

Discrimination and the Legal Profession

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Informal Poll

-You are over the age of:

25 35 45 55

-You grew up in a hometown:

less than 5K . . . 5K-10K 10k-25K . . . 25K-50K Over 50K . . .

-Religion is important in your family life

-Your race is: Caucasian . . . African-American Something other than those two

-You grew up in a family of means you consider: Inadequate . . . Adequate . . . Excess

-You are from South Carolina

-You have been personally affected by violence or tragedy

-Law is: first/only career . . . second career . . . third career

-You are only here because you need to complete your ethics CLE requirement

Harvard IAT Test

Demo Test designed to uncover “hidden” or “implicit” bias:

<https://implicit.harvard.edu/implicit/demo/>

Several different categories:

Weight

Age

Race

Gender

Sexuality

Skin Tone

Countries

Nature has tempered women as little for the judicial conflicts of the courtroom as for the physical conflicts of the battlefield. Our profession has essentially to do with all that is selfish and extortionate, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to the female sense of innocence and the sanctity of their sex.

Chief Justice C.J. Ryan of the Wisconsin Supreme Court
(opposing admitting Lavinia Goodell to the bar, 1895,
cited in Epstein, 14993, p. 269)

History of Women in the Legal Profession



1869

Lemma Barkaloo is 1st woman to enter formal legal education. She quits after one year due to harassment from male classmates.

Arabella Mansfield is 1st woman admitted to practice law. (Iowa)



1873

Alta Hulett becomes 1st woman lawyer in Illinois at age 19, the youngest female attorney in the world.



1879

US Supreme Court compelled to admit Belva Ann Lockwood by Act of Congress that women lawyers must have access to even the highest court.



1895

4 out of 5 law schools refuse to allow women to study.

Only 29 states allow women to practice in their courts.

Credit: Lea Gutierrez, from Angela Nicole Johnson

History of women in the Legal Profession



Credit: Angela Nicole Johnson

The Women's Jury Movement in the South

Opponents in southern states:

- pointed to “ideals of Southern womanhood”
- played on racial animus
- ridiculed the women seeking jury service

Holly J. McCammon, *The U.S. Women's Jury Movements: A More Just Verdict* (Cambridge 2012)

The Women's Jury Movement in the South

Georgia:

- little response to the issue until more women are elected to the legislature
- proponents declare that they no longer wanted men to treat them chivalrously
- newspapers begin to support jury service for women
- permits women to serve on juries in 1953

The Georgia Association of Women Lawyers proved to be the most effective advocate.

Holly J. McCammon, *The U.S. Women's Jury Movements: A More Just Verdict* (Cambridge 2012)

The Women's Jury Movement in the South

South Carolina was one of the last states to grant women jury rights.

1957: Congress passed the Civil Rights Act: permitted women to sit next to men on federal juries.

1966: Federal court held that racial and gender distinctions in state jury service violated the U.S. Constitution.

1967: SC voted to allow women on state juries.

South Carolina's active campaign started in 1936 - thirty-two years!

Holly J. McCammon, *The U.S. Women's Jury Movements: A More Just Verdict* (Cambridge 2012)

History of Women in the Legal Profession



1981

President Reagan appoints the 1st female justice to the US Supreme Court.



1988

South Carolina selects its 1st female justice to the state Supreme Court.



1993

1st meeting of what was to become the SC Women Lawyers Association.



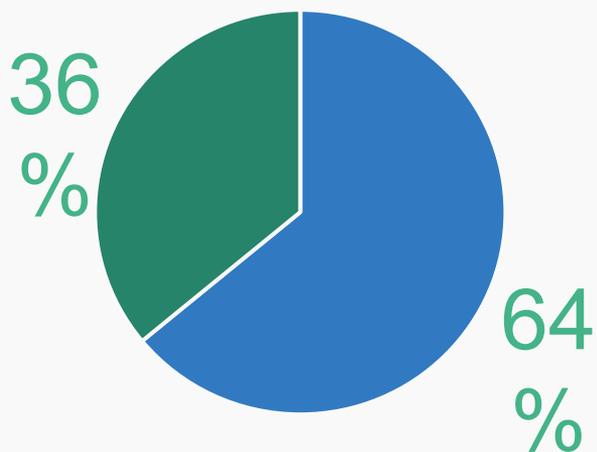
2003

50% of law students are women.
29% of lawyers are women.

Female lawyers earn 76% of what male lawyers earn.

Gender disproportionality

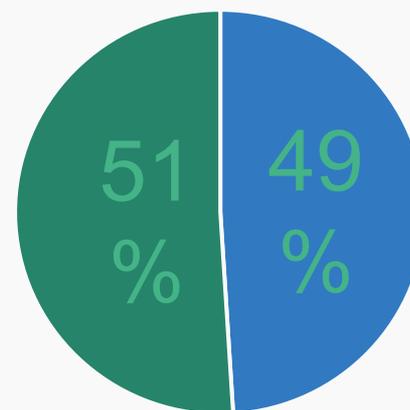
Lawyer Population



■ Male

■ Female

US Population



■ Male

■ Female

2016 – One hundred thirty years since the first woman was admitted to law school:

- 18% of equity partners
- 22% of general counsel in Fortune 500 companies
- 27% of trial counsel in civil cases
- 21% of trial counsel in criminal cases
- 24% of lead counsel in civil cases
- 33% of lead counsel in criminal cases
- 70% of lawyers report gender bias in courtroom

First Chairs at Trial: More Women Need Seats at the Table,
a study by the ABA Commission on Women in the Profession

2016 – The Pay Gap

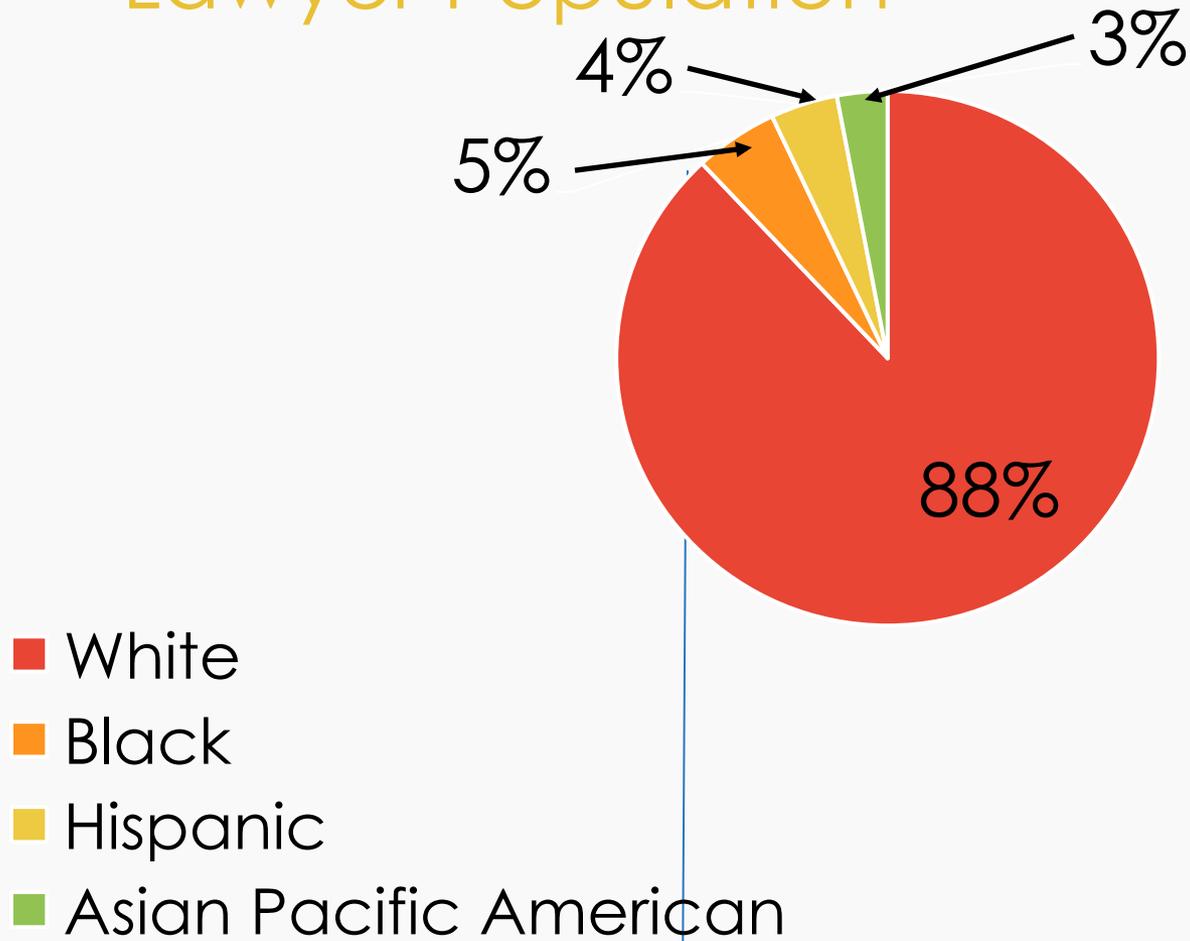
- Female lawyers earn 76% of what males earn
- No change since 2003
- Female partners earn 53% of what males earn
- The pay gap for partners is actually widening
- Only 47% of students at top-tier schools are female

2016 – One hundred years since the admission of women to the Bar in South Carolina:

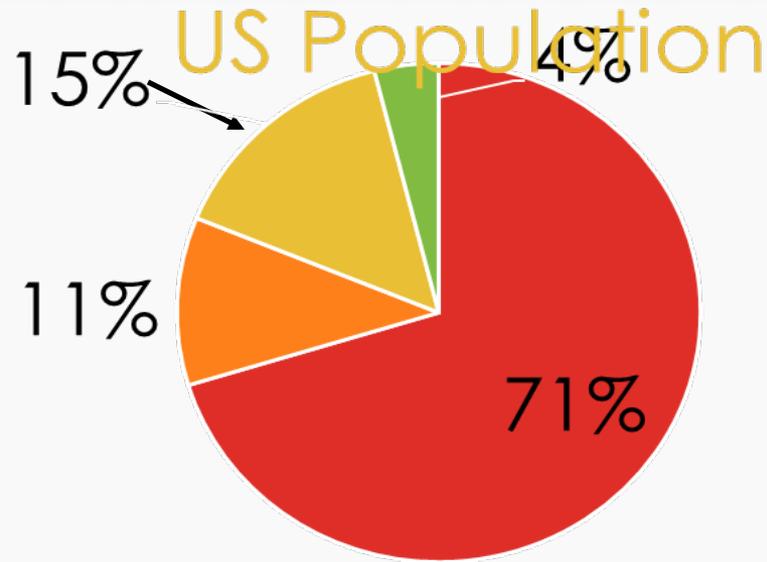
- 48% of SC law students are women
- 34% of SC lawyers are women
- 30% of SC judiciary is female
- 3% of SC Supreme Court Justices have been female

Racial Disproportionality

Lawyer Population



Racial Disproportionality



■ White

■ Black

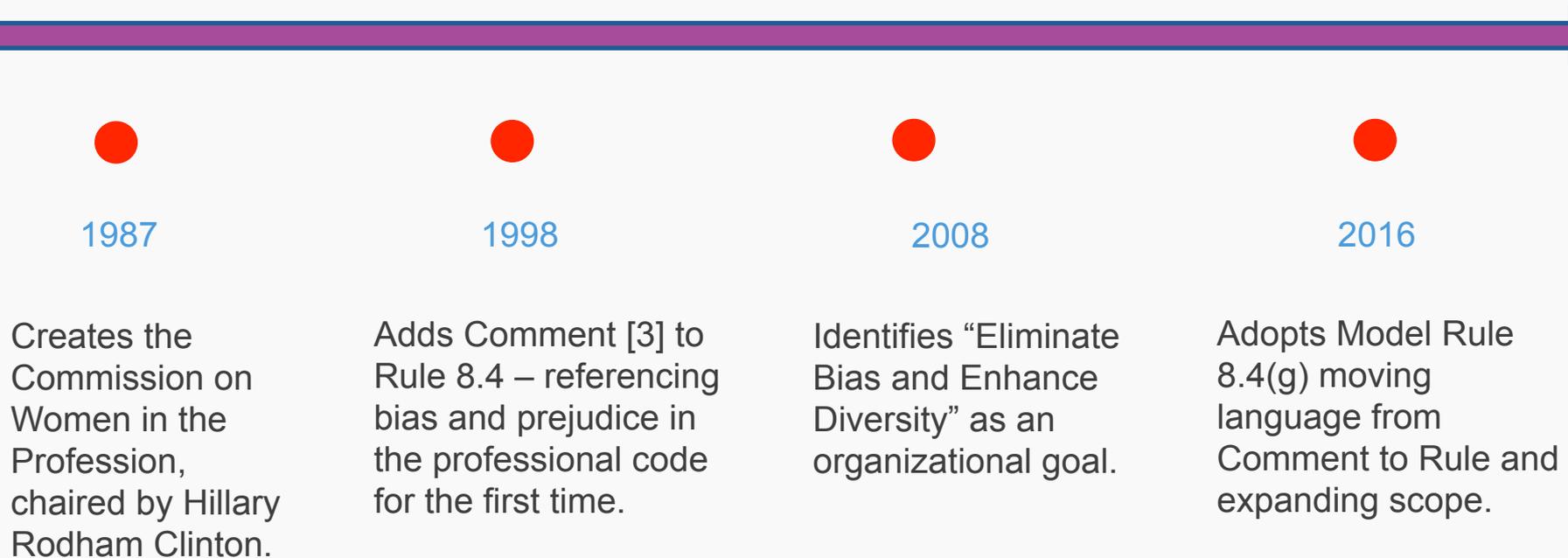
■ Hispanic

■ Asian Pacific American

2016:

- 95% of elected prosecutors are white
- 79% of elected prosecutors are white men
- 80% of modern executions have been for murders of white victims (52% of murder victims are white)
- 80% of cases submitted for federal death penalty had racial minority defendants
- 58% of US death row inmates are nonwhite (51% of murders are committed by nonwhite offenders)

History of ABA Anti-Discrimination Policy



Where do we stand?

- 25 jurisdictions have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules.
- 13 jurisdictions (including SC) have adopted a Comment similar to the former ABA MR Comment.
- 14 states do not address discrimination or harassment in their rules at all.
- The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions report that they have not seen a surge in complaints based on these provisions.

Is this Harassment?



New ABA Model Rule 8.4 (g)

- It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Isn't the civility oath enough?

- I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them;
- To opposing parties and their counsel, I pledge fairness, integrity, and civility;
- I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
- I will assist the defenseless or oppressed by ensuring that justice is available to all citizens;

How is this different?

- Comment vs. Rule
- “in the course of representing a client” becomes “conduct related to the practice of law”
- “knowingly manifest bias or prejudice by words or conduct” becomes “harassment or discrimination”
- “knowingly” becomes “knows or reasonably should know”
- “race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status” adds “ethnicity, gender identity & marital status”
- Eliminates requirement that conduct be proved to be “prejudicial to the administration of justice”

“My clients have had male colleagues expose themselves in conference rooms, grope them in limousines after a hard day in the office, and threaten them that if they would not have sex in the bathroom at a retreat, they would not be promoted to lead counsel in a litigation.”

Wendi S. Lazar, Member of the ABA Commission on Women in the Profession, Testimony before the ABA House of Delegates, August 2016.

QUESTIONS/COMMENTS?

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