

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

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Wendy J. Soto

**CJCE's REPLY TO THE HONORABLE RUTH NEELY'S RESPONSE TO THE
COMMISSION'S MOTION FOR PROTECTIVE ORDER**

COMES NOW the Commission on Judicial Conduct and Ethics (CJCE or Commission), by and through its attorney Patrick Dixon, and submits the following reply to THE HONORABLE RUTH NEELY'S RESPONSE TO THE COMMISSION'S MOTION FOR PROTECTIVE ORDER:

1. *The CJCE is not subject to a Rule 30(b)(6) Notice.*

This issue should be dispositive of all issues raised by the *CJCE's Motion for Protective Order*. To start, throughout her response, the Judge attempts to blur the issue by characterizing the CJCE as a governmental *entity*. While the CJCE may or may not be a governmental entity, it is clearly not a governmental *agency* for the purposes of Rule 30(b)(6), W.R.Civ.P. As noted in the motion, a party may notice and subpoena as a deponent "a public or private corporation or a partnership or association or governmental *agency*." Rule 30(b)(6), W.R.Civ.P. *Agency* is a term of art and is not synonymous with *entity*.

Because, as a matter of law, the CJCE is not a governmental *agency*, it is not subject to the notice and subpoena.

The CJCE is a constitutionally created organ of the Wyoming Judicial Department. See Wyo. Const. art. 5, § 6. It acts according to rules promulgated by the

Wyoming Supreme Court, *Id.* at § 6(e)(iv); CJCE Rule 1,¹ and is charged with disciplining, suspending, removing, and retiring judicial officers on the grounds of misconduct or disability, Wyo. Const. art. 5, § 6(d); CJCE Rule 3(a). While the CJCE may impose a private censure without further approval, it must recommend more substantial actions to the Wyoming Supreme Court, which has the ultimate authority to act. *See Id.* at §6(d), (f); CJCE Rule 12(a).

The CJCE has a total of twelve members, but operates through investigatory and adjudicatory panels that are appointed by the Commission chair and consist of between three and five members. Wyo. Const. art. 5, § 6(a), (c); Rules 5(b), 7 and 8.

Courts have consistently characterized analogous judicial commissions as “quasi judicial” in nature. *Adkins v. Kansas Commission on Judicial Qualification*, 2011 WL 5024346 (D.Ka.2011) at p. 4, characterizing the Commission as a quasi judicial body entitled to judicial immunity; *McKeown v. N.Y. State Com’n on Judicial Conduct*, 377 Fed.Appx. 121, 124, 2010 WL 1977825 (2nd Circ.2010), recognizing judicial immunity in the state judicial commission; *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 Fed.2d 467, 470 (3rd Circ.1986), characterizing the board as a “constitutionally independent body.”

Under Wyoming law, a governmental *agency* is defined as follows:

(ii) “agency” means any authority, bureau, board, commission, committee, or sub-agency of the state, a county, a municipality or other political subdivision which is created by or pursuant to the Wyoming Constitution, statute or ordinance, **other than the state legislature or the judiciary.** (Emphasis added.)

Wyoming Statute § 16-4-402(a)(ii). At least for the purposes of the Wyoming Public Meetings Act, judicially created entities are treated differently from other governmental

¹ Unless otherwise noted all references to Rules are references to the Rules Governing the Commission on Judicial Conduct and Ethics.

agencies and are not subject to the requirements of the Act. Similarly, the Wyoming Public Records Act does not apply where "inspection is prohibited by Rules promulgated by the Supreme Court." Wyoming Statute § 16-4-203(a)(iii). Judicial and quasi-judicial bodies should be entitled to the same freedom from inquiry under Rule 30(b)(6).

Although the Wyoming Supreme Court has not passed directly on this question, this position is supported by its holding in *Decker v. State ex rel. Wyoming Medical Commission*, 208 WY 100, 191 P.3d 105 (Wyo.2008). In *Decker* the Workers' Compensation claimant contended that he was deprived of due process because the deliberations of the Medical Review Panel were not subject to review under the Public Meetings Act. The Court observed that the Medical Review Panels were the logical extension of the Office of Administrative Hearings, charged with deciding workers' compensation cases. As such, the Court characterized the panels as quasi-judicial in nature and thus their deliberations were not subject to public scrutiny. *Id.* at ¶¶11 and 17, pp. 115 and 117. The logic of *Decker* should be persuasive on this issue.

The CJCE is a creature of Article 5 of the Wyoming Constitution, the article which establishes the judiciary. It is charged with enforcing the Code of Judicial Conduct and does so following a body of rules promulgated by the Wyoming Supreme Court. It is consistently characterized by the legal authorities as a quasi-judicial body. By definition, it is not a governmental agency under Wyoming law and thus should not be subject to deposition and subpoena under the Wyoming Rules of Civil Procedure.

2. *The CJCE has not waived the confidentiality requirement of Rule 22.*

By its motion the CJCE has objected to producing a witness to testify to the fourth, sixth and ninth bullet point requests in the Judge's notice. Generically, these contemplate inquiry into specific procedures relating to the appointment of the

adjudicatory and the investigatory panels in this proceeding. In arguing against the motion, the Judge reads the confidentiality requirements of Rule 22 narrowly, at least inferring that the right of confidentiality inures only to the benefit of the Judge. While the Judge may waive confidentiality as to the "subject matter" of the proceeding (Rule 22(c)), there is a broader right of confidentiality which belongs to the CJCE. In that regard, Rule 22(a) provides as follows:

(a) *Proceedings.* – Unless otherwise permitted by these rules, or unless revealed in public documents or a public hearing all proceedings before the Commission and all information, communications, materials, papers, files, and transcripts, written or oral received or developed by the Commission in the course of its work shall be confidential.

While that broad proscription of confidentiality serves the judge's interest, it also serves the interests of the Commission. Just as a judge or jury's deliberations are confidential, the proceedings of the Commission need to remain confidential for it to function properly.

Judge Neely argues that the CJCE has waived the confidentiality of its proceedings by producing transcripts of two I-panel meetings. While those were produced in a good faith attempt at transparency, on reflection, they should not have been produced. The question, then, becomes does this constitute a waiver of Rule 22(a)?

In response, the CJCE submits that it cannot waive that which is not waivable. It is axiomatic that certain things may not be waived. For example, a party may not waive subject matter jurisdiction. *Weller v. Weller*, 960 P.2d 493, 496 (Wyo.1998); *Cotton v. Brow*, 903 P.2d 530 (Wyo.1995). Similarly, in most instances, the statute of limitations may not be waived. *BHP Petroleum (Americas), Inc. v. Texaco Exploration and Production, Inc.*, 1 P.3d 1253 (Wyo. 2000); *Boller v. Western Law Associates, P.C.*, 828 P.2d 1182 (Wyo.1992); *Seckman v. Wyo-Ben, Inc.*, 783 P.2d 161 (Wyo.1989). The

confidentiality of Rule 22 falls into this same category. The confidentiality provisions are rules promulgated by the Wyoming Supreme Court. Disciplinary counsel can no more waive these requirements than he could waive Rule 4 of the Wyoming Rules of Appellate Procedure.

Second, as a matter of fact, the CJCE did not waive the confidentiality of Rule 22 in responding to Requests for Production of Documents. The CJCE objected to the requests, *in toto*, on the basis of Rule 22. See General Objection to the CJCE'S RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS attached hereto as Exhibit A. The audio recordings were produced responsive to Request No. 11, to which CJCE made further objection. See Exhibit A, pp. 4-5. The Wyoming Supreme Court has consistently defined waiver as "an express, voluntary, and intentional relinquishment of a known right, or is conduct that shows an intentional relinquishment of that right." *Jensen v. Fremont Motors, Cody, Inc.*, 2002 WY 173, ¶24, 58 P.3d 322, 328 (Wyo.2002). Thus, it is disingenuous for Judge Neely to suggest there has been a waiver of the confidentiality of Rule 22.

3. *The CJCE should not have to designate a witness to testify to historical discipline.*

The eleventh designation in the Rule 30(b)(6) notice asks the CJCE to designate an individual to testify to the "history of judicial discipline recommended by the Commission and the resulting discipline handed down by the Wyoming Supreme Court in all matters since the Commission's inception." First, except with respect to the *Lopez* discipline which was handed down in 2012, there is no person affiliated with CJCE who would have knowledge of prior disciplines. Second, except for the recommendation and resultant discipline, there is nothing to which the designated witness can testify. In material part, Rule 22(a) provides:

A recommendation filed by the Commission with the Wyoming Supreme Court loses its confidential character upon its filing. However, the record which is the basis of the recommendation remains confidential unless otherwise ordered.

To the extent that recommendations have been made and discipline handed down, they have been provided to Judge Neely and they speak for themselves. Under the confidentiality rule, the witness may not amplify on those matters.

Finally, this designation cannot reasonably be calculated to lead to the discovery of admissible evidence. None of the four public disciplines handed down by the Wyoming Supreme Court in the history of the Commission are even remotely related to the factual circumstances that underlie this proceeding. What different commissions, acting in different times recommended under different factual circumstances is completely irrelevant to the proceedings at hand.

4. *The CJCE should not be required to testify to general procedures.*

Finally, the CJCE objects to producing a witness to testify to bullet point numbers 1, 2, 3, 5, 7 and 8. Greatly simplified, these designations request that a witness appear and testify to the formation and composition of I-panels and A-panels and to the internal workings and operations of the CJCE. Judge Neely asserts that this discovery will lead to admissible evidence, but does not state how or what relevant evidence might be discovered.

To the extent that these matters are governed by the Rules, the Rules are matters of public record and speak for themselves. There is no point to the examination. To the extent that the examination proposes to go beyond the proscriptions set forth in the Rules, inevitably, it will lead to examination regarding the internal workings of the Commission which, once again, is protected by the

confidentiality requirements of Rule 22(a). Absent some demonstration of the relevance of these topics, the deposition should not proceed.

5. *Conclusion.*

The issue in this proceeding is not whether the Commission's procedures are proper, or whether the Commission followed them or what the CJCE has done in the past. The issue is whether Judge Neely violated the Canons of Judicial ethics. Given that she has admitted to the statements made in a newspaper in general circulation in her county, this is not a discovery case. It is extremely unlikely that prodding Commission members in a 30(b)(6) deposition will lead to a defense in this proceeding.

For the reasons set forth above, the CJCE requests the hearing officer enter his order that the Rule 30(b)(6) deposition not proceed, or in the alternative, that the examination be limited to matters which are non-confidential, non-privileged and within the proper scope of discovery.

DATED this 26 day of August, 2015.



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