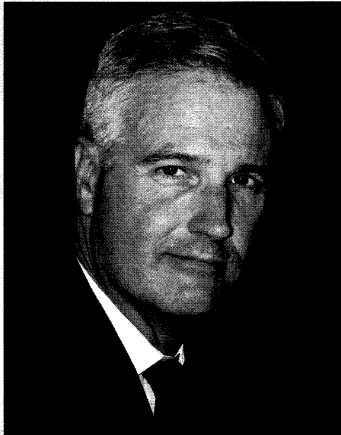


A Question of Ethics

PETER KIEFER



Doing One's Duty

Usually, I turn situations into hypothetical scenarios in these columns to focus on the issues at hand and to dissuade readers from trying to guess where the initial circumstances may have occurred. This column will be different. The circumstances are recent and in the public arena. In fact, footnotes are in order. Also, rather than asking a select group to respond, I am putting out a general request for you to email me with your opinion. I will compile the responses in the next issue.

BACKGROUND

On May 15, 2008, the California Supreme Court struck down a state proposition defining marriage as between a man and a woman. County clerks in California are required to issue marriage licenses but are allowed the option to perform marriage ceremonies. In June, just before the ruling took effect, county clerks in several counties declared they would discontinue performing marriages — all marriages. They would, however, issue marriage licenses to all couples, including same-sex couples. One clerk said the decision was not to avoid performing same-sex marriages but to conserve staff and resources in what was expected to be a deluge of requests.¹ Other clerks determined that issuing marriage licenses and performing marriage ceremonies were both part of their legal obligations; they planned to conduct business as usual.²

Staff in clerk's offices can also be authorized to perform marriages. Many clerks required their staff to perform same-sex marriages regardless of an employee's personal beliefs about the practice; other clerks asked for volunteers or allowed staff to opt out if they were uncomfortable.³ This dilemma is a variation on the older but still difficult question of clerical staff not wishing to deal with parties seeking an abortion when a court order is required.

One group intends to contact clerks' offices around the state to offer information that forcing employees to perform same-sex marriages violates the Civil Rights Act and the Fair Employment and Housing Act.⁴ Opponents of same-sex marriages are mounting a campaign to place a constitutional amendment on the November ballot to once again define marriage as between a man and a woman.⁵ Groups are urging clerk's offices to not issue marriage licenses to same-sex couples until after the November election.⁶ County supervisors in one county publicly urged the clerk not to issue licenses.⁷

This situation raises a host of questions about government professionals who are called to perform tasks repugnant to segments of the community or to which they are personally opposed. Though it is possible that county clerks in these specific counties do not work directly with the courts, many court administrators around the country do perform county clerk functions. These questions are therefore at our doorstep.

IN THE NACM CODE OF CONDUCT FOR COURT PROFESSIONALS, THREE CANONS IMMEDIATELY COME TO MIND.

- CANON 1.1 — Performing Court Duties: "A court professional shall faithfully carry out all appropriately assigned duties striving at all times to perform the work diligently, efficiently, equitably, thoroughly, courteously, honestly, truthfully and with transparency."
- CANON 1.2 — Avoiding Impropriety: "A court professional shall avoid improper influences from business, family, position, party, or person."

- CANON 1.3 — Fairness: “A court professional shall conduct his or her work without bias or prejudice including, but not limited to, bias or prejudice based upon race, gender, skin color, religion, age, sexual orientation, national origin, language, marital status, socioeconomic status, or physical or mental challenge.”

QUESTIONS

The questions (most of them) center on trying to resolve the tension between honoring one’s personal beliefs while doing one’s duty preserving the public’s trust in a professional manner.

- Performing marriages is not an essential clerk’s office function. Many of us have submitted budget proposals cutting non-essential functions in times of fiscal austerity. In this particular situation, the motivation appears not to be budgetary. **Is it permissible within our professional obligation to discontinue performing an optional function? Does the reason for discontinuing an optional function make a difference?**
- A few clerk’s offices are allowing staff to individually decide whether or not to perform same-sex marriages; other offices are requiring all staff who do preside over marriages to be available for same-sex and opposite-sex ceremonies. **Is it within the scope of our code to allow staff to refuse to participate (if that was one of their duties before the court ruling)? What if no staff wanted to preside over same-sex marriages; meaning the office would, in effect, stop offering the service?**
- Elected officials in at least one county publicly pressured the clerk to discontinue issuing marriage licenses — an essential function. This placed the clerk in an extremely precarious position. **Assume rather than an elected clerk, it is an appointed court administrator who serves at the pleasure of the bench and the elected judges have urged the administrator to stop issuing licenses. What options does a court administrator have and still possibly keep his or her job?**
- As a sidelight, judges and other government officials in some jurisdictions perform weddings in the courthouse during lunch and after business hours. Some have argued that these ceremonies are private affairs that take up public resources (security and facilities costs). **Does your court have a policy on judges or other public officials performing weddings in the courthouse during lunch or after hours?**

I look forward to your responses to any or all of the questions listed. I reserve the right to edit comments for space, but I will commit to ensuring that your fundamental view point is preserved. If requested, I will withhold the sender’s name from the published column. Please email your responses to me at pkiefer@superiorcourt.maricopa.gov.

NOTES

1. Walt Cook, “First same-sex marriage licenses issued by county,” *Union Democrat*, June 17, 2008.
2. Amanda Fehd, “County clerks vow not to conduct ceremonies,” *San Diego Union Tribune*, June 7, 2008.
3. Jean-Paul Renaud, “California’s county clerks’ policies vary on same-sex marriages,” *Los Angeles Times*, June 16, 2008.
4. Ibid.
5. Walt Cook.
6. Jesse McKinley, “I Do? Oh, No. Not Here You Don’t,” *New York Times*, June 13, 2008.
7. Robert L. Hue, “Johnston says she will uphold her oath and issue marriage licenses,” *Appeal Democrat*, June 14, 2008.

ABOUT THE AUTHOR

Peter Kiefer is the southeast regional court administrator for Maricopa Superior Court in Phoenix, Arizona. He has been questioning ethics for Court Manager since 1994.