

Razing the Patent Bar

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In discussions of the social utility of the patent system, the benefits of competition have played increasingly important roles, but one aspect of the patent system has largely escaped this competition-related scrutiny: the patent bar. The paucity of scholarship in this area is surprising, given that it is estimated that innovators spend more than a billion dollars a year on legal fees related to patent prosecution. Patent bar membership, and thus competition in the market for certain patent-related legal services, is limited by a requirement that members possess formal education in certain technological fields. This Work-in-Progress analyzes from both theoretical and empirical perspectives whether these features of the patent bar effectively promote social welfare. In the theoretical portion, I will compare the stated justifications for the patent bar's eligibility requirements with the activities that members of the patent bar perform today, including (1) prosecuting design patents, (2) prosecuting business method and software patents, and (3) representing clients in administrative substitutes for litigation like inter partes review, post grant review, and covered business method reviews. For the empirical portion, I will compare the educational backgrounds of patent attorneys and agents with the technologies covered by the patents that they prosecute. After assembling an original dataset, I will assess the extent to which patent agents and patent attorneys are using their technological training to help clients obtain patents. I will also evaluate the consequences of expanding patent-bar eligibility to allow lawyers without formal technical education to join the patent bar.