



Amid debate over rights, number of gay judges rising; Most report sexual identity not an issue, but conservative groups wary

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By Joan Biskupic

WASHINGTON -- When a case testing whether Oregon should allow same-sex marriages came before the state's Supreme Court in 2004, one of the court's seven justices quietly wrestled with a vexing question:

Should he, a gay man, take part in the case? Or did part of Rives Kistler's identity -- his sexual orientation -- mean that he should sit it out, to avoid any appearance of a conflict of interest?

Kistler, a former Oregon assistant attorney general and the first openly gay member of the state's highest court, consulted an ethics book to decide "whether it was permissible for me to sit on the case." Then he checked with a judicial ethics panel, which told him it would not be a conflict.

When Oregon's high court heard the dispute, Kistler was on the bench. Four months later, he joined a unanimous decision as the court ruled that same-sex marriages were not allowed under Oregon law. He says his sexual orientation wasn't a factor in his decision, and he agreed with the other justices that any changes in Oregon's marriage laws had to come from legislators, not judges.

"Everybody's got a personal life, but you don't bring it to work," says Kistler, 57. "You're not here to impose or enforce your personal viewpoint. You're here to follow the statutes and the Constitution."

The case was part of a recent string of state court rulings on same-sex marriage. It shed light on the rising number of openly gay judges, and the situations they face, at a time when gay civil rights is a key issue.

The complex issues associated with being gay and in politics also were evident in the recent scandal involving former U.S. representative Mark Foley, R-Fla., who resigned from Congress Sept. 29 after ABC News confronted him with sexually explicit Internet messages he allegedly sent to teenage pages.

Foley publicly acknowledged that he is gay, and his resignation drew attention to the pressures some gay men and lesbians in Washington feel to hide their sexual orientation.

It's unclear how many gay judges there are among the roughly 30,000 local, state and federal jurists in the USA. No one keeps precise figures, but comparisons of membership lists of gay and lesbian legal groups -- including the Victory Fund and the International Association of Gay and Lesbian Judges -- suggest there are 75 to 100 openly gay judges, most of them in California, New York and Chicago.

That's a large increase from the early 1990s, but still a tiny percentage of the overall number of judges. It does not include any gay judges who have kept their sexual orientation secret for a range of reasons, including a fear it would harm them professionally.

New York trial judge Michael Sonberg, 58, a former president of the International Association of Lesbian and Gay Judges, says California and New York each have about 20 openly gay judges. In the Chicago area, where jurists are elected, there are 10 openly gay judges on municipal courts, says Chicago's Advisory Council on Lesbian, Gay, Bisexual and Transgender Issues.

Cook County Circuit Court Judge Thomas Chiola says he expects that number to rise to 12 after the fall elections. Chiola, who was elected in 1994 and was the first openly gay judge in the Chicago area, says gay judicial candidates' sexual orientation rarely has been a significant issue in a campaign there. "Part of being successful in an election campaign is doing the groundwork," he says. "That means being involved in the community and already being known. That can make the gay and lesbian issue a non-issue."

But Chiola, 54, adds that when he first ran in 1994, he had trouble winning endorsements from some prominent lawyers because of his sexual orientation.

Gay and lesbian judges do not appear to have had a particular impact on gay-rights issues. However, in recent years they have been more vocal about their sexual orientation and the notion that having gay men and lesbians on the bench helps diversify the judiciary.

"To the extent to which the bench ought to reflect society in general, having openly gay and lesbian judges matters," says New York Supreme Court Judge Rosalyn Richter, 50, a lesbian who was elected in 2003 to a trial judgeship in the Bronx. "It matters for the same reason that we would not want a judiciary that was all men."

After joining the bench, Richter changed the questions asked of potential jurors in her court to be more welcoming to gay men and lesbians. Rather than ask jury candidates whether they are married and pose questions about a spouse, "I use the word 'family' and I tell jurors they can define it for themselves," Richter says. "In my own case, I thought, what would happen if my domestic partner showed up for jury duty?"

The effort by gay rights groups to increase the number of openly gay state and local judges has drawn criticism.

"We don't accept that homosexuality is any kind of cultural identity that should be sought in a judge," says Peter Sprigg of the Family Research Council, a conservative advocacy group in Washington, D.C., that opposes same-sex marriage. "We think it's a behavior, not something that should be held up as a role model."

'Chilling' atmosphere

Such sentiments -- and the partisan politics that surround judicial nominations on the federal level -- help explain why there appears to be only one openly gay judge on the 875-member federal bench, where appointments are for life.

That judge is Deborah Batts, a Harvard University law school graduate and a former professor at Fordham University. In 1994, Batts was appointed by President Clinton to a trial court in the southern district of New York.

Batts, 59, declined to be interviewed. She has participated in gay-rights events, and in 2001, when her portrait was hung at Harvard Law School, officials there said her Senate confirmation marked the first time an openly gay person had joined the federal judiciary.

During the confirmation process, Clinton administration lawyers did not emphasize Batts' sexual orientation. On a Senate questionnaire, Batts noted her membership in gay legal groups, but the issue was not discussed in hearings, and she was confirmed easily by the Senate, then led by Democrats.

In federal court nominations, things are different now. President Bush has vowed to make the judiciary more conservative, and it appears that none of his nearly 300 appointments to the federal bench has involved an openly gay person. It's unclear whether the administration has considered any gay men or lesbians for federal courts.

White House spokeswoman Emily Lawrimore says the administration does not reject potential nominees based on sexual orientation. "President Bush has based his nomination decisions solely upon a person's judicial excellence and experience," she says. "He will continue to select a diverse group of people with sterling credentials."

Eleanor Acheson, an assistant attorney general in the Clinton administration and now policy director of the National Gay and Lesbian Task Force, says "many different forces" make it tough for gays to become federal judges.

"I don't think this administration is committed in any deliberate way to not appointing gay men and lesbians," she says. "It might even have happened, but we don't know because the individuals are 'out' to such a small circle" of friends or associates. "But I do think there is probably a smaller pool of people who fall into the category of prominent, openly gay and lesbian lawyers well known to and supported by Republican senators. Also, the atmosphere created by the Republican Party, the right-wing base, and the president himself contribute to a bit of a chilling effect."

Acheson says gay men and lesbians interested in seeking a federal judgeship might think, "'I've got nothing to hide here. But do I want to go forward when there's a chance that the whole buzz about my nomination is that I'm openly gay?' It overtakes the person's professional qualifications."

Paul Smith, a gay man who is a partner in the Washington office of the 400-lawyer firm of Jenner and Block, says "the unpleasantness of the whole confirmation process" is a big reason there are not more openly gay federal judges. "Who wants to get caught up in it?"

Less of an issue at law firms

The relatively small number of openly gay judges contrasts with the increasing tendency of law firms to tout their gay and lesbian lawyers as symbols of diversity.

"In the broader legal profession, as opposed to the judiciary, there's been a sea change in attitudes," says Smith, whose firm highlights its work in gay civil rights on its website and in a newsletter.

Smith, who argues regularly before the U.S. Supreme Court, says the 1993 movie Philadelphia, in which Tom Hanks played a gay lawyer who was fired by his firm because he had AIDS, seems particularly dated today.

Mark Shields, director of the Human Rights Campaign's Coming Out Project, says gay men and lesbians have been more open about their orientation in recent years.

"It is difficult to quantify, but I don't think you need a survey to look around and say, in the early 1990s we didn't have (talk-show host) Ellen (DeGeneres) out, we didn't have Queer Eye for the Straight Guy, and we didn't have Brokeback Mountain. Looking around us, we see everyday people being more open and secure in their openness."

At the state and local levels, where judges can get on a bench through appointment or election and where appointments are not for life, there are increasing signs of acceptance of gay and lesbian judges -- and not just in California, New York and Chicago. Politicians elsewhere -- including Maryland Gov. Robert Ehrlich, a Republican, and Oregon Gov. Ted Kulongoski, a Democrat -- have appointed gay judges and then not flinched when conservative groups protested.

When Ehrlich appointed an openly gay man, Christopher Panos, to a state trial court in Baltimore last summer, the Family Research Council's Sprigg complained in a conservative, online newsletter. Panos was the first openly gay person Ehrlich had named to a court since taking office in 2003 and filling 67 judgeships.

For Ehrlich, Panos' sexual orientation was not relevant, says Henry Fawell, spokesman for Ehrlich.

"He is just looking for the best judge," Fawell says.

Fawell says Ehrlich was aware of Panos' sexual orientation but that it did not help or hinder Panos' candidacy. Panos declined to comment.

In Oregon, Kulongoski appointed Kistler to fill an unexpired term on the state's high court in 2003. The governor says Kistler's sexual orientation wasn't a factor, and that the judge proved his merit the next year by winning a statewide election. The Oregon Christian Coalition backed Kistler's rival, who supported a ban on gay marriage. However, Kistler's sexual orientation was not a big campaign issue.

Many of those calling for more gay and lesbian judges are focusing on the federal bench, the most powerful segment of the nation's judiciary. Nan Aron of the liberal Alliance for Justice says her organization and gay-rights groups don't expect much from the Bush administration, so they are pushing for more gay and lesbian judges on state courts. They aim to create a "farm team" of judges who could be in position for the federal bench if future presidents are willing to appoint such judges.

Sprigg says his group would fight such an effort. But he says gay judges are acceptable to his group -- as long as their sexual orientation isn't a factor in their work.

"We don't think we should make an issue of it, if they keep it private," he says. "If we had reason to believe that they would pursue a pro-homosexual agenda, then we would vigorously oppose them."