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Stephen Daniels

Joanne Martin

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# PLAINTIFFS' LAWYERS: DEALING WITH THE POSSIBLE BUT NOT CERTAIN

*Stephen Daniels\**

*Joanne Martin\*\**

## INTRODUCTION

Plaintiffs' lawyers do not work in a world of predictability or one of uncertainty. For them the dichotomy probably makes little sense. They work in a world of the possible, one grounded in the variability and complexities of individual disputes and the processes that resolve them. As one lawyer we interviewed said about screening cases, he has

to be able to see the light at the end of the tunnel. It doesn't mean that I'm 100% sure I'm going to recover, because it is never guaranteed. But I usually have a pretty good idea when I take a case that there is going to be some sort of recovery.<sup>1</sup>

To use the obvious term, plaintiffs' lawyers work in a world of contingency. Between the extremes of predictability and uncertainty, they work in a context of knowable patterns and regularities that allow them to make judgments about the likely. Plaintiffs' lawyers as we know them would not have a place in a truly predictable or regularized legal world because there would be few, if any, disputes.<sup>2</sup> Nor would they exist in a truly uncertain or random legal world because the risks in taking a case would be too great. In either situation, no

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\* Research Professor, American Bar Foundation.

\*\* Research Professor Emerita, American Bar Foundation. Research supported by the American Bar Foundation. The views expressed are those of the authors, not the American Bar Foundation.

1. All lawyers quoted in this paper were interviewed as a part of our research on Texas plaintiffs' lawyers. A detailed description of our methodology for the 2000 survey can be found in 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, 1826-28 (2002). The methodology of the 2006 survey was the same except that it used a current list of plaintiffs' lawyers rather than the one used in 2000, and it included new questions asking about referral practices. The 2000 survey had a response rate of 27.3% and the 2006 survey had a response rate of 25.7%. *Id.* at 1827. For both surveys, the number of responses fell within a confidence interval of plus or minus four percentage points at the 95% confidence level. Survey responses are confidential and on file with the authors.

2. This, of course, would make some critics quite happy. See generally PHILIP K. HOWARD, *LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW* (2009).

one would be foolish enough to engage their services—there would be no point. The adversary system is based on the idea that neither situation describes reality.

The contingent world in which these lawyers work includes processes and actors that resolve disputes within well-understood rules both formal and informal. Most of the papers in this Symposium focus on issues related to uncertainty (or the lack of predictability) in the formal rules and processes—the “black letter law” or the law on the books. Our focus is different; it is on the empirical reality of the world in which plaintiffs’ lawyers work—the law in action. This distinction between the law on the books and the law in action is an old one among law and society scholars. Stewart Macaulay described the idea in the following way:

I need not remind practicing lawyers that law is not only rules or appellate opinions. It is structures and practices in courts and administrative agency hearing rooms. It is the attempts by the Governor and the legislators to cope with emerging social problems. It is the quaint native customs of bench and bar in particular cities. It is the lawyer seeking new ways to deal with corporate take-overs or Superfund litigation in her office. It is also the not always consistent collection of ideas about law held by . . . citizens.<sup>3</sup>

The distinction is especially relevant in the context of uncertainty and predictability in the legal system because it is in the world of legal action where this distinction matters.

Along with the long-term concern with regard to the law on the books, there has also been concern over uncertainty with regard to the law in action. It can be seen in the political debate over tort reform and what can be called the “predictability critique” of the civil justice system. A serious lack of predictability in key parts of the system in action has been a predominant part of the argument made by tort reform advocates for substantial changes in the civil justice system. As if recognizing the centrality of juries and jury verdicts, much of that critique has focused on them. The problem is an alleged lack of predictability in what juries do and hence the characterization of the jury system as a lottery. This, in turn, is supposedly the cause of broader social and economic ills.<sup>4</sup> Plaintiffs’ lawyers are a key part of

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3. Stewart Macaulay, *Wisconsin's Legal Tradition*, 24 GARGOYLE, no. 3, 1993, at 6, 9.

4. For instance, see the American Tort Reform Association (ATRA) Web site, describing the organization’s mission and stating, “These [tort] lawsuits are bad for business; they are also bad for society. They compromise access to affordable health care, punish consumers by raising the cost of goods and services, chill innovation, and undermine the notion of personal responsibility.” *ATR’s Mission: Real Justice in Our Courts*, AMERICAN TORT REFORM ASSOCIATION, <http://www.atra.org/about/> (last visited Mar. 9, 2011).

the problem because, the critics argue, they help foster and maintain the unpredictability and profit greatly by it.<sup>5</sup>

In light of the predictability critique and the uncertain world it presumes, our interest in this Article is in how plaintiffs' lawyers perceive that same world. They must be keen observers of their environment—and the rules, processes, and actors in it—if they are to have any hope of being successful and making a profit. Given that these lawyers exist, and do so profitably, we want to identify and describe the sense of that environment that is reflected in how they structure their practices and what they actually do. We want to explore what these things tell us about the civil justice system and whether a predictability/uncertainty dichotomy is helpful in understanding it.

This Article is divided into five substantive parts. Part II looks briefly at the idea of the predictability/uncertainty dichotomy with regard to juries and does so from the perspective of the tort reform rhetoric, in which it is deeply embedded.<sup>6</sup> Juries are especially important to plaintiffs' lawyers, and juries are also a major target of tort reformers. Part III looks at the logic of plaintiffs' practice, a business model built on a particular view of how the civil justice system works—one that will support a successful practice that relies upon matters taken on a contingency fee basis.<sup>7</sup> This Part emphasizes the importance of juries, jury verdicts, and “going rates” to the logic of that business model. Because going rates delineate the possible, they also mean that substantial risk is involved for contingency fee-based practices.<sup>8</sup> In light of this, Part IV looks at what makes such a risky environment an attractive one.<sup>9</sup> One might well ask the question of why a lawyer would even try to build a contingency fee practice in a highly risky environment. The predictability critique, in its view of the law in action, points solely to profit—that plaintiffs' lawyers extract significant

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5. Again looking to the ATRA Web site, we find the following statement:

Aggressive personal injury lawyers target certain professions, industries, and individual companies as profit centers. They systematically recruit clients who may never have suffered a real illness or injury and use scare tactics, combined with the promise of awards, to bring these people into massive class action suits. They effectively tap the media to rally sentiment for multi-million-dollar punitive damage awards. . . .

. . . The personal injury lawyers who benefit from the status quo use their fees to perpetuate the cycle of lawsuit abuse. They have reinvested millions of dollars into the political process and in more litigation that acts as a drag on our economy.

*Id.*

6. See *infra* notes 12–34 and accompanying text.

7. See *infra* notes 35–60 and accompanying text.

8. See generally HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

9. See *infra* notes 61–67 and accompanying text.

and unwarranted profits from the civil justice system's dysfunctions. The view reflected in the practices of plaintiffs' lawyers is not so simple.

Part V looks at a more practical issue: how the logic underlying the plaintiffs' lawyers' business model shapes their practices.<sup>10</sup> Part VI also looks at a practical issue: how that logic affects what plaintiffs' lawyers do in trying to get clients.<sup>11</sup> This is perhaps *the* major challenge faced by plaintiffs' lawyers—maintaining a steady stream of clients with injuries the legal system will compensate adequately (meaning an amount sufficient to provide compensation for the client, a fee for the lawyer, and reimbursement for the costs incurred by the lawyer in representing the client). If the challenge is not met, then the lawyer goes out of business. And some do. As one lawyer told us, “As long as the phones are ringing, we're OK. If the phones stop ringing, I may as well turn out the lights.”

To explore these issues, we will draw from our research on Texas plaintiffs' lawyers, which includes two rounds of in-depth interviews and two detailed mail surveys. The first round of interviews took place in the late 1990s and the second took place in 2005–2006 (a total of 151 interviews). Among other things, both sets of interviews asked lawyers a series of detailed questions concerning their practices. The first survey took place in 2000 and had 554 respondents, while the second was in 2006 and had 460 respondents. Both surveys asked exactly the same questions about lawyers' practices, and for this Article we utilized the pooled responses from both surveys.

## II. PREDICTABILITY AND UNCERTAINTY

Juries have long been a target of critics, largely because of a concern over bias and competence.<sup>12</sup> For instance, Jerome Frank, writing in the early 1930s, gave voice to a common and persistent view of juries. He said, “Proclaiming that we have a government of laws, we have, in jury cases, created a government of often ignorant and prejudiced men.”<sup>13</sup> He saw juries as capricious and prejudiced. They ignore legal rules and doctrines and allow non-legal and often irrelevant factors to sway their judgment. Indeed, he claimed, “That the defendant is a

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10. See *infra* notes 68–73 and accompanying text.

11. See *infra* notes 74–86 and accompanying text.

12. The discussion in this Part draws from STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 1–28 (1995).

13. JEROME FRANK, *LAW AND THE MODERN MIND* 191 (1963).

wealthy corporation and the plaintiff is a poor boy . . . often determine[s] who will win or lose.”<sup>14</sup>

One can find similar sentiments in insurance industry public relations campaigns from the 1950s onward to the tort reform debate that heated up in the 1980s and continues today. By the 1970s there was an organized and concerted effort to bring about change in the civil justice system, and the criticism of juries played a central role in that effort.<sup>15</sup> For instance, writing in 1979 about insurance industry advocacy advertisements, psychologist Elizabeth Loftus observed,

In response [to jury verdicts] several insurance companies have begun a curious advertising campaign . . . .

These firms [such as St. Paul Insurance and Aetna] have spent at least \$10 million on print advertisements in such varied publications as *Time*, *Newsweek*, the *Wall Street Journal*, *Sports Illustrated*, *National Review*, and *New Republic*. For example, one ad of the St. Paul Insurance Company begins, “You *really* think it’s the insurance company that’s paying for all those large jury awards?” and goes on to answer that question, “We *all* do.”<sup>16</sup>

The criticisms that fueled that earlier effort have dominated the debate ever since—juries continue to be cast as capricious.<sup>17</sup> As a result, the critics believe the jury system has become a bizarre lottery, lacking predictability and consistency as to who wins and how much winners are awarded.

This allegation has had special relevance in areas like medical malpractice and products liability where damage awards can be very high. For example, in a widely circulated, pro-tort reform speech from the mid-1980s entitled *The American Tort System: A Time to Rebalance the Scales of Justice*, insurance executive William McCormick complained that “[c]ertainty and predictability have been two casualties of the developments of the last 25 years. Without certainty and predictability, plaintiffs sue, defendants don’t know how to protect themselves and we in the insurance industry can’t price, and in some cases

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14. *Id.*

15. See THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 22–59 (2002); DANIELS & MARTIN, *supra* note 12, at 29–59; WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 33–52 (2004); JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA* 96–108 (1996).

16. Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68, 69 (1979). For a discussion of similar campaigns in the mid-1980s, see generally Franklin W. Nutter, *The Fight for Civil Justice Reform*, *INS. REV.*, Nov.–Dec. 1984, at 2.

17. See, e.g., PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 50 (1988).

can't accept, risks."<sup>18</sup> Dr. Otis Bowen, Secretary of Health and Human Services in the Reagan Administration (this Administration was a major player in jump-starting the tort reform effort in the mid-1980s),<sup>19</sup> criticized the jury in the medical malpractice system: "It has become more a lottery than a rational system for compensating the injured."<sup>20</sup>

Peter Huber, a prolific tort reform policy entrepreneur, echoed these criticisms in his widely read book, *Liability: The Legal Revolution and Its Consequences*. He complained of the "mounting randomness and incoherence of jury outcomes" in products liability cases.<sup>21</sup> In his conclusion, he characterized the situation as "today's wide-open legal casino."<sup>22</sup> Long-time critic Jeffrey O'Connell even titled a 1979 book on the civil justice system *The Lawsuit Lottery* to describe "the capricious nature of our legal system as it applies to personal injury cases."<sup>23</sup> Former Monsanto CEO Richard Mahoney, in a series of widely circulated publications in the mid-1980s, also complained of uncertainty in the products liability area, especially with regard to cases involving punitive damages. In a co-authored piece that appeared in the prestigious journal *Science*, Mahoney and Director of Public Affairs for Monsanto, Stephen Littlejohn, stated that "[w]hen coupled with strict liability, huge punitive damage awards [made by juries] are the greatest cause of legal uncertainty for innovators."<sup>24</sup> They went on to say that "[t]he punitive damages system makes it too easy for lawyers to mislead jurors" and to reference the Reagan Justice Department for the observation "that punitive damages have become a legal lottery."<sup>25</sup>

Concern over juries continues today. For instance, the U.S. Chamber of Commerce's Institute for Legal Reform annually surveys "in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters at public and private companies with annual revenues of at least \$100 mil-

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18. William M. McCormick, *The American Tort System: A Time to Rebalance the Scales of Justice*, 52 VITAL SPEECHES OF THE DAY 267, 268 (1986).

19. See generally U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986).

20. Otis R. Bowen, *Congressional Testimony on Senate Bill S. 1804*, 257 JAMA 816, 818 (1987).

21. HUBER, *supra* note 17, at 50.

22. *Id.* at 229.

23. JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 4 (1979).

24. Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCI. 1395, 1396 (1989).

25. *Id.* (citing U.S. DEP'T OF JUSTICE, *supra* note 19).

lion.”<sup>26</sup> Problems with juries are the most important factors, according to the survey respondents, in creating a bad litigation environment and hence a low score on the Institute’s ranking scale.<sup>27</sup> Among the specific problems are unpredictability, bias, unfairness, excessive awards, and incompetence.<sup>28</sup> As further evidence of the ongoing concern over jury predictability and related allegations, one need only look to the contribution of Valerie Hans and Theodore Eisenberg to this Symposium—a contribution that calls the predictability critique into question.<sup>29</sup>

As noted in Jerome Frank’s earlier quote, there has always been a certain contradictory element in the criticism of juries. This is seen in the asserted combination of capriciousness and bias on the part of juries. Along with being a random lottery, jury decision making is also characterized as consistently and inappropriately favoring some interests to the detriment of others. An old and widely asserted claim is that juries are biased against businesses, professionals, governmental bodies, and other defendants with deep pockets. One need only look at Frank’s claim about the poor boy and the wealthy corporation for an expression of this notion. The problem, in his estimation and in that of many more recent critics, is that juries generally decide in favor of individual plaintiffs suing so-called deep pocket defendants and consistently award the plaintiffs large sums of money.<sup>30</sup>

In another article published the same year as the one in *Science*, Monsanto CEO Mahoney claimed that there is “a statistically proven relationship between the punitive damages award and the relative wealth and unpopularity of the defendant.”<sup>31</sup> He alludes to the same idea in the *Science* article, although less boldly.<sup>32</sup> He further muddies the waters by saying that the “legal lottery” that defines the awarding of punitive damages is apparently certain enough that plaintiffs’ law-

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26. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RANKING THE STATES: LAWSUIT CLIMATE 27 (2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/lawsuitclimate2010/2010LawsuitClimateReport.pdf>.

27. *See id.* at 13.

28. *Id.*

29. *See generally* Valerie Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375 (2010).

30. For a different view of this claim, see VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 219–21 (2000).

31. Richard J. Mahoney, *Consumers, Competitiveness Suffer from Excesses in Punitive Damages*, FINANCIER, Jan. 1989, at 20, 21. While Mahoney is arguing against such a relationship, Marc Galanter and David Luban have argued in favor of it, saying, “High punitive damages awards hit *homo economicus* where it hurts: an eye for eye, a tooth for a tooth, and a bottom line for a bottom line. It is poetic justice.” Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1440 (1992).

32. *See* Mahoney & Littlejohn, *supra* note 24, at 1397.



yers can successfully bet on a favorable outcome: "Even though their probability of success is small and only about 5% of all cases filed end with a verdict, plaintiffs' lawyers recognize that if enough such claims are filed, they may eventually hit the jackpot."<sup>33</sup>

While the notion of bias is, at one level, in apparent contradiction with that of capriciousness, the two are similar in one respect. The underlying logic is that juries are incompetent to decide cases fairly and rationally. The difference between the two allegations lies in the presumed result of jury incompetence. The concept of capriciousness expects a result of chaos, while the concept of bias predicts a kind of consistency and order, albeit one based upon inappropriate criteria. In either situation, it appears that plaintiffs' lawyers are the ones taking advantage of the situation. In Mahoney's words, the system makes it "too easy for a lawyer to persuade a jury . . . to enrich plaintiffs and contingent fee lawyers with multi-million dollar windfalls."<sup>34</sup>

### III. THE WORLD OF PLAINTIFFS' LAWYERS

#### A. *Knowable but not Predictable*

At the outset, we said that the predictability/uncertainty dichotomy may not make much sense to plaintiffs' lawyers. In either the world of predictability or that of uncertainty, there would not be plaintiffs' lawyers. Instead, plaintiffs' lawyers work in a world of contingency or the likely—a world of knowable processes, actors, patterns, and regularities. The idea of predictability assumes a process that works something like a formula—if certain specific factors are present, then a given result should always occur—and it assumes that it is clear what those factors are. It is as if we were talking about some part of the physical sciences. At the extreme, it is the kind of predictability—as the earlier quote from insurance executive William McCormack shows—that the insurance industry needs for underwriting risks and determining appropriate prices for insurance.

Plaintiffs' lawyers simply do not look at the legal environment in this way. They make sense of that environment in a completely different way, because for them it does not lend itself to formula-like statements. Still, their environment is knowable and understandable. To explain this we think it would be helpful to borrow loosely from a discussion by anthropologist Roy D'Andrade that looked critically at different research worldviews among social scientists. It offers a met-

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33. *Id.* at 1396 (footnote omitted).

34. Mahoney, *supra* note 31, at 21. Nearly the same words appear in the *Science* article. See Mahoney & Littlejohn, *supra* note 24, at 1396.

aphorical framework for thinking about the plaintiffs' lawyers' world in contrast to the predictability critique.<sup>35</sup> One key distinction D'Andrade made appears relevant for this discussion: a distinction between a research approach corresponding to the physical sciences and one corresponding to the natural sciences. Each, he says, has a different answer to the question of what kind of knowledge social science inquiry can produce and how it produces that knowledge.

The research world view of the physical sciences sees

an almost completely homogeneous universe where all generalizations apply equally through all time. There are only a few basic objects and a few forces, and their interrelationship can be stated in quantitative mathematical form. . . . There is also the sense that everything is the way it is because of some deep necessity, which is what one tries to capture in the statement of a law.<sup>36</sup>

This is the approach of "logical empiricism," which holds that "the aim of science is to discover universal laws, and the method is to deduce causal hypotheses from more general theories and test them against masses of observable data."<sup>37</sup> The critics of juries and the civil justice system who push the predictability critique seem to envision a legal system that should act in a way consistent with the physical sciences perspective. They appear to want the kind of predictability and certainty that comes with interrelationships that can be stated in law-like, mathematical form.

There is one big difference between the critics' approach and that of the physical scientist. For the critics, predictability is *the* normative standard to use in evaluating the civil justice system in general and evaluating what juries do in particular. Because in their view the system falls woefully short, changes should be made to ensure that it does work in predictable fashion. In contrast, the physical scientist makes no normative judgments and makes no arguments for changing what he or she observes. The idea is to describe and explain rather than pass judgment.

In contrast to a research worldview of the physical sciences, D'Andrade points to a worldview corresponding to the natural sciences. In this alternative, the world the natural scientist studies "is very lumpy or patchy" and not amenable to predictive statements.<sup>38</sup>

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35. See Roy D'Andrade, *Three Scientific World Views and the Covering Law Model*, in *METATHEORY IN SOCIAL SCIENCE: PLURALISMS AND SUBJECTIVITIES* 19 (Donald W. Fisk & Richard A. Shweder eds., 1986).

36. *Id.* at 20–21.

37. PAUL DIESING, *HOW DOES SOCIAL SCIENCE WORK?: REFLECTIONS ON PRACTICE*, at x (1991).

38. D'Andrade, *supra* note 35, at 21.

Where the worldview of the physical science approach is based on reduction and uniformity, the natural science approach sees complexity and contingency. From this perspective, D'Andrade notes, "The basic questions are, What is it made of? How does it work? Generalizations about how things work are often complex, true only of one particular kind of thing, and are usually best stated in simplified natural language."<sup>39</sup> Such an approach is likely to mix together deductive and inductive theorizing and to view different analytical techniques from the pragmatic perspective of what will work in a given situation. Rather than being about generalizable, predictive statements, this approach is about the nature of processes and their contingent relationships with other factors. It is an orderly and knowable world, but not a predictable one.

The plaintiffs' lawyers' worldview is closer to that of the natural sciences; it is descriptive and analytical in character. Theirs is a bottom-dweller's detailed view of the civil justice system rather than the top-down, aggregate view of an outside observer or critic. It is a complex, lumpy, and patchy world in which the lawyer needs to understand how the process of resolving disputes actually works in a given locale, who the key actors are, and how they behave (especially local juries). It is a world very different from the one supposed in the predictability critique. This can be seen in the comments of a Fort Worth lawyer in talking about local juries and the decision as to whether to take a case:

The statistics around here are 7 out of 10 rear-end collisions are losing [at trial] because of the propaganda factor [tort reform public relations campaigns]. . . . So we take that perspective on every case we take. The odds are against us no matter what. If we analyze the odds, we figure they're going to be 60% to 70% against us on anything. If we think they're 80%–90%, we're less likely to take that case, because the odds are too much. It really depends on damages, whether [the potential client] had prior problems. How clean is their slate, because juries like it simple—[juries] don't like complicated factors. And unfortunately, there's a lot of people that have complicated lives—the jurors don't like that.

The comments of a San Antonio lawyer are similar but a bit less pessimistic:

If you are case selective and you have good facts and good plaintiffs, you can [win]. I mean just . . . there are no run-away juries . . . . I think the jury, if they think you are being unreasonable, they are going to punish you. And if they think you're being reasonable, and if you are lucky and the other a guy is a gang-member scumbag,

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39. *Id.*

then they'll take care of your client. For the most part. Hey, we all lose, not by choice but it happens.

*B. Knowable but Risky*

Most of what plaintiffs' lawyers do involves the handling of individual matters and individual clients. While the cases may be similar in character, such as rear-end collision cases or medical malpractice cases, they are never identical—if for no other reason than that they involve different people. As the comments above suggest, the challenge is to learn the patterns and regularities of a process that does not allow one to know for sure what will happen but at the same time is not entirely random either. What makes that challenge especially acute is the fact that one key player—the jury—is made up of a constantly changing cast of individuals drawn from a varied pool of people that still share at least some general characteristics or attitudes.

Because this world is knowable but not predictable, it is a risky one in which to work. Adding to the riskiness, the plaintiffs' lawyers' business model is based on the contingency fee. This means the lawyer fronts the costs and gets paid and reimbursed only if he is successful, and he may be well-rewarded when he is successful. If the lawyer is not successful, he receives no fee for his time and probably no reimbursement for the costs incurred. As one lawyer said, "I front all the costs and if we lose, I eat the costs."

Plaintiffs' lawyers have little choice but to use this model because their clients could not otherwise afford their services. One lawyer we interviewed nicely summarized the view of almost all plaintiffs' lawyers regarding the contingency fee:

Ninety percent of the people out there make their living, they pay for the kids to go to school, they pay to take care of their kids, they pay for their mortgage, they pay for their one or two cars, and at the end of the month, they may have \$100 left over if they're the lucky ones. . . . And so, for someone to have the ability to go hire a lawyer on anything other than a contingency fee, you know, I think it's a fiction.

Another said, "The simple truth is at least 95% of our clients could not afford to pay the lawyer and could not finance the lawsuit. They just couldn't—at least 95%."

In short, riskiness is at the heart of a practice based on the contingency fee. Herbert Kritzer tells us that such a practice must balance risks, costs, and potential rewards—more specifically, the risks of losing, the costs that must be put into the case to have a chance at suc-

cess, and the likely amount of the settlement or verdict.<sup>40</sup> In short, it is about gauging the benefits and costs in order to manage that risk. In managing risks, it is important to realize that a winning case may not really equal success. To be successful, the case must yield an amount sufficient to cover the client's needs, the lawyer's fee, and the costs incurred. This is how one lawyer explained the problem:

Let's put it hypothetically. Let's say you've got \$1000 worth of damage to your car. You've got say \$3000 worth of medical . . . and all of the sudden the insurance company says we'll give you \$4500. Well, you figure that out, nobody's going to come out all right [because it will not cover all the costs plus the usual contingency fee of 33%]. So you end up filing a lawsuit . . . [and] you're going to spend another \$2000 or \$3000 just proving your case . . . well then the next thing you know you've got \$3000 worth of medical and \$3000 worth of expense actually on the case. And if the jury comes back and says, okay, we'll just give you your medical, you're screwed . . . even if you get \$7500.

Because not all cases will be winners or sufficiently successful, Kritzer also reminds us that a lawyer must balance risks, costs, and potential rewards across a practice's entire array of cases.<sup>41</sup> The plaintiffs' lawyer has to hedge—there is simply not enough certainty.

### C. *Going Rates and Managing Risk*

There is, however, enough regularity in the plaintiffs' lawyer's world to enable the lawyer to build a practice. This world is neither chaotic nor random—it is not the opposite of predictable. A plaintiffs' lawyer builds a practice around the "going rates." Going rates depend on what particular kinds of cases are worth in a given locale, and jury verdicts play a central role even though they tend to be relatively infrequent. These going rates are well-known to the civil justice system's regular players and have a powerful effect on how plaintiffs' lawyers structure their practices and what they do. For example, a Fort Worth-area lawyer said he has stopped taking certain kinds of cases because of a change in the going rate:

With the way juries are now in Tarrant County, it's gotten to the point if you have a rear-end collision with soft tissue injury, and say less than \$500, \$1000 of property damages, you can't even afford to take that case on. The insurance companies have gotten to where they offer \$500, \$1000.

Similarly, a Houston lawyer said that "with respect to the state of mind of juries in reference to minor cases . . . cases that used to be

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40. See KRITZER, *supra* note 8, at 1–18.

41. See *id.* at 10–11.

payable cases are no longer payable cases. Those are all gone . . . I can no longer afford to handle them . . . that was almost a third of the market . . . just little fender-benders." Perceptions of the going rate can also lead lawyers toward certain kinds of cases. In light of the hostility of juries toward personal injury suits (and as a result the harder stance taken by insurance companies), another lawyer's small litigation firm started handling commercial cases on a contingency fee basis:

Those are easier cases than plaintiffs' personal injury cases. . . . We do it on a contingency fee basis. They are easier because of standing up and saying [to a jury] my client has suffered greatly, his knee will never . . . and you have to try to paint the picture, you just write some numbers on a blackboard and say this \$4 million . . . for some reason people don't think those plaintiffs' are scumbags. They don't think business plaintiffs are scumbags. They have no problem with Southwestern Bell suing Greater Atlantic Bell. They don't like Alexander Bell and his wife suing for an injury.

Other plaintiffs' lawyers are also moving in this direction because of their perceptions of juries. An established Houston plaintiffs' lawyer who is redirecting his practice said that "there are a lot of plaintiffs' attorneys, personal injury type attorneys who have started doing commercial work. And I see more competition in that area now as well."

Insurance executive McCormick is also aware of the importance of juries. He noted, "Decided cases are only the tip of the iceberg; they directly affect the thousands of other cases that get settled before going to court, not to mention acting as a stimulant for even more lawsuits."<sup>42</sup> In other words, verdicts are important not just because of the results for the parties involved in the suit, but also because of the messages they send to others. Critics like McCormick are especially worried about the messages they claim verdicts are sending to plaintiffs' lawyers and their clients, enticing them to file frivolous suits against defendants with deep pockets in the hope of cashing in. This is a sentiment reflected in the discussion above on predictability and uncertainty and in the current statements of pro-reform groups like the American Tort Reform Association and the U.S. Chamber of Commerce's Institute for Legal Reform.<sup>43</sup> But it is the exact opposite of what plaintiffs' lawyers actually do.

There is, of course, a much more sophisticated version of the idea of juries as messengers in the law and society literature, and this version

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42. McCormick, *supra* note 18, at 268.

43. See AMERICAN TORT REFORM ASSOCIATION *supra* note 4; INSTITUTE FOR LEGAL REFORM, <http://www.instituteforlegalreform.com> (last visited Mar. 9, 2011).

places jury verdicts in a broader dispute-processing context.<sup>44</sup> It is worth discussing because it provides important insight into the world in which plaintiffs' lawyers work—again, a world that is characterized by neither predictability nor uncertainty. The idea of juries as messengers is usually associated with the work of Marc Galanter and what he has called the “radiating effects of courts.”<sup>45</sup>

Galanter argues that even though jury verdicts resolve only a small proportion of all civil disputes, they have a symbolic value and impact that extends beyond their frequency.<sup>46</sup> Their importance lies in their role as “transmitters of signals rather than as deciders of cases.”<sup>47</sup> These signals, in turn, contribute

a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but also possible remedies and estimates of the difficulty, certainty, and costs of securing particular outcomes.<sup>48</sup>

Though ultimately small in number compared to the number of cases filed and the number of events that may lead to a lawsuit (for example, the number of automobile accidents), jury trials cast a large shadow.<sup>49</sup> They send signals down through the entire process. In his classic study of how insurance companies settle matters, H. Laurence Ross found that, at least for serious bodily injury claims made to insurance companies, settlements seemed to be based on “an estimate

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44. There is also parallel literature dealing with the criminal justice system.

45. See Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117 (Keith O. Boyum & Lynn Mather eds., 1983).

46. *Id.* at 119.

47. Marc Galanter, *Jury Shadows: Reflections on the Civil Jury and the “Litigation Explosion,”* in *THE AMERICAN CIVIL JURY: FINAL REPORT OF THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES* 15, 22 (1987).

48. Galanter, *supra* note 45, at 121.

49. For example, the Texas Department of Transportation reported the following for 2008: of a total of 437,452 automobile accidents, 3,468 were killed in those accidents, 242,688 were injured, of which 84,508 had serious injuries. See *Rural and Urban Crashes and Injuries by Severity 2008*, TEXAS DEPARTMENT OF TRANSPORTATION, [ftp://ftp.dot.state.tx.us/pub/txdot-info/trf/crash\\_statistics/2008/2008\\_9.pdf](ftp://ftp.dot.state.tx.us/pub/txdot-info/trf/crash_statistics/2008/2008_9.pdf) (last visited Mar. 9, 2011). The Texas Office of Court Administration reported the following for 2008 for district and county courts combined: 25,433 new auto tort cases were filed and 650 auto tort cases were disposed of by a jury trial. See *Trial Court Judicial Data Management System*, TEXAS OFFICE OF COURT ADMINISTRATION, <http://www.dm.courts.state.tx.us/oca/ReportSelection.aspx> (last visited Mar. 9, 2011) (“Report Selection” function used to obtain figures).

of the likely recovery of the claimant before a jury.”<sup>50</sup> In his estimation, “Formal decision-making procedures . . . [are] *quantitatively* unimportant in the working out of legal rights and duties. To be sure, formal decisions are *qualitatively* important, for they set standards which informal decisions are expected to follow.”<sup>51</sup>

This means plaintiffs’ lawyers work, for the most part, in what scholars have called the “shadow of the law.”<sup>52</sup> They are close observers of the processes, actors, and rules that surround the handling of certain kinds of disputes in a given locale. They build their practices around knowable patterns and regularities that they see and learn. The comments of a San Antonio lawyer reflect this very idea:

Jury verdicts at the courthouse are being changed. What this does, of course, is have a trickle down effect. Because what we end up settling cases for in pre-litigation or otherwise really depends on what happens at the courthouse. If [insurance companies] are coming and saying look at your local reporter, those types of cases got poured out [lost before a jury] 80% of the time last term, why would you think we would want to pay you any money?

This lawyer would then adjust his practice accordingly.

The meaning of the signals sent by formal decisions is dependent on lawyers receiving and utilizing them. Plaintiffs’ lawyers pay close attention to what happens at the courthouse. One lawyer’s view of local trends in verdicts for auto accident cases gives some indication of how he tracks things beyond looking at his own cases:

I think we’ve bottomed out on low jury verdicts. My reading of the Blue Sheets [a local jury verdict reporter] indicates that juries are paying more money on cases . . . and the people I talk to on the defense side who try these kind of car wrecks day in and day out are telling me the same thing.

Plaintiffs’ lawyers do not have to make sense of these signals in isolation. They are part of a larger community of plaintiffs’ lawyers and so there is a shared understanding of those processes, actors, and rules.<sup>53</sup> Lawyers talk with other lawyers about their experiences and they belong to their own professional organizations that are a conduit for information, including information about what juries are doing. In

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50. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 114 (1980).

51. *Id.* at 5 (emphasis added).

52. Now widely used, the term appears to have entered the literature as a result of a 1979 article on divorce. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

53. On the idea of practice communities among lawyers, see LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 41–63 (2001).



Texas, this includes not only a strong and active state-level organization that emphasizes networking and information sharing (the Texas Trial Lawyers Association),<sup>54</sup> but also local organizations in the major metropolitan areas.<sup>55</sup> As one lawyer said, “I have heard lawyers talking about that, how there’s—both from the TTLA LISTSERV and locally—where you know, they’re turning down cases where, in the past, they would, you know, they might’ve taken a chance on.” In talking about his local trial lawyers association he went on to say, “instead of all of us being all by ourselves in these offices, going against these attorneys—defense attorneys and law firms—we’re all connected by our monthly meetings and also by email LISTSERV, where you know, we’re not on our own.”<sup>56</sup>

To a certain extent, learning the going rate process may be a part of being socialized into the practice community much like learning the going rate for plea bargaining may be a part of being socialized into a local criminal justice system.<sup>57</sup> But unlike plea bargaining, there are readily available sources on the civil side that have tracked verdicts for many years: jury verdict reporters.<sup>58</sup> These are commercial, typically subscription services (a number are now online) that exist for many parts of the country; some even claim to be national in scope.<sup>59</sup> Such reporters are a powerful indicator of the role jury verdicts play in forming the going rates as well as the importance of going rates

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54. See TEXAS TRIAL LAWYERS ASSOCIATION, <http://www.ttla.com> (last visited Mar. 9, 2011).

55. For instance, there is the Dallas Trial Lawyers Association and among the resources available to its members is information on verdicts and settlements. See *Verdicts and Settlements*, DALLAS TRIAL LAWYERS ASSOCIATION, <http://www.dtla.net/DA/index.cfm?event=ShowAppPage&pg=search&bid=138> (last visited Mar. 9, 2011).

56. On the role of listservs in building community among lawyers and disseminating community norms, see generally Leslie C. Levin, *Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers*, 37 ARIZ. ST. L.J. 589 (2005).

57. On learning about plea bargaining, see MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 99–100 (1978). On the worth of a criminal case, see MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 158–67 (1979); Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC’Y REV. 461, 462–63 (1979). On going rates, see JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 118–25 (1999).

58. See Stephen Daniels, *Civil Juries, Jury Verdict Reporters, and the Going Rate* (May 29–June 1, 1986) (unpublished paper presented at the 1986 Meeting of the Law & Society Association) (on file with authors).

59. For example, a widely used verdict reporter for the Houston area, the Blue Sheet, is now available online via Westlaw. See *Texas Blue Sheets Jury Verdicts Library on Westlaw*, WESTLAW, <http://west.thomson.com/productdetail/14070/40015093/productdetail.aspx> (last visited Mar. 9, 2011). Jury Verdict Review and Analysis claims to track verdicts nationwide (including Texas) with information available online by subscription. See *JURY VERDICT REVIEW & ANALYSIS*, <http://www.jvra.com/> (last visited Mar. 9, 2011).

themselves. These reporters' sole purpose (apparently a profitable one) is to help communicate to the relevant actors—plaintiffs' lawyers, defense lawyers, and insurance companies—the going rate in the civil justice system.<sup>60</sup>

Sixty-two percent of the respondents to our 2000 survey reported that they subscribed to a verdict reporter. Many of the plaintiffs' lawyers we interviewed referred to local verdict reporters in a way that shows verdict reporters are a key ingredient in gauging the going rate. Said one, "I read the trial reports all the time." Another said, "I look at these jury verdict reports and I see that a jury found the defendant in a car wreck 100% negligent, the defendant ran a stop sign and hurt somebody and they award . . . zero pain and suffering, zero mental anguish, zero disability, zero physical impairment." Still another said,

I was reading the other day [pointing to verdict reporters in his office] the plaintiff had sustained 3rd degree burns to his legs and had to have surgery. The jury awarded, I think it was \$5000 for physical pain and suffering and mental anguish. That was just this month. If they're not going to award much money for someone [who has] visible burns.

In talking about settlement discussions with insurance companies, a Houston lawyer said, "They'll [insurance companies] throw a Blue Sheet [local verdict reporter] with jury verdicts in front of you. And my response is, 'Just show me my name where you've hammered me and I'll take your money!'" An interesting comment by a staff lawyer for a major television advertiser often castigated for never trying cases showed the importance of verdict reporters in the plaintiffs' lawyers' world and the messages they send to the relevant actors. In talking about a recent decision by his boss to have the staff attorneys begin trying cases, he noted that the reason "is the negative connotation that sometimes [our] law firm carries with insurance companies because we advertise . . . and I think sometimes that hurts us."

A key part of that negative connotation is the assumption—not necessarily an incorrect one—that this firm would try few, if any, cases. This put the firm at a disadvantage in negotiating settlements compared to lawyers who have a reputation for trying cases. The staff member went on to say that the firm's owner has "made a commitment to litigation and trial cases." The intention behind the decision to try cases is to send a message about the firm that hopefully will enhance its bargaining position with regard to settlements. The owner likes "seeing [the firm's] name in the Blue Sheet . . . the insurance

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60. See Daniels, *supra* note 58, at 9–13.

companies are seeing [us] trying cases. The other lawyers are seeing [us] trying cases.”

#### IV. WHY EVEN DO IT

##### A. *The Pragmatic Balancing of Professionalism and Profit*

Before looking at how plaintiffs' lawyers structure their practices to manage the risks in their legal environments, there is a question that must be addressed in light of the view found in the predictability critique. Answering it is important for understanding how plaintiffs' lawyers view the environment in which they work (in contrast to the view of the predictability critique) and how they structure their practices in light of that view. Given the risky nature of the plaintiffs' lawyers' world and their reliance on the contingency fee as a business model, one might wonder why any rational person would even choose this line of work. In the predictability critique, the idea is that plaintiffs' lawyers are attracted to this line of work because they can profit, often handsomely, from the civil justice system's dysfunctional and chaotic character. To return to Richard Mahoney's words, the system's lack of predictability makes it “too easy for a lawyer to persuade a jury . . . to enrich plaintiffs and contingent fee lawyers with multi-million dollar windfalls.”<sup>61</sup> While there may be rhetorical value in such a characterization, it does little to help us actually understand these lawyers and what their practices can tell us about the civil justice system in action.

Many plaintiffs' lawyers are motivated by important noneconomic factors, such as the simple desire to be one's own boss (plaintiffs' lawyers are predominantly solo or very small firm practitioners), the desire to be an active litigator, or a sense of professionalism that is based on an idea of representing the underdog. Of course, there are some who see plaintiffs' practice simply as a moneymaker. In reality, the motivation for pursuing a plaintiffs' practice is a mix of these reasons, and profit always plays a role as it does with nearly all lawyers regardless of their practice area. We presume that this has always been the case. As Robert Nelson and David Trubek noted in talking about changes in the American legal profession,

When Paul Cravath developed his famous system for organizing corporate law practice, he did so with a keen eye toward the market for corporate legal services. Attacks on the commercialism of cur-

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61. Mahoney, *supra* note 31, at 21. Nearly the same words appear in the Mahoney & Littlejohn, *supra* note 24, at 1396.

rent practices should not mislead us into thinking that the Cravath firm was practicing law as a charity in the 1920s!<sup>62</sup>

Almost all lawyers work in a world in which professionalism and economic interest necessarily coexist. The important question here is what exactly is in the mix that helps us understand the plaintiffs' lawyers' view of their world and why they would work in such a risky environment.

To understand plaintiffs' lawyers' view of that risky environment and why they work within it, we need some sense of how they see themselves as professionals. For plaintiffs' lawyers, there is a distinctive mix of professionalism and personal financial interest, and it can be seen in the way Otto Mullinax, one of the most respected Texas plaintiffs' lawyers of the mid-twentieth century, described the ethos of his firm, the Mullinax Wells firm:<sup>63</sup>

That firm justified its existence by adhering to three simple objectives: First, to earn a good living for its members and staff; Second, to make that living representing unions and working people, if possible; and, Third, to use those resources, produced above the need to serve the first two objectives, in advancing liberal political processes in government and society.<sup>64</sup>

Of course, one may disagree with Mullinax's particular idea of professionalism and public service (and the critics mentioned earlier most certainly would), but there is no doubt that the practice of law was about more than just making a good living.<sup>65</sup> Most plaintiffs' lawyers would agree with the sentiment animating Mullinax's objectives.

As in Mullinax's objectives, plaintiffs' lawyers' sense of professionalism is a pragmatic rather than an abstract one, as it must be in order to balance against the need to make a good living. As a result, simply asking lawyers to directly describe or articulate their sense of professionalism may not be the most productive avenue for understanding it. A more useful approach may be to look at those values and that bal-

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62. Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 7 (Robert L. Nelson, David M. Trubek & Rayman L. Solomon eds., 1992).

63. The firm name varied over time as partners joined or left the firm. Otto Mullinax and Nat Wells were the constants. In addition to plaintiffs' work, the firm was also a major labor firm representing unions.

64. Otto Mullinax, Address Introducing the Honorable Oscar Mauzy as the Newly Elected Member of the Texas Supreme Court (Jan. 3, 1987) (on file with authors). Archived records of the Mullinax Wells firm and an oral history interview with Mullinax can be found at the University of Texas at Arlington Library, Special Collections.

65. It is worth noting that the political views of our survey respondents lean in the direction of Mullinax's views: 48% described their political views as liberal, 39% as moderate, and only 14% as conservative.

ance in relation to the severe criticisms of the one small group of plaintiffs' lawyers that most other plaintiffs' lawyers love to hate: big-time advertising lawyers, especially the television lawyers. What is valued can be seen in what is found lacking in these advertisers. Taking this approach also reinforces the importance of jury verdicts and the going rate for plaintiffs' lawyers' practices. Aside from being seen as unprofessional, the advertisers are seen as having a negative effect on juries and the going rate. This, in turn, makes it more difficult for most other plaintiffs' lawyers to successfully balance risks and costs against potential benefits.

### *B. Professionalism and a Worthy Cause*

In explaining what is objectionable about the aggressive advertisers, plaintiffs' lawyers often point to the goals of those they criticize in contrast to a more appropriate set of professional goals. The criticized lawyers are *only* interested in making money or building their practices—it's just a business. Such lawyers are not interested in their clients and the clients' best interests. Their practices are derisively called "mills," and the lawyers themselves are referred to as "bottom feeders" and even "scumbags." One highly respected plaintiffs' lawyer was emphatic in his criticism of television advertising, which to him seems unprofessional. What especially bothered him

are the people who are not competent to handle business, that advertise, get the business, and then instead of referring the better cases, they handle those cases in a less than satisfactory way. They make a fee on it, but their client is not very well served. The way they make their money is on a volume practice. I view those people as bottom feeders.

Another lawyer said that heavy advertisers "are not fulfilling a role as an attorney, they're doing nothing but adjusting claims from the plaintiffs' standpoint." And still another lawyer argued, "They don't give a damn. They got into to it for no worthy cause."

In one view, what is missing from these "bottom feeders" are the kinds of noneconomic values that should be the motivating factors (allowing, of course, for making a decent living). It is the "worthy cause" that is missing—the "worthy cause" that helps to define for lawyers what they are as professionals. An established East Texas lawyer described himself as follows:

I'm a solo practitioner. I like the freedom of being solo. I've never tried to handle a lot of mass torts. . . . I didn't want to take those cases. I just wanted to help people on a one-on-one basis with car wreck and workers' comp and, you know, premises liability. And I enjoy doing that.

Later in the interview he added, "It's part of my ministry, I guess. I'm a Christian and I feel like this is part of my ministry to help people."<sup>66</sup> Another lawyer—a younger one in San Antonio—said, "I've always had a feeling or empathy for the underdog. In most cases that I saw [while working during law school in a lawyer's office] in the plaintiffs' side of personal injury, you're the underdog . . . and going to take on more powerful interests."

It is the sentiment underlying the second of the guiding principles for Mullinax's firm. The younger lawyer in Houston noted,

Amongst plaintiffs' lawyers . . . you have two categories of lawyers. You have true believers who are doing this because they really care, they love people, they want to work for people, they want to help people and that's why they got into this business in the first place. It wasn't just driving fees and making money. . . . What has appealed to me is a family with kids whose life gets turned upside down because someone in the family gets seriously hurt or killed and they're facing a greater than David and Goliath battle and they need someone to fight for them. Guys like me, we can go do the commercial litigation and make money. . . . If you are a true believer, then what's the point of that? So you make money and you are not doing something you believe in. You're not helping people.

He later talked about his recent hiring of a lawyer to work in his office.

When I was interviewing him, he was telling me that his father loaded and unloaded baggage at the Houston Airport for his entire life and his father died when he was in high school. Before he died, his father told him, "I want you to work with your brain, instead of your back." And I asked him why he wanted to be a PI lawyer and he said, "I want to help people who work with their back." I said: you're hired. You're what I am looking for.

This is similar to the older lawyer in Austin who cannot see himself having a different kind of practice: "I'd still rather be a lawyer doing what I do for individuals than represent the bank or the insurance company or Pa Bell."

The "bottom feeders," whatever they are, are not true plaintiffs' lawyers in the eyes of their critics. A Dallas lawyer said,

The people who are really plaintiffs' personal injury trial lawyers give back a phenomenal amount to the bar to trial lawyers' activities . . . [while the "bottom feeders"] say well you big fat cats are trying to keep us out and I'm going to advertise and get all these cases and make just as much money as you do and never give anything back.

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66. This lawyer is not alone in emphasizing his religious beliefs as part of his motivation for pursuing his chosen career.

Another lawyer neatly summarized the critical view: “You know, those characters are obviously making money. If you speak to them of the profession or the culture of the profession or the traditions, they would look at you like you’re from Mars. They’re in it for a buck.”

In addition, the heavy advertisers and others who are openly aggressive in getting clients are perceived as following a business model that avoids actually trying cases. One Houston lawyer said, “Most of those people . . . have never seen the inside of a courtroom and don’t intend to ever see the inside of a courtroom, consider it a complete waste of time.” He later added, “They are not fulfilling a role as an attorney, they’re doing nothing but adjusting claims from the plaintiffs’ standpoint.” The idea is that a lawyer cannot be serving his clients well if he is not willing or able to litigate. This means that clients are not likely to get the settlement they should because the insurance companies will not pay since they know that the lawyer will not litigate. In discussing some of the television advertisers, a Fort Worth lawyer remarked that “the ones I knew . . . never tried any cases. . . . My impression of Y (a local advertiser) was that he used to settle for whatever he could get. He told the client he had to take it.”

Not all plaintiffs’ lawyers will see themselves as “true believers” like the younger lawyer in Houston previously quoted or feel that they have a personal ministry like the lawyer in East Texas, but most share the basic sentiment that animated the second of Otto Mullinax’s three objectives. This statement is a key reason why they work in the risky world of plaintiffs’ practice. Of course, there is a certain amount of truth in the criticism of the aggressive advertisers—for some (but not necessarily all), it is all about the money. One heavy advertiser with a high volume business explained his view as follows:

Sometimes I think I really would like to get into the courthouse and try a lot of cases, because I think I’d be pretty good at it. But then again more important to me, to be perfectly frank with you, is to make money. I don’t mean to sound crass about it, but, you know, heck if I’ve got an opportunity to be liquid for a few million dollars by the time I’m 35 or so. . . . I’d rather do that then, you know, become Perry Mason.

Another lawyer, a staff attorney for a heavy television advertiser, responded rather bluntly to another lawyer’s criticism of his boss’s approach: “I ain’t a big proponent of these ads, but this is what [X] wants to do. It’s an economic thing—we’re going to do it; it works; it makes money for us.”

*C. Professionalism, Pragmatism, and the Going Rate*

There is more to the criticism of heavy advertisers by other plaintiffs' lawyers than just the sense of professionalism and mission. The criticism reflects the pragmatic nature of plaintiffs' lawyers' sense of professionalism and the importance of jury verdicts and going rates. The substance and unprofessional nature of the aggressive tactics used to get clients dovetails with the aggressive tort reform public relations campaigns about frivolous lawsuits, runaway juries, greedy plaintiffs' lawyers, the loss of jobs, and the prospect of no longer being able to find a doctor. The most concrete indicator of this effect for plaintiffs' lawyers is what they see when they go to the courthouse and choose a jury. A Fort Worth lawyer's comments are typical of what many others said:

I think advertising is bad. It greatly contributed to the public cynicism towards lawyers and personal injury lawyers. I think it's been a very major factor. Every time I go down to the courthouse for a trial, I ask this because this is a question that will always get you a response—have they seen the ads for lawyers advertising for clients? At a minimum, two-thirds have seen them, usually more than that. Then if you say how many of you formed a bad impression about personal injury lawyers or personal injury cases because of those television ads, the vast majority of them raise their hand. The case I tried in Dallas, there were eight jurors disqualified for cause on that issue alone.

A Houston lawyer said,

I think advertising has been an engine that helped drive tort reform for the business interests and for insurance corporations. Because I think that so many attorneys, particularly the less experienced and less capable, did an overwhelming amount of poor taste advertising that just gave the appearance of the worst, put the worst possible face on plaintiffs' litigation practice. When I'd see ads on the television, late night ads, or something like that, it basically made . . . I think it gave people the impression that we are all a bunch of used car salesmen, and I hate that. Does that answer your question!

An East Texas lawyer said,

I would probably have to admit that I have a deep and abiding prejudice against lawyer advertising. . . . I think that as much as any other factor it is responsible for the image that the lawyer has in the public eye today. I go over there [pointing out his window at the courthouse] and I look at the jury panels. Folks out there . . . every time they turn their television on, radio on . . . a lawyer telling about how come hire him and he'll make the insurance company do right. . . . They would say here's a guy who really doesn't give a damn about a justifiable cause—he just wants money. . . . It has generated a tremendous distaste in the attitude and in the eyes of the public towards the legal profession . . . it has destroyed what the



public thinks of this profession. That's my mild view about advertising.

In short, the advertisers have helped "poison" the jury pools. A San Antonio lawyer said, "There is so much solicitation going on, the public is getting such a bad taste in their mouth for personal injury litigation in general—it's reflected in the jury verdicts."<sup>67</sup>

Interestingly, the concern over aggressive solicitation has given rise to a rival type of advertising aimed at reinforcing the plaintiffs' lawyers' idea of professionalism and at blunting the negative impact on the going rate. Established leaders in the plaintiffs' bar often do it. This is advertising not so much about getting business as about public relations. One lawyer described what his firm does as "an image-type advertising." In explaining it he said, "For example, one of the ads that we run is if you were going to see a doctor . . . you'd want to see a board certified doctor and all the lawyers in our law firm are board certified in personal injury trial law. That's basically it." One is a thirty-second television spot. Another is an informational spot about the jury system, and there is one about how "trial lawyers basically defend principles of who's right and personal injury and fairness." This lawyer readily admitted that "it's not a get business type of deal." Its purpose is focused elsewhere. "We have gotten a lot of positive comments from people talking about our ads. They like our ads and they say, you know, we like yours and, boy, the other guy's ad, I can't stand it." Rather than get business in the short-run, he said, "I think it's helped our public image a lot, which is what we wanted to do."

This helps not only his public image, but hopefully the public image of plaintiffs' lawyers as well. A key factor is the contrast with the usual television lawyers and their ads as well as the contrast to the tort reform public relations campaigns. It presents the public with a very different image of a plaintiffs' lawyer—one much more professional and serious and one not just hawking for business. One firm became a local underwriter of the News Hour on PBS. A member of this firm noted some original disagreement within the firm about the investment. He said,

They thought that you wouldn't get any business whatsoever for doing that, and it's probably true . . . but that wasn't the reason for doing it. The reason was to show that you had the public interest at heart and it was a good will type thing—a true good will type thing. Because we could say then, when we went over to select a jury, that

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67. For evidence that lends credence to this view, see Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1237-50 (2004).

we don't advertise except we do sponsor a program on public television. There's more to it than just being a mercenary interest.

In short, while some lawyers practice in this risky world simply because they believe they can make money doing it, not all do. Every plaintiffs' lawyer wants to make at least a decent living, but other motivations are still at work for most. Juries and going rates are central to successfully pursuing those motives because success depends on being able to sufficiently balance the risks and costs against the potential benefits in a world of the probable but not certain.

#### V. HOW PLAINTIFFS' LAWYERS STRUCTURE THEIR PRACTICES IN A CONTINGENT WORLD

How plaintiffs' lawyers view this contingent world and manage the risks involved in plaintiffs' practice is reflected in the way in which they structure their practices. Most immediately, it means that they structure them to be small and lean. As a general proposition, plaintiffs' lawyers' firms are very small, if for no other reason than to keep down the amount of overhead they carry. In our surveys, 37% of the respondents were solo practitioners and another 46% worked in firms of 2–5 lawyers, meaning that over 80% of the lawyers worked in the smallest of firms. By comparison, 60% of all private practice lawyers in Texas work in solo practices or in firms of 2–5 lawyers.<sup>68</sup> In addition, the non-lawyer staffs are also very small, constituting a median of 3 for our respondents.

There are, of course, larger plaintiffs' firms, especially those that handle mass tort litigation or those that have a high-volume, low-value business driven by television advertising. For instance, one television advertiser employed 20 staff people and 2 other lawyers. Another had 80 staff and 4 lawyers. A firm that focuses on mass tort and had offices in a number of states had about 60 lawyers (with the largest single office having a dozen lawyers) with “probably . . . five or six personnel for every lawyer,” according to its head. These firms are clearly an exception and they still pale in comparison in size to the large corporate firms. For instance, Fulbright & Jaworski, which is headquartered in Houston, has nearly 900 lawyers and a staff that runs into the low thousands. There are nearly 300 lawyers in the Houston office and departments in that office have far more lawyers

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68. *State Bar of Texas Membership: Attorney Statistical Profile (2008–09)*, STATE BAR OF TEXAS, [http://www.texasbar.com/AM/Template.cfm?Section=demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=8792](http://www.texasbar.com/AM/Template.cfm?Section=demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=8792) (last visited Mar. 9, 2011).

than the typical plaintiffs' firm. For instance, there are 23 lawyers in the Houston office's intellectual property department alone.<sup>69</sup>

Plaintiffs' lawyers abhor unnecessary or excessive overhead because they have to. It is the most important part of the costs that they must balance against the risk and potential benefits they see in the going rates. Any substantial amount of overhead requires a substantial and steady cash flow month after month. For plaintiffs' lawyers working on a contingency fee basis, this can be problematic. There is no guarantee that any particular matter a lawyer handles will be successful. Even if it is successful enough, there is always the problem of how quickly—or slowly—the proceeds will come in. A Houston lawyer, who described his operation as “a small solo practitionership . . . a low volume, high quality personal injury practice with some modest overhead,” talked about delay in payments:

It's a common complaint; it's at the top of the bitch list for every plaintiffs' lawyer. Fulbright [& Jaworski] representing Chevron just write a letter saying here are our expenses. The insurance companies are slow [in paying judgments or settlements]. At least Fulbright—they may get a delay in the payment of their fees, but they are not having to front [pay in advance with no guarantee of reimbursement] those experts or travel expenses. . . . [Insurance companies] wanted to put as much financial pressure on the plaintiffs' bar as possible.

Basically, a plaintiffs' lawyer cannot bet on anything. Reminiscent of Kritzer's observation that lawyers working on a contingency fee basis must balance risks, costs, and potential rewards across a practice's worth of cases,<sup>70</sup> a San Antonio lawyer said, “You learn to have enough irons in the fire to where you're not counting on any one. Because you can't. You ever put yourself in that position, which some guys do, then you're in real trouble.”

The story of a lawyer who was forced to close a high-volume, low-value practice illustrates the consequences of diminished cash flow. Third-party insurance bad faith cases were an important part of his business model (a victim bringing a claim against the defendant's insurance company for unfair settlement practices). When these actions were eliminated, he faced an immediate problem: insurance companies “would just tender the policy limits . . . all of a sudden, that

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69. See *Intellectual Property and Technology: Lawyers*, FULBRIGHT & JAWORSKI L.L.P., [http://www.fulbright.com/index.cfm?fuseaction=attorneys.attorneys\\_list\\_css&site\\_id=308](http://www.fulbright.com/index.cfm?fuseaction=attorneys.attorneys_list_css&site_id=308) (last visited Mar. 9, 2011).

70. See KRITZER, *supra* note 8, at 11.

\$20,000 case, I'm getting \$1500."<sup>71</sup> He had less money coming in each month, and he said,

I've got 19 people to pay here. I got health insurance; I got all the stuff that comes along with having that many employees. And I'm dying. . . . I had an overhead of \$100,000 a month. If say one month I get only \$80,000, then I'm \$20,000 in the hole next month. So now, I gotta do \$120,000 next month. And say next month I only do \$50,000. I'm really behind the eight ball.

Running a plaintiffs' practice is not a simple matter. As one Austin lawyer said, "It's very difficult to run your business. Costs keep going up . . . and the insurance companies get harder and harder." A lawyer who was planning the future growth of his firm talked about the need to move carefully:

One thing that being on this side [plaintiffs' side] and coming up and opening your own office has taught me is to be very, very conservative when it comes to overhead. So, I get the cold sweats when I have to hire somebody. I'm just very, very careful about incrementally growing until it's really necessary to do that.

If the cases do not keep coming in or the proceeds from those that do are too meager, cash flow drops accordingly and overhead has to be reduced. One lawyer who has seen the proceeds from his cases decline had reduced his staff and looked at other ways to cut overhead:

It's just a matter of economics, I mean the personal injury field is not as lucrative as it used to be. . . . So we're trying to work with less personnel . . . and the other part is automation. We've done a lot of automation . . . trying to work smarter instead of harder with less personnel.

To deal with the cash flow problem, some lawyers will focus a part of their practice on certain low-risk matters with the hope that these matters will cover the overhead. For instance, one lawyer said, "Auto [automobile accident cases] basically covers overhead and the bigger cases . . . the products cases, the serious, you know real serious like death cases, that's where the money I guess comes in . . . auto . . . keeps the ball rolling, keeps the salaries paid and that sort of thing." Another lawyer looked to simple non-contingency fee cases. A personal injury case, he said, "may settle tomorrow, it may settle next year." As a result, cash flow is a problem. His approach is to "maintain the office with cash flow from wills, divorces, bankruptcy, and then continue with the PI as much as we can. My goal is to take as many PI cases as I can possibly get."

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71. See *Md. Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 938 S.W.2d 27, 28 (Tex. 1996).

Smaller firms also mean relatively small caseloads. The median for our respondents was 35 open cases. For most plaintiffs' lawyers, the typical case value is modest—\$40,000 in 2006 dollars. A higher number of cases means more personnel to handle the volume—more overhead. Higher volume also means additional spending to keep that higher volume of cases coming into the firm, and this usually means advertising. Rather than go for more volume as a way to ensure a significant cash flow, plaintiffs' lawyers specialize. Being a plaintiffs' lawyer is itself a specialization, but we find plaintiffs' lawyers tend to specialize even more within this practice area. It is one way to minimize risk in a contingent world. If a lawyer deals with a narrow range of similar cases, he can develop expertise. This, in turn, makes it easier to master the going rates.<sup>72</sup>

Most of our survey respondents specialized more narrowly than just in plaintiffs' cases taken on a contingency fee basis. Defining a specialist as a respondent reporting 50% or more of his or her caseload in one particular type of case, we identified 16 types of specialists. Only 4 of those types included 25 or more respondents and they correspond to the cases making up the 4 largest categories of cases handled, on average, by our respondents: auto accident (344 specialists), medical malpractice (83), commercial (59), and products liability (50).<sup>73</sup> All told, just under two-thirds (64%) of all respondents were specialists of some kind, with just over one half of all specialists (344 of 638) being auto accident specialists.

## VI. HOW PLAINTIFFS' LAWYERS GET AND SCREEN CASES

### A. *Getting Cases*

The greatest challenge plaintiffs' lawyers face is attracting sufficient profit-producing matters to stay in business. They represent one-shot clients, not repeat players. So they must generate an ongoing flow of such clients in order to survive financially. Because they rely on the contingency fee, plaintiffs' lawyers cannot simply take anything that comes in the door with the idea of playing the legal lottery and getting a windfall from a dysfunctional and chaotic system. As Kritzer notes, there are two sides to the challenge. A lawyer needs "to attract a stream of potential clients while at the same time declining to re-

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72. Of course, this introduces a new risk as well—the risk that something changes in that area of specialization and cash flow diminishes as a result. The example above of the lawyer who relied heavily on third party bad faith insurance cases is a telling example.

73. The other twelve types follow in order of frequency: criminal (23), domestic relations (23), employment (23), consumer fraud (9), workers' compensation (7), civil rights (7), nursing home (6), aviation (5), premises liability (5), railroad injuries (5), probate (4), and bankruptcy (1).

present a large proportion of those clients. A lawyer must constantly look beyond the risks and rewards of a single potential case to the implications of a case for the lawyer's continuing portfolio of cases."<sup>74</sup> In other words, the challenge lies in attracting a sufficient number of potential clients and then in screening them to find the best opportunities in light of the going rates.

Cost, again, is a major factor, and so despite the apparent ubiquity of lawyer advertising, it accounted for just 14% of the survey respondents' business on average. Bringing in a substantial number of cases requires an intense and constant advertising effort—especially television, which is simply too expensive for most lawyers.<sup>75</sup> The most prolific advertisers will spend well over \$1 million a year just for the airtime.<sup>76</sup> Less expensive, other forms of advertising—like the Yellow Pages—still mean a substantial addition to a practice's overhead in a contingent world. For example, one Yellow Pages user said, "The Yellow Pages, of course, cost us a fortune . . . it just makes me sick to write those checks. It's \$20,000-\$25,000 we're spending on it." This was a monthly expense because this lawyer was advertising in five different telephone books in his metropolitan area.<sup>77</sup>

For a lawyer who advertises to any degree, there is another set of costs involved. These are the costs of the personnel and infrastructure—meaning even more overhead—needed to handle the calls coming into the practice, screen those calls (very few lawyers take everything or even most of what comes in), and service those matters the lawyer does take. Lawyers need the extra resources to handle a larger number of calls and clients and additional space and equipment; and then they also need to maintain a larger number of calls and clients to pay for the additional resources and facilities. In addition, lawyers also complained about the quality of the calls, which required substantial attention to screening (and added cost). And finally, a lawyer has to weigh the possible disapproval of his peers if the adver-

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74. KRITZER, *supra* note 8, at 46.

75. For all respondents, television accounted for only 3% of business, and it accounted for 50% or more of business for fewer than 2% of respondents.

76. In a 1999 article, we reported on the television spending for Jim Adler of Houston—the most prolific advertiser in the late 1990s. We noted that he "spent almost \$1.4 million in the Dallas/Fort Worth television market for the period July 1998 through June 1999, and \$3.3 million in the Houston market for the period January 1997 through June 1999," and these were not the only markets in which he advertised. Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest:" *How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 *LAW & POL'Y* 377, 390 (1999).

77. For all respondents in the pooled database, the Yellow Pages accounted for 8% of business.

tising is seen as too aggressive or unprofessional along with the potential negative effects on the jury pool and the going rates.

Rather than advertising, most business for plaintiffs' lawyers comes from referrals of one kind or another—76% of the respondents' business. More specifically, 38% of business came from referrals from other lawyers, 27% came from referrals from former clients, and 12% came from other referrals. Which source is more important for a lawyer depends on the nature of his practice. For instance, lawyers who specialize in automobile accident cases tend to rely more on client referrals than lawyer referrals—34% versus 26% (all advertising accounted for 20% of business). One Houston solo practitioner is such a lawyer: "Referrals from old business, just old clients, probably represent about 80% of my clients." This reflects the traditional idea of lawyers as professionals who attract clients because of their ability, integrity, and reputation for serving clients' needs. Lawyers like this one can rely heavily on word-of-mouth client referrals because their practices are localized. Geographically, most of these lawyers' clients come from the county in which they are located or an adjacent county. A localized practice makes it easier for a lawyer to master the going rates.

As Kritzer found in Wisconsin,<sup>78</sup> reputation is at the heart of client referrals for plaintiffs' lawyers in Texas. A practice is built as a lawyer's reputation grows as a result of satisfied clients recommending the lawyer. For a plaintiffs' lawyer, this means that they must accept only clients with cases that can be handled successfully. A solo practitioner in San Antonio noted, "You get some direct business—you represented somebody, did them a good job and their brother or sister, friend at church has an accident and they say: my lawyer did a good job, call him." In light of the going rates, if a lawyer cannot choose enough cases that will be successful, he is unlikely to get many client referrals in the future.

Lawyers relying heavily on client referrals for cases must also cultivate that client base. Reputations can fade quickly if they are left unattended. Lawyers cultivate their client base in a variety of ways. We found that it is not at all unusual for plaintiffs' lawyers—especially those with localized practices focusing on "bread and butter cases"—to informally help a caller or a former client with a small matter without charge. They do so because they believe it generates good will and possible referrals in the future. Said one lawyer in San Antonio

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78. See KRITZER, *supra* note 8, at 230-34.

whose practice concentrates on a working class clientele that is about 50% Hispanic and 50% Anglo,

We do a lot of pro bono work for our existing clients or our past clients. Let's say they have a little matter . . . a little fender-bender with no injuries and the other party won't talk to them. They'll come see us, we'll write letters here and there. We took a case to trial last year that was a matter of principle—people that only had property damage and we felt they were being very, very mistreated by the insurance company. We took it on knowing that it was going to be free and at a loss. But we were able to get them some money. They left very pleased. In turn, they will send us more business.

In addition, service to the client is very important. Many lawyers realize that theirs is a service business, and treating the customer right helps build a reputation. As one lawyer said, "Service to your client is real important." Some lawyers have case tracking systems that remind the lawyer or a staff member to call each client once every two weeks or once a month. Another said that service also means fair treatment and ensuring that the client gets good results, meaning above all that the client does not come out on the short end of a verdict or settlement.<sup>79</sup> A client who feels short-changed will not refer future clients. Several lawyers said that if need be they would reduce their fee or talk with a health care provider about taking less money. The lawyer quoted above who called service "real important" said, "We will reduce our attorney fees to help a client. . . . We can put more money in the client's pocket." Similarly, a lawyer in Austin said,<sup>80</sup>

We, to be honest with you, there are very few times we actually take a 40% fee [on a case that goes into litigation], but there are times when we deserve and we take it. But it does give us leeway and at times we take 20%. The case hasn't panned out the way we wanted and in order to get the case settled we give in our fee. So it happens that way and not by any means do we take a 40% fee on every case we settle. It's actually pretty rare.

We are not suggesting that all plaintiffs' lawyers are this concerned with their reputation or service. But those who rely upon client referrals and are successful in maintaining a client base tend to be concerned about reputation and service. In fact, it is a matter of some

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79. Herbert Kritzer and Jayanth Krishnan found that referrals by former clients are extremely important to lawyers in Wisconsin. See Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 *LAW & POL'Y* 347, 360–61 (1999).

80. Typically, 40% is the fee for a case that goes into litigation, with 33% typically being the fee for a case settling beforehand.



professional pride for lawyers to say that most of their business comes from word-of-mouth referrals from former clients.

Lawyers handling higher stakes and more complex cases see lawyer referrals as more important than client referrals. For instance, medical malpractice specialists (respondents who had 50% or more of their business in medical malpractice) reported that 58% of their business came from lawyer referrals. For some, the percentage may be much higher. A Houston medical malpractice specialist said, "Probably 90% of our cases are from other lawyers." Lawyers like these specialists rely heavily upon lawyer referrals because consumers are unlikely to know who the specialists are, although other lawyers are likely to know.<sup>81</sup>

The key to lawyer referrals, as with client referrals, is the reputation of the lawyer receiving the referral. Here it is the lawyer's reputation in the legal community. What makes a lawyer an attractive referral partner is that lawyer's reputation for success and his resources. As one lawyer put it,

That's 95% of the game, just getting the cases . . . in order to get that case, what's going to happen is some lawyer is going to bring 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 because he's going to get a referral fee. . . . The legal community has to see the firm in such a way that they believe the firm will get a good result and can finance the case.

This puts a premium on that lawyer's mastery of the issues involved in the case and mastery of a unique set of going rates. Of course, it also means taking good cases.

### *B. Screening Cases*

Given the world in which plaintiffs' lawyers work, cases must be screened with some care if these lawyers are to stay in business, and the going rate is at the center of this process. A practice that uncritically takes all comers—a practice made up of a large proportion of problematic or frivolous cases—is one that will certainly be short-lived. The same is true of the lawyer who takes cases with the hope of

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81. This is reflected in the use of direct mail to other lawyers. Medical malpractice specialists in our pooled survey data set were more likely to use direct mail to other lawyers than automobile specialists. Of 83 medical malpractice specialists, 25.3% used direct mail to other lawyers, while only 9.9% of 344 automobile accident specialists did. At the extreme, a Dallas medical malpractice specialist sent his marketing brochure to every lawyer in private practice in Texas. More modestly, a Houston medical malpractice specialist sent his brochure to every lawyer practicing in areas from Houston to San Antonio and south to the border.

hitting a jackpot.<sup>82</sup> The lawyer must be able to identify those cases with adequate liability and a reasonable chance of obtaining a level of compensation sufficient for the client while still covering the lawyer's fee and expenses. "You can't have every case be a good one. You hope and strive for that so hard. . . . I'd like to have each one of them have decent value, having screened each one very carefully," is how a Houston lawyer put it. He went on to say, "I made lots of money on premises liability [cases] in the past because I carefully screened them. They were good cases with the facts . . . liability and damages."

The exact process used to screen cases varies, but the basic parameters do not.<sup>83</sup> As one lawyer with a practice focused on automobile accident cases explained,

I don't look just at the damages. I was taught a long time ago that in order to have a good personal injury case, you need three things: 1) you need good liability; 2) you need good damages; and 3) you need a solvent defendant. It doesn't do any good to just have two of the three. So I try and evaluate all 3 of those factors in deciding whether or not to take the case.

Similarly, a lawyer who specializes in medical malpractice said, "If there's not good liability, you shouldn't take the case." But it is important to note that good liability is not enough in light of the going rates. There still must be a reasonable chance of getting enough money to cover both the client's needs and the lawyer's needs. Lawyers regularly turn down cases with good liability and low or no damages.

Plaintiffs' lawyers typically take only a small percentage of the calls they get from potential clients. Overall, our respondents signed up, on average, 25% of the callers.<sup>84</sup> The percentage was slightly higher for lawyers who specialize in automobile accident cases—34%; and the percentage was much lower for lawyers specializing in medical malpractice cases—10%. For the medical malpractice specialists, no lawyer participating in our surveys accepted more than 50% of the cases and 80% accepted less than 15% of the cases. For the automobile accident specialists, 20% of them signed up 50% or more of the callers. The difference, of course, reflects the vastly different risks and

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82. On the jackpot theory of plaintiffs' practice, see Mahoney & Littlejohn, *supra* note 24, at 1396.

83. On the need to examine the screening process and not just the rate of case acceptance, see Mary Nell Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.L. SCH. L. REV. 215, 240 (2006).

84. Kritzer found an acceptance rate of 31% for the contingency fee lawyers he studied in Wisconsin. See Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 24 (1997).

costs of the two types of cases. All plaintiffs' lawyers would probably agree with the lawyer we quoted at the very beginning of this Article who said,

I have to be able—on a contingency fee—to be able to see the light at the end of the tunnel. It doesn't mean that I'm 100% sure I'm going to recover, because it is never guaranteed. But I usually have a pretty good idea when I take a case that there is going to be some sort of recovery.

In deciding whether to take a case, what local juries have been doing is always an important part of the equation. In a Houston lawyer's view, "Right now, [insurance companies] are real tight with money because juries are real tight . . ." Lawyers are not going to take cases that juries reject or for which juries award too little money. For example, the working perception among most plaintiffs' lawyers is that juries look on soft tissue injury cases negatively and so lawyers shy away from them.<sup>85</sup> For the automobile accident cases they do take, lawyers are screening more stringently.<sup>86</sup> One lawyer said, "Well, we're selective. Low impact, soft tissue cases, we're very selective because the insurance companies are not paying for those cases, as well as juries are not giving monies for those cases." Even high-volume television advertisers pay attention to screening. "We try to screen them pretty good," one said. The first level is on the telephone at the initial call: "We do a screening on the phone, where we go through the facts with them." If it looks like there may be something, the lawyer talks to the caller in person and "we usually sign them up with the proviso that we're going to tell them in 2–3 weeks, after we've investigated it, whether it's a case or not." In describing what is involved he said, "With three investigators, we try to get out there, get the pictures, get witness statements, discover the case immediately." Once some investigation has been done, "then we'll make a decision here in the office, looking at what evidence we've been able to collect, if this is a decent case or not. Most of the time, unfortunately, they're not." As this lawyer's story makes clear, lawyers devote a substantial amount of resources to screening.

The riskier and more complex the case, the greater is the investment required for screening. A lawyer who occasionally handled both medical malpractice and products liability cases that were not too large or complex described his approach to screening:

[For medical malpractice] we have a nurse and several doctors that we have available to us on a contract basis. . . . They screen every

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85. See Daniels & Martin, *supra* note 67 at 1256–57.

86. See *id.* at 1257–61.

case that comes into the office. Especially in the medical negligence cases, we go through two or three different screenings to make sure that they are the type of case that will be cost effective and in the end will yield a positive result. On the products cases, we have a better feel but even there we've got to be very careful. We have to have a very serious injury for both cases, but for products cases that's one of the very first requirements. For example, I don't take . . . let's say an aerosol can that is defective and explodes and blows away somebody's finger. That's not worth taking unless it's a little girl or small child. But if it's an adult, it's just not cost effective. . . . You have to realize that in today's climate every case that you take, there's a 95% chance it will have to be tried to a jury. Our philosophy is we never take a case for settlement purposes because that's a good way to lose a lot of money, lose your time and to have a very unhappy client at the end.

A lawyer who focuses almost exclusively on medical malpractice will have an even more elaborate process. If a potential case gets past the initial screening by a nurse-paralegal, and most do not, the nurse-paralegal

either on her own or after consultation with one of the doctor-lawyers gets a medical authorization from the potential client and gets the medical records to review. We almost never take a contract from a client without first obtaining and reviewing all the medical records in the case. . . . So medical records are obtained and then the normal process is that those records are going to be reviewed by one of the nurse-paralegals and by one of the MD-JDs, and then either the records themselves or those initial reviews are going to be reviewed by the senior MD-JD and it's going to be reviewed by me. And then we meet once a month, what we call our non-litigation meeting. In any given month we're going to have 70 or 80 cases under consideration for the ones we're going to take. We talk about all of them. There has to be agreement for 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 and 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 research that says what was wrong. And then I look at it from a damages standpoint, a venue standpoint, and an economic standpoint. Only if we agree on all that and basically I and [the senior MD-JD] reach agreement, kind of everybody in the room reaches agreement, do we then decide we're going to then get the client and sign the client up.

Lawyers handling other kinds of complex, high stakes cases take a similarly thorough approach.

Some lawyers set a floor for the potential value of the case, although it may not always be high. Obviously, for medical malpractice

specialists, it will be well into six figures or more. For a younger lawyer with a small operation who focuses primarily on automobile accident cases, it can be relatively low. For a younger Austin lawyer, he and his partner will not accept a case

unless we think it will generate a fee to the firm of at least \$1,000, and that's after the smoke all clears, the referring lawyer is paid, and full expense reimbursement. That small fee case is a routine case in which 95% of the work can be done by non-lawyer staff.

Screening also takes the client into consideration. In looking at what juries and insurance companies do, this is crucial. It is not a matter of choosing clients that the lawyer thinks will evoke sympathy from the jury; instead, it is a matter of not taking a client that a jury will view negatively. According to a San Antonio lawyer,

Just across the board the credibility of your client is ever, ever more important in these times. You have to have a client that has a good work history, a client that has never been in trouble with the law. Those things make for a cost effective case. That's not to say that someone that's been in jail or has been convicted of a felony doesn't deserve to be handled by my office, but going in we know—and those are very standard questions for us—going in we know that that person is going to have to give some ground or that case will never be resolved. Or if it is tried it's going to be lost or severely, severely compromised. . . . So those are the cost effective things that we look at.

The explanation by a Houston lawyer of how he screens clients is quite similar:

We look for a client with no prior problems. It makes a good impression . . . those are the types of cases we've gone there, tried, got verdicts. Because we found that people [jurors]—that as long as you don't have somebody up there that has a lot of prior claims, and makes a good impression, is a working person—they'll award them some money. . . . What [jurors] don't want to see is Joe Blow who has a soft tissue back injury, but also had a soft tissue back injury two years ago, and four years ago, and doesn't work and is unemployed, has three kids and is on welfare. And those are lot of cases that get tried [and lose].

His view of what juries find acceptable is his guide, and it illustrates the long shadow cast by juries. It also illustrates quite well the way risk is managed in a contingent environment.

## VII. CONCLUSION

While much of the long-standing debate over predictability and uncertainty in the law has focused on the law on the books, our focus has been on plaintiffs' lawyers and what their practices can tell us about

the law in action. Plaintiffs' lawyers work in a world of contingency rather than a world of predictability or a world of uncertainty. For the most part they work in the shadow of the law, and they are close observers of the processes, actors, and rules that surround the handling of certain kinds of disputes in a given locale. They build their practices around knowable patterns and regularities that they see and learn. More specifically, they build their practices around going rates, which are tied to juries and jury verdicts. Nonetheless, it is a risky world made even more so by a reliance on the contingency fee, which means that the lawyer fronts the costs and gets paid and reimbursed only if he is successful. Many enter this practice area with a particular sense of professionalism in combination with the desire to make a good living. Success depends on their ability to structure and operate their practices around the going rates in a way that balances cost and risk against potential benefit. In other words, their practices show that the civil justice system is knowable and orderly.

