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AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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June 13, 2018

Glenn A. Grant, J.A.D.
Acting Administrative Director
of the Courts
Rules Comments -- Oral Argument Rule
Hughes Justice Complex
PO Box 037, Trenton, New Jersey 08625-0037

**via email at: Comments.Mailbox@njcourts.gov**

**RE: Proposed Amendment to Rule 2:11-1 Concerning Oral Argument Before the Appellate Division and Supreme Court**

Dear Judge Grant:

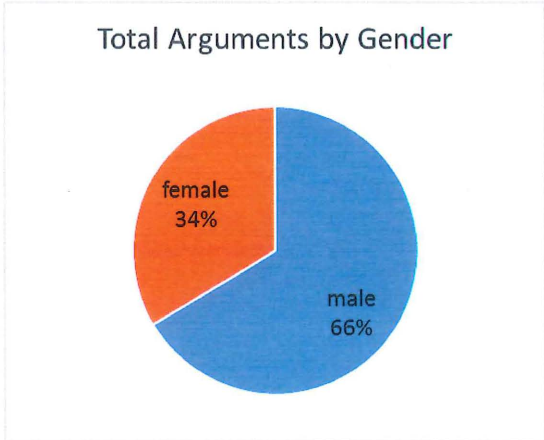
On behalf of the American Civil Liberties Union of New Jersey (ACLU-NJ), I write to oppose the proposed change to *Rule* 2:11-1(b)(3). Among the many persuasive arguments already presented to the Court in opposition to the proposed *Rule*, the ACLU-NJ wishes the Court to consider one other: expanding opportunities for women and people of color to gain valuable appellate argument experience.

No one can reasonably dispute that divided arguments before the Appellate Division and the Supreme Court are the exception rather than the rule.[1] Similarly, everyone must acknowledge that under both the existing *Rule* and the proposed one, courts allow split arguments. The question, really, is whether courts discourage them by imposing a requirement that counsel file a motion before such a division is permitted and, if so, what impact would this have on women and people of color, both of whom face significant barriers to inclusion in appellate courts as it is.

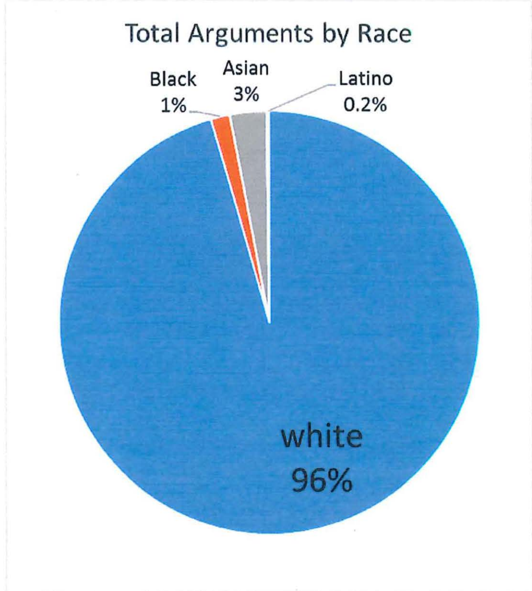
Women and people of color are dramatically underrepresented in New Jersey Supreme Court arguments. Demographic data collected for arguments at the Court in 2016 and 2017 illustrates how such racial and gender disparities permeate our state appellate courts.[2] Women account for just 30 percent of lawyers who argued in the Supreme Court.

[1] *See, e.g. Comments of Jeffrey J. Greenbaum, Esq.* #025 (noting that typically best practice calls for a single lawyer to argue, but explaining that exceptions exist); *Comments of Bruce D. Greenberg*, #026 (same).

[2] The ACLU-NJ collected data based on observations of every litigant (using archived video footage) who argued during the 2016 and 2017 calendar years (excluding disciplinary cases). Data are based on perception alone and cannot speak to how lawyers self-identify. In all, there were 508 arguments in 156 cases.

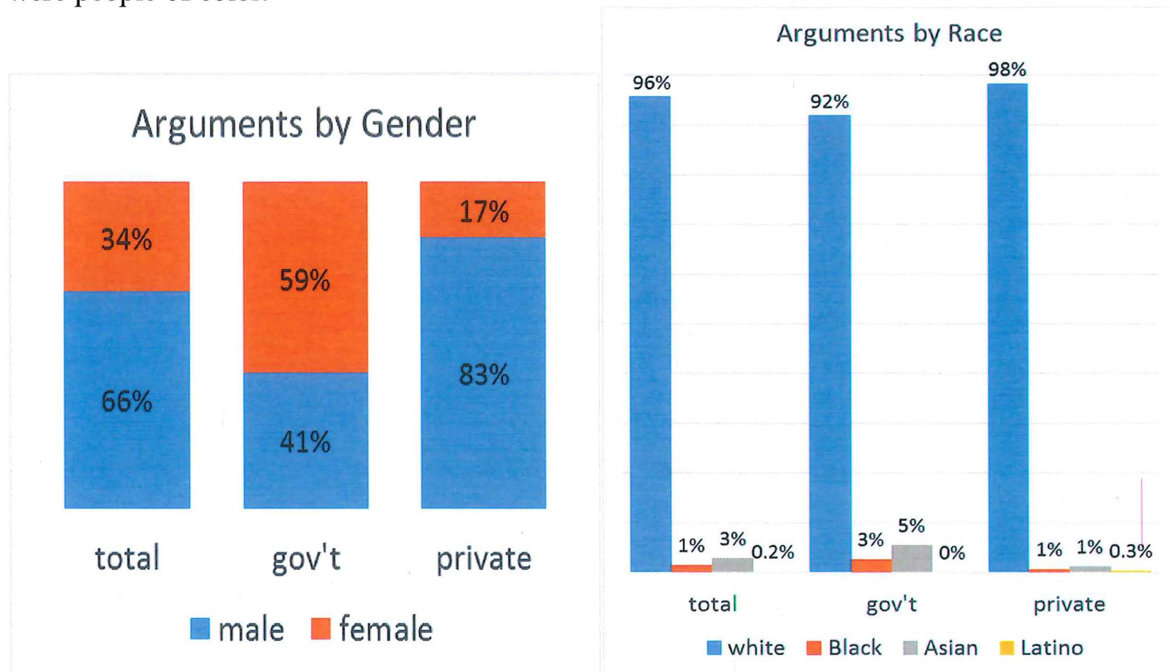



Perhaps even more alarming are the disparities among people of color, who account for less than four percent of arguing lawyers.[3]




[3] It would be valuable to compare these numbers to the numbers of licensed attorneys in New Jersey, but those data are unavailable. The Office of Attorney Ethics, which tracks various demographic trends such as firm size, admission in other jurisdiction and age, does not track race or gender. Office of Attorney Ethics, *Annual Report* 2017, available at https://www.judiciary.state.nj.us/attorneys/assets/oae/2017oaeannualrpt.pdf. The Supreme Court should mandate such record collection.

The disparities are even more acute in the private bar (that is, among lawyers not employed by state or county government). Amongst the private attorneys who argued at the New Jersey Supreme Court over that same two-year period, only 17 percent were women and only two percent were people of color.




This is not to suggest that the Judiciary is to blame for the underrepresentation of women and people of color arguing before the Supreme Court. All litigants – including the ACLU-NJ – must make a self-critical examination in which they ask why women and people of color receive so few opportunities to argue before the Court. The ACLU-NJ simply notes the existence of a problem and urges the Court not to take actions that risk making it even worse.

The New York State Bar Association's Commercial and Federal Litigation Section's Task Force on Women's Initiatives, chaired by retired Federal District Judge Shira A. Scheindlin recently released a report that examined ways in which some judges improve opportunities for participation by female attorneys.[4] The report emphasizes the importance of judicial and legislative efforts to increase the presence of female litigators in higher positions by giving them more opportunities in the courtroom and by encouraging firms to do the same.[5] This included active efforts by several judges to encourage split arguments, providing critical experience for more junior attorneys who were more likely to be women. That report and the changes that it spurred garnered significant press attention.[6]

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[4] New York State Bar Association, *If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*, November 2017, available at: http://www.nysba.org/WomensTaskForceReport/.

[5] *Id.* at 5, 23.

[6] *See, e.g.*, Alan Feuer, *New York Times*, "A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule," Aug. 23, 2017, available at: https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html; Shira A. Scheindlin, *New York Times*, "Female Lawyers Can Talk, Too" Aug. 8, 2017, available at: https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html

Denying counsel the right to – without motion practice – make split arguments runs the grave risk of *decreasing* these opportunities for women and people of color, exacerbating disparities.[7]

The proposed amendment to the *Rule* is flawed in several key ways. To ensure equitable outcomes and equal access to justice, women and people of color must play a vital role in our court system. These are not fleeting values – they are pillars that made New Jersey's judicial system the envy of our sister states. But, as the data reveal, we can, and we must, do much better. When women and people of color are so severely underrepresented among those who receive speaking roles from which they could make the most valuable and impactful contributions, the cause of justice suffers, as does the quality of argument.

The Judiciary should support policies that facilitate and encourage equal representation, and likewise, reject any *Rule* changes that run the risk of exacerbating these disparities, regardless of how minor or insubstantial these consequences may seem.[8]

Because split arguments do not extend the total time a party is allowed for argument, they need not extend oral arguments. *Rule* 2:11-1(b)(3) serves no apparent purpose, but may create another barrier for underrepresented persons by potentially decreasing their access to opportunities in the courtroom.

For these reasons, the ACLU-NJ opposes the *Rule* change. Additionally, in light of the data addressed here, the ACLU-NJ suggests that the Court seek input from the Supreme Court Committee on Minority Concerns and the Supreme Court Committee on Women in the Courts on ways to improve opportunities for women attorneys and attorneys of color to present appellate arguments. I am happy to provide our underlying data should anyone be interested in further examination of it.

Alexander Shalom (021162004)

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[7] *See Id.* at 20.

[8] It is true that divided arguments are infrequently used and none of the women or people of color who argued in 2016 or 2017 did so as part of a divided argument. The point remains: the Court should look for ways to expand not constrict available opportunities.