

# Leveling the Playing Field on Appeal: The Case for A Plaintiff-Side Appellate Bar

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Consider the following scenario: Against all odds, and after years of hard-fought litigation, the plaintiffs in a case—victims of environmental pollution, or consumers duped by an unscrupulous lender, or workers cheated out of their wages—win a major victory over a well-heeled corporate adversary. But before they can even celebrate their victory, they must contend with the next phase: an appeal. The corporate defendant is ready. Its specialized appellate team—based in the Washington, D.C., office of one the world’s largest law firms—has been busy anticipating the arguments. These are people who spend their days immersed in the world of the Supreme Court and lower appellate courts, with a special eye on issues that can kill cases—arbitration, preemption, class-action rules, standing. They’ve internalized how appellate judges and their law clerks think, and they know how the legal issues intersect with broader debates in Washington over the civil justice system and regulatory policy. Their job is to reframe the issues, recruit amici curiae, and implement long-term defense strategies through clear, precise, and compelling prose. The plaintiffs, meanwhile, will probably stick with the team that won the ver-

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dict—highly skilled trial lawyers who know their case backwards and forwards but who aren't nearly so focused on the appellate arena.

The rapid rise of a specialized appellate bar—aided by the U.S. Chamber of Commerce and its allies—has created a major advocacy imbalance between plaintiffs and corporate defendants in civil justice cases. Although scholars have focused much attention on this phenomenon in the U.S. Supreme Court, it is actually far more pronounced in the lower appellate courts. The impact can be hard to quantify, but there should be no question that it has real-world effects. Empirical studies suggest that access to expert appellate counsel often determines who wins and who loses: Plaintiffs, in areas ranging from employment to products liability, face poor odds on appeal—and those odds get even worse when their corporate opponents employ repeat-player appellate advocates and they do not. Other data back this up. Most state and federal appellate judges report major disparities in appellate advocacy, law clerks admit to being swayed by sophisticated appellate counsel, and rational market actors pay a premium for top appellate advocates. Corporate defense interests are already taking advantage of this opportunity in the lower courts. As a lawyer with the Chamber's litigation arm told *Reuters* in 2013, because “[m]ost cases in this country are not resolved by the U.S. Supreme Court, . . . [i]f you really want to expand your influence you have to be in other courts.”<sup>1</sup>

So, given the obvious need, why haven't many highly skilled appellate specialists emerged to represent plaintiffs against corporate defendants? This Article sketches some of the many reasons why: disabling ethical and business conflicts that prevent many of the best appellate advocates from representing both plaintiffs and more lucrative corporate clients; the extremely fragmented nature of the plaintiffs' trial bar; divergences in the social and professional networks that produce plaintiffs' and appellate lawyers; an imbalance in the sites of appellate training and the ability to recruit top talent; and, last but certainly not least, the economic uncertainties of plaintiff-side practice compared with a more predictable and established funding model on the other side.

Despite these considerable challenges, there is good reason to believe that advocates for plaintiffs can—and will—make great strides toward leveling the playing field. Of course, it will always

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1. Lawrence Hurley, *Insight: Chamber of Commerce Turns to Small Courts for Big Wins*, REUTERS, Sept. 23, 2013, <http://www.reuters.com/article/us-usa-legal-chamber-insight-idUSBRE98M04P20130923>.

be true that asymmetric resources will lead to asymmetric advocacy. But this is more likely to be an insurmountable obstacle in the resource-intensive, labor-intensive ground wars of trial-level litigation or lobbying, where one side must line up its ranks of lawyers and experts against another. Appellate litigation, on the other hand, is an area where just a few highly trained professionals, given the right circumstances, can make a large difference. As a result, any investment that the plaintiffs' bar makes to match the defense's resources will have a ripple effect for advocates throughout the civil justice system. While the resource and expertise gap between plaintiffs and defendants on appeal has grown over the last several decades, this trend can be reversed. Sustained effort from dedicated appellate specialists, along with explicit investment from leaders of the larger plaintiffs' bar and allied groups, can help ensure equal access to justice at all levels of the court system.

My own experience building a national plaintiff-side appellate boutique offers at least a proof of concept, and perhaps a model for others to build on. Over the past four years, our firm—Gupta Wessler PLLC, based in Washington, D.C.—has learned how to overcome several of the obstacles identified above. Despite the imbalanced labor economics, we have assembled a small, experienced team dedicated to the mission of plaintiff-side appellate practice. Our lawyers have presented appellate arguments in courts across the country, have clerked for federal judges (including the U.S. Supreme Court), and have appellate experience drawn from a broad spectrum of practice settings: public interest groups (Public Citizen and Public Justice), private law firms (Jones Day and Williams & Connolly), state and federal government, and state and national political campaigns. And, despite the fragmented nature of the plaintiffs' bar, we represent the leading trial lawyers' organization, the American Association of Justice, and have used existing networks and word of mouth to develop relationships with plaintiffs' firms nationwide—from large national class action firms to solo practitioners—in areas including consumer protection, employment, antitrust, civil rights, and the environment. In one recent high-profile case, *Businessweek* took note, observing that our firm's appearance—against an army of big-firm lawyers led by a former U.S. Solicitor General—meant that “the opposing parties' legal forces have been equalized,” at

least in the “more theoretical, less labor-intensive arena of appellate combat.”<sup>2</sup> There is much more “equalizing” yet to be done.

## I. THE RISE OF THE CORPORATE APPELLATE BAR

Over the last several decades, the growth of dedicated appellate practices has been closely tied to the development of large corporate-defense firms—thus linking specialized advocacy with major business interests. The first truly dedicated practices began as groups within growing firms that, in “a newly competitive market for legal services,” were “scrambl[ing] to find ways to distinguish themselves from their peers.”<sup>3</sup> Appellate expertise offered just that: a promise to corporate clients that they could be best served in everything from a business-to-business negotiation to a Supreme Court argument. Beginning with Rex Lee’s decampment from the Reagan administration for Sidley Austin,<sup>4</sup> the model for these new practice groups was the Solicitor General’s office.<sup>5</sup> The goal, according to Stephen Shapiro—a deputy solicitor general under Reagan and founder of the appellate group at Mayer Brown—was to create a private practice “equally plugged into the appellate system.”<sup>6</sup> As Shapiro reflected years later, there was “nothing analogous” to the Solicitor General’s office in the private sector at the time: “most of the firms felt that their litigators could handle a case in any court.”<sup>7</sup> That would soon change.<sup>8</sup>

Court watchers and scholars alike have long observed the growing presence of repeat-player advocates in the Supreme Court. An increasing portion of cases heard before the Supreme Court now arise from petitions brought by what Richard Lazarus calls “veteran” counsel.<sup>9</sup> In the 1980 term, repeat players filed just 6 of the

2. Paul Barrett, *Appeal in the Chevron Case Will Test the Boundaries of RICO*, BLOOMBERG BUSINESSWEEK (July 3, 2014), <http://www.bloomberg.com/news/articles/2014-07-03/appeal-in-the-chevron-case-will-test-the-boundaries-of-rico>

3. Thomas Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 521–22 (2010). As Hungar and Jindal explain, the growth in in-house counsel allowed businesses to shop around for expertise, in both substantive areas of law and in specialties like appellate practice. *Id.* at 523–24.

4. DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* 47 (2d ed. 2010).

5. The Solicitor General’s office continues to be a major source of talent for private practice groups. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at MM38, available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html>.

6. Jeffrey Cole, *An Interview with Steve Shapiro*, 23 LITIG. 19, 20–21 (1997).

7. *Id.*

8. David Cardone, *The Art of Cathedral Building: Why Appellate Advocacy is Different*, 28 PENN. LAW. 24, 25 (2006) (“The days of one attorney representing a client all the way from an initial phone call to the U.S. Supreme Court are drawing to a close.”).

9. Lazarus defines “veterans” as those who have already argued before the Court five times, or who are affiliated with a firm whose attorneys have argued ten times. Richard J.

102 successful cert petitions, but more than half of accepted petitions in the 2007 term—35 of the 65—were filed by repeat players.<sup>10</sup> And in the 2002 term, 33% of the arguments were handled by attorneys who had argued three or more previous cases before the court, up from 10% in 1980.<sup>11</sup> That shift has not gone unnoticed. In a lecture he gave a year before he took his seat on the Supreme Court, then D.C. Circuit Judge John Roberts noted that “the rise of Supreme Court and appellate practice departments in major firms” has “abetted” the trend towards exclusive reliance on experienced counsel at the Supreme Court.<sup>12</sup> As the Court’s docket has shrunk, fewer and fewer cases *without* the benefit of these appellate specialists are making it before the justices.

Though the sprawling dockets of lower appellate courts make tracking these trends difficult, there’s evidence that this development has filtered down to federal and state appellate courts. In an article examining the rise of appellate litigators, two experienced appellate lawyers, Thomas Hungar and Nikesh Jindal, surveyed “the analytical evidence” and found both “that appeals are more prevalent than ever and that experienced appellate litigators may realize more success in litigating these cases.”<sup>13</sup> They conclude that the “increased specialization in Supreme Court advocacy is likely evident in appeals to other federal and state courts as well. . . .”<sup>14</sup> Other evidence supports this view. A growing number of state bars, for instance, provide certification of a “specialization” in appellate practice.<sup>15</sup> In Texas, one of the earliest states to offer certification, the growth of the specialty mirrored national shifts: “Although there ha[d] always been a handful of Texas lawyers known for their appellate work, the number of appellate special-

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Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1516–17 (2008) [hereinafter Lazarus, *Advocacy Matters*].

10. *Id.*

11. John G. Roberts, Jr., lecture before the Supreme Court Historical Society Annual Meeting, reprinted in *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75–76 (2005).

12. *Id.* at 77.

13. Hungar & Jindal, *supra* note 3, at 516.

14. *Id.* Hungar’s own career typifies the close links between elite government advocacy and private sector, defense-side appellate specialization; a former deputy solicitor general and current partner at Gibson Dunn, Hungar has argued 26 cases, representing corporate clients like Microsoft, before the Supreme Court. See THOMAS G. HUNGAR, PARTNER, GIBSONDUNN.COM <http://www.gibsondunn.com/lawyers/thungar>.

15. See Melissa M. Serfass, *Standards for Certification of Appellate Specialists*, 1. J. APP. PRAC. & PROC. 381 (1999). For development of certification programs in general, see Judith Kilpatrick, *Specialist Certification for Lawyers: What Is Going On?*, 51 U. MIAMI L. REV. 273 (1997).

ists in the state exploded in the 1980s and 1990s.”<sup>16</sup> Another data point: State solicitors general offices, founded on the federal model over the last few decades, have rapidly increased both in number and size, and now serve as further sources of appellate talent in state courts as well as regional circuit courts.<sup>17</sup> In all levels of the appellate justice system, then, court specialists have begun to stake out their territory.

Business interests (and, therefore, defendants in civil litigation) have been the main beneficiaries of this growing expertise. In part, this imbalance is a product of overwhelming demand. Beginning in the 1970s and 1980s, businesses increasingly worried about large damages awards to plaintiffs. Knowing that these awards were likely to be reduced in further litigation, they began to recognize the importance of higher quality advocacy at the appellate stage.<sup>18</sup> A perceived growth in the judiciary’s business orientation also fueled the lopsided demand for appellate expertise.<sup>19</sup> “[T]he [Supreme] Court in the mid-eighties was then becoming more receptive to the arguments and concerns of the business community,” Chuck Cooper, a noted business-side advocate, reflected at a 2009 symposium on appellate litigation. The growth of the appellate bar under the Burger and Rehnquist courts was, as Cooper put it, “good” timing: “appellate expertise” was “at its most valuable” when the justices on the court seemed “closely divided,” and open to persuasion.<sup>20</sup> Hiring an attorney who understood how to advocate in front of the justices was increasingly seen as essential for businesses bringing cases before the Court.

Nothing exemplifies this trend more than the highly successful litigation strategy of the U.S. Chamber of Commerce. Over the last four decades, the Chamber has been perhaps the most effec-

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16. Kevin Dubose, *Standards for Appellate Conduct Adopted in Texas*, 2 J. APP. PRAC. & PROC. 191, 192 (2000).

17. James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?* 3 J. APP. PRAC. & PROC. 533 (2001) (explaining that the number of states with solicitors general grew from eight to twenty-four from 1987 to 2001). For example, Texas established an Office of the Solicitor General, which “supervises all appellate litigation for the Attorney General,” in 1999. James C. Ho, *The Office of the Solicitor General: A Decade of Representing Texas Interests*, Speech at the University of Texas Law School symposium on “The Rise of Appellate Litigators and State Solicitors General” (Jan. 22–23, 2009), *reprinted in* 47 *The Advoc.* 80 (2009).

18. Hungar & Jindal, *supra* note 3, at 526–27. *See also* Nilam A. Sanghvi & Bruce P. Merenstein, *Appellate Lawyers Learn to Play Well With Others*, 31 *DEL. LAW.* 11, 12 (2013) (“In the private sector, increasing client sophistication and the increasingly high stakes in civil cases have led to greater recognition of the value of an appellate lawyer’s skill.”).

19. Hungar & Jindal, *supra* note 3, at 527–28.

20. *The Rise of Appellate Litigators and State Solicitors General*, Transcript of Symposium held at University of Texas School of Law, 29 *REV. LITIG.* 545, 556 (2010).

tive driver of the appellate specialization's business-friendly orientation. The Chamber's appellate efforts date back to the early 1970s. At the time, conservative, pro-business forces were increasingly worried about the successes of the liberal public interest law movement, which had used the courts as a vehicle to push for change in areas like civil rights and the environment over the previous decades.<sup>21</sup> The Chamber's approach can be traced back to a 1971 memo to the Chamber's education committee chair, written by Lewis F. Powell, Jr., just two months before his nomination to the Supreme Court.<sup>22</sup> Calling attention to what he saw as a widespread "attack" on the "American free enterprise system," Powell set out the first blueprint for the Chamber's ultimate litigation strategy: "a highly competent staff of lawyers," "lawyers of national standing and reputation," in charge of carefully selecting the cases in which the Chamber would participate as amicus or start from the ground up.<sup>23</sup>

Since its founding in 1977, the U.S. Chamber Litigation Center<sup>24</sup> has initiated or participated as amicus in cases touching on a wide range of business interests, including administrative and regulatory litigation, antitrust, arbitration, class actions, employment, environmental law, preemption, intellectual property, taxation, and more.<sup>25</sup> The Chamber has become a center of appellate expertise; its own staff includes former federal appellate and Supreme Court clerks, as well as alums of corporate firms with large appellate groups.<sup>26</sup> In addition, the organization hires many of the top private practice litigators to write appellate briefs on its behalf or to bring regulatory challenges on behalf of the business community. In just the last few years, the Chamber's briefs have carried the names the appellate groups at Mayer Brown, Gibson Dunn, Hogan Lovells, and many more.<sup>27</sup> Beyond direct participa-

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21. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 60 (2008).

22. David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 *SANTA CLARA L. REV.* 1019, 1022 (2009).

23. *Id.* at 1022–23 (quoting Memorandum from Lewis F. Powell, Jr. to Eugene Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971) available at <http://law2.wlu.edu/powellarchives/page.asp?pageid=1251/>).

24. Originally called the National Chamber Litigation Center.

25. U.S. CHAMBER LITIGATION CENTER, ABOUT, <http://www.chamberlitigation.com/about>. For a full listing of the Chamber's litigation, see U.S. CHAMBER LITIGATION CENTER, RECENT CASE ACTIVITY, <http://www.chamberlitigation.com/cases>.

26. MEET THE STAFF OF THE U.S. CHAMBER'S LITIGATION CENTER, <http://www.chamberlitigation.com/about/staff>.

27. Examples include Hogan Lovells, whose attorneys worked as co-counsel in an amicus brief in support of a cert petition by American Farm Bureau Federation against the EPA; Gibson Dunn, who represented the Chamber in a D.C. Circuit lawsuit challenging the

tion in litigation, the Chamber has carved out a broader role in advocating for the business community's interests in the judiciary. It hosts regular moot courts to help prepare attorneys for argument, and crafts media strategy to shape the way that important cases are described in the press.

These efforts have paid off. As several legal analysts have reported, the Chamber is among the most influential advocacy groups at the Supreme Court and in lower appellate courts. Though causation is difficult to prove, cases taken up by the Chamber—as either a party or amicus—have had remarkable success at the certiorari stage, allowing it to wield potentially enormous influence over the Supreme Court's discretionary docket. Over a three-year period between 2009 and 2012 the Chamber was both the most prolific and most successful filer of amicus briefs: cert was granted in 32 percent of the 54 cases in which it filed a brief.<sup>28</sup> In contrast, cert was granted in just one of the thirteen cases in which the AARP participated as an amicus.<sup>29</sup> The overall grant rate is less than 5 percent for paid petitions.<sup>30</sup> On the merits as well, the Chamber has experienced significant success in advocating for business interests. In the term beginning in October 2006, for example, the Chamber filed amicus briefs in 15 cases; in 13, the side it supported prevailed.<sup>31</sup> At a minimum, then, the Chamber's frequent participation and favorable win rate speak to the coordinated, expert appellate expertise it musters on behalf of the business community.

Building on this Supreme Court legacy, the Chamber has begun expanding its efforts throughout the lower courts—a recent shift

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FCC's policy on class-action lawsuits under the TCPA; Mayer Brown, who co-counseled a Chamber amicus brief in the Ninth Circuit on the enforcement of arbitration agreements; Orrick, who represented the Chamber as amicus in a New York Supreme Court case about liability of parent companies with international subsidiaries, filing a brief in support of Ford Motor Company; and Mayer Brown, who authored a First Circuit amicus brief on certification of "issue" classes. See Brief for Chamber of Commerce of U.S.A. et al. as *Amicus Curiae* in Support of Petitioners, American Farm Bureau Federation v. EPA, 136 S. Ct. 1246 (2016) (No. 15-599), 2015 WL 8621652; Joint Brief for Petitioners ACA International et al., ACA International v. FCC, (No. 15-1211); Motion of Chamber of Commerce of U.S.A. and Retail Litigation Center, Inc. for Leave to File Brief as *Amicus Curiae* Out of Time, Hopkins v. BCI Coca-Cola Bottling Co. of L.A., (No. 13-56126), Brief of *Amicus Curiae* Chamber of Commerce of U.S.A. in Support of Ford Motor Company, Finerty v. Abex Corp., (APL-2015-00162); Motion of Chamber of Commerce of U.S.A. to File *Amicus* Brief Supporting Appellant and Reversal, In re Prograf Antitrust Litigation, (No. 15-1290).

28. Adam Chandler, *Cert.-stage amicus "all stars": Where are they now?*, SCOTUSBLOG (Apr. 4, 2013, 3:00 PM), <http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/>.

29. *Id.*

30. Franklin, *supra* note 22, at 1025.

31. *Id.* at 1020.

that could create further disparities in the resources that plaintiffs' and businesses' interests have on appeal. Just 9 months into 2013, according to a *Reuters* analysis, the Chamber had filed amicus briefs in 84 cases (including at the Supreme Court), up from 63 by that point in 2012 and 58 in the same time period for 2011.<sup>32</sup> The growth, according to representatives from the group, was almost entirely concentrated in state and lower federal appellate cases: "Most cases in this country are not resolved by the U.S. Supreme Court," Rachel Brand, then a senior lawyer with the National Chamber Litigation Center, told *Reuters*.<sup>33</sup> "If you really want to expand your influence you have to be in other courts."<sup>34</sup> With little counterweight on the plaintiffs' side (as discussed below), the Chamber's expansion has the potential to create a hugely influential business-friendly appellate bar in state and lower federal courts, all while few on the other side take notice.

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Over the last four decades, specialized counsel has become ever more essential for those seeking success on appeal, especially in those seeking to bring an agenda before the Supreme Court. Having driven this trend forward, the business community now reaps its benefits.

## II. THE RESULTING APPELLATE ADVOCACY IMBALANCE IN CIVIL JUSTICE CASES

The growing concentration of appellate resources on the side of business interests has created a clear advocacy imbalance and put plaintiffs at a major disadvantage in the civil justice system. While a select number of public interest legal nonprofits and law schools can connect plaintiffs with lawyers specialized in practicing before appellate forums (especially the Supreme Court), these limited correctives have not done enough to close the gap. The new reality is that plaintiffs are less likely to be represented by appellate specialists and increasingly likely to take on defendants who are.

This development has been especially well documented at the Supreme Court. Harvard's Richard Lazarus, for instance, has traced the rising number of antitrust cases at the Court to the

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32. Hurley, *supra* note 1.

33. *Id.*

34. *Id.*

growing “impact of the Supreme Court Bar.”<sup>35</sup> Between 2003 and 2008, all eleven of the antitrust cases that the Court heard began with petitions filed by corporate defendants, each represented by alumni of the Solicitor General’s office.<sup>36</sup> In the ten of those cases, the Court eventually ruled in favor of the defendants.<sup>37</sup> During that same time period, the Court did not grant cert to a single petition filed by an antitrust plaintiff.<sup>38</sup> Businesses have marshaled the talents of appellate veterans to increase the chances that their cases are heard—and heard favorably.

There is a “particularly acute” gap in access to expert appellate representation in certain areas of public-interest law “in which an individual sues a corporation,” Stanford’s Jeffrey Fisher has observed.<sup>39</sup> While corporate appellate groups might jump at the chance to argue on behalf of a public-interest client in criminal defense or immigration cases, “such law firms typically are unwilling to challenge the interests of corporations. That means that plaintiffs in employment and tort cases, in particular, often lack any access whatsoever to experienced Supreme Court counsel.”<sup>40</sup>

The divide is large (and relatively easy to track) at the Supreme Court, but this high-profile venue is also where the most potential correctives are already in place. Indeed, a small number of public interest legal nonprofits have in-house Supreme Court experience and thus offer plaintiffs a boost in matching the expert resources the defense bar deploys in the relatively small number of civil justice cases before the Court. For instance, observers have long noted the strength of Public Citizen,<sup>41</sup> founded five years before the Chamber of Commerce’s litigation center, as a counterweight on the plaintiffs’ side.<sup>42</sup> Each term, Public Citizen’s attorneys assist

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35. Lazarus, *Advocacy Matters*, *supra* note 9, at 1532.

36. *Id.* at 1532–33.

37. *Id.* at 1533–35. As a group, the attorneys arguing these cases on behalf of the respondents were not as uniformly experienced in Supreme Court advocacy. Some respondents were able to bring in experienced counsel; former Solicitor General Donald Verilli, for example, argued for the respondents in *Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004). In several other antitrust cases that term, the attorneys who presented oral argument for the respondents were named on the plaintiffs’ original complaint in the case. *See, e.g.*, Robert Coykendall for *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2704 (2007); Michael Haglund for *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

38. *Id.* at 1532.

39. Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 165 (2013).

40. *Id.* at 165–66.

41. BARBARA HINKSON CRAIG, *COURTING CHANGE: THE STORY OF THE PUBLIC CITIZEN LITIGATION GROUP* 37 (2004).

42. *See* Lazarus, *Advocacy Matters*, *supra* note 9, at 1501 (calling attention to Public Citizen’s Supreme Court practice, “which has long provided high-quality assistance in the

or handle dozens cases pending before the Court.<sup>43</sup> And the group's Supreme Court Assistance Project hosts pre-argument moot courts and provides more general support to attorneys representing consumer plaintiffs at the Court.<sup>44</sup>

Second, Supreme Court clinics in major law schools have also recently become another source of appellate expertise upon which under-resourced litigants can draw. Led by expert counsel and staffed by students who act as "associates" on cases, these school-based clinics take on a select number of pro bono cases each year. Fisher, a co-director of Stanford's clinic, has suggested that these institutions can help "level the representational playing field to the benefit of traditionally underserved litigants and bring balance to certain areas of the law that otherwise tend to be skewed by inequalities in lawyering."<sup>45</sup> Still, there are the clear limits to the ability of clinics to fix the disparity. For one thing, appellate litigators from the very same large firms that have gravitated toward civil defense work run many of these clinics (such as the Mayer Brown appellate group, which runs the Yale clinic).<sup>46</sup> As Stanford's Pam Karlan has observed, Supreme Court clinic partnerships have become a kind of marketing "loss leader" for many major firms—"Students go to firms in part because they have Supreme Court practices, and clients go to the firms with the understanding that, although hardly ever does a case go to the Supreme Court, this is a firm that's capable of taking it there if it does."<sup>47</sup> These arrangements merely transpose the same potential conflict-of-interest limitations to the law school setting. Even without this constraint, clinics—few in number and each small in size—could

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preparation of briefs and presentation of oral argument to public interest advocates with cases before the Court," and stands as "[t]he principle exception" to the general lack of plaintiff-side expertise); and Fisher, *supra* note 39, at 166 fn. 97 (noting that "[t]here are a few offices with Supreme Court specialists that handle even these cases—most notably in the tort area, Public Citizen—but their numbers are thin").

43. In the 2015 term, Public Citizen Litigation Group worked on more than 30 petition-stage cases, drafting the principal brief in opposition in 12 of them. Its attorneys served as co-counsel in two merits-stage cases. *Alan Morrison Supreme Court Assistance Project: 2015 Term 3* (2016), <http://www.citizen.org/documents/SCAP-report-2016.pdf>

44. In the 2015 term, the project held moots for 19 cases. *Id.*; see generally THE ALAN MORRISON SUPREME COURT ASSISTANCE PROJECT, <http://www.citizen.org/litigation/supremecourt> (last visited Aug. 3, 2016).

45. Fisher, *supra* note 39, at 137.

46. Victor Li, *Mayer Brown Associate Prepares To Make SCOTUS Debut in Politically Charged Redistricting Case*, ABA Journal, Nov. 3, 2015, 1:35 PM CST, [http://www.abajournal.com/lawscribbler/article/mayer\\_brown\\_associate\\_prepares\\_to\\_make\\_scotus\\_debut\\_in\\_politically\\_charged](http://www.abajournal.com/lawscribbler/article/mayer_brown_associate_prepares_to_make_scotus_debut_in_politically_charged).

47. Deborah L. Cohen, *Taking the Firm to SCOTUS School*, ABA Journal, Feb. 1, 2008, 5:05 PM CST, [http://www.abajournal.com/magazine/article/taking\\_the\\_firm\\_to\\_scotus\\_school](http://www.abajournal.com/magazine/article/taking_the_firm_to_scotus_school).

never provide enough expert manpower to fill the gap between plaintiffs and defendants.

Though it is harder to track and has attracted less attention, the imbalance in appellate advocacy is likely even more pronounced in federal circuit and state appellate courts. As Lazarus has remarked: “the advocacy gap is greater in many lower courts.”<sup>48</sup> A 1999 case study of products liability decisions in the U.S. Courts of Appeals substantiates this observation. Looking at the number of times attorneys for each party had appeared before the circuit, the authors found that “those representing defendants were more likely to be familiar with the circuit court hearing their case,” while “[o]ne-shot plaintiffs tended to be represented by attorneys who were less experienced. . . .”<sup>49</sup> At the state level too, scholars have found a relationship between access to legal counsel and the likelihood that under-resourced litigants—often plaintiffs—are able to succeed in appellate courts. A 1987 study of Supreme Court outcomes in 16 states from 1870 to 1970 attempted to uncover this link by examining the relationship between party (whether an individual, business, or government), representation (whether by a firm attorney, solo practitioner, or *pro se*), and success. The authors concluded that “[l]egal resources . . . appeared to affect outcomes,” as “some of the stronger parties’ net advantage seems to have come from their better legal representation.”<sup>50</sup> Given the limited docket of the United States Supreme Court, state supreme and federal appellate courts have the final word on the vast majority of issues. Thus, we should not underestimate the potential ramifications of plaintiffs’ systematic disadvantage in access to experienced counsel in these forums.

Those within the judiciary have increasingly taken note of this plaintiff-defendant advocacy divide. A 2011 survey of judges’ views on the state of legal representation by Judge Richard Posner

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48. Richard Lazarus, *Advocacy Matters: An Update and a Few Responses to Comments, THE VOLOKH CONSPIRACY* (Oct. 30, 2007), <http://volokh.com/2007/10/30/advocacy-matters-an-update-and-a-few-responses-to-comments/> [hereinafter Lazarus, *Advocacy Matters: An Update*].

49. Susan Brodie Haire et al., *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 *LAW & SOC’Y REV.* 667, 676–77 (1999). Though many on both sides were still represented by counsel who had never appeared before that particular circuit, the authors still found a differential in experience: “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.” *Id.* at 676.

50. Stanton Wheeler, et al., *Do the ‘Haves’ Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 *LAW & SOC’Y REV.* 403, 440–41 (1987). The authors found the reverse as well: “the weaker appellant, when represented by a law firm against the stronger respondent’s solo practitioner, did far better than when the reverse occurred.” *Id.*

and empirical legal scholar Albert Yoon provides evidence of this consensus. Posner and Yoon found that, overall, judges perceive “significant disparities in the quality of legal representation,” which can often “be traced to the resources of the litigant.”<sup>51</sup> When asked about the areas in which the biggest gaps in representation quality exist, both federal and state appellate judges named areas in which litigants are particularly under-resourced: 95% of federal appellate judges named either immigration or civil rights, while 77% of state appellate judges named personal injury and medical malpractice or family law.<sup>52</sup> As one state appellate judge told the researchers: “The unrepresented and under-represented (e.g., limited representation) clients are flooding state courts, and are causing many undesirable outcomes—both in individual cases, and for society as a whole.”<sup>53</sup>

The imbalance has become so large that even the American Academy of Appellate Lawyers has remarked upon it. A decade ago, the group put out a statement on the future of appellate lawyers that recognized the unequal progress of the “evolving phenomenon” of appellate specialization. In civil litigation, “sophisticated clients understand that specialization leads to reduced expense, realistic evaluation, and the potential for better results.”<sup>54</sup> On the plaintiffs’ side, the reality was, and is, more complicated. Litigants have moved far slower towards specialized appellate counsel, don’t have as deep pockets to pay for it, and may not even be able to find specialized counsel who can represent their interests effectively.

### III. APPELLATE SPECIALIZATION MATTERS—AND PLAINTIFFS SUFFER WITHOUT IT.

None of this would matter much, of course, if skilled appellate advocates could not offer something tangible for litigants on both sides of the table. But all evidence we have points to the fact that they can and do. Appellate briefing and argument are specialized skills, and those who make the decisions—from the law clerks and judges who read the briefs to the clients who hire specialist advocates to prepare them—believe that counsel familiar with the process and forum can make a difference. Indeed, though the effects

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51. Richard A. Posner and Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 317 (2011).

52. *Id.* at 331–32.

53. *Id.* at 344.

54. American Academy of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRAC. & PROCESS 1, 12 (2006).

that skilled attorneys have are notoriously difficult to measure, existing empirical evidence supports this conclusion. Plaintiffs—who tend to fare worse on appeal than defendants—should be especially interested in gaining access to a group of lawyers that can help rebalance the scales.

The first question that needs to be asked about the effects of appellate expertise is whether advocacy in these courts requires notably different skills, independent of general substantive or litigation experience. The answer is clearly yes. In the words of a recent manual for in-house counsel: “If the case is worth appealing, or defending on appeal, it is worth using someone skilled in dealing with appeals.”<sup>55</sup> Judges, who serve as the audience of appellate attorneys, agree. “Appellate advocacy is specialized work,” Third Circuit Judge Ruggero Aldisert has reflected, “draw[ing] upon talents and skills which are far different from those utilized in other facets of practicing law.”<sup>56</sup> On appeal, lawyers must specialize in framing issues and arguments in a way that will appeal to generalist appellate judges, looking beyond the four corners of the dispute to think through the downstream policy implications of parties’ legal positions, clarifying and condensing a complex record for busy judges, writing readable and persuasive briefs, and delivering coherent oral arguments that address the appellate judges’ real concerns.<sup>57</sup> Because the audience is so different—a panel of generalist appellate judges, rather than a jury— “[d]elivering an effective oral argument requires a set of skills wholly distinct from those valuable in...making a closing argument to a jury.”<sup>58</sup> Hiring appellate counsel can also provide trial attorneys with “a fresh pair of eyes” to “reevaluate[]” a case and identify “new themes” to emphasize.<sup>59</sup> D.C. Circuit Court Judge Laurence Silberman expressed similar sentiments in a 1990 speech, commenting that “the skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers.”<sup>60</sup>

It’s unsurprising, then, that judges and others within the court system say that hiring counsel with experience at the appellate

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55. James J. Seifert and David F. Herr, 4 Successful Partnering Between Inside and Outside Counsel § 66:4 (2015).

56. Hungar & Jindal, *supra* note 3, at 517.

57. Seifert & Herr, *supra* note 55. See also Cardone, *supra* note 8, at 29–30.

58. FEDERAL APPELLATE PRACTICE 442 (Mayer Brown LLP, 2008)

59. *Id.*

60. Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 11 APP. ADVOC. 3, 3 (1998) (adapted from a speech given by Judge Silberman to the Council of the Section of Public Utility, Communications, and Transportation Law of the ABA in October 1990).

level is important. Twenty-five years ago, Judge Silberman found it “astonishing how many cases are presented by lawyers who are simply not up to the task.”<sup>61</sup> He pointed to the potential benefits that “able counsel” can offer: increasing the chance of winning, reducing the risk of losing, and even advising on whether an appeal should be brought at all.<sup>62</sup> But, he concluded, “[t]he primary and obvious cost of trying to get by with less effort and talent than required for our court is the subtle, perhaps unconscious, tendency of the judges to undervalue the merits of a poorly presented case. . . . [T]he boost given a case by a thoughtful, elegantly written brief and a polished oral argument cannot be overstated.”<sup>63</sup> From Silberman’s perspective, quality appellate advocacy had become essential to helping him do his job well.

The presence of experienced appellate attorneys can exert influence over the fate of cases in more clear-cut ways as well. Supreme Court clerks, for example, have acknowledged the power of having a “big name” lawyer on a brief. In a 2004 study based on interviews with 70 former Court clerks, 88% admitted to “lend[ing] additional consideration” to amicus briefs filed with the name of a reputed, repeat-player attorney on the cover.<sup>64</sup> As one put it quite simply: “If a famous lawyer filed, you would pay attention and take a closer look.”<sup>65</sup> In short, whether through skill, name recognition, or a combination of the two, having a repeat-player appellate advocate on your side seems to make a difference. By extension, plaintiffs should be concerned when only their opponents have access to this reservoir of talent and influence. While tracking the actual value that these experienced attorneys add to a case is more difficult, existing empirical evidence points to the conclusion that veteran lawyers are generally more successful.<sup>66</sup> In one of the best empirical studies linking attorney experience and case outcomes, scholars David Abrams and Albert Yoon, tracking the random assignment of public defenders to felony cases in Clark County, Nevada, found that experience matters. Having a 10-year veteran on a case could reduce the incarceration

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61. *Id.*

62. *Id.* at 4.

63. *Id.*

64. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 54 (2004).

65. *Id.*

66. Legal scholars David S. Abrams and Albert H. Yoon have called measuring lawyer efficacy “[o]ne of the most challenging problems in legal scholarship,” given that a big part of many attorneys’ jobs is choosing cases well. David S. Abrams and Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1145 (2007).

length by 17%, relative to the sentences handed down in cases handled by a first-year defender.<sup>67</sup> Extending the implications of their analysis, the two predicted that the “quality of attorney” could matter as much, if not more, in civil litigation: “higher-ability plaintiff attorneys are more likely to win, and garner larger damage awards for their clients. . . .”<sup>68</sup> This is particularly important on appeal, when plaintiffs are more likely to see victories reversed or damages reduced.

Those who have worked in and watched the Supreme Court over the last decades have long observed that litigants with access to the highest quality Supreme Court advocates are more likely to be successful. Empirical evidence supports this position. “Lawyers who litigate in the high court more frequently than their opponents prevail substantially more often,” even when controlling for the relative status of the parties.<sup>69</sup> As Stanford’s Jeffrey Fisher found, looking at decisions from the October 2004 through October 2010 terms, representation by specialist counsel, all else held constant, led to as much as a 19.2 percent “greater chance of success on the merits.”<sup>70</sup> “[L]itigants in the Court who are represented by local counsel instead of Supreme Court specialists,” he explained, “are generally at a distinct disadvantage.”<sup>71</sup> To the extent that disparate access to expert counsel mirrors the plaintiff-defendant resource divide, plaintiffs could be at a disadvantage at the Court.

Similarly, scholars have identified several signs of the value that experienced counsel bring to other stages of the appellate process. “Appellees fortunate to hire more experienced lawyers appeared to enjoy some advantage in preserving trial court victories against appeal,” the authors of a study of Ninth Circuit cases from 2010 to 2013 determined.<sup>72</sup> A separate study examining briefs in civil cases before the Seventh Circuit from 2005 to 2007 found that experienced attorneys were also better able to frame legal issues for the court. “Appellants represented by firms with a specialization in appellate practice were more likely to find that

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67. *Id.*

68. *Id.* at 1146.

69. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POLITICS 186, 188 (Feb. 1995).

70. Fisher, *supra* note 39, at 162.

71. *Id.* at 137. Political scientists have found similar effects of “lawyer capability” when analyzing decisions from the Supreme Court of Canada—prior litigation experience and the size of the litigation team were both associated with the Court’s finding in favor of the appellant. John Szmer et al., *Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada*, 41 LAW & SOC’Y REV. 279, 279 (2007).

72. Gregory C. Sisk & Michael Heise, “Too Many Notes?” *An Empirical Study of Advocacy in Federal Appeals*, 12 J. EMPIRICAL LEGAL STUD. 578, 600 (2015).

precedents discussed in their briefs were later cited,” while those “represented by litigation teams with no experience in this forum fared poorly when attempting to call court attention to precedent.”<sup>73</sup> These data suggest a broader benefit that repeat-player litigants have when they hire experienced appellate counsel. If brief writers can frame how courts interpret and discuss precedent and legal questions, these specialized attorneys can begin to shape jurisprudence in ways that benefit repeat players’ long-term interests, looking beyond the outcome of an individual case.

This dynamic can compound the already uphill battle that “little guy” plaintiffs face throughout the appellate system, perhaps most notably at the Supreme Court. Court analysts have noted “a broadly shared skepticism among the justices about litigation as a mode of regulation,” meaning the deck may be stacked against plaintiffs before justices even get to the merits of an individual case.<sup>74</sup> Moreover, the justices themselves have admitted that cases about business interests, which often turn on technical decisions and statutory interpretation, are ones in which high-quality attorneys can play a major role. As Court analyst Jeffrey Rosen recalled in a 2009 speech, Justice Breyer—though unwilling to concede a “pro-business” tilt on the Court—acknowledged that the justices are “more open-minded and amenable to argument” in these cases.<sup>75</sup> If defendants are more likely to be represented by the kind of lawyers who can present high-quality arguments likely to sway the Court, then plaintiffs are at a distinct disadvantage.

And the premium that the market places on specialized advocacy seems to confirm the value that experienced Supreme Court counsel are at least *seen* as bringing to cases. One indication of this is the huge hourly billing rates that top appellate talent now commands. Recent fee requests have revealed publicly that the best-regarded experts at big firms regularly charge well over \$1,000 an hour for their services.<sup>76</sup> In 2012, the rate charged by former Solicitor General Ted Olson, the founder of the appellate practice at Gibson Dunn, was \$1,800—an “eye-popping” sum, as

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73. Laura P. Moyer et al., *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals*, 34 JUST. SYS. J. 62, 79 (2013).

74. Franklin, *supra* note 22, at 1054.

75. Jeffrey Rosen, Professor of Law, George Washington University Law School, Keynote Address at the Santa Clara Law Review Symposium: Big Business and the Roberts Court (Jan. 23, 2009), in 49 SANTA CLARA L. REV. 929, 933 (2009).

76. David Lat, *Top Supreme Court Advocates Charge How Much Per Hour?*, ABOVE THE LAW (Aug. 10, 2015), <http://abovethelaw.com/2015/08/top-supreme-court-advocates-charge-how-much-per-hour/>.

the *Wall Street Journal* succinctly observed.<sup>77</sup> Clients who pay these high hourly rates, then, clearly believe specialists are worth investing in.<sup>78</sup>

At other levels of the appellate court system, plaintiffs face a similarly hard road, meaning that they may particularly suffer without the access to the best possible forum-specific counsel.<sup>79</sup> Scholars have long found evidence that plaintiffs fare worse on appeal, though debates continue over the extent and cause of this trend. Cornell scholar Theodore Eisenberg has documented evidence of plaintiffs' relative weakness in a number of case studies over the past decades. For example, in a 2003 study of employment-discrimination cases, which by nature require individual or groups of individuals to go up against defendants with far more power, Eisenberg and his colleagues found a "dramatically greater success that defendants enjoy in appealing plaintiffs' wins after trial (42.19 percent), relative to the plaintiffs' success in overturning their losses (6.87 percent)."<sup>80</sup> An earlier study by two political scientists uncovered similar dynamics at play in their analysis of 1986 case outcomes in three federal appellate circuits. The authors found that "underdog individuals" had a low success rate on appeal, particularly when they went up against a party with ma-

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77. Jennifer Smith, *Bankruptcy Fees: The \$1,800-an-Hour Ted Olson Edition*, WALL ST. J. (June 6, 2012), <http://blogs.wsj.com/bankruptcy/2012/06/06/bankruptcy-fees-the-1800-an-hour-ted-olson-edition/>.

78. See also Michael Heise & Martin T. Wells, *Revisiting Eisenerg and Plaintiff Success: State Court Civil Trial and Appellate Outcomes*, 13 J. EMP. LEGAL STUDIES 516 (forthcoming 2016), Cornell Legal Studies Research Paper No. 16-5 at 21 (noting that "[t]rial and appeal work . . . typically involve distinctive skill sets," and that "the legal market reflects this distinctiveness as some niche law firms specialize in either trial or appellate work").

79. Much of the research into the relative success of "repeat player" defendants, in relation to one-shot plaintiffs, builds on the work of legal scholar Marc Galanter. His pioneering 1974 article was among the first to recommend reorganization at the bar level, including the formation of interest groups that can effectively lobby and litigate for the interests of one-shot parties, often plaintiffs. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). This trend has proved durable over time, according to an analysis of more than 60 years of U.S. Courts of Appeals decisions. The authors concluded, "[t]he advantage in appellate litigation enjoyed by repeat player 'haves' is remarkably consistent over time." Donald R. Songer et al., *Do the "Haves" Come Out Ahead Over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC'Y REV. 811, 811 (1999).

80. Kevin Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 547, 554 (2003). Eisenberg and his colleagues found similar trends in state appellate courts, where "the bulk of civil litigation—including appellate litigation—occurs." Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL. STUD. 121, 122 (2009). Defendants initiating appeals were again far more likely to see a reversal of trial outcomes than plaintiffs were (41.5% vs. 21.5%), leading to the conclusion that "defendants' success with appeals systematically and substantially exceeded plaintiffs' success." *Id.* at 121-22,

ior resources.<sup>81</sup> “The most probable explanation for the success of the ‘haves’ in the courts of appeals,” they concluded “would appear to be their superior litigation resources”—including, potentially, ability to pay for better lawyers, and receive better advice on whether to file an appeal at all.<sup>82</sup>

The gap in success rates between plaintiffs and defendants can be seen perhaps most clearly in case studies of interlocutory appeals under Federal Rule of Civil Procedure 23(f), from orders granting or denying class certification. These class-action appeals provide a good window into the danger of an imbalance in counsel because, as in Supreme Court certiorari petitions, jurisdiction is entirely discretionary under Rule 23(f).<sup>83</sup> Compelling arguments presented by counsel familiar with the appellate process can therefore make a particular difference in convincing a court to take up the appeal. Moreover, because these cases involve certification of class actions, often with large damages awards and thus large attorneys’ fees at stake, this is one area where we would expect plaintiffs to have the most resources to hire expert counsel.

Yet studies have found that plaintiffs still tend to fare worse than defendants, both in getting their cases heard and on the merits. In 2014, Skadden & Arps released a memo analyzing 7 years of 23(f) petitions. The data showed that the federal circuit courts granted 24.8% of the petitions by defendants appealing a successful class certification motion, while granting a smaller proportion—20.5%—of motions by plaintiffs appealing a denial of class certification.<sup>84</sup> In both pools of cases, the odds were not in plaintiffs’ favor. Overall, the appellate courts tended to rule against certification—confirming the lower court’s decision to deny certification 60% of the time, and overturning a lower court’s grant of certification 70% of the time.<sup>85</sup> To be sure, there are a number of

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81. Donald Songer & Reginald Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POLI. SCI., 235, 246 (1992). Analysts have found similar trends in state courts as well. A Bureau of Justice Studies survey of civil appeals from county court decisions from 2001 to 2005 found that trial judgments for plaintiffs were reversed more often (42% of the time) than judgments favoring defendants (21%). THOMAS H. COHEN, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2005, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: 2001 SUPPLEMENTAL SURVEY OF CIVIL APPEALS (2006).

82. Songer & Sheehan, *supra* note 81, at 254–55.

83. FED. R. CIV. P. 23(f).

84. Memorandum from Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (April 29, 2014), available at <https://www.skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings> [hereinafter *Skadden Arps Memo*].

85. *Skadden Arps Memo*, *supra* note 84. See also Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D.

reasons that plaintiffs find themselves worse off in 23(f) appeals. But because these discretionary review cases are ones where skilled advocacy can make a difference, the plaintiffs' bar should at the very least see this as a missed opportunity.

Drilling down even further, the best evidence we have lends support to the hypothesis that there is a link between plaintiffs' lower success rate on appeal and the plaintiff-defendant gap in access to dedicated appellate expertise. A 1999 study of products liability cases in the U.S. Courts of Appeals (described *supra*, at 14) found that plaintiffs who lacked appellate counsel that met a "minimum threshold" of experience and expertise suffered for it. For plaintiffs in particular, the authors determined that "judges were less likely to support" the position of those who "were represented by counsel appearing for the first time before the circuit."<sup>86</sup> In contrast, defendants—already less likely to be represented by these first time attorneys—suffered fewer negative consequences if they failed to invest in counsel familiar with the appellate process.<sup>87</sup> The deck was therefore doubly stacked against plaintiffs.

More and more, evidence demonstrates "that attorney experience matters in general and attorney experience in appellate work matters in particular."<sup>88</sup> Plaintiff-side advocates have been slow to acknowledge this reality. While it's difficult to prove any causal link between the kind of lawyers plaintiffs hire and any disadvantage that they face on appeal, it seems fair to conclude, at the very least, that the plaintiffs' bar should not ignore the potential benefits that specialized counsel can bring. Litigants should be particularly wary of an imbalance in appellate resources: the time that trial counsel has to spend getting up to speed on the ins and outs of the court is time that, "if the other party has engaged appellate counsel," they can spend "honing the discrete legal arguments instead."<sup>89</sup> As the defense builds up its stable of dedicated experts who can handle complex appeals, the plaintiffs' bar must respond.

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277 (2008). This earlier study tracking 23(f) petitions from 1998 to 2005 found that "defendants' petitions are granted more often" in most circuits, and that "regardless of whether the defendants or plaintiffs filed the appeal, the outcome was favorable to defendants about 70% of the time." *Id.* at 286 & n.43.

86. Haire et al., *supra* note 49, at 667.

87. *Id.* at 682–83.

88. Sisk & Heise, *supra* note 72, at 26.

89. Cardone, *supra* note 8, at 28.

## IV. OBSTACLES TO PLAINTIFF-SIDE APPELLATE SPECIALIZATION

Given the high stakes in many appeals and the successes of appellate defense counsel, what stands in the way of an equal and opposite force emerging on the plaintiffs' side?

At the outset, the baseline assumption on which this question relies—that the existing appellate bar, in spite of its defense-side origins, cannot serve plaintiffs equally well—merits some discussion. Repeat-player corporate defendants make up a large portion of many appellate practices' client base. This means that many litigators and practice groups could not take on plaintiffs as well without creating irreconcilable conflicts of interest—in either the ethical or business sense. As noted above, top Supreme Court advocates routinely avoid certain areas of law—such as environmental pollution, or litigation against banks—altogether, for fear that they “might upset the business community that serves as their client base for possible high-paying cases before the Court.”<sup>90</sup> A top partner at a California-based appellate practice that specializes in defense-side work, reflected on the ethical constraints that prevent the firm from working with plaintiffs: “There are a number of issues that are near and dear to our clients that we just wouldn't take an opposing position on.”<sup>91</sup>

Even those few specialists in corporate firms who have shown some willingness to take on plaintiff-side representation cannot escape the anti-plaintiff positions that their firms may take on behalf of major business clients. For example, the Kellogg Huber firm has provided high quality appellate representation to plaintiffs in many cases, but it also represented American Express in the *Italian Colors* case before the Supreme Court.<sup>92</sup> In that case, the credit-card giant successfully persuaded the Court to enforce an arbitration clause with a class-action ban even where doing so meant that federal statutory rights (in that case, the antitrust laws), could not be effectively vindicated—a controversial decision with chilling effects for plaintiffs across the spectrum.<sup>93</sup> This dilemma affects much of the private appellate bar. As noted above, many of the top corporate appellate litigation groups have represented or written amicus briefs on behalf of the U.S. Chamber of Commerce and allied groups. With the Chamber as a client or

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90. Lazarus, *Advocacy Matters: An Update*, *supra* note 48.

91. Katherine Gaidos, *Award Busters*, CALIFORNIA LAW BUSINESS, July 17, 2000. Partner David Axelrad reflected on these “ethical conflicts” in this 2000 profile of the firm Horvitz & Levy in *California Law Business*. *Id.*

92. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

93. *Id.* at 2311–12.

source of business, firms cannot (or are unwilling to) represent plaintiffs in or take positions in cases that might adversely affect the interests of the Chamber and its members. Conflicts of interest may often make plaintiff-side advocacy by corporate firms less desirable, if not altogether impossible.

The benefits of specialized appellate counsel are clear, and the existing bar is largely unable to service plaintiffs in cases against large corporate interests. So what has prevented a separate plaintiff-side specialization from developing? The explanation requires an understanding of how both supply and demand are different on this side of the table. Though scholars know relatively little about the plaintiffs' bar overall,<sup>94</sup> they have identified a number of dynamics that could be obstacles to the development of a plaintiff-focused appellate subspecialty. These include the fragmented nature of the bar, as well as how separated this sprawling system remains from the places where elite appellate attorneys are able to get their start.

For starters, though its members share certain common interests—particularly on important issues like arbitration, preemption, and class-action doctrines—the plaintiffs' bar as a whole remains “sprawling” and “decentralized.”<sup>95</sup> Its members range from large firms, initiating major class actions, to solo-practitioner personal-injury lawyers in small towns across the country. Plaintiffs' lawyers generally tend to work in smaller firms, which “were largely immune to the ‘mega-lawyering’ trend” of the last several decades.<sup>96</sup> Even the largest firms tend to be smaller—with several dozen attorneys, not several hundred.<sup>97</sup> And even in relatively well-financed areas of plaintiffs' litigation, such as securities or antitrust class actions, “firms were likely to be smaller and less

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94. Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 430 (“[l]egal academics generally know little about the sociology of the plaintiffs' bar”); Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 244 (2006–07) (the “[p]laintiffs' bar received scant attention among legal profession scholars” until “the past decade or so”).

95. John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 269 (2007).

96. Cheffins et al., *supra* note 94, at 455.

97. The nation's largest class-action firms—firms like Lieff Cabraser, Cohen Milstein, and Hagens Berman—tend to have between 50 and 100 attorneys. Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 776–77 & n.59 (2012). Morris Ratner has traced a growing trend toward bigger firms in major class-action litigation, but on the plaintiffs' side this “new model” of firm was still relatively small—the average size of the “five leading plaintiffs' labor and employment firms” on the Legal 500's 2011 ranking was still just 27 lawyers.

stable than the law firms representing corporations or their directors.”<sup>98</sup>

These small, diverse firms operate in a complex network that is often disconnected from other parts of the bar, creating a divide that can make it difficult to connect trial-level clients to appellate specialists who could take their case on in later stages. Several case studies of segments of the plaintiffs’ bar have found “complex hierarch[ies]” of referral networks that allow potential clients to find a firm that will serve their case well from inception to trial.<sup>99</sup> A “stratification” “has emerged in the plaintiffs’ bar” with the most sought-after attorneys drawing from a wider geographic area, seeking larger potential claims, and requiring more substantive expertise.<sup>100</sup> As empirical legal scholar Herbert Kritzer has suggested, “rather than ‘multiple worlds’ of litigation, perhaps we need to start thinking about ‘multiple solar systems’ or ‘multiple universes.’”<sup>101</sup> Still, even this complex hierarchy remains a world apart from the appellate practices in major corporate law firms. Those at the top of Kritzer’s hierarchy are trial-level experts, known for their ability to advocate in front of a jury and aggressively pursue cases at this first stage of litigation.<sup>102</sup>

The economics of plaintiff-side practice can help explain both the small, fractured nature of the plaintiffs’ bar, and the gulf that separates this group from the structures that have thus far allowed high-level appellate specialization to thrive. Plaintiffs’ firms have to spend more time working to bring new cases in the door. A 1995 study of the Chicago bar, for example, found that personal-injury lawyers on the defense side work with 37 clients on average each year, while their counterparts on the plaintiffs’ side worked with nearly four times as many.<sup>103</sup> Major corporate

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98. Cheffins et al., *supra* note 94, at 454–55. See also John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 707 (1986) (“Plaintiff’s firms seem inherently less stable than the more institutional firms in which defendant’s attorneys practice.”).

99. Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas*, 80 TEX. L. REV. 1781, 1783 (2002).

100. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs’ Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227 (2001).

101. *Id.*

102. *Id.* at 230 (describing “the top end of the spectrum[’s]” reliance on “the individual charisma of the star litigator”).

103. The average is 142 clients per year. Parikh, *How the Spider Catches the Fly*, *supra* note 94, at 247, citing John Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* (2005) (unpublished data).

firms, in contrast, work with a steady base of institutional clients, to whom they can cross sell transactional legal services, trial work, and, eventually, appellate expertise. Apart from the occasional large institutional plaintiff (such as pension funds in securities class actions), “client relationships are not enduring,” in general, on the plaintiffs’ side—“making it difficult to maintain and grow a practice.”<sup>104</sup> Moreover, plaintiffs’ firms generally engage clients on a contingency-fee basis, recovering a percentage of winnings rather than charging a flat fee. While “modest fees help to keep the lights on,” these practices have to hustle to find the “occasional ‘blockbuster.’”<sup>105</sup> And, although specialists working within the firm would offer valuable expertise to help defend earnings on appeal, the flow of cases likely would not be predictable enough to support such a position. Given their unstable client bases and unique compensation structures, it is unsurprising that plaintiffs’ firms have not developed in-house appellate expertise.

These smaller plaintiffs’ firms are also less tied in to the social and professional networks that the defense bar uses to gain access to appellate specialists, both within bigger firms and in smaller, boutique practices. Though this is beginning to change as major class-action firms grow in size and prestige, the plaintiffs’ bar has long been a truly separate universe from the corporate law firms where the first appellate practices thrived. The separation begins from the earliest stages of attorneys’ careers. While “the corporate bar heavily recruits from top national law schools,” the best plaintiffs’ lawyers “tend to be graduates of non-elite law schools.”<sup>106</sup> “Tort lawyers, unlike corporate lawyers, are not expected to come out of Harvard, since at most leading law schools tort law seems to offer limited professional horizons,” Public Citizen founder Ralph Nader recently observed.<sup>107</sup> “The convenient imagery is apparent to all—corporate practice is prestigious, while personal-injury attorneys are unfairly called ‘ambulance chasers.’”<sup>108</sup>

Further, because high-level plaintiffs’ lawyering and specialized appellate advocacy require dissimilar skill sets—with the former placing more emphasis on client development, pretrial discovery,

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104. Parikh, *How the Spider Catches the Fly*, *supra* note 94, at 247.

105. David A. Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1565.

106. Bill Henderson, *Where Did High-End Plaintiffs’ Lawyers Go to Law School?* EMPIRICAL LEGAL STUDIES BLOG (Dec. 4, 2006), [http://www.elsblog.org/the\\_empirical\\_legal\\_studi/2006/12/where\\_did\\_high.html/](http://www.elsblog.org/the_empirical_legal_studi/2006/12/where_did_high.html/).

107. Ralph Nader, *Suing for Justice*, HARPER’S MAGAZINE, (Apr. 2016), available at <http://harpers.org/archive/2016/04/suing-for-justice/>.

108. *Id.*

and the crafting of an initial narrative on the facts, and the latter prizing refined library research and writing—very different types of young lawyers continue to be attracted to each path. Plaintiff advocacy has thus become a distinct “subprofession,” defined by “a unique blend” of characteristics that developed in opposition to white-shoe law firms.<sup>109</sup> As the authors of a sociological study of plaintiffs’ lawyers in Chicago observed, though the bar had grown “from a small number of relatively marginal practitioners to a much larger, more prosperous, and more respectable group” in the second half of the twentieth century, it was still dominated by graduates of local law schools, who prized “trial craft” and service *within* the plaintiffs’ bar.<sup>110</sup> As a result, there is often little overlap in the social and professional networks of those at even the top echelons of the plaintiffs’ and appellate bars.

Compounding the present isolation of the plaintiffs’ bar is the fact that almost all of the existing training grounds for elite appellate attorneys are on the defense side. Appellate practice groups in major corporate law firms recruit their early-career attorneys from the ranks of federal judicial law clerks who have graduated from the most elite law schools, and poach top talent directly from the Solicitor General’s office and appellate sections of the Justice Department.<sup>111</sup>

To make matters worse, more direct financial incentives pull aspiring appellate litigators who might otherwise go on to represent plaintiffs toward corporate firms. The pool of potential specialists is largely made up of young lawyers who have spent time in appellate courts, as clerks in federal circuits or the Supreme Court.<sup>112</sup> Major firms now offer standard clerkship signing bonuses to those who go through these programs, so ambitious appellate attorneys may have to forgo huge sums of money if they want to focus on plaintiff advocacy—as much as \$50,000, for alumni of a

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109. Sarah Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs’ Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 269 (2005).

110. *Id.* at 274, 269–70.

111. For example, Jones Day boasts that its Issues & Appeals group includes “over 40 U.S. Supreme Court law clerks, and more than 65 former federal appellate law clerks,” as well as several former members of the Solicitor General’s office. See <http://www.jonesdayappellate.com>. Partners in Gibson Dunn’s Appellate and Constitutional Law group include former Solicitor General of the United States Theodore B. Olson, former Deputy Solicitor General Thomas G. Hungar, and former Assistant to the Solicitor General Miguel Estrada. See <http://www.gibsondunn.com/practices/pages/ACL.aspx>.

112. “[I]t helps to have occupied an inner chamber of the Marble Palace if you want to make a career of living inside the heads of the justices.” As long ago as 1998, Sidley & Austin had hired 20 former clerks to work in its Supreme Court practice. Steve France, *Takeover Specialists: Why Many Litigators Hand Their Cases to High Court Pros*, 84 A.B.A. J. 38, 39 (1998).

federal circuit clerkship,<sup>113</sup> or a whopping \$300,000, for those coming out of a Supreme Court clerkship.<sup>114</sup>

At the moment, those big firms also remain among the best places for young lawyers to train in this area of advocacy. Few alternatives exist on the plaintiffs' side of the table. Public Citizen, whose litigation group focuses on representing consumers and workers, has long stood as a "principal exception," offering one home for young appellate attorneys to train outside of the defense bar.<sup>115</sup> Certain parts of the federal government, including the Solicitor General's office and the civil appeals office at the Department of Justice, can also serve as a place for lawyers to train outside of big firms. To the extent that major defense-side appellate practices recruit directly from these government offices, however, the pipeline may still divert talent away from plaintiff-side representation.

Even those with the training and desire to take on plaintiffs' cases on appeal may find the economics of this practice model difficult. Appellate work on behalf of corporate defendants offers a more predictable, and at least potentially more lucrative, business model. Plaintiffs' lawyers generally work on a contingency-fee model, and compensation may be delayed until the end of a case, if it comes at all. While the rewards for big-ticket cases can be large, the risks of plaintiffs' work can be off-putting. And with high demand from defense-side clients, the still small supply of appellate specialists may be drawn away from plaintiff practice.

Partners at one highly regarded California appellate litigation boutique, Horvitz & Levy, admitted as much in a 2000 profile in *California Law Business*.<sup>116</sup> The firm had originally focused on representing plaintiffs on appeal, but in the early 1980s, "the defense started calling," as one partner put it, and "I must say the pay was more regular."<sup>117</sup> The firm switched sides. Described as "a plaintiffs worst nightmare," the firm had won 50 of the 66 punitive damages awards it appealed in the decade preceding the article, either reversing or reducing \$1.3 of the \$1.4 billion in pu-

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113. David Lat, *Clerkship Bonus Watch: Will \$75K Become The New Standard?*, ABOVE THE LAW (Jan. 20, 2016), <http://abovethelaw.com/2016/01/clerkship-bonus-watch-will-75k-become-the-new-standard/>

114. David Lat, *Which Law Firm Won the SCOTUS Clerk Sweepstakes?*, ABOVE THE LAW (Nov. 2, 2015), <http://abovethelaw.com/2015/11/which-law-firm-won-the-scotus-clerk-sweepstakes-you-should-know-by-now/>

115. Lazarus, *Advocacy Matters*, *supra* note 9, at 1501.

116. Gaidos, *supra* note 91.

117. *Id.*

nitive damages.<sup>118</sup> With a more stable client base and business model, defense-side appellate work can be a tempting path.

The structure of the plaintiffs' bar clearly presents a number of obstacles for an aspiring plaintiff-side appellate specialist. Defense firms dominate many of the training grounds for appellate advocacy, and they offer clear perks to help recruit ambitious young lawyers. The plaintiffs' bar, in contrast, remains internally fragmented and cut off from these networks of elite appellate attorneys. In order to develop a client base, an advocate hoping to represent plaintiffs on appeal needs to make connections across the decentralized plaintiffs' bar. Given all these challenges, it's perhaps unsurprising that the plaintiffs' bar has been relatively slow in responding to the overwhelming appellate resources that have developed on the other side.

#### V. PROSPECTS FOR LEVELING THE PLAYING FIELD ON APPEAL

Despite these considerable challenges—ranging from conflicts of interest and the structure of the plaintiffs' bar itself to the lack of an established economic model—there is reason to believe that a specialized appellate bar will emerge to represent plaintiffs.

This is not to say that the forces will ever be fully equalized in civil justice cases. It will always be true that, at least to some extent, asymmetric resources will produce asymmetric advocacy. But that is more likely to be the case in the resource-intensive, labor-intensive ground wars of trial-level litigation or lobbying, where the plaintiffs' bar has already invested enormous resources. Appellate advocacy, in fact, is an arena in which sheer manpower matters far less: A very small team of highly skilled specialists is all that is necessary to level the playing field.<sup>119</sup> Each of the obstacles to the development of a robust, plaintiff-side appellate bar—while not insignificant—can be overcome. Rather than making the task impossible, the financial and professional constraints described in the last section will instead shape how plaintiff-side appellate advocates do their job and organize their practices.

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118. *Id.*

119. See Paul Barrett, *Appeal in the Chevron Case Will Test the Boundaries of RICO*, BLOOMBERG BUSINESSWEEK (July 3, 2014), <http://www.bloomberg.com/news/articles/2014-07-03/appeal-in-the-chevron-case-will-test-the-boundaries-of-rico> (noting that “the opposing parties’ legal forces have been equalized” by the hiring of appellate counsel; while “Chevron’s vast team from the firm Gibson, Dunn & Crutcher overwhelmed a patched-together squad of trial attorneys” in this trial over a decades-long pollution dispute, the “corporate firm’s manpower will be irrelevant in the more theoretical, less labor-intensive arena of appellate combat”).

The ethical and positional conflicts inherent in balancing corporate and plaintiff-side clients' interests can be dealt with most easily. To be sure, some small elite firms—like Paul Clement's former firm, Bancroft PLLC—may continue to straddle the line and represent clients on both sides on a case-by-case basis.<sup>120</sup> But this is not a viable option across the board; most firms will need to pick sides, especially on the most controversial and high-stakes issues. Just as the lawyers at Horvitz & Levy realized when they made the switch from the plaintiffs' side to corporate defense, it seems likely that some advocates will make the opposite choice, deciding—based on ideological conviction, identification of a market niche, or a combination of the two—to focus on representing plaintiffs and to forgo representation of large corporate interests.

The fragmented nature of the plaintiffs' bar—with its discrete social networks and rarely overlapping hierarchies—presents both a greater challenge and a greater opportunity. Aspiring plaintiff-side appellate specialists will need to immerse themselves in this bar—and be seen as authentically a part of it—and they will need to use existing referral networks to develop relationships. Tapping into the diverse networks of plaintiffs' lawyers across the country will allow these specialists to find significant new cases from a variety of different sources. To be successful, any specialized appellate firm will have to build bridges, and will be far more likely to do so if it has some pre-existing roots and connections to the decentralized plaintiffs' world.

This issue is critical because the decentralization in the plaintiffs' bar has serious coordination costs that must be addressed. Take one example: Bad appeals make bad law, and there is typically nobody in a position (as a corporate general counsel or trade group might be) to stop plaintiffs' lawyers from taking doomed appeals. By contrast, the Chamber of Commerce's Institute for Legal Reform, working with private firms, is able to coordinate activities across a broad range of arenas—from filing amicus briefs in the U.S. Supreme Court to initiating regulatory challenges to

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120. As Clement himself put it in an interview, Bancroft had “some clients that are more unusual because they raise a lot of conflict problems for a big firm.” Susan Beck, *How Bancroft Became Conservatives' Law Firm of Choice for Hot-Button Cases*, *The American Lawyer* (Nov. 30, 2012), <http://www.americanlawyer.com/id=1202578839987/>. Bancroft often represented big businesses, but also represented class action plaintiffs on appeal. As this article was going to press, news broke that Clement and all of his colleagues at Bancroft would be hired en masse by Kirkland & Ellis, one of the world's largest firms; it's safe to assume that Clement will have far less freedom to represent plaintiffs going forward. See Joe Palazzolo, *Clement, Dinh, and Co. Take Their Practice to Kirkland*, *Wall Street Journal* (Sept. 12, 2016), <http://blogs.wsj.com/law/2016/09/12/clement-dinh-and-co-take-their-practice-to-kirkland/>.

coerce or stop actions by federal agencies. No organization truly occupies a similar perch on the plaintiffs' side. To be sure, groups ranging from Public Citizen and Public Justice to the National Employment Lawyers Association and National Association of Consumer Advocates play a role in many of these activities, but none has the resources or authority of parallel groups on the other side.

While the plaintiffs' bar has lagged in the appellate courts, it has made significant gains in the other branches of government. Over the past several decades, the trial bar, and particularly its lead trade group, the American Association of Justice (AAJ), have succeeded in bringing trial lawyers together to coalesce as a sophisticated lobbying force against the cadre of "well-funded, business-backed tort reformers."<sup>121</sup> Though these efforts have largely focused on political advocacy, the organization has also coordinated some state-level legal challenges to important issues affecting the plaintiffs' bar, such as damages caps, through the Center for Constitutional Litigation, a private firm that had worked closely with AAJ over the years.<sup>122</sup> The same kind of organized approach can and should be developed on behalf of the trial bar in the U.S. Supreme Court and the courts more broadly, where the ground rules for civil justice cases are made—especially on fundamental issues like arbitration, preemption, and class-action rules, and in regulatory challenges with broad impact. Bringing some coherent organization to the fragmented network of the plaintiffs' bar on these issues will not be easy, but the potential rewards are great for appellate advocates, their counterparts in trial courts, and the clients they serve.

What's more, the paucity of centers of elite appellate training on the plaintiffs' side can also be overcome. The few places that are already doing this work well—including Public Citizen, and some other nonprofit legal centers—have produced experienced litigators eager to build long careers working on civil-justice issues. Other potential sources of talent are elite government offices, like the appellate staffs at the U.S. Department of Justice or state solicitors general, and appellate groups at federal administrative agencies, like the Consumer Financial Protection Bureau or the

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121. WILLIAM HALTOM AND MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 111 (2004).

122. *Id.* at 120–21 (discussing CCL's past work on damages-cap litigation). In recent years, the size of CCL has dwindled greatly, and now stands at just one lawyer—its founder, Robert Peck. See <http://www.cclfirm.com/attorneys/>. As this article went to press, CCL's future remained uncertain.

Equal Employment Opportunity Commission, where lawyers can also develop related substantive expertise. A third, perhaps unlikely source of plaintiff-focused talent is the corporate firms that have spent the last several decades investing in appellate practices. Given the right opportunities, lawyers trained in the excellent Supreme Court and appellate practices of Jones Day or Mayer Brown may decide to switch sides.

Last but not least, the economic barriers to developing a viable, plaintiff-focused appellate practice—perhaps the most significant barrier to entry—can likewise be surmounted. The same cost-spreading rationales that make it possible for firms to prosecute class actions, mass actions, and multi-district litigation can be extended to appellate litigation as well. In a study examining federal district court class actions in 2006 and 2007, Brian Fitzpatrick calculated that judges approved 688 class-action settlements, transferring a total of \$33 billion—including \$5 billion in fees and expenses to class lawyers.<sup>123</sup> The 15% of the total award that went to class lawyers is a smaller percentage than many might expect,<sup>124</sup> but is more than enough to suggest that the resources are available to fund appellate litigation in high-stakes plaintiffs' cases. In addition, far more money is on the table in the tort system generally—with one study estimating that over \$150 billion is transferred through the American civil justice system each year.<sup>125</sup>

With so much at stake, the question is not whether the resources exist to fund appellate litigation but rather what model will accomplish it. For trial lawyers who operate on a pure contingency basis, the standard hourly fee model will generally be unappealing. The challenge for plaintiff-side appellate lawyers is to develop of a different business model—for example, one based on a hybrid of flat fees at the front end and a share of the contingency or risk at the back end. Appellate advocates who are willing to share some of the risks and the rewards of litigation may find that the practice is more lucrative than defense-side appellate work, which often operates as a loss leader for large firms. Of course, this will still leave a large gap: individual litigants, such

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123. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811 (2010) [hereinafter Fitzpatrick, *An Empirical Study*].

124. See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2045 (2010).

125. Fitzpatrick, *An Empirical Study*, *supra* note 123, at 830 (citing Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008)).

as employment-discrimination plaintiffs, cannot use similar cost-spreading mechanisms.

Ultimately, those representing plaintiffs must come together and understand that appellate courts are just as important as the halls of Congress in protecting the interests of their clients and ensuring that all will have their day in court. Success will require a constellation of non-profits and a specialized private bar to counter the weight of the Chamber, DRI, trade groups, and the private corporate bar. Groups like Public Citizen, Public Justice, trial lawyers' associations, and various allied nonprofits play an important role already, and must continue to do so. With the death of Justice Scalia, and the imminent prospect of a change in composition on the Supreme Court, the time is especially ripe for plaintiffs' advocates to develop an affirmative agenda and the institutional infrastructure to carry it out.

My own experience—building a small plaintiff-side appellate boutique from scratch over the past four years—speaks to the potential for private firms to be a part of this coalition.<sup>126</sup> Our firm's lawyers are drawn from a diverse range of practice backgrounds—from Public Citizen and Public Justice, to the federal government, to the Supreme Court and appellate practice at Jones Day.<sup>127</sup> All are former federal clerks (including a Supreme Court clerk) with years of dedicated appellate experience and commitment to advancing civil justice. By making ourselves known to the plaintiffs' bar, we have been able to bring a fresh perspective to appeals across a broad spectrum of plaintiffs' practice—including consumers' and workers' rights, antitrust, civil rights, and the environment.<sup>128</sup> Our work has covered many of the hot-button issues that the Chamber and its allies have successfully pursued, including arbitration, preemption, class-action rules, and standing doctrines. We have also started a summer associate program and a our own one-year fellowship for young lawyers, aimed at those who have just completed judicial clerkships, hoping to become a training center for future plaintiff-side appellate advocates. Although it is hard to draw generalizations from just one organization's example, we sincerely hope that our firm's experience serves as at least a proof of concept for a broader, more robust plaintiff-side appellate bar in the future.

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126. See Kimberly Robinson, *Mind the Gap: Appellate Boutique Going to Bat for the 'Little Guy'*, Bloomberg BNA (July 21, 2015) (profiling the mission of Gupta Wessler PLLC).

127. See <http://guptawessler.com>.

128. See <http://guptawessler.com/docket/>