

A Thesis Entitled

**Does Advocacy Matter?
Examining the Impact of Attorney Expertise in Federal Courts**

By

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Submitted as partial fulfillment of the requirements for

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For years scholars have asserted that attorneys with more extensive expertise (either overall or in relation to opposing counsel) achieve a higher rate of success for their clients. However, there has been little direct investigation of how differing institutional features among courts might influence the impact of attorney expertise. This paper theorizes that the impact of attorney expertise on judicial decision-making is minimized in institutional contexts where a judge has significant access to neutral information (such as research provided by law clerks) in addition to the partisan information provided by counsel. A more complex method than those previously employed to measure attorney expertise is developed which incorporates information about an attorney's litigation experience, years of practice, relevant clerkships, subject-area specialization, Martindale-Hubbell rating, and law school achievements. The resulting index of attorney expertise is employed to compare attorneys' winning percentages in products liability cases in the federal district and circuit courts

between 1995 and 2006. The results indicate that there is no statistically significant difference in the success rate of attorneys based on their expertise in the federal appellate courts where judges have relatively lower caseloads and more staff assistance than district court judges. However, in the district courts—where judges have less time and resources to obtain independent, neutral information—the winning percentage of attorneys with greater overall expertise than opposing counsel exceeds the baseline success rate to a statistically significant degree.

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Chapter One

Introduction

Socrates famously declared that “four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.” Since the emergence of legal realism in the 1920’s, scholars have widely embraced a less idealized notion of judges’ work (Duxbury, 1995). For example, James Gibson has claimed that the decisions judges render “are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.” (Cross, 2003: 1461) Considerable scholastic energy has been devoted to uncovering factors other than the legal merits of a case which impact judicial decision-making. Litigants, judges, policy-makers, and the public at large benefit from systematic examination of these factors and the extent to which they influence judicial decision-making. Understanding these factors is necessary in order to evaluate and examine ways to eliminate or at least reduce undue influences within our judicial system.

Scholars have demonstrated that one factor which can affect judicial decision-making is the level of expertise of the attorneys representing litigants. This factor is particularly interesting to consider for three reasons. First, the relationship between attorney expertise and judicial decision-making has practical, concrete relevance for potential litigants seeking to employ counsel. Increased understanding of this relationship would be a useful tool because litigants can control the level of expertise of the counsel they choose to hire.

Second, clarifying the impact of attorney expertise will provide information useful for the legal profession. Areas such as legal education, court administration, and legal malpractice law would be better informed by a more explicit understanding of how attorneys influence judicial decision-making. Third, quantifying this relationship will facilitate the discussion of the normative issue of what the relationship *should* be. Such a discussion is interesting and complex because there are competing basic assumptions which reflect different values and are likely to lead to very different answers. On one hand, there is an expectation that attorneys should represent their clients competently and vigorously in court. This expectation carries with it the underlying assumption that if an attorney is more skilled, his or her client should be more likely to win the case than if the attorney is less skilled. In other words, the level of an attorney's expertise should have some impact on judicial decision-making. On the other hand, there is also a fundamental expectation that judges should make decisions based on the merits of a case. This expectation implies that a judge's decision should not reflect counsel's performance or abilities, but only the appropriate legal result based on the facts and law. Understanding what *does* happen informs and enriches debate concerning what *should* happen and provides policy-makers with a baseline to understand what actions are needed or desirable.

Chapter Two

Literature Exploring Attorney Expertise and Case Outcomes

The importance of studying the role of attorneys in order to better understand judicial decision-making has long been understood. There is extensive literature which examines the impact of attorneys from different perspectives. For example, the influence of attorneys is discussed within the context of Marc Galanter's repeat player hypothesis which argues that wealthier parties with more litigation experience are likely to do better in litigation due, in part, to their ability to hire more expensive attorneys. The effect of oral argument—one discrete element of an attorney's abilities—has also been examined. Finally, the impact of attorney expertise as a whole on judicial decision-making has received considerable attention in its own right.

Expert Counsel as a Factor of Repeat-Player Success

In 1974 Marc Galanter first suggested a distinction between repeat player litigants and one shot litigants and argued that repeat players tend to obtain more favorable judicial decisions (Galanter, 1974). There is an entire constellation of possible reasons for this phenomenon, including repeat players' increased access to and familiarity with legal institutions, repeat players' tendency to have access to greater resources, and repeat players' ability and incentive to favorably influence the formulation of the rules which ultimately govern their cases (Galanter, 1974). Galanter's work spawned a considerable amount of scholarship and the further development of what came to be known as party capability theory (see, e.g., Wheeler, et. al., 1987; Songer and Sheehan, 1992; Songer, et. al., 1999; Haire, et.

al., 1999; Flemming and Krutz, 2002). The component of party capability theory which is relevant here is the hypothesis that because repeat players (also referred to as “haves”) typically have greater resources than one-shotters (also referred to as “have-nots”) they can hire more expensive attorneys who presumably have greater expertise which, in turn, contributes to the higher likelihood of securing favorable litigation outcomes (Wanner, 1975; Wheeler, et. al., 1987; Songer and Sheehan, 1992; McCormick, 1993; Albiston, 1999; Farole, Jr., 1999; Songer, et. al., 1999).

Empirical support for the party capability theory has been found in a variety of contexts including the United States Supreme Court (Ulmer, 1978; Ulmer, 1981), federal appellate courts (Songer and Sheehan, 1992; Songer, et. al., 1999; Albiston, 1999), state supreme courts (Wheeler, et. al., 1987; Farole, Jr., 1999), the Supreme Court of Canada (McCormick, 1993; Flemming and Krutz, 2002a), the Israeli High Court of Justice (Dotan, 1999); and the English Court of Appeals (Atkins, 1991). Wheeler, et. al., (1987) theorize that the following three reasons could explain why repeat players would do better in litigation: first, because the law is substantively slanted in favor of the types of litigants who tend to be repeat players such as businesses, employers, and governmental entities; second, because judges are ideologically slanted towards the interests of the types of litigants who tend to be repeat players; or third, because repeat players tend to have greater litigation resources—both experiential and financial. Their empirical findings in state supreme courts showed that while big businesses and larger governmental units did enjoy an advantage in litigation, small businesses and small governmental units did not enjoy any noticeable advantage. Wheeler, et. al, (1987) point out that if the overall advantage of repeat players was due to a pro-business or pro-government slant in either the law or the judiciary, this

disparity in results based on the size of the business or government would not have emerged. Consequently, they conclude that the primary reason for repeat players' observed advantage in litigation is due to greater litigation resources such as previous litigation experience and extensive financial resources (Wheeler, et. al., 1987). Subsequent scholars have interpreted their own empirical evidence to lead to the same conclusion (Songer & Sheehan, 1992; Songer, et. al., 1999).

After isolating litigation resources as the reason why repeat players have greater success in litigation, Wheeler, et. al., (1987) went on to assert that the ability of repeat players, or "haves" to afford better attorneys was one of the reasons their greater resources impacted case outcomes. Subsequent scholars have taken up this point and at least mention it in passing in their discussion of party capability theory (McCormick, 1993; Albiston, 1999, Farole, Jr., 1999). Others provide a more detailed examination and consideration of the extent to which the expertise of counsel plays a role in party capability theory.

Wheeler, et. al, (1987) examine case outcomes based on whether litigants were represented by solo practitioners or law firms in order to evaluate their theory about the role of counsel. They conclude that "[o]n balance, the stronger parties' advantage does not appear to be due in any major degree to imbalances in type of lawyer, or at least to those revealed by our simple solo-versus-firm indicator." (Wheeler, et. al. 1987: 437.) Songer, et. al., (1999) find reason to believe that the advantage repeat players enjoy is due more to their previous litigation experience which allows them to make informed strategic decisions than to their superior financial resources.

On the contrary, other scholars have concluded that having resources to spend on legal representation is a major, if not primary, reason for the explanatory power of party

capability theory. For example, Dotan (1999) found that overall haves fared better than have-nots in the Israeli High Court of Justice, but also discovered that have-nots who were represented by counsel had a better success rate than the haves. Consequently, Dotan (1999) concluded that the lack of resources available to have-nots or one shotters to hire any counsel at all was not just *part* of the reason haves came out ahead in the Israeli High Court of Justice, but was the *primary* reason for that phenomenon. Along a similar vein (although without empirical support) Atkins (1991) asserts that the cost and quality of counsel is central to party capability theory. In fact, he suggests that classifying litigants according to the cost and quality of the attorneys they hire would be a better way to test the party capability theory than the current practice of classifying litigants based on the type of entity of the litigant (Atkins, 1991).

The precise role of financial resources to hire better counsel within the overall party capability theory is only applicable to the extent that party capability theory itself is operating. Yet not all empirical studies have found support for the party capability theory. A study of Russian commercial courts failed to find higher success rates among repeat players (Hendley, et. al., 1999). Smyth (2000) found that in the Australian High Court the federal government was the only category of repeat player which enjoyed an advantage. In the Philippines an inverse relationship has been found with have nots enjoying a higher rate of success in the Supreme Court than haves (Haynie 1994; Haynie 1995). Haynie (1994) hypothesizes that “concerns for stability, legitimacy, and development in non-industrialized systems lead to biases for those within society who have less.”

While the applicability of the party capability theory in other countries with substantially different institutional features than the United States is not directly relevant, it

raises the important issue of the impact of institutional features on the party capability theory in general and on the effect of attorneys in particular. Brace and Hall (2001) recognize the importance of examining this issue and evaluate the party capability theory in state supreme courts in the United States with the purpose of identifying how various institutional features which vary from state to state might affect the success rates of haves and have nots. Brace and Hall (2001) found that in states where the supreme court had a higher level of “professionalism” (measured by number of law clerks, justices’ salaries, and number of judges) the party capability theory had less explanatory power. That is, the greater the resources available to the state tribunal, the more likely the fate of one-shotters was to be on par with the fate of repeat players (Brace and Hall, 2001). This research on party capability theory suggests that considering the impact of institutional features on the specific effect attorneys have on judicial decision-making is also warranted.

Effect of Oral Argument on Case Outcomes

The extensive research on Galanter’s thesis incorporates the effect of attorney expertise as one component of a larger theory. Another body of literature instead focuses on theorizing about the effect of one individual component of attorney performance—oral argument—on judicial decision-making. There is evidence that oral argument influences case outcomes (Bright and Arnold, 1984; Bright, 1991; Wasby, et. al. 1992; Johnson, et. al. 2006). Judges Bright and Arnold, federal appellate judges, recorded the number of times they each changed their mind about the result of a case after hearing oral argument (Bright and Arnold, 1984; Bright, 1991). Oral argument changed the judges’ minds in roughly twenty to thirty percent of the cases (Bright and Arnold, 1984). Judge Bright also constructed and administered a hypothetical test case and found that twenty-five percent of

the judges who participated changed their mind after oral argument (Bright, 1991). A study of the United States Supreme Court similarly concluded that oral argument can be “directly relevant to the Court’s disposition of a case—and at times determinative of the outcome” (Wasby, et. al. 1992: 30). Since the merits of a case and the law are the same before and after oral argument the forgoing results are instructive. The difference in a judge’s assessment of a case is arguably the result of how well the attorney presented the case at oral argument.

Johnson, et. al. (2006) provide a direct link between attorneys’ oral argument expertise and their success rate. They use Justice Blackmun’s grading of attorneys’ performance at oral argument as the measure of attorneys’ expertise and find that “the relative quality of the competing attorneys’ oral arguments influences the justices’ votes on the merits” (Johnson, et. al., 2006: 109). Nevertheless, expertise in oral argument is only one component of litigation. Expertise in brief writing is an equally, if not more significant component. Consequently, the literature discussing only the oral argument phase provides only limited information about the overall impact of attorneys on judicial decision-making.

Direct Examination of Attorney Expertise as a Whole

Significant attention has been paid to the entire role of an attorney as a discrete factor which influences judicial decision-making. The impact of the mere presence of counsel has been examined in the context of federal appellate courts (Lindquist, 1996) and the Israeli High Court of Justice (Dotan, 1999). These studies, among others, document higher rates of success among litigants who are represented by an attorney than among litigants who represent themselves (Lindquist, 1996; Dotan, 1999). The influence of attorneys based on their level of expertise has been examined in the United States Supreme Court (McGuire and

Caldeira, 1993; McGuire, 1995; Wahlbeck, 1997; Szmer, 2005; McAtee and McGuire, 2007), the Supreme Court of Canada (Flemming and Krutz, 2002(a),(b); Szmer, et. al., 2007), the South African Supreme Court of Appeal (Haynie and Sill, 2007), federal appellate courts (Marvell, 1978; Lindquist, 1996; Haire, et. al., 1999), and state supreme courts (Marvell, 1978; Wheeler, et. al., 1987). All of these articles find some relationship between higher levels of attorney expertise (either overall or in relation to opposing counsel) and an increased incidence of success.

The literature which directly examines the role of attorney expertise develops what has been described as attorney capability theory—which is related to party capability theory, yet distinct from it. However, while there is significant backing in the literature provided for the theory that an attorney’s level of capability (what I refer to as expertise) empirically *is* related to case outcomes, the theoretical explanation for *why* that occurs is less developed. The primary explanations which have been advanced to date concern the level of credibility of an attorney as an information provider, the ability of a more expert attorney to choose to litigate more legally meritorious cases, and the capability of attorneys with more experience and knowledge to make more persuasive arguments (Szmer, 2005). Little attention has been paid to institutional features of different courts which might have an impact on how and whether attorney expertise plays a role in case outcomes.

In 1993 McGuire and Caldeira demonstrated that the presence of an experienced litigator in obscenity cases increased the chances of the United States Supreme Court granting a certiorari petition and theorized that this occurred because the experience of the litigator allows him or her to establish a reputation before the Court for credibility. McGuire (1995) expands this theory in his study of the role of experienced attorneys in merits cases

before the Supreme Court. He points out that attorneys who appear before the Court on a regular basis have an incentive to be honest with the Court and over time the justices come to see them as credible and trustworthy (McGuire, 1995). Wahlbeck (1997) develops this line of thought by emphasizing the role attorneys play as information providers which is what makes a reputation for credibility valuable for attorneys appearing before the Supreme Court and why that reputation translates into increased success.

Haire, et. al, (1999) touch upon the role which credibility and reputation play in the success of experienced attorneys at the federal appellate level. However, applying this theoretical argument to explain the success of experienced attorneys below the supreme court level is problematic. Only a court of last resort has a chance to observe an attorney's work in every case in which the attorney appears in that court. An attorney could appear in multiple federal appellate cases and have different judges hear each case. Under these circumstances judges are much less likely to develop opinions regarding the reputation and credibility of individual attorneys which correspond to that attorney's amount of litigation experience. Another explanation must be found to explain the attorney capability theory in trial and intermediate appellate courts.

The second explanation given for the success of more expert attorneys is that they might enjoy greater levels of success because they are more skilled at choosing which cases to litigate (Songer and Sheehan, 1992; Songer, et. al., 1999; Haire, et. al., 1999). The ability to use their expertise to recruit and represent clients with more legally meritorious positions logically results in winning a higher percentage of cases (Songer and Sheehan, 1992; Songer, et. al., 1999; Haire, et. al., 1999). This theory is undermined to some extent by the finding of a relationship between attorney expertise and better case outcomes in the South African

Supreme Court of Appeal because in South Africa advocates are not allowed to reject cases based on the unlikeness of victory, but must take any case a client brings to them (Haynie and Sill, 2007).

The third explanation is simply that attorneys who are more intelligent, have more extensive substantive knowledge, and are more skilled in presenting arguments to a court are more likely to persuade a judge to rule in favor of their client (Wahlbeck, 1997; Haire, et. al., 1999). The reason the abilities of counsel matter is because the adversarial system sets up litigants' attorneys as the judge's primary source of information (Marvell, 1978; Szmer, et. al., 2007). While the existing literature recognizes attorneys' role as information providers and the significance of the adversarial institutional context, there is little discussion of how the availability of neutral information might diminish or eliminate the link between attorney expertise and case outcomes.

Chapter Three

Attorney Expertise and Institutional Context

In their article on party capability theory, Brace and Hall (2001) point out that “much of the existing work focuses upon single institutions, an approach that precludes a direct systematic evaluation of the effects of institutional arrangements and other contextual forces . . .” This criticism applies to the literature on attorney expertise as well. The existing literature comments in passing about some key points including the role of attorneys as information providers and the availability of information from other sources such as law clerks. Yet there has been no systematic exploration of how institutional features influence what information judges have at their disposal and how that might, in turn, affect whether and to what extent the attorney capability theory applies in different types of courts. This paper seeks to fill this gap by analyzing what information attorneys provide, what alternative information sources are available to judges, how the different types of information might affect judicial decision-making, and how such a difference would manifest itself in a comparison of federal trial and appellate courts.

The literature on the role of attorneys in judicial decision-making widely recognizes that attorneys function as information providers for the court (Marvell, 1978; McGuire, 1995; Wahlbeck, 1997; McAtee and McGuire, 2007; Szmer, et. al., 2007). The pertinent facts and legal authority in a case are certainly primarily furnished by counsel for the parties to a case. Yet the information-providing function is not limited to simply the facts and the law, but extends to include analysis, that is, reasoned application of the law to the facts in a way

which supports a particular conclusion. Since a judge's task is typically understood to include both reaching the legally correct decision and explaining why that decision is correct, the attorneys' role in suggesting methods of analysis which would justify a particular result is important.

The adversarial nature of the court system in the United States affects the way attorneys function as information providers as well as the effect their expertise level ultimately has on judicial decision-making (Marvell, 1978; Szmer, et. al., 2007). While the facts and law are technically the same, the attorney on each side of a case will strive to present them in the light most favorable to his or her client and will emphasize particular provisions of law and particular facts with that in mind. Moreover, the analysis proposed by opposing attorneys will be fundamentally different because each attorney will suggest a particular application of the law to the facts which leads to the result desired by their client. Consequently, if an attorney is more skilled than opposing counsel in presenting information to the judge, the judge will have unequal levels of information about the two sides of the case unless there is another source of information.

While attorneys occupy a central role in providing information, there are other sources a judge may rely upon to obtain information about a case (Marvell, 1978). A judge may undertake independent research of the law and (to a lesser extent) the facts, and will virtually always engage in independent legal analysis. Furthermore, a judge may also turn to staff attorneys or law clerks for such information to supplement or verify what has been provided by counsel. Such sources provide judges with neutral information which may serve to balance out any imbalance in information resulting from divergent levels of attorney expertise (Lindquist, 1996). By "neutral" information, I mean only that the information

sought out and developed by judges and their staff is not guided by an absolute motive mandated by the adversarial system to seek a particular result. There is extensive literature documenting the influence of judge's ideological predilections on their decision-making (e.g., Songer and Davis, 1990; Bright, 1991; Cross, 2003; Hettinger, et. al., 2006) and no contradiction of that scholarship is intended.

The adversarial structure of litigation and the concomitant role attorneys play as information providers is fairly constant throughout the various levels and types of courts in the United States. However, the ability of a judge to obtain information from neutral sources varies significantly because the availability of neutral information is related to caseloads and staffing levels which vary widely among different types of courts. Caseloads affect the availability of neutral information because a judge with more cases to decide has less time to spend conducting independent research in each case. Marvell (1978) points out that “[i]nformation gathering . . . is closely connected with time and work load problems; the amount of information that can be gathered greatly depends on the time available to receive or share it.” Even with staff help, the more cases there are on the docket, the less time there is for the staff to spend on each case. Conversely, the more staff attorneys or law clerks a judge employs, the more time each can devote to the cases to which they are assigned. Therefore, the presence of a larger staff gives a judge more access to neutral information.

I hypothesize that an increase in the amount of access a court has to neutral information due to its institutional features of caseload and staffing levels will result in a decrease in the extent to which attorney expertise influences judicial decision-making. If a disparity in information occurs due to a disparity in attorney expertise, a judge is likely to decide in favor of the party whose more expert counsel has presented a better analysis to

justify their desired result. However, if the judge has access to enough neutral information to fill the gaps or shortcomings of the information provided by the less expert counsel, the information imbalance should not affect judicial decision-making. In other words, if a judge has enough clerks and a low enough caseload that the judge or his or her clerks can marshal the best possible information for both parties to a case, then the expertise of counsel will be irrelevant. Only where inexperienced counsel creates a gap by providing inadequate information and a court does not have the time and resources to discover and fill that gap can greater attorney expertise be expected to result in a higher success rate.

Federal trial and appellate courts apply the same substantive law and share some institutional features since they are different levels of the same court system. However, the institutional features of caseload and staffing levels vary significantly between federal district (trial) and circuit (intermediate appellate) courts. District judges have much higher caseloads than circuit judges. Furthermore, most of the cases on a circuit judge's docket are assigned to panels of three judges. This means that a circuit judge typically only has primary responsibility for one-third of his or her cases and often relies on colleagues (and their clerks) for a significant amount of work on the other two-thirds of the cases. Circuit judges also enjoy an advantage in neutral information gathering due to having more staff assistance. District judges usually employ only two full time law clerks while circuit judges typically employ four law clerks. Since appellate judges have relatively low caseloads and significant staff assistance, I hypothesize that the neutral information available to them outweighs any discrepancy in information provided by counsel and, therefore, no significant link between attorney expertise and case outcomes will be found. Since district judges have higher caseloads and less staff assistance, I hypothesize that while some neutral information is

available, it is not enough to outweigh any discrepancy in information provided by counsel and, therefore, a statistically significant link between attorney expertise and case outcomes will be found.

If the observed advantage enjoyed by more experienced litigators is, in fact, due to an imbalance in information, that advantage will only appear when an attorney has more expertise relative to opposing counsel. The mere fact that an attorney has significant expertise will not affect judicial decisions, only relative expertise will produce the result previously noted in attorney capability literature. Therefore, my final hypothesis is that even in district courts only relative, not absolute, attorney expertise will be linked to case outcomes. The expectations which follow from the foregoing hypotheses are summarized in Figure 1.

Figure 1 – Summary of Hypotheses

Federal Circuit Courts → similar win rates regardless of attorney expertise
(fewer cases + more staff = no effect of attorney expertise on judicial decision-making)

Federal District Courts → higher win rate for party with more expert attorney
(more cases + less staff = direct effect of greater relative expertise on judicial decisions)

Chapter Four

Research Design

Case Selection

Since federal district and circuit courts have institutional features which create different neutral-information gathering capacity, the success of attorneys and their expertise level is examined in these two types of courts. However, in order to compare outcomes in district courts with outcomes in circuit courts it is necessary to find a unit of analysis which is similar enough to support a comparison. Since only judges (not juries) make decisions at the circuit court level, decisions from judges must be analyzed at the district court level as well. Moreover, the rulings from district court judges must be analogous to circuit court decisions. Judicial rulings at both levels typically center on issues of legal interpretation. At the trial level issues of fact are decided by a jury (except in the somewhat rare case where a jury is waived), and at the appellate level the factual determinations made by juries are given considerable deference. However, while district and circuit court judges both focus on primarily legal (not factual) issues, there are many ancillary legal issues routinely addressed by district court judges which are rarely appealed or not appealable at all such as jurisdictional, evidentiary, and discovery matters. These types of decisions must be excluded from analysis in order for a useful comparison to be possible.

One way to exclude district court rulings which are not comparable to circuit court opinions is to focus on district court summary judgment motions. Summary judgment motions provide a forum for district court judges to rule on the legal merits of a case. This

analysis is similar to the analysis of the legal merits of the case which takes place at the circuit court level. When a summary judgment motion is being considered, the district court's legal ruling is based on the facts as taken in the light most favorable to the non-moving party, which is similar to the circuit court practice of deferring to the factual findings made at the trial level (unless they are clearly erroneous). Furthermore, the procedural aspects of deciding a motion for summary judgment are similar to those employed in the circuit courts. First written briefs are submitted by both parties which set forth the legal arguments in detail. Then oral arguments may or may not be heard by the court depending upon local court rules and the litigants' preferences. Finally, the judge issues a ruling (usually in writing) which gives both a disposition and a reasoned analysis supporting that disposition.

Not only are the cases at both levels analogous, but any of the summary judgment cases appealed (except for the last year or so of the sample) will appear in this study as both a district court ruling and a circuit court ruling. The factual and legal issues remain the same at the appellate level. No new evidence is presented and when the circuit court reviews a motion for summary judgment they apply the exact same legal standard that is applied at the district court level. Consequently, the effect of the case appearing twice in this study is a paradoxical strength by providing the clearest analogy possible. Even where the cases heard at the district and circuit court levels are different cases, the bulk of the circuit court cases in this study review summary judgment rulings from the district courts. Since the legal standard is precisely the same at both levels in these cases, the judicial decision-making process is substantively indistinguishable. While district court rulings on summary judgment motions are not absolutely identical to circuit court rulings, they provide the closest available

analogy and the similarities are substantial enough to support a comparison of the results in these two forums.

Data is analyzed from all products liability decisions issued by United States district and circuit courts from 1995 through 2006. Although a cross section of all types of cases might seem more desirable at first glance, limiting the analysis to products liability cases both reduces the sample to a manageable size and provides a feasible method to control for the effect of a litigant's status as a repeat player or one-shotter (Haire, et. al., 1999). Because of the nature of products liability litigation, plaintiffs are usually one-shot players and defendants are usually repeat players (Haire, et. al., 1999; Cross, 2000). Consequently, the widely-recognized advantage of repeat players in litigation can be largely controlled for by comparing win rates among plaintiffs and among defendants separately. This is significantly more manageable than attempting to characterize each party in each case as a repeat player or one-shotter. For all these reasons, which Haire, et. al. (1999) explain, I will examine only products liability cases. While there are good reasons for adopting this approach, the limitations it entails must also be remembered when considering the results of this study.

Haire, et. al. (1999) examine only *published* appellate decisions. Such an approach is not sufficient for this paper. The selection problems which can be caused by relying on only published court decisions have frequently been recognized (Songer, 1988; Songer, et. al., 1989, Songer and Sheehan, 1992; Albiston, 1999; Dotan, 1999; Smyth 2000). The selection of only published cases in the federal appellate context is problematic for this study because unpublished cases include most cases with very clear resolutions. In other words, these are often the cases where attorney expertise is least likely to have an influence because the answer is so obvious that the judges do not need assistance from the attorneys to figure it

out. The answer is often simply too clear cut for any attorney, no matter how skilled, to obtain a different result. Consequently, the effect of only examining data from published cases is that any impact of attorney expertise found would likely appear stronger than it actually is. Additionally, looking at only published products liability cases can be problematic because most of these tort cases are in federal court based on diversity jurisdiction, and diversity cases are more likely to be unpublished than cases addressing a federal issue.¹ At this point in time there is no reason to exclude unpublished cases since they are easily accessible in electronic case databases.

Furthermore, court rules limiting the precedential value of unpublished appellate cases or limiting citation² to them do not suggest their exclusion here. Such rules are concerned about applying reasoning from unpublished cases to future cases, but do not undermine the applicability of an unpublished decision to the parties involved in that case. The research undertaken here only looks at the results of each case as they apply to the parties involved, namely whether an attorney won the case for his or her client. Therefore, I will analyze all applicable cases, both published and unpublished.

The LexisNexis Academic database contains opinions from the United States District Courts and the United States Courts of Appeals (whether officially “published” or not). A search of this database from 1995 through 2006 for all cases with the phrase “products liability” in the headnotes produced citations to 1,072 district court opinions and 417 circuit

¹ In diversity cases federal courts apply the relevant state law. Since a federal court’s interpretation of state law is not binding in state courts, federal appellate courts are less likely to publish such decisions.

² A recent amendment to the Federal Rules of Civil Procedure prohibits the circuits from limiting citation to unpublished cases decided on or after January 1, 2007. (Fed. R. App. P. 32.1.)

court opinions. Of these opinions 882 district court opinions and 370 circuit court opinions were suitable for analysis.³ The bulk of the data analyzed was obtained directly from the case decisions which were used to identify which party prevailed; whether the plaintiff, defendant, or both filed an appeal; and the identity of lead counsel⁴ for each party.

Measuring Attorney Expertise

The primary challenge in developing a research design to investigate the effect of attorney expertise on case outcomes is to develop an accurate method of measuring attorney expertise. A variety of factors have been employed in previous literature as rough approximations of attorney expertise. The most commonly used factor is the number of cases in which an attorney has appeared before the court being studied (Partridge and Bermant, 1978; Marvell, 1978; McGuire and Caldeira, 1993; McGuire, 1995; Szmer, 2005; Haire, et. al., 1999; Flemming and Krutz, 2002(a), (b); Johnson, et. al., 2006; McAtee and McGuire, 2007; Szmer, et. al., 2007). In addition to looking at litigation experience most scholars look at other factors as well such as an attorney's clerkship experience (Szmer, 2005; Johnson, et. al., 2006), specialization in the subject area of litigation (McGuire and Caldeira, 1993; Haire, et. al, 1999), professional rating (Marvell, 1978; Flemming and Krutz, 2002(a), (b); Szmer, et. al., 2007), law school credentials (Partridge and Bermant, 1978;

³ Most of the excluded district court decisions did not resolve a motion for summary judgment. The remaining excluded decisions at both levels did not address a products liability issue, certified a question, could not be coded definitively as a win for either party, did not list counsel, or were similarly unsuitable for analysis.

⁴ Lead counsel was identified as the first listed attorney representing each party. In cases where there were multiple parties on one side of the litigation, the party's lead counsel with the highest level of experience was coded for analysis. In the rare cases where two such parties' interests diverged and the court ruled in favor of one, but not the other, the case was coded as two separate cases to take into account the varying results and experience level of respective counsel.

Marvell, 1978; Szmer, 2005; Johnson, et. al., 2006), or years of practice (Partridge and Bermant, 1978; Marvell, 1978). Research has also examined case outcomes based on an attorney's prior win/loss record (Haynie and Sill, 2007), whether an attorney was a solo practitioner or in a law firm (Partridge and Bermant, 1978; Marvell, 1978; Wheeler, et. al., 1987), and whether an attorney was a member of a Washington D.C. private law firm (Johnson, et. al., 2006). Subjective evaluations of expertise have also been employed including using Supreme Court Justices' scores and grades for attorneys' performance at oral argument (Johnson, et. al., 2006; McAtee and McGuire, 2007) and a scholar's own evaluations of attorneys based on first-hand observation (Marvell, 1978).

Some of the factors employed previously to measure attorney expertise were specific to the type of court being studied, such as the United States Supreme Court or the Supreme Court of Canada, and are not suitable in a different context. For example, while looking at whether an attorney is a member of a Washington, D.C. private law firm may be viewed as an indicator of expertise in the context of litigation in the U.S. Supreme Court, it makes little sense to use such a measure in a study of courts across the nation. The factors with broader application including litigation experience, years of practice, clerkship experience, subject area expertise, professional ranking, and law school credentials are all amenable to use in the context of studying attorneys in federal district and circuit courts. These factors are useful because they reflect a broad array of elements of attorney expertise including different sources of both procedural and substantive expertise (Kritzer, 1998; Haire, et. al. 1999). This study will use all of these factors as indicators of attorney expertise, so now it is necessary to consider precisely how each factor will be measured.

Evaluating attorneys' litigation experience by counting the number of cases they have litigated in a particular type of court is designed to reflect the attorney's procedural familiarity with that court. There is evidence that such procedural familiarity results in better attorney performance (Partridge and Bermant, 1978; Johnson, et. al, 2006). For example, the grades Justice Blackmun assigned to attorneys based on their performance have been demonstrated to be positively correlated to the number of times an attorney had appeared before the Supreme Court (Johnson, et. al., 2006). McGuire (1995) and Haire, et. al. (1999) measure litigation experience by counting the number of times an attorney had appeared before the same court in the years the case sample had been drawn from. Flemming and Krutz (2002) point out that there is no reason to only count appearances in the time period the sample cases are drawn from. Instead, they count the actual number of times an attorney has appeared before the pertinent court previous to (and including) each particular case. The latter, more thorough approach is adopted here. For each district court case, the number of an attorney's appearances in federal district court cases as of that date is counted. For each circuit court case, the number of an attorney's appearances in federal circuit court cases as of that date is counted. This information is obtained from the U.S. Courts of Appeals database by searching for all cases in which a particular attorney was counsel prior to and including the date of a particular case. Each attorney is coded into one of five categories based on his or her total number of appearances. Those with only one appearance fall into the first category. The next four categories are composed of attorneys with two to five, six to ten, eleven to twenty, and twenty or more appearances respectively.

Recent scholarship on attorney expertise has not employed an attorney's years of practice as an indicator of attorney expertise. Yet over the span of a career an attorney

accumulates information, knowledge, and skill that is often intangible. Just as the number of cases an attorney has litigated before a court gives an indication of procedural familiarity with that forum, the number of years an attorney has practiced law reflects his or her overall experience. That experience can reasonably be understood to reflect expertise in the practice of law. Most attorneys who are listed in the *Martindale-Hubbell Law Directory* list the year they graduated from law school. Graduation marks an individual's entrance into the legal sub-culture and professional training although official practice of law does not commence immediately. Although "years of practice" is used as shorthand, this is used to describe the number of years between when an attorney graduated from law school and the year a particular decision was issued. For analytical purposes the total years of practice for each attorney will be broken down into the same five categories as litigation experience with number of years replacing number of appearances.

Looking at whether an attorney has clerked for a judge accounts for an important source of process expertise. Even just one year spent as a law clerk will introduce a lawyer to a host of procedural knowledge about that type of court which cannot be equaled even by litigating several cases in that forum. Justice Blackmun's oral argument grades positively correspond to previous Supreme Court clerkship experience just like they do for litigation experience (Johnson, et. al., 2006). Since the purpose of this measure is to calculate an attorney's familiarity with the procedural requirements of a specific type of court, in district court cases the attorneys are evaluated for whether they clerked for a federal district judge and for circuit court cases attorneys are evaluated for whether they clerked for a circuit court judge. Clerkships for a state court judge or a federal judge at a different level are disregarded.

An attorney's specialization in the particular subject area of litigation is useful to indicate enhanced substantive expertise in a particular case. The *Martindale-Hubbell Law Directory* provides a source for such information because it gives attorneys an opportunity to self-identify as specializing in particular subject areas. Haire, et. al., (1999) use this information to construct a quite elaborate measurement of subject area expertise. They add any listed specialization in products liability, appellate litigation, or mass torts together and then divide that number by the attorney's total number of listed areas of specialization (Haire, et. al., 1999). This is problematic because an attorney who identifies a specialization in both products liability and mass torts does not necessarily have twice the substantive expertise to handle a products liability case as an attorney who just lists products liability. Moreover, using the total number of specializations as a denominator assumes that an attorney's practice is equally distributed among the listed specialties. There is simply no basis for such an assumption. Looking at specialization in the relevant topic area can indicate the presence or absence of subject-area expertise, but it cannot be realistically used as anything other than a blunt measuring instrument. An attorney either is specialized in the relevant field of products liability or is not. Consequently, I only measure whether an attorney specializes in products liability or not. Any attorney not listed in the directory is coded as missing so that the records of specialized versus unspecialized attorneys can be accurately evaluated.

Professional ranking systems used to assess attorneys can be considered as a reflection of overall expertise. In the United States Martindale-Hubbell engages in an extensive and thorough evaluation of individual attorneys which includes surveys and peer

review.⁵ This evaluation process results in a rating of either A, B, or C, with A being the highest rating. There is another component of a lawyer's rating which evaluates ethics, but since I am measuring substantive expertise, I disregard the ethics element of the rating. Martindale-Hubbell ratings have been recorded for the attorneys in the sample. Any attorney who is not rated or whose rating does not appear in their *Martindale-Hubbell Law Directory* listing is coded as missing.

Another indicator of overall attorney expertise is success in law school. Such success can be viewed as demonstrative of both overall intellectual ability and an individual attorney's capabilities relative to other attorneys. Those who perform at a level above their fellow law students can be expected to out-perform their fellow attorneys in the practice of law.⁶ To some extent this measure of expertise may overlap the overall level of expertise denoted by a lawyer's *Martindale-Hubbell* rating. However, there is merit to considering law school achievement as a distinct category both because such information can fill the gap present for young lawyers who have not yet been rated by the *Martindale-Hubbell* system and because examining law school credentials can allow a somewhat more detailed analysis of general legal expertise than simply looking at a *Martindale-Hubbell* rating.

A measure of law school credentials is compiled based on whether an attorney graduated from law school with honors, was a member of a law journal, or both. Each of

⁵ For a discussion of how the ratings are compiled see http://www.martindale.com/xp/Martindale/Peer_Review_Ratings/ratings_process.xml

⁶ An important caveat to using law school credentials as a measure of attorney expertise is that this measure would not necessarily be appropriate to evaluate performance in jury trials. Trial litigation is heavily focused on factual issues and is, consequently, a context which is significantly different from law school. On the other hand, the task of taking a given set of facts and thinking, writing, and arguing about the law in light of those facts is common to the law school experience, litigating summary judgment motions, and litigating at the appellate level.

these qualifications is logically linked to overall legal expertise. Graduating from law school with honors demonstrates significant prowess in a variety of legal subject areas as well as a general ability to evaluate and present legal arguments. Participation in law review reflects extensive training in professional writing. Although excellent grades are often a prerequisite for law review, meeting the time and work requirements associated with law review demonstrates capabilities beyond those needed to simply earn excellent grades. Therefore, these measures are not duplicative. The *Martindale-Hubbell Law Directory* provides biographical information on attorneys including identifying whether they graduated from law school with honors and whether they were on a law review or law journal. An attorney's qualifications were coded between 0 and 2 depending on whether they had none, one, or both of these qualifications. Once again, any attorneys not listed in the directory, or who did not have any biographical information listed, were coded as missing.

While each of the factors discussed above have been used as a measurement of attorney expertise in the past, most articles examine only two or three of these measures independently. Rather than stopping after examining a series of factors which each provide only a rough estimation of attorney expertise, this paper will follow up an examination of each individual measure with an evaluation of an index formed by a compilation of all these factors (Tate 1983: 64). Similar additive indices have been used to produce and evaluate measures of challenger experience in elections (Krasno & Green 1988, Bullock et. al. 2001). The construction of such an index admittedly does not provide the detailed inquiry into the effect and relationship of the different components of attorney expertise which would be achieved through employing other methodological tools such as multivariate analysis. However, the focus in this study is an examination of the effect of attorney expertise as a

whole rather than an exploration of the impact of various facets of an attorney's expertise. The additive index compiled here is designed to provide a substantively more accurate quantification of attorney expertise as a whole by taking a number of factors into account and, therefore, fulfills the purpose for which it is intended.

The individual measures are combined into an overall expertise index for each attorney by adding the coded scores on each of the components together for a total index with a possible range of 0 to 10. Clerkship experience and product liability specialty are each coded as "0" in their absence and "1" in their presence. Litigation experience, Martindale-Hubbell rating, law school achievement and years of practice are all coded with a value ranging between 0 and 2. For litigation experience, attorneys with one appearance are coded as "0". Two to five appearances are coded as "0.5." Six to ten appearances are coded as "1." Eleven to twenty appearances are coded as "1.5." Finally, twenty-one appearances or more are coded as "2." Martindale-Hubbell ratings are coded as C = 0, B = 1, and A = 2. Law school achievement is coded as explained above with both law review membership and graduation with honors each being worth one point. Years of practice are coded on the same scale as litigation experience with years of practice being substituted for cases litigated. The scores on all of the individual components are added together for a total index with a possible range of 0 to 10.

Coding Case Outcomes

Evaluating case outcomes necessitates classifying the winner in each case. While apparently simple at first glance, scholars have recognized that identifying winners and losers in litigation is not always as clear cut a task as it appears on its face (Albiston, 1999; Grossman, et. al., 1999). For purposes of this paper, the determination is simplified by the

fact that the pertinent concern is simply which party was favored by a judicial decision without taking into account long-term or big-picture ramifications of the judicial decision. In the district court context this means that a summary judgment motion which is granted is a victory for the moving party and a denial is a victory for the non-moving party.⁷ However, in many cases a summary judgment motion addresses multiple issues and a judge may grant summary judgment on some claims and deny summary judgment on others. Rather than make a subjective evaluation in each case of which party was better off after the ruling, decisions which grant in part and deny in part are coded as a tie. A loss is coded as “0,” a tie is coded as “1,” and a victory is coded as “2.”

The considerations for classifying circuit court decisions are a bit different because of the different procedural posture of the litigation. A denial in part and grant in part of a summary judgment motion means each side won on some issues and lost on some issues. But at the appellate level things are different. When all issues are affirmed, the status quo from the district court level is maintained which is clearly a victory for the appellee. However, if even one substantive issue is reversed or remanded, the appellant secures at least a possibility that a different result can be obtained at the district court level. In other words, when an appellant prevails on even one issue, they are in a better position and the appellee is in a worse position. Therefore, a decision is coded as a victory for the appellant if any of the products liability issues appealed were resolved in the appellant’s favor.

⁷ Because of the nature of summary judgment motions, the movant is usually the defendant.

Chapter Five

Results

The purpose of looking at several different measures of attorneys' expertise is to weave them together into a tapestry which bears as close a resemblance as possible to the complex real-world phenomenon of attorney expertise. However, before compiling that composite picture, each of the components will be examined individually to see if there is a significant correlation between any of them and case outcomes in either the district or circuit courts. Then all the factors will be combined together to create an overall expertise index for each attorney. Both the individual components and the composite index will be analyzed from an absolute perspective and a relative perspective. In other words, I will examine both the success rates of attorneys at each value of a category and the success rates of attorneys based on whether they have more, less, or equal expertise in a given category than opposing counsel.

The first step in the analysis is to establish a baseline. Since the sample consists of products liability cases in which plaintiffs are usually one-shotters and defendants are usually repeat players, we can expect a higher winning percentage for defendants than for plaintiffs. Moreover, in the circuit courts the fact that the appellate standard of review usually involves deference to the trial court decision leads us to expect that there will be different winning percentages between appellants and appellees. The sample bears out these expectations. Table 1 demonstrates that in district court cases plaintiffs won only twenty-two percent of cases compared to a fifty-six percent winning percentage for defendants (while twenty-two

percent of decisions were split). In circuit court cases appellants only won thirty percent of the time. But the results vary between plaintiff-appellants, who won twenty-eight percent of their cases, and defendant-appellants, who won forty-six percent of the time. Table 2 presents these results. Because of the different base winning percentages of each group as categorized by party and appellant status, each litigant category will be evaluated separately in the following analyses (except where otherwise noted).

Table 1 – District Court Baseline Success Rates

	Plaintiff	Defendant	Total
Win	21.5 % (190)	56.5 % (498)	39 % (688)
Loss	56.9 % (502)	21.8 % (192)	39.4 % (694)
Split Decision	21.5 % (190)	21.7 % (191)	21.6 % (381)
Total	100 % (882)	100 % (881)	100 % (1,763)

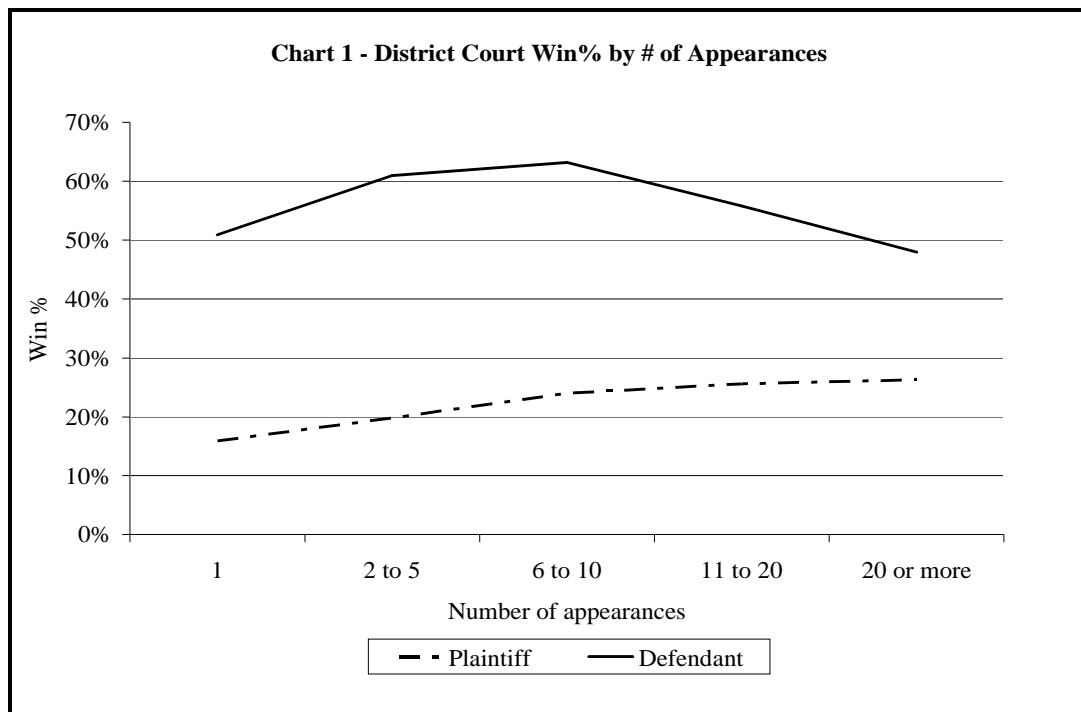
Table 2 – Circuit Court Baseline Winning Percentage

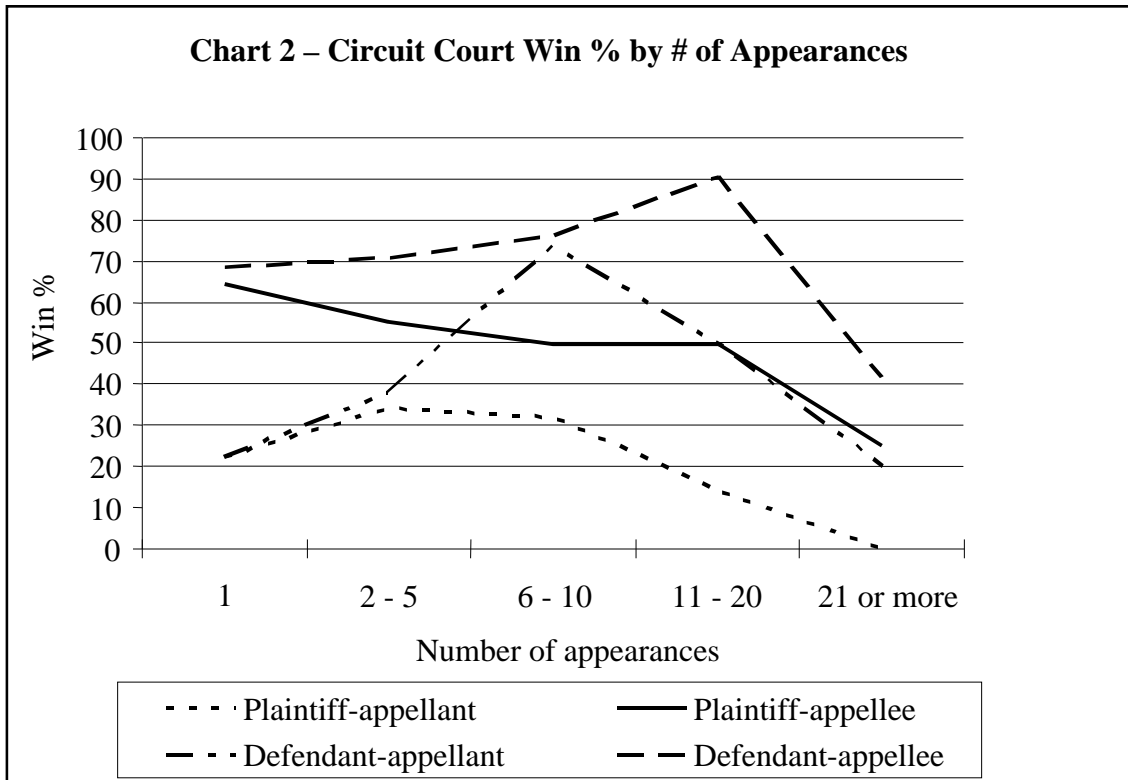
	Plaintiff	Defendant	Total
Appellant	27.5 % (84)	46 % (29)	30.7 % (113)
Appellee	54 % (34)	72.5 % (221)	69.3 % (255)
Total	32.1 % (118)	67.9 % (250)	100 % (368)

Number of Appearances

The first component of attorney expertise measured is an attorney’s number of appearances before the relevant court. Chart 1 illustrates each litigant category’s winning percentage based on the attorney’s number of appearances in district court cases and Chart 2 shows the same phenomenon in the circuit court cases. Since the number of appearances includes the case in question, all attorneys making their first appearance are grouped together based on that one appearance. After that, attorneys are grouped into one of four groups based on their number of appearances. These groupings are designed to reflect increasing levels of process expertise and are necessary to collapse the available data into categories with a

significant enough number to analyze. As the charts indicate, while there is an initial increase in winning percentage, in each litigant category except one, as the number of appearances increases the increase does not just level off but actually goes into decline. The one exception is that plaintiffs' counsel in district court cases do have continually (although modestly) increasing success rates as the number of previously litigated cases grow. Yet for defense counsel in the district courts and for three of the four litigant categories in the circuit courts, the win rate ultimately declines to a winning percentage which is lower than that of the least experienced cohort.





An examination of counsel’s number of appearances *relative* to opposing counsel demonstrates that in district courts both plaintiffs’ and defendants’ counsel who have a greater number of appearances than opposing counsel have a higher winning percentage than those who have less litigation experience than opposing counsel. Furthermore, the chi square value indicates that this relationship is statistically significant because there is only a 1.6 percent chance of obtaining these results if there were no relationship between an attorney’s relative litigation experience and winning percentage. The results in the circuit courts, however, do not provide such evidence. Table 3 indicates that when defendants appealed, an attorney with more appearances won the same percentage of the time as an attorney with fewer appearances. When plaintiffs appealed, the numbers at first appear to indicate a possible effect because both plaintiff-appellant and defendant-appellee’s counsel who were more experienced achieved a winning percentage roughly five points higher than the baseline

winning percentage. However, the small chi square value of 3.204 indicates that this differential would be obtained randomly twenty percent of the time. Therefore, the data does not establish a statistically significant link between relative number of appearances and case outcomes in the circuit courts.

Table 3 – Winning Percentage by Number of Appearances Relative to Opposing Counsel

	Fewer	Equal #	More	Baseline	χ^2	p
Plaintiff (dist. ct.)	20.4 % (102)	16.4 % (11)	24.4 % (77)	21.5 % (190)	12.118	.016
Defendant (dist. ct.)	49.8 % (157)	70.1 % (47)	58.9 % (294)	56.5 % (498)	12.124	.016
Plaintiff-appellant	24.1 % (35)	23.3 % (10)	33.3 % (39)	27.5 % (84)	3.204	.201
Plaintiff-appellee	50 % (16)	85.7 % (6)	50 % (12)	54 % (34)	3.195	.202
Defendant-appellant	50 % (12)	14.3 % (1)	50 % (16)	46 % (29)	3.195	.202
Defendant-appellee	66.7 % (78)	76.7 % (33)	75.9 % (110)	72.5 % (221)	3.204	.201

Years of Practice

The data does not provide any basis for a link between the number of years an attorney has practiced and his or her chances of winning in either district or circuit courts. The number of cases which fall within the categories of two to five years of practice and six to ten years of practice is rather small to be helpful at a quick glance. The relationship between win rates in the categories of eleven to twenty years and twenty-one or more years does not display a connection between practicing law longer and winning more cases. In district courts attorneys' win rates with the most years of practice decline somewhat while the same thing happens in the circuit courts in defendant-appealed cases. Although there is an increase from the third to fourth category of years of practice in circuit court cases

appealed by plaintiffs, the increase is not sufficient to evidence a statistically significant relationship.

Table 4 – Winning Percentage by Years of Practice

	2 to 5 yrs.	6 to 10 yrs.	11 to 20 yrs.	21 or more yrs.	χ^2	p
Plaintiff (dist. ct.)	8.3 % (1)	23.1 % (9)	27.7 % (33)	25.8 % (55)	6.160	.405
Defendant (dist. ct.)	61.9 % (13)	52.8 % (38)	63.2% (148)	54.3 % (182)	6.999	.321
Plaintiff-appellant	50 % (1)	22.2 % (2)	25 % (9)	31.2 % (24)	1.084	.781
Plaintiff-appellee	0 % (0/1)	100 % (1)	87.5 % (7)	55.6 % (10)	4.831	.185
Defendant-appellant		0 % (0/3)	61.5 % (8)	45.8 % (11)	3.768	.152
Defendant-appellee		66.7% (12)	70 % (56)	76.9 % (93)	1.636	.441

Table 5 shows that examining attorneys’ win rates based on their years of practice relative to opposing counsel also fails to reveal any statistically significant relationship between practicing law longer than opposing counsel and winning more frequently. Circuit court cases in which the defendant is the appellant actually demonstrate the opposite trend with the party represented by less experienced counsel prevailing a higher percentage of the time. The small number of cases within this category is likely the reason for this unexpected and apparently large disparity. Plaintiff-appealed cases at the circuit court level and all district court cases show a win rate a few percentage points higher for counsel who have the edge in years of practice, but the small chi square value in each of these categories demonstrates that the relationship is not statistically significant.

Table 5 – Winning Percentage by Year of Practice Relative to Opposing Counsel

	Fewer	Equal #	More	Baseline	χ^2	p
Plaintiff (dist. ct.)	24.9% (56)	27.3% (3)	26.5% (39)	25.6% (98)	0.687	.953
Defendant (dist. ct.)	47.6% (70)	54.5% (6)	51.8% (116)	50.3% (192)	0.817	.936
Plaintiff-appellant	21.3% (10)	0% (0/4)	35% (14)	26.4% (24)	3.595	.166
Plaintiff-appellee	68.8% (11)		33.3% (1)	63.2% (12)	1.362	.243
Defendant-appellant	66.7% (2)		31.3% (5)	36.8% (7)	3.542	.170
Defendant-appellee	64.9% (24)	100% (4)	78.7% (37)	73.9% (65)	1.362	.243

Clerkship

Only forty-one of the more than seventeen hundred attorneys who appeared in the district court cases had clerked for a district court judge, and only seventeen of the seven hundred-plus appellate attorneys in the circuit court cases had experience clerking for a federal appellate judge. These small numbers make it difficult to achieve a statistically significant result. However, the raw results for former clerks are set forth in Table 6 and can be examined for a general pattern. In district court cases, both plaintiffs' and defendants' counsel with clerkship experience enjoyed higher rates of success than the overall win rate for their respective categories. When plaintiff-appellant's attorneys had clerked, they won two out of three cases compared to a 27.5 percent win rate overall. The only plaintiff-appellee's attorney who had clerked won that case, while 54 percent of plaintiff-appellee's attorneys overall won their case. Defendant-appellant's counsel who had clerked also exceeded the overall average of 46 percent by winning three out of four cases. However, Defendant-appellee's former-clerk counsel only won four out of nine cases which was significantly lower than the 72.7 percent win rate for that litigant category. None of the former clerks appeared against each other in the same case. Therefore, there is no difference between an absolute and relative analysis of this component of attorney expertise.

Table 6 – Cases Won by Former Clerks

	Cases Won	Total Cases	Clerk Win %	Base Win %
Plaintiff (dist. ct.)	4	8	50%	21.5%
Defendant (dist. ct.)	23	33	69.7%	56.5%
Plaintiff-appellant	2	3	66.7%	27.5%
Plaintiff-appellee	1	1	100%	54%
Defendant-appellant	3	4	75%	46%
Defendant-appellee	4	9	44.4%	72.5%

Products Liability Specialty

Table 7 reveals a variety of different relationships between win rates and products liability specialization in the various litigant categories. In district court cases, unspecialized plaintiffs’ attorneys actually enjoy a somewhat higher winning percentage than specialized plaintiff’s counsel. In circuit court cases, when plaintiffs appealed attorneys without a specialty in products liability achieved a virtually identical win rate as those who did specialize in the subject area of the litigation. On the other hand, in cases appealed by defendants, specialized attorneys achieved a win rate approximately twelve points higher than non-specialized attorneys within the same litigant category. Specialized defense counsel achieve a similar advantage, but only by about five percentage points. Nevertheless, the small chi square values in the categories where specialized attorneys secure higher win rates belie the apparent significance of this differential.

Table 7 – Winning Percentage by Products Liability Specialty

	Yes	No	Baseline	χ^2	p
Plaintiff (dist. ct.)	23.4% (43)	27.7% (49)	25.2% (92)	2.343	.310
Defendant (dist. ct.)	59.4% (244)	54.1% (105)	57.7% (349)	1.490	.475
Plaintiff-appellant	30.9 % (21)	30.8 % (24)	30.8 % (45)	0.000	.988
Plaintiff-appellee	72.2 % (13)	60 % (9)	66.7 % (22)	0.458	.458
Defendant-appellant	54.5 % (12)	41.7 % (10)	47.8 % (22)	0.382	.555
Defendant-appellee	73.5 % (111)	75 % (63)	74 % (174)	0.803	.877

Table 8 shows that in cases which the defendant appealed where only one side’s counsel specialized in products liability, the appellants and appellees each won the same percentage of cases whether or not their attorney was the one with specialized expertise. In district court cases defendants experienced the same nearly equal success rates regardless of whether their attorney was more or less specialized than opposing counsel. Plaintiff-appellant and defendant-appellees’ counsel who enjoyed the advantage of specialization over their opponent did have higher winning percentages than those who suffered from a disadvantage vis-à-vis opposing counsel. However, plaintiff-appellants’ attorneys who had equal subject area specialization to opposing counsel had a higher winning percentage than those with an advantage in specialization while defendant-appellee’s counsel with equal specialization had a lower winning percentage than those at a disadvantage in this category. Finally, plaintiffs’ attorneys in district court cases who were not specialized had a higher winning percentage versus specialized defense counsel than when those credentials were reversed. Overall, these results do not support the conclusion that an attorney’s greater specialization vis-à-vis opposing counsel is related to a greater chance of success.

Table 8 – Winning Percentage by Products Liability Specialty Relative to Opposing Counsel

	Less	Equal	More	Baseline
Plaintiff (dist. ct.)	20.5% (15)	26.6% (37)	14% (6)	22.7% (58)
Defendant (dist. ct.)	60.5% (26)	44.6% (62)	60.3% (44)	51.8% (132)
Plaintiff-appellant	15 % (3)	33.3 % (18)	27.8 % (10)	28.2 % (31)
Plaintiff-appellee	75 % (6)	64.3 % (9)	75 % (3)	69.2 % (18)
Defendant-appellant	25 % (1)	35.7 % (5)	25 % (2)	30.8 % (8)
Defendant-appellee	72.2 % (26)	66.7 % (36)	85 % (17)	71.8 % (79)

Martindale-Hubbell Rating

An attorney’s Martindale-Hubbell rating is a particularly interesting variable because a considerable amount of time, effort, and information goes into compiling it. Since very few

attorneys in the sample had a rating of C, the analysis is primarily confined to a comparison of attorneys rated A and B. Table 9 shows that attorneys with an A rating do have a higher win rate than attorneys with a B rating in all but two of the litigant categories. However, in the plaintiff-appellant category attorneys rated B have a higher win rate than those rated A and in the defendant-appellee category the win rates are nearly identical. Moreover, the chi square values reveal that the numbers in most of the categories where A has an apparently substantially higher win rate than B would occur randomly a substantial percentage of the time. The only exception is that in district court cases, plaintiffs' attorneys win rates are related to their Martindale-Hubbell rating to a statistically significant degree.

Table 9 – Winning Percentage by Martindale-Hubbell Rating

	A	B	C	Baseline	χ^2	p
Plaintiff (dist. ct.)	25.2% (95)	16.7% (32)	14.3% (2)	22.1% (129)	11.266	.024
Defendant (dist. ct.)	58.1% (337)	47.4% (37)	100% (3)	57% (377)	5.547	.236
Plaintiff-appellant	28.1 % (45)	34 % (18)	33.3% (1)	29.6 % (64)	0.671	.715
Plaintiff-appellee	65.5 % 19()	41.7 % (5)		58.5 % (24)	3.017	.221
Defendant-appellant	54.5 % (24)	33.3 % (1)	100% (1)	54.2 % (26)	1.373	.503
Defendant-appellee	75.4 % (156)	74.1 % (20)	0% (0/1)	74.9 % (176)	1.989	.158

Not all attorneys are rated by Martindale-Hubbell. Slightly more than seventy percent of the attorneys in this study are rated. In order to evaluate the effect of the rating in relation to opposing counsel, it is necessary that the attorneys on both sides of the case have a rating. Approximately half of the cases meet this criterion. In most of these cases the attorneys have the same Martindale-Hubbell rating. The results for attorneys with different ratings could only be compared in 170 district court cases and 60 circuit court cases. The results in Table 10 show that in the district court cases there is a gradual increase in the win rates based on the Martindale-Hubbell rating relative to opposing counsel. Attorneys with a higher rating than their opponent do better than attorneys who have the same rating who do

better than attorneys who have a lower rating than opposing counsel. This is the expected relationship if attorney expertise influences judicial decision-making. While these statistics are not quite significant at the ninety-five percent level, the p-value of .066 makes these numbers thought-provoking. At the circuit court level the picture is different and more similar to the results in Table 8. Defendant-appealed cases seem to be unaffected by relative expertise. Plaintiff-appealed cases do show a higher winning percentage for those with a higher relative rating than for those with a lower relative rating, but comparing these to the winning percentages for cases where the rating was equal shatters the illusion that an attorney's Martindale-Hubbell rating vis-à-vis opposing counsel is directly related to a greater chance of success.

Table 10 – Winning Percentage by Martindale-Hubbell Rating Relative to Opposing Counsel

	Less	Equal	More	Baseline
Plaintiff (dist. ct.)	16.4% (23)	24.1% (66)	30% (9)	22.1% (98)
Defendant (dist. ct.)	43.3% (13)	52.6% (144)	65.7% (92)	56.1% (249)
Plaintiff-appellant	36.8 % (14)	23.2 % (29)	60 % (6)	28.3 % (49)
Plaintiff-appellee	33.3 % (3)	60 % (12)	33.3 % (1)	50 % (16)
Defendant-appellant	66.7 % (2)	40 % (8)	66.7 % (6)	50 % (16)
Defendant-appellee	40 % (4)	76.8 % (96)	63.2 % (24)	71.7 % (124)

Law School Achievement

Since graduating from law school with honors and participating in law review are closely related, they have been combined to create a single measure of law school achievement. If an attorney's expertise, as reflected by his or her achievement in law school, was a factor in judicial decision-making we would expect to see winning percentages be highest for attorneys who both graduated with honors and participated in law review and be lowest for attorneys with neither of those qualifications. However, Table 11 shows that such a pattern is not evident in any of the litigant categories. In fact, the exact opposite trend is

displayed in circuit court cases appealed by the defendant. Furthermore, in all of the circuit court litigant categories the attorneys with a lower level of law school achievement than their opposing counsel have a higher winning percentage than those with a higher level of achievement than opposing counsel. While the attorneys in the district court cases display the expected relationship based on relative law school achievement, those numbers do not rise to a level of statistical significance.

Table 11 – Winning Percentage by Law School Achievement

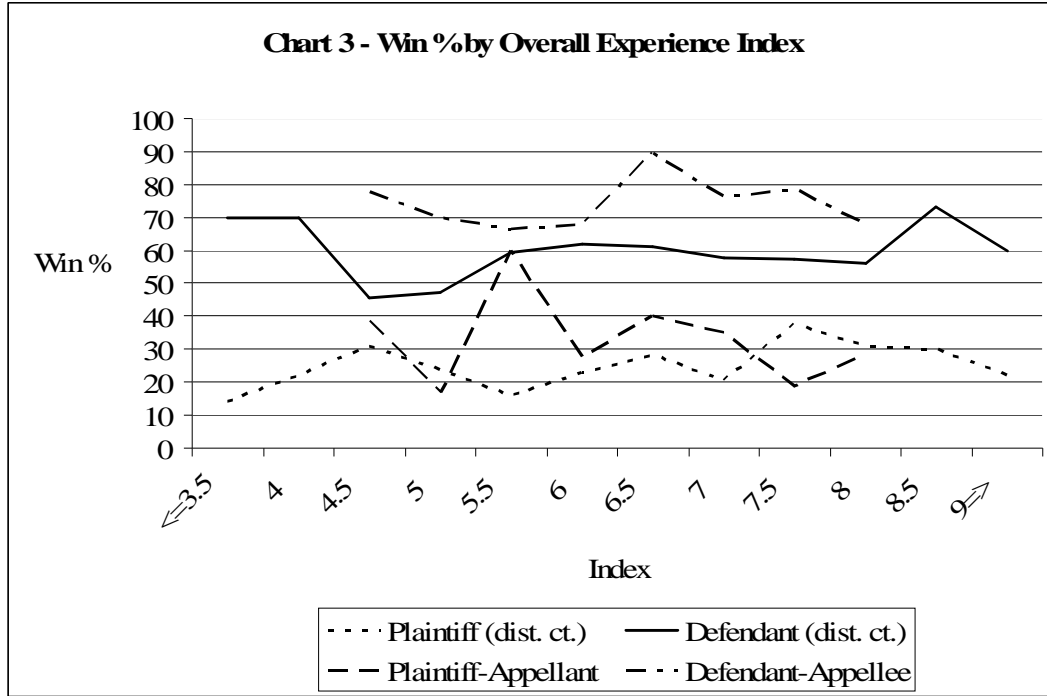
	Neither honors nor law review	Either honors or law review	Both honors and law review	Baseline Win %	Less	More
Plaintiff (dist. ct.)	25.3% (66)	23.1% (21)	37% (10)	25.6% (97)	17.2% (5)	30.3% (23)
Defendant (dist. ct.)	56.6% (323)	63.9% (46)	58.8% (10)	57.4% (379)	42.1% (32)	62.1% (18)
Plaintiff-appellant	32.1 % (26)	25 % (11)	35% (7)	30.3% (44)	35.3 % (12)	25.6 % (10)
Plaintiff-appellee	73.7 % (14)	60 % (6)	50 % (2)	66.7% (22)	70 % (7)	66.7 % (4)
Defendant-appellant	54.2 % (13)	43.8 % (7)	40 % (2)	48.9% (22)	33.3 % (2)	30 % (3)
Defendant-appellee	74 % (97)	76 % (57)	70 % (21)	74.2 % (175)	74.4 % (29)	64.7 % (22)

Overall Expertise

Few of the individual components of expertise show a statistically significant relationship to case outcomes when party and appellant status are controlled for. However, each of these components measures only one area of expertise. When each attorney’s expertise in each specific area is compiled into an overall picture of expertise there is still the possibility that a relationship between overall attorney expertise and winning percentage may emerge. Total overall experience scores were only calculated for those attorneys in the sample who had data available in every category. This was done in order to avoid treating

attorneys with no information available in a certain area as though they had no expertise in that area.

It was possible to construct an overall expertise index for roughly half the attorneys in the study. In the circuit court cases most of these attorneys were either plaintiff-appellant or defendant-appellee's counsel, so Chart 3 depicts the variation in winning percentage by overall expertise index in those two litigant categories in circuit court cases as well as for plaintiffs and defendants in district court cases. Because of the small number of attorneys with an index at the top and bottom ends of the scale in each category, the ends of the scale were collapsed to provide sufficient data for analysis. Because there were more district court cases, a smaller portion of the data had to be collapsed than in the circuit court cases. The first and last point of each line represents the winning percentage of attorneys with that index and lower (for the first point of each line) or that index and higher (for the last point of each line). The results exhibit a fair amount of fluctuation in winning percentages across the various levels of attorney expertise, and there is no consistent indication that winning percentages tend to increase as expertise increases. In short, the picture presented by this data is one in which an attorney with a high level of overall expertise simply does not have any better chance of winning a case than if he or she had a low level of expertise.



The numbers in the remaining circuit court litigant categories of plaintiff-appellee and defendant-appellant also do not demonstrate any relationship between overall expertise and greater success. There are insufficient numbers in the defendant-appealed cases to examine winning percentages at each possible score on the overall index. However, when the numbers are collapsed into two categories representing the top half and bottom half of attorneys by overall expertise, the winning percentage for the bottom half is actually higher than the winning percentage for the attorneys whose overall index is in the top half.

Evaluating attorneys' overall expertise relative to opposing counsel reduces the sample further because a comparison can only be done if there is data available in each component category for attorneys on both sides of a given case. There are 200 district court cases and 94 circuit court cases in the study which meet this criterion. Within the subset of circuit court cases there is little difference between the success of plaintiff and defendant's attorneys (about five percent difference), but there is still significant difference between

appellant and appellee's win rates (over forty percent difference). Because of the smaller number of circuit court cases and relatively small difference between plaintiffs and defendants success rates within those cases, the circuit court results are examined controlling only for appellant status and not for party as well.

Chart 4 shows that in the circuit court cases attorneys with a lower overall expertise index than their opposing counsel had a higher winning percentage than those who had greater expertise than opposing counsel. Moreover, the win rate when the attorneys had an identical expertise index was the highest rate for appellees and the lowest rate for appellants. This reveals an absence of any observable relationship between relative overall expertise and success rates in federal appellate courts. The picture revealed in the district court cases, however, is different. There, both the plaintiff and defendant categories show a fairly substantial advantage in winning percentage for attorneys who have a greater overall expertise index than their opposing counsel. Furthermore, the win rates when attorneys have an identical index is where it would be expected to be if there is a relationship between greater relative expertise and greater success in obtaining favorable judicial decisions, namely between the win rates for attorneys with lower and greater levels of expertise than opposing counsel. Furthermore, Table 12 confirms that the trend observed in the district court data in Chart 4 is statistically significant at the ninety-four percent level.

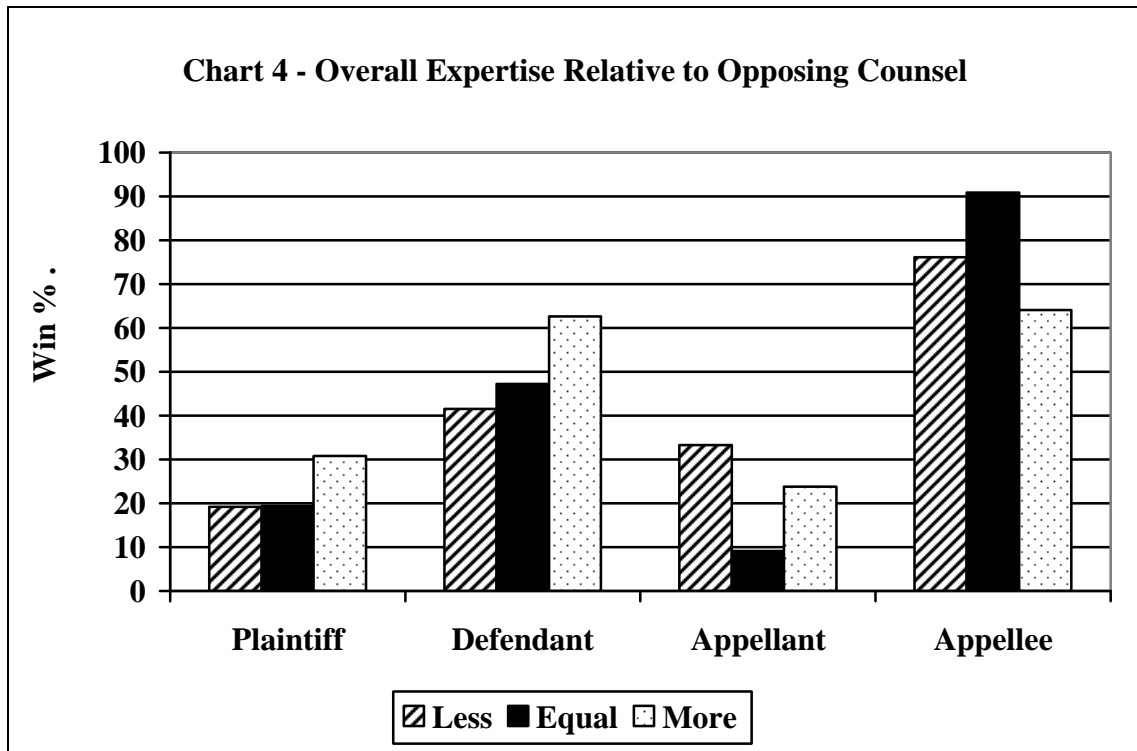


Table 12 – Winning Percentage by Overall Index Relative to Opposing Counsel

	Less	Equal	More	Baseline	χ^2	p
Plaintiff (dist. ct.)	19.2% (19)	19.4% (7)	30.8% (20)	23% (46)	9.169	.057
Defendant (dist. ct.)	41.5% (27)	47.2% (17)	62.6% (62)	53% (106)	9.169	.057

Chapter Six

Discussion

Justice Antonin Scalia has commented that not infrequently a party who appears before the United States Supreme Court with completely incompetent counsel still prevails in the case (Scalia, 2007). This anecdotal account raises the issue of whether Justice Scalia's observation that the competence or expertise of an attorney has little to do with case outcomes can be empirically verified in particular institutional contexts. The results of this study demonstrate that in the federal circuit courts Justice Scalia's comment rings true. No relationship at all between attorney expertise and greater success rates was found in the circuit court cases for any of the individual categories or the overall index either in an absolute or relative analysis. These results confirm the first part of my hypothesis. Like Justice Scalia and his colleagues, federal circuit court judges have access to a significant amount of neutral information from their law clerks and their own research. The time and staff resources each circuit judge can devote to each case allows for the full development of the best arguments on each side of the case which compensates for any disparity in expertise between the attorneys representing the parties. As a result, there is no observable link between the level of attorney expertise and case outcomes in the circuit court cases in this study.

The district court data reveals a different pattern. An analysis of each of the individual components of attorney expertise exhibits that in all except one (subject area specialization) the attorneys with greater expertise than opposing counsel had a higher

winning percentage than the attorneys with less expertise than opposing counsel. This is precisely the trend which would be expected if relative attorney expertise affected judicial decision-making. However, of these individual factors, the previous number of appearances before a federal district court was the only one in which the relationship was clearly statistically significant. Yet each individual component of attorney expertise measured provides only a partial assessment of the complex attribute that is attorney expertise. The overall index—a mosaic pieced together out of the individual components—gives us a more complete picture of each attorney’s level of expertise. The relative analysis of the overall index of attorneys in the district court cases provides support for the second part of the hypothesis by showing a relationship between expertise which is greater than opposing counsel and higher win rates which is statistically significant at a ninety-four percent level. While the p-value of .057 falls just short of placing the results within the ninety-five percent level of significance typically employed, the numbers are close enough to lend support to the hypothesis and at least justify further study. There is certainly an indication that the role of attorney expertise is different in district courts than in circuit courts and that the difference may very well be due to the significantly lessened degree of access to neutral information which would, in turn, neutralize the effect of disparate attorney expertise. With only two law clerks and hundreds of cases on the docket at any given time, district court judges simply cannot independently develop full legal analysis for both sides of every case. The statistical results support the conclusion that this results in higher success rates for attorneys with more experience than opposing counsel.

Evaluating the final hypothesis requires evaluating the difference in the results of looking at attorney expertise as an absolute, overall characteristic, and looking at it in

relationship to the expertise level of opposing counsel. This distinction cannot really be profitably made in the circuit court data because there was no relationship found in either the absolute or relative analysis. The district court data, however, is another story. There, the relationship found across the board in the relative analysis was not present in the absolute analysis. The only relationship found in any of the absolute analysis was that plaintiffs' attorneys in district court cases have a statistically higher winning percentage the higher their Martindale-Hubbell rating. Aside from that lone instance (which did not even hold true for defense counsel in the same cases), no relationship was observed between greater expertise in general and greater success. This confirms my final hypothesis that any relationship between attorney expertise and judicial decision-making would appear only in a relative analysis and not in an absolute analysis.

While this research design is a further development of past efforts and provides useful and interesting information, certain limitations must be borne in mind. First, the analysis is limited to products liability cases. While this limitation was logical and necessary for purposes of this study, it limits the applicability of the findings to other subject areas of litigation. Most notably, the results derived from this research design may not accurately reflect the dynamic present in criminal litigation. A second limitation is created by the difficulty in quantifying a concept as complex as attorney expertise. Although this paper makes positive strides in addressing this difficult task, the results will never fully capture attorney expertise. Finally, this study does not control for judicial ideology which has been widely recognized as a significant factor in judicial decision-making. Further breaking down categories based on judges' ideological predilections would require a considerably larger

body of data than that which is analyzed here. Further analysis based on more extensive data which allows for using this control variable is a logical progression for future research.

This paper's development of a more complete theoretical understanding of the link between attorney expertise and judicial decision-making and how institutional factors affect that link is only the beginning of a deeper exploration. Similar future research is needed to examine the relationship between attorney expertise and judicial decision-making in other subject areas, as well as in other courts including state courts, special jurisdictional courts, foreign courts, and international tribunals. Such research will go a long way to helping us understand the impact of advocacy on judicial decision-making and how that relationship is affected by different institutional features.

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