Vanderbilt Law Review

Volume 59 | Issue 4 Article 2

5-2006

Plaintiffs' Lawyers, Specialization, and Medical Malpractice

Stephen Daniels

Joanne Martin

Plaintiffs' Lawyers, Specialization, and Medical Malpractice

*Stephen Daniels** *and Joanne Martin***

I. INTRODUCTION: RHETORIC AND REALITY

Our interest is in medical malpractice as an area of specialized practice for plaintiffs' lawyers, and we want to explore this area because plaintiffs' lawyers are key actors in the medical malpractice system. An understanding of their role is necessary in identifying what problems may exist in this system and in evaluating both proposed and enacted solutions. Indeed, some reforms appear to be specifically aimed at plaintiffs' lawyers who handle medical malpractice cases—especially the repeat players whose experience and expertise may give them, and hence their clients, a strategic advantage.

Like most of the political rhetoric surrounding medical malpractice, the characterization of lawyers representing plaintiffs has always been vivid, symbolically charged, and divorced from reality. The rhetoric's purpose, of course, is not to present an accurate picture of reality. The idea is to gain political advantage by portraying such lawyers in the most negative light and to blame them for a host of ills curable only by medical malpractice reform. Writing in 1991, Randall Bovbjerg and his colleagues summarized the medical

* Senior Research Fellow, American Bar Foundation, Chicago, IL.

** Senior Research Fellow, American Bar Foundation, Chicago, IL. Prepared for the Vanderbilt University Law School/Roscoe Pound Foundation Medical Malpractice Symposium and VANDERBILT LAW REVIEW. The authors wish to thank Melissa Derr for her assistance.

community's views, saying that physicians believe there is systematic jury bias against them.[1] Physicians also believe that "[b]ecause malpractice plaintiffs receive extravagant amounts in malpractice cases, their contingent-fee lawyers also earn too much—far more than needed to assure competent representation. Hence, the lawyers are willing to take even more and weaker cases to trial in the hopes of hitting the 'jackpot.'"[2] Herein, supposedly, lies the gist of the problem.

The "greedy, opportunistic lawyer" characterization leaves little room for a perspective that recognizes sophisticated specialization by plaintiffs' lawyers. Such an alternative perspective would require us to view malpractice differently, because it calls into question both the "jackpot lawyer" as a key cause of the "malpractice crisis" and what this theory presumes about the malpractice system. Specialization in malpractice cannot be built on a "jackpot" system of weak cases and jury sympathy, because malpractice cases are complex, expensive, and risky. Instead, a successful practice is built on the development of expertise and the strategic advantages that come from being a repeat player, rather than an infrequent "jackpot" player. Success comes with the development of advantages sufficient to offset the strategic advantages of the insurance companies and their lawyers, who are the epitome of repeat players. In fact, the existence of specialists itself calls into question the veracity of the "jackpot" characterization of the malpractice system.

While not necessarily adopting the political rhetoric's characterization of plaintiffs' lawyers, the academic literature also suggests that the kind of specialization we have in mind will not exist on the plaintiffs' side. For instance, Bovbjerg and his co-authors argue that because malpractice cases are complex, expensive to prepare, and very risky, plaintiffs' lawyers—as rational actors—will be deterred from specializing in the area. In order to maximize their return in a risky and expensive environment, plaintiffs' lawyers will invest instead in different kinds of cases based on likely jury sympathy, only some of which will involve malpractice.[3] Herbert Kritzer makes a similar argument in his book regarding lawyers in Wisconsin who rely on the contingency fee.[4] He leaves out consideration of jury sympathy, but he also argues that lawyers will act rationally and build their practices around a diverse portfolio of cases rather than specialize in

1. Randall Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?*, 54 LAW & CONTEMP. PROBS. 5, 16–17, 31–33 (1991).

2. *Id.* at 16–17.

3. *Id.* at 12, 35–36.

4. HERBERT KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE PRACTICE IN THE UNITED STATES 45–95 (2004).

an area with considerable risk and uncertainty and in which their compensation is based on a percentage of the award.[5] Indeed, it is unclear why any rational actor, from this perspective, would ever handle a malpractice case.

In his classic 1974 article on repeat players and the reasons that the "haves" come out ahead, Marc Galanter is also not optimistic about the development of specialization on the plaintiffs' side, although for different reasons.[6] He suggests that repeat players such as insurance companies "can buy legal services more steadily, in larger quantities, in bulk[,] . . . and at higher rates [and, as a result,] get services of better quality."[7] In addressing the possibility of specialization on the plaintiffs' side, Galanter asks:

> Might we not expect the existence of specialization to offset RP [repeat players] advantages by providing OS [one-shotters] with a specialist who in pursuit of his own career goals would be interested in outcomes that would be advantageous to a whole class of OSs? Does the specialist become the functional equivalent of an RP?[8]

Galanter's answer to his own question is no. Such plaintiff-side specialists, he writes, will have problems in developing optimizing strategies because they cannot use the repeat player's long-term strategy of trading-off short-term gains for longer-term benefits.[9] More importantly, because of the low state of information among "one-shotters," they will have problems mobilizing a clientele. There is simply no reason, Galanter asserts, for one-shotters to know who the real specialists are.[10]

In contrast, we believe that there *can* be specialized practice on the plaintiffs' side, at least with regard to medical malpractice. To explore this possibility, we will utilize three different data sets to answer three basic questions about such specialization. The first question is the simplest and most straightforward: do repeat playing lawyers exist on the plaintiffs' side with regard to medical malpractice claims? In any given data set on medical malpractice matters, are

---

5. *Id.*

6. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 114–19 (1974).

7. *Id.* at 114.

8. *Id.* at 115.

9. *Id.* at 117.

10. *Id.* at 116–17. In fairness, we are not saying that Galanter would necessarily answer his own question the same way today. Because his 1974 article and its logic have had such an enormous impact on socio-legal scholarship, however, we think the original argument deserves to he empirically evaluated, rather than dismissed out of hand. The interesting question for us is whether Galanter's answer may have indeed been empirically correct in the mid-1970s, but is not in 2006. If so, the question becomes one of what allowed for the development of such specialization over the past thirty years. Answering this question, however, must wait for another article.

there some lawyers who will appear on the plaintiffs' side more often than other lawyers? If the answer is yes, we also want to know if these lawyers appear to have developed any strategic advantages, as evidenced in the data by a higher rate of successful verdicts and by higher awards as compared to other lawyers. To answer this first set of questions, we will use a closed medical malpractice insurance claims data set from Wisconsin covering the years 1976 to 1988.[11]

The second question compliments the first, but asks more specifically about the plaintiffs' lawyers themselves, rather than the malpractice matters they handle. In a data set on plaintiffs' lawyers (not malpractice matters), what proportion of lawyers handle any medical malpractice matters at all? Based on the amount of medical malpractice handled, are there lawyers whose business consists primarily of medical malpractice matters—lawyers we could call specialists? If so, what do their practices look like? To answer this second question, we will use survey data on Texas plaintiffs' lawyers from 2000 (hereinafter the "Plaintiffs' Lawyer Survey") and interview data involving plaintiffs' lawyers in Texas covering the years 1997 to 2005.[12]

The third question asks specifically about the mobilization problem posed by Galanter—that would-be specialists have problems mobilizing a clientele because of the low state of information among "one-shotters." Without a reliable and steady source of clients, there can be no specialization. How do medical malpractice specialists mobilize a clientele in light of the one-shot plaintiffs' information problem? How do they get their cases? To answer this question, we will use some of the same data used for the second question along with data from a State Bar of Texas survey done in 2004 involving referral

11. *See* WIS. OFFICE OF THE COMM'R OF INSURANCE, WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN (WHCLIP): PRELIMINARY REPORT ON MEDICAL MALPRACTICE IN WISCONSIN 1, 13 (1992) [hereinafter WHCLIP REPORT].

12. *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access*, 55 DEPAUL L. REV. 635 (2006) [hereinafter Daniels & Martin, *Texas Two-Step*]; Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004) [hereinafter Daniels & Martin, *Strange Success*]; Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2002) [hereinafter Daniels & Martin, *It Was the Best of Times*]; Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears:" Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2001); Stephen Daniels & Joanne Martin, *"It's Darwinism – Survival of the Fittest": How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POL'Y 377 (1999) [hereinafter Daniels & Martin, *It's Darwinism*]. A detailed description of our methodology can be found in Daniels & Martin, *It Was the Best of Times*, *supra*, methodological app., at 1826–28.

practices among lawyers in Texas (hereinafter the "Texas Referral Survey").[13]

Ideally, all of the data used would be from the same place and time period, rather than two states and two time periods. This approach, however, is not possible for Texas, our primary research focus.[14] The major benefit of the Wisconsin data is that they include information on the identity of the claimant's attorney as well as the identity of the defendant's attorney. Despite their obvious shortcomings, the Wisconsin data do allow us to answer a basic question about repeat players on the plaintiffs' side, the answer to which may be generally applicable. If so, there are some things we would expect to find in the Texas data, including clear evidence of specialization and a solution to the mobilization problem.

II. DO REPEAT PLAYERS EXIST?

The Wisconsin closed claims data we will use in addressing this threshold question come from a major study of medical malpractice insurance conducted by the Wisconsin Office of the Commissioner of Insurance in 1988–89.[15] It sought to cover *all* medical malpractice claims closed in the state between 1976 and 1988.[16] The most complete and useful data from that study are those for the Wisconsin Health Care Liability Insurance Plan ("WHCLIP"), which was a state-

13. DEP'T OF RESEARCH & ANALYSIS, STATE BAR OF TEX., TEXAS REFERRAL PRACTICES SURVEY REPORT (2004), *available at* http://www.texasbar.com/Template.cfm?Section=Research_and_Analysis&Template=/ContentManagement/ContentDisplay.cfm&ContentID=12060 [hereinafter TEXAS REFERRAL SURVEY]. The survey was sent to a random sample of 4,000 active in-state members of the State Bar of Texas in the spring of 2004. Texas is a mandatory bar state, so this sample represents all active lawyers in the state. Of the 4,000 surveys sent, 1,215 completed surveys were returned (or 30.4%). This level of response means a confidence interval of plus or minus three percentage points at the 95% significance level. *Id.* at 3–5. For a description of the survey's methodology, see *id.* at 3–7. The specific data used in this Article are on file with the authors; the analyses reported in this Article were conducted by the authors and represent only their interpretations and not those of the State Bar of Texas or the Referral Fee Task Force.

14. Closed claims data are available for Texas, and those data do say whether or not a claimant was represented by an attorney. Unfortunately, the data do not include the necessary information on the lawyers' identity. *See generally* Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005).

15. *See* WHCLIP REPORT, *supra* note 11.

16. *See* Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* 15 (Am. Bar Found., Working Paper No. 9210, 1993) [hereinafter Daniels et al., *Why Kill All the Lawyers*]. The start date was chosen because Wisconsin first enacted legislation on medical malpractice reforms in 1975. The study was intended to cover all insurance carriers operating in Wisconsin during the 1976–1988 time period. *See id.* at 13–17; *see also* WHCLIP REPORT, *supra* note 11, at 1.

backed insurance plan administered by Wausau Insurance Company.[17] For the 1976-88 time period, WHCLIP closed a total of 2,904 claims in which a legal claim was filed as a result of a patient's assertion of a claim for monetary damages.[18] Data on the plaintiff's lawyer can be found in 2,736 claims, and 728 different plaintiffs' lawyers or firms appeared.[19] For the purposes of this Article, we have chosen to ignore time and analyze the data set as a whole, as one or even a few years will not capture the existence of repeat players.

The largest number of lawyers appeared only once on the plaintiffs' side in the WHCLIP data (349 of 728, or 47.9%), and most appeared fewer than 10 times (676, 92.9%). However, these infrequently appearing lawyers do not account for an equivalent percentage of claims. While making up the vast majority of listed lawyers, they account for just 55.5 percent of the claims in which a lawyer appears. The 52 lawyers who appear 10 times or more make up only 7.1 percent of lawyers, but account for 44.5 percent (1218 of 2736) of the claims. As Table 1 shows, four attorneys appear more than 50 times, and they account for 16.1 percent (440) of the claims. Two of them appear over 100 times (107 and 168) and account for 10.1 percent of the claims. As indicated in Table 1, more frequently appearing attorneys handle more severe injuries, are more successful, and win higher awards for their clients.[20]

---

17. Daniels et al., *Why Kill All the Lawyers*, *supra* note 16, at 16. WHCLIP was the largest malpractice carrier in the state at tbe time and had the broadest book of business covering hospitals, physicians, and other health care professionals. As the state-backed carrier, it had to write insurance for all risk levels and specialties. *See id* at 15–16; WHCLIP REPORT, *supra* note 11, at 1–2. WHCLIP reported data for the study on all closed claims for the years 1976-1988. On-site verification of the data collection showed the quality of these to be quite high, due in large part to a vigorous system of reliability checks used by WHCLIP managers. Daniels et al., *Why Kill All the Lawyers*, *supra* note 16, at 16.

18. WHCLIP closed a total of 6,727 claims for the years 1976–1988. Of these, 3,831 (56.9%) were incident reports in which no legal claim was filed and in which the patient did not assert a claim for money. In these situations, a file was opened after WHCLIP had been contacted by the insured concerning an incident and a potential claim. Some minimal follow-up was done by WHCLIP personnel, and if the patient did nothing tbe claim was closed in six to eight months. The claim would be reopened later if the patient decided to pursue the matter. *Id.* at 16–17.

19. Sixty-two claims were literally listed as pro se, and another 98 claims had no attorney listed. A total of 728 different attorneys or firms appeared in the 2,736 claims. If the closed claim file did not list a firm name for the claimant's attorney, the Wisconsin Legal Directory was consulted to see if the attorney was working in a firm at the time. If so, the appearance was counted as a firm appearance rather than an individual appearance. If there was no firm affiliation at the time, the appearance was counted as the individual's appearance. An appearance was a claim handled. *Id.* at 17–18.

20. The difference in success is statistically significant (Fisher's Exact, sig. at .00); difference in injury level is statistically significant (chi square at .00); and the difference in award is also statistically significant (difference of means, sig. at .00).

Table 1
Plaintiffs' Lawyers: All Appearances
(WHCLIP Closed Claims 1976–88) [21]

Appearances	Claims	Lawyers	Success Rate	Median Injury Severity	Mean Award	Median Award
1–50	2296	724	30.7%	4	$75,000	$15,000
51+	440	4	47.5%	6	$173,000	$67,000

Because more serious injuries bring higher awards, the higher awards for the more frequently appearing lawyers in Table 1 may simply be a product of the more serious injuries they handle (we will leave to the next Part the question of why they handle more of such matters). If these lawyers have developed some level of expertise and strategic advantage compared to other lawyers, however, we would expect them to be more successful and to win higher awards holding severity of injury constant. Table 2 supports this hypothesis by comparing lawyers with 50 or fewer appearances to those with more than 50 appearances.

21. Definitions of some table values:

Total N of Claims with an attorney: 2,736 (1–50, 2296 claims and 50+, 440 claims)

Success Rate: Percentage of claims closed with a monetary award

Median Injury Severity: Median injury using the following scale:

1. emotional only
2. temporary insignificant: lacerations, minor scars, rash
3. temporary minor: infections, misset fracture, fall, recovery delayed
4. temporary major: burns, drug side effect, recovery delayed
5. permanent minor: loss of fingers, non-disabling injuries
6. permanent significant: deafness, loss of eye, loss of limb
7. permanent major: paraplegia, blindness, loss of two limbs, brain damage
8. permanent grave: quadriplegia, severe brain damage, life-long care
9. death

Mean and Median Award: Award in successful claims expressed in 1988 dollars (last year included in data) and rounded to the nearest thousand

Injury scale taken from NAT'L ASS'N OF INSURANCE COMMISSIONERS, MALPRACTICE CLAIMS: FINAL COMPILATION 10 (1980).

Table 2
Injury Levels and Plaintiffs' Lawyers Appearances
(1–50 appearance = 724 lawyers; 51+ = 4 lawyers)

Temporary Injury

Appearances	N of Claims	Success Rate	Mean Award	Median Award
1–50	1223	29.6%	$30,063	$6,000
51+	152	46.7%	$58,137	$23,000

Permanent Injury

Appearances	N of Claims	Success Rate	Mean Award	Median Award
1–50	714	31.2%	$149,508	$38,000
51+	198	47.5%	$248,229	$116,000

Death

Appearances	N of Claims	Success Rate	Mean Award	Median Award
1–50	352	33.8%	$71,235	$20,000
51+	90	48.9%	$196,915	$107,000

Table 2 compares three different levels of severity taken from a collapsed version of the same scale used on Table 1 and explained in footnote 21. Temporary injury includes levels 1 through 4 of that scale, and permanent injury includes levels 5 through 8. In each scenario, the more frequently appearing lawyers win more often and achieve higher awards.[22] In addition, the more frequently appearing attorneys concentrate on the more serious injuries. These lawyers account for 11.1 percent of temporary injuries, 21.7 percent of permanent injuries, and 20.4 percent of death cases while accounting for less than 1 percent of the lawyers. More tellingly, these lawyers account for 34.1 percent of level 8 permanent grave injuries—the most serious level short of death.

While repeat playing is evident on the plaintiff's side, it is prominent on the defense side. The vast majority of claims are handled by defense lawyers appearing more than 50 times (2,223 of 2,872 claims in which a defense attorney could be identified—77.4%).

22. In each of the tables, the relationship between appearances and success is statistically significant (Fisher's Exact, sig. at 01), as is the relationship between appearances and award size (difference of means, sig. at .05).

As Galanter would remind us, insurance carriers have ongoing relationships with defense lawyers who develop substantial expertise in particular areas of medical malpractice. Only 26 defense lawyers (1.2% of all cases with an identifiable defense lawyer) appear once, and 93 (4.2%) appear fewer than 10 times. The comparable figures for plaintiffs' lawyers are 47.9 percent and 92.9 percent, respectively.

The key question with regard to strategic advantage asks what happens when lawyers with different appearance rates face each other. Generally speaking, we would expect the advantage to be in favor of the defense, and this effect is best seen in Table 3 in those situations in which 1–50-appearance defense lawyers face 1–50-appearance plaintiffs' lawyers and when 50+-appearance defense lawyers face 1–50-appearance plaintiffs' lawyers (the first and third rows in the table). These two pairings have the lowest claimant success rates in Table 3.[23]

Table 3
Plaintiff Success Rate by Appearance Pairings
(WHCLIP Closed Claims 1976-88)

Appearance Pairing	N of Claims	Plaintiff Success Rate
Def 1–50 v. Pf 1–50	552	31.2%
Def 1–50 v. Pf 50+	71	57.7%
Def 50+ v. Pf 1–50	1736	30.5%
Def 50+ v. Pf 50+	367	45.5%
Def 100+ v. Pf 100+	168	50.0%

The other pairings set out in Table 3 suggest that more frequently appearing plaintiffs' attorneys may indeed have developed a strategic advantage compared to their less frequently appearing peers.[24] Though relatively few in number, this effect is most evident in the second row in the table, where more frequently appearing plaintiffs' lawyers (50+ appearances) face less frequently appearing defense lawyers (1–50 appearances). The success for claimants in these situations is 57.7 percent. When specialists on both sides face each other—the fourth row in the table—the plaintiffs' lawyers do

23. The difference in success rate is not statistically significant. This is what we would expect, since less frequently appearing plaintiffs' attorneys will have little strategic advantage and should fare poorly in any situation.

24. The difference in success rate between less frequently and more frequently appearing plaintiffs' lawyer situations are all statistically significant (Fisher's Exact, sig. at .001). This is what we would expect if the more frequently appearing attorneys have developed some degree of strategic advantage.

relatively well compared to their peers in the first and third rows. Perhaps the most telling evidence of strategic advantage is evident in those cases when 100+ appearance lawyers on both sides (the super-specialists) face each other. There were two such specialists on the plaintiffs' side and eight on the defense side. The plaintiff success rate is 50 percent—exactly what we might expect to see if lawyers on both sides, not just the defense side, have developed a strategic advantage.

In summary, we can answer our first question by saying that there are repeat-playing lawyers on the plaintiffs' side in the medical malpractice arena, but they are few in number compared to the defense side. Because these repeat players are successful more often than their less frequently appearing peers and win higher awards, we can say that they have developed some amount of strategic advantage. Can we really characterize these repeat players as medical malpractice specialists? The next Part addresses this question.

III. DO SPECIALISTS EXIST?

To characterize some set of plaintiffs' lawyers as specialists in medical malpractice means saying that they concentrate a significant proportion of their practices on medical malpractice matters while most of their plaintiffs' lawyer peers do not. Our research on plaintiffs' lawyers in Texas indicates that medical malpractice specialists do in fact exist. We found lawyers who consciously see themselves as medical malpractice specialists, almost to the exclusion of other types of cases. One such lawyer, whose firm is "80% to 85% medical malpractice," told us in an interview, "It's probably been . . . seven or eight years since we had a straight-up, pure products liability case, seat belt case, or rollover case. . . . An aviation case, for example, would never come to this firm and probably shouldn't."[25] It is equally important to note that we also found lawyers who handle little or no malpractice business.

In the Plaintiffs' Lawyer Survey, usable data on caseload composition is available for 541 of the 554 respondents. Just over one-half of these 541 respondents (295, or 54.4%) report handling no medical malpractice cases. This is easy to understand. Medical

25. All lawyers quoted in this Article were interviewed as a part of our Texas research. Promises of confidentiality prevent us from identifying them. Our research involves ninety-six in-depth interviews with Texas plaintiffs' lawyers conducted in the late 1990s and a major mail survey of Texas plaintiffs' lawyers administered in late 1999/early 2000. Our research continues. We are currently in the process of interviewing plaintiffs' lawyers in Texas again: in recent months, we have conducted thirty-five of fifty planned interviews. In addition, as of this writing another mail survey of Texas plaintiffs' lawyers is in the field and approximately 330 lawyers have responded.

malpractice cases are complex, risky, and expensive to prepare, and many lawyers working on a contingency fee do not have the expertise or resources to handle such cases. As a non-specialist San Antonio lawyer noted, "[M]alpractice cases are really expensive to develop . . . [A]nyone can take a car wreck case and try it, but for the medical malpractice cases you've got to know more about the medicine."[26] Of course, the contingency fee lawyer recoups none of the money spent on the case and receives no fee for his/her time if there is no award. As an illustration, one such lawyer said, "I just handled a trial case down in Houston that I lost $50,000 on and didn't get paid a fee."

Table 4 shows that even of those lawyers in the Plaintiffs' Lawyer Survey who report handling some medical malpractice matters, most pursue relatively few. For those who handled at least one malpractice matter at the time of the survey, the median percentage of their business made up by malpractice is 10 percent (mean 24.0%). For 90 percent of these respondents, malpractice comprises less than 80 percent of their business. Still, there are a small number of respondents for whom medical malpractice makes up the majority of the matters handled. For 46 lawyers, malpractice comprises 50 percent or more of their business. These are the lawyers we consider the specialists.

Table 4
Texas Plaintiffs' Lawyers
Medical Malpractice as a Percentage of Business
(respondents with at least one med mal case, N=246)

Percent of Business	N of Respondents	Percent of Respondents
1–24%	171	69.5%
25–49%	29	11.8%
50–74%	18	7.3%
75–100%	28	11.4%

Because malpractice cases are complex, risky, and expensive to handle, this kind of substantive focus requires specialists to pay particular attention to the economics. As a result, we would expect

26. The remarks of a Houston lawyer witb a substantial litigation practice summarized nicely the reluctance to handle medical malpractice matters:

> We don't take any medical malpractice cases. Number one, they are way too technical for our expertise. . . . They are also very, very expensive to handle. Easily you can spend $100,000 without blinking on those kinds of cases and typically we don't have that kind of cash lying around. We don't have the contacts with the experts in those kinds of fields. So it's just not something that we do and probably won't ever.

specialists to organize and run their practices differently when compared to the non-specialists. This is what our findings from Texas show. Perhaps most important are differences in how they attract and screen cases.[27] While attracting and screening cases are constant challenges for all plaintiffs' lawyers, the challenges are particularly acute for the specialist. This is especially so with regard to screening. Because the specialist is investing a substantial amount of his own money, he must screen cases with a ruthless eye. For the remainder of this Part, our focus will be on screening. We will address the second challenge—attracting cases—in the next Part.

To successfully screen and prepare malpractice cases, specialists need more specialized office staffs. This is reflected in the Plaintiffs' Lawyer Survey, which shows that 6.0 percent of non-specialists had at least one nurse on staff, while 35.5 percent of the malpractice specialists had at least one nurse. Our interviews, however, probed more deeply than the survey and indicate that some malpractice specialists go beyond just having nurses on staff. They may have either nurse-lawyers or physician-lawyers in their firms, which allow the specialists to internalize some of the important expert costs related to the screening and preparation of cases.[28] Others may have less formal arrangements with such experts, such as retaining physician-lawyers as "of counsel" to the firm and having that person at the firm on a regular basis.[29] The specialists also have regular networks of medical experts to whom they can turn in screening and preparing cases if they do not literally have such experts on staff.[30]

The specialists' practices differ in other ways as well. In the Plaintiffs' Lawyer Survey, the size of the malpractice specialists' practices is smaller than the size of non-specialists' practices as measured by the number of open cases. On average, the specialists report having 31.8 open cases at the time of the survey, while non-

27. Based on a statistical analysis of reported jury verdicts, Bovbjerg and colleagues argue that plaintiffs' lawyers screen and choose cases based on jury sympathy and damage potential. *See* Bovbjerg et al., *supra* note 1, at 38. The analysis we will present challenges the idea that sympathy—bias—is a factor. If anything, Texas plaintiffs' lawyers claim, juries are "biased" *against* medical malpractice plaintiffs.

28. One specialist reported, "We have nine lawyers now that do almost nothing but medical malpractice. Two of our lawyers are doctor-lawyers, one is a nurse-lawyer, and we have three nurse-paralegals."

29. An Austin specialist described such an arrangement: "[We have] a doctor and a lawyer and he is here on Wednesdays. He is of counsel to our firm. He is an eigbteen-year board-certified ER doctor . . . and he reviews our medical cases."

30. As if to echo this, a Houston-area specialist noted, "[W]e have a nurse and a doctor on staff. Then we have other doctors that consult with us, almost on staff but technically not. That, I think, is where you make your money as a malpractice lawyer, having ready access to smart folks who will give you honest answers."

specialists report 69.4 open cases.[31] However, though this is not statistically significant, the specialists report getting more calls per month from prospective clients: on average, the specialists report receiving 24.6 calls per month, compared to 18.3 for non-specialists.[32] More importantly, the specialists sign significantly fewer calls to a contract for representation. On average, the specialists report signing up 13.0 percent of calls, while non-specialists sign 27.9 percent.[33] While the Plaintiffs' Lawyer Survey asked only about calls in general signed to a contract, our interviews suggest that many specialists actually accept far fewer than 10 percent of malpractice cases that come to them.[34]

The smaller number of open cases, the larger number of calls, and especially the much smaller percentage of cases taken all point to the importance of screening for the specialists.[35] Our interviews indicate that malpractice specialists are quite stringent in screening cases and have elaborate and very thorough processes for doing so. They are often quite adamant in explaining the importance of the screening process and the investment they make in it.[36] Specialists invest thousands of dollars in deciding whether to take a case, and that expenditure does not include the internalized costs of having nurses, nurse-lawyers, or physician-lawyers on staff. The lawyers we

---

31. The difference of means is statistically significant (sig. at .00).

32. The difference of means is not statistically significant (sig. at .16).

33. The difference of means is statistically significant (sig. at .00).

34. A lawyer with a narrow specialization in brain damage cases said, "We look at 200 cases now before I take one." Another specialist said that his firm "turned down at least 600 [potential cases] last year. We probably took in—getting records and screening—about 50, and of those I think we probably only filed 10 lawsuits last year. I keep my caseloads very small." An Austin specialist was equally strict, noting that "I was a defense lawyer, I was predominately med mal defense and I have a pretty good handle on the claims that I think are meritorious." He estimated that they represented 1 out of 120 of the potential claimants. A Houston lawyer reported an even stricter screening process through which the firm took, at best, 1 out of 300 potential cases.

35. We have described elsewhere in detail the importance of screening for plaintiffs' lawyers, including malpractice specialists, and will draw from the discussion here and in the conclusion. *See* Daniels & Martin, *Texas Two-Step*, *supra* note 12, at 638 ("Acquiring and screening cases is crucial for plaintiffs' lawyers since their profitability requires an ongoing flow of clients with injuries that the civil justice system will compensate adequately.").

36. A specialist in Houston explained:

> Between 40 and 50 percent of our temporal resources go into saying no to people who've either lost a family member or have themselves been significantly injured. But doctors think anyone that's had a complication from a medical procedure, they walk in here, we file the lawsuit, and then we hold hands and skip over to the courthouse, raise hell in front of the jury, and the jury shovels millions of dollars in every case. That's what they're thinking. We have screening criteria for these cases. Last year, I looked at over 350 cases against health care providers . . . and we took eleven cases.

A Dallas malpractice specialist made the point succinctly: "I do think an important point is that we do a hell of a lot of screening of cases that shouldn't be filed."

interviewed routinely indicate that an initial outlay of at least $10,000 is needed for experts to determine whether to take a medical malpractice case. This means that specialists may spend thousands of dollars in deciding *not* to take a case. This alone may help explain why a majority of the respondents in the Plaintiffs' Lawyers Survey report taking no medical malpractice cases and why those who do take so few. It also suggests that few lawyers, if any, are likely to work on the "jackpot" basis that is at the heart of the political rhetoric surrounding malpractice.

Each interview revealed a somewhat different process for screening malpractice cases, but all of the interview subjects share a deep concern for determining whether there is likely malpractice *and* whether there are substantial damages. Indeed, specialists are unlikely to take low-value cases even if there is evidence of malpractice. The practice of law is, first and foremost, a business that needs to make a profit, and cases must be seen as being economically feasible. The remarks of two specialists are typical. The first used the following example to explain:

> I had a case today, that called in and a doctor left a tube in their stomach [after surgery] . . . . The guy was fine, the guy was doing well—he just felt like it was malpractice . . . I explained to him that it probably was malpractice, but if he is fine and dandy, then there is no problem. They opened him up and took the tube out and he's fine. There is hardly any way economically to pursue a medical malpractice case such that in the end I will have a happy client. We will pursue the claim and then all the money will have gone for court reporters and doctors' expenses and testifying and things of that nature.

The second lawyer said, "[W]e don't take [low value medical malpractice cases] because the damages may not be of a size that we can dedicate the office forces to handling . . . You just can't stop the world and handle a $25,000 malpractice case. You just can't do it."

The reason for not taking low-value cases even though there may be malpractice involved is simple. There must be enough potential for recovery to pay for the costs of screening the case, the costs of preparing the case, the costs of actually litigating the case, the cost of the lawyer's time, and possibly the cost of a referral fee to the lawyer who brought the case to the specialist. On top of this, there must be enough financial recovery to help pay for the costs of screening all of the cases ultimately rejected by the lawyer, as well as other parts of the lawyer's overhead.[37] The amount of damage

37. According to a San Antonio specialist:

> [T]he contingency fees have to offset the amount of money that I put into other cases or losses that I don't recover . . . you have to be very selective. There are a lot of cases where they are good medical malpractice cases, where there are no damages . . . . [I]t

potential varied among the lawyers interviewed, but few are willing to take anything much below $100,000, and some will take nothing below $1 million. Trying a case, of course, is even more expensive, and that money comes out of the lawyer's pocket as well.[38]

As to the varying processes used to screen malpractice cases, all specialists start with some threshold procedure to eliminate as many callers as possible at the initial contact and determine those in which it might be worth investing further. One specialist's procedure illustrates how stringent the screening process can be. First, a nurse-paralegal takes the initial call. For a large number of these calls, the nurse-paralegal tells the caller that what he or she is describing is not medical malpractice, and things end here. Second, if the nurse-paralegal thinks the case might have merit, then she will get authorization from the potential client to review the medical records, either on her own or after consulting with one of the physician-lawyers in the firm. This firm will not take any medical malpractice client until the medical records have been thoroughly reviewed. Third, once the medical records are obtained, they are reviewed by one of the nurse-paralegals and by one of the firm's physician-lawyers. Fourth, if the initial records review still shows merit, then the records are reviewed again, this time by the firm's senior physician-lawyer and the senior partner who heads the medical malpractice litigation section. Finally, the firm holds a monthly meeting at which those matters that make it through the review process are discussed. Before deciding to proceed with something, the firm's medical professionals must agree that malpractice has been committed and the firm's lawyers must agree that the litigation components—including the amount of damages—are sufficient to warrant litigation.[39]

---

takes just as long and just as much expense to try a case that you can recover $10,000 as the one you recover $100,000 in. So you can't do it [run a successful practice] on that basis.

38. As the San Antonio lawyer quoted in the previous footnote put it:

[W]hen you try a case, you have to pay a physician to come in and testify against another physician—and the cost, if they come to trial and testify, is between $13,000 and $20,000 a person . . . . And those are expenses that your client has to pay out of any recovery, or you, as the plaintiff's attorney, have to eat if you lose the case.

39. According to the firm's senior partner:

We talk about all of them. There has to be an agreement from the medical side and from my side—the legal side of it—that we're going to pursue that case—that not only is the medicine favorable in terms of we believe that there has been a medical screw-up but that we can find an expert that will say that, or we've already found an expert that will say that. At that point, we will have done research through Medline and the medical journals and the medical texts, and we will have medical literature that says what was wrong. And then I look at it from a damages standpoint, a venue standpoint, an economic standpoint. Only if we agree on all of that and basically . . . everybody in the room reaches agreement, do we then decide we're going to then get the client in and sign the client up.

In summary, we can answer our second question by saying there are specialists on the plaintiffs' side in the medical malpractice arena, and the specialists' practices are different from those of other plaintiffs' lawyers. Particular attention goes to screening cases. Not all specialists have a process as elaborate as that described in our illustration or have the in-house expertise that that firm does, but all screen on both the medical and legal factors with great care. Very few matters survive any specialist's review process, including some matters in which malpractice may be evident but the actual damages are relatively low. As one Austin specialist explained it, "[W]e put up the money and we put up the time. . . . I tell my clients exactly what I'm looking at so that they understand that this has got to be economically feasible for our firm." The remaining question to answer is how specialists meet the second key challenge: mobilizing a clientele. The next Part addresses that question.

IV. HOW CAN SPECIALISTS MOBILIZE A CLIENTELE?

As we noted earlier, Galanter argues that a major barrier to the development of real specialization on the plaintiffs' side is the information problem.[40] How will injured individuals—classic "one-shotters" in Galanter's terms—know who the real specialists are? How will specialists get cases? Perhaps one way would be through lawyer advertising. However, Table 5, which presents data from the Plaintiffs' Lawyers Survey on respondents' sources of business, demonstrates that advertising is not a major source of business for medical malpractice specialists.[41] This is not surprising. While advertising may show consumers which lawyers are interested in medical malpractice cases, it does not indicate whether they are any good at it—and this is the key to specialization. Interestingly, it also shows that advertising is not a major source of business for non-specialists either.[42]

40. *See supra* notes 6–10 and accompanying text.

41. The differences of all of the means except advertising are statistically significant (sig. at .02 or better).

42. This is not to say that advertising may not be very important for a small number of specialists. For instance, one specialist interviewed makes a substantial investment in aggressive Yellow Pages and television advertising.

Table 5
Sources of Business (mean %)

	Med Mal Specialists (44)	Non-Specialists (489)
Lawyer Referrals	57.8%	38.9%
Client Referrals	20.6%	29.5%
Other Referrals	7.4%	13.4%
Advertising	10.9%	12.5%
Other Sources	3.0%	6.6%

Instead, Table 5 indicates that the major source of business for medical malpractice specialists is lawyer referrals. Indeed, one-quarter of specialists (11 of 44) report getting 90 percent or more of their business in this way. While injured individuals are unlikely to know who the real specialists are, lawyers—especially plaintiffs' lawyers—are likely to know. As one malpractice specialist observed, almost in direct response to Galanter, "The majority of people don't have that level of knowledge about who they would go to for a medical malpractice case. They would go to who their family goes to, their uncle or who they see on TV, and that lawyer will then bring the case to us . . . [P]robably 90% of cases are from lawyers."

Until 2005, Texas allowed for pure referral fees, meaning that a lawyer could receive a fee for referring a case to another lawyer even if the first lawyer did no other work on the case. In 2005, Texas changed the rules on referrals, eliminating pure referral fees but still allowing for the sharing of fees based on the amount of work performed by the referring lawyer and the lawyer eventually handling the matter.[43] In both the old and new schemes, the idea is to provide economic incentives to move cases—especially complex cases—to the lawyers best able to handle them. As a Dallas malpractice specialist put it, "[T]he truth of the matter is that it encourages referral to a specialist." We found that medical malpractice specialists are able to mobilize a clientele through the referral system.

Table 6 reports on all respondents to the Texas Referral Survey who are in private practice (the likely source of medical malpractice referrals).[44] It shows that medical malpractice cases are the most referred matters in Texas. They are not, of course, the most frequently occurring type of case, or even the most frequently

43. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04 (2005), *available at* http://www.texasbar.com/Content/ContentGroups/Client_Attorney_Assistance1/Texas_Disciplinary_Rules_of_Professional_Conduct/TDRPCEffectiveJune12005.pdf.

44. *See* TEXAS REFERRAL SURVEY, *supra* note 13.

occurring tort cases. Automobile accident cases are by far the most frequent tort cases.[45] Many lawyers may be willing to take an automobile accident case, but most plaintiffs' lawyers, as we have seen, either take no medical malpractice cases or take very few. We can assume that other (non-plaintiffs') lawyers would be even more reluctant to take a medical malpractice case. While lawyers may not actually want to handle a medical malpractice case, they may be quite willing to refer such a case for a shared fee if there are lawyers who are looking for such cases and can handle them successfully. In the Texas Referral Survey, 42 lawyers report that they accepted at least one medical malpractice case for which they paid a referral fee to another lawyer.

Table 6
Top Five Types of Cases Referred with Expectation of a Fee:
All Respondents in Private Practice (N=861)
(Texas Referral Survey)

Type of Case	N of Cases
Medical Malpractice	642
Auto Accident	550
Products Liability	484
Criminal	344
Employment	287

Table 7 shows that for those respondents to the Referral Survey who had referred at least one medical malpractice case with the expectation of receiving some kind of fee in return, the most important reason for that referral was that the case was outside of the lawyer's practice area. The next most important reason was that the case was in the lawyer's general practice area but was too complex. Given the reluctance of many lawyers to handle malpractice cases (as illustrated in the previous Part), this pattern is exactly what we would expect to see.

45. Daniels & Martin, *Strange Success*, *supra* note 12, at 1231–32.

Table 7
Reasons for Referring Medical Malpractice:
All Who Referred at Least One (N=195)
(Texas Referral Survey)

Reason	Percent*
Out of Practice Area	79.0%
Too Complex	44.1%
Geographic Distance	38.5%
Caseload Full	18.5%
Value Too Low	21.0%
Value Too High	12.8%
Most Cases Referred	0.5%

*Percentages will not add to 100%, since respondents were asked to check all that applied.

Table 8 shows that when lawyers were asked in the Referral Survey how they chose to whom to refer the case, the most important reason they gave, by far, is a lawyer's reputation, followed by a lawyer's compatibility with the client. The size of the referral fee is far less important. Both our interviews with plaintiffs' lawyers and the academic literature reinforce the importance of reputation in attracting referrals.[46] Perhaps the best illustration of this observation is the statement of an Austin plaintiffs' lawyer we quoted in an earlier article, a lawyer who aspired to building a practice based on lawyer referrals of substantial cases:

> That's 95% of the game, just getting the case . . . In order to get the case . . . some lawyer is going to hring it to you. And the reason he brings it to you is because, at least in his mind, you have a reputation for being equipped to deal with it, and equipped to get a good result, which is important to him hecause he's going to get a referral fee.[47]

46. *See* Daniels & Martin, *It's Darwinism*, *supra* note 12, at 380–82 (providing empirical analysis of how a lawyer's reputation attracts clients and allows for a more profitable practice); *see also* Kritzer, *supra* note 4, at 232–33 (describing how a lawyer's business is developed through reputation among other lawyers).

47. Daniels & Martin, *It's Darwinism*, *supra* note 12, at 387.

Table 8
Reasons for Choosing the Lawyer:
All Who Referred at Least One Malpractice (N=195)
(Texas Referral Survey)

Reason	Important %	Neutral %	Unimportant %
Size of Fee (189)	11.6%	21.2%	67.2%
Lawyer's Reputation (190)	98.9%	1.1%	0
Reciprocity (186)	16.7%	18.3%	65.1%
Compatibility with Client (184)	56.5%	24.5%	19.0%

Reputation, of course, is about name recognition, and malpractice specialists must find ways of establishing and maintaining visibility among other lawyers. Our interviews indicate that they do so in a number of ways. Some malpractice specialists, like other lawyers relying upon referrals, engage in sophisticated marketing campaigns. More than one specialist told of sending brochures to other lawyers. For example, one mailed a brochure summarizing his firm's successes in the malpractice arena to approximately "50,000 of the 60,000 members of the State Bar of Texas." He reported, "We have referrals from all over the state."[48]

Specialists also enhance their visibility in other ways. All are careful to make sure that their verdicts appear in the local jury verdict reporters and in the newspapers.[49] An increasing number of them use sophisticated websites that tell about their specialization and many successes, including the size of the awards or settlements attained. In addition, specialists build and maintain visibility through various kinds of professional activities and networking. Many are active members of local, state, and national plaintiffs' lawyers' organizations, frequently in leadership positions. Others teach continuing education classes in Texas or appear as speakers at major professional meetings.[50]

48. Another specialist mailed a brochure to an estimated 7,000 lawyers "as a marketing pamphlet . . . from Houston south." He said, "We got a lot of phone calls out of that . . . . It is a constant reminder of why marketing is important."

49. The lawyer quoted in the previous footnote said: "If we get a big verdict, whether it makes the newspapers or not, word gets out amongst lawyers and we'll get a big spike on phone calls . . . . [Y]ou are always keeping the name out there . . . and there's nothing that does tbat better than a real good verdict." Another said, "We try to be available to the media when they want us to talk about an issue. I go out of my way to try to do that and that constitutes some marketing."

50. One specialist said, "[I]n the past five years I've spoken at [a Texas law school] CLE program four times [and] for [a trial lawyers organization] three times . . . . [T]he wbole reason is

Once a referral relationship is established, many specialists cultivate the relationship with the hope of receiving referrals in the future if the source is a good one. As one lawyer bluntly put it, "It's everything [the relationship]. That's our client [the referring lawyer]." The referral relationship can last for years.[51] The geographic range of these relationships, once established, can be quite broad. Some cover particular regions as market niches, while others are simply statewide.[52] Of course, specialists in the larger urban centers also develop ongoing referral relationships with lawyers in their own area.

Specialists meet Galanter's challenge and mobilize a clientele by mobilizing other lawyers through a referral system that allows the referral of cases with the expectation of a fee. The fee is everything, because it provides the economic incentive for lawyers who are less able to handle medical malpractice cases to move those cases to lawyers who can handle them. Tables 7 and 8 provide clear support for the idea that—at least with regard to complex cases like medical malpractice—the referral system may indeed work to move cases from less able to more able lawyers. In providing detail on the extensive efforts specialists make to attract referrals, our interview data reinforce this idea. In Texas, at least, there is a robust market for referrals that allows a small number of plaintiffs' lawyers to build highly specialized practices in medical malpractice litigation.

V. CONCLUSION

The medical malpractice system is quite different from its characterization in the political rhetoric when we take into consideration lawyers who specialize in medical malpractice litigation. It is not a "jackpot" system in which lawyers are willing to take more and weaker cases in the hopes of winning big. Economically, a "jackpot" system cannot work for very long for lawyers handling medical malpractice cases on a contingency fee basis. The lawyers will, quite simply, go broke.[53]

---

to get your name out there in a legitimate way to a legitimate audience because you are speaking to all lawyers." At his firm, "we make a commitment to speak at as many legal seminars as we can. Those are state-wide types of events . . . . [Y]ou make the circuit."

51. A Dallas specialist noted, "[W]e have some lawyers that frequently refer to us and have for many years, and then we have lawyers that may just have an occasional case that they send over."

52. An Austin specialist built ongoing relationships with lawyers in East and West Texas. A Houston specialist developed referral relationships with lawyers in East Texas, and a San Antonio specialist developed referral relationships with lawyers in South Texas.

53. As a specialist from San Antonio noted:

Reforms based on the "jackpot" characterization, such as caps on non-economic damages, are unlikely to succeed in solving the kinds of problems identified by the political rhetoric to justify these reforms. For instance, the political rhetoric talks about doctors leaving the state, the unavailability of medical services in rural areas, and the unavailability of services from certain medical specialists anywhere, to name just a few problems that supposedly will be solved by reforms like damage caps. Of course, simply because the rhetoric touts certain goals to gain political support for desired changes, it does not mean that those are the real targets.

Caps, if they are low enough, may drive the specialists out of this market or lessen their participation by making it harder for the specialists to operate in a profitable manner. This is exactly what we heard in our recent interviews with specialists in the wake of the 2003 enactment of a $250,000 cap on non-economic damages in health care cases in Texas. For instance, we re-interviewed a specialist interviewed a number of years before the 2003 cap (and quoted previously in this Article). He said that his practice used to consist of over 90 percent medical malpractice; since the 2003 cap, however, that ratio has fallen to 60 percent medical malpractice and 40 percent other contingency fee work. He is not alone, and specialists like him who have attained a meaningful level of strategic advantage may well be the real targets of reforms like caps.[54] Such a cap is less likely to affect the lawyer who handles only one or a few malpractice cases, since these lawyers are less likely to handle the kinds of cases that bring awards above the cap limit and are less successful when they do handle such cases.

Diminishing the participation of the most skilled plaintiffs' lawyers in the medical malpractice system can have far-reaching effects.[55] Typically, these lawyers obtain the best settlements, not only because they are better-than-average negotiators, but also

---

> The practice of plaintiffs' personal injury law is not the lottery; it's not people who come in here and we get them big bucks. . . . I don't know of very many frivolous lawsuits. . . . I can't imagine from any set of facts bow anybody could helieve that you would take a case on a contingency fee that had no merit. I mean all it does is cost [the lawyer] money.

54. *See* Daniels & Martin, *Texas Two-Step*, *supra* note 12, at 661–64 (exploring the "possible effect of the Texas damage cap on" lawyers specializing in med mal); *see also* Mark Donald, *Access Denied: Does Tort Reform Close Courthouse Doors to Those Who Can Least Afford It?*, TEX. LAW., Jan. 10, 2005, at 1 (describing the decline in profitable medical malpractice work among Texas lawyers).

55. This paragraph draws from an argument found in Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1452–54 (1993). For a more detailed use of the Galanter and Luban argument in the medical malpractice context, see also Daniels & Martin, *Texas Two-Step*, *supra* note 12, at 663–68.

because defendants do not want to confront them in jury trials. The Wisconsin data show that the specialists are more successful, even against the best defense lawyers. Most cases, of course, settle out of court, and information about the size of settlements is usually disseminated among both the plaintiffs' and defense bars. This information sends signals that govern negotiations in future cases, because settlement negotiations occur in the "shadow" of past settlements. It also sends signals that enhance a lawyer's reputation and attract referrals. If too many good lawyers exit this market, the shadow shortens, and defendants will be able to bargain harder for lower settlements. In other words, it may be possible to affect change in the law itself—*in practice*—by attacking specialists and altering the market for their services.

***