Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals

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In the U.S. legal system, litigants frequently retain counsel to represent their interests in civil cases, particularly when the stakes are high. Scholarly work and anecdotal evidence suggest that variation in the quality of advocacy has the potential to affect litigant success. We examine the relationship between attorney characteristics, case outcomes, and judicial voting in products liability decisions of the U.S. Courts of Appeals. Our analysis found some differences in the levels of experience and specialization of counsel representing defendants and plaintiffs and that counsel expertise was, at times, related to litigant success. In a multivariate model of decisionmaking, judges were less likely to support the position of plaintiffs when they were represented by counsel appearing for the first time before the circuit. When defendants were represented by attorneys who did not specialize in relevant areas of the law, judges were more likely to decide in favor of the plaintiff. These findings suggest that those attorneys who do not meet a minimum threshold of expertise will be less likely to find judicial support for their client than other attorneys. Such attorneys may be less successful as a result of their lack of familiarity with the law and appellate process or because they make poor choices regarding the likelihood of success on appeal.

Stratification within the private legal profession in the United States has been well documented (Abel 1988; Heinz and Laumann 1994). In general, scholars have divided the legal profession into two groups or hemispheres, elite lawyers and ordinary lawyers. Elite lawyers belong to large firms, represent large corporations and wealthy individuals, and have high incomes on average. In contrast, ordinary lawyers practice alone or in smaller firms, represent one-shot individual clients, and have lower incomes on average (Abel 1988). The higher compensation and prestige associated with employment in elite law firms suggests

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that this stratification is related to the quality of representation, which may ultimately be related to the likelihood of success in litigation. This article evaluates this impression by assessing the impact of attorney expertise in appellate litigation.

Our analysis focuses on products liability cases in the U.S. Courts of Appeals. In addition to providing a sufficient number of cases that present roughly comparable fact patterns and issues, this subset of civil appeals provides a particularly appropriate context for analyzing differences in counsels' expertise. In the typical products liability case, an individual "one-shot" plaintiff sues one or more corporate "repeat player" defendants. Defendants in these cases often have the benefit of previous experience in similar litigation, in-house counsel to provide guidance, and the financial resources necessary to retain additional expert representation. They also have the incentive to do so; the stakes in products liability lawsuits can be very high in both financial and reputational terms (Viscusi 1991). Indeed, an adverse judgment in a products liability case, whether at trial or on appeal, may influence subsequent product sales or inform other injured parties that a case is worth bringing (Priest & Klein 1984; Viscusi 1991).

In contrast, plaintiffs in products liability lawsuits are often one-shot players interested solely in the outcome of their case. Unlike large corporate defendants, plaintiffs do not have the resources to shop for expert counsel. Instead, they rely on attorneys who will represent them on a contingency fee basis, rather than an hourly rate (Gross & Syverud 1996). Although the high stakes of products liability litigation has created a financial incentive for many plaintiffs' lawyers and firms to orient their practice in this area, individual plaintiffs may not be capable of making informed judgments when selecting firms or attorneys best suited to represent their interests. As a consequence of these dynamics, one would expect the expertise of counsel representing plaintiffs in products liability appeals to be more widely varied than that of counsel representing corporate defendants. To explore these premises, our analysis offers a comparative profile of counsel representing plaintiffs and defendants in products liability cases in the federal appeals courts.

We also examine the connections, if any, between litigants' success in these cases and the expertise of their counsel. The notion that litigation success in appellate courts is related to the parties' ability to retain expert counsel has been explored in only a few studies (McGuire 1995; Wheeler et al. 1987). In one study of the U.S. Supreme Court, parties with more experienced counsel were more likely to prevail (McGuire 1995). This finding led the author to conclude that attorneys who repeatedly argue before the Court may win more often as a result of their enhanced level of credibility (ibid.). From this perspective, litigant

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success is tied to an attorney's knowledge of the court and the appellate process as measured by the attorney's experience level before the court. Yet legal expertise also has a substantive dimension (Kritzer 1998). Lawyers must understand not only the litigation and appeals process but also master the substantive elements of their client's legal claims or defenses. Both substantive and process expertise are critical to a lawyer's ability to assess the likelihood of success on appeal and thus whether to pursue the appeal in the first place. Given these elements essential to successful lawyering, we evaluate the impact of process and substantive expertise on decisionmaking in the federal appeals courts by developing measures of attorney experience and specialization and assessing their impact on judges' votes in products liability cases.

Since stratification within the legal profession is strongly related to the types of clients elite and ordinary lawyers represent, we begin with a review of the literature exploring the relationship between litigant types, resources, and case outcomes in the federal courts. Our discussion then turns to identifying the potential linkages that may exist between litigant success in appellate courts and the quality of legal counsel by incorporating the insights of existing research, including those on case selection decisions. Finally, we assess the theoretical and empirical foundations for potential relationships between attorney expertise and judicial voting that underlie the hypotheses tested in our research design.

Party Capability Theory and the Quality of Representation

Litigant Types and Litigation Success

A well-developed body of literature exists regarding the likelihood of success before the courts for different categories of litigants (Galanter 1974; Wheeler et al. 1987; Sheehan et al. 1992; Songer & Sheehan 1992). These studies provide some empirical verification for the theory that "haves," including government and corporate litigants, are more likely to prevail because of their enhanced resources, their ability to settle unfavorable cases, their institutional farsightedness, and their repeat-player status, especially when these parties are paired against less powerful individual litigants (but see Sheehan et al. 1992). In their study of the U.S. Courts of Appeals, Songer and Sheehan (1992) constructed a hierarchy of party types on the basis of litigant resources (ranked from high to low): U.S. government, state governments, local governments, big business (railroads, banks, manufacturing companies, insurance companies, airlines, and oil companies), other businesses, other individuals, and "underdog" individuals (e.g., poor, minorities). Those parties ranking higher within the

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hierarchy were more likely to prevail. Research on state appellate courts systems also suggests that different types of litigants vary in their success rates. In their analysis of state supreme court decisions from 1870 to 1970, Wheeler et al. (1987) examined the success rates of different litigant types on appeal. As in the U.S. Courts of Appeals, large governmental parties fared best in the state supreme courts, followed by "big business" litigants. They found significant differences between stronger and weaker parties emerged when individual case types were analyzed separately (e.g. landlord-tenant disputes, creditor-debtor cases).

This line of research indicates that the underlying causal mechanisms to explain the impact of party strength on case outcomes may be conceptualized along multiple, but overlapping, dimensions. From one dimension, party strength may be viewed in relationship to resources. As Songer and Sheehan note, superior resources allow the "haves" to "incur the expenses of extensive discovery, expert witnesses, and so forth, which may increase the chances of success at trial" (1992:235). From another dimension, party strength may be conceptualized in terms of a party's "repeat player" status before the courts. For those parties who continually reappear in court, advantages may accrue as a result of their familiarity with the institutional practices of particular courts and the decisionmaking practices of judges sitting on those courts (Bright 1984, 1991). It is also possible that institutional players who litigate cases in the same substantive area repeatedly over time influence the development of legal doctrines in a manner that furthers their own interests (Horwitz 1977).

Selection Effects, Litigant Success, and Attorney Expertise

As noted above, one of the most frequently cited explanations for the success of repeat players in the courts is their ability to choose to litigate winning cases and settle those with less favorable fact patterns. Indeed, it has been observed that most disputes settle because attorneys are familiar with patterns of jury awards in different localities (Mnookin & Kornhauser 1979) and thus are able to predict the likelihood of success at trial. From this premise, a seminal work by Priest and Klein (1984) suggested that those who litigate (rather than settle) do so after taking into account the expected costs of the decision, information about the likelihood of success, and the direct costs of litigation and settlement. They concluded that, in general, plaintiffs' win rate at trial should tend toward 50%, since disputes that clearly favor the plaintiff or defendant will settle before trial is commenced. Disputes that ultimately result in litigation will tend to fall more or less randomly on either side of the decision standard, tending toward a 50% win rate for both plaintiffs and defendants.

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Later research has demonstrated, however, that in a number of substantive areas, some categories of litigants do prevail more often than 50%, indicating that other factors create asymmetries between the parties (Eisenberg 1990; Clermont & Eisenberg 1998). The notion that asymmetries exist between party types is, of course, consistent with party capability theory, particularly if some of that variation from the 50% win ratio is related to resources rather than simply to a favorable legal standard. Indeed, it seems plausible that differences between the expertise of parties' attorneys may create asymmetries of information between them (Schavell 1996). In making strategic calculations about whether to proceed with trial or appeal, more expert counsel will seek settlement rather than risk trial when the probability of success at trial is low due to the legal standard or to contextual variables such as the predilections of judge or jury. On the other hand, those counsel with less expertise may instead choose to litigate even when the probability of success is low, since their ability to assess or predict success is less well developed and thus less accurate. As Wheeler et al. (1987) argue in the context of the decision to appeal, "in making these strategic decisions, richer, more experienced parties presumably more often have the counsel of lawyers experienced in appellate litigation" (p. 409). Testing for such a link between quality of legal counsel and success rates of certain litigant groups, Wheeler et al. (1987) identified both types of litigant and counsel in their analysis of state supreme court cases. Specifically, they coded attorneys as either solo practitioners or members of a firm (including partnerships). They found that stronger parties tended to retain attorneys affiliated with a firm and that clients represented by firms fared better.

Attorney Expertise and Judicial Behavior

In addition to their enhanced ability to assess the likelihood of success on appeal, more expert attorneys may be more able to influence judges in their decisionmaking process. Kritzer (1998) has distinguished two dimensions of expertise, substantive and process, both of which may be expected to influence judges' votes and case outcomes. Substantive expertise, involving knowledge of legal principles in a particular area of the law, may be expected to shape judicial decisionmaking as these knowledge-based skills will vary. To begin with, some attorneys are able to craft persuasive legal arguments that influence judges and justices to find in favor of their clients. Attorneys who practice in a specialized area of the law would be expected to be more skillful in framing the issues and fact patterns in accordance with relevant precedent. Anecdotal evidence and testimonials from judges suggest that the quality of legal briefs and oral argument matter

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to their decisionmaking calculus, at least in some cases (Coffin 1994). Other more systematic studies in certain doctrinal areas similarly indicate that the nature and quality of legal argument may affect judges' decisions (Epstein & Kobylka 1992). Even though judges often act on their policy preferences, institutional norms and stare decisis require judges to reconcile decisions with existing case law (Knight & Epstein 1996; Merritt 1990), especially in lower appellate courts.

In addition to substantive expertise, lawyers may also develop process expertise when they come to understand the institutional characteristics of the courts in which they litigate and the ideological or other predilections of individual judges. More experienced litigators before a particular court may have reputations for veracity in factual presentations, so that judges come to "trust" particular attorneys more than others. Empirical studies suggest that process expertise affects case processing and outcomes (McGuire 1995; Kritzer 1998). With respect to the U.S. Supreme Court, McGuire (1995) found that more experienced litigators prevailed more often when opposed by those with fewer previous appearances before the Court. He attributed this finding to repeat litigators' reputation for reliability, "a commodity upon which the justices apparently place some value" (ibid., p. 195). Similar findings have been made in the context of grievance arbitration hearings where more experienced advocates prevailed (Kritzer 1998). Thus, judges' familiarity with and respect for a particular repeat litigator or law firm may provide a "signal" that the party's arguments are worthy of careful consideration.

Process expertise may also reflect on the ability of experienced counsel to steer an effective course around and among the "pylons" of judicial attitudes in their arguments before the court (Higginbotham 1986). As Judge Patrick Higginbotham observes: "The fine art of advocacy requires an ability to recognize when a case falls into [the small percentage of cases with unclear outcomes]. In these cases the holding may be influenced one way or another by the attitude of the judges. Fortunately, the advocate can acquire the necessary sensitivity [to individual judges' attitudes] through episodic ventures to a court of appeals" (1986:182–83). Similar observations have been made in the context of Social Security disability appeals before administrative tribunals, where experienced advocates "clearly play to the reputational expectations of individual judges" (Kritzer 1998:136).

In contrast to these findings, prior studies of lower appellate courts have not found a clear relationship between characteristics of counsel and judicial decisionmaking. In one early study sponsored by the Federal Judicial Center (FJC), specific attorney characteristics, such as educational background, were found not

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to be good predictors of quality advocacy according to evaluations of sitting judges of the U.S. Courts of Appeals (Partridge & Bermant 1978). Although the FJC study provides substantial insight into judges' perceptions, the analysis did not examine the relationship between the quality or characteristics of representation and judicial voting. In one effort evaluating this relationship on the U.S. Courts of Appeals, Lindquist (1996) found that the absence of counsel was a significant factor in determining judges' votes. Examining Section 1983 civil rights cases, Lindquist found that judges were more likely to vote against pro se litigants, even in cases raising more important policy issues.

Hypotheses: Litigants, Representation, and Decisionmaking

The existing literature described above provides ample background for the development of hypotheses concerning the influence of attorneys on judicial decisions in the U.S. Courts of Appeals. First, literature describing a stratification within the legal profession between elite and ordinary attorneys suggests that corporate defendants in products liability cases will hire lawyers with greater substantive and process expertise. In the initial section of our analysis, therefore, we compare the expertise of counsel retained by plaintiffs and defendants along several dimensions, including the extent to which the attorneys have experience before the circuit court and their specialization in substantive areas relevant to products liability litigation. Second, existing literature has explored the relationship between litigant types, attorney expertise, and case outcomes in appellate courts, finding that litigants with enhanced resources often enjoy greater success in court and that litigants represented by attorneys with repeat experience before a single court are similarly more likely to prevail. Research on case selection effects would also suggest that more expert counsel will evaluate cases more accurately (in terms of the likelihood of success on appeal). In the second portion of our analysis, therefore, we evaluate the extent to which case outcomes vary depending on the substantive and process expertise of the litigants' attorneys. In the last portion of our analysis, we shift our attention to the relationship between litigants' representation and judicial behavior. As outlined above, judicial decisionmaking may be affected by an advocate's ability to persuade judges to endorse a particular legal approach or argument. The extent to which an argument is attractive to a judge would be expected to correspond to counsel's substantive knowledge of the law or familiarity with the judge and practices of their court. Therefore, we anticipate that judges' votes will be associated with

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the expertise of attorneys representing either plaintiffs or defendants.[1]

Research Design

The data for our analysis are drawn from published decisions of the U.S. Courts of Appeals. These decisions were identified through a Westlaw search for products liability cases decided from 1982 to 1993.[2] Drawing from a list stratified by decision date, every other case was coded for analysis. After excluding cases that raised solely procedural issues unrelated to products liability[3] (e.g., whether or not the parties were diverse), indemnity claims (e.g., defendant is seeking contribution from another party), cases that did not identify counsel, or cases that could not be unambiguously characterized as either in favor of the plaintiff or defendants, 285 cases remained for analysis.

Parties

By analyzing products liability cases, we already are focusing on a particular type of dispute noted in the studies above: individual plaintiffs versus business defendants. Assessments regarding the relative merits of an appeal may vary by litigant type, however, requiring us to control for appellant status.[4] Therefore, we identified whether plaintiffs, defendants, or both filed the appeal.[5]

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[1] We emphasize here that expertise of counsel is not analogous to presence of counsel. Also, analyses that examine the influence of firm size are suggestive (Wheeler et al. 1987); our test, however, requires that we develop more refined measures of attorney expertise.

[2] The cases in this analysis are all in federal court as a result of diversity of citizenship. In addition, it is important to note that cases here resulted in a published opinion, suggesting a possible selection effect. Cases decided with published opinion are typically those that judges consider to be more important in terms of legal policy. Therefore, it would not be surprising if counsel were more evenly matched in these relatively more important cases. In this respect, we may be underestimating differences between counsel representing plaintiffs and defendants as well as the effect of litigation resources, such as quality of counsel, on decisionmaking in the U.S. Courts of Appeals.

[3] For example, we include cases that raise procedural questions within the realm of products liability law, such as whether the claim was filed within the relevant limitation period.

[4] Research by Barclay (1997) indicates that individual litigants may choose to appeal, even in the face of an extremely low expectation of prevailing. One would not expect the same response pattern for corporate clients whose decisions are based more on financial considerations.

[5] If the decision indicates a cross-appeal, we code both plaintiffs and defendants as "appellants" in the case.

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Attorney Process Expertise

Published decisions typically include the names of counsel involved in the appeal.[6] We recorded the names of all attorneys listed for each party and conducted a Westlaw search to determine the number of times that attorney had appeared before the same circuit court. This process resulted in measures of experience levels for 1,375 attorneys. Since many appeals involved multiple counsel and multiple parties, we used the measure of litigation experience for the most experienced counsel for each side. If the attorney was appearing for the first time in the case included in our data set, the experience measure was coded "1." If the attorney had previous experience, this measure counted those previous appearances as well as the appearance in the current case.

Attorney Substantive Expertise

Although there are multiple dimensions underlying the concept of attorney substantive expertise, we focus here on specialization. From the list of all attorneys, we identified the lead attorney for the plaintiff or defendant.[7] For each of the 570 lead attorneys, we recorded information related to his or her area of practice. To identify area of specialization, we searched the *Martindale-Hubbell Law Directory,* which lists attorneys by name and designates whether their practice is focused in a particular substantive area.[8] For the purposes of our analysis, we identified whether the attorney listed products liability, mass torts, or appellate litigation as an area of specialty. In addition, we recorded the total number of specialty fields listed. We created a ratio measure of specialization (following Kritzer 1990:127) where the numerator ranges from zero to three, reflecting the number of specialty fields listed (products liability, mass torts, or appellate litigation), and the denominator is the total number of fields listed. If the attorney did not list any field or the attorney was not included in the *Martindale-Hubbell Law Directory* for any of the years during our period, this measure was coded "0."

[6] There were a few cases where the decision listed only the attorney firm or no information at all. These cases, making up less than 3% of the total cases sampled, were excluded from the analysis.

[7] If not specifically designated, we assumed that the first listed attorney was the lead attorney.

[8] In the appellate courts, substantive knowledge in this issue area includes principles of products liability law as well as appellate procedure. We relied, therefore, on *Martindale-Hubbell* listings to identify those attorneys who specialized in all of these areas. By relying on *Martindale-Hubbell,* we recognize the limitations of using listings that are volunteered by the attorneys themselves.

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Results

Expertise of Counsel Representing Plaintiffs versus Defendants

The first stage of our analysis assesses whether substantive and process expertise of counsel vary for those representing plaintiffs and defendants. We compare characteristics of counsel after controlling for appellant status.

Table 1 presents univariate statistics on the number of times the most experienced counsel had appeared before the same circuit court (including appearance in the current case). Overall, both plaintiffs and defendants tend to retain more experienced counsel when appealing the decision of the trial court. In particular, the data in Table 1 demonstrate, for all three measures of central tendency, that when they initiate an appeal, products liability defendants are represented by more experienced advocates.

Table 1. Attorney Process Expertise, Products Liability Cases in the U.S. Courts of Appeals

	Mean	Median	Mode	Range
Plaintiff	5.17	2	1	132
Plaintiff-appellant	5.33	3	1	132
Defendant	7.11	4	1	79
Defendant-appellant	7.72	5	2	79

NOTE: Number of previous appearances by most experienced counsel.

Compared with counsel retained by plaintiffs, therefore, those representing defendants were more likely to be familiar with the circuit court hearing their case. Given the range of previous appearances,[9] the median and mode also were reported in the table. Although the medians are substantially less than the means, they indicate that defendants were slightly more likely to have counsel with greater experience before the court (compared with plaintiffs). Still, with the exception of those representing defendant-appellants, the largest cohort for each category consisted of attorneys making their first appearance before the circuit court. In the U.S. Courts of Appeals, these "first timers" represented 35.1% of the plaintiffs and 20% of the defendants in the cases analyzed.

Table 2 presents data measuring substantive expertise for counsel representing plaintiffs and defendants. The proportions in the table can be converted to reflect the percentage of the attorney's practice devoted to products liability, mass torts, or appellate litigation. For example, the mean proportion for plaintiff counsel indicates that, on average, 11% of their listed specialty

[9] Those attorneys who had extremely high experience levels were usually outliers as a result of their work in the U.S. Attorney's office.

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Table 2. Attorney Substantive Expertise Specialization of Practice for Lead Counsel, Products Liability Cases in the U.S. Courts of Appeals

	Mean	Median	Mode
Plaintiff	0.11	0	0
Plaintiff-appellant	0.11	0	0
Defendant	0.18	0	0
Defendant-appellant	0.19	0.17	0

NOTE: Proportion of listed fields includes products liability, mass torts, or appellate litigation.

fields fell into one or more of these three critical areas. Although the measures of central tendency characterize a set of attorneys whose practices are generally not focused on these narrowly defined fields, the comparison between counsel representing plaintiffs and counsel representing defendants suggests that repeat player corporate litigants were represented by more specialized attorneys. Again, however, the largest single cohort for counsel representing either plaintiffs or defendants did not specialize in either of these three fields.

Earlier research had documented stratification in the legal field where the profession is divided into two "hemispheres": elite lawyers and ordinary lawyers (Heinz & Laumann 1994). The two hemispheres specialize by client, with elite lawyers representing institutional litigants, including corporations, labor unions, and government, and ordinary lawyers representing one-shot individual clients (Heinz and Laumann 1994; Abel 1988). Specialization varies within these hemispheres as "elite" lawyers are more likely to serve powerful, corporate clients and have less control over how they practiced law than "ordinary" lawyers whose clients are one-shot individuals (Heinz & Laumann 1994). The portrait of the bar presented in Tables 1 and 2 is consistent with these earlier studies depicting a legal profession where stratification is linked to specialization. One-shot plaintiffs tended to be represented by attorneys who were less experienced than those counsel representing large corporate defendants. Counsel representing plaintiffs also were more likely to practice in other fields when compared with attorneys representing corporate defendants. When they initiate the appeal, repeat player corporate litigants also appeared to invest in more expert counsel. The next portion of our analysis tests whether substantive and process expertise of counsel affects the likelihood of success for their client.

Litigant Success Rates and Expertise of Counsel

Table 3 presents success rates for plaintiffs and defendants in products liability cases before the U.S. Courts of Appeals. In our sample of U.S. Courts of Appeals' published decisions, defendants won 56.5% of all cases. Since the raw rate of success may be affected by whether corporate defendants (or individual plain-

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Table 3. Success Rates for Plaintiffs/Defendants (by Characteristics of Counsel), Products Liability Decisions in the U.S. Courts of Appeals

	Appellant	Respondent
Defendants (overall)	36.7%[a]	64.1%[b]
Counsel has more experience than attorney representing plaintiff	38.8%	64.2%
Counsel has less experience than attorney representing plaintiff	40.9%	61.3%
Counsel is inexperienced	30.0%	63.8%
Counsel has more specialized practice than plaintiff's attorney	38.2%	68.8%
Counsel has less specialized practice than plaintiff's attorney	35.3%	60.7%
Counsel does not have specialized practice in this area	34.2%	60.9%
Plaintiffs (overall)	37.1%[c]	65.6%[d]
Counsel has more experience than attorney representing defendant	39.1%	66.7%
Counsel has less experience than attorney representing defendant	37.1%	61.9%
Counsel is inexperienced	24.0%	60.0%
Counsel has more specialized practice than attorney representing defendant	38.6%	68.8%
Counsel has less specialized practice than attorney representing defendant	34.1%	61.5%
Counsel does not have specialized practice in this area	37.8%	66.7%

[a] $N = 79$.
[b] $N = 206$.
[c] $N = 221$.
[d] $N = 64$.

tiffs) are more likely to appear as appellant or respondent, we present rates for plaintiffs and defendants as appellants and respondents.[10] The success rates, after controlling for appellant status, were remarkably similar for both plaintiffs and defendants. As appellants, both plaintiffs and defendants won about 37% of their appeals.

The data in Table 3 offer mixed support for the premise that attorneys' process expertise influences litigant success. A slightly higher success rate was reported for parties who retained counsel with more experience than the counsel representing the opposing party. More dramatic, however, were the lower success rates for appellants who hired attorneys with no previous experience before the circuit court. Thus, in the U.S. Courts of Appeals, the *lack* of attorney experience may be related to substantial reductions in success rates for both plaintiff-appellants and defendant-appellants. The data in Table 3 are even less clear when evaluating the relationship between attorney substantive expertise and litigant success. With the exception of defendants-appellants represented by counsel who did not specialize in products liability,

[10] If a party cross-appeals, it is counted as an appellant rather than a respondent. Since each party is classified as either appellant or respondent for this cross-tabulation, in cases involving cross-appeals, both plaintiff and defendant are classified as appellants. As a result, the figures do not total so that, for example, the number of plaintiff-appellants does not equal the number of defendant-respondents.

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mass torts, or appellate litigation, litigants' success rates did not vary much with their counsel's substantive expertise.

Thus far, our analysis has found that process and substantive expertise levels of counsel varied with corporate defendant "haves" more likely to be represented by attorneys with greater expertise when compared with counsel representing one-shot plaintiffs. Further, a lack of expertise, particularly as it relates to process knowledge, is associated with lower success rates for their clients. Although our examination of success rates is only moderately suggestive of the importance of attorneys' backgrounds in decisionmaking, our theoretical expectations suggest that we extend our focus to examine how individual judges' decisions are influenced by attorneys' expertise levels. Therefore, in the last portion of our analysis, we use a multivariate model of judicial voting to test these premises.

Expertise of Counsel and Judicial Voting

In contrast to our analysis of success rates, our dependent variable here is judges' votes.[11] If the judge supported the position of the plaintiff, the vote was coded "1." If the judge supported the position of the defendant, the vote was coded "0." After excluding votes that could not be unambiguously classified, 841 votes remained for analysis.[12]

Since the analysis in Table 3 suggests a relationship between the lack of experience/specialization and litigant success, we measure expertise as a simple, dichotomous measure. Counsel who did not have any prior experience before the circuit court were considered to lack process expertise, whereas those who did not specialize in any relevant substantive area, including appellate litigation, lacked substantive expertise. If counsel representing the plaintiff-defendant did not have any prior experience before the circuit, this variable ("no process expertise" for plaintiff-defendant) was coded "1" (otherwise "0"). If counsel representing the plaintiff-defendant were not specialists, these variables ("no substantive expertise" for plaintiff-defendant) were coded "1" (otherwise "0").

To control for attitudes selected for by the appointing president, this analysis uses the measure developed by Tate and Handberg (1991) in which appeals court judges are classified according to the ideology and strategy of the appointing president. Tate and Handberg's classification scheme results in three cohorts: those appointed by a conservative ideology–conscious

[11] Votes by all courts of appeals judges are included as well as those of district court judges sitting by designation.

[12] Excluded are the votes of judges who could not be identified as well as those cast by judges from specialized courts who were sitting by designation. Influence diagnostics also indicated that one vote be excluded as it disproportionately affected parameter estimates.

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president (coded −1), those appointed by a president who was not ideology conscious (coded 0), and those appointed by liberal ideology–conscious presidents (coded +1).[13] We expect judges appointed by liberal ideology–conscious presidents to be more likely to support the position of the plaintiff, and judges appointed by conservative ideology–conscious presidents to be less likely to do so. Legal norms and principles of case law lead appeals court judges to accord a high level of deference to the decisions of trial court judges. As a result, a variable is included that measures the directionality of the lower court decision (coded "1" if lower court ruled in favor of the plaintiff, "0" if in favor of the defendant).

Prior research also has documented case characteristics associated with important claims, defenses, and factual elements in products liability lawsuits (Viscusi 1991). Many of these case characteristics can be shown to mitigate in favor of the plaintiff or defendant (ibid.). Thus, to ensure that judges' votes are roughly comparable, we included case characteristics in the model (Songer & Haire 1992). Compared with other theories of tort recovery (e.g. negligence, warranty), the application of a strict liability standard is more likely to favor the plaintiff than the defendant. If the opinion indicated that the claim was being brought under this theory, this variable was coded "1." A favorable fact pattern for the plaintiff also may increase judicial support for that position. We coded a variable that identified whether the defect existed when the product left the manufacturer's control as "1"; otherwise, this variable was coded "0." Other characteristics may reduce the likelihood of a vote in favor of the plaintiff. For example, the fact pattern of a case may permit defendants to argue that plaintiffs contributed to their injury perhaps through the unreasonable use of the product. If the defendant made the argument, we coded the variable as "1"; otherwise, this variable was coded "0."

Since our dependent variable is dichotomous, the parameters of this model were estimated by logistic regression, a maximum-likelihood estimation technique (Aldrich & Nelson 1984). This method produces estimates for the parameters of a model's independent variables in terms of the contribution each makes to the probability that the dependent variable falls into one of the designated categories (e.g. pro plaintiff or pro defendant). For each independent variable, a maximum-likelihood estimate *(mle)* is calculated along with its standard error *(SE)*. Since our observations consist of judges' votes, we estimated robust standard errors to correct for any clustering that may occur as a re-

[13] Tate and Handberg did not classify President Carter because he did not appoint a justice to the Supreme Court. For our analysis, we place judges appointed by Carter in the "liberal" ideology–conscious cohort.

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sult of decisionmaking by three-judge panels.[14] Tests of statistical significance were calculated by dividing the *mles* by the robust standard errors. In addition, we report the statistics on the performance of the overall model.

The results in Table 4 suggest that variation in attorney expertise influences judicial voting behavior. For plaintiffs, the lack of attorney process expertise contributed to the likelihood of the judge voting against them to a statistically significant degree. Although the relationship is significant at the .08 level, judges were more likely to vote against defendants who were represented by counsel whose practice did not focus on products liability, mass torts, or appellate litigation. The findings for the remaining variables also supported our expectations. Judicial attitudes affect support for the plaintiff, with judges selected by "liberal" presidents more likely to vote in favor of the plaintiff. Claims governed by strict liability standards also resulted in pro-

Table 4. Logit Model
Likelihood of Vote in Favor of Plaintiff
Products Liability Decisions of the U.S. Courts of Appeals (1983–1992)

Independent Variable	Parameter Estimate
Counsel representing plaintiff has no process expertise	–0.854****
	(0.306)
Counsel representing plaintiff has no substantive expertise	0.139
	(0.288)
Counsel representing defendant has no process expertise	0.102
	(0.322)
Counsel representing defendant has no substantive expertise	0.389*
	(0.279)
Judicial ideology	0.225***
	(0.088)
Lower court	5.841****
	(1.045)
Strict liability	0.761***
	(0.296)
Defect existed when left manufacturer	0.219**
	(0.111)
Plaintiff contributed to injury	–0.380*
	(0.288)
Intercept	–1.232
	(0.387)
	$N = 841$
	Mean of dependent variable: 0.427
	Model chi-square 49.22 ($p = 0.0001$)
	% classified correctly = 73.5
	Pseudo $R^2 = 0.261$

NOTE: Robust standard errors reported in parentheses.
* $p < .09$ ** $p < .05$ *** $p < .01$ **** $p < .001$

[14] By "creating" three observations (judge votes) from a single case, uncorrected *SEs* may lead us to commit type I errors.

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plaintiff judicial voting. Finally, judicial voting reflects the overall tendency of appeals courts to affirm the decision of the trial court. Overall, the model performs well, with 73.5% of the votes classified correctly and a pseudo R^2 of 0.261.

Discussion

We outlined our expectations regarding the relationship between litigants, representation, and judicial decisionmaking in the U.S. Courts of Appeals earlier. We expected large corporate defendants, who were repeat player parties with substantial economic resources, to hire the best available counsel to serve their interests. On the other hand, we also anticipated that plaintiffs, generally one shotters, would be represented by counsel who had less expertise. Our results, although not dramatic, generally support those expectations. Defendants hired attorneys who had, on average, more experience before the same circuit court hearing their cases than those attorneys representing plaintiffs. Analysis of our measures of attorney substantive expertise suggested that plaintiffs were represented by counsel whose practices were less likely to be concentrated in specialty fields associated with products liability appellate litigation. Corporate defendants were more likely to have access to counsel who specialized in these areas.

In contrast to research on the U.S. Supreme Court, our study suggests that individual "matchups" between counsel representing plaintiff and defendant do not affect litigant success.[15] Overall, even when opposed by more expert attorneys, the parties fared about the same. Increasing levels of counsel expertise did not appear to correspond to similar increases in litigant success. Still, our findings suggest that a threshold effect exists because the lack of expertise by counsel may disadvantage the client. As noted earlier, the ability of counsel to assist in case selection decisions may be associated with expertise. For example, counsel who do not meet a minimum level of expertise may simply make bad judgments about the likelihood of success on appeal and thus continue to litigate (either by appealing or defending) marginal claims or defenses. The ability to evaluate the likelihood of success includes identifying those cases where appeals will be lost as a result of threshold issues, such as whether a claim is timely. In

[15] Although we did not present the results here, we also estimated logit models of judicial voting and case outcomes to assess whether the lack of relationships found in the cross-tabulations presented in Table 3 held after the introduction of controls. The results of these logit models using difference-based measures similar to McGuire (1995) supported the findings from the bivariate data analysis in Table 3: Differences in expertise levels between opposing counsel do not affect case outcomes or judicial voting. We estimated additional logit models using the continuous measures of expertise and experience for counsel representing plaintiffs and defendants. The estimated relationships for these models also were weak and therefore not statistically significant.

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our analysis, we found that of the cases appealed by the plaintiff, 22.5% of those brought by attorneys without previous experience in the circuit court involved an issue about the timeliness of the plaintiff's claim. In contrast, plaintiff attorneys with prior experience appealed relatively fewer cases where there was a question raised about timeliness (15.9%). Although these numbers are far from dispositive, they suggest the need for further investigation of the linkage between case selection decisions and attorney expertise.

Our analysis of attorney expertise also led us to examine individual judicial decisionmaking. Similar to our analysis of case outcomes, we found that the relationship between attorney expertise and judicial voting was not a continuous one where increased levels of counsel expertise corresponds to increased levels of judicial support for their position. Instead, the results indicate that the relationship between expertise and judicial voting is dichotomous. That is, only when counsel were stratified into two tiers (expertise/no expertise) did the relationship between judges' decisions and advocacy emerge. In particular, plaintiffs' attorneys who were unfamiliar with the judges and practices of the circuit were less likely to garner judicial support for their position than attorneys who were familiar with the circuit. Similar to findings reported on the U.S. Supreme Court (McGuire 1995) and administrative tribunals (Kritzer 1998), this analysis supports the proposition that advocates' process expertise plays an important role in judicial decisionmaking. The relatively weak relationship found between judicial voting and defendants' counsel who did not practice in this area of the law also suggests that a minimum level of substantive expertise plays a role, albeit a limited one.

Influence of attorney expertise affected judicial decisionmaking differently, depending on the type of litigant. One-shot plaintiffs lost more often with counsel who lacked process expertise, whereas repeat player defendants lost more often with counsel who lacked substantive expertise. This finding suggests that plaintiffs' attorneys may already be on a level playing field in terms of substantive knowledge. Even if they do not specialize in products liability law, they are more likely to be personal injury attorneys who are knowledgeable in principles of state tort law. Within this group of plaintiffs' counsel, however, stratification may exist, with some attorneys far more likely than others to practice in federal court. These plaintiff attorneys may win more often as a result of their familiarity with federal appeals court judges and the procedures and practices of the circuits. In contrast, a lack of substantive expertise mattered only for counsel representing defendants, whereas lack of process expertise for counsel made no difference for defendants in terms of judicial voting. This finding may be due to the repeat player status of the

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defendants, who, as large corporations are more likely to make sophisticated decisions regarding legal strategy without the assistance of outside counsel. These parties, and their attorneys, are therefore more likely (as a group) to have process expertise stemming from their institutional knowledge of the federal courts. Experience being more common, the value of the attorney for a corporate defendant is through substantive expertise: knowledge of the relevant law.

The results of our study suggest the existence of some linkages between counsel expertise and decisionmaking in civil cases before the federal appeals courts. Although our design focused on a narrowly defined issue area to control roughly for case comparability across judges' votes, we recognize the limitations of generalizing from results based on cases drawn from a single issue area. For example, these findings may be less helpful in assessing the effects of counsel in cases where the government is a litigant or in civil appeals where the economic stakes are relatively low. Nevertheless, these findings support the results of studies examining the linkage between representation and decisionmaking in other courts (Kritzer 1998; McGuire 1995). Moreover, as earlier research has demonstrated, narrowly controlling for issue area may allow influences on judicial behavior to emerge that would otherwise be obscured by variability in the data or other random influences not controlled in the model (Wheeler et al. 1987). Thus, although necessarily limited, our model provides an initial look at the influence of attorney expertise that may similarly emerge in other issue areas. Only future comparative research will allow for a fuller assessment of the influence of attorneys in the federal courts of appeals and in other courts in our judicial system.

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