How Elite Lawyers Shape the Law

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- Paul R. Gugliuzza, *The Supreme Court at the Bar of Patents*, 95 **Notre Dame L. Rev. __** (forthcoming, 2020), available at SSRN.
- Paul R. Gugliuzza, *Elite Patent Law*, 104 **Iowa L. Rev. __** (forthcoming, 2019), available at SSRN.

Christopher Langdell's "case" method of teaching the law has dominated the law school classroom for over a century. In this pedagogical approach, students typically read appellate opinions, and professors tease "rules" from the opinions—often in concert with the so-called Socratic method, which enlists students to aid in this abstractive process. This approach is said to make students "think like lawyers," but what's typically ignored in the process is the role lawyers actually play in the very cases under consideration. Instead, the working assumption is that judges are presented with arguments and facts up high from anonymous sets of ideal lawyers, who never miss a key argument or forget a relevant fact.

Of course, the actual world of lawyering is much messier, and lawyers range from the glorious and gifted to the struggling and essentially incompetent. But exactly how does this variation in attorney quality affect case outcomes? This all-too-important question has scarcely been addressed, much less answered, by systematic academic study. In an outstanding duo of articles, Paul Gugliuzza shines newfound light on the issue by examining the role of "elite" advocates in the certiorari process at the U.S. Supreme Court.

Unlike actual case outcomes, which are often a poor test for attorney quality because of endogeneity concerns (the best attorneys often take the hardest cases), selection effects, and the lack of any "natural experiment" comparing a before-and-after "treatment," certiorari in patent cases is in my view quite a worthy domain in which to suss out the effects of attorney quality.

As Gugliuzza recounts in exhaustive and well-researched detail, there is a major shift in patent action appeals in the participation of "elite" attorneys, particularly at the Supreme Court. (By "elites," Gugliuzza refers to those attorneys who presented oral argument in at least five cases in that term and the ten previous terms combined.) Barring other explanations—which Gugliuzza does a thorough job in effectively eliminating—this sets up enough of a natural experiment to assess the causal role of elite attorneys in the fate of patent appeals, especially the grant (or denial) of cert petitions.

Notably, Gugliuzza finds that "the Supreme Court is 3.3 times more likely to grant cert. when a petition in a Federal Circuit patent case is filed by an elite advocate as compared to a non-elite." (*Supr. Ct.*, P. 34.) Specifically, while non-elite petitions are granted at a 4.7% rate, elite petitions are granted at a high 15.6% rate. Exactly how and why this occurs is complex. Part of the reason is the fact that in cases handled by elites, large numbers of amicus briefs are filed at the cert stage, and the presence of those briefs is even more strongly correlated with cert grant than the presence of elites.

Of course, it could be the fact that elites tend to work on more important cases, and it is precisely those cases that garner more amicus briefs. But as Gugliuzza explains—and which aligns with my own experience—it is the network and know-how of elites that drive the amicus filings, creating a causal link between elites and cert grants. Also, many elites are known to the justices and clerks. And elites know how to craft briefs to increase the odds of a cert grant. Thus, even more so than Gugliuzza, I think it's

fairly clear that elites are a substantial causal factor in the Supreme Court's renewed interest in patent law issues.

What's more incredible about Gugliuzza's findings is that, in my view, they substantially understate the role "elites" are playing in patent cases at the Supreme Court, because Gugliuzza's definition excludes attorneys who regularly draft briefs (but do not argue) Supreme Court cases and also excludes well-known academics (since none has argued 5 cases), who have increasingly played a role at the certiorari stage in patent cases over the past 10 years.

Gugliuzza plans to tease out some of these additional influences in a follow-on study, which I have no doubt will strongly support the causal role between elites and cert grants in patent cases. But where does all this leave us?

First and foremost, Gugliuzza's study reminds us as law professors that attorneys really do matter and that we need to teach students as much, including the nitty gritty of why—not just in "skills" and "clinical" courses, but in "doctrinal" courses, too. It also opens the door for further empirical study on the role of attorney quality in outcomes (outside of mere win rates—which, as I noted above, is a difficult way to measure the effects of attorney quality) in many other areas of law.

Second, it raises important normative issues regarding the development of the law. As Gugliuzza rightly notes, elite advocates tend to have little training in science and technology, and instead are typically generalists. When both the advocates and judges are generalists in patent cases, this can lead to a "blind leading the blind" problem. As Justice Scalia aptly recognized in his Myriad opinion, he could not join certain portions of the majority opinion, stating "I am un-able to affirm those details on my own knowledge or even my own belief."[1] Personally, I find it hard to believe that any justice in the majority had any scientific knowledge substantially greater than Justice Scalia's. Indeed, Gugliuzza documents cause for concern because most of the Supreme Court decisions have been in areas that are basic enough for the justices to understand, like procedure or statutory interpretation, rather than core substantive issues of patent law. Even the substantive cases, like KSR, *Myriad*, Mayo, Alice, Global-Tech, and the like, present relatively simple sets of facts, which in essence means the Court has eschewed many doctrinal areas in need of resolution, such as enablement, written description, and complex obviousness doctrines.

At the same, the elites arguably have stronger skills when it comes to law and policy than the usual patent litigator. Elites may help to correct for the sometimes tunnel-vision of patent litigators and, more importantly, "specialized" Federal Circuit judges. This may help avoid court capture and pro-patent biases, which tend to serve the economic aims of the patent bar.

As Gugliuzza perceptively notes, perhaps it's too early to answer the normative question. There are decent arguments on both sides of the fence. My own instincts are that generalist elites—in concert with the elites that make up the Supreme Court—are mucking up patent doctrine to the point that the system isn't working as it should. Most problematic are generalist opinions, which often don't provide sufficient guidance to innovators and potential infringers, alike, to order their business affairs. More generally, the Supreme Court has produced many opinions that have weakened patents (e.g., *KSR*, *Alice*, *Mayo*, *eBay*, *Global-Tech*, and *TC Heartland*), which although not always intentional, is in my view the wrong policy choice.

In sum, I thoroughly enjoyed Gugliuzza's insights on these important questions, and the more general question of the role of lawyers on the law, and I believe Gugliuzza's articles and follow-on studies will surely play a critical role in resolving these thorny debates as the empirics continue to unfold.

1. Ass'n of Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 596 (2013) (Scalia, J., concurring).

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