

The Impact of the Performance of Lawyers on Judicial Proceedings: A Literature Review

O Impacto da Atuação dos Advogados em Processos Judiciais:
Uma Revisão da Literatura

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ABSTRACT

This article analyzed 32 empirical studies on the impact of the lawyer's performance on the outcome of the judicial decision. The findings were: the concentration of research in the United States (81.25 percent), civil jurisdiction (62.5 percent), the year of publication in general in the 2010 decade (56.25 percent) and the predominant use of the observational method (75 percent). The great methodological difficulty of these researches is to identify with precision if the impact in the judicial decision stems from the lawyer's performance or if it is only a consequence of the characteristics of the processes that are being judged, which can be achieved through experiments with research design with distribution cases to balance hidden variables.

Keywords: justice administration, judicial decision, attorney, performance, outcome

RESUMO

Este artigo analisou 32 estudos empíricos sobre o impacto da atuação do advogado no resultado da decisão judicial. Foram identificados: concentração de pesquisas nos Estados

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Unidos (81,25 por cento), na jurisdição cível (62,5 por cento), com ano de publicação em geral na década de 2010 (56,25 por cento) e utilização predominante do método observacional (75 por cento). A grande dificuldade metodológica dessas pesquisas é identificar com precisão se o impacto na decisão judicial decorre da atuação do advogado ou se é apenas consequência das características dos processos que estão sendo julgados, o que pode ser alcançado por meio de experimentos com desenho de pesquisa com distribuição aleatória de casos para balancear variáveis ocultas.

Palavras-chave: administração da justiça, decisão judicial, advogados, desempenho, resultados

1. Introduction

This literature review sets out to analyze studies of the impact of the performance of lawyers on the administration of justice, through a review of the literature on trial outcomes.

In Brazil, the Federal Constitution of 1988 recognizes that “lawyers are indispensable to the administration of justice” (Article 133) and the law establishing the Legal Practice Statutes expressly states that “by arguing their client’s position, lawyers contribute to forming the conviction of judges” (Law 8.906/41, Article 2.2).

In ideal circumstances, judicial proceedings should be judged only on their merit, observing the evidence produced by the parties and the law applicable to the case. However, judicial disputes do not arise in a vacuum and isolated from the social context to which they belong. There are several external factors which can influence a judicial decision, such as the socio-economic advantages of the parties, the region where the case is being judged, preconceptions on the part of judges or juries and the quality of the lawyers involved in the case (Eisenberg, 1988).

We should stress the importance of not ignoring the protagonism of other actors in the judicial process: over the decades, empirical research has focused on differences in the outcomes of criminal cases depending on the role played by judges, and more recent studies have also addressed the influence of prosecutors in trials (Kim, Spohn and Hedberg, 2015).

The influence of the lawyer on the judicial decision has been studied since at least 1974, starting with Marc Galanter who looked at the power that better off parties have in obtaining more favorable decisions than parties with less resources, in which he explains that the advantage enjoyed by more powerful parties was precisely their ability to contract better and more specialized lawyers (1974).

The lawyer functions as a source of information for the court (McGuire, 1995), in that the arguments that he or she presents to the judge end up serving as a source for the final understanding on the case. However, that influence is not uniform in all situations. There are circumstances where the attorney may have a greater or lesser influence on the outcome of the dispute.

2. Comparative Studies on Possible Factors that Influence Judicial Decisions

This chapter reviews the literature on the possible factors that influence judicial decisions, which range from the degree of access by the judge to sources of neutral information, to the level of issue salience and also comparison of outcomes with or without the participation of lawyers.

Schwab and Eisenberg (1988) in compensation claims, Lederman e Hrung (2006) in tax cases and Norberg and Compo (2007) in judicial recovery cases concluded that representation meant better outcomes for clients.

For their part, Greiner and Pattanayak (2012) investigated whether the provision of legal aid influenced the outcome of applications for unemployment benefit. This service was provided free of charge by Harvard University law students who helped unemployed people in their administrative appeals to a government agency. It should be observed that the subject matter of this research was the offer of aid and not the actual use of the aid. The methodology used was fairly robust, insofar as the offer of aid was made randomly, from those applying for unemployment benefit.

The findings of this research were rather intriguing because there was no difference between the two groups (those who received the offer of aid and those who did not). The authors then decided to conduct an extensive, in-depth review of the literature on this topic. With the exception of a few studies, the conclusions was always that the assistance of a lawyer brought more advantageous outcomes than those achieved without that assistance.

However, after reviewing the methodological aspects of the research undertaken, Greiner and Pattanayak (2012) asserted emphatically that nearly all the previous studies into the effect of judicial assistance in civil claims presented findings which were not reliable (although they might be correct), insofar as they had not used randomization to establish a relationship of cause and effect, an issue that will be addressed specifically in the chapter on research methodology.

One of the studies that used randomization was that of Seron & Frankel (2001), which involved a treatment group of tenants eligible for legal aid which was guided to receiving legal advice under the Pro Bono Project and a control group that was not. The tenants who received the lawyers' services had much better outcomes than those who did not: eviction warrants were sent in 24.1 percent of cases where the lawyers acted, as against in 43.5 percent where they did not; and 31.8 percent of decisions were unfavorable, as compared to 52.0 percent for those without legal assistance.

TABLE 1. Comparative studies on possible factors that influence judicial decisions

TOPIC	TYPES OF PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Access by judge to neutral information	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The skills of a lawyer are fairly significant in district courts, where the judge does not have access to much neutral information, but not in the federal circuit courts, where he or she has access to more neutral information.	Hinkle (2007)	Observational
Issue salience	Oral arguments from 1977 to 1982 in the United States Supreme Court	The lawyers' experience has more influence on decisions on less salient issues	McAtee and McGuire (2007)	Observational
Presence or absence of lawyers	Civil compensation claims against public agents in 1980 and 1981 in the United States	Assistance from lawyers meant higher success rates, higher compensation and a higher rate of settlements.	Schwab and Eisenberg (1988)	Observational
	Decisions of the United States Tax Court from 1990 to 1994	Parties assisted by lawyers reduced payments by 17.9 percent in relation to those not assisted. There was no significant difference for settlements.	Lederman and Hrunig (2006)	Observational
	Judicial recovery claims between 2000 and 2002 in the United States	Parties without lawyers had their claims rejected more often than those represented by a lawyer.	Norberg and Compo (2007)	Observational
	Administrative appeals for unemployment benefit from 2008 to 2010 in the United States	There was no significant difference between those who received an offer of free legal aid and those who did not.	Greiner and Pattanayak (2012)	Randomized
	Eviction cases due to non-payment at Manhattan Housing Court from 1993 to 1994 in the United States	The group of tenants that received legal aid had better outcomes in judicial decisions, sending of eviction warrants, non-appearance of tenant in court and rent deductions or repairs to building.	Seron and Frankel (2001)	Randomized
	Home eviction cases in 2010 in the United States	There were better results for the group that received full legal aid in comparison with the group that received limited legal aid.	Greiner, Pattanayak and Hennessy, 2013	Randomized
	Several studies of different matters in the United States	In the juvenile courts, there was no evidence of a benefit from representation by a lawyer.	Poppe and Rachlinski (2016)	Literature review
Court-appointed attorneys and public defenders	Criminal cases from 1997 to 2001 in the United States	Defendants represented by federal public defenders received less convictions and, when convicted, their sentences were shorter than defendants represented by court-appointed attorneys.	Iyengar (2007)	Randomized
	Criminal proceedings in the United States	Defendants represented by state public defenders had 19 percent less convictions, 62 percent less death sentences and sentences with 24 percent less time in jail than defendant represented by attorneys by the court.	Anderson and Heaton (2012)	Randomized
	Criminal cases from 1990 to 2004 in Ohio, United States	Public defenders obtain better outcomes than court-appointed attorneys.	Roach (2014)	Observational
	Criminal cases from 2004 to 2007 in Taiwan	Defendants represented by public defenders received more convictions but their sentences were shorter than defendants represented by court-appointed attorneys.	Huang, Chen and Lin (2010)	Randomized
	Criminal cases in 2000 and 2001 in the United States	The outcomes obtained by public defenders are very similar to those obtained by court-appointed attorneys.	Shinall (2010)	Randomized

TABLE 1. (cont.)

TOPIC	TYPES OF PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Court-appointed attorneys, public defenders and hired counsel	Criminal cases from 2004 to 2006 in the United States	Court-appointed attorneys performed worse than the others on acquittals, non-custodial sentences and average duration of custodial sentences.	Cohen (2014)	Observational
	Criminal cases in 2012 and 2013 in Iowa, United States	The best outcomes are from hired counsel, followed by public defenders and court-appointed attorneys.	Buller (2015)	Observational
	Criminal cases from 1990 to 2006 in four Florida counties, United States	Defendants represented by public defenders are more likely to be detained awaiting trial and received more convictions than defendants with hired counsel.	Williams (2013)	Observational
	Criminal cases in 2010 in Texas, United States	Court-appointed attorneys had worse results than hired counsel.	Agan, Freedman and Owens (2016)	Observational
	Criminal cases from 2000 to 2015 in Ohio, United States	Public defenders obtain 11 percent less convictions for defendants in comparison with court-appointed attorneys.	Linzmeier (2017)	Observational
Political lawyers and private lawyers	Cases concerning demolition of Palestinians' houses from 1990 to 1995 at the Israel Supreme Court of Justice	The judicial outcomes secured by political lawyers were significant superior to those by private lawyers, which was explained as resulting mainly from the ability of political lawyers to reach better settlements for their clients, avoiding demolition of their houses.	Dotan (1999)	Observational
Hired counsel and law faculty clinics	Administrative appeals for unemployment insurance from 2011 to 2013 in the United States	There was no statistically significant difference between the outcomes obtained by employees represented by hired counsel and those by law faculty clinics.	Shanahan, Selbin, Mark and Carpenter (2018)	Observational
Lawyers rated by Chambers	Tax cases from 1996 to 2000 in the United Kingdom	Better rated lawyers obtained better outcomes, but only in cases which are substantially more difficult to win.	Hanretty (2016)	Observational
Lawyers from a single team	Civil judicial decisions in 2012 in Brazilian Federal Justice	A statistically significant different was found in the outcomes obtained by lawyers from a single team acting in judicial cases distributed randomly.	Vasconcelos (2014)	Randomized

In another study, Greiner, Pattanayak and Hennessy (2013) compared the judicial outcomes of two groups: one group received the offer of full legal aid and the other received an offer of limited legal aid. All the participants in both groups faced claims for eviction from their homes. The first group had access to the work traditionally done by a lawyer, whilst the second group had access to limited services (asking questions in offices, asking for help in filling in forms and on judicial procedures). The aid program researched was unable to offer full assistance to all those seeking it. The choice of what type of assistance was offered was made randomly.

The conclusion was that the offer of full assistance had substantially better impacts than the limited assistance in retaining possession of their homes (two thirds and one third, respectively) and in the time for which they received rent support (9.4 months and 1.9 months).

3. Comparative Studies of Factors that Influence the Performance of Lawyers

3.1 Lawyer experience or specialization factor

The significant differences in performance shown by individuals with more experience were to be attributed to the development of a certain *modus operandi* in discharging their tasks and responsibilities, and between those considered more as novices in the organization (Coelho Junior, 2009). Russel (2001) found that length of service in the position presented a positive and significant relationships with performance in work.

In principle, the longer people had been in the organization, the more they had learned and, consequently, the better their performance. Studies show that performance improves initially with the passage of time in a specific job and then stabilizes (Sonntag and Frese, 2002).

For Hanretty (2013), the experience of working on ten previous cases makes a lawyer 24 percent more likely to win a case in comparison with one who has only had one case before the United Kingdom House of Lords (effectively the Supreme Court, connected to the British Parliament).

According to Priest and Klein (1984), if a company envisages the possibility of losing a case in which it is accused of poor services, the tendency is to seek a settlement, avoiding damage to its image or case law that can be invoked in other proceedings. This means that the cases that go to trial are those where the likelihood of losing is relatively low.

However, a study by Goodman-Delahunty et al. (2010) with lawyers in criminal proceedings identified that experience measured in years of work did not lead to better prognoses of the minimum outcome to be obtained in cases in which they acted. In general, attorneys were over-confident in their performance, making predictions that were more favorable than the outcomes actually obtained.

For McGuire (1995) the better outcomes of more experienced lawyers are explained by their added credibility in the eyes of the judiciary, in comparison to novices, due to their track record of acting before the American Supreme Court. Judges would tend to have more trust in those lawyers already known to them and these, in turn, would seek to foster this credibility, acting with propriety, in order to retain the trust they had acquired.

For Johnson, Wahlbeck and Spriggs (2006) more experienced lawyers exert a positive and statistically significant influence on the decisions of the United States Supreme Court because they have better developed their skill in making oral arguments. Using this same methodology, McAtee and McGuire (2007) again con-

firmed the impact of the lawyer's experience on decisions reached by the American Supreme Court.

Wright and Peebles (2013) found that more experienced lawyers could learn from the past and become more effective over time; on the other hand, after many years in the job, lawyers would devote less energy to each case, be less interested in keeping abreast of case law or be less disposed to try to change the understanding of local judges concerning given matters.

Lawyers can also grow complacent and suffer from a lack of stimulus when their case work is excessively repetitive, where a large number of cases dealing with the same issues can lead to repetitive practices and set routines, without paying attention to the particularities of each case (Norberg and Compo, 2007).

Abrams and Yoon (2007) concluded that there are significant differences even between lawyers who work on the same types of criminal proceedings, within the same legal unit, and defendants represented by more experienced defenders are less likely to be convicted and, if held in custody, will spend less time in jail. Vasconcelos (2014) identified differences in the outcomes obtained by lawyers in the same team who receive civil cases distributed randomly, but found no evidence that experience in the career is related to performance.

3.2 University attended and academic prizes won by lawyers

Some studies have sought to verify the possible existence of a relationship between the university attended and the outcomes achieved by lawyers. Iyengar (2007) detected differences in outcomes between lawyers in that lawyers who studied at more prestigious universities secured sentences 8 months shorter for their clients than others.

For Abrams and Yoon (2007) the university attended leads to better results, but they were not statistically significant. Hinkle (2007) opted to seek to identify a possible relationship between the performance of a lawyer at university and his or her performance as a lawyer, but found no relationship between the academic performance metrics and outcomes obtained as lawyers.

3.3 Sex, race and physical attractiveness of lawyer

Taken together, the research suggests that the lawyer's gender generally has no influence on the judicial decision. Szmer, Sarver and Kaheny (2010) identified no differences in trial outcomes, with men and women presenting the same performance.

Abrams and Yoon (2007) extracted from the data the conclusion that men and women achieved the same outcomes both in terms of conviction rates and in

terms of the duration of custodial sentences. At the same time, it was found that race had an influence on the conviction rate and the time that defendants would spend in jail: Hispanic lawyers did better than those of other racial origins.

A possible cause suggested was the effect of the labor market on Hispanic lawyers' choice of place of work, as they in general are paid less than white or Asian lawyers, so that the salary offered for a public defender in Clark district, Nevada, is more attractive to Hispanics than other groups.

Biddle and Hamermesh (1998) concluded that physical attractiveness makes a positive difference to the earnings of students who went on to work in both the private sector and the public sector, although the difference in the private sector is greater. The possible explanations were that people like to spend more time and feel better alongside more attractive people, and that they may think that good-looking employees could achieve better decisions because of more favorable attitudes on the part of judges or jurors.

3.4 Case load and pay structure

It is intuitive that a lawyer with a larger case load will have less time to spend on each case, and that this may prejudice the outcome of the cases in which he or she acts. It is also intuitive that low pay will lead to a lower quality of work.

Iyengar (2007) detected that case load has a negative effect on the outcomes of public defenders (it increases the likelihood of conviction by 6 percentage points and increase sentence duration by 3 months), but not for court-appointed attorneys (no increase in conviction rate and reduction of 6.75 months in sentence duration).

The explanation offered is that by acting in more cases, lawyers may have more contact and interaction with the criminal justice system, gain more experience of jury trials and develop greater institutional knowledge of the court, which appears to have more influence on court-appointed attorneys than on public defenders.

The desire to gain more experience of jury trials is precisely the cause investigated by Boylan and Long (2005) to explain the higher turnover in Assistant U.S. Attorneys in districts where private sector salaries are higher. The authors noted that the turnover in these professionals was higher in some districts than in others and identified that this occurred precisely in places where the private sector paid higher salaries. In these areas the dynamic can be explained as follows: lawyers would seek public employment as Assistant U.S. Attorneys as a way of gaining experience in jury trials with a view to be hired further down the road by one of the larger law firms in the area, for a higher salary.

This apparently inoffensive phenomenon actually causes a distortion in their work. Boylan and Long (2005) found that in areas where turnover was high, the

settlement rate is significantly lower. The Assistant U.S. Attorneys appeared to avoid reaching settlements and opted instead for a jury trial not just because this was a better strategy for the prosecution, but in order to gain more experience in jury trials, a phenomenon which was not observed in districts where private sector pay is lower. According to the research, when the salary differential between the public and private sectors rises from US\$ 2,900 to US\$ 12,000 the number of cases that go to a jury trial increases by 25 percent.

Research by Anderson e Heaton (2012) concluded that the pay structure for court-appointed defense attorneys in Philadelphia actually created perverse incentives to the detriment of the defendant.

Iyengar (2007) observed the same problem in his research, and was able to measure how far this fact affects outcomes in the justice system. The study identified that the hourly rate paid at the jury trial phase was higher than that for time spent prior to the trial, which had the effect of encouraging defense attorneys to put their cases to a jury, to the apparent detriment of the defendants.

3.5 Oral arguments by attorney

Oral arguments are one of the means used by lawyers to win over judges in the cases in which they act. Haire, Lindquist and Hartley (1999) state that, alongside legal briefs, oral arguments are important to the decisions taken by judges.

The judges Myron H. Bright and Richard S. Arnold (1984) have described how the oral arguments of attorneys influence their decisions. When the case load increased, the time devoted to each case was drastically reduced, meaning that oral arguments became highly important as a source of information for decision-making, especially in cases where an element of doubt remains as to which side should prevail.

Johnson, Wahlbeck and Spriggs (2006) confirmed that there is a positive and statistically significant correlation between the ratings assigned to lawyers by Justice Blackmun and the outcomes of judicial decisions.

TABLE 2. Comparative studies of factors that influence the performance of lawyers.

TOPIC	TYPES OF JUDICIAL PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
Lawyer's experience as time in job	Decisions on serious felonies in North Carolina, United States, in 2006	The experience of defense lawyers in criminal proceedings has a positive impact on the outcome of the proceedings in the first 8 years of their career, but then declines over the years.	Wright and Peebles (2013)	Observational
	Civil judicial decisions in 2012 in Brazilian Federal Justice	No statistical correlation was found between the lawyer's experience, measured in year in the institution, and the outcomes obtained.	Vasconcelos (2014)	Randomized
Experience as specialization in area	Judicial recovery of fines by government lawyers	The group of lawyers specialized in the field is able to recover greater amounts than the other group.	Ringquist and Emmert (1999)	Observational
Experience of public defender	Criminal cases from 1990 to 2005 in the United States	Defendants with more experienced defenders are less likely to be convicted and, if taken into custody, will spend less time in jail.	Abrams and Yoon (2007)	Observational
	Criminal cases from 1997 to 2001 in the United States		Iyengar (2007)	Randomized
Experience as previous work in court	Appeals to the House of Lords between 1969 and 2003 in the United Kingdom	An appellant with a lawyer who has already acted in ten cases is 24 percent more likely to succeed in comparison with a lawyer who has acted in only one case.	Hanretty (2013)	Observational
Experience and outcome	Court of Appeal Decisions from 1983 to 1992 in the United States	Experiences has only a moderate influence on the outcome of judicial decision-making in civil liability claims judged by the U.S. federal courts of appeal.	Haire, Lindquist and Hartley (1999)	Observational
	Decisions of the United States Tax Court from 1990 to 1994	Experience is identified as a cause for the better outcomes obtained by certain lawyers.	Lederman and Hrunig (2006)	Observational
	Outcomes of U.S. Attorneys from 1969 to 1999 in the United States	Prosecutors with more experience were more likely to obtain a conviction and custodial sentence.	Boylan and Long (2005)	Observational
	Decisions of the U.S. Supreme Court from 1977 to 1982	More experienced lawyers enjoyed greater success at the United States Supreme Court	McGuire (1995)	Observational
	Decisions of the U.S. Supreme Court from 1970 to 1994		Johnson, Wahlbeck and Spriggs (2006)	Observational
	Oral arguments from 1977 to 1982 in the United States Supreme Court		McAtee and McGuire (2007)	Observational
	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The lawyer's experience influences decisions taken by district courts in civil liability claims, but does not influence the U.S. federal courts of appeal.	Hinkle (2007)	Observational
	Judicial recovery claims between 2000 and 2002 in the United States	The lawyer's specialization has a negative effect on the outcome of judicial claims.	Norberg and Compo (2007)	Observational
	Lawyers in 44 U.S. states	No relation was found between experience and assertiveness in the outcomes of judicial cases.	Goodman-Delahunty et al. (2010)	Observational
	Criminal cases from 1990 to 2005 in the United States	Defendants with more experienced lawyers are less likely to be convicted and, if convicted, are subject to shorter sentences.	Abrams and Yoon (2007)	Observational

TABLE 2. (cont.)

TOPIC	TYPES OF JUDICIAL PROCEEDINGS	CONCLUSIONS	REFERENCE	RESEARCH DESIGN
University attended by lawyer	Criminal cases from 1997 to 2001 in the United States	Lawyers who studied at more prestigious universities secured shorter sentences for their clients in criminal cases.	Iyengar (2007)	Randomized
	Decisions of the U.S. Supreme Court from 1970 to 1994		Johnson, Wahlbeck and Spriggs (2006)	Observational
	Criminal cases from 1990 to 2005 in the United States	The classification of the university attended by the lawyer did not have a significant influence on the outcomes of criminal cases,	Abrams and Yoon (2007)	Observational
	Judicial decisions of district courts and federal circuit courts on product liability from 1995 to 2006 in the United States	The fact of graduating with honor or contributing to faculty law journal has no impact on outcomes achieved by the lawyer.	Hinkle (2007)	Observational
Sex of lawyer	Decisions of the Canadian Supreme Court from 1988 to 2000	The gender of the persons making oral arguments does not affect the decision of the Canadian Supreme Court, except in cases related to women's issues, where female lawyers have an advantage.	Szmer, Sarver and Kaheny (2010)	Observational
	Lawyers in 44 U.S. states	Women make more accurate predictions of case outcomes than men.	Goodman-Delahunty et al. (2010)	Observational
Race of lawyer	Criminal cases from 1990 to 2005 in the United States	Hispanic public defenders secure shorter sentences for defendants than white, black and Asian defenders	Abrams and Yoon (2007)	Observational
Physical attractiveness of lawyer	Assessment of the attractiveness of 4,000 trained lawyers	Physical attractiveness is associated in better pay for lawyers in both the private and public sectors.	Biddle and Hamermesh (1998)	Observational
Case load	Criminal cases from 1997 to 2001 in the United States	A larger case load has a negative effect on the work of public defenders, but has a positive effect on the outcomes of court-appointed attorneys in criminal cases.	Iyengar (2007)	Randomized
	Decisions on serious felonies in North Carolina, United States, in 2006	No relationship was detected between the size of case load and outcome of decisions in criminal cases.	Wright and Peebles (2013)	Observational
Lawyers' pay	Outcomes of U.S. Attorneys from 1969 to 1999 in the United States	Higher pay in the private sector results in higher turnover in public attorneys and a lower number of settlements in criminal proceedings.	Boylan and Long (2005)	Observational
	Criminal proceedings in the United States	The remuneration paid per case causes private court-appointed attorneys to accept more criminal cases than would be reasonable for providing a good defense,	Anderson and Heaton (2012)	Randomized
	Criminal proceedings in the United States	Higher rates of pay for appearances at jury trials than in the preceding procedural phase discourages settlements, which has the result of prejudicing the defendant.	Anderson and Heaton (2012)	Randomized
	Criminal cases from 1997 to 2001 in the United States		Iyengar (2007)	Randomized
Oral arguments presented by lawyer	Decisions of the U.S. Supreme Court from 1970 to 1994	Positively assessed oral arguments are correlated with better outcomes.	Johnson, Wahlbeck and Spriggs (2006)	Observational
	Oral arguments from 1977 to 1982 in the United States Supreme Court		McAtee and McGuire (2007)	Observational

4. Differences Between Studies using Observational or Randomized Research Models

As we have seen, the studies analyzed use the outcome of judicial decisions as a metric for the performance of lawyers. However, according to Clermont and Eisenberg (1997), there is an element of ambiguity in this type of datum, which can make it significantly misleading: the case-selection effect. The sets of cases selected for analysis are often not comparable with each other, as they entail a specific feature which stands in the way of making the intended comparison. For example, it is not possible to make a direct comparison between the outcomes of public defenders with those of private attorneys, because both the type of cause and the type of client can vary significantly between the two groups, making it unfeasible to attribute the difference in outcomes to the type of defense.

In many situations, it is natural for clients and lawyers to choose each other reciprocally, and it is difficult to determine whether the outcome achieved by a given professional should be attributed to the lawyer or to the characteristics of the case that he or she chose (Anderson and Heaton, 2012). It may be that better lawyers only accept better cases, leaving precisely the more difficult cases to less well known lawyers; on the other hand, the opposite can also happen, in other words, clients may seek out lawyers known for their abilities only in cases where they know that their chances of success are small (Abrams and Yoon, 2007).

Because of this situation, an attorney's outcomes may sometimes bear no relation to his or her expertise, and reflect only the type of case in which they act (Shinall, 2010). This means that the main methodological issue in this type of research is to isolate the lawyer's influence from other factors that affect the judicial decision, principally the type of case.

In order to solve this, Ho and Rubin (2011) argue that the research design is more important than the analytical method. According to these authors, the design of empirical studies that seek causal inference should create mutually comparable groups, without any reference to outcomes, so that any difference in the outcomes of each group can be plausibly attributed to how it is handled.

The literature points to two possible research designs. One of these, described by Clermont and Eisenberg (1997), consists of gathering information on each judicial case and using these data as independent variables in a multivariate regression (statistical technique that quantifies the influence of each factor, or independent variable, on the phenomenon that is being studied, the dependent variable), in order to identify which groups of cases are similar to each other, allowing an adequate comparison of the success rates in each group.

Abramowicz, Ayres and Listokin (2011) criticize this option and posit that studies based only on the available information can fail to account for important

hidden variables. The authors state that the research design that would best assure similarity within groups is that which uses a random experiment, because randomization would ensure that all the variables were similar to each other. According to Greiner (2008), random experiments are the gold-standard for causal inference, as they are able to balance even the hidden variables, imperceptible to the analyst. Abrams and Yoon (2007, p. 1154) apply this reasoning to the performance of lawyers when they state that “when the case load is not distributed randomly, it is difficult, not to say impossible, to know whether we should attribute differences in outcomes to the skills of the lawyer or to the type of work distributed”.

According to Greiner (2008), the first task to be done in a random experiment is to identify the basic items: which units will be treated, what treatment will be applied, what the period of treatment will be and what the output variable will be. In the case study conducted by Abrams and Yoon (2007), for example, the units that were treated were judicial cases (distributed randomly to the lawyers), the treatment applied was the performance of each lawyer, the period assessed was the duration of the research and the output variable used was the conviction rate and the jail sentence applied.

The next stage, proposed by Ho and Rubin (2011), is to verify the main assumption in this type of study: whether the randomization mechanism is actually working, i.e. whether the units (in this case, the judicial cases) were really distributed on a random basis between the treatments (in this case, the lawyers). According to these authors, the credibility of this steps depends on collecting a sufficient quantity of control variables (also called co-variables) and achieving homogeneity in the distribution of the variables between the groups. In order to verify the distribution whether the distribution of cases between public defenders and court-appointed attorneys was really done in a random way, so as to allow comparison of their outcomes, Iyengar (2007) tested whether the types of crime and also the race, age and sex of the defendants were evenly distributed between the two groups.

Greiner (2008) explains that the control variables are those prior to treatment, and it is important to distinguish between control variables (not affected by treatment) and output variables (affected by the treatment). The choice of variables to be used in verifying randomization requires detailed knowledge of the data generation process (Greiner, 2008) and substantive knowledge of the area of interest (Ho and Rubin, 2011).

In short, research that seeks to use the outcomes of judicial cases to measure performance must identify units where cases are really distributed on a random basis. However, this is no easy task, insofar as in many legal units the case load is not distributed in this way (Abrams and Yoon, 2007; Iyengar, 2007), which is the first major hurdle faced by any research into lawyer performance.

Although it is possible to agree with the authors that randomization is essential in order to assert with certainty that a cause and effect relationship exists, the extent and diversity of research that has been conducted on the difference in case outcomes with and without lawyers permits us to conclude that the presence of a professional generally has a significant influence on the outcome of judicial proceedings.

In those cases, the choice of lawyer by the party is not randomized, and the actual choice provides evidence that the consumer of legal services is more sophisticated to the point of dispensing with legal ratings.

It is noted that, both in the research by Iyengar (2007), which compares federal public defenders with court-appointed attorneys, and in that of Anderson and Heaton (2012), which compares state public defenders with court-appointed attorneys, there was a difference in outcomes achieved by the different groups, and it is clear that public defenders had better outcomes in both studies. On the other hand, research conducted by Huang, Chen and Lin (2010), on the differences between public defenders and court-appointed attorneys, and Shinall (2010), who made a comparison between private lawyers and those appointed by the court, found differences in the outcomes of the groups researched.

The variation in research findings may be attributed to the fact that each jurisdiction has its own features, as explained by Huang, Chen and Lin (2010, p. 114): “The answer to the question of whether the type of defense affects the outcomes is by nature dependent on the jurisdiction”. There are districts which may assign greater priority to public defense, in the form of institutional and material support (financial, human resources, etc.), for example, whilst in others priority is assigned elsewhere. The type of professional that each career path attracts will vary from place to place

5. Conclusions

Of the 32 empirical studies analyzed, we identified that most are concentrated in the United States (81.25 percent), in the civil jurisdiction (62.5 percent), with a publication year generally in the 2010s (56.25 percent) and they predominantly use the observational method (75 percent).

As demonstrated over the course of the literature review, the main methodological difficulty faced by this research is to identify precisely whether the impact on the judicial decision derives from the performance of the lawyer or whether it is merely a consequence of the characteristics of the cases being judged. In order to balance out possible hidden variables, Abrams and Yoon (2007), Greiner (2008), Ho and Rubin (2011), Abramowicz, Ayres and Listokin (2011) suggest the use of experiments with a research design entailing random case distribution in order to

balance out hidden variables, which is said to be the “gold-standard” for the use of causal inference.

However, only 25 percent of the studies reviewed used randomized case distribution, and we therefore consider it to be important that further studies should seek to use that research design more in future.

