

FAWL CHRONICLES

GENDER BIAS IN THE JUDICIAL SELECTION PROCESS THEN AND NOW



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FAWL made a commitment more than four decades ago to put women on the bench. The organization's efforts are documented in *A History of Florida Association for Women Lawyers 1951-2002*, which was published by the late **Mattie Belle Davis** (President 1957-58) in 2002.

Judge Davis was, in fact, the first beneficiary of FAWL's call to action. Although FAWL had adopted a resolution to commend President **Mildred Akerman** (1958-59) on her election on November 4, 1958, as Judge of Small Claims of Broward County, and official congratulations were extended to **Josephine Howard Stafford** (President 1964-65) on her appointment to the Municipal Court of Tampa in 1958, FAWL actually participated in Judge Davis' appointment. **Michael Isenberg**, Chair of the Courts Committee of the Dade County Bar Association, invited FAWL to recommend three women attorneys to be appointed as the 13th judge of the newly expanded Metropolitan Court of Dade County. FAWL member **Rhea Grossman** of Miami Beach, who was first appointed to be a Judge of Industrial Claims, was appointed by Governor **Claude Kirk** in 1970 to the Circuit Court for the 11th Judicial Circuit, and then, as the result of temporary assignments, she became the first woman judge to sit on a District Court of Appeal in 1971 and on the Florida Supreme Court in 1972. Other women were elected or appointed to various judgeships. **Elizabeth Kovachevich** was elected in 1972 to a six-year term as a Circuit Court Judge in the 6th Judicial Circuit. (She was later appointed to the United States District Court for the Middle District of Florida in 1982.) **Evelyn Gobbie** was appointed as Municipal Judge of Longboat Key and

she was elected in 1972 to the Circuit Court for the 12th Judicial Circuit. **Lenore Carrero Nesbitt** was appointed to the Dade County Circuit Court by the Governor's Merit Selection Committee under Governor **Reubin Askew** in 1975. (In 1983, President **Ronald Reagan** appointed Judge Nesbitt to be the first woman on the United States District Court for the Southern District of Florida.) Judge **Susan Harrell Black** was appointed by President **Jimmy Carter** to the United States District Court for the Middle District of Florida in 1979. (Twenty-eight of the 32 women judges in federal courts in December 1979 had been appointed by President Carter.) **Maria Korvick** was elevated from County to Circuit Court by Governor **Bob Graham** in 1981, and she became the first Hispanic woman to serve as a Circuit Court Judge in Florida. Judge **Natalie Baskin** was appointed to the Third District Court of Appeal in 1982, and **Gisela Cardonne-Dienstag** was sworn in as a County Court Judge in Dade County the same year. Hillsborough County had its first woman judge, **Susan C. Bucklew**, appointed by Governor Graham in 1982. (She was elevated from the County Court to the Circuit Court in 1986 and then appointed to the federal bench in 1993.) **Helen Hansel** was invested to the 6th Judicial Circuit in St. Petersburg in 1983. Thirteen years after Judge Grossman had been temporarily appointed to the Florida Supreme Court, **Rosemary Barkett** was elevated from the Fourth District Court of Appeal by Governor Graham, and she became the first woman Florida Supreme Court Justice in 1985.

The successes of the late 1970s and 1980s are due in some part to FAWL creating a procedure to endorse qualified judicial candidates in its Bylaws. A Judicial Endorsement Committee was formed to interview candidates and recommend endorsements. FAWL had a letter-writing campaign in 1979 to the federal Judicial Nominating Commissions (JNCs) and Senators for those who obtained FAWL's endorsement.

While there were successes for women, there were also many disappointments and an increasing awareness of gender bias in the judicial selection process. The Volusia County FAWL Chapter wrote to Governor Graham in 1981 to report that the local JNC had never recommended a woman, although women had applied. Following a panel

discussion on sexual bias in the courtroom at its annual meeting on June 28, 1985, FAWL committed itself to further study and work to eliminate gender bias in Florida. FAWL President **Gill Freeman** (1984-85) and Dade County FAWL President **Sandy Karlan**, with the assistance of Judge Davis, who introduced them to the justices while at Justice Barkett's investiture, were ultimately successful in persuading Florida Supreme Court Chief Justice **Parker Lee McDonald** to form a Gender Bias Steering Committee, chaired by **Sandy Karlan**, which laid the groundwork for the formation of the Gender Bias Study Commission in June 1987, chaired by Justice **Gerald Kogan**, with **Gill Freeman** as Vice Chair.

The Gender Bias Study Commission, after gathering evidence and holding public hearings around the state, issued its report in

1990. In regard to gender bias in the legal profession, the commission found that "[b]ias against women lawyers—sometimes subtle, sometimes flagrant—is evident everywhere" and that women were not "represented proportionately in law firms, partnerships, judgeships or tenured faculty positions." Disproportionate numbers of "women work in government and legal services, [yet] even within these specialties, they are not found in policy-making positions." Gender Bias Study Comm'n, *Report of The Supreme Court of Florida*, p. 196 (1990) (footnote omitted). Only ten

percent of the state's judges were women, and 50 percent of those women were concentrated in Dade, Broward and Palm Beach Counties. Another 25 percent were in the Tampa Bay area. But even within those urban areas, women accounted for only 13 percent of the circuit court judiciary. Women were slightly better represented in county courts, but South Florida still accounted for 50 percent of the total. *Id.* at 211. Some areas of the state had virtually no female representation on the bench. Of the 16 northwestern counties, there were only four

Women in Florida's Judiciary

Statistics confirm that women remain underrepresented in Florida's judiciary. As of April 1, 2004, The Florida Bar reports that there are 19,991 active women members and 46,244 active male members, which yield the following percentages: 30.2 percent women and 68.8 percent men. Yet not one level in the court system reflects these percentages. As of April 8, 2004, the Office of State Courts Administrator reports that of the seven supreme court justices, two are women, which equates to 28.5 percent; of the 62 DCA judges, 13 are women, which equates to 20.9 percent; of the 525 circuit court judges, 114 or 21.7 percent are women; and of the 280 county court judges, 81 or 28.9 percent are women.

women judges. Only 14 women held trial judge positions in the entire state outside South Florida and Tampa Bay. *Id.*

Defects in the appointment process were attributed to the JNCs. The evidence collected showed that a different and higher standard was applied to women applicants. *Id.* at 211-12. Many believed the differing standards applied to male and female applicants arose because of the disproportionate representation of men on the JNCs. Moreover, some types of law practice were given greater weight in the selection process, such as commercial law, an

area more likely to have been practiced by men than women. Bias in favor of attorneys in private law firms also contributed to the problem, as did the tacit disparagement of areas of specialization perceived as being more "female," such as family law. JNCs gave inadequate consideration to women candidates' successful management of job, children and a spouse. Rather, these accomplishments took on negative connotations for JNCs, which focused almost exclusively on bar activities. The JNCs were unduly concerned with the women candidates' child care arrangements. The commission found no uniform policies or standardized criteria for evaluating judicial candidates, and it recommended that the Florida Supreme Court and The Florida Bar adopt standardized criteria, including a prohibition against candidates who are members of or frequent clubs that practice invidious discrimination. *Id.* at 211-15, 235.

Even before the commission's report was final, FAWL began pressing for the appointment of women to the JNCs. The theme at the August 1987 FAWL Retreat was "Promoting Women to Positions of Prominence—Becoming Influential," with President-Elect **Andrea Hillyer** discussing the Governor's appointment process and Past President **Diane Van Ness** (1986-87), herself a member of a JNC, describing that process. In the early

1990s, FAWL's lobbyist, **Sandy Allen**, would become a conduit to the Governor's office for judicial appointments. In 1994-95, FAWL's

efforts resulted in gradual appointments to the judiciary of more women.

Reports of biased questioning

by the JNCs in the mid-to-late 1990s reenergized FAWL's commitment to eliminate gender bias from the JNC process. FAWL supported legislation to create gender balance on the JNCs, and section 43.29, Florida Statutes, was amended to require that minorities constitute one-third of the JNC members. The statute, however, was successfully challenged on equal protection grounds, which led FAWL to support legislation that would amend section 43.29 to set an aspirational goal for minority representation on the JNCs.

In 1997, FAWL worked to fill a vacancy on the Florida Supreme Court with a woman. A committee was formed, an evaluation form prepared, and copies of all applications for the vacancy were obtained. After reviewing the applications, letters of support were written to the JNC and the Governor. FAWL



Former Attorney General Janet Reno with Judge Chastain

members monitored the interviews to ensure that gender bias was not an issue. FAWL's perseverance and dedication was rewarded when

Fourth DCA Judge **Barbara Pariente** was appointed by Governor **Lawton Chiles** to the Florida Supreme Court in December

1997.

Since 2000, FAWL has focused its efforts to eliminate gender bias in the judiciary by continued lobbying in regard to JNC legislation in an effort to keep the aspirational minority goal and to oppose the politicalization of the JNC process. In 2001-02, President **Susan Fox** directed FAWL's attention to gender bias in the judicial rotation system, because circuits were keeping women in the juvenile and family divisions and not rotating them to the civil division, where they would gain valuable experience that would further their judicial careers, and to the gender disparities in the District Courts of Appeal. **Governor Jeb Bush** responded favorably to FAWL's urging by publicly demanding diversity in the JNC nominations and appointing women to the bench. In March 2002, FAWL presented its first-ever President's Award to Governor Bush for his record of appointing women and minorities in over 40 percent of the judicial vacancies and his appointment of women to the District Courts of Appeal.

Some may question whether

gender bias still exists in the judicial appointment process. The American Bar Association Commission on Women in the Profession recently published its third report, *The Unfinished Agenda: Women and the Legal Profession (2001)*, which found that while great strides had been made for women in the judiciary, thanks in large part to President **Bill Clinton**'s appointment of 100 female judges, women still remain underrepresented in the judiciary. The report explains:

Part of the reason for such underrepresentation may have to do with biases in selection and confirmation processes, biases that most surveyed women, but not men, identify as problems. Another reason may be the tendency of such processes to penalize applicants who have public service and public interest backgrounds, because these backgrounds are assumed to predict "activism" on controversial issues.

Such assumptions work against women, particularly women of color, who disproportionately come from such backgrounds or who have been involved with such issues. The result is to deprive the judiciary of the diversity of experience necessary to ensure both the fact and appearance of justice. As Justice **Ruth Bader Ginsburg** noted in the ceremony marking her appointment to the U.S. Supreme Court, "women, like persons of different racial grounds and ethnic



Florida Supreme Court Justice Barbara Pariente

origins, contribute . . . [to the U.S. judiciary a] distinctive medley of views influenced by differences in biology, cultural impact, and life experience.” Diversity is critical to the legitimacy, credibility, and quality of the justice system.

Id. at 26 (footnotes omitted).

FAWL continues its tireless crusade against gender and other forms of bias in the JNC process today. Following reports that the Broward JNC was regularly asking questions about candidates’ personal religious views (were they “God-fearing”), their ability to balance motherhood with judicial service (a woman candidate was asked how she would balance her duties as a

single mother of twins with being a judge), and their views on controversial issues (the Ten Commandments case from Alabama), President **Dinita James** and Judicial Selection Committee Chair **Sherri Johnson** (Sarasota FAWL) wrote to Governor Bush and The Florida Bar’s JNC Procedures Committee. Because judicial candidates may be reluctant to complain when asked inappropriate questions during a JNC interview for fear of jeopardizing their selection chances, FAWL acted to lodge a complaint.

FAWL is also continuing its work to monitor the JNCs and the nominations sent to the Governor through its Judicial Selection Committee. Committee member **Vicki Kaufholz** (Pinellas FAWL)

recently monitored JNC interviews for the 6th Circuit, which included 29 applicants, 24 men (2 African-American and 1 Asian) and 5 women. Although the questions asked did not appear facially biased, Ms. Kaufholz reported that some of the male commissioners indicated a preference for applicants with jury trial experience and experience handling paying clients. These are exactly the biased attitudes identified in the Gender Bias Study Commission’s report of 1990 and the ABA’s *Unfinished Agenda* report as a reason for women’s continued underrepresentation in the judiciary. And so, FAWL’s work to eliminate gender bias from the judicial selection process must and will continue.

