

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

REVISED ADVISORY OPINION 15-01  
(March 9, 2015)

**JUDICIAL OBLIGATION TO PERFORM SAME-SEX MARRIAGES**

**Overview**

The Judicial Ethics Advisory Committee (JEAC) has received an inquiry containing a series of questions centered on whether a judge who performs opposite-sex marriages may decline to perform same-sex marriages. Below are the questions asked, with brief answers, followed by a discussion of the applicable provisions of the Arizona Code of Judicial Conduct.

**Questions and Brief Answers**

1. May a judge distinguish between same-sex and opposite-sex couples when determining whether to perform a marriage ceremony?

**No.**

2. May a judge decline to perform same-sex marriage ceremonies if the individuals with a marriage license are referred to another court or individual?

**No.**

3. May a judge decline to perform same-sex marriages if the judge performs other marriages in a court facility?

**No.**

4. May a judge decline to perform same-sex marriages if the judge conducts all opposite-sex wedding ceremonies at locations that are not at a court facility?

**No.**

5. Do the answers to questions 1 through 4 change if the judge's decision to not conduct same-sex marriages is based upon the judge's sincerely held religious belief that marriage is the union of one man and one woman?

**No.**

6. Do the answers to questions 1 through 4 change if the judge's decision to not conduct same-sex marriages is based upon a personal belief rather than a sincerely held religious belief?

**No.**

7. May a judge choose to conduct marriage ceremonies only for friends and relatives?

**A qualified yes.**

### **Discussion**

Same-sex marriages are now legal in Arizona. *See Majors v. Horne*, 14 F.Supp.3d 1313 (D. Ariz. 2014). Although still the subject of debate and continuing litigation, same-sex couples have been marrying in Arizona since October 2014. The JEAC received a multi-question inquiry regarding the obligation of judicial officers to perform same-sex marriages. At the core of the JEAC's response below is the principle that a judge who chooses to perform marriages may not discriminate between marriages based on the judge's opposition to the concept of same-sex marriage.

Rule 2.3(B) of the Arizona Code of Judicial Conduct provides that a judge shall not, "in the performance of judicial duties," manifest bias or prejudice based upon sexual orientation. Although the performance of a marriage by a judge is a "discretionary function" rather than a mandatory function under Rule 3.16 of the Code, it is based on statutory authority granted by the legislature. Because of this specific grant of authority, the JEAC concludes that the performance of a marriage by a judicial officer is performance of a "judicial duty" as contemplated by the Code.

Because performing a marriage is a discretionary function, a judge may, consistent with the Code, decline to perform any marriages whatsoever. *Cf.* Rule 3.6(C)(recognizing a judge's right to exercise freedom of religion). But because performing a marriage is a judicial duty within the scope of Rule 2.3(B), a judge cannot refuse to perform same-sex marriages if the judge is willing to perform opposite-sex marriages. This principle resolves questions 1 through 6 above. It makes no difference whether the judge refers same-sex couples to another judicial officer (question 2), where the judge performs the marriages (questions 3 and 4), or on what principle the judge has declined to perform a same-sex marriage (questions 5 and 6). If a judge chooses to perform marriages, refusing to perform a same-sex marriage

based on the participants' sexual orientation manifests bias or prejudice and violates Rule 2.3(B).

Refusing to perform same-sex marriages, while agreeing to perform opposite-sex marriages, also violates Rule 2.2 of the Code which provides that “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”

The issue raised in question 7 is more nuanced. The JEAC concludes that a judge may choose for various reasons not to conduct any marriages at all because performing marriages is a discretionary, not mandatory, function. A judge may also choose to conduct marriages only for friends and relatives to the exclusion of all others. Such a choice would not run afoul of Rule 2.3(B) because it is not based on sexual orientation. Of course, a judge who performs marriages only for friends and relatives would violate Rule 2.3(B) if the judge refuses to perform marriages for same-sex friends and relatives.

The JEAC recognizes the potential misuse of any accepted limitation on the categories of marriages a judicial officer is willing to perform. For example, broadly defining “friends” as all members of a social club or a church would seem to create a pathway for a judicial officer to perform marriages yet still decline to perform same-sex marriages. This practice likely would undermine a judge’s ability to assert a non-discriminatory intent and the protection of this opinion in defense of a misconduct charge.

However, the JEAC does not believe that this potential misuse of a narrow category of marriages that a judge may perform justifies an all or nothing approach, where a judge either must accept every request, or perform no marriages at all. Instead, the JEAC believes that the question of whether a judge truly has a non-discriminatory reason for declining to perform a same-sex marriage must be determined on a case-by-case basis.