

# ADVISORY OPINIONS

## Opinion 11-87

December 8, 2011

Digest: (1) Unless a judge is required by law to perform marriages, a judge may adopt a policy of performing marriages for friends and relatives only or may decline to perform all marriages. (2) Whether a judge may adopt a policy with respect to performing marriages that distinguishes between same-sex and opposite-sex couples raises primarily legal questions; however, if a judge acts in conformity with governing law the judge will not violate the Rules Governing Judicial Conduct.

Rules: Marriage Equality Act (L 2011, ch 95 as amended by L 2011, ch 96 [effective July 24, 2011]); Domestic Relations Law §§10-a(1), 11(3); Judiciary Law §212(2)(l); *Hernandez v Robles*, 7 NY3d 338 (2006); 22 NYCRR 101.1; 100.2; 100.2(A); 100.2(D); 100.3(A); 100.3(B)(1), (4); 100.4(A)(1); Opinions 09-34; 92-106 (Vol. X); Joint Opinion 04-38/04-39.

Opinion:

In reference to the Marriage Equality Act (L 2011, ch 95 as amended by L 2011, ch 96 [effective July 24, 2011]), a judge writes, "Given my personal religious beliefs, I am currently unwilling to conduct same sex marriages, despite the New York State Law." The judge asks for ethics advice in response to the following questions:

- 1) May I ethically refuse to conduct same sex marriages?
- 2) If I continue to perform male/female marriages, may I ethically refuse to conduct same sex marriages?
- 3) May I refuse to conduct all marriages?
- 4) May I refuse to conduct same sex marriages if I provide the contact information of others (including judges or civil officers) who are willing to conduct same sex marriages?
- 5) May I limit weddings that I conduct to those people who are friends or relatives?

Preliminarily, the Committee notes that it has not been asked to, nor can it, evaluate the merits of same-sex marriage; weigh any potentially competing constitutional interests such as those relating to separation of church and state, free exercise of religion, and rights of expressive association; or opine on issues of constitutional or statutory interpretation (see Judiciary Law §212[2][l]; 22 NYCRR 101.1).

THE RULES GOVERNING JUDICIAL CONDUCT

A judge must always avoid even the appearance of impropriety (see 22 NYCRR 100.2) and must always act to promote public confidence in the judiciary's integrity and impartiality (see 22 NYCRR 100.2[A]). A judge must "respect and comply" with the law (*id.*) and "be faithful to the law and maintain professional competence in it" (22 NYCRR 100.3[B][1]). In the performance of judicial duties, a judge must not, by words or conduct, manifest bias or prejudice based on numerous factors, including sexual orientation (see 22 NYCRR

100.3[B][4]).

A judge's judicial duties take precedence over all the judge's other activities (*see* 22 NYCRR 100.3[A]), and thus a judge must not engage in extra-judicial activities that will cast reasonable doubt on the judge's capacity to act impartially as a judge (*see* 22 NYCRR 100.4 [A][1]). Therefore, a judge must not hold membership in any organization that "practices invidious discrimination on the basis of ... sexual orientation," although this provision "does not prohibit a judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members" (22 NYCRR 100.2[D]).

### DECLINING TO CONDUCT MARRIAGES ON A NEUTRAL BASIS

#### Questions 3 and 5

In Questions 3 and 5, the judge asks whether it is ethically permissible to decline to perform some or all marriages on a facially neutral basis that has no apparent connection to sexual orientation or any protected class.

In the Committee's view, the Rules Governing Judicial Conduct do not, by their terms, require judges to perform marriages. Accordingly, unless a judge is required by law to perform marriages, the Committee sees no impropriety if a judge declines to conduct all marriages. Similarly, it is permissible for a judge to consistently decline to conduct marriages for anyone who is not a friend or relative as such a policy honors the judge's time constraints and does not raise reasonable questions about invidious discrimination, bias or prejudice.

### DISTINGUISHING BETWEEN SAME-SEX AND OPPOSITE-SEX COUPLES

#### Questions 1, 2, and 4

In Questions 1, 2 and 4, the judge asks whether it is ethically permissible to distinguish between same-sex and opposite-sex couples, in certain ways, when considering a request to perform a marriage.

Until this year, New York law limited marriage to persons of the opposite sex, a limitation which the Court of Appeals held did not violate the New York Constitution and was consistent with opinions of the Supreme Court of the United States (*see Hernandez v Robles*, 7 NY3d 338 [2006]). The new Marriage Equality Act declares that "Marriage is a fundamental human right" (L 2011, ch 95 §2 and amends the Domestic Relations Law to provide that "a marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex" (DRL 10-a[1]; *see also* L 2011, ch 95 §3). The overall statutory scheme continues to provide, as it did before, that "No marriage shall be valid unless solemnized by" one of a list of public officials, including, among others, "a justice or judge of a court of the unified court system" (Domestic Relations Law §11[3]).

In the Committee's view, Questions 1, 2 and 4 raise serious legal issues relating to

statutory and constitutional interpretation, questions which are both unsettled and highly controversial. The Committee is not empowered to answer such questions (see Judiciary Law §212[2][1]; 22 NYCRR 101.1; see also e.g. Opinion 09-34 [no authority to respond to the question whether a judge may refer a juvenile delinquent to a faith-based organization, because the question “involves the separation of church and state,” which is a question of law]; Joint Opinion 04-38/04-39 [no authority to answer legal questions regarding same-sex marriage]; Opinion 92-106 [Vol. X] [no authority to construe the New York Constitution]).

Therefore, with respect to Questions 1, 2 and 4, the Committee can state only that if the inquiring judge acts in conformity with the governing constitutional and statutory law concerning same-sex marriage and sexual orientation, the judge will not violate the Rules Governing Judicial Conduct (see Joint Opinion 04-38/04-39). These legal issues, to the extent unsettled, must be raised and addressed by persons with standing in the appropriate legal venue.