

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

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No. 2014-27

CERTIFIED RECORD
VOLUME 6

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

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

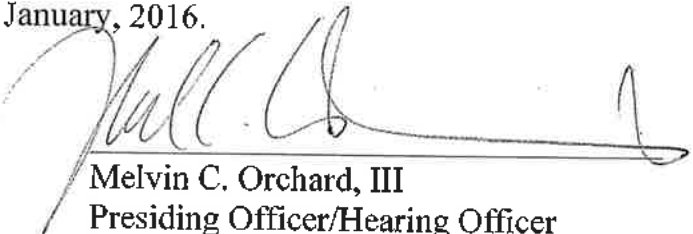
ORDER DENYING MOTION TO SUPPLEMENT THE RECORD

THIS MATTER having come before the Adjudicatory Panel upon the Commission's Motion to Supplement the Record, filed January 19, 2016, and the Adjudicatory Panel having reviewed the Motion and Judge Neeley's Response to the Commission's Motion to Supplement the Record, filed January 20, 2016, and being otherwise advised in the premises finds as follows;

1. Sufficient information exists to decide the present issues.
2. Evidence of costs and fees is premature.

IT IS HEREBY ORDERED the Motion to Supplement the Record is **Denied**.

DATED this 25th day of January, 2016.


Melvin C. Orchard, III
Presiding Officer/Hearing Officer

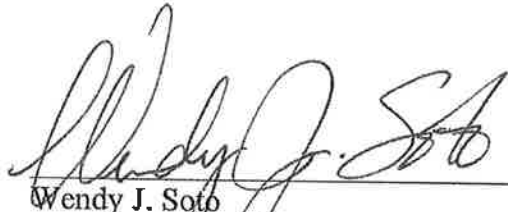
CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2016, I served the foregoing **ORDER DENYING MOTION TO SUPPLEMENT THE RECORD** by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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

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

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


Wendy J. Soto
Executive Director
Commission on Judicial Conduct & Ethics
P.O. Box 2645
Cheyenne, WY 82003
Phone: (307) 778-7792

cc: Adjudicatory Panel

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS

STATE OF WYOMING

An inquiry concerning)

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: 2/4/16

Wendy J. Soto

COMMISSION'S SUBMISSION OF BILLING RECORDS

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its disciplinary counsel Patrick Dixon, and submits the attached billing records and cost invoices, together with a summary thereof, for the purpose of compliance with Rule 17 of the Rules Governing the Commission on Judicial Conduct and Ethics.

DATED this 4 day of February, 2016.


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 4 day of February, 2016, I served the above and foregoing **Commission's Submission of Billing Records** via email or U.S. mail, postage prepaid, as noted below:

VIA EMAIL

dobylaw@embarqmail.com

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

VIA EMAIL kconnelly@adflegal.org

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

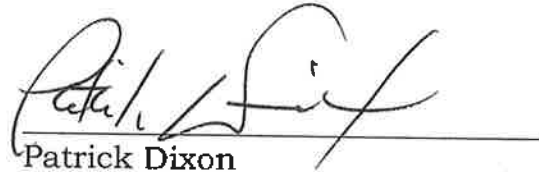
VIA EMAIL

orchard@spencelawyers.com

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

VIA U.S. MAIL

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


Patrick Dixon

DATE	INVOICE NO.	FEEs	COSTs	TOTAL
3/3/15	Dixon 16491	580.00	0.00	580.00
4/10/15	Dixon 16498	650.00	2.39	652.39
5/4/15	Dixon 16509	160.00	1.09	161.09
6/2/15	Dixon 16516	50.00	0.00	50.00
7/1/15	Dixon 16525	550.00	10.18	560.18
8/18/15	Dixon 16533	2,310.00	21.94	2,331.94
9/15/15	Dixon 16542	4,207.50	13.82	4,221.32
10/9/15	Dixon 16559	11,208.33	2,331.96	13,540.29
11/10/15	Dixon 16573	3,205.00	1,416.02	4,621.02
12/7/15	Dixon 16586	5,017.00	35.80	5,052.80
12/14/15	Walz 3516	0.00	449.32	449.32
1/6/16	Dixon 16595	3,127.50	134.77	3,262.27
2/3/16	Dixon 16606	1,690.00	11.08	1,701.08
	TOTAL	\$32,755.33	\$4,428.37	\$37,183.70

Rebilled
Inv. # 16491
580⁰⁰

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

March 03, 2015
In Reference To: I-Panel (Honorable R. Neely)
Invoice #16482

Professional Services

			<u>Hours</u>	<u>Amount</u>
2/18/2015	PD	Call from Wendy on new complaint; review file material recieved via email and respond to email	0.50	117.50
2/24/2015	PD	review retention letter and contract (NC) and email to Wendy on investigation	0.15	35.25
2/25/2015	PD	research other jurisdictions position on issue; emails to Wendy and research Canons and draft Notice of Formal Proceedings	2.00	470.00
2/26/2015	PD	revise Notice and emails and fax to Wendy	0.25	58.75
For professional services rendered				<u>\$681.50</u>
Balance due				<u><u>\$681.50</u></u>

Please make checks payable to Dixon & Dixon, LLP

User Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Pat Dixon - Attorney	2.90	235.00	\$681.50

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

April 10, 2015
In Reference To: I-Panel (Honorable R. Neely)
Invoice #16498

Professional Services

			<u>Hours</u>	<u>Amount</u>
3/2/2015	PD	emails and review notices and revise formal notice accordingly	0.35	70.00
3/5/2015	PD	call from WS re call from Judge; call to Judge (.5) and follow up with WS; call to KC and draft memo and email.	1.20	240.00
3/6/2015	PD	revise memo and email to WS; call to Hon Brooks w/ Advisory Commission	0.25	50.00
3/9/2015	PD	emails and call to WS on scheduling	0.10	20.00
3/10/2015	PD	call from Judge Brooks; attend I-panel conference and memo to file on same; email from WS and call to Judge	0.80	160.00
3/11/2015	PD	calls to judge and to Wendy and emails on same	0.35	70.00
3/13/2015	PD	email to WS on request for extension	0.10	20.00
3/18/2015	PD	review order and email to WS	0.10	20.00
For professional services rendered				<u>\$650.00</u>

Additional Charges :

			<u>Qty</u>	
3/31/2015	\$Postage	March 1-31, 2015	1	1.19
	\$Copy Log	March 1-31, 2015	6	1.20
Total additional charges				<u>\$2.39</u>

	<u>Amount</u>
Total amount of this bill	\$652.39
Previous balance	\$580.00
Balance due	<u>\$1,232.39</u>

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Pat Dixon - Attorney	3.25	200.00	\$650.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

May 04, 2015

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16509

Professional Services

		<u>Hours</u>	<u>Amount</u>
4/30/2015	PD review answer and call to Wendy S on same	0.30	60.00
	PD research on pro hac vice	0.50	100.00
	For professional services rendered		<u>\$160.00</u>

Additional Charges :

		<u>Qty</u>	
4/30/2015	\$Copy Log April 1-30, 2015	3	0.60
	\$Postage April 1-30, 2015	1	0.49
	Total additional charges		<u>\$1.09</u>

Total amount of this bill	<u>\$161.09</u>
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Previous balance	\$1,232.39
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Balance due	<u><u>\$1,393.48</u></u>
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Please make checks payable to Dixon & Dixon, LLP

Name	User Summary	Hours	Rate	Amount
Pat Dixon - Attorney		0.80	200.00	\$160.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

June 02, 2015
In Reference To: I-Panel (Honorable R. Neely)
Invoice #16516

Professional Services

		<u>Hours</u>	<u>Amount</u>
5/4/2015	PD call to Wendy on scheduling	0.10	20.00
5/11/2015	PD emails and call to Wendy on scheduling, etc	0.15	30.00
	For professional services rendered		<u>\$50.00</u>
	Previous balance		\$1,393.48
	Accounts receivable transactions		
4/13/2015	Payment - thank you		<u>(\$580.00)</u>
	Total payments and adjustments		<u>(\$580.00)</u>
	Balance due		<u><u>\$863.48</u></u>

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Pat Dixon - Attorney	0.25	200.00	\$50.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

July 01, 2015

In Reference To: I-Panel (Honorable R. Neely)
Invoice #16525

Professional Services

			<u>Hours</u>	<u>Amount</u>
6/15/2015	PD	prep for and attend scheduling conference and do Rule 11 disclosures; emails to counsel on schedule and mark documants as potential exhibits	1.10	220.00
6/16/2015	PD	emails and calls to potential witness	0.15	30.00
6/17/2015	PD	calls to and from Stoll on two issues; witnesses and research	0.25	50.00
	PD	review AUSCS memo on religious freedom issues	0.35	70.00
6/18/2015	PD	calls to Wendy and potential witnesses and resources	0.25	50.00
6/30/2015	PD	review designation, interrogatories, requests and admissions and letter to WS	0.65	130.00

For professional services rendered

\$550.00

Additional Charges :

			<u>Qty</u>	
6/30/2015	\$Copy Log	June 1-30, 2015	34	6.80
	\$Postage	June 1-30, 2015	1	3.38
Total additional charges				<u>\$10.18</u>

Total amount of this bill

\$560.18

Previous balance

\$863.48

	<u>Amount</u>
Accounts receivable transactions	
6/8/2015 Payment - thank you	<u>(\$813.48)</u>
Total payments and adjustments	<u>(\$813.48)</u>
Balance due	<u><u>\$610.18</u></u>

Please make checks payable to Dixon & Dixon, LLP

Name	User Summary	Hours	Rate	Amount
Pat Dixon - Attorney		2.75	200.00	\$550.00

DIXON & DIXON, LLP
 First Interstate Bank Building
 104 S. Wolcott, Suite 600
 Casper, WY 82601
 Tax ID #20-5256380

Invoice submitted to:
 Commission on Judicial Conduct and Ethics
 c/o Wendy Soto, Executive Director
 P.O. Box 2645
 Cheyenne WY 82003

August 18, 2015
 In Reference To: I-Panel (Honorable R. Neely)
 Invoice #16533

Professional Services

			<u>Hours</u>	<u>Amount</u>
7/15/2015	PD	calls to haws; conference call with Wendy and KC on discovery and begin dictation of responses	2.20	440.00
7/16/2015	PD	finish and revise draft of Requests for admission, draft Production and Interrogatories; review documents and calls to Wendy S; listen to I-panel tapes	3.75	750.00
7/20/2015	PD	further work on discovery; review I-panel file and draft privilege log; emails to WS and call to same on further documents; calls to Cuprill and Gilbertz	1.85	370.00
7/21/2015	PD	interviews with Donovan and follow up emails; review further documents from donovan and WS and call to WS on second issue; revise all discovery accordingly; dictate supplemental disclosures	3.00	600.00
7/22/2015	PD	place all responses in final form and email interrogatories to Gilbertz	0.30	60.00
7/23/2015	PD	emails to Gilbertz on revisions to interrogatories	0.25	50.00
7/28/2015	PD	email audio recordings and do supplemental production of Schroeder docs	0.20	40.00
For professional services rendered				<u>\$2,310.00</u>

Additional Charges :

			<u>Qty</u>	
7/31/2015	\$Copy Log	July 1-31, 2015	38	7.60

	<u>Qty</u>	<u>Amount</u>
7/31/2015 \$Postage July 1-31, 2015	1	14.34
Total additional charges		\$21.94
Total amount of this bill		\$2,331.94
Previous balance		\$610.18
Accounts receivable transactions		
6/18/2015 Payment - thank you		(\$50.00)
7/21/2015 Payment - thank you (DIRECT DEPOSIT)		(\$560.18)
Total payments and adjustments		(\$610.18)
Balance due		\$2,331.94

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Pat Dixon - Attorney	11.55	200.00	\$2,310.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2845
Cheyenne WY 82003

September 15, 2015

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16542

Professional Services

			<u>Hours</u>	<u>Amount</u>
8/3/2015	BFT	Review file, documents (n/c), legal research (2.0)	1.00	150.00
8/4/2015	BFT	Review research	3.80	570.00
8/7/2015	BFT	Research	1.00	150.00
8/10/2015	BFT	Research, discussion (n/c)	0.15	22.50
	PD	emails to WS on two matters and review Ohio opinion	0.30	60.00
8/13/2015	BFT	Comparing implicated JCR Ohio vs. WY, draft memo	0.70	105.00
	PD	receive and review depo notices and subpoenas and calls to WS and multiple calls to witnesses re same	1.00	200.00
	BFT	Research compare Ohio JC to WY JC	0.50	75.00
8/14/2015	BFT	Researching Alliance Defending Freedom	1.00	150.00
	PD	calls to Cuprill and smith and Tiedeken; emails on Rule 30(b) 6 notice	0.25	50.00
8/17/2015	PD	calls to WS, Julie T on deposition issues, to newspaper reporter and to witnesses on subpoena; calls from judge H and Donovan in London; draft letter to Judge H; and motion for protective order on 30(b)(6) notice; attend conference call meeting and draft press release	3.50	700.00
8/18/2015	PD	final objections; emails on press release; calls to Conelly on same	0.40	80.00
8/19/2015	PD	call and email on press release and call to WS on inquiry from reporter	0.35	70.00

1160

			<u>Hours</u>	<u>Amount</u>
8/19/2015	PD	review emails and revisions on press release; do notice of depo for Judge; emails to Wendy	0.50	100.00
8/21/2015	PD	calls to Wendy and emails from Connoley and Gifford.	0.50	100.00
	BFT	Read new opinion, research	1.00	150.00
8/24/2015	PD	review response to Rule 30(b)(6) motion and do westlaw and other research	1.15	230.00
8/25/2015	PD	Finish research and drafting of reply; emails on press and subpoenas and call to Wendy on same.	3.50	700.00
8/26/2015	PD	review and respond to multiple emails; final revision to memo	0.65	130.00
8/27/2015	BFT	Research and amending notice	1.00	150.00
	PD	respond to multiple emails on 30b6 issues	0.30	60.00
8/28/2015	PD	review and final drafts of amended Notice	0.30	60.00
	BFT	Edit, review notice, research cases.	0.50	75.00
8/31/2015	PD	review emails re emails and call to WS	0.35	70.00
For professional services rendered				<u>\$4,207.50</u>
Additional Charges :				
			<u>Qty</u>	
8/31/2015	\$Postage	August 1-31, 2015	1	5.02
	\$Copy Log	August 1-31, 2015	44	8.80
Total additional charges				<u>\$13.82</u>
Total amount of this bill				<u>\$4,221.32</u>
Previous balance				\$2,331.94
Balance due				<u><u>\$6,553.26</u></u>

Please make checks payable to Dixon & Dixon, LLP

Name	User Summary	Hours	Rate	Amount
Britney F. Turner		10.65	150.00	\$1,597.50
Pat Dixon - Attorney		13.05	200.00	\$2,610.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

October 09, 2015

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16559

Professional Services

			<u>Hours</u>	<u>Amount</u>
9/1/2015	BFT	Research at the Court (ALR)	0.50	75.00
	PD	emails on scheduling and prep for and attend hearing; call from WS and email on Rule 30 designee	1.50	300.00
	PD	review Judge's response brief and emails to WS and to mel on hearing.	0.35	70.00
9/2/2015	BFT	Research; write memo on affirmative offenses	1.00	150.00
9/3/2015	BFT	Research at court and memo	1.25	187.50
9/4/2015	BFT	Research memo and write	3.50	525.00
9/8/2015	PD	respond to Subpoena DT for Wendy and multiple calls to JT and WS on deposition arrangement	1.75	350.00
9/9/2015	PD	call to WS on disciplines - review emails	0.25	50.00
9/11/2015	PD	receive and review evidentiary material from Judge N; other depo prep; email to Julie on same	0.60	120.00
	BFT	Research equal protection, draft memo, edit memo	2.00	300.00
9/12/2015	PD	begin prep for next week's depositions	0.35	70.00
9/14/2015	PD	depo prep	1.50	300.00
	PD	travel to Cheyenne and meet with WS and JT in depo prep	4.50	900.00

			<u>Hours</u>	<u>Amount</u>
9/14/2015	BFT	Drove to Cheyenne (no charge)	3.00	NO CHARGE
9/15/2015	BFT	Research into cases ADF has been involved in and memo	1.50	NO CHARGE
	BFT	Attend depositions (no charge)	9.50	NO CHARGE
	PD	attend depos of WS and JT	9.50	1,900.00
9/16/2015	BFT	meet with and attend depo of Artery and finish JT; travel to Pinedale (no charge)	11.00	NO CHARGE
	PD	meet with and attend depo of Artery and finish JT; travel to Pinedale	11.00	2,200.00
9/17/2015	PD	meet with and attend depos of Cuprill and Smith and prep for Judge N	6.50	1,300.00
	BFT	Attend deposition; Meet with client (no charge)	6.50	NO CHARGE
	BFT	Prepared Depo Exhibit List	0.20	30.00
9/18/2015	PD	attend depo of Judge Haws and take depo of Judge N; return to Casper	9.75	1,950.00
	BFT	Attend depositions (no charge)	5.50	NO CHARGE
	BFT	Return travel from Pinedale to Casper (no charge)	4.30	NO CHARGE
9/22/2015	PD	prep for and attend meeting with I-panel; research annotated code and wyo case law	1.00	200.00
	PD	review new answer, motion to dismiss and White v Minnesota	0.65	130.00
9/23/2015	PD	calls to ADF attorneys	0.20	40.00
9/24/2015	PD	draft motions on amendment	0.30	60.00
9/28/2015	PD	emails and revise order per same	0.00	0.83
For professional services rendered				<u>\$11,208.33</u>

Additional Charges :

			<u>Qty</u>	
9/18/2015	Travel	9/14-18/2015 DEPOSITIONS IN CHEYENNE AND PINEDALE Mileage - Patrick Dixon: 900 X \$.575 = \$517.50 Hotels for PD & BT: \$997.96 Meals for PD: \$131.71 Meal for BT: \$4.50	1	1,651.67

		<u>Qty</u>	<u>Amount</u>
9/29/2015	\$Transcript Q & A REPORTING Transcripts of depositions and exhibits: Wendy Soto, Julie Tiedeken, Jeran Artery	1	670.50
9/30/2015	\$Postage September 1-30, 2015	1	0.49
	\$Copy Log September 1-30, 2015	44	8.80
	\$Copy Log September 1-30, 2015 (Color Copy)	1	0.50
	Total additional charges		<u>\$2,331.96</u>
	Total amount of this bill		<u>\$13,540.29</u>
	Previous balance		\$6,553.26
	Accounts receivable transactions		
9/14/2015	Payment - thank you		<u>(\$2,331.94)</u>
	Total payments and adjustments		<u>(\$2,331.94)</u>
	Balance due		<u><u>\$17,761.61</u></u>

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Britney F. Turner	8.45	150.00	\$1,267.50
Britney F. Turner	41.30	0.00	\$0.00
Pat Dixon - Attorney	49.70	200.00	\$9,940.83

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

November 10, 2015

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16573

Professional Services

			<u>Hours</u>	<u>Amount</u>
10/1/2015	PD	download, review and forward discovery from Judge	0.30	60.00
10/8/2015	PD	call from ADF and emails to Wendy.	0.25	50.00
	PD	review motion to continue and emails following on scheduling hearing	0.35	70.00
10/9/2015	PD	do opposition to motion to continue	0.50	100.00
	PD	attend hearing on motion to continue	0.50	100.00
10/13/2015	BFT	Phone meeting with Wendy Soto concerning discovery responses	0.50	75.00
10/15/2015	BFT	Drafting Response to requests for production and interrogatories (2nd set)	2.00	300.00
10/26/2015	PD	call to Wendy; review and revise responses to discovery; review Judges disclosures and amended answer	1.25	250.00
10/27/2015	PD	calls to WS and Gilbertz on interrogatories; begin work on motion for summary judgement	2.50	500.00
10/28/2015	PD	emails to gilbertz and final discovery	0.15	30.00
	PD	continue work on Motion for Summary Judgment brief	3.35	670.00
10/29/2015	PD	continue work on brief	2.70	540.00
10/30/2015	PD	finalize brief and do statement of undisputed facts.	2.30	460.00
For professional services rendered				<u>\$3,205.00</u>

Additional Charges :

	<u>Qty</u>	<u>Amount</u>
10/14/2015 \$Transcript JACKSON HOLE COURT REPORTING SERVICE Appearance Fee, Transcripts of Neely, Cuprill, Smith, Haws, Exhibits.	1	1,394.65
10/31/2015 \$Postage October 1-31, 2015	1	7.17
\$Copy Log October 1-31, 2015	71	14.20
Total additional charges		<u>\$1,416.02</u>
Total amount of this bill		<u>\$4,621.02</u>
Previous balance		\$17,761.61
Accounts receivable transactions		
10/13/2015 Payment - thank you		<u>(\$4,221.32)</u>
Total payments and adjustments		<u>(\$4,221.32)</u>
Balance due		<u><u>\$18,161.31</u></u>

Please make checks payable to Dixon & Dixon, LLP

Name	User Summary		
	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Britney F. Turner	2.50	150.00	\$375.00
Pat Dixon - Attorney	14.15	200.00	\$2,830.00

DIXON & DIXON, LLP
 First Interstate Bank Building
 104 S. Wolcott, Suite 600
 Casper, WY 82601
 Tax ID #20-5256380

Invoice submitted to:
 Commission on Judicial Conduct and Ethics
 c/o Wendy Soto, Executive Director
 P.O. Box 2645
 Cheyenne WY 82003

December 07, 2015

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16586

Professional Services

			<u>Hours</u>	<u>Amount</u>
11/4/2015	PD	calls to Steve smith; review Motion for Summary Judgment brief	1.25	250.00
11/5/2015	BFT	Reading motion sum jdgt, research response	1.50	225.00
	BFT	Discussion with PD re responding to the motion for summary judgment; assigned (n/c)	0.20	NO CHARGE
	PD	work on response brief	1.50	300.00
11/6/2015	BFT	Continue research for response to motion for summary jdgt	1.00	150.00
11/9/2015	BFT	Researched and begin drafting response to motion for sum. Jdgmt section	2.00	300.00
11/10/2015	PD	work on response brief; westlaw research and draft intial sections	3.50	700.00
	BFT	Research motion response	0.30	45.00
11/11/2015	PD	continue research and drafting of response brief; notice of changed hearing to witnesses; motion to strike affidavit	4.00	800.00
	BFT	Drafting response to motion for summary judgment	1.50	225.00
	BFT	Reviewing depositions for references in brief	1.00	150.00
11/12/2015	PD	finish first draft of brief; emails to WS on several issues and review Gray material;	3.70	740.00
	BFT	Review, revise, draft and edit response to motion for summary judgment	1.00	150.00

			<u>Hours</u>	<u>Amount</u>
11/13/2015	PD	work on revisions to brief	0.75	150.00
	BFT	Editing section of Response, looking up additional cases, fixing citations,	2.00	300.00
11/16/2015	PD	revisions to first draft	0.35	70.00
11/17/2015	PD	finish work on brief; draft response to interrogatories	2.00	400.00
	BFT	Review, revise and finalize response to motion for summary judgment	0.30	45.00
11/24/2015	KC	Draft Motion and proposed Order to allow Ned Donovan to testify by telephone (.20)	0.20	17.00
		For professional services rendered		<u>\$5,017.00</u>
		Additional Charges :		
			<u>Qty</u>	
11/6/2015	PACER	PACER SERVICE CENTER Fee for research/obtaining Miller v. Davis docket and documents	1	11.50
11/30/2015	\$Copy Log	November 1-30, 2015	63	12.60
	\$Postage	November 1-30, 2015	1	11.70
		Total additional charges		<u>\$35.80</u>
		Total amount of this bill		<u>\$5,052.80</u>
		Previous balance		\$18,161.31
		Accounts receivable transactions		
11/10/2015	Payment - AUTO DEPOSIT			<u>(\$13,540.29)</u>
		Total payments and adjustments		<u>(\$13,540.29)</u>
		Balance due		<u>\$9,673.82</u>

Please make checks payable to Dixon & Dixon, LLP

Name		User Summary		
		<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Britney F. Turner		10.60	150.00	\$1,590.00

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Britney F. Turner	0.20	0.00	\$0.00
Pat Dixon - Attorney	17.05	200.00	\$3,410.00
Kim Carlson - Paralegal	0.20	85.00	\$17.00

Merrilyn Walz, Inc.

3560 Gannett Street

Casper, WY 82609

(307) 265-0543

EIN 83-0321963

Invoice

DATE	INVOICE #	DUE DATE
12/14/2015	3516	1/14/2016

BILL TO

Wendy Soto

Wyoming Commission on Judicial Conduct

P.O. Box 2645

Cheyenne, WY 82003

RECEIVED
12/16/15

ITEM	DESCRIPTION	Pages/Hrs/Mil...	DATE	AMOUNT
Hearing	Original and one copy of the Neely	82		369.00
Appearance	Summary Judgment Motion		12/4/2015	75.00
Shipping	half day			5.32
Thank you for your business.				
Total				\$449.32

First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

January 06, 2016
In Reference To: I-Panel (Honorable R. Neely)
Invoice #16595

			<u>Hours</u>	<u>Amount</u>
12/2/2015	PD	emails and call to WS on confidentiality issues	0.30	60.00
12/3/2015	PD	prep for hearing and meet with Wendy	2.50	500.00
	BFT	Review pleadings; prepare for motion for summary judgment hearing	2.50	375.00
12/4/2015	PD	attend motion hearing	2.25	450.00
	BFT	Hearing on motion for summary judgment	2.25	337.50
12/10/2015	BFT	Working on Conclusions of Law	0.80	120.00
12/11/2015	BFT	Conclusions of Law " s)	0.20	30.00
	BFT	Reviewing Pat Dixon's sections, editing my sections of conclusions of law	0.30	45.00
	PD	work on findings and conclusions	2.20	440.00
12/15/2015	PD	further work on Findings and conclusions	0.75	150.00
12/16/2015	PD	final and file Findings and conclusions	0.30	60.00
12/17/2015	PD	respond to Connelly's letter on sanction hearing	0.30	60.00
12/18/2015	PD	review orders and call to witness Olson	0.30	60.00
12/22/2015	PD	call to Olson - potential witness	0.25	50.00
	PD	work on exhibit designation	0.70	140.00

	<u>Hours</u>	<u>Amount</u>
12/23/2015 PD finish exhibit list and draft witness designations and call to WS	1.25	250.00
For professional services rendered		\$3,127.50
Additional Charges :		
	<u>Qty</u>	
11/5/2015 \$Westlaw WESTLAW: Online Research outside of plan	1	114.00
12/31/2015 \$Postage December 1-31, 2015	1	3.77
\$Copy Log December 1-31, 2015	85	17.00
Total additional charges		\$134.77
Total amount of this bill		\$3,262.27
Previous balance		\$9,673.82
Accounts receivable transactions		
12/14/2015 Payment - thank you		(\$9,673.82)
Total payments and adjustments		(\$9,673.82)
Balance due		\$3,262.27

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Britney F. Turner	6.05	150.00	\$907.50
Pat Dixon - Attorney	11.10	200.00	\$2,220.00

DIXON & DIXON, LLP
First Interstate Bank Building
104 S. Wolcott, Suite 600
Casper, WY 82601
Tax ID #20-5256380

Invoice submitted to:
Commission on Judicial Conduct and Ethics
c/o Wendy Soto, Executive Director
P.O. Box 2645
Cheyenne WY 82003

February 03, 2016

In Reference To: I-Panel (Honorable R. Neely)

Invoice #16606

Professional Services

			<u>Hours</u>	<u>Amount</u>
1/4/2016	PD	review order on Motion for Summary Judgment; review rules and several calls and emails to WS on procedure going forward	1.25	250.00
1/5/2016	PD	calls and emails to notify witnesses of no hearing	0.50	100.00
1/6/2016	PD	emails on process	0.20	40.00
1/7/2016	PD	emails and call on scheduling; emails re	0.50	100.00
1/13/2016	PD	draft motion and affidavit	0.50	100.00
	PD	email from and calls to Wendy on affidavit and other matters	0.50	100.00
1/15/2016	PD	calls and emails and revise affidavit and file motion to supplant	0.35	70.00
1/20/2016	PD	begin work on sanctions memo	1.50	300.00
1/25/2016	PD	call to WS on process	0.15	30.00
1/29/2016	PD	work on sanctions memo - review all depositions and do outline; review case law on costs and draft part of memo during week of 25th	3.00	600.00
For professional services rendered				<u>\$1,690.00</u>

Additional Charges :


		<u>Qty</u>	<u>Amount</u>
1/31/2016	\$Postage January 1-31, 2016	1	2.08
	\$Copy Log January 1-31, 2016	45	9.00
	Total additional charges		<u>\$11.08</u>
	Total amount of this bill		<u>\$1,701.08</u>
	Previous balance		\$3,262.27
	Accounts receivable transactions		
1/20/2016	Payment - thank you		<u>(\$3,262.27)</u>
	Total payments and adjustments		<u>(\$3,262.27)</u>
	Balance due		<u><u>\$1,701.08</u></u>

Please make checks payable to Dixon & Dixon, LLP

User Summary			
<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Pat Dixon - Attorney	8.45	200.00	\$1,690.00

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: 2/9/18
Circuit Court Magistrate)	
Ninth Judicial District)	Wendy J. Soto
Pinedale, Sublette County)	

MEMORANDUM REGARDING SANCTIONS

COMES NOW the Commission on Judicial Conduct and Ethics, by and through its Disciplinary Counsel, Patrick Dixon, and submits the following for the Commission's consideration in connection with the imposition of sanctions in the captioned matter:

I. *Introduction.*

For the benefit of those Commission members who have not been involved of the process until this point, the matter was initiated as an Own Motion Complaint on December 22, 2014 pursuant to Rule 7(b) of the Rules Governing the Commission on Judicial Conduct and Ethics. The basis for the Complaint was a newspaper article which appeared in three publications in Sublette County, in which Judge Neely was quoted as stating her opposition to same-sex marriages and her refusal to perform such ceremonies. Following inquires to Judge Neely and her supervising judge, Circuit Court Judge Curt A. Haws, the Investigative Panel concluded that there was reasonable cause to support a finding that Judge Neely engaged in judicial misconduct. Accordingly, a Notice of Commencement of Formal Proceedings was filed and

served on March 4, 2015. Judge Neely answered, essentially admitting the factual allegations of the Notice and denying that ethical violations occurred. Judge Neely asserted thirteen separate affirmative defenses based upon United States and Wyoming State Constitutional rights.

After considerable discovery, the parties filed cross motions for summary judgment, supported by extensive evidentiary materials. The Adjudicatory Panel, on December 31, 2015, entered its *Order Granting Commission's Motion for Partial Summary Judgment and Denying Judge Neely's Motion for Summary Judgment*. The A-Panel found that there were no genuine issues of material fact and concluded as a matter of law that Wyoming law recognizes same-sex marriage, solemnization of matrimony is a judicial function and Judge Neely's statements violated the Wyoming Code of Judicial Conduct. In so doing, the A-Panel concluded that Judge Neely had violated Rules 1.1, 1.2, 2.2 and 2.3. The A-Panel rejected Judge Neely's constitutional defenses.

As a result of this Order, the matter now comes before the full Commission pursuant to Rule 16(e) to determine the nature of the sanction to be imposed against Judge Neely, if any.

II. *Available Sanctions.*

Rule 6 empowers the Commission to make recommendations to the Wyoming Supreme Court for sanctions "including imposition of monetary sanctions." Rule 8(d)(2) directs the Adjudicatory Panel to

... make an adjudication and submit findings to the full Commission for disposition which may include, but is not limited to, temporary discipline or interim suspension as provided in these

Rules, letters requiring remedial action, issuing or recommending deferred discipline agreements, or stipulated private censure.

Finally, Rule 16(e) specifies the type of discipline which the Commission may recommend:

Upon a majority vote of the entire Commission, the Commission shall make its recommendation for censure, removal or retirement, including imposition of monetary sanctions, and transmit its record and recommendations forthwith to the Wyoming Supreme Court consistent with these Rules.

In this proceeding, for the reasons outlined below, Disciplinary Counsel recommends that Judge Neely be removed both from her position as Magistrate for the Circuit Court and her position as Municipal Judge for the Town of Pinedale.

III. *Factors to be Considered in Imposing Sanctions.*

A. In General. Rule 8(d)(2) lists eleven factors to be considered by the Commission in determining sanctions in this case. In pertinent part the Rule provides as follows:

In determining the appropriate sanction, the adjudicatory panel may consider the following, nonexclusive factors:

- (A) the nature, extent, and frequency of the misconduct;
- (B) the judge's experience and length of service on the bench;
- (C) whether the conduct occurred in the judge's official capacity or private life;
- (D) the nature and extent to which the acts of misconduct injured other persons or respect for the judiciary;
- (E) whether and to what extent the judge exploited his or her position for improper purposes;
- (F) whether the judge has recognized and acknowledged the wrongful nature of the conduct and manifested an effort to change or reform the conduct;
- (G) whether there has been prior disciplinary action concerning the judge, and if so, its remoteness and relevance to the present proceeding;

- (H) whether the judge complied with prior discipline or requested and complied with a formal ethics advisory opinion;
- (I) whether the judge cooperated fully and honestly with the Commission in the proceeding; and
- (J) whether the judge was suffering from personal or emotional problems or physical or mental disability or impairment at the time of the misconduct.
- (K) The ABA Standards for Imposing Lawyer Discipline may be considered in determining the appropriate sanction.

Except to the extent they place a heavy emphasis on acknowledgment of wrongdoing and cooperation with the disciplinary authority, the ABA standards for lawyer discipline are not particularly germane to this proceeding. Disciplinary Counsel submits that factors C, D, E, F and I compel a heavy sanction in this case.

B. Factors Supporting Discipline.

1. **8(d)(2)(C).** The A-Panel specifically found that Judge Neely was acting in her official capacity when she made the comments to Pinedale Roundup reporter Ned Donovan. *Order Granting Commission's Motion for Partial Summary Judgment*, p. 6. The finding is supported by Judge Neely's own admission that she was acting in her official capacity. *Neely Deposition*, pp. 56-57. It is also supported by common sense. Obviously, Mr. Donovan did not contact Judge Neely as a member of the general public. He contacted her because she was the go-to judge for performing wedding ceremonies in Sublette County. Clearly she was acting in her official capacity when she spoke to reporter Donovan.

2. **8(d)(2)(D).** The full Commission is well qualified to assess the nature and extent to which Judge Neely's comments caused injury to persons

and to the public's respect for the judiciary. Again, Disciplinary Counsel would offer to prove through the testimony of Carl Oleson the impact that Judge Neely's comments had on the LGBT community in Wyoming. If allowed to testify, Mr. Oleson, a LGBT community leader, would testify to the distress Judge Neely's comments had in the community. Just having prevailed in *Guzzo v. Mead* it was highly concerning to hear a member of the judiciary deny same-sex couples an equal right to marriage. Further, Mr. Oleson would testify that, having read or heard of Judge Neely's comments no reasonable member of the LGBT community would feel comfortable appearing in her court.

To similar effect is the testimony of Anna Cuprill, a Pinedale citizen who expressed dismay regarding Judge Neely's comments and brought them to the attention of the Commission. Ms. Cuprill testified to her own reaction and to the fact that Judge Neely's comments were the subject of public discussion at a Town Council meeting. *Cuprill Deposition*, pp. 66-67, 75 and 98-101.

Clearly Judge Neely's stated willingness to pick and choose which laws to enforce impacts the public's respect for the judiciary. Left unsanctioned the effect will compound.

3. **8(d)(2)(E).** While this factor generally questions whether the Judge used her position for financial or other personal gain, it is applicable in this context. Judge Neely obviously believes passionately about the subject of same sex marriage. At the time of her interview with Donovan, she was aware that he was a newspaper reporter and that her comments would most likely be published. *Neely Deposition*, pp. 96-97. It can be inferred that she, as a

person of influence, deliberately took the opportunity to express her views on the subject, and thus benefited from some emotional or psychological gain, to the detriment of an estimated ten percent of the country's population.

4. **8(d)(2)(F).** To date, Judge Neely has abjectly refused to acknowledge that her position regarding same sex marriage and her published comments constitute an ethical violation:

Q. And what was your position then?

A. That due to my sincerely held religious beliefs about what marriage is, I would be unable to perform – to officiate at same-sex marriages.

Q. Okay. Is that still your position today?

A. Yes.

Neely Deposition, p. 33. Rather than acknowledge the ethical implications of her conduct, Judge Neely has filed repeated pleadings with this Commission asserting minor, technical defenses to the ethical charges and asserting that her imagined Constitutional rights trump her ethical obligations as a judge. Moreover her counsel, presumably with her approval, have personally attacked the Commission's Executive Director, and have alleged bias on the part of Commission members. Not only has Judge Neely refused to acknowledge the ethical violations, she has attempted to twist the Code of Judicial Conduct to justify her behavior. In writing to the Judicial Advisory Committee she conceded a bias toward same-sex couples seeking to enjoy their legal right to marriage and then, incredibly, put forth that Rule 2.11 required her to recuse from those ceremonies. *Exhibit 41*, p. 2.

Finally, if returned to her position as magistrate, it is fair for this Commission to assume that Judge Neely will continue to perform traditional ceremonies, while declining to honor the rights of same-sex couples.

5. **8(d)(2)(G).** Although Judge Neely has not been formally disciplined prior to this complaint, discovery has indicated judicial conduct which might form the basis of a complaint, had one been filed. Judge Haws testified to Judge Neely's practice of rejecting and/or rewriting warrants and tickets submitted to her by the charging law enforcement officers. *Haws Deposition*, pp. 54-56. This was apparently the subject of considerable concern to the officers and might well have justified the imposition of sanctions, had the practice resulted in a formal complaint.

6. **8(d)(2)(I).** Clearly, Judge Neely has not cooperated with this Commission. Rather, she has fought it at every step of the process. While that is certainly her legal right, the judicial disciplinary process is not intended to be an adversarial process but a remedial or corrective process. To the extent she has made it adversarial weighs for a heavy sanction.

Likewise, her honesty before the Commission is in question. In response to the I-Panel's initial inquiry, Judge Neely wrote with respect to the Donovan telephone conversation: "but at the time of the phone call I was at home and was completely distracted with another matter." *Deposition Exhibit 21*. The intended implication was that, because of the distraction, she inadvertently made the inappropriate comments to Donovan. In fact, Judge Neely testified that she was engaged in putting up Christmas lights and noticed that she had

missed a call on her cell phone. She, rather than Donovan, initiated the contact by returning the call. And there were not one, but three phone calls with Donovan on the afternoon in question. In the final phone call, given the opportunity to retract the statements, Judge Neely deliberately rejected the opportunity. *Neely Deposition*, pp. 93-99. That Judge Neely was not more forthcoming about these facts indicates a lack of candor toward the Commission.

IV. *Monetary Sanctions.*

As noted above, Rules 6(c) and 16(e) specifically empower the Commission to impose "monetary sanctions" in addition to the other disciplinary sanctions listed above. Rule 17 requires that the full Commission make findings "as to costs or fees incurred or paid by the Commission in connection with any proceedings concerning a judge." Rule 18 directs the Commission to certify an "itemization of costs and fees incurred or paid by the Commission ...". Both Rules use the mandatory "shall." Two conclusions can be drawn by these Rules. Although the Rules do not specifically authorize an award of fees and costs on a finding of ethical violations, the implication is clear that monetary sanctions should somehow be tied to the fees and costs incurred by the Commission in prosecuting the matter. Second, it is clear from Rule 18 that the Supreme Court may impose fees and costs, whether or not recommended by the Commission.

In this case, Disciplinary Counsel recommends that monetary sanctions be imposed in an amount roughly approximating the total fees and costs

incurred by the Commission. In this proceeding, although there has never been any question as to the conduct and little question as to whether the conduct constitutes an ethical violation, Judge Neely has nonetheless engaged an advocacy group in her defense and used this as a forum to assert her religious beliefs and her claimed constitutional rights. While she has every right to do so, it should not be done at taxpayer expense.

In her opposition to the Commission's attempt to supplement the record, Judge Neely asserted that she should not be assessed fees or costs because she did not have notice of the Commission's intent to claim fees and costs. Specifically, she argues that the Notice of Commencement of Formal Proceedings fails to make such a claim. *The Honorable Ruth Neely's Response to the Commission's Motion to Supplement Record*, at 4-6.

Anticipating this argument will again be asserted at the full meeting of the Commission, Disciplinary Counsel responds as follows. First, nothing in the Rules requires that a claim for fees and costs be pled in this notice. The requirements for the Notice of Commencement of Formal Proceedings are set forth in Rule 8(b). It requires only that the notice specify the nature of the allegations made against the judge, include the names of the adjudicatory panel members and advise the judge of the right to file a written verified answer. The notice used in this matter is a form developed by prior disciplinary counsel and used in recent proceedings and complies with those requirements.

Second, Judge Neely is charged with notice that the Commission might seek monetary sanctions equivalent to fees and costs by virtue of Rules 6(c), 16(e), 17 and 18. Axiomatically, persons are charged with knowledge of the law. *Wightman v. American National Bank*, 591 P.2d 903, 906-907 (Wyo.1979). And, in fact, Judge Neely had actual notice of the Commission's intent to seek fees and costs. The subject was discussed in her deposition, albeit over strenuous objection from her counsel. *Neely Deposition*, pp. 105-106.

Third, Judge Neely's reliance on the dicta of *Board of Professional Responsibility v. Stinson*, 2014 WY 134, 337 P.3d 401 (Wyo.2014), is misplaced. *Stinson* stands for the proposition that before the Bar Association can assess fees and costs to a lawyer, the lawyer must have notice. Where Bar Counsel included a specific claim for fees and costs in the original complaint, the Court held the notice to be sufficient. However, the Court stopped short of imposing a requirement that notice in the complaint is mandatory. *Id.*, at ¶¶80-82, p. 425. Importantly, *Stinson* relied on the earlier case of *Meyer v. Norman*, 780 P.2d 283, 290 (Wyo.1989). *Norman* recognized that fundamental fairness requires that an attorney must be given notice of the Bar's intent to seek fees and costs. Finding that the requisite notice was missing, the Court remanded the matter to the grievance committee in order to give Norman the opportunity to defend against the fee and cost claim. The obvious conclusion from these cases is that notice may be given at any stage of the proceeding so long as the attorney, or in this case, the judge, has a reasonable opportunity to defend against the claim.

V. *Legal Precedent Regarding Sanction.*

A scholarly discussion about how other commissions or courts have arrived at sanctions is probably not helpful. As those Commissioners who regularly follow the updates from the NCSC Center for Judicial Ethics are aware, the cases are so varied and fact driven as to be of little guidance in this situation. To date, there have only been two decision which address the question of refusal to perform same-sex marriages.

The first is *In Re: the Matter of the Honorable Gary Tabor, Before the Commission on Judicial Conduct of the State of Washington, CJC No. 7251-F-158 (Oct.2013)*. As in this case, Judge Tabor publicly expressed his opposition to same-sex marriage, resulting in considerable publicity. The Washington Commission determined that a public admonition was appropriate. The distinguishing fact between the *Tabor* case and this is that Judge Tabor publicly acknowledged that his comments and actions constituted ethical violations and took appropriate remedial actions. In fact, the opinion itself is a Stipulated Agreement and Order of Admonishment.¹

The second case is *Inquiry Concerning a Judge: Honorable Vance D. Day, Before the Commission on Judicial Fitness and Disability, State of Oregon, Case No. 12-139 and 14-86 (Jan.2016)*, decided two weeks ago. In that case, Judge Day was removed from office. However, his violation of Rules 1.1, 1.2 and 2.3

¹ *Tabor* was the first ethical pronouncement on the subject of same-sex marriage. In view of the six Commission or Supreme Court opinions issued since *Tabor*, it is unlikely that Judge Tabor would have escaped with a reprimand today.

by reason of his position on same-sex marriage was but one of numerous serious ethical violations.

Finally, in the absence of any other direct authority on the question, the Commission is referred to a very recent opinion released by the Supreme Court of Florida *In Re Murphy*, ___ S.3d ___, 2015 WL 9258254 (Fla.S.Ct.2015). That opinion recites a number of long recognized principals providing guidance in the imposition of sanctions:

The object of these proceedings is not to inflict punishment, but to determine a judge's fitness to serve. ... When considering fitness to serve this Court must hold judges to "higher ethical standards than lawyers by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system. ... The standard of ethical and professional conduct is necessary because "[t]he judicial system can only function if the public is able to place its trust in judicial officers." (Citations omitted.)

Id. at p. 7. The Court also said: "removal is an appropriate discipline where the actions of the judge simply 'should erode confidence in the judiciary', even where it does not appear that the public has lost confidence. ..." (Citations omitted.) *Id.* at p. 7. Further:

Even where a judge has an outstanding record, removal is the appropriate sanction for a judge whose misconduct is fundamentally inconsistent with responsibilities of judicial office or strikes at the heart of judicial integrity.

Id. at p. 7. The Court concluded by stating that "a pattern of misconduct is not necessary for removal." *Id.* at p. 8.

VI. *Conclusion.*


Two things compel removal in this case. First, while claiming to be the fairest judge since Solomon, Judge Neely has demonstrated a bias which absolutely precludes her from remaining on the bench in any capacity. In seeking an advisory opinion from the Judicial Advisory Committee Judge Neely equated homosexuals to drunks, liars and thieves:

Without getting in too deeply here, homosexuality is a named sin in the Bible, as are drunkenness, thievery, lying and the like. I can no more officiate at a same-sex wedding than I can buy beer for the alcoholic or aid in another person's deceit. I cannot knowingly be complicit in another's sin. Does that mean that I cannot be impartial on the bench when that homosexual or habitual liar or thief comes before me with a speeding ticket?

Deposition Exhibit 41. These are Judge Neely's own words. A person with that type of bias against a broad class of individuals cannot remain in office.

Second, and equally important, Judge Neely has demonstrated the belief that she is free to pick and choose among the laws which she is willing to apply. And, she has remained steadfast in that position. If the primary purpose of the judicial disciplinary process is to maintain the integrity of the judiciary, Judge Neely cannot be returned to the bench under a lesser sanction. Her intractable position on this issue demands her removal.

DATED this 9 day of February, 2016.


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

CERTIFICATE OF SERVICE

I, Patrick Dixon, do hereby certify that on the 9 day of February, 2016, I served the above and foregoing **Memorandum Regarding Sanctions** via email or U.S. mail, postage prepaid, as noted below:

VIA EMAIL

dobylaw@embarqmail.com

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

VIA EMAIL kconnelly@adflegal.org

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


VIA EMAIL

orchard@spencelawyers.com

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

VIA U.S. MAIL

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


Patrick Dixon

Index to Attachments

1. Deposition Exhibit 21
2. Deposition Exhibit 41
3. Excerpts from Deposition of Ana Cuprill
4. Excerpts from Deposition of Honorable Curt Haws
5. Excerpts from Deposition of Honorable Ruth Neely
6. Inquiry Concerning A Judge: Honorable Vance D. Day
7. Inquiry Concerning A Judge, No. 14-255 re: John C. Murphy

Attachment 1:
Deposition Exhibit 21

P.O. Box 1386
Pinedale, WY 82941

February 7, 2015

TO: Commission on Judicial Conduct and Ethics
P.O. Box 2645
Cheyenne, WY 82003

RECEIVED
2/11/15

RE: Response to letter of January 12, 2015

Dear Commission Members:

I had begun a letter to the Judicial Advisory Committee on December 15, 2014, asking for its opinion regarding a judge's ability to refuse from officiating at a same sex marriage due to religious convictions about marriage. With Christmas looming and children and grandchildren home for and through the holidays, I did not mail that letter until January 6, 2015. Eight days later, on January 14, I received your letter of January 12.

I respond to the issues of your January 12, 2015 letter in the order presented by you to me:

1. Under what authority do I perform marriages;
2. Was I aware my comments would be published;
3. Am I refusing to perform same sex marriages while performing others; and
4. Comments regarding Rule 2.3.

1. Under What Authority Do I Perform Marriages?

In March 2001, then Circuit Court Judge John Crow appointed me as magistrate, and I performed marriages from then until he "retired." Judge Haws subsequently appointed me as magistrate, and it has been under that authority that I have been performing marriages. The last marriage ceremony that I officiated occurred on December 13, 2014.

2. Was I Aware My Comments Would Be Published?

Following the federal decision requiring same sex marriage in Wyoming, I met with Judge Haws regarding same sex marriages. He advised that I make no comment if approached by the media on the topic. When Ned Donovan called me in December, almost two months later, he identified himself as being with The Pinedale Roundup, one of our two local newspapers. I should have recognized that my comments might be published. But at the time of the phone call I was at home and was completely distracted with another matter. The Pinedale Roundup is published on Fridays. My comment did not appear in that week's Roundup. However, the "story" then appeared in the following Tuesday's Sublette Examiner, the second of our two newspapers—and not the one that Mr. Donovan had identified as his employer. The story

recounted that I had informed Mr. Donovan that I will not be able to solemnize same sex unions due to my religious convictions regarding marriage. I recognize that it would have been better had I answered, "No comment." But, as I already explained, I was caught off guard by the phone call. He asked the question, and I answered truthfully.

3. Am I Refusing To Perform Same Sex Marriages While Performing Opposite Sex Marriages?

I have never been asked to perform any same sex marriage, nor have I ever refused to perform a same sex marriage ceremony.

My conscience, formed by my religious convictions, will not allow me to solemnize the marriage of two men or two women were I ever asked to do so. Same sex couples wishing to marry here have many people other than me who are available to officiate their weddings. Whether same sex or heterosexual, no couples to this day have been denied access to the marriage process.

As noted earlier, the last marriage at which I officiated was December 13, 2014. Between then and January 10, 2015, I declined to perform nine marriages, all of which involved a woman marrying a man. One of those nine, by the way, was a man and a woman who my husband and I coached for seven years in t-ball and baseball from 1989 to 1995. We watched them grow up together. It broke my heart to say no, but I did. I had already begun my letter to the Judicial Advisory Committee requesting an opinion concerning recusal from same sex marriages and didn't think it proper to proceed with marriages until I had an answer to my question. On January 15 I met with Judge Haws after we had both received your letter, and it was at that meeting that he officially suspended me from performing any marriages until this issue is resolved. Between January 11 and today, I have turned away three more weddings, all of which involved a woman marrying a man. It has never been, nor will it ever be, my intent to bring disrepute to the judiciary.

4. Comments regarding Rule 2.3.

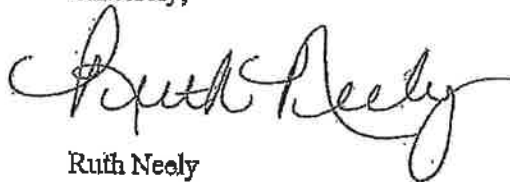
In almost 21 years of being a judge there has never been a complaint of any kind filed against me, either with the Commission or with the Pinedale Town Council. I have certainly never been accused of being prejudiced or biased. And as I explained in my letter to the Committee, my inability to solemnize same-sex unions does not arise from any prejudice or bias against people, but rather from my sincerely held religious beliefs about marriage.

Rule 2.3(A) provides that a judge must act without bias or prejudice. Rule 2.11 indicates that if a judge's impartiality were to be reasonably questioned, he or she must disqualify himself or herself. Nothing I have done indicates bias or prejudice. I have lived in Pinedale for almost 38 years, and most people here know who I am and what I believe. As stated, I am not prejudiced or biased against anyone. But my religious convictions will not allow me to officiate at same sex ceremonies.

As a magistrate, I have been proud to serve the citizens of Sublette County and surrounding areas by performing weddings. I have gone into homes, to our beautiful parks, to local libraries, and to community centers. I have also gone to the middle of Fremont Lake in a boat. I drive 37 miles to Big Piney and 60 miles to LaBarge. I have performed weddings on horseback, at hunting camps, on ranches 40 miles away surrounded by horses and hay. I have done them on a snowmobile on the top of Horse Mountain in the Wyoming Range. I go everywhere, and am happy to do so. The pay is lousy. The experiences are unforgettable. I want to serve our citizens in this way. I hope to be allowed to continue to do so, without being forced to violate my sincerely held religious beliefs.

As we await your decision, please keep my and others' First Amendment rights in mind. I want to continue to officiate at weddings; and I should not have to fear that the lawful exercise of my freedom of religion as a member of a Lutheran church in Pinedale, Wyoming would be a violation of the Code. Thank you for allowing me the opportunity to share my thoughts and explain my actions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ruth Neely".

Ruth Neely

**Attachment 2:
Deposition Exhibit 41**

January 6, 2015

TO: Judicial Ethics Advisory Committee
ATTN: Lily Sharpe
Wyoming Supreme Court
2301 Capitol Avenue
Cheyenne, WY 82002

RE: Same sex marriages

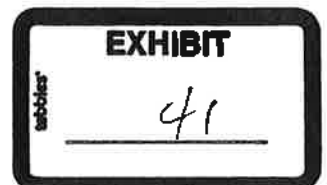
Dear Committee Members:

Recent events in the Town of Pinedale lead me to ask the following:

Question: Can a magistrate recuse himself/herself from officiating at a same sex wedding due to religious conviction; and if so, without fear of civil rights repercussion?

Discussion: As you all are aware, same sex marriages are now performed in Wyoming following the 10th U.S. Circuit Court of Appeals' ruling in October. Since that time we have had two such ceremonies in Pinedale, both last month. There is no shortage of commissioners or magistrates available here to officiate at such events. I have been a circuit court magistrate for well over 10 years, and it is under that authority that I officiate at weddings all around the county. Although I have not yet been asked to officiate at a same sex wedding, I will not be able to do so if/when asked.

Without getting in too deeply here, homosexuality is a named sin in the Bible, as are drunkenness, thievery, lying, and the like. I can no more officiate at a same sex wedding than I can buy beer for the alcoholic or aid in another person's deceit. I cannot knowingly be complicit in another's sin. Does that mean I cannot be impartial on the bench when that homosexual or habitual liar or thief comes before me with a speeding ticket? Or the alcoholic appears before me for yet another charge of public intoxication? No. Firmly, no. I have been the municipal judge for the Town of Pinedale for over 20 years; and there has not been one claim of bias or prejudice made by anyone who has come before me. Not the homosexual, not the alcoholic, not the liar, not the thief. Not one.



I understand "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially" (Code of Judicial Ethics, Canon 2, Rule 2.2); and the accompanying Comment [2] "... a judge must. . . apply the law without regard to whether the judge approves or disapproves of the law in question." However I also understand that "A judge *shall* disqualify himself or herself in *any proceeding* in which . . . The judge has a personal bias or prejudice concerning a party. . ." (Canon 2, Rule 2.11(A)(1)) [emphases added]. While I have no bias or prejudice concerning the parties, I do recognize a bias or prejudice in myself concerning the act of same sex marriage. And because I am fully aware of that predisposition in me, I must recuse myself from those proceedings. To not do so would be a flagrant violation of 2.11.

Rule 3.6 Affiliation with Discriminatory Organizations, Comment [4]: I, too, believe a judge should be allowed the lawful exercise of his or her freedom of religion without fearing violation of the Code. I am not a member of some crazy religious organization. I am a Christian. I am a Lutheran. Pretty simple. I stand on the teachings of the Bible and the accompanying convictions of my church, and await your reply.

Thank you.

enclosures

Attachment 3:
Excerpts from Deposition of Ana Cuprill

1

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

10
11
12
13 DEPOSITION OF

14 ANA MARGARITA CUPRILL
15 Thursday, September 17, 2015
16

17 TAKEN AT

18 Sublette County Library Board Room
19 Pinedale, Wyoming
20
21
22

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

Jackson Hole Court Reporting Service (307) 733-2637

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<p>66</p> <p>1 Q. Do you follow that -- do you read the paper when it comes out?</p> <p>2 A. We get the newspapers here at the library. Yeah, we keep up with current events.</p> <p>3 Q. So you found out about it just by being on the regular roll of newspaper --</p> <p>4 A. Readership, yes.</p> <p>5 Q. -- readership?</p> <p>6 Okay. Do you remember speaking to anybody about it after you read it?</p> <p>7 A. Sure. As librarians, we discuss current events --</p> <p>8 Q. Okay.</p> <p>9 probably talked about it here at the library.</p> <p>10 Q. Okay.</p> <p>11 Do you remember having an opinion of Judge Neely's statements?</p> <p>12 A. Yeah, I have an opinion.</p> <p>13 Q. What was your opinion when you first read this article?</p> <p>14 A. I was sort of dismayed that she would make these statements, and I was concerned</p> <p>25 Jackson Hole Court Reporting Service - (307) 733-2637</p>	<p>67</p> <p>1 that this would open up the town to liability because of a shown bias against a certain group of people.</p> <p>2 Q. So it was your conclusion that Judge Neely was biased against a certain group of people?</p> <p>3 A. Yes.</p> <p>4 Q. And why -- what led you to that conclusion?</p> <p>5 A. She said her religion does not agree with same-sex marriage.</p> <p>6 Q. How many churches would you say there are in Pinedale?</p> <p>7 A. Maybe a dozen.</p> <p>8 Q. Okay.</p> <p>9 Would it be fair to say that some of those churches believe that marriage is exclusively the union of one man and one woman?</p> <p>10 A. Most of them.</p> <p>11 Q. Okay.</p> <p>12 So would it be fair to say that many of the people you know in town hold the same beliefs as --</p> <p>13 A. Yes.</p> <p>14 Q. -- Judge Neely?</p> <p>25 Jackson Hole Court Reporting Service - (307) 733-2637</p>
<p>68</p> <p>1 You spoke about, when you first read the article, having conversations with librarians. Were there any other conversations you had --</p> <p>2 A. No, we don't --</p> <p>3 Q. -- about the article -- outside the librarian context? In town?</p> <p>4 A. Maybe with friends. Not at work. I mean, we don't discuss issues with patrons here at the library. It's -- but, yeah, probably with friends and neighbors and...</p> <p>5 Q. Do you remember who? A specific conversation you might have had about this article?</p> <p>6 A. No.</p> <p>7 Q. Had you talked to Ned Donovan about this issue before this article came out?</p> <p>8 A. No. Not that I remember, no.</p> <p>9 Q. Did you know that he was going to make a phone call --</p> <p>10 A. No.</p> <p>11 Q. -- to Judge Neely?</p> <p>12 Do you know whether Mr. Donovan called any other circuit court magistrates in town?</p> <p>25 Jackson Hole Court Reporting Service - (307) 733-2637</p>	<p>69</p> <p>1 A. I don't. We're not -- we -- I don't have that kind of relationship with him.</p> <p>2 Q. Okay.</p> <p>3 How many times would you estimate you spoke with him while he was here in Pinedale?</p> <p>4 A. Maybe ten at the most.</p> <p>5 Q. Okay.</p> <p>6 A. He -- he did a program for our after-school kids one time. I -- I think I probably introduced myself when he was first here. I asked him about doing a program. He did a program for me.</p> <p>7 I probably had seen him on the street, waved hello, but I -- we've never had any, like, events together where he wasn't working. He's never been to my home.</p> <p>8 Q. Okay.</p> <p>9 Did you send the article to anyone?</p> <p>10 A. I don't think so.</p> <p>11 Q. Did you forward it electronically, if it came out in an electronic form?</p> <p>12 A. No.</p> <p>13 Q. Okay.</p> <p>14 At some point in late 2014, were you at a party at Miss Wendy Soto's house?</p> <p>25 Jackson Hole Court Reporting Service - (307) 733-2637</p>

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1 There was a larger group of people,
2 but, specifically, I'm not gonna remember
3 more names right now.

4 Q. Would you estimate how many people were
5 there?

6 A. Maybe 15 to 20, at the most.

7 Q. Did you speak to Jeran at some point
8 during the party?

9 A. Yes.

10 Q. Do you recall what you spoke about?

11 A. Yes. Specifically on this issue?

12 Q. Just in general first, please.

13 A. I brought a plant. I believe they had
14 just been married in Hawaii, and I brought
15 a plant as a gift.

16 Q. For Mr. Artery and Mr. Bleakley?

17 A. Yes.

18 Q. Okay.

19 Had you talked to Mr. Artery -- once you
20 got the -- sort of the social media invite,
21 had you spoken to Mr. Artery? What other
22 conversation did you have with Mr. Artery
23 outside of looking for a place to say?

24 A. That was it.

25 Q. Did you have a copy of the article -- the

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1 Sublette County Examiner article with you?

2 A. No.

3 Q. Okay.

4 At some point, did you speak about the
5 Judge Neely situation with Mr. Artery at the
6 party?

7 A. Yes.

8 Q. Okay.

9 What did you say to Mr. Artery?

10 A. I think -- I can't, you know, recall
11 the conversation specifically, but we kind
12 of were just amazed about the article and
13 that she would say what she did say.

14 Q. And when you say you were "amazed,"
15 what -- what do you mean by that?

16 A. That somebody would actually make those
17 statements and stand behind them as a
18 judge --

19 Q. Okay.

20 A. -- and prove a bias.

21 Q. When you read the article, did you have
22 any doubt that Judge Neely's religious
23 beliefs were sincere; that she was sincere in
24 her religious beliefs?

25 A. I did not have a doubt about that,

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1 no --

2 Q. Okay.

3 A. -- she's a fairly religious woman.

4 Q. Okay.

5 So you said you were amazed she would make
6 those comments. What did Mr. Artery say
7 then?

8 A. I don't remember specifically. We were
9 just -- you know, we just discussed the
10 article and -- and the issue in general.

11 Q. Was there anybody else discussing the
12 issue --

13 A. No.

14 Q. -- in that discussion?

15 A. No.

16 Q. Do you remember where you were with
17 Mr. Artery?

18 A. We were in Wendy's kitchen.

19 Q. And what happened next?

20 A. There were other people around. We
21 were still discussing. And I believe Wendy
22 was doing something, fixing some food or
23 doing something, getting ready for the
24 party. And she came over and said, "Do you
25 know what I do for a living?"

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1 And I said, "No. I assumed you were a
2 lawyer," because she's friends with Lori,
3 who is also a lawyer, so I just had that in
4 my mind.

5 And she mentioned that she was the
6 director with the Judicial Ethics
7 Commission, and she gave me her card. She
8 said, you know, "There's a place on there,
9 if you would like to file a complaint."

10 But she said, "That's all that I can really
11 say. You can look into it."

12 Q. So before the party, you did not know what
13 Miss Soto's occupation was?

14 A. Not at all.

15 Q. Miss Soto alerted you that she was the
16 executive director of the Commission?

17 A. Correct.

18 Q. After you had the conversation with
19 Mr. Artery, was there a subsequent
20 conversation with Miss Soto about the Judge
21 Neely --

22 A. No.

23 Q. -- story?

24 A. There were -- more people came into the
25 party. I don't think so.

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1 A. She works here in the summertime.
2 She's a retired teacher.

3 Q. Do you recall going to a Town Council
4 meeting in August of this year at which
5 Miss Smulski inquired into Judge Neely's
6 availability to conduct same-sex marriages?

7 A. Yes.

8 Q. Did you speak with Miss Smulski about that
9 before you went to the Town Council meeting?

10 A. No. I was there for the health
11 insurance part of the meeting.

12 Q. Okay.

13 Do you remember what Miss Smulski said
14 at that meeting?

15 A. She made a comment about whether -- I
16 thought it was funny because she called her
17 "Ruthie," because they've been friends for
18 a long time -- would be doing same-sex
19 marriages, and I'm -- I can't remember what
20 the -- why the conversation led up to that.

21 Q. Did you speak about that with Miss Smulski
22 after the meeting?

23 A. I don't think so.

24 Q. Did you remember asking her whether -- why
25 she spoke about that at the meeting?

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1 A. No.

2 Q. Okay.

3 Were you surprised that she said that
4 at the meeting?

5 A. Yes.

6 Q. Why?

7 A. Because she was also there for the
8 health insurance issue and another issue
9 that had come up with zoning changes for
10 the microbrewery.

11 Q. Okay.

12 So you didn't -- you had no idea that she
13 was going to speak about that?

14 A. No. The -- whatever that topic was
15 that led up to that was not on the agenda.

16 Q. Okay.

17 After Miss Smulski -- did you discuss
18 the -- the Mayor Jones health insurance
19 complaint before Miss Smulski -- or Mayor --
20 Mayor Jones issue before Miss Smulski made
21 the marriage comments; do you recall?

22 A. What do you mean did I "discuss"?

23 Q. Well, you said you were there to -- were
24 you there to listen or were you there to --

25 A. I probably --

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1 Q. -- express an opinion?

2 A. I -- express an opinion.

3 I probably made some statements.

4 Q. Do you recall what was the order of that?
5 Did you speak about the health insurance
6 before Miss Smulski?

7 A. I don't recall. There's --

8 Q. Okay.

9 Do you remember when you left the meeting?

10 A. I don't. Probably shortly after that.

11 I can't remember if they went into
12 executive session or -- the rest of the
13 agenda items didn't -- were not a concern
14 to me.

15 Q. Have you been with anybody else at any
16 other Town Council meetings where the issue
17 of Judge Neely relating to same-sex marriage
18 has come up?

19 A. I don't believe so.

20 Q. Okay.

21 And you don't remember any conversations
22 after leaving -- did you leave with
23 Miss Smulski?

24 A. No.

25 Q. Did you contact her after that meeting to

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1 ask her why she had made those inquiries?

2 A. I don't think so. I mean, we work
3 together, so we do have conversations, but

4 I don't believe we talked about that, about
5 why she made those comments. I think the
6 only conversation we had about that
7 probably the next day was that we were both
8 surprised by the statement that was made
9 that she was no longer a magistrate.

10 Q. And who made that statement?

11 A. The mayor.

12 Q. Okay.

13 Did you speak with anybody else who
14 might have been at that meeting about what
15 Miss Smulski said?

16 A. No.

17 Q. Did anybody contact you about those --

18 A. No.

19 Q. -- comments?

20 Okay.

21 Were there any articles written about
22 that?

23 A. I don't think so, no.

24 Q. Do you know whether they were in the
25 minutes of the Town meeting?

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Attachment 4:
Excerpts from Deposition of Honorable Curt Haws

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

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11

12

13

DEPOSITION OF

14

THE HONORABLE CURT AUSTIN HAWS
Friday, September 18, 2015

15

16

17

TAKEN AT

Sublette County Library Board Room
Pinedale, Wyoming

18

19

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23

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

24

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1 A. Judge Neely at -- at one point --
2 Judge Neely is legendary for correcting
3 citations and affidavits and sending them
4 back to the officers for corrections so, I
5 mean, that's somebody that's really taking
6 their job seriously.

7 Q. Right.

8 And when you say "correct," can you just
9 amplify that?

10 A. Grammatical corrections. I don't know if
11 she was a teacher in the past, but the --
12 the -- that's my impression.

13 Q. But as a circuit court magistrate, that
14 would be the proper thing to do; correct?

15 A. No. No, it would not. I --

16 Q. And why do you say that?

17 A. To me, that's a -- that's a -- to me,
18 that's invading the province of the
19 executive branch of our government for me
20 to tell the cops how to write their
21 reports, for me to criticize their grammar.
22 I -- it's a personal choice. I -- I think
23 it's -- it's not something I would do.

24 Q. It's not something you would do, but it's
25 not improper under statute?

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1 A. I don't know.

2 MR. DIXON: Well --

3 Q. (By Mr. Connelly) You're not aware of
4 that?

5 MR. DIXON: I'm gonna object. That
6 calls for a legal conclusion.

7 Q. (By Mr. Connelly) You can answer.

8 A. I don't know.

9 Q. But you're not aware of any statute that
10 would -- that would prevent her from sending
11 back a summons or a warrant that she believed
12 was improperly put together?

13 MR. DIXON: Of course, I -- I don't
14 doubt that he's probably qualified to make
15 a legal conclusion.

16 MR. CONNELLY: I don't think I needed
17 to put that in the legal record.

18 THE WITNESS: There are those that
19 would disagree with you.

20 MR. DIXON: Half of --

21 THE WITNESS: Half of everybody every
22 day.

23 In my mind, that may border on -- on --
24 on crossing the line into invading the
25 province of the executive branch.

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1 More fundamentally than that, it's just
2 not a great way to have a great
3 relationship with the men and women you
4 work with every day.

5 Q. (By Mr. Connelly) But she did -- she did
6 respond swiftly to --

7 A. Oh --

8 Q. -- to calls for assistance --

9 A. -- yes.

10 Q. -- as a magistrate?

11 A. Absolutely.

12 Q. And you'd say she did her job
13 professionally?

14 A. Oh, yeah.

15 Q. Has Judge Neely ever, to your knowledge,
16 before this matter was initiated by the
17 Commission, been the subject of any complaint
18 or judicial discipline?

19 A. The only complaint I have -- I have
20 heard is the one from law enforcement that,
21 "Judge, you may not like that we're writing
22 public intoxication tickets into your court
23 instead of municipal court, but we are and
24 here's why." So that's not a formal
25 complaint; that's just the guys with badges

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1 grumbling a little bit.

2 Q. Bellyaching?

3 A. Yeah.

4 And I went very far out of my way to
5 not get involved in that. "Write your
6 tickets the way you're gonna write them,
7 and I'll deal with it."

8 Q. Can you describe Judge Neely's work ethic?

9 A. I don't know anything about her work
10 ethic, other than to say she responds
11 quickly to any calls for help.

12 Q. And you -- when you say that, you're
13 speaking as Judge Neely's role as a circuit
14 court magistrate?

15 A. Correct. The only thing that would be
16 useful for this situation.

17 Q. And maybe the Drug Treatment steering
18 committee?

19 A. Yes.

20 Q. So in your experience, if Judge Neely were
21 to get a call from either your clerk or
22 someone else who's looking for her in a
23 magistrate capacity, she'd quickly return
24 that phone call; is that fair?

25 A. That's -- I'm -- that is fair, yes.

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Attachment 5:
Excerpts from Deposition of Honorable Ruth Neely

1

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

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DEPOSITION OF

16

THE HONORABLE RUTH NEELY
Friday, September 18, 2015

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19

TAKEN AT

Sublette County Library Board Room
Pinedale, Wyoming

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

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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 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 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 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 Did the select committee discuss that
2 provision?

3 A. Yes.

4 Q. Okay.

5 Same question with regard to Rule 2.3
6 addressing "bias, prejudice, and harassment."
7 Did the committee consider that code a
8 provision?

9 A. Yes.

10 Q. Rule 2.4 addressing "external influences
11 on judicial conduct," is that one that was
12 addressed by the Commission -- the select
13 committee?

14 A. Yes.

15 Q. Canon 3: "A judge shall conduct the
16 judge's personal and extrajudicial activities
17 to minimize the risk of conflict with the
18 obligations of judicial office."

19 Was that canon addressed by this
20 Commission -- this committee?

21 A. Yes.

22 Q. All right.

23 And -- and so you had some working
24 knowledge of those code provisions in
25 December of 2014? Is that -- Is that true?

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1 A. Yes.

2 Q. All right.

3 The -- the newspaper article, which is
4 marked as Exhibit 4, was a result of a
5 conversation with Ned Donovan; is that
6 true?

7 A. I don't have 4.

8 Q. We looked at it earlier.

9 A. (Reviewing document.)

10 Ask me again, please.

11 MR. DIXON: You want to read it back?

12 (Whereupon, the record was read

13 back as follows: Question:

14 The newspaper article, which
15 is marked as Exhibit 4, was a
16 result of a conversation with
17 Ned Donovan; is that true?)

18 THE WITNESS: This isn't the newspaper
19 article. This is the online article.

20 So do you want to address the newspaper
21 article or the online article?

22 Q. (By Mr. Dixon) Were either the newspaper
23 article or the online article as a result of
24 your conversation with Ned Donovan?

25 A. Okay. So -- so --

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1 Q. I mean, if you want to split hairs with
2 me, we'll split hairs.

3 A. Tell me the question about this
4 article, then.

5 MR. CAMPBELL: Counsel, don't -- don't
6 get argumentative with the witness. She's
7 trying to be clear in her response.

8 Q. (By Mr. Dixon) Is Exhibit 4, whatever it
9 might be, a result of a conversation with Ned
10 Donovan?

11 A. (Reviewing document.)

12 Yes.

13 Q. Did you consult the Code of Judicial
14 Conduct before you made the statements to
15 Mr. Donovan that resulted in Exhibit 4?

16 A. No.

17 Q. All right. Why not?

18 A. I don't consult the code every time I
19 talk to somebody.

20 Q. When you spoke to Mr. Donovan, you were --
21 about the subject of same marriage --
22 same-sex marriage, you were speaking in your
23 capacity as a circuit court magistrate;
24 correct?

25 MR. CAMPBELL: Objection. It's a vague
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1 question.

2 THE WITNESS: Yes.

3 Q. (By Mr. Dixon) okay.

4 Could I get 4 back, because that's my
5 copy?

6 Let me give this to you.

7 A. (Reviewing document.)

8 Q. I'm gonna -- I just handed you a document
9 which we marked this morning as Exhibit 41.
10 Do you recognize that?

11 A. (Reviewing document.)

12 Yes.

13 Q. Okay. This is a three-page document. And
14 the first two pages -- what are the first two
15 pages?

16 MR. CAMPBELL: Just -- I just want to
17 make sure something's clear. Can we go off
18 the record?

19 MR. DIXON: You bet.

20 (Whereupon, a discussion was held off
21 the record.)

22 Q. (By Mr. Dixon) So now that we have that
23 sorted out, what is Exhibit 41?

24 A. (Reviewing document.)

25 Exhibit 41 is a letter that I wrote to

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1 the Judicial Ethics Advisory Committee on
2 January 6, 2015, asking for guidance in
3 performing marriages.

4 Q. Okay. And that's addressed to the
5 attention of Lily Sharpe at the Wyoming
6 Supreme Court; right?

7 A. Yes.

8 Q. And -- and I assume that's the contact
9 person for the Ethics Advisory Commission, as
10 you understood it?

11 A. That is the name given to me, yes.

12 Q. Okay.

13 In -- in that letter -- and I'm gonna
14 direct your attention to the last sentence
15 of the first paragraph, that's the
16 paragraph starting "discussions"; all
17 right?

18 A. Um-hum. Yes.

19 Q. It -- it says: "Although I have not yet
20 been asked to officiate at a same sex
21 wedding, I will not be able to do so if,"
22 slash, "when asked."

23 Did I read that correctly?

24 A. Yes, you did.

25 Q. Those are your words; is that right?

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1 A. Yes.

2 Q. Okay. But that was, then, your position
3 on same-sex marriages?

4 A. Yes.

5 Q. And continues to be at this time?

6 A. Yes.

7 Q. Okay.

8 Then in the first sentence of -- of
9 the -- of the second paragraph, you say,
10 and I quote: "Without getting too deeply
11 here," comma, "homosexuality is" named --
12 "is a named sin in the Bible," comma, "as
13 are drunkenness," comma, "thievery," comma,
14 "lying, and the like," period, closed
15 quote."

16 Did I read that accurately?

17 A. Close.

18 Q. Why don't you --

19 A. You left out a word, but it's all
20 right.

21 Q. Which word did I leave out?

22 A. "In." "Without getting in too deeply."

23 Q. "Without getting in too deeply." Thank
24 you for correcting me.

25 Then it -- toward the middle of that

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1 paragraph, you say: "Does -- does that
2 mean I can't be impartial on the bench when
3 that homosexual or habitual liar or thief
4 comes before me with a speeding ticket,"
5 question mark.

6 Did I read that one right?

7 A. Yes, you did.

8 MR. CAMPBELL: Just want the record to
9 reflect there were sentences in the middle
10 that were deleted.

11 Go ahead.

12 Q. (By Mr. Dixon) And -- and then at the
13 bottom of that paragraph, the last sentence
14 that appears on the first page -- well, the
15 next to last sentence on the first page, you
16 say, quote: "Not the homosexual, not the
17 alcoholic, not the liar, not the thief."

18 Are those your words?

19 MR. CAMPBELL: Objection. The document
20 speaks for itself, and Counsel's
21 mischaracterizing it.

22 You may answer it.

23 THE WITNESS: (Reviewing document.)

24 Q. (By Mr. Dixon) Judge Neely, do you equate
25 a gay individual with a drunk, a thief, and a

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1 liar in your mind?

2 MR. CAMPBELL: Objection. Vague
3 question.

4 You may answer.

5 THE WITNESS: Homosexual conduct,
6 drunkenness, stealing, and lying are named
7 sins in the Bible. Those people are
8 sinners, as am I. They are no worse
9 sinners than I am.

10 Q. (By Mr. Dixon) If -- do you have any
11 perception of how a homosexual individual
12 might be -- might feel about being equated
13 with a drunk, a thief, or a liar?

14 MR. CAMPBELL: Objection. Lacks
15 foundation.

16 THE WITNESS: (Moving head from side to
17 side.)

18 How -- tell me the first part of the
19 question.

20 MR. DIXON: Read the question back,
21 please.

22 (Whereupon, the record was read
23 back as follows: Question:

24 Do you have any perception of
25 how a homosexual individual

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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 A. No.
 2 Q. -- you had three conversations --
 3 A. No.
 4 Q. -- with Mr. Donovan?
 5 Bear with me for a moment.
 6 Let me show you Exhibit 21. Do you
 7 recognize that?
 8 A. (Reviewing document.)
 9 Yes.
 10 Q. Okay. I've highlighted that one sentence.
 11 You stated to the Commission: "But at the
 12 time of the phone call, I was at home and was
 13 completely distracted with another matter,"
 14 closed quote.
 15 Is that -- Is that accurate?
 16 A. Yes.
 17 Q. So go back to the question: Why didn't
 18 you tell us there were three calls that day?
 19 A. It wasn't -- didn't matter. Wasn't
 20 pertinent to my --
 21 Q. Okay.
 22 A. -- to my --
 23 Q. Were you distracted during the first call?
 24 A. Somewhat, yes.
 25 Q. By what?

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- 1 A. I had come in from outside. That time
 2 of year is Christmas light time at the
 3 Neely house. I had come in from outside.
 4 I had armloads of lights. I had a jacket
 5 and my snow boots. And I saw I missed a
 6 call, and I had an armload of lights, and
 7 called the person back.
 8 Q. Okay.
 9 A. And so when I was talking to him, yes,
 10 I was trying to untangle some lights, take
 11 off a hot jacket, and yes, I was
 12 distracted.
 13 Q. Were you distracted at the time of the
 14 second and third calls with Mr. Donovan?
 15 A. Second one, no -- no.
 16 Q. Who made the second call?
 17 A. I did.
 18 Q. And you called him the sec- -- actually,
 19 you called him both times, the first time and
 20 the second time. You returned his call the
 21 first time and then called him back the
 22 second time; correct?
 23 A. I returned an unknown call, yes, and it
 24 was him.
 25 Q. Yes.

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- 1 A. It was him the first time.
 2 Q. Yes. Yes.
 3 A. And, yes, the second time, I called him
 4 back.
 5 Q. And why did you call him back?
 6 A. Because when I hung up the phone the
 7 first time, I had the Impression that Ned
 8 Donovan knew my beliefs and that he was
 9 trying to stir things up.
 10 Q. Okay.
 11 At the time of that call, you knew that
 12 he was a newspaper reporter too?
 13 A. At the time of which call?
 14 Q. The first call -- very first call.
 15 A. First call.
 16 Q. That's a yes?
 17 A. I think --
 18 Q. You knew he was a newspaper reporter;
 19 right?
 20 A. First -- yes.
 21 Q. You knew he was likely to publish your
 22 comments; correct?
 23 MR. CAMPBELL: Objection. Lacks
 24 foundation.
 25 THE WITNESS: I don't know. He could

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- 1 have or could not have. That would be his
 2 choice.
 3 Q. (By Mr. Dixon) Well, that's what
 4 newspaper reporters do, don't they?
 5 A. Not all the time, but, yes, that's
 6 their job.
 7 Q. All right.
 8 And you knew that Judge Haws had asked you
 9 not to go public with this; correct?
 10 MR. CAMPBELL: Objection. Assumes
 11 facts not in evidence.
 12 You can answer.
 13 THE WITNESS: Judge Haws told me to
 14 respond, "No comment."
 15 Q. (By Mr. Dixon) Okay.
 16 So why -- I -- I don't get -- I didn't
 17 get why you called Mr. Donovan back the
 18 second time. Tell me that.
 19 MR. CAMPBELL: Objection. Asked and
 20 answered.
 21 You can answer again.
 22 THE WITNESS: When I hung up after the
 23 first call, I was left with the impression
 24 that he already knew or was aware of my
 25 beliefs and he was making an effort to stir

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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, famillal,
 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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1 A. Then I will tell you no.

2 Q. Are -- are you aware that there are -- are
3 rumors in Pinedale that you did support his
4 election?

5 MR. CAMPBELL: Objection. Lacks
6 foundation.

7 You can answer.

8 THE WITNESS: I'm not aware of any
9 exact rumors, but it doesn't surprise me
10 one bit knowing Pinedale, Wyoming.

11 Q. (By Mr. Dixon) Okay.

12 Do you -- do you know -- well, let me see
13 how to phrase this question. Do you have any
14 idea why those kind of rumors would be
15 circulating?

16 A. Yes.

17 Q. And that would be?

18 A. When Bob Jones took office in June of
19 2014, he essentially cleaned house at the
20 Town Hall. I was the only survivor --
21 that's not true. I was one of two
22 survivors. I was the longest term
23 survivor. Everybody else was let go --

24 Q. Okay.

25 A. -- so I suppose the assumption would be

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1 that we stayed because we supported him.

2 That is incorrect.

3 Q. Okay.

4 You didn't contribute financially to his
5 campaign?

6 A. No.

7 Q. You didn't go door to door for him?

8 A. No.

9 Q. You didn't put on his bumper sticker?

10 A. No.

11 Q. Did you have a yard sign?

12 A. No.

13 Q. Did you have a three-color yard sign?

14 A. No.

15 Q. Are you a member of the Alliance Defending
16 Freedom?

17 A. No.

18 Q. Have you ever paid dues or made
19 contributions to that organization?

20 MR. CAMPBELL: Objection.

21 Wait. Can I have a second?

22 MR. DIXON: Sure.

23 MR. CAMPBELL: I'm gonna object on that
24 First Amendment associational-privilege
25 ground and instruct the witness not to

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1 answer.

2 MR. DIXON: I wasn't aware there was a
3 First Amendment association privilege.

4 MR. CAMPBELL: There is.

5 MR. DIXON: Okay.

6 Q. (By Mr. Dixon) Is -- is the -- we'll call
7 them the ADF, providing you with a legal
8 defense in this proceeding?

9 A. Yes.

10 Q. And is that pro bono?

11 A. Yes.

12 Q. In other words, they're not charging you
13 for your defense; is that correct?

14 A. Yes.

15 Q. Do you see any ethical problems with that?

16 A. No.

17 Q. If you are sanctioned in this proceeding
18 by the Commission and/or by the Wyoming
19 Supreme Court under Rule 16(d), has the ADF
20 agreed to pay your sanctions?

21 MR. CAMPBELL: Hold on.

22 Objection. Calls for privileged
23 information. Calls for communication
24 between attorney and client.

25 Q. (By Mr. Dixon) Have you received anything

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1 from the ADF, other than from one of their
2 attorneys, that says that if you are
3 sanctioned under Rule 16(d), ADF will pay
4 your sanctions?

5 A. No.

6 Q. Are -- are you aware that you could be
7 made to pay all of the Commission on Judicial
8 Conduct and Ethics' costs of this matter?

9 MR. CAMPBELL: Objection. It's
10 irrelevant.

11 You can answer.

12 Q. (By Mr. Dixon) Are you aware of that?

13 MR. CAMPBELL: Plus it assumes facts
14 not in evidence.

15 Can you read the question back?

16 (Whereupon, the record was read
17 back as follows: Question:

18 Are you aware that you could
19 be made to pay all of the
20 Commission on Judicial Conduct
21 and Ethics' costs of this
22 matter?)

23 THE WITNESS: Yes.

24 Q. (By Mr. Dixon) And are you aware that
25 those costs are now into the tens of

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1 thousands of dollars?

2 MR. CAMPBELL: Objection. Lacks
3 foundation. Assumes facts not in evidence.

4 THE WITNESS: No.

5 Q. (By Mr. Dixon) Have you ever been made
6 aware that it may not be legal for a third
7 party to pay those kind of sanctions imposed
8 by a Commission before the Court?

9 MR. CAMPBELL: Objection. Calls for
10 privileged communications.

11 MR. DIXON: I'm not asking what you
12 told her. I'm just saying has she been
13 made aware of that fact or that law.

14 MR. CAMPBELL: Could you read it back,
15 please?

16 (Whereupon, the record was read
17 back as follows: Question:

18 Have you ever been made aware
19 that it may not be legal for a
20 third party to pay those kind
21 of sanctions imposed by a
22 Commission before the Court?)

23 MR. DIXON: I don't think you quite got
24 that right.

25 Q. (By Mr. Dixon) Have you ever been made

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1 aware that it may be illegal for a third
2 party to pay the type of sanctions that could
3 be imposed by the Commission on Judicial
4 Conduct and Ethics or the Supreme Court? In
5 other words, that you may have to pay those
6 personally?

7 A. No.

8 Q. Have -- have you approved and ratified the
9 conduct of your attorneys in defense of this
10 proceeding?

11 MR. CAMPBELL: Objection.

12 This is just harassing the witness.
13 We're not -- we're not asking anything.

14 MR. DIXON: Well, I don't think that's
15 right, Counselor.

16 Q. (By Mr. Dixon) Do you approve of the way
17 these people have conducted your defense in
18 this case?

19 MR. CAMPBELL: Objection. Objection.
20 You're asking for communications between
21 attorney and client.

22 MR. DIXON: No, I'm not.

23 Q. (By Mr. Dixon) I'm not asking what they
24 told you or what they -- what you told them.
25 I'm asking you if you approve of what they

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1 are doing in your defense?

2 MR. CAMPBELL: But how -- how can you
3 ask if she approved it without asking the
4 communications between her and counsel?
5 That's the only way she could approve it is
6 by talking to her counsel.

7 MR. DIXON: Well, let --

8 Q. (By Mr. Dixon) You haven't attended any
9 depositions in this proceeding, have you?

10 A. No.

11 Q. Why not?

12 A. I just didn't come. I didn't --

13 Q. If -- if I told you that your lawyers'
14 strategies appear to be to personally attack
15 the executive director of the Commission,
16 would you approve of that behavior?

17 MR. CAMPBELL: Objection.

18 Don't answer the question. Don't
19 answer the question.

20 Counsel is simply asking questions to
21 annoy, embarrass, or oppress the deponent
22 or the party here, which is a violation of
23 Rule 30(d).

24 Q. (By Mr. Dixon) Have you read the rules on
25 judicial conduct and ethics?

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1 A. Yes.

2 Q. Specifically, have you read Rule 8,
3 sub (d), sub (F) [sic], which states -- I'll
4 just show it to you. I've got it
5 highlighted.

6 A. (Reviewing document.)

7 MR. CAMPBELL: And was that
8 Rule 8(d)(2)(F)?

9 MR. DIXON: Yeah. I must have read it
10 wrong. Thank you.

11 THE WITNESS: (Reviewing document.)

12 MR. CAMPBELL: I'm sorry. Was there a
13 question? I think there might have been.
14 I just don't recall what it was.

15 Q. (By Mr. Dixon) My -- my question is: Are
16 you familiar with that rule?

17 A. Yes.

18 Q. And -- and do you understand from your
19 familiarity with that rule that your response
20 to these proceedings can be a factor in the
21 discipline and sanctions imposed on a finding
22 of breach of ethics?

23 MR. CAMPBELL: Objection. Assumes
24 facts in evidence.

25 You can answer it.

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Attachment 6:
Inquiry Concerning A Judge: Honorable Vance D. Day

BEFORE THE COMMISSION ON JUDICIAL FITNESS AND DISABILITY

STATE OF OREGON

Inquiry Concerning a Judge:

Case No. 12-139 and 14-86

Honorable Vance D. Day

Opinion

BY UNANIMOUS DECISION¹

This matter comes before the Oregon Commission on Judicial Fitness and Disability on a thirteen count complaint alleging that the Honorable Vance D. Day, a Marion County Circuit Court Judge, violated the Oregon Code of Judicial Conduct.

Between November 9 and November 20, 2015, in the City of Salem, Marion County, Oregon, the Commission held its hearing with regard to the allegations in the complaint in accordance with ORS 1,420 and Article VII, § 8 of the Oregon Constitution.

¹ Members of the Oregon Commission on Judicial Fitness and Disability participating in this matter were Hon. Debra Vogt, Judge Member, Presiding; Hon. James Egan, Judge Member; Hon Patricia Sullivan, Judge Member; W. Eugene Hallman, Attorney Member; Judy Snyder, Attorney Member; Judy Parker, Attorney Member; Annabelle Jaramillo, Public Member; and Linda Collins, Public Member.

Upon review of the evidence and for the reasons outlined below, the Commission concludes that counts 7, 8, 10, 11, and 13 have not been proven by clear and convincing evidence and recommends dismissal as to those five counts.²

Upon review of the evidence and for the reasons outlined below, the Commission concludes that the remaining eight counts have been proven by clear and convincing evidence, involving various violations of the Oregon Code of Judicial Conduct, and recommends removal.

I

FINDINGS OF FACT

A. Standard of Proof

A violation must be proven by clear and convincing evidence. *In re Schenck*, 318 Or 402, 405, 870 P2d 185 (1994); *In re Gustafson*, 305 Or 655, 668, 756 P2d 21 (1988); *In re Jordan*, 290 Or 303, 307, 622 P2d 297 (1981); and *Matter of Field*, 281 Or 623, 629, 576 P2d 348 (1978). This is proof that is highly probable and extraordinarily persuasive. *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.* 303 Or 390, 402, 737 P2d 595 (1987).

Although the Commission does make specific credibility findings within this opinion, the Commission bases all of the findings of fact herein on the evidence the Commission finds to be the most credible evidence before it.

B. Background

Judge Day has been an attorney licensed to practice law in Oregon since 1991. He was appointed to the Marion County bench in 2011 and was elected the following year. Upon his

² If the Commission finds a violation it shall recommend censure, suspension or removal to the Oregon Supreme Court. ORS 1.420(4). The rules of the Commission require that a dismissal also be submitted as a recommendation to the Supreme Court. Rule 16(a).

swearing in, Judge Day took the oath of office for judges detailed in ORS 1.212.³ Judge Day's courtroom and chambers are on the fourth floor of the Marion County courthouse, located in Salem, Oregon. Judge Day is married and has three children.

C. Soccer

Judge Day's son, Daniel Day, played soccer for the Chemeketa Community College team. The Chemeketa soccer coach is Marty Limbird, a friend of the Day family. The Chemeketa team regularly played on the Willamette University campus at Sparks Field. Judge Day attended these 'home' games to support his son and the team. As is customary, at Sparks Field the designated referees' area is segregated from the public and across the field from the spectator area. Referees are trained to keep spectators away from the referees' table. Likewise, if spectators request the names or titles of referees, referees are trained to tell the person to contact the league or refer to the coaches' scoresheets for such information. Referees at this level of play are specifically trained not to give out their names to spectators.

On October 17, 2012, a year after Judge Day took the bench, Daniel Day's Chemeketa soccer team played Clark Community College at Sparks Field. The game was particularly contentious, with seven yellow cards⁴ issued by the referees. The center referee at the game was Andrew Deuker.⁵ Daniel Day started the game with the team but was seriously injured with a concussion twelve minutes into the match. Judge Day was quite upset and believed that his

³ The oath in ORS 1.212(2) reads as follows: "I, (name), do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the (court), according to the best of my ability, and that I will not accept any other office, except judicial offices, during the term for which I have been (elected or appointed)."

⁴ In soccer, a yellow card is a warning from a referee; two yellow cards against a single player or coach equals a red card, which is an automatic expulsion from the game. Even two yellow cards would be considered a lot at this level of play.

⁵ Mr. Deuker is a Pac12 referee and the only national soccer referee in Oregon.

son's injury was due to poor officiating on the part of Mr. Deuker. Although it is highly unusual for spectators to cross the soccer field and approach game officials, Judge Day crossed the field from the spectators' section to the officials' side of the field seconds after the "end of game" whistle blew. Judge Day approached the referees' table while Mr. Deuker was changing his shoes.

At the referee's table, Judge Day asked Mr. Deuker for his name but, consistent with Mr. Deuker's training, did not receive it. Instead, he was directed to check Coach Limbird's scoresheet. Judge Day then laid his judicial business card on the referees' table and forcefully shoved it across the table toward Mr. Deuker, such that the writing on the card faced the referee. Judge Day told Mr. Deuker that he thought Mr. Deuker had lacked control over the game and failed to manage player safety. Judge Day indicated that he would be filing a complaint regarding the poor officiating. During this encounter, Judge Day's voice was loud and forceful and his behavior was condescending and intimidating. Mr. Deuker had not asked for the business card and did not pick it up. At that, Judge Day picked up his judicial business card and walked away. Mr. Deuker realized that he may need the card to include in his referee's report. Mr. Deuker then asked a second referee to get the card from Judge Day. While Judge Day was on the phone with his daughter, the second referee ran up to Judge Day, asked for and received the card.

It was only after the card was retrieved that Mr. Deuker actually read the card and realized that the person who he had encountered was a judge. It was at that time that Mr. Deuker felt both intimidated and disappointed because he believed that a judge was abusing his power within the community.

While sitting in his car after leaving the field, Mr. Deuker was frightened and nervous as a result of his interaction with Judge Day. He called Steve Brooks, the Assignor of the Oregon Intercollegiate Soccer Referee Association, and told him what happened. Mr. Deuker then started his car to drive home. As Mr. Deuker was driving his car away from Sparks Field, Judge Day and his son Daniel stopped while crossing the street and made a note of Mr. Deuker's license plate number. Mr. Deuker observed this, which further intimidated him.

After the game, Mr. Deuker called Mike Allen,⁶ a local soccer official, and told him about the interaction he had with Judge Day. Mr. Allen urged him to come to his house to discuss the matter further. Mr. Deuker met Mr. Allen at his home in Portland. Mr. Allen urged Mr. Deuker to file a complaint with the Commission on Judicial Fitness and Disability, which Mr. Deuker did. The Commission received Mr. Deuker's complaint on October 21, 2012.

Due to Mr. Deuker's concerns about Judge Day, Mr. Allen attended the next Chemeketa game held at Sparks Field on November 7, 2012. Mr. Allen communicated his concerns to the other referees regarding Judge Day's prior conduct and, thus, all were alert for possible inappropriate spectator behavior. Separately, Mr. Brooks had contacted the CCC athletic director, Cassie Belmodis, and alerted her that a CCC player's parent had intimidated a referee at the October 17, 2012 game. As a result and at the request of Mr. Brooks, Ms. Belmodis also attended the November 7, 2012 game. Judge Day attended the same game.

At the conclusion of the game, an altercation broke out between two opposing players. As the altercation was ending, Judge Day left the spectator section, crossed the field, and approached the officials' table. In order to prevent Judge Day from engaging with the officials, Mr. Allen yelled at Judge Day to return to the spectator section, saying things similar to "get the

⁶ Mr. Allen is 71 years old and roughly 6' tall and 240 lbs. He was a soccer referee for 22 years and then became a national assessor for another 25 years. He is an expert referee.

hell out of here" and "you can't be here." At the time Judge Day approached the referees, he was a significant distance away from the location of the prior player altercation and a significant distance from Mr. Allen. All the witnesses who were present at the November 7, 2012 game, save Judge Day himself, consistently testified that neither Mr. Allen nor any other individual made any physical contact with Judge Day on the field that day.

On November 14, 2012, Mr. Allen sent the Commission an additional complaint regarding Judge Day and the events of October 17 and November 7. Mr. Allen reported that there was "great concern among the officials that [Judge Day] is using his judicial position to express his views and intimidate officials where he feels his son has been wronged." The Commission received Mr. Allen's complaint on November 21, 2012.

In response to Mr. Deuker's and Mr. Allen's complaints, the Commission queried Judge Day. The Commission received Judge Day's response on February 11, 2013. In Judge Day's response to the Commission about the October 17 game, he claimed that a referee requested his business card which was the only reason he gave it. Judge Day further claimed that the same referee brushed his business card off to the side of the table after he politely placed it there. The Commission specifically finds that Judge Day was, in this instance, referring to Andrew Deuker. As to the November 7 game, Judge Day claimed that he approached the referees' side of the field post-game to thank the officials but that "[b]efore I could finish the sentence I was grabbed by my shoulders from behind without warning, whirled around, and nearly picked off my feet and forcefully thrown forward. I nearly went down on my hands and knees but was able to right myself." Judge Day continued in his response to the Commission, "[a]s best I could tell, the person who grabbed me was about 6' 3" and perhaps 260 lbs. He then yelled at me something along the lines 'you have no authority to be near these officials.'" The Commission specifically

finds that Judge Day was, in this instance, referring to Michael Allen, who is roughly 6' and 240 lbs and who did indeed yell to Judge Day that he had no authority to be on that end of the field.

The Commission finds Mr. Deuker to be a very credible witness. Mr. Deuker has absolutely no motivation to misrepresent what occurred. He made a timely complaint about Judge Day's behavior, which he memorialized in writing very shortly after the event. Mr. Deuker's testimony was consistent and corroborated by other witnesses. Mr. Deuker's demeanor on the stand was earnest. Clearly nervous, he expressed fear about potential repercussions for reporting Judge Day's conduct. The depth of his concern was evident in his voice and manner on the witness stand.

Likewise, the Commission finds Mr. Allen to be a very credible witness. Mr. Allen presented as a very straightforward, honest and genuine person in his demeanor on the witness stand. Mr. Allen had no motivation to misrepresent what occurred on the soccer field. At the time of the November 7, 2012 game, Mr. Allen was being a careful observer of events. In fact, that was the very reason he was present. His testimony was consistent and was corroborated by other witnesses who were, likewise, disinterested observers.

Judge Day's testimony regarding the soccer incidents was internally inconsistent and inconsistent with his initial written response to the Commission. His testimony is contrary to virtually every other witness. His demeanor on the stand was measured and controlled when being asked about his version of events. However, when challenged by contrary evidence, his facial expressions and responses were tinged with a bit of sarcasm. Furthermore, Judge Day's demeanor while Mr. Deuker was testifying bordered on mockery. As Mr. Deuker emotionally related how afraid he felt when Judge Day was noting his license plate number, Judge Day was smiling smugly. The Commission does not find Judge Day's testimony credible.

D. Staff

Employees at the Marion County courthouse are employed by the State of Oregon. The supervisor of these judicial staff employees is the judge for whom they work.

During the time period relevant to the Commission's inquiry, Judge Day's judicial assistant was Christina "Tina" Brown and his clerk was Megan Curry. Although Ms. Brown's and Ms. Curry's leave requests were often granted, they did not always receive rest periods, meal breaks, or flex time. The Marion County Trial Court Administrator and Deputy Trial Court Administrator met with Judge Day to discuss the staff concerns and court policy.

At one point, Judge Day placed portraits of Presidents Reagan and Bush in his jury room. Senior Judge Paul Lipscomb saw the portraits when he was using Judge Day's jury room for a settlement conference. He turned the portraits to face the wall and reported the incident to Marion County Presiding Judge Jamese Rhoades. Judge Rhoades advised Judge Day that partisan artwork was best left at home as it might manifest bias. She reminded Judge Day that the courthouse is a neutral, non-partisan facility. Judge Day then hung the artwork and other partisan artwork in Ms. Brown's workspace, to which she objected. He then removed it.

E. Regarding Defendant B.A.S. and Veterans Treatment Court

In 2013, Marion County transitioned its Veterans Treatment Docket (VTD) to a Veterans Treatment Court (VTC).⁷ During the times relevant to this inquiry, the VTC team included, among others, Judge Day as the judge presiding, an assigned Deputy District Attorney, Bryan

⁷ It is not the purpose of this proceeding to evaluate Marion County's Veterans Treatment Court, its practices, the best practices in any other treatment court or the effectiveness of treatment courts, either specifically to Marion County or generally elsewhere. Findings of fact herein that relate to VTC are included to give context to other inquiries that are relevant to this proceeding.

Orrio, Defense Attorney Daniel Wren, Probation Officer Austin Hermann, VTC Coordinator and Evaluator⁸ E'lan Lambert. The VTC also tapped local veterans to serve as mentors for probationers. VTC met every other Friday morning. VTC was informal compared to other court settings. Judge Day required the veterans speaking to stand in "parade rest." He occasionally called the probationers "raggedy asses." He jokingly called one mentor "Baldy." Occasionally, Judge Day had the VTC participants watch certain videos or read certain books that he thought would be helpful to their progress. Judge Day has a sincere interest in helping veterans.

To participate in the Marion County VTC, a defendant must be a veteran charged with a qualifying crime in Marion County. The veteran must have an injury-induced issue, addiction issue, and/or mental health issues. Finally and ideally, a nexus would exist between the crime and the veteran's service.

Each participant in the VTC must sign a contract which sets forth terms and conditions of participation. In the VTC contract in effect between January 24, 2013 and February 6, 2015, paragraph 24 reads as follows: "I agree that the VTD Judge may communicate with others about my participation in VTD without the presence of my attorney or myself." This was the language permitting the treatment team to meet and communicate about cases without the defendant, or potentially his attorney, being present.

On June 28, 2013, BAS⁹ appeared before Judge Day and pleaded guilty to felony driving under the influence of intoxicants and entered VTC in Marion County. Judge Day placed BAS on 24 months of supervised probation, with the standard conditions of probation applying.

⁸ Lambert had an evaluator contract with the County funded through a federal grant. Judge Day was not responsible for Lambert's contract. Despite Lambert's belief to the contrary, Judge Day consistently attempted to resolve the funding mechanism for her contract and to obtain payment for her professional services.

⁹ The Commission identifies this particular veteran by these initials for security.

including that BAS not possess any weapons, including firearms. The plea negotiations also included the mandatory 90 days jail sanction as well as successful completion of VTC. If BAS was successful, at the end of his probationary period his felony conviction would be reduced to a misdemeanor at the recommendation of the VTC team. As part of the entry into VTC, BAS signed the VTC contract containing the provision in paragraph 24 noted above, which would allow Judge Day to "communicate with others about my participation in VTD without the presence of my attorney or myself."

BAS is, without question, a national hero. A Navy SEAL who was deployed twelve to fifteen times abroad, BAS received a Bronze Star and was lauded by his fellow Navy SEALs. BAS was wounded multiple times and suffers from Traumatic Brain Injury and Post-Traumatic Stress Disorder. BAS no longer lives in Oregon, but appeared by telephone at the hearing in these proceedings.

The Commission finds the testimony of BAS to be credible. BAS has no motive to lie. He received no benefit from testifying. In fact, some of his testimony was against his interest. BAS did not initiate a complaint against Judge Day with the Commission and clearly did not want to participate in these proceedings. Although BAS's concerns about repercussions for participating were evident, his testimony was consistent with his numerous prior interviews, the notes of which are in evidence. And, although he appeared by telephone, his demeanor was genuine, sincere, heartfelt, and he displayed authentic emotion at appropriate times.

The first two months of his participation at the VTC, BAS was in a rehabilitation center. On August 23, 2013, BAS graduated from rehab and returned to Marion County. He continued to have medical issues. As he had lost his driver's license due to his conviction, he needed transportation assistance from his home in rural Marion County to the VA in Portland. On

September 25, 2013, Judge Day's son, Justin Day, provided transportation to BAS with the knowledge and permission of the VTC treatment team.

In late September 2013, after a VTC session, Judge Day met with BAS alone in his chambers to interview him for an article that Judge Day was writing for OTLA's Trial Magazine about VTC. This article described identifying and personal information about BAS, including that he was a member of certain high-profile Navy SEAL teams; that he was in the VTC for a felony DUI to which he pleaded guilty; that he had a traumatic brain injury and PTSD; and quoted BAS concerning trauma he experienced during his service career.¹⁰ BAS felt that he was in no position to decline the interview or to object to the release of his personal information for fear that it would harm his chances of being successful on probation and obtaining the benefits of his plea bargain.

During a VTC hearing in the fall of 2013, Judge Day reiterated to BAS on the record that he was not allowed to possess or handle firearms. At VTC on October 11, 2013, Judge Day told BAS in court: "No guns, you don't get any guns." The following month, on November 8, 2013, BAS again appeared in VTC and asked, "Can I touch a gun now?" Judge Day said, on the record and unequivocally, "No."

Shortly before Thanksgiving, 2013, Judge Day arranged for BAS to do some work for Judge Day's son-in-law, Donald Mansell. Judge Day arranged to pick up BAS at his house and drive him to the Mansell house to do paint preparation work on November 18, 2013. After picking BAS up, Judge Day informed him that they would stop at a wedding at which Judge Day was officiating. Judge Day asked BAS to accompany him. BAS did not believe he could refuse

¹⁰ See Exhibit 12 - "What got to me, what I see in my dreams, is what the enemy did to the women and children. The combat I could handle, but the inhumanity to the enemy toward its own people is what haunts me today." Pg.3.

the request. The wedding was a small affair – five or six guests in total, plus the bride and groom. Judge Day introduced BAS as a Navy SEAL and used BAS's call sign.¹¹ BAS felt like he was being exploited and put on display.

After the wedding, Judge Day brought BAS to the Mansell house. Although BAS had been told there would be other veterans present, BAS was the only non-Day family member there. The Mansell house has a living room which contains a homemade cabinet spanning the length of one wall. The family regularly challenged visitors to find secret compartments which Judge Day had built into the cabinet. While at the Mansell house, Judge Day challenged BAS to find a secret compartment and told him that one of the hidden drawers contained a gun. BAS found the compartment quickly and opened the drawer to see the gun. BAS asked Judge Day for permission to check the gun for safety, which Judge Day granted. BAS cleared the gun by removing the clip and making certain it was not loaded. The Commission recognizes that these facts are inconsistent with the testimony of Judge Day and his son-in-law. We specifically find that BAS is the most credible source on this information. We note also that Donald Mansell's declaration, submitted in support of his father-in-law, and his testimony on stand were not consistent.

Between November 28 and December 26, 2013, BAS received numerous texts from Judge Day and his family repeatedly inviting him to Day family events. BAS's text messages establish that he was trying, tactfully, to evade these out-of-court contacts with Judge Day.

In early December 2013, Judge Day attended a conference in Washington D.C. with his wife, Ms. Lambert and Judge Tracy Prall. The conference was for veterans' court judges and

¹¹ The identification of his military call-sign was of particular concern to BAS because he feared identification as a result of his many Navy SEAL missions.

treatment teams throughout the country. Before the trip, Judge Day asked BAS to connect the Marion County team with some of BAS's friends in D.C. Judge Day particularly solicited an introduction to a famous Navy SEAL, Rob O'Neill. BAS complied. When Judge Day met with Mr. O'Neill, he found out the full extent of the extraordinary nature of BAS's military experience and service.

While at the conference, Judge Prall and Judge Day had a conversation about VTC. The conversation was focused on boundaries and out of court contact with probationers. She told Judge Day that she limited her contact with participants to be only in the courtroom, other than responding with "hello" or a similar pleasantries when a participant addressed her out in the community. Judge Prall also told Judge Day that she believed that out of court contact can result in concerns that inappropriate influence has affected the handling of a case. Notwithstanding Judge Prall's advice concerning boundaries, Judge Day's out of court contacts with BAS continued and, actually, increased.

December 26 is Judge Day's birthday. That day in 2013, Judge Day texted BAS and invited him to a birthday brunch at his house. Judge Day picked up BAS and brought him to his home, despite BAS's tactful attempts to avoid the event. There were no other veterans present, nor any other judges or VTC team members. The only people present were the immediate Day family and BAS. At this birthday brunch, the Day family asked BAS about his military service and had him share details about his experiences. BAS was also asked about religion and his opinions about Jesus Christ. It was an uncomfortable event for BAS. While at Judge Day's house that day, BAS saw an H&K gun case and commented to Judge Day that it was a good weapon, to which Judge Day replied, "Shhh."

At least twice after the birthday brunch, on December 27, 2013, and January 7, 2014, Justin Day asked BAS via text messaging if BAS would go shooting with him. On both dates, BAS declined. In response to the second invitation, BAS said no, texting that he was worried about getting in trouble with his probation officer for having possession of a gun.

During this same time period, BAS had a broken pellet stove and was living in the country in a farmhouse without heat. The weather was extremely cold. Due to the broken stove, on January 10, 2014, Judge Day told BAS that he would like to come over to the farmhouse the next day. BAS declined that offer. On January 11, Judge Day again asked to come over to BAS's home the next day. Again, BAS declined. BAS texted in reply that he would not be home and that he would get someone else to fix the stove. Nonetheless, later that day, January 12, 2014, Judge Day and his son Justin arrived unannounced to help BAS with his pellet stove. BAS had not invited them to his home and he had in fact repeatedly tried to convince them not to come over.

While Judge Day was in BAS's house, Justin Day went to their car and returned, bringing in the H&K pistol case BAS had seen in the Day house at the birthday party. Justin Day pulled out the gun from the case and handled it. Judge Day was present. BAS watched Justin handle the gun and asked Judge Day if he could show Justin how to handle it safely. Judge Day said, "No problem." Judge Day then indicated to BAS that, as he was the judge who put him on probation, he could make "adjustments." Judge Day further indicated to BAS that because BAS was teaching someone Judge Day loves how to shoot and handle a weapon safely, Judge Day had no objections to BAS handling the gun. Before Judge Day and Justin left, BAS confirmed with Judge Day that Justin would be returning to shoot the H&K pistol later that day. Justin Day did in fact return to BAS's house later that day and the two of them shot the H&K pistol. BAS

shot the gun because he believed that he was allowed to do so based upon Judge Day's permission.

The next day, January 13, 2014, BAS told Ms. Curry about the previous day's activities involving the gun, who in turn told Ms. Lambert. Ms. Lambert went to BAS's house to learn firsthand what had happened. She then confronted Judge Day with the information, reminding him about BAS's probation conditions and status as a convicted felon. Judge Day "panicked" during that conversation with Ms. Lambert.

At this point in time, the number of out-of-court contacts between Judge Day and BAS decreased dramatically. On January 24, Judge Day met with the VTC prosecutor and BAS's defense attorney. The purpose of this meeting was to disclose BAS's handling of the gun on January 12, 2014. Judge Day did not invite the probation officer to the meeting. Judge Day did not disclose BAS's handling a gun on November 18, 2013 at the Mansell residence. Judge Day did not disclose that Justin Day went target shooting with BAS later in the day on January 12, 2014. Judge Day downplayed the full extent of BAS's access to guns in, and due to, Judge Day's presence.

Later on January 24, BAS appeared in VTC. During that court appearance, BAS indicated to Judge Day that he would not possess firearms.

On February 21, 2014, Judge Day dropped BAS's felony status to a misdemeanor, signing the judgment *nunc pro tunc* to June 28, 2013. At that time, BAS had not yet completed his probation, nor had he completed the 90 day jail sentence ordered in the original judgment, which is required under ORS 813.011(3).¹² As part of the February 21 judgment, Judge Day

¹² ORS 813.011 is the Felony Driving Under the Influence of Intoxicants statute - (3) reads: Upon conviction for a Class C felony under this section, the person shall be sentenced to a mandatory minimum term of incarceration of 90 days, without reduction for any reason.

gave BAS credit for time he had spent in inpatient treatment instead of having him complete the mandatory minimum term of incarceration.

BAS left Oregon in February 2014 and has not returned. He continued to appear at VTC hearings telephonically. After a particularly frustrating hearing in August 2014 during which Judge Day asked BAS, on the record and in front of other veterans, if he knew what an order was, BAS reached out to Ms. Lambert. BAS told Ms. Lambert about much of, if not all of, his treatment by Judge Day and indicated that he would like to speak to the presiding judge. Ms. Lambert took BAS's concerns to Presiding Judge Rhoades and asked that she call BAS.

Judge Rhoades talked to BAS, telephonically, on August 14, 2014. During that phone call, BAS told Judge Rhoades about (1) the events at Judge Day's house on December 26, 2013; (2) the events at BAS's house on January 12, 2014; (3) Judge Day waiving the prohibition against BAS handling the gun; (4) Judge Day making BAS feel like Judge Day's possession and that he was being put "on display" while with Judge Day; (5) Judge Day making BAS attend the November 2013 wedding against his wishes; and (6) Judge Day and his son Justin wanting BAS to be Justin's mentor. Judge Rhoades was very concerned.

Judge Rhoades assigned BAS's case to Judge Prall. She tried to schedule a meeting with Judge Day and Judge Dale Penn, although this was harder to schedule because Judge Day was out of the office.¹³

On August 21, 2014, Judge Rhoades and Judge Penn met with Judge Day in Judge Penn's office. The conversation centered around the gun incidents and Judge Day's ex parte contacts with BAS. Although the conversation was pointed, Judge Rhoades was not aggressive, nor did she engage in rapid-fire questioning tactics. During the meeting, Judge Day claimed he

¹³ Judge Day told Judge Rhoades he could not return to the courthouse because he and another VTC probationer — Joseph S. — were painting his house.

did not know that BAS was a felon and justified his contacts with BAS. Judge Day said that he had not known about Justin Day showing BAS the gun on January 12 because he was busy with fixing the pellet stove. Judge Rhoades and Judge Penn determined that Judge Day's conduct needed to be reported to this Commission. Judge Day decided to self-report his conduct to the Commission.

On August 23, 2014, Judge Day wrote the Commission a very vague letter as his self-report, noting a completely unspecified violation. The letter reads, "I was recently advised that one of the veteran participants in our court contacted our presiding judge with concerns about an interaction he had with me in January of this year." The letter named BAS and gave his case number but failed to identify any factual circumstances at all.

The Commission hired an attorney, Karen Saul, to investigate the matter further. Ms. Saul interviewed over a dozen people, including Judge Day, other Marion County judges and BAS. At the request of the Commission, Ms. Saul also investigated the 2012 soccer complaint.

Ms. Saul's December 12, 2014, interview with Judge Day was memorialized. Judge Day had an opportunity to review and revise the interview summary. The Commission finds that Judge Day was disingenuous on the following subjects:

- (1) Judge Day claimed that each and every out of court contact with BAS happened with full knowledge of the VTC team;
- (2) Judge Day claimed that his first out of court contact with BAS happened at the request of Lambert;
- (3) Judge Day denied that BAS had any contact with a gun at his daughter and son-in-law's house;

(4) Judge Day claimed that the VTC team encouraged the Days to invite BAS to Judge Day's house on December 26, 2013; and

(5) Judge Day denied that there was any conversation about waiving the weapons prohibition for BAS on January 12, 2014 when BAS handled Justin Day's gun in Judge Day's presence.

On February 6, 2015, Judge Day's then-counsel Mark Fucile wrote a lengthy defense of Judge Day's conduct to the Commission. One of the points Mr. Fucile made was that the VTC contract permitted ex parte contact and he cited the pertinent language: "I understand and agree that there will be discussions about my case, my treatment program, and my condition which may take place out of my presence or the presence of my attorney. I also understand that out of court contact with any members of the VTC team, including the VTC Judge and court personnel, authorized by the VTC team or treatment professionals is not considered ex parte contact." However, this was not the language in BAS's VTC contract.¹⁴ The contract language cited by Mr. Fucile is actually VTC contact language that became effective on February 6, 2015, the very day of Mr. Fucile's letter to the Commission. Judge Day amended this contract language without input from other members of the VTC team.

F. The "Hall of Heroes"

In 2011, Ms. Lambert formed the Partnership for Veterans at Risk (PVR), a registered 501(c)(3) non-profit, to provide training to law enforcement regarding working with veterans. Judge Day declined a position on the PVR Board of Directors. Nevertheless, he exercised

¹⁴ Compare with the provision in the contract signed by BAS: "I agree that the [VTC] Judge may communicate with others about my participation in [VTC] without the presence of my attorney or myself."

authority over the PVR. He created its budget and directed that more than 40% of its funds be used to create military art to be hung in his courtroom and in the surrounding public areas on the fourth floor of the Marion County Courthouse. The military art consisted of memorabilia, photographs, and documents. Judge Day determined the amounts to be donated for the creation and framing of the particular pieces of military art. He publically dubbed the fourth floor the "Hall of Heroes." He personally selected all the art work to be displayed, including pieces from his own family. The overall appearance of this military art collection, including the volume and content, created an atmosphere of implied partiality. Several of Judge Day's colleagues on the fourth floor were uncomfortable with the scope and nature of the art.

Judge Day, and Judge Day alone, sought and obtained donations from attorneys, some of whom appeared before him, to pay for the matting and framing of some of the military art. Judge Day set the price each donor should pay for the piece they wished to "sponsor." Judge Day solicited and collected funds from Marion County attorneys Kevin Mannix, Keith Bauer, Phil Parks, Ralph Spooner, Joe Much, and Paul Ferder. While Judge Day also accepted donations from some other Marion County judges, the amount of the judicial donations is quite different than the attorney donations. The judges collectively donated \$100, while the smallest individual attorney donation was \$225. The largest donation, \$793.50, came from Mr. Spooner, who was scheduled to appear in a trial before Judge Day the week following the donation. On at least one occasion, Judge Day solicited funds during a status conference involving a matter pending trial before Judge Day in Judge Day's chambers. Some of the checks to pay for the matting and framing of the war memorabilia were delivered directly to Judge Day and some

were collected by his staff at his direction. Furthermore, the amount of each piece specifically sponsored by the attorneys exceeded the actual cost of that piece.¹⁵

Judge Day knew that the donors expected something in return for their donations and he created placards identifying the attorneys or law firms who donated the funds. He also wrote descriptive placards for all of the art. At the direction of Judge Rhoades, Judge Day later removed the "sponsored by" portions of the placards. However, the descriptive placards remained, some of which were inappropriate and showed bias and a lack of neutrality.¹⁶

One of the pieces was a collage donated by the family of Dr. Ken Vollmar which contained a portrait of Adolph Hitler. Judge Day advanced \$879.20 to mat and frame this piece. PVR reimbursed him that amount. When Judge Rhoades told Judge Day to take that piece down, he responded, "You don't want to go there because some very influential people in this town want it up." Judge Rhoades viewed this as a veiled political threat. Judge Day did remove the Vollmar piece but returned it to the Vollmar family rather than giving it to the non-profit. The Vollmar family then reimbursed Judge Day \$879.20 for the expense associated with framing it. Judge Day did not reimburse PVR from the funds he received from the Vollmar family.

Judge Day did not personally profit from the proceeds of the wall hanging project.

G. Same Sex Marriage

Although performing marriages is not a mandatory judicial duty, from the beginning of Judge Day's tenure, he had officiated marriage ceremonies.

¹⁵ Mannix, for example, donated \$400 to sponsor a Wally Carson collage, which Elsinore framed and matted for \$232.12. Park and Bauer collectively donated \$500 to sponsor an Otto Skopil collage, valued at \$203.95. Spooner's \$793.50 far exceeded the \$387.60 value of a Bruce Williams collage. Ferder donated \$400 to sponsor a collage of the Vietnam War featuring Chief Justice De Muniz, which cost only \$270.90 to frame and mat.

¹⁶ For example, artwork with a placard that declared a bias against mental illness defenses. See Ex. 599.

On May 19, 2014, Judge Michael McShane overturned Oregon's ban on same-sex marriage. *Geiger v. Kitzhaber*, 994 F Supp 2d 1128 (D Or 2014). In early summer of 2014, Judge Day instructed his staff to "screen" marriage applicants to determine if they were a same sex couple. When a couple called about a marriage, Judge Day directed his staff to get their personal information and to tell them they needed to check the judge's schedule and would call them back. Staff was to then search OJIN for indications of same sex relations. If staff found that the couple was a same sex couple, Judge Day instructed them to call the couple back and indicate that Judge Day was "unavailable" on the day of their service and refer them to other judges. Judge Day continued to marry opposite-sex couples. He performed his last marriage on or after August 2014. In November 2014, Judge Day removed himself from the Marion County list of wedding officiants.

Between early summer 2014 and November 2014, Judge Day's staff did not have an occasion come up where Judge Day's screening process had to be used.

Judge Day is a Christian whose firmly held religious beliefs include defining marriage as only between a woman and a man.

H. Miscellaneous Factual Findings

1. Dating Website

In mid-2014, Ms. Brown and Ms. Curry viewed a profile on the dating website farmersonly.com which contained a picture of three people at a wedding, one of whom was Judge Day. The profile indicated it belonged to a man in the Salem area approximately Judge Day's age. Thus, Ms. Brown and Ms. Curry assumed the profile to be that of Judge Day. Evidence at the hearing established very clearly that the profile did exist and the photograph was indeed of Judge Day. However, the profile had nothing to do with Judge Day. It belonged to a

person for whom Judge Day had performed a wedding. Thus, the farmersonly.com evidence is simply not relevant to any material issue in this case.¹⁷

2. District Attorney's Office Internship

In the summer of 2015, Judge Day's son Daniel Day was looking for a summer legal internship due to his intent to apply to law school. For that purpose, Judge Day facilitated a connection between Daniel Day and Deputy District Attorney Orrio. Mr. Orrio then brought Daniel Day onto his prosecutorial team as an intern on a criminal case being tried before Judge Day that summer. According to Mr. Orrio, the defense attorneys did not object to Daniel Day's participation. Daniel Day was in the court room assisting Mr. Orrio during the trial and was identified to the jury as being Judge Day's son.

3. Judge Pellegrini

After Judge Cheryl Pellegrini was appointed to the bench in 2014, Judge Day invited her out to breakfast. Judge Day had been opposed to her appointment. At that breakfast, Judge Day indicated to her that his objections were not due to her qualifications to serve on the bench, but were due to her sexual orientation as a lesbian. Judge Pellegrini was relieved that Judge Day's objection to her appointment did not have to do with her abilities.

Judge Day's testimony was inconsistent with Judge Pellegrini's on this topic. Judge Day testified that he did not support Judge Pellegrini's appointment because she was a government lawyer. He stated that was the reason he had expressed to her at the breakfast noted above.

¹⁷ All evidence proffered on this subject was proffered by Judge Day in an attempt to impeach Ms. Brown and Ms. Curry. However, in that regard, the evidence only proved that Ms. Brown and Ms. Curry were truthful regarding what they viewed on the website.

Given all the other factual and credibility findings herein, the Commission finds Judge Pellegrini to be the more credible.

4. Publicity

Prior to the hearing in this case, Judge Day engaged in an organized media campaign designed to create the impression that the only reason for the investigation of his conduct is his position regarding same sex marriage. To this end, Judge Day made repeated public assertions that he was being unfairly attacked by this investigation due solely to his religious beliefs concerning same sex marriage. Judge Day made these statements despite the fact that his position on same sex marriage was not discovered by the Commission until after the investigation was well underway. His assertions in this regard were intentionally deceptive to the public.

II

ANALYSIS AND CONCLUSIONS OF LAW

A. The Constitutional and Statutory Scheme.

The permissible grounds for disciplining a judge were altered in 1976 as Article VII, §8(1) of the Oregon Constitution was amended to read:

"(1) In the manner provided by law, and notwithstanding section 1 of this Article, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

(a) Conviction in a court of this or any other state, or of the United States, of a crime punishable as a felony or a crime involving moral turpitude; or

(b) Wilful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties; or

(c) Wilful or persistent failure to perform judicial duties; or

- (d) Generally incompetent performance of judicial duties; or
- (e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court; or
- (f) Habitual drunkenness or illegal use of narcotic or dangerous drugs.”

In 1971 before these amendments to the Constitution, the Oregon legislature amended ORS 1.420 and 1.430, to give the Oregon Supreme Court authority to “suspend or censure” with further power to “suspended from office for the period specified in the order and his salary shall cease, if so ordered,” without creating “... a vacancy in the office of judge during the period of suspension.” The new statute did not specify the grounds or methodology for determining “suspension or censure” as distinct from grounds or methodology for removal.¹⁸

Since there are no separate grounds for suspension or censure, the Commission must prove the accused was guilty of one of the specific grounds for removal as stated in Article VII, §8(1) of the Oregon Constitution. *In re Piper*, 271 Or 726, 734-35, 534 P2d 159 (1975). Nevertheless, the Supreme Court retains authority to reprimand and censure judges for misconduct under its inherent power over lower courts. *Id* 271 Or at 738.

The Commission has authority to inquire into complaints concerning “any judge” or judicial candidate who allegedly failed to abide by the Code of Judicial Conduct. *In re Fadeley*, 310 Or 548, 556, 802 Or 31 (1990); *In re Piper*, 271 Or 726, 736, 534 P2d 159 (1975). The Supreme Court has admonished that the courts of Oregon belong to the people and in order to maintain the confidence of the people of Oregon in the courts of this state, it is essential that the judges of those courts be held to the highest standard of honesty and competence. *In re Jordan*,

¹⁸ The legislature adopted this statute, as Senate Bill 711, after the Commission called the Senate Judiciary Committee’s attention to the fact that it had “no power to recommend censure or suspension of judges, but could only removal for the offending judge.” See Report of the Judicial Fitness and Disability Commission dated March 2, 1971. See Minutes, Senate Judiciary Committee, April 7, 1971, p. 14.

290 Or 303, 335, 622 P2d 297 (1981). This standard appears to afford the Commission, as the Supreme Court's investigatory arm, the widest discretion in applying Article I, §8(1) and ORS 1.420.

The authority of the Commission to investigate is not limited to the words of a complaint submitted by a person. ORS 1.420(1) reads in part:

- 1) Upon complaint from any person concerning the conduct of a judge or upon request of the Supreme Court, and after such investigation as the Commission on Judicial Fitness and Disability considers necessary, the Commission may do any of the following:
 - (a) The Commission may hold a hearing pursuant to subsection (3) of this section to inquire into the conduct of the judge.
 - (b) The Commission may request the Supreme Court to appoint three qualified persons to act as masters, to hold a hearing ... on the conduct of the judge.
 - (c) The Commission may allow the judge to execute a consent to censure, suspension or removal. ... The consent and stipulation of facts shall be submitted by the commission to the Supreme Court.

The words "complaint from any person" in this section does not impose a jurisdictional requirement that there be a formal complaint by some identifiable person. *In the Matter of Sawyer*, 286 Or 369, 374, 594 P2d 805 (1979). The Commission may investigate the conduct of a judge upon the basis of any information coming to it from any person, including any information coming to it through any of its members or staff. *Id.* Furthermore, the accused judge need not be informed of the identity of any complainant or be provided with a copy of the complaint when the facts are not in dispute. ¹⁹ *Id.*

¹⁹ This is not to say that the Judge alleged to have committed a violation of the Oregon Code of Judicial Conduct must defend against a complaint without notice of the allegations. The rules governing the hearing process clearly provide that the judge shall receive a copy of the Commission's complaint and shall have an opportunity to prepare an answer to the complaint. The statute further provides that the hearing shall be public, the judge may be present at all times during the hearing, the judge has the right to present testimony and other evidence, the judge has the right to cross-examine the Commission's witnesses, and the judge has the right to representation. ORS 1.420(3).

As explained earlier, the burden of proof in this case is by clear and convincing evidence before a judge may be censured, suspended, or removed from office. This is the standard of review carried over from bar disciplinary proceedings accorded under *In re J. Kelly Farris*, 229 Or 209, 367 P2d 387 (1961). *In re Field*, 281 Or 623, 629, 576 P2d 348 (1978), citing *Geiler v. Commission on Judicial Qualifications*, 10 Cal3d 270, 515 P2d 1, 110 Cal Rptr 201 (1973); *In re Nowell*, 293 NC 235, 237 SE2d 246 (1977).

B. Applicable Sections of the Oregon Code of Judicial Conduct

The Commission finds that the following code sections from the Oregon Code of Judicial Conduct are applicable to the conduct being reviewed in the present case:

Rule 1.3 Definitions

For the purposes of this Code, the following definitions apply:

Ex parte communication: A communication between a judge and fewer than all parties or their lawyers, concerning a pending or impending matter.

Pending matter: A matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

Personally solicit funds: Directly requesting financial support or in-kind services, in person, by letter, by telephone, or by any other means of communication, but does not include receiving and handling funds or goods donated or offered in exchange for goods and services sold to raise funds.

Rule 2.1 Promoting Confidence in the Judiciary

(A) A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.

(B) A judge shall not commit a criminal act.

(C) A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.

(D) A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rule 2.2 *Avoiding Misuse of the Prestige of Office*

A judge shall not use the judicial position to gain personal advantage of any kind for the judge or any other person. However, a judge may provide a character or ability reference for a person about whom the judge has personal knowledge.

Rule 3.3 *Impartiality and Fairness*

(A) A judge shall uphold and apply the law and perform all duties of judicial office, including administrative duties, fairly, impartially, and 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, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic 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.

(C) A judge shall not take any action or make any comment that a reasonable person would expect to impair the fairness of a matter pending or impending in any Oregon court.

Rule 3.7 *Decorum, Demeanor, and Communication with Jurors*

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not praise or criticize jurors for their verdict other than in a ruling in a proceeding, but a judge may thank and commend jurors for their service. A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

Rule 3.9 *Ex Parte Communications*

(A) Unless expressly authorized by law or with the consent of the parties, a judge shall not initiate, permit, or consider ex parte communications. The following exceptions apply:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, that does not address the merits of a matter, is permitted, provided:

(a) the judge reasonably believes that no party will gain a

procedural, tactical, or other advantage on the merits, as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties a reasonable opportunity to respond.

(2) A judge may consult with court staff, court officials, and employees of the judicial branch of government whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges at the same level, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(3) A settlement judge may, with the consent of the parties, confer separately with the parties or their lawyers in an effort to settle matters before the court.

(B) If a judge receives an unauthorized ex parte communication bearing upon the merits of a matter, the judge shall promptly notify the parties of the substance of the communication and provide them with a reasonable opportunity to respond.

Rule 3.12 Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid with judicial and lawyer discipline agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person whom the judge knows or suspects has assisted or cooperated with an investigation of a judge or lawyer.

Rule 4.5 Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Except as provided in Subsection (B), a judge may not personally solicit funds for an organization or entity.

(B) So long as the procedures employed are not coercive, a judge may personally solicit funds for an organization or entity from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority, and the judge may assist the judge's minor children with fundraising.

(C) Subject to Subsection (A) and Subsection (D), and so long as the procedures employed are not coercive, a judge may participate in activities sponsored by organizations or entities devoted to the law, legal education, the legal system, or the administration of justice, and those sponsored by or on behalf of not for profit, public or private, legal, educational, religious, charitable, fraternal, or civic organizations, including but not limited to the following activities:

(1) assisting such an organization or entity in fundraising, management, and investment of the organization's or entity's funds;

(2) speaking at, receiving an award or other recognition at, or being featured on the program of such an organization or entity;

(3) serving as an officer, director, trustee, or nonlegal advisor of, and soliciting membership for, such an organization or entity;

(D) A judge may not engage in activities described in Subsection (C) if it is likely that the organization or entity will frequently be engaged in adversary proceedings in the state courts of Oregon.

(E) So long as the procedures employed are not coercive, a judge may personally encourage or solicit lawyers to provide publicly available pro bono legal services.

C. Wilfulness under the Oregon Constitution

Under the Oregon Constitution a judge may be removed for numerous reasons, including "wilful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;" "wilful or persistent failure to perform judicial duties;" and a "wilful violation of any rule of judicial conduct as shall be established by the Supreme Court." Or Const, Art VII (Amended), §8(1)(b); §8(1)(c); §8(1)(e).

A judge's conduct is considered "wilful" under Article VII (Amended), section 8, if the judge intended to cause a result or take an action contrary to an applicable rule and the judge is aware of circumstances that in fact make the rule applicable. *In re Conduct of Gustafson*, 305 Or 655, 660 (1988). The intent required under this rule is the same as for an intentional act – that the act was done with the conscious objective of causing the result or of acting in the manner defined in the rule of conduct. *In re Conduct of Schenck*, 318 Or 402, 405 (1994). An improper motive is not required for a finding of willful misconduct. *Gustafson*, 305 Or at 660. ("An improper motive can taint an otherwise permissible act, and a benign motive will not excuse an intentional or knowing violation of a nondiscretionary norm.") Both subjective and objective elements of culpability may be used in determining willful misconduct. *Id.* at 659.

The severity of a judge's misconduct has no weight in determining if the misconduct was willful. *Id.* at 660. Ignorance of the applicable standards does not negate the willfulness of a judge's actions. *Id.* In fact, if a judge acts in conscious ignorance of the legal basis for an action and does not seek to determine the lawfulness of that action, this action is considered willful. *Id.* at 668. Mere incompetence does not fall under the definition of willfulness. *Id.* at 659.

D. Count One

Judge Day violated Rule 2.1(A) at the October 17, 2012 Chemeketa soccer game. All of Judge Day's actions that day were clearly designed to intimidate a referee because Judge Day was upset. His behavior did not observe high standards of conduct required to preserve the integrity, impartiality, and independence of the judiciary. Furthermore, he did not act in a manner that promotes public confidence in the judiciary. His behavior embodied the opposite.

Judge Day also violated Rule 2.1(C) at the October game. In trying to intimidate Mr. Deuker through the use of his judicial business card, Judge Day engaged in conduct that reflects adversely on his character and temperament to serve as a judge, as did the manner in which Judge Day addressed Mr. Deuker. This violation was also evident by Judge Day's demeanor while Mr. Deuker was testifying concerning the events of that day.

Finally, Judge Day violated Rule 2.2 during the exchange with Mr. Deuker. Judge Day is well aware of the power of his position as it may impact a member of the public in this type of interaction. By brandishing his judicial business card while threatening to complain to a person's employer about their job performance, Judge Day was clearly trying to use his judicial position for personal gain, that gain being compliance with his requests.

It has been established by clear and convincing evidence that Judge Day intentionally intimidated Mr. Deuker by the use of his judicial position for his own personal gain. Judge Day

was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

E. Count Two

Judge Day was not forthright to the Commission in his February 2013 response regarding the soccer incidents. He claimed that, at the October game, he only produced his card because Mr. Deuker requested it. That was not true. Not only was there credible evidence to the contrary, the Commission finds it completely implausible that the event could have unfolded as Judge Day claims. Mr. Deuker did not request Judge Day's card, Judge Day thrust it at him in anger. Judge Day further claimed that at the November game, Mr. Allen had physically accosted him. That is likewise not true. Neither Mr. Allen nor anyone else on the field at the November game touched Judge Day.

By misrepresenting these facts in his February 2013 response letter to the Commission, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit, and misrepresentation, and violated Rule 3.12(A) by not being candid with the Commission, a judicial discipline agency.

It has been established by clear and convincing evidence that Judge Day's misrepresentations were an intentional attempt to avoid responsibility for his own actions. As such, Judge Day was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

F. Counts Three and Four

On November 18, 2013 and January 12, 2014, Judge Day facilitated the handling of a firearm by BAS, a convicted felon on active supervised probation. On January 12, 2014, Judge Day was also aware of his son's plans to target shoot with BAS, which would also facilitate BAS's handling of a firearm.

During these incidents, Judge Day verbally granted permission for BAS to handle the weapon. Although Judge Day continues to deny this, it is actually inconceivable that BAS would handle a firearm in the presence of Judge Day without asking and receiving permission from the judge. BAS was on Judge Day's caseload and had every motivation to be successful on probation. For this veteran, success meant not having a felony conviction on his record at the end of his probationary period. Judge Day clearly waived the prohibition against BAS handling a firearm during these incidents. At the time of these incidents, Judge Day knew that BAS was a felon and knew that BAS's supervised probation conditions prohibited him from possessing firearms. Judge Day was fully aware that, under Oregon law, it is a felony for a felon in BAS's position to possess a firearm.

At the time of these incidents, BAS's case was a pending matter. BAS's attorney, Mr. Wren, and the prosecutor, Mr. Orrio, were not present and neither of them had been consulted previously by Judge Day regarding the events that transpired. Nothing within BAS's VTC contract allowed Judge Day to have ex parte communications with BAS.²⁰

²⁰ It should be noted that there are no special provisions in the Code of Judicial Conduct that pertain to specialty or treatment courts or exempt judges presiding over those courts from the rules in the code.

By facilitating the handling of a firearm by a convicted felon on active supervised probation on each of these dates, Judge Day violated Rule 2.1(A) in that his behavior did not observe high standards of conduct so that the integrity and impartiality of the judiciary would be preserved, nor did he act "in a manner that promotes public confidence in the judiciary."

By facilitating the handling of a firearm by a convicted felon on each of these dates, Judge Day aided and abetted in the commission of the crime of felon in possession of a firearm, which is a felony. *See* ORS 166.270 and ORS 161.155(2)(b). Thus, during these incidents Judge Day violated Rule 2.1(B), which prohibits a judge from committing a criminal act.

By facilitating the handling of a firearm by a convicted felon on active supervised probation on each of these dates, Judge Day violated Rule 2.1(C) in that his conduct was adverse to both his character and his competence to serve as a judge.

By facilitating the handling of a firearm by a convicted felon on active supervised probation and by verbally granting the permission for that person to handle the weapons in violation of his probation conditions and prohibitions under Oregon law on each of these dates, Judge Day violated Rule 3.9(A), which prohibits a judge from initiating or permitting ex parte communications as such communications are defined in Rule 1.3.

It has been established by clear and convincing evidence that Judge Day facilitated the possession of a firearm by a felon intentionally. In the first instance, Judge Day encouraged BAS to seek out and find the weapon, followed by his permission to allow BAS to handle it. In the second instance, Judge Day purposefully allowed BAS to handle the weapon in order to show his son how to use it safely. As such, on each occasion, Judge Day was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(B), 2.1(C) and Rule 3.9(A) during each incident constitutes willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is also in violation of Article VII, §8(1)(b) of the Oregon Constitution.

G. Count Five

Judge Day was not forthright with the Commission's investigator in several respects, most notably when he denied having waived the prohibitions against BAS possessing firearms. For the reasons previously stated herein, the Commission finds this not to be a true statement. Furthermore, Judge Day was not forthright to his colleagues, Judge Rhoades and Judge Penn when he indicated to them that he had not waived those same prohibitions and when he claimed to not know that BAS was a felon. Those statements were simply not true.

By misrepresenting facts in his statement to the Commission's investigator, Karen Saul, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, he violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit and misrepresentation, and he violated Rule 3.12(A) by not being candid with the Commission, a judicial discipline agency.

By misrepresenting the facts noted above to Judge Rhoades and Judge Penn, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, and he violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit and misrepresentation.

It has been established by clear and convincing evidence that Judge Day's misrepresentations were an intentional attempt to avoid responsibility for his own actions. As such, Judge Day was acting with a conscious objective to cause a result. His violation of the

above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

H. Count Six

Clearly, Judge Day was enamored with BAS's notoriety and his accomplishments in the military. This fascination with BAS's military history caused Judge Day to lose perspective on who he was really dealing with. BAS was a criminal defendant on Judge Day's caseload subject to Judge Day's orders and sanctions. In this context, Judge Day's unsolicited, and often unwanted, personal out-of-court contacts with BAS were completely inappropriate. These contacts include texting BAS, showing up at BAS's home uninvited, taking BAS to a wedding, soliciting introductions to BAS's out of town friends, bringing BAS to Judge Day's home, nurturing a relationship between BAS and Judge Day's son, allowing BAS to handle firearms and facilitating other favors for BAS in the form of rides, food, etc. In many, if not most, of these instances, BAS actively tried to avoid Judge Day's overt attentions. In the end, due to Judge Day's conduct, this criminal defendant had no choice but to acquiesce to Judge Day's requests to avoid any negative impact on the outcome of his probation.

Judge Day's conduct singled out BAS for obvious favoritism. Several VTC participants testified on Judge Day's behalf at the hearing. However, no other VTC participant had personal visits from Judge Day at their home while in VTC. No other VTC participant received texts from Judge Day while in VTC. No other VTC participant had been to Judge Day's residence for any reason, let alone during the holidays for a family celebration. These acts of favoritism are tangible manifestations of Judge Day's bias toward BAS.

Judge Day's conduct regarding BAS violates Rule 2.1(A) in that he did not observe high standards of conduct so that the integrity, impartiality and independence of the judiciary were

preserved. Further, this conduct violated Rule 2.1(C) as it reflects adversely on Judge Day's character, competence, and temperament to serve as a judge. Finally, Judge Day's conduct violated Rule 3.7(B) in that his insistent, unwanted out of court contacts were discourteous and undignified toward BAS.

It has been established by clear and convincing evidence that all of the out-of-court contacts with BAS were intentional and purposeful, as was Judge Day's overall treatment of him. Judge Day was acting with a conscious objective to cause a result. In some instances, Judge Day's objective may have been charitable. However, in other instances, his objective was personal gain. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(C) and Rule 3.7(B) constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is also in violation of Article VII, §8(1)(b) of the Oregon Constitution.

I. Count Seven

As previously noted, it is not the purpose of this proceeding to evaluate Marion County's Veterans Treatment Court, its practices, the best practices in any other treatment court, or the effectiveness of treatment courts, either specific to Marion County or generally elsewhere. During the hearing on this matter, expert opinions varied greatly regarding such practices and procedures.

None of the findings made by the Commission regarding the allegations in count seven implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count seven.

J. Count Eight

The allegations in count eight were not proven by clear and convincing evidence. As such, the Commission recommends dismissal as to count eight.

K. Count Nine

The "Hall of Heroes" was Judge Day's personal project and he was the sole fundraiser for it. Either directly or under the guise of PVR, Judge Day secured all the funds, decided how they would be spent, gathered the materials and artwork, worked with the framer, drafted the placards, and hung the pieces.

To this end, there is no question that Judge Day sought and received money from attorneys. In various contexts, Judge Day talked to attorneys about the project and donations, prompting the attorneys to ask about donating. Judge Day would then solicit financial support from them and collect the money. Oftentimes, this occurred in the courthouse with attorneys that appear before Judge Day. In one instance, it happened during a status conference in his chambers.

By soliciting funds from attorneys, Judge Day violated Rule 2.1 (A). Instead of preserving the integrity, impartiality, and independence of the judiciary, Judge Day's actions tarnished each of those concepts.

By soliciting funds from attorneys, Judge Day also violated Rule 4.5(A) which prohibits judges from personally soliciting funds from anyone for any organization or entity. There are

exceptions to this rule, but there are no exceptions that excuse Judge Day's solicitations.

Soliciting funds from anyone in this context is a violation of Rule 4.5(A). Judge Day's doing so from attorneys who appear before him is a flagrant violation of the rule.

Soliciting funds is very clearly an intentional and purposeful act. Judge Day was acting with a conscious objective to cause a result. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(C) and Rule 3.7(B) by soliciting funds from attorneys constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is in violation of Article VII, §8(1)(b) of the Oregon Constitution.

L. Count Ten

None of the findings made by the Commission regarding the allegations in count ten implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count ten.

M. Count Eleven

None of the findings made by the Commission regarding the allegations in count eleven implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count eleven.

N. Count Twelve

Between the time of Judge McShane's ruling on same sex marriage in May of 2014 and November of 2014, when Judge Day declined to perform any marriages, Judge Day implemented a system directing his staff to discriminate against any same sex couple that may seek out Judge Day to perform their marriage. He directed his staff to research inquiring couples and, if their research revealed a same sex couple, he instructed his staff to lie to the couple about his availability and direct the couple to another judge. Judge Day asserts that this system of discrimination "accommodated" same sex couples.

Judge Day took the oath of office for judges in ORS 1.212 upon his swearing in. "The oath represents the judge's solemn and personal vow that he or she will impartially perform all duties incumbent on the office and do so without regard to the status or class of persons or parties who come before the court. The oath is a reflection of the self-evident principle that the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty. When a judge takes the oath of office, 'he or she yields the prerogative of executing the responsibilities of the office on any basis other than the fair and impartial and competent application of the law' *Mississippi Judicial Performance Com'n v. Hopkins*, 590 So2d 857, 862 (Miss 1991)." OH Adv Op 15-001 (Ohio Bd Prof Cond), 2015 WL 4875137.

In keeping with the oath of office, Rule 3.3(B) prohibits a judge from manifesting prejudice against anyone based upon sexual orientation in the performance their judicial duties. The discriminatory practice implemented by Judge Day violates Rule 3.3(B). Furthermore, the idea that a discriminatory practice is a positive "accommodation" to those being discriminated against shows a deplorable lack of understanding of the most basic concepts of impartiality.

Judge Day's implementation of this discriminatory practice also violates Rule 2.1(A). Despite the fact that Judge Day's staff did not have the occasion to utilize his plan, the intended discrimination corrodes the integrity and impartiality of the judiciary. Furthermore, Judge Day's actions did not promote public confidence in the judiciary and the judicial system. In fact, his actions have had quite the opposite effect.

Judge Day's discriminatory plan required his staff to lie to the public in order to conceal Judge Day's discriminatory tactics. Thus, Judge Day also violated Rule 2.1(D).

Judge Day's discriminatory practice was an intentional, purposeful act with a conscious objective to cause a result. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(A), 2.1(D) and Rule 3.3(B) constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is in violation of Article VII, §8(1)(b) of the Oregon Constitution.

O. Count Thirteen

Despite the non-partisan nature of his judicial position and the neutral nature of the court, Judge Day's plan for the décor in his jury room was clearly partisan. Although Judge Day originally planned to hang partisan artwork in his jury room, knowing that some colleagues would likely object, the artwork was never actually hung. Judge Day acquiesced to Judge Rhoades request by eventually removing the artwork from the courthouse without displaying it to the public. Thus, the allegations in count thirteen do not implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count thirteen.

III

SANCTION

A. The Purpose and Standard for Judicial Sanctions

The purpose of this proceeding is not punishment, but the proper administration of justice for the public good. *In re Jordan*, 290 Or 303 (1981). In that regard, it is the duty of the Commission under ORS 1.420(4) to make a recommendation to the Oregon Supreme Court of censure or suspension or removal of the judge.

"In order to maintain the confidence of the people of Oregon in the courts of this state, it is essential that the judges of those courts be honest and competent judges. To accomplish that purpose, the Oregon Constitution was amended in 1976 to impose upon this court the duty and responsibility of suspending or removing from judicial office any judge found by it to be unfit for judicial office for any of the grounds set forth in that constitutional amendment. Article VII (Amended), Section 8(1). * * * To be a competent judge it is not sufficient that a judge have legal knowledge and ability and be diligent, industrious and independent. It is also essential that a judge must have unquestioned integrity, together with a judicial temperament of fairness, patience, courtesy and common sense."

Id.

"Judges are disciplined primarily to preserve public confidence in the integrity and impartiality of the judiciary. Thus, disciplining judges serves to educate and inform the judiciary and the public that certain types of conduct are improper and will not be tolerated. Discipline of a judge also serves to deter the disciplined judge as well as other judges from repeating the type of conduct sanctioned." *In Re Conduct of Schenck*, 318 Or 402, 438 (1994).

The general criteria to be evaluated in determining the appropriate sanction in judicial discipline cases include the impact upon litigants and attorneys of the judge's conduct, the extent to which the conduct tends to undermine public confidence in the judicial system, the seriousness

of the violations, and the extent to which the judge demonstrates an interest in avoiding similar problems in the future. *Id.*

Similarly, in *In re Deming*, 736 P2d 639 (Washington 1987), the Washington Supreme Court stated that, to determine the appropriate sanction, it would consider the following non-exclusive factors: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent, and frequency of occurrence of the acts of misconduct (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

B. Analysis of Judge Day's Conduct

In reviewing the *Scheneck* and *Deming* factors, an overview of Judge Day's behavior reveals several patterns of misconduct.

First, Judge Day's behavior indicates that he has little insight concerning the boundaries required in a judicial position. In fact, much of Judge Day's conduct violated common sense restrictions prescribed by the very nature of the judiciary. Examples of Judge Day's lack of boundaries include:

- Facilitating the hiring of probationers under his supervision to assist with home projects for himself and his family
- Continuing to have improper ex parte contact with VTC probationers despite

- Judge Prall's warnings at the December 2013 treatment court conference
- Sitting as the judge on a case while his son was working for one of the parties and allowing that fact to be announced to the jury
 - Compelling BAS to come to Judge Day's home and interact with his family
 - Relentlessly texting BAS, all the while ignoring his efforts to avoid engaging in a personal relationship with Judge Day and his family
 - Sending personal photos and family images to BAS
 - Going to BAS's home
 - Interviewing BAS for the article Day wrote for the OTLA Trial Magazine and revealing personal information about BAS
 - Soliciting an introduction to BAS's Navy SEAL friends
 - Shoving his judicial business card at a soccer referee and crossing the soccer field to interact with the officials in an off limits area
 - Responding to Judge Rhoades in the manner he did when she asked him to take down the Hitler collage – not only was it a veiled political threat, it also reflected his knowledge that contributors expected political benefits
 - Imposing his personal agenda onto the courthouse via the volume and content of his military wall art collection
 - Soliciting funds from attorneys, some of whom appear before him

Judge Day's lack of boundaries in these instances clearly evidences a pattern of misconduct the nature of which is disturbing. The behavior is frequent and extensive. His lack of boundaries occurs both in and out of the courtroom and in both his official capacity and in his personal life. Although Judge Day acknowledges that most of these acts did in fact occur, he either does not believe that they implicate any of the governing judicial rules or he characterizes them in such a way as to excuse them. All these boundary issues have had a damaging effect on the integrity of and respect for the judiciary. The misconduct undermines confidence in the judicial system. Furthermore, much of this misconduct was an exploitation of his position for personal gain. Given the nature of the misconduct and Judge Day's lack of appreciation for its seriousness, the Commission is not confident that Judge Day will make any effort to change or modify his behavior.

Second, there is a pattern of self-benefit to much of Judge Day's conduct. Examples of Judge Day's misconduct that provided him with a personal benefit include:

- Allowing a felon to handle a firearm to help his own son learn to safely handle a gun and to mentor his own son to prepare him for entry into the military
- Taking a noted Navy seal to a wedding to show him off
- Soliciting an introduction to a famous person from a probationer under his supervision
- Using his judicial business card to intimidate a soccer referee
- Encouraging his son's internship with the District Attorney's office during a case he was adjudicating such that his son would gain experience prior to applying for law school
- Putting up certain artwork in order to ingratiate himself to "powerful people"
- Compelling BAS, with whom he was fascinated because of BAS's military activities, to come to his home and interact with his family
- Using probationer laborers at his home, whether or not they were paid
- Soliciting funds from attorneys for his personal project
- Receiving a double reimbursement for the Vollmar wall hanging
- Using the 501(c)(3) PVR to decorate his own courtroom and the hallways of the fourth floor to promote a personal agenda and personal prestige
- Making public statements in pre-hearing publicity to create the impression that this proceeding was solely regarding his religious beliefs and his refusal to conduct same-sex marriages in order to deflect public attention away from other misconduct

Judge Day's actions evidence a pattern of exploiting his judicial position to satisfy his personal desires. The behavior is frequent and extensive. Judge Day uses his judicial position to exert discreet pressure on members of the public, including attorneys and litigants, for his personal gain. The conduct occurs both in and out of the courtroom and in both his official capacity and in his personal life. Judge Day acknowledges that most of these acts did in fact occur. However, once again, he either does not believe that they implicate any of the governing judicial rules or he characterizes them in such a way as to excuse them. The misconduct undermines confidence in the judicial system. Given the nature of the misconduct and Judge

Day's lack of appreciation for its seriousness, the Commission is, once again, not confident that Judge Day will make any effort to change or modify his behavior.

Third, and possibly the most disturbing, Judge Day has engaged in a pattern of dishonesty. Although the goal of much of his disingenuousness appears to be covering up misconduct, some of this conduct seems to have other independent objectives. Examples of Judge Day's untruthfulness include:

- Judge Day represented by implication to the Commission via letter that the new VTC contract language, implemented on February 6, 2015, was in effect at the time of his interactions with BAS and, thus, it excused his ex parte contacts with BAS, neither of which were true.
- Regarding the October 17, 2012 soccer game, Judge Day stated in writing and under oath at the hearing that he provided his business card to Mr. Deuker because Mr. Deuker asked him for the card. That is not true.
- Regarding the November 7, 2012 soccer game, Judge Day stated in writing to the Commission that Mr. Allen physically accosted him. That is not true. After credible evidence was discovered to the contrary, Judge Day maintained under oath at the hearing that someone physically shoved him, but backed off on identifying the individual. Although Judge Day attempted to adjust his testimony to conform to the more credible evidence, his statements remained deceptive.
- Judge Day's testimony concerning how he introduced BAS at the wedding was untruthful.
- Judge Day indicated that he did not solicit funds from attorneys for the Hall of Heroes project. That is not true.
- Judge Day was dishonest in accepting reimbursement from the Vollmar family for their wall hanging when it was removed when he had already been fully reimbursed for that piece by the 501(c)(3) PVR.
- Regarding the gun at the Mansell residence, Judge Day testified under oath at the hearing that he did not suggest that BAS find the gun. That was untrue. Judge Day testified under oath at the hearing that he did not waive the prohibition against BAS handling guns on that occasion. That was not true. Judge Day testified under oath at the hearing that BAS did not touch the gun on that occasion. That was not true.
- Regarding the gun on January 12, 2014, Judge Day testified under oath at the hearing that he did not give BAS permission to handle the gun. That was

untrue. Judge Day testified under oath at the hearing that he did not see BAS handle the gun on that occasion. That was not true. Judge Day testified under oath at the hearing that he did not know that his son was returning that day to go target shooting with BAS. That was not true.

- Judge Day was not honest with the VTC staff concerning BAS's access to guns and he disingenuously omitted the extent of BAS's gun handling when speaking to the prosecutor and defense attorney.
- At the meeting in Judge Penn's chambers, Judge Day claimed that he was unaware that BAS was a felon. That was not true.
- Judge Day instructed his staff to lie about his scheduling in the event that a same-sex couple sought his services in the performance of their marriage.
- Judge Day testified under oath at the hearing that he told Judge Pellegrini that he was concerned about her appointment because of the number of government attorneys on the bench. That was not true. Judge Day actually indicated to her that he was concerned about her appointment due to her sexual orientation.
- Judge Day has been dishonest to the public at large when asserting that this proceeding is due to his religious beliefs and his refusal to perform same-sex marriages. That is not true:

Judge Day's dishonesty by its very nature greatly undermines public confidence in the judicial system, particularly those untruths uttered under oath. A judge's integrity is paramount to the fair and impartial administration of justice. Judge Day's misrepresentations constitute a systematic effort to avoid responsibility for his misconduct. His continual mischaracterization of his behavior involving a felon and a firearm are particularly serious and disconcerting. Not only does it impugn his integrity, but it is an attempt to conceal criminal conduct. Given the nature of Judge Day's dishonesty, rehabilitating his integrity to the point of judicial competency is dubious at best.

Finally, the pattern of Judge Day's continuing conduct indicates that, even after the Commission's investigation of his behavior began in August, 2014, he was unable to understand the magnitude of his actions in relation to the Code of Judicial Conduct. Examples of Judge Day's continuing poor judgment include:

- Continuing to collect and track money donations for his Hall of Heroes project as late as October 2015
- Making the VTC contract change in February 2015 in an attempt to justify his ex parte contacts with BAS
- Sitting as the judge on a case in the summer of 2015 while his son was working for one of the parties and allowing that fact to be announced to the jury
- Continual public mischaracterizations of this disciplinary process, both procedurally and substantively

This pattern of ongoing conduct indicates a continuing lack of appreciation for the nature of a judicial position. Judge Day does not appear to recognize situations that either impugn his integrity or trigger ethical violations. Thus, once again, the Commission is not confident that Judge Day will make the required effort to change or modify his behavior.

C. Conclusion

Although Judge Day has no prior record of discipline and has a good reputation among his colleagues, all other evaluation factors noted in *Schenck* and *Deming* are implicated by Judge Day's behavior. His misconduct is not isolated. It is frequent and extensive. The Commission has found that Judge Day willfully violated ten Rules of the Code of Judicial Conduct, several of them multiple times.²¹ Judge Day's pattern of behavior includes misconduct for personal gain and misconduct amounting to criminal behavior. Judge Day shows no outward sign of comprehending the extent or nature of his ethical violations. His misconduct is of such a nature as to impugn his honesty and integrity. Finally, Judge Day's conduct before, during and after the Commission's investigation undermines the public's confidence in the judiciary.

²¹ Rules 2.1(A), 2.1(B), 2.1(C), 2.1(D), 2.2, 3.3(B), 3.7 (B), 3.9(A), 3.12(A) and 4.5(A).

"Removal from office is appropriate where the judge is not competent to perform the duties of the office, *In the Matter of Field, supra*, 281 Or at 634-37, 576 P2d 348, or where a series of misconduct incidents calls into question the judge's competence and integrity, *In re Jordan*, 290 Or 303, 336-37, 622 P2d 297, reh'g den 290 Or 669, 624 P2d 1074 (1981)." *Schenck, supra*.

Taking into account the reasons for imposing judicial discipline, the nature of the accused's misconduct, and all the other factors described above in *Schenck* and *Deming*, the Commission concludes unanimously that the appropriate sanction in this case is removal.

Pursuant to Commission Rule of Procedure 16 (b) – I certify this to be the true and accurate recitation of the findings of fact, conclusions of law, and recommendation of the Oregon Commission on Judicial Fitness and Disability.



Oregon Commission on Judicial Fitness and Disability Chairperson

Attachment 7:
Inquiry Concerning A Judge, No. 14-255
re: John C. Murphy

Supreme Court of Florida

No. SC14-1582

INQUIRY CONCERNING A JUDGE, NO. 14-255 RE: JOHN C. MURPHY.

[December 17, 2015]

PER CURIAM.

This matter is before the Court for review of the recommendation of the Florida Judicial Qualifications Commission that Judge John C. Murphy be disciplined as follows: a public reprimand, suspension without pay for 120 days, a fine of \$50,000 plus costs, continued participation in a mental health therapy program until successfully discharged, and completion of Phase I of the Judicial Education Courses in the Florida Judicial College New Judges Program at his own expense and without receiving continuing judicial education credit. We have jurisdiction. See art. V, § 12, Fla. Const. Pursuant to our constitutional authority, we reject the Judicial Qualifications Commission's recommendation and instead remove Judge Murphy from office for violations of the Code of Judicial Conduct and Rules of Professional Conduct by his misconduct on June 2, 2014.

Judge Murphy's misconduct includes the following: (1) threatening to commit violence against an assistant public defender; (2) engaging in a physical altercation with counsel; and (3) resuming his docket while defendants were without counsel. This egregious conduct demonstrates his present unfitness to remain in office. Furthermore, where a judge's actions erode public faith in the courts, removal is appropriate. Judge Murphy's grievous misconduct became a national spectacle and an embarrassment to Florida's judicial system. We conclude that, through his misconduct, Judge Murphy surrendered his privilege to serve in our court system.

BACKGROUND

The Florida Constitution establishes the Judicial Qualifications Commission (JQC), an independent entity with two parts, an Investigative Panel and a Hearing Panel, to investigate and hear allegations of professional misconduct by Florida judges. The Investigative Panel investigates alleged misconduct and files formal charges. The Hearing Panel subsequently hears evidence on the charges and makes findings, conclusions, and recommendations on both the misconduct and appropriate discipline. Art. V, § 12(b), Fla. Const.

We may accept, reject, or modify the Hearing Panel's findings, conclusions, and recommendations. Art. V, § 12(c)(1), Fla. Const. Although the Hearing Panel in this case recommended discipline short of removal, the Florida Constitution

gives this Court the responsibility to determine appropriate discipline, which includes removal from office. Id.; see In re Sloop, 946 So. 2d 1046, 1049 (Fla. 2006); In re Henson, 913 So. 2d 579, 589 (Fla. 2005).

On August 13, 2014, the JQC filed its Notice of Formal Charges against County Court Judge John C. Murphy of the Eighteenth Judicial Circuit in and for Brevard County for his behavior during court proceedings. A majority of the JQC's Investigative Panel found that probable cause existed for charges based on Judge Murphy's alleged misconduct of threatening violence against an assistant public defender, leaving the bench to meet the assistant public defender in the hall to engage in a physical scuffle, returning to the bench to call cases in which defendants were represented by the Public Defender's Office and were without the presence of their attorney, and inducing some of the defendants to waive speedy trial rights. The JQC asserted in its Notice of Formal Charges that Judge Murphy's conduct violated Canons 1, 2A, 2B, 3A, 3B(2), 3B(4), and 5G of the Code of Judicial Conduct.

On August 13, 2014, Judge Murphy filed his answer to the Notice of Formal Charges. Judge Murphy maintained that he did not become frustrated because the assistant public defender refused to waive speedy trial, but rather because counsel "repeatedly refused to make any announcement to the court regarding the wishes of several clients—whether it be to proceed to trial, to enter a plea, or to waive the

right to a speedy trial.” Judge Murphy denied that he induced any defendant to waive speedy trial rights.

The Hearing Panel heard this matter on March 30 and March 31, 2015. A portion of the courtroom video from the incident was played for the Hearing Panel. The video showed Judge Murphy’s verbal altercation with assistant public defender Andrew Weinstock after Mr. Weinstock refused to waive speedy trial for his client. Judge Murphy stated, “You know if I had a rock, I would throw it at your [sic] right now. Stop pissing me off. Just sit down.” When Weinstock refused to sit down, asserting his right to stand and represent his clients, Judge Murphy responded, shouting: “I said sit down. If you want to fight, let’s go out back and I’ll just beat your ass.” The two men left the courtroom and met in the hall.

Although there is no video of the events that occurred in the hallway, the courtroom audio captured Judge Murphy remarking, “Alright you, you want to fuck with me?” and sounds of a scuffle. Mr. Weinstock subsequently requested that Judge Murphy be arrested for hitting him twice in the face, but no arrest was made. There was no evidence, other than his own testimony, that Mr. Weinstock had been hit, and there is no video to confirm what occurred in the hallway. Upon Judge Murphy’s return to the courtroom, he called the following cases in which the

defendants were represented by the Public Defender's Office, but no assistant public defender was present:

1. State v. Rounkles. Judge Murphy gave the defendant options, either set the charges for trial or waive speedy trial. After the defendant stated he wanted his case done as fast as possible, Judge Murphy set the case for trial.

2. State v. Samperi. After the defendant told the court that his lawyer had not returned his phone calls, Judge Murphy responded, "I'm sorry. Not all public defenders do that." Judge Murphy later suggested that "all of you that have a complaint about the public defender, if you'd call the Public Defender's Office and make the complaint or, even better, write a letter and send it to the Public Defender's Office . . . I think that would help." Judge Murphy asked the defendant if he wished to have the public defender removed from his case, to which the defendant said, "I think that's evident, sir." Judge Murphy removed the public defender and took testimony from the alleged victim in the case, the defendant's girlfriend, who wanted contact with the defendant. Judge Murphy lifted the no-contact order and instead ordered no unconsented contact. The defendant asked for a continuance. Judge Murphy set a new court date on the docket and reappointed the public defender.

3. State v. Simpkins. Judge Murphy announced the waiver of speedy trial for the defendant's violation of community supervision charge even though the

defendant did not state her intent to waive speedy trial nor did she request a continuance.

4. State v. Spikes. The defendant stated that he wanted to resolve his resisting arrest charge. Judge Murphy asked the defendant if he wanted to relieve the public defender and represent himself instead; the defendant answered in the affirmative and pled no contest to the charge. Judge Murphy accepted his plea and ordered him to pay court and investigative costs.

5. State v. White. Judge Murphy offered the defendant to have her DUI trial the following week or to waive speedy trial. The defendant asked for a speedy trial, which Judge Murphy so scheduled.

6. State v. Agnello. The defendant agreed to waive speedy trial after Judge Murphy told the defendant that he could either go to trial not knowing who his lawyer would be or ask for a continuance.

7. State v. Anderson. When asked by Judge Murphy what he wanted to do with his DUI case, the defendant said that he had "no idea what to do in this situation. I haven't had a chance to speak to my public defender. And, now, I don't have a public defender." Judge Murphy told the defendant that he might have a chance to talk to a public defender if he waived speedy trial. The defendant then waived speedy trial.

8. State v. Barbour. The defendant told the court that he was hoping to resolve his two counts of assault on a law enforcement officer and one count of disorderly conduct. Judge Murphy asked the State if it wanted to make him an offer. The State made an offer, but the defendant rejected it, stating that he did not understand the offer.

The Hearing Panel also heard testimony from several witnesses, including Judge Murphy and Andrew Weinstock. Suzanne Carter was seated in the back of the courtroom during the incident. When Judge Murphy and Mr. Weinstock entered the hallway, Ms. Carter saw Judge Murphy grab Mr. Weinstock's collar with his left hand and raise his right arm as if he were going to punch Mr. Weinstock. She did not see a punch land because the door closed. Ms. Carter heard "a bunch of punch, punch," and Judge Murphy using expletives, including "fuck." Ms. Carter recalled the courtroom deputy going into the hallway after the first or second punching sound she heard. In addition to what she believed were three punches, Ms. Carter also heard sounds of a scuffle.

Andrew Weinstock testified that he was assigned to Judge Murphy's courtroom about three months prior to the incident. Mr. Weinstock described his relationship with Judge Murphy as adversarial, high stress, and very mercurial. From time to time they would have testy exchanges. Mr. Weinstock recalled that on other occasions prior to the date of the incident, Judge Murphy had told him,

"Let's go out in the back hallway and discuss it." According to Mr. Weinstock, taking a lawyer into the hallway to chat is a regular occurrence in Brevard County, although it had only happened to him one other time with another judge about ten years before.

Mr. Weinstock stated that although Judge Murphy was "clearly angry" and said he was going to "beat [Mr. Weinstock's] ass," Mr. Weinstock did not think the Judge would follow through. Mr. Weinstock went into the hallway expecting to have a discussion in which Judge Murphy would yell at him and the two would come to an agreement about how to handle the remaining cases. Mr. Weinstock testified that he went through the door and into the hallway before Judge Murphy. Mr. Weinstock recalled Judge Murphy's left arm pinning him against the wall and alleged that he was punched twice with Judge Murphy's right arm. Mr. Weinstock further testified that before Judge Murphy could hit him a third time, two deputies pulled Judge Murphy off of him. Mr. Weinstock claimed that he had a bruise on his face which did not appear in the photographs taken afterwards. Mr. Weinstock denied punching Judge Murphy.

Judge Murphy testified that Mr. Weinstock was consistently rude to defendants and rude and disrespectful to Judge Murphy on a regular basis. Judge Murphy and Mr. Weinstock at times would have discussions in the courtroom or bench conferences, and had gone into the hallway on one prior occasion to discuss

whether appearance by a client at docket sounding was mandatory. Judge Murphy agreed that he was in a very high state of anger during the incident. Judge Murphy testified that he regretted his words and actions.

Judge Murphy recalled that he entered the hallway before Mr. Weinstock and alleged that Mr. Weinstock was the aggressor, hitting Judge Murphy in the chest. Judge Murphy remembered having two hands on Mr. Weinstock at all times and that he "only took defense actions." Judge Murphy recalled Deputy Byron Griffin separating the two combatants after a short scuffle during which Judge Murphy attempted to fend off Mr. Weinstock and force him to submit by swinging Mr. Weinstock off balance and using profanity.

Judge Murphy testified that he resumed his docket without Mr. Weinstock because Mr. Weinstock's clients were also his clients and because he wanted to make sure everyone received fair representation. When asked how they could be his clients, Judge Murphy said, "This is county court. It's people's court. . . . They're my people." Judge Murphy admitted that the defendants he dealt with after the incident were not pro se and that he treated them like pro se defendants. He also admitted that resuming with the defendants' cases was "clearly wrong" and waiting for a new public defender to arrive before proceeding would have been a better course of action.

Deputy Griffin testified that he did not think there would be a physical altercation, even though he heard Judge Murphy ask Mr. Weinstock if he wanted to fight and say that he would beat Mr. Weinstock's ass. Deputy Griffin testified that he saw Mr. Weinstock's hands on Judge Murphy's garments and Judge Murphy's hands on Mr. Weinstock's jacket. Deputy Griffin did not recall seeing or hearing either man punch the other. Deputy Griffin further testified that he immediately stepped into the hallway and put his hands between the men to separate them. They all shifted and hit the back wall, causing a thumping sound. Deputy Griffin opined that there was no opportunity from the time he moved towards the door to the time he went through it for either man to hit the other without Deputy Griffin knowing it.

Deputy Cheryl Martinez, who was assigned to an adjacent courtroom, exited her courtroom immediately after she heard shouting and a bang. She recalled seeing Judge Murphy and Mr. Weinstock screaming at each other with two hands each on the other's collar. Deputy Martinez observed Deputy Griffin separating the men. She did not see any punch or recall seeing an arm raised in anticipation of a strike. She recalled that Mr. Weinstock claimed he was punched two times in the face and wanted Judge Murphy arrested. Deputy Martinez observed no injuries or sign that Mr. Weinstock had been punched.

Following the incident, Judge Murphy contacted psychologist Dr. Ronsisvalle for counseling. Dr. Ronsisvalle testified that he met with Judge Murphy weekly or biweekly for cognitive behavioral therapy related to anger management beginning June 6, 2014. Dr. Ronsisvalle found that throughout their therapy sessions Judge Murphy appeared positive and humble, accepted responsibility and accountability for his actions, and labeled his misconduct as inappropriate. Dr. Ronsisvalle testified that Judge Murphy was initially confused about the incident and could not believe what he had done. Once he completed the course with Dr. Ronsisvalle, Judge Murphy requested additional sessions to try to better understand the emotions underneath his anger.

Dr. Ronsisvalle described a “perfect storm” occurring within Judge Murphy emotionally during incident: Judge Murphy was fatigued, his father had recently passed, and a defendant had recently been killed outside the courthouse. Dr. Ronsisvalle also stated that during the incident Judge Murphy was in fight or flight mode: his frontal lobe was shut down, adrenaline and cortisol were pulsing, and his amygdala was activated, interfering with his judgment. Referring to the phrase “fog of battle,” Dr. Ronsisvalle explained that “many soldiers after the trauma do what? They go back to their duty post. That’s what you do. You put your nose to the grindstone, and you—you do what you’re called to do.”

Dr. Ronsisvalle was confident that the incident was atypical for Judge Murphy. Dr. Ronsisvalle opined, in his best clinical judgment, that Judge Murphy could safely return to work and that he was not at risk to repeat this behavior because he showed a significant ability to understand his emotion, developed skills to cope with anger, and recognized that a perfect storm of emotions compromised his ability to function in that moment. Dr. Ronsisvalle concluded that Judge Murphy developed more control of his anger and was confident in his coping skills to handle similar situations in the future.

Dr. Scott Fairchild conducted a Comprehensive Psychological Evaluation and six therapy sessions with Judge Murphy in June 2014. Dr. Fairchild did not testify before the Hearing Panel but offered a report dated June 23, 2014. Dr. Fairchild found in his report that "the comprehensive psychological assessment reveals no evidence of a diagnosable Posttraumatic Stress Disorder."

Finally, the parties stipulated to the testimony that would be elicited if five more witnesses were called before the Hearing Panel, each of whom was expected to testify about Judge Murphy's good character and Mr. Weinstock's reputation as difficult and unprofessional. Additionally, there were 45 letters of support submitted to the JQC on Judge Murphy's behalf. Following the incident, Judge Murphy wrote apology letters to members of the legal community and residents of

Brevard County.¹ In his letter to the Public Defender of Brevard County, Judge Murphy specifically apologized to Mr. Weinstock.

In its May 19, 2015, written order, the Hearing Panel unanimously found Judge Murphy guilty of violating Canons 1,² 2A,³ 3A,⁴ 3B(3),⁵ 3B(4),⁶ 3B(7),⁷

1. The apology letter to the residents of Brevard County can be viewed at http://media.cmgdigital.com/shared/news/documents/2014/06/30/Brevard_residents_letter.pdf.

2. "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. . . ."

3. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

4. "The judicial duties of a judge take precedence over all the judge's other activities. . . ."

5. "A judge shall require order and decorum in proceedings before the judge."

6. "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control."

7. "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding"

3B(8),⁸ and 5G⁹ of the Code of Judicial Conduct, and Rule of Professional Conduct 4-1.1.¹⁰ The Hearing Panel found that there was no clear and convincing evidence that Judge Murphy struck Mr. Weinstock and could not determine which of them initiated physical contact. The Hearing Panel unanimously recommended that Judge Murphy be disciplined as follows: a public reprimand, a 120-day suspension, a \$50,000 fine, mental health therapy, and Judicial Education Courses in the Florida Judicial College New Judges Program.

In response to this Court's Order to Show Cause why he should not be removed, Judge Murphy submitted a response including a Department of Veterans Affairs (VA) finding of 30% disability based on Post Traumatic Stress Disorder (PTSD) resulting from combat deployment in Afghanistan. The VA found that Judge Murphy's PTSD manifests in "disturbances of motivation and mood, chronic sleep impairment, anxiety, occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." Although this finding was not in evidence before the JQC Hearing or Investigative Panels, the JQC noted

8. "A judge shall dispose of all judicial matters promptly, efficiently, and fairly."

9. "A judge shall not practice law. . . ."

10. This Rule provides that a lawyer shall provide competent representation to a client.

in its Reply that periods of significant stress are a common feature of trial judge duties and that this new diagnosis cuts against Judge Murphy's present fitness to serve.

ANALYSIS

First, we address the JQC's findings and determination that Judge Murphy violated Canons 1, 2A, 3A, 3B(3), 3B(4), 3B(7), 3B(8), and 5G of the Code of Judicial Conduct and Rule of Professional Conduct 4-1.1 as alleged. We then analyze the JQC's recommendation and appropriate discipline.

I. Findings and Determination of Guilt

This Court upholds JQC findings on alleged misconduct where supported by clear and convincing evidence. Sloop, 946 So. 2d at 1054. This standard of proof has been described as "more than a 'preponderance of the evidence,' but the proof need not be 'beyond and to the exclusion of a reasonable doubt.' " In re Kinsey, 842 So. 2d 77, 85 (Fla. 2003) (quoting In re Davey, 645 So. 2d 398, 404 (Fla. 1994)). Where the JQC's findings are undisputed and a judge admits misconduct, we generally conclude that the findings are supported by clear and convincing evidence. Id.; see also In re Diaz, 908 So. 2d 334, 337 (Fla. 2005); In re Andrews, 875 So. 2d 441, 442 (Fla. 2004). There is no dispute that Judge Murphy threatened violence, had a physical confrontation with Mr. Weinstock, and subsequently resumed his docket with defendants whose attorneys were not present.

Judge Murphy does not contend that the Hearing Panel erred in finding him guilty of violating the Judicial Canons and Rule of Professional Conduct.

Therefore, we find the JQC's findings and its conclusion that Judge Murphy violated Canons 1, 2A, 3A, 3B(3), 3B(4), 3B(7), 3B(8), and 5G of the Code of Judicial Conduct, and Rule of Professional Conduct 4-1.1, supported by clear and convincing evidence. Accordingly, we approve the JQC's findings and conclusion.

II. Recommended and Appropriate Discipline

"While this Court gives the findings and recommendations of the JQC great weight, 'the ultimate power and responsibility in making a determination rests with this Court.' " Kinsey, 842 So. 2d at 85 (footnote omitted) (quoting In re Davey, 645 So. 2d at 404). Under the Florida Constitution,

The supreme court may accept, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it may order that the justice or judge be subjected to appropriate discipline, or be removed from office with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, or be involuntarily retired for any permanent disability that seriously interferes with the performance of judicial duties.

Art. V, § 12(c)(1), Fla. Const. "[D]iscipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline."

Art. V, § 12(a)(1), Fla. Const. Additionally, "[t]he supreme court may award costs to the prevailing party." Art. V, § 12(c)(2), Fla. Const.

The object of these proceedings is not to inflict punishment, but to determine a judge's fitness to serve. In re McMillan, 797 So. 2d 560, 571 (Fla. 2001). When considering fitness to serve, this Court must hold judges "to higher ethical standards than lawyers 'by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system.' " In re Hawkins, 151 So. 3d 1200, 1212 (Fla. 2014) (citing McMillan, 797 So. 2d at 571). This high standard of ethical and professional conduct is necessary because "[t]he judicial system can only function if the public is able to place its trust in judicial officers." In re Ford-Kaus, 730 So. 2d 269, 277 (Fla. 1999). Removal is proper when clear and convincing evidence is presented that the judge has engaged in "conduct . . . demonstrating a present unfitness to hold office." Art. V, § 12(c)(1), Fla. Const.; see also In re Albritton, 940 So. 2d 1083, 1088 (Fla. 2006). "Malafides, scienter or moral turpitude on the part of a justice or judge" is not necessary for removal from office. Art. V, § 12(c)(1), Fla. Const.

A. Present Fitness to Hold Office

We examine judicial misconduct for present fitness to hold office "from two perspectives: its effect on the public's trust and confidence in the judiciary as reflected in its impact on the judge's standing in the community, and the degree to which past misconduct points to future misconduct fundamentally inconsistent with the responsibilities of judicial office." Sloop, 946 So. 2d at 1055. To

preserve the integrity of the judiciary, a judge must observe a high standard of personal conduct, “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and be “patient, dignified and courteous” to every individual with whom the judge interacts professionally. Fla. Code of Jud. Cond. Canons 1, 3. We have repeatedly held that “[r]emoval is an appropriate discipline where the actions of the judge simply ‘should erode confidence in the judiciary,’ even where it does not appear that the public has lost confidence, and even where the Hearing Panel has recommended a lesser sanction than removal.” Hawkins, 151 So. 3d at 1215 (quoting Sloop, 946 So. 2d at 1055 (emphasis in original)). See also In re Henson, 913 So. 2d at 588 (finding removal appropriate because “the respect of the public [is] essential to [the judiciary’s] mission as the third branch of government.”); In re LaMotte, 341 So. 2d 513, 518 (Fla. 1977) (finding removal proper even where misconduct does not appear to have shaken public faith in the judiciary). Even where a judge has an outstanding record, removal is the appropriate sanction for a judge whose misconduct is fundamentally inconsistent with the responsibilities of judicial office or strikes at the heart of judicial integrity. See, e.g., In re Graziano, 696 So. 2d 744, 749 (Fla. 1997); In re Johnson, 692 So. 2d 168, 172 (Fla. 1997) (“We cannot dispute Judge Johnson’s otherwise unblemished judicial record.”); In re Garrett, 613 So. 2d 463,

464 (Fla. 1993) (removing Judge Garrett based on one incident of petit theft despite an “unblemished career of public service”).

Our inquiry into judicial misconduct must also consider its future implications on the offending judge’s ability to serve. Our determinations of appropriate discipline are based in part on the likelihood of that misconduct reoccurring. Compare, e.g., In re Crowell, 379 So. 2d 107, 110 (Fla. 1979) (removing Judge Crowell for unfitness “substantially due to his tendency to lose his temper”) and Sloop, 946 So. 2d at 1059 (removing Judge Sloop because “we [were] unconvinced that [he could] both effectively manage his temper and remain an effective jurist”) with In re Wood, 720 So. 2d 506, 509 (Fla. 1998) (finding public reprimand appropriate given Judge Wood’s candor and commitment to ongoing treatment for anger and stress management). This Court has found removal appropriate even where a judge seeks treatment for a medical condition related to his or her severe misconduct. See, e.g., Sloop, 946 So. 2d at 1056 (finding removal appropriate for arresting traffic defendants who were in the wrong courtroom as a result of being misdirected, where the judge blamed his conduct on his Attention Deficit Hyperactivity Disorder); Garrett, 613 So. 2d at 464 (finding removal appropriate for a one-time theft of electronics where the judge suffered from depression). Furthermore, a pattern of misconduct is not necessary for removal. See Sloop, 946 So. 2d at 1056; Garrett, 613 So. 2d at 464.

Focusing first on the effects on the public's trust in the judiciary, we must conclude that Judge Murphy is not presently fit to serve. Judge Murphy used profanity in an open courtroom and threatened violence against an attorney appearing before him. This is the sort of egregious conduct that erodes the public's confidence. It is without question that except for the June 2, 2014, incident, Judge Murphy has been a good judge. Notwithstanding his prior judicial performance, Judge Murphy's total lack of self-control became a national spectacle—an embarrassment not only to the judge himself but also to Florida's judicial system. Given the clear erosion of public confidence in the judiciary caused by his misconduct, removal is an appropriate sanction.

As to the likelihood of future misconduct, it is unclear whether Judge Murphy is likely to have another similar outburst. Although he immediately sought treatment and an underlying cause for his misconduct, this Court has found removal appropriate even where a judge takes steps to address mental health. See Sloop, 946 So. 2d at 1056; Garrett, 613 So. 2d at 464. We must also take note that Judge Murphy ultimately discovered an underlying cause of his misconduct: PTSD.

Although Judge Murphy's doctors indicated before the Hearing Panel that his anger and stress were being managed through treatment, these assurances conflict with the VA finding that Judge Murphy is 30% disabled based on PTSD

stemming from his combat deployment in Afghanistan. Dr. Ronsisvalle made no mention of PTSD in his testimony before the Hearing Panel, and Dr. Fairchild's report explicitly found no evidence of PTSD. In contrast, the VA found "[o]ccupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress." As the JQC indicated, a trial judge's duties frequently include periods of significant stress. The severity of Judge Murphy's behavior and the VA finding leave open the possibility of future misconduct. Based on the clear erosion of public faith in our court system caused by Judge Murphy's misconduct and the unmistakable possibility that he could have a similar outburst in the future, we must find that Judge Murphy is presently unfit to serve.

B. JQC Recommendation

In evaluating judicial misconduct, we generally place great weight on the recommendation of the Hearing Panel. However, this Court will not approve a recommendation for discipline short of removal for particularly egregious misconduct rendering a judge unfit for office. See, e.g., Sloop, 946 So. 2d at 1056; In re Renke, 933 So. 2d 482, 493 (Fla. 2006). Ultimately, the decision of whether to order removal rests with this Court. Kinsey, 842 So. 2d at 85.

In this case, the Hearing Panel's recommended discipline stops short of removal. However, the JQC, in its Reply to this Court's order to show cause,

argued that Judge Murphy's VA disability did not support his present fitness and described his misconduct as having "single-handedly caused the Florida judicial system to become a national embarrassment." Judge Murphy's "intemperate courtroom behavior not only damaged public confidence in him as a judicial officer but struck 'at the very roots of an effective judiciary, for those who are served by the courts will not have confidence in and respect for the courts' judgments if judges engage in this egregious conduct.'" In re Shea, 110 So. 3d 414, 418 (Fla. 2013) (quoting In re Schapiro, 845 So. 2d 170, 174 (Fla. 2003)). Given the erosion of public confidence caused by Judge Murphy's misconduct, we reject the JQC's recommendation of discipline in this case.

C. Appropriate Discipline

On June 2, 2014, Judge Murphy threatened an assistant public defender with violence in open court, challenged him to a physical fight, engaged in the threatened struggle in which the two men had to be physically separated by a deputy, and reassumed the bench to handle cases where the defendants were without the presence of their attorney. Because of Judge Murphy's appalling behavior, we conclude that there is clear and convincing evidence that Judge Murphy engaged in "conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office." Art. V, § 12(c)(1), Fla. Const. Judge Murphy's conduct is fundamentally inconsistent with the responsibilities of

judicial office and necessitates his removal. "[T]hrough his own actions culminating in the misconduct in this case, Judge [Murphy] has lost the public's confidence in his ability to perform his judicial duties in a fair, evenhanded, and even-tempered manner." Sloop, 946 So. 2d at 1059. Based on the foregoing, we conclude that appropriate discipline in this case demands that Judge Murphy be removed from office.

CONCLUSION

For the reasons set forth herein, we hereby remove Brevard County Judge John C. Murphy from that office.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, and
POLSTON, JJ., concur.
PERRY, J., recused.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

Original Proceeding – Judicial Qualifications Commission

Judge Kerry I. Evander, Chair, Michael Louis Schneider, General Counsel and Executive Director, Tallahassee, Florida; Fred Wallace Pope, Jr. and Margaret Knaust Kramer, Special Counsel, Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, Florida,

for Florida Judicial Qualifications Commission, Petitioner

Larry Gibbs Turner, Peggy-Anne O'Connor, Ronald Kozlowski, and Scott T. Schmidt of Turner O'Connor Kozlowski, P.L., Gainesville, Florida,

for Judge John C. Murphy, Respondent

**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**
Official Record

No. 2014-27

FILED

Date: 2/9/16

Wendy J. Soto
Wendy J. Soto

**THE HONORABLE RUTH NEELY'S MEMORANDUM
ADDRESSING SANCTIONS**

INTRODUCTION

Judge Neely has drawn the ire of the Commission on Judicial Conduct and Ethics (the "Commission") for respectfully stating her religious beliefs concerning marriage in response to reporter Ned Donovan's question about same-sex weddings. By stating her religious beliefs, Judge Neely merely affirmed a view about marriage that, in the words of the United States Supreme Court, is "based on *decent and honorable religious or philosophical premises*" and is "held[] *in good faith by reasonable and sincere people*" throughout Wyoming and across our nation. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2602 (2015) (emphasis added). She should be no more punished for expressing this respectable view about a contentious issue than a judge who states her belief that there is no God or that the death penalty is barbaric and unnecessary.

Nor can Judge Neely be sanctioned for indicating that her religious convictions about marriage preclude her from solemnizing a marriage between two people of the same sex. Wyoming law plainly affords Judge Neely discretion in performing wedding ceremonies. Indeed, it is a common and unchallenged practice for part-time circuit court magistrates in Wyoming to decline to solemnize marriages (both same-sex and opposite-sex) for a whole host of trivial secular reasons. It would therefore be a grave injustice for the Commission to allow this practice to flourish with respect to all other magistrates, and yet single out Judge Neely for punishment because she declined based upon her constitutionally protected religious beliefs. The Commission should thus conclude that no sanction is appropriate here.¹

¹ In its December 31, 2015 Order, the Adjudicatory Panel indicated that this "matter is hereby referred to the full Commission . . . for further disposition," and that "sufficient evidence exists to determine appropriate discipline without further hearing." Order Granting the Commission's Mo. for Partial Summ. J. and Denying Judge Neely's Mot. for Summ. J. at 8 (hereinafter "SJ Order"). It is thus Judge Neely's understanding that the full Commission has access to the entire record and all evidence submitted so far. Accordingly, Judge Neely refers to prior filings in this case and does not attach them to this memorandum.

ARGUMENT

I. Any Imposition of Sanctions Would Violate Both the Wyoming and United States Constitutions.

Imposing any sanction on Judge Neely would violate several provisions of the Wyoming and United States Constitutions. Judge Neely has thoroughly argued all these constitutional violations in support of her Motion for Summary Judgment. *See* Mem. of Law in Supp. of Judge Neely's Mot. for Summ. J. at 18-44 (hereinafter "Neely SJ Mem."). She incorporates all those arguments here, and briefly discusses three of them below.

First, the Wyoming Constitution provides that "no person shall be rendered incompetent to hold any office of trust . . . because of his opinion on any matter of religious belief whatever." Wyo. Const. art. 1, § 18. The United States Constitution likewise bars religious tests for public office. *See Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (holding that religious tests for public office "invade[] the . . . freedom of belief and religion" guaranteed by the U.S. Constitution and thus are unenforceable). As mentioned above, the Commission brought this prosecution against Judge Neely as a result of her response to a reporter's question, in which she revealed her belief, based on the precepts of her faith, that marriage is the union of one man and one woman. *See* Judge Neely's Statement of Undisputed Material Facts at 7 (hereinafter "Neely SOF"). But if Judge Neely had expressed a belief that marriage is the union of any two people regardless of their sex, it is indisputable that the Commission would *not* have commenced disciplinary proceedings against her. Accordingly, the Commission is now poised to discipline Judge Neely *because of the particular religious belief that she holds*. Removing Judge Neely from office for that reason, as the Commission seeks to do here, would thus impose a religious test for public office in violation of the state and federal constitutions. *See* Neely SJ Mem. at 18-21.

Second, in addition to this prohibition on religious tests, the Wyoming Constitution also

provides robust protection for individuals' religious belief and exercise, promising "perfect toleration of religious sentiment," Wyo. Const. art. 21, § 25, and the freedom to exercise the religion of one's choice "without discrimination or preference," Wyo. Const. art. 1, § 18. Imposing any sanction on Judge Neely for expressing her religious beliefs about marriage would also violate these state constitutional guarantees. *See Neely SJ Mem.* at 21-23.

Third, the United States Constitution similarly safeguards the free exercise of religion. *See Neely SJ Mem.* at 23-27. Under the First Amendment, the government infringes free-exercise rights when it acts in a way that is not neutral or generally applicable toward religion, unless it satisfies the "most rigorous of scrutiny" (that is, strict scrutiny). *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Here, the Commission permits part-time circuit court magistrates to decline to solemnize marriages (both same-sex and opposite-sex) for a whole host of trivial secular reasons (like if a judge wants to perform weddings only for close friends and family, if she wants to reserve certain times of the week for family, or if the proposed wedding location is too far away in the judge's opinion). *See Neely SOF* at 2. But the Commission seeks to punish Judge Neely for declining to solemnize marriages for a religious reason. By singling out the religious motivation of Judge Neely for disfavored treatment, the Commission is not acting neutrally toward religion or applying the Code of Judicial Conduct (the "Code") in a general way. *See Neely SJ Mem.* at 24-25. This triggers strict scrutiny.

But strict scrutiny is not satisfied here. *See Neely SJ Mem.* at 30-35. The Commission has not shown that punishing Judge Neely is "necessary to serve a compelling state interest." *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (emphasis added). The Commission cannot rely on an interest in ensuring that judges follow the law because the law of Wyoming only *authorizes* part-

time circuit court magistrates to solemnize marriages—it does not *require* that they do so. *See* Wyo. Stat. § 20-1-106(a). Moreover, the federal-court decision in *Guzzo v. Mead*, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014), which permits same-sex couples to enter a state-recognized marriage in Wyoming, did not impose a duty on any particular judge to solemnize such marriages. Indeed, no legal authority of any kind whatsoever requires part-time circuit court magistrates like Judge Neely to solemnize marriages that conflict with their faith. Nor does the Commission, by punishing Judge Neely here, further a compelling interest in maintaining judicial impartiality. *See* Neely SJ Mem. at 32-33. Judge Neely did not express a bias against any party in a judicial proceeding before her or against *LGBT individuals* in general. She merely stated her religious belief *about the institution of marriage*. Accordingly, the Commission has no interest—let alone a compelling one—in punishing Judge Neely here. *See* Neely SJ Mem. at 31-33.

Neither can the Commission satisfy the narrow-tailoring requirement of strict-scrutiny analysis because less restrictive means exist to accomplish the Commission's asserted goals. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (noting that the narrow-tailoring requirement is not satisfied “[i]f a less restrictive alternative would serve the [g]overnment's purpose”). For example, rather than removing Judge Neely because of the Commission's unfounded speculation concerning what some people might think about her ability to be fair to LGBT litigants, an actual party can replace Judge Neely in a particular case if that party shows that Judge Neely's impartiality may reasonably be questioned in that proceeding. *See* Neely SJ Mem. at 34-35. Or the government could permit Judge Neely to recuse herself from performing discretionary functions like weddings when she has a conflict, just like other judges can do when they have a conflict in a case before them. *See* Wyoming Code of Judicial Conduct,

Rule 2.11(A)(1) (hereinafter “W.C.J.C., R.”). Because the Commission cannot satisfy strict scrutiny, imposing any sanction on Judge Neely would violate her rights under the First Amendment’s Free Exercise Clause. *See Neely SJ Mem.* at 30-35.

In sum, of all the options for sanctions that the Commission may adopt, only by imposing no sanction will the Commission comport with the highest laws of the land. The Wyoming and United States Constitutions thus compel the Commission to impose no sanction here.

II. The Factors for Determining Sanctions Show that No Sanction is Appropriate Here.

The Commission’s Rules permit a vast array of remedies, which presumably include the power to impose no sanction. *See Rules Governing the Commission on Judicial Conduct and Ethics*, Rule 8(d)(2) (hereinafter “Commission Rule”) (noting that the “disposition” rendered by the full Commission “may include, *but is not limited to*, temporary discipline or interim suspension . . . , letters requiring remedial action, issuing or recommending deferred discipline agreements, or stipulated private censure”) (emphasis added). Those Rules outline a number of “nonexclusive factors” for the Commission to consider “in determining the appropriate sanction.” *Id.* Those factors, as discussed below, support the conclusion that no sanction is appropriate against Judge Neely in this case.

A. The Nature, Extent, and Frequency of the Alleged Misconduct

Judge Neely responded to Mr. Donovan’s query about same-sex marriage by respectfully informing him of her religious belief that marriage is the union of one man and one woman and her corresponding inability to solemnize same-sex marriages. *See Neely SOF* at 7. There is nothing egregious about the nature of this statement, for, as the United States Supreme Court has acknowledged, beliefs concerning marriage like those held by Judge Neely 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.

Moreover, in her response to Mr. Donovan, Judge Neely did not effectively “state[] that she would not follow the law,” and the Adjudicatory Panel is wrong to suggest otherwise. *See* SJ Order at 3 ¶ 12. Wyoming statutory law gives part-time circuit court magistrates discretionary authority to perform marriages; it does not require them to do so. Wyo. Stat. § 20-1-106(a). Indeed, the undisputed facts show that part-time circuit court magistrates and other judges may decline to solemnize marriages for a host of trivial secular reasons. *See* Neely SOF at 2. The federal-court decision in *Guzzo* does not change this. There, the court held that the State of Wyoming must license and recognize marriages between same-sex couples. It did not say anything about whether a particular part-time magistrate with discretionary authority to solemnize marriages must officiate at weddings that conflict with her religious beliefs. Thus, Judge Neely did not state an unwillingness to comply with the law,² and the benign nature of her isolated statement to Mr. Donovan weighs against the imposition of sanctions.

B. The Judge’s Experience and Length of Service on the Bench

Judge Neely has been a municipal judge for over 21 years and a circuit court magistrate for approximately 14 years. *See* Neely SOF at 1. She is well respected for her fairness and scrupulous attention to following what the law requires. *See* Neely SOF at 2-4. Her unblemished

² Contrary to the Adjudicatory Panel’s finding, Judge Haws did not indicate that “performing [same-sex] ceremonies was an essential function of [Judge Neely’s] job” as a part-time circuit court magistrate. SJ Order at 2 ¶ 9. Judge Haws testified that he did not specifically recall saying those words to Judge Neely. Haws Dep. at 110-11 (Connelly Aff., Ex. 3). And his testimony reveals that he has never determined that performing same-sex marriages was an essential function of the job of a part-time circuit court magistrate. Indeed, he testified that he told Judge Neely that he “respected her for . . . taking th[e] position” she did in adhering to her religious convictions, 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).

record of lengthy judicial service should weigh heavily against sanctioning Judge Neely here.

C. Whether the Conduct Occurred in the Judge's Official Capacity or Private Life

Judge Neely's respectful response to Mr. Donovan's question about same-sex marriage occurred over the phone while she was at home in the process of hanging Christmas lights. *See* Neely SOF at 7. Consequently, her allegedly improper speech occurred in her private life (not while operating in her official capacity as a judge), and that factor counsels against imposing a sanction here.

Indeed, judges act in their "official capacity" only when they speak from the bench or are in the course of actually performing their judicial duties. *See, e.g., In re Disciplinary Proceedings Against Gorenstein*, 434 N.W.2d 603, 608 (Wis. 1989) (discussing a judge's comments toward litigants and witnesses during judicial proceedings); *In re Rome*, 542 P.2d 676, 684 (Kan. 1975) (discussing a judge's memorandum opinion ridiculing a defendant); *Jenevein v. Willing*, 493 F.3d 551, 560-61 (5th Cir. 2007) (discussing a judge's decision to hold a press conference in his courtroom while wearing his judicial robe). In contrast, a judge acts in her private capacity when she engages in speech off the bench that does not address a particular adjudicative proceeding or a litigant appearing before her. *See, e.g., Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1008-09 (Miss. 2004) (refusing to discipline a judge for off-the-bench remarks regarding his views on an issue of public concern in a letter to the editor and during a radio interview with a reporter); *In re Hey*, 452 S.E.2d 24, 33 (W. Va. 1994) (refusing to discipline a judge for off-the-bench remarks regarding his own disciplinary proceeding made during a radio interview).

Here, Judge Neely's response to Mr. Donovan was an expression of her religious beliefs about marriage, unrelated to any adjudicative proceeding or litigant, made off the bench, at home

via telephone while in the midst of hanging Christmas lights. That off-the-bench speech occurred during Judge Neely's private life—not, as the Adjudicatory Panel erroneously concluded, “in her capacity as judge.” SJ Order at 6. Hence, this factor bolsters the conclusion that no sanction is appropriate in this case.

D. The Nature and Extent to Which the Acts of Alleged Misconduct Injured Other Persons or Respect for the Judiciary

Judge Neely has not engaged in any conduct that has injured anyone. She has never been asked to perform a same-sex marriage and thus has never declined to perform one. *See* Neely SOF at 7-8. Additionally, no same-sex couple in Sublette County has been unable to find, or experienced inconvenience in locating, an authorized celebrant to solemnize their marriage. *See* Neely SOF at 10.

Nor does any evidence in the record suggest that Judge Neely's mere communication of her religious beliefs about marriage has injured anyone or undermined respect for the judiciary. Again, she simply stated a belief that is “based on decent and honorable religious or philosophical premises” and is “held[] in good faith by reasonable and sincere people” throughout Wyoming and across the nation. *Obergefell*, 135 S. Ct. at 2594, 2602. The only evidence in the record from members of the LGBT community who might appear before Judge Neely belies any suggestion of harm to gays and lesbians. In fact, far from supporting the Commission's baseless claims of injury, Pinedale resident and member of the LGBT community Kathy Anderson affirms that “it would be obscene and offensive to discipline Judge Neely for her statement to [Mr.] Donovan about her religious beliefs regarding marriage.” Anderson Aff. ¶ 5. Indeed, as Ms. Anderson's affidavit suggests, respect for the judiciary will be undermined not by permitting Judge Neely's respectful response to Mr. Donovan, but by a decision punishing Judge Neely for that response, because any such punishment will openly manifest hostility

toward people of faith.

In short, the absence of injury stemming from Judge Neely's response to Mr. Donovan, and the very real threat of harm that will result from punishing Judge Neely here, weighs heavily against imposing any sanction.

E. Whether and to What Extent the Judge Exploited her Position for Improper Purposes

No evidence whatsoever suggests that Judge Neely exploited her position as either a municipal judge or a part-time circuit court magistrate for improper purposes. On the contrary, Judge Neely urges the Commission not to remove her from her judicial positions for an improper purpose (that is, for an unconstitutional purpose). This factor thus indicates that no sanction is appropriate in this case.

F. Whether the Judge Has Recognized and Acknowledged the Wrongful Nature of the Conduct and Manifested an Effort to Change or Reform the Conduct

Judge Neely maintains that she has not violated the Code and that imposing discipline upon her in this matter would violate the Wyoming and United States Constitutions. *See Neely SJ Mem. at 8-44.* For at least four reasons, neither Judge Neely's legal position nor her decision to defend herself against the Commission's charges can be used as a factor to impose sanctions against her.

First, this case does not involve conduct that is obviously wrongful. Unlike a judicial-discipline proceeding where a judge has engaged in criminal activity or undeniable impropriety, like drug dealing, fraud, ticket fixing, or habitual public drunkenness, this case presents a novel judicial-ethics issue that implicates profound constitutional questions. Indeed, Disciplinary Counsel has admitted that the issues presented here "are hard questions," Transcript of Hearing Proceedings at 73, for which there are no "guiding judicial precedence [sic]," Commission's

Mem. in Supp. of Mot. for Partial Summ. J. at 10 (hereinafter "Commission SJ Mem."). And he has further conceded that Judge Neely's counsel have "ma[de] really good arguments." Transcript of Oral Argument at 73. Additionally, in response to Judge Neely's request for an advisory opinion from the Judicial Ethics Advisory Committee, Committee Chairman Dr. John Burman wrote that this situation presents a "complex ethical issue." Neely SOF at 15-16. Where, as here, no judicial agency in Wyoming ever issued guidance to judges about the issues raised herein, *see* Neely SOF at 6, and where the Commission and the Chair of the Judicial Ethics Advisory Committee, Wyoming's ostensible expert on judicial ethics, admitted that this matter implicates complex and unresolved legal questions, *see* Neely SOF at 15-16, there is no warrant for any sanction.

Second, requiring Judge Neely to admit wrongdoing in order to avoid or reduce a potential sanction is at odds with fundamental due-process guarantees afforded to judges during disciplinary proceedings. *See, e.g., In re Renfer*, 482 S.E.2d 540, 543 (N.C. 1997) (holding that a judicial disciplinary matter implicating removal requires that a judge have the "opportunity to participate in the hearing and to defend the charges against her"); *Matter of Deming*, 736 P.2d 639, 650 (Wash. 1987) (holding that "a judge accused of misconduct is entitled to no less procedural due process than one accused of crime," and providing that due process requires that the judge be able to "prepare and present a defense"). Notably, the Commission's own Rules provide that judges "shall have the right and reasonable opportunity to defend against the allegations made against [them]." Commission Rule 13. But if the Commission employs this factor as a basis for sanction, it would contravene Judge Neely's due-process right to defend herself.

Third, basing a sanction on Judge Neely's defense of her constitutional rights would

compromise her judicial independence and thereby interfere with her ability to comply with Rule 1.2 of the Code, which provides that a "judge shall act at all times in a manner that promotes the public confidence in the independence . . . of the judiciary." Judge Neely took an oath to uphold and defend both the Wyoming and United States Constitutions. *See* Wyo. Const. art. 6, § 20. It is her belief that the speech for which she has been brought before this Commission is both lawful and constitutional. Interpreting this sanction factor to require Judge Neely to concede misconduct where she believes that the state and federal constitutions provide protection essentially asks her to sacrifice her fealty to the law in exchange for a reduced risk of sanction. Putting Judge Neely to that choice would be improper.

Fourth, under the facts of this case, Judge Neely had no realistic choice but to defend herself against the Commission's charges. Early in this proceeding, Disciplinary Counsel proffered an exceedingly unreasonable settlement offer that would have required Judge Neely to resign both of her judicial positions (even though her municipal judge position has nothing to do with solemnizing marriages), agree never again to seek judicial office in Wyoming, admit wrongdoing, and agree to the release of a public statement indicating that she had decided to resign in response to a complaint of judicial misconduct that had been lodged against her. Faced with such a one-sided demand, Judge Neely had only one option: exercise her due-process rights and resist the Commission's claims against her.

For all these reasons, the Commission cannot use Judge Neely's decision to defend herself as a basis for imposing a sanction against her.

G. Whether There Has Been Prior Disciplinary Action Concerning the Judge, and If So, Its Remoteness and Relevance to the Present Proceeding

Never, in all her years of judicial service, has Judge Neely had a complaint filed against her with the Commission, been disciplined by the Commission, or been accused of harboring or

exhibiting bias, prejudice, or partiality by anyone who has appeared before her in court. *See* Neely SOF at 3. Indeed, the Adjudicatory Panel in this case acknowledged that “there’s been no evidence that [Judge Neely has] done anything except be a well-recognized and respected judge in the community.” Transcript of Hearing Proceedings at 32. Thus, as with her lengthy record of sterling judicial service, this lack of disciplinary history counsels against imposing sanctions here.

H. Whether the Judge Complied with Prior Discipline or Requested and Complied with a Formal Ethics Advisory Opinion

Judge Neely’s extensive work as a judge has not only earned her an unblemished record, it has also been filled with notable efforts to improve the judiciary and its compliance with ethical standards. *See* Neely SOF at 4 (detailing Judge Neely’s volunteer efforts on behalf of the Sublette County Drug Court and her service on the select committee to revise the Wyoming Code of Judicial Conduct). Not surprisingly, then, in early January 2015, because no state official or judicial governing body had issued any guidance on the legal issues presented in this proceeding, Judge Neely requested an advisory opinion from the Judicial Ethics Advisory Committee. *See* Neely SOF at 15-16. This proactive search for guidance on the questions raised here illustrates her abiding concern to follow the law at all times, and it weighs strongly against assessing any sanctions under these circumstances.

I. Whether the Judge Cooperated Fully and Honestly with the Commission in the Proceeding

Judge Neely has cooperated fully and honestly with the Commission in this proceeding. That consideration further demonstrates that the Commission should not impose any sanction here.

J. Whether the Judge Was Suffering from Personal or Emotional Problems or Physical or Mental Disability or Impairment at the Time of the Alleged Misconduct

Judge Neely was not suffering from any impairments that would affect or inform the Commission's determination of whether sanctions are appropriate here. This consideration is therefore irrelevant to the Commission's sanctions analysis.³

In sum, these factors demonstrate that the Commission should impose no sanction here. This proceeding has afforded the Commission an opportunity to adopt its legal position on an unsettled and profoundly important question of judicial ethics. Having now done that in the form of the Adjudicatory Panel's Order, it would hardly be fair to impose a sanction on an unsuspecting part-time circuit court magistrate like Judge Neely, who could not have possibly known the position that the Commission might adopt. The Commission should thus refuse to sanction Judge Neely in this case.

III. Imposing Fees or Costs Against Judge Neely Would Be Improper and Unjust.

The Commission's Rules do not expressly command the assessment of costs or fees against a judge. Rule 17 states that the Commission "shall include a finding as to fees and costs incurred or paid by the Commission" in any recommendation it makes, and Rule 18 provides that such a finding be "itemiz[ed]." But neither of those Rules states that fees or costs "shall" or "should" be assessed against the judge. This omission is notable because when legislatures and courts intend one party to pay another party's costs or fees, they adopt rules that expressly say so. *See, e.g.,* Wyo. Stat. § 40-19-119 (providing in the consumer rental context that a merchant who fails to comply with the law will be liable for "actual damages . . . *plus* the costs of the

³ Commission Rule 8(d)(2)(K) provides that the "ABA Standards for Imposing Lawyer Discipline may be considered in determining the appropriate sanction." The particular ABA standards germane to this proceeding are basically subsumed by the other Rule 8(d)(2) factors discussed above. Thus, Judge Neely need not separately discuss the ABA standards.

action and reasonable attorney's fees") (emphasis added). Furthermore, assessment of costs or fees would be improper in this context for at least two reasons.

First, in its Notice of Commencement of Formal Proceedings, the Commission did not plead any intention to seek fees or costs as part of this proceeding. The Wyoming Supreme Court has made it clear in almost identical circumstances that "before costs may be assessed against an [individual] in a disciplinary proceeding, that [individual] must be given notice of the [government's] intention to seek those costs" at the outset of the proceeding. *Bd. of Prof'l Responsibility, Wyoming State Bar v. Stinson*, 2014 WY 134, ¶ 80, 337 P.3d 401, 424-25 (Wyo. 2014). "Fundamental fairness demands that sufficient notice of charges and their consequences must be provided to enable [an individual] to make meaningful choices with the respect to the need for, and the manner of, [her] defense without being subjected to any element of surprise." *Meyer v. Norman*, 780 P.2d 283, 290 (Wyo. 1989). The failure of the Commission to plead fees or costs in its Notice of Commencement of Formal Proceedings is fatal to any attempt it might now make to assess fees or costs against Judge Neely.

Second, the equitable considerations presented here weigh against any attempted assessment of fees or costs against Judge Neely. This matter was initiated by the Commission on its own motion, *see* SJ Order at 3, absent the filing of a formal complaint by a member of the public. And as previously explained, the Commission admittedly seeks to punish Judge Neely—who has an unblemished record of judicial service, integrity, and fairness—without any "guiding judicial precedence [sic] on th[e] exact question" presented by this case. Commission SJ Mem. at 10. It is not fair that the government should saddle Judge Neely with fees or costs for exercising her due-process right to defend herself against charges that lack support in any guiding judicial precedent. This is especially so, as discussed above, where Judge Neely proactively sought

guidance from the Judicial Ethics Advisory Committee but was rebuffed by the very government agency tasked with providing such guidance, and where the Commission itself admits that the matter raises difficult questions of constitutional law. *See supra* at 9-10.

To the extent that the full Commission recommends a sanction that includes an award of fees or costs, it must then demonstrate that “the fee charged represents the product of reasonable hours times reasonable rates” and “whether other factors of discretionary application should be considered to adjust the fee either upward or downward.” *McLain v. Anderson*, 933 P.2d 468, 473 (Wyo. 1997). That is because “attorney’s fees are a variety of punitive damages and must be proven to have been incurred and to be reasonable in amount in order to be awarded.” *Id.* Judge Neely therefore requests an opportunity to review and specifically respond to any submission ostensibly supporting an attorneys’ fees award, in order to ensure that the hours billed are reasonable and not duplicative or unnecessary. *Dishman v. First Interstate Bank*, 2015 WY 154, ¶ 14, 362 P.3d 360, 365 (Wyo. 2015). Allowing Judge Neely to specifically respond to an attorneys’ fees submission will assist the full Commission in “exercising its . . . judgment” when assessing fees and costs. *Id.* at 366-67 (stating that a “court must scrutinize the claim [for attorneys’ fees] with particular care,” and holding that an “itemized billing statement, listing the nature of the services performed, the time expended and the hourly rate is required to prove a claim for attorney fees”).

CONCLUSION

For the foregoing reasons, the Commission should impose no sanction on Judge Neely.

Respectfully submitted this the 9th day of February, 2016.

By:


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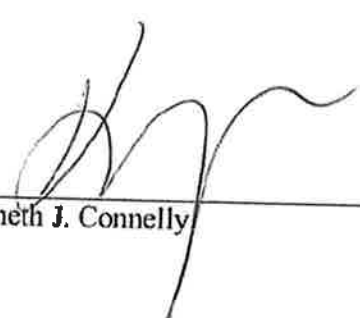
Attorneys for Respondent
*Out-of-State Certification Obtained

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2016, I served the foregoing Memorandum by electronic mail on the following:

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Kenneth J. Connelly

AGENDA
Commission on Judicial Conduct and Ethics
9:00 a.m., February 19, 2016
Federal Court Building
Casper, Wyoming

1. Call to Order
2. Declaration of a quorum
3. Statement of purpose of meeting pursuant to the rules
4. Guidelines to consider when determining the appropriate sanction
5. Statements of the parties (30 minutes each side)
 - A. Disciplinary Counsel
 - B. Judge Neeley's Counsel
6. Discussion – Executive Session
7. Recommendation for sanction
8. Adjournment:

BEFORE THE COMMISSION ON JUDICIAL CONDUCT AND ETHICS
STATE OF WYOMING

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

No. 2014-27

COMMISSION ON JUDICIAL CONDUCT
AND ETHICS
Official Record
FILED

Date: 2/26/16

Wendy J. Soto

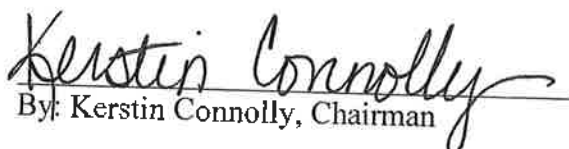
COMMISSION ON JUDICIAL CONDUCT & ETHICS RECOMMENDATION

The Wyoming Commission on Judicial Conduct and Ethics, having convened on February 19, 2016, for the purposes of considering the issue of sanctions against Judge Ruth Neely, pursuant to Rule 16, of *Rules Governing the Commission on Judicial Conduct and Ethics* (herein after "Rules") and having heard the arguments of counsel, considering the evidence in the record, and in recognition of the guidelines provided by our Rules, specifically Rule 8(d), and, having adopted by reference the findings of fact and conclusion of law of the Adjudicatory Panel dated December 31, 2015, hereby unanimously finds and recommends as follows:

1. Judge Neely be removed from her position as Municipal Court Judge and Circuit Court Magistrate;
2. The Commission recommends that the assessment of costs and fees in this matter be left to the discretion of the Wyoming Supreme Court.

DATED this 26th day of February, 2016.

THE COMMISSION ON JUDICIAL
CONDUCT AND ETHICS


By: Kerstin Connolly, Chairman

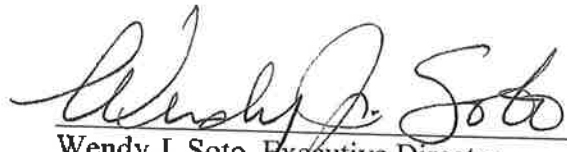
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2016, I served the foregoing COMMISSION ON JUDICIAL CONDUCT & ETHICS RECOMMENDATION via email and by placing a true and correct copy thereof in the United States Mail, postage prepaid, and properly addressed to the following:

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