

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 485**

**February 14, 2019**

## **Judges Performing Same-Sex Marriages**

*A judge for whom performing marriages is a mandatory obligation of judicial office may not decline to perform marriages of same-sex couples. A judge for whom performing marriages is a discretionary judicial function may not decline to perform marriages of same-sex couples if the judge agrees to perform opposite-sex marriages. A judge's refusal to perform same-sex marriages while performing opposite-sex marriages calls into question the judge's integrity and impartiality and reflects bias and prejudice in violation of Rules 1.1, 2.2, 2.3(A), and 2.3(B) of the Model Code of Judicial Conduct. In a jurisdiction in which a judge is not obligated to perform marriages but has the discretion to do so, a judge may refuse to perform marriages for members of the public. A judge who declines to perform marriages for members of the public may still perform marriages for family and friends. If a judge chooses to perform marriages for family and friends, however, the judge may not decline to perform same-sex marriages for family and friends.*

### **Introduction**

The Committee has been asked whether a judge subject to the Model Code of Judicial Conduct<sup>1</sup> may perform marriages of opposite-sex couples but refuse to perform marriages for same-sex couples. The Committee concludes that such a refusal violates the Model Code. A judge for whom performing marriages is a discretionary function may, however, decline to perform any marriages for members of the public. A judge who declines to perform any marriages for members of the public may still perform marriages for family and friends. If a judge chooses to perform marriages for family and friends, though, the judge may not decline to perform same-sex marriages for family and friends.

### **Background**

The laws of all fifty states and the District of Columbia authorize one or more categories of judicial officers to perform marriages. This opinion covers judges for whom performing

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<sup>1</sup> MODEL CODE OF JUDICIAL CONDUCT (2011) [hereinafter MODEL CODE].

marriages is either a mandatory obligation of judicial office or a discretionary function.<sup>2</sup> The conclusions stated here are based solely on the Model Code.

### *The Model Code*

Canon I of the Model Code articulates the bedrock principle that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>3</sup> Rule 1.1 provides that “[a] judge shall comply with the law, including the Code of Judicial Conduct.”<sup>4</sup> Accordingly, a judge must “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.”<sup>5</sup> The term “impartiality” as used in this context means “the absence of bias or prejudice in favor of, or against, particular parties or classes of parties.”<sup>6</sup>

Canon II expresses another fundamental principle: “A judge shall perform the duties of judicial office impartially, competently, and diligently.”<sup>7</sup> Although a judge’s performance of a marriage typically is a discretionary function rather than a mandatory function, it is nonetheless a duty of judicial office within the meaning of the Model Code.<sup>8</sup> Correspondingly, Model Rule 2.2 requires a judge to “uphold and apply the law” and to “perform all duties of judicial office fairly

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<sup>2</sup> “A judge, within the meaning of [the Model] Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.” *Id.* at Application I(B).

<sup>3</sup> *Id.* at Canon I.

<sup>4</sup> *Id.* at R. 1.1. The Model Code defines the term “law” to include constitutional provisions, court rules, decisional law, and statutes. *Id.* Terminology.

<sup>5</sup> *Id.* at R. 1.2.

<sup>6</sup> *Id.* at Terminology.

<sup>7</sup> *Id.* at Canon II.

<sup>8</sup> *See, e.g., In re Day*, 413 P.3d 907, 950 (Or. 2018) (concluding that the act of solemnizing marriages, once a judge has chosen to do so, qualifies as a judicial duty within the meaning of judicial ethics rules), *cert. denied*, 139 S. Ct. 324 (2018); Ariz. Sup. Ct., Judicial Ethics Advisory Comm. Op. 15-01, 2015 WL 1530659, at \*1 (2015) (“Although the performance of a marriage by a judge is a ‘discretionary function’ rather than a mandatory function . . . it is based on statutory authority granted by the legislature. Because of this specific grant of authority . . . the performance of a marriage by a judicial officer is performance of a ‘judicial duty’ as contemplated by the Code [of Judicial Conduct].”); Sup. Ct. of Ohio, Bd. of Prof’l Conduct Adv. Op. 15-001, 2015 WL 4875137, at \*1 (2015) (“When a judge performs a civil marriage ceremony . . . the judge is performing a judicial duty and is thus required to follow the Code of Judicial Conduct in the performance of that duty.”); Wis. Sup. Ct., Judicial Conduct Advisory Comm. Op. No. 15-1, 2015 WL 5928528, at \*2 (2015) (discussing judges’ discretionary functions in connection with the performance of marriages); Elizabeth A. Flaherty, *Impartiality in Solemnizing Marriages*, JUDICIAL CONDUCT BD. OF PA. NEWSLETTER, Summer 2014, at 18, 25 (“When a judge chooses to conduct a wedding ceremony, s/he acts in an official judicial capacity, authorized by statute.”).

and impartially.”<sup>9</sup> Although judges come to the bench with different backgrounds and personal views or philosophies, judges “must interpret and apply the law, without regard to whether the judge approves or disapproves of the law” or principle or rule in question.<sup>10</sup> Model Rule 2.3(A) mandates that judges perform the duties of judicial office without bias or prejudice.<sup>11</sup>

Most importantly for present purposes, Model Rule 2.3(B) prohibits a judge who is performing judicial duties from manifesting bias or prejudice based on people’s sex, gender, sexual orientation, or marital status.<sup>12</sup> A judge who manifests such bias or prejudice threatens to undermine public confidence in the judiciary and to bring it into disrepute.<sup>13</sup> Indeed, because impartiality and unbiased decision-making and conduct are critical to our justice system and to the public’s faith in the judiciary, the Model Code emphasizes in several places that judges must avoid even conduct that may be *perceived* as biased or prejudiced.<sup>14</sup>

### ***State Judicial Ethics Opinions***

Several states have analyzed judges’ obligations to perform same-sex marriages. In a leading opinion, the Supreme Court of Ohio Board of Professional Conduct was asked by judges and a judicial association on behalf of its members (1) whether a judge who is authorized to perform marriages may refuse to marry same-sex couples on personal, moral, or religious grounds, but still marry opposite-sex couples; and (2) whether a judge may decline to perform all marriages to avoid marrying same-sex couples.<sup>15</sup> Relying on the oath of office to which all Ohio judges swear, and provisions of the Ohio Code of Judicial Conduct, which track the Model Code, the Board concluded that “[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,

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<sup>9</sup> MODEL CODE R. 2.2, *supra* note 1.

<sup>10</sup> *Id.* at cmt. [2].

<sup>11</sup> *Id.* at R. 2.3(A).

<sup>12</sup> *See id.* at R. 2.3(B) (prohibiting bias, prejudice, or harassment “based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation”).

<sup>13</sup> *Id.* at cmt. [1].

<sup>14</sup> *See, e.g., id.* at Preamble cmt. [2] (“Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the *appearance of impropriety* in their professional and personal lives.”) (emphasis added); *Id.* at R. 1.2 cmt. [3] (“Conduct that compromises or *appears to compromise the independence, integrity, and impartiality of a judge* undermines public confidence in the judiciary. . . .” (emphasis added)).

<sup>15</sup> Sup. Ct. of Ohio, Bd. of Prof’l Conduct Advisory Op. 15-001, 2015 WL 4875137, at \*1 (2015).

moral, and religious beliefs.”<sup>16</sup> The Board further concluded that “[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.”<sup>17</sup> Thus, Ohio judges may not decline to perform all marriages to avoid marrying same-sex couples on personal, moral, or religious grounds.<sup>18</sup> Other authorities have disagreed on this final point, however, and have held that judges may decline to perform all marriages without manifesting bias or prejudice toward same-sex couples.<sup>19</sup>

The Arizona Supreme Court Judicial Ethics Advisory Committee concluded that judges may not (1) distinguish between same-sex and opposite-sex couples when deciding whether to perform marriage ceremonies; (2) decline to perform same-sex marriage ceremonies even if the judge refers would-be spouses to other courts or individuals; (3) decline to perform same-sex marriages if they perform other marriages in court facilities; or (4) decline to perform same-sex marriages even if they conduct all opposite-sex weddings outside of court facilities.<sup>20</sup> These principles hold true even if a judge’s decision not to conduct same-sex marriages reflects the judge’s sincerely-held religious beliefs.<sup>21</sup>

Because performing marriages is a discretionary function, an Arizona judge may choose to perform no marriages.<sup>22</sup> An Arizona judge may also choose to perform marriages exclusively for family and friends without violating judicial conduct rules because the judge’s practice is unrelated to the celebrants’ sexual orientation.<sup>23</sup> If judges opt to perform marriages only for friends and relatives, however, they cannot ethically refuse to perform same-sex marriages for friends and relatives.<sup>24</sup> To do so would violate Arizona Rule of Judicial Conduct 2.3(B), which prohibits

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<sup>16</sup> *Id.* at \*5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*1, \*5.

<sup>19</sup> *See, e.g.*, Wis. Sup. Ct., Judicial Conduct Advisory Comm. Op. 15-1, 2015 WL 5928528, at \*1 (2015) (stating that judicial officers may not decline to officiate at same-sex weddings because of their religious or personal beliefs, but that judicial officers may decline to perform marriages at all, regardless of whether the parties seeking to be married are of the same or opposite genders, because officiating at weddings is a discretionary duty).

<sup>20</sup> Ariz. Sup. Ct., Judicial Ethics Advisory Comm. Op. 15-01, 2015 WL 1530659, at \*1 (2015).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*2.

<sup>24</sup> *Id.* (citing Rule 2.3(B)).

judges who are performing judicial duties from manifesting bias or prejudice based on sexual orientation.<sup>25</sup>

The Nebraska Judicial Ethics Committee reached essentially the same conclusion. In Opinion 15-1, the Nebraska Committee held that judges may not refuse to perform same-sex marriages notwithstanding their personal or sincerely-held religious beliefs that marriage is limited to the union of one man and one woman.<sup>26</sup> Nor may a judge refuse to perform a same-sex wedding if he or she refers the couple to a judge who is willing to perform same-sex marriages because the refusal to perform the ceremony manifests bias or prejudice based on the couple's sexual orientation notwithstanding the referral.<sup>27</sup> A judge may choose to avoid such personal or religious conflicts by refusing to perform marriages altogether.<sup>28</sup> Judges may also choose to perform marriages exclusively for close friends and relatives, but if they do so, they may not refuse to perform same-sex marriages for close friends and relatives.<sup>29</sup>

### Analysis

The public is entitled to expect that judges will perform their activities and duties fairly, impartially, and free from bias and prejudice.<sup>30</sup> Further, while actual impartiality is necessary, it is not sufficient; the public must also *perceive* judges to be impartial.<sup>31</sup>

If state law authorizes or obligates a judge to perform marriages, a judge's refusal to perform same-sex marriages while agreeing to perform marriages for opposite-sex couples is improper under Rules 1.1, 2.2, 2.3(A), and 2.3(B) Model Code. This conclusion would have been true in any state that recognized same-sex marriages before the Supreme Court decided *Obergefell*

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<sup>25</sup> *Id.*

<sup>26</sup> Neb. Judicial Ethics Comm. Op. 15-1, at 2 (2015), *available at* [https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1\\_0.pdf](https://supremecourt.nebraska.gov/sites/default/files/ethics-opinions/Judicial/15-1_0.pdf).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See generally* *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring) (noting that judicial impartiality in both fact and appearance is “one of the very objects of law”); *Alexander v. Primerica Holdings*, 10 F.3d 155, 162 (3d Cir. 1993) (noting the importance of “the public’s confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted”) (citations omitted); *United States v. CBS*, 497 F.2d 107, 109 (5th Cir. 1974) (observing that “the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system”).

<sup>31</sup> *See* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888–89 (2009).

*v. Hodges*,<sup>32</sup> but it is broadly correct now. In *Obergefell*, the Supreme Court held that the Fourteenth Amendment to the U.S. Constitution prohibits states from refusing to license marriages between individuals of the same sex. As the Court explained, the U.S. Constitution “does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”<sup>33</sup> The Court further determined that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>34</sup>

Model Rule 1.1 obligates judges to comply with the law. *Obergefell* makes clear that the U.S. Constitution prohibits state officials from engaging in discrimination and bias toward gays and lesbians in decisions related to same-sex marriage; in short, the decision establishes law with which judges must comply. Model Rule 2.2 requires judges to “uphold and apply [this] law,” and further directs that judges “perform all duties of judicial office fairly and impartially.”<sup>35</sup> As noted earlier, the term “impartiality” as used in this context means “the absence of bias or prejudice in favor of, or against, particular parties or classes of parties.”<sup>36</sup>

Furthermore, Model Rule 2.3(A) specifically requires judges to perform their duties free from bias and prejudice. Model Rule 2.3(B) prohibits a judge who is performing judicial duties from manifesting bias or prejudice based on sex, gender, sexual orientation, or marital status. Indeed, we are aware of no state judicial ethics opinion concluding that similar judicial code provisions permit judges who perform marriage ceremonies for opposite sex couples to refuse to perform marriage ceremonies for same-sex couples.

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<sup>32</sup> 135 S. Ct. 2584 (2015).

<sup>33</sup> *Id.* at 2607; *see also id.* at 2604–2605 (stating that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty”).

<sup>34</sup> *Id.* at 2607–2608. We recognize that a judge’s refusal to perform a same-sex marriage may be based on the judge’s sincerely-held beliefs regarding the concept of marriage. As the Supreme Court noted in *Obergefell*, “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical principles, and neither they nor their beliefs are disparaged here.” *Id.* at 2602. We also recognize, as the Supreme Court observed in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), that the First Amendment ensures that people receive proper protection as they seek to live according to the principles of their religious faith. *Id.* at 1727. *Masterpiece Cakeshop* also underscored the fundamental importance of impartiality on the part of all officials vested by the state with adjudicative authority. *Id.* at 1721 (noting that biased comments and differential treatment on the part of a state agency “cast doubt on the fairness and impartiality of the Commission’s adjudication”). But as noted earlier and reiterated here, this opinion addresses the obligations of judicial officers under the Model Code.

<sup>35</sup> MODEL CODE R. 2.2, *supra* note 1.

<sup>36</sup> *Id.* at Terminology.

A judge may choose to perform no marriages, or to perform marriages exclusively for family and friends. If judges opt to perform marriages only for friends and relatives, however, they cannot refuse to perform same-sex marriages for friends and relatives. Again, to refuse to perform same-sex marriages for friends and relatives while performing marriages of opposite-sex friends and relatives would violate Model Rules 2.2, 2.3(A), and 2.3(B). The fact that the judge’s conduct affects a smaller group of people—that is, friends and family versus the public at large—does not change the judge’s ethical obligations.

Our conclusions are reinforced by the Oregon Supreme Court’s decision in *In re Day*.<sup>37</sup> The respondent in that case, Judge Vance Day, was appointed to the Oregon trial court bench in 2011 and re-elected in 2012. He made himself available to solemnize marriages upon becoming a judge in 2011.

After an Oregon federal judge invalidated Oregon’s constitutional ban on same-sex marriage in 2014, Day’s judicial assistant and clerk asked him about possibly performing weddings going forward given Day’s religious belief that marriage should be confined to a man and a woman.<sup>38</sup> Judge Day “instructed [his clerk and judicial assistant] that, when his chambers received any marriage request, [they] should obtain” personal gender information available in the Oregon Judicial Information Network (OJIN)—which they had never done before—to try to determine whether the request involved a same-sex couple.<sup>39</sup> If it did, they were to inform the couple that the judge was not available on the desired date or otherwise notify him, so that he could decide how to proceed.<sup>40</sup> If the request came from an opposite-sex couple, however, his judicial assistant and clerk were to schedule the wedding.<sup>41</sup> On one occasion Day’s judicial assistant checked OJIN and determined that the requesters might be a same-sex couple. Day had a genuine scheduling conflict,

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<sup>37</sup> 413 P.3d 907 (Or. 2018), *cert. denied*, 139 S. Ct. 324 (2018); *see also In re Neely*, 390 P.3d 728, 753 (Wyo. 2017) (“Judge Neely must perform her judicial functions, including performing marriages, with impartiality. She must either commit to performing marriages regardless of the couple’s sexual orientation, or cease performing all marriage ceremonies. This does not mean . . . that no judge can now turn down any request to perform a marriage. What it means is that no judge can turn down a request to perform a marriage for reasons that undermine the integrity of the judiciary by demonstrating a lack of independence and impartiality.”), *cert. denied*, 138 S. Ct. 639 (2018).

<sup>38</sup> *In re Day*, 413 P.3d at 921, 949.

<sup>39</sup> *Id.* at 921–22, 949.

<sup>40</sup> *Id.* at 922, 949.

<sup>41</sup> *Id.*

so the judicial assistant truthfully told the couple that the judge was unavailable. Day stopped performing marriages soon thereafter.

The Oregon Commission on Judicial Fitness and Disability charged Day with violating Rule 3.3(B) of the Oregon Code of Judicial Conduct, which provides: “A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice . . . against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, 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.”<sup>42</sup> The *In re Day* court easily concluded that the act of solemnizing marriages, once a judge has chosen to do so, constitutes a judicial duty under Oregon Rule 3.3(B).<sup>43</sup> That led the court to the question of whether Day had manifested bias or prejudice against same-sex couples. Day argued that he had not done so because he never actually refused to marry any same-sex couple as a result of his short-lived screening process.<sup>44</sup> According to Day, Oregon Rule 3.3(B) could not authorize punishment “for discrimination that did not occur against unknown parties.”<sup>45</sup>

The *In re Day* court reasoned that to “manifest” bias or prejudice, “the act in question must be undertaken such that it is obvious to others” or “must be capable of perception.”<sup>46</sup> To be sure, Day’s screening process was not displayed or made known in a manner that was capable of perception by anyone outside his chambers. But that factor did not resolve the issue because his “chosen course of action—motivated by his intention to marry only opposite-sex couples—was evident to his staff.”<sup>47</sup> His instructions to his staff in implementing his plan to avoid marrying same-sex couples “indisputably communicated to his staff his intention to treat same-sex couples who requested a marriage officiant differently from opposite-sex couples.”<sup>48</sup> Furthermore, he instructed his staff to implement “that differential treatment, which included providing inaccurate information to same-sex couples. Those actions ‘manifest[ed]’ prejudice in the performance of judicial duties, within the meaning of [Oregon] Rule 3.3(B).”<sup>49</sup>

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<sup>42</sup> *Id.* at 950 (quoting OREGON CODE OF JUDICIAL CONDUCT R. 3.3(B) (2013)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 951.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 952.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

Next, Day contended that because no same-sex couple was denied the opportunity to marry by virtue of his screening process, he did not discriminate or manifest prejudice “against” any such couple as required for a violation of Oregon Rule 3.3(B).<sup>50</sup> While it was true that he never actually refused to marry a same-sex couple, the *In re Day* court nevertheless concluded that Day’s conduct manifested prejudice against others within the meaning of the rule.

We reiterate that, in prohibiting a judge from manifesting prejudice against court participants or others based on personal attributes, [Oregon] Rule 3.3(B) seeks to prevent judicial actions that impair the fairness of a proceeding or prompt an unfavorable view of the judiciary. . . . Most commonly, problematic conduct likely would involve a judge’s overt and prejudicial treatment of a particular person involved in a proceeding before the court—such as a litigant, juror, witness, or lawyer. . . . However, a judge could manifest prejudice against others based on personal attributes in a more general way that still could affect perceptions of fairness or prompt an unfavorable view of the judiciary. . . . Given the fundamental objective of [Oregon] Rule 3.3(B)—ensuring the public’s trust in an impartial and fair judiciary—we conclude that that rule is not limited to a manifestation of prejudice against an identified, particular person. Rather, it may encompass an expression of bias against an identifiable group, based on personal characteristics, in the performance of judicial duties.<sup>51</sup>

Day crafted a screening process that was intended to ensure that he married only opposite-sex couples. The screening process demonstrated to his staff that, in exercising his judicial duty to solemnize marriages, he would not treat all couples fairly. That conduct, in turn, manifested prejudice against same-sex couples based on their sexual orientation in violation of Oregon Rule 3.3(B).<sup>52</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 952–53 (citations omitted).

<sup>52</sup> *Id.* at 953. Although the Court found that Day violated Rule 3.3(B), it did not consider this violation in calculating the three-year suspension it imposed, explaining that “[i]n light of the other, notably serious misconduct that the commission has proved by clear and convincing evidence, we conclude that—whether respondent’s constitutional challenges are meritorious or not—our ultimate conclusion to impose a lengthy, three-year suspension remains the same.” *Id.* at 954.

## Conclusion

A judge for whom performing marriages is either a mandatory part of his or her official duties or an optional exercise of judicial authority violates the Model Code of Judicial Conduct by refusing to perform marriages for same-sex couples while agreeing to perform marriages of opposite-sex couples. In a jurisdiction where a judge is not obligated to perform marriages, the judge may decline to perform all marriages for members of the public. A judge who chooses not to perform any marriages for the public may still perform marriages for family and friends, so long as the judge does not discriminate between same-sex and opposite-sex couples when performing marriages for family and friends.

### **AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

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