



# A Question of Ethics

BY PETER KIEFER<sup>1</sup>

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## Doing One's Duty: Part Two

When California's Proposition 8 passed in November last year, many readers probably thought that the recent ethics column, where some of that state's county clerks refused to perform weddings, had become moot. A number of county clerks in California refused to marry anyone so as to avoid marrying same-sex couples. Rather than rendering the question moot, passage of Proposition 8 has sparked even more (albeit subtle) issues that we can ponder.

## Background Recap

After the California Supreme Court struck down the law defining marriage as between a man and a woman, county clerks in several counties declared they would stop performing all marriages (an optional function for county clerks). One clerk said the decision was an attempt to conserve staff and resources against an expected onslaught of wedding requests.

Many clerks required their staff to perform same-sex marriages regardless of staffs' personal beliefs concerning the practice; other clerks asked for volunteers or allowed staff to opt out if they were uncomfortable.

Opponents of same-sex marriages mounted a campaign (Proposition 8) to restore the definition of marriage as between a man and a woman. Groups (and in one county members of the board of supervisors) urged county clerks not to issue marriage licenses (a required function) to same-sex couples until after the election. In November, Proposition 8 passed once again, making same-sex marriages illegal.

Since the election, same-sex marriage proponents (Proposition 8 opponents) organized a campaign, which some have said targets individuals and groups that supported Proposition 8, such as the Mormon Church.<sup>2</sup> This includes a request for state election officials to investigate the church's activities supporting the proposition.<sup>3</sup> They have also found an ally in

Attorney General Jerry Brown, who is filing a legal challenge.<sup>4</sup> For their part, same-sex marriage opponents (Proposition 8 supporters), represented by former Whitewater prosecutor Kenneth Starr, are filing legal briefs to invalidate the approximately 18,000 same-sex weddings that took place during the window of time when those marriages were declared valid.<sup>5</sup>

## The Respondents

Responding to the questions posed in the previous column are: Kevin J. Lane, assistant clerk-administrator for Division One, Fourth Appellate District for the California Court of Appeal; Professor Aine Donovan, executive director of the Institute for the Study of Applied and Professional Ethics, Tuck School of Business, Dartmouth College; Frank Maiocco, director of administration for the Kitsap County Superior Court in Port Orchard, Washington; James Murchison, court administrator for the Third Judicial District Trial Courts in Salem, Oregon; and Suzanne James, court administrator for the Howard County Circuit Court, in Ellicott City, Maryland.

## The Questions

**Is it permissible to stop performing an *optional* function, and does the reason for discontinuing that function make a difference?**

Suzanne James saw that both the reason and the timing for discontinuing an optional function make a difference. "They both contribute to the public's perception of our motives and the public's judgment as to whether or not we are correctly performing our professional responsibilities."

Kevin Lane believed it is permissible to discontinue an optional function, but the reason for doing so is critical. "Just because we ethically disagree with what we are to do,

refusing to perform that task is still unprofessional. As clerks, administrators, and managers we must respect those in the decision-making positions and focus on our task of ensuring the ruling or policy is implemented.”

Jim Murchison said that most public officials have numerous functions that they may or may not perform, but agreed that the real issue is the reason. “For example, prosecutors may have an office policy stating that they will not file on first-time, non-violent misdemeanor cases or on non-violent, non-person misdemeanors. Police officers may routinely not enforce certain ordinances as a matter of course. Judges may be ‘entitled’ or ‘empowered’ to perform marriages, but they are not mandated to do so and may selectively choose to do so, or not.”

The question is whether or not the decision to perform a function is discriminatory on its face, or if there is a reasonable, non-discriminatory basis for the decision. “If that is limited resources, rather than a discriminatory choice, you’re fine. If you announce to the world that it is based on an illegal decision, it is pretty hard to defend in court. For purposes of ethical standards, Canon 1.3 specifically prevents discrimination based on sexual orientation, unless expressly prohibited by law. So, unless it is clearly illegal, refusal based on sexual orientation would be unethical.”

Frank Maiocco observed that the legislative and executive branches have given considerable scrutiny to “mandatory” versus “non-mandatory” court functions. It is apparent that court leaders have the authority to suspend or stop optional services. “In a vacuum, the reason for stopping or suspending non-mandated services should not make a difference. However, given the court’s political relationships, the practical reality is that court leaders should be prepared to justify such actions with appropriate legal, procedural, or budgetary reasons to avoid the perception of being an ‘activist’ court.”

### **Is it within our code to allow staff to refuse to preside over same-sex weddings?**

Professor Donovan observed that same-sex marriage poses a variety of ethical issues for society, which will not be easily resolved in the near future. Court administrators face a unique dilemma in deciding whether to force staff to participate in an activity that they may find morally objectionable.

The issuing of marriage licenses is not optional; it is a required clerk’s office duty. As such, staff are held to the professional

code that requires they conduct their work without bias or prejudice. Performing marriage ceremonies, on the other hand, is an optional function and, as such, can be limited to volunteers. Similarly, hospitals often allow nurses and physicians to opt out of the performing of abortions if they hold strong moral objections. It is important to note that no hospital has encountered the problem of having no available staff for procedures; similarly, it is reasonable to assume that courts would always have some personnel who would be willing to preside over same-sex marriage ceremonies.

Frank and Suzanne both thought that individual staff did not have an ability to “opt-out” of a required duty of the office. Frank had a unique tack, believing that performing weddings is not an appropriate function to be assigned to court staff; most judicial systems in which Frank has worked have sided against court staff performing weddings. “However, where legal authority permits staff to conduct weddings and the performance of weddings is optional, court leaders should determine whether the performance of weddings is an expected function of court staff or not. In this regard, the clerk should not permit staff to refuse. Instead, the clerk will need to establish an ‘all or nothing’ policy for individual staff, removing any discretion among court staff from deciding whether to perform same sex marriages.”

Suzanne’s basic premise was that we, as court professionals, are dedicated to serving the public by following the Rule of Law. As public servants, we do not get to pick and choose which laws we uphold and which we do not. The same-sex marriage question is couched in terms of serving or not serving a particular class of people, which is discrimination. “I do not think that it truly shares a philosophical foundation with the abortion court order, which is taking issue with a particular procedure across the board as opposed to endorsing the procedure but not wanting to apply it to all classes of people. This may not seem like an important distinction, but I think that it cuts to the heart of discrimination.”<sup>6</sup>

Kevin believes staff must realize that their job is to perform the essential functions of the court. “I feel that they should not be offered the ability to refuse to do their functions simply because they personally disagree with the function. This negatively affects the functioning of the office and creates a discriminatory atmosphere.” He points out the dilemma that we would be faced with if clerks were able to select which cases they prefer to work on based on the charge or the party involved.

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Jim thought there were too many unknowns, including questions about conditions of employment. Refusal would probably be addressed in the personnel rules but would still have to be for non-discriminatory reasons. (And of course, if an employee is allowed to illegally discriminate, the employer is also liable.) “At a minimum, the employee would be acting unethically under Canon 1.3, again, unless same-sex marriages are clearly against the law.”

### Editor’s Note

Regarding the question of allowing staff to “opt out” of performing same-sex weddings, recently we saw a somewhat related development. The U.S. Department of Health and Human Services (HHS) proposed new rules for comment to further discourage discrimination against healthcare workers who refuse to participate in activities they find morally objectionable (known as “*the conscience clause*”).

Two interesting questions regarding a refusal to participate in morally objectionable activities come to mind:

#### *Must one at least help by referring an alternative?*

Many people concede to a provider who refuses to participate in an activity, so long as that provider refers the client to someone else who can provide the service. Others contend that the very act of referring a client to someone else is de facto participation. The next question becomes “What is the difference between refusing to participate and actively subverting an activity?” Where is the line, for example, between a pharmacist who refuses to fill a “Morning After” pill prescription and placing a client who is asking about the pill indefinitely “on hold”? The new HHS rules define the act of requiring healthcare providers to assist clients to find an alternative as discrimination.

#### *What is “morally objectionable”?*

The current HHS rules and most states limit “*conscience clause*” references to healthcare workers involving abortion and contraception. There is no reason however, why this debate will not extend to other areas, including the courts. In the past, we have dealt with staff choosing not to handle applications by minors for court-ordered abortions. We are currently dealing with staff not wanting to perform same-sex marriages. We may very well have to accommodate staff opposed to handling death penalty paperwork, for example. (This would be significant here in Maricopa County, where we currently have more than 140 pending capital cases.) Some court professionals could be morally opposed to divorce. I have even met people who have moral objections to the jury system. (At least they say they have a moral objection to it.)

Couple this expanded working definition of moral objections with new rules not to actively participate (including referrals). Could court professionals be protected if they (as matter of conscience) let death penalty or dissolution paperwork sit on their desk without telling anyone?

#### **What if no staff wanted to preside over same-sex marriages, meaning the office would, in effect, stop offering the service?**

Both Kevin and Frank saw that staff should not have an option, which would make this question a non-issue. Kevin thought that if the entire office refused to preside over the marriages, it would be up to the administrator to relieve those clerks of their positions for failing to perform the essential functions of their position. The administrator would then have to obtain people who understood that this is the function and expectation of the position.

**Assume instead of an elected clerk being pressured by the board of supervisors, an appointed court administrator issues marriage licenses, and some of the judges ask the administrator to stop issuing licenses to same-sex couples. What can the court administrator do since he or she serves at the pleasure of the elected bench?**

Frank suggested that the court administrator respectfully remind the presiding judge and/or executive judicial committee of his/her ethical obligation to perform the legally prescribed duties of his position. "It is incumbent in this discussion for the court administrator to emphasize that failure to fulfill the prescribed duties places him/her in a position, as a direct judicial employee, of violating that law. Consulting with the judges will give the court administrator an opportunity to mutually brainstorm potential and legally prudent alternatives for ensuring compliance with the law (e.g. administrative delegation of the specified function, where permissible, to an alternative department)." If the judges and the court administrator could not find another acceptable solution, Frank thought the court administrator would need to insist on a judicial order directing him/her to stop issuing licenses.

To Suzanne, the issuance of marriage licenses is an essential court function, so there is no option but to continue. "Possibly keeping his/her job" will be dependent upon the ongoing relationship among the bench and the court administrator and the bench's allegiance to the rule of law. "I would suggest framing the response to the bench in terms of the requirement of bench or court to lead the judiciary by faithfully implementing the law."

Kevin pointed out that working as an appointed administrator poses significant ethical dilemmas when the appointing authority urges one to perform or not perform certain functions. A discussion must take place to explain the obligations of the clerk's office and the potential negative effects of failing to issue licenses. "Ultimately, if the judges were insistent that the administrator not issue licenses despite a ruling from a higher court, the administrator would ethically need to assert the position of the office and continue to issue licenses even at the risk of dismissal."

Jim thought that the judges should not be inserting their personal bias, prejudices, and opinions into public policy matters. The judges' authority should be directed to the matters properly before them in the court. "Judicial canons

of ethics clearly limit those public policy matters upon which a judge may express an official position. However, assuming that such marriages are not illegal (or at least the law is not yet settled), if judges 'urge' the court administrator not to issue marriage licenses for reasons of sexual orientation, I believe that the correct ethical answer is to issue all or issue none. If the judges feel strongly enough to fire the administrator over this decision, you're potentially back in court. Unless same-sex marriages are clearly illegal, the administrator is ethically bound to honor the canons. One would hope that the judges would respect the administrator who makes the ethically correct decision and that their working relationship is solid otherwise. (Again, if the law is clear that the marriages cannot be performed, then the ethics issue is basically removed. Obeying the law is paramount.)

From the judges' standpoint, the more correct and legally proper course to follow would be to get the matter into a court of law. Find a "friendly counsel" to file a mandamus, or issue the license and allow a challenge to it. The judges can exercise their proper powers in dealing with the matter in open court rather than attempting to "influence" the administrator or clerk.

### **Does your court have a policy on judges or other public officials performing weddings in the courthouse during lunch or after hours?**

*Editors Note: In many jurisdictions judges and other government officials perform weddings in courthouses during lunch and after business hours. Performing weddings is controversial even outside the realm of same-sex marriages. Some argue that weddings are private affairs that inappropriately take up precious public resources such as security and facilities expenses at a time of severe fiscal austerity. In addition, some judicial officers are given "tips" that sometimes amount to hundreds of dollars by grateful couples. There are venues outside of a public courthouse where couples can marry. Courts should focus on their primary purpose: resolving disputes.*

Jim and Suzanne said that judges can perform weddings in courthouses in their states. Jim noted that Oregon has specific statutes that empower judges to perform weddings in or away from the courthouse and at any time. There are also specific restrictions on whether judges can accept fees or honoraria. Suzanne said that in Maryland, judges and clerks of court can hold marriages in the courthouse. Participants are charged a nominal fee that goes to the state's and county's coffers.

On the other hand, the judges in Frank's court decided not to perform weddings in or around the courthouse in response to a Washington ethics advisory opinion, which defined weddings as a permissible, albeit non-judicial, function of the judges. Judges could perform weddings as long as (1) weddings did not impede or interfere in the regular "judicial" function of the judges, and (2) judges do not charge or collect a fee for weddings performed during business hours. "Given the regular size of caseloads and daily calendars, the superior court judges in my county simply decided that weddings performed during the day would likely conflict with their performance of 'judicial' business."

Kevin said that although California does not have an official policy regarding judges performing marriages at the court, the court of appeal allows them. "My feeling is that our security and facilities are here and available during public hours whether we have a wedding or no one is in the building. As long as the judges agree to perform the ceremonies and the functions of the court continue to be performed, I don't see a problem."

My thanks go out to Professor Aine Donovan, Kevin Lane, Jim Murchison, Suzanne James, and Frank Maiocco for

their insights regarding this timely and interesting topic of performing controversial functions. These comments are only the start of what I hope is an ongoing conversation. If you have an ethical issue, or if you have comments on this scenario, please contact me at [pkiefer@superiorcourt.maricopa.gov](mailto:pkiefer@superiorcourt.maricopa.gov). I also invite you to visit the National Association for Court Management's ethics Web page for a variety of ethics codes and discussions.

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#### 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.

#### NOTES

1. My thanks to Brenda Varty Bly for her conscientious editing of this and all my columns.
2. Jonah Goldberg, *The Los Angeles Times*, December 2, 2008.
3. Mike Swift, "State Officials to Investigate Mormon Church's Prop. 8 Campaign Activities." *The San Jose Mercury*, November 25, 2008.
4. Andrew Malcolm, "AG Jerry Brown, Prop. 8 Defender Now Seeks Ban on Same — Sex Marriage Ban," *Los Angeles Times*, December 19, 2008.
5. "AG Stands for Marriage," *The San Francisco Chronicle*, December 23, 2008.

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