ADVOCACY THROUGH BRIEFS IN THE U.S. COURTS OF APPEALS

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The process of issue formation, in which events at the trial level are transformed into legal questions, may result in significant policy making opportunities for an appellate court. Advocates initiate this transformation process for their clients and, in doing so, are expected to define the contours of the issue agenda. This role is a vital one in the U.S. Courts of Appeals where each circuit's docket represents a wide range of substantive legal questions.[1] In one account of this workload, Judge Coffin of the First Circuit detailed the rich variety of cases before him: habeas corpus petitions, appeals from criminal convictions, petitions from the National Labor Review Board, and review of district court summary judgment decisions in employment discrimination.[2] When evaluating claims from these areas, appellate court judges do not simply decide which party will prevail. Their reasoned decisions are expected to address the issues raised by litigants and subsequently shape legal policy for the circuit. Not surprisingly, judges indicate that they rely on advocates for identifying and developing the issues.[3] The appeals court judge is characterized as having "very little time to spend on each case and, in addition, he lacks specialized knowledge of most of the cases that come before him . . . . The judge so circumstanced is very badly in need of the advocates' help."[4] Counsel in appellate litigation therefore play an important role in shaping a court's issue agenda by defining the context for

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1. The 2006 annual report, the "Judicial Business of the U.S. Courts," noted that the twelve regional circuit courts terminated just over 34,000 cases on the merits that year. The business of the Seventh Circuit alone consisted of 1721 of the merits terminations in 2006. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE U.S. COURTS (2006), at 50 tbl.B–1 (2006), *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf.
2. *See* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 121–24 (1994).
3. For an in-depth analysis of workload in the Second, Fifth, and DC Circuits, see J.W. HOWARD, COURTS OF APPEALS IN THE FEDERAL SYSTEM (1981); Fred I. Parker, *Appellate Advocacy and Practice in the Second Circuit*, 64 BROOK. L. REV. 457 (1998) (describing the role of advocates in the Second Circuit); Richard A. Posner, *Convincing A Federal Court of Appeals*, 25 LITIG. 3 No. 2 (1999) (describing strategies for effective advocacy).
4. Posner, *supra* note 3, at 3.

their judicial audience. Through appellate briefs, advocates can provide clear cues in a complex decision making environment.[5]

The focus of this paper is to evaluate the role of advocates in the U.S. Court of Appeals for the Seventh Circuit by examining the characterization of issues offered in appellate briefs against the issues addressed in the court's decisions. Specifically, in an environment in which attorneys are expected to frame the issues on appeal and judges are expected to respond to those issues, what accounts for judges addressing some issues while suppressing others? By explicitly focusing on how the substantive content of an opinion is shaped, we depart from other, earlier scholarship on the advantages of "repeat player" litigants that primarily emphasizes who wins (and who loses) on appeal.[6] Though this study is exploratory in its scope, we believe it does offer some important insights into the process of issue framing in the U.S. Courts of Appeals.

This essay proceeds in the following way. Part I reviews existing scholarship on appellate advocacy and relevant theoretical frameworks advanced in prior studies of judicial decision making. Part II describes the data used and the approach to analysis. Part III presents the results, comparing the findings on the Seventh Circuit with an earlier analysis of appellate litigation in the Eleventh Circuit. Part IV offers some concluding comments.

PART I. JUDICIAL DECISION MAKING AND APPELLATE ADVOCACY

A. Party Capability Theory and the Role of Counsel

"Repeat-player" parties with organizational strength tend to prevail more often than "one-shot" litigants in cases before the U.S. Courts of Appeals.[7] Party capability theory posits several reasons for this trend, including the notion that litigants with superior resources can retain better quality counsel who provide parties with expertise in substantive matters as well as procedural

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5. Although oral argument provides counsel an opportunity to clarify the issues, advocates' presentations are generally limited to the issues and legal authorities raised in the briefs.

6. *See* Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974)(developing a conceptual framework for understanding the advantage of repeat player haves over one-shotter litigants); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 235 (1992) (finding empirical support for party capability theory in judicial decisions using ordinal categorization with individual litigants at one end of the spectrum and the federal government at the other end).

7. *Id.*

issues.[8] In "ordinary" civil litigation before trial courts, attorneys have been portrayed as "brokers" with counsel focused on securing the best "deal" for their client.[9] The role of counsel at the appellate level shifts, however, as advocates rely more on legal skills and institutional experience to screen cases and present information to a judicial audience on behalf of their clients.[10] At this level, attorneys, through appellate briefs and oral arguments, can shape the court's issue agenda and persuade judges to adopt their arguments.[11] The relative success of counsel's efforts may vary, however. In the U.S. Courts of Appeals, one analysis of products liability decisions found that attorneys with no previous appearance before a particular circuit were less successful in persuading their judicial audience.[12] A recent study of cases decided by the Supreme Court of Canada found that the probability of litigant success increased with the size of the litigation team.[13]

B. Issue Framing and Information Processing in Appellate Courts

In appellate litigation, advocates are responsible for defining the contours of the issues for the court to address. The Federal Rules of Appellate Procedure clearly specify that initial briefs filed by parties contain a statement of issues that is to be placed before the brief's arguments.[14] Following the identification of issues presented, the brief provides a summary of the argument followed by the body of the argument that includes citations to relevant precedent.[15] Through issue statements, attorneys initially frame the questions raised in the appeal for their judicial audience. In the arguments, counsel attempt to convince that audience of the need to follow the issue frame presented in his or her brief.

Psychological perspectives offer some insights on potential causal mechanisms for an expected relationship between issue framing and judicial

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8. Kevin McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995).
9. HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990).
10. Gregory J. Rathjen, *Lawyers and the Appellate Choice: An Analysis of Factors Affecting the Decision to Appeal*, 6 AM. POL. RES. 387 (1978) (noting the importance of attorneys in decision to appeal).
11. LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE (1992) (finding that attorneys may alter the contours of legal issues).
12. Susan B. Haire, Stefanie A. Lindquist & Roger Hartley, *Attorney Expertise, Litigant Success, and Judicial Decisionmaking in the U.S. Courts of Appeals*, 33 LAW & SOC'Y REV. 667 (1999).
13. John Szmer, Susan W. Johnson & Tammy A. Sarver, *Does the Lawyer Matter? Influencing Outcomes on the Supreme Court of Canada*, 41 LAW & SOC'Y REV. 279 (2007).
14. FED. R. APP. P. 28
15. *Id.*

behavior. In one, issue framing is thought to simply activate memory structures and the accompanying concepts and other opinion ingredients. Shortcuts or "cues" trigger these knowledge structures in the decision making process. In the context of appellate courts, judges may be viewed as possessing limited attention and information-processing abilities due to their heavy, diverse caseload. Therefore, judges' memory structures are "primed" through issue statements crafted by counsel to activate specific considerations for their judicial audience. This priming effect may then be enhanced by the use of precedent in the body of the argument. Once she has refreshed her memory on this legal policy issue, the judge will then decide on the basis of her previous legal and extra-legal preferences governing this issue.

In a more sophisticated model of this linkage, issues frames are thought to affect opinion by selectively highlighting elements in "such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation."[16] This model of framing effects proposes that "[f]rames . . . supply no new information . . . yet their influence on our opinions may be decisive through their effect on the perceived relevance of alternative considerations."[17] In appellate advocacy, counsel's issue statements structure the decision making process by selectively identifying the array of potential questions raised on appeal. Following the issue statements, attorneys selectively utilize precedent and other legal authorities that would be expected to control the outcome of the case. Viewed in this light, the effect of issue framing is not simply the activation of particular memories. Issue framing becomes an integral part of persuading judges of the merits of one's case.[18]

Advocates have long recognized the importance of the issue statement and its potential effect on winning and losing the case. Although the temptation is to itemize all potential legal errors committed in the trial court, one single meritorious issue may get lost in the "blizzard" of questions. Issue selectivity is encouraged by appeals court judges who recognize their own limitations due to heavy dockets.[19] Since substantial deference is accorded to the lower court, the advocate must convince the appellate judge that the error

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16. Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221, 222 (1997).

17. *See id.* at 226.

18. Frames not only help organize information, but also often suggest a course of action. *See id.* at 222 (discussing the framing of the Bosnian conflict as "genocide" or "a lingering dispute" and the courses of action suggested by each frame). By selectively citing precedent and other legal authorities, attorneys heighten judges' attention to particular elements of the claim, while downplaying other elements, and consequently may succeed in promoting a favored outcome.

19. *See* COFFIN, *supra* note 2, at 172.

merits reversal. Still, the decision to exclude an issue from the "statement of issues" is problematic as a court may refuse to consider arguments not based on the statement of issues. Issue framing decisions by advocates are complicated further by court rules which limit the page length for each brief.

C. Issue Fluidity and Appellate Advocacy

As outlined thus far, appellate advocates play an important role in identifying the issues for the court. The consequences of this role become more important, however, in light of research on case perceptions and issue fluidity. In an early analysis of the Supreme Court, one scholar noted that there was a "potential disparity between a highly complex and fluid 'input' stage and a relatively simplistic official 'output' in the judicial process."[20] Research on the U.S. Supreme Court has found that justices often ignore issues raised in attorneys' briefs and sometimes address issues not raised by the parties, contrary to their own court rules.[21] These two separate phenomena, issue suppression and issue expansion,[22] appear to be driven by very different sets of factors. Issue expansion, a relatively infrequent event, appears to be closely related to the policy agenda-setting processes of the Supreme Court. On the other hand, issue suppression on the Court is more likely to occur when a brief raises "too many" questions or there are time limitations imposed by the end of the term.[23]

PART II. ANALYTICAL FRAMEWORK

A. Judicial Treatment of Issues on the U.S. Courts of Appeals

Institutional features of the circuit and legal rules may be expected to shape the treatment of appellate advocates' issue statements in cases decided by the U.S. Courts of Appeals generally and reduce the likelihood of issue expansion in particular. For example, judges generally do not address

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20. J.W. Howard, *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43, 55 (1968).
21. Rules 14.1(a) and 24.1(a) explain that the issues considered by the court will be limited to those issues raised in the cert petition and in the brief, except where there is clear error evident from the record. *See* RULES OF THE SUPREME COURT OF THE UNITED STATES 10, 28 (2007) *available at* http://www.supremecourtus.gov/ctrules/ctrules.html (last visited Apr. 8, 2008).
22. McGuire and Palmer's later analysis substitutes the term "expansion" for "creation." *See* Kevin McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853 (1996).
23. Kevin McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 (1995).

questions that were not properly raised in the district court.[24] In some very limited situations, the court will entertain arguments not raised below and even less frequently, identify an issue *sua sponte*. There are two scenarios that potentially lend themselves to issue creation or expansion. In the first one, judges may raise issues that relate to the processing of the appeal. For example, appellate judges must address whether the court has jurisdiction to hear the case, even if the issue is not raised by one of the parties. Over the course of an appeal, unethical or improper conduct by attorneys may result in judges raising Federal Rule of Civil Procedure 11 sanctions *sua sponte*. Under a second scenario, issue expansion may occur when widespread, repeatable legal error seems likely.[25] Concerned about future appeals and the functioning of the judiciary, judges may raise an issue to address these institutional needs.

Like all circuits, the U.S. Court of Appeals for the Seventh Circuit provides a set of guidelines and rules for attorneys filing appellate briefs with the court.[26] The Practitioner's Handbook reminds attorneys that briefs are "by far the more important step" in persuading judges because they should "contain all that the judges will want to know" and are reviewed by the judges both before and after oral argument.[27] It further cautions that, because

> judges are reading the briefs in six cases in preparation for each day of oral argument[,] . . . [t]he writer must select what is important and deal only with that . . . Except in unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious.[28]

In a recent interview, one federal appeals court judge from another circuit agreed with the three-to-four issue rule of thumb, noting, "When I read a brief, I want to be able to put it down and say, 'What is he asking for?' If there's

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24. *See* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 1:2, at 3–7 (5th ed. 2007) (identifying several exceptions to the general rule of not raising new issues on appeal including situations that involve plain and fundamental error, issues of great public concern, standing, mootness, ripeness, and res judicata).
25. For instance, a panel might describe a hypothetical situation that differs in some way from the facts in the case at hand, as a means of explaining a broader rule related to prosecutorial conduct. If neither of the litigants asked the court to establish a broader rule in its brief, but instead kept a narrow focus on the dispute in question, this would be one example of issue expansion.
26. *See* PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 71–75 (2003), *available at* http://www.ca7.uscourts.gov/Rules/handbook.pdf.
27. *See id.* at 71.
28. *See id.* at 74.

one long monologue and the issues aren't clear, you're not clear what they're asking for."[29]

The characterization of issue agendas presented in research on the Supreme Court tends to conceptualize judicial treatment of the issue agenda as one where the court suppresses, expands upon, or agrees with the questions presented by the parties.[30] Yet, parties and courts can generally agree on the broad parameters of the issue agenda but still differ in the specific characterization of the issues. For example, the statement of issues may characterize the case as raising multiple issues whereas the opposing brief consolidates them into a single issue. Or, there may be substantial overlap in the briefs' contentions but no explicit agreement in the characterization of an issue. Although variation may be due to flexible legal standards and authors' writing styles, differences also may stem from calculated decisions by counsel to frame issues in the most favorable light possible. Even if the characterization does not contribute to an outright win for their client, an attorney's efforts to define the issues can minimize the potential loss. For example, counsel may decide to appeal an adverse trial court holding that is broadly defined. On appeal, counsel may be expected to lose the case in terms of outcome; however, counsel may also "win" if the court follows their characterization of the issues and narrows the scope of the trial court's holding.

B. Appellate Processes and Issue Agendas

The initial responsibility for identifying the issues rests with the appellant. Assuming that counsel did not waive the issues in the trial court below, appellant's initial brief identifies the questions presented in the appeal and establishes the baseline for subsequent efforts to modify that issue agenda. Although the norm is for the appellee to follow the appellant's issue statement, appellee's counsel can expand or modify the agenda in their own statement of questions presented. An appellant has the opportunity to respond to the appellee's brief in a "reply" brief; however, these briefs typically focus on countering arguments and distinguishing precedent raised in the opponent's brief and generally do not raise any additional issues. Given the sequential process of filing briefs, one would expect appellees to follow the characterization of issues originally presented by the appellant or, at a minimum, begin with the issues that are raised by appellant. However, the appellee may add issues to lead to a favorable outcome. In addition, the

29. Confidential interview (Dec. 27, 2007).
30. *See* McGuire and Palmer, *supra* note 22, at 853.

appellee may re-order the questions presented or devote more space in its brief to highlight particular issues.

As noted earlier, the court may decide an issue *sua sponte* in very limited circumstances, such as procedural matters that arise between trial and the time of appeal. Therefore, in the aggregate, issue expansion will be rare. In contrast, a wide range of potential factors contributes to the probability that a court will not address issues raised by counsel. Issue suppression is particularly likely when the question is without merit. In these situations, attorneys have not been selective in their identification of the questions presented. Evidence of the lack of selectivity may be found simply in the number of questions presented. As outlined earlier, if judges possess limited information processing abilities due to their caseload, cases that raise "too many" issue frames are more likely to result in issue suppression. Courts can refuse to follow the issue characterizations put forth by the parties and propose overlapping, alternative characterizations. If the court does not adopt the parties' agendas, the decision to adopt an alternative may be guided by the same sorts of institutional considerations that lead to issue suppression. However, in contrast to suppression, clarification requires that judges take additional time to re-characterize an issue frame. Therefore, one would expect that judges would prefer to either suppress or rely on the frame provided.

From this perspective, successful advocacy includes the ability to frame the issues and arguments to be addressed by the court. Here, we focus on the initial element of issue framing in which counsel may be expected to influence this process through their own statement of issues presented in the appellate brief. Our analysis examines factors which may contribute to the likelihood of an issue being addressed. In the latter part of our analysis, we build on these findings to evaluate more broadly whether litigant success is shaped by legal resources.

C. Data and Methods

To explore these questions, we gathered data from parties' appellate briefs filed in connection with a probability sample of cases decided by the U.S. Court of Appeals for the Seventh Circuit from 2001–2003.[31] We also

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31. To compile our sample, we first generated a list of all published opinions by three-judge panels from the Seventh Circuit in a given year using Lexis Nexis. We then selected every twenty-first case for inclusion. Using a systematic sampling strategy ensures that our sample is representative of the time period of the study, though like any sample, there will be some error around the estimates. Given that the results from this initial exploratory study parallel those of a much larger study of the Eleventh Circuit, we can be reasonably confident that our findings here are not driven by bias in our sample. *See* Susan B. Haire, Issue Framing, Court Agendas, and Advocacy in the U.S. Courts of Appeals

compared these data with information previously collected on briefs filed with the U.S. Court of Appeals for the Eleventh Circuit from 1994 to 1997.[32] Appellate briefs for all parties were coded. After excluding those cases where briefs were not available, counsel could not be identified, or court opinions did not provide sufficient information to assess judicial treatment of issues, data for the analysis of Seventh Circuit appellate litigation were drawn from 34 cases decided with published opinions. This observation strategy yielded 205 observations (with issues as the unit of analysis) and 68 observations (with issue agendas as the unit of analysis).[33] The analysis of Eleventh Circuit issue agendas was based on information collected from 104 cases, yielding 275 observations (with issues as the unit of analysis).

In the appellate process, the appellants, seeking redress of a trial court's errors, largely frame the issues for appellate litigation. While respondents may also raise new issues, these parties largely react to the issues raised by the appealing party. As a result, this analysis controls for litigant status (i.e. comparing appellants with other appellants) to determine if certain parties may be more successful than others.

In terms of coding, the statement of issues ("questions presented") was recorded verbatim. The word count for arguments contained in the brief which addressed the issue(s) also was recorded. The appellate court opinion was then coded in two stages. First, the issues identified by the court were coded. An issue was coded as present if the court explicitly referred to the question as an "issue" in the introductory text of the opinion and/or the organization of the opinion, including the use of headings, to indicate an issue.[34] In the second stage of data collection, the issue agenda of each party was compared against the issues addressed in the court opinion to determine judicial treatment of the litigant's issue statements.

(April 27, 2000) (unpublished conference paper, on file with authors).

32. The Eleventh Circuit briefs were also drawn from a probability sample of published opinions, and a portion of the data were collected with the support of grants from the National Science Foundation (SES–0318349 and SBR 98–19628). Any findings and conclusions of this paper do not necessarily reflect the views of the Foundation. While the appellate briefs coded from the Eleventh Circuit were accessed on site at the court's library in Atlanta, the briefs from the Seventh Circuit were accessed electronically from http://www.ca7.uscourts.gov/briefs.htm. Pursuant to the Judiciary Privacy Policy of the Judicial Conference of the United States, appellate briefs filed in criminal cases are not electronically available and are thus not included in this sample of Seventh Circuit briefs.

33. We define an "issue agenda" as the set of issues raised by each party (appellant and respondent). Therefore, a case with one appellant brief and one respondent brief will contain two issue agendas.

34. This coding convention proved to be reliable method of identifying the issue agenda of the court (in an earlier analysis of the Eleventh Circuit, this method resulted in an inter-coder agreement rate of approximately 85%).

Although advocates are interested in shaping the identification of issues in the court's opinion, whether the court agrees with the party on that issue ultimately defines the success or failure of the advocate. It is possible that a court may address every issue raised by an appellant, yet rule against the appellant on each issue. Therefore, some measure of whether a litigant "wins" or "loses" may allow a further examination of a party's overall success in influencing the court. In this last portion of the analysis, we rely on data from the Multi-User Database on the U.S. Courts of Appeals.[35] Using the variable indicating the appeals court's treatment of the decision below, we identified instances of appellant success or failure, focusing only on unequivocal wins and losses.[36]

1. Dependent Variables

This in-depth data collection of both the cases and the briefs provided multiple dependent variables for the analysis. The first set of dependent variables reflects whether the court addressed an issue raised in the appellate brief. A dichotomous measure was created to capture the opinion's treatment of the issues. If the court did not discuss the issue,[37] this treatment was considered to be "suppression" and a value of zero (0) was coded. If the court clearly addressed the issue as raised by the litigant in the full text of the opinion, then a one (1) was coded for that issue. This information was then aggregated to evaluate the extent to which the court addressed the brief's statement of issues. To measure whether the appellant won or lost, we used an indicator of the appellate court's treatment of the decision below and coded "1" for appellant success if the court granted the petition or reversed or vacated the judgment below. An appellant "loss" was coded "0" if the court dismissed the petition or affirmed the judgment below.

2. Independent Variables

a. Litigant resources. Each appellant and respondent was categorized as one of the following: individual, business/corporation, state and local government, or federal government. Individuals who were appearing in their official

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35. These data were collected with the support of grants from the National Science Foundation (SES–0318349). Any findings and conclusions of this paper do not necessarily reflect the views of the Foundation.

36. We excluded cases where the court affirmed in part and reversed in part.

37. If a court elaborates on an issue in a footnote, we did not consider this to be issue suppression; however, if the footnote simply mentions that the litigant raised the issue—but the court does not address it—we consider it to be an instance of issue suppression.

capacity were coded according to the organization they represented. Building on party capability theory, this variable ranks the litigants based on their perceived level of resources. While there are certainly many exceptions to this categorization, individuals would be expected to have fewer resources than businesses, businesses less than state and local governments, and the federal government generally possesses substantially more resources than any other type of litigant. One would expect that weaker parties (individuals) will be less likely to have their issues addressed, and lose on those questions more frequently, when compared to organizational litigants. Consistent with party capability theory, one would also expect that those represented by larger litigation teams would be more likely to prevail.

b. Number of issues raised in the brief. Given that the appealing party is challenging the status quo, arguments raised in the appellant's brief are more likely to include those that are rejected as "meritless." Litigants who are dissatisfied with the decision of the court below may raise arguments that have little merit because they are desperate for the court to find something that will at least result in a remand to the lower court. Judges also may be less likely to be persuaded by arguments that are lost in a blizzard of legal questions. In this respect, individual arguments may not be adequately developed as a result of too many issues presented. As the number of questions in the issue statement increases, the likelihood of the court addressing any single issue raised in that brief may be expected to decrease.

Table 1
% of 7th Circuit Briefs in which Court Addressed All Issues
By Number of Issues in Brief, Appellant and Respondent

Number of Issues in Brief	Appellant (N=34)	Respondent (N=34)
1	71% (5)	100% (5)
2	78% (7)	83% (10)
3	71% (5)	60% (6)
4	25% (1)	100% (2)
5+	43% (3)	20% (1)

PART III. RESULTS

In the sample of cases selected, individuals were far more likely than any other group to bring the appeal (in 20 out of the 34 cases), with businesses as a distant second (11 out of 34). On the respondent side, businesses, the federal government, and sub-state governments were the most common litigants, collectively representing 82 percent of the respondents.

Table 2
Judicial Treatment of Issues in Multi-Issue Briefs
By Appellant and Respondent, 7th and 11th Circuits

	7th Circuit		11th Circuit	
	Applnt (N=1000)	Respdt (N=93)	Applnt (N=273)	Respdt (N=275)
Issue Suppression	20%	17%	24%	25%
Issue Addressed	80%	83%	76%	75%

In Table 1, we can see that the court is generally more likely to address all issues presented in a brief when attorneys limit the questions presented to three or fewer issues, which suggests that the recommendations in the *Practitioner's Handbook*[38] accurately describe judges' preference for more succinct issue advocacy. It appears that counsel who employ the so-called "blizzard effect" would do well to limit their focus in order to improve the odds of a panel considering their arguments.[39] When too many questions are presented, counsel are not well-positioned to fully develop the arguments underlying each issue, given the restrictions on brief length.[40] However, in our

38. *Supra* note 26, at 71–75.

39. In one such example of a failed "scattershot" approach, the appellant's brief in an employment discrimination suit listed a total of seven issues, the third of which had seven subparts. The Seventh Circuit panel suppressed all but three of the issues raised by the appellant and affirmed the decision of the district court denying him relief. *See* Johnson v. Cambridge Ind., 325 F.3d 892 (7th Cir. 2003).

40. THE PRACTITIONER'S HANDBOOK recommends that attorneys limit briefs to fifty or fewer pages. *Supra* note 26, at 78.

sample, counsel in the majority of briefs tended to keep the total number of issues from exceeding three.[41]

Table 3 Judicial Treatment of Issues, By Litigant Type 7th Circuit				
	Issues Suppressed		Issues Addressed	
	Appellant	Respondent	Appellant	Respondent
Individual	N=70	N=4	N=70	N=4
	23%	25%	77%	75%
Business, private organizations, & government	N=37	N=90	N=37	N=90
	16%	16%	84%	84%

Table 2 demonstrates the court's treatment of issues raised by appellants and respondents is similar in both the Seventh and Eleventh Circuits, as well as across time. Individuals, as Table 3 indicates, fare worse than all other categories of litigants (business, private organizations, and government) in issue suppression and issue adoption by the court. This lends support to the party capability account, in which litigants' success may be shaped by the legal resources they can bring to bear on appeal. Perhaps more importantly, this differential in issue adoption demonstrates how "repeat player" litigants can shape "rules of the game" in their favor by convincing the court to adopt their framing of the case.

41. It may be argued that issue adoption may be entirely due to the way that attorneys prioritize the issues in their briefs by listing the most important ones first. However, an earlier analysis of briefs from the Eleventh Circuit found no statistically significant relationship between issue order and issue adoption by the Court. *See* Haire, *supra* note 31 at 21. This may be because a number of areas of the law require attorneys to establish certain elements of a claim before moving on to other elements, even if the latter are "stronger" than the former. For example, advocates in employment discrimination cases will discuss whether a prima facie case was made before moving to issues related to causation.

Table 4 Judicial Treatment of Issues, By Size of Appellant Litigation Team 7th Circuit			
	Single Attorney	2–3 Attorneys	4 + Attorneys
Issue Suppression	24%	5%	27%
Issue Addressed	76%	95%	73%
	N=76	N=21	N=10

Tables 4 and 5 clearly show that litigants who can retain multiple attorneys have a distinct advantage over those who do not, though the effect appears to have somewhat diminishing returns for appellants once the legal team increases beyond three attorneys.[42] This finding may reflect case selection effects, namely, that higher profile, "winnable" appeals may attract more resources and attorney manpower than appeals that appear to be weaker. Single attorneys with fewer resources simply may not have the luxury of being as selective as larger firms, and as a consequence, are not as successful in persuading the court to adopt their arguments and issue frames.

Table 5 Judicial Treatment of Issues, By Size of Respondent Litigation Team 7th Circuit			
	Single Attorney	2–3 Attorneys	4 + Attorneys
Issue Suppression	20%	19%	5%
Issue Addressed	80%	81%	95%
	N=25	N=54	N=19

Moving beyond the court's consideration of issue agendas and specific issues, we can see that the success of repeat player litigants is reflected in case

42. We acknowledge that other measures of legal resources, such as law firm size, might provide additional leverage in understanding the nature of the advantages for litigants.

outcomes (see Table 6).[43] Legal resources, too, play a role in the larger picture. While, overall, appellants lose more often than they win, as the size of litigation team increases, the appellant success rate increases from twenty-three percent (with a single attorney) to thirty percent (with four or more attorneys). This advantage is mirrored in the Seventh Circuit data, which shows a slightly larger increase with additional counsel.

Table 6
Appellant Success[44]
By Litigant Type

	Individuals	Business	State-Local Gov't	Federal Gov't
All Circuits				
Won	22.6% (306)	24.8% (114)	36% (49)	63.2% (72)
Lost	67.4% (911)	59.5% (273)	47.1% (64)	24.6% (28)
	N=1352	N=459	N=136	N=114
7th Circuit				
Won	15.2% (21)	10.3% (3)	40% (2)	75% (6)
Lost	80.4% (111)	79.3% (23)	60% (3)	25% (2)
	N=138	N=29	N=5	N=8

43. The results shown here suggest that litigants who are more successful in having their issues addressed by the court are also those who are more successful on appeal, in terms of case outcomes. However, it should be stressed that, in order to make a stronger showing of that relationship, we would need to collect and code briefs for all cases included in Table 6 (which is not possible at this time, given availability and resource constraints on collecting such data). Nonetheless, given our sampling procedure, we are confident that this relationship would continue to hold if the sample was expanded.

44. Winning is defined as those cases where the court reversed, vacated, remanded, or the petition was granted. Losing is defined as those cases where the court affirmed or denied the petition. "Mixed" outcomes were not counted as "winning" or "losing." These data are drawn from the update to the Multi-User Database of Decisions of the U.S. Courts of Appeals. The dataset represents a stratified random sample of 30 cases decided with published opinion per circuit year, 1997–2002.

Table 7 Appellant Success[45] By Size of Litigation Team			
	Single Attorney	2–3 Attorneys	4 + Attorneys
All Circuits			
Won	22.9% (220)	27.5% (228)	30.3% (83)
Lost	68% (653)	60% (497)	50.4% (138)
	N=961	N=829	N=274
7th Circuit			
Won	15.5% (16)	20.7% (12)	25% (3)
Lost	80.6% (83)	74.1% (43)	58.35 (7)
	N=103	N=58	N=12

PART IV. CONCLUSION

Given the relatively limited scope of our study, the findings discussed above ought to be viewed as merely a first step in fully understanding the dynamics of issue framing in the judicial context. However, this examination of issue advocacy in the U.S. Court of Appeals for the Seventh Circuit provides an empirical basis for understanding the characterization of appellate litigation offered by judges. Courts clearly rely on advocates for framing the questions raised in the appeals. Appellants establish the baseline issue agenda and appellees make only modest changes to that baseline. Nevertheless, judges frequently focused on a narrower set of issues than those raised in the briefs,[46] and issue suppression was generally more likely when a brief raised "too many" questions. The resources of litigants also may play a role as individual appellants and those represented by a single attorney were more likely to have issues suppressed by the court.

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45. This analysis includes only those cases where at least one attorney was listed as representing the appellant.

46. We note that the analysis focuses on published opinions. As a result, it is likely that courts, focusing on the precedential value of the court's opinion, may be more likely to suppress insignificant issues. However, it is also plausible that judges, knowing that the audience for the opinion will extend beyond the litigants, will be attentive to fully developing potential issues.

The analysis of decisions in the Seventh Circuit during this time period reinforces the conclusion that the effect of resources on issue framing extends to case outcomes in appellate litigation. The number of attorneys working on an appeal corresponded to moderately higher success rates for appellants. Particularly impressive, however, was the variation in case outcomes associated with the status of the litigant. The high success rate of the U.S. government supports the conclusions of numerous other scholars who suggest that the resources of the federal government yield favorable outcomes in the federal judiciary.[47] In particular, its success as an appellant in cases decided with published opinions would indicate that the federal government pursues appeals which result in favorable "rules."

Future research on these questions should expand its scope to include other circuits for greater generalizability of results; however, limitations on the electronic availability of appellate briefs make such an enterprise more difficult.[48] Though it is not mandatory to do so, three circuits (the Eighth, Tenth, and Eleventh) upload briefs to the Public Access to Court Electronic Records system (PACER), and the briefs may be accessed, along with other court documents, for a small fee to registered users. Data collection challenges aside, expanding the analysis would allow researchers to compare the degree to which advocates' attempts to frame the issues are successful in similar kinds of cases across courts. Given the variation in docket composition across circuits, cross-court comparisons could examine whether frequent exposure to certain kinds of appeals affects judges' propensity to adopt issue frames by repeat player or one-shot types of litigants. These and other inquiries could provide important insights as to whether and how the playing field of appellate litigation might be leveled for all those who bring their claims to federal court.

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47. For an example of the comparative advantage of government litigants, see Donald Songer, Reginald Sheehan & Susan Haire, *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to the U.S. Courts of Appeals, 1925–1988,* 33 LAW & SOC'Y REV. 811 (1999). For an earlier study examining outcomes in state courts, see 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 (1987) (finding that government litigants are consistently more successful than litigants without organizational resources).

48. The Court of Appeals for the Seventh Circuit is the only circuit that posts appellate briefs on its court website at no cost to the public.