

ISSUES

1. May a judicial officer, because of his or her own religious or personal beliefs, decline to be the “officiating person” at the marriage of two persons of the same sex?

ANSWER

No.

2. If a judicial officer cannot decline because of his or her own religious or personal beliefs to be the “officiating person” at the marriage of two persons of the same sex, may he or she decline to perform marriages at all, regardless of whether the parties seeking to be married are of the same or opposite gender?

ANSWER

Yes.

FACTS

The U.S. Supreme Court on June 26, 2015, 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

Wis. Stats. Section 765.16(1m) in part provides as follows:

Marriage contract, how made; officiating person. (1m) Marriage may be validly solemnized and contracted in this state only after a marriage license has been issued therefor, and only by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband and wife, made before an authorized officiating person and in the presence of at least 2 competent adult witnesses other than the officiating person. The following are authorized to be officiating persons:

...

(d) Any judge of a court of record or a reserve judge appointed under s. 753.075.

(e) Any circuit court commissioner appointed under SCR 75.02 (1) or supplemental court commissioner appointed under s. 757.675 (1).

(f) Any municipal judge.

For purposes of this opinion, a “judicial officer” includes any judge of a court of record, a reserve judge, any circuit court commissioner, any supplemental court commissioner or any municipal judge defined in WSS 765.16 (1m).

DISCUSSION

The Committee concludes that both issues presented are governed by the provisions of several Wisconsin Supreme Court Rules. SCR 60.04(1)(e) provides as follows:

A judge shall perform the duties of judicial office impartially and diligently.

The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law.

(1) In the performance of the duties under this section, the following apply to adjudicative responsibilities:

...

(e) A judge shall perform judicial duties without bias or prejudice. A judge may not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, and may not knowingly permit staff, court officials and other subject to the judge’s direction and control to do so.

SCR 60.03(1) provides as follows:

SCR 60.03 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

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

Finally, SCR 60.05(1) provides as follows:

A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

(1) Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do none of the following:

- (a) Cast reasonable doubt on the judge's capacity to act impartially as judge.
- (b) Demean the judicial office.
- (c) Interfere with the proper performance of judicial duties.

As WSS 765.16(1m) provides, judicial officers in Wisconsin may act as authorized officiating persons for marriages in this state. This authority is granted by the Wisconsin legislature and judicial officers who do so are performing a judicial duty or function. Under the statute, the performance of marriages is a discretionary function rather than a mandatory function of judicial officers by virtue of the legislature's use of the word "may".

SCR 60.04(1)(e) provides that judges must perform their judicial duties fairly and impartially. Judges shall perform those duties without bias or prejudice based on a number of listed bases, one specifically including sexual orientation. Judges must be alert to avoid behavior that can be perceived as prejudicial. The Committee concludes that a judicial officer's refusal to perform same-sex marriages based on a couple's sexual orientation would manifest bias or prejudice under SCR 60.04(1)(e).

Prior to taking office judicial officers in Wisconsin take an oath. Under that oath, those officers solemnly swear that they will support the constitution of the United States and the constitution of the state of Wisconsin. See WSS 757.02(1). In *Obergefell*, the U.S. Supreme Court has ruled that the 14th Amendment to the U.S. Constitution requires states to license same-sex marriages. That is now the law of the land which judicial officers in Wisconsin under their oath have sworn to support.

Under SCR 60.03(1), judges must avoid impropriety and the appearance of impropriety in all their activities. Included under that rule is an obligation to respect and comply with the law. Under that rule, the test for the appearance of impropriety is whether the conduct of the judge would create in reasonable minds the perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

In *Obergefell*, the U.S. Supreme Court has invalidated prohibitions against same-sex marriage. The Committee concludes that a refusal by a judicial officer to perform same-sex marriages for any reason, including religious or personal beliefs, while being willing to perform opposite-sex marriages would constitute a refusal to follow the law and would draw into question the integrity and impartiality of the judiciary under SCR 60.03(1).

If it were perceived that a judicial officer's officiating at marriages is not a judicial duty but is an extra-judicial activity, SCR 60.05(1) would apply. That rule provides that a judge shall conduct all of his or her extra-judicial activities so as to not cast reasonable doubt on their capacity to be impartial or interfere with the proper performance of their judicial duties. Expressions of bias or prejudice by a judge even outside of their judicial activities may cast reasonable doubt on their capacity to act impartially as a judge. The Committee concludes that if officiating at marriages is considered an extra-judicial activity, a refusal to perform same-sex marriages based on a couple's sexual orientation would manifest bias or prejudice and would cast reasonable doubt on a judge's capacity to act impartially and properly perform his or her judicial duties under SCR 60.05(1).

The Committee further concludes that judicial officers in Wisconsin may decline to officiate at marriages, regardless of whether the parties are same-sex or opposite-sex couples. As has already been summarized in this opinion, WSS 765.16(1m) provides that judicial officers may officiate at marriages in this state, but it does not mandate that they do so. As such, the performance of marriage ceremonies by judicial officers is a discretionary versus mandatory duty of those officers.

CONCLUSION

The Committee concludes that judicial officers in Wisconsin based upon their religious or personal beliefs may not decline to officiate at marriages in this state for same-sex couples if they chose to officiate at marriages of opposite-sex couples. The Committee further concludes that judicial officers in Wisconsin may

decline to act as an officiant at marriages generally because it is a discretionary and not a mandatory duty under WSS 765.16(1m).

APPLICABILITY

This opinion is advisory only. It is based on the specific facts and questions submitted by the petitioner to the Judicial Conduct Advisory Committee and is limited to the questions arising under the Supreme Court Rules, Chapter 60, *Code of Judicial Conduct*. This opinion is not binding on the Wisconsin Judicial Commission or the Supreme Court in the exercise of their judicial disciplinary responsibilities. This opinion does not purport to address provisions of the Code of Ethics for Public Officials and Employees, subchapter III of Ch. 19 of the statutes.

I hereby certify that this is Formal Opinion No. 15-1 issued by the Judicial Conduct Advisory Committee for the State of Wisconsin this 18th day of August, 2015.

The Honorable D. Todd Ehlers
Chair