

Nebraska Judicial Ethics Committee Opinion 15-1

Question Presented--

May a judge or clerk magistrate: refuse to perform marriages for same-sex couples; refuse to perform marriages for same-sex couples if the couple can be referred to another judge willing to perform the ceremony; refuse to perform same-sex marriages if based on a personal or sincerely held religious belief that marriage is between one man and one woman; refuse to conduct all marriages; or limit performing marriage ceremonies to only close friends and relatives?

Conclusion

With limited exceptions, the Nebraska Revised Code of Judicial Conduct does not permit a judge or clerk magistrate to refuse to perform same-sex marriages.

Statement of Facts

On June 26, 2015, the U.S. Supreme Court ruled that the 14th Amendment requires a state to license a marriage between two people of the same sex. See *Obergefell v. Hodges*, Nos. 14-55b, 14-562, 14-571, 14-574, 2015 WL 2473451 (U.S. June 26, 2015). The U.S. Supreme Court held that state laws restricting same-sex marriage are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Id.* at *4. The Administrative Office of the Courts has sought an advisory opinion with regard to a number of anticipated questions, as set forth above, now that Nebraska’s prohibition on same-sex marriage has been invalidated by the high court.

Applicable Code Sections

Neb. Rev. Code of Judicial Conduct, Canon 1 and §§ 5-301.0, 5-301.1, 5-301.2

Neb. Rev. Code of Judicial Conduct, Canon 2 and §§ 5-302.0, 5-302.2, 5-302.3

Neb. Rev. Code of Judicial Conduct, Canon 3 and §§ 5-303.01, 5-303.16

References in Addition to Nebraska Revised Code of Judicial Conduct

Neb. Rev. Stat. § 42-108 (Reissue 2008).

Discussion

Although the performance of marriage ceremonies is not a mandatory function for a judge or clerk magistrate, the Legislature has limited the authority to conduct such ceremonies to clergy, judges, retired judges, clerk magistrates, and retired clerk magistrates. See Neb. Rev. Stat. § 42-108 (Reissue 2008); Neb. Rev. Code of Judicial Conduct § 5-303.16. Because of this narrow and specific grant of authority, the Committee concludes that the performance of a marriage ceremony by a judge or clerk magistrate is performance of a judicial function under the Code.

Section 5-302.3(A) and (B) requires a judge to perform the duties of judicial office “without bias or prejudice,” and, specifically, to not manifest bias or prejudice based on sexual

orientation. If a judge is willing to perform traditional marriages, his or her refusal to perform same-sex marriages would be a manifestation of bias or prejudice based on sexual orientation when a valid law permits such couples to marry, even if the judge states that the reason is based on sincerely held religious beliefs or upon a personal belief. Section 5-302.2 provides that “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Comment [2] acknowledges that while each judge comes to the bench with a unique background and personal philosophy, “a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.” Thus, a refusal to perform a marriage based on the couple’s sexual orientation manifests bias or prejudice, and violates §§ 5-302.2 and 5-302.3.

While § 5-303.16 lists the performance of a marriage ceremony as an extrajudicial activity, Canon 3 states that “[a] judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.” When engaging in extrajudicial activities, a judge shall not “participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” § 5-303.1(C).

Most basically, § 5-301.1 requires that “[a] judge shall comply with the law, including the *Code of Judicial Conduct*.” Section 5-301.2 states that “[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.” Comment [5] sets forth a test for appearance of impropriety as “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.” Because the U.S. Supreme Court has invalidated prohibitions against same-sex marriage, the refusal to perform such marriages while performing opposite-sex marriages would constitute a refusal to follow the law, a violation of § 5-301.1. In addition, a refusal to perform a same-sex marriage would question the integrity and impartiality of the judiciary as well as giving the appearance of impropriety, a violation of § 5-301.2.

In summary, the Committee concludes that when the U.S. Supreme Court’s decision in *Obergefell* takes effect, a judge or clerk magistrate may not refuse to perform a same-sex marriage notwithstanding the judge’s or clerk’s personal or sincerely held religious belief that marriage is between one man and one woman. A refusal to perform the ceremony but providing a referral to another judge willing to perform a same-sex marriage similarly manifests bias or prejudice based on a couple’s sexual orientation and is prohibited. A judge or clerk magistrate may avoid such personal or religious conflicts by refusing to perform all marriages, because the performance of marriage ceremonies is an extrajudicial activity and not a mandatory duty. While a judge or clerk magistrate who chooses to only perform marriage ceremonies for close friends and relatives is not obligated to perform ceremonies for those who are not close friends and relatives, as such a practice is not based on a discriminatory intent, a judge or clerk magistrate who performs marriages only for close friends or relatives may not refuse to perform same-sex marriages for close friends or relatives.

Disclaimer

This opinion is advisory only and is based on the specific facts and questions submitted by the person or organization requesting the opinion pursuant to appendix A of the Nebraska Revised Code of Judicial Conduct. Questions concerning ethical matters for judges should be directed to the Judicial Ethics Committee.

APPROVED AND ADOPTED BY THE COMMITTEE
ON JUNE 29, 2015

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