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Judicial Ethics -- Judicial Words May Speak Softer Than Actions, But They Do Still Speak: The Code of Judicial Conduct; *Neely v. Wyo. Comm'n. on Judicial Conduct & Ethics*, 2017 WY 25, 390 P.3d 728 (Wyo. 2017)

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CASE NOTE

**JUDICIAL ETHICS—Judicial Words May Speak Softer Than
Actions, But They Do Still Speak: The Code of Judicial Conduct;
Neely v. Wyo. Comm’n. on Judicial Conduct & Ethics,
2017 WY 25, 390 P.3d 728 (Wyo. 2017)**

*Keeley O. Cronin**

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I. INTRODUCTION

To preserve public confidence in the judiciary “[j]ustice must satisfy the appearance of [j]ustice.”¹ Satisfying the appearance of justice necessarily imposes a duty of impartiality on judges.² The public’s confidence in this impartiality is essential to a functioning judicial branch, and this duty requires a high standard of conduct for judges.³ Society understandably holds lawyers to a higher standard of conduct than the general public; and the standard for a judge must be higher still.⁴ A judge’s heightened standard of conduct applies both on and off the bench and extends beyond actual acts of impropriety to encompass those acts that may give even the *appearance* of impropriety.⁵

In *Neely v. Wyoming Commission on Judicial Conduct & Ethics*,⁶ the Wyoming Supreme Court addressed the extent to which a judicial committee may regulate the speech and conduct of a judge in order to preserve public confidence in the judicial branch.⁷ Ultimately, the court ordered a public censure of Judge Neely for her misconduct.⁸ In ordering Judge Neely’s public censure, the court held Judge Neely had violated several rules of the Wyoming Code of Judicial Conduct (Code

¹ *Offutt v. United States*, 348 U.S. 11, 14 (1954).

² *See Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 24, 390 P.3d 728, 737–38 (Wyo. 2017).

³ *In re Raab*, 793 N.E.2d 1287, 1292 (N.Y. 2003) (“[W]ithout public confidence, the judicial branch could not function.”).

⁴ *In re Piper*, 534 P.2d 159, 164 (Or. 1975). (“Just as an attorney is held by the Code of Professional Responsibility to standards of integrity and ethical conduct higher than that required for ordinary persons . . . because the office of judge is one of even greater trust and confidence, a judge must be held by the Canons of Judicial Ethics . . . [t]o standards of integrity and ethical conduct higher than those required for attorneys.”). *See also* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵ MODEL CODE OF JUDICIAL CONDUCT Canon 1 r. 1.2 cmt. 1 (AM. BAR ASS’N 2011) (“Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.”); *In re Roth*, 645 P.2d 1064, 1068–69 (Or. 1982) (“The purview of Canon 2A, therefore, is conduct by a judge, on or off the bench, in an official or personal capacity, which has a detrimental effect upon the public’s perception of the judiciary.”).

⁶ On January 8, 2018, The United States Supreme Court denied Judge Neely’s petition for writ of certiorari. *Neely*, 390 P.3d 728, *petition for cert. denied*, 2018 LEXIS 103* (U.S. Jan. 8, 2018) (No. 17-195).

⁷ *Neely*, ¶ 27, 390 P.3d at 738.

⁸ *Id.* at ¶ 74, 390 P.3d at 753.

of Judicial Conduct).⁹ While the court imposed an appropriate sanction on Judge Neely, it mistakenly found violations of the Code of Judicial Conduct Rules 2.2 and 2.3(B).¹⁰ In fact, the only appropriate sanction was pursuant to Rule 1.2.¹¹ The fact that a general, catch-all rule is the only rule available to sanction actions such as Judge Neely's, is suggestive of the need for the creation of a new rule, to ensure that there is uniformity of decisions moving forward.¹²

This case note focuses on the *Neely* court's discussion of the Code of Judicial Conduct and the importance of maintaining public confidence in the judicial branch.¹³ First, it discusses the legal backdrop to *Neely* and the Code of Judicial Conduct.¹⁴ Next, it outlines the facts of the case and the majority and dissenting opinions.¹⁵ Third, it argues that the Wyoming Supreme Court imposed the correct sanctions on Judge Neely, but for improper reasons.¹⁶ Finally, it proposes that, because Rule 1.2 is the only provision available to sanction a judge's expressed intent to refuse to apply the law in the future, it is necessary to enact a new rule that will adequately address such behavior.¹⁷

II. BACKGROUND

A. *The Right to Marry*

Looming in the background of *Neely* are the Wyoming Supreme Court's *Guzzo v. Mead* and the United States Supreme Court's *Obergefell v. Hodges*

⁹ *Id.* at ¶ 73, 390 P.3d at 752.

¹⁰ *See infra* notes 187–240 and accompanying text.

¹¹ *Id.* at ¶ 66, 390 P.3d at 750.

¹² As it stands, this rule is by its nature, likely to provide inconsistent results. Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1373 (2006) (“One of the nice things about charging ‘appearances of impropriety’ is that one does not have to be consistent, because ‘appearances’ require weighing and considering each case as unique, so there is no precedent. . . . But law is not supposed to be like that.”).

¹³ *Neely*, ¶ 2, 390 P.3d at 732. In *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, the Wyoming Supreme Court examined many divergent issues. *Id.* at ¶¶ 1–3, 390 P.3d 728, 732. However, for the purposes of this case note and its limited scope, the note will discuss only the Code of Judicial Conduct and the necessity that the public maintain its confidence in the judiciary, as covered by *Neely*. For a critical analysis on freedom of speech, strict scrutiny, or the Wyoming Constitution, *see* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007); Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773 (2008); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 67, 86 n.48 (prac. ed., 1986); *see also* *People v. Morely*, 725 P.2d 510, 516 (Colo. 1986); *Statewide Grievance Comm. v. Rozbicki*, 595 A.2d 819, 825 (Conn. 1991); ROBERT KEITER, *THE WYOMING CONSTITUTION* (G. Alan Tarr ed., 2nd ed. 2017).

¹⁴ *See infra* notes 18–57 and accompanying text.

¹⁵ *See infra* notes 58–143 and accompanying text.

¹⁶ *See infra* notes 144–252 and accompanying text.

¹⁷ *See infra* notes 144–252 and accompanying text.

decisions.¹⁸ In the wake of these cases, *Neely* is not about whether same-sex couples have the right to marry, they do.¹⁹ However, *Guzzo* and *Obergefell* played an indispensable role in creating the situation that resulted in *Neely*. The law, as established by *Guzzo* and *Obergefell*, made Judge Neely's announcement that she would not perform any same-sex marriage ceremonies a violation of the Code of Judicial Conduct.²⁰ Therefore, a complete analysis warrants a brief summary of these cases.²¹

1. *Guzzo v. Mead*

Wyoming Statute § 20-1-101 defines marriage as a "civil contract between a male and a female person."²² In *Guzzo*, the plaintiffs challenged the constitutionality of the statute.²³ The plaintiffs were same-sex couples who had been denied marriage licenses in Wyoming, a married, same-sex, Canadian couple whose marriage Wyoming refused to recognize, and a Wyoming LGBT advocacy organization.²⁴ The plaintiffs requested a preliminary injunction to prevent Wyoming from limiting marriage to opposite-sex couples, arguing that Wyoming's definition of marriage violated the Due Process and Equal Protection Clauses of the United States Constitution.²⁵

After weighing the factors governing preliminary injunctions, the United States District Court for the District of Wyoming held that it was bound by

¹⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481 (D. Wyo. Oct. 17, 2014).

¹⁹ *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 3, 390 P.3d 728, 732 (Wyo. 2017). ("This case is *not* about same-sex marriage or the reasonableness of religious beliefs . . . [t]his case is also not about imposing a religious test on judges. Rather, it is about maintaining the public's faith in an independent and impartial judiciary that conducts its judicial functions according to the rule of law, independent of outside influences, including religion, and without regard to whether a law is popular or unpopular."). Throughout the decision, the majority does not consider whether same-sex marriage is legal, but instead focuses on the freedom of speech and judicial conduct implications. *See id.*

²⁰ *See supra* note 18 and accompanying text.

²¹ As the validity of law regarding right to marry is not at issue here, the overview of both cases is very brief. For a more thorough analysis of these cases and same-sex marriage, *see* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481 (D. Wyo. Oct. 17, 2014); COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW § 8:2 (2017); Katherine G. Porter, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), 42 OHIO N.U. L. REV. 331 (2015).

²² WYO. STAT. ANN. § 20-1-101 (2017).

²³ *Guzzo*, 2014 U.S. Dist. LEXIS 148481, at *1.

²⁴ *Id.* at *3.

²⁵ *Id.* at *2, *11. The Due Process Clause reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause reads: "nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

Tenth Circuit precedent, holding that the states could not prohibit same-sex marriages.²⁶ Accordingly, the court enjoined Wyoming from “enforcing or applying Wyoming Statute § 20-1-101, or any other state law, policy, or practice, as a basis to deny marriage to same-sex couples or to deny recognition of otherwise valid same-sex marriages entered into elsewhere.”²⁷ The court further held that “[m]arriage licenses may not be denied on the basis that the applicants are a same-sex couple.”²⁸ This decision, issued prior to the United States Supreme Court’s *Obergefell* opinion, effectively held that same-sex marriage was legal in Wyoming.²⁹ Then, in 2015, *Obergefell* cemented this ruling as the law of the land.³⁰

2. *Obergefell v. Hodges*

In *Obergefell*, fourteen same-sex couples and two men whose same-sex partners were deceased, petitioned for a writ of certiorari in the Supreme Court of the United States, seeking review of a decision from the United States Court of Appeals for the Sixth Circuit.³¹ The Sixth Circuit’s decision held that states were not constitutionally required to recognize same-sex marriages performed out of state or to issue marriage licenses to same-sex couples.³² The United States Supreme Court granted review and held that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit the states from denying same-sex couples the right to marry.³³ Accordingly, the United States Supreme Court held that a state “[may not] exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.”³⁴

B. The ABA Model Code of Judicial Conduct and the Appearance of Impropriety

The American Bar Association (ABA) adopted the first Canons of Judicial Ethics in 1924, not as a set of black-letter rules, but as a guide of behavior and principles for all members of the judiciary.³⁵ Although the purpose of the Canons was to provide structure and guidance to the judiciary, many reacted to the

²⁶ *Guzzo*, 2014 U.S. Dist. LEXIS 148481, at *18.

²⁷ *Id.* at *21–22.

²⁸ *Id.* at *22.

²⁹ *Id.* at *1; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁰ *Obergefell*, 135 S. Ct. at 2584.

³¹ *Id.* at 2593.

³² *Id.* at 2643.

³³ *Id.* at 2598; *see infra* note 66 and accompanying text.

³⁴ *Obergefell*, 135 S. Ct. at 2605.

³⁵ MODEL CODE OF JUDICIAL CONDUCT, Application I(B) (AM. BAR ASS’N 2011). The Code of Judicial Conduct mandates that everyone who performs judicial functions as an officer of a judicial system, whether a lawyer or not, will be considered a judge for the purpose of the Code of Judicial Conduct. *Id.*

Canons with criticism.³⁶ In response to these concerns, and after much revision, the ABA unanimously adopted the 1972 Model Code of Judicial Conduct.³⁷ One noteworthy change in the 1972 revisions was that the Code of Judicial Conduct became a rigorous, enforceable set of rules rather than merely a suggested moral compass for judges.³⁸ The 1972 Code of Judicial Conduct contained seven Canons that became a blend of both standards and rules, as opposed to the 1924 version's thirty-six provisions.³⁹ For over a decade, the 1972 version of the Code of Judicial Conduct was widely used as a method for disciplining judges and, by all accounts, served its intended purpose.⁴⁰ Nonetheless, in 1986 the ABA's Standing Committee on Ethics and Professional Responsibility conducted a review of the Code and considered input from lawyers, members of the judiciary, and the public at large.⁴¹ This review resulted in the adoption of the 1990 version of the Code of Judicial Conduct, including new Preamble and Terminology sections.⁴² The comments included in the 1990 version of the Code of Judicial Conduct require judges to act at all times in a way that avoids impropriety or the *appearance* of impropriety.⁴³

Several additional amendments resulted in the most recent 2007 Code of Judicial Conduct.⁴⁴ Drafting the 2007 Code of Judicial Conduct was not a small undertaking and required an immense compilation of data and reports from

³⁶ Robert McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391 (1972). The Canons were criticized specifically for their reliance on "hortatory" language, as opposed to providing strict guidance to members of the judiciary in resolving complicated disputes. *Id.* These concerns were assuaged when the language was changed from "should" to "shall". *Id.*

³⁷ CHARLES G. GEYH & W. WILLIAM HODES, REPORTER'S NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT vii (Am. Bar Ass'n ed., 2009) ("After three years of work by the Special Committee, the Code of Judicial Conduct was adopted by unanimous vote of the ABA House of Delegates on August 16, 1972. The 1972 Code was designed to be enforceable and was intended to preserve the integrity and independence of the judiciary.").

³⁸ MODEL CODE OF JUDICIAL CONDUCT Preface (AM. BAR ASS'N 1972). The Preface to the 1972 Judicial Code said: "The canons and text establish mandatory standards unless otherwise indicated." *Id.*

³⁹ GEYH & HODES, *supra* note 37, at vii.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at viii.

⁴³ *Id.* (emphasis added); MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (AM. BAR ASS'N 1990) ("A judge must avoid all impropriety and appearance of impropriety . . . [e]xamples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.").

⁴⁴ ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT (2007), https://www.americanbar.org/content/dam/aba/migrated/judiciaethics/house_report_authcheckdam.pdf.

judges, judicial ethics committees, and other informed individuals.⁴⁵ The rules addressed in this version of the Code of Judicial Conduct are applicable to a judge's conduct both on and off the bench.⁴⁶ They extend not only to impropriety, but also to the appearance of impropriety.⁴⁷

While preparing the 2007 Code of Judicial Conduct, the Standing Committee on Ethics and Professional Responsibility received substantial input on an important question: "whether the 'appearance of impropriety' concept should be retained" from the 1990 version of the Code of Judicial Conduct.⁴⁸ While some argued for the omission of the phrase "appearance of impropriety" from the Code of Judicial Conduct, the majority of commentators advocated for its retention.⁴⁹ These commentators cited over three decades of supporting precedent and ultimately persuaded the Standing Committee on Ethics and Professional Responsibility not only to retain the language, but also to relocate it to the very first Canon.⁵⁰ The Standing Committee on Ethics and Professional Responsibility emphasized the importance of "judicial independence, integrity, and impartiality" by repeatedly using this phrase throughout the rules.⁵¹ This language was redrafted to a freestanding, independent basis for discipline.⁵² In 2009, Wyoming adopted a new Code of Judicial Conduct.⁵³ This new Code is based upon the

⁴⁵ *Id.* The revisions additionally took place over a more than three-year time span, dozens of meetings and conferences, and nine public hearings. *Id.* The revisions were disseminated to sixteen entities, various committees, and the ABA, as well as being posted periodically on the ABA website. *Id.*

⁴⁶ *In re Inquiry Concerning a Judge*, 788 P.2d 716, 722 (Alaska 1990) (finding that unethical behavior outside the courtroom diminishes respect for the judiciary); *In re Hill*, 568 A.2d 361, 373 (Vt. 1989) (finding that the Code reaches into judge's nonjudicial life); *In re Woodworth*, 703 P.2d 844, 845 (Kan. 1985) (finding that even in private life, judges are held to higher standards than others).

⁴⁷ GEYH & HODES, *supra* note 37, at 3–4.

⁴⁸ ABA JOINT COMM'N, *supra* note 44, at 4 ("Although it was used in earlier Codes as well, the Commission took pains to ensure that the three terms appear together whenever appropriate. . .").

⁴⁹ Conference of Chief Justices, *Resolution 3: Opposing the Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct in Light of its Failure to Provide for Enforceability of the Canon on "Appearance of Impropriety"* (Feb. 7, 2007), <http://ccj.ncsc.dni.us/JudicialConductResolutions/resol3AppearanceOfImpropriety.html>. Among the strongest proponents of keeping the "appearance of impropriety" as a black letter rule, was the Conference of Chief Justices of the state's highest courts. *Id.*

⁵⁰ ABA JOINT COMM'N, *supra* note 44, at 4. The Commission subsequently added a definition for "impropriety" to the Terminology section. *Id.*

⁵¹ GEYH & HODES, *supra* note 37, at 19.

⁵² *Id.* at 17–19.

⁵³ Order Repealing the Existing Code of Judicial Conduct and Order Adopting New Wyo. Code of Judicial Conduct, Wyo. Sup. Ct. (June 23, 2009), http://preview.courts.state.wy.us/CourtRules/Orders/OrderWyomingCodeOfJudicialConduct_20090701.pdf. The amendments in the Wyoming Code of Judicial Conduct that deviate from the ABA's Code of Judicial Conduct address Wyoming's unique judicial selection and retention process. *Id.* Prior to the adoption of the 2009 Code of Conduct, Wyoming had been using the same Code of Conduct since 1990. *Id.*

2007 ABA Code of Judicial Conduct.⁵⁴ Accordingly, Wyoming's revised Code of Judicial Conduct reflects the policies underlying the ABA's 2007 Code of Judicial Conduct⁵⁵, which seeks to hold judges to a high ethical standard in order to foster public confidence in the integrity and impartiality of the judiciary.⁵⁶ The public's confidence in the impartiality of the judiciary is an indispensable and key component to a functioning judicial branch.⁵⁷

III. PRINCIPAL CASE

A. *Factual Background*

The Mayor and City Council of Pinedale, Wyoming appointed Ruth Neely as a municipal court judge in 1994.⁵⁸ As a municipal court judge, Judge Neely hears a variety of cases arising from town ordinances but does not have the authority to perform marriages.⁵⁹ Judge Neely additionally was appointed as a part-time circuit court magistrate in 2001.⁶⁰ One of Judge Neely's primary functions as a part-time circuit court magistrate is to perform marriages, as authorized by Wyoming Statute section 5-9-212(a)(iii).⁶¹ Although Judge Neely is not a lawyer and has no formal legal training,⁶² in addition to her judicial positions, she was a voting committee member responsible for adopting the amended 2009 Wyoming Rules of Judicial Conduct.⁶³

As a member of the judiciary, Judge Neely, took an oath swearing to “[s]upport, obey and defend the Constitution of the United States, and the

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *In re Johnstone*, 2 P.3d 1226, 1234 (Alaska 2000).

⁵⁷ See WYO. CODE OF JUDICIAL CONDUCT *pmbi.* (2009).

⁵⁸ *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 4, 390 P.3d 728, 733 (Wyo. 2017).

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 5, 390 P.3d at 733.

⁶¹ *Id.*

⁶² *Id.* at ¶ 4, 390 P.3d at 733 n.1. Wyoming does not require either its municipal court judges or its circuit court magistrates to have any legal training in order for an appointment to the bench. WYO. STAT. ANN. § 5-6-103 (2017). All that is required of municipal court judges is that they be a qualified elector, appointed by the mayor, and approved by the council. *Id.* Similarly, all that is required of part time circuit court magistrates is that they be a qualified elector and reside within the district in which the circuit court is located. WYO. STAT. ANN. § 5-9-201. A “qualified elector” is defined as: “every citizen of the United States who is a bona fide resident of Wyoming, has registered to vote and will be at least eighteen (18) years of age on the day of the election at which he may offer to vote.” WYO. STAT. ANN. § 22-1-102.

⁶³ John M. Burman, *Wyoming Supreme Court Adopts New Code of Judicial Conduct*, WYOMING LAWYER, Aug. 2009, at 40. The 2009 Wyoming Code of Judicial Conduct, for which Judge Neely was on the Committee, included the requirement that judges act in a way that avoided impropriety or the appearance of impropriety. See *id.*

Constitution of the state of Wyoming”⁶⁴ As part of this duty, Judge Neely must comply with and uphold decisions from the United States Supreme Court interpreting the Constitution. On October 17, 2014, Wyoming issued an injunctive order in *Guzzo v. Mead*, prohibiting the state from enforcing or applying “any . . . state law, policy, or practice, as a basis to deny marriages to same-sex couples.”⁶⁵ *Obergefell v. Hodges* soon followed and prohibited all states from denying same-sex couples the right to marry.⁶⁶ Thus, Judge Neely acquired a duty to enforce these decisions.⁶⁷ Although part-time magistrates can turn down performing marriage ceremonies for a variety of secular reasons,⁶⁸ following the decisions in *Obergefell* and *Guzzo*, magistrates cannot decline to perform a marriage ceremony based on a parties’ sexual orientation.⁶⁹ Prior to January 15, 2015, Judge Neely had never been subject to disciplinary action and was considered a respected member of the judiciary.⁷⁰ However, shortly after the decision in *Guzzo*, Neely met with Circuit Court Judge Curt Haws, setting in motion the events leading to her disciplinary action.⁷¹

Judge Neely, who is a member of the Lutheran Church, Missouri Synod, and who holds an undisputed, sincere belief that marriage is a union between one man and one woman,⁷² informed Judge Haws that she “would not be able to officiate same-sex marriages due to [her] sincerely held religious beliefs about what marriage is.”⁷³ Shortly after this conversation, Ned Donovan, a reporter for the *Pinedale Roundup*, asked Judge Neely whether she was excited to be able to perform same-sex marriages.⁷⁴ Judge Neely responded that although there were other magistrates who would perform same-sex marriages, she personally would

⁶⁴ *Neely*, ¶ 7, 390 P.3d at 733. (quoting WYO. CONST. art. 6, § 20). This oath is required of all circuit court magistrates. WYO. STAT. ANN. § 5-9-203.

⁶⁵ *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481, at *21–22 (D. Wyo. Oct. 17, 2014); see *supra* notes 18–30 and accompanying text.

⁶⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); see *supra* notes 31–34 and accompanying text.

⁶⁷ *Obergefell*, 135 S. Ct. at 2604–05.

⁶⁸ *Neely*, ¶ 6, 390 P.3d at 733. Appropriate secular reasons for turning down officiating a marriage ceremony includes conflicting hair appointments, football games, illnesses or a preference for performing marriage ceremonies only for friends. *Id.* Judge Neely has reportedly officiated at over 100 marriage ceremonies, with no indication that she has previously refused to perform a marriage ceremony. *Id.*

⁶⁹ *Obergefell*, 135 S. Ct. at 2584; *Guzzo*, 2014 U.S. Dist. LEXIS 148481, at 1*.

⁷⁰ *Neely*, ¶¶ 4, 73, 390 P.3d at 733, 753.

⁷¹ *Id.* at ¶ 8, 390 P.3d at 734.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 9, 390 P.3d at 734. Ned Donovan’s phone call to Judge Neely followed the United States District Court for the District of Wyoming’s decision in *Guzzo*. See *id.*; *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 U.S. Dist. LEXIS 148481 (D. Wyo. Oct. 17, 2014).

not perform same-sex marriages.⁷⁵ Judge Neely had an additional conversation with Mr. Donovan in which she stated: “When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage.”⁷⁶ A few days later, the *Pinedale Roundup* published Judge Neely’s remarks.⁷⁷

After being made aware of Judge Neely’s comments and subsequent newspaper articles, the Wyoming Commission of Judicial Conduct and Ethics (Commission) launched an investigation into Judge Neely’s comments.⁷⁸ In response to a letter of inquiry sent by the Commission, Judge Neely affirmed the accuracy of her comments to the *Pinedale Roundup* and further stated that her “conscience, formed by religious convictions, [would] not allow [her] to solemnize the marriage of two men or two women.”⁷⁹ She reiterated that she had not yet been asked to perform a same-sex marriage.⁸⁰

With the Commission’s investigation underway, Judge Neely sent a letter to the Judicial Ethics Advisory Committee (Committee) seeking guidance on whether a magistrate could recuse herself from officiating same-sex marriage ceremonies due to religious convictions.⁸¹ She explained that she “could no more officiate a same-sex wedding than [she could] buy beer for the alcoholic or aid in another person’s deceit” because “[she could not] knowingly be complicit in another’s sin.”⁸² Judge Neely further explained she did not think this position made her biased.⁸³ The Committee did not respond to Judge Neely’s letter, as it found Judge Neely was not seeking guidance on a current or unresolved ethical dilemma, but instead was looking for the Committee to affirm her decision.⁸⁴ Judge Haws suspended Judge Neely from her part-time circuit court magistrate

⁷⁵ *Neely*, ¶ 9, 390 P.3d at 734.

⁷⁶ *Id.* at ¶ 84, 390 P.3d at 754.

⁷⁷ *Id.*

⁷⁸ *Id.* at ¶ 10, 390 P.3d at 734. The first article appeared in the *Pinedale Roundup* on December 9, 2014. *Id.* The *Sublette Examiner* subsequently published the article online on December 11, 2014. *Id.*

⁷⁹ *Id.* at ¶ 12, 390 P.3d at 734.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* Judge Neely filed a motion removing the confidentiality that normally accompanies all proceedings before the Commission, resulting in access to her communications with the Commission and the Committee. *Id.*

⁸³ *Id.* Judge Neely expressed that she had been the municipal court judge for over 20 years without a claim of bias or prejudice, and that she believed she would be impartial to homosexuals the same as she was to habitual liars, thieves, or alcoholics who appear before her on charges. *Id.*

⁸⁴ *Id.* The committee’s role is not to confirm decisions, but rather to aid in the guidance of resolution of ethical dilemmas. *Id.*

position on January 15, 2015.⁸⁵ The Commission concluded there was probable cause to find a Code violation and referred the matter to its Adjudicatory Panel.⁸⁶ The full Commission adopted the Adjudicatory Panel's findings and recommendation, and further recommended that Judge Neely be removed from both judicial positions.⁸⁷ Shortly thereafter, Judge Neely petitioned the Wyoming Supreme Court to reject the Commission's recommendation.⁸⁸

B. Majority Opinion

The Wyoming Supreme Court considered whether Judge Neely violated the Code of Judicial Conduct, focusing on the need to promote public confidence in the integrity and impartiality of the judiciary.⁸⁹ Although the opinion in *Neely* addressed additional issues of import, this case note is limited to the applicability of the Code of Judicial Conduct to Judge Neely's conduct and the sanctions imposed by the Wyoming Supreme Court.⁹⁰ Writing for the majority, Justice Fox explained that it was not Judge Neely's religious beliefs that were at issue but rather her conduct as a judge.⁹¹

The Wyoming Supreme Court held Judge Neely's announcement that she would not perform marriages for same-sex couples violated the Code of Judicial Conduct Rules 1.2, 2.2, and 2.3(B).⁹² The court imposed a public censure sanction and held that Judge Neely could either perform marriage ceremonies regardless of a couple's sexual orientation or perform no marriage ceremonies at all.⁹³

⁸⁵ *Id.* Judge Haws did not have the authority to suspend or remove Judge Neely from her position as a municipal court judge, as appointments to this position are at the discretion of the mayor and the city council. *See* WYO. STAT. ANN. § 5-6-103 (2017).

⁸⁶ *Id.* at ¶ 13, 390 P.3d at 735. The Commission and Judge Neely filed cross-motions for summary judgment to the Adjudicatory Panel. *Id.* The Adjudicatory Panel held a hearing following these motions and held that Judge Neely's motion for summary judgment was denied, while the Commission's motion for partial summary judgment was granted on December 31, 2015. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at ¶ 14, 390 P.3d at 735.

⁸⁹ *Id.* at ¶¶ 57, 71, 390 P.3d at 747, 751.

⁹⁰ Outside the scope of this note, though inescapably relevant, is the Wyoming Supreme Court's thorough discussion on the applicability of strict scrutiny and whether both the United States Constitution and the Wyoming Constitution permit the Court to discipline Judge Neely. *See supra* note 13 and accompanying text.

⁹¹ *Neely*, ¶ 3, 390 P.3d at 732. It was Judge Neely's repeated comments that she would not perform same-sex marriages that were at issue in this case. *Id.*

⁹² *Id.*

⁹³ *Id.* at ¶ 74, 390 P.3d at 753. The Court held that Judge Neely must make a choice whether or not to perform marriages regardless of the couple's sexual orientation. *Id.* After Judge Neely made this choice, it would then be the circuit court judge who would have the discretion in determining whether Judge Neely would be allowed to remain a part-time circuit court magistrate, as this position is necessarily dependent on each circuit court judge's needs. *Id.*

1. *Rule 1.1: A Judge Shall Comply with the Law, Including the Code of Judicial Conduct*

The Wyoming Supreme Court first considered Rule 1.1 of the Code of Judicial Conduct, which states: “A judge shall comply with the law, including the Code of Judicial Conduct.”⁹⁴ Rule 1.1 violations generally occur when a judge’s conduct violates a criminal law, although, occasionally, there are violations following a judge’s failure to follow clear procedural rules of law.⁹⁵ Examples of Rule 1.1 violations include a judge failing to sentence a defendant to a set time in jail; a judge failing to comply with state traffic infraction procedures; and a judge failing to release opinions in compliance with state law.⁹⁶ The Wyoming Supreme Court declined to extend Rule 1.1’s requirement to comply with the law to Judge Neely’s discretionary duty to perform marriages and instead, it found that, standing alone, her conduct had not violated Rule 1.1.⁹⁷

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

Next, the Wyoming Supreme Court analyzed whether Judge Neely violated Rule 1.2 of the Code of Judicial Conduct, which states: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”⁹⁸ The court determined the proper standard to apply when assessing whether a judge has exhibited the “appearance of impropriety” was the objective standard contained in the Code of Judicial Conduct comments.⁹⁹ This test asks “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, *impartiality*, temperament, or fitness to serve as a judge.”¹⁰⁰ Under these circumstances, this analysis requires the court to

⁹⁴ *Id.* at ¶ 59, 390 P.3d at 747–48 (quoting WYO. CODE OF JUDICIAL CONDUCT r. 1.1 (2009)).

⁹⁵ *Id.* at ¶¶ 59–60, 390 P.3d at 747–48.

⁹⁶ *See id.* at ¶ 60, 390 P.3d at 748 (citing *In re Harkin*, 958 N.E.2d 788, 791 (Ind. 2011); *In re Young*, 943 N.E.2d 1276, 1280 (Ind. 2011); *In re Bennington*, 24 N.E.3d 958, 961 (Ind. 2015); *In re Jones*, 55 S.W.3d 243, 248 (Tex. Spec. Ct. Rev. 2000); *In re Perez*, 843 N.W.2d 562, 564 (Minn. 2014)).

⁹⁷ *Id.* at ¶ 61, 390 P.3d at 748. The court acknowledged, however, that to the extent Judge Neely violated any other rules of the Code of Judicial Conduct, she had violated Rule 1.1. *Id.*

⁹⁸ *Id.* at ¶ 62, 390 P.3d at 748 (quoting WYO. CODE OF JUDICIAL CONDUCT r. 1.2).

⁹⁹ *Id.* at ¶¶ 62–63, 390 P.3d at 749. The court declined to follow either the Mississippi Supreme Court’s objective person standard, as advocated for by Neely, or Alaska’s standard advocated for by the Commission, finding no conflict between either party’s proposed standard. *Id.* The court further determined that the “objective person” standard articulated in Rule 1.2 Comment 5 necessarily implied that the “reasonable person” would be informed of all “relevant facts and circumstances.” *Id.*

¹⁰⁰ WYO. CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 5 (emphasis added).

determine whether a reasonable person could conclude that Judge Neely's stated refusal to perform marriage ceremonies for same-sex couples rendered her unable to perform her judicial duties impartially.¹⁰¹

Employing this standard, the majority of the court rejected Judge Neely's argument that, because her duty to perform marriages was discretionary, her refusal to perform same-sex marriages would not violate Rule 1.2.¹⁰² Instead, the court held the requirement that judge's act impartially was not limited to only certain types of judicial functions, but not to others.¹⁰³ The Wyoming Supreme Court also rejected Judge Neely's argument that solemnizing marriages involves personally participating in and supporting a marital union as marriage is a civil contract and does not require the person officiating the ceremony to condone it.¹⁰⁴ Finally, the court rejected Judge Neely's argument that her stated willingness to perform other magisterial functions for same-sex couples, or her assertion that she would help same-sex couples find other judges to perform their marriage ceremonies, overcame her unequivocal refusal to perform marriages for same-sex couples.¹⁰⁵ The court held Judge Neely's statements created the perception in reasonable minds that she lacked independence and impartiality and, therefore, she had violated Rule 1.2.¹⁰⁶

3. Rule 2.2: Impartiality and Fairness

The court next considered Rule 2.2, which states: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."¹⁰⁷ The court found that, as Judge Neely's primary function as a circuit court magistrate was to perform marriage ceremonies, her announcement that she would do so for opposite-sex couples but not same-sex couples interfered with the fair and impartial performance of her judicial duties.¹⁰⁸ Comment 2 to Rule 2.2 states, "Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard

¹⁰¹ See *Neely*, ¶¶ 62–63, 390 P.3d at 749–50.

¹⁰² *Id.* at ¶ 63, 390 P.3d at 749.

¹⁰³ *Id.* at ¶¶ 63–64, 390 P.3d at 749 (citing *In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at *1 (Wash. Comm'n Jud. Conduct Oct. 4, 2013)).

¹⁰⁴ *Id.* at ¶ 65, 390 P.3d at 749–50. When a judge performs a civil marriage ceremony, the Board concludes that the judge is performing a judicial duty, and thus is required to follow the Code of Judicial Conduct in the performance of that duty. Ohio Sup. Ct. Bd. of Prof'l Conduct, Op. No. 2015-1, at *1 (Aug. 7, 2015), http://www.ohioadvop.org/wp-content/uploads/2017/04/Op_15-001.pdf.

¹⁰⁵ *Neely*, ¶ 66, 390 P.3d at 750.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at ¶ 67, 390 P.3d at 750 (quoting WYO. CODE OF JUDICIAL CONDUCT r. 2.2 (2009)).

¹⁰⁸ *Id.* (explaining that the law has established that both classes of people are entitled to marriage and Judge Neely's stance opposite of this undermines public confidence in the judiciary).

to whether the judge approves or disapproves of the law in question.”¹⁰⁹ The court held that, in light of Rule 2.2 and Comment 2, Judge Neely had improperly allowed her religious beliefs to interfere with a fair and impartial application of the law and, thus, had violated Rule 2.2.¹¹⁰

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

Finally, the court turned to Rule 2.3 of the Code of Judicial Conduct to determine whether there had been a violation of that rule. Rule 2.3 states:

- (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
- (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, 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.¹¹¹

The Comments to Rule 2.3 elaborate on the requirement that judges perform their judicial duties in an impartial manner, stating: “A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.”¹¹² Judge Neely argued she had no bias or prejudice against same-sex couples and that her comments to Mr. Donovan did not reflect any such bias or prejudice as they were simply an expression of her religious beliefs.¹¹³ The court was not persuaded by this argument, finding Judge Neely’s statements were more than a mere expression of religious beliefs.¹¹⁴ Rather, the court found Judge Neely’s statements to be an expression of her intent to allow her religious beliefs to supersede the law, and therefore impede the impartial performance of her judicial duties.¹¹⁵ As such, Judge Neely would be performing her judicial functions for one class of

¹⁰⁹ *Id.* (quoting WYO. CODE JUDICIAL OF CONDUCT r. 2.2 cmt. 2).

¹¹⁰ *Id.* (“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”).

¹¹¹ *Id.* at ¶ 68, 390 P.3d at 750 (quoting WYO. CODE OF JUDICIAL CONDUCT r. 2.3).

¹¹² *Id.* at ¶ 70, 390 P.3d at 751 (quoting WYO. CODE OF JUDICIAL CONDUCT r. 2.3 cmt. 2).

¹¹³ *Id.* at ¶ 69, 390 P.3d at 750–51.

¹¹⁴ *Id.*

¹¹⁵ *Id.* The court determined that given Judge Neely’s public announcement that she would refuse to perform same-sex marriages, it is very unlikely that any same-sex couple would now approach Judge Neely to request a marriage. *Id.*

people, but not another, based on sexual orientation.¹¹⁶ Relying primarily on Comment 2 to Rule 2.3, the Wyoming Supreme Court held: “Judge Neely’s refusal to conduct marriages on the basis of a couple’s sexual orientation can reasonably be perceived to be biased [and therefore] Judge Neely violated Rule 2.3.”¹¹⁷

C. Dissent

Justice Kautz (joined by Justice Davis) argued in dissent that Judge Neely did not violate the Code of Judicial Conduct and therefore discipline was not appropriate.¹¹⁸ The dissent rejected the majority’s assertion that this case was not about Judge Neely’s religious beliefs and argued the majority’s conclusions imposed a religious test on Wyoming judges.¹¹⁹

1. Rule 1.1

Although the dissent concurred with the majority’s conclusion that Judge Neely had not violated Rule 1.1, it disagreed with the majority’s finding that Wyoming judges are required by law to perform marriage ceremonies for same-sex couples.¹²⁰ In analyzing *Guzzo*, the dissent determined that Wyoming officials are prohibited from denying marriage to same-sex couples “on the basis of any state law, policy, or practices.”¹²¹ The dissent argued Judge Neely’s announcement that she would not perform same-sex marriages herself because of her religious beliefs did not constitute a denial or a statement of future denial of marriage to anyone.¹²² The dissent concluded that neither *Guzzo* nor *Obergefell* created a requirement for any individual judge or magistrate in Wyoming to perform every marriage when requested, nor did these cases give any couple the right to insist a particular judge officiate their wedding.¹²³ Therefore, the dissent determined the majority incorrectly concluded Judge Neely was required to perform all marriages or at least all same-sex marriages whenever requested.¹²⁴

Next, the dissent analyzed the language of Wyoming Statute § 20-1-106(a), which states: “[e]very district or circuit court judge, district court commissioner, supreme court justice, [and] magistrate . . . acting in accordance with traditions

¹¹⁶ *Id.*

¹¹⁷ *Id.* at ¶ 70, 390 P.3d at 751 (citing *In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at *3 (Wash. Comm’n Jud. Conduct Oct. 4, 2013)) (“A judge must not only be impartial, but must also be perceived as impartial.”).

¹¹⁸ *Id.* at ¶ 163, 390 P.3d at 769.

¹¹⁹ *Id.* at ¶ 78, 390 P.3d at 753–54.

¹²⁰ *Id.* at ¶¶ 94–99, 390 P.3d at 756–57.

¹²¹ *Id.* at ¶¶ 92–93, 390 P.3d at 755–56.

¹²² *See id.* at ¶ 92, 390 P.3d at 755.

¹²³ *See id.* at ¶¶ 92–94, 390 P.3d at 755–56.

¹²⁴ *See id.* at ¶ 98, 390 P.3d at 757.

or rites for the solemnization of marriage . . . *may* perform the ceremony of marriage in this state.”¹²⁵ Relying on the use of “*may*,” the dissent concluded that no particular judge is required to perform any particular marriage ceremony; no couple has the right to demand a particular judge officiate their wedding; and judges and magistrates may in fact decline to perform some legal marriage ceremonies without regard to the reason for such denial.¹²⁶ The dissent determined the law requires only that state officials not deny marriage as an institution to same-sex couples, not that a particular judge perform every requested same-sex marriage.¹²⁷ Consequently, the dissent determined Judge Neely’s declarations that she would not perform marriage ceremonies for same-sex couples did not result in a failure to comply with the law.¹²⁸ The dissent based its conclusion on Judge Neely’s assertion that there were other judges able to perform marriage ceremonies for same-sex couples.¹²⁹

2. Rule 1.2

Next, the dissent argued the majority mistakenly found that Judge Neely’s assertions that she would not perform same-sex marriages meant Judge Neely had refused to follow any laws.¹³⁰ The dissent disagreed with the majority finding that Judge Neely decided to pick and choose the law she would follow, arguing that the language of Rule 1.2 is vague and the majority overreached in its conclusion.¹³¹ The dissent asserted the majority’s opinion would require every Wyoming judge to perform all requested same-sex marriages.¹³² Additionally, the dissent contended that the majority’s opinion imposes a religious test on Wyoming judges by banning any person with a religious belief opposing same-sex marriages from being a judge in Wyoming who performs marriages.¹³³ The dissent also criticized the majority for purportedly using an objective test when instead, according to the dissent, it employed a subjective test, which led to an incorrect conclusion.¹³⁴ Concluding a totality of the circumstances consideration was the appropriate reasonable person test, the dissenting justices reasoned that the majority had

¹²⁵ *Id.* at ¶ 94, 390 P.3d at 756 (quoting WYO. STAT. ANN. § 20-1-106(a) (2017) (emphasis added)).

¹²⁶ *See id.* at ¶¶ 95–97, 390 P.3d at 756–57 (citing in support, magistrates who had declined to solemnize some marriages due to family commitments, watching a football game, scheduling conflicts, or a preference to perform weddings only for friends).

¹²⁷ *Id.* at ¶ 98, 390 P.3d at 757.

¹²⁸ *Id.* at ¶ 99, 390 P.3d at 757.

¹²⁹ *Id.* at ¶ 92, 390 P.3d at 755.

¹³⁰ *Id.* at ¶ 102, 390 P.3d at 757.

¹³¹ *Id.* at ¶¶ 102–03, 390 P.3d at 757–58.

¹³² *Id.* at ¶ 104, 390 P.3d at 758.

¹³³ *Id.*

¹³⁴ *Id.* at ¶ 106, 390 P.3d at 758.

failed to apply an objective reasonable person test.¹³⁵ The dissent stated that an objective, reasonable person would have concluded that Judge Neely's statements did not erode public confidence in an impartial judiciary, nor did her statements give any appearance of impropriety.¹³⁶

3. Rule 2.2

Relying on the fact that Judge Neely had yet to be asked to perform a same-sex marriage, and thus, had never refused to perform one, the dissent argued that the plain language of Rule 2.2 makes the rule applicable only to actions, "not statements made outside the context of a case or an actual request."¹³⁷ Further, the dissent found the actions taken against Judge Neely were in response to her faith and not her deeds.¹³⁸ The dissent concluded that Judge Neely did not have an obligation to perform all marriage ceremonies, and as such found no fault in a judge refusing to perform a marriage ceremony based on a couple's sexual orientation, when there were other judges willing to perform same-sex marriage ceremonies.¹³⁹ Accordingly, the dissent disagreed with the majority's holding that Judge Neely's statements constituted a violation of Rule 2.2.¹⁴⁰

4. Rule 2.3(B)

Finally, the dissent analyzed Judge Neely's statements and determined that they were neither biased nor prejudiced under the definition of those terms.¹⁴¹ The dissent found Judge Neely's statements simply indicated what her religious beliefs about marriage were, but did not show that Judge Neely had a leaning either for or against same-sex couples.¹⁴² Lastly, the dissent concluded that Judge Neely's announcement that she would not perform marriage ceremonies for same-sex couples related to her religious beliefs about who may be married, but it did not relate to the "worth of any individual or class of individuals," and, therefore, she did not exhibit a bias or prejudice towards same-sex couples.¹⁴³

¹³⁵ See *id.* at ¶¶ 108–09, 390 P.3d at 759–60.

¹³⁶ See *id.* (arguing that as Judge Neely had not yet been asked to perform a same-sex marriage ceremony, combined with the fact that Wyoming law does not require Judge Neely to perform any marriages, Judge Neely had not violated Rule 1.2).

¹³⁷ *Id.* at ¶ 113, 390 P.3d at 760–61 (the words "uphold", "apply", and "perform" all indicate actual action taken by a judge, and "simply cannot apply to a judge's statement about how her religious views would come into play at some unknown, future time.").

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.* at ¶ 116, 390 P.3d at 761.

¹⁴¹ *Id.* at ¶¶ 118–19, 390 P.3d at 761–62 (defining "bias" as "a leaning of the mind or an inclination toward one person over another" and "prejudice" as involving "a prejudgment or forming of an opinion without sufficient knowledge or examination.").

¹⁴² *Id.* at ¶ 121, 390 P.3d at 762.

¹⁴³ *Id.* at ¶ 124, 390 P.3d at 762.

IV. ANALYSIS

Respect for the law is contingent on both the reality of justice and the appearance of justice.¹⁴⁴ Polls throughout the country show that faith in the judiciary is at a low point.¹⁴⁵ However, how the public perceives the judicial branch is not a new concern.¹⁴⁶ In fact, a judge's duty to possess the confidence of the community, by both acting and appearing impartial, has been a concern for generations.¹⁴⁷ As one scholar eloquently wrote:

A government of the people, by the people and for the people rises or falls with the will and consent of the governed. The public will not support institutions in which they have no confidence. The need for public support and confidence is all the more critical for the judicial branch, which by virtue of its independence is less directly accountable to the electorate and, thus, perhaps more vulnerable to public suspicion.¹⁴⁸

Maintaining public confidence in an impartial judiciary is critical to the functioning of the judicial branch, and to maintain the public's confidence it is more imperative than ever that judges be held to a high standard of impartiality and sanctioned when they act with impropriety or partiality.¹⁴⁹

¹⁴⁴ *In re Greenberg*, 280 A.2d 370, 372 (1971) (“Without the appearance as well as the fact of justice, respect for the law vanishes in democracy.”).

¹⁴⁵ Caleb Diehl, *Harvard Poll Finds Millennials Have Little Faith in Government*, USA TODAY COLLEGE (Apr. 29, 2015), <http://college.usatoday.com/2015/04/29/harvard-poll-finds-millennials-have-little-faith-in-government-media> (“[M]illennials are split on the U.S. judicial system’s ability to ‘fairly judge people without bias for race and ethnicity.’” Forty-nine percent said they had “not much” or “no” confidence in the American justice system.); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Courts*, 20 J. AM. JUD. SOC. 178, 178–79 (1936) (There is a “real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today . . . [c]ourts are distrusted [which] has almost destroyed the traditional respect for the Bench.”).

¹⁴⁶ *In re Greenberg*, 280 A.2d at 372 (“For generations before and since it has been taught that a judge must possess the confidence of the community; that he must not only be independent and honest, but, equally important, believed by all men to be independent and honest [J]ustice must not only be done, it must be seen to be done.”)

¹⁴⁷ *Id.*

¹⁴⁸ AM. BAR ASS’N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 10 (2003), <https://www.americanbar.org/content/dam/aba/migrated/judindl/jeopardy/pdf/report.authcheckdam.pdf>.

¹⁴⁹ *Id.* (“Appearances matter because the public’s perception of how the courts are performing affects the extent of its confidence in the judicial system. And public confidence in the judicial system matters a great deal First, and perhaps foremost, public confidence in our judicial system is an end in itself.”); CHARLES G. GEYH ET AL., JUDICIAL CONDUCT & ETHICS § 1.04 (5th ed. 2015) (“The principle that public officials should not only behave properly, but appear to behave properly has come to occupy a prominent place in contemporary American political culture.”).

Neely presents the question of which disciplinary actions are available when a judge announces a future intent to comply with only those laws that do not conflict with her religious beliefs, thereby expressing an intent to act with impropriety.¹⁵⁰ This is one of very few cases considering the consequences of a member of the judiciary merely announcing she will not perform marriage ceremonies for same-sex couples in the future.¹⁵¹ The Wyoming Supreme Court attempted to maintain the public's confidence in an impartial judiciary when it sanctioned this Wyoming Judge for announcing she would not uphold the law with impartiality, as required by the Code of Judicial Conduct.¹⁵² Yet the current Rules available to the court did not provide a satisfactory conclusion to the case.¹⁵³

A. *The Court Reached a Correct Outcome Based on Rule 1.1*

Standing alone, Judge Neely did not violate the Code of Judicial Conduct Rule 1.1. Rule 1.1 states: "A judge shall comply with the law, including the Code of Judicial Conduct."¹⁵⁴ The Code of Judicial Conduct's Terminology section defines "Law" as encompassing "court rules as well as statutes, constitutional provisions, and decisional law."¹⁵⁵ The majority correctly found that violations of Rule 1.1 most commonly occur when judges fail to comply with criminal laws or procedural rules, but not for violations of the Code of Judicial Conduct alone.¹⁵⁶ For example, a judicial committee removed a Kansas judge from the bench for violating Canon 1 of the Code of Judicial Conduct when he struck two highway signs with his vehicle, left his vehicle at the scene of the accident, and

¹⁵⁰ *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 2, 390 P.3d 728, 732 (Wyo. 2017). What is at issue here is whether a judge may announce that, if called upon, she will not perform her job impartially, as she is sworn to do. *Id.*

¹⁵¹ *Id.* at ¶ 72, 390 P.3d at 752 (citing Ohio Sup. Ct. Bd. Of Prof'l Conduct, Op. No. 2015-1, at *1 (Aug. 7, 2015), http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf; Wis. Sup. Ct. Judicial Conduct Advisory Comm., Op. No. 15-1, at 1* (Aug. 18, 2015), <https://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878>; Arizona Sup. Ct. Judicial Ethics Advisory Comm., Op. No. 15-01, at *1 (Mar. 9, 2015), <https://media.azpm.org/master/document/2015/3/16/pdf/revisedadvisoryopinion15-01.pdf>). The cases cited by the *Neely* court are situations where judges were sanctioned for declining to perform a *specific* couple's marriage ceremony on the basis of their sexual orientation. *Id.* These cases are distinguishable from the present case, as these judges did not state a future intent to decline to perform marriage ceremonies based on a parties' sexual orientation, but rather declined to perform specific, present requests. *See id.*

¹⁵² *See id.* at ¶ 76, 390 P.3d at 753; *supra* notes 58–143 and accompanying text.

¹⁵³ *Id.* at ¶ 59, 390 P.3d at 747 (citing WYO. CODE OF JUDICIAL CONDUCT r. 1.1 (2009)).

¹⁵⁴ *Id.* at ¶ 59, 390 P.3d at 747 (citing WYO. CODE OF JUDICIAL CONDUCT r. 1.1 (2009)).

¹⁵⁵ MODEL CODE OF JUDICIAL CONDUCT, terminology (AM. BAR ASS'N 2011).

¹⁵⁶ *Neely*, ¶ 59, 390 P.3d at 747–48; *see supra* notes 94–97 and accompanying text.

failed to contact the police department that had jurisdiction over his accident.¹⁵⁷ Another judicial committee sanctioned a judge in Indiana who subsequently resigned from the bench following his arrest for his involvement in an automobile crash that resulted in property damage.¹⁵⁸ These cases are distinguishable from the current matter, as they involve independent criminal conduct, not purely violations of the Code of Judicial Conduct's mandate to avoid acting or appearing to act with impropriety.

B. The Court Reached a Correct Outcome and Proper Sanctions Based on Rule 1.2

Judge Neely eroded public confidence in her impartiality by failing to avoid impropriety or the appearance of impropriety.¹⁵⁹ Rule 1.2 requires a judge to avoid improper conduct as well as conduct that could create even *the appearance of impropriety*.¹⁶⁰ It is well accepted that, for the general public, and even for lawyers, this standard is far too heavy a burden to shoulder.¹⁶¹ However, this is a burden a judge willingly bears upon taking office.¹⁶² The need to maintain public confidence in the judiciary requires that this standard be enforced rigorously.¹⁶³

Both the majority and the dissent heavily emphasized Judge Neely's initial statement to the *Pinedale Roundup* reporter, yet it was this statement, in combination with her other statements, that truly reflected the violation of Rule 1.2.¹⁶⁴ Judge Neely informed both Judge Haws and Mr. Donovan that she would not perform same-sex marriages, as doing so was in conflict with her religious beliefs.¹⁶⁵ Then, Judge Neely told the Commission that she could not be complicit in another's sin, and as such, she would not officiate at any

¹⁵⁷ *In re Yandell*, 772 P.2d 807, 809–10 (Kan. 1989) (“K.S.A. 1987 Supp. 8-1605 [which] provides that the driver of a vehicle having an accident with property, must leave identification and without necessary delay, notify the nearest office of the duly authorized authority. Respondent clearly did not do that. He not only violated the laws of the State of Kansas, but in addition, the cease and desist order resulting from an earlier proceeding.”).

¹⁵⁸ *In re Weber*, 21 N.E.3d 92–93 (Ind. 2014) (finding Judge Weber violated both Rule 1.1 and Rule 1.2 of the Code of Judicial Conduct due to his Criminal mischief and Drinking While Under the Influence guilty pleas).

¹⁵⁹ *Neely*, ¶ 62, 390 P.3d at 748.

¹⁶⁰ WYO. CODE OF JUDICIAL CONDUCT r. 1.2 (2009) (emphasis added).

¹⁶¹ *See id.* r. 1.2 cmts. 1–3.

¹⁶² *Carey v. Wolnitzek*, 614 F.3d 189, 194 (6th Cir. 2010) (“Unlike the other branches of government, the authority of the judiciary turns almost exclusively on its credibility and the respect warranted by its rulings . . .”).

¹⁶³ *Id.*

¹⁶⁴ *Neely*, ¶¶ 9, 69, 83, 390 P.3d at 734, 750, 754 (2017); WYO. CODE OF JUDICIAL CONDUCT r. 1.2.

¹⁶⁵ *Id.* at ¶ 8, 390 P.3d at 734; *see supra* notes 71–77 and accompanying text.

same-sex marriage ceremonies.¹⁶⁶ Finally, under oath, Judge Neely affirmed that her conscience would not allow her to solemnize the marriage of same-sex individuals.¹⁶⁷ Judge Neely's statements that she would not be impartial when dealing with same-sex individuals suggest both impropriety and the appearance of impropriety.¹⁶⁸ At the very least, the public should have confidence that a judge will be fair and impartial in dealing with the responsibilities of office. Judge Neely's comments blatantly indicate that she is not and will not be.¹⁶⁹

The dissent reached the opposite conclusion because it incorrectly assumed that Judge Neely's religious beliefs were the subject of inquiry.¹⁷⁰ However, Judge Neely did not merely state that her religious beliefs compelled her to disapprove of same-sex marriages.¹⁷¹ Judge Neely went a step further by announcing she would "not be able to" officiate any same-sex couple's marriage ceremony, even though officiating marriages was her primary function as a part-time circuit court magistrate.¹⁷² It was this critical step beyond merely stating her opinion that subjects her to the current discipline. Judge Neely not only expressed her opinion that homosexuality is a sin; she repeatedly announced that she would only perform marriages, one of her judicial duties, for opposite-sex couples but not for same-sex couples.¹⁷³ Regardless of her personal beliefs, this was an expressed intent by a judge to partially apply the law, constituting a violation of Rule 1.2.¹⁷⁴ Judge Neely is entitled to her personal beliefs; she is not entitled to permit them to impact her performance as a judge.¹⁷⁵

Although Judge Neely never refused to perform a specific same-sex marriage ceremony, she expressed bias and prejudice against same-sex couples by declaring her intent to refuse any marriage request by same-sex couples.¹⁷⁶ The majority correctly concluded that Judge Neely's conduct was inconsistent with the Code of Judicial Conduct.¹⁷⁷ The dissent, on the other hand, disagreed.¹⁷⁸ The dissent

¹⁶⁶ *Id.* at ¶ 11, 390 P.3d at 734; *see supra* note 82 and accompanying text.

¹⁶⁷ *Id.* at ¶ 12, 390 P.3d 734; *see supra* note 79 and accompanying text.

¹⁶⁸ Judge Neely's religious beliefs and personal opinions are irrelevant to the current state action. *Id.* at ¶ 3, 390 P.3d 728, 732. Rather, it is Judge Neely's expression of intent to fail to impartially uphold and apply the law which are at issue. *Id.*

¹⁶⁹ *Id.* at ¶ 9, 390 P.3d at 734.

¹⁷⁰ *See supra* notes 118–43 and accompanying text.

¹⁷¹ *See supra* notes 72–73 and accompanying text.

¹⁷² *See supra* note 73–79 and accompanying text.

¹⁷³ *See supra* notes 72–88 and accompanying text.

¹⁷⁴ WYO. CODE OF JUDICIAL CONDUCT r. 1.2 (2009).

¹⁷⁵ *See In re Bailey*, 541 So.2d 1036, 1039 (Miss. 1989).

¹⁷⁶ *See supra* notes 111–17 and accompanying text.

¹⁷⁷ *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 71, 390 P.3d 728, 751 (Wyo. 2017); *see supra* notes 111–17 and accompanying text.

¹⁷⁸ *Neely*, ¶ 78, 390 P.3d at 753–54; *see supra* notes 141–43 and accompanying text.

argued that, because other magistrates in Pinedale were willing to perform marriage ceremonies for same-sex couples, Judge Neely's statements that she would not do so herself were not expressions of partiality.¹⁷⁹ The dissent mistakenly assumed that another judge's willingness to act impartially excused Judge Neely from her own duty of impartiality.¹⁸⁰ One judge's willingness to impartially apply the law, as required by oath, is irrelevant to another judge's duty to do the same, and does not negate Judge Neely's expressed bias or prejudice.¹⁸¹ Judge Neely's statements to Judge Haws, the *Pinedale Roundup*, and to the Commission undermine a reasonable person's confidence in the impartiality of the judiciary and give the appearance of impropriety.¹⁸²

It is also unpersuasive to argue that Judge Neely was free to refuse to perform any marriage ceremony, regardless of the reason, because solemnizing marriages is a discretionary power.¹⁸³ Certainly, judges and magistrates in Wyoming can decline to perform certain marriage ceremonies.¹⁸⁴ But the dissent incorrectly asserted that "Wyoming judges may or may not perform weddings *without regard to the reason for their decision*."¹⁸⁵ The law does not require judges and magistrates to perform every marriage ceremony, yet it *does* require judges and magistrates to refrain from discriminating on the basis of race, gender, religion, sex, sexual orientation, or other protected classes.¹⁸⁶ Further, the United States Supreme Court has held that same-sex couples are entitled to civil marriages on the same terms and conditions as opposite-sex couples.¹⁸⁷ The assertion that a judge who declines to officiate a marriage ceremony due to a scheduling conflict is equivalent to a judge who declines to officiate a marriage ceremony because she does not agree with the person's sexual orientation is inaccurate.¹⁸⁸ For the aforementioned reasons, Judge Neely violated Rule 1.2

¹⁷⁹ *Neely*, ¶ 83, 390 P.3d at 754; see *supra* note 139 and accompanying text.

¹⁸⁰ *Neely*, ¶ 83, 390 P.3d at 754.

¹⁸¹ See *id.* at ¶ 9, 390 P.3d at 734.

¹⁸² *Id.* at ¶¶ 8–12, 390 P.3d at 734–35; see *supra* notes 98–107 and accompanying text.

¹⁸³ *Neely*, ¶ 97, 390 P.3d at 756–57; see *supra* notes 102–03 and accompanying text.

¹⁸⁴ *Neely*, ¶ 97, 390 P.3d at 757; see *supra* notes 66–68 and accompanying text.

¹⁸⁵ *Neely*, ¶ 97, 390 P.3d at 757 (emphasis added); see *supra* note 126 and accompanying text.

¹⁸⁶ *In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at * 2 (Wash. Comm'n. Jud. Conduct Oct. 4, 2013). Two judges from Ohio have both acknowledged that part of their powers and duties of office include performing marriage ceremonies, and following The United States Supreme Court's decision in *Obergefell*, their duties now include performing marriage ceremonies for same-sex couples. Jessie Balmert, *Marion Judges Will Marry Gay Couples, Cite Oath, Law*, THE MARION STAR (July 31, 2015, 4:08 PM), <http://www.marionstar.com/story/news/local/2015/07/31/marion-judges--marry-gay-couples-cite-oath-law/30953365/>.

¹⁸⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); *Pavan v. Smith*, 137 S. Ct. 2075 (2017); see *supra* note 34 and accompanying text.

¹⁸⁸ *Neely*, ¶ 97, 390 P.3d at 756–57.

of the Code of Judicial Conduct. However, this is the only rule of the Code of Judicial Conduct under which the Wyoming Supreme Court could properly sanction her.¹⁸⁹

C. The Court's Analysis under Rule 2.2 Misunderstands the Purpose of the Rule

Both the majority and the dissent erred in their analysis of Rule 2.2.¹⁹⁰ Rule 2.2 of the Code of Judicial Conduct reads: “A judge shall *uphold* and *apply* the law and shall *perform* all duties of judicial office fairly and impartially.”¹⁹¹ The comments elaborate that, although each judge will bring to the bench unique beliefs and backgrounds, he must interpret and *apply* the law regardless of these beliefs.¹⁹² The language of this rule expressly includes the terms “uphold” and “apply.”¹⁹³ These terms convey the crucial intent of the rule, which is to ensure judges follow “the rule of law when deciding cases.”¹⁹⁴ This rule applies to all judges during all cases and decisions.¹⁹⁵ In *Disciplinary Counsel v. Hale*, an Ohio judge was sanctioned for violating several rules of the Code of Judicial Conduct, including Rule 2.2.¹⁹⁶ In *Hale*, the judge falsely completed a judgment entry form, dismissing a case against an attorney who was representing the judge, without receiving any input from the prosecutor.¹⁹⁷ This conduct was found to be a failure to “uphold and apply” the law in a fair or impartial manner.¹⁹⁸ In *Disciplinary Counsel v. McCormack*, a judicial committee sanctioned another Ohio magistrate for violating Rule 2.2’s mandate following an emergency custody motion.¹⁹⁹

¹⁸⁹ *Id.* at ¶¶ 62–66, 390 P.3d at 748–50.

¹⁹⁰ *Id.* at ¶¶ 67, 112–16, 390 P.3d at 750, 760–61.

¹⁹¹ WYO. CODE OF JUDICIAL CONDUCT r. 2.2 (2009) (emphasis added).

¹⁹² *Id.* at r. 2.2 cmt. 2.

¹⁹³ *Id.* at r. 2.2.

¹⁹⁴ GEYH & HODES, *supra* note 37, at 27.

¹⁹⁵ See WYO. CODE OF JUDICIAL CONDUCT r. 2.2.

¹⁹⁶ *Disciplinary Counsel v. Hale*, 141 Ohio St. 3d 518, 2014-Ohio-5053, 26 N.E.3d 785, at ¶ 17.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See *Disciplinary Counsel v. McCormack*, 133 Ohio St. 3d 192, 2012-Ohio-4309, 977 N.E.2d 598, at ¶ 13. As a magistrate, McCormack conducted several hearings over a post-decree motion to modify child support, as well as numerous other motions filed by both parties. *Id.* At these hearings, among other things, McCormack repeatedly “goaded” and chided attorneys to the point of being asked to recuse himself by one of the party’s attorneys. *Id.* Throughout the hearings, McCormack laughed and made faces while witnesses were being cross-examined, answered questions directed at the witnesses, and asked questions of parties sitting at counsel table while other witnesses were on the witness stand. *Id.* Judge McCormack further held hearings on issues not before the court and failed to rule on several objections of the attorneys, while continuing to call both parties and their attorneys insulting names. *Id.*

Following a stipulation, the Judicial Committee sanctioned the magistrate for, “fail[ing] to allow the parties a meaningful opportunity to present testimony and evidence on the issues” and for failing to provide a sufficient record.²⁰⁰ The Judicial Committee further found Magistrate McCormack had improperly conducted a hearing in which there was no motion pending before the court and where the parties had no notice of the subject matter of the hearing.²⁰¹ Both Ohio cases are distinguishable from *Neely*. In both cases, the Judicial Committees found the judge or magistrate had violated Rule 2.2 of the Code of Judicial Conduct following behavior that occurred while the judges were performing judicial duties.²⁰² In *Neely*, Judge Neely manifested an intention to partially apply the law, yet her conduct was not during the performance of any judicial duty mandated by Wyoming or Federal law.²⁰³

The majority concluded Judge Neely violated Rule 2.2 because she expressed she would not apply the law in an impartial manner if called upon, which it viewed as equivalent to unfairly applying the law.²⁰⁴ However, the plain language of the rule and the comments do not support this conclusion.²⁰⁵ Judge Neely did assert that she would not perform same-sex marriage ceremonies if asked, but at the time, she had not actually refused to perform a same-sex marriage ceremony.²⁰⁶ Therefore, Judge Neely had not yet failed to apply the law or perform a duty of her judicial office, and thus could not have violated Rule 2.2. If Judge Neely had, in fact, refused to perform a same-sex marriage ceremony because of the couple’s sexual orientation, that would have constituted a violation of Rule 2.2.²⁰⁷ However, Judge Neely’s position had not yet ripened into a specific case and, as such, she had not actually failed to *apply* any law whatsoever.²⁰⁸

The supporting case law cited throughout the Wyoming Supreme Court’s opinion is distinguishable from the present matter, as the judges in those cases

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Hale*, 141 Ohio St. 3d 518, 2014-Ohio-5053, 26 N.E.3d 785, at ¶ 17 (finding a Rule 2.2 violation for conduct occurring while preparing a judicial order); *McCormack*, 133 Ohio St. 3d 192, 2012-Ohio-4309, 977 N.E.2d 598, ¶ 14 (finding a Rule 2.2 violation for conduct occurring during a hearing).

²⁰³ See WYO. STAT. ANN. § 5-9-212 (2017). Duties of a part-time magistrate include: administering oaths or affirmations, performing marriage ceremonies, issuing warrants and setting bail, and conducting small claims trials. *Id.* Duties of a municipal court judge include issuance of search warrants, subpoena powers, and ordering fines or imprisonment for contempt of court. WYO. STAT. ANN. § 5-6-202.

²⁰⁴ *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 25, ¶ 67, 390 P.3d 728, 750 (Wyo. 2017); see *supra* notes 108–10 and accompanying text.

²⁰⁵ See MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 2 (AM. BAR ASS’N 2011).

²⁰⁶ See *supra* notes 76–80, 137 and accompanying text.

²⁰⁷ See *supra* notes 58–88 and accompanying text.

²⁰⁸ *Neely*, ¶ 74, 390 P.3d at 753.

actually had refused to perform marriage ceremonies for particular couples because of the couple's sexual orientation.²⁰⁹ Judge Neely's position indicated only an *intent* to refuse to impartially apply the law.²¹⁰ Yet, as noted by the dissent, the language of the rule applies to actions, not intent.²¹¹ The majority itself impliedly recognized that Judge Neely's statements to Judge Haws, the *Pinedale Roundup*, and the Commission did not reflect action, as it consistently described Judge Neely's conduct as something that would occur in the future.²¹²

While the dissent correctly determined Judge Neely had not violated Rule 2.2, it also analyzed immaterial matters in its analysis of this rule.²¹³ Throughout its opinion, the dissent continually pointed to the use of "may" versus "shall" in Wyoming Statute § 20-1-106(a).²¹⁴ The dissent specifically argued that Rule 2.2 was not violated because as Judge Neely did not have a duty to perform any particular marriage ceremony; she was therefore allowed to refuse to officiate at all same-sex marriage ceremonies regardless of the reason.²¹⁵ A judge's authority to decline to perform a marriage is irrelevant under this rule.²¹⁶ The analysis required by this rule is simply whether Judge Neely *applied* the law in a biased manner.²¹⁷ Judge Neely had not yet declined to fairly and impartially uphold and apply the law and, therefore, could not have violated Rule 2.2.²¹⁸

²⁰⁹ *Id.* at ¶ 72, 390 P.3d at 752 (citing Ohio Sup. Ct. Bd. Of Prof'l Conduct, Op. No. 2015-1, at *1 (Aug. 7, 2015), http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf; Wis. Sup. Ct. Judicial Conduct Advisory Comm., Op. No. 15-1, at *1 (Aug. 18, 2015), <https://www.wicourts.gov/sc/judcond/DisplayDocument.pdf?content=pdf&seqNo=146878>; Arizona Sup. Ct. Judicial Ethics Advisory Comm., Op. No. 15-01, at *1 (Mar. 9, 2015), <https://media.azpm.org/master/document/2015/3/16/pdf/reviseadvisoryopinion15-01.pdf>).

²¹⁰ *Id.* at ¶ 9, 390 P.3d at 734.

²¹¹ *Id.* at ¶ 113, 390 P.3d at 760–61. ("The rule, by its terms, applies only to actions, not to statements made outside the context of a case or an actual request. The words "uphold," "apply" and "perform" all relate to action or deliberate inaction by a judge. They simply cannot apply to a judge's statement about how her religious views would come into play in the event at some unknown, future time, some unknown same sex couple insisted that Judge Neely, rather than someone else, perform their marriage.").

²¹² *See id.* at ¶¶ 59–71, 390 P.3d at 747–52.

²¹³ *Id.* at ¶¶ 112–16, 390 P.3d at 760–62.

²¹⁴ *Id.* at ¶¶ 94–96, 390 P.3d at 756 (citing WYO. STAT. ANN. § 20-1-106(a) (2017)); *see supra* notes 125–29 and accompanying text.

²¹⁵ *Neely*, ¶ 115, 390 P.3d at 761; *see supra* notes 125–29 and accompanying text.

²¹⁶ WYO. CODE OF JUDICIAL CONDUCT r. 2.2 (2009).

²¹⁷ *See id.*

²¹⁸ *Neely*, ¶ 11, 390 P.3d at 734.

D. Rule 2.3 of the Code of Judicial Conduct Only Applies During the Performance of Judicial Duties

Additionally, the court's reasoning under Rule 2.3(B) was misplaced.²¹⁹ Judge Neely's various statements that she would refuse to perform lawful same-sex marriage ceremonies because of her opposition to same-sex marriages, manifested bias and prejudice against couples based on their sexual orientation.²²⁰ However, the specific language of the rule is limited to conduct occurring "in the performance of judicial duties."²²¹ Judicial duties include "all duties of which the judge's office prescribes by law."²²² Judge Neely was not performing a judicial duty when she responded to the *Pinedale Roundup* reporter, or when she spoke with Judge Haws.²²³ There is a difference between judges acting in their *capacity* as judges, and judges performing their official *judicial duties*.²²⁴ Judge Neely was indeed acting in her judicial capacity when she told Judge Haws she would not perform same-sex marriages due to her religious beliefs and also when she responded to Mr. Donovan's questions about whether she was excited as a judge to perform same-sex marriages.²²⁵ However, Rule 2.3(B) applies only when the manifestation of bias or prejudice occurs *in the performance of judicial duties*.²²⁶ Judge Neely's manifestation of bias was not made while performing judicial duties.

A Washington case provides insight into the difference between "judicial duties" and "judicial capacity."²²⁷ Judge Tabor, a Washington judge, was sanctioned in 2013 for informing his fellow judges and court personnel during an administrative meeting that "he felt uncomfortable performing same-sex marriages and [asked those judges] who did not have similar personal objections to officiate in his stead over such marriages."²²⁸ In the stipulated agreement,

²¹⁹ *Id.* at ¶ 68–71, 390 P.3d at 750–51.

²²⁰ *See supra* notes 144–213 and accompanying text.

²²¹ WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B). Due to the public nature of the judiciary, a judge's "off-bench" behavior is also subject to scrutiny and it can hardly be argued that a judge is free to act however they want off-bench and have no fear of repercussions. *See generally* Howard T. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373 (1984); *see also In re Discipline of Anderson*, 981 P.2d 426 (Wash. 1999). However, Rule 2.3(B) specifically identifies "in the performance of judicial duties" as the conduct it seeks to regulate, and as such, off-bench behavior is not subject to this rule's scrutiny. WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B).

²²² WYO. CODE OF JUDICIAL CONDUCT r. 2.1 cmt. 2 ("[N]ot a duty of judicial office unless prescribed by law."). *See supra* note 107 and accompanying text.

²²³ *Neely*, ¶¶ 8–9, 390 P.3d at 733–34.

²²⁴ *See In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at *3 (Wash. Comm'n Jud. Conduct Oct. 4, 2013).

²²⁵ *See supra* notes 73–76 and accompanying text.

²²⁶ WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B). Duties considered to be "within judicial duties" include disciplinary, adjudicatory and administrative duties. *Id.*

²²⁷ *In re Tabor*, 2013 WL 5853965.

²²⁸ *Id.* at *1.

Judge Tabor was sanctioned for his statements which created an appearance of impropriety and violated Canon 1 Rules 1.1 and 1.2 as well as Canon 3 Rule 3.1(C).²²⁹ In the stipulated agreement, the Washington Commission concluded that, although Judge Tabor's conduct "occurred in the courthouse and in [Judge Tabor's] capacity as a judge," he was not performing his official judicial duties at the time.²³⁰ Thus, *In re Tabor* demonstrates that a judge can be acting in his judicial capacity, but not be performing judicial duties.²³¹ The majority's analysis that a reasonable person could find Judge Neely manifested a bias and prejudice against homosexuals is persuasive.²³² Yet, it is insufficient, in and of itself, to find that Judge Neely violated Rule 2.3.²³³ Her prejudicial comments were not made specifically in the performance of her judicial duties.²³⁴ As such, the majority incorrectly found a violation under Rule 2.3.²³⁵

The dissent concluded that Judge Neely's conduct did not fit within its definitions of bias or prejudice.²³⁶ The dissent argued Judge Neely's expression of her religious beliefs did not manifest bias or prejudice because she said she would be willing to help same-sex couples find an officiant who was willing to perform same-sex marriage ceremonies.²³⁷ The record simply does not and cannot support this reasoning, as Judge Neely went further than simply relaying her religious beliefs.²³⁸ Judge Neely stated her position, that as a judge, she would continue performing opposite-sex marriage ceremonies, but would not perform same-sex marriages, and thus expressed her intent to treat parties differently based on their sexual orientation.²³⁹

²²⁹ *Id.* at *2. These rules require judges to act at all times in a manner that promotes public confidence in their independence, integrity and impartiality, just as the Wyoming Code of Judicial Conduct requires. *See id.*; WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B).

²³⁰ *Id.* at *3.

²³¹ *Id.*

²³² *Neely v. Wyo. Comm'n on Judicial Conduct & Ethics*, 2017 WY 70, ¶¶ 68–71, 390 P.3d 728, 751 (Wyo. 2017).

²³³ *Id.*

²³⁴ *Id.* at ¶¶ 8–9, 390 P.3d at 733–34.

²³⁵ *Id.* at ¶ 67, 390 P.3d at 751.

²³⁶ *Id.* at ¶ 118, 122, 390 P.3d at 762–63 (citing WYO. CODE OF JUDICIAL CONDUCT r. 2.3 cmt. 2 (2009)); *see supra* notes 141–43 and accompanying text. The dissent further turns to Comment 2, which holds that a "judge is guilty of expressing bias or prejudice by statements which denigrate the human value or standing of a person based on the fact that they fit within a particular class of persons." WYO. CODE OF JUDICIAL CONDUCT r. 2.3 cmt. 2.

²³⁷ *Neely*, ¶ 121, 390 P.3d at 762; *see supra* notes 139–40 and accompanying text.

²³⁸ *Neely*, ¶ 11, 390 P.3d at 734; *see supra* notes 73–88 and accompanying text. Judge Neely expressly compared homosexual persons to thieves, liars, and perpetual alcoholics. *Id.* She also asserted that she did not believe same-sex couples should be allowed to marry, as she believed this was a right reserved for only opposite-sex couples. *Id.*

²³⁹ *Id.* at ¶ 9, 390 P.3d at 734.

Ultimately, however, the discussion need not have ever reached the definitions of either bias or prejudice. Instead, both the dissent and the majority should have held that Judge Neely did not violate Rule 2.3 because she simply was not performing her judicial duties when she expressed her intent to refuse to perform same-sex marriage ceremonies in the future.²⁴⁰ The dissent focused on determining “accurate definitions of the terms bias and prejudice,” but failed to properly discuss whether Judge Neely’s statements occurred during the performance of her judicial duties.²⁴¹ To properly analyze whether Judge Neely violated Rule 2.3(B), the dissent should have considered what judicial duties are and how they differ from judicial capacity.²⁴² Under this analysis, the dissenting justices would ultimately have reached the same conclusion: that Judge Neely did not violate Rule 2.3(B).²⁴³

E. Wyoming Should Adopt a New Rule to the Code of Judicial Conduct to Ensure the Public’s Confidence in the Judiciary

The Judicial Committee and the Wyoming Supreme Court correctly concluded that Judge Neely must be sanctioned for her manifestation of bias and prejudice towards same-sex couples and for her impermissible expression of intent to partially uphold and apply the law.²⁴⁴ However, the only rule available to sanction this type of conduct is Rule 1.2.²⁴⁵ Therefore, this note proposes that Wyoming adopt a new rule. The law is constantly changing, likewise requiring that the Code of Judicial Conduct continue to evolve as well.²⁴⁶ Throughout its opinion, the majority articulated a thorough and sound analysis regarding Judge Neely’s manifestation of bias and prejudice towards same-sex couples, as well as her expressed intent to partially uphold the law in the future.²⁴⁷ But the court overreached when it held that Judge Neely violated rules of the Code of Judicial Conduct other than Rule 1.2.²⁴⁸

The problem with the majority’s holdings on Rules 2.2 and 2.3(B) is not that Judge Neely’s statements were permissible. Rather, the problem is with the

²⁴⁰ *Id.* at ¶¶ 68–71, 118–125, 390 P.3d at 750–51, 761–63; *see supra* notes 216–34 and accompanying text.

²⁴¹ *Neely*, ¶¶ 118–124, 390 P.3d at 761–62.

²⁴² *Id.* at ¶¶ 117–125, 390 P.3d at 761–63; *In re Tabor*, CJC No. 7251-F-158, 2013 WL 5853965, at *3 (Wash. Comm’n Jud. Conduct Oct. 4, 2013); WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B) (2009); *see supra* notes 220–41 and accompanying text.

²⁴³ *Neely*, ¶ 125, 390 P.3d at 762–63.

²⁴⁴ *Id.* at ¶ 72, 390 P.3d at 752; *see supra* notes 98–106, 154–58 and accompanying text.

²⁴⁵ WYO. CODE OF JUDICIAL CONDUCT r. 1.2 (2009).

²⁴⁶ *Id.*

²⁴⁷ *See Neely*, ¶¶ 61–71, 390 P.3d at 748–51.

²⁴⁸ *Id.* at ¶ 72, 390 P.3d at 752 (citing WYO. CODE OF JUDICIAL CONDUCT r. 1.2 (2009)).

specific language of the rules.²⁴⁹ Rules 1.1, 2.2, and 2.3 only provide consequences for a judge's impermissible conduct *in the performance of judicial duties* or while *upholding, complying with, or applying* the law, but not when a judge has only declared an intent to do so.²⁵⁰ At this time, Judge Neely has only indicated, albeit repeatedly, that she would not impartially apply the law in the future.²⁵¹ When a judge states an intent to act with bias, an intent to refuse to uphold or comply with a law, or an intent to refuse to perform the judicial duties of office in an impartial manner, that judge has given the appearance of impropriety. The consequences of such behavior should send a message to the public that any expressed intent from judges to act with bias and prejudice will not be tolerated.²⁵²

Although it availed in this instance, Rule 1.2 is unlikely to be sufficient for future purposes.²⁵³ The appearance of impropriety standard is a general catch-all rule, which has been contested for years as being too vague to provide reliable guidance to judicial committees.²⁵⁴ That is evidenced here by the court's 3-2 split.²⁵⁵ A rule that strictly prohibits expressions of future intent to partially apply the law, regardless of personal beliefs, would have insulated the majority in this case from any attacks that their decision was based on politics, religion, or applying a subjective test.²⁵⁶ The majority in *Neely* should have been able to sanction Judge Neely's impermissible stance that the law would have to cede to her personal beliefs, without having to defend that their decision was not about freedom of religion or freedom of speech, but was rather about a judge's *conduct*.²⁵⁷ The new rule this note proposes will create a uniformity in future decisions in these types of cases.²⁵⁸

²⁴⁹ See *supra* notes 187–237 and accompanying text.

²⁵⁰ See *supra* notes 153–54, 187–237 and accompanying text.

²⁵¹ See *supra* notes 72–88 and accompanying text.

²⁵² It is the law, not persons or entities, that ensure an independent court, and as such, a judge simply cannot treat the bench as a “pulpit or soapbox for self-expression.” *In re Velasquez*, Decision and Order (Cal. Comm’n, Apr. 16, 1997) https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Velasquez_4-16-97.pdf.

²⁵³ WYO. CODE OF JUDICIAL CONDUCT r. 1.2.

²⁵⁴ See Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1343, 1337, 1340 (2006); see also *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong. (1969) (statement of Justice Arthur Goldberg).

²⁵⁵ *Neely v. Wyo. Comm’n on Judicial Conduct & Ethics*, 2017 WY 70, ¶ 1, 390 P.3d 728, 728 (Wyo. 2017).

²⁵⁶ *Id.* at ¶ 76–164, 390 P.3d at 753–69.

²⁵⁷ *Id.*

²⁵⁸ Application of the new rule will provide consistency of sanctions for judges who express an intent to act with bias or prejudice against any party; whether this bias be on the basis of race, sexual orientation, religion, or any other impermissible reasoning.

F. This Case Note Proposes the Wyoming Code of Judicial Conduct Implement a New Rule

The following includes the author's proposed rule to the Wyoming Code of Judicial Conduct. "A judge shall not express, declare, or otherwise indicate that the judge will fail to comply, uphold, or apply the law." To accompany this new rule, this note further proposes the following comments. "This rule does not prohibit a judge from holding or expressing personal opinions or beliefs. Rather, this rule prohibits a judge from allowing those personal beliefs or opinions to impact or otherwise dictate the future performance of the judicial office and duties." This new rule should be read in conjunction with a judge's duties to comply with the law under Rule 1.1.²⁵⁹ Together, both rules shall ensure that a judge does not act with partiality nor give the appearance of impropriety in any manner which may impair public confidence in the judicial branch.

V. CONCLUSION

The Wyoming Supreme Court correctly held Judge Neely violated Rule 1.2 of the Code of Judicial Conduct because she acted in a way that undermined public confidence in an impartial judiciary.²⁶⁰ However, the language of the Code of Judicial Conduct simply does not support the majority's holdings on Rules 2.2 and 2.3(B).²⁶¹ Additionally, neither Judge Neely's actions nor the law, supports the dissent's analysis on these rules.²⁶² Although the majority reached the correct result here, Rule 1.2 is unsatisfactory because it cannot guarantee that a correct outcome will be consistently reached when a member of the judiciary blatantly expresses an intent to refuse to follow the oath of their office and to the people.²⁶³ When the only applicable rule available to dispense justice for a judge's expressed intent to uphold the law in a partial and biased manner is the general catch-all provision of Rule 1.2, the law should recognize the insufficiency of this and implement a new rule that will appropriately and consistently prevent this behavior in the future and admonish the offender appropriately.²⁶⁴ This note does not suggest that members of the judiciary must agree with every law and opinion handed down by The United States Supreme Court. If a judge does not like or approve of certain laws, the judge has recourses available to express this discontent. Judges may express their dissatisfaction with such rules by writing dissenting, concurring, or even majority opinions that express their

²⁵⁹ WYO. CODE OF JUDICIAL CONDUCT r. 1.1 (2009).

²⁶⁰ See *supra* notes 98–106, 158–168 and accompanying text.

²⁶¹ See *supra* notes 107–17, 187–208, 215–31 and accompanying text.

²⁶² See *supra* notes 118–43, 209–14, 233–43 and accompanying text.

²⁶³ See *supra* notes 248–53 and accompanying text.

²⁶⁴ See *supra* notes 139–257 and accompanying text.

disapproval with such rule; Justices anticipate this reaction.²⁶⁵ However, judges are nonetheless required to impartially apply, uphold, and comply with the law at all times. A statement of future refusal to apply the law should be sanctioned the same as a present refusal to apply the law.

²⁶⁵ Justice Clarence Thomas, *Address Before the Federalist Society at the National Lawyers Convention: On Judicial Independence* (Nov. 12, 1999), <https://fedsoc.org/commentary/publications/clarence-thomas-address-before-the-federalist-society-at-the-1999-national-lawyers-convention> (Justice Clarence Thomas said: “As judges, we must expect that our opinions will be dissected not only by the parties, but by scholars, journalists, students, politicians, and the bar. . . . Judges can benefit from constructive criticism to improve the quality of their work, just as anyone can. . . . I am willing to let my opinions speak for themselves, and it is part of my judicial duty to accept outside criticism, however, incorrect or unjust, to go by unanswered.”).