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# OPTING OUT IN THE NAME OF GOD: WILL LAWYERS BE COMPELLED TO HANDLE SAME-SEX DIVORCES?

*Bill Piatt\**

## I. INTRODUCTION

In June 2015 the Supreme Court of the United States determined, by a 5–4 ruling in the case of *Obergefell v. Hodges*,<sup>1</sup> that same-sex couples have a constitutionally guaranteed right to marry.<sup>2</sup> Soon thereafter, a same-sex couple applied for a marriage license in Rowen County, Kentucky.<sup>3</sup> Kim Davis, the Rowen County clerk refused to issue the license, citing her own religious beliefs.<sup>4</sup> The couple brought suit against Ms. Davis, and she was ordered by a federal district judge to issue the license.<sup>5</sup> When she refused, she was held in contempt, and jailed for five days.<sup>6</sup> Ultimately U.S. District Judge David Bunning ordered Ms. Davis’ deputies to issue the license in her stead.<sup>7</sup> Ms. Davis’ actions brought her a great deal of notoriety.<sup>8</sup> Some of the publicity was positive with her actions being characterized “heroic,” while others considered her to be a “homophobe,” or a “Hitler.”<sup>9</sup> While certainly dramatic, Ms. Davis’ case was not the first time in recent history that courts or administrative bodies have imposed sanctions against citizens or

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>2</sup> *Id.* at 2607.

<sup>3</sup> See *Miller v. Davis*, No. 15-44-DLB, 2015 WL 4866729, at \*1–2 (E.D. Ky. Aug. 12, 2015).

<sup>4</sup> *Id.* at \*1, \*3.

<sup>5</sup> *Id.* at \*4, \*15.

<sup>6</sup> Claire Galofaro, *Kim Davis Back at Work*, U.S. NEWS & WORLD REP. (Sept. 14, 2015), <http://www.usnews.com/news/us/articles/2015/09/14/kentucky-clerk-jailed-over-gay-marriage-to-return-to-work>.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> See Amita Kelly, *Kim Davis’ Supporters, In Their Own words: ‘Courageous,’ ‘Heroic,’* NPR (Sept. 26, 2015), <http://www.npr.org/sections/itsallpolitics/2015/09/26/443485200/courageous-heroic-meet-kim-daviss-supporters>; Emily Shapiro, *Kentucky Clerk Kim Davis Tells ABC News She’s Been Called ‘Hitler’ and ‘Homophobe,’* ABC NEWS (Sept. 21, 2015), <http://abcnews.go.com/US/kentucky-clerk-kim-davis-tells-abc-news-shes/story?id=33930655>.

private business operators who declined to provide goods or services to same-sex couples.<sup>10</sup>

In 2013, the Supreme Court of New Mexico considered a matter involving a photographer who had declined to photograph the commitment ceremony of one woman to another.<sup>11</sup> The photographer, Elaine Huguenin, indicated that she was “personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs.”<sup>12</sup> The customers filed a discrimination complaint against the photographer with the New Mexico Human Rights Commission.<sup>13</sup> They alleged that the photographer had engaged in discrimination that violated the provisions of the New Mexico Human Rights Act.<sup>14</sup> The Act precludes discrimination by public accommodations on the basis of sexual orientation.<sup>15</sup> The New Mexico Human Rights Commission ruled against the photographer.<sup>16</sup> The photographer appealed, asserting that her constitutionally-protected First Amendment rights to the free exercise of her religion and expression allowed her to decline to participate in the event.<sup>17</sup> A state district judge granted the customer’s motion for summary judgment.<sup>18</sup> The New Mexico Court of Appeals affirmed the ruling against the photographer and in favor of her customers, as did the Supreme Court of New Mexico.<sup>19</sup>

Also in 2015, the Bureau of Labor and Industries of the State of Oregon considered a case involving a baker who declined to make a wedding cake for a same-sex couple.<sup>20</sup> The Commissioner determined that the bakery owners had violated the Oregon statute prohibiting discrimination in public accommodations on the basis of sexual orientation.<sup>21</sup> In addition, the Commissioner awarded money damages to the complainants in the total sum of \$135,000, signifying compensatory damages for emotional, mental, and physical suffering

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<sup>10</sup> See, e.g., *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 79, 309 P.3d 53, 77 (N.M. 2013); *State v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 94248, \*17 (Wash. Super. Ct. Jan. 7, 2015).

<sup>11</sup> *Elane Photography*, 2013-NMSC-040, ¶ 1, 309 P.3d at 59.

<sup>12</sup> *Id.* at ¶ 7, 309 P.3d at 59–60.

<sup>13</sup> *Id.* at ¶ 9, 309 P.3d at 60.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at ¶ 1, 309 P.3d at 58.

<sup>16</sup> *Id.* at ¶ 9, 309 P.3d at 60.

<sup>17</sup> *Id.* at ¶ 10, 11, 309 P.3d at 60.

<sup>18</sup> *Id.* at ¶ 10, 309 P.3d at 60.

<sup>19</sup> *Id.* at ¶¶ 4, 10, 309 P.3d at 59, 60 (citing *Elane Photography, LLC v. Willock*, 2012-NMCA-086, ¶ 1, 284 P.3d 428, 432 (N.M. Ct. App. 2012)).

<sup>20</sup> *Melissa Elaine Klein*, Nos. 44-14, 45-14, 2015 WL 4868796, at \*24 (Or. Bureau of Lab. & Indus. July 5, 2015).

<sup>21</sup> *Id.* at \*16.

resulting from the denial of service.<sup>22</sup>

These are but a few of the cases which have been brought against public officials and private individuals who have declined to provide services in the manner described so far.<sup>23</sup> Undoubtedly, more will follow. As Chief Justice Roberts notes in his dissenting opinion in the *Obergefell* case:

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court.<sup>24</sup>

The cases which have arisen so far, and the observations by Chief Justice Roberts, raise an important issue for lawyers. Is it possible that attorneys who decline on religious grounds to provide legal services to same-sex individuals seeking divorces will be ordered to provide that representation? Might those attorneys be sanctioned if they fail to do so? An analysis of these issues will involve an examination of the lawyer's role as both a private practitioner and also as an officer of the court. It will involve a discussion as to whether legal services are "public accommodations" for purposes of human rights acts. It will require an examination of legal ethics rules and principles. It will necessitate examination of the power of courts to order attorneys to represent clients. And, of course, it will require an examination of the constitutional and statutory protections afforded to the religious beliefs and practices of attorneys. These are novel and difficult questions, but they are questions that will undoubtedly be raised. Attorneys need to consider them before the questions arise in their practices.

Before examining the potential obligations of attorneys in this

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<sup>22</sup> *Id.* at \*23.

<sup>23</sup> *See, e.g.,* *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 45 (Colo. App. 2015) ("We conclude that the Commission's order merely requires that [defendant] not discriminate against potential customers in violation of [Colorado Anti-Discrimination Act] and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections."); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 94248, at \*3, \*17 (Wash. Super. Ct. Jan. 7, 2015) (ruling against a florist who was sued for not providing services to a same-sex wedding).

<sup>24</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625–26 (2015) (citations omitted).

controversy, we turn first to a brief exploration of the right of Americans to “opt out” of performing what otherwise would be a legal duty when their religious beliefs preclude that participation. We must also consider limitations on that right. Obviously, emotions run high, as do political considerations, on all sides of this current debate. It might be helpful from the outset, however, to recognize that this is not the first time in American history that we have witnessed a clash between religious beliefs and government duties imposed in a highly-charged environment.<sup>25</sup> The cases are voluminous, and an examination of each is beyond the scope of this article. Nonetheless, we turn to a brief attempt to understand some of this history by quickly considering some areas where religiously-based conscientious objections have been raised to government mandates.

### A. *A Right to Opt Out?*

#### 1. The Draft

Kim Davis is not the first person from Kentucky to be cast into the national spotlight for refusing to perform a government-required duty because of a religious objection to it. On October 1, 2015, *Sports Illustrated* inaugurated its Muhammad Ali Legacy Award in Ali’s Kentucky hometown.<sup>26</sup> Ali was not always regarded in such a positive light. In the Olympic games of 1960, Ali, who was then known by his birth name of Cassius Clay, Jr., won the gold medal in the 175-pound division.<sup>27</sup> Four years later he defeated Sonny Liston and became the heavyweight champion of the world.<sup>28</sup> Clay’s victory was surprising, because of his decided underdog status in that fight.<sup>29</sup> He stunned the country again by announcing two days after the fight that he had become a member of the Nation of Islam.<sup>30</sup> Then on March 6, 1964, he announced that hereafter he would be known as Muhammad Ali.<sup>31</sup>

Over the course of the next four years, Ali successfully defended his

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<sup>25</sup> See discussion *infra* Part I.A.

<sup>26</sup> Tim Layden, *The Legacy: The Greatest is Still an Inspirational Force*, SPORTS ILLUSTRATED, Oct. 5, 2015, at 61, 62, 64.

<sup>27</sup> Thomas Hauser, *Muhammad Ali: American Boxer*, ENCYC. BRITANNICA, <http://www.britannica.com/biography/Muhammad-Ali-boxer> (last updated Dec. 31, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

crown against numerous opponents.<sup>32</sup> However, 1967 found this country in the midst of the Vietnam War and an increasingly unpopular mandatory draft.<sup>33</sup> On April 28, 1967, Ali refused to be inducted into the armed forces of the United States.<sup>34</sup> He cited his religious belief as the basis.<sup>35</sup> Ali's religious claim was made even more controversial by his acknowledgment that while he would fight in an Islamic holy war, he would not fight for the United States in Vietnam.<sup>36</sup> At the time, "conscientious objectors" would only qualify for exemption if they stated that their religious beliefs precluded them from participating in any war.<sup>37</sup>

Ali's administrative appeal to the Kentucky Appeal Board was denied and the case ultimately reached the Supreme Court of the United States.<sup>38</sup> The Court agreed with Ali.<sup>39</sup> He went on to regain the title that had been stripped from him as a result of his refusal to participate in the draft, but he had lost four years, perhaps the best four years, of his career.<sup>40</sup>

It is important not to understate the intensity of the debate that raged around this case. While the Kim Davis matter has attracted national attention and controversy, at the time of the Ali matter, the country was involved in the increasingly unpopular Vietnam War. College campuses were in turmoil and demonstrations rocked the country.<sup>41</sup> Yet, the Supreme Court upheld the religious based conscientious exemption, and applied it to allow a very high profile sports combatant to decline to participate in military combat.<sup>42</sup> And Ali's case was not the only situation where the Supreme Court recognized the validity of a religious or ethically based objection to induction into the draft.<sup>43</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Vietnam War Protests*, HISTORY.COM, <http://www.history.com/topics/vietnam-war/vietnam-war-protests> (last visited Mar. 20, 2016).

<sup>34</sup> Hauser, *supra* note 27.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Clay v. United States*, 403 U.S. 698, 700 (1971) ("In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form." (citing *Gillette v. United States*, 401 U.S. 437, 443 (1971))); Hauser, *supra* note 27.

<sup>38</sup> *See Clay*, 403 U.S. at 700.

<sup>39</sup> *See id.* at 705.

<sup>40</sup> *See Hauser, supra* note 27.

<sup>41</sup> *See Student Antiwar Protests and the Backlash*, PBS (Sept. 22, 2005), [http://www.pbs.org/wgbh/amex/twodays/peopleevents/e\\_antiwar.html](http://www.pbs.org/wgbh/amex/twodays/peopleevents/e_antiwar.html).

<sup>42</sup> *See Clay*, 403 U.S. at 700–01, 705.

<sup>43</sup> *See, e.g., Welsh v. United States*, 398 U.S. 333, 343–344 (1970); *United States v. Seeger*, 380 U.S. 163, 187–88 (1965).

## 2. The Workplace

The cases recognizing a religious exemption for workers in various contexts are voluminous, and are based not only on statutory concerns but on the First Amendment's Free Exercise of Religion Clause.<sup>44</sup> Illustrative of the latter is the case of *Sherbert v. Verner*.<sup>45</sup> In *Sherbert*, a claim by a Seventh-Day Adventist for workers compensation benefits in the State of South Carolina was denied.<sup>46</sup> South Carolina barred workers from receiving benefits who failed, "without good cause . . . to accept available suitable work when offered."<sup>47</sup> The worker had refused, because of her religion, to take a job which would have required her to work on Saturdays.<sup>48</sup> The Court concluded that, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."<sup>49</sup> Ultimately, the Court determined that disqualification of her benefits imposed a non-constitutionally permissible burden on the free exercise of her religion.<sup>50</sup>

On the other hand, in a 1990 case, the Supreme Court determined that the state of Oregon could criminalize even the religiously inspired use of peyote.<sup>51</sup> It could deny unemployment benefits to employees who were discharged for possession of that drug, even in the face of their claims that the Free Exercise Clause of the First Amendment protected those activities.<sup>52</sup> This case, however, served as impetus three years later for the enactment of the Religious Freedom Restoration Act ("RFRA"),<sup>53</sup> discussed below.

In addition to constitutional protections raised in employment issues, Title VII of the Civil Rights Act of 1964<sup>54</sup> provides in part that it "shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his

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<sup>44</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

<sup>45</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>46</sup> *Id.* at 399-401, 410.

<sup>47</sup> *Id.* at 400-01 (alteration in original).

<sup>48</sup> *Id.* at 399-400.

<sup>49</sup> *Id.* at 404.

<sup>50</sup> *Id.* at 410.

<sup>51</sup> *See Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>52</sup> *Id.*

<sup>53</sup> *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (1993); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>54</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 253, 255 (codified as amended at 42 U.S.C § 2000e-2(a)(1) (2014)).

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>55</sup> In 1972, Congress included the following definition: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."<sup>56</sup> Courts have reached often conflicting decisions in the application of these provisions.<sup>57</sup> And the provisions do not extend to government officials.<sup>58</sup>

A case considered by the Supreme Court in 2015 involved the issue of whether a private business can prohibit an employee who practices the Muslim faith from wearing religiously-compelled attire to her job.<sup>59</sup> The case was remanded.<sup>60</sup> When that case is ultimately decided, we might have additional guidance on the extent of the right of employees to opt out of work regulations, and the accommodations which might be required of employers when religious issues arise in the workplace.

### 3. School Attendance

In 1972 the Supreme Court of the United States considered the case of *Wisconsin v. Yoder*.<sup>61</sup> Yoder refused to send his school-age children to the Wisconsin public schools in violation of a statute requiring such attendance.<sup>62</sup> He argued that his church, Old Order Amish, precluded such public school participation beyond the eighth grade.<sup>63</sup> The Supreme Court agreed that his conviction and the five dollar fine imposed upon him for his noncompliance with the statute violated the First Amendment's Free Exercise Clause.<sup>64</sup>

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<sup>55</sup> § 703, 78 Stat. at 255.

<sup>56</sup> 42 U.S.C. § 2000e (j) (2014).

<sup>57</sup> See Debbie N. Kaminer, *Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace*, 17 VA. J. SOC. POL'Y & L. 453, 467-69 (2010).

<sup>58</sup> See 42 U.S.C. § 2000e (f) ("[T]he term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.").

<sup>59</sup> EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).

<sup>60</sup> *Id.* at 2034.

<sup>61</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>62</sup> *Id.* at 207.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 208, 234.



#### 4. Religious Practice Involving Animal Slaughter

Animal sacrifice is part of the practice of the Santeria religion.<sup>65</sup> In 1993 the Supreme Court struck down as unconstitutional a Florida city's ban on "ritual slaughter" which precluded members of the Church of the Lukumi Babalu Aye from practicing their religion by slaughtering goats within the city limits.<sup>66</sup>

#### 5. Taxation

Not all claims of religious liberty allow an individual to opt out of performing a government-imposed duty. In the case of *United States v. Lee*,<sup>67</sup> the Supreme Court denied to an Amish employer an exemption from compulsory participation in the Social Security system.<sup>68</sup> The employer alleged that such participation violated his free exercise of religion protections.<sup>69</sup> The Court later determined in 1990 that a religious organization would not be allowed to refuse to pay the general sales tax regarding the distribution of religious products and religious literature.<sup>70</sup>

#### 6. Individuals in Government Custody or Control

Inmates have been allowed to exercise dietary and grooming choices, which would otherwise be prohibited, when those inmates demonstrate a religious reason for those choices pursuant to the First Amendment.<sup>71</sup> In the military, however, members of the armed services do not have the right to opt out of the dress code regulations based on a free exercise objection.<sup>72</sup>

#### 7. Government Mandated Provision of Contraception—RFRA

The Congress of the United States enacted the Patient Protection and Affordable Care Act of 2010.<sup>73</sup> In general, that Act mandates

<sup>65</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993).

<sup>66</sup> *Id.* at 527–28, 547, 550, 551.

<sup>67</sup> *United States v. Lee*, 455 U.S. 252 (1982).

<sup>68</sup> *Id.* at 261.

<sup>69</sup> *Id.* at 257.

<sup>70</sup> *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392, 397 (1990).

<sup>71</sup> *See, e.g., Holt v. Hobbs*, 135 S. Ct. 853, 861, 863, 867 (2015) (holding prison grooming policy substantially burdened practicing Muslim prisoner's free exercise of religion under the First Amendment).

<sup>72</sup> *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986).

<sup>73</sup> *Patient Protection and Affordable Care Act*, Pub. L. No. 111–148, 124 Stat. 119 (2010).

that employers with fifty or more full-time employees must offer a group health insurance plan that provides “minimal essential coverage.”<sup>74</sup> In regulations implementing the Act, the United States Department of Health Human Services required employers to provide contraception under the statute, but exempted certain religious non-profit organizations from them.<sup>75</sup> A private employer which did not meet the definition of a religious nonprofit nonetheless challenged the provisions of the Act.<sup>76</sup> The owners of the company believed that life begins at conception and some contraception pills, which were required to be provided by the government, resulted in a termination of the pregnancy after conception had occurred.<sup>77</sup> Being required to provide these pills, they felt, violated their religious beliefs.<sup>78</sup> In deciding the case, the Supreme Court of the United States ruled for the private business owners.<sup>79</sup>

The Court determined that the applicable regulations violated the Religious Freedom Restoration Act of 1993.<sup>80</sup> The Court noted that the RFRA was enacted three years after the decision of the Supreme Court in *Employment Division v. Smith*, cited above.<sup>81</sup> Congress enacted the RFRA to provide additional religious safeguards against government action which infringes upon religious belief.<sup>82</sup> The Court noted that the RFRA provides that, “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”<sup>83</sup> The Court noted that if the government substantially burdens a person’s exercise of religion under the Act, that person is entitled to an exemption from the rule unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.”<sup>84</sup> The Court concluded that there were many other ways that the government could ensure that women have access to contraception without mandating that it be provided by business owners over their religious

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<sup>74</sup> 26 U.S.C. § 4980H (a), (c)(2)(A) (2014).

<sup>75</sup> 45 C.F.R. § 147.131(a) (2015).

<sup>76</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>77</sup> *Id.* at 2764–65.

<sup>78</sup> *Id.* at 2765.

<sup>79</sup> *Id.* at 2785.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2760.

<sup>82</sup> *Id.* at 2761.

<sup>83</sup> *Id.* (internal quotation marks omitted).

<sup>84</sup> *Id.* (internal quotation marks omitted).

objections.<sup>85</sup>

On a similar note, another case has worked its way up to be heard by the Supreme Court in the upcoming Term. That case, *Little Sisters of the Poor v. Burwell*,<sup>86</sup> involves a challenge by a Catholic order of nuns.<sup>87</sup> The nuns had declined not only to provide contraception to their employees, but refused to sign the proposal by the government to authorize a private insurer to issue the contraception in the name of the Little Sisters.<sup>88</sup>

Note that following the enactment of the federal RFRA, states enacted similar versions.<sup>89</sup> However, these typically only provide protection against action by a government.<sup>90</sup> Thus in the *Elane Photography* case, the Supreme Court of New Mexico held that the state's RFRA law did not apply because the government was not a party.<sup>91</sup>

## 8. Polygamy

In our last quick examination of some of the areas where individual religious beliefs have clashed with government policy, we return to the subject of marriage. In the case of *Reynolds v. United States*,<sup>92</sup> the Supreme Court of the United States determined, over religious objections, that individuals do not have a constitutional right to practice polygamy.<sup>93</sup> This case was decided before the enactment of the RFRA.<sup>94</sup> Undoubtedly the result would be the same even in the post-RFRA environment. Kim Davis' counterparts could lawfully be sanctioned not only for refusing to issue marriage licenses to same-sex couples, but they could be sanctioned under state law for providing licenses to multiple parties within the same marriage, even if the clerks' religious beliefs or those of the applicants permitted or even required polygamy.<sup>95</sup>

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<sup>85</sup> *Id.* at 2759.

<sup>86</sup> *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir.), *cert. granted in part*, 136 S. Ct. 446 (2015).

<sup>87</sup> *Id.* at 1167.

<sup>88</sup> *See id.* at 1167–68, 1170.

<sup>89</sup> *See, e.g.*, N.M. STAT. ANN. §§ 28-22-1 to 28-22-6 (West 2015).

<sup>90</sup> *Id.* § 28-22-3.

<sup>91</sup> *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 4, 309 P.3d 53, 59 (N.M. 2013).

<sup>92</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>93</sup> *Id.* at 166–67.

<sup>94</sup> *See* 42 U.S.C. § 2000bb-1 (2014); *Reynolds*, 98 U.S. at 145.

<sup>95</sup> *See, e.g.*, UTAH CODE ANN. §§ 30-1-2, 30-1-16 (LexisNexis 2015).

### B. *The Role of Lawyers in Same-Sex Divorces*

The discussion of the situations where courts have had to decide whether, and to what extent, an individual's religious beliefs permit that person to opt out of compliance with what otherwise would be a government-imposed obligation could be quite lengthy. Nonetheless, it is apparent that while not absolute, the individual right to the free exercise of religion provides an important opportunity to refrain from compliance with many government mandates.<sup>96</sup> Without detailing all of these circumstances, it is apparent that our system recognized an important balance. While "government" necessarily requires that people be governed, there are limits. The free exercise of religion is valued and respected, even to the point of excusing the performance of duties that otherwise would be compelled. Of course, that freedom is not unlimited. These principles serve as the backdrop as we now turn our attention to an area which could potentially affect the readers of this article in their practices and in their judicial determinations. Will lawyers be required to provide legal services, over their religious objections, to individuals seeking same-sex divorces?

Nobody enters into a marriage expecting that it will end in divorce. Yet the cold hard reality is that approximately half of all marriages will end that way.<sup>97</sup> There is no reason to believe that same-sex marriages will be any different. Indeed, even before *Obergefell*, while same-sex couples could not marry in Texas, some same-sex couples who had recently married elsewhere sought to obtain divorces in Texas.<sup>98</sup> Undoubtedly, many of the same-sex couples who celebrate the newly-acquired right to marry by contracting for the services of wedding planners, florists, photographers, bakers and the like will eventually find themselves seeking the services of the legal profession to resolve the property, child custody, and other areas of conflict associated with the breakdown of their marriages.

Many attorneys don't handle divorces because they are not interested in that area of law. Some decline to handle divorces

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<sup>96</sup> See discussion *supra* Part I.A.

<sup>97</sup> See Nat'l Ctr. for Health Statistics, *FastStats: Marriage and Divorce*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nchs/fastats/marriage-divorce.htm> (last updated June 19 2014).

<sup>98</sup> See *State v. Naylor*, 330 S.W.3d 434, 436 (Tex. App. 2011) (dismissing same-sex divorce action for lack of subject matter jurisdiction); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010) (holding Texas courts do not have subject matter jurisdiction over same-sex divorce case). For a further discussion of these cases, see BILL PIATT, *CATHOLIC LEGAL PERSPECTIVES* 40, 41, 48 (2d ed. 2015).

because of religious concerns.<sup>99</sup> Some attorneys might feel a religious compulsion not to represent individuals in a same-sex divorce because doing so would require the assertion that a valid marriage exists. On the other hand, an attorney who is religiously opposed to same-sex marriage actually might be fulfilling his/her view that such individuals should not be married, by assisting in obtaining a divorce. While we will explore these issues below, at this point it seems inevitable that the same type of challenges to pre-wedding service providers who decline, on religious grounds, to provide those services, will be brought against attorneys who decline, on religious grounds, to provide legal services to an individual seeking a same-sex divorce. It is also possible that there could be challenges to attorneys who decline to assist in pre-nuptial planning, or adoptions, for gay couples.

In trying to determine whether such challenges might succeed, consider first the ethical concerns relating to the role of attorneys. The American Bar Association Model Rules of Professional Conduct (“Model Rules”)<sup>100</sup> is an important source for this examination. These are the rules promulgated by the American Bar Association, and adopted with some modifications, from state to state.<sup>101</sup> They serve to establish the norms of conduct required of attorneys, quite separate and apart from other regulatory statutes or theories of civil liability.<sup>102</sup>

The very first sentence of the Preamble to the Model Rules identifies the unique role of attorneys: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>103</sup> Paragraph 6 of that preamble includes the provision that, “all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>104</sup> These introductory provisions seem to suggest that the importance of the role of the lawyer in society is probably greater than the role of

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<sup>99</sup> For an examination of the role of a catholic lawyer or judge in divorce proceedings, see PIAT, *supra* note 98, at 78–81.

<sup>100</sup> See MODEL RULES OF PROF'L CONDUCT PREFACE (AM. BAR ASS'N 2013).

<sup>101</sup> See *About the Model Rules*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited Mar. 16, 2016).

<sup>102</sup> MODEL RULES OF PROF'L CONDUCT PMBL AND SCOPE (AM. BAR ASS'N 2013).

<sup>103</sup> *Id.* at ¶ 1.

<sup>104</sup> *Id.* at ¶ 6.

photographers, bakers, or florists. If that is true, then the obligations of attorneys similarly might be greater than those of photographers, bakers or florists as well.

If a lawyer who has religious concerns regarding same-sex marriage is concerned that his or her role in representing same-sex couples might be construed as an endorsement of same-sex marriage, Model Rule 1.2(b) provides this approach: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>105</sup> Comment 5 to that rule provides: “Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client’s views or activities.”<sup>106</sup>

Nonetheless, if the attorney’s concern is not so much with whether the lawyer’s representation will be viewed as an endorsement of same-sex marriage, but rather, because the attorney, for religious reasons finds same-sex marriage repugnant, may the attorney decline the representation under the Model Rules? Model Rule 1.16 is entitled, “Declining or Terminating Representation.”<sup>107</sup> Rule 1.16(b)(4) allows an attorney to withdraw from representing a client if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>108</sup> Note that the language only speaks to withdrawing from the case on this repugnancy ground and does not directly address the issue of declining the representation in the first place.<sup>109</sup> Comment 7 to that same rule, in referring to withdrawal, allows such withdrawal “where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”<sup>110</sup> By analogy, if a lawyer would be allowed to withdraw from representing a client whose behavior is considered repugnant, or with which the lawyer fundamentally disagrees, a lawyer should be allowed to decline to represent a client on the same grounds. Indeed, historically attorneys have been viewed as being free from ethical sanction in declining cases,<sup>111</sup> and

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<sup>105</sup> MODEL RULES OF PROF’L CONDUCT r. 1.2(b).

<sup>106</sup> *Id.* at r. 1.2 cmt. 5.

<sup>107</sup> *Id.* at r. 1.16.

<sup>108</sup> *Id.* at r. 1.16 (b)(4).

<sup>109</sup> *See id.*

<sup>110</sup> *Id.* at r. 1.16 cmt. 7.

<sup>111</sup> *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE § 1.16-1 n.2, at 675 (2011–2012); *but see* Nathanson v. Commonwealth, No.

as we are about to discuss, might have the ability to avoid court appointments on a “repugnancy” ground.

However, consider this scenario. Suppose that in a small town or rural area there are relatively few attorneys. Most of them do not handle divorces. The ones that do represent divorce litigants decline on religious grounds to handle divorces of same-sex couples. A local judge becomes concerned with the inadequate presentation by a same-sex couple attempting to obtain a pro se divorce, because no local attorney will represent them. The judge appoints local attorneys to handle the case. In these circumstances, the provisions of Model Rule 6.2, regarding “Accepting Appointments” apply. That rule provides that: “A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”<sup>112</sup>

Comment 1 to this rule provides:

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer’s freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono public service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.<sup>113</sup>

It begins to appear that under the ethical rules, it is likely that attorneys could be required to represent an individual in a same-sex divorce even where the attorney might have some religious objection to it or might find the client’s situation repugnant. Refusal to accept the appointment and represent the client could result in the attorney, an officer of the court, being sanctioned under the Model Rules.<sup>114</sup> It could also result in a contempt proceeding against the attorney.<sup>115</sup>

Whether appointed or not, attorneys might also face civil liability under applicable human rights statutes in the state or city in which

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1999-01657, 2003 Mass. Super. LEXIS 293, at \*16 (Mass. Super. Ct. Sept. 16, 2003).

<sup>112</sup> MODEL RULES OF PROF’L CONDUCT r. 6.2(c).

<sup>113</sup> *Id.* r. 6.2 cmt. 1 (citation omitted).

<sup>114</sup> *Id.* at r. 8.4 cmt. 3.

<sup>115</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6(6) (AM. LAW INST. 2000).

they practice for declining same-sex clients in divorces.<sup>116</sup> It would be difficult for an attorney to convince the body hearing the complaint, or ultimately the courts, that the provision of legal services is somehow not included in the definition of “public accommodations.” While we found no cases which directly hold that legal services are a form of public accommodations, other professional services including dental services, and a wide range of other businesses, have been held to be public accommodations.<sup>117</sup> The trend is toward inclusion, rather than exclusion of businesses under those statutes.<sup>118</sup>

Moreover, the ordinances or statutes could easily be amended in the future to include such language so as to resolve any ambiguity. While attorneys view their profession as largely self-regulated, state statutes imposed by the legislatures often add to the professional obligations of attorneys. For example, in Texas, while the Texas Disciplinary Rules of Professional Conduct, Rule 1.05 requires an attorney to maintain client confidences, a state statute requires that attorneys who learn of child abuse—even in client communications—must report it.<sup>119</sup> Barratry statutes in Texas<sup>120</sup> expand upon the professional obligations set out in the Rules. Thus, legislative actions, including human rights statutes, could easily be amended to include attorneys as regulated providers, even if there is some ambiguity as to the current wording of those acts.

What then would become of the attorney’s argument that his or her

<sup>116</sup> The following is a partial list of states that have sexual orientation anti-discriminatory laws for places of public accommodations: California (CAL. CIV. CODE § 51(b) (West 2015)), Connecticut (CONN. GEN. STAT. ANN. § 46a-81d(a) (West 2015)), Iowa (IOWA CODE ANN. § 216.7(1)(a) (West 2014)), Maine (ME. STAT. ANN. tit. 5, §4592(1) (2015)), Massachusetts (MASS. GEN. LAWS ANN. ch. 272, §92(A) (West 2015)), Minnesota (MINN. STAT. ANN. §363A.11(a)(1) (West 2015)), New Hampshire (N.H. REV. STAT. ANN. § 354-A:17 (2015)), New Jersey (N.J. STAT. ANN. §10:5-4 (West 2015)), New York (N.Y. EXEC. LAW §296(2)(a) (McKinney 2015)), Vermont (VT. STAT. ANN. tit 9, §4502(a) (2015)), Washington (WASH. REV. CODE ANN. §49.60.215(1) (West 2015)), and Wisconsin (WIS. STAT. ANN. §106.52 (3)(a)(1) (West 2015)).

<sup>117</sup> See 42 U.S.C. §12181(7) (2014); *D.B. v. Bloom*, 896 F. Supp. 166, 169, 170 (D. N.J. 1995) (citing *Howe v. Hull*, 873 F. Supp. 72, 77 (N.D. Ohio 1994)).

<sup>118</sup> See, e.g., *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 865 (9th Cir. 2004) (holding a private group hosting a public event (a rodeo) was a place of accommodation); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir. 2000) (relating to accommodations at a golf course); *Nat’l Ass’n for the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201, 202 (D. Mass. 2012) (holding a Netflix website falls within the definition of public accommodation); *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996) (holding a dentist’s office must comply); *Local Fin. Co. v. Mass. Comm’n Against Discrimination*, 242 N.E.2d 536, 539 (Mass. 1968) (holding a public accommodation includes a finance company specializing in offering loans).

<sup>119</sup> TEX. FAM. CODE ANN. § 261.101(c) (West 2015); TEX. DISCIPLINARY R. OF PROF’L CONDUCT r. 1.05 (2015).

<sup>120</sup> TEX. PENAL CODE ANN. §§ 38.12, 38.18 (West 2015).



right to the free exercise of his or her religion exempts the attorney from performing such services? After the bakery and photography cases, courts relying upon those decisions would have an easy time disposing of any constitutional argument that an attorney might raise. Same-sex divorce litigants could also point to the additional obligations placed upon an attorney as an officer of the court. Those obligations would be heightened if the attorney was court appointed to represent the litigant. Under the order of a court to represent a litigant, the conduct of the attorney moves not only from the bakery and photography realm, but into the Kim Davis realm of state mandated official duties. Ms. Davis' religious beliefs did not save her from jail time.

Does this mean that divorce attorneys could ultimately be compelled to handle same-sex divorces? It is beginning to appear that the answer is in the affirmative. Is there any mechanism by which this could be avoided? One approach appears to be that if the lawyer wishes to handle any divorces, the attorney could be compelled to handle same-sex divorces.<sup>121</sup> It would probably be too late for an attorney facing disciplinary sanctions or a civil proceeding for refusing to represent the same-sex individual in the divorce to suddenly determine not to handle any divorces. That approach did not work for Kim Davis and would not work in the other civil cases. If an attorney is seriously opposed on religious grounds to handling a same-sex divorce that attorney should, in advance of any complaint or charge by an individual seeking a same-sex divorce, abandon handling any divorces. That approach avoids the accusation that the attorney is discriminating against same-sex divorces or against an individual based on sexual orientation.

Another approach would be for the attorney to simply decline to handle same-sex divorce and raise the religious objection before the sanctioning body.<sup>122</sup> The attorney would have to be prepared for the possibility that courts would continue to decline to recognize a constitutional right to decline such representation.<sup>123</sup> Under an applicable RFRA, the attorney would demonstrate that representing persons in same-sex divorces "substantially burdens" the attorneys

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<sup>121</sup> See generally note 112 (citing to various state statutory provisions relating to public accommodations that could be enforced against lawyers).

<sup>122</sup> Cf. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn. Formal Ethics Op. 96-F-140 (1996) (finding that the appointed attorney could not decline to represent client despite conflicting religious beliefs).

<sup>123</sup> See, e.g., *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1280–81, 1283, 1290–91 (11th Cir. 2012).

exercise of religion.<sup>124</sup> The attorney would need to bring the action against the state agency that requires his or her participation, in order to avoid a New Mexico-style dismissal for failure to name the state body as a defendant.<sup>125</sup> Applying the RFRA, the court hearing the attorney's challenge would then require the government to demonstrate its compelling governmental interest in forcing the attorney's participation or penalizing his or her refusal.<sup>126</sup> It would also have to show that the coercion is the least restrictive means of furthering that interest.<sup>127</sup> While access to legal services by all members of the public is a critical and compelling interest of the courts,<sup>128</sup> permitting the attorney to demonstrate that other officers of the court are available to provide the necessary services would satisfy those concerns.<sup>129</sup> That approach of attempted referral was not successful in the bakery or wedding photography cases, but given the unique role of the attorney in client representation, it might be applicable in the legal services cases.

## II. ACCOMMODATION NOT COERCION

In resisting a mandate to represent persons in same-sex marriages, the attorney should hope that eventually our system will reach a model of accommodation between the newly announced right to same-sex marriage and the sincerely held religious beliefs of those who wish not to participate. Accommodation, not coercion, should be the model. Attorneys might point to the concerns of Chief Justice Roberts, who elaborated on the extensive history of traditional marriage in his dissenting opinion in *Obergefell*. He noted with dismay:

Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary

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<sup>124</sup> See 42 U.S.C. § 2000bb-1(a) (2014).

<sup>125</sup> *E.g.*, *Elane Photography v. Willock*, 2013-NMSC-040, ¶¶ 74, 75, 78, 309 P.3d 53, 76, 77 (N.M. 2013).

<sup>126</sup> See 42 U.S.C. § 2000bb-1(b)(1).

<sup>127</sup> See *id.* § 2000bb-1(b)(2).

<sup>128</sup> See *e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, § 51.1(b) (2015).

<sup>129</sup> See Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 716-17 (2014).

consequence” of laws codifying the traditional definition of marriage is to “demea[n] or stigmatiz[e]” same-sex couples. The majority reiterates such characterizations over and over. . . . These apparent assaults on the character of fair-minded people will have an effect, in society and in court.<sup>130</sup>

Attorneys should argue that they should not be disparaged; their beliefs should be accommodated.

Attorneys might also note that another difficulty with the model of coercion rather than accommodation is that it is counterproductive. Attempting to force people to do something against their deeply held religious belief will only inflame resistance, as it did in the Kim Davis matter.<sup>131</sup> High profile individuals and people from all walks of life rallied to her defense.<sup>132</sup> In the case of the Oregon bakers, contributions likely exceeding the fine of \$135,000 poured into the bakers.<sup>133</sup>

Courts and other adjudicative bodies should also recognize that there will probably need to be time for society to make the necessary adjustments and accommodations. After all, only a few years ago present-day high-profile advocates of same-sex marriage were opposed to it, including then Senator Hillary Clinton and President Barack Obama.<sup>134</sup> Lawyers, by definition are trained in the law. They would be effective adversaries if a coercion model, rather than accommodation model were to be imposed upon the legal profession. Even attorneys who are in favor of same-sex marriage might feel compelled to rally to the sides of their brothers and sisters who were being coerced into providing representation of individuals those

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<sup>130</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) (first and second alteration in original) (citations omitted).

<sup>131</sup> See *Ky. clerk: I am being forced to disobey God*, CBS NEWS (Sept. 14, 2015), <http://www.cbsnews.com/news/ky-clerk-i-am-being-forced-to-disobey-god/>.

<sup>132</sup> See Elisha Fieldstadt, *Supporters of jailed Kentucky clerk Kim Davis rally to her defense*, MSNBC (Sept. 8, 2015), <http://www.msnbc.com/msnbc/supporters-jailed-kentucky-clerk-kim-davis-rally-her-defense>.

<sup>133</sup> *GoFundMe Nixes Donations for Bakery That Refused to Serve Gay Weddings*, FOX NEWS: INSIDER (Apr. 27, 2015), <http://insider.foxnews.com/2015/04/27/gofundme-blocks-fundraising-oregon-bakery-refused-serve-gay-weddings>.

<sup>134</sup> GLASSBOOTHdotORG, *Barack Obama on Gay Marriage*, YOUTUBE (Oct. 28, 2008), <https://www.youtube.com/watch?v=N6K9dS9w17U> (“I believe that marriage is the union between a man and a woman. Now, for me as a Christian, it’s also a sacred union; God’s in the mix.”). Barack Obama went on to say, “No [he] would not” support a constitutional amendment allowing gay marriage because he believed it should remain a state issue. *Id.* However, Obama says he supports the idea of civil unions as it has been applied to same-sex couples. *Id.*; see also *Jvideos8, Hillary Clinton was against Gay Marriage & for removing Saddam*, YOUTUBE (June 12, 2014), [https://www.youtube.com/watch?time\\_continue=141&v=9TyZBeGfeVM](https://www.youtube.com/watch?time_continue=141&v=9TyZBeGfeVM) (noting that Hillary Clinton responded to the question of whether or not she thought New York State should recognize gay marriage by flatly saying “no”).

attorneys did not want to represent.

What if the attorney is not only opposed to same-sex marriage, but is opposed to representing homosexual clients in other matters? The refusal to provide legal services based upon the sexual orientation of the client would be a clear violation of human rights acts prohibiting such practices.<sup>135</sup> While there are well recognized, religiously-based arguments in support of traditional marriage, there appears to be no valid legal or moral argument for refusing to provide legal services based on the sexual orientation of the client.<sup>136</sup> Courts could easily pierce through a pretext of “religious defense of marriage” argument if it is obvious that the real motivation is the desire not to provide any legal services based on sexual orientation. In this regard, though, it is worth noting that neither the New Mexico case nor the Oregon case recognized any distinction.<sup>137</sup> In both instances the providers were willing to serve homosexual customers.<sup>138</sup> Both declined, however, to participate in any activity that would acknowledge the validity of a same-sex marriage.<sup>139</sup> Neither succeeded.<sup>140</sup> Both the Oregon and New Mexico tribunals concluded that the refusal to provide the services for wedding-related matters constituted discrimination based on sexual orientation rather than a conscientious objection to the validity of same-sex marriages.<sup>141</sup>

From an ethics perspective, it would not be possible to justify refusing to serve all homosexual clients on a “repugnancy” basis any more than refusing to serve clients based on race could be justified on a “repugnancy” basis.<sup>142</sup> Still, some lawyers and firms only

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<sup>135</sup> See *supra* note 116 and accompanying text.

<sup>136</sup> See PIATT, *supra* note 98, at 14.

<sup>137</sup> *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 7, 11, 14, 18, 19, 309 P.3d 53, 59–60, 61, 62, 63 (N.M. 2013); Melissa Elaine Klein, Nos. 44-14, 45-14, 2015 WL 4868796, at \*19, \*24, \*25, \*51–52 (Or. Bureau of Lab. & Indus. July 5, 2015).

<sup>138</sup> *Elane Photography*, 2013-NMSC-040 at ¶ 7, 309 P.3d at 59–60 (refusing to photograph ceremony of same-sex couple); Melissa Elaine Klein, 2015 WL 4868796, at \*3 (refusing to provide a wedding cake for same-sex couple).

<sup>139</sup> See *Elane Photography*, 2013-NMSC-040 at ¶ 7, 309 P.3d at 59–60; Melissa Elaine Klein, 2015 WL 4868796, at \*3.

<sup>140</sup> *Elane Photography*, 2013-NMSC-040 at ¶ 79, 309 P.3d at 77; Melissa Elaine Klein, 2015 WL 4868796 at \*13.

<sup>141</sup> See *Elane Photography*, 2013-NMSC-040 at ¶ 18, 309 P.3d at 62, 70; Melissa Elaine Klein, 2015 WL 4868796 at \*19.

<sup>142</sup> See David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1038 (1995) (discussing the possible repercussions facing an African American lawyer that motivated him to accept the Ku Klux Klan as a client); cf. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 20 (2003) (“[O]ne’s status as a lawyer, and hence the role itself, is conditioned both by the right of a court to order appointment and the principle that such appointment must be accepted irrespective of the lawyer’s opinion of the client.”).

represent men or women in divorce matters.<sup>143</sup> To this author's knowledge, that method of client selection has not been found to be unlawful or unethical.

But assume that an attorney is not unwilling to serve homosexual clients. He or she in fact represents some gay clients in matters unrelated to a marriage issue. However, that attorney holds a religious view that does not recognize the validity of same-sex marriage. As a result, the attorney declines to represent individuals in same-sex divorces, because such would, in effect, be arguing that a valid marriage is before the court. How might an appropriate accommodation model be implemented to protect the rights of this attorney, others similarly situated, and potential clients?

Attorneys and judges will need to become aware of the reality that some lawyers hold a deeply held religious belief against same-sex marriage which in many instances is based on religious traditions which pre-date our country by thousands of years. The Catholic Church specifically identifies the religious foundation for traditional marriage, while at the same time extending its love and inclusion of gay Catholics into the church.<sup>144</sup> These issues are discussed in this author's book, *Catholic Legal Perspectives*.<sup>145</sup>

There will also have to be additional legal exploration of the right to the free exercise of religion. Implicit attempts to limit that exercise in political rhetoric and in judicial opinions should be scrutinized. For example, the First Amendment guarantees of free exercise are much broader than the guarantee that President Obama refers to when he characterizes the First Amendment's guarantee as the "freedom of worship."<sup>146</sup> This appears to some observers to be an attempt to seriously limit the First Amendment's Free Exercise clause, which of course, does not limit the guarantee of religious liberty to only "worship."<sup>147</sup> Chief Justice Roberts points out that the majority opinion in *Obergefell* only refers to the right to "advocate" and "teach" that same-sex marriage is inappropriate, "ominously"

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<sup>143</sup> See, e.g., *Family Law Attorneys for Men*, CORDELL & CORDELL, LLC, <http://cordellcordell.com> (last visited Mar. 17, 2016); *Nashville Divorce for Men*, DUNN LAW FIRM, <http://dunnlawtn.com/tennessee-divorce-for-men/> (last visited Mar. 20, 2016); MEN'S DIVORCE LAW FIRM, <http://www.mensdivorcelaw.com> (last visited Mar. 20, 2016); THE LAW FIRM OF VICTORIA, <http://www.lawfirmofvictoria.com> (last visited Mar. 20, 2016); DIVORCE ATTORNEYS FOR WOMEN, <http://www.dawnforwomen.com> (last visited Mar. 20, 2016).

<sup>144</sup> PIATT, *supra* note 98, at 26.

<sup>145</sup> See *id.* at 23–31.

<sup>146</sup> Randy Sly, *Obama Moves Away From 'Freedom of Religion' Toward Freedom of Worship?*, CATHOLIC ONLINE (July 19, 2010), <http://www.catholic.org/news/national/story.php?id=37390>.

<sup>147</sup> See *id.*

omitting the right to “exercise” one’s religious beliefs.<sup>148</sup> Attorneys will want to ensure that everyone in these discussions understand that the First Amendment protects that “exercise.”

On the other hand, participants in same-sex marriages enjoy all the benefits conferred upon any married couple.<sup>149</sup> Property rights, benefits under government programs such as social security, immigration laws, and the tax laws, are among those benefits.<sup>150</sup> In the unfortunate situation where the marriage breaks down, those individuals will have the right to the assistance of the legal system in the resolution of the issues which will arise. If attorneys reject their cases, these rights could be damaged or lost. The anguish associated with divorce will be compounded. If we recognize a right to marriage that can compel a clerk to issue the marriage license, should we not also recognize a right to divorce that would compel state-licensed attorneys to assist?

The market might provide its own accommodation of these issues. If, as this author anticipates, many of the same-sex marriages will end in divorce, it is very likely that the need for legal representation will be eagerly met in a market where recent graduates are struggling to find employment. In the circumstances where the market does not provide sufficient attorneys, courts should accommodate the religious beliefs of those opposed to same-sex divorce by expanding the additional resources necessary to bring in counsel who are not opposed to handling the divorce. Even where an attorney might nonetheless be ordered to represent a litigant in a same-sex divorce, and where the attorney chooses not to defy the court, the attorney would still have the right, under the First Amendment, to post a disclaimer. The attorney could state that while he/she opposes same-sex marriage, the attorney will nonetheless comply with the order or the anti-discrimination provision.<sup>151</sup>

Accommodation might not happen anytime soon. It might be that there are potential litigants within the same-sex community who would be looking to add lawyers to the list of those who could be required provide services to same-sex couples. It might have been no accident that the same-sex couples bringing the actions against

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<sup>148</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (Roberts, C.J., dissenting) (citations omitted). Of course, “the government may . . . accommodate religious practices . . . without violating the Establishment Clause.” *Hobbie v. Unemp’t Appeals Comm’n of Fla.*, 480 U.S. 136, 144–45 (1987).

<sup>149</sup> *See Obergefell*, 135 S. Ct. at 2599, 2601 (majority opinion).

<sup>150</sup> *See id.* at 2601.

<sup>151</sup> *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 3, 309 P.3d 53, 59 (N.M. 2013).

photographers, bakers, and other businesses were well aware that there were others who could have provided the services but chose to pursue the legal claims to establish precedent. As a result, it is possible that future litigants will not be inclined to accept an accommodation model, and will instead press for all possible sanctions in order to dissuade others from refusing to handle same-sex divorces.

In this scenario, a lawyer who opposes same-sex marriage, and has made his or her views known, could become a target of a disciplinary proceeding or civil action. The attorney might expect to lose the initial rounds under the Oregon, New Mexico, and Washington cases cited in this article.<sup>152</sup> The attorney would have to pursue the appeals, perhaps sacrificing his or her ability to practice law and suffering severe economic losses, similar to the career interruption in losses suffered by Muhammad Ali.<sup>153</sup> The attorney might have to be willing to face jail time for contempt, as did Kim Davis, while ultimately hoping that the courts will accommodate his or her religious beliefs.<sup>154</sup>

Perhaps others in the bar might step up. They could volunteer to assist their brothers and sisters in the legal profession. They could take the cases which some attorneys, in the tradition of conscientious objection based upon religious beliefs and in the exercise of their First Amendment rights, decline to handle. In this manner, the rights of same-sex couples to legal representation, and the rights of attorneys to the free exercise of their religion, could best be accommodated.

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<sup>152</sup> See *id.*; State v. Arlene's Flowers, No. 13-2-00871-5, 2015 WL 720213, at \*31 (Wash. Super. Ct. Feb. 18, 2015); Melissa Elaine Klein, Nos. 44-14, 45-14, 2015 WL 4868796, at \*23, \*24 (Or. Bureau of Lab. & Indus. July 5, 2015).

<sup>153</sup> See Hauser, *supra* note 27.

<sup>154</sup> Galofaro, *supra* note 6.