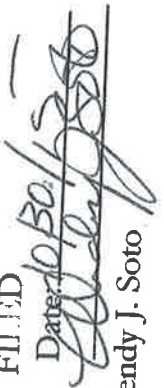


BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

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

COMMISSION ON JUDICIAL CONDUCT  
 AND ETHICS  
 Official Record

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

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

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

A. *Statement of the Facts.*

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

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

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

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

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

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

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

...

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

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

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

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

B. *Statement of Issues.*

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

C. *Statement of the Argument.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



Rule 1.2 echoes Canon 1. It provides as follows:

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

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

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

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

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

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

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

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

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

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

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

**Rule 2.2. Impartiality and Fairness.**

A Judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

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

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

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



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

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

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

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

(A) A Judge shall perform the duties of judicial office, including administrative duties without bias or prejudice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.* at pg 5.

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

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

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

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

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

*Id* page 2 of 3.

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

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

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

*Id* at Pg. 4.

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

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

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

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

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



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

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

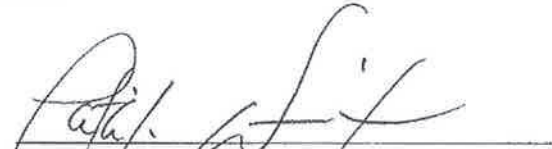
The opinions referred to above are attached hereto. Collectively, they uniformly, and without exception, support the Commissions position in this proceeding that Judge Neely's conduct and statements violate each of the ethical principals alleged in the Notice of Commencement of Formal Proceedings.

D. *Conclusion*

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

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

DATED this 30 day of October, 2015.



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**CERTIFICATE OF SERVICE**

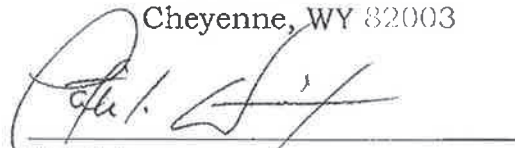
I, Patrick Dixon, do hereby certify that on the 30 day of October, 2015, I served the above and foregoing ***Memorandum in Support of Motion for Partial Summary Judgment*** via email or U.S. mail, postage prepaid, as noted below:

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