seen some publications  
 7 that addressed the subject of same-sex  
 8 marriage.  
 9 A. Yes.  
 10 Q. Did it address the ethics that surround  
 11 that?  
 12 A. Yes.  
 13 Q. And -- and what -- what guidance did it  
 14 give on the ethics?  
 15 A. What guidance did the article --  
 16 Q. Yes.  
 17 A. -- give --  
 18 Q. Yes.  
 19 A. -- on the -- okay.  
 20 The -- anything that I would have read  
 21 would have been a -- a brief reading. And  
 22 it was -- I didn't spend a lot of time with  
 23 it because the situation was -- whatever it  
 24 was, was nothing that I would -- that would  
 25 have come to me. And so I -- it was -- the  
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1 Q. And what was your position then?  
 2 A. That, due to my sincerely held  
 3 religious beliefs about what marriage is, I  
 4 would be unable to perform -- to officiate  
 5 at same-sex marriages.  
 6 Q. Okay. Is that still your position today?  
 7 A. Yes.  
 8 Q. Okay.  
 9 My understanding is that this article  
 10 or one very much like it appeared in three  
 11 other publications in this area?  
 12 A. I have no idea.  
 13 Q. You don't know?  
 14 A. No.  
 15 Q. Did you not tell Judge Haws that it  
 16 appeared in three other publications?  
 17 A. No.  
 18 Q. You didn't say that to him?  
 19 A. I did not.  
 20 Q. And -- and if he recalled your  
 21 conversation to that effect, he'd be  
 22 mistaken; is that right?  
 23 A. If that is what he thought, yes, he  
 24 would be mistaken.  
 25 However, I will clarify that  
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1 conversation. I did not tell Judge Haws  
 2 that that article appeared in three other  
 3 publications. I told him that article or  
 4 similar appeared in the *Sublette Examiner*  
 5 and there -- and then appeared in the  
 6 *Pinedale Roundup*; they are owned by the  
 7 same company. *Examiner* is published on  
 8 Tuesday. *Roundup* is published on Friday.  
 9 The same article appeared in the *Examiner*  
 10 as appeared in the *Roundup*.

11 And there were another two articles  
 12 written by Ned Donovan that were not that,  
 13 and those were the three that I referred to  
 14 when I told Judge Haws that there may be  
 15 three other articles: The *Roundup* and the  
 16 editorial from Ned and another editorial  
 17 from Ned.

18 Q. Okay. So -- so the -- the exact news  
 19 story that we looked at in Exhibit 4 appeared  
 20 in the *Pinedale Roundup*?

21 A. I believe so.

22 Q. Okay.

23 And then -- but to your knowledge, did  
 24 not appear in any other publication?

25 A. That is correct.

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1 Q. All right. But there was subsequently, on  
 2 different days, other articles on this topic  
 3 written by Mr. Donovan?

4 A. Two editorials.

5 Q. Two editorials?

6 A. I believe there's a difference between  
 7 an editorial and a news article.

8 Q. I definitely will agree with you.

9 And then which publications -- in which  
 10 publications did those appear?

11 A. One was in the *Sublette Examiner*, and  
 12 one was in the *Pinedale Roundup*.

13 Q. Was it the same editorial or -- published  
 14 in both papers?

15 A. No.

16 Q. So it was two editorials?

17 A. Correct.

18 Q. Do you remember -- I haven't -- I  
 19 haven't -- I've seen one -- when in time  
 20 those appeared?

21 A. Sometime between the middle of December  
 22 and the end of January.

23 Q. Okay.

24 What was Mr. Donovan's position in those  
 25 editorials?

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1 MR. CAMPBELL: Objection. Lacks  
 2 foundation.

3 Q. (By Mr. Dixon) As you recollect.

4 A. I -- his position in the editorials as  
 5 what?

6 Q. What was the thrust of his editorial?

7 As I understand what an editorial is -- we  
 8 agreed that an editorial's different than a  
 9 news article. My thinking about an editorial  
 10 is it's some -- the editor or writer of the  
 11 editorial takes a position on the issue.

12 A. Yes.

13 Q. What was his position on -- what was the  
 14 issue that he editorialized, and what was his  
 15 position?

16 MR. CAMPBELL: Objection. Lacks  
 17 foundation.

18 Answer to the extent you know.

19 Q. (By Mr. Dixon) Did you read them?

20 A. Yes.

21 Q. Okay. And your best recollection of what  
 22 was his position.

23 A. He was disturbed because there was a  
 24 judge who had told him she would be unable  
 25 to perform -- to officiate at same-sex

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1 weddings.

2 Q. He didn't think that was proper for that  
 3 judge to take that position?

4 A. He did not think so.

5 Q. That was his opinion?

6 A. Yes.

7 Q. Okay.

8 And -- and the judge he referred to was  
 9 you?

10 A. Yes.

11 Q. Okay.

12 Let's talk generally about your duties as  
 13 a municipal judge. What are your duties?

14 A. To hold court and to deal with all  
 15 citations that come before the Court.

16 Q. Okay.

17 Is it your understanding and thinking  
 18 that you are bound by the Wyoming Code of  
 19 Judicial Ethics in the discharge of those  
 20 duties?

21 A. Yes.

22 Q. Okay.

23 What are your duties as municipal court  
 24 judge?

25 A. I just answered that.

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1 MR. CAMPBELL: Asked and answered.  
 2 Q. (By Mr. Dixon) Sorry, sorry.  
 3 A. I just answered that one.  
 4 Q. I just looked at the wrong question on my  
 5 outline.  
 6 A. All right.  
 7 Q. Your duties as circuit court magistrate.  
 8 Sorry.  
 9 A. To serve at the will of the sitting  
 10 judge and do whatever is asked of me.  
 11 Q. Okay. And in the discharge of those  
 12 duties, is it your belief that you're bound  
 13 by the Wyoming Code of Judicial Ethics?  
 14 A. Yes.  
 15 Q. Show you Exhibits 2007 and 2008.  
 16 MR. CAMPBELL: Exhibit?  
 17 MR. DIXON: I'm sorry.  
 18 MR. CAMPBELL: That's okay.  
 19 MR. DIXON: I looked at the date. 38  
 20 and 45.  
 21 MR. CAMPBELL: 42. Yeah, they're 38  
 22 and 42.  
 23 MR. DIXON: Thank you.  
 24 Q. (By Mr. Dixon) Yeah, are you familiar  
 25 with those documents?

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1 A. That it was an unlimited magisterial  
 2 position.  
 3 Q. Okay. So am I right in thinking that in  
 4 2007, you were appointed for the sole purpose  
 5 of doing marriages?  
 6 A. Yes.  
 7 Q. And in 2008, then, your appointment could  
 8 include other duties, other tasks for the  
 9 circuit court?  
 10 A. Yes.  
 11 Q. And -- and did you, in fact, perform other  
 12 assignments after 2008 for the circuit court?  
 13 A. Other than --  
 14 MR. CAMPBELL: Objection. Vague.  
 15 Other than what?  
 16 Q. (By Mr. Dixon) Did you do other judicial  
 17 functions as a magistrate of the circuit  
 18 court?  
 19 A. Other than what?  
 20 MR. CAMPBELL: Other than what?  
 21 Q. (By Mr. Dixon) Other than doing  
 22 marriages.  
 23 A. Yes.  
 24 Q. Okay. What other functions did you  
 25 perform under your general appointment?

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1 A. (Reviewing documents.)  
 2 Yes.  
 3 Q. Okay. The earlier one is 2007; right?  
 4 A. Yes.  
 5 Q. And that would be Exhibit 40- --  
 6 A. 42.  
 7 Q. 42. And what -- what was -- those are the  
 8 documents that constitute your appointment as  
 9 magistrate; right?  
 10 A. Yes.  
 11 Q. What was the scope of your employment in  
 12 2007?  
 13 A. Limited to the purpose of performing  
 14 weddings.  
 15 Q. Okay.  
 16 Then did the scope of your appointment  
 17 change in 2008?  
 18 A. Yes.  
 19 Q. And how did it change?  
 20 A. (Reviewing document.)  
 21 MR. CAMPBELL: Objection. Calls for a  
 22 legal conclusion.  
 23 You can answer.  
 24 Q. (By Mr. Dixon) Well, as you understood it  
 25 as -- as the appointee.

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1 A. I held -- I held bond hearings. I did  
 2 a felony warrant and -- and set bond  
 3 several times with the sheriff's office  
 4 over the phone.  
 5 Q. Okay. Thank you.  
 6 Now, tell us what -- what is a bond  
 7 hearing?  
 8 A. A bond hearing is held to ascertain  
 9 what the least restrictive terms are to get  
 10 an incarcerated person out of jail and  
 11 still assure that the public is safe and  
 12 that the person will appear when ordered.  
 13 Q. Okay. So the typical process is someone's  
 14 arrested; they have a right to apply to the  
 15 Court for a bond as a condition of their  
 16 release from jail. Is that a fair statement?  
 17 A. Yes.  
 18 (Whereupon, Deposition Exhibit 43 was  
 19 marked for identification.)  
 20 Q. (By Mr. Dixon) Let me show you  
 21 Exhibit 43; all right?  
 22 A. (Reviewing document.)  
 23 MR. CAMPBELL: This is a new exhibit?  
 24 MR. DIXON: Yes.  
 25 MR. CAMPBELL: Okay.

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1 Q. (By Mr. Dixon) Judge Neely, do you know  
 2 what that is?  
 3 A. Do I know what what is?  
 4 Q. This document.  
 5 A. This top page? This? Or this whole  
 6 thing?  
 7 Q. Well, let's start with Page 1. What's  
 8 Page 1 of Exhibit 43?  
 9 A. Page 1 is a bill that I submitted to  
 10 circuit court for work done in April 2009  
 11 as a circuit court magistrate.  
 12 Q. Okay.  
 13 Your attorneys gave that to me. I -- I  
 14 assume you gave it to them?  
 15 A. I did.  
 16 Q. And is that how your -- I guess I didn't  
 17 ask this: Were you -- were you compensated  
 18 for your services as a circuit court  
 19 magistrate?  
 20 MR. CAMPBELL: Objection. Vague.  
 21 In what capacity? When she does what?  
 22 Q. (By Mr. Dixon) In any -- in any capacity.  
 23 Do you receive compensation for your  
 24 services as a circuit court magistrate?  
 25 A. In this capacity, yes.  
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1 were gonna get paid or not paid for a given  
 2 wedding?  
 3 A. Are we done with this?  
 4 (Indicating.)  
 5 Q. Not yet.  
 6 A. Okay.  
 7 Tell me again.  
 8 Q. How would you figure out which wedding you  
 9 were gonna get paid for and which wedding you  
 10 were gonna do pro bono?  
 11 A. I didn't figure anything out.  
 12 Q. Well, how'd that work?  
 13 A. If they paid me, they paid me, and if  
 14 they didn't pay me, they didn't pay me.  
 15 Q. So if the would-be Mr. and Mrs. Smith  
 16 called you and said, "Would you do a  
 17 wedding?" would you say, "Yes, but there's a  
 18 fee of 'X' dollars"?  
 19 A. No.  
 20 Q. What would you say to them? If you were  
 21 willing to do the wedding.  
 22 A. If everything worked out and I was  
 23 going to do the wedding, if they pay me,  
 24 they pay me, and if they don't, they don't.  
 25 I don't charge -- if you're getting to  
*Jackson Hole Court Reporting Service - (307) 733-2637*

1 Q. Okay. In -- In the capacity --  
 2 A. In the capacity of this bill here, yes.  
 3 Q. All right.  
 4 And is there another capacity that you  
 5 serve that you don't get compensation?  
 6 A. Yes.  
 7 Q. And that would be what?  
 8 A. Sometimes weddings.  
 9 Q. Doing weddings?  
 10 A. Yes.  
 11 Q. Okay. Do you do those -- when you were --  
 12 when you did weddings, you were not  
 13 compensated by the State of Wyoming; is that  
 14 true?  
 15 A. That's correct.  
 16 Q. Were you compensated by the celebrants of  
 17 the wedding?  
 18 A. Sometimes.  
 19 Q. Sometimes. Okay.  
 20 And when were you and when were you not?  
 21 What -- what would make that happen?  
 22 A. Well, when they paid me, I was  
 23 compensated, and when they didn't pay me, I  
 24 wasn't.  
 25 Q. And how did you figure out whether you  
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1 this: I do not charge a fee. I don't  
 2 charge a flat fee.  
 3 Q. Okay. So if they paid you, it was  
 4 voluntary on their part?  
 5 A. Yes.  
 6 Q. Okay. Very good.  
 7 So back to our Exhibit 43. The first  
 8 page would be a bill for the year  
 9 April 2009 -- the month of April 2009;  
 10 right?  
 11 A. Yes.  
 12 Q. And the first entry is "Eduardo Vargas,"  
 13 and then what you list: DUI, reckless  
 14 endangering, roadway, lane for traffic."  
 15 Were those, like, the charges --  
 16 A. Yes.  
 17 Q. -- that -- that Mr. Vargas was -- was  
 18 arrested for?  
 19 A. Yes.  
 20 Q. And then you tell what you did, and the  
 21 last thing that you did is set bond.  
 22 A. Yes.  
 23 Q. So you set bond for Mr. Vargas on April 9,  
 24 2009?  
 25 A. Yes.  
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1 couples.  
 2 Q. Did -- did you anticipate that they might  
 3 want to become legally and officially married  
 4 after this ruling?  
 5 A. I hadn't thought about it.  
 6 Q. You didn't think about it?  
 7 A. No.  
 8 Q. And did anybody indicate to you that might  
 9 be the case?  
 10 A. Not that I recall.  
 11 Q. Did you tell anyone or put the word out  
 12 that if that were to come to pass, you would  
 13 not be able to do the ceremonies, before the  
 14 Donovan article came out?  
 15 A. No.  
 16 Q. For example, did you talk to the county  
 17 clerk and say, "I won't do these ceremonies"?  
 18 A. No, I did not.  
 19 Q. Okay.  
 20 So then it came to pass that you did  
 21 have a conversation with Ned Donovan;  
 22 correct?  
 23 A. Yes.  
 24 Q. And tell me how that came about.  
 25 A. In December, I was working on a project  
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1 *Roundup.*"  
 2 Q. Okay.  
 3 A. That's all I know.  
 4 Q. Do you -- do you go to council meetings  
 5 routinely?  
 6 A. Yes.  
 7 Q. Did --  
 8 MR. CAMPBELL: What kind of council  
 9 meetings?  
 10 Q. (By Mr. Dixon) Town Council meetings.  
 11 THE WITNESS: I'm sorry, Jim.  
 12 Town Council meetings, yes, I do.  
 13 Q. (By Mr. Dixon) And did Mr. Donovan, in  
 14 those days, go to those meetings? If he did,  
 15 you didn't know him?  
 16 A. If he was there, I did not know who --  
 17 Q. Okay.  
 18 A. -- he was.  
 19 I don't know what he looked like.  
 20 Q. I just wondered if you'd encountered him  
 21 in those kind of meetings.  
 22 A. Early on, no.  
 23 Q. Okay. Later on, did you?  
 24 A. After the article came out, I  
 25 recognized his face from the picture in the  
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1 at home, outside, and I was outside for an  
 2 extended amount of time.  
 3 I came in the house and looked at my  
 4 cell phone, which was on the kitchen table.  
 5 I saw that I had missed a call, and as is  
 6 my practice, I called that number back. It  
 7 was an unfamiliar number to me, but it was  
 8 a local number. And so I called that  
 9 number back, and -- from my house phone in  
 10 my kitchen. And I said who I -- I  
 11 identified myself. I said, "Someone at  
 12 this number called me, and I'm returning  
 13 the call."  
 14 A male voice at the other end said,  
 15 "That was me. I called you. I'm Ned  
 16 Donovan."  
 17 And that's how it began.  
 18 Q. Okay. Did you know Mr. Donovan?  
 19 A. I did not.  
 20 Q. Well, did you know who he was?  
 21 A. No.  
 22 Q. Or where he worked?  
 23 A. Only when I returned the call and then  
 24 whoever answered the -- the male at the  
 25 other end of the phone said "*Pinedale*"  
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1 paper. He was at council meeting. When  
 2 the council meeting was over, I followed  
 3 him outside and introduced myself to him.  
 4 Q. Okay. Did you have a conversation with  
 5 him then?  
 6 A. No.  
 7 Q. Just introduced yourself?  
 8 A. Yes.  
 9 Q. All right.  
 10 But when he -- when you called him back,  
 11 he did tell you he was with the *Pinedale*  
 12 *Roundup*?  
 13 A. Yes.  
 14 Q. And, obviously, you know that's the local  
 15 paper; right?  
 16 A. Yes.  
 17 Q. And you understood he to be a reporter?  
 18 A. Yes.  
 19 Q. Okay.  
 20 What did -- what -- tell me about the  
 21 conversation with Mr. Donovan. Do you  
 22 remember the date?  
 23 A. The exact date, no. It was a Friday,  
 24 December -- Friday in December.  
 25 Q. Okay.  
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1 Sometime before -- Friday sometime  
 2 before December 11th; correct?  
 3 **A.** Yes.  
 4 **Q.** December 11th being the day the article  
 5 came out.  
 6 **A.** Yes.  
 7 **Q.** So what was your conversation with  
 8 Mr. Donovan?  
 9 **A.** He asked me procedural questions and  
 10 questions involving same-sex marriages.  
 11 **Q.** Like, what do you mean "procedural  
 12 questions"?  
 13 **A.** Several procedural questions on how a  
 14 person obtains a marriage license --  
 15 **Q.** Okay.  
 16 **A.** -- and what the procedure is to find  
 17 someone to do the wedding.  
 18 **Q.** All right. And I assume you answered  
 19 those questions?  
 20 **A.** Yes.  
 21 **Q.** Do you remember what you told him?  
 22 **A.** Yes.  
 23 **Q.** What did you tell him?  
 24 **A.** I told him that in order to get a  
 25 marriage license, a person goes to the  
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1 marriage.  
 2 And the conversation was approximately  
 3 ten minutes long, and it was done, and I  
 4 ended it.  
 5 **Q.** Okay.  
 6 And how did you end it?  
 7 **A.** "Goodbye," I guess.  
 8 **Q.** Okay. Ask a dumb question.  
 9 So back to our Exhibit 4. He quotes you  
 10 in two different places, and I've highlighted  
 11 those.  
 12 **A.** (Reviewing document.)  
 13 **Q.** Did he accurately quote you?  
 14 **A.** (Reviewing document.)  
 15 The two quotes highlighted, yes.  
 16 **Q.** Okay.  
 17 Can I have that back since that is my  
 18 copy? The actual --  
 19 **MR. CAMPBELL:** Would you mind reading  
 20 those in? The two that are highlighted.  
 21 **MR. DIXON:** Yes, I will. The first  
 22 quote is: Quote, "I will not be able to do  
 23 them," closed quote, "Neely told the  
 24 *Examiner*," period. Quote, "We have at  
 25 least one magistrate who will do same-sex  
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1 county clerk's office, fills out the  
 2 papers, pays the fee, and the county  
 3 clerk's office, circuit court and the  
 4 district court would be able to give the  
 5 couple names and phone numbers of people  
 6 who would be able to -- or were authorized  
 7 to do weddings.  
 8 **Q.** Okay.  
 9 And -- and then he asked you about your  
 10 position on same-sex marriage?  
 11 **A.** He did.  
 12 **Q.** Tell -- tell me how that works.  
 13 **A.** When I answered the phone, very first  
 14 thing -- when he introduced himself, his  
 15 first question to me was something to the  
 16 effect of, "Aren't you excited now that  
 17 you'll be able to do same-sex marriages?"  
 18 **Q.** Okay.  
 19 **A.** And my instant answer was the truth,  
 20 and I said, "No."  
 21 He changed course. We talked about  
 22 procedural stuff and then my personal views  
 23 on same-sex marriages. I made it clear to  
 24 him that the issue is not at all about the  
 25 people; that it's solidly about the  
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1 marriages, but I will not be able to,"  
 2 closed quote.  
 3 **Q.** (By Mr. Dixon) And that was accurately  
 4 quoted?  
 5 **A.** Yes.  
 6 **Q.** And then below that he quoted you as  
 7 saying: Quote, "When law and religion  
 8 conflict," comma, "choices have to be made,"  
 9 period. "I have not been asked to perform a  
 10 same-sex marriage," comma, closed quote,  
 11 "Neely said," period.  
 12 Was that an accurate quote?  
 13 **A.** Yes.  
 14 **Q.** Thank you.  
 15 Between -- between those two quotes,  
 16 Ned Donovan writes: "But Neely's  
 17 inabilities to perform the marriages has  
 18 nothing to do with her schedule," comma,  
 19 "rather, her religious beliefs."  
 20 Did you tell him something to that  
 21 effect?  
 22 **A.** I don't recall that.  
 23 **Q.** You don't remember that?  
 24 **A.** No.  
 25 **Q.** Okay.  
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1 You wouldn't have any reason to  
 2 disagree that -- that he accurately  
 3 reported what you said?  
 4 **A.** I have no reason to agree, either.  
 5 **Q.** Fair enough.  
 6 **A.** I don't recall.  
 7 **Q.** That's fair. If you don't remember, you  
 8 don't.  
 9 Have you seen Exhibit 19?  
 10 **A.** (Reviewing document.)  
 11 **Q.** And I -- and, specifically, have you seen  
 12 that document? Have your lawyers given you a  
 13 copy that one?  
 14 **A.** (Reviewing document.)  
 15 Yes.  
 16 **Q.** Okay.  
 17 The fourth page starts with the caption  
 18 "Process." And you've read that before  
 19 today?  
 20 **A.** Yes.  
 21 **Q.** All right. Do you know what that is?  
 22 **A.** Do I know what --  
 23 **Q.** What the --  
 24 **A.** -- process is.  
 25 **Q.** What this document is?  
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1 **MR. CAMPBELL:** Objection. Lacks  
 2 foundation.  
 3 **MR. DIXON:** I asked if she knew.  
 4 **THE WITNESS:** (Reviewing document.)  
 5 I understand that it's a -- possibly a  
 6 typed-out paper of Ned's notes.  
 7 **Q.** (By Mr. Dixon) Okay. If -- you know  
 8 what? I don't think that's a fair question  
 9 and I'm not gonna ask it.  
 10 But I will ask this and I will represent  
 11 to you that Mr. Donovan told me this and gave  
 12 this to me and said that these were his notes  
 13 on your conversation you have just described.  
 14 And he says, quoting you: "Gently, I  
 15 would like people not to know that I" -- let  
 16 me start over.  
 17 "Gently, I would like people not to know  
 18 that I can't do them. I would gently direct  
 19 them to Steve Smith," comma. "I would gently  
 20 tell them that I am not available that day."  
 21 Closed quote.  
 22 Did you say something like that to  
 23 Mr. Donovan? And I -- I highlighted it  
 24 there.  
 25 **A.** (Reviewing document.)  
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1 My recollection of this quote is this:  
 2 "Gently, I would like people to know that I  
 3 can't do them."  
 4 **Q.** Okay.  
 5 **A.** "I would gently direct them to Steve  
 6 Smith."  
 7 And I don't recall saying I would  
 8 gently tell them I'm not available that  
 9 day. He put in one more note in that first  
 10 part that I don't recall.  
 11 **Q.** He put in one more what?  
 12 **A.** In the first -- in the first sentence,  
 13 he has: "Gently, I would like people not  
 14 to know that I can't do them."  
 15 **Q.** Yeah.  
 16 **A.** My recollection of that sentence is  
 17 this: "Gently, I would like people to know  
 18 that I can't do them."  
 19 **Q.** Okay. All right.  
 20 My concern is with the statement, quote,  
 21 "I would gently tell them I'm not available  
 22 that day."  
 23 Did you say something like that to him?  
 24 **A.** I don't recall saying that to him.  
 25 **Q.** Mr. Donovan says you did say that. You  
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1 would disagree with that?  
 2 **A.** I'm saying I don't recall saying that  
 3 to him.  
 4 **Q.** If you were to tell a same-sex couple that  
 5 you couldn't do their ceremony because you  
 6 were not available that day when you were, in  
 7 fact, available, that would be a lie,  
 8 wouldn't it?  
 9 **A.** Yes.  
 10 **MR. CAMPBELL:** Object --  
 11 **THE WITNESS:** Sorry.  
 12 **Q.** (By Mr. Dixon) Did you have more than one  
 13 conversation with Mr. Donovan on this day?  
 14 **A.** Yes.  
 15 **Q.** How many conversations did you have?  
 16 **A.** We were on the phone three different  
 17 times.  
 18 **Q.** Was there a reason you didn't tell the  
 19 Commission that you had three conversations  
 20 with Mr. Donovan that day?  
 21 **MR. CAMPBELL:** Objection. It's  
 22 argumentative.  
 23 **THE WITNESS:** Is there a reason I did  
 24 not tell them --  
 25 **Q.** (By Mr. Dixon) That --  
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1 things up.  
 2 Q. (By Mr. Dixon) Yes, you told me.  
 3 A. Yes. And then you asked me again, and  
 4 I told you again.  
 5 Q. So why -- what about that caused you to  
 6 call him a second time?  
 7 A. I asked him at the second call if he  
 8 would replace the comments that I made to  
 9 him with just a summary of the comments.  
 10 Q. And what did he say to you?  
 11 A. I don't recall exactly what he said.  
 12 Q. How long did that conversation last?  
 13 A. The second one?  
 14 Q. Yeah.  
 15 A. Three minutes.  
 16 Q. Did he agree to your request?  
 17 A. He said that he would check with other  
 18 people and let me know.  
 19 Q. Okay. And -- and then did he call you  
 20 back to let you know?  
 21 A. No.  
 22 Q. Did you have a third conversation with  
 23 Mr. Donovan?  
 24 A. Yes.  
 25 Q. How -- and did you call him?

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1 A. No.  
 2 Q. How did that occur?  
 3 A. He called me back, but it was not to  
 4 let me know.  
 5 Q. Oh, okay. All right.  
 6 Why did he call you back?  
 7 A. He called me back and told me that if I  
 8 would agree to change my mind, he would not  
 9 publish any of that.  
 10 Q. Okay. And -- and what did you say to him  
 11 in response?  
 12 A. "No comment."  
 13 Q. No comment? That --  
 14 A. Correct.  
 15 Q. -- was all you said to him?  
 16 A. Yes, but I said it about six times.  
 17 Q. Okay. Okay.  
 18 But you did not agree to change your  
 19 position; right? You just said, "No  
 20 comment"?  
 21 A. Correct.  
 22 Q. Okay.  
 23 Did you have any other comments --  
 24 conversations with Ned Donovan on this  
 25 topic after the ones we've just discussed?

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1 A. No.  
 2 Q. Have you read an opinion regarding the  
 3 ethics of performing same-sex marriage  
 4 anywhere else, other than the sources I  
 5 showed you earlier today? From any other  
 6 source?  
 7 MR. CAMPBELL: Objection. Vague.  
 8 You can answer.  
 9 THE WITNESS: No.  
 10 Q. (By Mr. Dixon) Okay.  
 11 When did you last perform a wedding of any  
 12 kind?  
 13 A. December 31, 2014.  
 14 Q. Okay.  
 15 Do you have some kind of relationship with  
 16 Mayor Jones, other than your official  
 17 municipal-mayor relationship?  
 18 MR. CAMPBELL: Objection. Vague you  
 19 can answer.  
 20 THE WITNESS: What relationship?  
 21 Q. (By Mr. Dixon) A social, familial,  
 22 business? Any other type of relationship?  
 23 A. Bob Jones is a customer of Bucky's  
 24 Outdoors.  
 25 Q. Okay.

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1 A. That's --  
 2 Q. Did he ever work for Bucky's Outdoors?  
 3 A. Did he ever work for Bucky's Outdoors?  
 4 Q. Yes.  
 5 A. He volunteered a couple of times to  
 6 help put together snowmobiles in a pinch,  
 7 but he didn't ever get a paycheck or any --  
 8 it was a volunteer thing.  
 9 Q. Okay.  
 10 Neither you nor your husband ever worked  
 11 for him --  
 12 A. No.  
 13 Q. -- other than in the -- the Town  
 14 business -- the Town arena?  
 15 A. Correct.  
 16 Q. Okay.  
 17 I understand there was a contested  
 18 mayoral race last time around; correct?  
 19 A. Yes.  
 20 Q. Did you support him in that election;  
 21 Mayor Jones?  
 22 MR. CAMPBELL: Objection. Vague as to  
 23 "support."  
 24 Q. (By Mr. Dixon) In any -- in any form?  
 25 I'm not asking how you voted.

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EXCERPT FROM DEPOSITION OF THE  
HONORABLE CURT AUSTIN HAWS  
9/18/15

1 BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

2 STATE OF WYOMING

3

4

5 An inquiry concerning ) Commission on Judicial  
6 ) Conduct and Ethics

7 The Honorable Ruth Neely ) No. 2014-27

8 Municipal Court Judge and )

9 Circuit Court Magistrate )

10 Ninth Judicial District )

11 Pinedale, Sublette County )

12 ----- )

13

14

15

DEPOSITION OF

16

THE HONORABLE CURT AUSTIN HAWS

17

Friday, September 18, 2015

18

19

TAKEN AT

20

Sublette County Library Board Room  
Pinedale, Wyoming

21

22

23

COURT REPORTER:

24

Michelle L. Cunningham

Deputy and Freelance Reporter

Notary Public

25

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1 Q. Okay.  
 2 We spoke a little bit about this with  
 3 respect to the Drug Treatment Court. Do  
 4 you have an opinion regarding, say, her  
 5 compassion for others in the community?  
 6 A. I think she's a very compassionate  
 7 person.  
 8 Q. And what makes you say that, besides the  
 9 steering committee experience?  
 10 A. Just watching her interact at -- at  
 11 social functions in the community. The --  
 12 the -- just seeing her out and about in the  
 13 town. She's always talking with someone  
 14 and seems like a -- that would strike me as  
 15 someone that's engaged and compassionate.  
 16 Q. And when she did have to substitute for  
 17 you as on a referral basis as a circuit court  
 18 magistrate, what would be your opinion of her  
 19 competence in doing that?  
 20 A. Fine. I have no complaints.  
 21 Q. What is your opinion of Judge Neely's  
 22 character?  
 23 A. I think she has -- I think she has a  
 24 strong, good character. If -- if I didn't  
 25 think that, she wouldn't have served as a  
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1 magistrate for as long as she did.  
 2 Q. Did you ever hear of any allegations or  
 3 complaints that Judge Neely was biased when  
 4 she was a circuit court magistrate?  
 5 A. No.  
 6 Q. Did you ever hear of any allegations that  
 7 she was prejudiced against anyone --  
 8 A. No.  
 9 Q. -- as a circuit court magistrate?  
 10 A. No.  
 11 Q. Did you ever hear of any allegations,  
 12 given the fact this is a small town, that she  
 13 was biased or prejudiced against someone who  
 14 had appeared before her in municipal court?  
 15 A. Didn't ever hear that.  
 16 Q. Did you ever experience any of that or see  
 17 any of that when she was on the steering  
 18 court -- the Drug Treatment Court steering  
 19 committee?  
 20 A. No.  
 21 Q. Is it fair to say that Judge Neely, when  
 22 she was a circuit court magistrate serving  
 23 under you, performed a lot of weddings?  
 24 A. Yes.  
 25 Q. Okay.  
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1 Would it be fair to say that she  
 2 performed on average a significantly --  
 3 significantly more weddings than most other  
 4 magistrates?  
 5 A. She was the -- the go-to magistrate for  
 6 weddings.  
 7 Q. And when you say "the go-to magistrate,"  
 8 was that -- was that something that was known  
 9 in Pinedale --  
 10 A. Right.  
 11 Q. -- and Sublette County? Is that fair to  
 12 say?  
 13 A. I -- based on my -- on my information,  
 14 yes.  
 15 Q. Do you have an estimate of how many  
 16 weddings she would do a year?  
 17 A. Not even a guess.  
 18 Q. Okay. But it was -- was generally more?  
 19 She was the one people would go to?  
 20 A. Yeah, people would call our office or  
 21 the -- or the -- the county clerk's office,  
 22 and I don't know what the county clerk  
 23 said. I know that my office would say, "If  
 24 you want to get married Monday through  
 25 Friday during business hours and we have a  
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1 spot in the schedule, the judge would be  
 2 happy to do it. If you're looking for an  
 3 evening or a weekend or something like  
 4 that, here's a list of folks."  
 5 And it's -- it's a short list and Ruth  
 6 headed up that list.  
 7 Q. When you say "Ruth headed up that list,"  
 8 would your clerks give her pride of place or  
 9 say, "Call Ruth first"?  
 10 A. No, I don't think so, but I think as  
 11 they -- they read from the list, she was at  
 12 the head of the list.  
 13 Q. Okay. And she was obviously, on average,  
 14 willing to do a lot of weddings per year?  
 15 A. I -- I assume, so --  
 16 Q. Yeah.  
 17 A. -- because that was my sense of -- of  
 18 the -- in the last, I don't know, four or  
 19 five years, that was her primary function.  
 20 Q. Okay.  
 21 Do you remember who else is on the  
 22 list?  
 23 A. Any -- you know, I -- I don't. Any of  
 24 the -- the magistrates would be available.  
 25 I know that Mr. LaBuda, Mr. Wood indicated  
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1 A. No.  
 2 Q. Or the Commission of Judicial Conduct and  
 3 Ethics?  
 4 A. I did not.  
 5 Q. Were there any newsletters regularly being  
 6 circulated to you as --  
 7 A. No.  
 8 Q. -- a judge?  
 9 A. No.  
 10 Q. Do you know if any other judges received  
 11 any regular newsletters regarding these types  
 12 of issues? Same-sex marriage.  
 13 A. No. I -- I -- let me amend that.  
 14 I -- I receive, weekly, something from  
 15 the National Center for State Courts that  
 16 talks about judicial discipline issues  
 17 around the country, so...  
 18 But I requested to receive that, I --  
 19 it's not generally circulated, I don't  
 20 believe. I don't know who gets that or  
 21 doesn't. I request it because I like to  
 22 learn from other people's mistakes, instead  
 23 of making them myself, if I can.  
 24 Q. Do you remember anything in those  
 25 newsletters or offerings from that -- that  
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1 national body?  
 2 A. No --  
 3 Q. Okay.  
 4 A. -- not -- not until, you know, 2015.  
 5 Q. Okay.  
 6 Were there any meetings held at the  
 7 circuit court level, the district court  
 8 level, or -- or statewide on this issue?  
 9 A. No, not that --  
 10 Q. Okay.  
 11 A. -- I was aware of.  
 12 Q. Okay.  
 13 And no official memoranda that you recall  
 14 being produced or sent around?  
 15 A. No.  
 16 Q. Okay.  
 17 Do you know if there are any advisory  
 18 opinions released on this issue?  
 19 A. No. I'm not -- I am not aware of any  
 20 and have -- have looked. I believe there  
 21 are not.  
 22 Q. Okay.  
 23 Do these generally come down automatically  
 24 to judges if they are released?  
 25 A. Yes.  
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1 Q. Okay. How does that happen?  
 2 A. Via e-mail, it'll either come from --  
 3 from the Supreme Court administrator or  
 4 from the Wyoming State Bar.  
 5 Q. Are you familiar with the *Guzzo v. Mead*  
 6 case which effectively legalized same-sex  
 7 marriage in Wyoming?  
 8 A. It doesn't sound familiar to me.  
 9 Q. Okay. So you don't remember hearing about  
 10 that ruling?  
 11 A. Is that the case that Judge Skavdahl  
 12 ruled on?  
 13 Q. It is.  
 14 A. Okay. I call it the "Skavdahl  
 15 decision." I don't know the parties'  
 16 names.  
 17 Q. Yes.  
 18 A. Yes, I'm aware of that.  
 19 Q. Do you remember when you heard about that  
 20 ruling?  
 21 A. I heard about it -- I can't remember  
 22 the specific day that the ruling came down,  
 23 but I heard about it the day or -- or,  
 24 perhaps, the next day thereafter.  
 25 Q. Okay.  
*Jackson Hole Court Reporting Service - (307) 733-2637*

1 And after that decision came down, did you  
 2 have a meeting with Judge Neely?  
 3 A. I did.  
 4 Q. Okay.  
 5 Now, in your letter responding to the  
 6 Commission's inquiry in this matter, you  
 7 outline four separate conversations you had  
 8 with her regarding same-sex marriage. I'd  
 9 like to take those in order, starting with  
 10 that initial meeting you had in --  
 11 A. Sure.  
 12 Q. -- in October.  
 13 Do you remember, to the best of your  
 14 recollection, when that was?  
 15 A. As -- without -- without referring  
 16 to -- to my letter, I -- I couldn't tell  
 17 you. Early 2015. I -- I think I have --  
 18 perhaps I listed a date. I don't know if I  
 19 listed a date, but I don't remember the  
 20 specific date that Judge Neely called and  
 21 asked to visit.  
 22 Q. Could -- if you want to refer to --  
 23 refresh your recollection.  
 24 A. Oh.  
 25 (Reviewing document.)  
*Jackson Hole Court Reporting Service - (307) 733-2637*

1 Okay, well, that would -- that would  
 2 confirm my lack of recollection. I know  
 3 that it was shortly after  
 4 Judge Skavdahl's -- the decision came down  
 5 that Judge Neely called and asked for -- to  
 6 come visit with me.

7 MR. CONNELLY: Please go off the record  
 8 for one second.

9 (Whereupon, a discussion was held off  
 10 the record.)

11 Q. (By Mr. Connelly) Okay, Judge.

12 A. It's her -- it's her laptop now, so I  
 13 conceded control of that.

14 Q. Looking -- looking at what's been  
 15 previously marked as Exhibit 12 --  
 16 Respondent's Exhibit 12, Judge, does that  
 17 refresh your recollection as to when that  
 18 first, initial meeting with Judge Neely was?

19 A. (Reviewing document.)

20 January 15, 2015. And I -- I'm relying  
 21 on that letter. I don't have an  
 22 independent recollection today that that's  
 23 when it happened, but I have no reason to  
 24 doubt that's not when it happened.

25 Q. Well, if you'll look back, Judge, at  
*Jackson Hole Court Reporting Service - (307) 733-2637*

1 Q. -- chambers?

2 A. -- correct.

3 We sat down next to one other, and I  
 4 asked her what I could do for her.

5 Q. Okay.

6 A. And she expressed concern about this  
 7 decision and -- and relayed to me her  
 8 strong conviction that marriage was an  
 9 institution reserved to men and women and  
 10 that she didn't -- she had concerns about  
 11 whether or not she could perform a wedding  
 12 ceremony if it involved a same-sex couple.

13 Q. Okay.

14 A. And I don't remember the specifics of  
 15 the conversation. I remember trying to be  
 16 very empathetic to that very difficult  
 17 position. I believe I expressed to her  
 18 that I held similar views and that each  
 19 person needed to decide where -- where --  
 20 where they need to stand up for those  
 21 views, where it was appropriate and where  
 22 it wasn't.

23 It was -- I -- I believe that I  
 24 expressed to her my belief that that was an  
 25 essential function of the job, and that if

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1 the -- the third full paragraph on what's  
 2 been marked as --

3 A. Shortly -- starting "Shortly after  
 4 Judge Skavdahl"?

5 Q. Yes.

6 A. Okay.

7 Q. That's the first conversation I'm  
 8 referring to.

9 A. Okay. Thank you.

10 Q. If I represent to you that *Guzzo v. Mead*  
 11 came down -- that opinion came down  
 12 October 17th, 2014, does that refresh your  
 13 recollection a little bit?

14 A. That helps. Thank you.

15 Yes, it would have been within that  
 16 time frame.

17 Q. Okay. So it would be safe to say late  
 18 October, then?

19 A. (Moving head up and down.)

20 Thank you, yes.

21 Q. Please tell me everything you remember  
 22 about that conversation from the time  
 23 Judge Neely walked into your office. Was it  
 24 in your office --

25 A. We were in chambers --

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1 we were called upon to do it, that -- that  
 2 we needed to do that.

3 But I don't -- no decisions were made  
 4 at that point because it was -- the  
 5 decision had just come down, and we had no  
 6 guidance from any higher authority as to --  
 7 to what to do, how to prepare, what steps  
 8 to take. And so it was kind of -- I  
 9 think -- I don't recall if it was at that  
 10 first meeting or a subsequent meeting where  
 11 I suggested to her that until we knew more,  
 12 my advice was to "keep your head down and  
 13 your mouth shut."

14 Q. Okay.

15 Do you remember what she said to you after  
 16 you -- after she initially told you about her  
 17 religious beliefs regarding marriage?

18 A. (Moving head up and down.)

19 Q. And that was gonna be that, you know, that  
 20 was her belief --

21 A. Right.

22 Q. -- and you told her that?

23 Do you remember what she said to you?

24 A. She -- she said, "I'm just not sure I  
 25 can do that."

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1 And I -- and I told her I respected her  
 2 for -- for taking that position. I told  
 3 her that I would never ask her to  
 4 compromise her personal beliefs, but  
 5 there -- there might come a point in time  
 6 where she had to choose. Because if that  
 7 turned out to be a necessary essential  
 8 function of the job and she was unable to  
 9 perform that function, that that would be a  
 10 problem.  
 11 Q. Okay. When you say that "she would not be  
 12 able to do that," you're referring to the  
 13 fact she didn't think she would be able to  
 14 solemnize a same-sex marriage --  
 15 A. Correct.  
 16 Q. -- given her religious beliefs?  
 17 A. Correct. Correct.  
 18 Q. To that point in time when that meeting  
 19 happened, to your knowledge, had any same-sex  
 20 couples sought a marriage license in  
 21 Pinedale?  
 22 A. Not to my knowledge.  
 23 Q. Sought -- in Sublette County?  
 24 A. Not to my knowledge.  
 25 Q. Or sought to be married?

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1 of the meeting? Do you remember anything  
 2 else that happened at that -- at that  
 3 meeting?  
 4 A. I don't. I remember -- I remember  
 5 struggling to try and -- and support  
 6 Judge Neely's strongly held personal belief  
 7 and support her in that, in her right to  
 8 hold that belief, and struggling with --  
 9 with the juxtaposition of that necessity in  
 10 my mind, because that's a necessity to  
 11 support somebody's religious beliefs.  
 12 And to struggle with saying, "Jeez,  
 13 I -- this -- this -- this could be a  
 14 problem," and to try and communicate that  
 15 concern effectively to her while at the  
 16 same time supporting her in -- in her very  
 17 strongly held beliefs.  
 18 Q. Would it be fair to say it was a complex  
 19 issue?  
 20 A. I would say that's an understatement,  
 21 yes.  
 22 Q. Okay.  
 23 Can you remember anything else that was  
 24 said during that initial conversation?  
 25 A. I -- I don't.

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1 A. No. I was not aware of any.  
 2 Q. At the time of that initial meeting in  
 3 late October, were you aware of circuit court  
 4 magistrates, either ones we've spoken about  
 5 or others, or other government officials in  
 6 Pinedale or Sublette County, say, district  
 7 court commissioners, who were prepared to  
 8 handle same-sex ceremonies if they came up?  
 9 A. The issue had not arisen.  
 10 Q. Okay.  
 11 A. I had not polled my magistrates. I had  
 12 not talked with anybody about what they  
 13 were or were not willing to do. This was  
 14 the very first conversation on the subject.  
 15 Q. So at that point, the issue was so fresh  
 16 that it was too early for that?  
 17 A. For this judge, it was too early, yes.  
 18 Q. Okay. So you didn't have any  
 19 conversations with those magistrates about  
 20 their availability or willingness to perform  
 21 same-sex marriages at that point?  
 22 A. Did not.  
 23 Q. Okay.  
 24 What did you -- so when you said "keep  
 25 your head down," is that -- is that the end

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1 Q. How long would you say it lasted?  
 2 A. Ten minutes, 15 minutes at the most, I  
 3 would think. Maybe -- maybe a little  
 4 longer. We -- we sat and chatted and tried  
 5 to -- you know, I spent a lot of time  
 6 listening, because I -- this -- this was  
 7 a -- this was a very serious issue to her  
 8 and I wanted her to -- to feel like that  
 9 was a safe environment to talk through her  
 10 feelings and concerns.  
 11 Q. Okay.  
 12 After the conversation ended, did you  
 13 relay the substance of that conversation to  
 14 anyone else after speaking with  
 15 Judge Neely?  
 16 A. I -- probably talked about it with my  
 17 wife --  
 18 Q. Okay.  
 19 A. -- but --  
 20 Q. Anyone else?  
 21 A. No.  
 22 Q. Okay.  
 23 As to that initial -- that late October  
 24 conversation, have you told me everything you  
 25 can remember about that initial meeting with

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1 Q. Okay.  
 2 So does --  
 3 A. So I --  
 4 Q. Does that appear to be the letter that  
 5 Judge Neely handed to you that she was --  
 6 that she had submitted to the Judicial Ethics  
 7 Advisory Committee seeking opinion on this  
 8 issue?  
 9 A. I believe it is, yes.  
 10 Q. And that was her attempt to seek  
 11 clarification as to what the Code required  
 12 and --  
 13 A. Correct.  
 14 Q. -- get some clarification?  
 15 And you said, upon receiving the letter at  
 16 that chambers, you decided that because the  
 17 Commission had expressed a concern, that it  
 18 was, at that time, appropriate to suspend her  
 19 until this was resolved?  
 20 A. I can't remember the exact words I  
 21 used, but --  
 22 Q. Is that a fair characterization?  
 23 A. That's fair.  
 24 Q. Because the Commission had expressed the  
 25 concern that until that -- until the matter

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1 suspend. I don't recall a specific word I  
 2 used. I see that I used the word "suspend"  
 3 in my response to the Commission. That's  
 4 best evidence of what I --  
 5 Q. Okay.  
 6 A. -- can recall.  
 7 Q. Can you remember anything else about that  
 8 conversation? What did Judge Neely say to  
 9 you after you said that?  
 10 A. She acquiesced. I don't -- It was --  
 11 It was a -- It was a difficult  
 12 conversation, but it was not an unpleasant  
 13 conversation.  
 14 Q. As a judge in Pinedale, I think you  
 15 referred to this earlier in the deposition,  
 16 it's a very small legal community; you've got  
 17 a lot of conflicts, you know --  
 18 A. Right.  
 19 Q. -- just because there's so few people.  
 20 Since Judge Skavdahl's opinion in -- In  
 21 October of 2014, have you ever heard of  
 22 anyone -- a same-sex couple not being able to  
 23 get married here in Pinedale?  
 24 A. I know of no such case.  
 25 Q. Okay.

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1 was resolved and clarity was gained, it'd be  
 2 best for her --  
 3 A. That's --  
 4 Q. -- not to be --  
 5 A. That's correct.  
 6 Q. At that time, did you give her a formal  
 7 written notice of suspension?  
 8 A. I did not.  
 9 Q. Okay.  
 10 Your letter -- your response letter to the  
 11 Commission references that you notified the  
 12 county clerk of that action. Would there  
 13 have been any document related to that?  
 14 A. That was a face-to-face conversation.  
 15 Q. Okay.  
 16 And when you talk about the -- the  
 17 suspension pending the -- the review by the  
 18 Commission, what was the scope of the  
 19 suspension? Was there something you said to  
 20 Judge Neely about that?  
 21 A. Yes, that she could no longer perform  
 22 any magisterial functions.  
 23 Q. Okay, so while the -- while the  
 24 Commission's action was pending --  
 25 A. I can't remember if I said terminate or

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1 Would you say there's a high demand for  
 2 same-sex marriage in Pinedale or Sublette  
 3 County?  
 4 A. No.  
 5 Q. Would you say that there are a sufficient  
 6 number of government officials willing to  
 7 solemnize same-sex marriage here in Pinedale?  
 8 A. Absolutely. No one's been denied that  
 9 opportunity.  
 10 Q. Okay.  
 11 If you could give me an estimate, how  
 12 many same-sex marriages would you estimate  
 13 have been requested in Pinedale since that  
 14 ruling?  
 15 A. There are -- have been two.  
 16 Q. Two. And you're not aware of any other  
 17 requests?  
 18 A. No.  
 19 Q. Okay.  
 20 So you haven't been asked to solemnize  
 21 any same-sex marriages?  
 22 A. I have. I was asked to solemnize one  
 23 of the first marriages, was unable to do so  
 24 because of -- I had a performance in -- in  
 25 Jackson at the same time.

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1 the county clerk, and within that testimony  
 2 you spoke about the county clerk, I guess,  
 3 administratively trying to prepare for --  
 4 A. Correct.  
 5 Q. -- the rollout, I guess, of *Guzzo v. Mead*  
 6 or same-sex marriage here in Wyoming.  
 7 Do you recall what she --  
 8 Is it she?  
 9 A. It is.  
 10 Q. -- what she said as to what the office was  
 11 doing to implement same-sex marriage in the  
 12 county?  
 13 A. Just modifying the forms to make them  
 14 gender-neutral.  
 15 Q. Okay. Anything else you can recall?  
 16 A. They were ready. The -- it was not --  
 17 it was not gonna be an issue in this  
 18 county.  
 19 Q. Okay.  
 20 So to the best of your recollection,  
 21 that was -- that was all you spoke about --  
 22 A. Um-hum.  
 23 Q. -- other than Mr. Donovan being there  
 24 frequently?  
 25 A. Correct.

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1 Q. Okay,  
 2 I don't have any further questions for  
 3 you, Judge. Thank you.  
 4 A. All right. Thank you.  
 5 MR. DIXON: I might ask you a couple  
 6 just briefly, so indulge me.  
 7 THE WITNESS: I will.  
 8 **EXAMINATION OF THE HONORABLE CURT AUSTIN HAWS**  
 9 **BY MR. DIXON**  
 10 Q. Other than observing that Ned Donovan was  
 11 very interested in the question, do you know  
 12 if he -- what his personal opinion of the  
 13 subject was?  
 14 A. I do not know.  
 15 (Moving head from side to side.)  
 16 Q. And it wouldn't be unusual for a newspaper  
 17 reporter to be interested in that topic at  
 18 that time?  
 19 A. I would think that would be perfectly  
 20 logical.  
 21 (Whereupon, Deposition Exhibit 42 was  
 22 marked for identification.)  
 23 Q. (By Mr. Dixon) Let's see here. Where was  
 24 I?  
 25 Let me -- let me hand you what's been

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1 marked as Exhibit 42. And can you identify  
 2 that?  
 3 A. That's a -- an order appointing adjunct  
 4 court magistrate dated June 4, 2007.  
 5 (Whereupon, a discussion was held off  
 6 the record.)  
 7 Q. (By Mr. Dixon) Let me ask you to compare  
 8 that to --  
 9 MR. WARDLOW: This is Commission  
 10 Exhibit 40?  
 11 MR. DIXON: It's not. It's Exhibit 42.  
 12 When we get to a hearing, we'll identify  
 13 them as --  
 14 MR. WARDLOW: Very good.  
 15 Q. (By Mr. Dixon) Okay. Can you -- can you  
 16 compare that to 38 and tell me what's the  
 17 difference?  
 18 A. The difference is that 42 was an  
 19 appointment for the limited purpose of  
 20 performing weddings and had a duration on  
 21 it from July 1, 2007, through June 30,  
 22 2008.  
 23 Q. So -- and this pertains to Ruth Neely;  
 24 correct?  
 25 A. Correct.

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1 Q. So 2007 had limited appointment in terms  
 2 of time and duties; correct?  
 3 A. Correct.  
 4 Q. And then did -- did that appointment  
 5 change in 2008?  
 6 A. It did. It -- it became -- it went  
 7 back to what it was. It had -- it had --  
 8 It had been broad under Judge Crow, and I  
 9 had not modified that. Then for some  
 10 period of time, all she was doing was  
 11 weddings. And it was costing -- for a  
 12 general appointment, we had to purchase  
 13 insurance for each magistrate, and I -- I  
 14 just -- that's all she was doing. It  
 15 didn't make any sense to spend money on the  
 16 performance bond.  
 17 And then -- and too -- I believe it was  
 18 2008, or somewhere in that time frame, the  
 19 requirement that magistrates be bonded went  
 20 away and so it was no longer a financial  
 21 issue, and I thought it made sense to have  
 22 her available for more than just weddings,  
 23 if the need arose.  
 24 Q. All right. So after 2008, she had just a  
 25 general magisterial appointment?

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1 A. Correct.  
 2 Q. And I take it there's not been a  
 3 subsequent order entered?  
 4 A. There has not.  
 5 Q. Okay.  
 6 So prior to January 15, 2015, this was  
 7 the order she was operating under?  
 8 A. Correct.  
 9 Q. "Serving under" would be a better word.  
 10 A. Correct.  
 11 Q. Now --  
 12 MR. CAMPBELL: Just to make the record  
 13 clear, what is "this" that you're referring  
 14 to?  
 15 MR. DIXON: Thanks, Counsel. "This"  
 16 being Exhibit 42 -- no 38.  
 17 THE WITNESS: 38.  
 18 MR. DIXON: That didn't make the record  
 19 clear.  
 20 MR. WARDLOW: Exhibit 38.  
 21 MR. CONNELLY: Exhibit 38.  
 22 Q. (By Mr. Dixon) Exhibit 38 is the order  
 23 under which she served until January 15th?  
 24 A. That's correct.  
 25 Q. And I think that you made it clear, but --  
*Jackson Hole Court Reporting Service - (307) 733-2637*

1 STATE OF WYOMING )  
 2 )  
 3 COUNTY OF SUBLETTE )  
 4 I, Michelle L. Cunningham, Deputy and  
 5 Freelance Shorthand Reporter and notary Public  
 6 in and for the State of Wyoming, do hereby  
 7 certify that the foregoing proceeding was  
 8 reported by me and was thereafter transcribed  
 9 under my direction into typewriting consisting  
 10 of pages 1 to 128; that the foregoing is a  
 11 full, complete and true record of said  
 12 proceedings to the best of my ability.  
 13 I further certify that I am not of counsel  
 14 or attorney for either or any of the parties in  
 15 the foregoing proceeding and caption named, or  
 16 in any way interested in the outcome of the  
 17 cause named in said caption.  
 18 In witness whereof, I have hereunto set my  
 19 hand and affixed my seal this day.  
 20 Date: \_\_\_\_\_, 2015  
 21 \_\_\_\_\_  
 22 Michelle L. Cunningham  
 23 Deputy and Freelance Reporter  
 24 Notary Public  
 25  
*Jackson Hole Court Reporting Service (307) 733-2637*

1 but her current status, as you perceive it,  
 2 is that she is a magistrate under  
 3 suspension --  
 4 A. Correct.  
 5 Q. -- as opposed to having been terminated  
 6 from her office as magistrate?  
 7 A. I have -- I have not used Donald  
 8 Trump's favorite line and fired her. A  
 9 suspension was the -- the word that I used.  
 10 Q. Okay.  
 11 That's -- that's all that I have.  
 12 MR. DIXON: You want to read and sign  
 13 it?  
 14 THE WITNESS: I'd be happy to.  
 15 MR. DIXON: You can waive if you want.  
 16 THE WITNESS: I will waive.  
 17 (Whereupon, the deposition of The  
 18 Honorable Curt Austin Haws was ended at  
 19 11:23 a.m.)  
 20  
 21  
 22  
 23  
 24  
 25  
*Jackson Hole Court Reporting Service - (307) 733-2637*

DEPOSITION  
EXHIBIT 38

Circuit Court of the Ninth Judicial District  
Sublette County, Wyoming

Curt A. Haws  
Circuit Court Judge

Wendy Sell  
Clerk of Court



40 South Fremont  
P.O. Box 1796  
Hinedale, WY 82941  
(307) 367-2556  
(307) 367-2658 fax

**ORDER APPOINTING COURT MAGISTRATE**

IT IS ORDERED that pursuant to W.S. § 5-9-201, et seq., **RUTH NEELY**, be, and is hereby appointed Magistrate of the Circuit Court in and for Sublette County, State of Wyoming, and shall take and subscribe an oath as provided by law to perform the duties provided by W.S. § 5-9-210.

DATED this 1<sup>st</sup> day of July, 2008.

BY THE COURT:

  
CURT HAWS  
Circuit Court Judge



DEPOSITION  
EXHIBIT 42

IN THE CIRCUIT COURT OF THE 9<sup>TH</sup> JUDICIAL DISTRICT  
SUBLETTE COUNTY, WYOMING  
CURT HAWS, CIRCUIT COURT JUDGE

THE STATE OF WYOMING,     )  
  ) ss.  
COUNTY OF SUBLETTE     )

FILED IN CIRCUIT COURT  
9TH JUDICIAL DISTRICT  
SUBLETTE COUNTY WYOMING

JUN - 4 2007

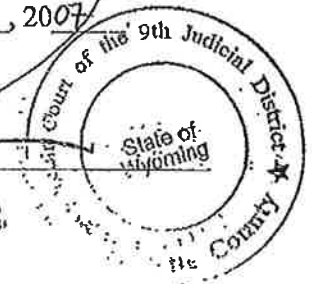
WENDY SEEL  
CLERK OF CIRCUIT COURT

ORDER APPOINTING ADJUNCT COURT MAGISTRATE

IT IS HEREBY ORDERED that RUTH NEELY be and is hereby appointed  
Adjunct Magistrate of the Circuit Court in and for Sublette County from July 1, 2007,  
and until June 30, 2008, for the limited purpose of performing weddings; and to serve  
without salary and shall take and subscribe an oath as provided by law to perform the  
duties provided by Sec. 5-9-212 (a)(iii).

DATED this 4 day of JUNE, 2007

CURT HAWS,  
Circuit Court Judge



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	)	11/19/15
Circuit Court Magistrate	)	<i>[Signature]</i>
Ninth Judicial District	)	Wend
Pinedale, Sublette County	)	

**CJCE'S RESPONSE TO THE HONORABLE RUTH NEELY'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Commission on Judicial Conduct and Ethics (CJCE or the Commission), by and through its attorney Patrick Dixon, and submits the following response to THE HONORABLE RUTH NEELY'S MOTION FOR SUMMARY JUDGMENT:

**I. Introduction.**

This is submitted in response to THE HONORABLE RUTH NEELY'S MOTION FOR SUMMARY JUDGMENT. The Commission incorporates herein, rather than restate, its October 30, 2015 MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT. Judge Neely raises a myriad of arguments in her submission. The Commission will attempt to address the most important issues; to the extent issues are not addressed, they are not conceded. Finally, the issues addressed herein are framed by the paragraph headings below.

II. **Judge Neely Violated the Wyoming Code of Judicial Conduct.**

A. *Judge Neely's Comments to Ned Donovan Violate Rule 2.3.*

Once again, Rule 2.3 of the Wyoming Code of Judicial Conduct 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).

In arguing that she did not violate this Rule, Judge Neely raises four distinct arguments. First, she argues that she did not violate the Rule because her comments about marriage were made "outside the context of performing 'judicial duties'." In so arguing, she observes that her duties as a Municipal Judge do not include performing marriage ceremonies and performing marriage ceremonies as a Circuit Court Magistrate is discretionary. Because she had no legal obligation to perform the ceremonies, therefore her comments were outside of her judicial duties.

This argument misses the mark on several points. First, the "primary function" of her duties as a Circuit Court Magistrate was to perform wedding ceremonies. *Haws Deposition, p. 61.* The record reflects that she performed very limited duties, back in 2009, in addition to her duty of performing marriage ceremonies. *See Deposition Exhibit 43, Neely Deposition pp. 40-41.*

With this exception, the only reason for her appointment was to perform wedding ceremonies and she was considered the “go to” judge in Sublette County for weddings. *Haws Deposition*, p. 60.

With reference to the Judicial Advisory Opinion cited in the Commission’s Memorandum in Support of Motion for Partial Summary Judgment, the opinions uniformly hold that refusal to perform same sex marriages is a violation of Rule 2.3. The opinions in jurisdictions where performing marriage ceremonies is a discretionary judicial function seem to indicate that a judge may avoid ethical problems by simply refusing to perform all marriages. But that is not what Judge Neely did in this instance. First, she gave what amounted to a press release stating her opposition to same sex marriages, and thus the law of the jurisdiction. Second, while electing not to perform same sex marriages, she continued performing traditional marriages until at least December 31, 2014. *Neely Deposition*, p. 100, *Verified Amended Answer*, ¶8.b. In this regard, the factual situation is more akin to that discussed in *In re the Matter of: The Honorable Gary Taber, Thurston County Superior Court Judge*, CJCE No. 7251-F-158, in which Judge Taber was publicly sanctioned in the wake of widespread publicity regarding his position on same sex marriages.

Last on this point, the Panel is again addressed to the very recent opinion in the *Supreme Court of Ohio Board of Professional Conduct Opinion 2015-1* in which the Ohio Supreme Court found that the act of refusing to perform all marriages in order to avoid performing same sex marriages was a



demonstration of bias under Rule 2.3. The Commission submits that the Ohio opinion is the better reasoned and more logical opinion and the one that should be followed in this matter.

The second argument that Judge Neely raises on this issue was that her comments were made outside of and did not relate to the adjudicative process. The language of Rule 2.3(B) is clear. It states that a judge shall not by words or conduct manifest bias or prejudice “in the performance of judicial duties.” It does not limit itself to words or conduct performed in the course of an adjudicative proceeding. Case law supports a broad, as opposed to restrictive reading of Rule 2.3. See *In re Nelson*, 532 S.E.2d 609 (S.C.2000); *Dodds v. Comm’n on Jud. Performance*, 906 P.2d 1260 (Cal.1996), previously cited and *In re Reddin*, 111 A.2d 74, 78 (N.J.2015), in which the disciplinary proceeding was predicated exclusively on the judge’s outside, social activities.

Neither does logic support a restrictive reading of the Rule. It can scarcely be argued that a judge would be free to go about the county espousing racial epithets or supporting anti-Semitic causes and still remain immune from a charge of bias under Rule 2.3 simply because her comments were made outside the courtroom.

The third argument that Judge Neely makes is that her comments were not malicious or inflammatory. To be sure, she did not engage in the type of language listed in Comment 2 to the Rule. However, Comment 2 states expressly that “examples of manifestations of bias or prejudice include **but are not limited to** bias, prejudice or harassment based upon race, sex, gender,

religion, national origin, ethnicity, disability, age, sexual orientation ...". In this case, Judge Neely's comments were more restrained. She did not deploy the well known homophobic slurs. Nonetheless, her message could not have been clearer: According to her personal religious beliefs, members of the LGBT community enjoy a lesser set of rights than all other citizens of the United States.

Judge Neely's final argument on Rule 2.3 is that she did not violate the Rule because she did not manifest bias or prejudice against any individual gay person. She supports this argument with the Blacks Law Dictionary definition of prejudice and affidavits of two members of the Lander LGBT community. First, the Commission submits that a better definition in this context may be found in the case of *Cleveland Bar Assn. v. Cleary*, 754 N.E.2d 235, 245-46 (Ohio2001):

The term "bias or prejudice" when used in reference to a judge "implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge as **contradistinguished from an open state of mind which will be governed by the law and the facts.**" (Emphasis added.)

If Judge Neely's comments do not demonstrate personal animus toward a given individual, neither do they demonstrate the open-mindedness toward a class of persons, requisite of a sitting judge.

Perhaps an even better definition of bias or prejudice is this: "prejudice is the belief that one class of persons enjoys lesser or different rights from the majority of persons." The essence of *Obergefell* is that gay and lesbian persons should enjoy the same rights to the institution of marriage as any other citizen

of the United States. To the extent that Judge Neely's stated, publicized opinion on same sex marriage disagrees with that premise, it is a manifestation of bias.

To conclude on this issue, much the same argument was raised by Kim Davis in *Miller v. Davis*, 2015 WL 4747523 (E.D.Ky.2015). Davis argued that she was just an ordinary citizen when she expressed her First Amendment beliefs regarding gay marriage. The Kentucky District Court had little trouble with this argument.

The logical answer to the question is no, as the average citizen has no authority to issue marriage licenses. Davis is only able to issue these licenses, or refuse to issue them, because she is the Rowen County Clerk. Because her speech (in the form of her refusal to issue marriage licenses) is a product of her official duties, it is likely not entitled to First Amendment protection.

*Id.*, pp. 24-25. In this case, Ned Donovan did not call Judge Neely on the subject of same sex marriage because she was a member of the Lutheran Church or because her husband works at Bucky's Outdoor. He called her because she was the "go to" Magistrate for marriage ceremonies. Her comments were made in that context and it is disingenuous to suggest that they were not made in the performance of her duties.

B. *Judge Neely's Conduct Violated Rule 2.2.*

Judge Neely next argues that her statements to Ned Donovan did not violate Rule 2.2 of the Code. As a reminder, 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.

In advancing her argument Judge Neely relies primarily on the comments to Rule 2.2. At this point, it might be helpful to revisit the purpose of the comments to the Code of Judicial Ethics. Paragraph 3 of the **Scope** recites the following:

(3) The COMMENTS that accompany the capital rules serve two functions. First, they provide guidance regarding the purpose, meaning and proper application of the rules. They contain explanatory material and, in some instances provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the rules. Therefore, when a comment contains the term “must” it does not mean that the comment itself is binding or enforceable, it signifies that the rule in question, properly understood is obligatory as to the conduct at issue.

In other words the Comments are meant to amplify and not to alter the meaning of the Rules.

Based upon her reading of the Comments to Rule 2.2, Judge Neely argues that the duty of fairness and impartiality applies only to parties in litigation. While that is the general application of the Rule, the Rule is much broader than that. It applies equally to the performance or nonperformance of the judge’s duties. The commentators indicate that:

A judge’s failure to do something that should be done may constitute nonfeasance in violation of Rule 2.2 because a judge has “an ethical as well as a legal obligation to apply the law.”

*A. Garwin, et al., Annotated Model Code of Judicial Conduct, 2d. Ed. (2011), at p. 110.* Commentators then cite a number of cases where the judge’s disregard of state law or failure to perform duties constitutes a violation of Rule 2.2. *See e.g., In re Sanders, 564 S.E.2d. 670 (S.C.2002); In re Nelson, supra; Miss. Comm’n on Jud. Performance v. Spencer, 725 S.2d 171, 180 (Miss.1998).*

Again, Judge Neely argues that the Comments do not demonstrate an unwillingness to perform her duty because the performance of marriages is discretionary in Wyoming; to which, the Commission makes the same response as above. Judge Neely's primary duty was the performance of marriages. Following *Guzzo*, the law of Wyoming allowed same sex couples to be married. Judge Neely failed to impartially apply that law by refusing to perform same sex marriages.

C. *Judge Neely Violated Rule 1.2.*

Rule 1.2 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.

Judge Neely makes two arguments in support of her contention that she is not in violation of Rule 1.2. First, she argues that Rule 1.2 regulates a judge's conduct as opposed to speech. In so doing, she under-reads the Commission's Amended Notice of Commencement of Formal Proceedings, assuming that the charges of misconduct are based solely on the words which she spoke to Ned Donovan. However, that is not the case. The Commission's charges are based on a series of events that unfolded following the *Guzzo* decision. After expressing her unwillingness to perform same sex marriages, Judge Neely was told by her supervising judge to keep her head down and her mouth shut. She disregarded his instructions and engaged in a series of three phone conversations with a newspaper reporter, full well knowing that her opinions

regarding same sex marriage would be published in local news publications. Thereafter, she continued to perform traditional marriages until the end of the year and presumably would have continued to do so had she not been suspended from office by Judge Haws. Thus the Commission's charges of a Rule 1.2 violation are based both on words and conduct.

And, in fact, Judge Neely's assertion that Rule 1.2 prohibits "conduct," not speech, is incorrect. Commentators indicate that "a judge can be disciplined for creating an impression of bias by his words or conduct." A. Garland, et al., *Annotated Model Code of Judicial Conduct*, 2d. Ed. (2011) at 47. The Annotation cites a number of cases in support of this proposition, including the following: *In re Brown*, 691 N.E.2d 573 (Mass.1998) regarding a judge's intemperate comments about a local union; *State v. Simmons*, 646 N.W.2d 564, 569-570 in which the court relied on Rule 1.2 in holding that the judge's comments during a sentencing hearing warranted a review of the sentence; *Mississippi Com'n on Judicial Performance v. Osborne*, 11 S.3d 107 (Miss.2009) where a judge was suspended from office following racially insensitive remarks during a campaign speech.

Judge Neely next argues that no reasonable person would conclude based upon her published comments regarding same sex marriage that she would be anything less than impartial in matters involving gay litigants. The Commission asserts that any reasonable person would reach just the opposite conclusion from her comments. Having publicly stated her belief, religious or otherwise, that homosexuals should enjoy lesser rights than straight citizens,

there is no reason to believe that Judge Neely could be impartial in dealing with gay litigants in her court. At least one reasonable member of society in her community so concluded in bringing her complaint regarding Judge Neely to the Commission. See *Cuprill Deposition*, pp. 66-67, 75. Moreover, five members of the Commission including three lay persons, a judge and an attorney, the collective embodiment of the reasonable person, concluded there was probable cause to believe that Judge Neely had violated the strictures of Rule 1.2.

In support of this argument, Judge Neely buttresses a number of facts that she believe supports her assertion that she bears no personal animus toward any member of the LGBT community and would be perfectly impartial in dealing with such litigants.<sup>1</sup> This exact argument was raised by Justice Brown in *Matter of Brown*, *supra*. There Justice Brown asserted that, notwithstanding his comments he was “entirely impartial and fair” in the litigation involved and in fact pointed to the fact that the appellate support sustained his decision in the case. In response to this argument, the Massachusetts Supreme Court observed:

Judges wield an awesome and final power over the liberty and property of their fellow citizens ... for every litigation at least one half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over

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<sup>1</sup> Note that in bullet point six of page sixteen of her submission Judge Neely indicates that if asked to perform a same sex marriage she would “very kindly” palm them off on a more tolerant magistrate. This very conduct has been found to be an ethical violation by the Nebraska Ethics Commission. *Nebraska Judicial Ethics Committee Opinion 15-1 (June 15, 2015)* at p. 2.

our fellow citizens requires that we appear to be so as well. How else are ordinary citizens to have the faith in us that we have in ourselves and Justice Brown's colleagues testified that they have in him? An impartial manner, courtesy and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. Surely it is arrogance for us to say to them that we may not seem impartial, but we know we are, and so they must submit.

*Id.* at 149. That she is not perceived as impartial in her duties is illustrated by her own submission. In paragraph 4 of her Affidavit, Kathryn Anderson testifies:

4. It never occurred to us to ask Ruth to officiate our wedding because we know that it would put Ruth in a difficult position in light of her religious beliefs about marriage. There are plenty of people in Sublette County who are willing to perform marriage ceremonies for same-sex couples, so it would have been completely unnecessary and unfriendly to ask Ruth.

This is the Commission's very point. A citizen should not have to avoid dealings with a judge because of the judge's perceived bias.

Recall the cliché, "it's all about appearances." In this case it truly is all about appearances. No reasonable member of the community, and certainly no member of the LGBT community could possibly accept Judge Neely's assertion of impartiality in the face of her publicized comments.

D. *Judge Neely violated Rule 1.1.*

Again, 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.

Once again, Judge Neely urges the most restrictive possible reading of this Rule. The Commission anticipated this argument in its MEMORANDUM IN



SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT at p. 6, which is restated, and not repeated here.

III. **Enforcing the Code of Judicial Ethics does not Violate Judge Neely's Rights to the Free Exercise of Religion and Free Speech under the U.S. and Wyoming Constitutions.**

A. *Enforcing the Code of Judicial Conduct Does Not Violate Judge Neely's Religious Freedom.*

1. **Enforcing the Code of Judicial Conduct Does Not Impose an Unconstitutional Religious Test.**

Both the United States and Wyoming Constitutions forbid the government from creating a religious test for public office. See U.S. Const. amend. I, U.S. Const. art. VI, cl. 3; Wyo. Const. art. 1, § 18. Article VI, § 3 of the U.S. Constitution provides as follows:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

As stated in *Miller* at 13, under this Clause, "[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, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961)(striking down a state requirement that an individual declare his belief in God in order

to become a notary public); *see also* *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) (invalidating a state law that prevented religious officials from serving in the state legislature).

In *Miller*, a county clerk defended her policy of refusing to issue marriage licenses due to her sincerely held religious beliefs. She contended that compelling all to participate in issuing marriage licenses amounts to improper test for holding public office. *Id* at 13. The Court explained that issuing marriage licenses is not a sign of religious or moral approval, rather it merely signifies that a couple has met the *legal requirements* to marry. *Id*. Further, the Court opined, “The State is not requiring Davis to express a particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties.” *Id*. Thus, the Court held it seemed unlikely that Davis will be able to establish a violation of the Religious Test Clause. *Id*.

Similar to Kim Davis, Judge Neely contends that the Commission’s position establishes a religious test because religions differ with regard to their stance on marriage equality.

In Judge Neely’s case, as in Davis’, the act of performing marriage ceremonies, like the act of issuing a marriage license to a same-sex couple, merely signifies that the couple has met the *legal requirements* to marry. *Id* at 42. It is not a sign of moral or religious approval. *Id*. The State is not requiring Judge Neely to express a particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order

to perform her duties. Other Judges with deeply held religious beliefs regarding opposing marriage equality still recognize the necessity to uphold the law and the Code of Judicial Ethics and are able to uphold the constitutional jurisprudence and the Code of Judicial Ethics.

**2. Enforcing the Code of Judicial Conduct Does Not Violate Judge Neely's Free-Exercise Rights.**

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*" See *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (applying the First Amendment to the states via the Fourteenth Amendment). Free Exercise Clause stands for two notions—the freedom to believe and freedom to act. *Miller* at 9. "The first is absolute but, in the nature of things, the second cannot be." *Id.* at 9 quoting *Cantwell v. Connecticut*, at 304. Thus, "[c]onduct remains subject to regulation for the protection of society." *Id.*

Previously, a free exercise challenge to a particular law triggered strict scrutiny. *Miller* at 9, see, e.g., *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Strict scrutiny required that a statute would only be upheld if it served a compelling government interest and was narrowly tailored to effectuate that interest. *Id.* However, the U.S. Supreme Court has retreated from this approach. *Id.* see also, *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Although laws targeting religious conduct remain subject to strict scrutiny, “a law that is neutral and of general applicability, need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice.” *Id.* Further religious beliefs do not allow an individual to refuse to comply with an otherwise valid law. *Id.*, see also *Emp’t Div., Dep’t of Human Res. Of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed. 2d 876(1990).

“Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Miller* at 17, quoting *Babalu*, *supra* at 532. If its object “is to infringe upon or restrict practices because of their religious motivation” the law is not neutral. *Miller* at 17; *Babalu*, 508 U.S. at 533. As noted in *Miller*, the Court has not yet precisely defined the standard to be used to evaluate whether a prohibition is of general application. *Id.* at 17; see *Babalu*, 508 U.S. at 543. However, the Supreme Court has observed that “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’ and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Id.* quoting *Babalu*, 508 U.S. at 542.

Lower courts have interpreted *Smith* and *Babalu* as imposing a similar standard of review as “rational basis” on neutral laws of general applicability, even though the term is not explicitly used. *Miller* at 18; see, e.g., *Seeger v. Ky. High Sch. Athletic Ass’n*, 453 Fed.Appx. 630, 634 (2011). Rational basis review

requires the law be “rationally related to furthering a legitimate state interest” to be upheld. *Miller* at 18, quoting *Seeger*, 453 *Fed.Appx.* at 635 (noting that “[a] law or regulation subject to rational basis review is accorded a strong presumption of validity”); see also *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)(stating generally that laws subject to rational basis review must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

For purposes of this inquiry, the state action at issue is Commission’s enforcement of the Code provisions. Judge Neely argues that the Commission’s enforcement of Rule 2.3 is not neutral or generally applicable, and is therefore subject to strict scrutiny. However, the text itself of Rule 2.3 supports a contrary inference. Rule 2.3(B) prohibits a judge, in her performance of official duties from engaging in words or conduct that manifest bias or prejudice or harassment “including but not limited to bias, prejudice, or harassment based upon ... *sexual orientation* ...” See W.C.J.C. 2.3(B)(emphasis added). The text of the Wyoming Code of Judicial Conduct 2.3(B) is identical to the text of the American Bar Association Model Code of Judicial Conduct Rule 2.3(B). See A.B.A. Model Code of Judicial Conduct Rule 2.3(B). The comments to the rule explain that a judge must avoid conduct that may reasonably be perceived as biased or prejudiced. The implicated code provisions are facially neutral and in fact, protect bias on the very basis that Judge Neely purports they discriminate on, that is *religion*. Arguably a demonstrated bias favoring one’s religious group

at the expense of another religious group would be a violation of the rule as well.

Moreover, although facial neutrality is not dispositive, Judge Neely cannot show that the aim of the Commission's enforcement of the code provisions here is to suppress religious practice. She simply cannot point to a similarly situated individual that based on religious practices, was treated differently by the Commission in its' enforcement of the code. In contrast, Judge Neely is refusing to recognize the legal force of U.S. Supreme Court and United States District Court for the District of Wyoming. In performing her judicial duties, she refused to follow Judge Haws' advice when he told her "keep your head down and your moth shut."

There being no evidence in the record to suggest that the Commission's enforcement of the code provisions is anything but neutral and generally applicable, it should be upheld if it is rationally related to a legitimate government purpose.

The Commission's enforcement of the code provisions certainly serves the State's interest in upholding the rule of law. However, it also rationally relates to several narrower interests identified in the *Wyoming Code of Judicial Conduct*: it ensures that the judiciary is not brought into disrepute, preserves the independence, impartiality, integrity and fairness of the judiciary and promotes public confidence in the judiciary. Therefore, the Commission's enforcement of the code provisions does not infringe upon Judge Neely's free exercise rights.

**3. Enforcing the Code of Judicial Conduct Does Not Violate the Establishment Clause.**

Judge Neely claims that the Commission's enforcement of the code provisions violates her religious freedom and violates the Establishment Clause of the First Amendment to the U.S. Constitution and the corresponding provisions of the Wyoming Constitution. See U.S. Const. amend. I; Wyo. Const. art. 1, § 18; Wyo. Const. art. 1, § 21; § 25. Observance of the free exercise rights of its employees is not the extent of the State's concerns. *Miller* at 8; see also *Marchi v. Bd. of Coop. Educ. Serv. of Albany*, 173 F.3d 469, 476 (2d. Cir.1999). In fact, the State has some priorities that run contrary to Judge Neely's claim that the Commission's enforcement of the code provisions violates her religious freedom. Chief among these is its interest in preventing Establishment Clause violations by Judge Neely. See U.S. Const. amend. I (declaring that "Congress shall make no law respecting the establishment of religion").

Judge Neely has arguably committed such a violation by openly adopting a policy that promotes her own religious convictions at the expenses of others. "As a member of the Lutheran Church, Missouri Synod (LCMS), Judge Neely sincerely believes that marriage is the union of one man and one woman, and that she cannot in good conscience solemnize any marriage outside this context. *Neely Affidavit*, ¶23. But if she were an adherent of a Christian denomination like the United Church of Christ (UCC), she would be able to officiate at same-sex marriages. See United Church of Christ, *Equal Marriage*

*Rights for All (Connelly Affidavit, Ex. 41).*” See Memorandum of Law in Support of the Honorable Judge Ruth Neely’s Motion for Summary Judgment, p. 20. In such situations, “the scope of the employees’ rights must yield to the legitimate interest of governmental employer in avoiding litigation.” *Id.*, quoting *Marchi*, 173 F.3d at 476.

The State also has a countervailing interest in upholding the rule of law and the Code of Judicial Conduct. *Id.*, see generally *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (“The rule of law, evenly applied to minorities as well as majorities, ... is the great mucilage that holds society together.”). Judge Neely is certainly free to disagree privately with the Court’s opinion in *Guzzo v. Mead*, but that does not excuse her from complying with it nor does it excuse her from complying with the Wyoming Code of Judicial Conduct. To hold that a Judge could publicly defy the rule of law and the Code of Judicial Conduct at the expense of her constituents would set a dangerous precedent.

For these reasons, the Commission’s enforcement of the code provisions not only do *not* violate the Establishment Clause of the First Amendment to the U.S. Constitution and the corresponding provisions of the Wyoming Constitution; the Commission’s enforcement of the code provisions serve the additional interests of preventing Establishment Clause violations by Judge Neely and upholding the integrity of the judiciary. See U.S. Const. amend. I (declaring that “Congress shall make no law respecting the establishment of religion”).



B. *Enforcing the Code of Judicial Conduct Does Not Violate Judge Neely's Freedom of Expression.*

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Under the Free Speech Clause, an individual has the "right to utter or print, [as well as] the right to distribute, the right to receive and the right to read." *Griswold v. Connecticut*, 381 U.S. 479, 483, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)(internal citations omitted). An individual also has the "right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977).

The First Amendment does not completely insulate a judge from discipline for judicial misconduct, which happens to take the form of speech. *See, e.g., Halleck v. Berlinger*, 427 F.Supp. 1225 (D.D.C., Jan. 26, 1977)<sup>2</sup> ("a judge's constitutional right to freedom of speech is not without limits, and the ABA code of Judicial Conduct, adopted by the joint committee on judicial administration in this District of Columbia, reflects most of those limits."). *Id* at 21. Rejecting a First Amendment defense, the court in *In Re Kelly*, stated "we are not concerned with his right to speak, but whether his motive or method does violence to the Canons of Judicial Ethics." *In Re Kelly*, 238 So.2d 565, (1970); *cert den* 401 US 962, 28 L Ed 2d 246, 91 S Ct 970, *reh den* 403 US 940, 29 L Ed 2d 720. 91 S Ct 2245 distinguished on other grounds by, *In re McAllister*, 646 So.2d 173 (1994).

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<sup>2</sup> Distinguished on other grounds by *Bason v. Judicial Council of Columbia Circuit*, 86 B.R. 744, (D.D.C., Feb. 5, 1988).

To be sure, although judges retain—albeit limited relative to laypersons—First Amendment rights with respect to speech made in their capacities as private citizens, “courts have *universally* held that judges possess no First Amendment protection with regard to writings, comments, and other expressions made in their official capacity as judges.” *In re Kendall*, S.Ct. Misc. No. 2009-0025, 2010 WL 4962811, (July 16, 2010)(emphasis added).

In this context, the first inquiry is whether Judge Neely ‘spoke’ as a judge in her official capacity. As mentioned above the conduct or ‘speech’ at issue is when Judge Neely gave what amounted to a press release stating her opposition to same sex marriages. The logical answer to this question is “yes”; Judge Neely ‘spoke’ in her official capacity as a judge. Judge Neely is only able to perform wedding ceremonies because she is a Circuit Court Magistrate. Because her speech is a product of her official duties, because it pertained to her job description as a judge and because her speech was made in her official capacity as a judge, it is not entitled to First Amendment protection.

#### **IV. Judge Neely Has Not Been Deprived of Procedural Due Process.**

Judge Neely’s argument in this section is characteristic of her response to the entire proceeding. Rather than show any insight as to why the Commission might have concerns with her conduct, she has elected to attack the Commission’s Executive Director, its Disciplinary Counsel, its rules and procedures and, inferentially, the Commission members themselves. The Commission’s first response to this argument is that it is premature. The process is ongoing, there is a hearing pending and Judge Neely has suffered no

deprivation of life, liberty or property. The Commission submits that this issue is not ripe until disciplinary action is imposed.

Having said that, a brief response is in order. Judge Neely advances three claims in support of her due process argument. First, she asserts that the Commission's Executive Director, Wendy Soto, has shown a bias against Judge Neely's position on same sex marriage by affiliating with and supporting equal rights organizations. It seems a bit hypocritical for Judge Neely to maintain on the one hand that, as a sitting judge she has constitutional rights to express her religious beliefs, but on the other hand Ms. Soto must be completely impartial and is not entitled to affiliate with organizations of her choice. But that is not the point. The point is that Ms. Soto, whether biased or not, is not a decision maker. *See Riggins v. Goodman*, 572 F.3d 1101 (10<sup>th</sup> Circ. 2009) where, citing Supreme Court authority the 10<sup>th</sup> Circuit observed "due process is violated only when 'the risk of unfairness is intolerably high' ... there must be some substantial countervailing reason to conclude that a **decision maker** is actually biased with respect to factual issues being **adjudicated.**" (Emphasis added, citations omitted.) Ms. Soto is the Commission's administrator, not an adjudicator and therefore any perceived bias is immaterial to a due process argument.

Judge Neely argues that in her position as Executive Director, Ms. Soto has unilateral power to appoint committees and thus to steer the trajectory of the proceeding. As this Panel well knows, Ms. Soto's authority to appoint investigatory and adjudicatory panels is constrained by Rules 7 and 8 of the

*Rules Governing the Commission on Judicial Conduct and Ethics*, and the Commission's own internal procedures. All panels must include at least one lay person, one judge and one attorney. Panel members are selected on a rotating basis, except in the instance where they might sit on a complaint involving a judge in their home town, in which case other panel members are selected. *Tiedeken Deposition*, pp. 20, 45-46. Thus, the reality there is very little opportunity to "steer the proceeding."

Next, Judge Neely attacks Disciplinary Counsel both with respect to the manner in which the case has been pled and depositions conducted. This attack merits little response except to note first, that this proceeding has been exceedingly adversarial from the inception and second, that the role of Disciplinary Counsel is that of advocate and prosecutor and not that of decision maker.

Third, Judge Neely attacks the structure of the Commission, arguing that the fact that the full Commission, including members of both the I- and A-panels vote on the final recommendation for discipline pursuant to Rule 16(e). Rather than constituting a due process violation, the Commission submits that this procedure acts as yet another check and balance in favor of the judge. This procedure insures that the full Commission, including members not involved in either the investigatory or adjudicatory process, have a say in the final disposition. In this regard, the Wyoming Commission's procedural model is very much akin to those in other jurisdictions. See C. Gray, *Center for Judicial Ethics, Bifurcated Judicial Discipline Systems* (Sept. 2015) attached

hereto. Note that on page one Ms. Gray observes: "That argument (procedural due process) has been rejected by every state supreme court that has considered it because the decisions of the commission may be reviewed by the Supreme Court." Ms. Gray cites cases from 22 jurisdictions to support this.

Ultimately, Judge Neely is entitled to the due process described in Rule 3 of the Rules Governing the Commission on Judicial Conduct and Ethics. Due process is defined by the Supreme Court as this: "An essential principal of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 Led.2d. 494 (1985). In this case, Judge Neely has been afforded notice, has had the opportunity to defend, and will enjoy the right to a hearing. The fact that members of the I-Panel and the A-Panel participate in the final recommendation is immaterial. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not ... disqualify a decision maker' and demonstrate actual bias." (Citations omitted.) *Riggins*, 572 F.3d at 1112. In order to prevail on her due process claim, Judge Neely must demonstrate actual bias on the part of the Commission members in the decision making process:

We have held though that a "substantial showing of personal bias is required to disqualify a hearing officer or tribunal ..." Indeed, a person claiming bias on the part of an administrative tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators." (Citations omitted.)

*Id.* at 1112, citing Supreme Court authority.

**V. The Code of Judicial Conduct is Not Unconstitutionally Vague or Overbroad.**

Judge Neely's final argument is, incredibly, that the Code of Judicial Ethics is unconstitutionally vague and overbroad. As the Court observed in *Republican Party of Minn. v. White*, 536 U.S. 765, 786-787 (2002) some iteration of the Code of Judicial Ethics has been in effect since the early 1920's. As with the Code of Professional Responsibility for attorneys, the concepts of impropriety, the appearance of impropriety and bias have been intrinsic to these codes for over 100 years. The Wyoming Code of Judicial Conduct is based almost exclusively on the ABA Model Code of Judicial Conduct, as such this Code is derived from generations of scholarly discussion, debate and judicial construction. And its terms and concepts are or should be well understood in the profession.

The Code is not a criminal code, it is a Code of Judicial Ethics. As such, its scope must be broad. As anyone who regularly follows the judicial reporters well knows, it would be utterly impossible to proscribe every type of misconduct which might constitute an ethical violation.

Not surprisingly, the vagueness challenge has been raised and rejected in a number of state court disciplinary proceedings. In *In re Disciplinary Action Against McGuire*, 685 N.W.2d 748, 762 (ND.2004) the North Dakota Supreme Court addressed this contention as follows:

Judge McGuire has cited no authority holding rules of judicial conduct similar to the North Dakota Code of Judicial Conduct are unconstitutionally vague, and we have found none. Rather courts

in other jurisdictions appear to have routinely rejected vagueness challenges to codes of judicial conduct.

The North Dakota Court then cited to the case of *In re Barr*, 13 S.W.3d 525, 565 (Tex.Rev.Trib.1998) which in turn cited precedent from Texas, Illinois, Pennsylvania, the D.C. District Court, Kentucky and Minnesota, all rejecting vagueness claims.

With respect to the claim of over-breadth, Judge Neely posits a number of hypothetical instances where the Code provisions might be used to "target" a judge for her speech. However, the Commission has not cited Judge Neely for being a loud talker, a baseball fan or for driving a Porsche. Rather, she is charged with very specific conduct which clearly violates the Rules cited above. Indeed, it is apparent that even Judge Neely understood that she had run afoul of the Code of Ethics. Shortly after the Donovan article came out, she contacted her supervising Judge and expressed to him that she had "messed up." *Haws Deposition*, pp. 92-93.

In any case, arguments based upon overbreadth are generally rejected by the courts:

Arguments in other jurisdictions that constitutional and statutory provisions for the discipline of judges are vague or **overbroad** have been consistently rejected on the ground that the code of judicial conduct furnished sufficient specification of the judicial conduct which warrants disciplinary actions ... Statutes and Constitutional provisions which define in similarly broad terms the grounds for removal of judges from office have been upheld in *In re Lowry*, 999 S.W.2d 639 (Tex.Rev.Trib.1998), pet denied; *Napolitano v. Ward*, 317 Fed.Supp. 79 (N.D.Ill.1970) "for cause"; *Keiser v. Bell*, 332 Fed.Supp. 608 (Ed.PA.1971); *Hallock v. Berliner*, 427 Fed.Supp. 1225 (D.D.C.1997); *In re Nowell*, 23 N.C. 235, 237, S.E.2d. 246 (1977); *Nicholson v. Judicial Retirement and Removal Comm.*, 562

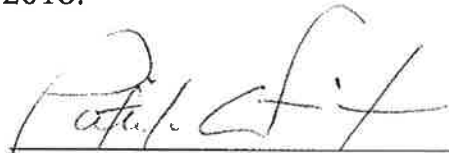
S.W.2d 306 (Ky.1978) and *In re Gillard*, 271 N.W.2d 785 (Minn.1978). (Emphasis added.)

*In re Disciplinary Action Against McGuire* at 762.

VI. **Conclusion.**

The Wyoming Supreme Court has recognized that summary judgment is a useful tool "to cut short litigation in which there is no useful purpose for trial" but that in other cases it may not be appropriate to pass on difficult questions of law to the appellate court without an adequate record. *Weaver v. Blue Cross-Blue Shield of Wyoming*, 609 P.2d 984, 988 (Wyo.1980). Although the Commission has filed a cross motion for summary judgment, this is probably not the type of case which should be disposed of in this manner. Should the Commission recommend discipline against Judge Neely, the matter will inevitably go to the Wyoming Supreme Court. While some record can be made of discovery depositions and affidavits, that is less satisfactory than a full record developed after hearing. Judge Neely's Motion for Summary Judgment should be denied.

DATED this 19 day of November, 2015.



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**CERTIFICATE OF SERVICE**

I, Patrick Dixon, do hereby certify that on the 19 day of November, 2015, I served the above and foregoing ***CJCE's Response to THE HONORABLE RUTH NEELY'S MOTION FOR SUMMARY JUDGMENT*** via email or U.S. mail, postage prepaid, as noted below:

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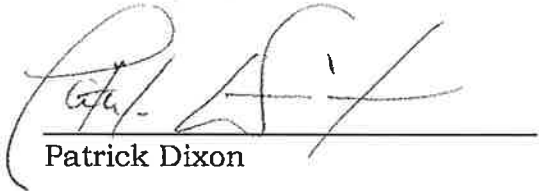
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Patrick Dixon

## Bifurcated judicial discipline systems

Judges frequently argue that the judicial discipline systems in most states violate their constitutional due process rights because the commission both investigates and prosecutes complaints and makes the decisions. That argument has been rejected by every state supreme court that has considered it because the decisions of the commission may be reviewed by the supreme court. *See, e.g., In re Hanson*, 532 P.2d 303 (Alaska 1975); *In the Matter of Flournoy*, 990 P.2d 642 (Arizona 1999); *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (California 1995); *In re Zoarski*, 632 A.2d 1114 (Connecticut 1993); *In re Kelly*, 238 So. 2d 565 (Florida 1970); *In the Matter of Vaughn*, 462 S.E.2d 728 (Georgia 1995); *In the Matter of Holien*, 612 N.W.2d 789 (Iowa 2000); *In re Rome*, 542 P.2d 676 (Kansas 1975); *Alred v. Judicial Conduct Commission*, 395 S.W.3d 417 (Kentucky 2012); *In re Bowers*, 721 So. 2d 875 (Louisiana 1998); *In re Diener*, 304 A.2d 587 (Maryland 1973); *In re Chrzanowski*, 636 N.W.2d 758 (Michigan 2001); *Commission on Judicial Performance v. Russell*, 691 So. 2d 929 (Mississippi 1997); *In re Elliston*, 789 S.W.2d 469 (Missouri 1990); *Mosley v. Commission on Judicial Discipline*, 22 P.3d 655 (Nevada 2001); *Friedman v. State of New York*, 249 N.E.2d 369 (New York 1969); *In re Nowell*, 237 S.E.2d 246 (North Carolina 1977); *In re Schenck*, 870 P.2d 185 (Oregon 1993); *In re Pirraglia* (Rhode Island Supreme Court February 28, 2007); *In re Brown*, 512 S.W.2d 317 (Texas 1974); *In re O'Dea*, 622 A.2d 507 (Vermont 1993); *In re Deming*, 736 P.2d 639, as amended by 744 P.2d 340 (Washington 1987).

### General categories

Although bifurcation is not required by the constitution, some states have adopted it as a matter of policy. For purposes of this memo, a judicial discipline system is "bifurcated" if (1) the group that decides to investigate a complaint and to file formal charges is different than (2) the group that makes findings of facts and conclusions of law and sanctions a judge or makes a recommendations on sanction to the supreme court. Judicial discipline systems may be bifurcated in a variety of ways; this memorandum divides the systems into 3 general categories: 2-tiered states, 2- panel states, and ad hoc states. Even within a category, the method for bifurcation varies as described below. Note that the procedures may be different from those described in cases in which the judge consents to discipline, in which there are allegations of a disability, or in which the charges are against a supreme court justice.

**2-tiered states.** There are 7 two-tier states -- **Alabama, Delaware, Illinois, Ohio, Oklahoma, Pennsylvania, and West Virginia.** In those states, complaints against judges are investigated by one body (the first tier), which decides whether to file formal charges; the formal charges are heard and decided by a second body that has a different name and different membership (the second tier). The exact procedures vary considerably from

state-to-state among those 7 states. For example, the decision by the second tier may be reviewed by the supreme court except in Illinois and Oklahoma.

**2-panel states:** 9 states -- **Arizona, Arkansas, Florida, Kansas, North Carolina, South Carolina, Tennessee, Vermont, and Wyoming** -- have bifurcated commission functions so that investigative and adjudicative roles are handled by different panels of the commission. The use of 2 panels is based on the *American Bar Association Model Rules for Judicial Disciplinary Enforcement* (1994), although no state has adopted the precise structure suggested by the *Model Rules* and each state's system is different. This "2-panel" structure differs from the "2-tier" structure because there is only 1 agency with continuing, appointed members, but the members play different roles depending on whether they are assigned to an investigative or an adjudicative panel.

**Ad hoc panels:** In 6 states, if the commission files formal charges, the hearing is held before a panel that is not comprised of members of the commission or any other permanent body and that is appointed only for the purposes of hearing that case. The findings of the ad hoc hearing panel are presented to the supreme court. (If the findings of a master or masters are presented to the commission, not directly to the court, as is the procedure in many states, the process is not completely bifurcated so those states are not counted in this memo.) The 6 states in this category are: **Indiana, Maine, Minnesota, New Hampshire, Texas, and Wisconsin.**

### Two-tier states

#### **Alabama**

The **Judicial Inquiry Commission** has 9 members: 4 judges, 2 attorneys, and 3 public members. The Commission investigates complaints and files and prosecutes charges that are heard and decided by the **Court of the Judiciary**. The Court of the Judiciary has 9 members: 4 judges, 2 attorneys, 2 public members, and 1 person who may either be an attorney or a non-attorney. Following a public trial, the Court of the Judiciary may remove, suspend with or without pay, or censure a judge. Decisions of the Court may be appealed to the **Alabama Supreme Court**. The Commission and the Court of the Judiciary were created by an amendment to the constitution in 1973.

#### **Delaware**

The chief justice of the Supreme Court refers complaints about judges to the **Preliminary Investigatory Committee**, which has 12 members (8 attorneys and 4 public members). If a panel of the Committee or the Chief Justice finds that there is probable cause, the **Court on the Judiciary** appoints a Board of Examining Officers, comprised of 1 or more active or retired judges. The Court on the Judiciary is composed of the justices of the Delaware Supreme Court, the chancellor of the Court of Chancery, and the

president judge of the superior court. The Board conducts a hearing and prepares draft findings of fact, conclusions of law, and a recommendation. If the report finds misconduct or if the Court on the Judiciary determines sua sponte to proceed further, the judge is given an opportunity to file exceptions, and the Court on the Judiciary schedules briefing and oral argument. If there are disputed issues of material fact, the Court will consider the evidence de novo and make its own findings of fact and conclusions of law. The Court files a written opinion and order dismissing the charges against the judge or censuring, suspending, removing, or retiring the judge. The decision of the Court on the Judiciary is final. The Court on the Judiciary was created by the state constitution in 1979.

### **Illinois**

The **Judicial Inquiry Board** has 9 members: 2 judges, 3 attorneys, and 4 public members. The Board investigates complaints against judges and, if it determines a reasonable basis exists, files and prosecutes complaints with the **Courts Commission**. The Commission (which has 5 judge and 2 non-judge members) holds public hearings on complaints filed by the Board and has the authority to remove, suspend without pay, censure, or reprimand a judge. The decision of the Commission is final. The Board and the Commission were created by the state constitution in 1971.

### **Ohio**

Complaints against Judges are Investigated by either the **Disciplinary Counsel** or **Certified Grievance Committees** organized by the state bar or local bar associations. If either the Counsel or a committee finds probable cause, a complaint against a judge is filed with the 28-member **Board of Commissioners on Grievances and Discipline** (7 members are judges, 17 are attorneys, and 4 are public members). The Board was created by statute in 1957 (it also disciplines attorneys). The Counsel or committee file a complaint under one of two rules.

- If the complaint is filed under Rule 5, a hearing is held before a 3-member panel of the Board, which reports back to the full Board. The full Board deliberates and files a written report to the Ohio Supreme Court, which issues an order to show cause to both sides. If either side objects, the Court hears oral arguments and renders a decision. The judge's license to practice law may be suspended, which results in suspension without pay from bench, or the judge can be reprimanded.
- Under Rule 3, if two-thirds of the Board determines that there is substantial credible evidence to support a complaint against a judge, the Board certifies the result of the investigation to the Court to appoint a **Commission of Judges** composed of 5 judges. The 5-judge commission holds a public hearing. The commission determines whether grounds for retirement, removal, or suspension without pay have been established by clear and convincing evidence. The judge

may appeal that order to the Court. If the judge does not appeal, the decision of the commission is final. For a complaint to be filed under Rule 3, the charges must relate to the judge's off-the-bench conduct. In Rule 3 proceedings, the only available sanctions are removal or suspension and the judge's license to practice law is not affected.

### **Oklahoma**

The **Council on Judicial Complaints** has 3 members: 2 attorneys and 1 public member. If the Council finds that a complaint should be made the subject of proceedings before the Court on the Judiciary, the Council forwards its findings and all information to the Supreme Court, the chief justice, the governor, the attorney general, the board of directors of the Oklahoma Bar Association, or the House of Representatives. That person or entity, in its discretion, may file a petition invoking the jurisdiction of the **Court on the Judiciary**. The **Court on the Judiciary** has both a trial and an appellate division. The **Trial Division** has 9 members: 8 judges and 1 attorney. The Trial Division conducts a hearing on the petition. The Trial Division's judgement can be appealed by either the judge or the prosecutor to the 9-member (8 judges and 1 attorney) **Appellate Division**. The decision of the Appellate Division is final. The only available sanctions are removal or permanent retirement although, if the Council finds evidence of misconduct that does not warrant removal or retirement, it may refer the matter to the Chief Justice. The system was established by statute in 1974.

### **Pennsylvania**

The **Judicial Conduct Board** has 12 members: 3 judges, 3 attorneys, and 6 public members. If the Board finds probable cause, it files formal charges with the **Court of Judicial Discipline**. The Court has 8 members: 4 judges, 2 attorneys, and 2 public members. The Court holds a trial and renders a decision. The Court may dismiss the charges or reprimand a judge, suspend the judge with or without pay, or remove the judge from office. A judge may appeal an adverse decision to the **Pennsylvania Supreme Court**. The Board may appeal the dismissal of charges to the Supreme Court, but the appeal is limited to questions of law. The Board and the Court of Judicial Discipline were created by an amendment to the constitution in 1993.

### **West Virginia**

The **Judicial Investigation Commission** has 9 members: 6 judges and 3 public members. The Commission files formal charges if it determines that probable cause exists and formal discipline is appropriate. The formal charges are heard by the **Judicial Hearing Board**. The Board has 9 members: 6 judges and 3 public members. Following a hearing, the Board files findings of fact, conclusions of law, and a recommended disposition with the **Supreme Court of Appeals**. The Board can recommend

admonishment, reprimand, censure, suspension without pay for up to one year, a fine of up to \$5,000, or involuntary retirement. The Commission and the Board were created by court rule in 1976.

## Two-panel states

### Arizona

The **Commission on Judicial Conduct** has 11 members: 6 judges, 2 attorneys, and 3 public members. After a preliminary investigation, a 3-member investigative panel appointed by the chair determines whether to authorize a full investigation; the panel is "whenever possible" comprised of 1 Judge-member of the Commission, 1 attorney-member, and 1 public member of the Commission. If the investigative panel authorizes formal charges after a full investigation, the hearing is held before the members of the Commission who were not on the investigative panel or before a hearing officer or a panel of 3 hearing officers. The hearing panel can impose an informal sanction; recommend censure, which is final unless the judge or disciplinary counsel files a petition; or recommend other formal sanctions that are subject to review by the Arizona Supreme Court, either by petition or on the Court's own motion. *The Commission was created by the state constitution in 1970; the bifurcation was accomplished by rule amendments adopted by the Court effective 2002.*

### Arkansas

The **Commission on Judicial Discipline and Disability** has 9 members: 3 judges, 3 attorneys, and 3 public members; each member also has an alternate. The Commission chair appoints 3 investigation panels from the 9 Commission members and 9 alternates; each investigation panel has 1 judicial member, 1 attorney member, and 1 public member. All complaints not summarily dismissed by the executive director are presented to an investigation panel; the investigation panel dismisses a complaint or directs the staff to investigate. After an investigation, the investigation panel dismisses a complaint or directs the filing of a formal statement of allegations. The hearing is before 9 members Commission, 3 justices or judges, 3 attorneys, and 3 public members, none of whom may have served on the investigation panel for the complaint. If the Commission finds misconduct, it may admonish the judge, direct professional treatment, counseling, or assistance, or impose conditions on the judge or recommend to the Arkansas Supreme Court that the judge be removed, suspended, reprimanded, or censured. *The Commission was created by constitution in 1989; bifurcation was accomplished when the Court amended the Commission's procedural rules in 2008.*

### Florida

The **Judicial Qualifications Commission** has 15 members: 6 judges, 4 attorneys, and 5 public members. Each year, Commission members are assigned to either a 9-member investigative panel (composed of 4 judges, 2 attorneys, and 3 public members) or a 6-member hearing panel (2 judges, 2 attorneys, and 2 public members). The investigative panel receives complaints and conducts investigations and then either dismisses the complaint or submits formal charges to the hearing panel. The hearing panel holds a

public hearing on the formal charges and makes a recommendation to the Florida Supreme Court. The final decision is made by the Court. *The Commission was created in 1966 by the state constitution; the bifurcation was accomplished through a constitutional amendment effective in 1996.*

### **Kansas**

The **Commission on Judicial Qualifications** has 14 members: 6 judges, 4 attorneys, and 4 public members. The Commission is divided into two 7-member panels (designated Panel A and Panel B), each consisting of 3 judges, 2 attorneys, and 2 public members. Complaints are assigned to either Panel A or Panel B for initial review and investigation. Sitting as an investigative panel, a panel may dismiss complaints, issue letters of caution or informal advice, issue a cease and desist letter to a judge, or initiate formal proceedings. If one panel initiates formal proceedings, the other panel sits as the hearing panel. Following the hearing, the hearing panel may terminate the proceedings, admonish the judge, issue a cease and desist order, or recommend that the Kansas Supreme Court censure, suspend, remove, or retire the judge. *The Commission was created by Court rule in 1974; the bifurcation was accomplished by a court rule effective 1999.*

### **North Carolina**

The **Judicial Standards Commission** has 13 members: 5 judges, 4 attorneys, and 4 non-public members. The chair divides the members into two 6-member panels (designated Panel A and Panel B), each comprised of 2 judges, 2 attorneys, and 2 citizens. Complaints are assigned to either Panel A or Panel B for initial review and investigation. The chair presides over all panel meetings. After a formal investigation, an investigative panel may dismiss a complaint, issue a public reprimand, or file a statement of charges. After a hearing, the hearing can dismiss the charges or recommend that the North Carolina Supreme Court censure, suspend, or remove a judge. *The Commission was created by statute in 1973; bifurcation was accomplished by rules adopted by the Commission in 2007.*

### **South Carolina**

The **Commission on Judicial Conduct** has 19 members: 14 judges, 3 attorneys, and 2 public members. The chair divides members (other than the chair, the vice chair, and the public members) into 3 panels with 5 members each (4 judges, 1 attorney). The chair designates whether a panel will serve as an investigative panel or a hearing panel. If the panel is assigned to serve as an investigative panel, the chair adds either the chair or the vice chair and 1 public member to the panel to increase its membership to 7. The investigative panel decides whether to conduct a full investigation and, after a full investigation, whether to dismiss the complaint, privately admonish the judge, enter



into a deferred discipline agreement, or file formal charges. The hearing panel conducts a hearing and makes findings, conclusions, and recommendations to the South Carolina Supreme Court. The Court reviews the hearing panel's recommendation and decides whether to dismiss the case or to remove, suspend, or publicly reprimand a judge. *The Commission was created by court rule in 1976; bifurcation was accomplished by a court rule effective 1997.*

### **Tennessee**

The **Court of the Judiciary** has 15 members: 9 judges, 3 attorneys, and 3 public members. The presiding judge divides the court into 5 investigative panels of 3 members each. Disciplinary counsel investigates complaints and forwards the report and evidence to one of the investigate panels. The investigative panel can then dismiss the complaint, direct the filing of formal charges, or propose a private admonition or deferred discipline agreement. If formal charges are filed, the other 12 members serve as the hearing panel. After a hearing, the hearing panel may dismiss the charges, publicly reprimand or censure the judge, or recommend removal. The judge may appeal a decision to impose a sanction to the Tennessee Supreme Court where the review is de novo on the record with no presumption of correctness of the judgment or the findings of the hearing panel. If the Court affirms a removal, the matter is referred to the legislature for removal proceedings; neither the Court of the Judiciary nor the Supreme Court may remove a judge. *The Court of the Judiciary was created by statute in 1978; the statute was amended to bifurcate proceedings in 1995.*

### **Vermont**

The **Judicial Conduct Board** has 9 members: 3 judges, 3 attorneys, 3 lay persons. Following a preliminary investigation, a recommendation is presented either to the Board or to a 3-member investigative panel consisting of 1 judge, 1 attorney, and 1 lay member, appointed by the chair. If the Board or the investigative panel believes that there is probable cause, a formal complaint is filed, and a hearing is held before a panel of at least 5 members of the Board, at least 1 of whom is a lay member. The hearing panel may impose limitations or conditions on the performance of judicial duties, issue a public reprimand, or suspend a judge. If no appeal from a hearing panel order is filed within 30 days, and the Vermont Supreme Court does not order review on its own motion, an order of the panel other than an order imposing a suspension becomes final; if no appeal is filed, an order of suspension becomes final only upon issuance of an order of the Court. Neither the Board nor the Court may remove a judge. *The Board was created by a court rule in 1978; the bifurcation was accomplished by an amendment to the rules effective 2002.*

### **Wyoming**

**The Commission on Judicial Conduct and Ethics** has 12 members: 3 judges, 3 attorneys, and 6 public members. The chair may divide the Commission into investigatory panels of 3 or more members and adjudicatory panels of 3 or more members from each category of membership. Members rotate between the panels, but a member may not sit "on an adjudicative panel in any case in which that member served in an investigative capacity." If an investigative panel institutes formal proceedings, the chair selects 3 or more members to serve on an adjudicatory panel to conduct a formal hearing. After the hearing, the adjudicatory panel dismisses the case or submits findings to the full Commission, and the full Commission makes a recommendation on sanction to the Wyoming Supreme Court. The judge's failure to file a petition to modify or reject a recommendation may be deemed consent to the Commission's determination. *The Commission was created by the state constitution in 1973; the bifurcation was accomplished in a constitutional amendment adopted in 1996.*

## Ad hoc panels

### **Indiana**

The **Indiana Commission on Judicial Qualifications** has 7 members: the Chief Justice, 3 attorneys, and 3 public members. If, after an investigation, the Commission finds probable cause, the Commission may file formal charges, and the Indiana Supreme Court appoints 3 active or retired judges to preside as masters at a hearing. After the hearing, the masters prepare and transmit to the Court a report with their recommended findings of fact and conclusions of law. Within 30 days, the Commission files a recommendation and any specific objections to the masters' report. The judge has 30 days to file any objections and arguments. The Commission may file a reply brief. The Court is not bound by the masters' report but gives it deference. If the Court concludes that the judge committed misconduct, it may issue a private or a public reprimand, suspend the judge without pay, or remove the judge. *The Commission was established in 1970 by constitution.*

### **Minnesota**

The **Board on Judicial Standards** has 10 members: 5 judges, 2 attorneys, and 4 public members. If the Board files a formal complaint, the Chief Justice of the Minnesota Supreme Court appoints a hearing panel comprised of 1 judge or retired judge, 1 attorney, and 1 member of the public who is a former member of the Board "whenever possible." After conducting a hearing, the panel may enter into a deferred disposition agreement with the judge, publicly reprimand the judge, or recommend that the judge be removed, retired, suspended, censured, or otherwise disciplined. The Board or the judge may appeal; if there is no appeal, the panel's disposition becomes final after 60 days. If there is an appeal, "the board shall, and the judge may, file briefs with the Court." The Court may accept the recommendation of the panel or reject or modify it in whole or in part. *The Board was created by statute in 1971; the Minnesota Supreme Court amended the Board's rules to create the hearing panel in 2009.*

### **Maine**

The **Maine Committee on Judicial Responsibility & Disability** has 7 members: 2 judges, 2 attorneys, and 3 public members. Following an investigation, the Committee holds a hearing at the request of a majority of its members or of the judge being investigated. If the Committee decides that a charge has been established, it files a report with the Supreme Judicial Court. The Court assigns the case to one of its justices. If there is a dispute as to facts, the justice will hold a hearing, make recommended findings of fact, and refer matter to the full Court for briefing, argument, and decision. If there is no dispute as to facts, but a dispute as to the interpretation of the code, the matter is referred directly to the full Court for briefing, argument, and decision. *The Supreme Judicial Court established the Committee by court rule in 1978.*

### **New Hampshire**

The **Judicial Conduct Committee** has 10 members: 3 judges, 1 attorney, and 6 public members. After an investigation, if the Committee concludes there is probable cause, it files a formal statement of charges and holds a hearing. If the Committee determines that formal disciplinary action is warranted, the Committee prepares a summary report of its findings and a recommendation concerning sanction with the New Hampshire Supreme Court. The Court holds a public hearing at which the judge has the opportunity to appear in person and/or by counsel and be heard on the facts and the law. The Court directs such disciplinary action as it finds just and proper or exonerates the judge. *The Court established the Committee by court rule in 1977.*

### **Texas**

The **State Commission on Judicial Conduct** has 13 members: 6 judges, 2 attorneys, and 5 public members. After an investigation, if the Commission does not dismiss a complaint, it may order additional education or privately or publicly sanction the judge (warning, reprimand, or admonishment) or initiate formal proceedings. (1) If the Commission privately or publicly sanctions a judge, the judge may file a written request with the Chief Justice of the Texas Supreme Court for the appointment of 3 appellate justices to act as a **Special Court of Review**. The Commission then files a charging document, and the Special Court of Review holds a public hearing in which the case is considered from the beginning, as if the Commission had not taken any previous action. The Special Court of Review may dismiss the case, affirm the Commission's decision, impose a greater or lesser sanction, or order the Commission to file formal proceedings. The decision of the Special Court of Review is final. (2) If the Commission decides to initiate formal proceedings or is ordered to do so by the Special Court, the Commission may conduct the fact-finding hearing or it may ask the Texas Supreme Court to appoint a special master (a sitting or retired district or appellate judge) to conduct the hearing. The Commission may adopt the special master's findings in whole or in part, modify the findings, reject them and enter its own findings, or order a hearing for the taking of additional evidence. The Commission may dismiss the case, issue a public censure, reprimand, warning or admonition, or recommend removal or involuntary retirement to a 7-member Review Tribunal appointed by the Texas Supreme Court. A judge may also appeal the Commission's decision to issue a public censure or sanction to a Special Court of Review. *The Commission was established by the constitution in 1963.*

### **Wisconsin**

The **Judicial Commission** has 9 members: 2 judges, 2 attorneys, and 5 public members. If, after an investigation, the Commission finds probable cause that a judge has engaged in misconduct that warrants discipline, the Commission files a complaint in the Wisconsin Supreme Court. The Court orders the Chief Justice of the Court of Appeals to

appoint a panel of 3 judges (at least 2 of whom sit on the Court of Appeals). After a hearing, the panel reports its findings of fact, conclusions of law, and recommended disposition to the Court. The Court receives briefs from the Commission and the judge, hears oral argument, makes the final decision, and determines what discipline, (reprimand, censure, suspension, or removal) is appropriate, if any. *The Commission was created by the constitution in 1977.*

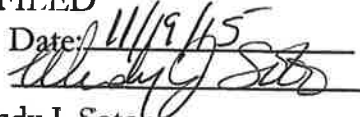
Prepared by Cynthia Gray, Director of the American Judicature Society's Center for Judicial Ethics ([www.ajs.org](http://www.ajs.org)). **Up-dated September 2015.**

**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  
) No. 2014-27 AND ETHICS  
) Official Record  
) FILED  
) Date: 11/19/15  
)   
)

Wendy J. Soto

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**THE HONORABLE RUTH NEELY'S RESPONSE TO THE COMMISSION'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

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## **INTRODUCTION**

The Commission's Motion for Partial Summary Judgment ("Commission's Motion") fails for three principal reasons. First, the Commission has adduced no evidence whatsoever to support its allegations that Judge Neely violated the Wyoming Code of Judicial Conduct ("Code"). On the contrary, the undisputed evidence establishes that Judge Neely is not biased or prejudiced and is an unfailingly impartial adjudicator. Second, the Commission's attempt to punish Judge Neely is based on a flawed understanding of the Code. Indeed, the Commission concedes that it has no precedent for its position, admitting that the cases it cites "are all distinguishable from the facts of this case . . . and are not intended to be persuasive." Commission's Memorandum in Support of Motion for Partial Summary Judgment at 5 n.1 ("Commission's Memorandum" or "Commission's Mem."). Third, applying the Code in the manner contemplated by the Commission would violate Judge Neely's constitutional rights, including her rights to the free exercise of religion and free speech. Accordingly, the Adjudicatory Panel should deny the Commission's Motion, grant Judge Neely's Motion for Summary Judgment ("Judge Neely's Motion"), and dismiss all claims against her.

## **RESPONSE TO THE COMMISSION'S STATEMENT OF FACTS**

It is clear from the Commission's Motion and Judge Neely's Motion that the parties agree (1) that there are no genuine issues of material fact that necessitate an evidentiary hearing and (2) that summary judgment is an appropriate vehicle for resolving this matter. Even still, the Commission's version of the facts is incomplete for assessing all the claims and defenses in this case. Specifically, the Commission's Statement of Undisputed Facts excludes many facts that are material to Judge Neely's defenses. Judge Neely has included those material facts in her Statement of Undisputed Material Facts, and she incorporates those facts here. Judge Neely also provides the following clarifications to the facts stated by the Commission.

1. The Commission states that the “primary purpose” for Judge Neely’s most recent appointment as a circuit court magistrate was “to perform civil marriage ceremonies.” Commission’s Statement of Undisputed Facts ¶ 2. But Judge Haws testified that Judge Neely’s most recent appointment was a general appointment that authorized her to exercise the full array of powers granted to circuit court magistrates under Wyoming statute. *See* Haws Dep. at 43-45, 75, 125-26 (Connelly Aff., Ex. 3); Neely Dep. at 39-40 (Connelly Aff., Ex. 10). Indeed, that is what the appointment order explicitly says. *See* 7/1/08 Magistrate Appointment Order (Dep. Ex. 38) (attached to the Commission’s Filing of Additional Supporting Documents on 11/3/15). The Commission cites Judge Haws’s testimony indicating that Judge Neely’s “primary function” turned out to be performing weddings, *see* Commission Mem. at 1-2 (citing Haws Dep. at 61 (Ex. 3)),<sup>1</sup> but that testimony does not mean that Judge Neely was appointed only to perform marriage ceremonies. Even though Judge Neely disagrees with this fact as stated by the Commission, whether performing marriages was the “primary purpose” of her most recent appointment is immaterial to the resolution of this case, and thus a dispute regarding that fact does not prevent the Adjudicatory Panel from resolving this matter on summary judgment.

2. The Commission notes that after the initial phone conversation between Judge Neely and Ned Donovan, they had “two additional conversations . . . on the same day.” Commission’s Statement of Undisputed Facts ¶ 4. Yet the Commission does not provide the context of those additional conversations. The first one was initiated by Judge Neely because “when [she] hung up the phone the first time, [she] had the impression that [Mr.] Donovan knew [her religious] beliefs and that he was trying to stir . . . up” trouble. Neely Dep. at 96-98 (Ex. 10). So she called to ask him to replace what she had originally told him with a much shorter summary of her comments. *Id.* at 98.

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<sup>1</sup> Unless otherwise indicated, all citations to “Ex.” refer to the exhibits attached to the Affidavit of Kenneth J. Connelly and the Affidavit of Judge Neely filed in support of Judge Neely’s Motion.

The second additional conversation was initiated by Mr. Donovan, who called Judge Neely and offered her a quid pro quo—he would not publish any comments she previously made to him if she would agree to violate her beliefs and perform same-sex marriage ceremonies. *Id.* at 98-99. Judge Neely “could not compromise [her] religious convictions in that way.” Neely Aff. ¶ 43. So she said “No comment” about six times in response to Mr. Donovan. Neely Dep. at 99 (Ex. 10). Given that this is a mere clarification and not a dispute regarding the facts, it does not prevent the Adjudicatory Panel from resolving this case on summary judgment.

3. The Commission states that “[t]he Donovan article, in one form or another[,] appeared in three other publications in Sublette County and generated at least two subsequent editorials.” Commission’s Statement of Undisputed Facts ¶ 8. But the record does not support the statement that the “Donovan article” appeared in three other publications. Judge Neely testified that the same article appeared in both the Sublette Examiner and the Pinedale Roundup, two local newspapers that are owned by the same company but published on different days of the week. *See* Neely Dep. at 33-34 (Ex. 10). And the “subsequent editorials” that were supposedly “generated” by Mr. Donovan’s article were written by Mr. Donovan himself. *Id.* at 34; Neely’s Statement of Undisputed Material Facts at 10-11; Neely Aff., Exs. 49, 50, 51, 55. These facts about how many publications Mr. Donovan’s article appeared in and how many editorials his article generated are not material to the resolution of this case, and thus any dispute regarding them does not prevent the Adjudicatory Panel from resolving this case on summary judgment.

4. The Commission states that Judge Haws suspended Judge Neely “[a]s a result of the[] publications” by Mr. Donovan. Commission’s Statement of Undisputed Facts ¶ 10. Yet Judge Haws testified that he suspended Judge Neely because he received the Commission’s letter indicating that the Commission was investigating her. *See* Haws Dep. at 106-07 (Ex. 3). No evidence supports the version of this fact as stated by the Commission. Thus, there is no genuine

dispute regarding this fact, and the Adjudicatory Panel may proceed to resolve this case on summary judgment.

5. The Commission states that during the meeting between Judge Haws and Judge Neely “[s]hortly after the *Guzzo* opinion came down,” Judge Haws informed Judge Neely that “he felt that performing [same-sex marriage] ceremonies was an essential function of her position.” Commission’s Mem. at 2. But Judge Haws testified that he did not specifically recall saying those words to Judge Neely. Haws Dep. at 110-11 (Ex. 3). Moreover, his testimony reveals that he had not actually determined that performing same-sex marriages was an essential function of the job of a circuit court magistrate. In particular, he testified that during that meeting, he told Judge Neely that he “respected her for . . . taking th[e] position” she did, that he “would never ask her to compromise her personal beliefs,” and that “if [performing same-sex marriages] *turned out to be a necessary essential function of the job* and she was unable to perform that function, that that would be a problem.” *Id.* at 86 (emphasis added). Whether Judge Haws initially told Judge Neely that performing same-sex weddings was an essential function of her position is immaterial for resolving the legal issues in this case, particularly since Wyoming law clearly states that performing weddings is a discretionary authority (not a mandatory duty) given to circuit court magistrates, *see* Wyo. Stat. § 20-1-106(a) (Connelly Aff., Ex. 6), and the Commission has admitted that circuit court magistrates are not “required to perform marriages,” Soto Dep. at 153 (Connelly Aff., Ex. 7). Therefore, any dispute about what Judge Haws said to Judge Neely regarding this issue does not prevent the Adjudicatory Panel from resolving this case on summary judgment.

## ARGUMENT

### **I. Judge Neely Did Not Violate the Wyoming Code of Judicial Conduct by Respectfully Stating Her Religious Beliefs about Marriage.**

The Commission claims that Judge Neely violated two canons and four rules in the Code. As an initial matter, the Commission’s citation to two canons is unavailing because the Code itself

provides that “a judge may be disciplined only for violating a Rule” (not for violating a canon). Wyoming Code of Judicial Conduct, Scope (hereinafter “W.C.J.C.”). Moreover, Judge Neely established in her Memorandum of Law in Support of her Motion, that she did not violate any of the cited rules. *See* Memorandum of Law in Support of the Honorable Ruth Neely’s Motion for Summary Judgment at 8-18 (“Judge Neely’s Memorandum” or “Neely’s Mem.”). She incorporates those arguments here and offers the following responses to the specific points that the Commission raises.

**A. Judge Neely Did Not Violate Rule 1.1 Because She Has Not Refused to Comply with the Law.**

Rule 1.1, which provides that “[a] judge shall comply with the law,” W.C.J.C., R. 1.1, “addresses the judge’s duty to comply with the law in his or her daily life.” Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 93 (2d ed. 2011); *see also* Charles Gardner Geyh et al., *Judicial Conduct and Ethics* 2-7 (5th ed. 2013) (stating that the duty to comply with the law is “directed at judges who commit criminal acts”). The Commission admits as much, noting that “this rule is generally applied in instances where a Judge violates some law, such as assault and battery, tax evasion, etc.” Commission’s Mem. at 6. Therefore, as the Commission has not, and could not, allege such a transgression on the part of Judge Neely, its argument that she violated Rule 1.1 should be summarily rejected. *See* Neely’s Mem. at 17.

Even though Rule 1.1 focuses on punishing judges who violate the law in their personal lives, the Commission attempts to extend it by claiming that it may also apply “where a Judge fails to follow the law in connection with a Court proceeding.” Commission’s Mem. at 6. But the cases that the Commission cites—all of which involve egregious legal violations in the adjudicative context, *see, e.g., Miss. Comm’n on Judicial Performance v. Wells*, 794 S.2d 1030, 1033-34 (Miss. 2001) (punishing a judge for finding a criminal defendant guilty based on affidavits and depriving him of the opportunity to present a defense)—highlight just how inapplicable the Rule is here,

where the alleged misconduct has nothing to do with an adjudicative proceeding. The Commission thus has failed to establish a violation of Rule 1.1.

**B. Judge Neely Did Not Violate Rule 1.2 Because No Reasonable Person Would Conclude that Her Religious Expression about Marriage Compromises Her Impartiality When Adjudicating Cases.**

The Commission's Rule 1.2 claim fails for two reasons. *See* Neely's Mem. at 14-17. First, the Rule is directed at the conduct of judges—not their speech or expression. *Id.* at 15. Thus, Judge Neely's *statement* of her religious beliefs cannot violate that Rule. *Id.* Second, no reasonable person—one who knows all the relevant facts, rules, and laws—would conclude that Judge Neely's religious beliefs about marriage render her unfit to act impartially as a judge. *Id.* at 15-17.

The Commission argues that the “failure to comply with law or legal process” constitutes a violation of Rule 1.2. Commission's Mem. at 7. Yet as Judge Neely has established, the Commission cannot show that she has failed to follow the law or any applicable legal processes. *See* Neely's Mem. at 12-13.

Furthermore, the cases that the Commission cites for its “failure to comply with law” argument are entirely unlike this case and thus are utterly unpersuasive. In *In re Inquiry Concerning a Judge No. 94-70*, 454 S.E.2d 780, 780-82 (Ga. 1995), for example, the Georgia Supreme Court removed a judge for multiple acts of “willful misconduct in office” that generated fifteen complaints against her. *Id.* Among other misdeeds, the judge abused her judicial position by issuing orders to intimidate elected county officials and by using her judicial power “as a weapon in political power struggles.” *Id.* at 782. And in *In re Dixon*, 559 S.E.2d 576, 577 (S.C. 2002), the South Carolina Supreme Court disciplined a judge for conduct leading up to his issuance of a contempt order because the judge did not hold a contempt hearing and had no legal authority to issue the contempt order. Merely describing these cases illustrates that they have no relevance here and that the Commission's “failure to comply with law” argument must fail.

Pressing its arguments further, the Commission suggests that Judge Neely “attempt[ed] to impose [her] own moral views” on others. Commission’s Mem. at 7. That is a baseless charge. In fact, by indicating that she could not take part in certain marriages that conflict with her religious beliefs, she was ensuring that she would *not* impose her views on the participants in those marriages. Similarly, in *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012), the court concluded that a religious counseling student who could not affirm same-sex relationships and thus referred clients seeking such guidance did not impose her beliefs on others but rather “avoid[ed] imposing her values on gay and lesbian clients.” *Id.* The same is true here. The Commission cites *State v. Pattno*, 579 N.W.2d 503 (Neb. 1998), to support its specious “imposing morality” argument, but that case is inapposite because the judge there, unlike Judge Neely, expressed his “religious views *from the bench*” and “rel[ied] upon [his] personal religious beliefs *as a basis for a sentencing decision.*” *Id.* at 509 (emphasis added):

The Commission also intimates that Judge Neely’s respectful response to Mr. Donovan’s pointed question about same-sex marriage is akin to a judge using “racial slurs or ethnic epithaps [sic].” Commission’s Mem. at 8. A moment’s worth of reflection, however, reveals that Judge Neely’s polite expression of her religious beliefs about marriage in no way resembles the use of derogatory slurs. Indeed, Judge Neely’s beliefs, as the U.S. Supreme Court has recognized, are “based on decent and honorable religious or philosophical premises,” and are “held[] in good faith by reasonable and sincere people.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602 (2015).

Rule 1.2 thus does not permit any form of discipline against Judge Neely.

**C. Judge Neely Did Not Violate Rule 2.2 Because She Has Not Refused to Uphold the Law or to Impartially Perform a Required Duty of Her Judicial Office.**

The Commission’s Rule 2.2 claim fails for three reasons. *See* Neely’s Mem. at 11-14. First, that Rule applies only to judges’ conduct when deciding cases between parties, and the Commission



does not argue (nor could it) that Judge Neely has refused to “uphold [or] apply the law” in deciding cases brought before her. *Id.* at 11-13. Second, even outside the adjudicative context, Judge Neely has not indicated an unwillingness to follow the law. *Id.* at 13. Wyoming law does not require circuit court magistrates like Judge Neely to officiate at any weddings, let alone to officiate at all of them. Wyo. Stat. § 20-1-106(a) (Ex. 6).<sup>2</sup> Third, Judge Neely has not refused to “impartially” perform a “duty” because she has no duty to officiate at marriages and she has not expressed prejudice against any group of individuals. *See* Neely’s Mem. at 13-14; *see also id.* at 8-11. Rule 2.2, therefore, cannot be invoked by the Commission as a basis for disciplining Judge Neely.

Notwithstanding this, the Commission argues that Judge Neely has failed to uphold and apply the decision in *Guzzo*. Commission’s Mem. at 8. But that is not accurate. *Guzzo* requires the state to license and recognize marriages between same-sex couples. *See Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797, at \*9 (D. Wyo. Oct. 17, 2014) (Connelly Aff., Ex. 12) (holding that “[m]arriage licenses may not be denied on the basis that the applicants are a same-sex couple”). It says nothing about whether a particular judge with discretionary authority to solemnize marriages must officiate at weddings that conflict with her religious beliefs. Therefore, Judge Neely has not indicated that she will refuse to uphold or apply the holding in *Guzzo*. She has never denied the legality of same-sex marriage in Wyoming, and if a case were to come before her that implicated same-sex marriage, she would recognize that marriage and afford the litigant all the rights that flow from it. Neely Aff. ¶¶ 32-33.<sup>3</sup> Because no binding legal authority compels Judge Neely to solemnize marriages that conflict with her faith, she has not violated Rule 2.2.

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<sup>2</sup> Regardless of what state statutory law requires, the various constitutional protections discussed in Judge Neely’s Memorandum forbid the government from punishing her for her religious speech and exercise. *See* Neely’s Mem. at 18-44.

<sup>3</sup> This is why the Commission’s citation to Comment 2 to Rule 2.2 is unavailing because Judge Neely *has* “interpret[ed]” *Guzzo* “without regard to whether [she] approves or disapproves” of it. W.C.J.C., R. 2.2, cmt. 2.

**D. Judge Neely Did Not Violate Rule 2.3 Because Her Stated Beliefs about Marriage Do Not Relate to a Required Duty of Her Judicial Office or Manifest Prejudice Based on Sexual Orientation.**

The Commission declares that the gravamen of its argument rests on Rule 2.3. *See* Commission's Mem. at 9 (“[T]he crux of this matter lies in Rule 2.3.”). But the Commission cannot prevail on its Rule 2.3 claim for four reasons. *See* Neely's Mem. at 8-11. First, Judge Neely's response to Mr. Donovan occurred outside the context of performing “judicial duties,” and did not refer to the performance of “judicial duties,” because circuit court magistrates have no duty to officiate at weddings. *Id.* at 8-9. Second, Rule 2.3 focuses on eliminating bias or prejudice during adjudicative proceedings, but the Commission does not contend that Judge Neely manifested prejudice during an adjudicative proceeding. *Id.* at 9-10. Third, Judge Neely's respectful response to Mr. Donovan in no way resembles the types of malicious or inflammatory speech outlawed by that Rule. *Id.* at 10; *see also* W.C.J.C., R. 2.3 cmt. 2 (giving examples that include “epithets . . . slurs . . . [and] demeaning nicknames”). Fourth, and perhaps most important, Judge Neely did not express a bias or prejudice (that is, a baseless and unreasonable dislike of individuals), but merely stated religious beliefs about marriage that are “based on decent and honorable . . . premises” and are “held[] in good faith by reasonable and sincere people.” *Obergefell*, 135 S. Ct. at 2594, 2602. The Commission has thus failed to establish that Judge Neely violated Rule 2.3.

Once again, the Commission has not supported its argument with relevant case law. It cites *In re Nelson*, 532 S.E.2d 609 (S.C. 2000), and *Dodds v. Commission on Judicial Performance*, 906 P.2d 1260 (Cal. 1995), for the proposition that “a Judge's speech, both on and off the bench can constitute a violation of Rule 2.3.” Commission's Mem. at 9. But the geographical location of speech is not determinative—what matters is whether the speech occurs in, or relates to, an adjudicative proceeding or a judicial duty. *See* W.C.J.C., R. 2.3(B) (“A judge shall not, *in the performance of judicial duties*, . . . manifest bias or prejudice . . .”) (emphasis added). Both *Nelson*

and *Dodds* involve speech by judges directly related to adjudicative proceedings. Those opinions are therefore inapposite here, where Judge Neely's response to Mr. Donovan did not refer to a judicial duty or an adjudicative proceeding.

The Commission is thus left with nothing but its own *ipse dixit* that Judge Neely has violated Rule 2.3. *See* Commission's Mem. at 10 (arguing that "Judge Neely's comments . . . clearly manifest a bias, based upon religious belief, against the LGBT community"). Indeed, since the inception of this prosecution, the Commission has operated under the assumption that its mere say-so is tantamount to proof that Judge Neely violated Rule 2.3. *See* Transcript of the Investigatory Panel's 2/18/15 Teleconference at 4 (Connelly Aff., Ex. 29) (quoting an Investigatory Panel member as stating that Judge Neely "has manifested evidence of bias based upon sexual orientation in violation of a clear rule of judicial conduct"). But that is insufficient to establish a violation because the Commission's own rules require it to "prov[e], by clear and convincing evidence, the facts justifying discipline." Rules Governing the Commission on Judicial Conduct and Ethics, Rule 10(c). This it has failed to do. The Commission thus cannot prevail on its Rule 2.3 claim.

**II. The Advisory Opinions that the Commission Cites Are Not Persuasive Because They Do Not Consider Concrete Facts, Wyoming Law, or the Constitutional Arguments that this Case Presents.**

The Commission has admitted that it sought no guidance from the Wyoming Judicial Ethics Advisory Committee before it brought charges against Judge Neely, and has stated that even if the Committee had provided state-specific guidance pertinent to this matter, its opinion would have been advisory only and not binding on the Commission. *See* Tiedeken Dep. at 53-54 (Connelly Aff., Ex. 25). Yet now the Commission seeks to rely on advisory opinions *from other states* in its attempt to discipline Judge Neely, claiming that they are persuasive support for its position. *See* Commission's Mem. at 15 ("The opinions . . . [c]ollectively . . . support the Commissions [sic]

position . . .”). The Commission’s newfound respect for advisory opinions is not only self-serving but also misplaced because the legal discussion in the opinions it cites is not compelling here.

Of particular note, applying the Code and the relevant constitutional protections that Judge Neely has raised requires exceedingly fact-specific analysis, so what one agency generally opines about a hypothetical situation under the law of its own state does not speak to the concrete facts and Wyoming law at issue here. *See, e.g.*, Ohio Board of Professional Conduct Opinion 2015-1 at 7 (noting that the opinion is created “in response to . . . hypothetical questions”). Here, the Commission seeks to punish Judge Neely for simply expressing her religious beliefs about marriage, *see* Notice of Commencement of Formal Proceedings ¶¶ A.4, A.8, B.2 (Connelly Aff., Ex. 34); and the evidence shows that the Commission treats her differently than other circuit court magistrates who are permitted to solemnize some marriages and decline others, *see* Soto Dep. at 151-54 (Ex. 7); Haws Dep. at 62-63 (Ex. 3); Smith Dep. at 41-44 (Connelly Aff., Ex. 8). Also, as the Commission admits, Wyoming law establishes that a circuit court magistrate’s performance of weddings is a discretionary authority rather than a mandatory duty, *see* Wyo. Stat. § 20-1-106(a) (Ex. 6); Soto Dep. at 153 (Ex. 7); and the state constitution clearly forbids the sort of religious test for public office that the Commission would establish through this prosecution of Judge Neely, *see* Wyo. Const. art. 1, § 18 (“[N]o person shall be rendered incompetent to hold any office of trust . . . because of his *opinion on any matter of religious belief whatever.*”) (emphasis added). These unique facts and governing laws render the advisory opinions from other states unpersuasive here.

In addition, none of those opinions are the product of a disputed adversarial proceeding, meaning that those agencies did not hear vigorous arguments shaped by the crucible of litigation in defense of judges’ rights and interests. *See* Geyh, *supra*, at 1-38 (“[A]dvisory opinions about judicial conduct and ethics . . . are rendered in a non-adversary context and possibly before all of the relevant facts have been developed. Therefore, they may be hasty or even mistaken in the advice

they purport to give.”). Nor do any of those opinions analyze the myriad constitutional issues implicated when a government agency disciplines a judge for communicating her religious beliefs about marriage and explaining how those beliefs affect her discretionary authority to perform marriages.<sup>4</sup> Moreover, the advisory opinions that declare as “prejudice” the belief that marriage is the union of one man and one woman cannot be reconciled with the U.S. Supreme Court’s acknowledgement that such beliefs are “based on decent and honorable religious or philosophical premises” and are “held[] in good faith by reasonable and sincere people.” *Obergefell*, 135 S. Ct. at 2594, 2602.

For these reasons, the Adjudicatory Panel should decline to rely on the advisory opinions that the Commission cites, conclude that Judge Neely did not violate the Code, and deny the Commission’s Motion.

**III. Applying the Code to Punish Judge Neely through this Proceeding Violates Her Rights Protected under the U.S. and Wyoming Constitutions.**

The Commission’s Motion should be denied not only because the Commission has failed to establish that Judge Neely violated the Code, but also because the Commission’s attempt to apply the Code here would violate Judge Neely’s constitutional rights in at least four different ways. *See* Neely’s Mem. at 18-44. First, it would violate her religious freedom under the U.S. and Wyoming Constitutions by creating an impermissible religious test for public office, by infringing her free exercise of religion, and by exhibiting hostility toward religion in conflict with Establishment Clause principles. *Id.* at 18-27. Second, applying the Code against Judge Neely would contravene her freedom of expression under both the federal and state constitutions by discriminating against her based on the viewpoint and content of her religious speech. *Id.* at 27-30. Third, this proceeding

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<sup>4</sup> One of the opinions at least recognizes that attempting to punish a judge because she expresses her religiously based inability to solemnize a same-sex marriage “raise[s] serious legal issues relating to . . . constitutional interpretation” that are “unsettled” and that “must be raised . . . in the appropriate legal venue.” New York Advisory Committee on Judicial Ethics Opinion 11-87 at 2-3. But that opinion did not analyze those issues.

violates Judge Neely's due-process rights guaranteed by the U.S. and Wyoming Constitutions. *Id.* at 35-39. Fourth, the Code provisions that the Commission seeks to apply here are vague and overbroad in violation of the federal and state constitutions. *Id.* at 39-44.

Anticipating Judge Neely's constitutional arguments, the Commission offers a long-rejected response, suggesting that it can infringe her constitutional rights because "there is no . . . right to be a Judge." Commission's Mem. at 15. That argument—claiming that the government can deprive someone of a benefit like public office for an unconstitutional reason simply because the person does not have a "right" to the benefit in the first instance—has been rejected and buried under more than a half century of U.S. Supreme Court precedents. In *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961), for example, the Court concluded that the mere fact that a citizen does not have a "right" "to hold public office cannot possibly be an excuse for barring [her] from office" based upon reasons "forbidden by the Constitution." *Id.*; see also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990) (noting that the Court "premised *Torcaso v. Watkins*, 367 U.S. 488 (1961), on [its] understanding that loss of [public office] for failure to compromise one's convictions states a constitutional claim"). The Court elsewhere explained why the absence of a right to public office cannot defeat a constitutional claim:

For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . . For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

*Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quotation marks, alteration, and citation omitted).

The Court then emphasized the well-established nature of these principles by citing no less than

sixteen decisions applying them. *Id.* Thus, the Commission's primary response to Judge Neely's constitutional arguments is meritless.

The Commission also asserts that even though Judge Neely "certainly enjoys [her] constitutional rights," she "must subordinate" those rights and "her beliefs to her ethical obligations" as outlined in the Code. Commission's Mem. at 15. This is flatly wrong—a judge does not sacrifice her constitutional rights upon taking the bench. Indeed, many cases, including decisions from the U.S. Supreme Court, establish that some Code provisions—either on their face or as applied to a particular set of circumstances—violate the constitutional rights of judges. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (striking down a provision in a code of judicial conduct that prohibited candidates for judicial election from announcing their views on disputed legal and political issues because that restriction on speech violated the First Amendment); *In re Sanders*, 955 P.2d 369, 375 (Wash. 1998) (stating that "[a] judge does not surrender First Amendment rights upon becoming a member of the judiciary," and rejecting a judicial commission's attempt to discipline a judge for his speech at a pro-life rally because his expression did not compromise judicial impartiality). These cases refute the Commission's empty claim that the Code compels Judge Neely to sacrifice her religious beliefs and constitutional rights.

#### CONCLUSION

For the foregoing reasons, the Adjudicatory Panel should deny the Commission's Motion, grant Judge Neely's Motion, and dismiss all charges that the Commission has brought against Judge Neely.

Dated: November 19, 2015



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*\*Out-of-State Certification Obtained*




**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of November, 2015, I served the foregoing Response to the Commission's Motion for Partial Summary Judgment by electronic mail on the following:

Patrick Dixon, Esq.  
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104 South Wolcott Street, Suite 600  
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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	)	COMMISSION ON JUDICIAL CONDUCT
	)	AND ETHICS
The Honorable Ruth Neely	)	No. 2014-27 Official Record
	)	FILED
Municipal Court Judge and	)	Date: 11/23/15
Circuit Court Magistrate	)	<i>Wendy J. Soto</i>
Ninth Judicial District	)	Wendy J. Soto
Pinedale, Sublette County	)	

**MOTION TO STRIKE AFFIDAVIT OF STEPHEN CRANE**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its disciplinary counsel Patrick Dixon, and moves the A-Panel for an order striking the Affidavit Stephen Crane, submitted in support of Judge Neely's Motion for Summary Judgment. The motion is on the grounds and for the reasons that the Affidavit contains impermissible hearsay statements.

Rule 56(e), W.R.Civ.P., provides that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ..." Courts generally disregard hearsay statements in affidavits in summary judgment motions. *Denbury Onshore, LLC v. Christensen*, \_\_ F.Supp.3d \_\_ WL 1810366 (D.Wyo.2015).

DATED this 23 day of November, 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 23 day of November, 2015, I served the above and foregoing ***Motion to Strike Affidavit of Stephen Crane*** via email or U.S. mail, postage prepaid, as noted below:

**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@adflegal.org](mailto:kconnelly@adflegal.org)**

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

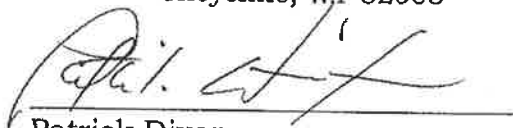
**VIA EMAIL**

**[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

COMMISSION ON JUDICIAL CONDUCT  
AND ETHICS

An inquiry concerning )

The Honorable Ruth Neely )

Municipal Court Judge and )  
Circuit Court Magistrate )  
Ninth Judicial District )  
Pinedale, Sublette County )

No. 2014-27

Official Record

FILED

Date: 11/24/15

Wendy J. Soto

**MOTION FOR WITNESS TO APPEAR BY TELEPHONE**

**COMES NOW** the Commission on Judicial Conduct and Ethics, by and through its Disciplinary Counsel Patrick Dixon, and moves the court for an order allowing witness Ned Donovan to appear and testify at the hearing scheduled for January 11-12, 2016 by telephone. In support of the motion, counsel states as follows:

1. The hearing of this matter is will be conducted in Casper, Wyoming, U.S.A.
2. Ned Donovan, a witness herein, is currently residing in London, England.
3. Requiring Mr. Donovan travel to Casper, Wyoming from the London, England to testify in person would be very expensive. As well, the travel expenses for the parties to travel to London, England for a trial deposition would also be prohibitively expensive.

4. It would be in the interest of judicial economy to allow Ned Donovan to testify at the January 11-12, 2016 hearing by telephone.

**DATED** this 24 day of November, 2015.



Patrick Dixon, #5-1504  
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104 South Wolcott Street, Suite 600  
Casper, Wyoming 82601  
(307) 234-7321  
(307) 234-0677 (fax)

**CERTIFICATE OF SERVICE**

I, Patrick Dixon, do hereby certify that on the 29 day of November, 2015, I served the above and foregoing *Motion for Witness to Appear by Telephone* via email or U.S. mail, postage prepaid, as noted below:

**VIA EMAIL dobylaw@embarqmail.com**

Herbert K. Doby  
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**orchard@spencelawyers.com**

Melvin C. Orchard, III  
Presiding Officer/Hearing Officer  
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**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  
No. 2014-27 AND ETHICS  
Official Record

FILED

Date: 12/2/15

  
Wendy J. Soto

---

**THE HONORABLE RUTH NEELY’S RESPONSE TO THE COMMISSION’S MOTION  
TO STRIKE AFFIDAVIT OF STEPHEN CRANE**

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The Honorable Ruth Neely respectfully requests that the Presiding Officer deny the Commission’s Motion to Strike Affidavit of Steven Crane (“Motion”).

The Commission seeks to strike Mr. Crane’s affidavit because in its estimation that affidavit “contains impermissible hearsay statements.” Motion at 1. While the Commission does not identify the purportedly objectionable statements in Mr. Crane’s affidavit, Judge Neely will assume that it is Mr. Crane’s testimony about Mr. Donovan’s statement that he wanted “to see her sacked,” referring to Judge Neely. Crane Affidavit at ¶ 4. Because this particular statement falls within a well-recognized exception to the hearsay rule, it need not and should not be stricken.

Wyoming Rule of Evidence 803(3) provides that a “statement of the declarant’s then-existing state of mind,” which includes “intent, plan, motive, [and/or] design,” is not excluded by the hearsay rule. Mr. Donovan’s statement over the phone to Mr. Crane, indicating his desire to see Judge Neely “sacked,” shows his state of mind with respect to his interactions with Judge

Neely. Therefore, it clearly falls within Rule 803(3)'s hearsay exception, and it thus constitutes admissible evidence. *See, e.g., Humphrey v. State*, 185 P.3d 1236, 1250 (Wyo. 2008) (recognizing state of mind as hearsay exception); *Robinson v. State*, 11 P.3d 361, 371 (Wyo. 2000) (admitting statement over hearsay objection because it showed state of mind).

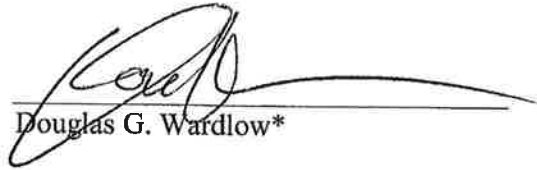
Even if the Presiding Officer were to conclude that the above-referenced statement by Mr. Donovan is impermissible hearsay and thus must be stricken from Mr. Crane's affidavit, the rest of his affidavit should remain.

Finally, although Judge Neely contends that striking all, or even a portion, of Mr. Crane's affidavit would constitute legal error, the resolution of this evidentiary dispute has no bearing on the ultimate outcome of the parties' pending motions for summary judgment. The fact supported by that evidence is not essential for Judge Neely to prevail on her defenses and striking that evidence does not create a genuine issue of material fact that warrants a formal evidentiary hearing.

Accordingly, for the reasons noted herein, the Commission's Motion should be denied.



Dated: December 2, 2015



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*Attorneys for Respondent*

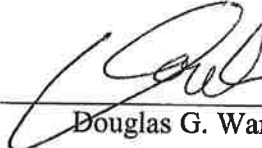
*\*Out-of-State Certification Obtained*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of December, 2015, I served the foregoing Response by electronic mail on the following:

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---

Douglas G. Wardlow



parties has asserted that no material facts are in dispute, and thus an evidentiary hearing of this matter would serve no useful purpose. Should the Adjudicatory Panel ("Panel") grant either party's motion for summary judgment, the Commission's Motion for Witness to Appear by Telephone will be rendered moot. Accordingly, Judge Neely respectfully requests that a telephonic hearing and consideration of this Motion be deferred until after the Panel has decided the parties' cross-motions for summary judgment.

### **ARGUMENT**

#### **I. The Commission Has Failed to Establish Good Cause and Compelling Circumstances to Allow Testimony from a Remote Location.**

The taking of testimony by telephonic or other means of transmission from a location outside the courtroom is strongly disfavored under Wyoming law. Wyoming Rule of Civil Procedure 43(a) provides that "the testimony of witnesses shall be taken in open court." The Rule allows courts to "permit presentation of testimony in open court by contemporaneous transmission from a different location" *only* "for good cause shown in compelling circumstances and upon appropriate safeguards." W.R.C.P., R. 43(a). This Rule is based on its federal counterpart, Federal Rule of Civil Procedure 43(a), which is identical in all material respects. The explanation of the reason for the presumption in favor of in-person testimony given by the Advisory Committee Notes to the Wyoming Rule's federal counterpart is thus instructive here:

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.

Fed. R. Civ. P. 43(a), Advisory Committee Note on 1996 Amendment. Given the importance of these considerations for the fair administration of justice, it is not surprising that the courts have interpreted the "good cause in compelling circumstances" exception narrowly under Rule 43(a).

*See, e.g., Galloway v. Islands Mechanical Contractor, Inc.*, No. 2008-071, 2012 WL 5830710, \*6 (D.V.I. Nov. 16, 2012) (holding that a request for testimony by contemporaneous transmission was not sufficient to show good cause where it was supported by unsigned affidavits from the witness and counsel regarding the witness's fear of her estranged husband, who she expected to encounter at trial); *Niemeyer v. Ford Motor Co.*, No. 2:09-CV-2091, 2012 WL 5199145, \*2 (D. Nev. Oct. 18, 2012) (rejecting a request for testimony by contemporaneous transmission for a doctor who claimed to have patient obligations at the time scheduled for trial); *Scozzari v. City of Clare*, No. 08-10997, 2012 WL 2003509, \*2 (E.D. Mich. June 5, 2012) (denying motion for testimony by contemporaneous transmission due to uncertainty regarding whether good cause might exist due to health condition of witness).

In this case, the Commission puts forward only one justification for allowing Mr. Donovan to appear by telephone: the inconvenience in terms of expense and time associated with requiring Mr. Donovan to travel from London to Wyoming or arranging for a trial deposition in London. Inconvenience, however, is insufficient to establish "good cause in compelling circumstances." Testimony by telephonic or video "[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." Fed. R. Civ. P. 43(a), Advisory Committee Note on 1996 Amendment; *see also Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, No. 96 Civ. 8414, 2002 WL 32068971, \*1 (S.D.N.Y. Mar. 31, 2003) (refusing to allow a witness to testify by telephone or video-conference when the only reason given was inconvenience to witness in traveling from California to New York); *In re Henson*, 289 B.R. 741, 743 (Bankr. N.D. Cal. 2003) (denying bankruptcy debtor's motion for leave to appear at trial by videoconference when the only reason given was that he had moved to Canada and would "likely still be there" at time of trial); *In re Van Sickle*, 694 N.W.2d 212, 218 (N.D. 2005) (holding

under an identical North Dakota rule that convenience to the witness is not sufficient in itself to allow testimony to be taken by telephone).

In addition, a review of cases where courts have allowed testimony by contemporaneous transmission under the federal counterpart to Wyoming's Rule 43(a) demonstrates that "good cause in compelling circumstances" requires a much weightier justification than the inconvenience and expense of transatlantic travel. Indeed, in *El-Hadad v. United Arab Emirates*, before permitting the plaintiff to testify from Egypt by video transmission, the district court "insisted that [the plaintiff must] prove he had pursued and repeatedly been denied a visa to the United States." 496 F.3d 658, 669 (D.C. Cir. 2007). See also *Jennings v. Bradley*, 419 Fed. Appx. 594, 598 (6th Cir. 2011) (unpublished) (holding that it was proper to allow four witnesses to testify by video teleconferencing where "district court found that three witnesses presented security threats because they were housed at maximum security prisons and had extensive disciplinary records, and that the fourth witness was in a crisis stabilization program and would not have access to proper mental health support if he were transported to another facility"); *Saenz v. Reeves*, No. 1:09-CV-00557, 2013 WL 1636045, \*3 (E.D. Cal. Apr. 16, 2013) (permitting testimony by video conference for incarcerated witness due to security risk of producing inmate for trial); *Monserate v. K.K. Mach. Co. Inc.*, No. 10-3732, 2013 WL 1412194, \*1 (E.D.N.Y. April 8, 2013) (finding good cause for use of video conference testimony where witness was statutorily prohibited from returning to the United States under the Immigration and Nationality Act). Because the Commission has failed to present any evidence of good cause in compelling circumstances—let alone evidence of compelling circumstances akin to a security risk or immigration prohibition—the Commission's Motion should be denied.

**II. Allowing Mr. Donovan to Testify Remotely from London Would Undermine the Fairness of the Proceeding.**

The Commission has also failed to demonstrate that appropriate safeguards can be put in place to ensure truthful, accurate testimony and prevent prejudice to Judge Neely. *See* W.R.C.P., R. 43(a) (allowing a court to “permit presentation of testimony . . . by contemporaneous transmission” only “for good cause shown in compelling circumstances *and upon appropriate safeguards*”) (emphasis added). If Mr. Donovan were allowed to testify from a location outside the United States, the Panel and the courts of the State of Wyoming would have no jurisdiction over him. As a result, the Panel would not be able to rely on the power of contempt or any other mechanism to ensure Mr. Donovan’s compliance with the Rules of Evidence or other directives of the Panel or Wyoming courts. The Panel and the Wyoming courts would likewise be unable to enforce the law should Mr. Donovan be found to have committed perjury under the laws of Wyoming. Indeed, it is not even clear which jurisdiction’s laws would apply regarding such matters.

Moreover, Mr. Donovan’s demeanor would not be visible to the Panel or counsel for Judge Neely. Allowing Mr. Donovan to testify from a remote location would thus make it difficult for the Panel to judge the credibility of his testimony and interfere with counsel’s ability to cross-examine the witness effectively. This is a particular concern given that this witness is the person who contacted Judge Neely, asked about her views on marriage, penned the newspaper article that led the Commission to initiate these proceedings, and subsequently published an op-ed in which he stated that “[i]t is sad that Judge Ruth Neely is still in an office of responsibility, almost two months after admitting to me that she would not officiate in same-sex marriages.” 1/30/15 Pinedale Roundup Article (Neely Aff., Ex. 55) (filed in support of Judge Neely’s Motion

for Summary Judgment). It would also be difficult, if not impossible, to prevent Mr. Donovan from relying on documents and other aids when testifying.

In short, allowing Mr. Donovan to testify from a location outside the courtroom and beyond the jurisdictional reach of Wyoming courts severely diminishes the incentives that normally encourage witnesses to give truthful and accurate testimony. *See* Martin Davies, *Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation*, 55 Am. J. Comp. L. 205, 205 (2007) (observing that “[t]he probative force of evidence given remotely from another country is affected if there is no effective sanction for perjury or contempt by the witness, or if the witness claims a privilege that would not be available in the jurisdiction where the court sits”). The “ceremony of trial and the presence of the factfinder” will not exert their normally “powerful force for truth-telling.” Fed. R. Civ. P. 43(a), Advisory Committee Note on 1996 Amendment. Consequently, the Panel should deny the Commission’s Motion.

**III. In No Event Should Mr. Donovan Be Allowed To Testify Unless He First Submits to Deposition by Counsel for Judge Neely.**

As previously mentioned, Mr. Donovan called Judge Neely, asked about her views on marriage, and authored the newspaper article that led the Commission to initiate this proceeding. For the entire duration of the discovery period through the present time, however, Mr. Donovan has been residing in London, beyond the reach of the Commission’s subpoena power. *See* W.R.C.P., R. 45(b)(1) (“A subpoena may be served . . . at any place within the State of Wyoming”); Commission Rule 12(c) (providing that an action to enforce a subpoena may be brought “in the district court of any county in which the hearing or proceeding is conducted or in which the person or entity subject to a subpoena resides or is found”). Accordingly, counsel for Judge Neely has not had the opportunity to depose him. Given this, it would unfairly prejudice



Judge Neely to allow him to testify without first submitting to a discovery deposition. Now that Mr. Donovan has apparently made himself available to testify, if the Commission allows him to testify at an evidentiary hearing (whether by contemporaneous transmission or in person),<sup>1</sup> Mr. Donovan should be required to first make himself available for deposition by Judge Neely's counsel.

### CONCLUSION

For the foregoing reasons, the Commission's Motion should be denied.

Dated: December 2, 2015



Douglas G. Wardlow\*

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Douglas G. Wardlow\*  
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(307) 532-2700 Fax: (307) 532-2706

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

---

<sup>1</sup> If the Panel does not eliminate the need for an evidentiary hearing by disposing of this proceeding on the parties' pending cross-motions for summary judgment, Judge Neely anticipates bringing a motion in limine with respect to Mr. Donovan's testimony (regardless of whether he appears in person or by telephone).

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of December, 2015, I served the foregoing Response to the Commission's Motion for Witness to Appear by Telephone by electronic mail on the following:

Patrick Dixon, Esq.  
Dixon & Dixon, LLP  
104 South Wolcott Street, Suite 600  
Casper, WY 82601  
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Wendy J. Soto  
Executive Director  
Commission on Judicial Conduct & Ethics  
P.O. Box 2645  
Cheyenne, WY 82003  
wendy.soto@wyboards.gov



---

Douglas G. Wardlow

**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: 12/2/15  
*Wendy J. Soto*  
Wendy J. Soto

---

**AFFIDAVIT OF DOUGLAS G. WARDLOW**

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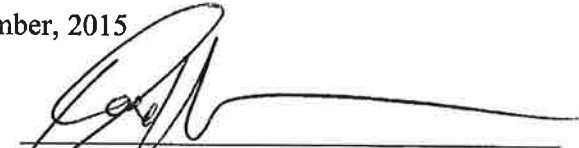
COMES NOW Affiant Douglas G. Wardlow, and presents the following sworn testimony:

1. I am one of the attorneys representing Judge Neely in the above-captioned matter. I submit this affidavit in support of the Honorable Ruth Neely's Motion for Summary Judgment. I have personal knowledge of all matters asserted herein.
2. On November 19, 2015, Patrick Dixon, counsel for the Wyoming Commission on Judicial Conduct and Ethics, served by email on counsel for Judge Neely a supplemental answer to Interrogatory No. 1 of the Honorable Ruth Neely's Second Set of Interrogatories. A true and correct copy of that document, entitled CJCE's Supplemental Answer to Interrogatory No. 1, dated November 19, 2015, is attached hereto as Exhibit 57.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


**[Signature Page Follows]**

Dated this 2<sup>nd</sup> day of December, 2015

  
\_\_\_\_\_  
Douglas G. Wardlow

STATE OF ARIZONA     )  
                                  )SS  
COUNTY OF MARICOPA )

SUBSCRIBED AND SWORN before me this 2<sup>nd</sup> day of December, 2015, by Douglas G. Wardlow

  
\_\_\_\_\_  
Notary Public

My commission expires: 5/14/17



# **EXHIBIT 57**

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	)	

**CJCE'S SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 1**

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its attorney Patrick Dixon, and, pursuant to direction from the Chairman of the A-Panel, hereby submits its supplemental answer to Interrogatory No. 1 of THE HONORABLE RUTH NEELY'S SECOND SET OF INTERROGATORIES TO THE WYOMING COMMISSION ON JUDICIAL CONDUCT AND ETHICS.

**INTERROGATORY NO. 1:** Describe all instances since January 1, 2010, where an investigatory Panel of the Commission has discussed or otherwise communicated about whether a judge violated Wyoming Code of Judicial Conduct Rule 2.3, or where the Commission has alleged a violation of that Rule in a Notice of Commencement of Formal Proceedings; and include in the response the Commission's final resolution of each matter referenced.

**ANSWER:** On October 11, 2012, the Commission received a sworn complaint from an enrolled member of a tribe located in Wyoming. The complaint alleged that Judge X made certain specific derogatory remarks during the course of judicial proceedings which, if true, would have constituted the violation of Rule 2.3 of the Wyoming Code of Judicial Ethics. An I-Panel was formed and tapes of all proceedings involving the complainant were obtained and reviewed by the I-Panel. The tapes clearly failed to substantiate the charges. However, a comment was made in the course of a bail



**CERTIFICATE OF SERVICE**

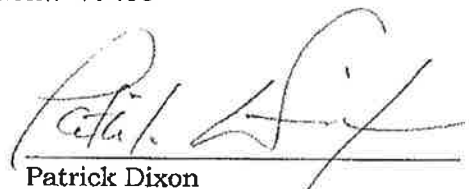
I, Patrick Dixon, do hereby certify that on the 19 day of November, 2015, I served the above and foregoing ***CJCE's Supplemental Answer to Interrogatory No. 1*** via email as noted below:

**VIA EMAIL dobylaw@embarqmail.com**

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**VIA EMAIL kconnelly@adflegal.org**

James A. Campbell  
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Douglas G. Wardlow  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
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Patrick Dixon

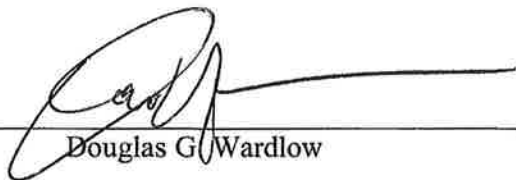


**CERTIFICATE OF SERVICE**

I hereby certify that on the 2nd day of December, 2015, I served the foregoing Affidavit of Douglas G. Wardlow by electronic mail on the following:

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Dixon & Dixon, LLP  
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Douglas G. Wardlow

**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  
No. 2014-27 AND ETHICS

Official Record

FILED

Date: 12/2/15  
Wendy J. Soto

Wendy J. Soto

---

**REPLY MEMORANDUM OF LAW IN SUPPORT OF  
THE HONORABLE RUTH NEELY'S MOTION FOR SUMMARY JUDGMENT**

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