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Formal Opinion No. 1-2007

Re: Whether Public Officials and
Religious Figures May Decline to
Exercise their Authority to
Solemnize Civil Unions

Dear Mr. Komosinski:

On December 21, 2006, I provided advice to you regarding whether public officials may refuse to solemnize civil unions, once the statute authorizing civil unions becomes effective. A related question has arisen regarding whether religious figures, that is priests, ministers, rabbis, imams, and other religious officiants (hereinafter "members of the clergy" or "religious figures") may refuse to solemnize civil unions based on sincerely held religious beliefs. The legal analysis and conclusions regarding these two categories of individuals authorized to solemnize marriages and civil unions differs. I, therefore, wish to provide you with comprehensive advice on the questions noted above, which includes a reiteration of my December 21, 2006 advice.

You were previously advised that although public officials can decline to exercise their authority to solemnize marriages and civil unions entirely, if a public official elects to be available generally for the purpose of solemnizing marriages,



that official must also be available generally to solemnize civil unions. Any attempt to distinguish between marriages and civil unions in the exercise of the statutory authority to solemnize would violate the Law Against Discrimination, N.J.S.A. 10:5-1, et seq., ("LAD"). Should the solemnization power be implemented in a discriminatory way by a public official, the Attorney General is authorized to seek judicial relief to ensure compliance with the LAD.

The LAD, however, does not apply to the administration of religious rites by members of the clergy. As a result, there is no statutory bar to a member of the clergy declining to solemnize civil unions in accordance with sincerely held religious beliefs, even though that religious figure regularly solemnizes marriages.

L. 2006, c. 103, the law authorizing civil unions in this State, will become effective on February 19, 2007. The law amends existing statutes to authorize various public officials and religious figures to solemnize marriages and civil unions.

Once the law becomes effective, N.J.S.A. 37:1-13 will provide:

Each judge of the United States Court of Appeals for the Third Circuit, each judge of a federal district court, United States magistrate, judge of a municipal court, judge of the Superior Court, judge of a tax court, retired judge of the Superior Court or Tax Court, or judge of the Superior Court or Tax Court, the former County Court, the former County Juvenile and Domestic Relations Court, or the former County District Court who has resigned in good standing, surrogate of any county, county clerk and any mayor or the deputy mayor when authorized by the mayor, or chairman of any township committee or village president of this State, and every minister of every religion, are hereby authorized to solemnize marriage or civil union between such persons as may lawfully enter into the matrimonial relation or civil union; and every religious society, institution or organization in this State may join together in marriage or civil union such persons according to the

rules and customs of the society, institution
or organization.

Public Officials

Nothing in New Jersey law compels a public official to exercise his or her authority to solemnize marriages and civil unions. It is our understanding that many public officials authorized to solemnize marriages do not do so. Other officials, however, regularly make themselves available to solemnize marriages to members of the public wishing to avail themselves of this service.

Where a public official elects to be available generally to solemnize marriages, he or she must also be available generally to solemnize civil unions. The Law Against Discrimination provides that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation . . . [or] sex" N.J.S.A. 10:5-4. "This opportunity is recognized as and declared to be a civil right." Ibid. The regular availability of a public official to solemnize a marriage or civil union is an accommodation, advantage, or privilege of a place of public accommodation.

The LAD is not limited to a literal interpretation of the phrase "place" of public accommodation, but also applies to the generally available services of government entities and public officials. "To have the LAD's reach turn on the definition of 'place' is irrational because 'places do not discriminate; people who own and operate places do.'" Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 533 (App. Div. 1998) (quoting Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1282 (7th Cir.) (Cummings, C.J., dissenting), cert. denied, 510 U.S. 1012 (1993)), aff'd, 160 N.J. 562 (1999), rev'd on other grounds, 530 U.S. 640 (2000). Courts have interpreted "place of public accommodation" broadly to include public entities and government officials. Notably, in 2004, the Appellate Division held that a "Township police department -- both the building and the individual officers -- is a place of public accommodation." Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 347 (App. Div.), certif. denied, 182 N.J. 147 (2004). The court noted that "[a]s a public entity, by its very nature a police force is a place of public accommodation." Ibid. To hold otherwise, the court reasoned, would lead to the incongruous result of having a myriad of private entities and employers subject to the LAD's

strictures while government law enforcement agencies and police officers are free to engage in discrimination. Id. at 347-348.

The rationale articulated in Ptaszynski follows the Supreme Court's observation in Dale, supra, where the Court, in its analysis of whether the Boy Scouts of America constitutes a place of public accommodation under the LAD, noted that "New Jersey governmental entities are, of course, bound by the LAD." 160 N.J. at 593, n.7. The Ptaszynski court added at the conclusion of its opinion: "We are satisfied that not just a municipal police force, but any State governmental agency is a place of public accommodation for purposes of inclusion under the umbrella of the LAD" 371 N.J. Super. 348.

These judicial statements leave no doubt that State and municipal governments and the services offered by public officials are places of public accommodation under the LAD. With this understanding of the LAD, where a public official elects to be available generally to solemnize marriages, that official must be available on the same terms to solemnize civil unions. Drawing a distinction between marriages and civil unions in the exercise of official powers would constitute discrimination in the provision of an accommodation, advantage, or privilege of a place of public accommodation based on either sexual orientation or sex or both. Differential treatment of this sort also may violate the equal protection provisions of the State Constitution. See Lewis v. Harris, 188 N.J. 415 (2006) (holding that equal protection provisions of State Constitution require committed, same-sex couples to be afforded all of the rights and responsibilities of marriage, including equal access to those rights and responsibilities).

Should a public official implement a practice of regularly solemnizing marriages, but not civil unions, the Attorney General could seek judicial relief. The Attorney General is authorized to receive, investigate and act upon complaints of violations of the LAD. "At any time after the filing of any complaint the Attorney General may proceed against any person in a summary manner in the Superior Court of New Jersey to compel compliance with any of the provisions of [the LAD], or to prevent violations or attempts to violate any such provisions, or attempts to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder." N.J.S.A. 10:5-14.1. The LAD provides for monetary penalties, as well as remedial and injunctive relief.

Religious Figures

It has long been the position of the Attorney General and the courts that religious institutions are not places of public accommodation under the LAD with respect to religious worship, sincerely held religious beliefs, practices and liturgical norms, even where the acts of religious institutions are ostensibly or colorably at odds with any of the categories of prohibited discrimination in the LAD. This position was recognized by the Third Circuit in The Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454 (1994). In that case, the Director of the New Jersey Division of Civil Rights filed with the Court an affidavit averring that it was the Attorney General's position that "the state did not consider churches places of 'public accommodations'" under the LAD and had never sought to apply the LAD to religious practices. Id. at 1460-1461.

Five years later, Presiding Judge Skillman of the Appellate Division concurred with the Attorney General's interpretation of the LAD by holding that

[a]lthough churches, seminaries, and religious programs are not expressly excluded from the definition of "place of public accommodation," the Legislature clearly did not intend to subject such facilities and activities to the LAD. None of the enumerated examples of "public accommodations" set forth in N.J.S.A. 10:5-5(1) are similar in any respect to a place of worship or religious training. Furthermore, a church or other religious institution does not ordinarily solicit the general public's participation, which is "a principal characteristic of public accommodations." Instead, a religious institution's solicitation of participation in its religious activities is generally limited to persons who are adherents of the faith or at least receptive to its beliefs.

[Wazeerud-Din v. The Goodwill Home and Missions, Inc., 325 N.J. Super. 3, 10 (App. Div. 1999) (citations omitted), certif. denied, 163 N.J. 13 (2000).]

Judge Skillman further noted that "any attempt to regulate a religious institution's policies concerning participation in its religious activities would raise serious constitutional questions" under the First Amendment. Id. at 10-11 (citing Serbian East Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)). The LAD, therefore, "should be construed to avoid governmental entanglement with religion in order to preserve its constitutionality." Id. at 11 (citing Market St. Mission v. Bureau of Rooming & Boarding House Standards, 110 N.J. 335, 341, appeal dismissed, 488 U.S. 882 (1988)).

This interpretation of the LAD is consistent with the language of N.J.S.A. 37:1-13, as it will appear once L. 2006, c. 103 becomes effective. That statute will provide:

[E]very religious society, institution or organization in this State may join together in marriage or civil union such persons according to the rules and customs of the society, institution or organization.

This statutory provision can be seen to reflect the Legislature's understanding of both the limited reach of the LAD and the potential Constitutional complications of an attempt by the State to dictate the ecclesiastical services to be performed by religious figures. It is apparent that the Legislature intended to permit members of the clergy to exercise the solemnization authority in accordance with their sincerely held religious beliefs. If those beliefs preclude recognition of civil unions, a religious figure's refusal to solemnize civil unions, even if that religious figure is regularly available to solemnize marriages, would not violate the LAD.

Nor would a religious figure's refusal to solemnize civil unions raise equal protection concerns under the State or federal Constitutions. Although, as noted above, differential treatment of same-sex and mixed-gender couples by public officials would raise significant equal protection concerns under the State Constitution, see Lewis v. Harris, supra, religious figures should not be seen as public actors in these circumstances. As a result, the equal protection provisions of the State and federal Constitutions are not triggered by the decision of members of the clergy to refuse to solemnize civil unions. While the State must make marriages and civil unions available on equal terms, the performance of a religious ceremony is not necessary for the solemnization of either a marriage or a civil union. Thus, the fact that some religious

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figures may solemnize marriages, but not civil unions, will not affect the equal availability of marriages and civil unions under the law.

Conclusion

In light of your authority to supervise and direct local registrars of vital statistics who will have statutory authority to issue marriage licenses and civil union licenses, see N.J.S.A. 26:8-24, and in the interest of uniform Statewide practices, it would be appropriate to inform local registrars and the public officials who will be authorized to solemnize marriages and civil unions of the advice provided in this letter.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Stuart Rabner".

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY