



LGBTQ in the Federal Judiciary: A Long Way to Go for Representation

As major civil rights issues reach the federal bench with increasing frequency, LGBTQ representation on the federal bench is more important than ever.

By **Jeremy Saks** | June 23, 2022



Jeremy T. Saks, principal with Fish & Richardson. (Courtesy photo)

Law firms have made great strides on LGBTQ representation in recent years, particularly among younger attorneys. But that progress has not yet extended to the federal judiciary. Despite accounting for nearly 7% of the population of the United States, there are only a handful of sitting openly LGBTQ Article III judges. As major civil rights issues reach the federal bench with increasing frequency, many of the judges presiding over those cases will decide issues affecting the rights of LGBTQ people, making LGBTQ representation on the federal bench more important than ever.

Where We Stand

LGBTQ individuals are grossly underrepresented in the federal judiciary. Of the more than 3,427 judges ever to have sat on Article III courts, only 16 are known to have been LGBTQ. Of the approximately 870 sitting Article III judges in 2022, only 14 are openly LGBTQ.

While these numbers are extraordinarily low, there is some reason for optimism. Of the 14 sitting LGBTQ Article III judges, nearly three-quarters were commissioned during the past decade, indicating that acceptance of LGBTQ individuals in the federal judiciary has increased greatly in a significantly short period of time.

The Private Practice-to-Federal Judge Pipeline

The problem of LGBTQ underrepresentation in the federal judiciary does not begin and end on the bench. Rather, it is a consequence of wider trends of underrepresentation within the legal industry. While Big Law generally performs well on the Human Rights Campaign's Corporate Equality Index—some years even coming in as the top industry—underrepresentation remains widespread, and it can be difficult to gauge the true strength of a law firm's culture of inclusion using objective criteria.

According to the most recent statistics from the National Association for Law Placement (NALP), the overall percentage of LGBT attorneys reported in the 2019 NALP Directory of Legal Employers was roughly 3%, which substantially trails the general population. Among older attorneys (those at the partner level and similar), the percentage is only about 2.1%. However, among the youngest staff

members (summer associates), the percentage is about 6.9%, roughly in line with the general population. NALP also found that the percentage of all attorneys identifying as LGBT rose from just over 1% in 2004 to 3% in 2019 – a 300% increase in 15 years.

While the true percentage of LGBTQ attorneys practicing in BigLaw is elusive, the NALP survey provides some insight regarding a possible reason for low LGBTQ representation in the federal judiciary: There are so few LGBTQ Article III judges because, traditionally, there have been few LGBTQ attorneys at the law firms from which federal judges tend to be recruited. Judges with backgrounds in private practice make up a substantial portion of the federal judiciary. A [2017 study](#) by the Congressional Research Service found that a plurality of both district court judges (about 35%) and circuit court judges (about 27%) were in private practice at the time of their appointment. Consequently, if there are fewer LGBTQ attorneys in the judicial pipeline, there will be fewer LGBTQ federal judges.

How Law Firms Can Support Future LGBTQ Judges

If the judicial pipeline theory is correct, the increasing number of junior attorneys identifying as LGBTQ may result in an increasing number of LGBTQ Article III judges in the coming years. However, the progress the LGBTQ legal community has made in recent years did not happen on its own; it was the result of a hard-fought campaign for equal dignity. Law firms that understand their role in this fight can take action now to support the LGBTQ judges of the future.

Recruitment

LGBTQ representation in law firms begins with recruiting bright LGBTQ legal talent. Many organizations, such as the [National LGBTQ+ Bar Association](#) and its [law school affiliate programs](#), are devoted to supporting LGBTQ representation in the legal profession and offer resources for law firms. Firms should also collect data on LGBTQ attorney hiring, retention and promotion to track their own progress towards meeting representation goals.

Firm Policies

LGBTQ attorneys need to know they are entitled to fair and equal treatment and that discrimination will not be tolerated. To that end, law firms should implement nondiscrimination policies that explicitly include LGBTQ individuals. Strong nondiscrimination policies generally cover sexual orientation, gender identity and gender expression.

Benefits

A key indicator for LGBTQ attorneys that their firms are committed to their well-being is equal employee benefits packages. Providing inclusive benefits shows LGBTQ attorneys that their contributions to the firm are valued on the same basis as their non-LGBTQ colleagues. Benefits packages generally should include insurance coverage for same-sex spouses; insurance policies that cover medical care for HIV+ and transgender individuals; and commensurate family, medical and bereavement leave.

Community

For many LGBTQ attorneys, the most crucial element of a firm's LGBTQ-friendliness is its culture. Unfortunately, this element is also the most nebulous and difficult for firms to gauge and control. Firms

can lay the groundwork for an LGBTQ-inclusive culture by establishing, for example, LGBTQ-focused affinity groups, mentorship programs and professional development programming.

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