

The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

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OPINION 2015-1

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Judicial Performance of Civil Marriages of Same-Sex Couples

SYLLABUS: A judge who exercises the authority to perform civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages. A judge may not decline to perform all marriages in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs.

QUESTIONS PRESENTED: The Board of Professional Conduct received inquiries from judges and a judicial association on behalf of its members seeking guidance concerning the obligation of a judge to perform same-sex civil marriages: 1) whether a judge who is authorized to perform marriages may refuse to marry same-sex couples based on personal, moral, or religious beliefs, but continue to marry opposite-sex couples; 2) whether a judge may decline to perform all marriages to avoid marrying same-sex couples.

APPLICABLE RULES: Jud. Cond. R. 1.1, 1.2, 2.2, 2.3, 2.4, 2.11, and Prof. Cond. R. 8.4(g).

OPINION:

Background

On June 26, 2015, the U.S. Supreme Court found the right to marry the person of one's choice to be a fundamental right under the Fourteenth Amendment of the United States Constitution. The laws of several jurisdictions, including Ohio that restricted marriage to only opposite-sex couples were declared unconstitutional. *Obergefell v. Hodges*, ___ U.S. ___, 35 S. Ct. 2584, 192 L.Ed.2d 609 (2015). The Supreme Court specifically 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.*

Obergefell is considered the law of the land and applies equally across all jurisdictions. See *Marbury v. Madison*, 5 U.S. 137, 180 2 L.Ed. 60 (1803).

In Ohio, municipal, county, and probate judges are specifically authorized by statute to perform civil marriage ceremonies. R.C. 1907.18(C), 1901.14(A)(1), 2101.27, and 3101.08. Whether judges are mandated or authorized by the Ohio Revised Code to perform civil marriages is a legal question and beyond the scope of the advisory opinion authority granted to the Board by the Supreme Court of Ohio. Gov. Bar R. V, Section 2(D), BPC Reg. 15(B)(1).¹ However, the General Assembly has granted judges the authority to perform marriages because of the unique public office that they hold. 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.

Judicial Oath of Office

Every judge is required to take an oath prior to each term of office in a form prescribed by R.C. 3.23:

I, (name), do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all of the duties incumbent upon me as a judge according to the best of my ability and understanding. [This I do as I shall answer unto God.]

The oath represents the judge's solemn and personal vow that he or she will impartially perform all duties incumbent on the office and do so without regard to the status or class of persons or parties who come before the court. The oath is a reflection of the self-evident principle that the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty. When a judge takes the oath of office, "he or she yields the prerogative of executing the responsibilities of the office on any basis other than the fair and impartial and competent application of the law...." *Mississippi Judicial Performance Com'n v. Hopkins*, 590 So.2d 857, 862 (Miss. 1991).

¹ The Board may only issue nonbinding advisory opinions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Code of Judicial Conduct, or the Attorney's Oath of Office.

A judge's oath to support the constitutions of the United States and the State of Ohio requires the judge to recognize and adhere to binding court interpretations of the same. A judge's unilateral decision to refuse to perform same-sex marriages based on his or her own personal, religious, or moral beliefs ignores the holding in *Obergefell* and thus, directly contravenes the oath of office.

Code of Judicial Conduct

Jud. Cond. R. 1.1—Compliance with the law

Jud. Cond. R. 1.1 requires a judge to comply with the law. A judge is always required to comply with the law and has a higher duty than ordinary citizens to comply. *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902. The definition of "law" encompasses court rules, the Code of Judicial Conduct, the Rules of Professional Conduct, statutes, constitutional provisions, and decisional law. Jud. Cond. R., *Terminology*. Consequently, a judge is required to comply with the U.S. Constitution and binding decisional law interpreting its provisions. A judge's refusal to marry same-sex couples, while continuing to marry opposite-sex couples, is contrary to the holding in *Obergefell*, and thus not in accord with the judge's obligation to comply with the law.

Jud. Cond. R. 1.2—Independence, integrity, and impartiality of the judiciary

Jud. Cond. R. 1.2 requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary. . . ." This requirement applies to all professional and personal conduct of a judge. Jud. Cond. R. 1.2, Comment [1]. In satisfying this responsibility, a judge "must accept the restrictions imposed by the Code" (Jud. Cond. R. 1.2, Comment [2]), including provisions that require a judge to set aside his or her own personal, moral, and religious beliefs in the fair, impartial, and unbiased performance of judicial duties. Public confidence in the independence of the judiciary is undermined when a judge allows his or her beliefs concerning the societal or religious acceptance or validity of same-sex marriage to affect the performance of a judicial function or duty.

Jud. Cond. R. 1.2 also requires a judge to "avoid impropriety and the appearance of impropriety." An act of impropriety occurs when a judge violates the law or provisions of the Code of Judicial Conduct. Jud. Cond. R. 1.2, Comment [5]. A judge who publicly states or implies a personal objection to performing same-sex marriages and reacts by ceasing to perform all marriages acts contrary to the mandate to avoid impropriety and the appearance of impropriety. *See, e.g., In re Tabor*, Case No. 7251-F-158, Wash. St. Comm. on Jud. Cond. (October 4, 2013) (judge was publicly admonished for creating an appearance of

impropriety by stating opposition to same-sex marriages and subsequently refusing to perform all marriages under a discretionary state statute.) A determination by a judge that he or she will marry only opposite-sex couples undermines the holding in *Obergefell* and runs counter to the requirement of Jud. Cond. R. 1.2 to avoid impropriety and the appearance of impropriety.

Jud. Cond. R. 2.2—Impartiality and fairness

A judge is required to “perform all duties of judicial office fairly and impartially” and “apply the law without regard to whether the judge approves or disapproves of the law in question.” Jud. Cond. R. 2.2, Comment [2]. In *Cleveland Bar Ass’n. v. Cleary*, 93 Ohio St.3d 193, 2001-Ohio-1326, a judge was suspended for six months after she denied a pregnant defendant’s post-conviction motion for probation and continued her prison sentence in order to prevent the defendant from having an abortion. The Supreme Court reasoned that the judge had revealed bias toward the defendant based on conduct she thought was morally inappropriate. The Court found that the judge improperly used the sentencing proceeding to enforce her personal beliefs against abortion in violation of former Canon 3(B)(5). The provisions of the former rule are now found in Jud. Cond. R. 2.2 and 2.3.

“A judge is free to hold his or her own personal beliefs, so long as those attitudes, prejudices, or beliefs are not translated into action or inaction that results in a violation of the Code of Judicial Conduct or of law.” *Cleary* at 201 citing *In re Inquiry Concerning a Judge*, 357 So.2d 172, 177-178 (Fla.1978). A judge who displays disapproval of statutory or decisional law by refusing to enforce or follow the law because of personal, moral, and religious beliefs demonstrates a lack of the fairness and impartiality required by Jud. Cond. R. 2.2 and the judge’s oath of office.

Jud. Cond. R. 2.3—Manifesting bias and prejudice

Jud. Cond. R. 2.3(A) requires a judge to “perform the duties of judicial office, including administrative duties, without bias or prejudice.” A judge should avoid all conduct that “may reasonably be perceived as prejudiced or biased.” Jud. Cond. R. 2.3, Comment [2]. Jud. Cond. R. 2.3(B) prohibits a judge from exhibiting bias or prejudice based upon a number of enumerated traits or characteristics, including sexual orientation. If a judge manifests bias or prejudice in any proceeding, he or she may bring disrepute to their office and to the judiciary as a whole. Jud. Cond. R. 2.3, Comment [1].

These provisions bear directly on a judge’s decision to perform same-sex marriages. A judge who is willing to perform marriages of only opposite-sex couples because of his or

her personal, moral, or religious beliefs, may be viewed as possessing a bias or prejudice against a specific class or group of people based on sexual orientation. Exhibiting bias or prejudice in the performance of judicial duties is antithetical to a core tenet of judicial office and erodes the public's confidence in the independence, integrity, and impartiality of the judiciary. In addition, a judge's conduct may run afoul of Prof. Cond. R. 8.4(g), which prohibits any lawyer from engaging in discrimination prohibited by law.

In *State v. Arnett*, 88 Ohio St.3d 208, 2000-Ohio-302, the Supreme Court considered a case in which the trial judge quoted from the Bible during the sentencing of a defendant. The Court ultimately concluded that the biblical quote and other references did not form the basis for the sentence and thus did not result in reversible error. However, the Court issued a cautionary reminder that similar comments made by judges could represent a manifestation of bias and prejudice contrary to the mandates of the Code of Judicial Conduct.

Jud. Cond. R. 2.4—External influences on judicial conduct

Jud. Cond. R. 2.4(A) and (B) require a judge to avoid being swayed “by public clamor or fear of criticism” in the performance of his or her judicial duties and to avoid permitting outside interests and relationships to influence the judge's conduct or judgment. This mandate reflects another tenet essential to an independent judiciary—that a judge is obligated to follow and apply the law without regard to whether the law is “popular or unpopular with the public, the media, government officials, or the judge's friends or family.” Jud. Cond. R. 2.4, Comment [1]. A judge who permits these external factors to influence his or her execution of a judicial function erodes public confidence in the judiciary. *Id.*

Impact on other functions or duties of judicial office

A judge's decision to decline to perform some or all marriage ceremonies, when grounded on the judge's personal beliefs, may reflect adversely on perceptions regarding the judge's performance of other judicial duties. A judge is required to “disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned” and specifically where the judge has a personal bias or prejudice concerning a party. Jud. Cond. R. 2.11(A) and (A)(1). A judge may reasonably be perceived as having a personal bias or prejudice based on sexual orientation if he or she elects to perform opposite-sex marriages, but declines to perform same-sex marriages. Even if a judge decides not to perform any marriages, but does so only after *Obergefell*, the judge may face the prospect of disqualification in matters where the sexual orientation of the parties is at issue.

For example, if a judge who has declined to perform same-sex marriages is later assigned to hear a misdemeanor domestic violence charge involving a same-sex couple, the judge's ability to follow the law and impartially apply the domestic violence laws could reasonably be questioned. This same result obtains if a judge has maintained a position that he or she will perform only opposite-sex marriages. Under either scenario, if the judge's refusal to marry same-sex couples equates to the judge possessing or appearing to possess a personal bias or prejudice toward persons based on sexual orientation, he or she is required under Jud. Cond. R. 2.11 to disqualify himself or herself from the proceeding. As such, a judge's decision to decline to perform some or all marriage ceremonies, when grounded on the judge's personal beliefs, may reflect adversely on perceptions regarding the judge's performance of other judicial functions and duties.

A judge should further be mindful of the requirement under Jud. Cond. R. 2.3(A) to perform administrative duties without bias or prejudice despite the judge's personal, moral, and religious beliefs. A judge may not allow sexual orientation to affect employment decisions (Jud. Cond. R. 2.13) or the judge's treatment of court personnel, court officials, attorneys, and jurors, despite the judge's personal beliefs about sexual orientation. Jud. Cond. R. 2.3(B). Likewise, a judge must never permit court staff or court officials under his or her direction or control to engage in discriminatory conduct based on sexual orientation or act in a manner inconsistent with the judge's obligations under the Code. Jud. Cond. R. 2.3(B). A judge must be aware of the impact that his or her own conduct or perceptions concerning same-sex couples may have on the manner in which court employees conduct their job responsibilities.

Finally, a judge should be cognizant of the impact a decision to decline to perform all civil marriage ceremonies has on the public's perception of the judiciary. Regardless of whether the statutes authorizing the performance of civil marriages are deemed mandatory or permissive, the statutes reflect the legislative intent to grant citizens the opportunity to obtain a civil marriage from designated public officials. When all judges in a jurisdiction decline to perform civil marriages, regardless of the reason for their decisions, the public's access to a fundamental right may be foreclosed or significantly limited. These decisions may reflect adversely on the judiciary as a whole.

The principles set forth in this advisory opinion are not novel. Rather, they are a restatement of core tenets that have long governed judicial conduct and continue to guide the proper and ethical performance of a judge's constitutional and statutory obligations. Ethics authorities in other jurisdictions that have analyzed the same questions presented to this Board have reached similar conclusions: Neb. Adv. Op. 2015-1 (June 29, 2015) (the refusal to marry a same-sex couple based upon sexual orientation manifests bias and

prejudice and is prohibited under the Code of Judicial Conduct); Az. Adv. Op. 2015-1 (March 9, 2015) (the performance of a marriage is a discretionary duty for Arizona judges, but a judge may not decline to perform a same-sex marriage, while continuing to perform opposite-sex marriages without violating Rules 2.2 and 2.3(B) of the Code of Judicial Conduct); La.Comm. on Jud. Ethics (July 14, 2015) (judge may not refuse to conduct same-sex marriages while continuing to perform opposite-sex marriages and a judge may not recuse him/herself from matters ancillary to same-sex marriages based on sincerely held beliefs); Pa.Jud.Comm., *Newsletter* (Summer, 2014) (a judge may not act in a discriminatory, biased, and prejudiced manner toward a same-sex couple regarding the performance of a marriage. If a judge decides not to perform any marriages, a change from past conduct may be interpreted as bias and prejudice against a specific class.)

CONCLUSION: A judge who performs civil marriages may not refuse to perform same-sex marriages while continuing to perform opposite-sex marriages, based upon his or her personal, moral, and religious beliefs, acts contrary to the judicial oath of office and Jud. Cond. R. 1.1, 1.2, 2.2, 2.3, 2.4, 2.11, and Prof. Cond. R. 8.4(g).

A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class. The judge's decision also may raise reasonable questions about his or her impartiality in legal proceedings where sexual orientation is at issue and consequently would require disqualification under Jud. Cond. R. 2.11.²

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.

² The Board declines to address questions concerning the recommended case management procedures or requirements for the assignment or rotation of judges conducting marriages at a court. See fn. 1, *supra*.