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Introduction: The Plaintiff's Bar

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Introduction

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In March 2006, the New York Law School Center for Professional Values and Practice sponsored a symposium on the plaintiffs' bar. The conference brought together legal academics, social scientists, and members of the practicing bar to explore the current terrain of plaintiffs' practice. Presentations at the conference considered the organizational structures and business strategies that shape plaintiffs work, compared the challenges faced by lawyers in different types of practice, reflected on the politics and effects of tort reform, and — most fundamentally — explored the compromised state of civil justice in the United States at the dawn of the 21st Century.

The papers collected in this special issue reflect the diversity of questions raised at the conference. Several of the papers seek to deepen our empirical understanding of the work of plaintiffs' lawyers. In her study, Mary Nell Trautner considers the extent to which case selection rates map onto social hierarchies within the high-end plaintiffs' bar. She finds that — with the exception of lawyers who specialize in medical malpractice and products liability cases — variables, such as years of experience, do not account for differences in case selection rates among high-end plaintiff lawyers. She concludes that focusing on case selection rate may not yield additional useful data. She urges future researchers to explore more deeply the case selection process and, in particular, the avenues through which lawyers obtain potential cases and the various criteria they apply in selecting them. Trautner's paper is a valuable contribution to a burgeoning literature that seeks to understand how tort lawyers' screening decisions provide — or more often deny — victims access to the justice system.

Advancing the research agenda previewed by Trautner, Sara Parikh investigates the referral process in case selection. As she shows, high-end lawyers tend to obtain their cases through referrals from other lawyers more frequently than low-end lawyers, who more typically depend on advertising, word of mouth within local communities, and other sources. Embedded referral networks, in which high-end practitioners obtain cases from low-end tort lawyers or lawyers in other fields, reinforce social stratification within the plaintiffs' bar. Drawing on network theory, Parikh suggests that embedded networks benefit clients by strengthening the market for legal services and lawyers. Referral relationships increase standards for performance in terms of how lawyers handle cases and clients. According to Parikh, they also promote trust, efficiency, and the informal transfer of information. Although lawyers have to invest in referral relationships to maintain them, they provide significant advantages by allowing lawyers to avoid competing over every case.

In their article, Stephen Daniels and Joanne Martin turn to the effects of recent tort reforms in Texas on plaintiffs practice and, by extension, on access to the civil justice system. They emphasize that political efforts to reform the tort system focused not only on concrete legislative initiatives, but also on shaping public views about the merits of the civil justice system. Comparing data they collected in 2000 and 2006, Daniels and Martin show how legal reforms and shifts in public opinion, reflected in lower jury awards, have altered the business

of tort practice. Among the changes they document are: fewer calls from prospective clients, a decline in median and mean case values, and a shift away from contingency fee to other types of cases. They also observe a greater reluctance among lawyers to bring lower-value automobile cases involving soft tissue injury. As their respondents explained, juries have become much more skeptical about these sorts of claims. In the area of medical malpractice, Daniels and Martin found that a cap on non-economic damages enacted by the Texas legislature in 2003 had a significant effect on lawyers' willingness to take malpractice claims involving seriously injured persons — such as children and the elderly — who do not have substantial economic damages. As their research illustrates, tort reform, though phrased in ostensibly neutral terms, has had its most severe impact on the capacity of the least powerful members of American society to obtain redress for their injuries.

The next papers focus on normative issues. Robert S. Peck and John Vail survey the various strategies tort reformers have pursued to limit plaintiffs' access to the justice system. The tactics they describe include statutory limits on contingency fees, the ubiquitous use of mandatory arbitration agreements, the expansion of civil immunity to particular industries, and attempts to amend procedural and evidentiary rules to favor corporate defendants. Less publicized are attacks on doctors willing to provide expert testimony on behalf of plaintiffs in medical malpractice cases. These doctors are increasingly scrutinized through peer review processes and medical licensure proceedings in an effort, Peck and Vail suggest, to discourage them from testifying.

In his article, Richard Abel explores the normative question animating much research on the plaintiffs' bar, namely, what changes would most likely enhance the capacity of victims to obtain redress for their injuries. Unlike other participants in the conference, Abel is deeply skeptical that lawyers play a positive function in providing access. In his view, there is a fundamental misalignment between clients' interest in acquiring information about lawyers' integrity and competence, and lawyers' economic interest in protecting their monopoly over the market for legal services. Abel first considers whether plaintiffs would not be better served if the current private market in plaintiff legal services were eliminated. In its place, he considers three proposals: an insurance abrogation mechanism that would give insurers incentives to sue tortfeasors, the loosening on practice restrictions to allow para-professionals to represent clients, and government funding for plaintiff's legal services. He concludes that, for different political reasons, none of these options is feasible.

Abel next describes recent innovations in the market for plaintiffs' services intended to address information and economic asymmetries that limit plaintiffs' ability to obtain competent and ethical representation. In recent years, disinterested rating organizations have cropped up on the internet that efficiently aggregate consumer information about products and services. Abel is doubtful that

such a system would be effective in providing information about the quality of legal services since these services are individualized and not subject to evaluation by simple objective measures. Rejecting next the idea of aggregating claims, Abel turns to the possibility of brokers who would match clients with tort lawyers. As he notes, such a system already exists in the form of lawyer referral networks. Contra Parikh in this issue, Abel argues that these networks do not optimize clients' interests since referral decisions are often driven by considerations, such as maintaining a long-term professional tie, that differ from finding the best lawyer for a client. Finally, Abel considers various new devices to finance plaintiffs or their lawyers. While these devices appear to solve the problem of providing resources to plaintiffs with pressing financial needs, they risk imposing significant costs on plaintiffs in the form of interest exceeding standard commercial rates. All the proposals reviewed by Abel are, at bottom, market mechanisms and are therefore plagued by the market's inherent limits in ensuring access to quality legal representation. Ultimately, Abel takes lawyers to task for supporting a wide range of restrictions that increase barriers for would-be plaintiffs. According to Abel, significant responsibility for the failures of the civil justice system lies with the American legal profession, which has pursued monopolistic regulatory strategies that impose significant costs on injured persons seeking redress. Were it not for expensive and unjustified barriers to entry into the profession, restrictions on referral fees to non-lawyers, prohibitions against unauthorized practice, and resistance to specialized certification, more injured clients would be able to recover — and in greater amounts — for their injuries.

These papers build an empirical foundation to consider the practices that plaintiffs' lawyers adapt to ever changing regulatory, market, and political realities. They also suggest that debates about the root cause of lack of access will not be put to rest any time soon. Looking outward, scholars and legal practitioners will continue to see a political environment hostile to individual plaintiffs and their lawyers. Looking inward — a direction less taken, but one faced in this volume — observers see the bar's own complicity in driving up costs, reinforcing barriers that prevent victims from obtaining compensation, and detracting from the law's deterrent and preventive effects.

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