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Lawyers, Power, and Strategic Expertise

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Lawyers, Power, and Strategic Expertise

LAWYERS, POWER, AND STRATEGIC EXPERTISE

COLLEEN F. SHANAHAN, ANNA E. CARPENTER, AND ALYX MARK[†]

ABSTRACT

The only sound in a courtroom is the hum of the ventilation system. It feels as if everyone in the room is holding their breath Litigants are uneasy in the courthouse, plaintiffs and defendants alike. They fidget. They keep their coats on. They clutch their sheaves of paper—rent receipts and summonses, leases and bills. You can always tell the lawyers, because they claim the front row, take off their jackets, lay out their files. It's not just their ease with the language and the process that sets them apart. They dominate the space.¹

This empirical study analyzes the experience of the parties described above, specifically the power, representation, and strategic expertise they bring to a dispute. Our analysis of these factors clarifies how representation may be a solution to the access to justice crisis. We find that a representative helps most parties most of the time. We also find that the other party's representation and the representative's strategic expertise are significant factors for understanding representation for civil litigants.

This study analyzes a database of 1,700 unemployment insurance appeals in the District of Columbia over a two-year period, the broadest and deepest collection of data about representation in recent years. The analysis shows wide disparity in representation, with employers (the more powerful party to a dispute or the quintessential “haves”) represented twice as often as claimants (the less powerful party or the “have nots”), as well as a notable difference in parties' use of procedures in hearings. Using difference-in-proportions tests, this Article examines the interaction of party power and representation and finds that represented parties have better case outcomes than unrepresented parties, though

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1. Kat Aaron, *The People's Court?*, AM. PROSPECT (Nov. 21, 2013), <http://prospect.org/article/peoples-court>.

employers see less benefit from legal representation than claimants. In addition, the Article confirms the intuitive result that represented parties are more likely to use procedures than unrepresented parties. Yet, surprisingly, the Article finds that represented claimants who use certain evidentiary procedures have worse case outcomes than represented claimants who do not use those same procedures.

We recommend that any policy solution to the country's civil litigation crisis, whether it is a right to civil counsel, unbundled legal services, lay advocacy, or pro se court reform, must account for these factors. To achieve this goal, we call for a deeper understanding of representation in context.

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INTRODUCTION

Advocates, scholars, and courts are struggling to address critical needs in civil representation in the United States. Despite these focused efforts, we are still unable to answer a fundamental question: when do civil litigants need a lawyer to effectively participate in our justice sys-

tem?² In part, this ongoing quest is the result of the incomplete development of empirical research—much existing research is focused on the outcome of cases with little exploration of how those outcomes are reached.³ And in equal part, this quest continues because we have not yet fully developed theories that explain the effectiveness of representation.⁴ This Article attempts to provide both theoretical grounding and empirical analysis of when, why, and how representation matters.

This study is informed by existing scholarship regarding the role lawyers play in civil justice settings, including theories of the balance of power and of professional expertise. Scholars have developed theories of the role that lawyers play in civil justice settings and how representation interacts with a range of variables, including the area of law, the complexity of procedural rules,⁵ and the balance of power between the parties in a given dispute. Yet, these theories have not been tested in practice, until now.

We believe these core questions can only be understood, and we can only make good legal and policy decisions about when civil litigants should have lawyers, by investigating legal representation in context. We begin to engage in the complexity of studying representation in context by moving beyond the question of whether a litigant wins when he or she has a lawyer. To do this, we investigate how the balance of power between the parties interacts with representation and ask exactly what expertise a lawyer lends to the civil litigation process. We then use our empirical findings to propose a new theory of strategic expertise: how lawyers connect formal training with situational understanding and supplement it with judgment as they serve their clients. We argue that these findings mean policy decisions about legal assistance must be grounded in balance of power and strategic expertise.

Part I of this Article describes the site of the study: an administrative court where judges hold *de novo* hearings to resolve legal disputes between two parties, claimants seeking unemployment benefits and em-

2. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 106; Jeffrey Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145, 158–60; D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2125–26 (2012); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 53–54 (2012).

3. See, e.g., Greiner & Pattanayak, *supra* note 2.

4. See generally Albiston & Sandefur, *supra* note 2, at 105–19 (offering an access to justice research agenda that is theory-driven and exploring a broad range of issues related to civil justice); Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 121 (2013) (calling for legal scholars to develop and be explicit about normative goals in empirical research and noting that “[i]ntuition alone cannot suffice to relate observable data to normative claims; legal scholarship needs conceptual frameworks and empirical methods that can bridge the gap between ‘is’ and ‘ought’”).

5. See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 915–16 (2015).

ployers opposing the grant of unemployment benefits. The units of observation are cases, all of which have the potential to end in a hearing and most of which do end in this way. Thus, like much of the access to justice literature, this study is concerned with legal disputes that are formally adjudicated.⁶ These hearings are a particularly good context for examining the complexity of the value of representation because they have clear binary outcomes, a variety of parties and representatives, and a relatively formal legal process with clear procedural steps.⁷

This Article relies on a data set of 1,794 unique cases. As described in the Methodological Appendix, the data encompass all unemployment benefit appeals in the District of Columbia in 2012 where the circumstances of separation were at issue, regardless of which parties appeared at the hearing. The data for each case include extensive coding regarding the circumstances and activities in the case, such as the fact and type of representation, the presence of a representative at the hearing, the presence of parties at the hearing, the participation of parties in different procedural steps of the hearing process, and the procedural and substantive outcomes of the cases. This data set is larger in the number of cases collected than many recent empirical studies of representation and has broader data collected about each case than previous studies.⁸ Further, while this study is not randomized, it uses a complete set of cases to look at differences among groups and, thus, contributes to ongoing research of representation in context.⁹

Part II of the Article presents our first finding from this examination of representation in context, which is that less powerful parties gain more from representation than more powerful parties do. To test theories of balance of power and representation, we ask whether one or both parties

6. Most empirical studies on access to justice focus on civil justice problems that actually reach a lawyer's attention and become formal cases in the justice system, a focus that Albiston and Sandefur have challenged because it leaves out the vast majority of civil justice problems that never actually come to the attention of a lawyer, let alone an adjudicator. See Albiston & Sandefur, *supra* note 2, at 108–09.

7. It is common, when writing about administrative hearings, for scholars and policy-makers to assert that the quasi-inquisitorial nature of these hearings—where many parties are pro se, representation is rare, and the rules of evidence and procedure are relaxed—is a departure from the regular operation of civil courts. See Greiner & Pattanayak, *supra* note 2, at 2136–37. It might be suggested that the applicability of a study such as this is limited given the differences between administrative hearings, and city and county civil courts. However, the reality of the day-to-day operations of our civil justice system suggests this claim is overstated. The vast majority of litigants in civil cases are unrepresented, and even a brief observation at any of our nation's workhorse civil courts will reveal that hearings in these settings are often no less inquisitorial in nature, the rules of evidence and procedure are similarly relaxed (or ignored), and representation is rare. Although the structure, and perhaps the dream, of the adversarial system are more visible in our civil justice system, it is certainly not the case that inquisitorial judging is a rarity in America today. For that reason and others, we argue that the results of this study have wider applicability than the administrative appeals setting.

8. For a discussion of other empirical studies, see *infra* Section I.D.

9. For a detailed discussion of the contributions of observational and randomized studies, see *infra* Methodological Appendix.

have lawyers. We then investigate the case outcomes across variation in balance of power and balance of representation. The data show that representation makes a difference, especially for claimants and especially for claimants when employers are not represented. Interestingly, claimants also benefit from representation when both parties are represented. In this context, the employer generally is the party with more power and corresponds with the haves in the civil justice system, while the claimant is the party with less power and corresponds with the have nots.¹⁰ As a result, we argue that while legal representation may offer advantages for anyone who can secure it, the benefit that flows from a representative's legal expertise is greatest for those who can least afford representation because the haves can acquire and use elements of legal expertise,¹¹ even without actual representation.¹² Thus, the have nots are at a disadvantage when they do not have representation and face the haves. If representation can shift the power dynamic in the civil legal setting, as we suggest it does, this raises the question of what lawyers are doing to create this shift.

Part III explains our second finding: what representatives do to help parties is more complex and dependent on context than simply using the available law or procedure. Our data reveal that all represented parties are more likely to appear at a hearing and use evidentiary steps than unrepresented parties. Represented employers who use these steps have better case outcomes than represented employers who do not use the same procedures. In contrast, represented claimants who use certain evidentiary steps have comparatively worse case outcomes than represented claimants who do not use the same procedures. This finding is surprising because it challenges basic assumptions about how lawyers use law and procedure to help their clients. As discussed more fully below, this finding suggests a variety of explanations, including the interaction of use of procedures with substantive legal burdens, the nature of representation in this study's context, and the signaling function of lawyers. We argue that one important explanation is a lawyer's strategic expertise, an important and previously uninvestigated component of representation. If lawyers potentially contribute three types of expertise—substantive, relational, and strategic—the concept of strategic expertise captures how lawyers make choices by synthesizing the rules that govern their work and the informal relationships they navigate in the course of that work.

10. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–107 (1974) (dividing parties in the civil legal system into "repeat players" and "one-shotters" and describing how well-resourced repeat players—the "haves"—gain advantage in litigation against one-shotters—the "have nots").

11. In this Article, we will use the terms "legal expertise" and "professional expertise" interchangeably.

12. See Galanter, *supra* note 10, at 98–101.

Finally, Part IV examines the implications of our findings for theory, future research, and policy reform. We reach the conclusion that it is not sufficient to ask whether a party is represented; we must also ask who that party is, what the balance of power is between the parties, and what the representative is doing for the party. We recommend avenues for future research and policy reforms to better match the problem of the civil litigation crisis with the solution of representation.

I. THE DATA: UNEMPLOYMENT CASES

To understand the data, and thus our analysis of the context in which we investigate our theories of balance of power and expertise, it is helpful to understand the unemployment insurance appeals that are the subject of our study. The site of this study is the District of Columbia's central administrative court, the Office of Administrative Hearings (OAH). The study focuses on a subset of OAH cases, unemployment insurance appeals regarding qualification.¹³ In these cases, an individual seeking unemployment insurance benefits, a claimant, faces his or her previous employer in a hearing before an Administrative Law Judge (ALJ) who determines whether or not the claimant will receive unemployment insurance benefits.¹⁴ This process begins when the claimant files for benefits with the D.C. Department of Employment Services (DOES), and one party subsequently appeals the grant or denial of benefits by DOES to OAH.¹⁵ Under District law, unemployed workers are presumed qualified for benefits but may be disqualified from benefits for one of two reasons: (1) because they were terminated for work-related misconduct or (2) because they voluntarily quit without good cause.¹⁶

A. *The Parties*

Our data set for this Article includes unemployment appeals where the employer and the claimant are parties to the case. Employers have a stake in these cases because the regulatory scheme requires payroll taxes based in part on the number of former employees who have received unemployment insurance.¹⁷

In this study, we did not collect identifying or demographic data on either party, in part for confidentiality reasons and in part because the data was not consistently available in the case files. However, based on other research and our own observations in litigating cases from 2010 to 2015, we can generally describe the characteristics of employers and

13. Much of the discussion of the procedural practices and characteristics of these courts come from the authors' own observations. For a detailed discussion, see *infra* Methodological Appendix.

14. See D.C. MUN. REGS. tit. 1, § 2821 (2015) (emergency action adopted as a regulation on Nov. 6, 2015).

15. See *id.* (emergency action adopted as a regulation on Nov. 6, 2015).

16. D.C. CODE § 51-110(a)-(b) (2015).

17. See *id.* § 51-103(c)(1)-(2).

claimants in unemployment appeals. The employers who appear before OAH in unemployment cases range from small businesses to major corporations to federal agencies. Our anecdotal experience suggests that certain high turnover industries that tend to pay lower wages may be overrepresented among employers. For example, private security, food service, janitorial, and health-care companies were often the opposing parties in the cases the authors tried before OAH. In addition, due to a feature of the unemployment tax system, many nonprofit employers have a strong incentive to participate.¹⁸

Claimants, similarly, include individuals from a range of backgrounds and industries, from low-wage workers to lawyers who earned six-figure salaries.¹⁹ However, our observation and data from studies of unemployment claimants indicate that those who receive unemployment benefits are disproportionately low income and people of color.²⁰ In addition, for a variety of reasons too numerous to list here, low-wage jobs tend to expose workers to the possibility of being terminated, or present reasons for quitting a job, far more often than higher wage work.²¹

B. The Representatives

Although most litigants are unrepresented, with claimants much more likely to be unrepresented than employers, there is a significant amount of representation in OAH cases.²² On the employer side, there are lay representatives and attorneys.²³ On the claimant side, representatives are usually either attorneys or law students working in the context

18. Under federal law, nonprofit employers may opt out of paying unemployment taxes and instead reimburse states directly for the cost of payments made to former employees. 26 U.S.C. §§ 3306(c)(8), 3309(a)(2) (2012).

19. In the United States during 2013, the number of weekly claims was around 682,102, 56.2% of which were by males while 43.2% were by females. U.S. DEP'T OF LABOR, *Characteristics of the Unemployment Insurance Claimants*, <http://workforcesecurity.doleta.gov/unemploy/chariu.asp> (last visited Nov. 7, 2015). The industries with the highest unemployment submissions were the Administration and Support/Waste Management/Remediation Services at 12.9%, Construction at 11.9%, and Manufacturing at 9.8%. *Id.* The races with the highest claims rates were whites at 54.7%, blacks at 17.5%, and Hispanics at 15.9%. *Id.*

20. *But see* AUSTIN NICHOLS & MARGARET SIMMS, URBAN INST., UNEMPLOYMENT AND RECOVERY PROJECT BRIEF # 4: RACIAL AND ETHNIC DIFFERENCES IN RECEIPT OF UNEMPLOYMENT INSURANCE BENEFITS DURING THE GREAT RECESSION 4 (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412596-Racial-and-Ethnic-Differences-in-Receipt-of-Unemployment-Insurance-Benefits-During-the-Great-Recession.PDF> (finding African-Americans are less likely to receive unemployment benefits even after accounting for factors that affect benefit receipt for other workers); U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-1147, LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT 3 (2007) (finding low-wage workers were half as likely to receive UI benefits despite being two and a half times more likely to be out of work, even where job tenure for both groups was similar).

21. Christine Vestal, *An Unemployment Insurance Balancing Act*, STATELINE (June 1, 2010), <http://web.archive.org/web/20140113030802/http://www.pewstates.org/projects/stateline/headlines/an-unemployment-insurance-balancing-act-85899374819> (finding low-wage and part-time workers are less likely to qualify for unemployment benefits as other workers).

22. *See infra* Section III fig.1.

23. *See* D.C. MUN. REGS. tit. 1, § 2835 (2015).

of a clinical education program where an attorney supervises their work.²⁴

Employer lay representatives are typically employees or contractors working for third-party employer representation firms. OAH rules allow these lay representatives to appear on behalf of parties in unemployment appeals.²⁵ A third-party firm may, entirely or partially, manage an employer's unemployment insurance cost-reduction program.²⁶ Services provided by representatives may include handling correspondence with DOES and OAH, collecting and submitting evidence, and full representation at a hearing.²⁷ The actual representatives who appear at a hearing may have years of experience in unemployment appeals, or may have little experience. When an attorney appears on behalf of employers at OAH, the attorney may be a private lawyer, in-house counsel for the company (this is particularly common where the employer is a District or Federal government agency), or part of a program run by the Chamber of Commerce, which provides attorney representation to employers who qualify for services.²⁸

On the claimant side, the most common attorney representatives work for the District AFL-CIO's Claimant Advocacy Program, which provides free legal representation to claimants.²⁹ The Legal Aid Society also assists unemployment claimants on a limited basis, and a number of local law schools provide student attorney representatives in unemployment appeals.³⁰

C. Hearing Process and Procedure

OAH hears all unemployment insurance appeals in the District.³¹ The hearings are de novo, which means the ALJ takes evidence in the case and makes factual determinations and conclusions of law without regard to DOES's initial determination.³² An unemployment insurance

24. See *id.* § 2833.

25. *Id.* § 2982.

26. See, e.g., *Help Control Unemployment Claims Cost, Maximize Human Capital, and Mitigate Risk*, ADP, <https://www.adp.com/solutions/large-business/services/tax-and-compliance/unemployment-claims.aspx> (last visited Nov. 8, 2015); *Unemployment Cost Management*, EQUIFAX, <http://www.tax.com/Solutions/Compliance/UnemploymentTax/> (last visited Nov. 8, 2015).

27. See, e.g., *Help Control Unemployment Claims Cost, Maximize Human Capital, and Mitigate Risk*, *supra* note 26; *Unemployment Cost Management*, *supra* note 26.

28. See Enrique S. Pumar & Faith Mullen, *The Plural of Anecdote is Not Data: Teaching Law Students Basic Survey Methodology to Improve Access to Justice in Unemployment Insurance Appeals*, 16 UDC L. REV. 17, 22–23 (2012).

29. *Id.* at 22–24.

30. *Id.* at 23–24. While we acknowledge it is an imperfect distinction, for the purposes of this Article, we consider only licensed lawyers as attorneys, and all other representatives, including law students, as nonattorney or lay representatives.

31. *About OAH*, D.C. OFF. ADMIN. HEARINGS, <http://oah.dc.gov/page/about-oah> (last visited Nov. 8, 2015).

32. See *Rodriguez v. Filene's Basement Inc.*, 905 A.2d 177, 179–80 (D.C. 2006).

hearing begins with the baseline legal presumption that a claimant is entitled to benefits, and it is up to the employer to prove otherwise.³³ Because the hearing is *de novo* and the employer has the burden of proof, if a claimant attends and the employer does not, the claimant automatically wins.³⁴

Because the claimant is presumed qualified for benefits, hearings begin with the employer's case-in-chief, including witnesses and documentary evidence.³⁵ Next, the ALJ takes evidence from the claimant, who may also have witnesses or documents. The ALJ may ask questions of either party and may also allow the employer to present a rebuttal case.

Although this basic pattern is followed by most ALJs in most hearings, individual judges have different styles and preferences.³⁶ As OAH has been part of a recent effort in the District of Columbia to improve access to justice for *pro se* parties, ALJs have focused on providing more consistent and clearer descriptions of concepts like burdens of proof and use of testimony in hearings with unrepresented parties.³⁷ For example, some judges, when faced with an unrepresented employer, may ask the employer to give a narrative about why the claimant was separated from employment. Other judges may ask a series of very direct questions and refuse to hear a longer narrative.

1. Burdens of Proof

Burdens of proof are an important part of the legal and procedural landscape of an unemployment hearing, as in any litigation. As a matter of procedure, the burden of proof determines which party must present evidence first. As a matter of law, the party with the burden must provide the evidence necessary to prevail under the law. Under District law, in a misconduct case where the claimant was terminated, the employer bears the burden of proving, by a preponderance of the evidence, that the claimant was terminated for a reason that amounts to misconduct.³⁸ In such hearings, the ALJ will typically instruct the employer to present evidence first, followed by the claimant. In a "quit" case, where the claimant resigned from the position, the employer bears the burden of

33. See *id.* at 180; see also D.C. CODE § 51-110 (2016).

34. See D.C. MUN. REGS. tit. 1, § 2822.4 (2016); see also *Rodriguez*, 905 A.2d at 180.

35. See D.C. CODE § 51-111 (providing minimal guidelines for hearing procedure); see also D.C. MUN. REGS. tit. 1, § 2822.4-5.

36. See Shannon Portillo, *The Adversarial Process of Administrative Claims: The Process of Unemployment Insurance Hearings*, 2014 ADMIN. & SOC'Y 1, 1-2 (concluding, based on a sociological study of forty-five unemployment insurance hearings at OAH, that "the hearing runs like traditional courtroom litigation" but that when claimants represent themselves, "[ALJs] engage directly with the claimant, gathering as much information as possible," and in contrast, when counsel is present, finding that "ALJs behave in traditionally passive ways, allowing each party to present their case").

37. See *infra* note 58.

38. See D.C. CODE § 51-110; D.C. MUN. REGS. tit. 1, § 2822.2(d).

proving the claimant quit voluntarily.³⁹ The burden then shifts to the claimant to prove that the resignation was for good cause as defined by District law.

The burden of proof has a significant impact on the strategic choices that parties, including legal representatives, make in presenting unemployment cases. Because the hearings are *de novo*, a threshold issue in any appeal hearing is whether it is a misconduct or quit case. There is a strategic calculus regarding whether it is in a claimant's interest to accept the facts framed by the employer's presentation of facts or whether it is in the claimant's interest to attempt to define the issues from the beginning by, for example, making an early evidentiary objection. It may be that the facts of a claimant's separation from employment may blur the line between termination and resignation. To understand this concept, consider this hypothetical example:

Wilma worked as a security guard, earning minimum wage, for Security Guards, Inc. Wilma has a high school education and has never been involved in a legal proceeding. SGI is a company with approximately 700 employees. Wilma was fired from her job after she got a new supervisor who did not like her. The supervisor and Wilma had several heated exchanges over the length of Wilma's breaks, exchanges that were very upsetting for Wilma. In addition, in a period of three weeks Wilma was late to her shift three times: by four minutes, six minutes, and seven minutes. Wilma's supervisor wrote her up each time and then fired her after the third incident for violating the company's attendance policy.

Wilma filed for and was denied unemployment benefits by DOES based on a finding that she was fired for misconduct. Wilma filed an appeal and is attending her hearing by herself. SGI sends Elaine, the director of Human Resources, to the hearing. Elaine handles five to ten unemployment benefits hearings for SGI each year.

Now imagine if Wilma knew she was about to be fired, perhaps because she heard statements to that effect from other employees. Rather than face the potential embarrassment of being fired, Wilma chose to resign instead. Unfortunately for Wilma, it may be very difficult to win an unemployment insurance appeal under District law on resignation. Thus, if Wilma has a sophisticated representative, she may assess the facts and law and determine that Wilma's chances of winning will be greatly improved if the ALJ applies a misconduct analysis. Despite the fact that the employer technically has the burden of proof, and even if the ALJ turns to the employer first, the representative may make the strategic choice to make a statement to the ALJ noting that Wilma was functional-

39. D.C. MUN. REGS. tit. 7, § 311.3.

ly terminated, with the hope that this remark will frame the hearing as a misconduct case, resulting in a more favorable burden for Wilma.

In an alternate scenario, where Wilma is unrepresented, she might say at the beginning of the hearing that she quit because she was not being treated well by the employer, her supervisors were always getting on her case about her breaks, and she had enough of it. Wilma may be operating out of a desire to protect her own personal pride—she may not want to admit that she was about to be fired for something she did on the job. Unfortunately for Wilma, satisfying her personal instincts may defeat her legal case by framing it as a quit case with a more challenging burden.

The burden of proof also presents critical choices about offering evidence. In a misconduct case where the employer has the burden, it is often unwise for a claimant to offer much evidence at all, other than evidence that undercuts the employer's case-in-chief. A claimant may unwittingly make a statement, introduce a document, or call a witness who provides facts that actually harm the claimant's case and help the employer's argument for misconduct. Just like a defendant in a criminal trial, the wisest strategy for a claimant is often to say as little as possible.

A nuanced understanding of the role of burdens in unemployment appeals can make the difference between a claimant winning or losing. In this context, representatives can frame issues and present evidence in the light most favorable to their client.⁴⁰ A representative might also decline to put a claimant on the stand to testify based on an assessment that the employer's evidence is too weak and the claimant's potential testimony too damaging to risk opening the client up to cross-examination or questioning by the ALJ. Similarly, a representative might make a motion at the close of the employer's case, pursuant to a little-used OAH rule, asking that the claimant be granted benefits because the employer has not carried the burden of proof.⁴¹

An understanding of burdens of proof can also affect preparation for a hearing. For example, a claimant's lawyer may present her client's testimony in a limited way so that the employer has to present evidence to uphold its burden rather than relying on the claimant's testimony. Similarly, a representative may prepare the client for the hearing by explaining the particular court and judge so that the client knows what to expect, feels more confident, and thus is a better witness.⁴²

40. HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 38–39 (1998).

41. See D.C. MUN. REGS. tit. 1, § 2819.

42. KRITZER, *supra* note 40, at 38.

2. Evidence Disclosures

Another critical aspect of hearing procedure is an OAH procedural rule that governs the disclosure of evidence prior to a hearing. The rule requires a party to send the court and the opposing party, at least three days prior to the hearing, any documents and a list of any witnesses that the party plans to offer at the hearing.⁴³ This “three-day rule” is designed to ensure that parties, and the court, have notice of evidence that will be presented at a hearing.⁴⁴

Parties may choose to disclose, and ultimately introduce, a variety of documentary evidence.⁴⁵ For employers, this may include documents such as employee policies, documents reflecting discipline of the employee such as prior warnings, communications between the employee and supervisors about conduct or the circumstances of separation from employment, or documentary evidence of conduct such as video or written reports. Claimants may have documentary evidence, including communications with supervisors reflecting permission or acquiescence to conduct; documents reflecting contrary or supplementary policies; communications regarding the circumstances of separation from employment; or evidence of mitigating circumstances such as health problems, family demands, or failure to be paid.

The three-day rule presents a choice for claimants, employers, and their representatives: if there are documents or witnesses you may want to use at the hearing, do you disclose them? For employers, the choice is fairly simple. If you want to be sure the evidence gets in, you should probably disclose it. For claimants, the picture is more nuanced. The rule has an exception for evidence that will be used for impeachment or rebuttal, which leaves an opening for claimants to introduce evidence without disclosing it.⁴⁶ Thus, a representative may decide not to disclose documents in advance in a misconduct case, relying on an attempt to use the documents as rebuttal or impeachment at the hearing. In contrast, in a resignation case, a claimant may be more likely to disclose documents. A claimant or representative without appropriate expertise might disclose documents to the claimant’s disadvantage based on an assumption that disclosure is required or on a misunderstanding of the burdens of proof in the case.

Similarly, a representative can contribute her expertise by gathering evidence and preparing evidentiary arguments based on her understanding of what evidence will be useful and whether documents or testimony are more powerful.⁴⁷ This is particularly important for employers, who

43. D.C. MUN. REGS. tit. 1, § 2985.1.

44. *See id.*

45. *See* D.C. CODE § 51-111(c) (2016).

46. D.C. MUN. REGS. tit. 1, § 2985.1(b).

47. KRITZER, *supra* note 40, at 39–41.

are required to bring witnesses with personal knowledge and documentation of the incidents to meet their burden of proof.⁴⁸ Experienced or represented employers may begin gathering evidence from the day an employee starts work (for example, having the employee acknowledge receipt of company policies) and will be able to easily access these records for an unemployment hearing. In contrast, unrepresented claimants are unlikely to appreciate or operationalize the need for documents or other evidence for the strategic power of disclosing (or not disclosing) evidence. This documentation is particularly important for claimants to try to exclude or at least discredit the weight of hearsay evidence. In general, understanding, preparing, and asking good questions on direct and cross-examinations of witnesses is also an element of expertise in presenting evidence. So in Wilma's case, a lawyer may choose to introduce a vague employer policy regarding attendance or to object to Elaine's testimony on hearsay grounds because Elaine's office location means she did not witness any of Wilma's conduct.

Although unemployment hearings are not procedurally complex compared to protracted commercial litigation, the cases do present significant layers of legal and procedural choices for any party or representative. The ability of a litigant to navigate these legal and procedural steps can make the difference between winning and losing.

D. Previous Studies of Representation in Unemployment Appeals

Ours is not the first study to investigate unemployment insurance appeals. Existing research overwhelmingly concludes that parties with representation—in general, and in unemployment insurance appeals—fare better in legal disputes than those who are not represented.⁴⁹ Previous studies of unemployment appeals have examined questions of the effectiveness of representation by comparing success rates of claimants with representation to those of claimants without representation.⁵⁰ All of these studies, save for the most recent one, reach the conclusion that representation improves a claimant's probability of winning, and these same studies also suggest that there are advantages to representation by nonlawyers, such as paralegals, law students, and lay representatives.⁵¹ In

48. See D.C. MUN. REGS. tit. 7, § 312.2.

49. See Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 69–71 (2010); see also Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 456–58 (2011) (examining the effectiveness of unbundled legal services). As discussed below, we acknowledge that one study does not support this assumption and believe others have adequately discussed the limits of that study.

50. See, e.g., KRITZER, *supra* note 40, at 33–34; Murray Rubin, *The Appeals System*, in 3 NAT'L COMM'N ON UNEMPLOYMENT COMP., UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH 625, 628–29 (1980); Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. MICH. J.L. REFORM 289, 291–92 (1996); Greiner & Pattanayak *supra* note 2, at 2124.

51. See, e.g., KRITZER, *supra* note 40, at 76–77; Sandefur, *supra* note 49, at 79.

three major observational studies of unemployment insurance appeals, authors analyzed national or state data in cases where parties appeared at hearings and consistently found higher rates of representation for employers as compared to claimants, as well as higher win rates for represented claimants as compared to unrepresented claimants.⁵² There is interesting variation among the previous studies of unemployment insurance appeals and this project. In the present study, in all cases with any level of participation by the parties, the claimant won in 67% of the cases, which is higher than in most of the previous studies.⁵³ In addition to differences in samples, this variation may be explained by the fact that unemployment regulations in many states, including the District of Columbia, have evolved in the decades since earlier studies conducted by Kritzer, Emsellem and Halas, and Rubin. Specifically, states have enacted statutory or regulatory exceptions in favor of claimants, including exceptions granting benefits for claimants who are victims of domestic violence,⁵⁴ relocate with spouses,⁵⁵ or are caretakers for sick family

52. The 1980 Rubin study examined cases nationally where the parties appeared at hearings and found representation rates for both parties of less than 10% and overall claimant win rates of 35.7%, regardless of representation. Rubin, *supra* note 50, at 628. Further, the Rubin study found that claimants won 30.8% of cases where employers appeared, but 45.4% of cases where employers appeared and the claimant was represented, and 49.3% of cases where both parties were represented. *Id.*

The 1995 Emsellem and Halas study analyzed data from unemployment insurance appeals in Ohio and found employers were represented four times (45%) as often as claimants (10%). Emsellem & Halas, *supra* note 50, at 292. The study found that unrepresented claimants won 34% of cases, and represented claimants won 45% of cases. *Id.* It is not clear whether this study included all appeals or only those where the parties appeared at the hearing.

Kritzer's 1998 study examined unemployment insurance appeal data in Wisconsin, and for the first time parsed the data according to which party appealed and which party had the burden of proof, though the analysis was restricted to cases where both parties appeared for the hearing. KRITZER, *supra* note 40, at 33. Kritzer found that representation made no difference for employers (winning approximately 58% of cases whether represented or not) but that unrepresented claimants won 41.5% of cases and represented claimants won 50.4% of cases. *Id.* at 34. Further, Kritzer found that when both sides brought a representative, claimants won 44.6% of cases, when representation was imbalanced in favor of the claimant, claimants won 53.4% of cases, and when representation was imbalanced in favor of the employer, claimants won 41.6% of cases. *Id.*

53. See *supra* note 52. In Greiner and Pattanayak's more recent data from Massachusetts, in all cases, claimants won 47% of cases where the claimant appealed and 75% of cases where the employer appealed. Greiner & Pattanayak, *supra* note 2, at 2135–36. It appears from the description of the sample for the study that while the appeals in this sample are legally *de novo* hearings, the process in these hearings is not necessarily a *de novo* review of the evidence. *But see id.* at 2136. This difference in practice may lead to lower claimant win rates where claimants appeal.

54. In addition to the District of Columbia, there are thirty-four states and the Virgin Islands that have extended unemployment benefits to cover victims of domestic violence. LEGAL MOMENTUM, STATE LAW GUIDE: UNEMPLOYMENT INSURANCE BENEFITS FOR VICTIMS OF DOMESTIC & SEXUAL VIOLENCE (2013), <http://www.legalmomentum.org/sites/default/files/reports/State%20Guide%20UI%20Final%20June%202013.pdf>.

55. An exemption for claimants who voluntarily leave his or her employment for the purpose of relocating with his or her spouse exists in some states, including D.C., but it is unavailable in others. See, e.g., VA. CODE ANN. § 60.2-618 (2015); WASH. REV. CODE § 50.20.050(2)(b)(iii) (2015); see also George L. Blum, *Eligibility for Unemployment Compensation as Affected by Voluntary Resignation Because of Change of Location of Residence Under Statute Denying Benefits to Certain Claimants Based on Particular Disqualifying Motive for Move or Unavailability for Work*, 27 A.L.R. 6th 123, pt. II.A, § 4 (2007).

members.⁵⁶ In addition, the tribunal for this study, the District of Columbia Office of Administrative Hearings, is unusual in that it is a highly professionalized administrative court that hears a variety of administrative appeals.⁵⁷ As such, it has been the subject of a variety of efforts aimed at protecting the rights of pro se litigants, including a revision of the D.C. Code of Judicial Conduct, effective January 1, 2012, emphasizing the affirmative duty of judges to facilitate the use of the courts by pro se litigants.⁵⁸ Thus, one would expect the nature of judicial conduct in our study would result in higher win rates for claimants who benefit from this assistance. Each of these factors is likely to contribute to the greater win rates for claimants as compared to earlier studies. However, as noted above, we are less concerned with overall win rates and more concerned with the relative advantages provided by representation and the use of procedures, as measured by case outcomes.

The most recent study of unemployment insurance appeals has garnered attention for its use of randomized design to measure the effect of an offer of representation. In this study, Greiner and Pattanayak found that an offer of representation by clinical law students does not make a significant difference in a claimant's probability of winning.⁵⁹ In addition, the claimants who received an offer of representation waited longer for resolution of their case.⁶⁰ While others have raised critiques of this study,⁶¹ several characteristics of the Greiner and Pattanayak study are useful for understanding this Article.⁶²

56. Most states, including D.C., provide exceptions for caregivers of family members with an illness, others provide very limited exceptions in some cases, and others do not provide an exemption for this circumstance. *See, e.g.*, CONN. GEN. STAT. § 31-236(a)(2)(A) (2015) (providing an exception); FLA. STAT. § 443.101(1)(a) (2015) (providing no exception for caregivers).

57. This is in contrast to unemployment insurance appeal hearings in other jurisdictions that have been the subject of other studies. *See, e.g.*, KRITZER, *supra* note 40, at 24; Greiner & Pattanayak, *supra* note 2, at 2135–36.

58. *See* Zoe Tillman, *D.C. Courts System Adopts New Code of Judicial Conduct*, BLOG OF LEGAL TIMES (Jan. 23, 2012, 1:58 PM), <http://legaltimes.typepad.com/blt/2012/01/dc-courts-system-adopts-new-code-of-judicial-conduct.html> (explaining additional changes made to the D.C. Code of Judicial Conduct for pro se litigants beyond what is provided by the ABA Model Rules, including that judges may change the order in which they collect evidence, explain or avoid legalese, and suggest additional resources that may help a pro se litigant). *See generally* CODE JUDICIAL CONDUCT r. 2.6 cmt. 1A (D.C. COURTS 2012). In addition to the District of Columbia, twenty-four states have adopted provisions similar to the 2007 ABA Model Code of Judicial Conduct to help a litigant's ability to be fairly heard. Margaret J. Vergeront & Jeff Brown, *Access to Justice Commission Update*, 21 THIRD BRANCH 7 (2013), <http://wicourts.gov/news/thirdbranch/docs/fall13.pdf>.

59. Of those claimants who received an offer of clinical law student representation, 76% won their cases, and of those who did not receive an offer, 72% won. Greiner & Pattanayak, *supra* note 2, at 2149.

60. *Id.* at 2125.

61. *See, e.g.*, Albiston & Sandefur, *supra* note 2, at 106–13 & n.29; Fischman, *supra* note 4, at 165–67 & n.234; Selbin et al., *supra* note 2, at 48–51; Bob Sable, *What Difference Representation – A Response*, CONCURRING OPINIONS (Mar. 28, 2011), <http://www.concurringopinions.com/archives/2011/03/what-difference-representation-a-response.html>; David Udell, *What Difference Presentation?*, CONCURRING OPINIONS (Mar. 28, 2011), <http://www.concurringopinions.com/archives/2011/03/what-difference-presentation.html>.

62. For a detailed description of our methodological choices, see Methodological Appendix.

The core challenge of a nonrandomized study, like the one presented in this Article, is the effect of selection bias on the analysis of representation and case outcomes. For example, it may be that only the most sophisticated claimants or only employers with the strongest factual cases seek out representation, but there is no way of knowing the effect of these factors on the measured variables. The Greiner and Pattanayak study overcame this challenge through randomization of the offer of representation and relied heavily on its randomized design as its source of authority. We do not dispute the value of randomized studies, but we believe that relying solely on randomization of claimants' offers of representation and then observing win rates misses important opportunities to understand legal representation.⁶³ For example, Greiner and Pattanayak's randomized design did not account for the ultimate representation status of claimants, whether they received an offer of clinical law student representation or not. Thus, their study ultimately provides limited insight into the relative experiences of claimants with different types of representation, or no representation at all. Similarly, the randomized design does not account for the representation status of the employer. In addition, the Greiner and Pattanayak study does not investigate the level of participation by the parties or the representatives, including use of procedures and attendance at the hearing, and so does not engage in questions of what representatives actually do for parties. While our study does not rely on randomized design, it does use a substantial data set and valid statistical methods to observe and investigate correlations at a breadth and depth of analysis that has not previously been conducted. In particular, this Article's analysis of the correlation between parties' use of procedural steps and case outcomes compares parties with the same representation status, thereby avoiding selection bias concerns. In sum, this study examines the experiences of parties with varying types of representation and participation in a way that a randomized study cannot.

II. REPRESENTATION AND BALANCE OF POWER

While there is extensive theory about the role of party power in the legal system, there is limited empirical examination of this phenomenon. As a general matter, scholars have examined how socioeconomic status and social power have a relationship with a person or organization's interactions with law and the justice system.⁶⁴ If the operation of law and

63. See Greiner & Pattanayak, *supra* note 2, at 2198–2208 (discussing limitations of randomized controlled studies).

64. Scholars from a range of fields, including law and sociology, have examined the relationship between the social power of individuals and groups and the operation of law and justice. The idea that legal doctrine, by itself, does not explain how cases are handled in the legal system, and that differences may be attributed in some measure to the social status of the parties, can be traced back to legal realism. In response to this idea, sociologists and legal scholars have attempted to explain the social factors that influence the operation of law. An early work in the field of legal sociology, Donald Black's *Sociological Justice*, published in 1989, explored how the social structure of cases and the power of parties predicts the way those cases are handled in the legal system. See

justice varies with social status, a full understanding of the impact of legal representation requires understanding the status of each party to a dispute and their statuses relative to each other.⁶⁵

A corollary issue is the symbolic effect of a powerful party. Others have investigated how a party's social status or power has a signaling function in the legal system.⁶⁶ Scholars have theorized how individuals and businesses who have (or are perceived to have) higher status and better reputations are likely to be perceived more positively by judges and other court staff.⁶⁷ Along the same lines, representatives may confer a signaling benefit on a party by virtue of their presence. The lawyer's presence can signal to the court that the party is of some significance and

generally DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989). Black argued that law is "situational" and "relative" and explained how law varies with social status. See *id.* at 6. He proposed that high status and low status parties experience the legal system differently as a baseline matter and noted that the treatment of a given case may be predicted by looking at the balance of power between parties. See *id.* at 8–10. More recently and in the context of access to justice literature, sociologist Rebecca Sandefur examined empirical approaches to studying the relationship between civil justice and various forms of social inequality. She notes:

Civil justice experiences can reflect inequality in the sense that inequalities that exist prior to contact with or in some other way outside law and legal institutions are reproduced when people and groups come into contact with justiciable events or legal institutions. Such experiences can also create inequality, in the sense that differences between people or groups become disparities through contact with justiciable events or legal institutions. Finally, civil justice experiences can destroy or destabilize inequality, as disparities are reduced through contact with justiciable events or legal institutions.

Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346 (2008). In legal scholarship, an expansive literature has assessed how social factors, including race, class, and gender, systematically influence law and justice. The literature explores issues such as the role of race in sentencing decisions, the effect of gender on jury selection, and the relationship between poverty, economic inequality, and constitutional law. See, e.g., Margaret Etienne, *Pain and Race: A New Understanding of Race-Based Sentencing Disparities*, 3 U. ST. THOMAS L.J. 496, 503 (2006) ("The fourth (and current) wave of research questions the existence and extent of race-based sentencing disparities in the post-guideline, or 'determinate sentencing' era."); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 2 (2005) (exploring gender and jury dynamics); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278 (1993) ("[E]xamin[ing] the Supreme Court's use of the rationality standard in areas that affect poor people, and argu[ing] that the political powerlessness of the poor requires some form of enhanced judicial protection."); Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1029 (2012) (arguing the poor have been excluded from constitutional protection). A goal of this Article is to add to the literature by questioning how the combination of representation, a party's power, and the balance of power between the parties influences the legal process and the outcomes of cases in civil legal settings.

65. See BLACK, *supra* note 64, at 10–11.

66.

In general, one sees evidence that lawyers, officials, and legal authorities, as well as perhaps legal procedures themselves, exhibit impaired comprehension of the disadvantaged and less powerful. However, in the case of class inequality, . . . we have no studies comparing different groups' experiences handling similar problems or in similar hearing settings . . .

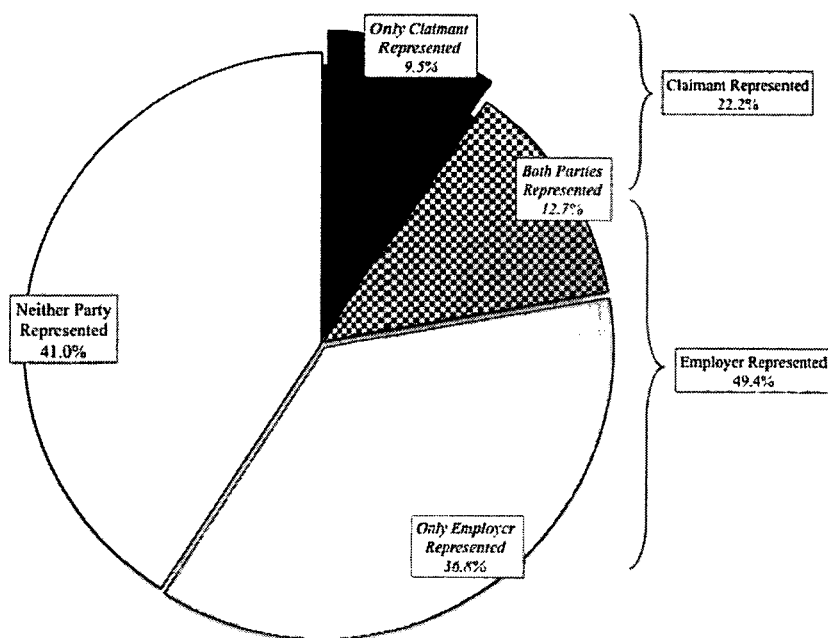
Sandefur, *supra* note 64, at 349 (citations omitted).

67. See, e.g., Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 L. & SOC'Y REV. 993, 996 (1999) ("Status expectations theory argues that the influence attempts of high-status individuals succeed, and those of lower-status people fail, due to *socially shared* cognitions and expectations that link social status to attributions about personal ability and worth . . .").

that merits of the claim are worthy of consideration.⁶⁸ This may be particularly true in courts with a large number of pro se litigants, where the presence of a lawyer is notable. Thus, we hypothesize that representation provides the represented party with an advantage and that this advantage is greater when the parties have imbalanced representation. As a general matter, we are using the employer as a proxy for the more powerful party in civil legal processes and the claimant as a proxy for the less powerful party in the civil legal process.⁶⁹

This analysis begins with the independent variable of the fact of representation. As shown in Figure 1, employers are represented more than twice as often as claimants, and rarely do both parties have representation. It is also rare for a claimant to have representation when an employer does not. In contrast, an employer has representation when a claimant does not in a third of the cases.

Figure 1



As it is possible for a party to have a representative of record who does not actually appear at the hearing, another independent variable is

68. Sandefur, *supra* note 5, at 910.

69. We acknowledge that employers and claimants, like all parties, are a variety of individuals and institutions. However, we believe that the general characteristics of claimants and employers in unemployment insurance appeals make the use of these parties as proxies for "haves" and "have nots" a fair one. See *infra* note 98.

whether a representative actually appears at a hearing.⁷⁰ In our data, 51% of employers with representatives and 65% of claimants with representatives have that representative appear at the hearing.

As shown in Figure 2, claimants' win rates are significantly higher when represented, while unrepresented employers do not see a significant difference in win rates compared to represented employers.⁷¹ An additional layer of analysis is whether a party with representation imbalanced in its favor sees higher win rates than a party in a case with balanced representation. Figure 2 also shows how both a claimant and an employer with a representation advantage see a significantly higher win rate compared to a claimant and an employer without that advantage.

Figure 2: Party Win Rates with Levels of Representation

	<u>Claimant Wins</u>	<u>Employer Wins</u>
<i>All Cases</i>	67%	33%
Claimant unrepresented	62%	38%
Claimant represented	83.2%	16.8%
Claimant representation advantage	88.3%	11.7%
Employer unrepresented	66.2%	33.8%
Employer represented	67.3%	32.7%
Employer representation advantage	63.7%	36.3%
Both parties represented	79.3%	20.7%
Neither party represented	61.0%	39.0%

In addition, the data demonstrate that claimants have higher win rates when both parties have representation, as opposed to when both parties do not have representation.

70. For a discussion of situations where a representative of record may not appear at a hearing, see *infra* note 72.

71. As this Article uses difference in proportion tests to demonstrate patterns of relationships between the examined variables, we report our findings as comparisons, e.g., "represented claimants have a higher win rate than unrepresented claimants." For ease of expression, we do not reiterate each time we describe a finding that this describes two distinct groups: the group of claimants in the data who were represented and the group of claimants in the data who were not represented, rather than the experience of a single claimant exposed to the presence and absence of the variable of representation. In addition, we use the word "significant" to report statistically significant findings, as reflected in the Methodological Appendix. All of the differences described in this Article are statistically significant unless explicitly described otherwise.

As it is possible for a party to have a representative of record who does not actually appear at the hearing,⁷² and this dynamic has not yet been studied, we examine this additional layer of representation—a representative who actually appears at the most important moment of representation.⁷³ When the representative's appearance at the hearing is factored in, a different picture appears. Among those cases where an employer has representation of record, the employer wins a significantly greater number of cases when the representative appears at the hearing, winning 23.9% of the time when the representative does not show up as compared to 46% when the representative appears. When a claimant is represented and her representative appears, there is no significant difference in the proportion of cases the claimant wins as compared to represented claimants whose representative does not appear. This result is not particularly surprising, as there is a high correlation between a claimant having representation and the representative showing up at the hearing. Thus, it is difficult to determine the additional benefit of the appearance of a claimant's representative, given both the high win rate in the represented group, as well as the high rate of appearance by that representative.

Our analysis of imbalance in the appearance of a representative is similar to overall imbalance in representation. Claimants for whom a representative appears win a significantly greater amount of the time when no representative appears for the other party, 90.5%, as compared to when representation appearance is balanced, 71.5%. When representation is unbalanced in favor of the employer, the employer wins a significantly greater amount of the time, 58.9%, compared to when representative appearance is balanced, 28.4%.

Our results reflect the practical reality of the civil justice system in America, one in which the vast majority of low-income Americans represent themselves—often against much more powerful parties—in the “ordinary, everyday cases” that constitute the bulk of the civil justice

72. See *supra* notes 27–27 and accompanying text. There are a variety of situations where a representative of record may not appear at a hearing. It may be that a party has a retained representative who is the contact for service of process. Thus, there is a representative of record but that representative might not actually be asked to be involved in the handling of a case. It may also be that a party retains a representative to help a human resources employee prepare for the hearing but does not want to spend the money to pay the representative to attend the hearing. It may also be that a party indicates to the court that she has a representative but in fact does not or ceases retaining that representative before the hearing. It is the authors' anecdotal impression that these situations are more likely to occur for employers, where the lay representative industry involves large companies that provide claims management as well as actual representation. These distinctions in representative type are a topic for future research.

73. This analysis also avoids concerns about randomizing representation and selection bias, as the entire sample in this section of the analysis is parties with representation. For a discussion of selection bias challenges in research on the effects of representation, see Greiner & Pattanayak, *supra* note 2, at 2192–95.

landscape.⁷⁴ The results similarly support the theory that the civil justice system can reflect and reproduce existing social inequality, just as it can be a site where inequality is challenged.⁷⁵ Where less powerful litigants represent themselves against those with more power, baseline inequities are likely to persist. But where such litigants have legal representation, the opportunity to challenge inequality follows. If there are power dynamics at play between the parties and representatives are a significant layer of these dynamics, especially when representation is imbalanced, what are representatives doing to shift the power dynamics? Our second area of analysis examines this question.

III. REPRESENTATION AND USE OF PROCEDURES

We use the concept of expertise to frame our inquiry into what representatives are doing that shifts the power dynamics between the parties. This examination of expertise builds upon existing scholarship regarding effectiveness in civil legal settings and, in particular, on theories of two categories of a lawyer's professional expertise: substantive and relational expertise, or what might also be called "formal training" as compared to "people knowledge."⁷⁶

"[S]ubstantive . . . expertise is [the] abstract and 'principled'" knowledge held by professionals and gained through formal training.⁷⁷ In the legal context, this includes knowledge of the essential framework of professional theories, concepts, and rules, as well as an understanding of

74. See HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 3, 27 (1990) (offering a comprehensive analysis of lawyers' role in the routine litigation that takes place in America's state and federal civil courts). For a vivid description of the day-to-day operations of an American civil court, see COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS* 3, 11 (2012).

http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx, finding in a study of seventeen state general jurisdiction courts in 2010, 61% of cases were contract matters, 11% probate, 11% small claims, 6% tort, 2% real property, 2% mental health, and 7% all other civil; this excludes domestic relations cases, which make up 6% of state cases nationwide, and Aaron, *supra* note 1. One study found that "62% of all plaintiff award winners [in state courts] were awarded \$50,000 or less." LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, *CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005* (2009), <http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>.

75. See Sandefur, *supra* note 64, at 346–52 (discussing how race, class, and gender inequalities influence, reproduce, and are challenged by civil justice experiences).

76. See KRITZER, *supra* note 40, at 14–16, 194–95 (describing formal training and insider knowledge, or people knowledge, and a third category called process knowledge); Sandefur, *supra* note 5, at 911–12 (describing substantive and relational expertise). Sandefur describes two aspects of legal expertise, substantive (Kritzer's "formal training") and relational (Kritzer's "insider" or "people" knowledge). See Sandefur, *supra* note 5, at 911–12. Sandefur's substantive expertise category includes formal knowledge of the law, as well as procedural rules. See *id.* at 911. In contrast, Kritzer places knowledge of procedural rules in a separate category called "process expertise," which also includes lawyers' understanding of how a court or other legal institution operates and the processes involved in legal advocacy in that setting, such as the process of a given type of hearing in a given court. KRITZER, *supra* note 40, at 15.

77. Sandefur, *supra* note 5, at 911; see Stephen R. Barley, *Technicians in the Workplace: Ethnographic Evidence for Bringing Work Into Organizational Studies*, 41 *ADMIN. SCI. Q.* 404, 424–29 (1996).

how to operate within those rules.⁷⁸ Thus, substantive expertise includes both law and procedure.⁷⁹ Substantive legal knowledge consists of legal theories, common law rules, statutes, doctrine, case law, and other content-based knowledge.⁸⁰ In their work, lawyers draw on this knowledge to determine what law is relevant to a given client's case.⁸¹ Procedural knowledge is what lawyers use to move cases through the formalities of the civil justice system, such as the appropriate means of communicating with the court and opposing parties, the use of pleadings and motions, the mechanisms of introducing evidence, and the navigation of litigation timelines.⁸²

In contrast to the principled and rule-based nature of substantive expertise, relational expertise is "'situated' and 'contextual.'"⁸³ It involves understanding how to navigate human relationships, including how to behave and how to communicate with others.⁸⁴ This includes what can be called "people knowledge" and is the expertise that guides interactions with judges, court staff, clients, and other attorneys.⁸⁵ A characteristic of relational expertise across professional contexts is that it is not typically part of the "explicit curriculum of professional training," despite the fact that it may be essential for a professional's success in her work.⁸⁶ Many professionals learn relational skills outside of formal training and through experience in their day-to-day working lives.⁸⁷ In addition, relational expertise operates on specific as well as general levels. There are ways of behaving and communicating that are fairly universal, but there are also ways of behaving and communicating that are context dependent. For example, when speaking in court, a lawyer will address a judge with "Your Honor" because this is a universal practice in the profession. But that same lawyer, if she is new to the courtroom, will not know whether that judge prefers standing objections until she has appeared several times.

78. Sandefur, *supra* note 5, at 911; *see* KRITZER, *supra* note 74, at 7.

79. Sandefur, *supra* note 5, at 911.

80. *See id.*; *see also* KRITZER, *supra* note 74, at 7.

81. Sandefur, *supra* note 5, at 911.

82. *Id.* Sandefur notes that an important use of substantive expertise is the translation of a client's real-world problems into legally cognizable terms. *See id.* For example, transforming a client's experience of a car accident into an argument for liability and damages uses formal legal knowledge, while knowing where to file such a claim and how the applicable court processes work uses procedural knowledge. Through substantive expertise, a lawyer will identify which harms might have a legal remedy, such as physical injury and property damage, and which do not, such as psychological effects.

83. *Id.* (quoting Barley, *supra* note 77, at 425).

84. *Id.* at 911-12.

85. KRITZER, *supra* note 40, at 196.

86. Sandefur, *supra* note 5, at 912. This is traditionally the case in legal education, which emphasizes instruction in legal doctrine and formalized legal argument, particularly in the core courses of the first year of law school. Many law students graduate without any formal training to develop the knowledge and skills of relational expertise. However, the growth of clinical and other forms of experiential legal education has incorporated the development of relational expertise into the law school curriculum for some students.

87. *See id.*

As our first set of findings reflects, representation correlates to advantages, and this reflects the value of professional expertise. But in the absence of representation, some parties to legal disputes may have the functional equivalent of professional expertise. Some parties may possess this functional equivalent unrelated to their involvement in the civil justice system, but most gain this equivalent expertise over time by virtue of their involvement as repeat players.⁸⁸ Mark Galanter famously articulated how powerful parties, whether individuals or organizations, benefit from being repeat players and how comparatively less powerful parties, one-shot litigants, are disadvantaged.⁸⁹ Repeat players have frequent dealings with the legal system, can develop the functional equivalent of substantive expertise by anticipating the issues they will face in a given case, and thus can plan in advance for the litigation. These parties can also develop relational expertise by building relationships with court staff and judges and, thus, develop both comfort and fluency in communicating with the people who work within a civil justice setting.

Even parties that are not repeat players can use some elements of a lawyer's professional expertise, particularly relational expertise. For example, nonlawyers who are familiar with general norms of professional communication may have the ability to relate effectively to actors in the civil justice system. Other parties who are not repeat players may be able to obtain a basic level of substantive expertise through education by studying the law or reading a court's procedural rules. Finally, some individuals may seek the advice of an attorney but then choose to represent themselves, and thus, they benefit from at least a measure of professional legal expertise. Of course, those parties that are the least likely to have some equivalent to professional expertise may be those without the social, cultural, economic, or professional background to come to the legal process with this knowledge or to quickly adopt such knowledge during their interaction with a court. These parties are the ones at the greatest disadvantage in the legal process and, thus, have the most to gain from representation and the expertise it provides.

To examine the role of expertise, our second area of inquiry identifies four different procedural steps in the unemployment appeals process: (1) whether the party appears at the hearing, (2) whether the party presents testimony,⁹⁰ (3) whether the party discloses documents before the

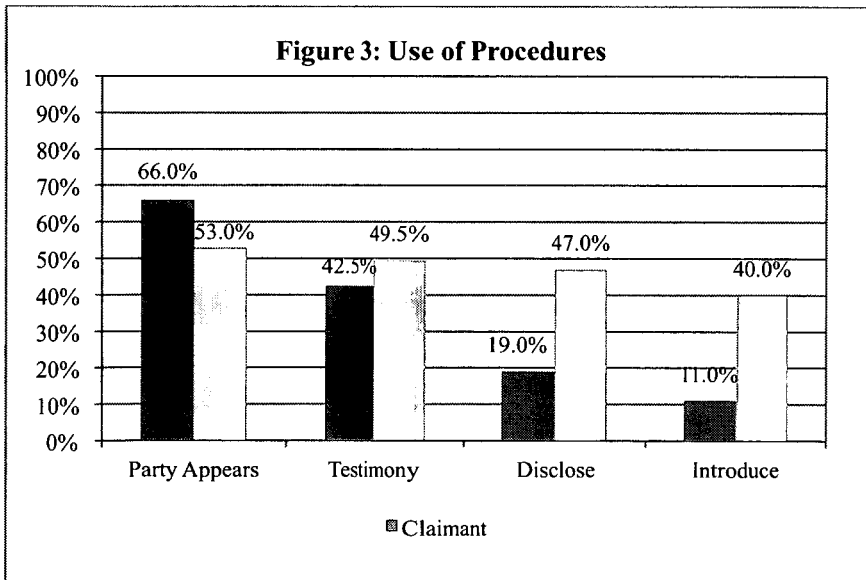
88. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 79 (2010) ("Repeat players are more likely to wield financial power, utilize a forum that serves their interests, benefit from the substantive law, and be familiar with the procedure."); Galanter, *supra* note 10, at 97–99; see also Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1806 (2001) ("Yet comparative research finds that nonlawyer specialists are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.").

89. See Galanter, *supra* note 10, at 97–107.

90. This variable is defined broadly—whether there is any testimony for a party's case—to encompass both parties who themselves testify (i.e., did Elaine or Wilma testify) and witnesses

hearing as provided by court procedures, and (4) whether the party introduces documents at the hearing.⁹¹ We focus on these procedures as they are the most commonly used steps for a party to present evidence in a case. For each procedural step, we examine two distinct questions: (1) whether having a representative results in greater use of the procedure, and (2) for those parties with representatives (or those without), whether using each procedural step correlates with improved case outcomes.⁹² Examining these dependent variables provides additional nuance to the interaction of representation, expertise, and power. At the outset, it is important to note that the overall rate at which parties win is less meaningful in a study such as this one that looks at comparative case outcomes. Because our theories concern the relative advantages of representation, the more important analysis is case outcomes for the same party in light of different variables.

In the entire sample, regardless of representation, claimants and employers used procedures at the rates shown in the figure below.

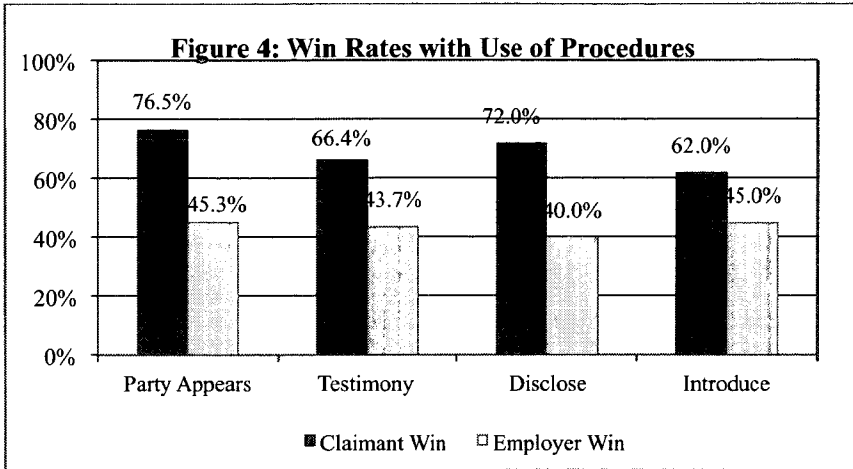


whose testimony is elicited by parties (i.e., did Elaine bring another company employee to testify). We use this broad definition because our interest is in the choice by the party or representative to present testimony.

91. We use the terms “appearance” and “evidentiary steps” to capture the four variables measured in this Article and the term “procedures” to describe the more general concept. There is admittedly some variation in the nature of the procedural steps considered in this analysis. One variable—disclosure of documents—occurs before the hearing, while the other variables occur at the hearing.

92. For all of these dependent variables, our analysis includes all of the cases in our sample, regardless of whether or which party appeared at the hearing and, thus, whether a full hearing was held. We include all of these cases because we cannot know why one party or its representative appears at a hearing. For example, this may be due to an imperfect appeal, ignorance, inadvertence, or a party or representative’s strategic choice.

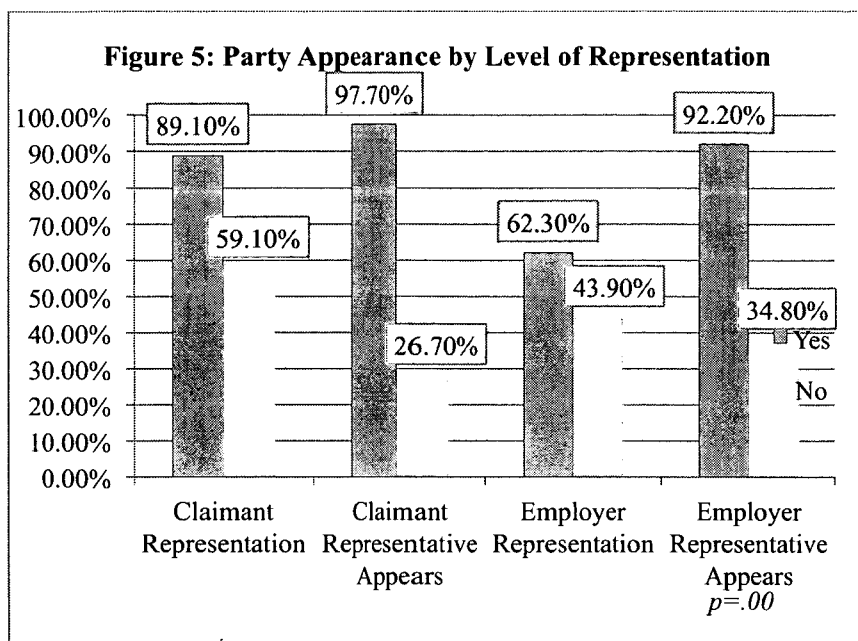
And for the entire sample, regardless of representation, use of each procedural step correlates to the case outcomes in the table below.



We then analyzed how representation interacts with procedural behaviors against these baseline measurements.

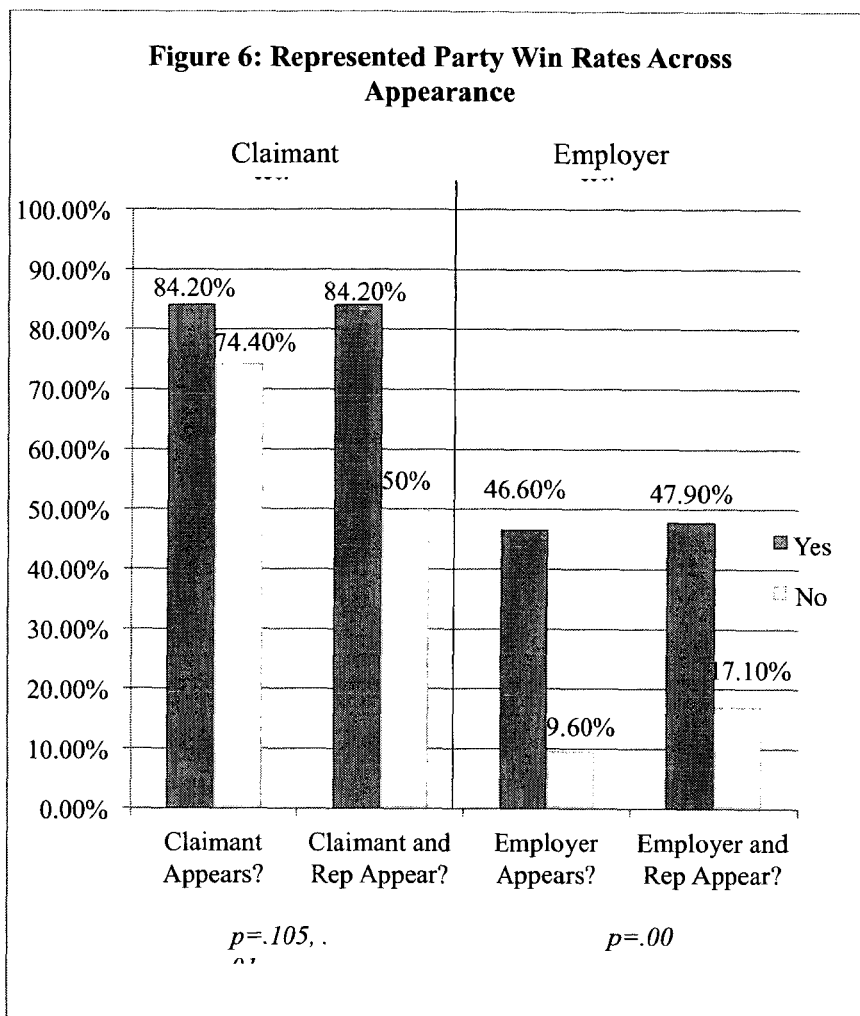
A. Party Appearance at Hearing

As an initial matter, we examined whether represented parties appear at the hearing more often than unrepresented parties, which they do. When a claimant has a representative, the claimant appears at the hearing at a significantly higher rate, compared to when the claimant does not have a representative. If a claimant's representative appears at the hearing (as opposed to just being a representative of record), claimants also attend the hearing at a higher rate, compared to the group in which the claimant's representative does not appear. Figure 5 describes how the same is true for employers.



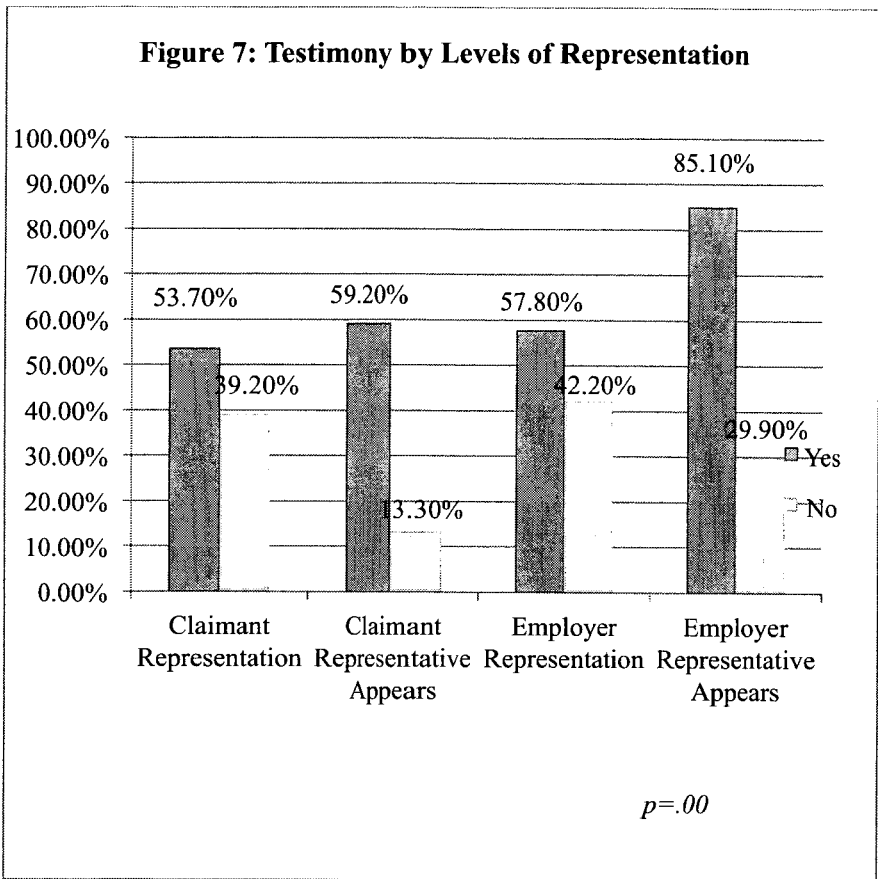
When a claimant has a representative and the claimant appears at the hearing, the win rate for those claimants is higher—though not quite statistically significant—than for those in the group of represented claimants who do not appear at their hearing.⁹³ Similarly, among represented claimants, when both the claimant and representative appear at a hearing, the claimant has a higher win rate compared to when only the representative appears. Figure 6 shows that employers see the same differences in significant proportions.

93. Note that represented claimants who appear at their hearing do not necessarily appear with a representative. For an explanation of why a party may have a representative of record, but that representative may not appear at the hearing, see *supra* note 72.

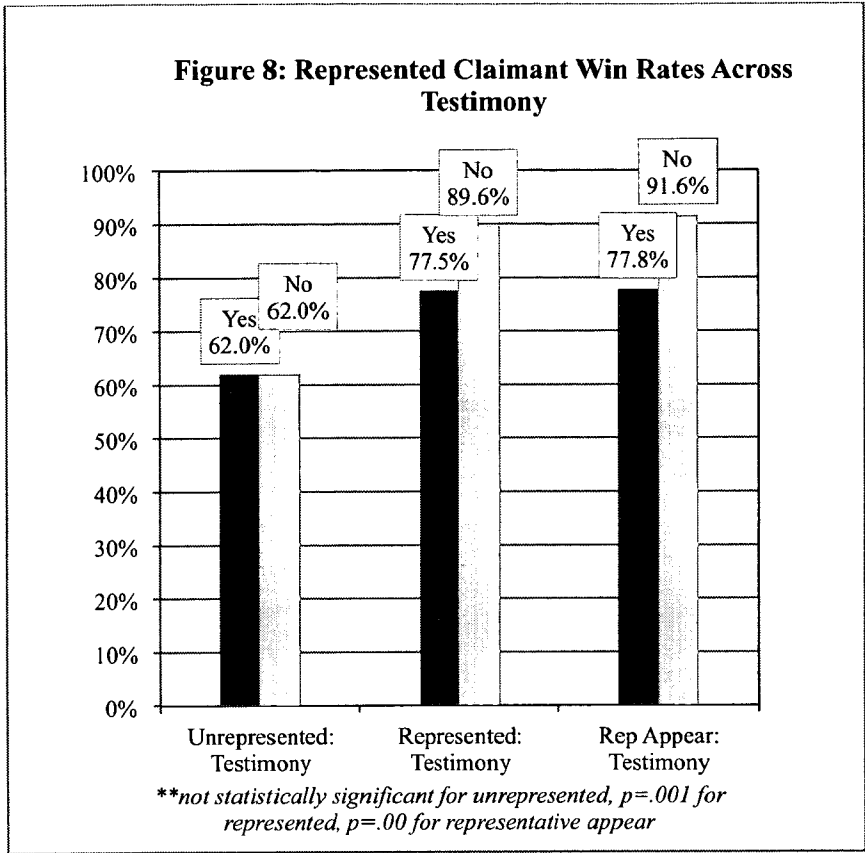


B. Testimony

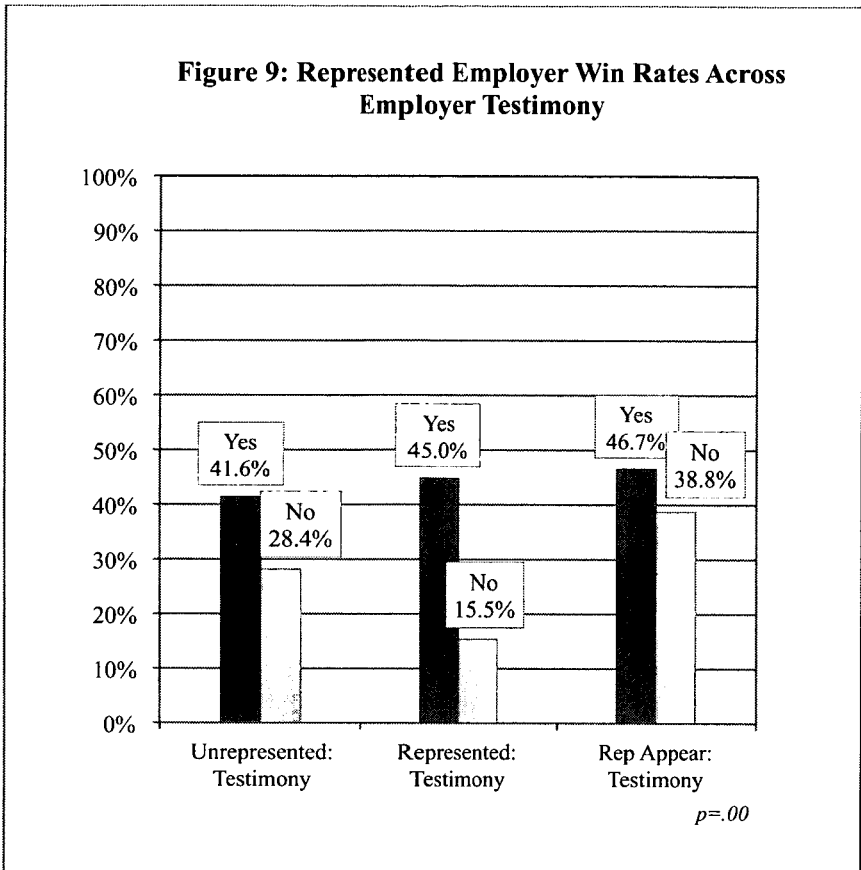
The second variable we examine is the presentation of testimony. We find that when parties have a representative, they present testimony at a higher rate compared to those who do not have a representative. In addition, among represented claimants, those whose representative does not appear present testimony at a significantly lower rate than when the representative does appear. The same is true for employers.



We then examined the correlation between presentation of testimony and win rates. As Figure 8 shows, when an unrepresented claimant presents testimony of any kind, there is not a statistically significant difference in the claimant's win rate compared to when an unrepresented claimant presents no testimony. But represented claimants see higher win rates, as do claimants whose representative appears.

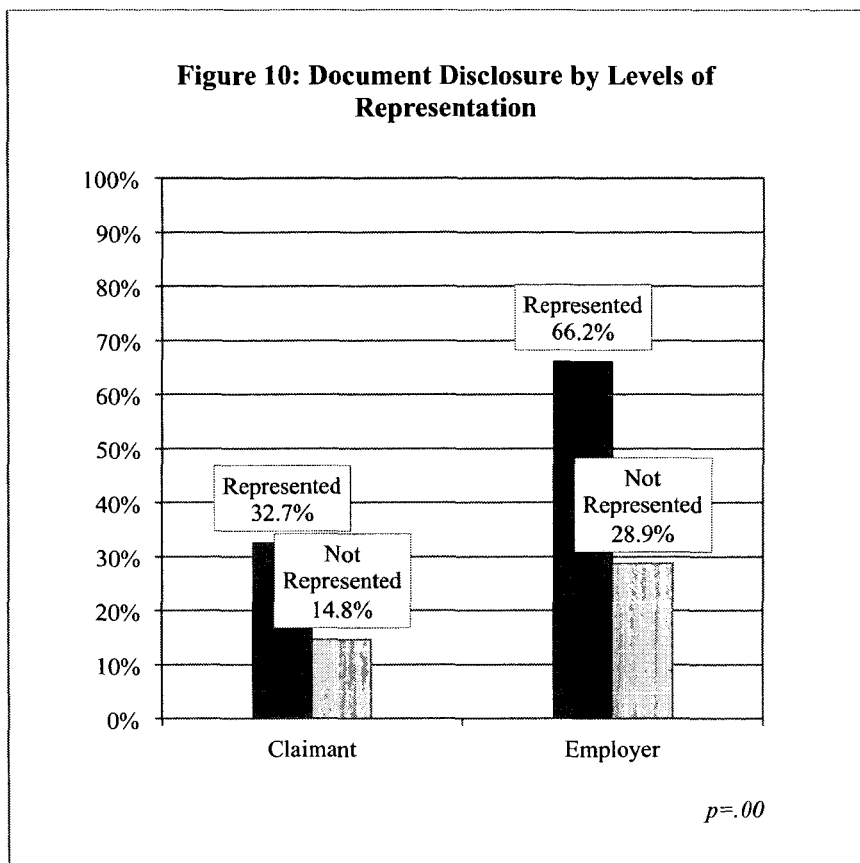


The analysis of an employer’s representation and presentation of testimony demonstrates a different situation, as demonstrated in Figure 9. When an employer is unrepresented, those in the group who present testimony win at a significantly higher rate than those in the group who do not present testimony. Among represented employers, those who present testimony have a higher win rate than those in the group who did not present testimony. And there is a similar pattern among employers whose representatives appeared: those who present testimony have a higher win rate.

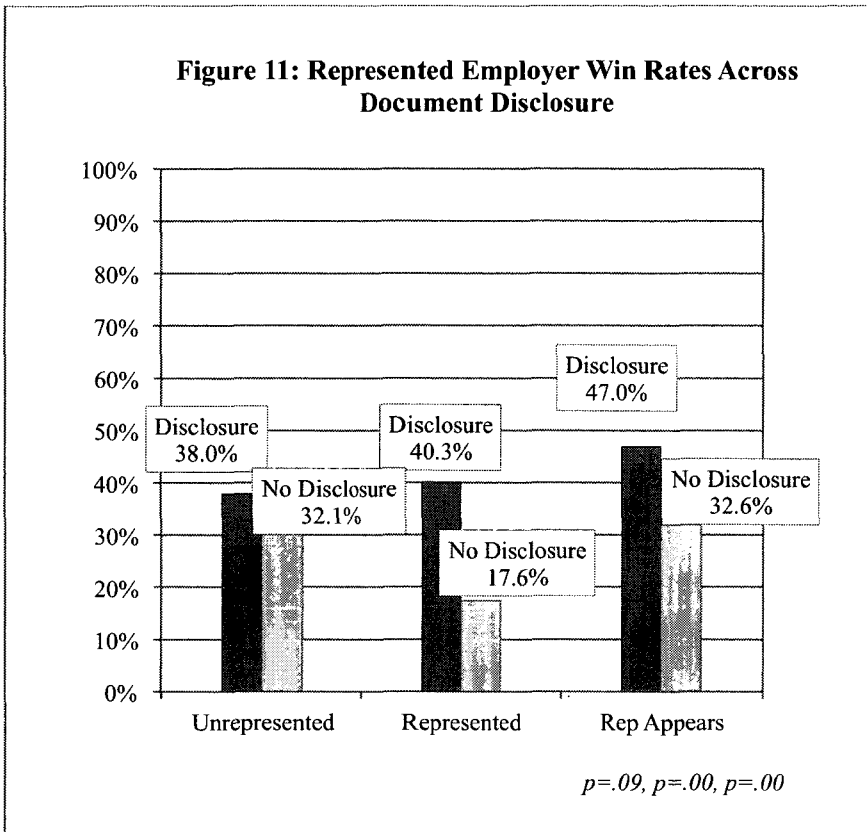


C. Document Disclosure

We also analyzed parties' use of the required document disclosure procedure. Both represented claimants and represented employers disclose and introduce documents at a higher rate than unrepresented claimants and unrepresented employers.



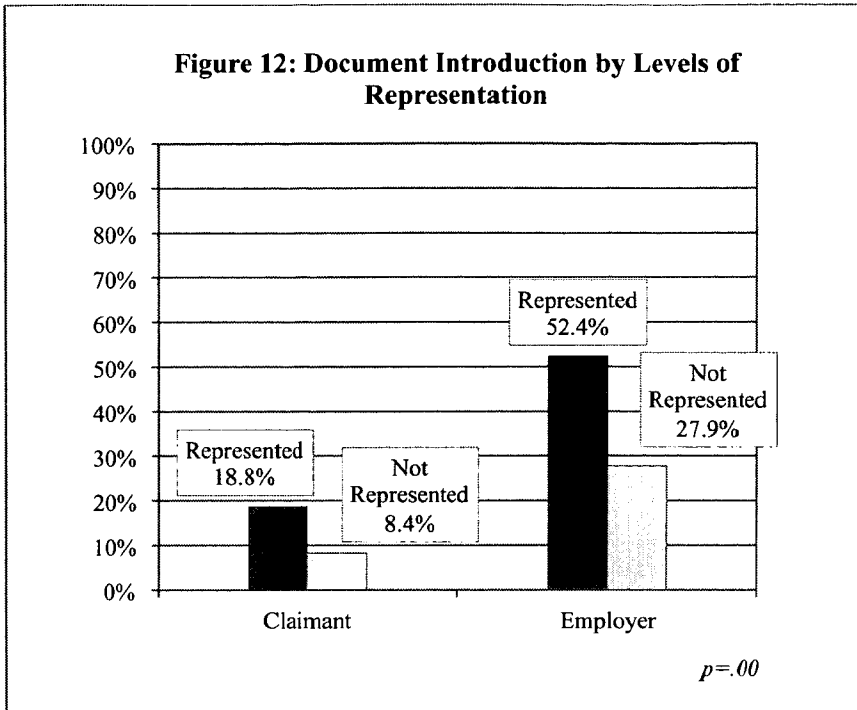
We next examined win rates across representation and document disclosure. When a claimant is represented, or when a representative appears at a hearing, there is no statistically significant difference in the claimant’s case outcomes based on document disclosure. However, there are significant differences for employers. Represented employers, and those whose representative appears, have significantly higher win rates when disclosing documents as compared to not disclosing. Unrepresented employers also have significantly higher win rates when they disclose documents as compared to those unrepresented employers who do not disclose documents.



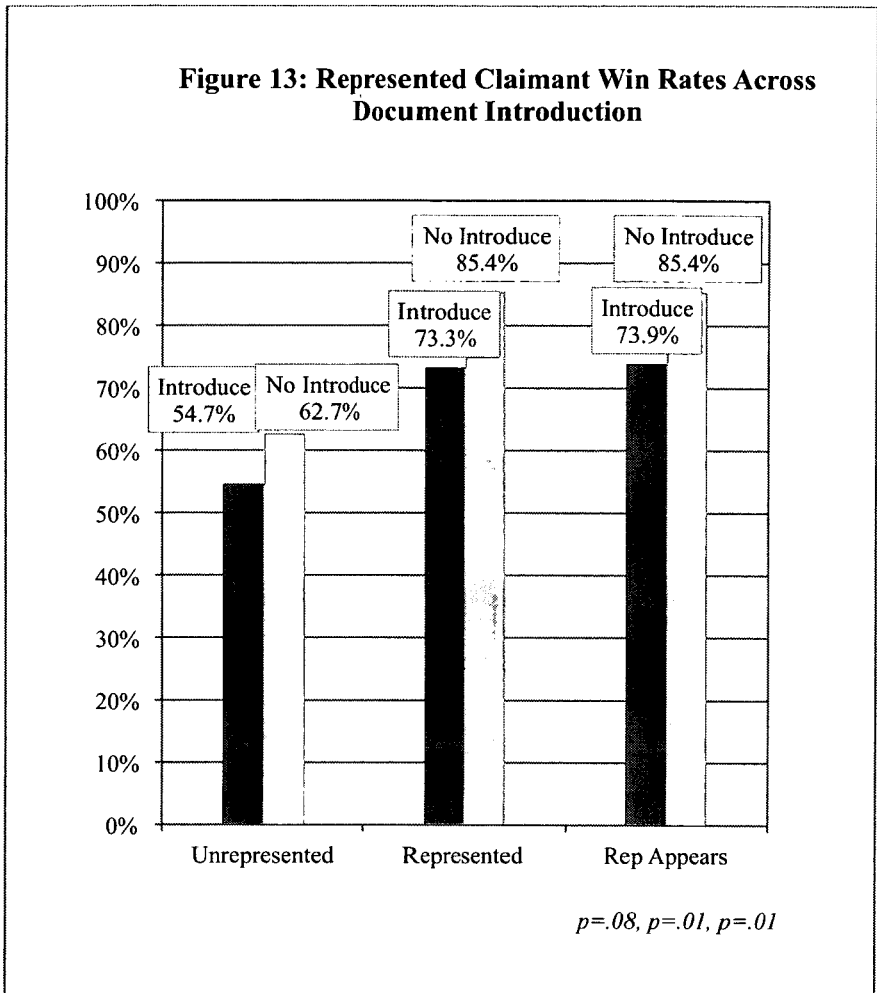
D. Introduction of Documents

The introduction of documents follows a similar pattern, with claimants and employers in the respective represented group introducing documents at a significantly higher rate than unrepresented claimants and employers.⁹⁴

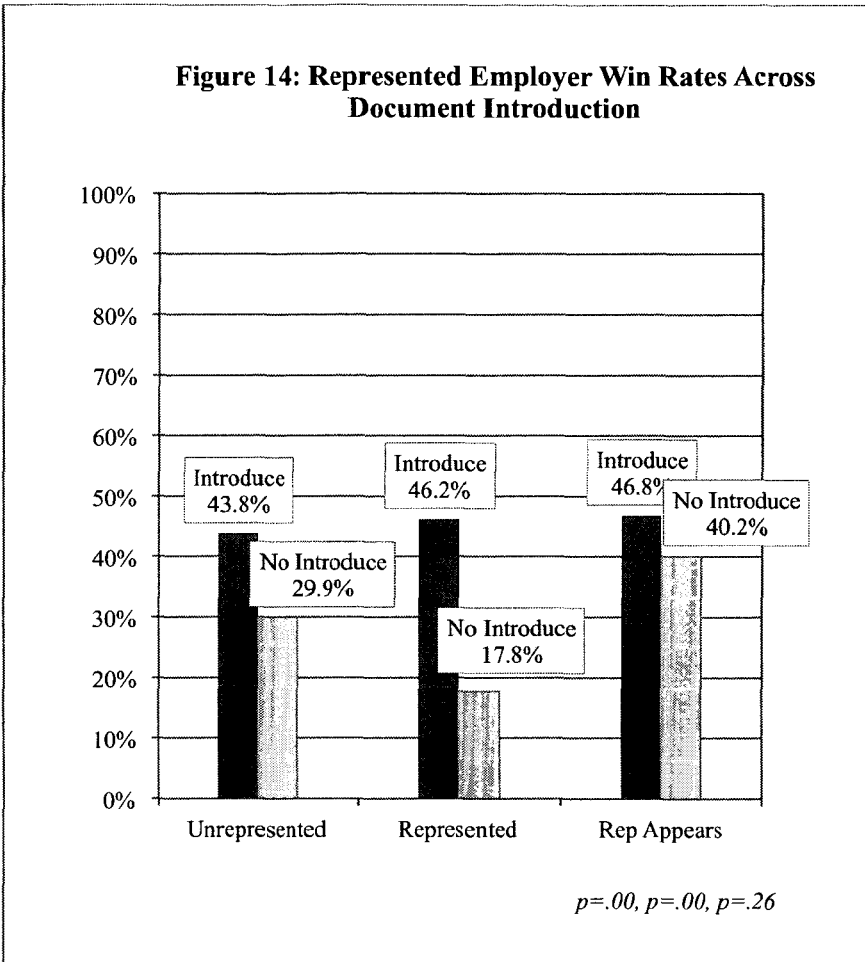
94. For both parties, the introduction of a document almost always resulted in admission of that document (95% of the time for claimants and 99% of the time for employers).



The introduction of documents has a different relationship to case win rates for employers and claimants, as shown in Figures 13 and 14. For unrepresented claimants, represented claimants, and claimants whose representative appears, the introduction of documents is associated with a lower win rate, as compared to not introducing documents.



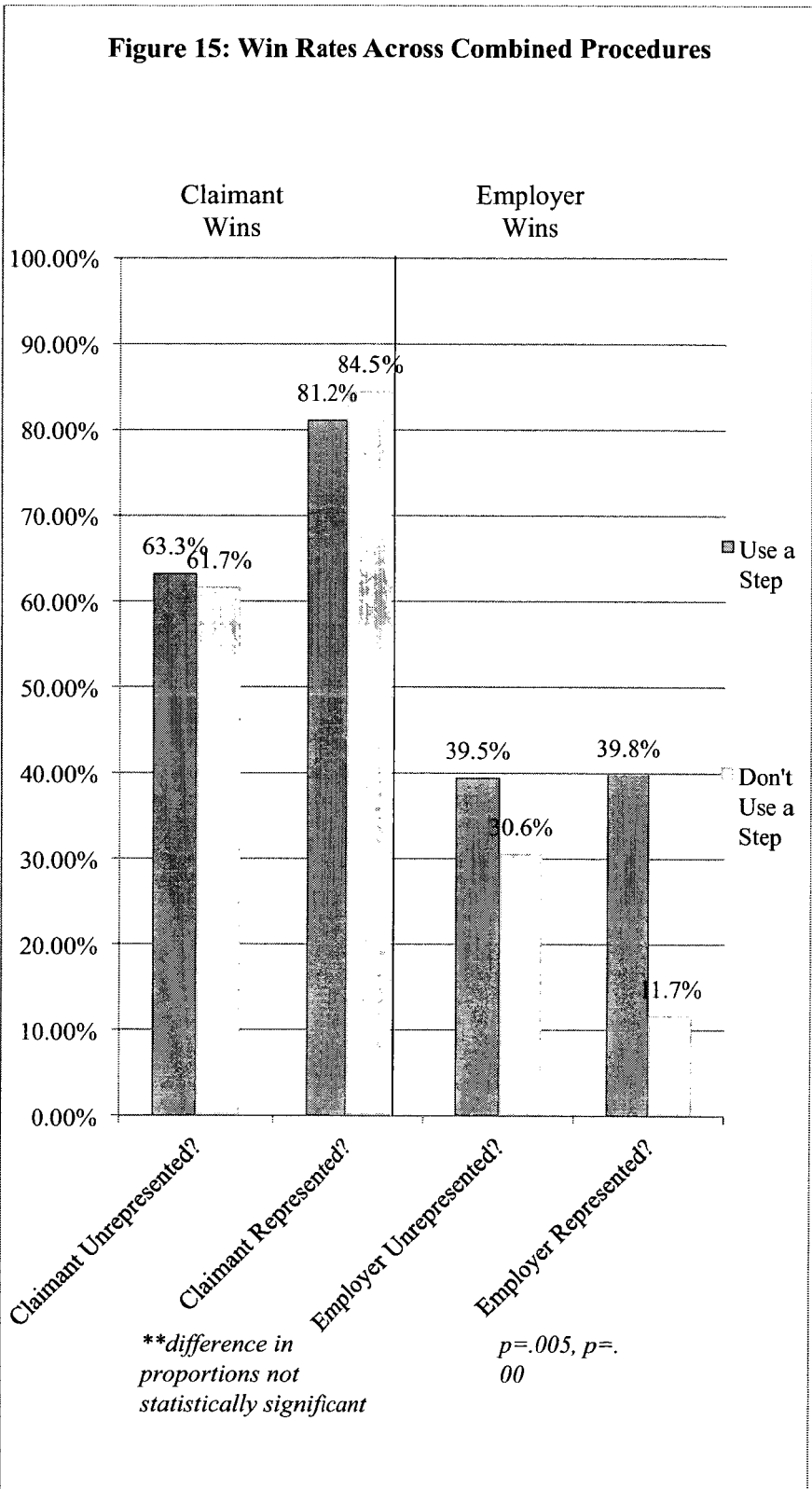
On the other hand, for employers, the introduction of documents is associated with a higher win rate (as compared to the win rates of the groups not introducing documents) for unrepresented and represented employers, but this difference in proportions is not statistically significant in the representative appearance comparison.



E. Procedures in Combination

Finally, we combined party appearance and the use of the four evidentiary steps described above into a single model to examine whether a party's use of any of these steps is advantageous and whether it is more or less advantageous for parties in represented groups. Here, we use a binary indicator—claimants and employers are separated into groups based on whether they have used any of the four variables or not.

Figure 15: Win Rates Across Combined Procedures



As shown in Figure 15, the win rate for unrepresented claimants who do not appear or use any evidentiary steps is not significantly different from the win rate for unrepresented claimants who use these procedural steps. When these four steps are combined for represented claimants, claimants see slightly, but still not significantly, lower win rates when using an evidentiary step.

However, the win rate for unrepresented employers who appear or use evidentiary steps is significantly higher than the win rate for those unrepresented employers who do not use any of these steps. And the same is true for represented employers who see proportionally higher win rates when appearing or using an evidentiary step compared to represented employers who do not use any of these steps.

IV. THEORETICAL IMPLICATIONS, POLICY RECOMMENDATIONS, AND FUTURE RESEARCH

“The only thing less popular than a poor person these days is a poor person with a lawyer.”

Jonathan D. Asher, Executive Director, Legal Aid Society of Denver⁹⁵

Though Mr. Asher was commenting on public opinion of legal aid funding two decades ago, the question remains if and how his assessment bears out in the courtroom. Our empirical results are consistent with previous studies finding that representation does help the less powerful. We add to these studies with our new results measuring the interaction between balance of power and representation. Our results show for the first time that a representative who uses court procedures is not necessarily helpful, especially if that assistance is not grounded in, what we define as, strategic expertise. These empirical findings have implications for theories of representation, and so we propose a theory of strategic expertise that captures the overlap of formal training with client and case-specific judgment. Our findings, and this concept of strategic expertise, translate to policy and practice, as well as to future research.

A. Representation and Balance of Power

Our findings support the theory that the lower a party's power relative to its opponent, the more it stands to benefit from representation. We believe this is due to the ability of better resourced parties to use functional equivalents of professional expertise, an ability that is based on a party's resources, social status, education level, and other elements of social and economic power. Thus, as a baseline matter, while some parties have advantages that would otherwise be conferred by representa-

95. Robert Pear, *As Welfare Overhaul Looms, Legal Aid for Poor Dwindles*, N.Y. TIMES, Sept. 5, 1995, at A1.

tion, others have no such advantage. This latter group will benefit the most from legal representation, particularly when it faces a more powerful opponent.

Our findings support previous studies that have found representation correlates with improved case outcomes for claimants.⁹⁶ More importantly, the data demonstrate that the relationship between representation and case outcomes is more pronounced when the balance of power is introduced into the analysis. In the modern American legal system, where civil legal representation is not guaranteed by the state, a more powerful party, such as an employer, is more likely to have the resources to obtain representation, whether it is through an in-house legal department for a large employer or through a third-party lay representative retained to control costs for a smaller employer. In this scenario, our data show that the less powerful party, such as a claimant, is at a significant disadvantage. In addition, the lower marginal advantage of representation for employers is consistent with the theory that employers come to the process with greater power—that can often approximate expertise—and, thus, have less to gain from representation than claimants. Similarly, claimants come to the process with less power and, thus, have more to gain from representation, whether it is the fact of their own representation, representation when the employer has none, or when both parties are represented.

And for both parties, this theory and the findings carry through to a representative who appears at a hearing, as opposed to simply being the representative of record. This is consistent with theories of power and expertise, as a representative who appears is more likely to affirmatively act on behalf of a party than a representative who is only of record. Although, it is important to note that the data show that representation without appearance still confers some advantage. We argue that this is because representatives can still provide expertise without appearing at a hearing—by helping the party select which evidence is important to disclose or introduce, by shaping case theory or testimony, by explaining substantive or procedural law, or through other means.

Notably, when both parties are represented, claimants see a higher proportion of favorable outcomes as compared to when both parties are unrepresented. This last observation highlights the role of party power in any question of representation and supports the idea that more powerful parties, whether through functional expertise, repeat player advantage, or simply greater resources, necessarily have an advantage in the civil legal process. The presence of representation on both sides mitigates this ad-

96. Despite the difference from previous studies in overall claimant success rates, this study's findings that represented claimants, as compared to unrepresented claimants, have a higher proportional win rate than represented employers, as compared to unrepresented employers, is consistent with those studies. See KRITZER, *supra* note 40, at 34; Rubin, *supra* note 50, at 628.

vantage. Where there is no representation, the parties do not have balanced power, but when there is representation for both parties, the parties' power is more balanced.⁹⁷

Returning to our example, when Wilma faces SGI in her unemployment benefits appeal, there is an obvious disparity in power between the parties. Wilma has never been in the court before; indeed, she has never been in any court. She earned minimum wage working for SGI and has had no income for a month while awaiting a decision on her appeal. Elaine has been in the court many times before. She has a basic understanding of what she must prove to ensure the judge denies the worker's claim for benefits. She knows the type of evidence the judge wants to see. Although she is not a lawyer, she understands the setting and the process well.

In this setting, Elaine would certainly benefit from legal representation. For example, a lawyer would understand that the testimony of a witness is better than assertions contained in a hearsay document. But we argue Elaine will do a fairly good job on her own because she has done it so many times before and learned some things along the way.⁹⁸ In comparison, the relative benefit of legal representation for Wilma is much greater. She has everything to gain from a lawyer's expertise. In addition, the fact of representation may provide Wilma with some psychological comfort and increase in power as the party who has never been to court before. A corollary issue is the symbolic effect of a powerful party. Thus, in our example, SGI's reputation in the community as a significant employer and Elaine's reputation in the court as a regular presence may be another imbalance in power that works against Wilma.

B. Representation, Use of Procedures, and Strategic Expertise

An initial finding of our research, that employers are more likely to take advantage of appearing at the hearing and evidentiary steps, can be explained in two different ways. First, the employer has the initial burden in quit cases and the entire burden in misconduct cases and, as a result, must show up and use testimony or documents to make its case. Thus, it is unsurprising that employers are more likely to appear and take ad-

97. Of course, a limitation of our study is that we do not know why some parties have representation and some do not. There are many reasons why an employer or a claimant may seek or retain counsel, and these reasons are likely to interact with our findings regarding balance of power. We hope that future work explores the interaction of these issues.

98. We recognize that there is variation in employers and claimants. For example, if Wilma had been a cashier at a store with two employees and the owner, who appears at the hearing, has never been to court before, the role of representation may be different. If the owner, like Wilma, knows nothing about the substantive law, procedures, or formalities of communication in the courtroom, he would also benefit significantly from legal representation. For example, a lawyer might introduce a crucial piece of evidence that the owner would never think to bring. However, for purposes of this project we are relying on the assumption that employers, in general, are more sophisticated and appear in court more frequently than claimants. It is our hope that future research will test our findings and theories through a more detailed examination of parties' sources of power.

vantage of the mechanisms for introducing evidence. Second, employers, whether represented or not, are more likely to be sophisticated or repeat-player actors and, thus, more likely to be aware of and take advantage of procedural mechanisms.

Further, the finding that represented parties on both sides appear, introduce testimony, and disclose, introduce, and admit documents at higher rates, as compared to unrepresented parties, is a logical result because it reflects the procedural expertise of the representative. In addition, the frequency with which employers use procedures—whether represented or not—underscores the theory of how parties' inherent power interacts with the expertise contributed by a representative. In this data, the employer uses most of the studied procedures most of the time, and the rate is slightly higher when the party is represented. This is consistent with the theory that employers come to these cases with sophistication and repeat-player experience that places them in an advantageous position, regardless of representation. Thus, as borne out by the data on representation and case outcomes, an employer wins marginally more cases when represented, as compared to employers who are not. A represented employer who uses any procedure has more favorable case outcomes compared to employers, represented or not, that do not use these procedural steps.

However, the analysis of the relationship between use of procedures and the party's case outcome reveals a more complicated picture. Our analysis of balance of power argues that claimants have more to gain from representation because they begin in a position of less power and sophistication. The data showing significant differences in use of procedural steps when a claimant is represented as compared to when she is not represented is consistent with this theory. However, our results also reveal the surprising result that when a represented claimant uses some of these steps, the claimant's win rate is lower than when the represented claimant does not use those same procedures.

The data show that a represented claimant who presents testimony or discloses or introduces documents is associated with a lower proportion of favorable case outcomes as compared to represented claimants who do not use these same steps. The same is true when the claimant presents testimony and is exaggerated when the claimant testifies. The only exception to this pattern of worse case outcomes with increased procedural participation is when the claimant appears at the hearing. When all of the procedures are analyzed together, neither represented claimants nor unrepresented claimants see significant differences in case outcomes with the use of any procedure as compared to not using any procedure. This result—contrary to our hypothesis—suggests that claimant representatives' use of procedures is in some way not effective and raises important questions about the value of representation and the type

of representation necessary to have a positive effect on a party's outcome.

There are a number of potential explanations for this surprising finding, and we argue that our theory of strategic expertise captures a number of these explanations. One explanation for this finding is that the substantive legal context of our study—where the burden of proof is placed entirely on the employer in misconduct cases and initially on the employer in voluntary quit cases—creates disincentives for a claimant to use procedural steps to introduce evidence. In these cases, a claimant automatically wins when an employer introduces no evidence. Thus, any use of procedures to introduce evidence by a represented claimant holds the inherent risk of weakening the presumption in the claimant's favor. Claimant representatives may choose to introduce documents in "closer" cases or cases where the representative perceives the case as unlikely to win and, thus, is simply using every procedure. Alternatively, it may be that represented claimants are more likely to use procedures to introduce evidence where the employer has already presented a strong case, and the representative perceives the need to introduce more evidence to counter the perceived or real lower likelihood of winning the case. Relatedly, when a representative uses a procedure to introduce evidence, there is a risk that the lawyer goes too far and introduces more evidence than is necessary to advance the claimant's case theory, ultimately weakening the claimant's case.

Another explanation may be the judge's perception of a claimant representative's procedural activity. It may be that because employers have the burden of proof a judge perceives a represented employer's use of procedures to introduce evidence as a signal that the employer has a strong case. This may be especially true when employers or their representatives are repeat players before a particular judge. The judge may similarly perceive a represented claimant's use of procedures as a sign of a weak case, interpreting introducing evidence when the burdens of proof do not require it as a desperate measure. A more cynical explanation may be that a judge may not be used to claimants having representatives, and the shift in procedural dynamics that results from a lawyer in the courtroom leads the judge to be less receptive to the claimant's case.

This pattern of better outcomes for represented employers who use procedures and worse outcomes for represented claimants who use procedures suggests that there is more to understand about how power and expertise function in civil justice settings. Each of these explanations underscores that for a representative to be effective, she must understand and adapt to the context in which she operates. As a result, we argue that the advantage provided by representation only occurs when the representative acts strategically. Thus, a representative who reflexively uses procedures, such as having a claimant testify when the claimant does not have the burden, may hurt the party. In contrast, a representative who

strategically uses procedures, such as keeping a claimant from testifying so that the claimant does not help the employer meet its burden, is more likely to help the party. This is especially true for the party without the burden—usually the claimant—as a representative for an employer who has the burden is more likely to improve outcomes by using any procedure. Similarly, a representative for a claimant who uses a procedure based on unsound strategic judgment is more likely to worsen outcomes because the presentation of evidence may carry the employer's burden and, thus, worsen the claimant's case.

Thus, we propose a third theoretical component of representative's expertise: strategic expertise. This third component of strategic expertise complements existing theories of substantive and relational expertise.⁹⁹ Specifically, strategic expertise is the ability to synthesize substantive expertise with relational expertise and to exercise judgment in applying this synthesis to a particular client's circumstance. This concept of strategic expertise explains what lawyers do to connect formal training with situational understanding and supplement it with strategic thinking and judgment as they serve their clients. Where substantive expertise is abstract, rule based, and learned primarily through formal training, and where relational expertise is grounded in relationships and learned through experience, strategic expertise involves the knowledge, judgment, and skill lawyers employ when making decisions based on a synthesis of inputs gleaned from substantive and relational expertise.¹⁰⁰ Strategic expertise involves combining knowledge of the underlying legal framework with the particularities of a given civil legal setting, including individual personalities and preferences, and exercising judgment to apply this knowledge to a particular client's circumstance.

Revisiting Wilma's case illustrates how lawyers can employ strategic expertise. Imagine that both Wilma and Elaine have lawyers for the hearing, and during the hearing Elaine testifies about Wilma's tenure as an employee of SGI. Elaine asks a question about Wilma's habit of lending money to fellow employees—a topic that is not relevant under the rules of evidence. In the moment that she hears the question, Wilma's

99. See *supra* notes 77–86 and accompanying text.

100. Others have attempted to define legal strategy and strategic decision-making in a variety of ways. See, e.g., David R. Barnhizer, *The Purposes and Methods of American Legal Education*, 36 J. LEGAL PROF. 1, 63–64, 66–67 (2011) (differentiating strategic awareness from both substantive law and “[j]udgment, [a]nalysis, [s]ynthesis and [p]roblem-[s]olving” as an essential focus for legal education); Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 26–27, 42–43 (2004) (observing that “strategic intelligence” is essential in exploring scenarios and choosing effective courses of action and differs from personal, narrative, logical-mathematics, categorizing and linguistic intelligences, which together contribute to a lawyer’s “critical judgment”); Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 345 (1990) (defining legal strategy as a composition of legal tactics based upon fundamental principles such as “concentration of effort on an [sic] hypothesized decisive event, planning from that event backward in time to the present, [and] generating the largest number of reasonable strategic options from which to choose”).

lawyer has a decision to make: does she make a relevance objection? Her substantive expertise in the law of evidence tells her that the statement may be inadmissible and that most judges would sustain an objection. She knows the case well enough to anticipate the answer, one that she believes is not damaging for her case if it comes in (again, drawing on her substantive expertise regarding what she must prove to win the case). Turning to her relational expertise, she knows that this judge has little patience for objections as a general matter, and she has already objected on a number of issues that concern her more than this particular question. She also believes that if she objects, the judge may read it as a sign of weakness in her client's case. The attorney also knows that Wilma is confident in her advocacy and will not be concerned if she does not object to this question. In the mere seconds that she has to make this decision, she weighs all of the inputs from her substantive and relational knowledge and skill and considers how they interact to impact her chance for overall success in the case. She decides there is a greater risk to objecting than there is to letting the answer in. Thus, although an objection would be a legally and procedurally accurate choice, one that would likely have been sustained by the judge, her understanding of the human dynamics in the room, the substantive legal issues in her case, her particular client, and her strategic understanding of the choice presented led her to not object.¹⁰¹

Strategic expertise is the hallmark of quality legal representation and is inextricably linked with good judgment and zealous representation. It is the expertise that lawyers draw on when making bold choices or taking calculated risks in their work. It comes into play when a lawyer pushes the boundaries of the law to make a novel legal argument; when a lawyer presents the facts of her client's case in a way that reflects not only the merits of the case but also her impressions of the jury; when a lawyer chooses to make a lengthy closing argument before a visibly impatient judge based on the calculation that the legal and factual issues are too complex to forego thorough treatment; or when a lawyer chooses to disclose information to an opposing party because she believes it will lead to a favorable settlement, even when the disclosure is not required by formal legal procedures. Unlike substantive or relational expertise, only a representative can provide a party with strategic expertise. While a judge may be able to explain a legal concept or procedure to a pro se party, and an unbundled service provider may be able to tell a claimant to

101. Kritzer's concept of "process knowledge," described *supra* note 76, includes a lawyer's understanding of how a given legal setting typically operates, for example, knowledge about the hearing process for a particular type of case, including the process in a particular court. Our concept of strategic expertise includes the understanding of the operation of a given legal setting that is captured in Kritzer's process knowledge, but strategic expertise expands process knowledge to capture a lawyer's contextualized decision-making, which takes into account her knowledge of "typical process" as well as what this knowledge means for the specific case, client, and issue she is handling, and ultimately, how the synthesis of this information will inform her choices.

speak slowly before a certain judge, only a representative who is in a hearing with a party and knows the party's case as her advocate can lend strategic expertise at a given moment.

This theory of strategic expertise is consistent with the sociological theory that a lawyer's effect is primarily about helping a party navigate procedures and forcing a court to follow its own rules.¹⁰² However, our view is that a lawyer using strategic expertise may push a court to enforce its own rules if that is the strategically advantageous choice in a particular factual and legal context. But it is just as likely that a lawyer makes the choice to not encourage the enforcement of a rule because that is the strategically sound choice for that client in that context.

Strategic expertise, like relational expertise, is not necessarily taught in any formal context.¹⁰³ It is perhaps sometimes innate or developed from nonprofessional experiences, but it is typically gained and developed through professional experience. It is situated and highly contextual, but it includes a deep appreciation for legal and procedural complexity. It also includes an appreciation of risk and the ability to weigh costs and benefits of choices. It necessarily involves judgment. Sometimes, strategic choices require an attorney to ignore social and cultural cues in favor of a principled legal position. Sometimes, strategy requires a lawyer to ignore legally incorrect moves by judges or opposing counsel in favor of preserving relationships. It is the expertise that guides a lawyer in choosing her battles wisely. In many ways, it is the essence of effective problem solving; it combines an appreciation of legal frameworks, an understanding of the human context in which law operates, and effective contextual judgment, and it is thus an essential component of a lawyer's professional expertise.

C. Recommendations for Policy and Practice

Readers may draw varying conclusions from our findings. Some may conclude that our data suggest that lawyers are not the solution to the civil litigation crisis, while others may conclude that our findings support full representation for all civil litigants. We do not believe that our findings tell us that representatives do not help less powerful parties. In fact, the data show that, overall, representatives can and do help less powerful parties. But there are things that representatives do that may not be helpful in certain contexts. Thus, we think the appropriate starting point to any policy change is the principle that representation is not monolithic.

102. See Sandefur, *supra* note 5, at 910–11, 924; Sandefur, *supra* note 49, at 74 (describing empirical evidence suggesting that “part of what lawyers do to affect litigation outcomes may be assisting people in managing procedural complexity”).

103. Though, like relational expertise, clinical legal education and other experiential curricular approaches are opportunities for law students to develop strategic expertise.

As a matter of policy, we recommend that different legal contexts call for different types of legal assistance and for representatives making different strategic choices. It may be that our theories of strategic expertise lead to the conclusion that lay representation, unbundled services, court reform, or technology-based services are the most effective solutions for particular legal contexts. But we cannot assume representation needs based on partial information. Instead, we need to understand how the balance of power and expertise interact with the particular legal context and how that translates to the role of representation and other forms of legal assistance. That said, we believe that several broad policy recommendations emerge from our analysis.

First, any policy designed to increase access to civil justice requires a particularized understanding of the balance of power in the cases and civil justice settings in question. For example, those courts with drastically unequal balances of power are likely to be legal contexts that require full representation because limited representation or nonlawyer court assistance does not provide enough expertise to offset an imbalance in power between parties. Similarly, some legal contexts are (or can be designed to be) ones where the parties are on equal footing and, thus, representation is a poor use of limited resources to assist civil litigants.

Second, our findings regarding strategic expertise suggest that partial representation or limited legal assistance may be more harmful than helpful. Our findings show that among represented claimants, those who use procedures do not fare better than those who do not use procedures, and we suggest this is closely tied to strategic expertise. This suggests that even a lawyer who does not wield appropriate strategic expertise runs the risk in certain contexts of being harmful to her client. Though it is theoretically possible that limited assistance can be designed to include strategic expertise, we believe this is a daunting challenge. Thus, it may be that limited legal assistance or unbundled representation is in fact counterproductive for a client in that circumstance.

A corollary to this recommendation is that we need effective mechanisms for making sure lawyers are using strategic expertise on behalf of their clients. This is a component of the challenge that legal education continues to face regarding how to prepare law students to be practicing attorneys. It is also a challenge for legal employers to understand how particular lawyers can share their own contextual knowledge most efficiently. Finally, this is a particular challenge for pro bono legal services. Pro bono representation often involves handling individual cases that diverge from an attorney's usual area of expertise. Our findings suggest that, for this approach to legal services to be effective, we must identify ways to ensure these attorneys have relevant strategic expertise, and do not reflexively—and harmfully—use their knowledge without an appreciation for the legal and factual context.

Our third policy recommendation is that self-help resources must find a way to convey the functional equivalent of strategic expertise to litigants. For example, in our data, burdens of proof are a powerful legal concept that shape strategic choices and ultimate outcomes in many cases. And, like many courts with largely pro se parties, the site of our study has resources available for pro se litigants in unemployment insurance appeals.¹⁰⁴ Yet, none of these resources explain how the burdens of proof function in these cases, even though a basic instruction like “if the employer does not appear and you do, you will win” would be meaningful for many litigants. If self-help resources are going to continue to play a major role in access to justice reforms and if they are to be effective, they must evolve to convey some equivalent to strategic expertise to pro se litigants.

Our final policy recommendation concerns pro se court reform. Though we are not willing to abandon representation as a powerful tool for increasing access to justice, we recognize that pro se court reform is also an important strategy.¹⁰⁵ We believe that our findings suggest that pro se court reform rightly focuses on increasing the navigability of courts for unrepresented individuals, but it must also account for situations when representatives do appear. As our findings demonstrate, the balance of power and representation is as significant as the presence or absence of representation for a single party. Thus, even in the most pro se-friendly court, the unusual appearance of a representative may shift the power dynamic and, thus, complicate the litigants’ experiences of justice. If pro se court reform is to be an effective access to justice strategy, then it must account for these balance of power dynamics.

D. Areas for Future Research

In addition to insights for policy reform, our findings raise new questions for future research in this study and others.¹⁰⁶ One issue raised by our analysis is whether and how the type of representation affects the represented party’s advantage. For example, in our sample, employers have nonlawyer representatives in 38% of all cases while claimants have nonlawyer representatives, mostly student attorneys, in 2% of all cases. Other studies have shown that nonlawyer representatives are less effec-

104. See *Department of Employment Services*, D.C. OFF. ADMIN. HEARINGS, <http://oah.dc.gov/node/173242> (last visited Nov. 24, 2015).

105. See Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 787–88 (2015). See generally Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (emphasizing the importance of focusing energy and resources on pro se court reform due the shortcomings of the “Civil Gideon” approach).

106. See, e.g., Dalié Jiménez et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL’Y 449, 451 (2013) (“Our hope is that, in describing our project in detail, we will clarify the process and encourage other to dip their toes in, seek out an empirically-minded partner if needed, and start testing hypotheses.”).

tive than lawyer representatives.¹⁰⁷ This suggests a number of questions for future research. Do nonlawyer representatives help parties less than lawyers? Does this analysis change relative to the power of the represented party or the balance of representation in the case? Could the high proportion of nonlawyer representation explain this Article's finding that employers gain less advantage from representation than claimants? What is it that lawyers do for a party, as compared to what nonlawyers do, that makes them more helpful? What is the nature of nonlawyer expertise versus lawyer expertise? These questions naturally tie to questions of strategic expertise. If, as we theorize, lawyers contribute strategic expertise in a way that lay representatives cannot, then the data should bear this out. Employers with attorneys who show up should win more than employers with lay representatives, and this should be especially true when these representatives appear at the hearing. In addition, analysis of the variation in actors may reveal different insights. Does expertise function differently for different representative types? Are there differences in how expertise functions for individual representatives within a given category of representatives? Does it function differently for representatives who are repeat players as compared to those who are not? The role of representative expertise, which leads to increased engagement in the legal process but that can, paradoxically, lead to worse case outcomes when exercised inappropriately, also suggests areas for future inquiry. Does the use of procedure and its success vary by the type of representative? Is a lawyer more successful than a nonlawyer at using procedures, suggesting that lawyers do contribute unique, or at least less common, strategic expertise? These questions of representative type are especially important for our civil legal system. We continue to struggle with achievable ways to provide civil litigants with effective access to legal systems, and we continue to debate solutions ranging from guaranteed attorney representation to limited legal advice to self-help resources. Yet, we are trying to create change without understanding which of these types of representation is effective in which contexts. Thus, understanding representation type in context is a crucial part of this conversation, and a future article will focus on some of these questions.

An additional area of inquiry is how the presence of representation in a particular court or type of case might itself impact the dynamics of power balance and expertise. Put another way, when representatives are repeat players in a legal context, does that presence create systemic change that alters or reduces the need for representation? Are there types of cases—in our data and generally—where representation has been consistently present, and are there measurable changes in behavior or outcomes in those cases even when representation is no longer present?

107. KRITZER, *supra* note 40, at 76–77.

Another set of questions concerns how parties come to have representation. Qualitative research into the selection criteria representatives use to take clients may help us understand selection in context, as might qualitative research into how employers and claimants come to seek out or obtain representation. Further, developing controlled or randomized study designs that take these factors into account will enhance our understanding of this important component of representation in context.

Analysis of procedures other than those used to introduce evidence may reveal additional insights into representation and expertise. Is there a difference between those procedures that happen in a hearing and those that happen outside the hearing, such as motion practice? Does expertise function differently with regard to procedures that do not implicate the burdens of proof, such as a motion to continue as compared to a motion to dismiss on the merits? Does analysis of how expertise actually functions pose critical questions about theories of client-centeredness and how a lawyer should enable her client's voice and narrative in the legal process? Are a representative's actions outside the hearing important to the analysis of expertise? Are there procedures which representatives use more and with more success, such as pretrial motions, requests for continuances, or requests for phone hearings, that have different relationships to case outcomes than procedures in the hearing?

We also believe our findings raise important questions about the sources of parties' power and how they affect the balance of power between the parties. One identified source of power is substantive law; in this study the burden of proof is an example of this source of power for a claimant and her representative. An area for future research is theorizing a typology of sources of power and how these sources of power are different in different legal contexts. Another source of power is procedural rules, and this source of power may shift depending on how representatives and parties use it. For example, a representative who makes frequent use of a procedure that has not been previously used may shift the balance of power in that legal setting. Thus, another area for future research is the existence of these sources of power and how use of them by representatives shifts the balance of power between the parties. Are there characteristics of parties that can predict the functional expertise the party wields without representation?

In addition, there is much to learn about how the characteristics of a case interact with the balance of power and representation. For example, in unemployment cases, the burden of proof varies depending on the theory of the case, and so we hope to explore how this variable interacts with the balance of power and representation. Analysis regarding the type of case may provide more insight into the use of procedures and strategic expertise. It may be that claimants' use of procedures to introduce evidence in a quit case—where the claimant bears part of the burden of proof—has a different relationship to case outcomes than in a

misconduct case—where the employer bears the entire burden. And if there is not variation in the use of procedures and case outcomes, that may provide important insight into whether representatives for claimants are in fact contributing strategic expertise that translates to effective representation. An additional layer of analysis could also include which party files the appeal, as this may help understand the party's interest in the case or motivation to use procedures. Does the type of case change the expertise dynamic? Is it more or less important to have a lawyer's expertise when you are a party with the burden or a party without the burden? Similarly, does this expertise operate differently in cases where the party on the other side is the government as opposed to an employer? In addition, is there a way to measure the factual strength of a case to explore the interaction of that variable with balance of power and representation?

Finally, we believe there is a compelling need for analysis of the role of judges. Do different individual judges or their backgrounds result in different case outcomes relative to use of procedures? What is the role of judges in analyses of representation in context? What role does the judge play in exacerbating or mitigating the balance of power and representation between the parties in the hearing? If one party is unrepresented, does the judge—intentionally or unintentionally—change her behavior to level the playing field? How does strategic expertise, and particularly the absence of it, affect a judge's perception of a party and that party's case outcomes? Does the presence or absence of a representative exercising strategic expertise interact with the judge's procedural or substantive choices in the hearing? Are judges appropriate and effective actors in mitigating an imbalance of power or lack of expertise? Some of these questions may be answered by additional analysis of this data set, and some may be understood better through qualitative research.

All of these questions for future exploration underscore the central concept of this project: to understand when, how, and why representation matters, we must engage in the complexity of the legal process and parties' experiences in it. The corollary to embracing complexity in our research efforts is understanding how these questions and their empirical results affect the reality of the civil justice system.

CONCLUSION

We cannot understand civil justice outcomes, party experiences, or the role of representation without an appreciation of context. This Article begins a conversation about the context in which representation operates. Our analysis of the balance of power and the role of expertise can be replicated across a range of civil justice settings, from other administrative courts to immigration proceedings to municipal and state district courts. These issues can and should be explored in other areas of sub-

stantive law, particularly those affecting the vast majority of litigants in American courts, such as housing, family, and consumer law.

Beyond the specific questions about representation raised in this Article, this research project and others like it add to our base of knowledge and understanding regarding the real-world operation of civil justice in America—a necessary step in solving problems facing the civil justice system. Despite the recent resurgence of interest in access to justice issues, there is still much that we do not know about how the civil justice system actually operates.¹⁰⁸ Even with ongoing conversations about the crisis in civil justice among those who work in the trenches of legal services and on access to justice research, it is all too clear that we do not yet have the theory, the data, or the analysis needed to change our civil justice system for the better. Studies such as this one advance our understanding of the nuanced dynamics of legal representation and legal processes in context. Just as importantly, this work also increases our understanding of what is actually happening, on a day-to-day basis, in our nation's civil courts.

METHODOLOGICAL APPENDIX

This Article is part of a broader study based on the broadest and deepest collection of data about representation in recent years. The study is informed by our experience representing claimants in unemployment insurance appeal hearings before the District of Columbia Office of Administrative Hearings. Though we did not conduct formal qualitative observations of these hearings, two of the authors have supervised clinical law students in these cases over the course of five years and in more than a hundred cases combined. This clinical practice has led to conversations with other representatives, judges, and court staff about various issues concerning representation in this context. The questions raised by the authors' experiences in these cases were the impetus for this project; the relationships developed during these cases led to access to the data for this study; and the authors' observations contribute to the hypotheses in this Article.

To identify a universe of cases for this Article, we collected unemployment benefits appeals hearing data from the District of Columbia Office of Administrative Hearings for the year 2012. This data set encompasses 1,794 unique cases over the study period.¹⁰⁹ In order to ensure the greatest utility of the data, coded variables include the following:

108. See Albiston & Sandefur, *supra* note 2, at 117–20 (identifying a lack of information about the demand for civil legal services including how individuals understand and interact with law and the justice system).

109. The data discussed in this Article are the result of a larger effort to collect data on all unemployment insurance appeals in the District of Columbia for 2011, 2012, and 2013. We anticipate that this data set will be available for the future research proposed at the conclusion of this

- a party's representation (or lack thereof),
- the type of representation (lawyers, third parties, clinical students, lay representatives),
- the presence of representation at the hearing (as representatives do not necessarily attend the hearing),
- the appearance of parties at the hearing,
- the participation of parties in different procedural elements of the case, and
- the length of time for procedural steps and cases to be resolved.

As a key goal of the study is to understand the context of representation, we attempted to code every possible procedural element of each case, though only a subset of these procedures are addressed in this Article.¹¹⁰ The coded variables include the following:

- dates of the eligibility period,
- date and substance of the underlying agency (claims) determination,
- date of filing of the appeal,
- date and number of document disclosures,
- number of documents introduced,
- number of documents admitted,
- date and number of witnesses disclosed,
- date and outcome of requests for subpoena,
- date of any pretrial motions filed and their outcomes,¹¹¹
- date of any hearings held,
- the appearance of parties at the hearing(s),
- the appearance of representatives at the hearing(s),
- any appearance and testimony by witnesses,
- telephone appearances,
- use of interpreter,
- verbal motion for judgment at a hearing,
- verbal voluntary dismissal at a hearing,
- date of any posthearing motions and their outcomes,
- final procedural outcome, and

Article and will include approximately 7,000 unique cases, approximately 5,200 of which concern the circumstances of separation from employment.

110. Some procedures, such as disclosure of witnesses, are excluded from this Article because of small sample sizes in our one-year data set. Other procedures, such as the use of motions, are not considered because we believe they are more complex and potentially implicate other areas of inquiry. Thus we plan to address them in future articles.

111. Pretrial motions include those to withdraw the appeal, withdraw as representative, expedite the final order, continue the hearing, for a new hearing or to reopen a case, for relief from a final order, for reconsideration, for subpoena, for telephone hearing, to compel, noting intent not to appear, for judgment, for extension of time, to file under seal, to add a party, to quash, for an interpreter, to consolidate cases, to appear *pro hac vice*, to supplement the record, and to remand, as well as responses to these motions.

- final substantive outcome.

To collect the data, we engaged in a three-step process. First, we downloaded data from the court's case-management system. Second, we supplemented and verified this data through review of each paper case file, conducted according to a comprehensive collection protocol. Third, we performed supplemental two-tier data checks of the paper case files and reviewed the collected data for both internal consistency and consistency with court procedures. We then coded the collected data according to a comprehensive coding plan to allow for the use of statistical software for analysis.

This Article focuses on a subset of the data: all unemployment appeals where the circumstances of separation are at issue, regardless of which parties appeared at the hearing. This is not a sample of available cases but rather every such case in the District of Columbia in 2012. This data set captures the breadth of circumstances where representation may have a correlation to outcomes and is a larger and broader sample than earlier studies. It does not, however, include the subset of unemployment appeals regarding underlying questions of eligibility and benefit calculation, as those appeals involve a state agency rather than the employer as the opposing party.¹¹²

We use a combination of cross tabulations and difference in proportions tests to demonstrate patterns of relationships between the variables of interest present in the data. Cross tabulation allows us to demonstrate basic patterns of correlation in the data, and difference in proportions tests allow us to further investigate the relationships of interest through statistical testing of the comparison of groups. Cross tabulation is a descriptive statistical tool that summarizes data into contingency tables by grouping the frequency of interrelation between variables.¹¹³ Difference in proportions tests allow us to determine if certain outcomes of interest (e.g., winning or losing an appeal) can be attributed to a statistically significant difference between groups based on the presence or absence of an additional characteristic of interest (e.g., having representation or not).¹¹⁴ In this initial examination of the data, we seek to identify meaningful patterns in the data that may be further tested by more complex empirical methodology in future work.

112. The results presented in this paper include only cases where the legal issue is a claimant's qualification for benefits. We have made the analytical choice of separating the two data sets because the parties, the nature of representation, the hearing process, and the legal and factual issues involved in eligibility and qualification cases are substantively different and would make a combined analysis unworkable. In future work, we hope to explore the particular dynamics of eligibility cases, which also raise issues of power and legal expertise, albeit in different ways.

113. PHILIP H. POLLOCK III, *THE ESSENTIALS OF POLITICAL ANALYSIS* 59–61 (4th ed. 2012).

114. ALAN C. ACOCK, *A GENTLE INTRODUCTION TO STATA* 139–42 (2d ed. 2008).

We recognize the criticisms lodged against observational studies about the impact of representation. Though our access to data and the ethical challenges of randomizing representation mean this study is not based on a randomized design, it is based on all unemployment cases, rather than a sample, in the relevant time period.¹¹⁵ We note that we do not call what we do “causal” and instead use statistical methods to compare groups and to demonstrate the correlative relationships between representation and case and procedural outcomes. While we recognize the limitations of our analysis, we believe our observations are still meaningful. Even though it is not operating from a random sample, our approach of using a complete set of cases to look at differences between groups provides important insights into the questions of representation, balance of power, and strategic expertise that frame future work to test the theories we develop in this Article.

115. An example of the logistical and ethical challenges of randomizing the contextual questions we raise is: even if one could randomize ethically the fact of representation for a party, it is hard to imagine how to randomize ethically whether a particular party presented testimony or introduced a document, in order to measure the corresponding case outcomes.

