

WOMEN AND THE DELAWARE BAR AND BENCH: IT TAKES GENERATIONS

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Despite the pride Delaware rightly claims as “The First State¹,” it was the last state to admit women to the bar. That was nearly a century ago, in 1923. Today, more than one-third of all attorneys in Delaware are women². Yet, on our world-renowned business courts – the Supreme Court and the Court of Chancery – exactly one woman has served on either bench. She is the same woman. She was first appointed and confirmed nearly thirty years ago.

Notwithstanding Delaware’s late admittance of women attorneys and lack of women’s representation on our “corporate courts,”³ female attorneys have made significant strides serving on Delaware’s Superior Court, Family Court and Court of Common Pleas; and as practicing attorneys in the areas of criminal, corporate, family, gender equality, disability rights, environmental, employment, bankruptcy and health care law.

This article will explore the progress and impact women have made in Delaware on the bench, as members of the bar, in private practice and in elected office. It also will provide perspective of how Delaware courts compare with other states and the federal bench. Finally, we examine potential reasons why more women are not yet as well represented on our corporate law courts, in the practice of corporate law and in elected office.

I. WOMEN AS “OFFICIALS OF THE STATE”

In 1923, the Delaware General Assembly approved a constitutional change that, without using the word “woman”, removed gender as a barrier to service as “officials of the State.” Section 10 of Article XV, titled “Miscellaneous,” of the Delaware Constitution as amended in 1923 states: “No citizen of the State of Delaware shall be disqualified to hold and enjoy any office, or public trust, under the laws of this State, by reason of sex.”

So, 54 years after the first woman was admitted to any state Bar,⁴ two women attorneys joined the Delaware Bar in March 1923: Sybil Ursula Ward and Evangelyn Barsky.

Sybil Ursula Ward worked for her family’s law firm Ward & Gray, which has evolved into today’s Potter Anderson & Corroon. Significantly, she also was the first woman elected to the Wilmington City Council, serving from 1925 to 1929 as the City Council member for the 12th Ward. Ms. Ward was the first of just seven women attorneys to serve in an elected office in Delaware’s history

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1. On December 7, 1787, Delaware became the “first state” to ratify the United States Constitution.

2. According to the Delaware State Bar Association, in 2013 there are 4,978 people licensed to practice law in Delaware. Of them 1,759, or 34 percent, are women.

3. References herein to Delaware’s “corporate” or “business” courts refer to the Court of Chancery and State Supreme Court.

4. The first woman was appointed to the Iowa bar in 1869. C.V. Waite & Company, Chicago, CHICAGO LAW TIMES , 1887, at 76-77.

Evangelyn Barsky practiced law with her brother Victor and in 1935 was appointed Assistant City Solicitor in Wilmington. Regrettably, her tenure was short-lived as she was killed in an automobile accident on September 13, 1936.

In 1926, Annie Miles Saulsbury was the third woman admitted to the Delaware bar. Little is known about her career, and there is no record that she practiced law in Delaware.

In 1931, Marguerite Hopkins Bodziak was the fourth woman admitted to the State bar and became the first female state prosecutor. She was elected to the Democratic National Committee and served as Delaware's Democratic National Committeewoman until 1944.

In 1941, Roxanna Cannon Arsht became the fifth woman admitted to the Delaware Bar. She was born in Wilmington and attended Wilmington public schools. After earning an undergraduate degree from Goucher College in Baltimore, Maryland, with a major in chemistry and a minor in mathematics, she attended the University of Pennsylvania Law School, graduating in 1939. After passing the Delaware bar examination in 1941, she applied for numerous jobs in Wilmington but received no offers. She turned her attention to being a wife to Wilmington attorney Samuel Arsht, a mother to two daughters and a community leader.⁵

In 1962, Judge Arsht began working as a volunteer master in the Family Court. She received no salary for nine years. In 1971, at the age of 56, she made history when she was appointed by Gov. Russell W. Peterson to be the first female judge on the Family Court. The year of her appointment was significant because it was the year the Delaware General Assembly passed a law establishing a statewide Family Court system.⁶

After serving for 12 years, Judge Arsht retired from the bench in 1983. Despite the inauspicious start to her legal career, she blazed the trail for women attorneys to serve on the bench. Until her death in October 2003, she served as a mentor, role model and friend to other women who would aspire to follow in her footsteps.

Following Judge Arsht, ten women have served or currently serve on the Delaware Family Court Bench.

- Chief Judge Chandlee Johnson Kuhn (Chief Judge 2003 to present, first appointed to Family Court Bench in New Castle County in 1998)
- Judge Barbara A. Crowell (New Castle County, 2008 to present)
- Judge Aida Wasserstein (New Castle County, 2007 to present)
- Judge Mardi Pyott (Kent County, 2000 to present)
- Judge Arlene Minus Coppadge (New Castle County, 2003 to present)
- Judge Joelle Hitch (New Castle County, 2005 to present)
- Judge Paula T. Ryan (Sussex County, 2013 to present)
- Judge Peggy Ableman (New Castle County Family Court 1983 to 2000, then Superior Court 2000 to 2012)
- Judge Alison Tumas (New Castle County, 1991 to 2004)
- Judge Jean Crompton (New Castle County, July 1992 until her death on June 15, 1995)

5. In 1966 — twenty-five years after her admission, Judge Roxanna Arsht's daughter, Adrienne Arsht, was the 11th woman admitted to the Delaware bar.

6. Prior to 1971, the creation of Family Court was piecemeal. Its origins date back to 1911 with the creation of the Juvenile Court for the City of Wilmington. That Juvenile Court was expanded to New Castle County in 1923. In 1933, the Juvenile Court for Kent and Sussex Counties was created. In 1945, the Delaware General Assembly statutorily created the Family Court for New Castle County. Kent and Sussex Counties maintained a Juvenile Court System with jurisdiction over family matters until 1962, when the name of the Juvenile Court for Kent and Sussex Counties was changed to the Family Court for Kent and Sussex Counties. The unified, statewide Family Court was finally established in 1971.

Judge Arshnt lived to see her legacy enhanced in the next generation of women attorneys. Fully 32 years after the statewide Family Court was established and Judge Arshnt, as its first female member was appointed to the bench, Chandlee Johnson Kuhn was sworn in as Family Court's first female Chief Judge in 2003. Judge Kuhn, who was first appointed to the Family Court bench in 1998, is the only female among all of the senior presiding and chief judges on any of Delaware's courts in all three counties.

As we will examine in more detail herein, it is worth noting that Judge Kuhn's nomination and confirmation as Chief Judge defied an intricate balancing act of politics and geography among our three counties. It is a credit to Judge Kuhn's experience, relationships on both sides of the political aisle and support among members of the Delaware Bar that she succeeded in her nomination and confirmation as Chief Judge despite the fact that she is a Republican female attorney from New Castle County. Indeed, she was nominated by a Democratic Governor, Ruth Ann Minner, who was a native of Milford, which straddles Kent and Sussex Counties. Moreover, Judge Kuhn was confirmed by a Democratic-controlled State Senate, led by the Democratic Chairman of the Senate Executive Committee, Thurman Adams, the longest-serving member of the Sussex County delegation.

II. 1977: DELAWARE REFORMS ITS JUDICIAL SELECTION PROCESS

Since the first term of Governor Pete du Pont in 1977, Delaware governors have established by executive order a judicial nominating commission.⁷ This Commission consists of eleven members. The governor appoints ten members, which must include at least four attorneys and at least four nonlawyers. The president of the Delaware State Bar Association nominates, with the governor's consent, the eleventh member, who is then appointed by the governor. The governor designates the commission's chairperson. Commissioners serve staggered, three-year terms and may be reappointed by the governor. No more than six commissioners may be members of the same political party at the time of their appointment. Currently, three of the eleven members of the Delaware Judicial Nominating Commission are women; however, none of these women is an attorney.

The Commission nominates judges of the Supreme Court, the Superior Court, the Court of Chancery, the Family Court, and the Court of Common Pleas, and the chief magistrate of the Justice of the Peace Courts.⁸ When a judicial vacancy is created, interested Delaware attorneys submit a detailed application to the Commission. Members of the Commission review the applications and interview applicants and then submit the names of at least three candidates to the governor. The governor may decline to nominate someone from this list and may request a supplemental list of no fewer than three names. The governor must nominate a candidate from one of these lists. Sitting judges apply to the commission for reappointment. The commission must recommend their reappointment unless at least two thirds of the members of the commission object.

III. DELAWARE'S "CONSTITUTIONAL COURTS" SUPREME COURT, COURT OF CHANCERY, SUPERIOR COURT

Today, only seven of the 31 members of Delaware's three original constitutional courts are women. Of these seven female judges, six serve on the Superior Court.

7. Prior to 1977 there was no formal judicial selection process in Delaware. Beginning with the Delaware Constitution of 1792, judges of all levels of courts were appointed by the governor to life terms, except for justices of the peace who were appointed to seven-year terms. In 1831, judges of all levels of courts were appointed by the governor to life terms. In 1897, judges of all levels of courts were appointed by the governor with senate confirmation. Tenure was changed from "good behavior" to twelve-year terms.

8. A magistrate screening committee is used for associate magistrates of the Justice of the Peace Courts.

Although women attorneys currently comprise 34 percent of the Delaware Bar⁹, women comprise just 22 percent of judges on the Supreme Court, Court of Chancery and Superior Court. The disparity is even starker when you consider that all six women who serve on the Superior Court sit in New Castle County. There is not now – nor has there ever been – a single female judge from Kent or Sussex Counties on any of the state’s three constitutional courts with jurisdiction over major criminal and corporate matters.

In its 221-year history, Delaware’s Court of Chancery has had one female judicial member, Carolyn Berger, who served from 1984 to 1994. The generation of attorneys admitted to the Delaware Bar after 1994 and who practice in the Court of Chancery has never argued a case before a female chancellor or vice chancellor.

Even before her judicial service, Justice Berger was one of the pioneers among women in the Delaware corporate bar. She was an associate at Prickett, Ward, Burt & Sanders before joining Skadden, Arps, Slate, Meagher & Flom from 1979 to 1984. From 1976 to 1979, Justice Berger was a Deputy Attorney General with the Delaware Department of Justice. In 1994, Governor Tom Carper nominated Carolyn Berger to the Supreme Court to fill the vacancy created when Justice Andrew Moore was not reappointed. Justice Berger has since been re-confirmed by the Delaware State Senate to a second 12-year term. Her current term expires in July 2018.

At her investiture ceremony, former Chancellor William T. Allen, who served with Carolyn Berger on the Court of Chancery, described her as “all hard substance and no frill.”¹⁰ He spoke eloquently of her fortitude, character, courage, independence, respect for others and capability of “greatness” as a jurist. Justice Berger will mark her 20th year as a Supreme Court Justice in 2014.

As for Superior Court, 171 years after it was created by the Delaware Constitution of 1831, the first woman judge was appointed: Susan Del Pesco in 1988. It may have taken almost two centuries for that milestone, but in the 25 years since Judge Del Pesco’s appointment, eight other women have followed in her path. The current and former female judges for Superior Court are:

- Judge Jan R. Jurden (2001)
- Judge Mary M. Johnston (2003)
- Judge M. Jane Brady (2005)
- Judge Diane Clarke Streett (2010)
- Judge Vivian Rapposelli (2013)
- Judge Andrea L. Rocanelli (2013)
- Judge Peggy Ableman (2000-2012)¹¹
- Judge Haile Alford (1992-2004)

Further, it is noteworthy that Judge Halie Alford was the first African-American woman to serve on the Superior Court bench. She was appointed by Governor Mike Castle in 1992. Judge Vivian Rapposelli is the Superior Court’s first Hispanic member – male or female. She was appointed by Governor Jack Markell in 2013.

9. Delaware State Bar Association statistics, 2013 membership data.

10. Transcript, Investiture of Carolyn Berger as Associate Justice of the Supreme Court, July 22, 1994.

11. Judge Ableman was first appointed to the Family Court in 1983 and served on that court until 2000.

IV. SUPERIOR COURT AND THE ROLE OF WOMEN JUDGES “PROBLEM-SOLVING COURTS”

It did not take long for the women on the Superior Court bench to make an impact. Judge Susan Del Pesco initiated the court’s e-filing system for complex civil litigation matters. Under her leadership, Delaware was the first state in the nation to implement an electronic docketing and filing system for civil cases. That system, called the Complex Litigation Automated Docket or CLAD, went into effect in 1991. Thanks to this e-filing system, more than 1.8 million court documents were converted from paper filings to electronic filings.¹²

Thirteen years after Judge Del Pesco was the first woman to serve on the Superior Court bench, Judge Jan Jurden joined the court in 2001. In 2008, Judge Jurden led an initiative to establish the Mental Health Court, now one of Superior Court’s so-called “Problem-Solving Courts¹³.” Based on Delaware’s nationally-acclaimed Drug Court, the model brings together representatives from the Department of Justice, the Public Defender’s Office and the Probation and Parole Office and Treatment Care Specialists. Judge Jurden also initiated a Mental Health Court after a defendant appeared on the weekly court calendar for violating his probation for the eighth time due to mental health issues. As Judge Jurden describes it, the pattern was always the same cycle: the defendant would stop taking his medications, get into trouble, get arrested, get convicted, get placed on probation, violate that probation, and end up in prison. Today, the Mental Health Court ensures regular review through a bi-weekly calendar of cases. Defendants understand their requirements and status conferences are held to keep defendants on track toward treatment, employment, housing, meals and clothing.

The same model is used in the newly-created Veterans’ Court, which was initiated by Judge William Witham in Kent County and expanded to New Castle County with Judge Jurden presiding. Both Judge Witham and Judge Jurden are military veterans.

V. COURT OF COMMON PLEAS WOMEN JUDGES IN ALL THREE COUNTIES

The Court of Common Pleas was originated in 1917 with the creation of “The Court of Common Pleas for New Castle County.” CCP, as it is commonly called, was funded and operated by county governments until 1969. In 1973, the three courts were merged into one statewide Court of Common Pleas¹⁴. A quarter century later, in 1999, the first woman was appointed as a judge to the CCP: Rosemary Betts Beauregard in Sussex County. Ten years later, in 2009, two more women were appointed as judges to the Court of Common Pleas: Andrea Rocanelli in New Castle County and Anne Hartnett Reigle in Kent County. Thus, CCP is the only court in Delaware that, from 2009 to July 2013, had a woman judge who is a member of the Delaware Bar serving on the bench in each of the State’s three counties. Currently, the Court, which

12. In 2003, the Court transitioned its e-filing processes to LexisNexis™ File & Serve; the existing CLAD files were imported into LexisNexis™. In 2007, the Court expanded the use of e-filing in Superior Court to all major categories of civil cases; again Delaware was the first state in the nation to do so.

13. Problem-solving courts accommodate offenders with specific needs and problems that were not or could not be adequately addressed in traditional courts. Problem-solving courts seek to promote outcomes that will benefit not only the offender, but the victim and society as well. Problem-solving courts were developed nationally as an innovative response to deal with offenders’ problems, including drug abuse, mental illness, and domestic violence.

14. The New Castle County CCP was established in 1917; Kent County in 1931; Sussex County in 1953.

consists of nine judges, is one of the busiest courts in the State of Delaware, exercising jurisdiction over: misdemeanor criminal offenses; traffic violations; civil matters where the amount in controversy does not exceed \$50,000; preliminary hearings in felony matters; and appellate jurisdiction for Justice of the Peace Court and motor vehicle hearing appeals.

With Judge Rocanelli's elevation to the Superior Court in July 2013, just two of the CCP judges currently are women. As more women serve on the CCP bench, gaining critical experience in criminal and civil cases, this may prove to be an opportunity for women judges to advance to the Superior Court in Kent and Sussex Counties.

VI. JUSTICE OF THE PEACE COURTS: A NOTABLE "FIRST"

There are 60 Justice of the Peace (JP) judges, with jurisdiction over civil cases in which the amount in controversy does not exceed \$15,000, certain misdemeanors and most motor vehicle cases, excluding felonies. By statute, these judges are not required to be attorneys. In total, six of the 26 women on the JP Court are lawyers, while just two of the 34 men on the JP Court are lawyers.

One other significant point is that the JP Court was the first statewide court in Delaware to be led by a female attorney. Patricia Griffin served as Chief Magistrate of the JP Courts from 1993 to 2005, before moving on to serve in her current position as State Court Administrator for all Delaware Courts.

VII. WOMEN JUDGES SERVING ON OTHER STATE COURTS VS. DELAWARE

The percentage of women serving on Delaware courts is consistent with the national average of female state court judges. According to national statistics by the National Center for State Courts (NCSC), 26 percent of all state judges are women, while 28 percent of the judges on Delaware courts are women. Delaware's percentage is slightly skewed, however, because as noted earlier there are only seven women serving on Delaware's constitutional courts. The remaining women judges serve on the Family Court and Court of Common Pleas.

In a record number of *twenty* states across this country, a woman now serves as the Chief Justice of the state supreme court.¹⁵ Southern states in particular show strong gains in gender diversity. Four southern states – Florida, Georgia, Kentucky and South Carolina – have as high or higher percentages of women on their state courts as do California, Connecticut, Illinois, Michigan and New Jersey. Nine of the 13 state supreme courts in the South have multiple women as justices, as does the District of Columbia. Five states have three or more women justices. In Texas five of the nine judges on Texas' highest criminal court – the Texas Court of Criminal Appeals – are women. Tennessee, Michigan and Wisconsin have a majority of women on their supreme courts. Two states have no women as justices—Idaho and Indiana.

Importantly, most states with a female chief justice have some form of an *elected* system for judicial candidates, rather than Delaware's *appointed* system. For example, in Florida and Tennessee, justices were appointed by the governor, ran in retention elections, and then were elected chief by their colleagues. In Louisiana, the chief justice was elected by a district in the state and then promoted to chief due to seniority on the supreme court. The Alabama chief justice and Texas Court of Criminal Appeals presiding judge were chosen directly by the citizens in statewide partisan elections. North Carolina's chief justice was initially elected to the state supreme court and was then appointed chief justice by the governor. The South Carolina legislature appoints its chief justice.

15. National Center for State Courts <http://www.ncsc.org/>.

Nationwide, 39 states elect judges in some form – either partisan elections, non-partisan elections or to continue after a judicial appointment. Delaware is among the remaining 13 states that appoints its judges. As noted above, in Delaware attorneys apply to a judicial nominating commission comprised of members of the bar as well as non-lawyers appointed by the Governor. The judicial nominating commission recommends the top candidates to the Governor for his or her review and nomination. The governor's judicial nominees must then be confirmed by the Delaware State Senate.

In Delaware, there currently are 16 female judges spanning the Supreme Court, Superior Court, Family Court and Court of Common Pleas. With 58 judicial positions on these four Delaware courts, including the Chief Magistrate of the Justice of the Peace Court, the number of women judges tracks national statistics at least for our most northern and most populous county, New Castle County. Significantly, there has never been a single female judge from Kent or Sussex County on the Supreme Court, Court of Chancery or Superior Court.

One other unique feature of Delaware's judicial system is its commissioners, whose jurisdiction includes the power to accept pleas, appoint counsel for indigent defendants and determine pre-trial matters.¹⁶ This has proven to be another opportunity for women to serve in our judicial system. In Delaware, the Governor nominates commissioners to serve on the Superior Court, Family Court and Court of Common Pleas for a term of six years and the nominations are subject to State Senate confirmation. Currently in Superior Court, three of the five commissioners are women, including notably, a female commissioner in Kent County and a female commissioner in Sussex County. In Family Court, 11 of its 16 commissioners are women, including representation from all three counties. On CCP, both of its commissioners are women, one for New Castle County and one who serves both Kent and Sussex Counties.

One final note is that Delaware also now has two Masters in the Court of Chancery. Masters hear and adjudicate cases assigned to them by the Court. They also play an important administrative role in ensuring that the Court handles its case load in a timely manner, particularly in the sensitive areas of trusts and estates and guardianships. Masters are appointed by the Chancellor and are *not* subject to Senate confirmation. For the first time both Masters in the Court of Chancery are female attorneys, one serving New Castle County and one for both Kent and Sussex Counties.

VIII. THE FEDERAL BENCH: TWO IN 224 YEARS

While Delaware's first female state court judge was appointed in 1971, a woman did not reach the Delaware federal bench until 1985.

The U.S. District Court for the District of Delaware was created in 1789 by the First Judiciary Act. In the 224 years since, there have been 25 federal district court judges in Delaware. Only two of these 25 judges have been women: Jane Richards Roth, who served from 1985 to 1991, before her elevation to the U.S. Third Circuit Court of Appeals, and Sue Robinson, who was nominated and confirmed in 1991 to fill the vacancy created by Judge Roth's promotion to the Court of Appeals. Judge Robinson continues to serve on the District Court today. In the 22 years since Judge Robinson joined the federal bench, five judges have been appointed to the Delaware District Court – all men. Delaware's U.S. District Court does have three Magistrates, two of whom are women. Magistrate judges generally oversee first appearances of criminal defendants, set bail, mediate cases and conduct other administrative duties.

The trailblazer on the federal bench was Jane Richards Roth. In 1985, four years after Sandra Day O'Connor became the first woman to sit on the U.S. Supreme Court, Jane Roth was nominated to the U.S. District Court for the District of Delaware by President Ronald Reagan. In 1991, she was nominated by President George H.W. Bush and confirmed to the U.S. Third Circuit Court of Appeals. After 21 years on the bench, Judge Roth elected to take senior status

16. 10 *Del. C.* § 512.

in May, 2006. With Judge Roth's retirement, the two current judges from Delaware who sit on the U.S. Third Circuit Court of Appeals are men. In fact, today women judges comprise just 16 percent of the Third Circuit Court of Appeals, which includes the states of Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands. That 16 percent is well below the national average of 32 percent of women judges on the U.S. Courts of Appeal.¹⁷

Moreover, nationwide about 30% of all Federal District Court judges are women.¹⁸ In Delaware just one of four of its current District Court judges is a woman, Judge Robinson. She joined the court in 1991, after serving as a magistrate judge for that court and as an assistant U.S. Attorney in Delaware for five years. Judge Robinson served as the Chief Judge of the court from 2000-2007. It is significant to note that even though all of Delaware's current District Court judges once served in the U.S. Attorney's Office, there has never been a female U.S. Attorney in Delaware.

If currently pending judicial nominees are confirmed, the number of women in the federal judiciary would increase. Of President Obama's 251 judicial nominees to date (including his nominees to the Supreme Court), 109 are women.¹⁹ Thirty-nine of these nominees have been women of color (20 African-American women, 10 Hispanic women, seven Asian-American women, one woman of Hispanic and Asian descent, and one woman of African-American and Hispanic descent).

According to the Alliance for Justice, about 41 percent of President Obama's confirmed nominees have been women. This has increased the number of women on the First, Second, Third, Fourth, Sixth, Eighth, Ninth, Eleventh and Federal Circuits as well as on a number of district courts. Nine judges have been confirmed as the first woman judge in their district; six more as the first woman circuit court judge in their state.

The number of women of color on the federal bench nationally has increased dramatically as well. The number of Asian-American women judges has more than tripled from just three to now 10, and includes the first Asian-American circuit court judge, Jacqueline Hong-Ngoc Nguyen who was confirmed in May, 2012. Seven states have their first African-American female judges, and three states have their first Hispanic female judge.

While examining the history of women serving on the federal bench in Delaware, it is important to include the congressionally-created U.S. Bankruptcy Court for the District of Delaware. Again, women judges, one in particular, have played a major role on that court. From 1974 to 1999, Judge Helen Balick presided over the Delaware Bankruptcy Court, which grew exponentially in national stature and importance during her tenure. Several national publications, including *Businessweek*, referred to her as the most "powerful woman judge in America"²⁰. She successfully handled numerous high-profile cases, including the bankruptcies of Continental, TWA, and Columbia Gas Transmission. While bankruptcy courts in New York handled similar high-profile cases, the difference was that New York had five bankruptcy court judges, Delaware had just Judge Helen Balick.

Considering her national stature, perhaps Judge Balick's lasting distinction among the Delaware Bar is the fact she was the first and only woman attorney or judge in Delaware who was admitted to law school without ever attending college. She earned her degree from the Dickinson School of Law in 1966 and was the thirteenth woman admitted to the Delaware Bar in 1969.

17. National Women's Law Center, based on data from the biographical directory of judges, Federal Judicial Center, U.S. Courts <http://www.nwlc.org/>

18. National Women's Law Center, based on data from the biographical directory of judges, Federal Judicial Center, U.S. Courts <http://www.nwlc.org/>

19. Alliance for Justice <http://www.afj.org/>

20. BUSINESSWEEK, NOVEMBER 29, 1992, *BAILIWICK IS A BACKWATER NO MORE*, HELEN BALICK.

On September 9, 1998, Judge Mary Walrath was appointed United States Bankruptcy Judge for the District of Delaware. So it took 24 years after the first female Bankruptcy Court Judge was appointed in Delaware for a second woman to serve on this federal bench. Judge Walrath is a member of the Pennsylvania Bar, however, not the Delaware Bar. Judge Walrath served as Chief Bankruptcy Judge from September 9, 2003, until June 30, 2008. She is a founding member and co-president of the Delaware Bankruptcy American Inn of Court. There currently are six judges on Delaware's U.S. Bankruptcy Court. Judge Walrath remains the only woman.

Considering that one-third of the U.S. Supreme Court now consists of women justices, Delaware's District Court and Third Circuit Court of Appeal lag behind even this most modest of national standards. Only one woman currently serves on the District Court of Delaware, no female judge from Delaware serves on the Third Circuit Court of Appeals and not a single minority woman from Delaware has ever served on either court.

IX. WOMEN IN THE DELAWARE BAR: PROGRESS, SLOW BUT SURE

Moving on from a review of Delaware women judges on the bench to women attorneys in the Bar, a review of Court of Chancery and Supreme Court opinions from the early 1980s lists just a handful of women attorneys who argued cases before these courts – and all appeared as associates or government attorneys –not as partners of a law firm. The corporate takeover era that began in the mid-to-late 1980s and continued through the 1990s, provided more women attorneys the opportunity to argue cases with their male colleagues in these two corporate courts. While there were fewer than 10 women attorneys practicing corporate law in the early 1980s, their numbers are increasing. Today, an estimated 70-80 women partners and associates in the Delaware Bar have a corporate law practice, which is about 1.6 percent of all Delaware attorneys.

The rigors of a corporate law practice – with court filing deadlines, emergency hearings and expedited litigation deadlines that require attorneys to work around the clock for days, even weeks and months on end – is not family friendly for attorneys, regardless of gender. With family dynamics, and work-life issues, the reality and requirements of a corporate practice pull many women out of this area of the law. For women attorneys who maintain a corporate law practice, surveys by the American Bar Association, the National Association of Women Lawyers (NAWL) and interviews with seasoned Delaware female corporate attorneys indicate that women attorneys must confront male-dominated business clients who second-guess their advice, seek a male partner's opinion instead, or openly prefer a male litigator to take the lead role. Furthermore, after female associates with a corporate law practice attain the rank of partner, they confront the challenges of business development required to build their own book of business for the firm and attain executive management leadership positions.

Nationwide, the number of women partners at law firms has held steady at 15% since 2006, despite the fact that about half of all law school graduates are women.²¹ The statistics show that women leave law firms disproportionately more than men, at every stage of practice; staff attorneys are predominantly female; and, the majority of attorneys who hold the title "of counsel" are off partnership track.²²

If Delaware is to increase the number of female applicants to judgeships and the number of women judges, it is imperative to attempt to level the gender parity playing field within law firms because that is where most qualified judicial applicants gain the needed experience. If Delaware has fewer female partners, especially at the equity partner level,

21. National Association of Women Lawyers Survey 2012 <http://www.nawl.org/p/cm/ld/fid=82#surveys>

22. *Id.*

inevitably there will be fewer qualified female judicial applicants – especially for Delaware’s major corporate courts – either because women attorneys left firm practice too early or because they are not perceived as “qualified” if they are not equity partners and/or do not serve in leadership positions. Thus, if women attorneys lag behind at the firm level, it will cascade to a lack of opportunities for service on the bench.

Beyond corporate law, examining the role and number of women in other areas of the law shows women have made their mark – in New Castle, Kent and Sussex Counties. For example, in 1979, when Kathleen Jennings joined the Delaware Attorney General’s office, she was one of only three women prosecutors. Today, fully half of the 203 deputy attorneys general in the Delaware Department of Justice are women. And Kathleen Jennings is now the department’s chief criminal deputy attorney general. In areas ranging from criminal law to environmental law, disability rights, gender equity and health care law, women attorneys in Delaware have been a leading voice for change. Before 1976, the number of women admitted to the Delaware Bar could be counted in single digits. Starting in 1976, the number of women admitted has been counted as a “percentage” of the total number of admittees. From 14 percent in 1976, today 34 percent of Delaware attorneys are women. In fact, since 1987 when Susan Del Pesco became the first woman to serve as President of the Delaware Bar, five other female attorneys have been elected to serve in this prestigious position. Moreover, five of the six women Presidents of the Delaware State Bar Association have been partners in their respective law firms.²³

In Delaware, there are no firm statistics on the number of female partners, but a cursory analysis of the major Delaware law firms show women partners consist of at least 10 to 12 percent of partners.²⁴ There is no doubt that woman attorneys have come a long way since 1960 when Brereton Sturtevant was named the first female partner of the firm formerly known as Connelly Bove Lodge and Hutz, LLP. But our numbers still lag significantly and stubbornly behind our male counterparts.

While more women are gradually becoming partners and being selected to law firm management positions, pay inequity between male and female partners remains a persistent problem. Numerous national studies show that origination of clients, allocating credit, and the disparity caused by more male lateral hires at higher salaries than women are some of the persistent reasons causing this continued gender pay inequity.

In August 2012, American Bar Association (ABA) President Laurel Bellows appointed a blue-ribbon Task Force on Gender Equity to recommend solutions for eliminating gender bias in the legal profession, with a principal focus on the disparity in compensation between male and female partners. The Task Force report was issued earlier this year. It found that for a variety of reasons – chiefly among them the allocation of credit for sharing clients and equity versus non-equity partners – women partners still earn significantly less than their male counterparts.²⁵

For example, a 2013 analysis by the ABA of the legal market reported that equity partners now average about 2.5 times the total compensation of their non-equity partners. During the past year, the compensation of equity partners jumped some 11 percent, while the compensation of non-equity partners was essentially flat. The ABA report on “Closing the Gap” documents that women make up a majority of non-equity partners. The ABA Report concludes that the slow progress for women in attaining equity partner parity is as much a compensation issue as it is a leadership concern.²⁶

23. One of the female presidents of the DSBA was an Assistant U.S. Attorney.

24. The cursory analysis involved a firm-by-firm review by the author, which resulted in this conclusion.

25. Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation, presented by the ABA’s Gender Equity Task Force and the Commission on Women in the Profession.

26. *Id.*

A survey released in October 2012 by the National Association of Women Lawyers (NAWL) confirmed this continued gender inequality that begins at the associate level and widens with experience and stature. At the associate level, for example, the NAWL survey reported that women constitute nearly 45 percent of the associate pool, yet they receive only 40 percent of the bonuses.²⁷ And although the data showed the gap narrowing for women income partners, the gap is still large at the equity partner level.²⁸

The NAWL 2012 report also concludes that:

- Average compensation for male partners in 2011 was about 30 percent higher than women partners.
- In 2011, women equity partners were significantly LESS likely than their male peers to receive credit for a \$500,000 book of business.
- Women equity partners received only 75 percent of the amount credited to their male colleagues for business generation.²⁹

The ABA Report on Closing the Gap to achieve gender pay equity included 12 recommendations which all firms, including those in Delaware, might consider. The recommendations include:

- Build transparency into the compensation process
- Include a critical mass of diverse members on the Compensation Committee
- Develop systems to promote fair and accurate allocation of billing and origination credit
- When making presentations to potential new clients, require diversity in “pitch teams” and related business development efforts
- Implement formal client succession protocols
- Measure and report results
- Develop a process to resolve allocation disputes promptly and equitably
- Implement systems to ensure equitable compensation for partners on a reduced-hours schedule
- Maximize the effectiveness of Women’s Initiatives Groups within firms

There are some encouraging developments that demonstrate how women attorneys in Delaware are determined to secure, sustain and grow their ranks. Women practitioners in the Court of Chancery have formed their own networking group to help build their practices, refer cases to one another, share experiences and ultimately demonstrate that women can have a thriving corporate law practice, while maintaining a semblance of balance with a stable family life and community involvement. This new Court of Chancery women’s attorney group was founded in the last year, modeled after a similar group of female bankruptcy attorneys and the umbrella group of the Women and the Law Section of the Delaware State Bar Association.

The Women and the Law Section was founded in 1978 and was originally called the “Women’s Rights Committee.” It was founded by a group of newly-admitted women attorneys, including Mimi Boudart and now Judge Aida Wasserstein, who recognized that for women to succeed in this male-dominated profession, they needed to support one another. In 1979, just one year after its creation, this new women’s committee submitted an *amicus curiae* brief to the

27. The National Association of Women Lawyers, *Report of the Seventh Annual National Survey on Retention and Promotion of Women in Law Firms* 6 (2012).

28. *Id.*

29. *Id.*

Delaware Supreme Court in support of the constitutionality of the Equal Rights Amendment. Throughout the 1980s, this group became active in supporting legislation impacting women on the state and local levels. During the 1990s, the Women and the Law Section led the effort on the Gender Fairness Task Force chaired by Judge Susan Del Pesco; created model policies to motivate law firms to establish alternative work schedules and promote more women to partner; led workshops to encourage more women to seek appointment to the bench; and encouraged women attorneys to apply for openings on state boards and commissions to achieve more gender balance among the hundreds of members appointed by the Governor to serve on these state boards and commissions.

The Women and the Law Section also has initiated numerous statewide projects, including the Governor's Awards for Excellence in Early Care and Education; the Roxanna C. Arsht Scholarship to help new women attorneys pursue careers in the public sector; and initiatives to help female juvenile delinquents, domestic violence victims and female prisoners climb out of the cycle of crime and poverty. The Women and the Law Section remains a vibrant part of the Delaware State Bar Association, 35 years after its initial founding by a group of women, who admit their first order of business was to "throw a party." That spirit of camaraderie is stronger than ever as more women join the Delaware Bar.

X. WOMEN ATTORNEYS AS DELAWARE ELECTED OFFICIALS

In addition to reviewing the rank and role of women on the Delaware bench, bar, among law firms and government offices, we should consider the impact of women serving as elected officials. No woman – regardless of whether she is an attorney by profession – has ever been elected to serve as one of Delaware's two United States Senators or lone member of the U.S. House of Representatives. Although not an attorney, we have elected one female governor and lieutenant governor – Ruth Ann Minner. Since women were first admitted to the Delaware Bar 90 years ago, seven female attorneys have been elected to office. Their service ranges from local government to statewide office, from so-called county "row" offices to the state's chief law enforcement officer and leader of the powerful state legislative budget-writing committee.

- Sybil Ward – Wilmington City Council, Republican (1925 to 1929)
- Mimi Boudart – New Castle County Council, Democrat (1983 to 1987)
- M. Jane Brady – Delaware Attorney General, Republican (1994 to 2005). Jane Brady was confirmed as a Superior Court Judge in 2005.
- Paulette Sullivan Moore – New Castle County Recorder of Deeds, Democrat (1991-1994). Paulette Sullivan Moore was the first African-American woman admitted to the Delaware Bar in 1977.
- Donna Lee Williams - Delaware Insurance Commissioner, Republican (1993 to 2005)
- Diane Clark Streett – Register of Wills for New Castle County, Democrat (2001 to 2010) In 2010, Diane Clark Streett was confirmed as a Superior Court Judge for New Castle County
- Melanie George Smith – State House of Representatives, Democrat, first elected in 2002. Chair of the Joint Finance Committee. She maintains an active legal practice at Richards Layton & Finger.

Although not elected to office, it is important to note the accomplishments of two other women attorneys: Battle Robinson and Rebecca Walker. Battle Robinson, who was the first woman to practice law in Sussex County in 1971, was also the first female candidate for Lieutenant Governor. She ran for office on the Republican ticket with gubernatorial candidate Mike Castle in 1984.³⁰ In 1985, Battle Robinson went on to become a Family Court Judge in Sussex County,

30. Delaware elects its Lt. Governor and Governor separately. In 1984, the Democratic Lt. Governor candidate, S.B. Woo was elected to serve with Republican Governor Mike Castle.

serving a 12-year term. State Representative Rebecca Walker (Democrat-Townsend) was elected in 2010. She is a member of the Pennsylvania Bar, in addition to being a registered nurse.

Currently, three members of the 62-member Delaware General assembly are attorneys, but only one is a female member of the Delaware bar, Melanie George Smith (Democrat-Bear).³¹ In 2002, Representative Melanie George Smith was the first Delaware woman attorney ever elected to the State House of Representatives. She now serves as the co-chair of the powerful Joint Finance Committee, which has jurisdiction over all budget matters for the General Assembly.

It is worth noting that the overall percentage of women in the Delaware General Assembly – nearly 26 percent – is higher than the national average of 24.2 percent. And women legislators in Delaware hold at least one leadership position in both the State House of Representatives and the State Senate.

- State Senator Patricia Blevins - President Pro Tempore – the highest ranking member of the State Senate
- State Senator Margaret Rose Henry – Majority Whip
- State Representative Valerie Longhurst – House Majority Leader
- State Representative Deborah Hudson – House Minority Whip

In fact, Delaware ranks eighth in the nation in the number of women legislators who chair committees. Currently, a female legislator chairs both the State House and State Senate Judiciary Committees, Representative Rebecca Walker and Senator Patricia Blevins, respectively. Moreover, for the first time, a woman legislator – Senator Blevins – chairs the powerful Senate Executive Committee, with jurisdiction over all judicial nominations.

Therefore, while it has taken generations, women are making steady, significant strides among Delaware's elected leaders, among law firm partners, government attorneys and within the Delaware Bar.

XI. EXAMINING THE REASONS FOR LACK OF PROGRESS ON THE CONSTITUTIONAL COURTS

Over the past three decades, an increasing number of women have joined the legal profession. Since 1992, women's representation in law school classes has approached 50 percent.³² Yet, the number of women judges on the federal bench and on Delaware's constitutional courts remains stubbornly low and below the national average.

As noted earlier, Delaware is one of 13 states that appoints, rather than elects, its judges. Delaware's Judicial Nominating Commission, gubernatorial nomination process, and Senate confirmation process, have served Delaware well. But this system, along with the state constitutional requirement that each court maintain a balance of Democrats and Republicans, plus the geographic representation among the Delaware's three counties inherent in the General Assembly's consideration of state court judges may, in fact, contribute to the lack of women on Delaware's two renowned corporate law courts.

As a society and as members of the Delaware legal community, it is incumbent upon us to explore why more women either do not apply for, or are not nominated to, state judgeships. For federal judgeships, there is no formal judicial nominating commission. Instead, Delaware's two U.S. Senators have an opportunity to recommend potential judicial

31. The others are State Representative Rebecca Walker and State Senator Bryan Townsend (Democrat - Newark).

32. American Bar Association, "First Year and Total J.D. Enrollment by Gender, Section of Legal Education and Admissions to the Bar", 2013.

candidates to the President. Such recommendations may carry more weight if the Senator and President are of the same party, since the President is not bound in any way by a senator's recommended nominee.

For all that is good about Delaware's judicial nominating process, it also carries the risk that qualified women either are not applying for or are boxed out of being nominated for judgeships on Delaware's renown Supreme Court and Court of Chancery because of the state's rigid political and geographic requirements. To be clear, this is not to suggest women are being intentionally disregarded for such judgeships. It is clear, however, that from the very beginning of our judicial history, gender disparities have been pervasive. That is why enhanced vigilance is needed to secure a more balanced representation of women from each of the State's three counties on all Delaware courts.

The purpose of highlighting the gender disparities within our judicial selection system is not to advocate for an elected system. Rather, by acknowledging the lack of women on Delaware's Court of Chancery and Supreme Court, perhaps members of the judicial nominating commission, the governor and state senators who ultimately confirm state court judges will recognize in the future that a woman candidate may in fact be the most qualified person for the job — even if her party affiliation does not match that of the Governor. And, even if her county of residence does not square with the traditional rigid geographic considerations which implicitly mandate that Delaware's corporate courts have at least one judge who resides specifically in New Castle, Kent and Sussex Counties.

Ninety years after women were first authorized to serve as "Officials of the State," our ranks among the federal and state judiciary still do not reflect our potential. Nor is the number of women judges in Delaware representative of our status within the Bar. It is of critical importance to increase the representation of women on the federal and state court bench. A goal to increase the number of women represented on Delaware's three original constitutional courts in each county is not meant to criticize the professionalism, expertise, dedication and courage of the many male judges who have and who currently serve on these courts. It is, rather, a simple recognition that when women are more fairly represented, these courts reflect our diverse population, diversity of experience, perspective and perception.

XII. CONCLUSION

By starting a dialogue about the need to continue to improve the representation of women attorneys as judges, perhaps by the 100th anniversary of women admitted to the Delaware Bar in the year 2023, more women attorneys will apply for judgeships in all three counties and more will be selected to serve on Delaware's corporate courts in particular. With Delaware Supreme Court Chief Justice Myron T. Steele's announcement that he will retire three years before his term expires, effective November 30, 2013, this presented the most immediate opportunity. It was an opportunity lost, however, when Delaware Governor Jack Markell nominated, and the State Senate confirmed the Honorable Leo Strine to the position, despite reports in the Wall Street Journal and Delaware News Journal that the other two jurists who applied and were considered for the position were sitting Delaware female judges.

In addition, within the next three years, the terms of two other Delaware Supreme Court justices will expire: Justice Jack Jacobs (June 4, 2015), and Justice Henry duPont Ridgley (July 22, 2016). Considering that these men have had long and distinguished careers on either the Court of Chancery or Superior Court before their confirmation to the Supreme Court, there may well be an opportunity for Governor Markell, to appoint at two new members of the Supreme Court before his second, four-year term ends in January, 2017.³³

33. The terms of the other two Supreme Court justices expire in 2018 (Justice Carolyn Berger) and 2023 (Justice Randy Holland).

On the Court of Chancery, there exists a vacancy to fill the seat of Chancellor or Vice Chancellor if a current member of that Court is elevated to the Chancellor position. In addition, Vice Chancellor Donald Parson's term expires in October, 2015. The remaining terms expire from 2021 to 2024.

The reality of maintaining politically and geographically-balanced courts in Delaware means that within the next three years, the Court of Chancery *may* have an opening to be filled by a Republican corporate attorney in New Castle County. On the Supreme Court, there currently are three members from New Castle County, two Democrats and one Republican; one member from Kent County, who is a Democrat; and, one member from Sussex County, who is a registered Republican. The purpose of this discussion is not to portray the future potential court vacancies in strictly political terms. Rather, it is to recognize the opportunity at hand: to afford women the chance to finally make their mark on Delaware's two major corporate law courts, nearly a century after being granted the opportunity to serve as "Officials of the State."³⁴

34. A sincere thank you to the many distinguished members of the Delaware Bench and Bar who provided background and context for this article, including: The Hons. Randy Holland, William Chandler, Jan Jurden, Susan Del Pesco, Chandlee Johnson Kuhn; and, Betsy McGeever, Ann Foster, Karen Valihura, Mimi Boudart, Melanie George Smith, Patricia Griffin, Patricia Enerio, Patricia Unhlenbrook, Elizabeth Wilburn Joyce, Kim Ayzavian, Shannon German and DSBA Executive Director Rina Marks and Rebecca Baird.

