

CULTURAL REVOLUTION

With many gay lawyers
on high court's staff,
same-sex marriage
hits close to home

By Mike McKee
RECORDER STAFF WRITER

While it's unlikely Chief Justice Ronald George or his six companions on the state Supreme Court will ever take part in a gay pride parade like local politicians, the justices are hardly isolated from gay life.

In fact, gay employees — many of them out — abound in the Supreme Court. That may put the justices in a unique — and possibly uncomfortable — position as they prepare to hear arguments next week on the emotional issue of same-sex marriages.

The court not only sits in the most gay-friendly city in the country, but it looks out on City Hall, where more than 4,000 same-sex couples wed earlier this year and where hundreds of thousands of gays gather after the city's annual pride parade each June.

It's common knowledge that the Supreme Court, the First District Court of Appeal and the Administrative Office of the Courts — all located within the same complex — employ a large number of gays and lesbians. The chief justice even regularly shows up to shake hands at the yearly dinner of the gay legal group Bay Area Lawyers for Individual Freedom.

This isn't Topeka, Kan., or even Sacramento. The court's location and, more importantly, the seven justices' personal and professional friendships with gays, could influence their ultimate decisions on same-sex marriages.

See SUPREME COURT'S page 12

12 THE RECORDER • WEDNESDAY, MAY 19, 2004

Supreme Court's marriage argument hits

Continued from page 1

"That this court is functioning in the San Francisco Bay Area and encountering gay people on a daily basis and working closely with them," appellate specialist Jon Eisenberg says, "will affect them to the extent that gays won't be faceless legal issues. It's a human issue."

But while some contend that the justices may feel the winds of social change, especially when they're at the heart of the maelstrom and their decisions could affect someone close, others say the jurists make their decisions solely on the law.

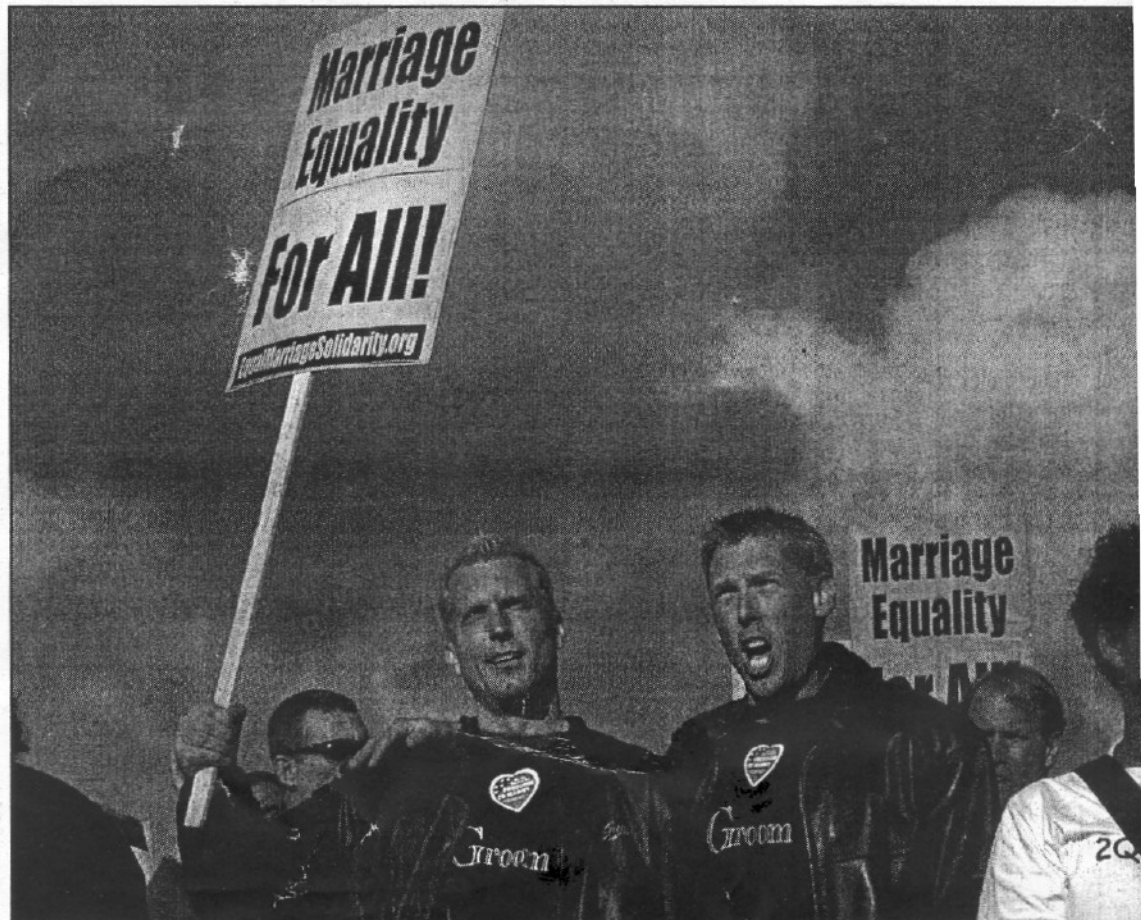
Joseph Grodin, who sat on the high court for five years in the '80s, says the justices can't, and won't, fall prey to personal feelings.

"The fact that there are gays, probably, around the courthouse," he says, "doesn't distinguish it from a case in which the court is passing on, say, a sex discrimination claim against women when there are women around the courthouse or a race discrimination claim when there are racial minorities around the courthouse.

"I don't think it has any additional pressures or ramifications than any other important case the court decides."

In some ways, however, these cases are unique.

As with most everyone else, the justices must have been caught off guard when city officials started issuing marriage licenses to gay couples on Feb. 12. Men and women from around the globe lined up just outside their windows for weeks, and protesters massed in front of their building when the Supreme Court stopped the weddings March



EQUAL JUSTICE: Bill Lenker, left, and Jim Spinello, center, demand recognition of same-sex marriages at a march. The couple were married in February.

During that time, the issue struck close to home. One attorney who works for the First District Court of Appeal was honored with a brief in-house ceremony after marrying her spouse. And employees of both courts acknowledge knowing couples that married. The justices were at ground zero of the events leading to next week's arguments over whether the city had the authority to issue marriage licenses.

"They could just look out the window," says Santa Clara University School of Law professor Gerald Uelmen, "and see the case that's coming."

A lawyer familiar with the court, but who requested anonymity, said there are "a number" of openly gay people working with the justices, and they are "very well regarded."

That was evident last year when the court, led by the chief justice, took time at one hearing to honor Brian Clearwater, a gay man and the court's longtime calendar coordinator, who died unexpectedly of an apparent pulmonary embolism.

"They are all very decent human beings," says the anonymous lawyer. "They are the kinds of people who, as a matter of social policy, would have nothing against same-sex marriage, and, certainly, if the Legislature enacted a statute that allows [marriages], they would probably breathe a sigh of relief."

CULTURE OF TOLERANCE

Current court employees won't talk about the justices' interaction with gays. But one former First District employee says gay culture was open in the building.

"Every justice on the court of appeal knows that there are gay and lesbian people working with them everyday," says Richard Inlander, who recently retired as the court's central staff attorney. "But the atmosphere there is such that it really never comes up. It's just very open and comfortable for everybody."

While not as familiar with the high court, Inlander says he would be surprised if the atmosphere was different there. But he doesn't believe the justices' decision on gay mar-

riages would be influenced by interpersonal relationships.

"Of course, the justices know this has an impact on people in the court," he says. "But I think you're going to hear that they're going to decide the case the same way they would decide any other case."

Stephen Barnett, a professor emeritus at Boalt Hall School of Law, agrees.

"They're human," he says. "But I think it's in the nature of their job to fence out those considerations and focus on the law. They're accustomed to doing that, and they'll do it here."

But even Barnett says the justices would be hard put to shut out the realities of working and living in San Francisco.

"This may be one respect," he says, "in which they are not sheltered from the real world."

Human interactions on a regular basis have been shown to have an impact, Santa Clara's Uelmen and others note.

Edgar Patterson was the longtime chauffeur to former U.S. Supreme Court Chief Justice Earl Warren. Many believe he influenced Warren's thinking on *Brown v. Board of Education*, which aimed at desegregating public schools.

"He had a great teaching role," Warren biographer Ed Cray told the *San Francisco Chronicle* after Patterson's death three years ago. "I believe he had an uncredited part in *Brown v. Board of Education*."

But former Justice Grodin, now a professor at Hastings College of the Law, thinks that may be giving Patterson too much credit.

"Earl Warren had strong views about racial discrimination long before *Brown v. Board of Education*," he said.

Even so, experts believe the current justices of the California Supreme Court are much more familiar with gays in general than are the U.S. Supreme Court justices — who may ultimately decide the issue.

Now-deceased Justice Harry Blackmun recounted in interviews how fellow Justice Lewis Powell Jr. — who cast the deciding vote in *Bowers v. Hardwick*, the since-revoked 1986 ruling that upheld anti-sodomy laws, said he had never known a homosexual. There were two on his staff at the time.

In a more accepting era and in a city rife with gay history, court watchers say, the California justices can't be that naive.

"Face it. Our parents, our children, our friends, our grandparents, any of them can be gay," says Eisenberg, an Oakland-based partner for Encino's Horvitz & Levy. "Undoubtedly, some of [the justices'] staff is gay and, undoubtedly, some of the staff are openly gay, and I wouldn't be surprised that some of those staff members got married."

Even with that, he says, any impact on the court's ultimate decision — for now, whether the marriages are null and void because the city overstepped its bounds, and in the future, the actual constitutionality of same-sex unions — will be subtle and intangible, not a conscious thing.

Staffers can have tremendous influence in educating a justice on the law, he says, "but no judge ever did anything that judge didn't want to do just to please a staff attorney."

A CHANCE TO MAKE HISTORY

The court's first bite at the same-sex issue comes at a curious confluence of events — eight days after the 50th anniversary of *Brown* and, coincidentally, the beginning of

same-sex marriages in Massachusetts.

Many are hoping that the court will see a parallel issue in gay rights. And they hope the justices recognize they are dealing with a case that many gays consider as historic as the Supreme Court's decisions in *Brown* and *Loving v. Virginia*, which abolished laws outlawing interracial marriage.

Boalt Hall's Barnett says there are obvious similarities.

"Most fundamentally," he says, "it involves the same kinds of considerations of changing social mores, and raises the question of what kinds of discrimination the law should forbid."

Eisenberg, for one, wants the justices to reflect upon their place in history, just as they can look back at their predecessors' 1948 decision in *Perez v. Sharp*, which OK'd interracial marriage in California 19 years before the U.S. Supreme Court.

"I want them to project themselves 50 years into the future and assess what they are doing now," he says. "It's so easy for us to look back 50 years and see clearly that striking down anti-miscegenation laws was the right thing to do."

Eisenberg isn't overly optimistic, however, that this court — with six Republican appointees and one moderate Democrat — will want to sanction same-sex marriage. But he hopes they use their hearts as well as their minds in deciding.

He says he wasn't a strong supporter himself until two women he knew tied the knot. Eisenberg filed an earlier *amicus curiae* brief in both cases challenging state law barring same-sex marriage as unconstitutional.

"It touched them deeply, and when I saw how much it meant to them, it changed me," Eisenberg says. "It turned me into an advocate, instead of a bystander."

"Now, perhaps," he adds, "a few of those justices will be touched in the same way by the marriage or marriages of their staff members."

Associate Editor Mike McKee's e-mail address is mmckee@therecorder.com. Disclosure: McKee and his partner are one of the same-sex couples issued a marriage license.

"We don't want to do things that chill jurors. If suddenly you want to do some systematic background checks with lots of bells and whistles, that might happen."

MICHAEL PASANO
ABA Criminal Justice Section