The Quality of Advocacy in the Federal Courts

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THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS

A Report to the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts

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TABLE OF CONTENTS

APPENDIXES

LIST OF TABLES

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

FOREWORD

This report sets forth in detail the findings of a study conducted by the Federal Judicial Center for the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts. The heart of the report is the analysis of information supplied by federal judges through responses to questionnaires and evaluations of attorney performances in actual trials in their courtrooms over a period of several months. Significant additional information was received from questionnaires distributed to members of the bar.

The degree of participation by both judges and lawyers in this study—as measured by the remarkably high response rates—demonstrates the shared concern of bench and bar that representation of litigants in federal courts should be of the highest possible quality.

We are grateful to all who participated in this study and are confident that their efforts will contribute to the goal of improved trial advocacy that led the Judicial Conference to create this special committee.

A. Leo Levin
Director

PREFACE

In September, 1976, the Chief Justice of the United States, acting in his capacity as Chairman of the Judicial Conference of the United States, appointed the Committee of the Judicial Conference of the United States to Consider Standards for Admission to Practice in the Federal Courts. This committee has come to be known by the name of its chairman, Chief Judge Edward J. Devitt of the United States District Court for the District of Minnesota.

Following the committee's initial meeting, Judge Devitt appointed a Subcommittee on Procedures and Methods, chaired by Judge James Lawrence King of the Southern District of Florida. The initial mandate of this subcommittee was to propose a course of action for gathering the information needed to accomplish the committee's task. In consultation with the staff of the Federal Judicial Center, the subcommittee developed the outlines of a program of research, and in December, 1976, they recommended to the full committee that the Center be asked to undertake the research. The full committee accepted the recommendation; this report is the product of the research undertaken pursuant to their request.

The report reflects the contributions of many people. The first and foremost contribution to be recognized is that of the members of the bar and bench who completed the various questionnaires and rating forms. Their responses are the substance of this report, and their high response rates have contributed greatly to our confidence in the validity of the results reported.

Special recognition is also due to the clerks of the courts and their staffs. In both the district courts and the courts of appeals, they were asked to draw samples of lawyers to generate mailing lists for questionnaires. In the courts of appeals, they were asked, in addition, to administer the program under which judges evaluated the performances of lawyers who appeared before them. Particularly in the courts of appeals, the tasks we asked them to perform represented a substantial addition to their normal duties. Their conscientious work was indispensable to the conduct of the research program, and their cheerfulness in undertaking the extra duties was an additional bonus for us.

Much of the work of preparing and administering survey instruments, as well as tabulating responses, was performed under a contract with the Bureau of Social Science Research, Inc. Gloria Shaw Hamilton, the project manager, and her colleagues at BSSR have been very supportive at all stages. Without their helpful and flexible attitude, we could never have met our deadline for reporting to the Devitt Committee.

In January, 1977, Judge Walter E. Hoffman, then Director of the Federal Judicial Center, appointed an advisory committee consisting of some people concerned with the level of performance of lawyers in the federal courts and some who, it was

thought, might be concerned about possible forms of remedial action. The committee met in February, 1977, to review drafts of research instruments with us; they gave us a number of valuable suggestions. Several members of the committee also commented on a draft of the portion of this report that deals with advocacy in the district courts; because of the slippage in the research schedule, we called on committee members for help at the report-writing stage less than we had anticipated. The members of this committee were Judge A. Leon Higginbotham, Jr., Judge Morris E. Lasker, Judge James R. Miller, Jr., and Professor Robert E. Keeton—all of whom are also members of the Devitt Committee—and Paul R. Connolly, Esq., of the District of Columbia bar; Professor Abraham S. Goldstein of Yale Law School; Dean Frederick M. Hart of the University of New Mexico School of Law; Charles Jones, Esq., of the Legal Services Corporation; and Morton Hollander, Esq., of the Department of Justice. We are indebted to them for their willingness to help.

Many people went out of their way to assist us in developing the portion of the program that involved gathering judges' and lawyers' ratings of videotaped segments of trial performances. The Court of Common Pleas of Franklin County, Ohio, made its file of videotaped trial records available, and the Hastings College of Law allowed use of its file of demonstration courtroom performances. Our colleague, Alan J. Chaset of the Judicial Center staff, played a critical role in reviewing these files for suitable performances, editing the performances to produce the segments used, and collecting some of the data. The four lawyers whose performances were selected for the experiment generously consented to this use of the materials. At the request of Professor Keeton, a small group of distinguished Boston trial lawyers viewed the videotaped performances and gave us useful suggestions about them. The American College of Trial Lawyers made it possible to pretest the experiment at their spring meeting in March, 1977. Thomas E. Deacy, Jr., a former president of the college and a member of the Devitt Committee, and Richard W. Pruter, the executive director, made the arrangements; some eighty-four members of the college took time out of their schedules to participate. Finally, Professor Clyde H. Coombs of the University of Michigan provided valuable advice on the analysis of the videotape data.

Among our many colleagues at the Center who have lent a hand from time to time during the progress of the research, five—in addition to Mr. Chaset—stand out for the importance of their contributions. They are Myrna L. Brantley, Charles R. Cohen, Michael R. Leavitt, Patricia A. Lombard, and Chloe A. Morgan.

Our debt to all of these people is cheerfully acknowledged. However, responsibility for any remaining errors of fact or interpretation is ours alone.

Anthony Partridge
Gordon Bermant

CHAPTER 1

PURPOSE, APPROACH, AND LIMITATIONS OF THE RESEARCH

The general purpose of the research reported here has been to assess the quality of advocacy in federal trial and appellate courts. More specifically, an effort has been made to develop data bearing on three questions:

1. the importance of the problem of inadequate trial and appellate advocacy;
2. whether inadequate advocacy is a more important problem among some segments of the profession than among others; and
3. whether certain aspects of trial or appellate performance can be identified as particularly appropriate targets for improvement efforts.

The hope has been that we could not only make an assessment of the seriousness of the problem of inadequate performances, but that we could also contribute to an understanding of the elements of the problem that would be useful in the development of any remedial programs that might be warranted.

The research program has been conducted almost entirely through the use of survey instruments. Judges in both district and circuit courts were asked to evaluate the performances of lawyers who appeared before them, using rating forms provided by the Judicial Center. A number of questionnaires were administered to judges and to members of the bar. In addition, an experiment was conducted in which federal district judges evaluated videotaped trial performances, so that an assessment could be made of the degree to which trial judges are mutually consistent in their evaluations when presented with a single performance.

Although we have tried to address each of the principal research questions in a variety of ways, and to bring several items of data to bear on each, it is important to recognize that everything in this report is ultimately founded on the judgments of judges and lawyers about the quality of lawyer performances. Judges were asked to evaluate particular performances without being given any standard for the measurement of performance quality. Judges and lawyers were asked for their opinions about the quality of lawyer performances, again without being given any standard. The results reported necessarily reflect the standards of judgment of those responding, standards that have surely been influenced by their experience in the American legal profession. English or Canadian judges and lawyers, who have had different common experiences in the course of their professional development, might have brought quite different standards to a similar evaluation task.

Implicit in this research, therefore—assumed rather than tested—is an acceptance of the standards for evaluation that are accepted by judges and lawyers in the United States.

As noted above, we have sought to identify segments of the profession in which problems of inadequacy are particularly serious, and also to identify particular litigating skills in which deficiencies appear to be a problem. To that extent, we have been able to respond to the committee's interest in the causes of inadequacy. But it must be

emphasized that statistical information is extremely limited in its power to support inferences of causality. To the extent that we have asked judges and lawyers for their opinions about causes of inadequacy, we can report on those opinions. To the extent that we have correlated performance ratings with characteristics of lawyers, we can report only on correlations. The fact that two items of data are statistically associated with one another does not mean that one is the cause of the other. A cause-and-effect statement, if it is to be made, necessarily reflects a combination of the statistical data with information derived from other sources.

The data show, for example, that performances by lawyers with little or no previous federal trial experience tend to be evaluated less favorably than performances by lawyers with considerable federal trial experience. It would not be unreasonable to infer that experience improves quality. But it is equally consistent with the data to conclude that a self-selection process is operating, and that lawyers drop out of federal trial practice if they perform poorly in their early efforts. The data available through this study are of no assistance in determining whether either or both of these mechanisms are operating. If an answer to that question is to be given, it must be found through bringing other information to bear.

To say this is not to suggest that it is inappropriate to draw causal inferences. It is merely to urge that they be recognized for what they are: that is, conclusions generated by considering the research data in the light of other knowledge. Before such inferences are accepted, they deserve to be examined with the same skepticism that American lawyers traditionally apply to explanations of connections between events, including exploration of the possibility that alternative explanations may be equally plausible. It might be concluded, after such consideration, that experience probably improves performance. But the data, alone, do not say it.

In a similar vein, nothing in this report purports to evaluate remedies for inadequacy in the legal profession. On the basis of research of the type reported on here, it may be possible to say that some remedies are irrelevant, or nearly so, because they are poorly targeted. If, for example, there is no serious problem of inability by trial lawyers to offer exhibits properly, an emphasis on improving training in that particular subject would seem to be misplaced. But to the extent that problem areas are pinpointed, and remedial measures targeted at those problem areas are considered, there is nothing in the present research that would tell whether or not a particular remedy would be more effective than another in dealing with the problem.

In short, we have no hope that the information contained in this report will provide answers to all the questions that are relevant for the making of policy. Our hope is much more modest. It is that the report will add a limited number of reliable factual statements to the entire body of knowledge that must underlie the policy-making process.

Research Instruments Used

The research instruments used are reproduced in appendix A. The brief descriptions that follow are intended to assist the reader in understanding the general plan of the research and, almost equally important, in understanding the terminology used throughout the report to describe the various instruments.

Case Reports

In the spring of 1977, each federal district judge was asked to file a report on each trial before him that terminated during a designated four-week period. On the case-report form, the judge was asked to provide a minimum of information about the case and the trial lawyers, and was then asked to evaluate the performance of each of the lawyers. In the fall of 1977, appellate judges were asked to complete somewhat similar case reports with respect to arguments before them. Each court of appeals was given a quota of arguments, and the judges were asked to evaluate up to two arguments a day until the quota was filled.

The effort in the case-reporting portion of the research was to obtain evaluations of a sample of lawyer performances in the trial and appellate courts.

Lawyers' Biographical Questionnaires

The lawyer's biographical questionnaires were brief questionnaires administered to the lawyers in the cases covered by the case reports. The objective was to obtain a modest amount of biographical information about the lawyers being evaluated, so that relationships between the evaluations and certain lawyer characteristics could be explored.

Videotape Study

The videotape study was an experiment in which eighty-nine district judges observed videotaped segments of trial-court performances by lawyers and evaluated the performances on the same scale used in the case reports. The purpose of the experiment was to determine the extent to which district judges apply mutually consistent standards in evaluating lawyer performances.

Judges' Questionnaires

Questionnaires were sent to all district judges and court of appeals judges in the spring of 1977. The purpose of the questionnaires was to elicit opinions about the state of advocacy in their courts.

Lawyers' Screening Questionnaires

The screening questionnaires were sent in the fall of 1977 to samples of lawyers drawn from the docket sheets of the district courts and the courts of appeals. Their primary purpose was to identify those lawyers who try cases or argue appeals in the federal courts with some regularity, so that the lawyers' opinion questionnaires could be sent only to those who had had enough federal court experience that they might reasonably be asked to generalize about it.

Lawyers' Opinion Questionnaires

These questionnaires, administered in the fall of 1977, were similar in concept to the judges' questionnaires—that is, their purpose was to elicit opinions from the bar about the state of advocacy in the federal district and appellate courts.

Quality of the Data

All of the instruments used called for highly structured answers. Specific questions were asked, alternative responses were offered, and the judge or lawyer was asked to choose from among the alternatives. As a separate activity, the Devitt Committee issued invitations for open-ended comments on the matters before them, including oral testimony. But the research reported here did not have that open-ended character. Hence, all of the data reported are subject to the qualification that the responses are only as good as the questions asked and the alternative responses offered. In those instances in which we have become aware, through the progress of the research, that there may have been difficulties with some of the questions, they are discussed in the appropriate sections of the report. There may, of course, still be places where the import of the data is not as clear as the authors would like to think.

The other important question about the data is whether we were successful in getting representative samples of the things that we were trying to sample. For example, can we draw inferences about the views held by United States district judges by analyzing the questionnaires of those judges who responded? In almost any survey research, there are uncertainties about the success in getting a representative response. Frequently, after analyzing the nonresponse to the extent possible, it is only possible to say that no demonstrable bias has been introduced. In the present study, the very high response rates among those who were asked to complete survey instruments provide the best guarantee of reasonably representative results. For example, even if the judges who responded to the district judges' questionnaire were not truly representative of all the district judges, the nonrespondents would have to hold dramatically different views on the questions asked if it were to make much difference in the final outcome.

For each of the instruments, an effort has been

made to analyze the question of representativeness in some detail. The analyses are contained in appendix B. Where the analysis suggests that there may be a serious concern about the data, the problem is also discussed in the body of the report where the relevant data are introduced.

CHAPTER 2

PRINCIPAL FINDINGS

Advocacy in the District Courts

An estimated 8.6 percent of the performances by lawyers in cases that come to trial in federal district courts are regarded as inadequate by the presiding judge. These performances occur in about 16 percent of the cases tried. Using the rating scale employed in the research, about 17 percent of the performances are considered "adequate but no better," 27 percent "good," 26 percent "very good," and 21 percent "first rate." We emphasize that these figures are percentages of performances by lawyers; it would not be correct to infer that 8.6 percent of the lawyers who practice in federal courts were responsible for the performances regarded as inadequate.

We are unable to say how many performances are inadequate according to the standards of a majority, or some other number, of the district judges. The figures above are based on individual trial judges' reports about cases that came before them. Another part of the research showed that district judges are not highly consistent with one another in rating performances using the seven-category scale provided in the research instruments. As in any environment in which evaluations are made by different people, some of the inconsistency reflects differences in the severity with which they rate, and some reflects differences in views about the relative merits of different performances. We are unable to say how much influence each of these elements has on the judges' evaluations of lawyer performances.

Most federal district judges believe there is not a serious problem of inadequate trial advocacy in their courts, but a substantial minority (about two-fifths) believe there is. Those who believe there is a serious problem are, as a group, more critical than those who do not, when evaluating individual lawyer performances. If all the performances in district courts were evaluated by the judges who believe there is a serious problem of inadequacy in their courts, the percentage of inadequate performances they reported might be as high as 13 percent. If all the performances were evaluated by the judges who do not believe there is a serious problem, the percentage they reported might be as low as 6 percent.

The question asked of the judges was whether they believe there is a serious problem *in their courts*. They were not asked to express a view on whether there is a serious problem nationally. Differences in their responses may therefore be partially a reflection of differences in the quality of lawyers' performances from court to court. The data from this study do not enable us to make statements about variations in performance quality between districts. Differences in the judges' responses may also, of course, reflect different standards for evaluating performances and different views about how bad a problem must be before it rises to the level of a "serious problem."

The trial bar's opinions about the quality of advocacy were elicited through questionnaires sent to lawyers who had conducted ten or more trials in district courts in the last five years. Since many practicing lawyers have an opportunity to observe performances in only limited types of cases, the lawyers were not asked for opinions on whether there is, overall, a serious problem of inadequate

trial advocacy in the district courts in which they practice. They were asked to give their opinions, for those groups of lawyers they have an opportunity to observe, on whether there is a serious problem of inadequacy among the groups. Their responses to that question, for each of thirteen categories of lawyers, suggest that the trial bar, on the whole, is about as likely as the bench to conclude that a serious problem exists. Lawyers who are themselves regarded as highly skilled trial lawyers are more likely than either the bench or the trial bar as a whole to think there is a serious problem. They are also more severe than the judges in evaluating individual performances.

A majority of the judges believe that the most frequent consequence of inadequacy in lawyers' trial performances is failure to fully protect the interests of their clients. About a quarter of the judges believe the most frequent consequence is impairment of the orderly, dignified, and efficient conduct of court proceedings; another 45 percent believe this is the second most frequent consequence. Only about a tenth believe that the most frequent consequence is the overstepping of ethical bounds. The responses of practicing lawyers to this question were similarly distributed. Hence, for a majority of both the bench and the bar, it appears that concern about inadequacy is principally concern about the quality of service to clients, and secondarily, concern about the functioning of the court.

The great bulk of lawyer performances in the district courts are by lawyers in five roles: United States attorneys and their assistants, retained criminal defense counsel, appointed criminal defense counsel, private practitioners representing corporate clients in civil cases, and private practitioners representing individual clients in civil cases. In the judges' evaluations of actual trial performances, the reported rates of inadequacy among these five categories varied only slightly: there is no suggestion that the problem of inadequacy is concentrated among lawyers in one or two of the roles. In responding to the question whether there is a serious problem of inadequate trial advocacy among the lawyers in each category, however, the judges did make distinctions. Substantially more judges think there is a serious problem among lawyers representing individual clients in civil cases than think there is a serious problem among the other groups, and very few judges believe there is a serious problem among lawyers representing corporate clients in civil cases. It is not clear how these responses are to be reconciled with the relative stability, across the role categories, of the percentages of inadequate ratings of actual performances.

Members of the bar also distinguished among the role categories when asked if they believe there is a serious problem of inadequate trial advocacy, but they did not make the same distinctions the judges did. Most strikingly, a much smaller proportion of the lawyers believe there is a serious problem of inadequacy among United States attorneys and their assistants.

Other characteristics of lawyers were found to be statistically associated with the percentage of inadequate performances reported. The rate of inadequate performances is higher among lawyers who practice alone than among those who practice with others. It is higher among lawyers thirty years old or younger than among those from thirty-one to fifty-five. It is also higher among those who have not had previous federal trial experience than among those who have.

Majorities of both judges and lawyers believe that the two most frequent causes of inadequate trial performances are lack of specialized trial skills or knowledge, and failure by lawyers to prepare cases to the best of their ability. Relatively few believe that failure to keep abreast of changes in the law or lack of basic legal ability are the most frequent causes.

When judges and lawyers were asked the areas of trial competence in which improvement is most needed, the areas mentioned most often were proficiency in the planning and management of litigation, technique in examining witnesses, and general legal knowledge. Within the category of proficiency in the planning and management of litigation, the component areas most frequently mentioned were skill and judgment in developing a strategy for the conduct of a case, and skill and judgment in recognizing and reacting to critical issues as they arise. Within the category of technique in examining witnesses, the component

areas most frequently mentioned were cross-examination, the use of objections, and direct examination. Within the category of general legal knowledge, the components most frequently mentioned were knowledge of the Federal Rules of Evidence and knowledge of federal rules of procedure.

In broad terms, these expressions of opinion about the areas in which improvement is most needed are consistent with the frequency with which particular deficiencies were observed when judges evaluated courtroom performances. The courtroom evaluations were more critical of time-wasting by trial lawyers, and gave less emphasis to lack of knowledge of the rules of procedure.

Advocacy in the Courts of Appeals

Inadequate performances appear to occur less frequently in the courts of appeals than they do in the district courts. About 4 percent of the performances by lawyers in cases that reach oral argument are regarded as inadequate by a majority of the three-judge panel. About 12 percent are regarded as inadequate by one panel member, and fewer than 2 percent are regarded as inadequate by all the panel members.

Using the rating scale employed in the research, about 16 percent of the performances are considered "first rate" by at least two members of the panel; about 45 percent are considered "very good" or "first rate"; about 82 percent are considered "good" or better, and about 96 percent are considered at least adequate.

These figures are based on panel judges' evaluations of 840 performances by lawyers in the courts of appeals. Because the number of performances evaluated was smaller than the number evaluated in the district courts, the above estimates for the appellate courts are subject to a greater margin of error. In addition, some of the ratings of appellate performances were made after discussion by the panel members and some were made without prior consultation; we do not know the effect on the data of these different modes of rating.

We are unable to say how many performances are inadequate according to the standards of a majority, or some other number, of appellate judges. Appellate judges, like district judges, differ in the standards they bring to the rating process. The judgment of the majority of the panel hearing the appeal provides, in our view, the best available estimate of the frequency of inadequate performances at the appellate level.

About two-thirds of the judges of the courts of appeals believe that there is not, overall, a serious problem of inadequate appellate advocacy by lawyers with cases in their courts. About one-third believe that there is a serious problem. Only in the Ninth Circuit did a majority of responding judges express the view that a serious problem exists. In the Seventh Circuit, there was an unusually strong response to the effect that there is not a serious problem of inadequate appellate advocacy. The data from this study do not enable us to say whether the quality of performances is different in the Seventh and Ninth Circuits than in others, or whether these statistics merely reflect differences in the reactions of judges to similar legal environments. In the other circuits, the proportion of judges believing there is a serious problem remained reasonably uniform.

The opinions of the bar about appellate advocacy were elicited through questionnaires sent to lawyers who had argued ten or more appeals in United States courts of appeals in the last five years. The lawyers were not asked for an opinion on whether there is, overall, a serious problem of inadequate appellate advocacy, since it was assumed that few of them would be able to answer such a question out of their own experience. They were asked for their opinions, for those groups of lawyers they have an opportunity to observe, on whether there is a serious problem of inadequacy among the members of each group. Their responses to that question, for each of thirteen categories of lawyers, suggest that the appellate bar is about as likely as the bench to conclude that a serious problem exists.

The overwhelming majority of appellate judges believe that the most frequent consequence of such inadequacy as exists in their courts is the imposition of unnecessary burdens on judges and their

staffs. A somewhat smaller majority of the lawyers, but nevertheless a substantial one, agrees. This response suggests that the problem of inadequacy in the appellate courts is of a different nature from the problem in the district courts, where majorities of both judges and lawyers believe the most frequent consequence of inadequacy is failure to protect the interests of the clients.

The data based on judges' evaluations of actual performances in the courts of appeals do not suggest that the frequency of inadequate performances is related to the kinds of cases that lawyers handle or the kinds of clients they represent. In responding to the questionnaire inquiry on whether there is a serious problem of inadequate appellate advocacy among the lawyers in each category, however, the judges did make distinctions. Because of the small number of performances evaluated for many of the categories, the questionnaire responses, reflecting the judges' experience over a longer period, may be entitled to greater weight than the evaluations of actual performances. However, it should be recognized that a response about the seriousness of the problem may be based partly on considerations other than the simple frequency of inadequate performances among the group.

A majority of the judges believe there is a serious problem among lawyers employed by state or local governments. Between 30 and 40 percent believe there is a serious problem among appointed counsel in criminal appeals, private practitioners representing individual clients in civil cases, retained criminal counsel, and United States attorneys and their assistants. Fewer than 10 percent believe there is a serious problem among public or community defenders, Justice Department lawyers other than those in United States attorneys' offices and on strike forces, and private practitioners representing corporate clients in civil cases.

Members of the bar who responded to our questionnaires also made distinctions among the categories. However, they did not always make the same distinctions the judges did. Fewer lawyers than judges said there is a serious problem among United States attorneys and assistant United States attorneys. More said there is a serious problem among appointed counsel in criminal appeals, public and community defenders, and United States government lawyers outside the Justice Department.

No relationships were found between the quality of appellate performances, as measured by judges' ratings in actual cases, and characteristics of lawyers such as size of law office, age, year of graduation from law school, previous courtroom experience, or educational background. This finding is in contrast to the outcome of similar analyses about performance quality at the trial level; there it was found that performance ratings were related to office size, age, previous federal trial experience, and some aspects of educational background. We do not interpret the finding as saying that a lawyer's education or experience is irrelevant to the quality of his appellate advocacy. We interpret it only to mean that the impact of the characteristics we examined, if indeed there is an impact, is not discernible through this kind of analysis because many factors we did not examine are also important in determining the level of a lawyer's skill.

About half the judges believe that the most frequent cause of inadequacy at the appellate level is failure by lawyers to research their cases and prepare themselves to the best of their ability. The remaining judges are about equally divided, some saying the most frequent cause is the lack of the basic analytical ability, knowledge, or judgment needed to be an adequate lawyer, and some saying it is lack of the special skills, knowledge, or judgment needed to be an adequate *appellate* lawyer. More lawyers than judges expressed the view that the most frequent cause of inadequacy is lack of the special skills needed to do appellate work. Fewer lawyers than judges identified lack of basic legal skills as the most frequent cause.

When judges were asked the areas of appellate competence in which improvement is most needed, the areas mentioned most frequently were ability to set forth the important facts and issues in briefs in a comprehensible manner, judgment in deciding what points to focus on in briefing, skill in making distinctive use of oral argument rather than repeating the brief, mastery of the law important to the particular case, and mastery of the record below. The information from the evaluations of actual performances does not seem entirely con-

sistent with the judges' questionnaire responses, but does tend to confirm the importance of the first three of these five areas. Responses to the lawyers' questionnaires suggest that more lawyers than judges think improvement is most needed in the oral argument skills, particularly in making distinctive use of oral argument and in responsiveness to questions from the bench.

PART I

ADVOCACY IN THE DISTRICT COURTS

CHAPTER 3

THE QUALITY OF PERFORMANCES IN THE DISTRICT COURTS

District judges' case reports provided district judges' evaluations of 1,969 performances by lawyers who appeared in 848 trials that ended in May and June, 1977. All but eleven of the evaluations included an overall rating of the lawyer's performance in the case, in terms of a seven-category scale provided on the case-report form. The distribution of these ratings is shown in table 1.

On the whole, the ratings present a very favorable picture of the quality of advocacy in the district courts. Almost half the performances were rated "first rate" or "very good"; almost three-quarters "first rate," "very good," or "good." Slightly more than a quarter of the performances, however, received ratings that the lawyers would probably not consider flattering, and slightly more than one-twelfth received ratings that fell short of the threshold of adequacy. The 169 ratings that were below the threshold were distributed among 135 of the 848 trials on which reports were submitted. Hence, at least one performance was regarded as inadequate by the trial judge in almost one-sixth of this sample of cases that came to trial.

It is worth emphasizing, in examining these data, that the unit considered is the lawyer's performance in a case. If two or more lawyers represented a single client, the judge was asked to rate as one "performance" the representation provided jointly by the lead counsel and his cocounsel. Hence, the unit may also be said to be the performance on behalf of a client. It would be incorrect to translate "performances" into "lawyers," and say that 8.6 percent of the lawyers were rated inadequate. Some lawyers who try cases in the federal district courts appear more frequently than others. A relatively small number of frequent appearers may account for a relatively large number of the trial performances. In a sample of performances, the frequent appearers have more influence than the infrequent; viewed as a sample of individuals, it is therefore not satisfactory. Perhaps even more important, the judges were asked to rate performances rather than individuals. They were specifically asked, even if they were familiar with

TABLE 1

District Judges' Ratings of Lawyers' Trial Performances

Rating Category	Number of Performances	Percent	
First rate: about as good a job as could have been done	412	20.9%	
Very good	517	26.3	
Good	532	27.0	
Adequate but no better	328	16.7	
Not quite adequate	100	5.1	
Poor	52	2.6	8.6
Very poor	17	0.9	
Not rated	11	0.6	
Total	1,969	100.0	

SOURCE: District Judges' Case Reports, question 9.

the rated lawyer from other cases, to "try to evaluate the performance in this case as if it were the performance of a lawyer you had never seen before."[1] Thus, not only was the sampling procedure inappropriate as a basis for estimating the proportion of trial lawyers who are inadequate, but the question was simply not asked.

It should also be noted that the district judges were asked to report only on cases that went to trial. Since much of the criticism of lawyers has focused on trial skills, we thought it important to have a substantial number of trial performances rated; if we had asked for reports on all cases, whether tried or not, the overwhelming majority of reports would have been on cases that did not reach trial. In the cases reported on, the judges were asked to rate the lawyer's entire performance, including performance in pretrial proceedings. Nevertheless, because of both the way the sample was selected and the peculiar vantage point of the judge, it must be recognized that these ratings represent a somewhat limited perspective on practice in the district courts. They emphasize the trial skills of those lawyers who went to trial. If there are lawyers who are such skillful negotiators that they regularly achieve favorable settlements without going to trial, their skill would not be reflected here. If there are lawyers who regularly avoid trial by giving too much away in settlements before trial, the case-report data would not reflect that fact.

Subject to that limitation imposed by the research design, we have no reason to believe that the performances evaluated were an atypical sample of performances in the district courts, or that the judges who cooperated in the case-reporting program were either unusually severe or unusually generous in their approach to evaluating the lawyers who came before them Hence, the distribution of ratings in table 1 is probably a reasonable approximation of the distribution that would be found if all district judges rated the performances in trials before them over a more substantial period of time.

Table 2 shows the ratings of the performances, by circuit. Because of the relatively small number of performances rated "poor" or "very poor," these categories have been combined in the table with the "not quite adequate" ratings to produce the single category, "inadequate."

The breakdown by circuit should be treated with considerable caution. Only in the Fifth Circuit is it based on performances in more than one hundred trials; in the First Circuit, it is based on performances in only twelve. For some of the circuits, the data could be heavily influenced by the ratings of relatively few judges. Hence, we are not prepared to say, for individual circuits, that the distribution of the ratings is probably a reasonable approximation of the distribution that would be found if all district judges in the circuit rated all the lawyers appearing in trials before them over a substantial period of time. But taken as a whole, the table seems to indicate that performances regarded as inadequate are spread fairly uniformly across the circuits, with the possible exception of the Ninth. More variability among circuits can be observed in the use of the top four rating categories. It seems probable that not all of the differences are the result of sampling problems, although the unusual pattern for the First Circuit should certainly be heavily discounted because of the very small number of cases involved.

Another approach to the question of inadequate trial advocacy was taken in the district judges' questionnaires and the lawyers' opinion questionnaires.

On the questionnaire for district judges, the following question appeared:

> "Do you believe that there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in your court?"[2]

This question, of course, asks for a broad-gauged assessment of the state of trial advocacy in the judge's court. The response subsumes the answers to a number of other questions, such as the standard to be used in judging adequacy, the frequency with which the judge sees performances that do not meet the standard of adequacy, and how frequent such performances have to be in order to constitute a "serious problem." Particularly in the Second Circuit, where a proposed rule for admis-

1. District Judges' Case Reports, instructions, p.2.

2. District Judges' Questionnaires, question 1.

TABLE 2

District Judges' Ratings of Lawyers' Trial Performances, by Circuit

Circuit[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
First (28)	35.7%	14.3%	32.1%	7.1%	10.7%
Second (238)	15.5	30.7	24.4	19.3	9.7
Third (192)	26.0	30.7	21.4	13.0	8.9
Fourth (176)	14.8	35.8	28.4	11.9	9.1
Fifth (510)	20.8	22.9	27.1	18.6	9.4
Sixth (201)	21.4	17.4	30.3	19.9	10.0
Seventh (151)	27.8	26.5	24.5	12.6	8.6
Eighth (110)	23.6	30.9	23.6	14.5	7.3
Ninth (223)	19.3	24.2	31.4	20.2	4.5
Tenth (101)	19.8	31.7	28.7	10.9	7.9
D.C. (39)	23.1	15.4	33.3	20.5	7.7
All performances (1,969)	20.9	26.3	27.0	16.7	8.6

SOURCE: District Judges' Case Reports, question 9.

[a]Performances are classified by the circuit in which the reporting judge holds his appointment; in a few cases, this will differ from the circuit in which the trial took place. The number in parentheses is the total number of performances reported by judges in the circuit. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 1.2% for any circuit.

Chi-square = 57.5, df = 32, p less than .01. (Chi-square computed on 1,891 performances in the Second through Tenth Circuits for which there were performance ratings.)

sion to practice in the district courts was a subject of controversy around the time the questionnaire was administered, it is not unlikely that some judges' views about the existence of a "serious problem" were influenced by their views on the merits of particular remedial proposals.

Of the 366 judges who expressed an opinion in response to this question, 41 percent stated that they believe there is a serious problem of inadequate advocacy in their courts, and 59 percent that they believe there is not. There were 110 district judges who did not express an opinion—89 who did not respond to the questionnaire, 2 who said they hold no opinion, and 19 who responded to the questionnaire but did not respond to this particular question.

Except for the two judges who said they don't have an opinion on the question, we have no reason to believe that the proportion of judges who believe there is a serious problem differs between those who did not express an opinion and those who did. In any event, to have a substantial impact on the general tenor of the results, the proportion among the judges for whom we have no response would have to be very different indeed. Hence, the views expressed by the judges who responded to the question can safely be accepted as a close approximation of the views of all district judges.

The responses to this question, by circuit, are displayed in table 3. The percentages shown are computed on the basis of judges who answered the question, but the table also shows the number of judges for whom we do not have an expression of opinion. The table thus includes all active district judges as of April 15, 1977, and all senior district judges who maintained a staff and chambers at that time.

It will be noted that some of the differences among circuits cannot possibly be explained by the fact that we did not get a 100 percent response. It is mathematically impossible that as high a proportion of the district judges believe there is a serious problem in the Second Circuit as in the Sixth. Nevertheless, it would be unwise to place a great deal of weight on the differences among circuits in the response to this question. In the First and Dis-

TABLE 3

Opinions of District Judges on Whether There Is, Overall, a Serious Problem of Inadequate Trial Advocacy in Their Courts

Circuit	Serious Problem	No Serious Problem	No Opinion Expressed [a]
First	6 (54.5%)	5 (45.5%)	4
Second	9 (22.5)	31 (77.5)	14
Third	20 (43.5)	26 (56.5)	10
Fourth	9 (30.0)	21 (70.0)	6
Fifth	28 (41.2)	40 (58.8)	16
Sixth	22 (56.4)	17 (43.6)	6
Seventh	9 (39.1)	14 (60.9)	10
Eighth	13 (52.0)	12 (48.0)	6
Ninth	19 (33.9)	37 (66.1)	21
Tenth	7 (43.8)	9 (56.3)	10
D.C.	9 (75.0)	3 (25.0)	7
Total	151 (41.3)	215 (58.7)	110

SOURCE: District Judges' Questionnaires, question 1.

[a] Includes 89 nonrespondents to the questionnaire, 2 respondents who answered "no opinion" to question 1, and 19 respondents who did not answer this question.

trict of Columbia Circuits, a single judge represents almost ten percentage points in table 3; even in the Fifth, a single judge represents 1.5 percent.

Each district judge was, of course, asked to respond to the question about the seriousness of the problem in terms of the quality of advocacy in that judge's court. The question was phrased this way in an effort to elicit opinions grounded in the personal experience of the judges. Since there is no reason at all to assume that the quality of the federal trial bar is uniform from district to district, it should not be assumed that differences in judgment about whether inadequacy is a "serious problem" represent disagreement among the judges in their reactions to a common legal environment. There is, of course, some disagreement reflected in these responses; judges sitting in the same courthouse did not always agree with one another. But it may also be that a single observer would find inadequacy to be a serious problem in some districts and not in others. There is no basis, in the present research, for determining the extent to which that is so.

Since most trial lawyers are not likely to be familiar with the full range of the trial business of the court, the questionnaires sent to trial lawyers did not ask whether there is, overall, a serious problem of inadequate trial advocacy. The trial lawyers were asked to identify, from a list of thirteen categories of lawyers such as "retained criminal defense counsel," those categories about which they felt qualified to comment, on the basis of their own observation.[3] The lawyers were then asked to consider these categories one at a time, and indicate whether they believe there is "a serious problem of inadequate trial advocacy among the representatives of that group in the federal district court(s) in which you practice."[4] The judges were asked to make similar judgments by category of lawyer in the district judges' questionnaires.[5]

The trial lawyers' opinion questionnaires were sent to two separate mailing lists. One list was derived by sampling docket sheets in cases that had gone to trial, and identifying lawyers who had tried ten cases or more in federal district courts in the last five years. This list, referred to as the docket-sheet sample, was designed to provide a sample of lawyers who are representative of those who try cases in federal courts with some frequency. The other list was derived from judges' identification of some "highly capable trial

3. Trial Lawyers' Opinion Questionnaires, question 1.

4. *Id.*, question 2.

5. District Judges' Questionnaires, question 2.

lawyers'' who practice regularly in their courts. This list was designed only to provide a group of lawyers, thought to meet high standards themselves, whose opinions might be worthy of special consideration.[6]

Chapter 4 contains a discussion of the responses to the questions about the seriousness of inadequacy among particular lawyer categories. Anticipating that discussion, it is appropriate to observe here that the tabulations based on the docket-sheet sample do not suggest that the federal trial bar is notably more critical or less critical than the judges are of the quality of advocacy in the district courts. Among those who expressed opinions about United States attorneys and their assistants, for example, a smaller percentage of the lawyers than of the judges believe there is a serious problem of inadequacy. But among those who expressed opinions about appointed criminal defense counsel, a larger percentage of lawyers believe there is a serious problem. For a number of the lawyer categories, the proportion of lawyers believing there is a serious problem is quite similar to the proportion of judges who believe so.

In the sample of trial lawyers identified as highly capable, on the other hand, there is a pronounced tendency for a greater proportion to believe that a serious problem of inadequacy exists. The percentage of these lawyers believing there is a serious problem was higher than the percentage of judges for eleven of the thirteen lawyer categories. Although the differences were negligible for some categories, they were substantial for others. It may be noted that the difference was also substantial for one of the exceptions: many fewer of the highly capable lawyers think a serious problem exists among United States attorneys and their assistants.

We know of no mathematical way to convert the responses about particular lawyer categories into a generalized statement about the views of the federal trial bar on the question whether there is, overall, a serious problem of inadequate trial advocacy. But an impressionistic examination of the views expressed about the thirteen categories of lawyers suggests that, if lawyers who regularly try cases in federal courts had the same opportunity as the judges to observe the entire spectrum of trial performances, the proportion believing there is a serious problem, overall, would probably not be greatly different. Among the group of trial lawyers identified as highly capable themselves, however, the proportion believing there is a serious problem would almost certainly be higher.

The questionnaire responses about the seriousness of the problem of inadequacy are further illuminated by expressions of views about the most frequent consequences of inadequacy. Both judges and lawyers were asked, to the extent that there are inadequate performances, ''which of the following, in your opinion, is the most frequent *consequence* of inadequacy?'' They were asked to rate the following three consequences in order of frequency:

> ''Ethical bounds overstepped in the pursuit of the clients' interests''
>
> ''Clients' interests not fully protected''
>
> ''Orderly, dignified, and efficient conduct of court proceedings impaired''[7]

Table 4 displays the responses of the 387 district judges who responded to the questionnaire. In addition, it shows the responses separately for the 151 judges who are critical of the quality of trial advocacy—in the sense that they believe inadequacy to be a serious problem in their courts—and for the 215 who do not believe inadequacy to be a serious problem. The 21 judges who did not express an opinion on the ''seriousness'' issue are not shown separately.

Among the whole group of 387 judges, the table shows that 56 percent said that the most frequent consequence of inadequacy is that clients' interests are not fully protected, and 82 percent said that this is the most or next most frequent consequence of inadequate performances. In second place, in the eyes of the judges, is impairment of the conduct of court proceedings, and the overstepping of ethical bounds runs a poor third. For most of the district judges, clearly, a concern with inadequate

6. The methods by which the two lists were generated are set forth in appendix B.

7. District Judges' Questionnaires, question 6; Trial Lawyers' Opinion Questionnaires , question 6.

TABLE 4

Opinions of District Judges About Relative Frequency of Three Consequences of Inadequate Trial Performances

	387 Judges		151 Critical Judges		215 Noncritical Judges	
	Most Frequent	Most or Next Most[a]	Most Frequent	Most or Next Most[a]	Most Frequent	Most or Next Most[a]
Clients' interests not fully protected	56.1%	81.7%	66.2%	87.4%	49.3%	77.7%
Conduct of court proceedings impaired	26.9	71.1	23.2	78.1	29.3	66.5
Ethical bounds overstepped	9.8	24.0	6.6	21.9	11.6	24.7
Partial responses included in above figures[b]	....	8.8	....	4.6	....	11.6
No response	7.2	7.2	4.0	4.0	9.8	9.8

SOURCE: District Judges' Questionnaires, question 6.

[a]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[b]Comprises respondents who indicated a "most frequent" consequence but not a "next most frequent."

TABLE 5

Opinions of Trial Lawyers About Relative Frequency of Three Consequences of Inadequate Trial Performances

	488 Lawyers[a]		198 Highly Capable Lawyers	
	Most Frequent	Most or Next Most[b]	Most Frequent	Most or Next Most[b]
Clients' interests not fully protected	57.9%	76.3%	60.1%	75.3%
Conduct of court proceedings impaired	25.0	60.3	22.2	63.1
Ethical bounds overstepped	7.6	25.6	8.1	28.3
Partial responses included in above figures[c]	....	18.8	....	14.1
No response	9.5	9.5	9.6	9.6

SOURCE: Trial Lawyers' Opinion Questionnaires, question 6.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who indicated a "most frequent" consequence but not a "next most frequent."

trial advocacy is principally a concern that some lawyers do not serve their clients well, and secondarily a concern that the conduct of court proceedings is impaired.

This general statement about the relative importance of the three consequences holds true regardless of the judge's response to the "seriousness" question, but the strength of the generalization is considerably greater among the "critical" judges than among the others. A larger proportion of the "critical" judges identified failure to protect clients' interests as the most frequent or next most frequent cause of inadequacy, and a smaller proportion of them identified the overstepping of ethical bounds.

Table 5 displays the trial lawyers' responses to the same question. Given the opportunities for errors of interpretation created by sampling problems, these data do not lend themselves to refined analysis. The table shows unmistakably, however, that there is substantial agreement between the bench and the bar about the relative frequency of the three consequences of inadequacy.

Consistency in the Evaluation of Lawyer Performances

All of the foregoing material is based, ultimately, on evaluations by judges and lawyers of performances in trial work. In the district judges' case reports, evaluations, in the sense of overall ratings of lawyer performances, were collected directly. In the judges' and lawyers' questionnaires, an implicit premise in a number of the questions was the assumption that the respondent was capable of distinguishing between an inadequate performance and an adequate one. We now turn to an effort to analyze that assumption, with particular reference to the validity of the performance ratings provided by the judges in the case reports. The principal undertaking here is to try to determine whether a count of *reports* of inadequate performances—in which 8.6 percent of the ratings were in the three categories below the threshold of adequacy—provides a reliable estimate of the number of performances that are in fact inadequate under some generally accepted standard.

We begin with the assumption that the spread of percentages reported in table 1 is partially due to differences in standards among judges instead of differences in skill among lawyers. In fact, it would be very surprising if judges did not differ somewhat in the standards they apply to lawyers. Trial advocacy is, after all, a complex skill, and there are no generally agreed-upon yardsticks for measuring it. In rating performances on the case reports, judges were free to choose their own criteria for applying the labels "first rate," "not quite adequate," and so on. Almost certainly, judges will not have agreed totally on the criteria they chose to evaluate performances or on the levels of skill they required for the application of each of the seven general labels used in the rating scale. The question is, how much did these inevitable differences influence the outcome reported in table 1?

We approached the question with two related methods. First, we asked a number of judges and trial lawyers to evaluate four brief segments of advocacy that had been recorded on videotape. Because everyone saw the same performances, we were able to measure differences between participants' uses of the rating scale. Some of these judges were asked to compare the videotaped performances with the best and worst performances observed in their own courts. Their replies allowed us to estimate, roughly, how the span of advocacy quality shown in the videotaped performances was related to the range of quality found in actual federal courts. The details of these and related analyses of the videotape study are presented below.

The second method of analysis was to examine the relation between the distribution of ratings and characteristics of judges. The purpose of the analysis was to discover where and when, if at all, the judges' ratings of lawyer performances were strongly associated with characteristics of judges that bore no plausible relation to the skills of lawyers. The presence of such associations would require reassessment of the reported percentages of inadequate trial advocacy.

Judges' Ratings of Videotaped Performances

The fundamental purpose of the videotape study was to collect advocacy ratings from judges and lawyers under controlled conditions. Because all the judges and lawyers saw the same performances, differences between individual ratings were due to the raters rather than the lawyers being rated.[3]

Four examples of courtroom practice were presented: an argument on a motion concerning the application of rule 37(a), Federal Rules of Civil Procedure; a defense attorney's cross-examination of an expert witness in a personal injury suit; a defense attorney's opening statement and cross-examination of an informer in a heroin sale case; and a prosecutor's closing argument in a cocaine and heroin possession case. Lasting about thirteen minutes each, the segments had been edited from longer videotaped performances.[9] At the conclusion of each segment, participants rated the performance using the same seven-point rating scale used in the district judges' case reports. Participants also reported their confidence in each judgment on a seven-point scale. The extremes of the confidence scale were labeled "not at all confident" and "completely confident," but the scale was otherwise entirely numerical.

Table 6 displays the spread of advocacy quality ratings that the eighty-nine judges who partici-

8. In fact, there is some likelihood that the ratings were also influenced by the order in which the four performances were viewed. Using only one order of presentation might have inflated the differences between average ratings of the four performances. We guarded against this possibility by using four different sequences with different groups of judges. This procedure may also have increased the observed variability in the ratings of single performances by the 89 judges beyond the variability that would have been observed if a single sequence had been used.

9. Because we edited the performances, our tapes are not necessarily fair representations of the lawyers' skills as advocates.

TABLE 6

Judges' Ratings of Videotaped Performances

Rating Category	Argument on Motion	Criminal Opening and Cross-Examination	Civil Cross-Examination	Closing Argument
First rate: about as good a job as could have been done	12	1	....	....
Very good	41	5	11	6
Good	28	29	21	20
Adequate but no better	5	31	33	32
Not quite adequate	2	14	12	17
Poor	1	8	9	12
Very poor	....	1	3	2
Total	89	89	89	89
Average rating[a]	5.6	4.1	4.0	3.8
Average confidence[b]	5.9	5.5	5.3	5.5

[a] Means calculated by assigning 1 to "very poor" through 7 to "first rate."

[b] 1 = not at all confident; 7 = completely confident.

pated gave the four videotaped performances. Also shown are the average rating for each performance and the average judgment of confidence that accompanied the evaluations of each performance. We will discuss the quality ratings and the confidence judgments separately.

Judges distributed their quality ratings over six of the seven available rating categories for three performances, and over all seven categories for the fourth. On the average, judges rated one of the performances between "good" and "very good" and the other three performances "adequate but no better." The percentage of judges rating in the three categories below the adequacy threshold was 3.4 percent for the argument on a motion, 25.8 percent for the opening statement and cross-examination, 27.0 percent for the civil cross-examination, and 34.8 percent for the closing argument. These percentages provide our first caveat regarding the interpretation of the 8.6 percent inadequacy found in the case reports. The caveat is that a certain percentage of ratings of inadequacy will be made on performances that an overwhelming percentage of judges would have rated at least adequate if not considerably better. We see this from the spread of ratings in the argument on a motion. That performance was considered at least adequate by 96.6 percent of the judges and at least very good by 60 percent. Still, 3.4 percent of the judges found the performance inadequate. Thus, we might reasonably expect that some of the performances rated inadequate in the case reports were, in fact, performances as good as the videotaped argument on a motion. We have no way of knowing how many such performances there were; hence we cannot turn our caveat into a quantitative correction factor.[10]

Of course, by this same logic we should expect that some of the performances rated adequate or better in the case reports would have been rated inadequate by a large percentage of judges. However, the worst of our videotaped performances was not poor enough, according to the standards employed by most judges, to allow an analysis similar to the one just presented for the best videotaped performance.

10. Appendix C contains a discussion of an attempt to develop a quantitative correction.

TABLE 7

Average Lowest Videotape Rating in Terms of Relation Between Videotaped and Court Performances

	Number of Judges	Mean Lowest Rating[a]	Standard Deviation
Worst videotaped performance at least as bad as worst court performance	27	2.85	1.3
Worst videotaped performance better than worst court performance	21	3.38	0.9

[a] Means calculated by assigning 1 to "very poor" through 7 to "first rate."

$t = 1.88$, $df = 46$, p less than .05 one-tailed.

It is reasonable to expect that one explanation for the differences in judges' ratings of the same performance is that different judges use different reference points in deciding when to use the "not quite adequate," "poor," and "very poor" categories. The data from the videotape study are consistent with that expectation. In particular, there is a suggestion that judges tend to define the categories of inadequacy by reference to the worst performances they see in their own courts. We infer this from the tendency shown by judges to give higher ratings to the videotaped performance they think is the worst of the four if they also believe it is better than the worst they see in their courts.

Table 7 presents the data on which the inference is based. Forty-eight judges participating in the videotape study also provided information relating the best and worst of the videotaped performances to the best and worst performances they observe in court. Twenty-seven judges reported that the worst videotaped performance was about as bad as, or worse than, the worst court performances, while twenty-one judges stated that the worst videotaped performance was better than the worst court performances. As shown in table 7, the lowest score given by judges in the group of twenty-seven

TABLE 8

Number of Times Each Performance Was in First or Last Place Among Four Videotaped Performances

	Alone in First Place	Tied for First Place 2-way	Tied for First Place 3-way	Total First Place	Alone in Last Place	Tied for Last Place 2-way	Tied for Last Place 3-way	Total Last Place
Argument on motion	49	22	6	77	0	1	0	1
Criminal opening and cross-examination	6	8	5	19	17	18	5	40
Civil cross-examination	4	6	4	14	16	17	5	38
Closing argument	1	8	3	12	23	16	5	44

NOTE: The table is based on 88 judges; one judge was removed from the analysis because he provided a four-way tie.

judges was one-half unit of evaluation less than the lowest score given by the other group. The difference is statistically reliable, given the theory as stated.

This result is useful for two reasons. First, it highlights the relatively personal or individual nature of the reference points judges use in making decisions about the inadequacy of advocacy. Second, it suggests that some of the variability shown in the ratings of the four videotaped performances can be attributed to the use of different reference points to give meaning to the verbal descriptions of quality in the seven-category scale.

Analysis of the rank orderings of the four performances provides a second approach to understanding the variability in judges' ratings. Table 8, for example, shows the number of times each performance was rated first or last among the four. Two-way and three-way ties are shown separately from the number of times each performance occupied each position alone.

The data support the conclusion that judges strongly agreed about the superiority of the argument on a motion to the other three performances; however, they were not in such clear agreement regarding the relative quality of the other three performances. The strength of consensus on the argument on a motion is made even clearer by the observation that all ties for first place included the argument on a motion. Only eleven judges considered the argument something other than best, and only one judge rated it worst, tied there with the civil cross-examination.

These data on rankings provide the same impreession about the separability of the four performances as the mean ratings displayed in table 6. The argument on a motion is clearly separated from the others, which among themselves are relatively closely ranked. Thus, where the mean rating of a performance was higher than the ratings of other performances by one and one-half units on the seven-point scale, the judges were quite consistent in treating that performance as superior to the others, even though they varied a good deal in the scale category that they applied to it. Among performances with mean ratings that were closely bunched, on the other hand, the judges were not very consistent in agreeing on a rank order. This latter result is not surprising, of course; it is natural to expect low consistency of rank-ordering of performances that are nearly equal in quality.

Unfortunately, the videotaped performances that we used do not provide a basis for making more refined statements about the extent to which judges are consistent in rank-ordering performances. In fact, we were somewhat disappointed in the lack of separation among the three performances other than the argument on a motion. As will be seen below, greater separation was observed when the videotape was pretested with the fellows of the American College of Trial Lawyers. This observation suggests a caveat about the use of

the mean of the judges' ratings as a basis for the analysis. There is some circularity in the argument that one should not expect consistency of rank-ordering among performances whose mean ratings are closely bunched. It could be argued that the close bunching of the mean ratings is the result, rather than the cause, of the failure to agree on a consistent rank order for these performances—that is, that the means are close because they are averages of judgments that are not mutually consistent. In the absence of an objective measure of performance quality, the validity of the analysis is therefore ultimately a matter of judgment.

In summary, then, the videotape study shows that judges' ratings of performances, using the seven-point scale that was used in the case reports, are not highly consistent. The analyses we have been able to perform do not satisfactorily explain the causes of the variability. We have seen that judges probably use different reference points in applying the descriptive categories in the scale. Certainly, some judges are tough raters and some are relatively easy raters. We have also seen a limited amount of evidence indicating that, where the average ratings of two performances are a point and one-half apart on the seven-point scale, judges are quite consistent in their rank-ordering of the performances. However, we are unable to measure precisely the extent to which the observed variability in ratings reflects disagreement about the *relative* quality of performances and the extent to which it reflects disagreement about the use of the labels in the particular scale used in our rating instruments.

Finally, there is some reason to think that the variability observed in the videotape experiment may be greater than the variability in judges' ratings of actual court performances. We have assumed, in the foregoing discussion, that judges used the seven-category scale to rate "the same thing" in both actual and videotape settings. In fact, this assumption is probably not totally supportable. And while we believe no serious error of interpretation has resulted from accepting the assumption for our current purposes, we should nevertheless spell out, briefly, why the two sets of judgments are not completely equivalent.

Court performances may be viewed as having three facets: strategy, tactics, and style. Strategy refers to the overall design and goal of the lawyer's conduct of the trial; tactics refers to the means used to achieve the goal; and style refers to the lawyer's demeanor or "presence" in the courtroom. Naturally, during the course of an actual trial, a judge can form opinions about all three of these facets, and weigh them according to his own view of their relative importance in rating a performance in terms of our seven-category scale. While we do not have explicit information about how judges make these weighting decisions, we do know, from results reported in chapter 5, that they consider both overall management of litigation (strategy) and skill in cross-examination (tactics, style) to be problem areas in current federal trial practice.

In the videotape study, however, judges could acquire little or no understanding of the strategy behind the lawyer's conduct. Judgments of tactics were also limited by the lack of background and context. Hence the quality judgments in the videotape study were at best judgments about tactics and style, possibly with a heavy emphasis on style.

While we cannot prove the point, we believe it is reasonable to expect that variability among judges in evaluations of advocacy style is greater than variability in evaluations that give full weight to strategic and tactical skills. Hence, we conclude that the variability shown by judges in the videotape study quite likely overrepresents the variability that would have been observed if all judges had rated all the performances submitted in the case reports.

Judges' Confidence in Ratings of Videotaped and Case-Report Performances

In general, judges were confident of their ratings in both the videotape study and the case reports. In particular, they were more confident of ratings at the extremes of the scale than in the middle categories. In the videotape study, for example, 47.5 percent of the ratings of "adequate but no better" were associated with the top two confidence categories, in contrast to 77.8 percent of the "very good" ratings, 92.3 percent of the

"first rate" ratings and 58.0 percent of the ratings in the three categories of inadequacy.

This result agrees with the findings from the case reports. There, 49.7 percent of the performances rated "adequate but no better" were associated with the top two confidence categories, while 70.4 percent of the "very good" ratings, and 88 percent of the "first rate" ratings, were made with these high degrees of confidence. At the low end of the quality scale, the judges used the top two confidence categories with 69.8 percent of the ratings in the three categories of inadequacy.

We take the high degree of confidence in the videotape performance ratings as a validation of the assumption that the presentation of brief videotaped performances is a legitimate method for assessing judicial consistency, even though we recognize that it does not provide a vehicle for assessing all facets of trial performance. Regarding the case reports, we interpret the high degree of confidence in relatively extreme judgments as validation of the assumption that the percentages of these ratings would remain relatively stable with repeated or continued measurements of district court performances. That is, the reported percentages of "first rate" and inadequate performances are not likely to represent mistaken judgments based on judges' uncertainties about the criteria they are using for evaluation.

Relations Between Case-Report Ratings, Questionnaire Responses, and Videotape Study Ratings

In this analysis we combine data from three major research instruments to provide estimates of the upper and lower bounds of the percentage of inadequate trial performances. In brief, we show first that judges who believe there is a serious problem of inadequate trial advocacy in their courts were more stringent graders of the four videotaped performances than were those who believe there is not. From this we conclude that the reported percentage of inadequacy in the case reports has been influenced, in part, by a difference in rating standards between these two groups of judges. By using data from each of these two groups, separately, to provide an estimate of the national percentage of inadequate performances, we arrive at a lower bound of 6.2 percent and an upper bound of 12.9 percent.

TABLE 9

Relation Between Judge's Ratings of Four Videotaped Performances and Judge's Opinion on Whether There Is a Serious Problem of Inadequate Trial Advocacy

Judge's Opinion on Whether There Is a Serious Problem	Percent of Judges with Average Ratings of "Good" or Better	Percent of Judges with Average Ratings of "Adequate" or Worse
Yes (24 judges)	29.2%	70.8%
No (37 judges)	67.6	32.4

SOURCES: District Judges' Questionnaires, question 1; videotape study.

Chi-square = 8.6, $df = 1$, p less than .01.

Sixty-one judges who participated in the videotape study also completed the judges' questionnaire; twenty-four judges said they believe that there is a serious problem, while thirty-seven disagreed. The average rating given by each of the judges was calculated and categorized in terms of whether it was in the range from "very poor" to "adequate but no better," or in the range from "good" to "first rate." As shown in table 9, judges who believe there is a serious problem gave lower scores to the videotaped performances than the judges who do not believe there is a serious problem. The difference is quite substantial.

Table 10 displays the relation between judges' ratings of trial performances in the case reports and their opinions about the existence of a serious problem of inadequate trial advocacy. The table shows that judges who stated that there is a serious problem were more likely to give inadequate or barely adequate ratings on the case reports, and less likely to give "first rate" or "very good" ratings, than were judges who do not believe that there is a serious problem. The data we have from the videotape study make it clear that this difference is due, at least in part, to differences in the judges' rating standards, and is not entirely due to

TABLE 10

Relation Between Rating of Trial Performance and Judge's Opinion on Whether There Is a Serious Problem of Inadequate Trial Advocacy

Judge's Opinion on Whether There Is a Serious Problem[a]	Ratings of Trial Performances: Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Yes (719)	17.4%	20.3%	26.7%	22.5%	12.9%
No (1,099)	23.0	30.0	27.0	13.7	6.2

SOURCES: District Judges' Questionnaires, question 1; District Judges' Case Reports, question 9.

[a]The number in parentheses is the total number of performances rated by judges expressing the opinion. The table excludes performances for which no overall rating was given on the case reports, as well as those rated by judges who did not express an opinion on the seriousness of the problem.

Chi-square = 63.7, $df = 4$, p less than .01.

differences in the actual quality of performances observed.

Assuming that the differences between these two groups are entirely the product of differences in rating standards, and using the different levels of inadequacy reported by them to provide estimates of the upper and lower bounds of inadequate performances in federal courts, we conclude that if all judges used the more rigorous evaluation standards of those who believe there is a serious problem, the percentage of inadequate performances reported on the case reports would have been about 13 percent. If all judges used the more relaxed standards of those who do not believe there is a serious problem, the reported rate would have been about 6 percent. To the extent that differences in the rates of inadequate performances reported by these two groups of judges may reflect differences in what they observed as well as differences in their evaluation standards, the range would probably be somewhat narrower.

Influence of Judge's Age on Case-Report Ratings

We have no reason to suspect that lawyers of different skill levels appear selectively before judges of different ages; hence any systematic differences in case-report ratings associated with age differences between judges must be attributed to the judges themselves. In this analysis, we demonstrate a strong relationship between the age of a judge and the judge's ratings in the case reports. Based on this relationship, we provide bounds on the percentage of inadequate performances of 6.6 percent (based solely on judges at least sixty years old) and 11.1 percent (based solely on judges younger than fifty). We also discuss, briefly, some reasons for favoring one or the other of these figures over the overall reported figure of 8.6 percent.

Table 11 displays the spread of case-report ratings by judges sixty years old or older, between fifty and fifty-nine, and younger than fifty. As the table indicates, there was a marked tendency for younger judges to give a higher proportion of inadequate ratings. Judges sixty or older also tended to use the "first rate" and "very good" categories more often.

The effect of age is not explainable in terms of senior status, because the percentage of inadequate ratings given by all senior judges did not differ appreciably from the overall average (8.1 percent versus 8.6 percent). Nor, as might have been expected, is the effect of age explainable as a correlate of years on the federal bench. When case-report ratings are tabulated against years on the bench, no significant associations are found.

TABLE 11

Relation Between Rating of Trial Performance and Judge's Age

Judge's Age[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
60 or older (894)	26.2%	25.3%	26.2%	15.7%	6.6%
50–59 (767)	15.8	28.0	27.5	18.6	10.0
Younger than 50 (297)	19.2	25.6	28.9	15.1	11.1

SOURCE: District Judges' Case Reports, question 9; judges' biographies.

[a]The number in parentheses is the total number of performances rated by judges in the age category. The table excludes performances for which no overall rating was given.

Chi-square = 34.6, $df = 8$, p less than .01.

We are left, then, with the conclusion that older judges tend to rate performances somewhat more leniently than younger judges. Although this tendency is not explicitly related to years spent on the federal bench, it may be related to legal and judicial experience more generally. Thus, if we were to base our estimate of inadequate trial advocacy on judges having the most relevant experience, our estimate would be 6.6 percent. On the other hand, the youngest judges have had the benefit of relatively recent educational and training opportunities; they are, arguably, somewhat more attuned to the expectations for and legitimate demands on modern trial advocates. Using this argument, we might wish to base our estimate of the level of inadequacy on the judgments of the youngest judges. In this case, our estimate would be 11.1 percent.

Influence of Duration of Trial on Case-Report Ratings

In this analysis, we demonstrate a relationship between the duration of a trial and the average rating given the lawyers in the trial. We use the data to provide upper and lower bounds for the percentage of inadequacy. The upper bound is 8.5 percent and the lower bound is 6.2 percent. These estimates are based on several premises, including the assumption that there is, in fact, no relationship between the quality of an advocate and the average duration of the trials in which he or she performs. We discuss briefly some reasons why this assumption may not be valid.

Table 12 shows how the percentages of ratings in the various categories were related to the durations of the trials in which the performances

TABLE 12

Relation Between Rating of Trial Performance and Duration of Trial

Number of Days of Testimony[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
1–5 (1,412)	19.9%	24.4%	28.7%	18.5%	8.5%
6–10 (119)	20.2	36.1	25.2	11.8	6.7
11 or more (81)	42.0	28.4	19.8	3.7	6.2

SOURCE: District Judges' Case Reports, questions 3, 4, 9.

[a]The number in parentheses is the total number of rated performances in the trial-duration category. The table excludes performances in trials that were aborted before the completion of testimony.

Chi-square = 39.3, $df = 8$, p less than .01.

were evaluated. It shows that, as trials get longer, the percentage of ratings at the top end of the scale grows and the percentage at the bottom end shrinks. The combined percentage of "first rate" and "very good" ratings is 44.3 percent for trials of five days' duration or less; it is 56.3 percent for trials of six to ten days' duration, and 72.1 percent for trials of more than ten days' duration. Ratings of "not quite adequate" or worse, by contrast, decrease from 8.5 percent for the shortest trials through 6.7 percent for the intermediate trials to 6.2 percent for the longest trials.

How is this result to be interpreted? As with other analyses in this section, we start with the assumption that observed variation reflects differences among judges as well as differences among the lawyers who were rated. In searching for accounts of the changes in ratings observed here, we can find both judge-related and lawyer-related variables that might account for the variation. First, regarding lawyers, it may be that longer trials represent "bigger" cases, e.g., those with more money at stake, and hence that more qualified and esteemed trial lawyers are retained for the cases. Along similar lines, it may be that better lawyers lay their cases out with more care and detail; hence their trials are likely to last longer. Second, regarding judges, it may be that judges make different kinds of estimates of lawyers' skills as they see more of them, even though the advocates' skill levels are not in fact changing from day to day in the trial. If judges make their estimates of quality based on summing up the good things the lawyer does, without accounting for how long the lawyer takes to do them, then the longer the trial, the better the lawyer's rating is likely to be. There may also be a pure familiarity factor; judges may upgrade lawyers who work steadily, if without inspiration, throughout a long trial. Third, there may be an interaction between judge characteristics and lawyer characteristics, such that in longer trials the lawyers come to understand the style or aspects of advocacy most appreciated by the judge, and display more of them in the trial's later stages. The result, of course, would be a higher rating from the judge at the conclusion of the trial.

We have no way to test or decide among these relatively plausible alternatives. We can, however, suggest that the decrease in inadequate ratings as trial duration increases means that judges' ratings in short trials may be relatively harsh. On this basis, then, ratings given during short trials (which, by virtue of their predominance, contribute the bulk of all the performance ratings) may provide a somewhat low estimate of performance *potential*, if not of observed activity. That is, if the lawyers observed here in short trials had all been observed in long trials, the overall reported inadequacy rate might have been somewhat less than 8.6 percent.

Comparison of Judges' and Lawyers' Ratings of Videotaped Performances

Earlier in this chapter, it was concluded that lawyers in our sample of highly capable trial lawyers are probably more likely than are judges to believe that there is a serious problem of inadequate trial advocacy. That conclusion, based on questionnaire data alone, is borne out by the lawyers' responses in the videotape study. The lawyers who participated in the study were all fellows of the American College of Trial Lawyers, an organization that elects its members partly on the basis of their trial skills.

Table 13 shows the spread of advocacy quality ratings provided by the lawyers. Table 14 provides a direct comparison of the means of the ratings given by judges and lawyers to the four performances; it also shows measures of variability or spread in the responses of the two groups (standard deviations).

The judges gave higher ratings than the lawyers did to all four performances. The differences shown were statistically reliable for all performances except the criminal opening and cross-examination.[11] In addition to being more lenient in their assessment of three of the performances, the judges were also significantly more consistent in their judgments on two performances (argument on

11. Mean differences were evaluated by *t*-tests assuming homogeneous variances for civil cross-examination and closing argument and heterogeneous variances for argument on motion and criminal opening and cross-examination.

motion and criminal opening and cross-examination).[12] Differences in variability were not significant in the other two performances, nor for sums of lawyers' and judges' scores across all four performances. Finally, it is useful to note, first, that the rank ordering of the four performances was the same for the two groups and, second, that the lawyers rated the poorest of the four performances "not quite adequate" (i.e., an average rating below 3.0), almost a full unit of evaluation below the average rating given by the judges. Overall, the lawyers were three-quarters of an evaluation unit stricter than the judges.

We may use this difference between district judges and fellows of the American College of Trial Lawyers to estimate what the reported rate of inadequacy would have been if the judges had used the standards employed by the lawyers. First, we assume that the seven categories of the quality-rating scale are of equal size, each one unit

12. The criminal opening and cross-examination was edited between the showing to the lawyers and subsequent use with judges. This change may have contributed to the difference in variance.

TABLE 13

Lawyers' Ratings of Videotaped Performances

Rating Category	Argument on Motion	Criminal Opening and Cross-Examination	Civil Cross-Examination	Closing Argument
First rate: about as good a job as could have been done	9	2	....	....
Very good	22	9	4	2
Good	31	16	12	10
Adequate but no better	13	18	14	11
Not quite adequate	7	24	25	26
Poor	2	13	26	24
Very poor	....	2	3	11
Total	84	84	84	84
Average rating[a]	5.1	3.8	3.2	2.9
Average confidence[b]	5.9	5.1	5.7	5.6

[a]Means calculated by assigning 1 to "very poor" through 7 to "first rate."

[b]1 = not at all confident; 7 = completely confident.

TABLE 14

Judges' and Lawyers' Ratings of Videotaped Performances Compared

	Judges		Lawyers	
	Average Rating	Standard Deviation	Average Rating	Standard Deviation
Argument on motion	5.6	0.9	5.1	1.2
Criminal opening and cross-examination	4.1	1.1	3.8	1.4
Civil cross-examination	4.0	1.3	3.2	1.3
Closing argument	3.8	1.2	2.9	1.3

wide, with a middle point defined by a whole number. Thus, the category "poor" has a lower boundary of 1.50, a middle point of 2.00, and an upper boundary of 2.49; similarly, the category "not quite adequate" has a lower boundary of 2.50, a middle point of 3.00, and an upper boundary of 3.49; and so on, for the other categories.[13] Second, we assume that the ratings placed in each category are distributed equally across all of its parts. Thus, we assume that if each quality category had been divided into a large number of subcategories, the number of rankings in each of the subcategories would be the same as in each of the others.

Using these two assumptions, we can translate the distribution of quality ratings given by judges to case-report performances into a distribution reflecting what the judges would have done, had they used the standards reflected by the lawyers' ratings of the videotaped performances. We can do this by moving three-quarters of the cases in each evaluation category to the next lowest category. This accounts for the three-quarters of a unit difference between judges and lawyers on the videotape study performance ratings. The effect of this change is to increase the number of ratings below the threshold of adequacy from 169 to 415 (because three-quarters of the 328 cases originally in "adequate but no better" move into "not quite adequate"). This increases the percentage of inadequate performances (the three lowest rating categories) from 8.6 percent to 21.1 percent.

Thus, using the standards employed by a group of trial lawyers generally recognized as among the best in the field, we estimate that the number of performances rated as inadequate by federal district judges would have to be increased by 12.5 percent.

Conclusion

We have tried to bring several items of data to bear on the magnitude of the problem of inadequate trial advocacy in the federal district courts.

Based on ratings by 284 federal district judges of 1,969 actual courtroom performances, we conclude that about a twelfth of the lawyer performances in cases that come to trial in the district courts are regarded as inadequate by the trial judge. These performances occur in about one-sixth of the trials. Almost half the performances are regarded by the trial judge as "first rate" or "very good," and almost three-quarters as "first rate," "very good," or "good." We emphasize that these conclusions are about *performances* by lawyers. No effort was made in the research to obtain evaluations of lawyers themselves, as contrasted with evaluations of limited portions of their professional activity.

When shown videotaped segments of four trial performances, district judges were not highly consistent with one another in assigning ratings on the basis of the seven-point scale used in the research. The observed inconsistency is partly a result of the fact that some judges rate more severely than others. It is partly the result of disagreements about the relative merits of different performances. We are unable to determine the contribution of each of these two elements. We are, therefore, unable to estimate the percentage of performances that would be considered inadequate under the standards of a majority, or some other number, of the judges. We can, however, use the differences in severity of ratings among judges to clarify somewhat the meaning of the 8.6 percent reported inadequacy figure. In particular, we find that judges who believe there is a serious problem of inadequate trial advocacy in their courts are, as a group, more severe in rating lawyer performances than judges who do not believe there is a serious problem. If all judges rated as severely as those who believe there is a serious problem, it appears that the percentage of ratings below the threshold of adequacy would not exceed 13 percent. If all judges rated as leniently as those who do not believe there is a serious problem, it appears that the percentage would not be less than 6 percent.

On the basis of data from opinion questionnaires, we conclude that most federal district judges do not believe there is a serious problem of

13. Clearly the extreme categories of "very poor" and "first rate" don't fit this model exactly, but that doesn't matter for the current analysis.

inadequate trial advocacy in their courts. A sizable minority, however—about two-fifths of the judges—believe there is. The difference of opinion, as has already been noted, is partly a reflection of differences in the standards by which judges evaluate lawyer performances. It may also reflect differences in the quality of the lawyers appearing in different courts; we have no reason to assume that the quality of the trial bar is uniform across the nation. Finally, there may be disagreement about the normative issue of whether a given situation rises to the level of a "serious problem." We cannot say how large a role each of these factors may have played in determining the judges' responses about the seriousness of the problem.

On the basis of questionnaires sent to a sample of lawyers who have tried ten or more cases in the federal district courts in the last five years, we conclude that the federal trial bar does not differ substantially from the judiciary in its assessment of the seriousness of the problem. Because most trial lawyers do not see all kinds of cases that come before the court, the lawyers were not asked for an opinion about whether there is, overall, a serious problem of inadequate trial advocacy in the courts in which they practice. They were asked, however, to answer a similar question about specific categories of lawyers whose talents they had had an opportunity to observe. Their answers suggested that, in general terms, they are about as critical as the judges are of the quality of trial advocacy. A group of lawyers selected to receive the questionnaire because they are themselves regarded as highly skilled, however, appeared to be more critical than the judges. Similarly, when a select group of lawyers rated the four videotaped performances, they employed more severe evaluation standards. It is estimated that about a fifth of the judges' performance ratings would have been in the three categories of inadequacy had the judges been as severe as this latter group of lawyers.

When asked the most frequent of three possible consequences of inadequate lawyer performances in trial courts, most representatives of both the bench and the bar were in agreement that, to the extent that inadequate performances occur, the most frequent consequence is a failure to protect the interests of clients. The next most frequent consequence is impairment of the orderly, dignified, and efficient conduct of court proceedings. Only a few judges and lawyers said that the most frequent consequence of inadequacy was overstepping ethical bounds, although a substantial minority think it is the second most frequent consequence among the three. Thus, to whatever extent judges and lawyers are concerned with inadequate performances in the district courts, their principal concern appears to be that clients are sometimes poorly served.

CHAPTER 4

RELATIONS BETWEEN PERFORMANCE RATINGS AND LAWYER CHARACTERISTICS

In the research program, several efforts were made to determine whether inadequate trial advocacy is found more frequently among some classes of lawyers than among others. Analyses were performed to find out whether quality of performance is correlated with the nature of the lawyer's practice, with various measures of experience, and with educational background. The results of these analyses are presented in this chapter.

In some of the analyses, we found that certain characteristics of trial lawyers are statistically associated with favorable performance ratings. It bears repetition at this point that care should be taken in reaching conclusions about the causes of such associations. The statistical data tell us only that the association probably exists, and that a cause is to be found somewhere. Not infrequently, there is more than one plausible causative statement that could be made.

The Lawyer's Role in the Case

In the district judges' case reports, the judges were asked to indicate the role of each lawyer in the case. As is explained in detail in appendix B, there is reason to think that there may have been a substantial rate of inaccurate responses to this question, partly because of ambiguities in our instructions and partly because we asked for a degree of detail that may sometimes have been beyond the knowledge of the trial judge.

Table 15 shows, for each of the lawyer roles as identified by the judges, the distribution of performance ratings. Once again, because of the small number of performances rated "poor" and "very poor," the three lowest rating categories have been combined. The role categories are listed in ascending order of the proportion of performances rated inadequate.

The number of performances evaluated for lawyers in each role category is given in parentheses next to the category description. For several categories, that number is very small. In such cases, the computed percentages are virtually meaningless. For categories in which fewer than twenty-five performances were observed, for example, the rating of a single performance is worth at least four percentage points, and the percentages displayed in table 15 may reflect little more than the chance by which particular members of the category found their way into the sample, or the chance of which judges they appeared before. For the categories in which there were more than one hundred observations, the range of inadequate performances is reasonably narrow, from 7.4 percent to 10.7 percent. Statistical analysis indicates that this range of difference is not statistically significant at the 95 percent confidence level; the differences could be entirely the product of chance factors in the sampling process.

Another attempt to measure differences among classes of lawyers was made in the judges' questionnaires and in the lawyers' opinion questionnaires. In the judges' questionnaire, the judges were asked, regardless of their response to the question whether there was, overall, a serious problem of inadequate trial advocacy in their courts, to "consider the following groups of lawyers one at a time and indicate whether you believe there is a serious problem of inadequate trial advocacy among the representatives of that

TABLE 15

Relation Between Rating of Trial Performance and Lawyer's Role in Case

Role in Case[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Staff lawyers for public interest law firms (13)	53.8%	30.8%	....	15.4%	....
Public or community defenders (51)	15.7	31.4	31.4	15.7	3.9
Private practitioners representing corporate clients in civil cases (540)	23.7	29.4	25.0	14.1	7.4
U.S. attorneys and their assistants (351)	17.4	24.8	30.8	19.4	7.4
Retained criminal defense counsel (234)	22.6	26.5	29.1	14.1	7.7
"Other" Justice Department lawyers (23)[b]	13.0	30.4	21.7	26.1	8.7
Private practitioners representing individual clients in civil cases (465)	20.4	25.8	24.1	19.1	9.5
Strike force lawyers (10)	30.0	20.0	30.0	10.0	10.0
Appointed criminal defense counsel (131)	19.8	16.8	33.6	18.3	10.7
Lawyers employed by state or local governments (58)	17.2	22.4	25.9	20.7	12.1
"Other" U.S. government lawyers (21)[c]	19.0	23.8	14.3	23.8	19.0
Staff lawyers for civil legal assistance programs (15)	....	20.0	40.0	13.3	26.7
House counsel for corporations or other organizations (6)	16.7	50.0	....	....	33.3
All performances (1,969)[d]	20.9	26.3	27.0	16.7	8.6

SOURCE: District Judges' Case Reports, questions 5, 9.

[a]The number in parentheses is the total number of performances for lawyers in the role category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 2.0% for any category.

[b]Other than U.S. attorneys and their assistants and strike force lawyers.

[c]Other than Department of Justice lawyers.

[d]Includes 51 performances for which the judge did not report the lawyer's role.

Chi-square = 27.0, df = 16, p less than .05; if inadequate performances are compared with all others, chi-square = 3.0, df = 4, not significant. (Chi-squares computed on 1,712 performances for which there were performance ratings in the five categories having more than 100 performances.)

group who try cases in your court.''[1] The groups listed were the same as the groups whose performance ratings are tabulated in table 15. A similar question was asked on the lawyers' opinion questionnaire.

The responses of the judges to this question are presented in table 16. The table shows, for each category of lawyers, the number of judges who said that a serious problem of inadequacy exists among the group, and the number who had no opinion or did not respond to the question. To simplify the table, the remainder—those who thought there was no serious problem among the group—have been omitted. The lawyer categories are listed in the same order as they were in table 15—that is, in order of the proportion of perform-

TABLE 16
Opinions of District Judges on Whether There is a Serious Problem of Inadequate Trial Advocacy, Separately by Category of Lawyer

	387 Judges		151 Critical Judges		215 Non-critical Judges	
Category of Lawyer[a]	Serious Problem	No Opinion[b]	Serious Problem	No Opinion[b]	Serious Problem	No Opinion[b]
Staff lawyers for public interest law firms[c]	19.9%	20.9%	33.8%	24.5%	7.9%	17.7%
Public or community defenders	10.6	33.6	20.5	33.1	3.7	32.6
Private practitioners representing corporate clients in civil cases	7.5	2.6	16.6	2.6	0.9	1.9
U.S. attorneys and their assistants	30.7	3.1	49.0	2.0	17.7	2.3
Retained criminal defense counsel	25.3	4.9	47.0	3.3	9.3	4.2
"Other" Justice Department lawyers[c]	19.1	16.5	33.1	18.5	9.8	13.0
Private practitioners representing individual clients in civil cases	43.7	3.6	81.5	3.3	16.3	2.3
Strike force lawyers[c]	18.1	38.5	23.8	44.3	13.0	33.0
Appointed criminal defense counsel	31.8	5.7	57.0	6.0	12.6	4.7
Lawyers employed by state or local governments	43.4	8.0	64.9	8.6	26.0	6.5
"Other" U.S. government lawyers[c]	30.5	19.1	53.6	19.9	14.9	16.3
Staff lawyers for civil legal assistance programs[c]	33.9	23.3	52.3	21.2	20.5	23.7
House counsel for corporations or other organizations[c]	18.9	35.7	28.5	33.1	11.6	35.3

SOURCE: District Judges' Questionnaires, questions 1, 2.

[a]Lawyer categories are listed in the same order as in table 15—that is, in order of the percentage of performances rated inadequate, lowest to highest.

[b]Includes failure to answer the question.

[c]These categories were the subject of fewer than 25 ratings in the case reports.

1. District Judges' Questionnaires, question 2.

ances rated inadequate on the case reports, from lowest to highest. The categories referenced to footnote c are those for which there were fewer than twenty-five performance ratings.

Whether there is a serious problem is not strictly a question of the frequency of inadequate performances in the lawyer category. The responses may also reflect views about the degree of inadequacy and about the social importance of having adequate representation in particular kinds of cases. Nevertheless, it is of some interest to compare the percentage of judges who think there is a serious problem for a certain lawyer category with the percentage of inadequate performances for that category in the case-report sample. Such a comparison tends to confirm the relatively favorable ratings received by public and community defenders and by lawyers for corporate clients in civil cases, as well as the relatively unfavorable ratings received by state and local government lawyers and lawyers for individual clients in civil cases. Indeed, the questionnaire responses set these four groups apart from the others in a way that the case-report performance ratings do not.

When the full group of judges is split into those who are defined as "critical"—in the sense that they believe there is a serious problem of inadequacy, overall, in their courts—and those who are noncritical, it is not surprising to find that those who think there is a serious problem overall are more likely to think there is a serious problem within a particular category. The "critical" judges averaged 5.6 categories for which they thought there was a serious problem; the noncritical judges averaged 1.6. On the average, then, a critical judge was about three and one-half times as likely as a noncritical judge to conclude that a serious problem exists for a category of lawyers. But the average does not hold from category to category, and differences of emphasis between the two groups of judges are apparent. The critical judges were more likely than the average suggests to find serious inadequacy among public or community defenders, retained and appointed criminal defense counsel, and private lawyers representing both corporate and individual clients in civil cases. They were less likely than the average suggests to find a serious problem among United States attorneys and their assistants, strike force lawyers, lawyers employed in civil legal aid, house counsel for corporations, and state and local government lawyers.

In seeking the views of practicing lawyers, we did not assume that most lawyers would be familiar with the full range of the business of the court. Lawyers were therefore not asked for an opinion on whether a serious problem of inadequate trial advocacy exists, overall, in the courts in which they practice. Rather, they were asked to identify those groups of lawyers with whom they had had enough experience that they felt qualified to comment, and to indicate whether they believe that there is a serious problem of inadequate trial advocacy among the representatives of any of those groups. Table 17 compares the responses of the lawyers with the responses of the judges. For purposes of the comparison, the responses of the judges have been recomputed to eliminate the "no opinion" category, so that both judges and lawyers are included only if they expressed an opinion. The categories are in order of the percentage of judges expressing belief that there is a serious problem.

Because of imperfections in the lawyer samples, not too much should be made of relatively small differences in the reported percentages. Nevertheless, some of the differences are striking. If we look at the opinions expressed about the five lawyer categories that account for the vast bulk of performances in the case reports, we find that both samples of lawyers are markedly less critical than the judges are of United States attorneys and their assistants, and those in the docket-sheet sample are markedly less critical of private practitioners representing individual clients in civil cases. On the other hand, the bar is markedly more critical of appointed criminal defense counsel.

In the case of the United States attorneys and their assistants, the data show that the relatively favorable reaction of the bar is not a result of self-congratulation by those in the group being evaluated. If the responses of lawyers who work in United States attorneys' offices were excluded from the tabulation based on the docket-sheet sample, the proportion believing there is a serious problem among this group would be 16.1 percent.

TABLE 17

Opinions of District Judges and Trial Lawyers on Whether There Is a Serious Problem of Inadequate Trial Advocacy, by Category of Lawyer

(Percentages of those expressing opinions who believe there is a serious problem among lawyers in the category)

Category of Lawyer	District Judges	Lawyers in Docket-Sheet Sample[a]	Highly Capable Lawyers
Lawyers employed by state or local governments	47.2%	48.0%	56.7%
Private practitioners representing individual clients in civil cases	45.3	32.1	41.4
Staff lawyers for civil legal assistance programs	44.1	50.7	52.2[b]
"Other" U.S. government lawyers	37.7	49.5	55.6[b]
Appointed criminal defense counsel	33.7	46.6	44.9
U.S. attorneys and their assistants	31.7	14.0	15.2
Strike force lawyers	29.4	18.0	34.8
House counsel for corporations and other organizations	29.3	41.5	58.3[b]
Retained criminal defense counsel	26.6	22.2	31.7
Staff lawyers for public interest law firms	25.2	28.1	33.3[b]
"Other" Justice Department lawyers	22.9	22.7	46.4
Public or community defenders	16.0	27.2	20.4
Private practitioners representing corporate clients in civil cases	7.7	7.4	12.4

SOURCES: District Judges' Questionnaires, question 2; Trial Lawyers' Opinion Questionnaires, question 2.

[a] Percentages in this column are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Based on fewer than 75 expressions of opinion.

A similar analysis for the private-practice categories is not possible, since we don't know which of the lawyers take appointments in criminal cases or which of them sometimes represent individual clients in civil cases.

To summarize, then, the data derived from the performance ratings in the district judges' case reports do not produce statistically significant results showing that inadequacy is more frequent among some categories of lawyers than among others. The differences that were observed could all have been the result of chance in the sampling process. Even if the observed differences are real, moreover, they do not suggest that inadequate trial performances are concentrated in one or a few kinds of law practice. Consequently, it seems probable that a substantial reduction in the number of performances considered inadequate by the trial judge could not be achieved by concentrating on a relatively small group of lawyers identified by type of practice.

The possibility of making qualitative distinctions remains, however. It may be thought by some, for example, that inadequacy among criminal defense counsel is more important than inadequacy among lawyers handling civil cases. In that case, it might be deemed appropriate to concentrate any remedial efforts on inadequacy among

representatives of the criminal defense bar, even though there does not appear to be a purely numerical justification for such a policy.

In contrast to the performance ratings, the judges' and lawyers' questionnaire responses do suggest that there may be a basis for distinguishing among categories of practice. They certainly suggest that the quality of representation of corporate clients is not a subject of major concern. The lawyers, but not the judges, would say the same for United States attorneys and their assistants. About a quarter of the judges and lawyers believe there is a serious problem among retained criminal defense counsel, and somewhat more believe there is a serious problem among appointed criminal counsel and private practitioners representing individual clients.

Considering the relative stability, across lawyer categories, of the performance ratings in the case reports, there is no obvious explanation for the distinctions in the questionnaire responses. The questionnaire responses may, of course, reflect policy choices as well as judgments about the frequency of inadequate performances—choices, for example, about the relative importance of adequate representation of different kinds of clients. At least insofar as judges' responses are concerned, however, it is hard to discern a plausible policy that would account for the pattern of responses that has been reported.

Size of Law Office

Table 18 presents data from the district judges' case reports showing the relation between the performance rating and the size of the lawyer's office as estimated by the judge. The table indicates that the likelihood that a lawyer will perform inadequately is substantially greater if he practices alone than if he practices with others, and that it tends to decline as the size of the office increases. In the absence of some reason to believe that the inadequacy rate is higher in offices of sixteen to twenty-five lawyers, we are inclined to believe that the apparent exception to the rule in the data for this group is probably a result of chance in the sampling process.

Among the various categories of adequate performances, trends are somewhat more difficult to

TABLE 18

Relation Between Rating of Trial Performance and Estimated Size of Lawyer's Office

Judge's Estimate of Office Size[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Practices alone (224)	16.1%	21.9%	27.7%	17.9%	16.5%
2 lawyers (138)	12.3	29.0	32.6	16.7	9.4
3 (134)	22.4	27.6	27.6	12.7	7.5
4–9 (439)	22.3	27.6	28.9	15.0	5.5
10–15 (200)	28.0	25.5	28.0	13.5	4.5
16–25 (119)	24.4	28.6	23.5	16.0	7.6
26–50 (104)	21.2	31.7	27.9	14.4	4.8
51 or more (101)	34.7	29.7	19.8	12.9	3.0
All performances (1,969)[b]	20.9	26.3	27.0	16.7	8.6

SOURCE: District Judges' Case Reports, questions 6, 9.

[a]The number in parentheses is the total number of performances reported for lawyers in the size category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 2.2% for any category.

[b]Includes 510 performances for which the judge did not estimate the office size.

Chi-square = 64.3, $df = 28$, p less than .01. (Chi-square computed on 1,452 performances for which there were both ratings and estimates of office size.)

discern. However, if the "first rate" and "very good" ratings are viewed together, there is a quite consistent trend suggesting that the likelihood of performing at these levels is related to office size. For offices of from three to fifty lawyers, the percentage of "first rate" and "very good" ratings stays reasonably close to 50 percent. For smaller offices it drops off to about 40 percent, and for the largest offices it climbs to about 64 percent.

Before the beginning of the case-reporting exercise, seventy-five of the federal district judges agreed to administer a short biographical questionnaire to the lawyers being rated. As a result of this program, we have biographical information from the lawyers in 257 performances rated by forty-seven judges. For these lawyers, we have more information about office size—information based on the lawyer's knowledge rather than the judge's estimate. However, the smaller sample size increases the possibility that observed results will be due to chance factors and will therefore be unrepresentative of conditions in the universe of performances. It also increases the danger that the rating standards of only a few judges will be strongly reflected in the data. These problems are of particular concern with respect to the performances considered inadequate by the rating judges; there were only twenty-two inadequate ratings among the 257 performances for which we have biographical questionnaires. Examination of the data for these 257 lawyers tends to confirm, in a very rough way, the trend seen in the larger group, where the office size was based on the judges' estimates. However, there is much more ambiguity in the smaller group's data, and the differences in ratings for various sizes of offices are not statistically significant.

Table 18 includes all the rated lawyers, without regard to type of practice. Table 19 shows the same data for the private practice categories only: retained and appointed criminal defense counsel, private practitioners representing corporate and individual clients, and house counsel for corporations or other organizations. Virtually all of the sole practitioners are, of course, in these

TABLE 19

Relation Between Rating of Trial Performance and Estimated Size of Lawyer's Office
(Private practice categories only)

Judge's Estimate of Office Size[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Practices alone (201)	14.4%	22.4%	28.4%	19.4%	15.4%
2 lawyers (125)	12.8	26.4	33.6	16.8	10.4
3 (106)	18.9	32.1	26.4	13.2	8.5
4–9 (313)	24.0	27.5	28.1	13.7	5.8
10–15 (134)	32.8	28.4	25.4	10.4	3.0
16–25 (63)	41.3	36.5	11.1	7.9	3.2
26–50 (73)	24.7	35.6	27.4	9.6	2.7
51 or more (48)	45.8	37.5	4.2	10.4	2.1
All performances (1,376)[b]	22.0	26.6	26.1	16.1	8.6

SOURCE: District Judges' Case Reports, questions 6, 9.

[a]The number in parentheses is the total number of performances reported for lawyers in the size category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 1.0% for any category.

[b]Includes 313 performances for which the judge did not estimate the office size.

Chi-square = 83.6, $df = 20$, p less than .01. (Chi-square computed on 1,059 performances for which there were both ratings and estimates of office size, with 10–25 and 26 or more treated as single categories.)

categories. In broad terms, the trends that appear in table 18 hold true for the lawyers in private practice, but the trend in the "first rate" and "very good" categories is even more pronounced.

The impression should not be left, of course, that sole or small-firm practice implies inadequacy. Many "first rate" and "very good" performances were turned in by people in these categories, and the inadequate performances are a small minority. However, inadequate performances are clearly more common among lawyers in these groups.

Nothing in the data suggests the reasons for the higher inadequacy rates among lawyers who practice alone or in very small offices. It may be that practicing with other lawyers is a supportive experience in the sense of building one's skills; it may be that people who go into small-office practice are in some relevant sense a different breed; it may be that the pressures are greater on lawyers in small offices, and that they don't find it as easy to take the time to handle every matter well. Whatever the cause, however, the data suggest that any remedial program should be designed in such a way that this group, if not singled out, is at least not excluded.

Lawyer's Age

Table 20 shows the relation between the performance rating received and the judge's estimate of the lawyer's age. The table indicates that lawyers thirty and under were more likely to receive inadequate ratings than older lawyers, and that lawyers over fifty-five also had a relatively high probability of receiving such ratings. It also shows a fairly consistent increase in the number of "first rate" and "very good" ratings as the lawyer's age increases, except for a small fall-off in the oldest age group. It should be noted that there are rather few lawyers in some of the age categories; hence, although the data are statistically significant, the detail is subject to considerable influence by chance factors in sampling.

There is a possibility that characteristics we associate with maturity might, in the lower age

TABLE 20

Relation Between Rating of Trial Performance and Estimate of Lawyer's Age

Judge's Estimate of Lawyer's Age[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
27 or younger (63)	14.3%	12.7%	20.6%	27.0%	23.8%
28–30 (328)	15.5	26.2	29.6	18.3	10.1
31–35 (555)	16.0	26.1	31.7	18.6	7.0
36–40 (330)	24.2	27.6	27.6	14.5	5.8
41–45 (208)	25.5	25.0	23.1	18.3	7.2
46–50 (204)	26.0	27.9	24.5	13.2	8.3
51–55 (127)	29.1	28.3	22.0	11.8	7.9
56 or older (122)	27.0	26.2	19.7	14.8	12.3
All performances (1,969)[b]	20.9	26.3	27.0	16.7	8.6

SOURCE: District Judges' Case Reports, questions 7, 9.

[a] The number in parentheses is the total number of performances reported for lawyers in the age category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 1.6% for any category.

[b] Includes 32 performances for which the judge did not estimate the lawyer's age.

Chi-square = 77.5, $df = 28$, p less than .01. (Chi-square computed on 1,928 performances for which there were both ratings and estimates of age.)

groups, sometimes influence both the judge's rating of a performance and his estimate of the lawyer's age. Similarly, lack of mental agility might sometimes influence both the rating and the age estimate of lawyers in the higher age groups. Hence, there is some danger that the apparent association of age with performance rating is spurious. At the lower end of the age range, however, it would appear that the observed tendency is too strong to be entirely explained that way; if the performances by lawyers thirty and under are compared with those of lawyers from thirty-six to fifty, leaving those between thirty-one and thirty-five as a buffer zone for bad age estimates, the difference between the groups remains statistically significant.[2] That is not true, however, for the finding that weak performance is more common in the oldest age group.[3]

Once again, the data from the lawyers' biographical questionnaires, in which the age data are presumably more trustworthy, are of limited utility. They tend to confirm the association of "first rate" and "very good" ratings with age, although not at a statistically significant level. But of the lawyers who returned the biographical questionnaire, only forty-eight were in the two youngest age groups and only nineteen were in the oldest group. Three of the former (6.3 percent) and two of the latter (10.5 percent) were rated inadequate. These figures do not lend much support to the findings based on the judges' estimates of the lawyers' ages. Given the small numbers involved, however, they can hardly be treated as negating those findings.

The lawyers' biographical questionnaire also asked for the date of graduation from law school. Since date of graduation from law school tends to be correlated with age, it is not surprising to find very similar results. The proportion of performances considered "first rate" or "very good" tends to increase with distance from law school, but there were not enough very recent or very distant graduates in the sample to enable us to make statements about their inadequacy rates.

Previous Trial Experience

Question 8 on the district judges' case-report form asked for the judge's opinion about whether the lawyer had previously tried, or assisted in the trial of, two or more cases in federal district courts. The alternative responses were "yes, or probably," "no, or probably not," or "don't know." Table 21 presents the relation between the rating and the answer to that question.

The data are highly significant, and suggest that lawyers without this prior experience are much more likely than others to turn in inadequate performances, and less likely to turn in "very good" or "first rate" ones.

Because of the correlation previously observed between age and performance rating, an analysis was made in which age was controlled for by eliminating the lawyers whose estimated age was thirty or under. The pattern shown in table 21 remained essentially unchanged.

The data from the lawyers' biographical questionnaires also indicate that performance quality is statistically related to the extent of previous federal trial experience. These data are presented in tables 22 and 23.

Because of the small numbers of performances in some of the categories, the percentages shown in these tables may be influenced considerably by chance in the sampling process, and the underlying trends in the data may not be immediately apparent. Particularly in table 22, however, the trends become apparent if the "first rate" and "very good" performance rating categories are considered together, and if the "adequate but no better" and "inadequate" categories are similarly treated. So viewed, there is a clear trend for the top two performance ratings to be awarded more frequently as the previous experience of the lawyer increases, and for the less favorable ratings to be awarded

2. Chi-square = 9.4, $df = 1$, p less than .01. (Chi-square computed on 1,128 performances for which there were both ratings and estimates of age, with ratings classified as "inadequate" and "other" and using age categories of 36–50 and 30 and under.)

3. Chi-square = 5.6, $df = 4$, not significant. (Chi-square computed on 861 performances for which there were both ratings and estimates of age, using age categories of 36–50 and 56 and over.)

TABLE 21

Relation Between Rating of Trial Performance and Estimate of Lawyer's District Court Trial Experience

Judge's Estimate of Lawyer's Previous Trial Experience [a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Previously tried or assisted in the trial of two or more cases in federal district courts (1,675)	22.9%	27.9%	27.6%	14.8%	6.3%
Had not tried or assisted in the trial of two or more cases in federal district courts (138)	10.9	16.7	24.6	26.1	21.7
All performances (1,969) [b]	20.9	26.3	27.0	16.7	8.6

SOURCE: District Judges' Case Reports, questions 8, 9.

[a] The number in parentheses is the total number of performances reported for lawyers in the experience category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 0.5% for any category.

[b] Includes 156 performances for which the judge had no opinion about previous experience.

Chi-square = 65.8, df = 4, p less than .01. (Chi-square computed on 1,804 performances for which there were both ratings and estimates of previous trial experience.)

less frequently. Similar trends can be discerned in table 23, although there is more ambiguity there.

It should be noted that there was some ambiguity in the questions about trial experience that were asked on the biographical questionnaire. It was not made clear whether the trial in which the lawyer's performance was being rated was to be included in the count of trials conducted by the lawyer in United States district courts. Since some lawyers may have completed the questionnaire before the trial began and others at various later times, it seems probable that some lawyers included the current trial and others did not. That ambiguity, however, does not diminish the overall impact of the findings; indeed, the expectation would be that the ambiguity would diminish the observed differences between different experience groups.

If one accepts the inference that experience is the cause of the better performances in the more experienced group, tables 22 and 23 suggest that getting better through experience is a continuous process, not one that levels off after a few trials. Hence, although it is true that lawyers who have conducted or assisted in two or more federal trials are more likely than others to be rated favorably, that should not be taken as indicating that something dramatic happens upon completion of the second case. Most of the lawyers classified in table 21 as having been involved in two or more trials had almost certainly been involved in many more than two.

It is not possible to say, on the basis of the data, whether performance ratings are related to experience in all courts, as contrasted with merely federal courts. No such relationship is apparent in the data, but we had only thirty-five lawyers who reported that they had conducted ten trials or fewer in all courts. We simply did not have an opportunity to observe a substantial group of people with virtually no trial experience.

We can say, however, that the correlation with federal trial experience persists, even among lawyers who have been involved in more than ten

TABLE 22

Relation Between Rating of Trial Performance and Number of District Court Trials Conducted by the Lawyer in the Last Ten Years

District Court Trials Conducted [a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
0-2 (43)	7.0%	18.6%	27.9%	25.6%	18.6%
3-5 (48)	8.3	27.1	22.9	29.2	12.5
6-10 (42)	21.4	21.4	19.0	31.0	7.1
11-30 (69)	15.9	29.0	34.8	18.8	1.4
31 or more (50)	28.0	32.0	20.0	12.0	8.0
All performances (257) [b]	16.3	26.5	26.1	22.2	8.6

SOURCES: District Judges' Case Reports, question 9; Trial Lawyers' Biographical Questionnaires, question 7.

[a] The number in parentheses is the total number of performances for lawyers in the category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 2.3% for any category.

[b] Includes five performances for which the number of trials was not provided.

Chi-square = 24.3, $df = 12$, p less than .05. (Chi-square computed on 251 performances for which there were both ratings and information about the number of trials, with the two lowest rating categories combined.)

TABLE 23

Relation Between Rating of Trial Performance and Number of District Court Trials Conducted by the Lawyer or in Which He Assisted in the Last Ten Years

District Court Trials Conducted or Assisted [a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
0-2 (30)	10.0%	20.0%	23.3%	30.0%	16.7%
3-5 (32)	3.1	21.9	34.4	21.9	15.6
6-10 (39)	15.4	28.2	12.8	33.3	10.3
11-30 (72)	19.4	25.0	25.0	25.0	5.6
31 or more (67)	17.9	35.8	28.4	11.9	6.0
All performances (257) [b]	16.3	26.5	26.1	22.2	8.6

SOURCES: District Judges' Case Reports, question 9; Trial Lawyers' Biographical Questionnaires, questions 7, 8.

[a] The number in parentheses is the total number of performances for lawyers in the category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 3.1% for any category.

[b] Includes 17 performances for which the number of trials was not provided.

Chi-square = 19.6, $df = 12$, p less than .10. (Chi-square computed on 239 performances for which there were both ratings and information about the number of trials, with the two lowest rating categories combined.)

trials in all courts. The data for these lawyers are presented in table 24. Once again, the trends are quite clear if the top two rating categories are considered together and the bottom two categories are similarly treated.

Once again, of course, the data by themselves do not say that experience improves performance. It might be suggested that people who perform poorly learn, sooner or later, to withdraw from federal trial practice, and that the relationship

TABLE 24

Relation Between Rating of Trial Performance and Number of District Court Trials Conducted by the Lawyer in the Last Ten Years

(Lawyers who had conducted more than ten trials in all courts in the last ten years)

District Court Trials Conducted [a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
0-2 (20)	5.0%	20.0%	20.0%	25.0%	30.0%
3-5 (31)	3.2	29.0	29.0	25.8	12.9
6-10 (38)	23.7	18.4	21.1	28.9	7.9
11-30 (65)	15.4	29.2	35.4	18.5	1.5
31 or more (45)	24.4	35.6	20.0	11.1	8.9
All performances (199)	16.1	27.6	26.6	20.6	9.0

SOURCES: District Judges' Case Reports, question 9; Trial Lawyers' Biographical Questionnaires, question 7.

[a] The number in parentheses is the total number of performances for lawyers in the category.

Chi-square = 21.7, *df* = 9, *p* less than .01. (Chi-square computed on 199 performances, with 0-5 trials treated as one category and the two lowest rating categories combined.)

between experience and performance quality is a consequence of that behavior. The inference that experience improves performance seems highly plausible, however.

Educational Background

On the lawyers' biographical questionnaire, several questions were asked about the educational background of the rated lawyers, so that responses could be correlated with their performance ratings. These questions were asked at the specific request of members of the Devitt Committee.

Law School Attended

One question asked what law school the lawyer attended. One hypothesis that had been suggested was that the more prestigious law schools do not emphasize trial skills, and that their graduates might therefore not have an advantage over graduates of other schools.

In the analysis, the respondents were separated into those who had attended nine prestigious law schools—Harvard, Yale, Michigan, Columbia, Chicago, Stanford, Boalt Hall, New York University, and the University of Pennsylvania—and those who had attended all other schools. Selection of the nine prestigious schools was based on a survey of law school deans, in which the deans were asked to name what they regarded as the top five law schools. The nine schools listed are those schools named by 10 percent or more of the deans.[4] The selection can obviously be argued with; it can also be questioned whether the selection would have been the same at the times that some of the rated lawyers attended law school. Nevertheless, this group of nine does provide a distinction, however imperfect, between graduates of some highly prestigious law schools and graduates who are mostly from less prestigious schools.

Forty respondents had graduated from the nine prestigious schools, 204 had attended other law schools, and 13 did not respond to the question. The data show a clear advantage for the graduates of the prestigious schools. None of them turned in performances that were rated inadequate, while 10 percent of the performances by lawyers from others schools received such ratings. At the other end of the rating scale, 33 percent of the performances by lawyers from the prestigious schools re-

4. Blau & Margulies, *The Reputations of American Professional Schools*, Change, Winter 1974-75, at 42, 44.

ceived ratings of "first rate," compared to 13 percent of the performances by lawyers from the other schools.[5]

It remains an open question whether the credit for the better showings by graduates of the prestigious schools should be claimed by the teaching faculties or by the admissions offices. The entering classes of the prestigious law schools are presumably composed of students with more promise, insofar as it is possible to identify them; they therefore might be expected to perform better as lawyers, even if the teaching quality is no better. In addition, because the schools are prestigious, the placement opportunities for their graduates may result in their having more opportunities, early in their careers, for experience that contributes to the development of their talents. Finally, it should be remembered that these data are based on aggregations of law schools. They do not negate the possibility that one or several of the law schools in the less prestigious group regularly turn out better trial advocates than the more prestigious schools do.

The lawyers were also asked on the biographical questionnaire whether most of their law school credits had been earned as full-time students. Only twenty-four of the respondents said that they had not. The distribution of those lawyers' performance ratings is not materially different from the distribution of those for the full-time students.

Subjects Studied

The lawyers were also asked on the biographical questionnaire whether they had taken law school courses that included substantial study of six specific subjects. The subjects covered in the inquiry were intended to reflect the recommendations of the Clare Committee in the Second Circuit that lawyers be required to have studied certain subjects in order to be admitted to the bars of the federal trial courts in that circuit.[6] However, while the Clare Committee specifically referred to the Federal Rules of Evidence, we asked only whether the lawyer had had a course in evidence. This change was made because it was anticipated that most of the responding lawyers would have attended law school before the adoption of the federal rules.

The responses about law school subjects are presented in table 25. The number of performances by lawyers who had not studied evidence or criminal law in law school was so small as to make statistical analysis impossible. But it may be noted, as a straw in the wind, that none of the inadequate performances by lawyers who responded to the biographical questionnaire were turned in by lawyers who had missed these subjects. No correlation was found between performance ratings and the study of either federal civil procedure or the Federal Rules of Criminal Procedure. In the case of professional responsibility and trial advocacy, statistical analysis indicates that the distributions of performance ratings are significant—that is, unlikely to be due simply to the luck of the draw. The trends in the data, however, are somewhat surprising. In both cases, the proportion of inadequate performances does not appear to be related to whether one has had the course, but lawyers who have *not* had the course are more likely to turn in a performance regarded as "first rate."[7]

In the case of trial advocacy, the analysis was taken a step further. We identified respondents who said that they had either studied trial advocacy in law school or studied the subject for ten hours or more in continuing legal education courses, and compared them with respondents who had not had such instruction. Once again, the results are statistically significant, and are in the same direction as those noted above. These data are presented in table 26. An attempt was then made to perform the analysis separately for those

5. Chi-square = 10.6, $df = 3$, p less than .05. (Chi-square computed on 243 performances for which there were both ratings and law school information, with the four lowest rating categories combined.)

6. Advisory Committee on Proposed Rules for Admission to Practice, Final Report, 67 F.R.D. 159, 188 (1975) (proposed rule).

7. Chi-square for professional responsibility = 10.6, $df = 4$, p less that .05; chi-square for trial advocacy = 12.1, $df = 4$, p less than .05. (Chi-squares computed with three lowest rating categories combined.)

TABLE 25

Whether Selected Subjects Had Been Studied in Law School

(Percentages of lawyers in 257 performances)

	Yes	No	No Answer
Evidence	98.1%	1.2%	0.8%
Criminal law	96.1	2.7	1.2
Federal civil procedure	84.4	13.6	1.9
Professional responsibility	68.5	26.5	5.1
Trial advocacy	52.9	40.5	6.6
Federal Rules of Criminal Procedure	42.0	51.0	7.0

SOURCE: Trial Lawyer's Biographical Questionnaires, question 5.

lawyers who graduated from law school in 1972 or later, to try to limit the independent effects that experience might have had on the data. This produced a group of only fifty-eight respondents, of which only fourteen had not had some study of trial advocacy. The results did not suggest a different outcome for this limited group, but the numbers are so small that any analysis would have to be considered untrustworthy.

These results, in our view, should serve only to illustrate the rule about the difficulty of drawing causal inferences from statistical data. We are aware of no plausible reason for believing that students' skills are damaged by studying professional responsibility or trial advocacy. In the absence of such a reason, it seems to us that the explanation of the data is much more likely to reside somewhere else—for example, in the greater experience of those who attended law school when courses in these subjects were not generally available.

Finally, the lawyers were asked whether they had taken any continuing legal education courses within the last five years and, if so, to indicate the number of hours devoted to studying the six Clare Committee subjects. We compared the performance ratings of those who indicated a total of ten or more hours of continuing education in these subjects with the performance ratings of those who said they had had no continuing education at all. No relation was found between performance ratings and participation in the continuing education courses.

TABLE 26

Relation Between Rating of Trial Performance and Instruction in Trial Advocacy

	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Studied trial advocacy in law school or had ten hours' instruction or more in last five years (168) [a]	10.7%	30.4%	28.0%	21.4%	8.9%
Neither studied trial advocacy in law school nor had ten hours' instruction or more in last five years (67) [a]	26.9	20.9	23.9	20.9	7.5
All performances (257) [b]	16.3	26.5	26.1	22.2	8.6

SOURCES: District Judges' Case Reports, question 9; Trial Lawyers' Biographical Questionnaires, questions 5, 9, 9A.

[a] The number in parentheses is the total number of performances for lawyers in the category. Since some performances were not rated, row percentages may not add to 100%. The percentage of performances not rated did not exceed 0.6% for any category.

[b] Includes 22 performances for which the questions regarding instruction in trial advocacy were not fully answered.

Chi-square = 10.1, $df = 4$, p less than .05. (Chi-square computed on 234 performances for which there were both ratings and information about the study of trial advocacy.)

CHAPTER 5

AREAS OF DEFICIENCY IN TRIAL SKILLS

In the research, we made several efforts to determine which areas of competence might be candidates for special attention if programs to upgrade professional competence are undertaken.

Both the district judges' questionnaire and the trial lawyers' opinion questionnaire asked the respondents to indicate, separately for the various occupational categories, the general areas of expertise in which they think there is the greatest need for improvement and in which they think there is the second greatest need for improvement. Eight areas of expertise were listed and defined as follows:

General Legal Knowledge. Includes:

a. Knowledge of federal jurisdiction and venue statutes

b. Knowledge of Federal Rules of Procedure

c. Knowledge of local court rules and practices

d. Knowledge of Federal Rules of Evidence

e. Broad, nonspecialized knowledge of legal subjects

Knowledge Relevant to the Particular Case. Includes mastery of:

a. Relevant facts

b. Governing statutory and decisional law

Proficiency in the Planning and Management of Litigation. Includes skill and judgment in:

a. Developing a strategy for the conduct of a case

b. Recognizing and reacting to critical issues as they arise

c. The use of discovery

d. The use of pretrial conferences

e. Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate

Technique in Arguing to the Court (other than as trier of facts). Includes skill and judgment in:

a. Preparation of memoranda on pretrial matters

b. Oral argument on pretrial matters

c. Preparation of requests for and objections to jury instructions

Technique in Arguing to the Trier of Facts. Includes skill and judgment in:

a. Opening statements

b. Closing arguments

Technique in the Examination of Witnesses. Includes skill and judgment in:

a. The use of direct examination to present the relevant facts clearly

b. Offering exhibits (including laying a proper foundation)

c. Responding to opponent's objections

d. The use of cross-examination

e. Rehabilitation of impeached witnesses

f. The use of objections (including knowing when to object and the phrasing of objections)

Professional Conduct Generally. Includes:

a. Diligence on behalf of the client

b. Observing standards of courtroom decorum

c. Compliance with the Code of Professional Responsibility generally

d. Avoiding wasting time on matters when the client would be equally well served by expeditious handling

Additional Factors in Criminal Cases. Includes:

a. Skill in representation on bail matters

TABLE 27

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: U.S. attorneys and their assistants, experienced

	387 Judges		119 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	27.6%	41.1%	37.0%	53.8%	22.6%	31.4%	23.2%	36.4%
Technique in the examination of witnesses	21.5	40.1	21.8	50.4	10.4	22.0	17.2	36.4
General legal knowledge	5.9	14.2	7.6	16.0	6.9	11.6	4.0	7.1
Knowledge relevant to the particular case	5.2	9.8	5.9	10.9	6.6	12.0	4.0	5.6
Technique in arguing to the court	4.7	11.6	5.9	10.9	3.2	9.9	6.1	14.1
Technique in arguing to the trier of facts	6.7	15.2	8.4	16.8	2.4	8.8	4.5	10.1
Professional conduct generally	1.6	4.7	1.7	5.9	5.6	8.9	6.6	11.1
Additional factors in criminal cases	0.5	1.6	....	0.8	0.7	1.9	....	1.5
Partial responses included in above figures[c]	....	9.0	....	10.9	....	10.1	....	9.1
No response or no opinion	26.4	26.4	11.8	11.8	41.6	41.6	34.3	34.3

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

b. Knowledge of exclusionary rules

c. Skill in representation at sentencing

It should be noted that the question was not limited to the areas in which inadequate lawyers need improvement. The respondents were asked to make a judgment about all lawyers in the occupational category, and not to distinguish between the adequate performers and the inadequate ones.

Tables 27 and 28 display the responses of both judges and lawyers about the areas in which there is relatively great need for improvement by United States attorneys and their assistants. Table 27 shows the responses about experienced United States attorneys and their assistants, and table 28 shows the responses about inexperienced ones. The tables for the other categories of lawyers are in appendix D.

Each table shows the responses of four groups: first, the 387 judges who responded to the judges'

TABLE 28

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: U.S. attorneys and their assistants, inexperienced

	387 Judges		119 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	24.8%	43.4%	31.1%	50.4%	16.3%	31.7%	16.7%	37.4%
Technique in the examination of witnesses	34.1	55.0	28.6	53.8	22.2	36.3	34.3	49.5
General legal knowledge	10.6	19.9	12.6	24.4	16.3	25.1	9.6	18.7
Knowledge relevant to the particular case	4.9	11.4	7.6	13.4	3.3	10.1	2.5	8.1
Technique in arguing to the court	2.3	9.6	0.8	7.6	1.1	7.5	3.5	12.6
Technique in arguing to the trier of facts	5.2	17.6	5.9	18.5	3.3	9.7	3.5	11.1
Professional conduct generally	1.6	3.4	1.7	4.2	5.8	9.1	4.0	7.1
Additional factors in criminal cases	0.3	0.8	0.8	1.7	0.1	1.1	0.5	2.5
Partial responses included in above figures[c]	....	6.5	....	4.2	....	6.2	....	2.5
No response or no opinion	16.3	16.3	10.9	10.9	31.5	31.5	25.3	25.3

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

questionnaire; second, those among the judges who were critical of lawyers in the particular occupational category, in the sense of having responded that they believe there is a serious problem of inadequate trial advocacy among lawyers in that category; third, the 488 lawyers in the docket-sheet sample; and fourth, the 198 lawyers who received the opinion questionnaire because they had been identified as "highly capable trial lawyers." The tables show the proportion of each of these groups of respondents who identified an area of competence as the one in which there is the greatest need for improvement, and the proportion identifying that area as the one in which there is the greatest or second greatest need for improvement.

The percentages in the "greatest or second" column are based on cumulative counting; they include, for each respondent, both the first-ranked and second-ranked areas of competence.

A study of these tables suggests several generalizations. Starting with the responses of all 387 judges who responded to the questionnaire, and in spite of high rates of nonresponse and "no opinion" responses, the following conclusions seem to be warranted:

1. For almost all of the categories of lawyers, whether experienced or inexperienced, the judges most often identified "proficiency in the planning and management of litigation" and "technique in the examination of witnesses" as the areas of greatest and second greatest need. These two areas of competence were mentioned more frequently than any other for all but three of the twenty-six lawyer categories. That should not be understood, however, to mean that all or almost all the judges share a common viewpoint.

2. The area "general legal knowledge" also received a high number of mentions for some groups.

3. With exceptions in a few of the tables, the other areas of competence were mentioned much less frequently. The notable exception concerns experienced retained criminal defense counsel, for which many judges identified "professional conduct generally" as the area in which there is the greatest need for improvement.

4. Between experienced and inexperienced lawyers within categories, the judges were more likely to say that the inexperienced need to improve their technique in the examination of witnesses. Except for that, there do not seem to be any consistent sharp distinctions between lawyers identified as experienced and those identified as inexperienced. (It should be noted that no definition of "experience" was provided in the questionnaire, and there is no reason to assume that the respondents had federal trial experience specifically in mind.)

When we move to those judges who are critical of the quality of advocacy within the particular occupational category, there is little evidence that they disagree about the areas in which there is a need for improvement. The generalizations made above continue to hold.

Members of the bar, in both the docket-sheet and "highly capable" samples, seem to agree, generally, with the bench about the areas of greatest need, but more lawyers than judges expressed concern about the areas identified as "general legal knowledge" and "professional conduct generally." The relatively high rate of "no opinion" responses from the lawyers tends to mask these trends in the tables. (The high rate of "no opinion" responses reflects the fact that most of the lawyer respondents did not feel qualified to comment on all of the occupational categories.) The trends are not terribly strong, and there is some risk that they are artifacts of the sampling process.

The judges and lawyers who responded to the questionnaires were also asked, within each of the eight broad areas of expertise, to identify component areas in which there is a need for improvement among the bar. Because of the complexity that would have been introduced, they were not asked to do this separately for different occupational categories, but were merely asked to give a single answer to the question. They were asked to identify, within each major area of competence, the three component areas in which there is the greatest need for improvement among trial lawyers. Tables 29 through 31 display the responses to this question for the three major areas that were identified as the areas of greatest need—proficiency in planning and management of litigation, technique in the examination of wit-

TABLE 29

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Proficiency in the planning and management of litigation

	387 Judges			151 Critical Judges			488 Lawyers[a]			198 Highly Capable Lawyers		
	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]
Recognizing and reacting to critical issues as they arise	26.4%	55.6%	64.9%	31.8%	60.3%	70.2%	25.8%	53.2%	63.5%	23.2%	48.0%	65.7%
Developing a strategy for the conduct of a case	31.5	49.4	59.2	34.4	53.6	64.9	29.7	51.0	64.0	35.9	61.1	69.7
Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	13.2	24.3	42.4	7.9	19.9	39.1	13.2	25.4	38.5	11.1	20.7	30.8
The use of discovery	10.6	22.7	35.9	7.9	23.8	35.1	14.9	31.6	47.4	16.2	31.8	49.0
The use of pretrial conferences	6.5	15.0	28.4	6.0	11.3	27.2	6.4	12.8	20.0	5.6	12.1	19.2
Partial responses included in above figures[c]	....	9.3	24.3	....	7.3	20.5	....	6.0	30.6	....	10.3	31.3
No response	11.9	11.9	11.9	11.9	11.9	11.9	10.0	10.0	10.0	8.0	8.0	8.0

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technque. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted more than once.

[c]Comprises respondents who identified an area of "most need" and, in some cases, an area of "second most need," but did not go further.

nesses, and general legal knowledge. Appendix E contains similar tables for the other five areas.

Within the general category of proficiency in the planning and management of litigation, there is a clear emphasis on two component areas: "developing a strategy for the conduct of a case," and "recognizing and reacting to critical issues as they arise." Within the general category of "technique in the examination of witnesses," the areas named most frequently were "the use of cross-examination," "the use of objections," and "the use of direct examination to present the relevant facts clearly." Within the category of "general legal knowledge," the greatest needs were thought to be in "knowledge of Federal Rules of Evidence" and "knowledge of federal rules of procedure." In this last category, however, the em-

TABLE 30

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Technique in the examination of witnesses

	387 Judges			151 Critical Judges			488 Lawyers[a]			198 Highly Capable Lawyers		
	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]
The use of cross-examination	31.8%	51.7%	65.4%	35.1%	57.0%	71.5%	28.1%	49.3%	64.1%	30.3%	51.5%	64.6%
The use of objections (including knowing when to object and the phrasing of objections)	20.2	47.3	63.6	13.2	36.4	54.3	23.8	50.1	70.3	21.2	50.5	68.2
The use of direct examination to present the relevant facts clearly	24.5	39.8	50.9	31.1	47.7	58.9	27.0	44.2	57.1	24.7	37.4	54.5
Offering exhibits (including laying a proper foundation)	9.6	20.2	33.9	5.3	17.2	33.1	7.3	18.3	29.9	11.6	20.7	32.8
Rehabilitation of impeached witnesses	1.3	6.2	11.4	1.3	6.6	11.3	4.3	10.8	17.4	3.5	12.1	21.7
Responding to opponent's objections	0.8	6.2	14.2	....	5.3	11.3	1.1	5.6	12.8	1.5	9.6	17.7
Partial responses included in above figures[c]	....	4.9	20.2	....	2.0	15.9	....	4.9	18.3	....	3.8	15.1
No response	11.9	11.9	11.9	13.9	13.9	13.9	8.4	8.4	8.4	7.2	7.2	7.2

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted more than once.

[c] Comprises respondents who identified an area of "most need" and, in some cases, an area of "second most need," but did not go further.

phasis on particular component areas was not as marked as in the other two.

Once again, the general statements made above hold for both the bench and the bar. Within each of these groups, there are considerable differences of opinion about the component areas in which there is the greatest need for improvement. But the distribution of opinions does not seem to differ greatly between the bench and the bar.

In the district judges' case reports, the judges were asked to evaluate each lawyer's performance in twenty-nine of the thirty component areas that were included in the questionnaire. They were not asked to make any judgment about the eight

TABLE 31

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Major area: General legal knowledge

	387 Judges			151 Critical Judges			488 Lawyers[a]			198 Highly Capable Lawyers		
	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]
Knowledge of Federal Rules of Evidence	27.1%	48.6%	62.3%	31.8%	50.3%	64.2%	36.8%	60.0%	70.0%	35.9%	61.1%	74.2%
Knowledge of federal rules of procedure	19.9	41.9	58.1	22.5	42.4	61.6	19.2	46.6	64.6	19.7	50.0	66.2
Knowledge of federal jurisdiction and venue statues	15.5	30.2	43.7	11.9	28.5	43.0	6.0	15.6	25.7	6.1	12.6	24.7
Knowledge of local court rules and practices	12.7	26.9	42.1	7.9	22.5	38.4	8.8	22.1	38.5	13.1	26.8	43.9
Broad, nonspecialized knowledge of legal subjects	14.2	24.0	33.9	13.2	26.5	35.8	19.1	29.7	39.0	16.7	25.3	35.4
Partial responses included in above figures[c]	....	7.2	20.9	....	4.6	14.6	....	5.8	26.1	....	7.2	22.9
No response	10.6	10.6	10.6	12.6	12.6	12.6	10.1	10.1	10.1	8.5	8.5	8.5

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted more than once.

[c] Comprises respondents who identified an area of "most need" and, in some cases, an area of "second most need," but did not go further.

general areas that were used in the questionnaire as a basis for grouping the components. Because case reports were to be completed at the ends of trials, the judges were also not asked about skill in representation at sentencing.

Evaluating individual performances at this level of detail is obviously difficult. In many trials, there may be no opportunity to observe some of the listed characteristics, and in others there may be no opportunity for a lawyer to demonstrate his proficiency (or deficiency) in the particular area. Hence, the alternative ratings offered the judges were not intended to create a scale. The ratings offered were as follows:

> "Demonstrated very good or superior knowledge or skill"
>
> "Did what was needed in the circumstances of the case"
>
> "Was not up to what was needed"
>
> "Showed seriously deficient knowledge or skill"

TABLE 32

District Judges' Evaluations of Components of Trial Performance

(Percentage of performances deemed "seriously deficient" or "not up to what was needed" with respect to the particular component)

	1,969 Performances	169 Inadequate Performances
The use of objections (including knowing when to object and the phrasing of objections)	18.9%	71.0%
Developing a strategy for the conduct of the case	16.6	75.7
The use of cross-examination	16.5	67.5
Knowledge of Federal Rules of Evidence	15.8	68.0
Avoiding wasting time on matters when the client would be equally well served by expeditious handling	14.6	53.8
Recognizing and reacting to critical issues as they arise	14.2	66.3
Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	13.0	30.2
Responding to opponent's objections	12.5	56.2
The use of direct examination to present the relevant facts clearly	12.0	62.1
Closing argument	11.5	44.4
Mastery of governing statutory and decisional law	11.5	56.8
Preparation of memoranda on pretrial matters	11.1	37.3
Preparation of requests for and objections to jury instructions	10.8	33.7
Knowledge of local court rules and practices	10.7	45.6
Offering exhibits (including laying a proper foundation)	10.0	46.2
Knowledge of federal rules of procedure	9.6	49.1
Opening statement	9.4	43.2
The use of discovery	8.6	36.7
Broad, nonspecialized knowledge of legal subjects	8.4	40.2
Rehabilitation of impeached witnesses	8.3	36.7
Mastery of facts of the case	8.1	44.4
The use of pretrial conferences	7.9	26.0
Oral argument on pretrial matters	7.0	33.7
Knowledge of exclusionary rules	6.1	28.4
Diligence on behalf of the client	5.8	30.2
Observing standards of courtroom decorum	5.7	28.4
Knowledge of federal jurisdiction and venue statutes	5.5	29.0
Compliance with the Code of Professional Responsibility generally	3.4	18.3
Representation on bail matters	0.7	3.6

SOURCE: District Judges' Case Reports, questions 9, 11.

"No opportunity to observe, or not enough on which to base a conclusion"

We intended no implication that a lawyer who demonstrated "very good or superior knowledge or skill" in one case was performing better than a lawyer who "did what was needed" in the same area of competence in another case.

Table 32 shows, for each of the twenty-nine areas, the proportion of performances in which the judge concluded that the lawyer was either not up to what was needed in the circumstances of the case, or showed seriously deficient knowledge or skill. The areas are listed in the order in which they were identified as areas of deficiency among the total of 1,969 performances evaluated in the case reports. Th proportions are also shown separately for the 169 performances that were rated as inadequate, but it should be kept in mind that these data are derived from relatively few performances. It should also be kept in mind that there were a substantial number of nonresponses and "no opinion" responses. In table 32, those responses are treated as responses in which the judges did not find inadequacy. Thus, the proportions shown in table 32 are based on those judges who made affirmative findings that the performance had been deficient regarding the particular characteristic. For the full group of 1,969 performances, table 33 shows the entire distribution of responses.

The data from the case reports, which are based on the frequency with which certain inadequacies are found, are generally consistent with the opinions given in the questionnaires. For example, nine components were identified in 12 percent of the performances or more as areas of deficiency. All but one of these components are within the three broader categories that were identified on the questionnaires as the general areas of expertise in which there was the greatest need for improvement: "proficiency in the planning and management of litigation," "technique in the examination of witnesses," and "general legal knowledge." (The area not within those categories is "avoiding wasting time on matters when the client would be equally well served by expeditious handling.")

Similarly, within the three general areas, the questionnaire responses suggested seven component areas as targets for improvement. Six of these appear within the nine components most often identified as areas of deficiency in performances that were the subjects of case reports; the seventh—"knowledge of federal rules of procedure"—is lower in the case report list.

The questionnaires did not ask, of course, that the judges and lawyers estimate the frequency of particular deficiencies. It asked them where improvement was most needed. The responses presumably reflect not only estimates of the frequency of deficient performances, but also judgments about the importance of particular aspects of trial performance. The case reports and the questionnaires thus provide two quite different approaches to the examination of areas of deficiency. The high degree of congruence between them provides some ground for confidence that we have a reasonable picture of where the problems are.

A final piece of evidence bearing on the areas of deficiency is the response to question 5 of the district judges' and lawyers' questionnaires. In this question, the judges and lawyers were asked what, in their opinion, are the most frequent causes of inadequacy among trial lawyers. Four possible causes were given, and the respondents were asked to rate them in order of frequency. The responses to this question are displayed in tables 34 and 35.

Table 34 suggests that, in the eyes of most judges, the two most frequent causes of inadequacy are lawyers' failure to prepare their cases to the best of their ability, and lack of special trial skills. Many fewer judges, but nevertheless a substantial number, emphasized lack of the basic analytical ability, knowledge, or judgment needed to be an adequate lawyer. Very few indicated that failure to keep abreast of new developments was among the more frequent causes of inadequacy. Table 35 shows a similar distribution of opinions among the lawyers who responded to our questionnaires.

These responses introduce some ambiguity into the picture. The emphasis on skills that are peculiar to trial work seems wholly consistent with the data that have already been discussed. But the emphasis on failure to prepare is somewhat surprising, in view of the lack of emphasis—in

TABLE 33

District Judges' Evaluations of Components of Trial Performance

(Percentages of 1,969 performances)

	Very Good or Superior	Did What Was Needed	Not Up to the Need	Seriously Deficient	No Opinion or No Response
The use of objections (including knowing when to object and the phrasing of objections)	24.2%	46.2%	15.2%	3.7%	10.7%
Developing a strategy for the conduct of the case	36.3	41.1	13.2	3.4	6.0
The use of cross-examination	27.8	47.1	13.2	3.3	8.6
Knowledge of Federal Rules of Evidence	26.0	50.1	12.6	3.2	8.1
Avoiding wasting time on matters when the client would be equally well served by expeditious handling	41.9	33.7	10.2	4.5	9.7
Recognizing and reacting to critical issues as they arise	32.4	42.6	11.2	2.9	10.9
Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	11.7	15.4	9.6	3.4	59.9
Responding to opponent's objections	26.3	49.1	10.7	1.9	12.0
The use of direct examination to present the relevant facts clearly	31.0	45.6	9.9	2.1	11.4
Closing argument	24.5	37.5	9.6	1.8	26.5
Mastery of governing statutory and decisional law	33.6	43.8	9.1	2.4	11.1
Preparation of memoranda on pretrial matters	23.6	30.9	9.3	1.8	34.3
Preparation of requests for and objections to jury instructions	14.5	27.4	8.0	2.7	47.3
Knowledge of local court rules and practices	30.6	42.5	8.2	2.5	16.2
Offering exhibits (including laying a proper foundation)	29.8	46.1	8.1	1.9	14.2
Knowledge of federal rules of procedure	30.5	47.1	7.7	2.0	12.7
Opening statement	24.2	44.9	8.2	1.3	21.5
The use of discovery	24.7	29.4	6.7	1.9	37.3

Broad, nonspecialized knowledge of legal subjects	20.3	33.2	6.5	1.9	38.2
Rehabilitation of impeached witnesses	12.6	23.6	6.7	1.7	55.5
Mastery of facts of the case	50.7	37.5	6.7	1.4	3.8
The use of pretrial conferences	19.1	27.2	6.0	1.9	45.8
Oral argument on pretrial matters	17.7	24.8	5.7	1.3	50.5
Knowledge of exclusionary rules	19.2	28.5	5.0	1.2	46.1
Diligence on behalf of the client	54.9	34.4	5.1	0.8	4.8
Observing standards of courtroom decorum	59.9	31.6	3.9	1.9	2.8
Knowledge of federal jurisdiction and venue statutes	29.3	36.5	4.2	1.3	28.6
Compliance with the Code of Professional Responsibility generally	56.3	26.7	2.2	1.2	13.7
Representation on bail matters	5.0	5.0	0.7	0.1	89.3

SOURCE: District Judges' Case Reports, question 11.

TABLE 34

Opinions of District Judges About Relative Frequency of Four Causes of Inadequate Trial Performances

	387 Judges			151 Critical Judges			215 Noncritical Judges		
	Most Frequent	Most or 2d Most [a]	Most, 2nd, or 3d Most [a]	Most Frequent	Most or 2d Most [a]	Most, 2d, or 3d Most [a]	Most Frequent	Most or 2d Most [a]	Most, 2d, or 3d Most [a]
Lack of special skills or knowledge needed for trial work	33.9%	61.8%	80.6%	38.4%	67.5%	84.8%	29.8%	57.7%	76.7%
Failure to prepare cases to best of ability	35.7	61.2	77.8	36.4	64.2	82.8	34.9	58.6	74.4
Lack of basic analytical ability, knowledge, or judgment	17.3	37.2	55.8	19.2	38.4	61.6	16.7	35.8	51.2
Failure to keep abreast of new law	5.9	22.2	49.6	1.3	18.5	47.7	8.8	25.1	52.1
Partial responses included in above [b]	....	3.1	11.4	....	2.0	7.3	....	3.3	13.0
No response	7.2	7.2	7.2	4.6	4.6	4.6	9.8	9.8	9.8

SOURCE: District Judges' Questionnaires, question 5.

[a] Percentages in this column add to more than 100% because a single respondent may be counted more than once.

[b] Comprises respondents who indicated a "most frequent" consequence and, in some cases, a "next most frequent," but did not go further.

responses to the earlier questions about areas in which there is a need for improvement—on mastery of the relevant facts and law or on professional conduct in the sense of diligence on behalf of the client. It might have been expected that failure to prepare would be viewed as an issue involving the exercise of proper diligence on the client's behalf, and that it would also go hand-in-hand with lack of mastery of the relevant facts or law. Table 32 does indicate that deficiencies in these three areas occupied a higher place on the rank list among the 169 inadequate performances than among all performances. Nevertheless, none of them is among the deficiencies most often identified, even among the inadequate performances.

"Failure by the lawyer to keep abreast of new statutes, rules, and decisional law" seems to be considered a relatively infrequent cause of inadequate performances. However, the frequency with which lawyers were found, in the case reports, to be deficient in their knowledge of the Federal Rules of Evidence might be thought to suggest that there is indeed a problem in keeping up. The relative newness of the Rules of Evidence provides the most obvious hypothesis, although not the only possible one, to explain the frequency of performances in which the lawyers were thought to be deficient in their knowledge of the rules. It may be that the judges do not think deficiency in knowledge of the rules is often serious enough to cause a failure of adequate representation, even though deficiency occurs relatively often.

TABLE 35

Opinions of Trial Lawyers About Relative Frequency of Four Causes of Inadequate Trial Performances

	488 Lawyers [a]			198 Highly Capable Lawyers		
	Most Frequent	Most or 2d Most [b]	Most, 2d, or 3d Most [b]	Most Frequent	Most or 2d Most [b]	Most, 2d, or 3d Most [b]
Lack of special skills or knowledge needed for trial work	32.3%	55.7%	76.6%	35.4%	63.6%	81.8%
Failure to prepare cases to best of ability	38.1	62.1	76.8	37.9	59.1	76.8
Lack of basic analytical ability, knowledge, or judgment	14.7	37.5	54.4	15.7	35.9	52.5
Failure to keep abreast of new law	7.4	25.4	48.2	4.5	22.7	47.0
Partial responses included in above [c]	....	4.3	17.2	....	5.7	16.7
No response	7.5	7.5	7.5	6.5	6.5	6.5

SOURCE: Trial Lawyers' Opinion Questionnaires, question 5.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted more than once.

[c] Comprises respondents who indicated a "most frequent" consequence and, in some cases, a "next most frequent," but did not go further.

PART II

ADVOCACY IN THE COURTS OF APPEALS

CHAPTER 6

THE QUALITY OF PERFORMANCES IN THE COURTS OF APPEALS

In the case-reporting program for appellate courts, we received evaluations of 840 performances by lawyers who appeared in 382 oral arguments in the fall and winter of 1977. Ideally, each performance would have been evaluated by each judge on the panel hearing the case. However, reports were not received from every judge on every panel, with the result that we had an average of 2.4 evaluations for each lawyer performance.

For 834 of the 840 performances evaluated, one or more of the judges provided an overall rating of performance quality. Tables 36 through 38 display the overall ratings that were given to these performances.

Table 36 shows the ratings of those performances in which overall ratings were received from all three judges on the panel. In the first column, each performance has been classified according to the least favorable rating received; in the last column, according to the most favorable rating received; in the middle column, according to the middle (median) rating.

The middle rating is, in a sense, the majority

TABLE 36

Judges' Ratings of Appellate Performances: Performances Rated by Three Judges

Rating Category	Number and Percentage of Performances by— Least Favorable Rating		Middle Rating		Most Favorable Rating	
First rate: about as good a job as could have been done	32 (6.9%)		75 (16.1%)		161 (34.6%)	
Very good	89 (19.1)		135 (29.0)		172 (37.0)	
Good	165 (35.5)		172 (37.0)		96 (20.6)	
Adequate but no better	127 (27.3)		63 (13.5)		26 (5.6)	
Not quite adequate	33 (7.1)		15 (3.2)		9 (1.9)	
Poor	15 (3.2)	(11.2)	4 (0.9)	(4.3)	1 (0.2)	(2.2)
Very poor	4 (0.9)		1 (0.2)		....	
Total	465 (100.0)		465 (100.0)		465 (100.0)	

SOURCE: Appellate Case Reports, question 5.

position of a three-judge panel. If the middle rating of a performance was "good," for example, at least two judges thought it was "good" or better, and at least two thought it was "good" or worse. This rating therefore provides our best estimate of the percentage of appellate performances that are inadequate according to a standard that would command a substantial consensus among the judges who hear appeals.

When the case-reporting program was planned, it was assumed that judges rating a particular performance would arrive at their ratings independently. This expectation was defeated, to an unknown degree, by the tradition of collegiality in the courts of appeals. In some cases, panels arrived at consensus ratings, and all three members of the panel reported the consensus rating on their case-report forms. In other cases, panel members discussed the lawyers' performances but did not try to reach a consensus. In still others, members of the panels rated the performances without any prior discussion. Thus, the data are an unknown mix of these three modes of rating.

TABLE 37

Judges' Ratings of Appellate Performances: Performances Rated by Two Judges

Rating Category	Number and Percentage of Performances by— Less Favorable Rating		More Favorable Rating		
First rate: about as good a job as could have been done	17	(7.3%)	55	(23.7)	
Very good	42	(18.1)	80	(34.5)	
Good	85	(36.6)	70	(30.2)	
Adequate but no better	55	(23.7)	22	(9.5)	
Not quite adequate	19	(8.2)	3	(1.3)	
Poor	10	(4.3)	2	(0.9)	
Very poor	4	(1.7)	....		
		(14.2)			(2.2)
Total	232	(100.0)	232	(100.0)	

SOURCE: Appellate Case Reports, question 5.

TABLE 38

Judges' Ratings of Appellate Performances: Performances Rated by One Judge

Rating Category	Number and Percentage of Performances		
First rate: about as good a job as could have been done	19	(13.9%)	
Very good	51	(37.2)	
Good	37	(27.0)	
Adequate but no better	24	(17.5)	
Not quite adequate	2	(1.5)	
Poor	2	(1.5)	(4.4)
Very poor	2	(1.5)	
Total	137	(100.0)	

SOURCE: Appellate Case Reports, question 5.

Table 37 shows the ratings of performances for which we received ratings from two judges, and table 38 shows the ratings of performances that were rated by only one judge. The data in table 37 are somewhat surprising, in that the percentage of performances regarded as inadequate by the less favorable panel member is higher than the similar percentage for performances rated by three judges, shown in table 36. We would have expected that percentage to be lower, since the "less favorable" of the two ratings received would presumably be the middle rating, in some cases, if the views of all three panel members could be known. Considering tables 36 and 37 together, and treating the "less favorable" of two ratings as if it were the "least favorable" of three, we would estimate that 12.2 percent of appellate performances are inadequate in the view of at least one member of the panel.

As was true of the data about performances in the

district courts, the unit considered is the lawyer's performance. Neither the sampling procedure nor the question asked on the case-report form was designed to produce an estimate of the proportion of lawyers who are inadequate lawyers.[1]

It should also be noted that the judges were asked to report only on cases that reached oral argument. This feature of the research design was motivated principally by a desire to obtain evaluations of performances that covered the full range of appellate advocacy skills. We have no particular reason to think that a distribution of performance ratings would be substantially different if cases briefed but not argued had been included in the sample, but we cannot be sure that the distribution would be similar.

The 834 performances reflected in tables 36 to 38 generated 1,996 separate ratings by judges. Of these ratings, 126 (6.3 percent) were in the three categories of inadequacy. The distribution of the ratings by circuit is shown in table 39. The figures at the circuit level should not be viewed as particularly reliable, however. Many of them are based on small numbers of performances, and in some circuits they can be heavily influenced by the standards used by only a few judges in the rating process. The data will not support conclusions about the relative quality of advocacy in the different circuits.

Judges of the courts of appeals provided 1,802 of the ratings; the remaining 194 were provided by judges of other courts sitting on appellate panels. The data do not suggest that judges of other courts, sitting by designation, differ from appellate judges in their ratings.[2]

Among the appellate judges, those who expressed the belief that there is a serious problem of

1. *See* pp. 13–14.

2. Chi-square=2.8, *df*=4, not significant. (Chi-square computed with the three lowest rating categories combined.)

TABLE 39

Judges' Ratings of Appellate Performances, by Circuit

Circuit[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
First (100)	22.0%	29.0%	21.0%	15.0%	13.0%
Second (292)	13.4	29.5	30.5	20.9	5.8
Third (146)	15.8	27.4	36.3	14.4	6.2
Fourth (228)	36.0	17.5	26.3	15.4	4.8
Fifth (331)	19.6	37.5	27.2	11.5	4.2
Sixth (86)	19.8	53.5	11.6	11.6	3.5
Seventh (247)	13.0	21.5	41.3	19.8	4.5
Eighth (155)	3.9	32.9	40.6	18.1	4.5
Ninth (177)	10.7	28.2	35.0	15.8	10.2
Tenth (64)	25.0	35.9	28.1	7.8	3.1
D.C. (170)	22.4	15.9	33.5	15.9	12.4
All evaluations (1,996)	18.0	28.5	31.3	15.9	6.3

SOURCE: Appellate Case Reports, question 5.

[a] The number in parentheses is the total number of judges' ratings of performances of lawyers in the circuit. For a single performance, as many as three ratings may be included. Evaluations that did not include overall performance ratings are excluded from the table.

Chi-square=76.3, *df*=30, *p* less than .01 (Chi-square computed with four lowest rating categories combined, with raw data divided by 2.4 to compensate for multiple counting of performances.)

inadequacy in their courts[3] tended to be more severe in rating lawyers who appeared before them than did the judges who do not believe there is a serious problem. This tendency is shown in table 40. It parallels a tendency found among the district judges. The appellate judges who believe there is a serious problem of inadequate appellate advocacy in their courts regarded 9.7 percent of the performances as inadequate, while those who believe there is not a serious problem regarded only 4.2 percent as inadequate.

The overall impression from the case reports is that inadequate performances are less frequent at the appellate level than at the trial level. This cannot be said with confidence, however, because the data from the trial and appellate levels are not strictly comparable. The most nearly comparable statistics are that 6.3 percent of the judges' ratings of performances in the courts of appeals were "not quite adequate" or below, compared with 8.6 percent in the district courts.

The impression that inadequacy is less frequent in appellate performances than in trial performances seems to be confirmed by the responses, on the questionnaire for appellate judges, to the following question:

> "Do you believe that there is, overall, a serious problem of inadequate appellate advocacy by lawyers with cases in your court?"[4]

Of the 93 judges who expressed an opinion, only 30 (32.3 percent) believe there is a serious problem of inadequate appellate advocacy in their courts. This compares with 41.3 percent of the district judges responding to a similar question.[5] Although we do not have an expression of opinion on this question from 38 of the 131 appellate judges queried, we think the questionnaire responses can be treated as reliable within reasonably narrow limits.

In considering data based on the questionnaire for appellate judges, it should nevertheless be kept in mind that the number of judges involved is much smaller than the corresponding number of district judges. There were 98 respondents to the questionnaire for appellate judges, as contrasted with 387 respondents to the questionnaire for district judges. Hence, among the appellate judges, the response of a single judge equals slightly more than 1 percent of the responses.

The relatively small number of appellate judges

3. Appellate Judges' Questionnaires, question 1.

4. *Id.*

5. *See* table 3, p. 16.

TABLE 40

Relations Between Rating of Appellate Performance and Judge's Opinion on Whether There Is a Serious Problem of Inadequate Appellate Advocacy

Judge's Opinion on Whether There Is a Serious Problem[a]	Ratings of Appellate Performances: Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Yes (404)	13.1%	30.2%	30.2%	16.8%	9.7%
No (1,008)	18.7	30.1	31.8	15.3	4.2

SOURCES: Appellate Judges' Questionnaires, question 1; Appellate Case Reports, question 5.

[a]The number in parentheses is the total number of ratings provided by judges expressing the opinion. The table excludes performance evaluations that did not include an overall rating, as well as ratings by judges who did not express an opinion on the seriousness of the problem.

Chi-square=21.0, $df=4$, p less than .01.

presents another problem: some data cannot be disclosed without violating the commitment made to the judges that their responses would be kept confidential. For that reason, data showing the response to the "seriousness" question by circuit are not being published. In only two circuits, however, was the response sufficiently different from the overall national response to be worthy of comment. Only in the Ninth Circuit did a majority of responding judges express the view that a serious problem exists in their court. In the Seventh Circuit, on the other hand, there was an unusually strong response to the effect that there is not a serious problem of inadequate appellate advocacy. Differences of this type could, of course, reflect differences in the quality of practice among appellate courts, differences in judges' standards for rating performances, or differences in judges' views about the level of inadequacy required to make the problem a "serious" one. No data are available that would resolve this ambiguity.

On the assumption that most practicing lawyers would not be familiar with the entire spectrum of cases that come before the courts of appeals in which they practice, the questionnaires sent to appellate lawyers did not ask for their opinion of whether there is, overall, a serious problem of inadequate appellate advocacy. As in the similar questionnaires for trial lawyers, however, the respondents were asked to identify categories of lawyers about which they felt qualified to comment, on the basis of their own observation.[6] They were then asked to consider these categories one at a time, and indicate whether they believe there is "a serious problem of inadequate appellate advocacy among the representatives of that group in the federal court(s) of appeals in which you practice."[7] The judges were asked to make similar judgments in the appellate judges' questionnaire.[8] As was the case with the trial lawyers, lawyers' responses to these questions were tabulated separately for two groups of respondents. One group, referred to as the docket-sheet sample, was designed to provide a sample of lawyers who are representative of those who argue appeals in federal courts with some frequency, while the other was a group of lawyers identified by some judges of the courts of appeals as "highly capable appellate lawyers."[9]

The responses to the questions about lawyers in various categories are presented in chapter 7. Examination of them suggests that, in general terms, the lawyers in the docket-sheet sample were about as likely as the judges to find a serious problem among a particular category of lawyers. The respondents identified as highly capable themselves were more likely than the judges to find a serious problem. If lawyers who regularly argue appeals in federal courts had the same opportunity as the judges to observe the entire spectrum of appellate performances, the proportion believing that there is, overall, a serious problem would probably not be greatly different from the proportion of judges who hold that belief. Among the group of appellate lawyers identified as highly capable themselves, however, the proportion believing there is a serious problem would probably be higher. On the whole, as was the case with the similar questions about trial advocacy, the responses to these questions suggest that there is much more disagreement on this issue within the bench and within the bar than between the two.

The questionnaire responses about the seriousness of the problem of inadequacy are further illuminated by expressions of views about the most frequent consequences of inadequacy. Both judges and lawyers were asked, to the extent that there are inadequate performances in federal courts of appeals, "which of the following, in your opinion, is the more frequent *consequence* of inadequacy?" They were offered the following two choices:

"Clients' interests not fully protected"

"Unnecessary burdens imposed on

6. Appellate Lawyers' Opinion Questionnaires, question 1.

7. *Id.* at question 2.

8. Appellate Judges' Questionnaires, question 2.

9. The methods by which the two groups were selected are set forth in appendix B.

TABLE 41

Opinions of Appellate Judges and Lawyers About Relative Frequency of Two Consequences of Inadequate Appellate Performances

More Frequent Consequence	98 Judges	328 Lawyers[a]	130 Highly Capable Lawyers
Unnecessary burdens imposed on judges and staff	77.6%	56.7%	57.7%
Clients' interests not fully protected	15.3	29.3	27.7
No response or no opinion	7.1	14.0	14.6

SOURCES: Appellate Judges' Questionnaires, question 5; Appellate Lawyers' Opinion Questionnaires, question 5.

[a]Percentages in this column are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

judges and staff"[10]

Table 41 displays the responses of the ninety-eight appellate judges and the two groups of lawyers who responded to the questionnaires.

The overwhelming majority of the appellate judges said that the principal consequence of inadequate appellate advocacy is the imposition of unnecessary burdens on the judges and their staffs. This was true of both those who believe there is a serious problem of inadequacy and those who do not; indeed, among the thirty judges who believe that inadequacy is a serious problem in their courts, only three indicated that the principal consequence of such inadequacy is failure to protect the interests of the clients. Among the lawyers, the majorities were less overwhelming, but a substantial majority of the questionnaire respondents in each group agreed that the most frequent consequence of inadequacy at the appellate level is the imposition of unnecessary burdens on the court.

These responses are in sharp contrast to the responses of district judges and trial lawyers to a similar question. Fifty-six percent of the district judges—including 66 percent of those who believe there is a serious problem of inadequacy in their courts—said that inadequate protection of the clients' interests is the most frequent consequence of inadequate performances. About 58 percent of the lawyers agreed. Thus, the impact of inadequacy on the administration of justice is perceived quite differently at these two levels of courts. Although we have no way of testing the proposition from the research data, it seems probable that this difference reflects a greater opportunity for judges to compensate for weaknesses of counsel in the appellate process than at the trial level.

Whatever the cause of the difference, the opinions of both judges and lawyers suggest that the problem created by inadequacy in the appellate courts is mainly one of efficiency, while the problem in the district courts is mainly one of the quality of the justice delivered.

10. Appellate Judges' Questionnaires, question 5; Appellate Lawyers' Opinion Questionnaires, question 5.

CHAPTER 7

RELATIONS BETWEEN APPELLATE PERFORMANCE RATINGS AND LAWYER CHARACTERISTICS

As we did for the district courts, we analyzed the data from the appellate case reports to determine whether quality of performance is correlated with the nature of the lawyer's practice, with various measures of experience, and with educational background.

We received 2,050 evaluations of appellate lawyers' performances, of which 1,996 included overall ratings of the lawyers' performances. These numbers are slightly larger than the comparable numbers for the district courts. However, each rating of a performance in the district courts represented a different performance. In the appellate sample, the 2,050 evaluations are of only 840 performances, so the sample of performances is considerably smaller.

Lawyers' biographical questionnaires were sought from each of the lawyers rated in the appellate case reporting program, rather than merely a sample of them. The analyses in this chapter are therefore based on comparison of the rating given by the judge with information provided by the lawyer; they do not rely, as some of the district court analyses did, on estimates by the judge of the lawyer's age, office size, and prior experience.

The Lawyer's Role in the Case

Table 42 shows the distribution of case-report performance ratings for the various lawyer roles. The role categories are based on information provided by the clerks of the courts, and are believed to be largely accurate, despite the difficulty that appellate judges had in making some of the distinctions we asked for about the lawyers' roles.[1] However, there is reason to think that some appointed criminal counsel may be erroneously classified as retained, and that there may have been inaccuracies in determining whether lawyers in civil cases represented individual or corporate clients.[2]

Strike force lawyers and staff lawyers for public interest law firms have been omitted from the table because only four evaluations were received for the two categories together. The other role categories are listed in ascending order of the percentage of ratings of "not quite adequate" or worse.

The number given in parentheses following each role category is the number of evaluations on which the percentages for that category have been computed. It should be kept in mind that this is, on the average, 2.4 times the number of performances. The data for the three categories in which there were fewer than forty evaluations should be regarded as very unreliable, likely to reflect performances in only a handful of appeals.

Statistical analysis indicates that for the categories in which a more substantial number of evaluations were available, the differences shown should also be considered unreliable. They could be entirely the product of chance factors in the selection of the sample of appeals for the case-reporting program. Hence, we are unable to say, on the basis of the case-report data, that any of

1. *See* appendix B, p. 132.
2. *ID.*, pp. 148–149.

TABLE 42

Relation Between Rating of Appellate Performance and Lawyer's Role in Case

Role in Case[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Public or community defenders (32)	9.4%	34.4%	50.0%	6.3%	....
"Other" Justice Department lawyers (117)[b]	17.9	20.5	39.3	14.5	3.4
U.S. attorneys and their assistants (338)	16.6	27.8	34.6	12.7	4.4
Private practitioners representing individual clients in civil cases (429)	16.1	28.4	30.8	18.2	4.9
Appointed criminal defense counsel (141)	18.4	24.8	30.5	17.7	5.0
Private practitioners representing corporate clients in civil cases (497)	21.1	30.8	25.6	13.3	6.0
Lawyers employed by state or local governments (122)	20.5	18.9	30.3	20.5	8.2
House counsel for corporations or other organizations (36)	19.4	38.9	19.4	13.9	8.3
Retained criminal defense counsel (177)	14.1	24.9	31.6	20.3	8.5
"Other" U.S. government lawyers (132)[c]	11.4	35.6	25.8	12.9	10.6
Staff lawyers for civil legal assistance programs (25)	28.0	4.0	28.0	12.0	28.0
All evaluations (2,050)[d]	17.5	27.8	30.5	15.5	6.1

SOURCE: Appellate Case Reports, questions 1, 8.

[a] The number in parentheses is the total number of evaluations of performances of lawyers in the role category. For a single performance, as many as three evaluations may be included. Since some evaluations were received that did not include overall ratings of the performances, row percentages may not add to 100%. The percentage of evaluations that did not include overall ratings did not exceed 4.3% for any category.

[b] Other than U.S. attorneys and their assistants and strike force lawyers.

[c] Other than Department of Justice.

[d] Includes four evaluations of performances by strike force lawyers and staff lawyers for public interest law firms.

Chi-square= 17.9, *df*= 21, not significant. (Chi-square computed on 1,899 evaluations for which there were ratings in the role categories with 100 evaluations or more, and with "adequate but no better" and "inadequate" ratings combined; raw figures divided by 2.4 to compensate for multiple counting of performances.)

these groups of lawyers characteristically turns in better performances than another.

In the appellate judges' questionnaires, respondents were asked to consider the groups of lawyers separately, and to indicate their belief about whether there is a serious problem of inadequate appellate advocacy among the representatives of the group. The responses of the judges to this question are presented in table 43. The lawyer categories are listed in the same order as in table 42, with strike force lawyers and staff lawyers for public interest law firms added at the end. The categories referenced to footnote c are those for which there were fewer than 100 evaluations in the case reports.

As the table indicates, the opinions expressed by the judges suggest some fairly sharp distinctions that are not suggested by the performance ratings from the case reports. The questionnaire question, of course, was not about the frequency of in-

TABLE 43

Opinions of Ninety-Eight Appellate Judges on Whether There Is a Serious Problem of Inadequate Appellate Advocacy, Separately by Category of Lawyer

Category of Lawyer[a]	Serious Problem	No Serious Problem	No Opinion[b]
Public or community defenders[c]	9.2%	78.6%	12.2%
"Other" Justice Department lawyers	8.2	81.6	10.2
U.S. attorneys and their assistants	31.6	64.3	4.1
Private practitioners representing individual clients in civil cases	37.8	54.1	8.2
Appointed counsel in criminal appeals	37.8	58.2	4.1
Private practitioners representing corporate clients in civil cases	5.1	87.8	7.1
Lawyers employed by state or local governments	57.1	36.7	6.1
House counsel for corporations or other organizations[c]	13.3	56.1	30.6
Retained counsel in criminal appeals	34.7	61.2	4.1
"Other" U.S. government lawyers	17.3	69.4	13.3
Staff lawyers for civil legal assistance programs[c]	19.4	57.1	23.5
Strike force lawyers[c]	19.4	45.9	34.7
Staff lawyers for public interest law firms[c]	13.3	75.5	11.2

SOURCE: Appellate Judges' Questionnaires, question 2.

[a] Lawyer categories are listed in the same order as in table 42—that is, in order of the percentage of ratings of inadequate, lowest to highest. The last two categories in this table are not included in table 42 because of the small number of evaluations received.

[b] Includes failure to answer the question.

[c] These categories were the subject of fewer than 100 evaluations in the case reports.

adequate performances, but rather was about the seriousness of the problem. The answers may reflect considerations other than the perceived frequency of inadequate performances among the various groups of lawyers. But they may also reflect more reliable perceptions about the relative frequency of inadequate performances than do the case-report data, given the small samples of performances rated in some of the categories.

The lawyers' questionnaires asked respondents to identify those groups of lawyers with whom they had had enough experience to feel qualified to comment, and to indicate, only for those groups, whether they believe there is a serious problem of inadequate appellate advocacy among the representatives of the group. Table 44 compares the responses of the lawyers with those of the judges. For purposes of the comparison, the responses of the judges have been recomputed to eliminate the "no opinion" category. The categories are listed in order of the percentage of judges expressing a belief that there is a serious problem.

Many of the percentages in table 44 are based on small numbers of responses. There were only 130 lawyers in the group of "highly capable appellate lawyers," for example; only for United States attorneys and their assistants did as many as 75 of them feel qualified to express an opinion. In addition, imperfections in the lawyer samples may have had an impact on the data. Two of the comparisons in table 44, however, gain credence from a comparison with the similar data bearing on performance at the trial level.[3] At both the appellate and trial levels, lawyers seem to be markedly less critical than judges of United States attorneys and assistant United States attorneys, and markedly more critical of appointed defense counsel. In the responses of the appellate lawyers, as was the case with the trial lawyers, examination indicates that the relatively favorable reaction to the United States attorneys' offices is not substantially influenced by the fact that some of the questionnaire respondents were members of that category.

To summarize, the data derived from the performance ratings in the appellate case reports do not produce statistically significant results showing different distributions of performance ratings for different categories of lawyers. As far as can be told from the case-report data, inadequate performances are spread reasonably evenly among the lawyer categories. There is certainly no suggestion in the data that inadequate appellate performances are concentrated in one or a few kinds of law practice. The judges' and lawyers' questionnaire responses, however, do suggest that there are distinctions to be made. And while the opinions of judges and lawyers are not in all cases similar, both groups appear to believe that the problems are particularly serious among appointed counsel in criminal appeals, lawyers in private practice representing individual clients in civil cases, and lawyers employed by state or local governments.

Size of Law Office

Table 45 shows the relation between performance ratings on the appellate case reports and the size of the lawyer's office as reported on the lawyers' biographical questionnaires.

The data from the district courts indicated that the likelihood of an inadequate trial performance is substantially greater if the lawyer practices alone than if he practices with others, and tends to decline as the size of the office increases. It also revealed a consistent trend for the number of "first rate" and "very good" ratings to increase with office size.[4] Similar tendencies are not apparent in the appellate data presented in table 45. Moreover, the differences among categories that appear in the table are not statistically reliable. Thus, there is no persuasive evidence that performance quality and office size are related at the appellate level.

Lawyer's Age and Date of Graduation from Law School

Table 46 shows the relation between the performance ratings received and the age of the rated lawyer. Table 47 shows the relation between performance ratings and date of graduation from

3. *See* table 17, p. 35.

4. *See* table 18, p. 36.

TABLE 44

Opinions of Appellate Judges and Lawyers on Whether There Is a Serious Problem of Inadequate Appellate Advocacy, Separately by Category of Lawyer

(Percentages of those expressing opinions who believe there is a serious problem among lawyers in the category)

Category of Lawyer	Appellate Judges	Lawyers in Docket-Sheet Sample[a]	Highly Capable Lawyers
Lawyers employed by state or local governments	60.9%	49.9%	59.6%
Private practitioners representing individual clients in civil cases	41.1	41.7	49.2
Appointed counsel in criminal appeals	39.4	49.5	54.5
Retained counsel in criminal appeals	36.2	31.9	38.0
U.S. attorneys and their assistants	33.0	13.7	20.0
Strike force lawyers	29.7	28.2[b]	34.2[c]
Staff lawyers for civil legal assistance programs	25.3	44.8[b]	39.1[c]
"Other" U.S. government lawyers	20.0	33.9	27.1[c]
House counsel for corporations and other organizations	19.1	39.5[b]	34.8[c]
Staff lawyers for public interest law firms	14.9	15.1[b]	9.4[c]
Public or community defenders	10.5	21.0	26.2[c]
"Other" Justice Department lawyers	9.1	14.5	16.7
Private practitioners representing corporate clients in civil cases	5.5	13.6	14.1

SOURCES: Appellate Judges' Questionnaires, question 2; Appellate Lawyers' Opinion Questionnaires, question 2.

[a]Percentages in this column are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Based on fewer than 100 expressions of opinion.

[c] Based on fewer than 50 expressions of opinion.

law school. Age and graduation date are, of course, highly correlated with one another, and it is not surprising to find that the general picture presented by both tables is the same.

The data for the district courts showed substantially higher inadequacy rates for lawyers who are thirty and younger than for older lawyers, except for the highest age group. It also showed a fairly consistent increase in the number of "first rate" and "very good" ratings as the lawyer's age increased, again with an exception for the highest age group.[5] The data from the appellate courts do not show a markedly higher inadequacy rate among young lawyers or recent graduates. Although tables 46 and 47 do show a relatively low number of "first rate" and "very good" ratings among the very young and the very recent graduates, as well as an increase in inadequate

5. *See* table 20, p. 38.

TABLE 45

Relation Between Rating of Appellate Performance and Size of Lawyer's Office

Office Size[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
Practices alone (180)	15.0%	23.9%	35.0%	14.4%	9.4%
2 lawyers (124)	17.7	30.6	23.4	20.2	6.5
3 (131)	12.2	22.1	42.0	16.8	6.1
4-9 (523)	15.7	28.3	29.4	18.0	5.2
10-15 (175)	21.1	23.4	31.4	13.7	9.1
16-25 (186)	17.7	24.2	31.7	16.1	6.5
26-50 (251)	17.1	34.7	29.9	11.2	4.4
51 or more (349)	23.2	28.7	28.4	12.6	4.0
All evaluations (2,050)[b]	17.5	27.8	30.5	15.5	6.1

SOURCES: Appellate Case Reports, question 5; Appellate Lawyers' Biographical Questionnaires, question 7.

[a] The number in parentheses is the total number of evaluations of performances of lawyers in the size category. For a single performance, as many as three evaluations may be included. Since some evaluations were received that did not include overall ratings of performances, row percentages may not add to 100%. The percentage of evaluations that did not include overall ratings did not exceed 3.8% for any category.

[b] Includes 131 evaluations of performances for which office size was not reported.

[c] Chi-square = 17.1, df = 21, not significant. (Chi-square computed on 1,867 evaluations for which there were both overall ratings and information on office size, with "adequate but no better' and "inadequate" categories combined, and with raw data divided by 2.4 to compensate for multiple counting of performances.)

TABLE 46

Relation Between Rating of Appellate Performance and Lawyer's Age

Lawyer's Age[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
27 or younger (95)	14.7%	22.1%	36.8%	17.9%	5.3%
28-30 (342)	11.4	30.7	35.4	15.5	3.8
31-35 (510)	15.9	29.2	32.2	13.5	5.9
36-40 (342)	19.4	27.8	32.4	14.5	4.3
41-45 (198)	22.7	24.7	24.7	21.2	4.5
46-50 (165)	24.8	27.3	20.6	16.4	8.5
51-55 (115)	12.2	26.1	30.4	20.0	7.8
56 or older (195)	21.5	26.7	26.7	10.3	12.8
All evaluations (2,050)[b]	17.5	27.8	30.5	15.5	6.1

SOURCES: Appellate Case Reports, question 5; Appellate Lawyers' Biographical Questionnaires, question 1.

[a] The number in parentheses is the total number of evaluations of performances of lawyers in the age category. For a single performance, as many as three evaluations may be included. Since some evaluations were received that did not include overall ratings of performances, row percentages may not add to 100%. The percentage of evaluations that did not include overall ratings did not exceed 3.5% for any category.

[b] Includes 106 evaluations of performances for which age was not reported.

Chi-square= 18.9, df= 21, not significant. (Chi-square computed on 1,892 evaluations for which there were both overall ratings and information on age, with "adequate but no better" and "inadequate" categories combined, and with raw data divided by 2.4 to compensate for multiple counting of performances. Using six age groups and five rating categories, chi-square = 24.3, df = 20, not significant.)

TABLE 47

Relation Between Rating of Appellate Performance and Year of Law School Graduation

Year of Graduation[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
1976-1977 (54)	14.8%	14.8%	38.9%	20.4%	3.7%
1974-75 (264)	9.8	32.2	32.6	16.7	4.9
1972-73 (257)	12.1	27.2	40.1	13.6	3.9
1967-71 (470)	16.4	30.2	30.0	14.7	6.0
1957-66 (477)	22.2	27.9	25.8	17.2	4.6
1947-56 (307)	21.8	25.1	28.7	13.7	9.1
1937-46 (61)	24.6	19.7	31.1	14.8	8.2
1936 or earlier (54)	18.5	27.8	24.1	9.3	16.7
All evaluations (2,050)[b]	17.5	27.8	30.5	15.5	6.1

SOURCES: Appellate Case Reports, question 5; Appellate Lawyers' Biographical Questionnaires, question 2.

[a] The number in parentheses is the total number of evaluations of performances of lawyers in the graduation-date category. For a single performance, as many as three evaluations may be included. Since some evaluations were received that did not include overall ratings of performances, row percentages may not add to 100%. The percentage of evaluations that did not include overall ratings did not exceed 7.4% for any category.

[b] Includes 106 evaluations of performances for which the graduation date was not reported.

Chi-square= 22.8, *df*= 16, not significant. (Chi-square computed on 1,892 evaluations for which there were both overall ratings and information on graduation date, with two most recent and three least recent graduation-date categories combined, and with raw data divided by 2.4 to compensate for multiple counting of performances.)

ratings among the oldest and the least recent graduates, the numbers of performances involved are quite small and the data are not statistically significant. Hence, we cannot say that such relationships exist.

Previous Appellate and Trial Experience

We find no persuasive evidence in the case-report data that the quality of appellate performances is related to previous courtroom experience. By comparing the performance ratings with biographical information provided by the lawyers,[6] we analyzed the relationship between ratings and the number, in the last ten years, of (1) appeals argued by the lawyer in federal courts, (2) appeals argued in all courts, (3) appeals in federal courts in which the lawyer either argued or had a substantial role in preparation of the brief, (4) appeals in all courts in which the lawyer either argued or had a substantial role in preparation of the brief, and (5) trials conducted by the lawyer in federal district courts. In no case did we find a statistically significant relationship at the 95 percent confidence level.

Table 48 sets forth the data relating performance ratings to arguments in federal courts of appeals. Although there is no evident tendency for the proportion of inadequate performances to decline with experience, there is an apparent tendency, at the higher end of the scale, for performance quality to improve with experience. The statistical analysis does not permit us to say that such a relationship has been demonstrated, however.

At the trial level, we saw a clear relationship between performance ratings and previous trial experience at both ends of the rating scale.[7] The failure of such a relationship to appear at the

6. Appellate Lawyers' Biographical Questionnaires, questions 8, 9, 10.

7. *See* pp. 39–42.

TABLE 48

Relation Between Rating of Appellate Performance and Number of Federal Appellate Court Arguments Conducted by the Lawyer in the Last Ten Years

Arguments Conducted[a]	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Inadequate
None (250)	10.4%	23.2%	37.2%	20.8%	4.8%
1 (276)	13.0	24.6	30.4	19.2	8.7
2-3 (322)	15.2	29.8	28.6	16.8	6.8
4-5 (219)	15.1	29.2	28.3	17.4	6.8
6-10 (337)	23.1	29.1	30.9	10.1	5.9
11-20 (229)	22.7	28.4	31.4	9.6	3.9
21 or more (211)	24.6	26.5	25.1	15.2	7.1
All evaluations (2,050)[b]	17.5	27.8	30.5	15.5	6.1

SOURCES: Appellate Case Reports, question 5; Appellate Lawyers' Biographical Questionnaires, question 8.

[a] The number in parentheses is the total number of evaluations of performances of lawyers in the category. For a single performance, as many as three evaluations may be included. Since some evaluations were received that did not include overall ratings of performances, row percentages may not add to 100%. The percentage of evaluations that did not include overall ratings did not exceed 4.0% for any category.

[b] Includes 206 evaluations of performances for which the number of arguments was not reported.

Chi-square= 26.3, *df*= 24, not significant. (Chi-square computed on 1,793 evaluations for which there were both overall ratings and information about the number of arguments, with raw data divided by 2.4 to compensate for multiple counting of performances.)

appellate level may be partly a function of the smaller number of performances that were rated. But it may also tend to confirm the view, held by some, that the expertise needed to perform well at the appellate level is acquired in law school but trial expertise is often acquired only through experience.

Educational Background

The appellate lawyers' biographical questionnaire contained several questions about the educational backgrounds of the rated lawyers.[8] Our analyses of the responses were like those performed in considering the similar data about lawyers rated in the district courts. We did not find a statistically reliable relationship between performance ratings and any of the items about educational background.

This negative result is not a function of having smaller numbers of performances in the appellate sample. The data about educational background in both the district and appellate samples are derived entirely from the lawyers' biographical questionnaires. We received only 257 such questionnaires in the district court portion of the research; we had 798 in the appellate court portion.

The following analyses were performed:

1. The performance ratings given to lawyers who had attended nine prestigious law schools were compared with the ratings given to lawyers who attended other law schools.[9]

2. The performance ratings given to lawyers who earned most of their law school credits as full-time students were compared with the ratings of those who did not.

3. The performance ratings given to lawyers who had studied certain subjects in law school were compared with the ratings given to lawyers

8. Appellate Lawyers' Biographical Questionnaires, questions 3, 4, 5, 6, 6A, 12, 12A.

9. For the nine law schools, and the basis for their selection, see p. 42.

who had not studied them. The subjects, each of which was considered separately, were evidence, federal civil procedure, criminal law, Federal Rules of Criminal Procedure, professional responsibility, trial advocacy, and appellate advocacy.

4. The performance ratings given to lawyers who had taken ten hours or more of continuing education in one or more of the above subjects in the last five years were compared with the ratings given to lawyers who had taken no continuing education courses in the last five years. (In the continuing education question, "Federal Rules of Evidence" was substituted for "evidence.")

5. The performance ratings given to lawyers who had not participated in a moot appellate court program in law school were compared with the ratings given to those who had argued varying numbers of moot appeals.

6. The performance ratings given to lawyers who had either studied appellate advocacy in law school or had had ten hours or more of continuing legal education in appellate advocacy in the last five years were compared with the ratings given to those who met neither of these criteria.

Thus, we have not been able to find a relationship between the quality of appellate performances and any of the educational experiences considered. We do not interpret this result as demonstrating that differences in educational experience are irrelevant to the quality of an appellate advocate's skills. We interpret it only to mean that the impact of the differences we examined, if indeed there is an impact, is not discernible through this kind of analysis because many other factors also affect the quality of a lawyer's performances in the courts of appeals.

CHAPTER 8

AREAS OF DEFICIENCY IN APPELLATE SKILLS

In the appellate judges' questionnaires and the appellate lawyers' opinion questionnaires, the respondents were asked to indicate, separately for the various occupational categories of lawyers, the factors affecting the quality of appellate advocacy in which they think there is the greatest need for improvement and the second greatest need for improvement. Twelve factors were listed, as follows:

Legal Knowledge

1. Knowledge of statutory and decisional law governing appellate jusrisdiction
2. Knowledge of Federal Rules of Appellate Procedure
3. Knowledge of circuit rules and practices
4. Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)

Briefing

5. Ability to set forth the important facts and issues in a comprehensible manner
6. Judgment in deciding what points to focus on
7. Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging
8. Ability to argue persuasively from statutory language, statutory purpose, and legislative history

Argument

9. Skill in making distinctive use of oral argument rather than repeating the brief
10. Responsiveness to questions from the bench and to indications of the judges' concerns
11. Mastery of the record below
12. Observing standards of courtroom decorum

It is important to pay attention to the three general headings under which the twelve factors were grouped, since they served in part to modify the factor descriptions. These headings were used when the factors were presented in the appellate case reports as well as in the judges' and lawyers' questionnaires. Because it is helpful, in some of the tabulations of the responses, to list the factors in different orders, the headings do not always accompany the factor descriptions in the material that follows.

It should be noted that the question put to the judges and lawyers was not limited to the factors in which improvement is needed by lawyers who perform inadequately. The respondents were asked to make a judgment about all lawyers in each occupational category, and not to distinguish between adequate performers and inadequate ones.

Tables 49 and 50 display the responses of both judges and lawyers about the factors in which there is relatively great need for improvement by United States attorneys and their assistants. Table 49 shows the responses about experienced lawyers in this group, and table 50 shows the responses about inexperienced lawyers. The tables for the other categories of lawyers are in appendix F.

TABLE 49

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: U.S. attorneys and their assistants, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	15.3%	21.4%	5.3%	8.8%	6.9%	11.5%
Judgment in deciding what points to focus on	9.2	18.4	5.3	10.4	7.7	13.8
Skill in making distinctive use of oral argument rather than repeating the brief	10.2	16.3	20.2	27.2	18.5	26.9
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	11.2	16.3	5.2	8.4	8.5	10.8
Mastery of the record below	8.2	21.4	7.0	13.4	6.9	15.4
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	9.2	5.3	20.6	4.6	19.2
Knowledge of circuit rules and practices	....	....	0.5	0.8	....	....
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	4.1	2.0	3.2	2.3	3.1
Knowledge of Federal Rules of Appellate Procedure	....	....	0.7	1.4	0.8	1.5
Ability to argue persuasively from precedent, including ability to distinguish precendent that might be damaging	2.0	6.1	3.8	8.9	0.8	6.2
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	6.1	1.9	5.4	2.3	6.2
Observing standards of courtroom decorum	....	....	....	0.5	....	....
Partial responses included in above figures[c]	....	5.1	....	5.4	....	3.8
No response or no opinion	37.8	37.8	42.9	42.9	40.8	40.8

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

In considering the data presented in these tables, it should be kept in mind that the numbers of responding judges and of lawyers identified as "highly capable" are small. Among the judges, a single response accounts for more than one percentage point; among the highly capable lawyers,

CONTINUED

1 OF 3

TABLE 50

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: U.S. attorneys and their assistants, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	16.3%	25.5%	10.9%	19.6%	10.0%	18.5%
Judgment in deciding what points to focus on	11.2	20.4	10.6	17.3	10.0	19.2
Skill in making distinctive use of oral argument rather than repeating the brief	7.1	23.5	17.0	33.6	17.7	33.1
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	13.3	16.3	8.9	12.5	10.8	15.4
Mastery of the record below	8.2	13.3	3.7	8.5	4.6	8.5
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	5.1	6.6	18.6	6.2	18.5
Knowledge of circuit rules and practices	2.0	3.1	1.3	2.6	1.5	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	4.1	0.4	1.9	....	0.8
Knowledge of Federal Rules of Appellate Procedure	4.1	7.1	1.7	2.5	....	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	5.1	2.7	6.4	2.3	6.2
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	8.2	1.8	4.1	1.5	3.8
Observing standards of courtroom decorum	....	1.0	....	....	....	....
Partial responses included in above figures[c]	....	4.1	....	3.7	....	2.3
No response or no opinion	31.6	31.6	34.4	34.4	35.4	35.4

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

it accounts for about three-quarters of a point. A change in a few opinions could therefore have a substantial effect on the reported percentages.

Despite this caveat, and despite the high rates of "no response or no opinion" for some of the categories, several generalizations seem warranted

by the data in tables 49 and 50 and those in appendix F. Looking first at the responses of the judges, we reach the following conclusions:

1. For most of the lawyer categories, there is a substantial consensus that the areas in which there is the greatest or second greatest need for improvement are within the first five areas listed in the tables. With occasional exceptions for some of the lawyer categories, relatively few judges said that any of the other seven areas was the area of greatest or second greatest need.

2. Within the first five areas, there is not a substantial consensus. There is, rather, substantial disagreement about the areas in which improvement is most needed.

3. For most of the lawyer categories, either "ability to set forth the important facts and issues in a comprehensible manner" or "judgment in deciding what points to focus on" was named as the area of greatest or second greatest need by more judges than any other area.

4. For a number of the lawyer categories, "skill in making distinctive use of oral argument" was named as the area of greatest or second greatest need by more judges than by any other area.

5. "Mastery of the constitutional, statutory, and decisional law that are important in the particular case" and "mastery of the record below" were rarely named by more judges than any other area, but were often named as the areas of greatest or second greatest need by respectable proportions of the judges.

The lawyers who responded to our questionnaires gave greater emphasis than the judges did to the oral argument skills. "Skill in making distinctive use of oral argument" was frequently named by more lawyer respondents than any other area. In addition, lawyers in both samples often said that the area of greatest or second greatest need was "responsiveness to questions from the bench." Although there is some risk that the greater emphasis on oral skills is a spurious result flowing from sampling problems, we suspect that it represents a real difference in perspective between the bench and the bar. Apart from this emphasis on oral skills, the lawyers do not seem to differ greatly from the judges in their opinions about where the needs for improvement are.

In the appellate case reports, the rating judges were asked to evaluate each lawyer's performance in terms of the twelve performance factors that were the subject of the questionnaire inquiries.

Paralleling the similar exercise in the district judges' case reports, the alternative ratings offered were as follows:

> "Demonstrated very good or superior knowledge or skill"
>
> "Did what was needed in the circumstances of the case"
>
> "Was not up to what was needed"
>
> "Showed seriously deficient knowledge or skill"
>
> "No opportunity to observe, or not enough on which to base a conclusion"

Although we asked the appellate judges to consider fewer factors than the district judges, the appellate judges generally found the task more difficult, and thus had a higher rate of nonresponse or "no opinion." Some judges indicated that it was very difficult to evaluate a performance in this much detail in view of the brief time allowed for oral argument.

Table 51 shows, for each of the twelve factors, the proportion of performance evaluations in which it was concluded that the lawyer was either not up to what was needed in the circumstances of the case or showed seriously deficient knowledge or skill. The areas are listed in the order in which they were identified as areas of deficiency among the total of 2,050 evaluations received on the 840 performances evaluated. The proportions are also shown separately for the 126 inadequate ratings, but it should be kept in mind that these represent a small sample of performances.

In table 51, the substantial number of nonresponses and "no opinion" responses are treated as ratings in which the judges did not find deficiency; thus, the proportions shown are based on evaluations of all the performances and not merely those in which there was an opportunity to observe the particular factor. Table 52 shows the entire distribution of responses.

The case-report data are somewhat surprising in

TABLE 51

Judges' Evaluations of Components of Appellate Performance

(Percentage of performances deemed "seriously deficient" or "not up to what was needed" with respect to the particular component)

	2,050 Evaluations	126 Evaluations of Performances Rated Inadequate
Skill in making distinctive use of oral argument rather than repeating the brief	10.6%	69.0%
Judgment in deciding what points to focus on	10.4	67.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	10.4	61.1
Responsiveness to questions from the bench and to indications of the judges' concerns	10.2	68.3
Ability to set forth the important facts and issues in a comprehensible manner	10.0	65.9
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	8.7	55.6
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	7.8	65.1
Mastery of the record below	4.8	32.5
Knowledge of statutory and decisional law governing appellate jurisdiction	4.6	34.1
Knowledge of circuit rules and practices	3.4	19.0
Knowledge of Federal Rules of Appellate Procedure	2.8	19.0
Observing standards of courtroom decorum	1.2	7.9

SOURCE: Appellate Case Reports, questions 5, 7.

NOTE: For a single performance, as many as three evaluations may be included in the table.

view of the judges' questionnaire responses. The first five performance factors listed in table 51 are very closely grouped in terms of the frequency with which deficiency was observed in the performances that were the subjects of case reports. Included in the five are two factors that did not receive much emphasis from the judges in the questionnaire responses—"responsiveness to questions from the bench" and "ability to argue persuasively from precedent." While the questionnaire responses suggested a relatively great need for improvement in "mastery of the record below" and "mastery of the law important in the particular case," these two factors ranked lower in the case-report data. But the case-report data do confirm the emphasis on "ability to set forth the important facts and issues," "judgment in deciding what points to focus on," and "skill in making distinctive use of oral argument." They also confirm the relative unimportance, in terms of need for improvement, of the last four factors listed in table 51.

A final piece of evidence bearing on the areas of deficiency is the response to question 4 of the appellate judges' questionnaire and the appellate lawyer's opinion questionnaire. In this question, the judges and lawyers were asked what, in their opinion, are the most frequent causes of inadequate performances by lawyers in federal appellate courts. Three possible causes were given, as follows:

"Lack of the basic analytical ability, knowl-

TABLE 52

Judges' Evaluations of Components of Appellate Performance

(Percentages of 2,050 evaluations)

	Very Good or Superior	Did What Was Needed	Not Up to the Need	Seriously Deficient	No Opinion or No Response
Skill in making distinctive use of oral argument rather than repeating the brief	40.1%	45.6%	9.0%	1.6%	3.7%
Judgment in deciding what points to focus on	38.9	45.2	8.5	1.9	5.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	33.1	45.5	9.4	1.0	11.0
Responsiveness to questions from the bench and to indications of the judges' concerns	43.4	41.1	8.2	2.0	5.4
Ability to set forth the important facts and issues in a comprehensible manner	37.7	48.5	8.5	1.5	3.8
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	29.0	35.8	7.8	1.0	26.5
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	36.0	45.2	6.8	1.0	11.1
Mastery of the record below	45.3	39.8	3.9	0.9	10.1
Knowledge of statutory and decisional law governing appellate jurisdiction	31.4	29.9	3.8	0.8	34.1
Knowledge of circuit rules and practices	21.1	20.1	2.6	0.8	55.4
Knowledge of Federal Rules of Appellate Procedure	23.4	22.6	1.7	1.2	51.2
Observing standards of courtroom decorum	70.8	23.0	0.8	0.3	5.0

SOURCE: Appellate Case Reports, question 7.

NOTE: For a single performance, as many as three evaluations may be included in the table.

edge or judgment needed to be an adequate lawyer''

''Lack of the special skills, knowledge or judgment needed to be an adequate *appellate* lawyer''

''Failure by lawyers to research their cases and to prepare themselves to the best of their ability''

Respondents were asked to rate these causes of inadequate performances in order of their frequency. Their responses are displayed in table 53.

Most of the responding judges identified failure to prepare as the most frequent cause of inadequacy at the appellate level. The others were about equally split between the lack of basic analytical ability and lack of special skills. The emphasis on failure to prepare is consistent with the indications, in response to question 3, that two of the principal areas in which appellate lawyers need improvement are ''mastery of the law important in the particular case'' and ''mastery of the record below.'' It is also consistent with the relatively high frequency with which deficiency was ob-

TABLE 53

Opinions of Appellate Judges and Lawyers About Relative Frequency of Three Causes of Inadequate Appellate Performances

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Most Frequent	Most or Next Most[b]	Most Frequent	Most or Next Most[b]	Most Frequent	Most or Next Most[b]
Failure by lawyers to research their cases and to prepare themselves to the best of their ability	48.0%	71.4%	43.7%	72.5%	35.4%	65.4%
Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer	23.5	49.0	13.1	39.5	16.2	42.3
Lack of the special skills, knowledge or judgment needed to be an adequate *appellate* lawyer	20.4	50.0	33.8	65.0	39.2	70.0
Partial responses included in above figures[c]	....	13.3	....	4.2	....	3.9
No response	8.2	8.2	9.4	9.4	9.2	9.2

SOURCES: Appellate Judges' Questionnaires, question 4; Appellate Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who indicated a "most frequent" cause but not a "next most frequent."

served, in the performance evaluations, in the area "mastery of the law important in the particular case." It should be recognized that the various questions in the questionnaire and the case reports did not ask for precisely comparable information. In particular, some focused on inadequate performances and some did not. The analysis of consistency, therefore, cannot be treated as a search for a precise match.

The lawyers' responses gave more emphasis than the judges' to lack of special appellate skills as a cause of inadequacy. Indeed, among the lawyers identified as "highly capable appellate lawyers," more said that lack of special skills is the most frequent cause of inadequacy than said that failure to prepare is most frequent. The lawyers' responses appear consistent with the lawyers' greater emphasis on oral argument skills in their responses to question 3 on the questionnaire.

APPENDIXES

APPENDIX A

COPIES OF RESEARCH INSTRUMENTS

District Judges' Case Report (Two Pages)

489-02 *1-5*

Judge #_____ *6-9*

REPORT OF TRIAL IN DISTRICT COURT *10-11*

1. Was the trial a bench trial or a jury trial? *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

   Bench trial. . . . 0
   Jury trial 1 *12/2*

2. How many lawyers were in the trial? *(COUNT ONLY THE LEAD COUNSEL WHEN TWO OR MORE LAWYERS REPRESENTED A SINGLE CLIENT.)* . . . . . _____ *13/9*

3. How many days of testimony were there? . . . . . _____ *14-16/9*

4. Did the trial go the full course, or was it aborted before completion of testimony by settlement, guilty plea, or the like?

   Full course. . . . 0
   Aborted. 1 *17/2*

	Lawyer #1	Lawyer #2	Lawyer #3	Lawyer #4	
5. Using the codes in the instructions, indicate the role of each lawyer in the case.	____	____	____	____	*18-25/9*
6. Does the lawyer practice: *(CIRCLE ONE ANSWER FOR EACH LAWYER.)*					
Alone?	0	0	0	0	
With others?	1	1	1	1	
Don't know.	2	2	2	2	*26-29/3*
IF WITH OTHERS: About how many lawyers are there in the office? *(IF YOU HAVE NO BASIS FOR ESTIMATING, LEAVE BLANK.)*	____	____	____	____	*30-41/9*
7. What is your best estimate of the lawyer's age? *(DO NOT GIVE A RANGE. IF YOU THINK IN TERMS OF RANGES, GIVE THE MIDDLE OF THE RANGE. IF UNABLE TO ESTIMATE, LEAVE BLANK.)*	____	____	____	____	*42-49/9*
8. Has the lawyer previously tried, or assisted in the trial, of two or more cases in federal district courts? *(CIRCLE ONE ANSWER FOR EACH LAWYER.)*					
Yes, or probably.	0	0	0	0	
No, or probably not	1	1	1	1	
Don't know.	2	2	2	2	*50-53/3*
9. Which of the following statements best describes your judgment of the quality of the lawyer's performance in this case?					
First rate: about as good a job as could have been done.	0	0	0	0	
Very good	1	1	1	1	
Good.	2	2	2	2	
Adequate but no better.	3	3	3	3	
Not quite adequate.	4	4	4	4	
Poor.	5	5	5	5	
Very poor	6	6	6	6	*54-57/7*
10. How confident are you, in the particular circumstances of this case, that the quality of the lawyer's performance can be reliably evaluated by a judge? *(ENTER A NUMBER, "1" THROUGH "7," FOR EACH LAWYER, BASED ON THE SCALE BELOW.)*	____	____	____	____	*58-61/8*

Not at all Confident — Completely Confident

1 2 3 4 5 6 7

(CONTINUED ON BACK OF PAGE)

11. Using the rating codes in the instructions (printed on the inside cover of the folder), please rate each lawyer's performance in this case with respect to the following factors:

	Lawyer #1	Lawyer #2	Lawyer #3	Lawyer #4	
Knowledge of federal jurisdiction and venue statutes.	____	____	____	____	*62-65/9*
Knowledge of Federal Rules of Procedure	____	____	____	____	*66-69/9*
Knowledge of local court rules and practices.	____	____	____	____	*70-73/9*
Knowledge of Federal Rules of Evidence.	____	____	____	____	*74-77/9*
Knowledge of exclusionary rules	____	____	____	____	*12-15/9*
Broad, nonspecialized knowledge of legal subjects	____	____	____	____	*16-19/9*
Mastery of facts of the case.	____	____	____	____	*20-23/9*
Mastery of governing statutory and decisional law	____	____	____	____	*24-27/9*
Developing a strategy for the conduct of the case	____	____	____	____	*28-31/9*
Recognizing and reacting to critical issues as they arise	____	____	____	____	*32-35/9*
The use of discovery.	____	____	____	____	*36-39/9*
The use of pretrial conferences	____	____	____	____	*40-43/9*
Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate.	____	____	____	____	*44-47/9*
Preparation of memoranda on pretrial matters.	____	____	____	____	*48-51/9*
Oral argument on pretrial matters	____	____	____	____	*52-55/9*
Preparation of requests for and objections to jury instructions .	____	____	____	____	*56-59/9*
Representation on bail matters.	____	____	____	____	*60-63/9*
Opening statement	____	____	____	____	*64-67/9*
Closing argument.	____	____	____	____	*68-71/9*
The use of direct examination to present the relevant facts clearly	____	____	____	____	*72-75/9*
Offering exhibits (including laying a proper foundation).	____	____	____	____	*12-15/9*
Responding to opponent's objections	____	____	____	____	*16-19/9*
The use of cross examination.	____	____	____	____	*20-23/9*
Rehabilitation of impeached witnesses	____	____	____	____	*24-27/9*
The use of objections (including knowing when to object and the phrasing of objections)	____	____	____	____	*28-31/9*
Diligence on behalf of the client	____	____	____	____	*32-35/9*
Observing standards of courtroom decorum.	____	____	____	____	*36-39/9*
Compliance with the Code of Professional Responsibility generally	____	____	____	____	*40-43/9*
Avoiding wasting time on matters when the client would be equally well served by expeditious handling	____	____	____	____	*44-47/9*

FOR EACH OF THE LAWYERS RATED, YOU SHOULD HAVE AN ENTRY--EITHER A NUMBER FROM 1 TO 4 OR A ZERO--IN EVERY BLANK IN THE COLUMN.

Instructions for District Judges' Case Reports (Two Pages—Printed on Two Sides of Front Cover of a Folder)

FEDERAL JUDICIAL CENTER ADVOCACY STUDY

REPORT OF TRIAL IN DISTRICT COURT

A report should be completed for each case in which a trial on the merits ends during the reporting period. The trial need not have begun during the period.

A trial is defined for this purpose as a hearing:

1) in which testimony is taken;

2) that is on the merits; and

3) that is contested.

No report should be completed for a proceeding that does not meet all three tests. For example, no report should be completed for a hearing on a suppression motion, even though testimony is taken. No report should be completed for a case that settles after jury selection but before testimony is taken.

A trial should be considered to end within the reporting period if the case is submitted to the trier of fact within the period or if it is terminated short of submission by settlement, guilty plea, directed verdict, or the like.

Exception: Do not complete a report for a trial if you anticipate that there will be further contested proceedings in which testimony on the merits is taken. For example, do not report on a trial that ends with a declaration of a mistrial.

Reports should be mailed to the Federal Judicial Center, in one batch, after the reporting period has ended. An envelope for that purpose is enclosed.

If you have no trials that end during the reporting period, please let us know. You can do this by writing "No trials" across the top of a report form and sending it back.

If you run out of forms, Xeroxed copies are acceptable. Enough forms have been provided so that almost no one should have this problem. (If you obtain blank forms from another judge's chambers, please be sure you change the judge number to the number shown on your forms.)

If you have questions, you should call Anthony Partridge, Project Director, at 393-1640, Ext. 510. (This is both an FTS and commercial number.)

The reporting period for your circuit:

Begins:

Ends:

Instructions for Completing Reports

One report form is to be used for each case reported on. On the form, you should rate the performance of each lawyer in the case, except that you should not rate more than one lawyer for a single client.

You are asked to rate the lawyer's performance in this case. Even if you are familiar with the lawyer from other cases, try to evaluate the performance in this case as if it were the performance of a lawyer you had never seen before. But consider the performance in the whole case--pretrial proceedings as well as trial.

You may find the form easier to handle if you go through the entire form for one lawyer and then move to the next lawyer, rather than trying to rate all the lawyers at once.

If two or more lawyers represent a single client, answer questions 5-8 for the principal trial counsel; then rate as one "performance" the representation provided jointly by the lead counsel and his co-counsel.

If there are more than four lawyers in the trial representing different parties, you are asked to rate only four in order to limit the burden involved in this exercise. In selecting the four to be rated, choose at least one lawyer from each side; if there are multiple parties on both sides of the trial, choose two lawyers from each side. If you are not going to rate the lawyers for all plaintiffs, select plaintiffs in the order in which they are listed in the complaint. Follow a similar procedure for defendants.

Codes for Lawyer Roles in Question 5	Code
U.S. Government lawyers	
U.S. Attorney or Assistant	51
Strike force lawyer	52
Other Justice Department lawyer	53
Other U.S. Government lawyer	54
Criminal defense	
Public or community defender	61
Retained counsel	62
Appointed counsel	63
Civil (other than U.S. Government)	
Private practitioner representing corporate client (including those representing insurers of nominal defendants)	71
Private practitioner representing individual client	72
House counsel for corporation or other organization	73
Staff lawyer for civil legal assistance program (including neighborhood legal services lawyers)	74
Staff lawyer for public interest law firm (including organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union)	75
Lawyer employed by state or local government	76
If none of the above codes is applicable, please use the margin of the report form to characterize the lawyer's role in the case.	

Codes for Rating Performance in Question 11	Code
Demonstrated very good or superior knowledge or skill	1
Did what was needed in the circumstances of the case	2
Was not up to what was needed	3
Showed seriously deficient knowledge or skill	4
No opportunity to observe, or not enough on which to base a conclusion	0

Trial Lawyers' Biographical Questionnaire (Two Pages)

489-11 *1-5*

Judge # _____ *6-9*

Case # _____ *10-11*

Lawyer # _____ *12*

LAWYER SURVEY

TO THE LAWYER:

This survey is part of a nationwide program of research being conducted under the auspices of the Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts. For a period of approximately one month, all lawyers who appear before certain Federal judges are being asked to complete these forms. Since a form is to be completed each time an appearance is made before one of these judges, you may be asked to complete the form more than once in the course of the study period.

Please complete the form, enclose it in the envelope that has been provided, seal it, and return it to the judge who gave it to you.

We do not believe that any of the information requested is sensitive. Nevertheless, you may be assured that it will be used for statistical purposes only. The envelope containing your form will be sent to the Federal Judicial Center for tabulation without being opened; the data will be tabulated by people with no knowledge of your identity.

1. What is your age? . . . . . _____ *13-14/9*

2. When did you graduate from law school? . . . . . 19____ *15-16/9*

3. Which law school? _____ *17-19/9*

	Yes	No	
4. Did you earn most of your law school credits as a full-time student? *(CIRCLE ONE)*	0	1	*20/2*
5. Did you take law school courses that included substantial study of the following: *(CIRCLE ONE ANSWER FOR EACH COURSE.)*			
Evidence?	0	1	*21/2*
Federal Civil Procedure?.	0	1	*22/2*
Criminal Law?	0	1	*23/2*
Federal Rules of Criminal Procedure?. . .	0	1	*24/2*
Professional Responsibility?	0	1	*25/2*
Trial Advocacy?	0	1	*26/2*

(CONTINUED ON BACK OF PAGE)

6. About how many lawyers are there in your office, including yourself? . . . . . _____ *27-29/9*

7. Approximately how many trials have you conducted (in the sense that you were the principal lawyer for a client in a case that went to trial) in the last ten years:

In United States District Courts? . . . . . _____ *30-32/9*

In other trial courts? . . . . . _____ *33-35/9*

8. In approximately how many trials did you assist the principal lawyer for a client in the last ten years:

In United States District Courts? . . . . . _____ *36-38/9*

In other trial courts?. . . . . _____ *39-41/9*

9. Within the last five years, have you taken any continuing legal education courses?

Yes *(ANSWER 9A)* 0

No 1 *42/2*

9A. *IF "YES,"* please estimate the number of hours of instruction devoted to each of the following subjects. *(ENTER THE NUMBER OF HOURS FOR EACH SUBJECT; IF NONE, ENTER "0." TREAT THE SUBJECTS AS MUTUALLY EXCLUSIVE, SO THAT A SINGLE HOUR OF INSTRUCTION IS COUNTED ONLY ONCE.)*

Federal Rules of Evidence . . . . . _____ *43-44/9*

Federal Civil Procedure . . . . . _____ *45-46/9*

Criminal Law. . . . . _____ *47-48/9*

Federal Rules of Criminal Procedure . . . . . _____ *49-50/9*

Professional Responsibility . . . . . _____ *51-52/9*

Trial Advocacy . . . . . _____ *53-54/9*

PLEASE RETURN THIS FORM, IN THE ENVELOPE PROVIDED, TO THE JUDGE WHO GAVE IT TO YOU. THANK YOU VERY MUCH FOR YOUR COOPERATION.

Answer Sheets for Videotape Study (Six Pages)

FEDERAL JUDICIAL CENTER

CONSISTENCY OF RATINGS OF COURTROOM ADVOCACY

In this program we present four examples of courtroom advocacy and request that you rate each of them. The rating forms also provide an opportunity to express your degree of confidence in each of the four judgments. The purpose of the study is to measure the extent of consistency in ratings of advocacy by qualified evaluators. The results of the study will become part of a larger research effort, including nationwide surveys of federal judges and trial lawyers, to determine levels and standards of advocacy.

We realize that these brief segments may not be representative of the lawyers' overall performances. Obviously, your judgments could be made more easily with longer segments. However, we ask you not to be concerned with this, but to evaluate the samples just as they are presented. In other words, we ask you not to try to rate the lawyers generally, but rather just to rate these performances.

A brief description of the context from which each segment was taken is presented at the top of the rating sheet for that segment.

Thank you.

PLEASE PLACE YOUR NAME AND CIRCUIT HERE:

_____

FEDERAL JUDICIAL CENTER

The Facts:

This segment presents the cross-examination of a research engineer by defendant's attorney in a personal injury case. After viewing the scene of an accident, inspecting plaintiff's car, and examining various photographs, the witness has attempted to reconstruct the incident. His version of the collision between the plaintiff's Volkswagen and defendant's tractor trailer differs materially from testimony given by police investigators. The police concluded that a sudden gust of wind forced the car into the truck, while this witness is of the opinion that an abrupt move by the truck into the lane already occupied by the auto initiated the accident. The trial took place in August, 1971.

ITEM 1: The quality of the performance

Please place a mark in the box next to the statement that most closely represents your judgment of the cross-examination as presented to you on the videotape.

First rate--about as good a job as could have been done [ ]

Very good representation [ ]

Good representation [ ]

Adequate representation but no better [ ]

Not quite adequate representation [ ]

Poor representation [ ]

Very poor representation [ ]

ITEM 2: Confidence in your judgment

How confident are you in the judgment you have just made? Please place a mark in one of the boxes provided below.

[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
1	2	3	4	5	6	7
Not at all confident						Completely confident

FEDERAL JUDICIAL CENTER

The Facts

This segment presents portions of a defense counsel's opening remarks and cross-examination of a key prosecution witness. The defendant, Peter McKinnon, is charged with sale of heroin. The witness, James Raglin, claims to have purchased the drugs from the defendant at an establishment known as Pete's House of Jazz. At the time of the purchase, the witness was out on bail on a drug charge and had agreed to be wired with a tape recorder in an effort to secure evidence against other drug offenders. The trial took place in July, 1974.

ITEM 1: The quality of the performance

Please place a mark in the box next to the statement that most closely represents your judgment of the performance as presented to you on the videotape.

First rate--about as good a job as could have been done	[ ]
Very good representation	[ ]
Good representation	[ ]
Adequate representation but no better	[ ]
Not quite adequate representation	[ ]
Poor representation	[ ]
Very poor representation	[ ]

ITEM 2: Confidence in your judgment

How confident are you in the judgment you have just made? Please place a mark in one of the boxes provided below.

[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
1	2	3	4	5	6	7
Not at all confident						Completely confident

FEDERAL JUDICIAL CENTER

The Facts:

This segment presents argument on a motion to compel the production of certain reports pursuant to Rule 37(a) of the Federal Rules of Civil Procedure. The case involves an injury sustained by a seaman while aboard the defendant's fishing vessel. Plaintiff is also seeking an award of the expenses of the motion pursuant to Rule 37(a)(4). The hearing took place in August, 1971.

ITEM 1: The quality of the performance

Please place a mark in the box next to the statement that most closely represents your judgment of the argument as presented to you on the videotape.

First rate--about as good a job as could have been done	[ ]
Very good representation	[ ]
Good representation	[ ]
Adequate representation but no better	[ ]
Not quite adequate representation	[ ]
Poor representation	[ ]
Very poor representation	[ ]

ITEM 2: Confidence in your judgment

How confident are you in the judgment you have just made? Please place a mark in one of the boxes provided below.

[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
1	2	3	4	5	6	7
Not at all confident						Completely confident

FEDERAL JUDICIAL CENTER

The Facts:

This segment presents the prosecutor's closing argument in a trial of two defendants, James Smith and Myrtle Grant, on a charge of possession of cocaine. The prosecutor's case consisted of testimony from the arresting officers and the police chemists. The defense theory was that the drugs were planted either at a party on the evening before the arrest or at the time of the arrest itself. Testimony was presented as to the various individuals at the party, their criminal records, and a fight which took place that evening. Further evidence was offered as to the location of various individuals within the apartment at the time of the arrest and search of the scene. The trial took place in July, 1973.

ITEM 1: The quality of the performance

Please place a mark in the box next to the statement that most closely represents your judgment of the argument as presented to you on the videotape.

First rate--about as good a job as could have been done	[ ]
Very good representation	[ ]
Good representation	[ ]
Adequate representation but no better	[ ]
Not quite adequate representation	[ ]
Poor representation	[ ]
Very poor representation	[ ]

ITEM 2: Confidence in your judgment

How confident are you in the judgment you have just made? Please place a mark in one of the boxes provided below.

[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]
1	2	3	4	5	6	7
Not at all confident						Completely confident

We want to compare the best and worst of the four video performances with the best and worst performances you see in your court. Please circle the appropriate answer in each of the following questions:

The best video performance was (better than) (about as good as)

(poorer than) the best performances in my court.

The worst video performance was (poorer than) (about as bad as)

(better than) the worst performances in my court.

We would appreciate any additional comments you would care to make.

_____

_____

_____

_____

_____

_____

_____

_____

_____

District Judges' Questionnaire (Four Pages)

489-01 *1-5*

Judge # _____ *6-9*

QUESTIONNAIRE FOR FEDERAL DISTRICT JUDGES

1. Do you believe that there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in your court? *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

Yes 0
No. 1
No opinion. 2 *10/3*

2. Regardless of your answer to Question 1, please consider the following groups of lawyers one at a time and indicate whether you believe there is a serious problem of inadequate trial advocacy among the representatives of that group who try cases in your court. *(PLEASE CIRCLE ONE ANSWER FOR EACH GROUP.)*

	Yes	No	No Chance to Observe or No Opinion	
U.S. Attorneys and their Assistants	0	1	2	*11/3*
Strike force lawyers.	0	1	2	*12/3*
Other Justice Department lawyers.	0	1	2	*13/3*
Other U.S. Government lawyers	0	1	2	*14/3*
Retained criminal defense counsel	0	1	2	*15/3*
Appointed criminal defense counsel.	0	1	2	*16/3*
Public or community defenders	0	1	2	*17/3*
Private practitioners representing corporate clients in civil cases (including those representing insurers of nominal defendants). .	0	1	2	*18/3*
Private practitioners representing individual clients in civil cases.	0	1	2	*19/3*
House counsel for corporations or other organizations	0	1	2	*20/3*
Staff lawyers for civil legal assistance programs (including neighborhood legal services lawyers)	0	1	2	*21/3*
Staff lawyers for public interest law firms (including staff lawyers for organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union).	0	1	2	*22/3*
Lawyers employed by state or local governments. .	0	1	2	*23/3*

3. The following is a list of factors that affect the quality of trial advocacy, grouped into eight general categories. Separately, within each category, please indicate those factors in which you think there is the greatest need for improvement, overall, among the lawyers who practice in your court. *(ENTER "1" NEXT TO THE FACTOR IN WHICH THERE IS THE MOST NEED FOR IMPROVEMENT, "2" FOR THE SECOND MOST NEEDED, AND "3" FOR THE THIRD. DO NOT TRY TO GO PAST THIRD PLACE IN ANY CATEGORY. IN CATEGORIES THAT HAVE ONLY TWO FACTORS, OR IF YOU CANNOT RANK AS FAR AS "3," GO AS FAR AS YOU CAN. FOR EXAMPLE, IN CATEGORY 6, IF YOU THINK THE GREATEST NEED FOR IMPROVEMENT IS IN THE USE OF CROSS EXAMINATION, BUT YOU HAVE NO VIEWS ABOUT THE OTHER FACTORS, ENTER "1" OPPOSITE "THE USE OF CROSS EXAMINATION" AND LEAVE THE OTHERS BLANK.)*

	Rankings	
(1) General Legal Knowledge. Includes:		
a. Knowledge of Federal jurisdiction and venue statutes.	_____	24/4
b. Knowledge of Federal Rules of Procedure	_____	25/4
c. Knowledge of local court rules and practices.	_____	26/4
d. Knowledge of Federal Rules of Evidence.	_____	27/4
e. Broad, nonspecialized knowledge of legal subjects	_____	28/4
(2) Knowledge Relevant to the Particular Case. Includes mastery of:		
a. Relevant facts.	_____	29/4
b. Governing statutory and decisional law.	_____	30/4
(3) Proficiency in the Planning and Management of Litigation. Includes skill and judgment in:		
a. Developing a strategy for the conduct of a case	_____	31/4
b. Recognizing and reacting to critical issues as they arise	_____	32/4
c. The use of discovery.	_____	33/4
d. The use of pretrial conferences	_____	34/4
e. Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	_____	35/4
(4) Technique in Arguing to the Court (other than as trier of facts). Includes skill and judgment in:		
a. Preparation of memoranda on pretrial matters.	_____	36/4
b. Oral argument on pretrial matters	_____	37/4
c. Preparation of requests for and objections to jury instructions	_____	38/4
(5) Technique in Arguing to the Trier of Facts. Includes skill and judgment in:		
a. Opening statements.	_____	39/4
b. Closing arguments	_____	40/4
(6) Technique in the Examination of Witnesses. Includes skill and judgment in:		
a. The use of direct examination to present the relevant facts clearly	_____	41/4
b. Offering exhibits (including laying a proper foundation).	_____	42/4
c. Responding to opponent's objections	_____	43/4
d. The use of cross examination.	_____	44/4
e. Rehabilitation of impeached witnesses	_____	45/4
f. The use of objections (including knowing when to object and the phrasing of objections).	_____	46/4
(7) Professional Conduct Generally. Includes:		
a. Diligence on behalf of the client	_____	47/4
b. Observing standards of courtroom decorum.	_____	48/4
c. Compliance with the Code of Professional Responsibility generally	_____	49/4
d. Avoiding wasting time on matters when the client would be equally well served by expeditious handling.	_____	50/4
(8) Additional Factors in Criminal Cases. Includes:		
a. Skill in representation on bail matters	_____	51/4
b. Knowledge of exclusionary rules	_____	52/4
c. Skill in representation at sentencing	_____	53/4

4. Now, please look at the eight numbered and underlined categories in Question 3. Thinking of these eight categories as areas of expertise, indicate, for each group of lawyers listed, the area in which you think there is the greatest need for improvement by that group, and the area in which there is the second greatest need for improvement. For example, if you think the greatest need for improvement for a particular group of lawyers is in their technique in the examination of witnesses, enter "6" in the appropriate blank. *(WRITE IN THE NUMBER--1 THROUGH 8--OF THE CATEGORY YOU HAVE CHOSEN IN EACH CASE, SEPARATELY FOR EXPERIENCED AND INEXPERIENCED LAWYERS. ENTER ZERO IF YOU HAVE NO OPINION.)*

	Greatest Need	Second Greatest Need	
U.S. Attorneys and their Assistants			
Experienced	_____	_____	*54-55/9*
Inexperienced	_____	_____	*56-57/9*
Strike force lawyers			
Experienced	_____	_____	*58-59/9*
Inexperienced	_____	_____	*60-61/9*
Other Justice Department lawyers			
Experienced	_____	_____	*62-63/9*
Inexperienced	_____	_____	*64-65/9*
Other U.S. Government lawyers			
Experienced	_____	_____	*66-67/9*
Inexperienced	_____	_____	*68-69/9*
Retained criminal defense counsel			
Experienced	_____	_____	*70-71/9*
Inexperienced	_____	_____	*72-73/9*
Appointed criminal defense counsel			
Experienced	_____	_____	*74-75/9*
Inexperienced	_____	_____	*76-77/9*
Public or community defenders			
Experienced	_____	_____	*10-11/9*
Inexperienced	_____	_____	*12-13/9*
Private practitioners representing corporate clients in civil cases			
Experienced	_____	_____	*14-15/9*
Inexperienced	_____	_____	*16-17/9*
Private practitioners representing individual clients in civil cases			
Experienced	_____	_____	*18-19/9*
Inexperienced	_____	_____	*20-21/9*
House counsel for corporations or other organizations			
Experienced	_____	_____	*22-23/9*
Inexperienced	_____	_____	*24-25/9*
Staff lawyers for civil legal assistance programs			
Experienced	_____	_____	*26-27/9*
Inexperienced	_____	_____	*28-29/9*
Staff lawyers for public interest law firms			
Experienced	_____	_____	*30-31/9*
Inexperienced	_____	_____	*32-33/9*
Lawyers employed by state or local governments			
Experienced	_____	_____	*34-35/9*
Inexperienced	_____	_____	*36-37/9*

(PLEASE BE SURE YOU HAVE FILLED IN ALL THE BLANKS ON THIS PAGE. THERE SHOULD BE A NUMBER FROM 1 TO 8 OR A ZERO IN EACH OF THOSE BLANKS. THEN GO ON TO QUESTION 5.)

5. To the extent that there are inadequate performances by lawyers who appear in your court, which of the following, in your opinion, is the most frequent cause of inadequacy? *(PLEASE ENTER "1" BESIDE THE CAUSE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, "3" FOR THE NEXT, AND "4" FOR THE LEAST FREQUENT CAUSE.)*

Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer	_____	*38/5*
Lack of the special skills or knowledge needed to be an adequate trial lawyer	_____	*39/5*
Failure by the lawyer to keep abreast of new statutes, rules, and decisional law . .	_____	*40/5*
Failure by the lawyer to prepare the case to the best of his or her ability	_____	*41/5*

6. To the extent that there are inadequate performances by lawyers who appear in your court, which of the following, in your opinion, is the most frequent consequence of inadequacy? *(AGAIN, ENTER "1" BESIDE THE CONSEQUENCE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, AND "3" FOR THE LEAST FREQUENT.)*

Ethical bounds overstepped in the pursuit of the clients' interests	_____	*42/4*
Clients' interests not fully protected.	_____	*43/4*
Orderly, dignified, and efficient conduct of court proceedings impaired	_____	*44/4*

7. Do you believe that the average case in your court today makes greater or lesser demands on trial lawyers than the average case of a dozen years ago (1965)?

Greater *(ANSWER 7A)*.	0	
About the same	1	
Lesser	2	
No opinion	3	*45/4*

7A. *IF "GREATER":* Does it demand:	Yes	No	
Greater analytical skill than the average case in 1965?.	0	1	*46/2*
Broader legal and factual knowledge than in 1965?.	0	1	*47/2*
Better developed litigating technique than in 1965?.	0	1	*48/2*

8. Do you think the proportion of inadequate performances by lawyers in your court is greater or smaller today than it was in 1965?

Greater *(ANSWER 8A)*.	0	
About the same	1	
Smaller.	2	
No opinion	3	*49/4*

8A. *IF "GREATER":* Is this because:	Yes	No	
The average case makes greater demands?.	0	1	*50/2*
The lawyers in the average case do not meet the same standards of quality?.	0	1	*51/2*
Some other reason? *(EXPLAIN):* _____ _____	0		*52/2*

PLEASE RETURN TO THE FEDERAL JUDICIAL CENTER IN THE ENCLOSED ENVELOPE.
THANK YOU FOR YOUR COOPERATION.

Trial Lawyers' Screening Questionnaire (One Page)

BSSR:489-05

QUESTIONNAIRE

1. In what year were you first admitted to the practice of law? . . . . . _____ (YEAR) *10-13/9*

2. Approximately how many trials have you conducted in United States District Courts (in the sense that you were the principal lawyer for a client in a case that went to trial):

   In the last five years? . . . . . _____ *14-16/9*

   In 1976?. . . . . _____ *17-19/9*

3. Approximately how many trials have you conducted in other trial courts:

   In the last five years? . . . . . _____ *20-22/9*

   In 1976?. . . . . _____ *23-25/9*

4. Are you currently engaged in the practice of law? *(PLEASE CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

   Yes 0

   No *(SKIP TO #8)* 1 *26/2*

5. Is trial work: *(CIRCLE ONE)*

   The major part of your practice? 0

   A substantial part of your practice, but not the major part?. 1

   An insubstantial part of your practice? 2 *27/3*

6. To the extent that you do trial work, is it: *(CIRCLE ONE)*

   All or almost all civil?. 0

   All or almost all criminal? 1

   Mixed civil and criminal? 2

   Other? *(PLEASE EXPLAIN):* _____

   _____. 3 *28/4*

7. Please indicate which statement best describes the nature of your present law practice: *(CIRCLE ONE)*

   Private practice with no partners or associates 00

   Private practice with _____ (NUMBER) other partner(s) and/or associate(s). . . 01

   House counsel for corporation or other organization 02

   Lawyer in nonprofit public interest law firm (including NAACP Legal Defense Fund, Civil Liberties Union, etc.). 03

   Lawyer in office of public or community defender. 04

   Civil legal aid or legal services staff lawyer. 05

   Lawyer employed by state or local government. 06

   U.S. Government lawyer as:

   U.S. Attorney or Assistant U.S. Attorney. 07

   Strike force lawyer 08

   Other Justice Department Lawyer 09

   Other U.S. Government Lawyer. 10

   Other: _____ . 11 *29-30/12*

8. *IF YOUR NAME AND ADDRESS ARE NOT PRINTED CORRECTLY ON THE REVERSE SIDE, PLEASE MAKE ANY APPROPRIATE CORRECTIONS. THEN RETURN THIS QUESTIONNAIRE TO THE BUREAU OF SOCIAL SCIENCE RESEARCH, INC., 1990 M STREET, N.W., WASHINGTON, D.C. IN THE ENVELOPE WHICH HAS BEEN PROVIDED. THANK YOU FOR YOUR COOPERATION.*

Trial Lawyers' Opinion Questionnaire (Four Pages)

BSSR:489-06 *1-5*

Lawyer #_____ *6-9*

TRIAL LAWYER'S QUESTIONNAIRE

1. Please review the list of groups of lawyers on the lower portion of this page. For each group, ask yourself whether you have had sufficient opportunity to observe so that you feel qualified to comment on the quality of trial advocacy practiced by that group in the federal district court(s) in which you practice. *(PLACE A CHECK MARK IN THE BOX TO THE LEFT OF EACH OF THE GROUPS ON WHICH YOU FEEL QUALIFIED TO COMMENT ON THE BASIS OF YOUR OWN OBSERVATION.)*

2. For each of the groups which you checked in response to Question 1, indicate, in the columns to the right, whether you believe there is a serious problem of inadequate trial advocacy among the representatives of that group in the federal district court(s) in which you practice. *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

	Yes	No	No Opinion	
☐ U.S. Attorneys and their Assistants.	0	1	2	*11/3*
☐ Strike force lawyers	0	1	2	*12/3*
☐ Other Justice Department lawyers	0	1	2	*13/3*
☐ Other U.S. Government lawyers.	0	1	2	*14/3*
☐ Retained criminal defense counsel.	0	1	2	*15/3*
☐ Appointed criminal defense counsel	0	1	2	*16/3*
☐ Public or community defenders.	0	1	2	*17/3*
☐ Private practitioners representing corporate clients in civil cases (including those representing insurers of nominal defendants) .	0	1	2	*18/3*
☐ Private practitioners representing individual clients in civil cases	0	1	2	*19/3*
☐ House counsel for corporations or other organizations.	0	1	2	*20/3*
☐ Staff lawyers for civil legal assistance programs (including neighborhood legal services lawyers).	0	1	2	*21/3*
☐ Staff lawyers for public interest law firms (including staff lawyers for organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union)	0	1	2	*22/3*
☐ Lawyers employed by state or local governments .	0	1	2	*23/3*

3. The following is a list of factors that affect the quality of trial advocacy, grouped into eight general categories. Separately, within each category, please indicate those factors in which you think there is the greatest need for improvement, overall, among the lawyers whom you have had the opportunity to observe in federal district courts. *(ENTER "1" NEXT TO THE FACTOR IN WHICH THERE IS THE MOST NEED FOR IMPROVEMENT, "2" FOR THE SECOND MOST NEEDED, AND "3" FOR THE THIRD. DO NOT TRY TO GO PAST THIRD PLACE IN ANY CATEGORY. IN CATEGORIES THAT HAVE ONLY TWO FACTORS, OR IF YOU CANNOT RANK AS FAR AS "3," GO AS FAR AS YOU CAN. FOR EXAMPLE, IN CATEGORY 6, IF YOU THINK THE GREATEST NEED FOR IMPROVEMENT IS IN THE USE OF CROSS EXAMINATION, BUT YOU HAVE NO VIEWS ABOUT THE OTHER FACTORS, ENTER "1" OPPOSITE "THE USE OF CROSS EXAMINATION" AND LEAVE THE OTHERS BLANK.)*

	RANKINGS	
(1) General Legal Knowledge. Includes:		
a. Knowledge of federal jurisdiction and venue statutes.	_____	24/4
b. Knowledge of Federal Rules of Procedure	_____	25/4
c. Knowledge of local court rules and practices.	_____	26/4
d. Knowledge of Federal Rules of Evidence.	_____	27/4
e. Broad, nonspecialized knowledge of legal subjects	_____	28/4
(2) Knowledge Relevant to the Particular Case. Includes mastery of:		
a. Relevant facts.	_____	29/4
b. Governing statutory and decisional law.	_____	30/4
(3) Proficiency in the Planning and Management of Litigation. Includes skill and judgment in:		
a. Developing a strategy for the conduct of a case	_____	31/4
b. Recognizing and reacting to critical issues as they arise	_____	32/4
c. The use of discovery.	_____	33/4
d. The use of pretrial conferences	_____	34/4
e. Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	_____	35/4
(4) Technique in Arguing to the Court (other than as trier of facts). Includes skill and judgment in:		
a. Preparation of memoranda on pretrial matters.	_____	36/4
b. Oral argument on pretrial matters	_____	37/4
c. Preparation of requests for and objections to jury instructions	_____	38/4
(5) Technique in Arguing to the Trier of Facts. Includes skill and judgment in:		
a. Opening statements.	_____	39/4
b. Closing arguments	_____	40/4
(6) Technique in the Examination of Witnesses. Includes skill and judgment in:		
a. The use of direct examination to present the relevant facts clearly	_____	41/4
b. Offering exhibits (including laying a proper foundation).	_____	42/4
c. Responding to opponent's objections	_____	43/4
d. The use of cross examination.	_____	44/4
e. Rehabilitation of impeached witnesses	_____	45/4
f. The use of objections (including knowing when to object and the phrasing of objections).	_____	46/4
(7) Professional Conduct Generally. Includes:		
a. Diligence on behalf of the client	_____	47/4
b. Observing standards of courtroom decorum.	_____	48/4
c. Compliance with the Code of Professional Responsibility generally	_____	49/4
d. Avoiding wasting time on matters when the client would be equally well served by expeditious handling.	_____	50/4
(8) Additional Factors in Criminal Cases. Includes:		
a. Skill in representation on bail matters	_____	51/4
b. Knowledge of exclusionary rules	_____	52/4
c. Skill in representation at sentencing	_____	53/4

4. Now, please look at the eight numbered and underlined categories in Question 3. Thinking of these eight categories as areas of expertise, indicate, for each group of lawyers that you checked in Question 1, the area in which you think there is the greatest need for improvement by that group, and the area in which there is the second greatest need for improvement. For example, if you think the greatest need for improvement for a particular group of lawyers is in their technique in the examination of witnesses, enter "6" in the appropriate blank. *(WRITE IN THE NUMBER--1 THROUGH 8--OF THE CATEGORY YOU HAVE CHOSEN IN EACH CASE, SEPARATELY FOR EXPERIENCED AND INEXPERIENCED LAWYERS. ENTER ZERO IF YOU HAVE NO OPINION.)*

	Greatest Need	Second Greatest Need	
U.S. Attorneys and their Assistants			
Experienced	_____	_____	*54-55/9*
Inexperienced	_____	_____	*56-57/9*
Strike force lawyers			
Experienced	_____	_____	*58-59/9*
Inexperienced	_____	_____	*60-61/9*
Other Justice Department lawyers			
Experienced	_____	_____	*62-63/9*
Inexperienced	_____	_____	*64-65/9*
Other U.S. Government lawyers			
Experienced	_____	_____	*66-67/9*
Inexperienced	_____	_____	*68-69/9*
Retained criminal defense counsel			
Experienced	_____	_____	*70-71/9*
Inexperienced	_____	_____	*72-73/9*
Appointed criminal defense counsel			
Experienced	_____	_____	*74-75/9*
Inexperienced	_____	_____	*76-77/9*
Public or community defenders			
Experienced	_____	_____	*10-11/9*
Inexperienced	_____	_____	*12-13/9*
Private practitioners representing corporate clients in civil cases			
Experienced	_____	_____	*14-15/9*
Inexperienced	_____	_____	*16-17/9*
Private practitioners representing individual clients in civil cases			
Experienced	_____	_____	*18-19/9*
Inexperienced	_____	_____	*20-21/9*
House counsel for corporations or other organizations			
Experienced	_____	_____	*22-23/9*
Inexperienced	_____	_____	*24-25/9*
Staff lawyers for civil legal assistance programs			
Experienced	_____	_____	*26-27/9*
Inexperienced	_____	_____	*28-29/9*
Staff lawyers for public interest law firms			
Experienced	_____	_____	*30-31/9*
Inexperienced	_____	_____	*32-33/9*
Lawyers employed by state or local governments			
Experienced	_____	_____	*34-35/9*
Inexperienced	_____	_____	*36-37/9*

(PLEASE BE SURE YOU HAVE FILLED IN ALL THE BLANKS FOR THOSE GROUPS OF LAWYERS YOU CHECKED IN QUESTION 1. THERE SHOULD BE A NUMBER FROM 1 TO 8 OR A ZERO IN EACH OF THOSE BLANKS. THEN GO ON TO QUESTION 5.)

5. To the extent that you have observed inadequate performances by lawyers in federal district courts, which of the following, in your opinion, is the most frequent cause of inadequacy? *(PLEASE ENTER "1" BESIDE THE CAUSE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, "3" FOR THE NEXT, AND "4" FOR THE LEAST FREQUENT CAUSE. IF YOU HAVE NO OPINION, LEAVE BLANK.)*

Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer . . . . . _____	*38/5*
Lack of the special skills or knowledge needed to be an adequate trial lawyer . . . . . _____	*39/5*
Failure by the lawyer to keep abreast of new statutes, rules, and decisional law. . . . _____	*40/5*
Failure by the lawyer to prepare the case to the best of his or her ability . . . . . _____	*41/5*

6. To the extent that you have observed inadequate performances by lawyers in federal district courts, which of the following, in your opinion, is the most frequent consequence of inadequacy? *(AGAIN, ENTER "1" BESIDE THE CONSEQUENCE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, AND "3" FOR THE LEAST FREQUENT. IF YOU HAVE NO OPINION, LEAVE BLANK.)*

Ethical bounds overstepped in the pursuit of the clients' interests . . . . . _____	*42/4*
Clients' interests not fully protected. . . . . _____	*43/4*
Orderly, dignified, and efficient conduct of court proceedings impaired . . . . . _____	*44/4*

7. Do you believe that the average case today in the federal district court(s) in which you practice makes greater or lesser demands on trial lawyers than the average case of a dozen years ago (1965)?

Greater *(ANSWER 7A)*	0	
About the same	1	
Lesser	2	
No opinion	3	*45/4*

7A. *IF "GREATER":* Does it demand:

	Yes	No	
Greater analytical skill than the average case in 1965?	0	1	*46/2*
Broader legal and factual knowledge than in 1965?	0	1	*47/2*
Better developed litigating technique than in 1965?	0	1	*48/2*

8. Do you think the proportion of inadequate performances by lawyers in the federal district court(s) in which you practice is greater or smaller today than it was in 1965?

Greater *(ANSWER 8A)*	0	
About the same	1	
Smaller.	2	
No opinion	3	*49/4*

8A. *IF "GREATER":* Is this because:

	Yes	No	
The average case makes greater demands?	0	1	*50/2*
The lawyers in the average case do not meet the same standards of quality?	0	1	*51/2*
Some other reason? *(EXPLAIN):* _____			
_____ .	0		*52/2*

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Trial Lawyers' Opinion Questionnaire, Special Version For "Highly Capable Trial Lawyers" (Five Pages)

BSSR:489-07 *1-5*

Lawyer #_____ *6-9*

TRIAL LAWYER'S QUESTIONNAIRE

IF YOU ARE NOT CURRENTLY ENGAGED IN THE PRACTICE OF LAW, PLEASE CHECK THE BOX BELOW AND RETURN THE QUESTIONNAIRE, UNCOMPLETED, IN THE POSTAGE-PAID ENVELOPE PROVIDED SO THAT WE MAY ACCOUNT FOR ALL QUESTIONNAIRES SENT OUT IN THIS STUDY. ☐

1. Please review the list of groups of lawyers on the lower portion of this page. For each group, ask yourself whether you have had sufficient opportunity to observe so that you feel qualified to comment on the quality of trial advocacy practiced by that group in the federal district court(s) in which you practice. *(PLACE A CHECK MARK IN THE BOX TO THE LEFT OF EACH OF THE GROUPS ON WHICH YOU FEEL QUALIFIED TO COMMENT ON THE BASIS OF YOUR OWN OBSERVATION.)*

2. For each of the groups which you checked in response to Question 1, indicate, in the columns to the right, whether you believe there is a serious problem of inadequate trial advocacy among the representatives of that group in the federal district court(s) in which you practice. *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

	Yes	No	No Opinion	
☐ U.S. Attorneys and their Assistants.	0	1	2	*11/3*
☐ Strike force lawyers	0	1	2	*12/3*
☐ Other Justice Department lawyers	0	1	2	*13/3*
☐ Other U.S. Government lawyers.	0	1	2	*14/3*
☐ Retained criminal defense counsel.	0	1	2	*15/3*
☐ Appointed criminal defense counsel	0	1	2	*16/3*
☐ Public or community defenders.	0	1	2	*17/3*
☐ Private practitioners representing corporate clients in civil cases (including those representing insurers of nominal defendants) .	0	1	2	*18/3*
☐ Private practitioners representing individual clients in civil cases	0	1	2	*19/3*
☐ House counsel for corporations or other organizations.	0	1	2	*20/3*
☐ Staff lawyers for civil legal assistance programs (including neighborhood legal services lawyers).	0	1	2	*21/3*
☐ Staff lawyers for public interest law firms (including staff lawyers for organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union)	0	1	2	*22/3*
☐ Lawyers employed by state or local governments .	0	1	2	*23/3*

3. The following is a list of factors that affect the quality of trial advocacy, grouped into eight general categories. Separately, within each category, please indicate those factors in which you think there is the greatest need for improvement, overall, among the lawyers whom you have had the opportunity to observe in federal district courts. *(ENTER "1" NEXT TO THE FACTOR IN WHICH THERE IS THE MOST NEED FOR IMPROVEMENT, "2" FOR THE SECOND MOST NEEDED, AND "3" FOR THE THIRD. DO NOT TRY TO GO PAST THIRD PLACE IN ANY CATEGORY. IN CATEGORIES THAT HAVE ONLY TWO FACTORS, OR IF YOU CANNOT RANK AS FAR AS "3," GO AS FAR AS YOU CAN. FOR EXAMPLE, IN CATEGORY 6, IF YOU THINK THE GREATEST NEED FOR IMPROVEMENT IS IN THE USE OF CROSS EXAMINATION, BUT YOU HAVE NO VIEWS ABOUT THE OTHER FACTORS, ENTER "1" OPPOSITE "THE USE OF CROSS EXAMINATION" AND LEAVE THE OTHERS BLANK.)*

	RANKINGS	
(1) General Legal Knowledge. Includes:		
a. Knowledge of federal jurisdiction and venue statutes.	_____	24/4
b. Knowledge of Federal Rules of Procedure	_____	25/4
c. Knowledge of local court rules and practices.	_____	26/4
d. Knowledge of Federal Rules of Evidence.	_____	27/4
e. Broad, nonspecialized knowledge of legal subjects	_____	28/4
(2) Knowledge Relevant to the Particular Case. Includes mastery of:		
a. Relevant facts.	_____	29/4
b. Governing statutory and decisional law.	_____	30/4
(3) Proficiency in the Planning and Management of Litigation. Includes skill and judgment in:		
a. Developing a strategy for the conduct of a case	_____	31/4
b. Recognizing and reacting to critical issues as they arise	_____	32/4
c. The use of discovery.	_____	33/4
d. The use of pretrial conferences	_____	34/4
e. Handling settlement negotiations, including judgment as to when a settlement (or plea agreement) is appropriate	_____	35/4
(4) Technique in Arguing to the Court (other than as trier of facts). Includes skill and judgment in:		
a. Preparation of memoranda on pretrial matters.	_____	36/4
b. Oral argument on pretrial matters	_____	37/4
c. Preparation of requests for and objections to jury instructions	_____	38/4
(5) Technique in Arguing to the Trier of Facts. Includes skill and judgment in:		
a. Opening statements.	_____	39/4
b. Closing arguments	_____	40/4
(6) Technique in the Examination of Witnesses. Includes skill and judgment in:		
a. The use of direct examination to present the relevant facts clearly	_____	41/4
b. Offering exhibits (including laying a proper foundation).	_____	42/4
c. Responding to opponent's objections	_____	43/4
d. The use of cross examination.	_____	44/4
e. Rehabilitation of impeached witnesses	_____	45/4
f. The use of objections (including knowing when to object and the phrasing of objections).	_____	46/4
(7) Professional Conduct Generally. Includes:		
a. Diligence on behalf of the client	_____	47/4
b. Observing standards of courtroom decorum.	_____	48/4
c. Compliance with the Code of Professional Responsibility generally	_____	49/4
d. Avoiding wasting time on matters when the client would be equally well served by expeditious handling.	_____	50/4
(8) Additional Factors in Criminal Cases. Includes:		
a. Skill in representation on bail matters	_____	51/4
b. Knowledge of exclusionary rules	_____	52/4
c. Skill in representation at sentencing	_____	53/4

4. Now, please look at the eight numbered and underlined categories in Question 3. Thinking of these eight categories as areas of expertise, indicate, for each group of lawyers that you checked in Question 1, the area in which you think there is the greatest need for improvement by that group, and the area in which there is the second greatest need for improvement. For example, if you think the greatest need for improvement for a particular group of lawyers is in their technique in the examination of witnesses, enter "6" in the appropriate blank. *(WRITE IN THE NUMBER--1 THROUGH 8--OF THE CATEGORY YOU HAVE CHOSEN IN EACH CASE, SEPARATELY FOR EXPERIENCED AND INEXPERIENCED LAWYERS. ENTER ZERO IF YOU HAVE NO OPINION.)*

	Greatest Need	Second Greatest Need	
U.S. Attorneys and their Assistants			
Experienced	_____	_____	*54-55/9*
Inexperienced	_____	_____	*56-57/9*
Strike force lawyers			
Experienced	_____	_____	*58-59/9*
Inexperienced	_____	_____	*60-61/9*
Other Justice Department lawyers			
Experienced	_____	_____	*62-63/9*
Inexperienced	_____	_____	*64-65/9*
Other U.S. Government lawyers			
Experienced	_____	_____	*66-67/9*
Inexperienced	_____	_____	*68-69/9*
Retained criminal defense counsel			
Experienced	_____	_____	*70-71/9*
Inexperienced	_____	_____	*72-73/9*
Appointed criminal defense counsel			
Experienced	_____	_____	*74-75/9*
Inexperienced	_____	_____	*76-77/9*
Public or community defenders			
Experienced	_____	_____	*10-11/9*
Inexperienced	_____	_____	*12-13/9*
Private practitioners representing corporate clients in civil cases			
Experienced	_____	_____	*14-15/9*
Inexperienced	_____	_____	*16-17/9*
Private practitioners representing individual clients in civil cases			
Experienced	_____	_____	*18-19/9*
Inexperienced	_____	_____	*20-21/9*
House counsel for corporations or other organizations			
Experienced	_____	_____	*22-23/9*
Inexperienced	_____	_____	*24-25/9*
Staff lawyers for civil legal assistance programs			
Experienced	_____	_____	*26-27/9*
Inexperienced	_____	_____	*28-29/9*
Staff lawyers for public interest law firms			
Experienced	_____	_____	*30-31/9*
Inexperienced	_____	_____	*32-33/9*
Lawyers employed by state or local governments			
Experienced	_____	_____	*34-35/9*
Inexperienced	_____	_____	*36-37/9*

(PLEASE BE SURE YOU HAVE FILLED IN ALL THE BLANKS FOR THOSE GROUPS OF LAWYERS YOU CHECKED IN QUESTION 1. THERE SHOULD BE A NUMBER FROM 1 TO 8 OR A ZERO IN EACH OF THOSE BLANKS. THEN GO ON TO QUESTION 5.)

-4-

5. To the extent that you have observed inadequate performances by lawyers in federal district courts, which of the following, in your opinion, is the most frequent cause of inadequacy? *(PLEASE ENTER "1" BESIDE THE CAUSE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, "3" FOR THE NEXT, AND "4" FOR THE LEAST FREQUENT CAUSE. IF YOU HAVE NO OPINION, LEAVE BLANK.)*

Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer . . . . . _____	*38/5*
Lack of the special skills or knowledge needed to be an adequate trial lawyer . . . . . _____	*39/5*
Failure by the lawyer to keep abreast of new statutes, rules, and decisional law. . . . _____	*40/5*
Failure by the lawyer to prepare the case to the best of his or her ability . . . . . _____	*41/5*

6 To the extent that you have observed inadequate performances by lawyers in federal district courts, which of the following, in your opinion, is the most frequent consequence of inadequacy? *(AGAIN, ENTER "1" BESIDE THE CONSEQUENCE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, AND "3" FOR THE LEAST FREQUENT. IF YOU HAVE NO OPINION, LEAVE BLANK.)*

Ethical bounds overstepped in the pursuit of the clients' interests . . . . . _____	*42/4*
Clients' interests not fully protected. . . . . _____	*43/4*
Orderly, dignified, and efficient conduct of court proceedings impaired . . . . . _____	*44/4*

7. Do you believe that the average case today in the federal district court(s) in which you practice makes greater or lesser demands on trial lawyers than the average case of a dozen years ago (1965)?

Greater *(ANSWER 7A)*	0	
About the same	1	
Lesser	2	
No opinion	3	*45/4*

7A. *IF "GREATER":* Does it demand:

	Yes	No	
Greater analytical skill than the average case in 1965?	0	1	*46/2*
Broader legal and factual knowledge than in 1965?	0	1	*47/2*
Better developed litigating technique than in 1965?	0	1	*48/2*

8. Do you think the proportion of inadequate performances by lawyers in the federal district court(s) in which you practice is greater or smaller today than it was in 1965?

Greater *(ANSWER 8A)*	0	
About the same	1	
Smaller.	2	
No opinion	3	*49/4*

8A. *IF "GREATER":* Is this because:

	Yes	No	
The average case makes greater demands?	0	1	*50/2*
The lawyers in the average case do not meet the same standards of quality?	0	1	*51/2*
Some other reason? *(EXPLAIN)*: _____ _____ .	0		*52/2*

(PLEASE TURN THE PAGE)

9. In what year were you first admitted to the practice of law? . . . . . _____ (YEAR) *10-13/9*

10. Approximately how many trials have you conducted in United States District Courts (in the sense that you were the principal lawyer for a client in a case that went to trial):

In the last five years? . . . . . _____ *14-16/9*

In 1976?. . . . . _____ *17-19/9*

11. Approximately how many trials have you conducted in other trial courts:

In the last five years? . . . . . _____ *20-22/9*

In 1976?. . . . . _____ *23-25/9*

12. Is trial work: *(CIRCLE ONE)* *26/0*

The major part of your practice?. 0

A substantial part of your practice, but not the major part?. 1

An insubstantial part of your practice? 2 *27/3*

13. To the extent that you do trial work, is it: *(CIRCLE ONE)*

All or almost all civil?. 0

All or almost all criminal? 1

Mixed civil and criminal? 2

Other? *(PLEASE EXPLAIN):* _____

_____ . 3 *28/4*

14. Please indicate which statement best describes the nature of your present law practice: *(CIRCLE ONE)*

Private practice with no partners or associates 00

Private practice with _____ other partner(s) and/or associate(s) . . . 01
(NUMBER)

House counsel for corporation or other organization 02

Lawyer in nonprofit public interest law firm (including NAACP Legal Defense Fund, Civil Liberties Union, etc.). 03

Lawyer in office of public or community defender. 04

Legal aid or legal services staff lawyer. 05

Lawyer employed by state or local government. 06

U.S. Government lawyer as:

U.S. Attorney or Assistant U.S. Attorney. 07

Strike force lawyer 08

Other Justice Department lawyer 09

Other U.S. Government lawyer. 10

Other: _____ . 11 *29-30/12*

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Appellate Case Report (Two Pages)

489-04 1-5

Argument No._____ 6-8

Circuit:_____ 9-10

Judge:_____

REPORT OF CASE ON APPEAL 11-14

	Lawyer #1	Lawyer #2	Lawyer #3	Lawyer #4	
1. Using the codes in the instructions, indicate the role of each lawyer in the appeal	_____	_____	_____	_____	15-22/9
2. Does the lawyer practice: *(CIRCLE ONE ANSWER FOR EACH LAWYER.)*					
Alone?.	0	0	0	0	
With others?.	1	1	1	1	
Don't know.	2	2	2	2	23-26/3
IF WITH OTHERS: About how many lawyers are there in the office? *(IF YOU HAVE NO BASIS FOR ESTIMATING, LEAVE BLANK.)*.	_____	_____	_____	_____	27-38/9
3. What is your best estimate of the lawyer's age? *(DO NOT GIVE A RANGE. IF YOU THINK IN TERMS OF RANGES, GIVE THE MIDDLE OF THE RANGE. IF UNABLE TO ESTIMATE, LEAVE BLANK.)*	_____	_____	_____	_____	39-46/9
4. Has the lawyer previously argued two or more cases in federal courts of appeals? *(CIRCLE ONE ANSWER FOR EACH LAWYER.)*					
Yes, or probably.	0	0	0	0	
No, or probably not	1	1	1	1	
Don't know.	2	2	2	2	47-50/3
5. Which of the following statements best describes your judgment of the quality of the lawyer's performance in this appeal?					
First rate: about as good a job as could have been done . .	0	0	0	0	
Very good	1	1	1	1	
Good.	2	2	2	2	
Adequate but no better.	3	3	3	3	
Not quite adequate.	4	4	4	4	
Poor.	5	5	5	5	
Very poor	6	6	6	6	51-54/7
6. How confident are you, in the particular circumstances of this appeal, that the quality of the lawyer's performance can be reliably evaluated by a judge? *(ENTER A NUMBER, "1" THROUGH "7," FOR EACH LAWYER, BASED ON THE SCALE BELOW.)*.	_____	_____	_____	_____	55-58/8

Not at all Confident — Completely Confident

1 2 3 4 5 6 7

(CONTINUED ON BACK OF PAGE.)

7. Using the rating codes at the bottom of this page, please rate each lawyer's performance in this appeal with respect to the following factors:

	Lawyer #1	Lawyer #2	Lawyer #3	Lawyer #4	
Legal Knowledge					
Knowledge of statutory and decisional law governing appellate jurisdiction	____	____	____	____	*59-62/9*
Knowledge of Federal Rules of Appellate Procedure	____	____	____	____	*63-66/9*
Knowledge of circuit rules and practices	____	____	____	____	*67-70/9*
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	____	____	____	____	*71-74/9*
Briefing					
Ability to set forth the important facts and issues in a comprehensible manner	____	____	____	____	*75-78/9*
Judgment in deciding what points to focus on	____	____	____	____	*15-18/9*
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging.	____	____	____	____	*19-22/9*
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	____	____	____	____	*23-26/9*
Argument					
Skill in making distinctive use of oral argument rather than repeating the brief	____	____	____	____	*27-30/9*
Responsiveness to questions from the bench and to indications of the judges' concerns	____	____	____	____	*31-34/9*
Mastery of the record below	____	____	____	____	*35-38/9*
Observing standards of courtroom decorum	____	____	____	____	*39-42/9*

FOR EACH OF THE LAWYERS RATED, YOU SHOULD HAVE AN ENTRY--EITHER A NUMBER FROM 1 TO 4 OR A ZERO--IN EVERY SPACE PROVIDED.

Codes for Rating Performance in Question 7	Code
Demonstrated very good or superior knowledge or skill	1
Did what was needed in the circumstances of the case	2
Was not up to what was needed	3
Showed seriously deficient knowledge or skill	4
No opportunity to observe, or not enough on which to base a conclusion	0

Instructions for Appellate Case Reports (Two Pages—Printed on Two Sides of Front Cover of a Folder)

APPELLATE ADVOCACY STUDY

TO THE JUDGE:

In connection with the Federal Judicial Center advocacy project, forms are enclosed for rating the performances of the following lawyers who are to appear today:

1._____

Use the Form headed "Argument No._____." Rate as

Lawyer #1: _____

Lawyer #2: _____

Lawyer #3: _____

Lawyer #4: _____

2._____

Use the Form headed "Argument No._____." Rate as

Lawyer #1: _____

Lawyer #2: _____

Lawyer #3: _____

Lawyer #4: _____

If, as a result of last-minute substitutions, any of the above lawyers is replaced by another, rate the replacement lawyer.

Instructions for Completing Reports

One report form is to be used for each argument reported on.

You are asked to rate each lawyer's performance in this appeal. Even if you are familiar with the lawyer from other cases, try to evaluate the performance in this appeal as if it were the performance of a lawyer you had never seen before. But consider the performance in the whole appeal--briefing as well as argument.

You may find the form easier to handle if you go through the entire form for one lawyer and then move to the next lawyer, rather than trying to rate all the lawyers at once.

If two or more lawyers represent a single client, answer questions 1-4 for the lawyer designated on the cover of this folder; then rate as one "performance" the representation provided jointly by this lawyer and his co-counsel.

Codes for Lawyer Roles in Question 1	Code
U.S. Government lawyers	
U.S. Attorney or Assistant	51
Strike force lawyer	52
Other Justice Department laywer	53
Other U.S. Government lawyer	54
Criminal defense	
Public or community defender	61
Retained counsel	62
Appointed counsel	63
Civil (other than U.S. Government)	
Private practitioner representing corporation or other organization (including those representing insurers of nominal defendants)	71
Private practitioner representing individual client	72
House counsel for corporation or other organization	73
Staff lawyer for civil legal assistance program (including neighborhood legal services lawyers)	74
Staff lawyer for public interest law firm (including organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union)	75
Lawyer employed by state or local government	76

If none of the above codes is applicable, please use the margin of the report form to characterize the lawyer's role in the case.

Completed report forms should be mailed to Anthony Partridge, Project Director, The Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005, or given to the clerk of the court for mailing. We do not need the yellow folders. We suggest that you accumulate the report forms until the end of a session in which you are participating, and include all the report forms for the session in a single mailing.

If you have any questions, you should call Anthony Partridge, Project Director, at 633-6344. (This is both an FTS and commercial number.)

Appellate Lawyers' Biographical Questionnaire (Two Pages)

489-12 *1-5*

Argument #_____ *6-8*

Lawyer #_____ *9*

LAWYER SURVEY

TO THE LAWYER:

This survey is part of a nationwide program of research being conducted under the auspices of the Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts. For a period of approximately three months, the lawyers in a sample of arguments in the courts of appeals are being asked to complete these forms. If you argue more than once during the survey period, you may be asked to complete the form more than once.

Please complete the form, enclose it in the envelope in which you received it, seal it, and return it to the clerk's office.

We do not believe that any of the information requested is sensitive. Nevertheless, you may be assured that it will be used for statistical purposes only. The envelope containing your form will be sent to the Federal Judicial Center for tabulation without being opened in the clerk's office.

1. What is your age? . . . . . _____ *15-16/9*

2. When did you graduate from law school? . . . . . 19_____ *17-18/9*

3. Which law school?_____ *19-21/9*

	Yes	No	
4. Did you earn most of your law school credits as a full-time student? *(CIRCLE ONE)*	0	1	*22/2*

5. Did you take law school courses that included substantial study of the following: *(CIRCLE ONE ANSWER FOR EACH COURSE.)*

	Yes	No	
Evidence?	0	1	*23/2*
Federal Civil Procedure?	0	1	*24/2*
Criminal Law?	0	1	*25/2*
Federal Rules of Criminal Procedure?	0	1	*26/2*
Professional Responsibility?	0	1	*27/2*
Trial Advocacy?	0	1	*28/2*
Appellate Advocacy?	0	1	*29/2*

6. Did you participate in a moot appellate court program in law school?

Yes *(ANSWER 6A)*	0	
No	1	*30/2*

6A. *IF "YES,"* about how many moot appeals did you argue? . . . . . _____ *31-32/9*

(CONTINUED ON BACK OF PAGE)

7. About how many lawyers are there in your office, including yourself?. . . . . _____ *33-35/9*

8. Approximately how many appeals have you argued in the last ten years:

In Federal appellate courts? . . . . . _____ *36-38/9*

In other appellate courts? . . . . . _____ *39-41/9*

9. In approximately how many other appeals in the last ten years did you have a substantial role in the preparation of the brief?

In Federal appellate courts?. . . . . _____ *42-44/9*

In other appellate courts? . . . . . _____ *45-47/9*

10. Approximately how many trials have you conducted (in the sense that you were the principal lawyer for a client in a case that went to trial) in the last ten years:

In United States District Courts? . . _____ *48-50/9*

In other trial courts?. . . . . _____ *51-55/9*

11. In approximately how many trials did you assist the principal lawyer for a client in the last ten years:

In United States District Courts? . . _____ *54-56/9*

In other trial courts?. . . . . _____ *57-59/9*

12. Within the last five years, have you taken any continuing legal education courses?

Yes *(ANSWER 12A)* 0

No 1 *60/2*

12A. *IF "YES,"* please estimate the number of hours of instruction devoted to each of the following subjects. *(ENTER THE NUMBER OF HOURS FOR EACH SUBJECT; IF NONE, ENTER "0." TREAT THE SUBJECTS AS MUTUALLY EXCLUSIVE, SO THAT A SINGLE HOUR OF INSTRUCTION IS COUNTED ONLY ONCE.)*

Federal Rules of Evidence . . . . . _____ *61-62/9*

Federal Civil Procedure . . . . . _____ *63-64/9*

Criminal Law. . . . . _____ *65-66/9*

Federal Rules of Criminal Procedure . . _____ *67-68/9*

Professional Responsibility . . . . . _____ *69-70/9*

Trial Advocacy. . . . . _____ *71-72/9*

Appellate Advocacy. . . . . _____ *73-74/9*

PLEASE RETURN THIS FORM TO THE CLERK IN THE ENVELOPE PROVIDED. THANK YOU VERY MUCH FOR YOUR COOPERATION.

The Federal Judicial Center
September 1977

Appellate Judges' Questionnaire (Four Pages)

489-03 *1-5*

Judge # _____ *6-9*

QUESTIONNAIRE FOR COURT OF APPEALS JUDGES

1. Do you believe that there is, overall, a serious problem of inadequate appellate advocacy by lawyers with cases in your court? *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

Yes 0
No. 1
No opinion. 2 *10/3*

2. Regardless of your answer to Question 1, please consider the following groups of lawyers one at a time and indicate whether you believe there is a serious problem of inadequate appellate advocacy among the representatives of that group who try cases in your court. *(PLEASE CIRCLE ONE ANSWER FOR EACH GROUP.)*

	Yes	No	No Chance to Observe or No Opinion	
U.S. Attorneys and their Assistants	0	1	2	*11/3*
Strike force lawyers.	0	1	2	*12/3*
Other Justice Department lawyers.	0	1	2	*13/3*
Other U.S. Government lawyers	0	1	2	*14/3*
Retained counsel in criminal appeals.	0	1	2	*15/3*
Appointed counsel in criminal appeals	0	1	2	*16/3*
Public or community defenders	0	1	2	*17/3*
Private practitioners representing corporate clients in civil cases (including those representing insurers of nominal defendants). .	0	1	2	*18/3*
Private practitioners representing individual clients in civil cases.	0	1	2	*19/3*
House counsel for corporations or other organizations	0	1	2	*20/3*
Staff lawyers for civil legal assistance programs (including neighborhood legal services lawyers)	0	1	2	*21/3*
Staff lawyers for public interest law firms (including staff lawyers for organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union).	0	1	2	*22/3*
Lawyers employed by state or local governments. .	0	1	2	*23/3*

3. On the facing page is a list of factors that affect the quality of appellate advocacy. Using the numbers assigned to the factors on the list please indicate, for each of the following groups of lawyers, the factor in which you think there is the greatest need for improvement by that group, and the factor in which there is the second greatest need for improvement. *(WRITE IN THE NUMBER--1 THROUGH 12--OF THE FACTOR YOU HAVE CHOSEN IN EACH CASE. ENTER A ZERO IF YOU HAVE NO OPINION.)*

	Greatest Need	Second Greatest Need	
U.S. Attorneys and their Assistants			
Experienced	_____	_____	*24-27/13*
Inexperienced	_____	_____	*28-31/13*
Strike Force lawyers			
Experienced	_____	_____	*32-35/13*
Inexperienced	_____	_____	*36-39/13*
Other Justice Department lawyers			
Experienced	_____	_____	*40-43/13*
Inexperienced	_____	_____	*44-47/13*
Other U.S. Government lawyers			
Experienced	_____	_____	*48-51/13*
Inexperienced	_____	_____	*52-55/13*
Retained counsel in criminal appeals			
Experienced	_____	_____	*56-59/13*
Inexperienced	_____	_____	*60-63/13*
Appointed counsel in criminal appeals			
Experienced	_____	_____	*64-67/13*
Inexperienced	_____	_____	*68-71/13*
Public or community defenders			
Experienced	_____	_____	*10-13/13*
Inexperienced	_____	_____	*14-17/13*
Private practitioners representing corporate clients in civil cases			
Experienced	_____	_____	*18-21/13*
Inexperienced	_____	_____	*22-25/13*
Private practitioners representing individual clients in civil cases			
Experienced	_____	_____	*26-29/13*
Inexperienced	_____	_____	*30-33/13*
House counsel for corporations or other organizations			
Experienced	_____	_____	*34-37/13*
Inexperienced	_____	_____	*38-41/13*
Staff lawyers for civil legal assistance programs			
Experienced	_____	_____	*42-45/13*
Inexperienced	_____	_____	*46-49/13*
Staff lawyers for public interest law firms			
Experienced	_____	_____	*50-53/13*
Inexperienced	_____	_____	*54-57/13*
Lawyers employed by state or local governments			
Experienced	_____	_____	*58-61/13*
Inexperienced	_____	_____	*62-65/13*

(PLEASE BE SURE THERE IS EITHER A NUMBER--1 THROUGH 12--OR ZERO FOR EACH OF THE BLANKS ABOVE. THEN GO ON TO QUESTION 4, PAGE 4.)

Factors Affecting the Quality of Appellate Advocacy

Legal Knowledge

(1) Knowledge of statutory and decisional law governing appellate jurisdiction

(2) Knowledge of Federal Rules of Appellate Procedure

(3) Knowledge of circuit rules and practices

(4) Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)

Briefing

(5) Ability to set forth the important facts and issues in a comprehensible manner

(6) Judgment in deciding what points to focus on

(7) Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging

(8) Ability to argue persuasively from statutory language, statutory purpose, and legislative history

Argument

(9) Skill in making distinctive use of oral argument rather than repeating the brief

(10) Responsiveness to questions from the bench and to indications of the judges' concerns

(11) Mastery of the record below

(12) Observing standards of courtroom decorum

4. To the extent that there are inadequate performances by lawyers who appear in your court, which of the following, in your opinion, is the most frequent cause of inadequacy? *(PLEASE ENTER "1" BESIDE THE CAUSE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, AND "3" FOR THE LEAST FREQUENT.)*

Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer	_____	*66/4*
Lack of the special skills, knowledge or judgment needed to be an adequate appellate lawyer.	_____	*67/4*
Failure by lawyers to research their cases and to prepare themselves to the best of their ability.	_____	*68/4*

5. To the extent that there are inadequate performances by lawyers who appear in your court, which of the following, in your opinion, is the more frequent consequence of inadequacy? *(CIRCLE ONE ANSWER)*

Clients' interests not fully protected.	0	
Unnecessary burdens imposed on judges and staff	1	*69/2*

6. Do you believe that the average case in your court today makes greater or lesser demands on lawyers than the average case of a dozen years ago (1965)?

Greater *(ANSWER 6A)*	0	
About the same	1	
Lesser	2	
No opinion	3	*70/4*

6A. *IF "GREATER":* Does it demand:

	Yes	No	
Greater analytical skill than the average case in 1965?	0	1	*71/2*
Broader legal and factual knowledge than in 1965?	0	1	*72/2*
Better developed litigating technique than in 1965?	0	1	*73/2*

7. Do you think the proportion of inadequate performances by lawyers in your court is greater or smaller today than it was in 1965?

Greater *(ANSWER 7A)*	0	
About the same	1	
Smaller.	2	
No opinion	3	*74/4*

7A. *IF "GREATER":* Is this because:

	Yes	No	
The average case makes greater demands?	0	1	*75/2*
The lawyers in the average case do not meet the same standards of quality?	0	1	*76/2*
Some other reason? *(EXPLAIN):* _____			
_____ .	0		*77/2*

PLEASE RETURN TO THE FEDERAL JUDICIAL CENTER IN THE ENCLOSED ENVELOPE.
THANK YOU FOR YOUR COOPERATION.

Appellate Lawyers' Screening Questionnaire (One Page)

BSSR:439-08

QUESTIONNAIRE

1. In what year were you first admitted to the practice of law? . . . . . _____ *(YEAR)* *10-13/9*

2. Approximately how many oral arguments have you conducted in United States Courts of Appeals?

   In the last five years? . . . . . _____ *14-16/9*

   In 1976?. . . . . _____ *17-19/9*

3. Approximately how many oral arguments have you conducted in other appellate courts:

   In the last five years? . . . . . _____ *20-22/9*

   In 1976?. . . . . _____ *23-25/9*

4. Are you currently engaged in the practice of law? *(PLEASE CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

   Yes 0

   No *(SKIP TO #8)* 1 *26/2*

5. Is appellate work: *(CIRCLE ONE)*

   The major part of your practice?. 0

   A substantial part of your practice, but not the major part?. 1

   An insubstantial part of your practice? 2 *27/3*

6. To the extent that you do appellate work, is it: *(CIRCLE ONE)*

   All or almost all civil?. 0

   All or almost all criminal? 1

   Mixed civil and criminal? 2

   Other? *(PLEASE EXPLAIN):* _____

   _____. 3 *28/4*

7. Please indicate which statement best describes the nature of your present law practice: *(CIRCLE ONE)*

   Private practice with no partners or associates 00

   Private practice with _____ *(NUMBER)* other partner(s) and/or associate(s) . . . 01

   House counsel for corporation or other organization 02

   Lawyer in nonprofit public interest law firm (including NAACP Legal Defense Fund, Civil Liberties Union, etc.). 03

   Lawyer in office of public or community defender. 04

   Civil legal aid or legal services staff lawyer. 05

   Lawyer employed by state or local government. 06

   U.S. Government lawyer as:

   U.S. Attorney or Assistant U.S. Attorney. 07

   Strike force lawyer 08

   Other Justice Department lawyer 09

   Other U.S. Government lawyer. 10

   Other: _____ 11 *29-30/12*

8. *IF YOUR NAME AND ADDRESS ARE NOT PRINTED CORRECTLY ON THE REVERSE SIDE, PLEASE MAKE ANY APPROPRIATE CORRECTIONS. THEN RETURN THIS QUESTIONNAIRE TO THE BUREAU OF SOCIAL SCIENCE RESEARCH, INC., 1990 M STREET, N.W., WASHINGTON, D.C. IN THE ENVELOPE WHICH HAS BEEN PROVIDED. THANK YOU FOR YOUR COOPERATION.*

Appellate Lawyers' Opinion Questionnaire (Four Pages)

BSSR:489-09 *1-5*

Lawyer #_____ *6-9*

APPELLATE LAWYER'S QUESTIONNAIRE

1. Please review the list of groups of lawyers on the lower portion of this page. For each group, ask yourself whether you have had sufficient opportunity to observe so that you feel qualified to comment on the quality of appellate advocacy practiced by that group in the federal court(s) of appeals in which you practice. *(PLACE A CHECK MARK IN THE BOX TO THE LEFT OF EACH OF THE GROUPS ON WHICH YOU FEEL QUALIFIED TO COMMENT ON THE BASIS OF YOUR OWN OBSERVATION.)*

2. For each of the groups which you checked in response to Question 1, indicate, in the columns to the right, whether you believe there is a serious problem of inadequate appellate advocacy among the representatives of that group in the federal court(s) of appeals in which you practice. *(CIRCLE THE NUMBER INDICATING THE APPROPRIATE ANSWER.)*

	Yes	No	No Opinion	
☐ U.S. Attorneys and their Assistants.	0	1	2	*11/3*
☐ Strike force lawyers	0	1	2	*12/3*
☐ Other Justice Department lawyers	0	1	2	*13/3*
☐ Other U.S. Government lawyers.	0	1	2	*14/3*
☐ Retained counsel in criminal appeals	0	1	2	*15/3*
☐ Appointed counsel in criminal appeals	0	1	2	*16/3*
☐ Public or community defenders.	0	1	2	*17/3*
☐ Private practitioners representing corporate clients in civil cases (including those representing insurers of nominal defendants) .	0	1	2	*18/3*
☐ Private practitioners representing individual clients in civil cases	0	1	2	*19/3*
☐ House counsel for corporations or other organizations.	0	1	2	*20/3*
☐ Staff lawyers for civil legal assistance programs (including neighborhood legal services lawyers).	0	1	2	*21/3*
☐ Staff lawyers for public interest law firms (including staff lawyers for organizations such as the NAACP Legal Defense Fund and the Civil Liberties Union)	0	1	2	*22/3*
☐ Lawyers employed by state or local governments .	0	1	2	*23/3*

3. On the facing page is a list of factors that affect the quality of appellate advocacy. Using the numbers assigned to the factors on the list please indicate, for each group of lawyers that you checked in Question 1, the factor in which you think there is the greatest need for improvement by that group, and the factor in which there is the second greatest need for improvement. Base your answers on your observation of lawyers in federal courts of appeals. *(WRITE IN THE NUMBER--1 THROUGH 12--OF THE FACTOR YOU HAVE CHOSEN IN EACH CASE. ENTER A ZERO IF YOU HAVE NO OPINION.)*

	Greatest Need	Second Greatest Need	
U.S. Attorneys and their Assistants			
Experienced	_____	_____	*24-27/13*
Inexperienced	_____	_____	*28-31/13*
Strike force lawyers			
Experienced	_____	_____	*32-35/13*
Inexperienced	_____	_____	*36-39/13*
Other Justice Department lawyers			
Experienced	_____	_____	*40-43/13*
Inexperienced	_____	_____	*44-47/13*
Other U.S. Government lawyers			
Experienced	_____	_____	*48-51/13*
Inexperienced	_____	_____	*52-55/13*
Retained counsel in criminal appeals			
Experienced	_____	_____	*56-59/13*
Inexperienced	_____	_____	*60-63/13*
Appointed counsel in criminal appeals			
Experienced	_____	_____	*64-67/13*
Inexperienced	_____	_____	*68-71/13*
Public or community defenders			
Experienced	_____	_____	*10-13/13*
Inexperienced	_____	_____	*14-17/13*
Private practitioners representing corporate clients in civil cases			
Experienced	_____	_____	*18-21/13*
Inexperienced	_____	_____	*22-25/13*
Private practitioners representing individual clients in civil cases			
Experienced	_____	_____	*26-29/13*
Inexperienced	_____	_____	*30-33/13*
House counsel for corporations or other organizations			
Experienced	_____	_____	*34-37/13*
Inexperienced	_____	_____	*38-41/13*
Staff lawyers for civil legal assistance programs			
Experienced	_____	_____	*42-45/13*
Inexperienced	_____	_____	*46-49/13*
Staff lawyers for public interest law firms			
Experienced	_____	_____	*50-53/13*
Inexperienced	_____	_____	*54-57/13*
Lawyers employed by state or local governments			
Experienced	_____	_____	*58-61/13*
Inexperienced	_____	_____	*62-65/13*

(PLEASE BE SURE YOU HAVE FILLED IN ALL THE BLANKS FOR THOSE GROUPS OF LAWYERS YOU CHECKED IN QUESTION 1. THERE SHOULD BE A NUMBER FROM 1 TO 12 OR A ZERO IN EACH OF THOSE BLANKS. THEN GO ON TO QUESTION 4, PAGE 4.)

Factors Affecting the Quality of Appellate Advocacy

Legal Knowledge

(1) Knowledge of statutory and decisional law governing appellate jurisdiction

(2) Knowledge of Federal Rules of Appellate Procedure

(3) Knowledge of circuit rules and practices

(4) Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)

Briefing

(5) Ability to set forth the important facts and issues in a comprehensible manner

(6) Judgment in deciding what points to focus on

(7) Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging

(8) Ability to argue persuasively from statutory language, statutory purpose, and legislative history

Argument

(9) Skill in making distinctive use of oral argument rather than repeating the brief

(10) Responsiveness to questions from the bench and to indications of the judges' concerns

(11) Mastery of the record below

(12) Observing standards of courtroom decorum

4. To the extent that you have observed inadequate performances by lawyers in federal courts of appeals, which of the following, in your opinion, is the most frequent cause of inadequacy? *(PLEASE ENTER "1" BESIDE THE CAUSE WHICH YOU THINK IS THE MOST FREQUENT, "2" FOR THE NEXT MOST FREQUENT, AND "3" FOR THE LEAST FREQUENT. IF YOU HAVE NO OPINION, LEAVE BLANK.)*

Lack of the basic analytical ability, knowledge or judgment needed to be an adequate lawyer	_____	*66/4*
Lack of the special skills, knowledge or judgment needed to be an adequate appellate lawyer.	_____	*67/4*
Failure by lawyers to research their cases and to prepare themselves to the best of their ability.	_____	*68/4*

5. To the extent that you have observed inadequate performances by lawyers in federal courts of appeals, which of the following, in your opinion, is the more frequent consequence of inadequacy? *(CIRCLE ONE ANSWER)*

Clients' interests not fully protected.	0	
Unnecessary burdens imposed on judges and staff	1	
No opinion.	2	*69/3*

6. Do you believe that the average case today in the federal court(s) of appeals in which you practice makes greater or lesser demands on lawyers than the average case of a dozen years ago (1965)?

Greater *(ANSWER 6A)*.	0	
About the same	1	
Lesser	2	
No opinion	3.	*70/4*

6A. *IF "GREATER":* Does it demand:

	Yes	No	
Greater analytical skill than the average case in 1965?	0	1	*71/2*
Broader legal and factual knowledge than in 1965?	0	1	*72/2*
Better developed litigating technique than in 1965?	0	1	*73/2*

7. Do you think the proportion of inadequate performances by lawyers in the federal court(s) of appeals in which you practice is greater or smaller today than it was in 1965?

Greater *(ANSWER 7A)*.	0	
About the same	1	
Smaller.	2	
No opinion	3	*74/4*

7A. *IF "GREATER":* Is this because:

	Yes	No	
The average case makes greater demands?	0	1	*75/2*
The lawyers in the average case do not meet the same standards of quality?	0	1	*76/2*
Some other reason? *(EXPLAIN):* _____			
_____.	0		*77/2*

PLEASE RETURN TO THE BUREAU OF SOCIAL SCIENCE RESEARCH, INC., 1990 M STREET, N.W., WASHINGTON, D.C. 20036, IN THE ENVELOPE WHICH HAS BEEN PROVIDED. THANK YOU VERY MUCH FOR YOUR COOPERATION.

APPENDIX B

ADMINISTRATION OF RESEARCH INSTRUMENTS: SAMPLE SELECTION, ANALYSIS OF RESPONSE RATES, AND ADDITIONAL OBSERVATIONS

District Judges' Case Reports

Selection of Sample

In May of 1977, packages of case-report forms were sent to the 371 active district judges then in service, and the 104 senior judges who maintained chambers and staff. The forms were contained in a folder, with the instructions for completing the reports printed on the outside and inside of the front cover.

The judges were asked to report on all trials ending within a four-week reporting period. The reporting period differed somewhat from circuit to circuit, since an effort was made to schedule around events such as circuit judicial conferences and Federal Judicial Center workshops. For the Second, Third, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, the four-week period began May 23 and ended June 18. For the First, Fifth, and District of Columbia Circuits, it began May 30 and ended June 25. For the Ninth Circuit, a five-week period from May 23 to June 25 was used; the circuit's judicial conference was held in Hawaii from Monday, June 13 to Thursday, June 16, and it was assumed that about one week's trial activity would be lost as a consequence.

If all district judges had participated, this methodology would have produced a complete four-week sample of the trial business of the district courts. Although we cannot represent that trials in late May and June are typical of the trial business, we have no reason to think they are seriously atypical. Whether a particular trial was included in the sample was based on whether or not it *ended* during the reporting period, so the sample should include both long and short trials in appropriate proportions.

It bears emphasis that the object was to obtain a sample of lawyer performances in cases that went to trial. If we had sought a sample of performances in all cases, whether tried or not, only a small proportion of the performances would have included trial activity. Because of the Devitt Committee's particular interest in trial performance, it was thought appropriate to limit the sample to cases in which there were trial performances to be observed. For those cases included in the sample, however, the judges were asked to rate each lawyer's entire performance in the case, including pretrial activities.

A trial was defined as "a hearing: (1) in which testimony is taken; (2) that is on the merits; *and* (3) that is contested."[1] In addition, the judges were instructed not to complete a report for a trial if it was anticipated that there would be further contested proceedings in which testimony on the merits would be taken.

Since this last instruction required the judge to anticipate the future of the proceeding, it was undoubtedly imperfect in achieving the goal of ensuring that a case could have only one event that could qualify it for inclusion in the sample. In addition, under this instruction, a case in which a

1. District Judges' Case Reports, instructions, p. 1.

mistrial was declared was included in the sample only if a second trial was held and if it ended during the reporting period; the evaluations of lawyer performances were then based on the lawyers who appeared in the second trial. That effect could create a small tendency to underestimate the number of inadequate trial performances.

Analysis of Response Rate

Of the 475 judges to whom case-report forms were sent, 284 returned one or more completed case reports. Another 70 judges reported that they had had no trials that ended during the reporting period. Thus 354 judges (74.5 percent) were accounted for. The remaining 121 (25.5 percent) did not respond.[2]

Because it was relatively easy for a judge who had no qualifying trials to report that fact, it might be surmised that most of the judges who were not heard from did preside over reportable trials. The extreme assumption would be that all the nonresponding judges had reportable trials. If that were true, the 284 judges who filed case reports would represent 70 percent of the judges who had trial activity.

Each judge was asked to file case reports on all trials before him that ended during the reporting period. We have no independent basis for determining whether some judges may have reported on only a portion of the qualifying trials. As the end of the reporting period approached, however, a reminder letter to the judges asked them to notify us if, for any reason, they were filing reports on fewer than all of their reportable cases. None of the judges indicated that this was the case. We therefore assume, subject to the possibility of minor discrepancies, that each reporting judge filed a report on each reportable case. Hence, we believe that the reports received—which (including the negative reports) came from 74.5 percent of all the judges and at least 70 percent of those with trial activity—represent somewhere between 70 and 75 percent of the cases that were reportable under the terms of the research design.

Implicit in this conclusion is the assumption that the nonresponding judges did not have heavier trial loads than the judges who filed reports. That assumption is a reasonably comfortable one for two reasons. First, the lower limit of 70 percent is based on the assumption that all the nonresponding judges had some reportable trial activity, which is an extreme assumption. Second, the nonresponse occurred disproportionately among senior judges, and they are not likely, as a class, to have carried heavier trial loads; 38.5 percent of the senior judges did not respond, compared with 21.8 percent of the active judges. It thus seems reasonable to treat 70 percent as a minimum figure.

There is no evidence that the case-report data are unduly influenced by judges who believe there is a serious problem of inadequacy among trial lawyers in their courts. Of the 366 judges who expressed an opinion on that subject in their responses to the district judges' questionnaire, 41.3 percent expressed a belief that there is a serious problem, and 58.7 percent expressed a belief that there is not.[3] If we disregard case reports filed by judges whose opinions on that subject are unrecorded, we find that 38.4 percent of the judges filing case reports were judges who believe there is a serious problem of inadequacy, and that they accounted for 39.5 percent of the lawyer performances that were evaluated. Their contribution to the case-report data is therefore slightly less than might have been anticipated.

Table 54 shows the distribution of case reports by circuit, compared with the expected distribution of 848 trials based on 1976 data. The 1976 data were developed as a by-product of the effort to develop a sample of lawyers who try cases in the district courts; the method is discussed in some detail at pages 140–141. Subject to the caveat that 1976 data do not provide an ideal basis for comparison, the table indicates that the First, Eighth, and Tenth Circuits were substantially underrepresented in the sample, and the Second and Seventh Circuits substantially overrepre-

2. The figures actually include a few judges to whom forms were not sent, either because they had indicated beforehand that they would not participate (counted as nonrespondents) or because they had told us in advance that they would not have any trials in the reporting period.

3. See table 3, p. 16.

TABLE 54

Distribution of District Judges' Case Reports Received, by Circuit, Compared with Expected Distribution of 848 Trials

Circuit	Reports Received [a]	Expected Number [b]
First	12	33
Second	100	68
Third	82	91
Fourth	81	72
Fifth	217	210
Sixth	90	85
Seventh	61	46
Eighth	49	67
Ninth	94	103
Tenth	45	60
D.C.	17	13
Total	848	848

SOURCES: District Judges' Case Reports; Administrative Office data tapes.

[a] Reports received are classified according to the circuit in which the reporting judge held his appointment; in a few cases, this differs from the circuit in which the trial took place.

[b] Expected distribution of 848 trials, based on cases terminated in calendar 1976. Trials are classified according to the circuits in which they were held. See pp. 140–141 for a discussion of the method of estimating the number of trials.

sented. The magnitude of the departures from the expected distribution, however, does not suggest that much distortion in the overall picture could have been introduced.

The 1976 data referred to above produce an estimated trial rate of 14,061 trials annually, of which 61.2 percent are civil and 38.8 percent are criminal. The 848 case reports received represent 6.0 percent of the total estimate. Of the 848 trials reported on, 59.4 percent were civil, 36.9 percent were criminal, and 3.7 percent were not classified. In terms of this characteristic, the case-report sample appears to be excellent.

Although the published statistics of the Administrative Office are based on a definition of "trial" which differs from that used in the current study, the differences in definition do not appear to affect statistics on the number of jury trials. Hence, the case-report data can be compared with the published data on jury trials alone. For the statistical year ending June 30, 1977, the Administrative Office reported a total of 8,374 jury trials, of which 45.5 percent were in civil and 54.5 percent in criminal cases.[4] In the case-reporting program, which took place at the end of that statistical year, reports were filed on 488 jury trials, or about 5.8 percent of the annual total. Of the jury trials covered by the case reports, 45.9 percent were civil, 50.4 percent were criminal, and 3.7 percent were not classified.

In short, although the available data about the universe of cases that come to trial in federal district courts are not perfectly comparable to the data we have about the cases covered by the case reports, it would appear that the case-report data reflect a reasonable distribution of cases in terms of geography, bench trials and jury trials, and criminal and civil cases. We also find no evidence that judges who believe there is a serious problem of inadequate advocacy were more likely to participate in the case-reporting program than were others. Hence, we think the lawyer performance ratings in the case reports can be accepted as a reasonable sample of the evaluations that would be made if all judges reported for a longer period on all trials that came before them.

One final point should be noted briefly. To limit the burden on the reporting judges, and for administrative convenience in designing the case-report form, the number of lawyers to be evaluated in a single trial was limited to four. However, the judges were asked on the case-report form how many lawyers were in the trial. In both the question and the reporting instructions, they were told to count only a single lawyer when two or more lawyers represented a single client. In 29 of the 848 cases, the judge provided evaluations of four lawyers but indicated that more than four were in the trial. In these 29 cases, there were 72 performances that would have been evaluated but for the arbitrary restriction. Thus, the 1,969 performances evaluated included 96.5 percent of the performances in the trials on which reports were received.

4. Administrative Office of the United States Courts, 1977 Annual Report, table C7, p. A-36 (preliminary print).

Additional Observations

In the administration of the case-reporting program for cases argued on appeal, a high degree of unreliability was found in the judges' reports of the lawyers' roles. This unreliability was revealed by differences in the reported roles when two or three appellate judges reported on the same case. We have no independent knowledge that district judges' reports were similarly unreliable, but some of the causes of unreliability among appellate judges may also apply to the district judges' reports of the lawyers' roles. These causes were as follows:

1. Court of appeals judges often did not know whether a United States government lawyer was an assistant United States attorney, a strike force lawyer, an "other Justice Department lawyer," or an "other U.S. government lawyer." It seems probable that trial judges are much more reliable on this score. Because they typically deal with one United States attorney's office and, at most, one strike force, they are certainly more likely to know whether a lawyer is a staff member of such an office.

2. Appellate judges frequently did not know whether criminal defense counsel was retained or appointed. It seems probable that the individual trial judge is more likely to have accurate knowledge on that point. In many cases, if counsel was appointed, the trial judge will have done the appointing. There may be cases, however, in which appointments have been made by magistrates or by other judges, and in which the trial judge does not know, at the time the trial ends, whether defense counsel was appointed or retained.

3. In appeals involving prisoner petitions and motions to vacate sentence, there was some ambiguity about the proper classification of counsel's role. On the one hand, these cases are treated as civil cases in the Administrative Office's statistical system, a fact known to many of the judges. On the other hand, they typically have a criminal flavor, and the lawyers are often aptly described as engaged in "criminal defense." Trial judges, as well as appellate judges, probably differed in the way they identified the roles of such lawyers.

4. Appellate judges often did not know whether a lawyer in private practice was representing a corporate client or an individual client. This may reflect an ambiguity concerning who the client is when an individual corporate officer is a named party in a suit, or it may have flowed from a difficulty in classifying a lawyer who represented both corporate and individual parties in the same case. The instructions specifically indicated that a lawyer representing an insurer of a nominal defendant should be treated as representing a corporate client, but they did not deal with other situations that may have been ambiguous. District judges may have had the same problems as appellate judges in this respect.

5. When a state or local government was a party, appellate judges often did not know whether the lawyer was an employee of the government or had been retained. District judges may have shared this difficulty.

6. Finally, some of the discrepancies in the appellate case reports can be explained only on the assumption that the judges misunderstood the instructions, and did not understand that some of the role categories offered were to be read as subcategories of "criminal defense" on the one hand and "civil" on the other. Thus, a lawyer in a civil case was sometimes identified as "retained counsel," which was offered as a subcategory of "criminal defense"; similarly, a lawyer in a criminal case was sometimes identified as a "private practitioner representing individual client," which was offered as a subcategory of "civil." Errors of that kind may also have been made by district judges.

Thus, although we have no direct evidence that the district judges' reports of the lawyers' roles were unreliable, there is reason to suspect that district judges may have had some of the same problems in this area that appellate judges did. Because district judges generally see lawyers from a more limited geographical area than appellate judges do, they are more likely to have independent knowledge about the lawyers who appear before them, and it can probably be assumed that their reporting of the lawyers' roles was more reliable than the appellate reporting. But we have no way to measure the degree of that reliability. To

the extent that errors were made, their probable tendency would be to diminish observed differences among different groups of lawyers. That would not be true, however, if the likelihood of making an erroneous judgment about the lawyer's role was related to the judge's view of the quality of the performance (as in "he can't be from the Tax Division if he knows that little about tax law").

The subjective nature of the evaluations in the case reports suggests that a note of caution is also in order about the application of statistical tests to the case-report data. The theory underlying most statistical tests assumes that the data being subjected to analysis are derived from independent observations. Where a single judge has evaluated a number of lawyer performances, this assumption is not strictly fulfilled. All of the evaluations are dependent to some extent on the judge's personal standards for evaluating advocacy.

Table 55 shows the distribution of district judges' case reports in terms of number of reports per judge. It is obvious that some judges contributed more than others to the data. One judge accounted for 1.7 percent of the trials evaluated, and several judges accounted for about 1 percent each. About 10 percent of the judges filed reports on six trials or more, and thereby accounted for about 23 percent of the reports filed. As a practical matter, we think this problem can be ignored in many of the analyses, but it is a problem to be watched when conclusions are to be based on relatively small numbers of observations. When performance ratings are reported by circuit, for example, there is a serious possibility that the pattern of ratings for a single circuit may be dominated by a small number of judges.

TABLE 55

Number of District Judges' Case Reports Completed by Each Judge

Number of Reports per Judge	Number of Judges	Total Number of Reports (Col. 1 x Col. 2)
1	66	66
2	67	134
3	60	180
4	39	156
5	23	115
6	16	96
7	9	63
8	3	24
14	1	14
Total	284	848

The 169 performances rated "not quite adequate" or worse were rated by 96 of the 284 judges. Of those 96, 49 judges gave 1 such rating each, and thus accounted for 49 of the inadequate ratings; 31 judges gave 2 such ratings each, and thus accounted for 62 of the ratings; 8 judges gave 3 such ratings each, and accounted for 24; 7 judges gave 4 such ratings each, and accounted for 28; and 1 judge gave 6 of the inadequate ratings.

Trial Lawyers' Biographical Questionnaires

Selection of Sample

Before the district judges' case-report forms were mailed to the judges in May, 1977, a sample of the district judges were asked to administer the lawyers' biographical questionnaire to lawyers who appeared before them in trials that were the subjects of case reports.

The sample of judges consisted of 80 district judges, selected at random from the 475 judges who were being asked to participate in the case-reporting program. Because the administration of lawyers' biographical questionnaire made the judge's task more complex, there was some concern that the response rate to the case reports might be diminished if judges were asked by letter both to participate in the case-reporting program and to administer the questionnaires. To guard against such an outcome, some of the judges on the Devitt Committee organized a telephone campaign. Each judge who had been randomly selected was telephoned, told that he would be receiving the case-report forms, and asked whether he would be willing, in addition, to administer the biographical questionnaires.

The judges who expressed a willingness to participate were sent a supply of biographical questionnaires along with their case-report forms.

The lawyers were asked to return the questionnaires to the judges, and were invited to return them in sealed envelopes that would not be opened until the questionnaires reached the Federal Judicial Center. Since names were not used on either the case reports or the questionnaires, the judges had the task of ensuring that the questionnaire given to each lawyer carried a case number and a lawyer number that could be matched with the corresponding numbers on the case report.

Analysis of Response Rate

Of the eighty judges randomly selected, four judges were not reached, and one judge declined to administer the biographical questionnaire. All of the remaining seventy-five judges either agreed to administer the biographical questionnaire or indicated that they would not have any trial activity during the reporting period.

Of these seventy-five judges, forty-seven filed case reports, fifteen indicated (either beforehand or afterward) that they had no qualifying trials, and thirteen did not respond. The forty-seven judges returned 125 case reports, on which they evaluated 290 lawyer performances. Biographical questionnaires were received for 257 of these performances.

The following results emerge from analysis of these responses:

1. One or more case reports were received from 62.7 percent of the judges who had agreed to participate in administration of the biographical questionnaires, as contrasted with 59.8 percent of the other judges.

2. The forty-seven participating judges who filed case-report forms reported on 125 trials, for an average of 2.7 per judge. This compares with an average of 3.0 trials per judge for the other judges. The number of performances per trial averaged 2.3 for both the participating judges and the nonparticipating judges.

3. The participating judges were somewhat less favorable than the others, on the whole, to the lawyers who appeared before them. They gave fewer ratings of "first rate," and somewhat more ratings in the four lowest categories. Statistical analysis indicates that these differences are not likely to reflect only chance factors involved in a random draw.[5] The reasons for the differences are not clear, however.

4. The 257 biographical questionnaires received represent 88.6 percent of the performances rated. There is some suggestion in the data that the nonresponding lawyers were less likely than the others to have received ratings of "first rate" or "very good," and correspondingly more likely to have received ratings of "good" or below. The differences are not statistically significant, however.[6]

5. Of the 290 performances rated by the participating judges, 28 performances received ratings of "not quite adequate" or worse. These ratings were given by 17 of the participating judges. Nine judges gave 1 such rating each, and thus accounted for 9 of the inadequate ratings; 5 judges gave 2 such ratings each, and thus accounted for 10 of the ratings; 3 judges gave 3 such ratings each, and thus accounted for 9 of the ratings. In analyses that focus on the inadequate ratings, there is therefore reason to be concerned that a handful of judges were responsible for a substantial proportion of those ratings among this limited group of performances.

In summary, several caveats apply to the data based on the trial lawyers' biographical questionnaires and the judges' evaluations of performances by the lawyers who returned them. The analysis suggests that the rating judges, the rated lawyers, or both may be atypical in some respects. Moreover, the data are heavily influenced by the contributions of a few judges. If the ratings of these lawyers were being used to estimate the frequency of inadequate performances, these problems would cast substantial doubt on the validity of the estimates. The information about this group of lawyers is used, however, principally to determine whether correlations exist between performance quality and certain lawyer characteristics.

5. Chi-square = 11.7, $df = 5$, p less than .05. (Chi-square computed on 1,958 performances for which there were ratings, with the two lowest rating categories combined.)

6. Chi-square = 2.2, $df = 3$, not significant. (Chi-square computed on 289 performances for which there were ratings, with the four lowest rating categories combined.)

Here, the likelihood of reaching an erroneous conclusion is smaller. Nevertheless, it must be recognized that there is some possibility that apparent relationships may be artifacts produced by peculiarities of the sample.

The Videotape Study

Preparation of the Material

The number, duration, and content of the videotaped segments of advocacy were fixed by several factors. First, we determined that we could not reasonably ask for more than one hour of judges' time to participate in the study. Second, several segments of advocacy had to be shown in order to eliminate the risk of collecting invalid data based on a single eccentric performance, as well as to gauge the sensitivity of the seven-category rating scale to differences between performances. Third, the content of the performances had to be as relevant as possible to federal trial practice. Fourth, the segments had to be self-contained enough that the performances could reasonably be rated with only a minimum of contextual information.

After searching available sources of videotaped trial advocacy, we selected two civil and two criminal performances for inclusion in the research instrument. The civil performances were an argument to compel production of evidence under rule 37(a) of the Federal Rules of Civil Procedure, and the cross-examination of a consulting engineer serving as expert witness in an automobile accident case. Both criminal performances involved narcotics charges: a prosecutor's closing argument in a prosecution for possession of cocaine, and portions of a defense attorney's opening statement and subsequent cross-examination of a police informer in a trial involving sale of heroin.

The criminal advocacy segments were edited from longer videotape records of trials in the Court of Common Pleas of Franklin County, Ohio; the civil segments were taken from performances staged at the Hastings Summer College of Advocacy. Each performance lasted approximately thirteen minutes. An off-screen narrator provided a general introduction to the research, as well as brief, specific, factual backgrounds to each of the four cases. (The text of the background material for each performance appeared on the answer forms used by the participants to record their ratings of quality and confidence; copies of these forms are included in appendix A.) The videotape included a sixty-second interval following each performance, to enable participants to make and record their judgments. The duration of the tape, running without interruption from beginning to end, was fifty-seven minutes. Very brief introductory and concluding comments were made by a member of the research team whenever the tape was shown. Thus, we were able to show the tape and obtain ratings within the one-hour limit established for judges' participation.

The tape was pretested at the March, 1977 annual meeting of the American College of Trial Lawyers. It was shown at two separate sessions to fellows of the college who volunteered to participate. At these sessions, the answer sheets for each performance were collected immediately after the performance, and the ratings were tabulated while the tape continued. After the last performance had been shown, the tabulated ratings were displayed to the participants, and there was a brief discussion about the appropriateness of asking people to rate the performances in the particular segments. Following the pretest, and before any judges participated in the study, additional editing was performed on the opening statement and cross-examination in a criminal case. This was mainly to eliminate a portion of the cross-examination that involved matters not explained in the excerpt from the opening statement. The changes made were thought to be minor enough that it remained appropriate to include this performance in the analyses comparing judges' ratings with lawyers' ratings.

The final tape was produced in four versions, each with a different sequence of performances, to enable us to control for the possibility that the performance ratings might be influenced by the order in which the performances were seen.

Participation of Judges

The tape was shown at a variety of meetings attended by district judges. These were a meeting

of the Devitt Committee; the Fifth Circuit Judicial Conference; a Federal Judicial Center workshop for judges of the Sixth, Seventh, and Eighth Circuits; and specially convened meetings of judges in the Southern and Eastern Districts of New York and the Northern District of California. All of the participating judges were, of course, volunteers.

Table 56 shows the number of participating judges by circuit. Although participants were predominantly from the South and the Midwest, and a broader geographical distribution would have been preferred, we have no particular reason to think that a broader distribution would have altered the results of the analysis.

TABLE 56

District Judges Participating in Videotape Study, by Circuit

Circuit	Number of Judges
First	0
Second	9
Third	1
Fourth	1
Fifth	23
Sixth	15
Seventh	14
Eighth	18
Ninth	5
Tenth	2
D.C.	1
Total	89

TABLE 57

Numbers of Judges and Lawyers Viewing Each Sequence of Videotaped Performances

Sequence	Number of Judges	Number of Lawyers
1	21	45
2	12	39
3	33	0
4	23	0
Total	89	84

Additional Observations

Table 57 shows the numbers of judges and lawyers who saw the four different sequences of the taped performances. Since the pretest of the tape with the American College of Trial Lawyers involved only two sessions, no lawyers saw sequences 3 and 4; hence we needed to make sure that the differences between judges' and lawyers' ratings reported in chapter 3 were not artifacts produced by this difference in participation. A comparison between judges and lawyers based only on judges who viewed sequences 1 and 2 produced the same results as were reported in chapter 3.

Table 58 presents the details of significance

TABLE 58

Significance of Differences Between Means of Judges' and Lawyers' Ratings of Each Videotaped Performance

Performance	Probability of Equal Variances	Appropriate *t* Value[a]	Two-Tailed Probability of Equal Means
Argument on motion	.04	2.99	.003
Criminal opening and cross-examination[b]	.03	1.71	.09
Civil cross-examination	.82	4.54	.001
Closing argument	.31	5.34	.001
All performances together	.47	6.87	.001

[a] *t* based on pooled variance estimate for civil cross-examination, closing argument, and all performances considered together, but based on heterogeneous variances for the other two performances.

[b] This performance was edited between its showing to the American College of Trial Lawyers and its use with judges. The difference between the two editions may have contributed to the difference in variability displayed by the two groups.

tests, summarized in chapter 3, for the differences between mean ratings by judges and lawyers for each of the four performances. In addition to providing measures of confidence in the differences between the means, the table shows the reliability of the finding that, for the argument on a motion and the opening statement and cross-examination, the fellows of the American College were more variable in their ratings than were the district judges.

Several analyses presented in chapter 3 relied on the average of each judge's or lawyer's four ratings as a single index of response in the videotape study. The validity of the index depends on its close association with each of the four scores that it comprised. Table 59 displays the product-moment correlation coefficients and associated significance levels of the index with each of its components. The correlations were sufficiently high to warrant use of the average rating as an index.

TABLE 59

Correlations Between Videotape Participants' Ratings of Each Performance and Their Average Ratings of All Performances

Judges

Performance	Correlation with Average Rating	Significance of Correlation
Argument on motion	+.56	.001
Criminal opening and cross-examination	+.43	.001
Civil cross-examination	+.70	.001
Closing argument	+.69	.001

Lawyers

Performance	Correlation with Average Rating	Significance of Correlation
Argument on motion	+.24	.013
Criminal opening and cross-examination	+.49	.001
Civil cross-examination	+.57	.001
Closing argument	+.59	.001

District Judges' Questionnaires

Selection of Sample

The district judges' questionnaires were mailed in April, 1977 to the 372 district judges then in active service and to the 104 senior district judges who maintained chambers and staff.[7] The questionnaires were sent before the case-reporting program began, so that questionnaire responses would not be unduly influenced by special attention given to the quality of advocacy in a four-week sample of trials.

Analysis of Response Rate

Of the 476 judges to whom questionnaires were sent, 387 (81.3 percent) returned completed questionnaires. This high rate of response provides substantial assurance that the views expressed by the responding judges are reasonably representative of the district judges as a whole. If the views of the nonresponding judges could be known and could be included in the tabulations, they would have a substantial influence on the data only if the views of the nonrespondents, as a group, differed dramatically from those of the respondents. Thus, although analysis of the response rate does indicate that judges with some characteristics were more likely to respond than others, we think the questionnaire data can be treated as fundamentally reliable. The analyses performed, and the results, are as follows:

1. Of the 372 active district judges, 323 (86.8 percent) responded. Of the 104 senior judges, only 64 (61.5 percent) responded. If active and senior judges had been proportionately represented among the 387 respondents, we would have had 21 fewer responses from active judges and 21 more from seniors. Correspondence received from some of the senior judges suggests that many of them

7. The number of active district judges is higher by one than the number to whom case-report forms were sent a month later. The difference is accounted for by the expiration, on April 30, 1977, of the term of Judge Guthrie F. Crowe of the District of the Canal Zone.

did not feel qualified to respond because they do not see the entire range of cases that come before the court. Some senior judges handle only some types of cases, some handle only motions, some sit primarily on courts of appeals, and the like. Among the judges who did respond, no significant difference was found between active judges and senior judges in their responses to the question whether they believe there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in their courts.[8] Hence, a higher rate of response among the senior judges probably would have produced a higher rate of "no opinion" responses to particular questions, but there is no particular reason to believe that it would have produced different patterns of response among those willing to express opinions.

2. Among the active judges, those appointed to the bench in the last ten years responded at a somewhat higher rate than did those appointed earlier. Of the 247 active judges appointed since 1967, 222 (89.9 percent) responded. Of the 125 active judges appointed before 1967, 101 (80.8 percent) responded. If judges appointed at different times had been proportionately represented among the 323 active judges who responded, we would have had responses from 8 fewer of the more recent appointees and 8 more of the less recent. Analysis does not suggest that there was any systematic difference between these two groups of judges in their answers about the seriousness of the problem of inadequate trial advocacy.[9]

3. Again among the active judges, those born in 1913 or later (and therefore under 65 at the time the questionnaire was administered) had a higher response rate than did those born before 1913. Of the 291 judges in the former category, 262 (90.0 percent) responded; of the 81 older judges, 61 (75.3 percent) responded. If judges of different ages had been proportionately represented among the 323 active judges who responded, we would have had responses from 9 fewer of the younger judges and 9 more of the older ones. Analysis does not suggest that there was any systematic difference between these two groups of judges in their answers about the seriousness of the problem of inadequate trial advocacy.[10]

4. Again among the active judges, response rates varied only slightly by size of court, as measured by the number of authorized judgeships. Among the four size categories examined, they ranged from 83.9 percent to 89.7 percent. If judges in the four size categories had been proportionately represented among the 323 active judges who responded, we would have had 2 fewer respondents from one- and two-judge courts, 2 fewer from five- to nine-judge courts, 1 more from three- to four-judge courts, and 3 more from ten- to twenty-seven-judge courts. Analysis does not suggest that there was any systematic difference among the judges from courts of different sizes in their answers about the seriousness of the problem of inadequate trial advocacy.[11]

5. The response rate among circuits varied from a low of 63.2 percent in the District of Columbia Circuit to a high of 91.1 percent in the Sixth Circuit. Among active judges only, it varied from 71.4 percent to 97.4 percent. It should be recognized, however, that many of the percentages are based on small numbers, so that a statement in percentage terms may tend to exaggerate the magnitude of differences in the response rate. If the circuits had been proportionately represented among the 323 active district judges who responded, we would have had 10 fewer responses from judges from the Third, Fifth, and Sixth Circuits combined, and 10 more from the Second, Seventh, Ninth, Tenth, and District of Columbia Circuits. As is observed in chapter 3, there were some differences among circuits in the opinions about the seriousness of the problem of inadequate trial advocacy.

8. Chi-square=0.4, $df=1$, not significant. (Chi-square computed on 366 judges who expressed an opinion on the seriousness of the problem.)

9. Chi-square=1.5, $df=1$, not significant. (Chi-square computed on 305 active judges who expressed an opinion on the seriousness of the problem.)

10. Chi-square=1.6, $df=1$, not significant. (Chi-square computed on 305 active judges who expressed an opinion on the seriousness of the problem.)

11. Chi-square=2.4, $df=3$, not significant. (Chi-square computed on 305 active judges who expressed an opinion on the seriousness of the problem.)

In summary, a number of differences in response rates can be observed when judges are categorized in different ways. The differences in response among circuits and among courts of different sizes are reasonably small, and do not seem likely to have had a substantial impact on the data. The underrepresentation of senior judges as compared with active judges is of greater magnitude, and should perhaps be considered in conjunction with the fact that, among the active judges, the response rate was relatively low for the older judges and for those with more years of service on the federal bench. (These last two categories, of course, overlap each other considerably.)

At least some of the senior judges did not respond because they did not feel qualified to comment on the matters covered by the questionnaire. Beyond that, we have no solid basis for believing that the differences in response rates had much impact on the reported results. Among those judges who did respond, we did not find evidence of systematic differences between senior and active, older and younger, of those with long service and those with short, in their opinions about the seriousness of the problem of inadequate trial advocacy in their courts. That fact provides some reinforcement for the intuition that the views of the nonrespondents, if known, would not be dramatically different from those of the respondents. The lack of evidence of a dramatic difference, taken together with the high overall response rate, gives us confidence that the views expressed by the judges who responded are reasonably representative of the views of all district judges.

Additional Observations

A number of the district judges had difficulties with questions 3 and 4 on the questionnaire. In question 3 they were asked to identify, within each of eight general areas of trial competence, the subareas in which there is the greatest need for improvement among lawyers who practice in their courts. In question 4 they were asked to indicate, separately for twenty-six groups of attorneys, where the greatest need for improvement lies, among the eight general areas of competence. It is reasonably clear that, in both cases, response required making generalizations that many judges did not feel prepared to make. This was particularly so regarding the twenty-six categories of lawyers listed in question 4. For the group about which the largest number of judges expressed an opinion—inexperienced lawyers among United States attorneys and their assistants—approximately one-sixth of the judges expressed no opinion. The proportion of judges who did not express an opinion was very much higher for some of the other categories. Comments we received indicated that some judges found they were being asked to slice the problem more finely than they reasonably could, and that their thinking didn't run to this kind of categorization. Some, clearly, did not feel that the needs for improvement among particular classes of lawyers were homogeneous enough to make an answer to the question possible. Hence, some of the responses that have been treated in the analysis as "no opinion" responses should, arguably, be treated as expressions of opinion that the question is irrelevant.

To a lesser extent, the same kind of problem arose regarding question 3. The judges were told not to respond to portions of that question on which they had no opinion. If a judge believed that lawyers were rarely deficient in their general legal knowledge, he may well have felt that there was no basis for ranking the relative importance of improvement among the five subcategories that were offered. Once again, some of the responses tabulated as "no opinion" may in fact represent a rejection of the relevance of the questions.

Trial Lawyers' Screening Questionnaires

Selection of Sample

The trial lawyers' screening questionnaire was designed principally as one step in the process of creating a sample of lawyers to whom the trial lawyers' opinion questionnaires would be sent. We wanted to send opinion questionnaires to only

those lawyers who had had enough recent federal trial experience that they might reasonably be expected to hold opinions, founded in their personal experience, about the quality of advocacy in federal district courts. The basic program for constructing such a sample was to select a sample of lawyers from district court docket sheets, and to use the screening questionnaires to screen out those who had conducted fewer than a threshold number of trials in federal district courts in the last five years.

The sample of lawyers who were sent screening questionnaires was constructed by first drawing a sample of cases terminated in calendar 1976 in which there had been trials, and then referring to the records of the district courts to identify the lawyers who had tried those cases. Lawyers whose names were drawn more than once were of course sent only one questionnaire. It will be observed that, with this technique, a lawyer who tried many cases had a greater chance of being included in the sample than did a lawyer who tried one or a few. Each trial had an equal chance of being included in the sample, but different lawyers had different probabilities of being included.

To provide an equal probability of each lawyer's being included in the sample, regardless of the number of cases tried, would have required construction of a list of the lawyers who had appeared in all trials in cases that terminated in 1976. After elimination of duplicate entries, that list would have represented the population of lawyers who had tried one or more cases. A sample could then have been drawn from that list. Constructing a list of lawyers who had appeared in all trials, however, as contrasted with a sample of trials, would have required an immense amount of additional work in pulling lawyers' names from district court records. Moreover, since the ultimate objective of the exercise was to identify lawyers who try cases in the district courts with some regularity, a sample in which such lawyers would be overrepresented was not wholly disadvantageous. Hence, we adopted the procedure described above, in which we started with a sample of cases tried. One of the questions on the screening questionnaire asked the number of cases the lawyer had tried in federal district courts in 1976. The responses to that question provided a basis for adjusting the raw data—for stratifying the sample, in effect—to compensate for the overrepresentation of frequent appearers in the sample. The adjustment procedure is discussed in detail at pages 142–143 below. The adjusted figures should provide a reasonable approximation of the responses that would have been received if we had begun with a list of lawyers who had appeared in all trials instead of a sample of trials.

In preparing the sample of cases in which there were trials, civil cases and criminal cases were handled separately. On the civil side, all cases were identified that terminated in calendar 1976 and were recorded on Administrative Office data tapes as having been terminated during or after trial. On the criminal side, the task was somewhat more complex, because the Administrative Office data tapes include a record for each defendant rather than a record for each case; a multi-defendant trial may appear on several records. To convert this defendant-oriented data to trial-oriented data, we began with data for defendants whose cases were terminated between July 1, 1975, and December 31, 1976. We eliminated defendants with magistrates' docket numbers, so that only defendants with court docket numbers were included. We then made a list of all those who had been acquitted or convicted at trial (as contrasted with those convicted on guilty pleas or whose cases were dismissed), and arrayed them by district, office, and docket number. Within a given case, established by identity of district, office, and docket number, we then eliminated all but the lowest-numbered defendant (who is generally the first defendant listed in the indictment or information), so that each docket number could appear only once on the list. This step was based on the assumption that, if several defendants in the same docket number were convicted or acquitted at trial, it was likely that only a single trial took place. The final step was to eliminate from the list the trials of defendants whose cases were terminated before January 1, 1976; the rule was that a trial was to be included if the termination date of the lowest-numbered defendant fell in 1976.

We believe that the above procedure, although not free from defects, provides a good approxima-

tion of the universe of cases that were terminated in 1976 after trial. It may be noted that this differs somewhat from cases tried in 1976. Civil cases are considered terminated at the time the final judgment is entered, and the cases of criminal defendants are considered terminated when the defendants are sentenced, in the case of those convicted, or when they are acquitted.

The Administrative Office does collect data on trials held, but its definition of a trial for the purpose of collecting such data is "a contested proceeding before either the court or a jury in which evidence is introduced." This definition, based on a Judicial Conference resolution of 1964, includes certain interlocutory matters such as evidentiary pretrial hearings.[12] For the purpose of the present study, we wanted to find lawyers who had conducted trials on the merits. We believe the procedure used provided a better sample than could have been obtained from the Administrative Office data.

After separate civil and criminal lists had been prepared according to the described procedure, they were sampled. Because of an estimating error made in the planning stages, we had originally thought it would be important to stratify the sample, and the computer was programmed to draw systematic samples of 750 civil cases and 450 criminal cases. Because the lists were in order by district and office, this system guaranteed that cases within each of the two categories were included in proportion to their numbers in the various districts. After the lists had been prepared and the names of the lawyers had been furnished by the clerks of the district courts, we recognized that the sampling procedure had resulted in sampling every twelfth criminal case and every eleventh civil case. With such a small difference in sampling intervals, there had been almost no point in stratifying the sample. Since stratification would have added to the analytical problems, it was decided to eliminate every twelfth case in the civil sample, so that the entire sample became a one-in-twelve sample. Obviously, this procedure was second best. To a small extent, it compromised the proportionate representation of cases from various districts. For all practical purposes, however, it is legitimate to treat the sample as a systematic sample of terminated cases that were tried in the district courts.

After the sampling of cases was completed, lists of the sampled cases were sent to the clerks of the district courts. The clerks were asked to provide the name and address of the principal trial counsel for each party in each case.

Lawyers' names and addresses were received from all the districts except the District of the Canal Zone. However, district court records are not uniformly maintained on a national basis, and not all of the returns were equally suitable. The principal problems were as follows:

1. Some disticts maintain no record of the lawyer who actually tried the case. They have a record only of the lawyer who entered an appearance at some earlier stage of the proceeedings. In such districts, that lawyer was included in the sample. It is not clear how many districts reported on this basis. Nor do we know the frequency with which the trial lawyer is someone other than the lawyer of record in such districts.

2. In some districts, it is sometimes the case that only a law firm name is on the record, without the name of an individual lawyer. Similarly, the records sometimes show that the United States attorney's office or a public defender's office handled the case without showing the individual lawyer involved. When a United States attorney's office or public defender's office was involved, the Judicial Center tried to determine the name of the individual attorney, either through the clerk's office or through direct communication with the law office. These efforts were not always successful, however. In two of the major urban districts, assistant United States attorneys were therefore completely excluded from the sample; in other districts, there were occasional omissions of this type. No efforts were made to follow up where only law firm names were available. This appears to have been most common in the Southern District of New York, where it occurred in about a third of the civil cases.

3. Although the districts were asked to give us only the principal trial counsel in cases in which

12. Proceedings of the Judicial Conference of the United States (1964), p. 40.

more than one lawyer represented a single client, there were some instances in which they nevertheless furnished the names of more than one lawyer for a single client. Where it was apparent that this had been done, the name of the second-listed lawyer was eliminated, on the assumption that the principal lawyer was likely to have been the first listed on the court record. An exception was made in government cases, in which it was generally assumed, if both an assistant United States attorney and a departmental lawyer from Washington were listed, that the departmental lawyer was the principal trial lawyer. The eliminations could be made, however, only in cases in which it was evident that two lawyers were working for a single client. That generally was true only if the clerk's office identified the clients, which they had not been asked to do, or if two lawyers from the same firm were listed. There are undoubtedly a number of instances in which two lawyers were listed for a single client and both got into the lawyer sample because the situation was not identified.

The list of lawyers who were sent screening questionnaires was therefore an imperfect sample in many ways. Some of the imperfections have geographical characteristics, in that they resulted from differences in record keeping or reporting among the distict courts. However, apart from the problem that the sample is weighted toward lawyers who are frequent litigators, we are not aware of any specific impact the imperfections may have had on the data derived from the questionnaires.

Analysis of Response Rate

Of the 2,380 trial lawyers' screening questionnaires mailed, 1,858 (78.1 percent) were completed and returned. Of the remainder, 3 were returned by addressees who said they were not lawyers, leaving 519 addressees who were presumed to have been properly selected but who did not respond. The last group includes addressees whom the mails did not reach and, perhaps, some whose completed questionnaires did not reach our contractor, as well as those who chose not to respond.

To analyze the nature of the nonresponse, a random sample was drawn of 100 of the 519 nonrespondents, and an intensive effort was made to reach them by telephone and obtain answers to three of the questions on the screening questionnaires: the nature of the lawyer's present law practice, the number of trials conducted in federal district courts in the last five years, and the number of trials conducted in federal district courts in 1976. Of these 100 nonrespondents, 83 were reached and one was determined to have died.

Although we had thought that the response rate might be higher among those who regularly try cases in federal district courts, comparison of the screening-questionnaire respondents with the eighty-three nonrespondents does not support that view. No appreciable difference between the two groups was found, either in terms of trials in district courts in the last five years[13] or in terms of trials in district courts in 1976.[14] However, lawyers currently in private practice were less likely to respond than were lawyers in government, legal aid, public defender offices, or public interest law firms.[15]

Computation of Adjustment Factor

The adjustment factor used in the analysis of data derived from the sample of trial lawyers is based on a determination of the probability of a lawyer's being included in a one-twelfth sample of cases that went to trial.

For a lawyer who tried only one case that terminated in 1976, the probability of being selected in the sample was one-twelfth, or .0833. For a lawyer who tried more than one such case, it

13. $t = 0.2$, $df = 82$, not significant.

14. $t = 0.8$, $df = 82$, not significant.

15. Of the 83 nonrespondents reached, 73 were in private practice. Treating the 83 as a random sample of all nonrespondents, and using a 95 percent confidence interval, the private-practice proportion among all nonrespondents is found to lie between 80.1 and 93.0 percent. The proportion among respondents was 77.0 percent.

can be shown that the probability of selection, p, is computed as follows:

$$p = 1 - \frac{(N-X)\,!\,(N-n)\,!}{N\,!\,(N-n-X)\,!}$$

where X = the number of cases tried by the lawyer,
N = the number of cases in the universe, and
n = the number of cases in the sample (in this case, $N/12$).

Adjusted tabulations of questionnaire data are based on assigning weights to the responses of various lawyers in inverse ratio to the probability of selection determined under this formula.

As noted above, the sample of trials was drawn systematically rather than randomly. Districts, and offices within districts, were therefore represented proportionately. Since many lawyers have largely localized practices, it can be argued that each district-office combination should have been treated as a separate universe for the purpose of computing the weights. On the other hand, not every lawyer has a localized practice, and a number of lawyers appeared in the sample for more than one district-office combination, so it would not always have been possible to identify a sampled lawyer with a particular district and office.

Fortunately, for a given value of X, the impact on the above formula of differences in the size of N is generally quite small. For example, if a lawyer has appeared in three trials, the probability of being selected in the sample is 25 percent in a location that had only 12 trials, and 23 percent in a location that had 600 trials. We therefore felt comfortable in uniformly using an N of 108 trials. When the population of 14,061 trials from which the sample was drawn is distributed according to the number of trials reported by each district-office combination, the median trial is from a location reporting 108 trials.

For values of N that are quite small relative to X, the uniform use of an N of 108 causes somewhat more distortion. That is, if a single lawyer participated in a substantial proportion of the trials held at a single location (somewhat more than a quarter of them), his probability of selection may have been substantially greater than the probability computed using $N = 108$. It does not seem likely that this happened with sufficient frequency to be a source of concern.

A more substantial imperfection in the technique is, of course, the reliance on the respondent's estimate of the number of trials conducted in 1976. We have no independent knowledge of the accuracy of such estimates; nor do we know whether lawyers have systematic tendencies to underestimate or overestimate the number of trials. It may be noted that the screening questionnaires were administered in the fall of 1977, so there was nearly a one-year lag between the end of 1976 and the time the estimates were made in response to the questionnaire. Moreover, the question did not perfectly match the data from which the sample of trials was taken. In drawing the sample, we sampled cases terminated in 1976, since actual trial dates are not recorded on Administrative Office data tapes. We thus included an unknown number of trials that in fact took place in 1975 (and perhaps even a few that took place earlier), and excluded an unknown number that in fact took place in 1976 in cases that terminated later. In asking lawyers to estimate the number of cases they had tried, we simply asked the number of trials in 1976.

In summary, the theoretical problems involved in using a consistent N of 108 pale beside the weaknesses in the data to which the adjustment formula was applied. It should be understood that the adjusted tabulations represent a quite rough effort to compensate for the fact that the sampling process did not give all lawyers an equal chance of selection.

Trial Lawyers' Opinion Questionnaires

Selection of Sample

The trial lawyers' opinion questionnaires were sent to two separate samples of lawyers: a sample drawn from the respondents to the screening questionnaire, referred to as the "docket-sheet

sample," and a sample drawn from a list of lawyers identified by federal district judges as "highly capable trial lawyers."

The docket-sheet sample was drawn from respondents to the screening questionnaire who reported, in response to question 4, that they are currently engaged in law practice and, in response to question 2, that they had tried ten or more cases in federal district courts in the last five years. As has already been noted, the objective was to obtain a sample of lawyers who had had enough recent federal trial experience that they might be expected to have opinions about the quality of advocacy in the district courts in which they practice.

To select a sample of highly capable lawyers, we began by taking a systematic sample of active federal district judges. Using a list in which the judges were arrayed by district, chief judge first and the others in seniority order, we sampled every fourth judge. If the sampled judge had neither responded to the district judges' questionnaire nor filed any district judges' case reports, we substituted another judge for the judge originally sampled. In addition, in a few of the larger districts, we sampled one or two extra judges as "backup" judges.

We asked each of these sampled judges to provide us with names of two lawyers in each of the following categories who practice regularly in the federal district court and whom the judges consider to be "highly capable trial lawyers": United States government lawyers (excluding public defenders), lawyers whose trial work is primarily criminal defense, and lawyers (other than United States government lawyers) whose trial work is primarily civil. Of the 102 judges who were asked to provide the information, 96 responded. Since some of the nonrespondents were "backup" judges, and others could be replaced by "backup" judges, there were only two districts from which responses were desired but not received. There were also two districts for which the sole responding judge was unable to suggest names for all of the three categories.

The sample of highly capable lawyers consists of the first lawyer named by each judge in each category, except that the second lawyer named was used as a replacement in cases in which two or more judges named the same lawyer. The use of the first lawyer named was arbitrary; the judges were not asked to list the lawyers in order of their capability.

A sample of 271 lawyers was produced in this manner. It is in no sense a scientifically drawn sample of some larger universe. Indeed, it could be argued that the use of the word "sample" is technically erroneous. The lawyers are simply a group of lawyers who have been identified by federal district judges as lawyers who try cases regularly in the federal district courts and are highly capable. Because of the way the judges were sampled, the group is geographically distributed in the same pattern as the active federal district judges are distributed, and both large and small courts (as measured by the number of active district judges) are proportionately represented. The universe of highly capable trial lawyers who practice regularly in district courts, assuming that one could be defined, may or may not be distributed in a similar pattern. Fundamentally, this should be treated as a group of lawyers, geographically diverse, who are thought to be highly skilled in trial work and whose views on the quality of trial advocacy may therefore be of special interest.

Of the 271 lawyers in the sample of highly capable lawyers, 30 were also in the docket-sheet sample, so the two samples have some overlap. The highly capable lawyers who were not in the docket-sheet sample were sent a special version of the trial lawyers' opinion questionnaire, which included, in addition to the questions in the regular version, most of the questions from the trial lawyers' screening questionnaire, to which they had not previously responded.

Analysis of Response Rates

Of the 271 lawyers in the sample of highly capable lawyers, 198 (73.1 percent) responded. There has been no analysis to determine whether the respondents may be, in some detectable way, different from the nonrespondents.

Of the 597 lawyers in the docket-sheet sample,

488 (81.7 percent) responded.[16] Since these lawyers had all previously answered the screening questionnaire, it was possible to use information from that questionnaire to compare the respondents and nonrespondents to the opinion questionnaire. The comparison indicates that lawyers in the private practice categories had a slightly lower response rate than those in government, legal aid, public defender offices, and public interest law firms. If these two types of lawyers had been proportionately represented among the respondents, we would have had eleven fewer responses from lawyers in the public categories, and eleven more from lawyers in private practice. Regarding the other characteristics examined, the differences between respondents and nonrespondents were even smaller. For all practical purposes, the two groups were the same regarding the number of trials the lawyers said they had conducted in United States district courts in the last five years, their characterization of trial work as the major part of their practice or merely a substantial or an insubstantial part, and the nature of the trial work as mostly civil, mostly criminal, or mixed.

The difference in response to the opinion questionnaire by lawyers in private practice and those in the public categories, although it is small, reinforces a similar tendency that occurred in the response to the screening questionnaire. Taking the response to both questionnaires into account, the result may have been considerable underrepresentation of the private bar among the trial lawyers whose opinions are reported here. Even so, the private bar accounts for about three-fifths of the questionnaire responses.

In conclusion, the sample of "highly capable trial lawyers" should be accepted only as a group of lawyers who were identified as highly capable and who chose to respond to our questionnaire. There is no definable larger group to which extrapolations can be made in a statistical sense. The selection process was informal rather than scientific, and the views expressed by the group should be accorded the same kind of weight that one might accord to the views of a group of lawyers, nominated by judges who considered them highly capable, who might be assembled in a meeting to discuss problems of advocacy. Although not statistically representative of anyone, they are a group whose opinions may be entitled to special weight because of the high standards that they are thought to meet themselves.

The docket-sheet sample, on the other hand, was designed to be representative of the lawyers who practice somewhat regularly in federal district courts. As in any survey research, there are imperfections in the sample: imperfections in the construction of the list of lawyers who were sent the screening questionnaires, imperfections created by nonresponse to both the screening questionnaire and the opinion questionnaire, and imperfections in the calculations involved in adjusted tabulations. There is reason to think that the private bar may be considerably underrepresented, even though about three-fifths of the respondents came from that segment. None of the other checks we have been able to make suggests any specific bias that may have been introduced by the imperfections, and the generally high response rate gives us some confidence that not a great deal of bias was introduced by nonresponse. We therefore think it is appropriate to take the views expressed by the docket-sheet sample as a reasonably close approximation of the views of the federal trial bar.

Appellate Case Reports

Selection of Sample

The case-reporting program in the courts of appeals was carried out in the fall and early winter of 1977. The objective was to obtain an evaluation of a sample of performances by lawyers in appeals that were argued orally.

Since we wanted an evaluation from each judge hearing the argument, we decided to ask the clerks of the courts of appeals to administer the program. The clerks selected the sample arguments pursuant to guidelines provided by the Judicial Center. For each day on which arguments were held during the

16. A sample of 600 lawyers was originally drawn, but it was later determined that 3 of them had not met the criteria for inclusion.

reporting period, the clerk gave the panel judges instruction folders containing the appropriate report forms. Entries on the outside front covers of the folders indicated which appeals were to be evaluated, which prenumbered reporting form was to be used for each argument, and which lawyer number was to be used for each of the lawyers involved in the argument. This procedure was intended to ensure that all three evaluations of a particular performance would carry the same identifying information.

We sought evaluations of the lawyer performances in 400 cases. The clerk of each court of appeals was provided a quota, based on the 1977 statistical year's distribution of oral hearings before three-judge panels in the various circuits.[17] In essence, the clerks were asked to sample a third of the arguments held on or after September 26, 1977, until the quota was filled.

Although the quota for each circuit was based on all arguments held before three-judge panels during the 1977 statistical year, including those held at locations at which panels sit infrequently, we decided that the sample would include only arguments held at the courts' major locations. In any reporting period substantially shorter than a year, it would not have been possible to achieve proportionate representation of arguments at all locations. If it had been decided to sample all arguments that took place during the relatively short reporting period used, it would have been very much a matter of chance whether the minor locations in a particular circuit were included in the program, and in what proportions. In the absence of an ideal solution to this problem, we limited the program to the major locations principally for administrative reasons. We thought this would enable the clerks to assign someone to the task in each major location, and to avoid having to introduce new people to the program when the courts sat at the minor locations. Therefore, in all circuits except the Ninth, the arguments rated are all from a single location. In the Ninth Circuit, the quota was split between Los Angeles and San Francisco, based on the numbers of arguments held in these two locations in the 1977 statistical year.[18]

The sampling guidance given the clerks was based on the "panel day," defined as one day's arguments before one three-judge panel. The clerks were asked to list panel days on a log. If only one three-judge panel was sitting at a time, they were to list the panel days in chronological order, beginning with the first panel day on or after September 26, and continuing until completion of the program. If two panels were sitting on the same day, the panel chaired by the more senior judge was to be listed first. If three panels sat at the same time in a single location, the order of listing was to be rotated from day to day to avoid periodicity in the sampling.

The clerks were instructed to select for the sample the first and fourth arguments on the first-listed panel day, the second and fifth arguments on the next-listed day, the third and sixth arguments on the next-listed day, and then to repeat the cycle for subsequent panel days. This system was to be maintained even if fewer than six arguments were scheduled for any given day, as is the case in most circuits. If there was no sixth argument on the third panel day, for example, only the third argument was to be included in the sample. No court of appeals hears as many as seven arguments a day, so this system was designed to provide a sample of one-third of the arguments. The method of selection was dictated largely by a desire that no judge be asked to evaluate more than two appeals argued on a single day.

Subject to the caveat about the lack of representation of arguments held in secondary locations, this system should have provided a representative sample of cases that reached oral argument. If there is anything to suggest that cases argued in the fall and early winter are systematically different from cases argued at other times of the year, it has not come to our attention.

The decision to focus on cases that reached oral argument was based on a combination of policy and administrative reasons. The policy reason was

17. *See* Administrative Office of the United States Courts, 1977 Annual Report, table 6, p. 71 (preliminary print).

18. Derived from Administrative Office form JS-33, Monthly Report of Cases Heard in the U.S. Courts of Appeals.

that it seemed desirable to have a sample of cases in which the full range of appellate skills could be observed; a number of questions on the case-report form would have been irrelevant for cases that did not reach oral argument. The administrative reason was that oral argument provided a single event, in which all the judges on the panel participated, that would be the time for reporting as well as a time at which the case was fresh in the judges' minds.

We do not know, of course, whether the overall ratings judges gave appellate performances would have followed a different pattern if cases briefed but not argued had been included in the sample. Since a somewhat more limited group of skills is available for evaluation in such cases, it is quite possible that the reported results would have been different. In addition, because different circuits have different policies about the opportunity for oral argument, the decision to focus on cases that reached oral argument had an impact on the geographical distribution of the sample. In the Third and Fifth Circuits, for example, more than half the appeals in the 1977 statistical year were submitted on briefs, while in the Second and Fourth Circuits, fewer than 10 percent were submitted.[19]

Convenience was the main reason underlying the decision to limit the sample to cases heard by three-judge panels. Including the en banc hearings would have required that we develop a special analytical program to handle the very few cases in which more than three judges would be reporting. In the 1977 statistical year, fewer than 1 percent of all oral arguments were en banc.[20]

Analysis of Response Rate

Table 60 shows the quota of arguments assigned to each circuit, the number of arguments on which reports were received, and the number of judges reporting on each case.

The 382 cases on which reports were received constitute 95.5 percent of our target of 400 cases. Thus, even with some difference between circuits

19. Administrative Office of the United States Courts, 1977 Annual Report, table 6, p. 71 (preliminary print).

20. *Id.*

TABLE 60
Response to Appellate Case-Reporting Program, by Circuit

Circuit	Quota of Cases	Number of Cases on Which Reports Were Received: Total	One Judge Reporting	Two Judges Reporting	Three Judges Reporting	Average Number of Reporting Judges per Case
First	17	17	....	5	12	2.7
Second	61	59	7	18	34	2.5
Third	25	25	2	8	15	2.5
Fourth	33	33	....	....	33	3.0
Fifth	55	55	1	8	46	2.8
Sixth	37	32	20	11	1	1.4
Seventh	41	41	1	5	35	2.8
Eighth	29	29	5	8	16	2.4
Ninth	54	45	15	23	7	1.8
Tenth	19	17	6	7	4	1.9
D.C.	29	29	....	5	24	2.8
Totals	400	382	57	98	227	2.4

in the proportion of the quota represented, we believe the sample can be treated as a trustworthy sample of appeals argued orally.

The 382 cases included 840 evaluated performances, for an average of 2.2 lawyers per case. As we did in the district court research, we specified that no more than 4 lawyers be evaluated in each case. We do not know the number of arguments in which there were in fact more than 4 lawyers arguing for different clients, but there were only 18 cases in which 4 lawyers were evaluated. With no more than 18 cases in which the four-lawyer limit came into play, we conclude that the limit did not seriously reduce the available data base.

There was substantial variation in the degree to which all members of a three-judge panel participated. As table 60 shows, 26 percent of the cases were evaluated by only two judges, and 15 percent by only a single judge. We know very little about the circumstances leading to nonresponse; indeed, we do not know who the nonresponding judges are. Though we cannot be absolutely sure that the reported rates of inadequacy are not biased by the nonresponse, it seems unlikely that the results would have been greatly different with a 100 percent response.

A total of 136 judges submitted case reports. Eighty-three were active court of appeals judges, 21 were senior court of appeals judges, and 32 were judges from other courts who sat on appellate panels during the reporting period. As shown in table 61, there was marked variability in the number of cases on which each judge reported. In part, this reflects variability in the number of arguments that different judges heard during the reporting period; in part, it may reflect reporting by some judges on fewer than all of the sampled cases that came before them.

The percentage contribution to the total number of case reports ranged from 0.1 percent for each judge who submitted one report to 2.0 percent for the single judge who submitted nineteen reports. The eleven judges filing the most reports accounted for 17.2 percent of all the reports filed. Each of these eleven judges reported on 3.7 percent or more of the cases. There is therefore some risk that our estimates of the extent of inadequate appellate advocacy have been appreciably influenced by the unusual standards of relatively few judges. Although the sample of performances available for evaluation was highly satisfactory, these differences among judges' contributions to the reported results reduce the reliability of the sample of ratings. Because there are fewer appellate judges than district judges, the problem is more serious in the appellate data than in the district data. Nevertheless, we believe that estimates based on data from all circuits provide acceptable approximations of the ratings that would be given if all judges reported for a longer period on all the cases argued before them. Data for individual circuits, on the other hand, should be regarded as highly unreliable.

TABLE 61
Number of Appellate Case Reports Completed by Each Judge

Number of Reports per Judge	Number of Judges	Total Number of Reports (Col. 1 x Col. 2)
1	17	17
2	10	20
3	12	36
4	9	36
5	11	55
6	12	72
7	7	49
8	12	96
9	4	36
10	6	60
11	10	110
12	9	108
13	6	78
14	8	112
15	2	30
19	1	19
Totals	136	934

Additional Observations

On the case-report form, the judge was to fill in a code for the role of each lawyer in the argument. In the Fifth and District of Columbia Circuits, the clerks of the courts improved upon our design by entering this information before giving the form to the judges. In the other circuits, we found a high degree of inconsistency in the identification of the

lawyer's role when more than one judge filed reports on a single argument. Although the judges apparently thought they were able to identify the lawyer's role using the categories provided in the instructions, investigation indicated that they frequently had erroneous impressions. We therefore asked the clerks in these circuits to review the docket sheets in sampled cases and provide us with an accurate identification of the lawyers' roles. The data received from the clerks was substituted for the data provided by the judges.

The difficulties the judges encountered are set forth on page 132. For the most part, we are confident that the clerks did not share these difficulties. The ambiguity about classification of prisoner petititons and motions to vacate sentence was resolved in favor of classifying them as civil. Some ambiguity probably remained in the standard for determining whether a client in a civil case was individual or corporate. Finally, some of the clerks' offices indicated that they do not always know whether counsel was appointed or retained. If counsel on appeal has been appointed by the trial court, the clerk's records may not indicate that counsel was appointed; in such cases, we have erroneously classified the lawyer as retained.

We believe that a high degree of accuracy in classifying the lawyers' roles was ultimately achieved with the assistance of the clerks' offices, but the data may still reflect the erroneous classification of some appointed counsel as retained, and erroneous conclusions about whether some civil counsel were representing individual or corporate clients.

In applying statistical tests to the data from the case reports, the caveat about similar data from the district courts has even stronger application.[21] We observed, in that context, that the theory underlying statistical tests assumes that the data being analyzed are derived from observations that are independent of one another. In the data from the appellate case reports, this assumption is violated in two ways.

First, we commonly have a situation in which several judges are evaluating the same performance; therefore their observations are not independent in the sense of being observations of different things. We have controlled for this by adjusting the data before subjecting them to chi-square tests. Since we had an average of 2.4 evaluations for each performance, we divided the raw data by 2.4 before performing the tests when examining relationships between lawyer characteristics and performance ratings. The tests are thus based on the number of independent lawyer performances rather than the number of observations of them.

The second way in which the assumption of independence is violated is the one that affected the district court data: to the extent that evaluations are subjective—that is, that they reflect the personal standards used by particular judges in evaluating advocacy—several evaluations provided by a single judge are not strictly independent. As was observed in the discussion of the response rate, the relatively small number of appellate judges increases the risk that the data may be unduly influenced by the standards of a few.

As is noted in the text, the case-reporting program was designed on the assumption that the appellate judges would not consult with one another before completing their evaluation forms. In fact, in some cases we received consensus evaluations, and in some others we received ratings that were not consensus evaluations but were arrived at after discussion among the judges on the panel. The tabulations are therefore based on a group of performance evaluations some of which reflect collegial procedures and some of which do not. We have no feeling that the collegial evaluations have less validity than the others. Indeed, had it not seemed an unreasonable imposition, we might have asked for collegial judgments. But problems of interpretation are created by the fact that both collegial and noncollegial evaluations are included in the data, with no means of distinguishing one from the other.

Appellate Lawyers' Biographical Questionnaires

Selection of Sample

Each lawyer whose performance was to be rated in the appellate case-reporting program was asked

21. *See* p. 133.

to fill out an appellate lawyers' biographical questionnaire. The questionnaires were given to the lawyers by the clerks' offices. The lawyers were asked to return the questionnaires to the clerks, and were invited to return them in sealed envelopes that would not be opened until the questionnaires reached the Federal Judicial Center. The clerks' offices had the task of insuring that the questionnaire given to each lawyer carried a case number and a lawyer number that could be matched with the corresponding numbers that had been assigned for the case reports.

Analysis of Response Rate

Of the 840 performances evaluated, biographical questionnaires were received for 798 (95.0 percent). Analysis of the response does not suggest that the distribution of performance ratings differed substantially between respondents and nonrespondents.[22]

Appellate Judges' Questionnaires

Selection of Sample

The appellate judges' questionnaires were mailed in April, 1977 to the eighty-nine court of appeals judges then in active service and to the forty-two senior court of appeals judges who maintained chambers and staff. The questionnaires were administered before the case-reporting program, so questionnaire responses were not influenced by the special attention given to a relatively small number of appeals.

Analysis of Response Rate

Of the 131 judges to whom questionnaires were sent, 98 (74.8 percent) returned completed questionnaires. This is a slightly lower response rate than was achieved with the similar questionnaire for district judges.

Analysis of the response rate according to a variety of characteristics indicates the following:

1. Of the eighty-nine active court of appeals judges, seventy-three (82.0 percent) responded. Of the forty-two senior judges, only twenty-five (59.5 percent) responded. If active and senior judges had been proportionately represented among the ninety-eight respondents, we would have had responses from six fewer active judges and six more seniors. Among the judges who responded, 44 percent of the senior judges expressed a belief that there is, overall, a serious problem of inadequate appellate advocacy by lawyers with cases in their courts, compared to 26 percent of the active judges.[23] Even assuming that this difference between senior and active judges holds for the nonrespondents, however, a higher response rate among the senior judges would have had only a minimal effect on the data reported.

2. Among the active judges, the response rate was virtually uniform for those appointed to the appellate bench relatively recently and those appointed less recently. If judges appointed at different times had been proportionately represented among the seventy-three active judges who responded, we would have had responses from one fewer of the judges appointed in 1972 or later, and one more of the judges appointed in 1966 or earlier.

3. Again among the active judges, the response rate was reasonably uniform across age categories. If judges of different ages had been proportionately represented among the seventy-three active judges who responded, we would have had responses from one fewer of the judges born in 1923 or later, one fewer of those born in 1918 through 1922, and two more of those born in 1912 or earlier.

4. The response rate among circuits varied from a low of 50 percent to a high of 100 percent. Among active judges only, it varied from 57.1 percent to 100 percent. These percentage state-

22. Chi-square=0.5, $df=4$, not significant. (Chi-square computed on 1,996 ratings, with three lowest rating categories combined, and with raw data divided by 2.4 to compensate for multiple counting of performances.)

23. Chi-square=2.73, $df=1$, p less than .10. (Chi-square computed on 93 judges who expressed an opinion on the seriousness of the problem.)

ments are, of course, based on very small numbers of judges. If the circuits had been proportionately represented among the seventy-three active district judges who responded, we would have had responses from two fewer judges from the Third Circuit and two more from the Fourth, and several circuits would have had either one fewer or one more judge responding. As is noted in chapter 6, only in the Seventh and Ninth Circuits were there substantial variations from the national response pattern concerning the seriousness of the problem of inadequate appellate advocacy.

In summary, when the appellate judges are categorized in different ways, the differences in response rates are generally quite minor. The single exception is that the response rate among senior judges was substantially lower than the rate among active judges. There is some evidence of a systematic difference between senior and active judges' opinions regarding the seriousness of the problem of inadequate appellate advocacy in their courts, but that difference is not large enough to suggest that the underrepresentation of senior judges had an appreciable impact on the questionnaire data. Given the high response rate overall, we think the questionnaire responses of those who responded can safely be taken as reasonably representative of the views of all appellate judges.

That statement should be considered, however, in the context of the relatively small population of appellate judges. In tabulations based on the questionnaire data, each judge represents approximately one percentage point. Thus, the proposition that the responses received are "reasonably representative" should be understood to allow for the possibility that inclusion of the nonrespondents' views, if they could be known, might produce changes of several percentage points in any of the percentages based on questionnaire data.

Additional Observations

In question 3 of the appellate judges' questionnaire, the judges were asked to indicate, separately for twenty-six groups of attorneys, where the greatest need for improvement lies among twelve general areas of competence. Many of the judges found this question difficult, as the district judges found a similar question on the district judges' questionnaire. For the group of lawyers for which we had the most responses, twenty-six of the judges (26.5 percent of those responding to the questionnaire) either said they had no opinion or did not respond to this question. In addition, the "no response" category in our tabulations includes the five appellate judges who pretested the questionnaire for us; a change in the question was made as a consequence of the pretest, and these judges were not asked to respond to the question as it finally appeared.

Comments from the appellate judges about this question were similar to those of the district judges.[24] But the problems of thinking about categories of lawyers, particularly the institutional categories, may be greater for appellate judges than for trial judges, because the appellate judges regularly see lawyers from a broader geographical area. When a trial judge is asked about the qualities of United States attorneys and their assistants, he is being asked, for practical purposes, to think about a single office whose institutional strengths and weaknesses may be reflected in the performances of its lawyers. When an appellate judge is asked about the same category of lawyers, he does not have that advantage.

Appellate Lawyers' Screening Questionnaires

Selection of Sample

The appellate lawyers' screening questionnaire served the same function as the trial lawyers' screening questionnaire, and the sample of lawyers that received it was drawn in very much the same manner.[25] That is, we constructed a sample of lawyers from court of appeals docket sheets, and then used the screening questionnaires to screen out

24. *See* p. 139.

25. *See* pp. 140–141.

those who had argued fewer than ten cases in federal courts of appeals in the last five years.

In the case of the appellate lawyers, a list of all arguments in calendar 1976 was compiled from JS-33 reports (Monthly Report of Cases Heard in the U.S. Courts of Appeals) filed with the Administrative Office. This list produced 6,055 oral arguments. A list of 1,697 random numbers was then generated, and a single sample was taken of the entire national list. This procedure was, of course, more straightforward than the procedure used for the district courts. The sample of arguments with which we started can be accepted, subject to occasional error on the JS-33 reports, as free of defects. As was the case with the district court sample, however, a lawyer who argued many cases had a greater chance of being included in the sample than a lawyer who argued one or a few.

After the sample of arguments had been generated, lists of the sampled arguments were sent to the clerks of the courts of appeals, who were asked to provide the name and address of the principal lawyer arguing on behalf of each party in the case. While the problems that were found in the lawyer lists received from the district courts all occurred, to some extent, in the lists from the courts of appeals,[26] they appeared to be of substantially smaller magnitude. In particular, the courts of appeals generally do maintain records identifying the lawyers who actually argued a case, while many district courts do not maintain records of who actually tried a case. Nevertheless, about 8 percent of the questionnaire respondents said they had argued no appeals in 1976, so it is reasonably clear that perfection was not achieved. To the extent that there were imperfections in the sample—other than the fact that it was weighted toward lawyers who appeared frequently—we are not aware of any specific impact the imperfections may have had on the data derived from the questionnaires.

Analysis of Response Rate

Of the 3,278 appellate lawyers' screening questionnaires mailed, 2,567 (78.3 percent) were completed and returned. Of the remainder, 8 were returned by addressees who said they were not lawyers, leaving 703 addressees who were presumed to have been properly selected but who did not respond. The latter group includes addressees whom the mails did not reach, and perhaps some whose completed questionnaires did not reach our contractor, as well as those who chose not to respond.

Following the procedure used for the trial lawyers' screening questionnaire, a random sample of 100 of the 703 nonrespondents was drawn, and an effort was made to reach them by telephone. Of these 100 nonrespondents, 86 were reached, and one was determined to have died.

One of the eighty-six who were reached was not a lawyer. Comparison of the screening questionnaire respondents with the eighty-five lawyer nonrespondents suggests that the response rate may have been higher among lawyers who had argued five cases or fewer in United States courts of appeals in the last five years than among those who had argued six or more. The result is not significant at the 95 percent confidence level, however.[27] If there was such a trend, it was contrary to our expectation that there would be a higher response rate among lawyers who have appeared more regularly in the appellate courts. There was not a significant difference between the two groups in terms of appeals argued in 1976.[28] And unlike the response rate for the district courts, there was no demonstrable tendency for the response rate to be lower among lawyers in private practice than among those in government, legal aid, public defender offices, or public interest law firms.[29]

Computation of Adjustment Factor

The sample included 1,697 arguments out of a universe of 6,055; therefore the probability of

26. *See* pp. 141–142.

27. $t = 1.8$, $df = 84$, p less than .10.

28. $t = 1.6$, $df = 84$, not significant.

29. Of the 85 nonrespondents reached, 65 were in private practice. Treating the 85 as a random sample of all nonrespondents, and using a 95 percent confidence interval, the private-practice proportion among all nonrespondents is found to lie between 67.1 and 83.8 percent. The proportion among respondents was 70.2 percent.

selection for a lawyer who conducted one argument in 1976 was .28. Lawyers who appeared in more than one argument had a greater probability of selection. For the purpose of providing adjusted tabulations of questionnaire data, weights were assigned to the responses of the various lawyers in inverse ratio to the probability of selection, determined under the same formula used for the trial lawyers.[30]

In contrast to the procedure used in sampling cases that went to trial in the district courts, the procedure used for sampling oral arguments in the courts of appeals involved the random drawing of arguments from a national universe. The value of N used in the adjustment formula was, therefore, 6,055, and the value of n was 1,697. The value of X remains the weak point in the adjustment technique, since it is based on the respondent's estimate of the number of arguments conducted in 1976. Unlike the sample of cases used to generate a list of trial lawyers, however, the sample used for appellate lawyers was based on arguments actually conducted in 1976, and therefore meshed with the question on the screening questionnaire asking the number of arguments. Thus, although it relies on respondents' estimates of the number of arguments conducted, the data about appellate lawyers to which the adjustment formula was applied is superior to the data about trial lawyers. The adjusted tabulations remain, however, an imperfect effort to compensate for the fact that the sampling process did not give all lawyers an equal chance of selection.

Appellate Lawyers' Opinion Questionnaires

Selection of Sample

The appellate lawyers' opinion questionnaires were sent to a sample of 399 lawyers drawn from respondents to the screening questionnaire who reported, in response to question 4, that they are currently engaged in law practice and, in response to question 2, that they argued ten or more appeals in United States courts of appeals in the last five years.[31]

Shortly after the questionnaires were sent out, we randomly drew the names of three active circuit judges from each court of appeals. We sent each of these judges a list of lawyers to whom the questionnaire had been sent, consisting of all the lawyers in the sample with addresses in the circuit and, in addition, United States government lawyers with Washington addresses (other than those in the Office of the United States Attorney for the District of Columbia). We asked the judges to identify any lawyers whom they recognized and who, in their opinion, were highly capable appellate lawyers.

Of the thirty-two judges,[32] thirty-one responded. All circuits were represented. The lawyers who returned opinion questionnaires and had been identified by one or more judges as highly capable appellate lawyers were included in the sample of highly capable lawyers.

The sample of highly capable lawyers is thus a subsample of the docket-sheet sample of appellate lawyers. It should be emphasized, however, that it would be improper to infer that the other lawyers in the docket-sheet sample are not highly capable. Many of the lawyers on the list were unfamiliar to the judges who reviewed it for us; thus, failure to characterize them as "highly capable" carried no implications at all about the quality of their appellate work. Because of this fact, moreover, there is no basis for stating that this sample is representative of some population of highly capable lawyers who practice regularly in the courts of appeals. Although the selection mechanism was different, the sample of highly capable appellate lawyers should be treated in the same way as the sample of highly capable trial lawyers—as a group of lawyers who are thought to be highly skilled in appellate work and whose views on the quality of appellate advocacy may therefore be of special interest.

30. *See* p. 143.

31. A sample of 400 lawyers was originally drawn, but it was later determined that one of them had not met the criteria for inclusion.

32. Only two judges were asked in the First Circuit, which had only two active circuit judges at the time of the request.

Analysis of Response Rate

Of the 399 lawyers to whom the appellate lawyers' opinion questionnaire was sent, 328 (82.2 percent) responded. Since these lawyers had all previously answered the screening questionnaire, it was possible to compare respondents and nonrespondents in terms of characteristics that had been reported on the screening questionnaire. The results of these comparisons are as follows:

1. There was no appreciable relationship between the response rate and the number of appeals the lawyers said they had argued in United States courts of appeals in the last five years.

2. Lawyers in the private practice categories had a somewhat lower response rate than those in government, legal aid, public defender offices, or public interest law firms. If these two types of lawyers had been proportionately represented among the respondents, we would have had eleven fewer responses from lawyers in the public categories, and eleven more from lawyers in private practice.

3. Lawyers who said that appellate work was the major part of their practice were somewhat more likely to respond than those who said it was merely a substantial part or an insubstantial part. If lawyers who responded differently to this question had been proportionately represented among the respondents, we would have had seven fewer responses from those who said appellate work was the major part of their practice, and seven more from those who said it was merely a substantial part or an insubstantial part.

4. There was no appreciable difference in the response rates between lawyers who said their appellate practice was mostly civil, those who said it was mostly criminal, and those who said it was mixed.

To the extent that there were departures from proportionate response in terms of the characteristics examined, none of them is very large in the context of a group of 328 respondents.

Although there were imperfections introduced in the construction of the sample of appellate lawyers, in the response rates to both the screening and opinion questionnaires, and in calculations involved in adjusted tabulations, we have not been able to identify any substantial bias that has been introduced. We think it is appropriate to take the views expressed by the responding lawyers as a rough approximation of the views of the federal appellate bar.

The 328 responses to the appellate lawyer's opinion questionnaire included 130 responses from lawyers who had been identified by judges as "highly capable appellate lawyers." This group was not intended to be representative of any definable larger population, and the opinions they expressed should be accepted only as the opinions of a group of lawyers, informally selected, who are thought to meet high standards in their own appellate practice. The group included 57 United States government lawyers, 63 lawyers in private practice, 5 public defenders, 4 employees of state or local governments, and 1 lawyer whose type of practice was not classified.

APPENDIX C

THE APPLICATION OF CORRECTION FACTORS BASED ON THE VIDEOTAPE STUDY TO RATINGS FROM THE CASE REPORTS

In this appendix we present an analysis of the spread of ratings of trial performances (case-report data), using quantitative correction factors determined from judges' ratings of the four videotaped performances. The analysis is included here principally for its methodological interest. As shown below, certain characteristics of the sample of judges who both filed case reports and participated in the videotape study left us without confidence in the outcome of the analysis as applied to our data.

Method of Analysis

Although the method of analysis is somewhat more technical than that of the analyses presented in chapter 3, its logic is straightforward and can be explained rather quickly.

We know from some of the data presented in chapter 3 that there are differences between judges in their use of the seven-category rating scale. Some judges are tougher raters than others. But when we look at the spread of ratings found in the district court case reports, we do not know how influential the differences among judges were in determining the reported percentages in each of the seven rating categories—in particular, the three categories of inadequacy. This is because the judges were reporting on different performances. It might be, for example, that the judges who provided the 8.6 percent inadequate ratings were unusually tough graders (''curmudgeons'') who are unrepresentative of the mainstream opinions of district judges. Similarly, it might be that the reported percentages were influenced by the ratings of unusually lenient graders (''Pollyannas'') whose opinions about advocacy are as atypical, but in the other direction, as the opinions of the curmudgeons.

The purpose of the analysis is to correct the ratings given in the case reports to compensate for the influence of curmudgeon and Pollyanna judgments. The judges' responses to the videotaped performances are used to determine how different each judge's average rating is from the average rating of all judges. A correction factor based on this difference is calculated for each judge. The correction factor is then applied to the ratings submitted on the case reports by those judges who both filed case reports and participated in the videotape study. The percentage of ratings of inadequacy given by this group of judges is then recalculated on the basis of the corrected ratings of case-report performances. Finally, an extrapolation is made to the ratings of all case-reporting judges, including those who did not participate in the videotape study. What follows is a detailed description of the method and results of the analysis, as well as caveats regarding interpretations that arise from technical problems encountered during the research.

The principal features of the analysis are listed in the following steps:

1. The four videotape ratings from each judge (one for each of the four performances) are averaged, using values of 1 for ''very poor'' through 7 for ''first rate.'' The four responses of

each judge are thus represented by a single number. Table 59 in appendix B shows the correlation between this average rating and each of the four individual ratings.

2. These average ratings are placed into a single distribution, and the average of the distribution is calculated. This number is defined as the *representative opinion* of this group of judges about the four videotaped performances.

3. The representative opinion is subtracted from the average score of each judge. Because roughly half the judges will have average scores lower than the representative opinion, roughly half of these subtractions will produce negative numbers.

4. The numbers resulting from these subtractions (one for each judge) are rounded off into whole numbers. Each of these whole numbers is the *correction factor* associated with a particular judge. It is a measure of the distance between that judge's average rating of the four videotaped performances and the representative opinion of all the judges. Some of the correction factors will be positive numbers, some will be negative, and some will be zero. Because of rounding off, the positive correction factors will be associated with judges—Pollyannas, relatively speaking—whose average ratings were one-half unit or more higher than the representative opinion of all judges. The negative correction factors will be associated with judges—curmudgeons—whose average ratings were one-half unit or more lower than the representative opinion. The zero correction factors will be associated with judges whose average ratings were within one-half unit of the representative opinion.

5. The correction factor for each judge is now subtracted from each of the ratings the judge submitted in the case reports. The subtraction is algebraic; that is, the subtraction of a negative correction factor from a case-report rating becomes the addition of the correction factor to the rating.

6. After the correction factors have been applied, the percentages of ratings in each of the seven categories after application are compared with the percentages in each category before application. *If* every judge who submitted case reports had participated in the videotape study, corrections could have been applied to the entire population of 1,958 rated performances. Absent complete participation, conclusions about the effect of the correction factor analysis become more-or-less dependable extrapolations from the available sample of judges to the population of 284 judges who submitted ratings on the case reports. In any event, the final steps in the analysis are to examine the percentage of inadequate performances indicated by the corrected distribution of case-report scores, and to assess the confidence with which the extrapolation can be made from the available sample to the entire population.

This, then, is the procedure of the analysis. We turn now to the results.

Representativeness of the Sample

Eighty-nine judges participated in the videotape study, of whom seventy-nine were asked to identify themselves on their answer forms. Fifty-four of these seventy-nine judges had submitted ratings on the case reports. Thus, while the correction factors are based on the ratings of videotaped performances by eighty-nine judges, the application to actual court performances is limited to the ratings of fifty-four.

During the case-reporting period, these fifty-four judges rated 421 performances, for an average of 7.8 performances per judge. The entire group of 284 case-reporting judges rated 1,958 performances, for an average of 6.9 performances per judge (excluding 11 performances that were included on the case reports but for which no overall rating was given). Thus, the judges in the videotape group represent 19 percent of the case-reporting judges and account for 21.5 percent of the performances rated in the case reports.

For the ratings of fifty-four judges to provide a fair foundation for extrapolation to all 234 case-reporting judges, the distribution of their ratings in the case reports must be very similar to the distribution of ratings from all the judges. In particular, because our special concern is with the percentage of ratings in the three categories of inadequacy, the sample should accurately reflect the larger population in this respect. Table 62

TABLE 62

Distributions of Case-Report Performance Ratings for All Judges and for Videotape Study Judges

	Percent First Rate	Percent Very Good	Percent Good	Percent Adequate but No Better	Percent Not Quite Adequate	Percent Poor	Percent Very Poor
All judges (1,958)[a]	21.0%	26.4%	27.2%	16.8%	5.1%	2.7%	0.9%
Videotape study judges (421)[a]	13.1	26.8	32.5	19.2	5.9	1.4	1.0

SOURCE: District Judges' Case Reports, question 9.

[a]The number in parentheses is the number of performances rated. The percentages for all performances differ slightly from those shown in table 1 because the eleven unrated performances are excluded from the computations in this table.

Chi-square = 18.7, $df = 6$, p less than .01.

presents the percentages of case-report performance ratings in each category for the fifty-four case-reporting judges in the videotape study and all 284 case-reporting judges. As the table indicates, the fit between the two groups was reasonably close for the three combined categories of inadequacy (8.3 percent versus 8.6 percent) but quite loose in the "first rate" category (13.1 percent versus 21 percent). The magnitude of this discrepancy is large enough to warrant a caveat about the representative quality of the sample.

We conclude, therefore, that as a model for the larger population of 284 case-reporting judges, the sample of fifty-four judges who both participated in the videotape study and submitted ratings of performances on case reports was partially flawed.

Calculation of Correction Factors

Table 63 shows the distribution of correction factors for the eighty-nine judges who participated in the videotape study and for the fifty-four whose correction factors could be applied to case-report data. The important fact is that the fifty-four case-reporting judges did not distribute equally or symmetrically into the correction-factor categories; there were twice as many judges with corrections of +1 as there were judges with correction factors of −1. As is also shown, most judges had correction factors of zero.

The method of calculating the correction factors is such that, subject to the effects of rounding, the algebraic sum of the correction factors must be zero for the judges for whom they were computed. The extent of the departure from this norm in the sample of fifty-four judges further reduces the acceptability of the sample as a basis for extrapolating to all 284 case-reporting judges.

Relation Between Correction Factor and Number of Performances Evaluated on Case Reports

The utility of the sample of fifty-four judges was weakened further by a positive relationship between judges' correction factors and the number of performances they rated on the case reports. Judges with negative factors reported on an aver-

TABLE 63

Distributions of Correction Factors Based on Responses to Videotaped Performances

	Correction Factor				
	−2	−1	0	+1	+2
All participating judges (89)	2	17	46	23	1
Participating, case-reporting judges (54)	1	7	32	14	0

age of 6.25 performances, judges with factors of zero reported on an average of 7.18 performances, and judges with positive factors reported on an average of 10.07 performances. While these differences were not statistically reliable,[1] they nevertheless produced a bias in the correction-factor analysis. In particular, the effect of these differences, combined with a disproportionately large number of judges with positive factors, produced a sample biased in favor of showing an increased percentage of inadequate performances at the completion of the analysis.

Applying the Correction Factors to the Case Reports

Applying the correction factors causes nineteen ratings to move down across the threshold of adequacy, and four ratings to move up across the threshold. Thus, there was a net increase of fifteen performances rated as inadequate. In percentage terms, the corrected ratings included 11.9 percent inadequate ratings—an increase of 3.6 percent over the 8.3 percent found in the uncorrected ratings.

If we could have confidence that the judges in our sample were a fair stand-in for all judges, we would estimate that the 8.6 percent inadequacy rate reported nationally was too low by approximately 3.6 percent. However, for the reasons already stated, we cannot place the required confidence in our sample. We do not, therefore, offer this correction along with the other analyses in chapter 3. We include it here for its methodological interest and to document the method, should the opportunity arise to repeat the study with a more adequate sample.

1. $F = 2.47$, $df = 2/51$, $p = .09$.

APPENDIX D

OPINIONS OF DISTRICT JUDGES AND TRIAL LAWYERS ABOUT AREAS OF COMPETENCE IN WHICH IMPROVEMENT IS NEEDED

The following tables display the responses of district judges and trial lawyers to a question asking them to identify, for various categories of lawyers, the area of expertise in which there is the greatest need for improvement and the area in which there is the second greatest need. The tables for United States attorneys and their assistants are omitted here; they are tables 27 and 28 in chapter 5.

The "critical judges" are those who believe there is a serious problem of inadequate trial advocacy among lawyers in the particular occupational group.

TABLE 64

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Retained criminal defense counsel, experienced

	387 Judges		98 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	13.2%	24.3%	16.3%	34.7%	10.0%	18.3%	10.1%	19.2%
Technique in the examination of witnesses	15.5	26.6	17.3	33.7	4.9	12.3	9.1	20.2
General legal knowledge	11.4	19.4	14.3	19.4	7.9	12.2	8.1	12.6
Knowledge relevant to the particular case	7.0	15.0	9.2	16.3	5.4	9.6	7.6	16.2
Technique in arguing to the court	5.2	13.7	5.1	9.2	4.5	8.0	5.1	10.6
Technique in arguing to the trier of facts	1.6	6.5	....	4.1	0.9	5.1	0.5	2.5
Professional conduct generally	16.8	28.4	17.3	30.6	12.6	19.7	17.7	29.3
Additional factors in criminal cases	3.6	8.5	3.1	10.2	2.4	6.8	3.0	6.6
Partial responses included in above figures[c]	....	5.9	....	7.1	....	5.3	....	5.1
No response or no opinion	25.8	25.8	17.3	17.3	51.3	51.3	38.9	38.9

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 65

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Retained criminal defense counsel, inexperienced

	387 Judges		98 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	16.3%	29.7%	22.4%	38.8%	7.0%	15.2%	11.1%	23.7%
Technique in the examination of witnesses	27.6	47.3	26.5	50.0	11.2	25.3	16.7	35.9
General legal knowledge	17.6	27.1	16.3	25.5	15.5	21.2	15.7	23.2
Knowledge relevant to the particular case	4.9	12.9	9.2	17.3	3.2	7.1	5.1	7.1
Technique in arguing to the court	2.3	8.3	1.0	8.2	2.1	4.4	2.5	7.1
Technique in arguing to the trier of facts	2.3	9.8	1.0	6.1	0.5	6.4	1.0	5.6
Professional conduct generally	6.5	14.2	5.1	12.2	8.7	14.0	10.1	15.7
Additional factors in criminal cases	3.6	6.2	4.1	7.1	4.0	7.9	1.5	6.1
Partial responses included in above figures[c]	....	6.7	....	6.1	....	3.1	....	3.0
No response or no opinion	18.9	18.9	14.3	14.3	47.7	47.7	36.4	36.4

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 66

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Appointed criminal defense counsel, experienced

	387 Judges		123 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	15.0%	25.8%	17.9%	31.7%	11.1%	20.1%	8.6%	19.7%
Technique in the examination of witnesses	19.1	32.6	16.3	33.3	7.0	16.8	9.6	21.2
General legal knowledge	11.6	18.9	14.6	22.0	10.6	13.8	10.1	16.7
Knowledge relevant to the particular case	6.7	13.7	6.5	14.6	6.7	11.2	9.6	13.6
Technique in arguing to the court	6.2	12.4	6.5	8.9	2.8	8.3	4.0	8.6
Technique in arguing to the trier of facts	2.3	8.5	2.4	9.8	0.7	5.1	1.0	4.0
Professional conduct generally	7.5	16.8	10.6	22.0	8.4	14.9	10.1	17.2
Additional factors in criminal cases	3.4	8.8	3.3	8.9	3.6	5.8	3.0	6.6
Partial responses included in above figures[c]	....	6.2	....	4.9	....	5.9	....	4.5
No response or no opinion	28.2	28.2	22.0	22.0	49.0	49.0	43.9	43.9

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 67

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Appointed criminal defense counsel, inexperienced

	387 Judges		123 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	17.8%	31.3%	23.6%	38.2%	8.2%	18.6%	11.1%	26.3%
Technique in the examination of witnesses	29.2	49.1	25.2	47.2	11.6	25.2	13.1	28.8
General legal knowledge	16.8	25.6	17.9	26.8	18.3	23.7	17.2	25.3
Knowledge relevant to the particular case	4.4	11.1	5.7	14.6	5.0	8.8	5.6	7.6
Technique in arguing to the court	2.3	9.3	1.6	5.7	1.2	5.2	2.0	6.1
Technique in arguing to the trier of facts	3.6	13.2	4.1	13.0	0.1	4.8	2.0	7.6
Professional conduct generally	3.9	9.6	4.9	13.0	5.8	11.3	9.1	13.1
Additional factors in criminal cases	2.3	6.7	2.4	6.5	3.2	6.2	1.5	4.5
Partial responses included in above figures[c]	....	4.9	....	5.7	....	3.0	....	4.0
No response or no opinion	19.6	19.6	14.6	14.6	46.6	46.6	38.4	38.4

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 68

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing corporate clients in civil cases, experienced

	387 Judges		29 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	18.9%	32.8%	24.1%	37.9%	18.4%	28.4%	12.6%	25.8%
Technique in the examination of witnesses	13.4	25.6	17.2	24.1	8.4	21.8	8.6	19.7
General legal knowledge	11.1	16.8	13.8	24.1	7.4	11.8	7.6	12.1
Knowledge relevant to the particular case	3.6	8.8	6.9	13.8	4.0	9.7	4.5	7.1
Technique in arguing to the court	4.7	13.7	....	13.8	2.7	7.7	2.0	5.1
Technique in arguing to the trier of facts	2.3	9.3	3.4	17.2	3.6	8.0	1.5	4.0
Professional conduct generally	8.3	10.3	6.9	6.9	10.6	14.5	7.1	11.6
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	7.2	....	6.9	....	8.4	....	2.5
No response or no opinion	37.7	37.7	27.6	27.6	44.9	44.9	56.1	56.1

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 69

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing corporate clients in civil cases, inexperienced

	387 Judges		29 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	20.9%	37.0%	34.5%	55.2%	19.0%	29.3%	11.6%	25.3%
Technique in the examination of witnesses	19.9	35.7	17.2	48.3	11.0	26.3	11.6	23.7
General legal knowledge	18.9	26.4	24.1	31.0	13.7	21.2	10.6	15.7
Knowledge relevant to the particular case	2.8	9.6	....	6.9	2.7	7.6	2.5	4.5
Technique in arguing to the court	3.1	8.3	....	....	1.1	4.6	0.5	4.0
Technique in arguing to the trier of facts	1.0	8.3	....	3.4	1.8	6.3	2.5	4.0
Professional conduct generally	3.1	7.0	3.4	6.9	5.7	9.5	4.0	7.1
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	7.5	....	6.9	....	5.2	....	2.5
No response or no opinion	30.2	30.2	20.7	20.7	45.0	45.0	56.6	56.6

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 70

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing individual clients in civil cases; experienced

	387 Judges		169 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	21.7%	38.2%	24.3%	46.2%	22.3%	34.8%	16.2%	27.8%
Technique in the examination of witnesses	12.9	25.8	14.2	31.4	6.5	19.8	5.1	16.7
General legal knowledge	16.0	25.6	20.1	30.8	13.8	21.6	9.6	14.1
Knowledge relevant to the particular case	5.7	12.7	5.3	11.8	4.2	10.9	5.1	8.6
Technique in arguing to the court	3.6	12.4	3.0	11.8	2.9	9.0	2.0	7.1
Technique in arguing to the trier of facts	1.3	7.0	1.8	8.9	2.6	5.8	3.0	5.6
Professional conduct generally	7.5	12.4	9.5	15.4	11.1	15.0	6.6	12.6
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	3.4	....	....	....	9.7	....	2.5
No response or no opinion	31.3	31.3	21.9	21.9	36.7	36.7	52.5	52.5

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 71

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing individual clients in civil cases, inexperienced

	387 Judges		169 Critical Judges		488 Lawyers[a]		198 Highy Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	20.4%	41.6%	23.1%	49.1%	18.1%	32.5%	8.6%	25.3%
Technique in the examination of witnesses	22.5	38.0	24.9	47.9	10.5	25.5	11.6	24.2
General legal knowledge	24.5	33.9	26.6	35.5	19.5	28.1	13.6	18.2
Knowledge relevant to the particular case	4.7	12.9	4.1	11.8	3.1	9.0	4.0	5.1
Technique in arguing to the court	2.3	9.3	1.8	7.1	1.8	4.3	1.5	5.1
Technique in arguing to the trier of facts	0.5	7.5	....	7.1	2.6	7.0	1.5	4.5
Professional conduct generally	3.9	9.3	5.9	13.0	5.7	9.5	5.6	8.6
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	5.2	....	1.2	....	6.9	....	2.0
No response or no opinion	21.2	21.2	13.6	13.6	38.5	38.5	53.5	53.5

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 72

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Strike force lawyers, experienced

	387 Judges		70 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	15.0%	22.2%	32.9%	50.0%	6.0%	9.6%	8.1%	15.7%
Technique in the examination of witnesses	11.4	22.0	21.4	48.6	4.8	7.6	9.1	15.7
General legal knowledge	4.9	9.8	8.6	20.0	1.9	3.9	3.0	5.6
Knowledge relevant to the particular case	2.8	4.1	4.3	5.7	1.1	2.2	....	0.5
Technique in arguing to the court	1.0	4.7	1.4	2.9	1.1	3.5	3.0	8.6
Technique in arguing to the trier of facts	3.4	8.3	1.4	8.6	1.2	2.9	1.0	4.0
Professional conduct generally	2.6	4.9	11.4	14.3	4.3	6.4	9.6	12.1
Additional factors in criminal cases	0.3	0.8	....	1.4	0.2	1.1	....	0.5
Partial responses included in above figures[c]	....	5.9	....	11.4	....	4.0	....	5.1
No response or no opinion	58.7	58.7	18.6	18.6	79.5	79.5	66.2	66.2

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 73

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Strike force lawyers, inexperienced

	387 Judges		70 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	12.4%	20.2%	22.9%	37.1%	3.4%	7.5%	9.6%	16.7%
Technique in the examination of witnesses	15.2	26.4	21.4	44.3	8.1	14.3	11.1	19.2
General legal knowledge	7.0	11.4	15.7	24.3	5.2	8.9	6.1	9.1
Knowledge relevant to the particular case	1.8	4.7	4.3	11.4	0.7	2.4	1.0	3.5
Technique in arguing to the court	1.3	5.4	1.4	4.3	0.1	2.8	1.0	6.6
Technique in arguing to the trier of facts	2.1	7.2	2.9	11.4	1.2	2.9	1.0	4.0
Professional conduct generally	1.6	2.8	5.7	7.1	4.2	5.0	7.6	10.6
Additional factors in criminal cases	0.3	0.5	....	1.4	0.2	0.8	....	1.5
Partial responses included in above figures[c]	....	4.7	....	7.1	....	1.5	....	3.5
No response or no opinion	58.4	58.4	25.7	25.7	77.0	77.0	62.6	62.6

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified area of "greatest need" but not area of "second greatest need."

TABLE 74

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other Justice Department lawyers, experienced

	387 Judges		74 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	18.3%	27.1%	24.3%	41.9%	8.6%	14.0%	12.6%	16.7%
Technique in the examination of witnesses	13.4	26.4	21.6	40.5	6.2	13.9	10.1	22.7
General legal knowledge	8.0	13.2	17.6	24.3	6.7	10.3	3.5	6.1
Knowledge relevant to the particular case	3.4	6.2	5.4	12.2	3.8	5.7	2.5	4.5
Technique in arguing to the court	3.9	9.8	5.4	18.9	3.0	7.1	3.0	8.1
Technique in arguing to the trier of facts	2.8	10.9	4.1	20.3	2.0	5.9	2.5	5.1
Professional conduct generally	2.6	4.4	5.4	8.1	2.7	4.4	3.0	5.6
Additional factors in criminal cases	....	0.5	....	....	0.3	0.4	....	0.5
Partial responses included in above figures[c]	....	6.5	....	1.4	....	5.0	....	5.6
No response or no opinion	47.5	47.5	16.2	16.2	66.7	66.7	62.6	62.6

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 75

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other Justice Department lawyers, inexperienced

	387 Judges		74 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	18.1%	29.2%	28.4%	41.9%	7.4%	16.6%	12.6%	19.7%
Technique in the examination of witnesses	18.9	33.6	21.6	43.2	8.0	14.8	13.1	24.2
General legal knowledge	9.0	15.8	14.9	25.7	10.8	15.3	8.1	13.6
Knowledge relevant to the particular case	2.8	7.5	6.8	17.6	0.8	3.8	1.5	6.6
Technique in arguing to the court	3.4	9.6	2.7	12.2	2.3	5.0	1.5	4.5
Technique in arguing to the trier of facts	2.1	8.8	5.4	18.9	1.4	3.4	2.0	5.6
Professional conduct generally	2.3	3.4	4.1	5.4	2.5	3.5	3.5	6.1
Additional factors in criminal cases	0.3	0.5	....	....	0.2	0.7	....	0.5
Partial responses included in above figures[c]	....	5.4	....	2.7	....	3.6	....	4.0
No response or no opinion	43.2	43.2	16.2	16.2	66.7	66.7	57.6	57.6

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 76

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other U.S. government lawyers, experienced

	387 Judges		118 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	18.1%	26.4%	22.0%	36.4%	7.1%	14.2%	6.6%	12.1%
Technique in the examination of witnesses	13.7	27.1	18.6	43.2	3.2	7.4	5.1	9.1
General legal knowledge	8.3	13.4	16.1	24.6	7.0	10.8	4.0	6.1
Knowledge relevant to the particular case	2.1	5.2	4.2	9.3	2.7	4.4	2.0	4.0
Technique in arguing to the court	3.6	10.6	5.1	13.6	3.4	5.7	1.5	4.5
Technique in arguing to the trier of facts	3.6	10.1	6.8	14.4	0.3	3.5	1.0	2.0
Professional conduct generally	2.3	4.1	3.4	5.1	2.8	4.3	1.0	2.5
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	6.5	....	5.9	....	2.5	....	2.0
No response or no opinion	48.3	48.3	23.7	23.7	73.7	73.7	78.8	78.8

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 77

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other U.S. government lawyers, inexperienced

	387 Judges		118 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	17.3%	28.7%	24.6%	39.8%	8.1%	14.1%	5.1%	8.6%
Technique in the examination of witnesses	16.3	31.5	17.8	43.2	4.0	8.8	4.0	12.1
General legal knowledge	10.6	16.8	18.6	28.8	7.9	11.0	8.1	12.6
Knowledge relevant to the particular case	1.8	4.4	2.5	6.8	1.2	3.6	1.0	4.0
Technique in arguing to the court	2.1	8.3	1.7	11.9	2.2	5.3	2.0	3.5
Technique in arguing to the trier of facts	2.3	7.5	5.9	11.9	0.5	2.9	1.0	1.0
Professional conduct generally	2.3	3.4	5.1	5.9	2.4	3.4	1.5	2.5
Additional factors in criminal cases	....	....	....	....	....	0.7	....	....
Partial responses included in above figures[c]	....	4.9	....	4.2	....	2.8	....	1.0
No response or no opinion	47.3	47.3	23.7	23.7	73.7	73.7	77.3	77.3

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

CONTINUED

2 OF 3

TABLE 78

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Public or community defenders, experienced

	387 Judges		41 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	10.3%	18.6%	14.6%	22.0%	7.5%	12.6%	6.6%	12.1%
Technique in the examination of witnesses	12.1	21.4	26.8	41.5	4.8	8.1	8.6	13.1
General legal knowledge	7.0	10.3	9.8	17.1	4.7	7.1	3.0	6.6
Knowledge relevant to the particular case	3.4	5.7	4.9	9.8	2.4	5.3	3.5	6.1
Technique in arguing to the court	4.1	8.0	4.9	9.8	1.5	4.3	2.5	9.6
Technique in arguing to the trier of facts	1.8	7.0	....	7.3	0.2	1.9	1.5	4.0
Professional conduct generally	2.8	8.0	4.9	17.1	4.6	6.7	5.6	6.6
Additional factors in criminal cases	2.1	3.6	....	2.4	0.7	2.1	1.0	3.0
Partial responses included in above figures[c]	....	4.9	....	4.9	....	4.9	....	3.5
No response or no opinion	56.3	56.3	34.1	34.1	73.6	73.6	67.7	67.7

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 79

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Public or community defenders, inexperienced

	387 Judges		41 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	12.7%	20.7%	12.2%	24.4%	5.1%	12.5%	8.1%	15.2%
Technique in the examination of witnesses	17.1	30.0	39.0	53.7	7.7	14.7	11.6	21.7
General legal knowledge	10.3	14.7	12.2	19.5	8.4	11.6	6.6	11.6
Knowledge relevant to the particular case	2.8	5.9	4.9	14.6	2.1	4.2	2.0	4.5
Technique in arguing to the court	2.3	7.0	....	9.8	0.6	2.5	0.5	4.5
Technique in arguing to the trier of facts	1.3	8.8	....	7.3	0.5	2.1	1.5	4.0
Professional conduct generally	2.1	5.4	4.9	12.2	4.5	7.1	5.6	7.1
Additional factors in criminal cases	1.3	3.1	....	....	0.4	2.0	0.5	2.0
Partial responses included in above figures[c]	....	4.1	....	4.9	....	2.1	....	2.0
No response or no opinion	50.1	50.1	26.8	26.8	70.7	70.7	63.6	63.6

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 80

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: House counsel for corporations or other organizations, experienced

	387 Judges		73 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	14.0%	23.8%	23.3%	42.5%	5.3%	15.0%	4.5%	9.6%
Technique in the examination of witnesses	9.8	20.2	16.4	31.5	3.9	9.6	1.0	5.1
General legal knowledge	10.9	15.8	20.5	30.1	11.4	13.8	6.6	9.6
Knowledge relevant to the particular case	1.8	4.7	1.4	6.8	1.1	3.1	0.5	1.0
Technique in arguing to the court	2.1	6.5	4.1	11.0	1.2	2.7	1.5	2.5
Technique in arguing to the trier of facts	1.0	5.2	2.7	13.7	1.1	2.9	1.0	1.5
Professional conduct generally	1.8	3.9	4.1	8.2	1.1	1.9	1.5	3.0
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	2.8	....	1.4	....	1.1	....	1.0
No response or no opinion	58.7	58.7	27.4	27.4	75.0	75.0	83.3	83.3

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 81

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: House counsel for corporations or other organizations, inexperienced

	387 Judges		73 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	13.7%	22.2%	26.0%	39.7%	4.3%	13.7%	4.0%	8.6%
Technique in the examination of witnesses	9.8	21.7	11.0	35.6	4.6	11.2	2.0	6.6
General legal knowledge	15.2	21.2	27.4	35.6	11.6	14.3	6.1	8.6
Knowledge relevant to the particular case	1.3	4.7	2.7	6.8	6	3.3	....	....
Technique in arguing to the court	1.3	5.4	4.1	11.0	0.7	1.6	1.5	2.5
Technique in arguing to the trier of facts	0.3	3.6	1.4	11.0	0.5	1.2	1.0	2.0
Professional conduct generally	1.0	3.4	2.7	8.2	1.1	1.4	0.5	1.0
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	3.1	....	2.7	....	2.1	....	1.0
No response or no opinion	57.4	57.4	24.7	24.7	75.6	75.6	84.8	84.8

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 82

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for civil legal assistance programs, experienced

	387 Judges		131 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	19.9%	32.0%	24.4%	43.5%	4.9%	11.3%	3.5%	8.6%
Technique in the examination of witnesses	13.2	25.6	16.0	34.4	3.9	8.6	2.0	5.1
General legal knowledge	12.4	18.1	20.6	26.0	5.0	7.2	6.1	6.6
Knowledge relevant to the particular case	2.1	4.4	3.1	7.6	0.8	2.5	0.5	3.0
Technique in arguing to the court	1.3	7.8	0.8	9.9	0.6	1.7	2.0	2.5
Technique in arguing to the trier of facts	0.5	5.2	0.8	7.6	0.1	1.6	0.5	2.0
Professional conduct generally	6.2	12.4	10.7	17.6	4.8	6.3	2.0	4.0
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	5.7	....	6.1	....	1.0	....	1.5
No response or no opinion	44.4	44.4	23.7	23.7	79.8	79.8	83.3	83.3

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 83

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for civil legal assistance programs, inexperienced

	387 Judges		131 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	17.1%	28.9%	20.7%	36.6%	4.1%	11.0%	2.0%	7.6%
Technique in the examination of witnesses	15.8	28.2	19.1	35.1	3.3	8.7	3.5	6.6
General legal knowledge	18.1	24.8	22.9	32.1	6.1	7.8	6.1	9.1
Knowledge relevant to the particular case	1.6	6.5	3.1	10.7	1.4	2.5	1.0	2.0
Technique in arguing to the court	0.8	6.2	0.8	9.2	0.5	1.3	1.0	2.5
Technique in arguing to the trier of facts	0.5	4.1	1.5	6.1	....	0.9	1.0	1.5
Professional conduct generally	4.4	11.6	8.4	17.6	4.7	6.2	2.5	4.0
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	6.2	....	5.3	....	1.7	....	1.0
No response or no opinion	41.9	41.9	23.7	23.7	80.0	80.0	82.8	82.8

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 84

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for public interest law firms, experienced

	387 Judges		77 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	15.5%	24.5%	18.2%	32.5%	3.1%	4.8%	3.5%	7.1%
Technique in the examination of witnesses	10.6	19.6	22.1	40.3	0.8	2.8	1.5	6.6
General legal knowledge	6.7	11.6	11.7	19.5	2.0	3.7	3.0	3.5
Knowledge relevant to the particular case	2.6	7.0	2.6	10.4	0.8	2.0	0.5	1.5
Technique in arguing to the court	1.0	5.4	1.3	6.5	1.0	1.5	1.0	1.0
Technique in arguing to the trier of facts	1.0	4.7	2.6	7.8	0.2	1.1	1.0	2.5
Professional conduct generally	6.7	11.4	6.5	11.7	3.9	4.9	4.0	6.1
Additional factors in criminal cases	0.3	0.3	....	....	....	0.4	....	....
Partial responses included in above figures[c]	....	4.4	....	1.3	....	2.2	....	1.0
No response or no opinion	55.6	55.6	35.1	35.1	88.4	88.4	85.4	85.4

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 85

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for public interest law firms, inexperienced

	387 Judges		77 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	14.0%	24.5%	23.4%	37.7%	2.8%	4.7%	2.5%	7.6%
Technique in the examination of witnesses	12.9	22.2	20.8	42.9	2.4	5.1	3.5	7.6
General legal knowledge	11.4	17.1	19.5	27.3	2.2	3.9	3.0	4.5
Knowledge relevant to the particular case	1.8	6.7	1.3	9.1	0.2	0.7	0.5	0.5
Technique in arguing to the court	0.5	5.7	....	6.5	0.5	0.7	0.5	1.0
Technique in arguing to the trier of facts	0.5	3.1	1.3	5.2	0.9	2.5	1.0	2.0
Professional conduct generally	5.2	10.1	3.9	10.4	2.8	3.2	2.5	3.5
Additional factors in criminal cases	0.3	0.3	....	....	....	0.4	....	....
Partial responses included in above figures[c]	....	3.4	....	1.3	....	2.2	....	0.5
No response or no opinion	53.5	53.5	29.9	29.9	88.2	88.2	86.4	86.4

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 86

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Lawyers employed by state or local governments, experienced

	387 Judges		168 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	19.9%	37.2%	20.2%	41.7%	10.2%	20.4%	7.1%	15.7%
Technique in the examination of witnesses	11.6	25.8	13.7	33.3	3.9	12.5	6.1	14.1
General legal knowledge	25.1	32.6	33.9	44.6	18.4	21.4	13.1	17.2
Knowledge relevant to the particular case	5.2	12.9	7.7	19.6	3.1	10.0	3.5	7.6
Technique in arguing to the court	1.0	8.3	1.2	9.5	2.0	5.7	1.5	6.1
Technique in arguing to the trier of facts	1.3	5.4	1.8	5.4	0.5	3.3	1.0	3.5
Professional conduct generally	4.1	9.6	4.2	7.7	2.2	5.3	2.5	3.5
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	4.7	....	3.6	....	2.0	....	2.0
No response or no opinion	31.8	31.8	17.3	17.3	59.8	59.8	65.2	65.2

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 87

Opinions of District Judges and Trial Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Lawyers employed by state or local governments, inexperienced

	387 Judges		168 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Proficiency in the planning and management of litigation	18.6%	37.5%	16.1%	38.7%	9.5%	21.9%	7.6%	18.7%
Technique in the examination of witnesses	15.5	32.0	16.1	36.3	5.5	14.3	7.1	15.7
General legal knowledge	29.5	38.8	39.3	50.0	19.1	21.7	13.6	22.2
Knowledge relevant to the particular case	3.6	12.4	4.2	15.5	2.0	6.9	4.0	6.6
Technique in arguing to the court	1.0	7.0	1.2	7.7	0.7	3.8	0.5	2.5
Technique in arguing to the trier of facts	0.5	5.2	0.6	4.8	0.8	4.2	0.5	2.0
Professional conduct generally	4.1	9.0	4.8	7.1	1.6	3.4	2.5	2.5
Additional factors in criminal cases	....	....	....	....	....	....	....	....
Partial responses included in above figures[c]	....	3.9	....	4.2	....	2.2	....	1.5
No response or no opinion	27.1	27.1	17.9	17.9	60.7	60.7	64.1	64.1

SOURCES: District Judges' Questionnaires, questions 2, 4; Trial Lawyers' Opinion Questionnaires, question 4.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

APPENDIX E

OPINIONS OF DISTRICT JUDGES AND TRIAL LAWYERS ABOUT COMPONENT AREAS OF COMPETENCE IN WHICH IMPROVEMENT IS NEEDED

The following tables display the responses of district judges and trial lawyers to a question asking them to identify, within each of eight major areas of trial competence, the component areas in which there is the most need for improvement by lawyers, the second most need, and the third most need. The tables for three of the major areas of competence are omitted here; they are included in chapter 5 as tables 29–31.

The "critical judges" are those who believe there is a serious problem of inadequate trial advocacy, overall, in their courts.

TABLE 88

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Professional conduct generally

	387 Judges			151 Critical Judges			488 Lawyers[a]			198 Highly Capable Lawyers		
	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]	Most Need	Most or 2d Most[b]	Most, 2d, or 3d Most[b]
Avoiding wasting time on matters when the client would be equally well served by expeditious handling	69.5%	82.2%	84.8%	64.9%	83.4%	87.4%	56.8%	71.4%	77.1%	60.1%	75.8%	81.8%
Diligence on behalf of the client	10.9	37.5	46.3	11.9	41.7	52.3	17.5	44.7	52.3	18.2	41.4	49.5
Observing standards of courtroom decorum	5.4	20.7	31.3	7.3	19.9	29.1	5.4	15.8	27.0	4.0	19.7	30.3
Compliance with the Code of Professional Responsibility generally	5.4	14.7	29.7	6.6	13.9	32.5	10.7	24.1	35.7	11.6	25.3	39.4
Partial responses included in above figures[c]	....	27.4	54.3	....	22.5	48.3	....	24.8	54.3	....	25.6	55.1
No response	8.8	8.8	8.8	9.3	9.3	9.3	9.6	9.6	9.6	6.1	6.1	6.1

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in these columns add to more than 100% because a single respondent may be counted more than once.

[c]Comprises respondents who identified an area of "most need" and, in some cases, an area of "second most need," but did not go further.

TABLE 89

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Knowledge relevant to the particular case

	387 Judges	151 Critical Judges	488 Lawyers[a]	198 Highly Capable Lawyers
	Most Need	Most Need	Most Need	Most Need
Mastery of governing statutory and decisional law	50.9%	51.0%	57.2%	56.6%
Mastery of relevant facts	37.2	39.7	31.8	31.3
No response	11.9	9.3	11.0	12.1

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in this column are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

TABLE 90

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Technique in arguing to the court

	387 Judges		151 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]
Preparation of memoranda on pretrial matters	42.6%	64.9%	47.0%	69.5%	42.0%	67.8%	46.0%	67.7%
Preparation of requests for and objections to jury instructions	36.4	58.1	29.8	53.0	28.8	45.9	28.3	49.5
Oral argument on pretrial matters	9.0	28.7	11.9	33.1	17.3	41.6	17.7	46.0
Partial responses included in above figures[c]	....	24.5	....	21.9	....	20.9	....	20.8
No response	11.9	11.9	11.3	11.3	11.9	11.9	8.0	8.0

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "most need" but not an area of "second most need."

TABLE 91

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Technique in arguing to the trier of facts

	387 Judges	151 Critical Judges	488 Lawyers[a]	198 Highly Capable Lawyers
	Most Need	Most Need	Most Need	Most Need
Closing arguments	47.5%	51.7%	43.2%	46.0%
Opening statements	29.2	26.5	35.0	35.4
No response	23.3	21.9	21.8	18.6

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in this column are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

TABLE 92

Opinions of District Judges and Trial Lawyers About Component Areas of Competence in Which Improvement Is Needed

Major area: Additional factors in criminal cases

	387 Judges		151 Critical Judges		488 Lawyers[a]		198 Highly Capable Lawyers	
	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]	Most Need	Most or 2d Most[b]
Knowledge of exclusionary rules	47.3%	58.1%	50.3%	63.6%	30.3%	39.0%	34.3%	45.5%
Skill in representation at sentencing	24.8	44.4	22.5	43.7	22.1	37.8	26.8	47.0
Skill in representation on bail matters	4.4	17.8	4.6	14.6	6.0	17.1	5.6	16.2
Partial responses included in above figures[c]	....	32.6	....	33.1	....	22.9	....	24.7
No response	23.5	23.5	22.5	22.5	41.6	41.6	33.3	33.3

SOURCES: District Judges' Questionnaires, questions 1, 3; Trial Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "most need" but not an area of "second most need."

APPENDIX F

OPINIONS OF APPELLATE JUDGES AND LAWYERS ABOUT AREAS OF COMPETENCE IN WHICH IMPROVEMENT IS NEEDED

The following tables display the responses of appellate judges and lawyers to a question asking them to identify, for various categories of lawyers, the factor affecting the quality of appellate advocacy in which there is the greatest need for improvement and the factor in which there is the second greatest need. The tables for United States attorneys and their assistants are omitted here; they are tables 49 and 50 in chapter 8.

TABLE 93

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Retained criminal defense counsel, experienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	12.2%	19.4%	9.8%	15.4%	8.5%	11.5%
Judgment in deciding what points to focus on	19.4	25.5	7.9	15.0	7.7	16.2
Skill in making distinctive use of oral argument rather than repeating the brief	6.1	14.3	8.2	18.6	11.5	19.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	12.2	19.4	4.7	8.1	3.1	5.4
Mastery of the record below	3.1	11.2	3.1	7.6	3.1	6.9
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	9.2	5.8	11.1	3.8	10.8
Knowledge of circuit rules and practices	....	4.1	1.6	3.5	0.8	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	4.1	1.8	2.3	0.8	1.5
Knowledge of Federal Rules of Appellate Procedure	1.0	2.0	0.4	1.7	0.8	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	6.1	3.9	7.8	3.8	6.9
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	5.1	1.5	2.8	....	3.1
Observing standards of courtroom decorum	....	....	....	....	....	....
Partial responses included in above figures [c]	....	4.1	....	3.3	....	3.1
No response or no opinion	37.8	37.8	51.4	51.4	56.2	56.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 94

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Retained criminal defense counsel, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	19.4%	28.6%	10.1%	18.6%	8.5%	15.4%
Judgment in deciding what points to focus on	13.3	20.4	11.8	18.9	12.3	19.2
Skill in making distinctive use of oral argument rather than repeating the brief	7.1	17.3	5.9	15.3	6.9	16.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	10.2	14.3	7.3	9.8	6.2	9.2
Mastery of the record below	5.1	13.3	3.0	4.8	3.1	3.8
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	9.2	2.8	9.6	3.8	11.5
Knowledge of circuit rules and practices	....	3.1	1.0	2.9	0.8	1.5
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	4.1	1.9	2.4	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	2.0	5.1	0.8	2.0	....	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	3.2	6.7	3.1	6.2
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	2.0	0.5	2.5	....	2.3
Observing standards of courtroom decorum	....	1.0	0.3	0.6	....	....
Partial responses included in above figures[c]	....	3.1	....	2.2	....	3.8
No response or no opinion	37.8	37.8	51.4	51.4	54.6	54.6

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 95

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Appointed criminal defense counsel, experienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	12.2%	20.4%	7.2%	16.1%	6.9%	13.1%
Judgment in deciding what points to focus on	11.2	15.3	9.7	16.5	10.8	15.4
Skill in making distinctive use of oral argument rather than repeating the brief	6.1	13.3	9.4	17.4	10.8	16.9
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	10.2	17.3	5.7	10.4	2.3	6.2
Mastery of the record below	4.1	17.3	6.9	10.1	5.4	9.2
Responsiveness to questions from the bench and to indications of the judges' concerns	4.1	7.1	4.2	12.0	2.3	10.8
Knowledge of circuit rules and practices	2.0	6.1	1.5	3.9	0.8	1.5
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	6.1	1.7	1.7	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	2.0	3.1	1.1	1.7	0.8	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	1.8	6.0	0.8	5.4
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	2.0	4.1	0.3	0.6	....	....
Observing standards of courtroom decorum	....	....	0.7	0.9	....	....
Partial responses included in above figures [c]	....	3.1	....	3.0	....	3.1
No response or no opinion	41.8	41.8	49.9	49.9	58.5	58.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 96

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Appointed criminal defense counsel, inexperienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	20.4%	29.6%	11.7%	21.9%	10.0%	16.9%
Judgment in deciding what points to focus on	13.3	18.4	12.6	20.2	14.6	20.8
Skill in making distinctive use of oral argument rather than repeating the brief	4.1	16.3	7.3	19.0	4.6	16.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	7.1	14.3	6.9	11.8	6.9	10.0
Mastery of the record below	5.1	15.3	5.0	6.9	5.4	6.9
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	6.1	2.6	8.0	1.5	7.7
Knowledge of circuit rules and practices	5.1	7.1	0.8	2.6	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	1.7	2.7	....	0.8
Knowledge of Federal Rules of Appellate Procedure	3.1	6.1	1.0	2.5	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	0.8	2.2	0.8	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	5.1	0.5	1.7	....	1.5
Observing standards of courtroom decorum	....	1.0	0.3	0.5	....	0.8
Partial responses included in above figures [c]	....	3.1	....	2.4	....	3.8
No response or no opinion	35.7	35.7	48.8	48.8	55.4	55.4

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 97

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing corporate clients in civil cases, experienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	11.2%	17.3%	3.3%	5.9%	3.8%	7.7%
Judgment in deciding what points to focus on	8.2	18.4	6.0	13.2	6.2	13.8
Skill in making distinctive use of oral argument rather than repeating the brief	12.2	21.4	12.9	17.1	14.6	20.0
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	9.2	1.6	4.1	2.3	5.4
Mastery of the record below	1.0	11.2	2.4	5.3	4.6	10.8
Responsiveness to questions from the bench and to indications of the judges' concerns	7.1	12.2	3.0	11.3	3.8	13.1
Knowledge of circuit rules and practices	2.0	4.1	0.7	0.9	....	....
Knowledge of statutory and decisional law governing appellate jurisdiction	5.1	6.1	0.4	0.9	0.8	1.5
Knowledge of Federal Rules of Appellate Procedure	....	....	1.3	1.8	0.8	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	5.1	2.8	5.7	3.1	6.2
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	3.1	7.1	0.8	2.3	1.5	2.3
Observing standards of courtroom decorum	....	....	....	0.3	....	....
Partial responses included in above figures [c]	....	4.1	....	1.9	....	1.5
No response or no opinion	41.8	41.8	64.7	64.7	58.5	58.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 98

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing corporate clients in civil cases, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	20.4%	25.5%	6.2%	9.0%	6.9%	10.0%
Judgment in deciding what points to focus on	9.2	24.5	5.3	10.2	6.2	10.0
Skill in making distinctive use of oral argument rather than repeating the brief	8.2	22.4	9.4	14.1	12.3	16.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	11.2	2.7	5.3	1.5	5.4
Mastery of the record below	5.1	11.2	0.8	2.5	1.5	4.6
Responsiveness to questions from the bench and to indications of the judges' concerns	5.1	7.1	2.4	11.0	3.8	13.8
Knowledge of circuit rules and practices	1.0	5.1	0.5	0.5	....	....
Knowledge of statutory and decisional law governing appellate jurisdiction	5.1	7.1	1.2	1.5	....	0.8
Knowledge of Federal Rules of Appellate Procedure	2.0	2.0	0.3	1.3	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	2.4	4.0	1.5	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	2.0	0.2	2.5	....	2.3
Observing standards of courtroom decorum	....	....	....	0.4	....	0.8
Partial responses included in above figures[c]	....	5.1	....	0.4	....	0.8
No response or no opinion	36.7	36.7	68.6	68.6	66.2	66.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 99

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing individual clients in civil cases, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	13.3%	18.4%	7.9%	9.9%	9.2%	10.0%
Judgment in deciding what points to focus on	13.3	19.4	4.0	10.0	4.6	13.1
Skill in making distinctive use of oral argument rather than repeating the brief	6.1	15.3	6.6	13.0	8.5	14.6
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	8.2	12.2	4.9	7.0	5.4	8.5
Mastery of the record below	3.1	13.3	1.3	3.6	0.8	3.8
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	10.2	2.9	10.9	3.8	10.8
Knowledge of circuit rules and practices	2.0	4.1	0.9	1.4	....	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	5.1	7.1	1.1	1.6	1.5	2.3
Knowledge of Federal Rules of Appellate Procedure	1.0	2.0	0.9	1.5	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	3.1	3.0	7.2	4.6	10.0
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	2.0	9.2	1.5	2.3	....	0.8
Observing standards of courtroom decorum	....	....	....	....	....	....
Partial responses included in above figures[c]	....	2.0	....	1.8	....	2.3
No response or no opinion	41.8	41.8	65.0	65.0	61.5	61.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 100

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Private practitioners representing individual clients in civil cases, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	16.3%	26.5%	7.6%	12.3%	9.2%	13.1%
Judgment in deciding what points to focus on	12.2	22.4	6.8	11.3	7.7	11.5
Skill in making distinctive use of oral argument rather than repeating the brief	9.2	20.4	2.9	10.9	3.1	11.5
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	10.2	12.2	5.8	10.0	3.8	10.0
Mastery of the record below	5.1	13.3	1.0	1.7	2.3	2.3
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	6.1	2.3	7.1	3.1	8.5
Knowledge of circuit rules and practices	....	5.1	0.6	2.5	0.8	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	5.1	9.2	2.8	2.8	3.1	3.1
Knowledge of Federal Rules of Appellate Procedure	1.0	3.1	1.5	2.4	....	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	1.0	1.7	3.0	2.3	4.6
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	3.1	0.2	0.9	....	....
Observing standards of courtroom decorum	....	1.0	0.4	1.8	....	2.3
Partial responses included in above figures[c]	....	3.1	....	0.5	....	0.8
No response or no opinion	36.7	36.7	66.4	66.4	64.6	64.6

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 101

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Strike force lawyers, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	7.1%	13.3%	4.2%	5.9%	5.4%	6.2%
Judgment in deciding what points to focus on	5.1	11.2	1.1	3.4	2.3	5.4
Skill in making distinctive use of oral argument rather than repeating the brief	8.2	10.2	7.1	10.0	4.6	9.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	5.1	8.2	2.3	2.9	3.8	4.6
Mastery of the record below	4.1	13.3	2.0	2.9	0.8	1.5
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	6.1	3.5	8.9	2.3	8.5
Knowledge of circuit rules and practices	3.1	5.1	0.7	0.7	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	0.3	1.0	0.8	2.3
Knowledge of Federal Rules of Appellate Procedure	....	....	....	0.5	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	0.6	5.9	1.5	5.4
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	4.1	0.4	1.4	0.8	1.5
Observing standards of courtroom decorum	1.0	1.0	0.7	0.7	....	. ..
Partial responses included in above figures[c]	....	1.0	....	1.7	..	0.8
No response or no opinion	60.2	60.2	77.1	77.1	76.9	76.9

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 102

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Strike force lawyers, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	8.2%	12.2%	5.7%	9.9%	7.7%	10.8%
Judgment in deciding what points to focus on	7.1	13.3	5.0	7.6	4.6	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	5.1	9.2	3.7	8.6	3.1	8.5
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	7.1	8.2	2.1	3.0	3.8	4.6
Mastery of the record below	2.0	8.2	0.7	1.0	....	0.8
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	5.1	1.8	5.9	1.5	5.4
Knowledge of circuit rules and practices	4.1	6.1	0.9	0.9	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	0.3	0.5	0.8	1.5
Knowledge of Federal Rules of Appellate Procedure	1.0	3.1	....	0.3	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	....	2.0	1.3	3.7	1.5	3.8
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	5.1	0.3	1.2	....	1.5
Observing standards of courtroom decorum	1.0	2.0	0.3	0.3	....	....
Partial responses included in above figures[c]	....	4.1	....	1.5	....	1.5
No response or no opinion	59.2	59.2	77.8	77.8	76.2	76.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 103

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other Justice Department lawyers, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	8.2%	15.3%	4.9%	8.3%	3.8%	7.7%
Judgment in deciding what points to focus on	7.2	14.3	3.4	8.2	4.6	7.7
Skill in making distinctive use of oral argument rather than repeating the brief	11.2	21.4	11.9	17.0	14.6	20.8
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	8.2	11.2	2.5	4.2	3.8	6.2
Mastery of the record below	5.1	13.3	5.8	10.1	6.2	10.0
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	9.2	5.0	14.5	4.6	19.2
Knowledge of circuit rules and practices	4.1	9.2	0.8	2.0	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	0.2	0.4	....	0.8
Knowledge of Federal Rules of Appellate Procedure	1.0	1.0	0.3	0.3	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	4.1	1.7	3.4	2.3	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	4.1	6.1	....	2.2	....	3.1
Observing standards of courtroom decorum	....	....	....	....	....	....
Partial responses included in above figures[c]	....	4.1	....	2.6	....	2.3
No response or no opinion	43.9	43.9	63.3	63.3	59.2	59.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 104

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other Justice Department lawyers, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	12.2%	19.4%	6.5%	13.2%	7.7%	13.1%
Judgment in deciding what points to focus on	8.2	16.3	5.4	9.7	5.4	10.8
Skill in making distinctive use of oral argument rather than repeating the brief	8.2	21.4	12.2	19.6	14.6	23.1
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	8.2	1.7	3.1	0.8	3.1
Mastery of the record below	5.1	11.2	4.1	7.2	4.6	6.2
Responsiveness to questions from the bench and to indications of the judges' concerns	1.0	7.1	3.8	12.7	5.4	18.5
Knowledge of circuit rules and practices	5.1	9.2	0.8	2.6	....	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	4.1	0.7	0.7	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	....	....	0.8	1.4	0.8	1.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	4.1	6.1	1.1	2.7	1.5	2.3
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	3.1	7.1	0.5	1.2	0.8	2.3
Observing standards of courtroom decorum	....	....	....	0.2	....	0.8
Partial responses included in above figures[c]	....	2.0	....	0.8	....	....
No response or no opinion	43.9	43.9	62.5	62.5	57.7	57.7

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 105

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other U.S. government lawyers, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	9.2%	16.3%	3.3%	6.1%	4.6%	6.9%
Judgment in deciding what points to focus on	8.2	19.4	5.1	8.2	3.8	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	13.3	22.4	8.8	14.1	10.8	15.4
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	9.2	12.2	1.3	1.8	0.8	1.5
Mastery of the record below	4.1	11.2	2.1	4.5	2.3	4.6
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	9.2	4.4	11.6	1.5	10.0
Knowledge of circuit rules and practices	6.1	10.2	0.5	1.2	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	0.5	1.1	0.8	2.3
Knowledge of Federal Rules of Appellate Procedure	....	....	0.7	1.4	1.5	2.3
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	0.9	2.9	1.5	2.3
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	5.1	....	0.9	....	2.3
Observing standards of courtroom decorum	....	....	....	....	....	....
Partial responses included in above figures[c]	....	2.0	....	1.1	....	....
No response or no opinion	42.9	42.9	72.4	72.4	71.5	71.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 106

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Other U.S. government lawyers, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	11.2%	19.4%	4.7%	8.6%	6.9%	10.8%
Judgment in deciding what points to focus on	9.2	18.4	5.1	9.7	3.1	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	9.2	20.4	9.8	14.1	6.9	10.0
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	9.2	13.3	0.7	1.7	1.5	3.1
Mastery of the record below	5.1	8.2	1.0	2.6	1.5	3.1
Responsiveness to questions from the bench and to indications of the judges' concerns	1.0	5.1	2.9	9.7	2.3	10.8
Knowledge of circuit rules and practices	5.1	10.2	0.5	2.0	1.5	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	1.0	3.1	0.9	1.6	0.8	2.3
Knowledge of Federal Rules of Appellate Procedure	2.0	2.0	0.9	1.2	1.5	1.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	4.1	6.1	0.8	2.6	2.3	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	7.1	0.2	0.7	....	1.5
Observing standards of courtroom decorum	....	1.0	0.3	1.0	....	....
Partial responses included in above figures[c]	....	2.0	....	....	....	....
No response or no opinion	41.8	41.8	72.3	72.3	71.5	71.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 107

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Public or community defenders, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	7.1%	20.4%	3.0%	4.0%	3.1%	3.8%
Judgment in deciding what points to focus on	11.2	15.3	6.1	10.8	4.6	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	8.2	13.3	7.1	13.3	5.4	8.5
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	4.1	9.2	2.7	3.8	0.8	1.5
Mastery of the record below	....	8.2	0.8	3.7	0.8	2.3
Responsiveness to questions from the bench and to indications of the judges' concerns	7.1	11.2	2.9	6.4	2.3	5.4
Knowledge of circuit rules and practices	1.0	1.0	0.8	1.3	0.8	1.5
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	3.1	0.5	0.5	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	....	....	0.5	1.5	0.8	1.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	4.1	6.1	3.2	5.2	3.1	5.4
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	2.0	4.1	0.3	1.0	....	2.3
Observing standards of courtroom decorum	....	....	0.6	0.9	....	....
Partial responses included in above figures[c]	....	2.0	....	4.4	....	3.1
No response or no opinion	53.1	53.1	71.6	71.6	77.7	77.7

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 108

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Public or community defenders, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	12.2%	18.4%	6.7%	9.9%	6.9%	10.8%
Judgment in deciding what points to focus on	13.3	21.4	7.2	11.8	5.4	9.2
Skill in making distinctive use of oral argument rather than repeating the brief	6.1	13.3	4.6	10.4	3.8	6.9
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	5.1	11.2	5.1	6.0	3.1	5.4
Mastery of the record below	4.1	13.3	1.2	3.2	....	0.8
Responsiveness to questions from the bench and to indications of the judges' concerns	3.1	5.1	1.4	8.5	3.1	8.5
Knowledge of circuit rules and practices	2.0	5.1	0.5	1.0	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	5.1	0.4	0.4	....	....
Knowledge of Federal Rules of Appellate Procedure	....	2.0	0.3	0.9	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	3.1	5.1	0.5	2.2	0.8	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	3.1	....	0.4	....	0.8
Observing standards of courtroom decorum	....	1.0	0.3	0.6	....	0.8
Partial responses included in above figures[c]	....	2.0	....	1.1	....	0.8
No response or no opinion	46.9	46.9	71.9	71.9	76.2	76.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for the distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 109

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: House counsel for corporations or other organizations, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	9.2%	11.2%	1.3%	2.2%	1.5%	2.3%
Judgment in deciding what points to focus on	11.2	18.4	1.6	2.7	2.3	4.6
Skill in making distinctive use of oral argument rather than repeating the brief	6.1	13.3	2.0	3.8	3.8	6.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	9.2	0.7	1.1	1.5	2.3
Mastery of the record below	1.0	6.1	0.5	1.2	1.5	3.1
Responsiveness to questions from the bench and to indications of the judges' concerns	1.0	6.1	0.3	0.9	....	0.8
Knowledge of circuit rules and practices	....	4.1	0.3	0.6	....	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	2.0	4.1	0.5	0.5	1.5	1.5
Knowledge of Federal Rules of Appellate Procedure	3.1	3.1	0.3	1.2	0.8	1.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	3.1	0.7	1.7	....	1.5
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	3.1	....	0.7	....	1.5
Observing standards of courtroom decorum	....	1.0	....	....	....	....
Partial responses included in above figures[c]	....	1.0	....	....	....	....
No response or no opinion	58.2	58.2	91.7	91.7	86.9	86.9

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a]Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b]Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c]Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 110

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: House counsel for corporations or other organizations, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	10.2%	16.3%	1.8%	2.3%	2.3%	2.3%
Judgment in deciding what points to focus on	11.2	18.4	1.9	3.7	3.1	5.4
Skill in making distinctive use of oral argument rather than repeating the brief	3.1	12.2	0.2	2.3	0.8	3.1
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	8.2	12.2	0.7	1.6	....	2.3
Mastery of the record below	1.0	4.1	0.5	0.5	1.5	1.5
Responsiveness to questions from the bench and to indications of the judges' concerns	1.0	2.0	1.0	1.8	2.3	3.8
Knowledge of circuit rules and practices	1.0	6.1	1.1	1.7	0.8	2.3
Knowledge of statutory and decisional law governing appellate jurisdiction	5.1	6.1	....	....	....	....
Knowledge of Federal Rules of Appellate Procedure	2.0	3.1	0.7	1.2	1.5	1.5
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	1.0	0.4	1.2	....	1.5
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	4.1	0.2	0.4	0.8	1.5
Observing standards of courtroom decorum	....	1.0	....	0.4	....	0.8
Partial responses included in above figures[c]	....	1.0	....	....	....	....
No response or no opinion	56.1	56.1	91.4	91.4	86.9	86.9

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 111

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for civil legal assistance programs, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	8.2%	14.3%	2.2%	3.5%	2.3%	3.1%
Judgment in deciding what points to focus on	11.2	17.3	2.9	4.8	4.6	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	4.1	10.2	1.6	4.4	2.3	6.2
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	8.2	11.2	2.0	3.5	0.8	1.5
Mastery of the record below	1.0	7.1	0.3	0.6	....	0.8
Responsiveness to questions from the bench and to indications of the judges' concerns	5.1	11.2	0.6	1.7	0.8	2.3
Knowledge of circuit rules and practices	1.0	1.0	0.8	0.8	0.8	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	5.1	0.6	0.6	....	....
Knowledge of Federal Rules of Appellate Procedure	1.0	1.0	....	0.9	....	.....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	5.1	0.6	1.1	1.5	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	3.1	....	0.7	....	.....
Observing standards of courtroom decorum	....	....	0.4	0.9	0.8	1.5
Partial responses included in above figures[c]	....	3.1	....	0.6	....	....
No response or no opinion	55.1	55.1	87.9	87.9	86.2	86.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 112

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for civil legal assistance programs, inexperienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	7.1%	12.2%	2.5%	4.0%	2.3%	5.4%
Judgment in deciding what points to focus on	10.2	15.3	2.2	2.6	3.1	3.8
Skill in making distinctive use of oral argument rather than repeating the brief	4.1	11.2	1.6	3.3	0.8	3.1
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	7.1	9.2	1.9	2.1	2.3	2.3
Mastery of the record below	2.0	9.2	0.6	2.5	....	0.8
Responsiveness to questions from the bench and to indications of the judges' concerns	4.1	7.1	....	3.3	....	3.1
Knowledge of circuit rules and practices	1.0	3.1	0.3	0.3	....	....
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	4.1	0.3	0.3	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	2.0	5.1	....	0.6	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	4.1	1.2	1.7	1.5	3.1
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	1.0	4.1	....	0.4	....	0.8
Observing standards of courtroom decorum	1.0	1.0	0.6	0.6	1.5	1.5
Partial responses included in above figures [c]	....	2.0	....	0.6	....	....
No response or no opinion	56.1	56.1	88.9	88.9	87.7	87.7

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 113

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for public interest law firms, experienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	7.1%	14.3%	1.3%	2.9%	2.3%	4.6%
Judgment in deciding what points to focus on	15.3	19.4	3.8	5.8	6.9	9.2
Skill in making distinctive use of oral argument rather than repeating the brief	4.1	13.3	2.5	5.4	4.6	8.5
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	9.2	0.7	1.0	0.8	1.5
Mastery of the record below	....	4.1	1.6	2.4	1.5	3.8
Responsiveness to questions from the bench and to indications of the judges' concerns	4.1	10.2	0.6	4.1	1.5	6.2
Knowledge of circuit rules and practices	2.0	2.0	0.3	0.6	....	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	3.1	6.1	0.3	0.3	....	....
Knowledge of Federal Rules of Appellate Procedure	2.0	2.0	0.4	0.7	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	2.0	5.1	1.1	1.4	0.8	1.5
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	3.1	....	0.7	....	0.8
Observing standards of courtroom decorum	....	....	0.5	0.9	1.5	2.3
Partial responses included in above figures [c]	....	3.1	....	0.2	....	0.8
No response or no opinion	54.1	54.1	86.8	86.8	80.0	80.0

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 114

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Staff lawyers for public interest law firms, inexperienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	8.2%	15.3%	2.3%	3.5%	3.8%	5.4%
Judgment in deciding what points to focus on	16.3	21.4	2.0	4.2	2.3	3.8
Skill in making distinctive use of oral argument rather than repeating the brief	3.1	14.3	2.3	3.7	4.6	5.4
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	6.1	9.2	1.4	2.7	1.5	3.8
Mastery of the record below	2.0	7.1	1.1	1.7	1.5	3.1
Responsiveness to questions from the bench and to indications of the judges' concerns	4.1	9.2	0.5	3.1	0.8	5.4
Knowledge of circuit rules and practices	1.0	3.1	0.3	0.6	....	0.8
Knowledge of statutory and decisional law governing appellate jurisdiction	4.1	6.1	1.0	1.0	0.8	0.8
Knowledge of Federal Rules of Appellate Procedure	2.0	4.1	....	0.3	....	....
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	2.0	0.6	1.1	0.8	2.3
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	2.0	....	0.8	....	0.8
Observing standards of courtroom decorum	....	....	0.3	1.0	0.8	2.3
Partial responses included in above figures[c]	....	2.0	....	....	....	....
No response or no opinion	52.0	52.0	88.3	88.3	83.1	83.1

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 115

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Lawyers employed by state or local governments, experienced

	98 Judges		328 Lawyers[a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]	Greatest Need	Greatest or Second[b]
Ability to set forth the important facts and issues in a comprehensible manner	14.3%	22.4%	3.9%	5.4%	2.3%	3.1%
Judgment in deciding what points to focus on	7.1	19.4	3.5	7.0	4.6	8.5
Skill in making distinctive use of oral argument rather than repeating the brief	4.1	10.2	9.3	14.2	9.2	15.4
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	16.7	22.4	2.9	5.8	2.3	6.2
Mastery of the record below	3.0	12.2	4.5	6.9	4.6	6.9
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	6.1	3.1	11.7	1.5	10.0
Knowledge of circuit rules and practices	....	3.1	0.5	0.7	0.8	1.5
Knowledge of statutory and decisional law governing appellate jurisdiction	7.1	8.2	2.2	2.9	3.8	3.8
Knowledge of Federal Rules of Appellate Procedure	7.1	11.2	0.3	2.9	....	2.3
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	1.0	2.0	1.8	3.6	3.8	5.4
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	4.1	0.4	2.2	0.8	3.1
Observing standards of courtroom decorum	....	....	....	....	....	....
Partial responses included in above figures[c]	....	3.1	....	1.5	....	1.5
No response or no opinion	37.8	37.8	67.6	67.6	66.2	66.2

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

TABLE 116

Opinions of Appellate Judges and Lawyers About Areas of Competence in Which Improvement Is Needed

Category: Lawyers employed by state or local governments, inexperienced

	98 Judges		328 Lawyers [a]		130 Highly Capable Lawyers	
	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]	Greatest Need	Greatest or Second [b]
Ability to set forth the important facts and issues in a comprehensible manner	16.3%	26.5%	5.1%	8.9%	5.4%	9.2%
Judgment in deciding what points to focus on	11.2	21.4	4.7	7.2	3.1	6.2
Skill in making distinctive use of oral argument rather than repeating the brief	3.1	12.2	6.2	9.9	6.2	10.8
Mastery of the constitutional, statutory, and decisional law that are important in the particular case (including relevant regulations)	13.3	19.4	4.7	8.3	6.9	10.8
Mastery of the record below	2.0	6.1	2.6	3.5	2.3	3.1
Responsiveness to questions from the bench and to indications of the judges' concerns	2.0	4.1	2.8	10.2	3.1	10.8
Knowledge of circuit rules and practices	2.0	6.1	0.5	1.0	0.8	1.5
Knowledge of statutory and decisional law governing appellate jurisdiction	6.1	8.2	2.3	2.3	2.3	2.3
Knowledge of Federal Rules of Appellate Procedure	5.1	8.2	0.6	2.8	....	0.8
Ability to argue persuasively from precedent, including ability to distinguish precedent that might be damaging	....	5.1	1.1	3.7	1.5	3.8
Ability to argue persuasively from statutory language, statutory purpose, and legislative history	....	4.1	....	1.5	....	0.8
Observing standards of courtroom decorum	....	....	....	0.7	....	1.5
Partial responses included in above figures [c]	....	1.0	....	1.2	....	1.5
No response or no opinion	38.8	38.8	69.3	69.3	68.5	68.5

SOURCES: Appellate Judges' Questionnaires, question 3; Appellate Lawyers' Opinion Questionnaires, question 3.

[a] Percentages in these columns are based on weighting responses to compensate for distortion that may have been introduced by the sampling technique. See appendix B.

[b] Percentages in this column add to more than 100% because a single respondent may be counted twice.

[c] Comprises respondents who identified an area of "greatest need" but not an area of "second greatest need."

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