

**The Church's Canon Law
and Laws of the States**

The Impact of Civil Law on Church Blessings

This essay is the work of a group called together by the Standing Commission on Liturgy and Music to provide analysis and insight into the canonical and legal issues arising from the Church's blessing of same-gender relationships.⁷⁷ As The Episcopal Church considers these resources, many people will want to know how the civil law affects the Church. Do state laws restricting civil marriage to different-gender couples present problems or risks for The Episcopal Church and for Episcopal clergy celebrating the liturgy?

Those who studied this question for the Commission concluded that the First Amendment to the U.S. Constitution forbids a state from enforcing a law prohibiting same-gender blessings. The First Amendment to the U.S. Constitution, which applies both to the federal government and to the states, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Some thirty-five states define marriage as between a man and a woman; these states expressly withhold recognition of a same-gender marriage that a couple obtains lawfully in another state or country. Preliminary research indicates that this legal scenario is common among the states that forbid and do not recognize same-gender marriages. The statutory or constitutional language used varies, but the intended result is the same.

So long as clergy in these states are *blessing a same-gender couple's covenantal relationship*, rather than purporting to establish a *civil marriage*, lawyers within the Church anticipate no successful state criminal prosecution or other adverse state action against the member of the clergy or his or her Church. The reason is that blessing a covenantal relationship is an exercise of religious faith, whereas establishing a civil marriage (through officiating at a "civil ceremony" and signing a marriage license) is an official act as an agent of the state. Well-settled First Amendment jurisprudence recognizes the difference between the two and protects the former.

The Book of Common Prayer and Canon I.18.1 require Episcopal clergy to conform to the laws of their state governing the creation of a civil marriage. Disciplinary consequences are clearly outlined for Episcopal clergy who perform a civil marriage ceremony and sign a state marriage license for a couple not permitted to marry in their state; civil law consequences could result, as well. However, celebrating a same-gender blessing ceremony using an authorized Church liturgy would not be counter to the Canons or the *Book of Common Prayer*—assuming that the language of the liturgy does not use the text of the *Book of Common Prayer's* marriage rites. This also assumes that the clergyperson is not attempting to create a civil marriage contrary to state law and canon law.⁷⁸

The above conclusion and assumptions are the same where the blessing ceremony takes place in a diocese located in a state that prohibits same-gender civil marriage, but where the same-gender couple was previously married or joined in a civil union in a state where same-gender civil marriage is legal.

Some states not only forbid (or do not recognize) same-gender marriage, but also do not recognize any legal status for same-gender couples who have a civil marriage or civil union from another state where that status is legal. This analysis and conclusion apply to these "non-recognition" states as well.

Clergy and lay members of the Church with questions or concerns about a specific impact or application of a marriage or civil union law in their state should ask their bishop for guidance.

⁷⁷ This essay on canons and civil law is presented for study and as a resource for diocesan chancellors and others, providing an interpretation of canon and civil law that we believe to be sound but with which some may differ.

⁷⁸ Canon I.18.2(b) describes Holy Matrimony as a "physical and spiritual union of a man and a woman." The structure and text of parts of Canon I.18 seem to contemplate that wherever a member of the clergy is officiating at a civil marriage, he or she is also solemnizing Holy Matrimony when, in fact, the two are distinct and separate acts.

The Requirements of the Marriage Canon in Different State Contexts

The following discussion of the “marriage Canon” (Canon I.18) continues with exploration of various scenarios of same-gender couples expected to request the proposed liturgy developed in response to General Convention Resolution 2009-C056 and/or civil marriage. It considers possibilities both in dioceses that permit blessings of same-gender relationships or same-gender marriage and in those that prohibit it.

The Marriage Canon

The “Marriage Canon” is Canon I.18, “Of the Solemnization of Holy Matrimony.” Section 1 of the Canon requires clergy to conform to (i) their state’s civil marriage laws (“shall conform to the laws of the State governing the creation of the civil status of marriage”) and (ii) the “laws of this Church governing the solemnization of Holy Matrimony.”

Section 2 sets forth five conditions for a member of the clergy to ascertain prior to solemnizing a marriage. This section does not always distinguish between the act of officiating at a civil marriage as an agent of the state, and the act of solemnizing Holy Matrimony using the Celebration and Blessing of a Marriage from the *Book of Common Prayer*. The structure and text of portions of the Canon seem to contemplate that the celebrant is performing both of these acts, not one or the other. The five conditions are:

- (a) both parties have the right to contract a marriage under state law;
- (b) both parties understand that “Holy Matrimony is a physical and spiritual union of a man and a woman, entered into within the community of faith, by mutual consent of heart, mind, and will, and with intent that it be lifelong”;
- (c) both parties “freely and knowingly consent to such marriage, without fraud, coercion, mistake as to identity of a partner, or mental reservation”;
- (d) at least one of the parties is baptized; and
- (e) both parties “have been instructed as to the nature, meaning, and purpose of Holy Matrimony by the Member of the Clergy, or that they have both received such instruction from persons known by the Member of the Clergy to be competent and responsible.”

Items (a) and (c) are conventional findings required of agents of the state (e.g., justices of the peace, judges, clergy) when performing a civil marriage ceremony, but they are critical canonical requirements for the Celebration and Blessing of a Marriage as well. The other three conditions are additional requirements of the Church, unrelated to state law.

Section 3 of the Canon states four additional requirements to be satisfied in connection with the solemnization of a marriage:

- (a) The announcement of the banns of marriage (this may be waived by the celebrant);
- (b) The requirement of at least two witnesses;
- (c) The recording of required data in the parish registry;
- (d) The signing of the declaration of intention, the contents of which are spelled out in subsections I.18.3 (e)-(g).

Section 4 of the Canon states that a member of the clergy has the discretion to decline to solemnize any marriage.

Scenarios

The following scenarios present a spectrum of likely fact patterns arising under the proposed liturgy. In each scenario, “eligible same-gender couple” means that at least one of the couple is baptized and participating in a Christian community of faith, and that a divorced person has obtained the required consent of the Bishop Diocesan. The term “civil union” may be substituted for “civil marriage” with the same results in most cases. Clergy and lay members of the Church with questions or concerns about

a specific impact or application of a marriage or civil union law in their state should seek guidance from their bishop.

Variations on these scenarios should generally be consistent with the following analysis.

Scenario A

In a state that authorizes same-gender civil marriage, an eligible same-gender couple asks a member of the clergy to celebrate the proposed liturgy for them and officiate at their civil marriage.

The member of the clergy must respond consistently with the directives of his or her Bishop Diocesan:

1. The Bishop Diocesan's directive is that neither is available in the diocese.
2. The Bishop Diocesan's directive is that a priest may celebrate the proposed liturgy but not officiate at the civil marriage.
3. The Bishop Diocesan's directive is that a priest may officiate at the civil marriage but not celebrate the proposed liturgy.
4. The Bishop Diocesan's directive is that a priest may both officiate at the civil marriage and celebrate the proposed liturgy.

Where a Bishop Diocesan is silent about officiating at a civil marriage, state law permits the clergy member to do so (although when in any doubt about this, the clergy member should seek guidance from his or her bishop). Where a Bishop Diocesan is silent about use of a proposed liturgy, such liturgy may not be celebrated.

Under these scenarios and those that follow, a priest disobeys the Bishop Diocesan's directive and/or the applicable Canon or rubric at her or his own risk of Title IV disciplinary action.

Scenario B

In a state that authorizes same-gender civil marriage, an eligible same-gender couple asks a priest to celebrate Holy Matrimony using the Celebration and Blessing of a Marriage from the *Book of Common Prayer* and also to officiate at their civil marriage.

Both the rubrics of the *Book of Common Prayer* and Canon I.18 reserve the rite of Holy Matrimony to a man and a woman. This is not subject to the discretion of either a bishop or priest. If the Bishop Diocesan has authorized use of a liturgy for Blessings, the priest may celebrate that. And, unless directed not to do so by the Bishop Diocesan, the priest may officiate at the civil marriage. However, the structure and text of parts of Canon I.18 may be interpreted as not authorizing a member of the clergy to officiate at a civil marriage where the couple is not eligible for Holy Matrimony, e.g., a civil marriage of a same-gender couple.

A bishop, priest, or deacon who violates the rubrics or the Canon risks disciplinary action under Title IV.

Scenario C

In a state that prohibits same-gender civil marriage, an eligible same-gender couple seeks both the proposed liturgy and civil marriage from a priest.

Since state law prohibits civil marriage for the couple, the priest may not officiate at their civil marriage.

If the Bishop Diocesan has authorized use of the proposed liturgy, the priest may celebrate that liturgy.

Scenario D

In a state that prohibits same-gender civil marriage, an eligible same-gender couple seeks only the proposed liturgy.

If the Bishop Diocesan has authorized use of the proposed liturgy, the priest may celebrate that liturgy.

Scenario E

In a state that authorizes same-gender civil marriage, an eligible same-gender couple with a marriage license from another state where that marriage is legal seeks the proposed liturgy from a priest.

If the Bishop Diocesan has authorized use of the proposed liturgy, the priest may celebrate that liturgy.

Scenario F

In a state that prohibits same-gender civil marriage, an eligible same-gender couple with a marriage license from another state where that marriage is legal seeks the proposed liturgy from a priest.

If the Bishop Diocesan has authorized use of the proposed liturgy, the priest may celebrate that liturgy.

Other Materials

The National Conference of State Legislatures, a nonpartisan association providing resources to state legislatures and legislators, maintains a useful Web resource on state marriage, civil union, and related laws.