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NEW YORK LAW SCHOOL LAW REVIEW

MARY NELL TRAUTNER

How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions

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In any given year, as many as 98,000 people may die from preventable medical errors.¹ This is more than the number of people who die from highway auto accidents,² workplace accidents,³ and breast cancer⁴ combined. Yet according to the Bureau of Justice Statistics, only 1156 medical malpractice cases were litigated in the seventy-five most populous counties in 2001.⁵ Of those, only one-third involved a wrongful death claim.⁶ Why is there such a discrepancy between the number of wrongful deaths and the number of cases litigated?

One possible answer is that lawyers simply decline to file a large number of potential cases.⁷ Plaintiffs' personal injury lawyers are commonly portrayed as greedy "ambulance chasers" who will take any case regardless of merit. However, a number of studies have shown that personal injury lawyers are highly selective about the cases they choose to accept.⁸ Although negligence victims do sometimes

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1. COMM. ON QUALITY OF HEALTH CARE IN AM., INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (1999) (stating that "the results of the New York study suggest the number may be as high as 98,000").
 2. In 2003, 42,643 people died in auto accidents according to the National Transportation Safety Board. See NATIONAL TRANSPORTATION SAFETY BOARD, 2004 ANNUAL REPORT TO CONGRESS (2004), available at <http://www.nts.gov/publictn/2005/SPC0503.pdf>.
 3. In 2004, 5764 people died in workplace accidents according to the Bureau of Labor Statistics. See U.S. DEP'T OF LABOR, FATAL OCCUPATIONAL INJURIES BY INDUSTRY OR EVENT AND EXPOSURE, ALL UNITED STATES, 2004 at 1 (2004), available at <http://www.bls.gov/iif/oshwc/foi/cftb0196.pdf>.
 4. The American Cancer Society estimated 40,870 deaths in 2005. AMERICAN CANCER SOCIETY, CANCER FACTS & FIGURES 4 (2005), available at <http://www.cancer.org/downloads/STT/CAFF2005f4PW-Secured.pdf>.
 5. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MEDICAL MALPRACTICE TRIALS AND VERDICTS IN LARGE COUNTIES, 2001 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlc01.pdf>. Of those 1156 cases, only 27% of medical malpractice plaintiffs won their case at trial. *Id.*
 6. *Id.*
 7. Of course, not all patients who could seek legal representation choose to do so. In addition, many cases accepted and filed by lawyers do not reach the litigation stage because they settle or are subsequently dropped.
 8. For good examples of such studies, see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004) [hereinafter KRITZER, RISKS, REPUTATIONS, AND REWARDS]; Mark Crane, *Lawyers Don't Take Every Case*, NAT'L L.J. 1, 34 (1988); Stephen Daniels & Joanne Martin, "The Impact That It Has Had is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers, 50 DEPAUL L. REV. 453 (2000) [hereinafter Daniels & Martin, *People's Ears*]; Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2002) [hereinafter Daniels & Martin, *It was the Best of Times*]; Stephen Daniels & Joanne Martin, *We Live on the Edge of Extinction All the Time: Entrepreneurs, Innovation and the Plaintiffs' Bar in the Wake of Tort Reform*, in LEGAL PROFESSIONS: WORK, STRUCTURE, AND ORGANIZATION 149 (Jerry Van Hoy ed., 2001) [hereinafter Daniels & Martin, *We Live on the Edge*]; Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the American Civil Justice System*, 81 JUDICATURE 22 (1997) [hereinafter Kritzer, *Contingency Fee Lawyers*]; Herbert M. Kritzer, *Rhetoric and Reality . . . Uses and Abuses . . . Contingencies and Certainties: The American Contingent Fee in Operation* (Disputes Processing Research Program, Univ. of Wisconsin-Madison, Working Paper No. 12-2, 1996) [hereinafter Kritzer, *Rhetoric and Reality*]; Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* (2001) (unpublished Ph.D. thesis, University of Illinois at Chicago) (on file with author).

successfully pursue their cases without a lawyer, it is generally accepted as a truism that lawyers are a necessary, but not sufficient, condition for obtaining compensation through the civil justice system.⁹ Thus, like other professionals who control people's access to socially valued resources, plaintiffs' lawyers act as "gatekeepers" to justice.¹⁰

Yet despite this important implication for social justice, only a small handful of studies have sought to uncover the process by which lawyers decide which cases to accept and which to decline.¹¹ In this article, I seek to replicate questions examined in these earlier studies with a specific focus on how the more elite stratum of plaintiffs' personal injury lawyers go about the task of case selection.¹²

Understanding the screening process in tort cases¹³ is especially important, not only because of lawyers' gatekeeping role, but also because of the potentially significant public and social benefits of personal injury litigation. Scholars of torts have argued that the tort compensation system has a number of positive functions.¹⁴ People suffering from injuries receive monetary compensation, which aids in the recovery and/or caretaking process. This compensation is designed to make the plaintiff "whole" again by replacing lost wages, by providing for lost earning capacity, and by reimbursing past and future medical expenses. As a result of litigation, tortfeasors are also often asked to compensate for a plaintiff's pain and suffering, emotional anguish, disfigurement, or loss of enjoy-

9. See KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Kritzer, *Rhetoric and Reality*, *supra* note 8; see also Joanne Martin & Stephen Daniels, *Access Denied: 'Tort Reform' Rhetoric is Closing the Courthouse Door*, 33 TRIAL 26 (1997); Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REV. 1 (2006).

10. Martin & Daniels, *supra* note 9, at 26.

11. See KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8; Crane, *supra* note 8; Daniels & Martin, *People's Ears*, *supra* note 8; Daniels & Martin, *It was the Best of Times*, *supra* note 8; Daniels & Martin, *We Live on the Edge*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Kritzer, *Rhetoric and Reality*, *supra* note 8; Martin & Daniels, *supra* note 9; Michelson, *supra* note 9; Parikh, *supra* note 8.

12. This article builds on my larger body of research focused on the impact of tort reform on the case screening process. See Mary Nell Trautner, *Screening, Sorting, and Selecting in Complex Personal Injury Cases: How Lawyers Mediate Access to the Civil Justice System* (2006) (unpublished Ph.D. dissertation, University of Arizona) (on file with author).

13. I use "tort law" and "personal injury law" interchangeably in this article. "Tort law" is a broad term that encompasses a wide range of wrongs, not all of which are physical. As Dobbs says, "[T]ort law is more than injury law because it includes rules for wrongs that cause economic and emotional injury even when no physical harm of any kind has been done." DAN B. DOBBS, *THE LAW OF TORTS* 9-10 (2000). An example is slander or libel. In contrast, people usually refer to "personal injury law" as the portion of tort law which deals directly with physical injuries caused by another.

14. See THOMAS H. KOENIG & MICHAEL RUSTAD, *IN DEFENSE OF TORT LAW* (2001) (containing a fuller discussion of the benefits of tort law); *c.f.* CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 34-40 (2001).

ment.¹⁵ In addition, regulators can become aware of the dangers and risks posed by particular products, which are sometimes exposed by civil lawsuits.¹⁶ Consequently, personal injury litigation has the potential to benefit the public interest by punishing tortfeasors and guarding against unsafe products, workplace hazards, unfair employment practices, and preventable medical errors.¹⁷ Personal injury litigation, in other words, not only deters “bad” behavior, encouraging self-regulation,¹⁸ but also directly impacts public policy.¹⁹ Many of the safety laws we now take for granted, such as laws on seatbelts, drug tests, warning labels, and machine guards were born from personal injury lawsuits.

Previous researchers have demonstrated that the plaintiffs’ personal injury bar contains a complex hierarchy, and that screening practices vary dramatically across the major cleavages and distinctions of the bar.²⁰ In this article, I examine social hierarchies within the personal injury bar to consider the effects that organizational practice characteristics and lawyers’ social and status characteristics have on case evaluation. I first offer a brief review of the divisions within the legal profession that other socio-legal researchers have found to be meaningful, and discuss how those divisions affect self-reported rates of case selection. I then develop and test a number of hypotheses which ask how lawyers at the *top* of the plaintiffs’ bar²¹ screen cases. Previous studies have laid a solid foundation for thinking about access to justice. They show that lawyers accept fewer cases than are presented to them, and that far fewer cases reach the courthouse steps than many would like. However, I conclude this article by suggesting that case selection rates may not meaningfully distinguish the top-end of personal injury lawyers. Instead of looking at rates, I argue that we should build on these previous insights and give greater attention to the *processes* of case screening by analyzing ways in which lawyers think and talk about case screening.

I. DISTINCTIONS AMONG LAWYERS: PREVIOUS RESEARCH

A number of scholars have identified distinctions within the legal profession, and they have done so primarily by examining the *kinds* of cases that lawyers

15. DOBBS, *supra* note 13, at 1052 (listing several activities that diminish one’s quality of life, such as no longer being able to “see a sunset, or hear music, or engage in sexual activity”).

16. For example, lawsuits exposed the dangers of silicone breast implants, asbestos, and the defective Firestone tires.

17. See KOENIG & RUSTAD, *supra* note 14, at 50–52, 131–205.

18. BOGUS, *supra* note 14, at 3.

19. See *id.*

20. See KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8; Crane, *supra* note 8; Daniels & Martin, *People’s Ears*, *supra* note 8; Daniels & Martin, *It was the Best of Times*, *supra* note 8; Daniels & Martin, *We Live on the Edge*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Kritzer, *Rhetoric and Reality*, *supra* note 8; Martin & Daniels, *supra* note 9; Michelson, *supra* note 9; Parikh, *supra* note 8.

21. That is, those who specialize in complex cases such as medical malpractice and products liability.

handle.²² Among the first to do this were John Heinz and Edward Laumann²³ in their work on Chicago lawyers. Through interviews with, and surveys of, a random sample of nearly 800 members of the bar, Heinz and Laumann argued that the legal profession was essentially divided into two distinct sectors (“hemispheres”): a highly prestigious sector that served primarily corporate and business clients, and a less prestigious sector that primarily served individuals.²⁴ Lawyers who fell into each of these two hemispheres differed from one another in terms of the setting in which they practiced (i.e., organizational size and structure), social networks, political orientation, and ethnic, class, and educational backgrounds.

Yet, as Heinz and Laumann acknowledged, the “two hemispheres” model is an imperfect classification system. Plaintiffs’ personal injury lawyers, along with criminal defense and divorce lawyers who also serve individuals, are part of the low prestige sector. But there are also a growing number of individual exceptions among these lawyers who seem to defy the two hemisphere model. For example, how does the model classify noted criminal defense lawyers who serve high-status individuals like celebrities, and become celebrities themselves (e.g., Alan Dershowitz,²⁵ F. Lee Bailey,²⁶ or Johnnie Cochran²⁷)?²⁸ And how does the model address personal injury lawyers who are very prestigious and/or nationally well-known because of prominent and lucrative cases (e.g., Gerry Spence,²⁹ or,

22. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (Russell Sage Foundation & American Bar Foundation eds., 1994) (1982); see also Daniels & Martin, *It was the Best of Times*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Parikh, *supra* note 8.

23. See generally HEINZ & LAUMANN, *supra* note 22.

24. In a follow-up study twenty years later, the authors found that the same general pattern holds true, although there is increasing specialization within all areas of the bar, including plaintiffs’ personal injury. Cf. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

25. Alan Dershowitz is noted for his criminal defense work for high-profile figures such as Patricia Hearst, Leona Helmsley, Jim Bakker, Mike Tyson, O.J. Simpson, and Claus von Bülow, whose retrial following reversal of the original judgment by the Rhode Island Supreme Court and subsequent acquittal was made into a movie, *Reversal of Fortune*. See generally *State v. von Bülow*, 475 A.2d 995 (R.I. 1984); REVERSAL OF FORTUNE (Warner Brothers 1990).

26. F. Lee Bailey, another member of the O.J. Simpson defense team, is also noted for his role in the successful appeal of Dr. Sam Sheppard, accused of murdering his wife, which spawned a popular TV series (“The Fugitive”) and movie of the same name. See THE FUGITIVE (Warner Brothers 1993); and *The Fugitive* (ABC television broadcast 1963–1967).

27. Johnnie Cochran is known for his role in O.J. Simpson’s criminal defense trial (he was the one to tell the jury that “if it doesn’t fit, you must acquit”), and has also represented Michael Jackson, Tupac Shakur, Snoop Dogg, Sean “Diddy” Combs, among others. His theatrical trial style has been spoofed in numerous popular TV shows such as Saturday Night Live and Seinfeld.

28. See Richard K. Sherwin, *Celebrity Lawyers and the Cult of Personality*, 19 N.Y.L. SCH. J. HUM. RTS. 147 (2003).

29. Gerry Spence became known for his victory in the Karen Silkwood case, won over \$26 million in a libel suit against *Penthouse* for Miss Wyoming in 1980, and won an acquittal for Imelda Marcos in 1990. According to his website, <http://www.gerryspence.com>, he has not lost a civil case since 1969 and has never lost a criminal case.

increasingly, John Banzhaf³⁰)? In other words, the Heinz and Laumann model is useful in identifying distinctions *across* broad areas of law, but is less effective in handling differences *within* particular areas of practice.³¹

Since the 1975 Heinz and Laumann study, a number of scholars have built on their work to argue that the plaintiffs' bar, like the bar as a whole, is not a "monolithic structure," but rather, that it also contains a complex hierarchy which is both a) measurable, and b) known to its members.³² That is, lawyers generally know their own place in the hierarchy, and can generally identify where other lawyers are situated as well. The three studies I will discuss define the distinctions between lawyers differently; yet like the Heinz and Laumann study, they capture major cleavages and distinctions *across* the personal injury bar as a whole, but obscure hierarchies *within* those major strata.³³

Based on a survey of over 500 Wisconsin contingent-fee lawyers,³⁴ a study conducted by Herbert Kritzer identified three primary groups of lawyers: low-contact volume lawyers (defined as those who receive 75 or fewer calls for potential cases per year), medium-contact volume lawyers (defined as those who receive between 76 and 1000 calls per year), and high-contact volume lawyers (those who receive more than 1000 calls per year). Within each of these three groups, Kritzer then looked at such characteristics as gender, years of experience, and experience handling product liability and medical malpractice cases.

In another study, Stephen Daniels and Joanne Martin³⁵ relied on average *case values*³⁶ and geographic markets as their primary classification tools for Texas personal injury lawyers.³⁷ They identified four broad categories of law-

30. John Banzhaf was one of the first lawyers to sue the tobacco industry for smoking-related health injuries, and has recently been testing anti-obesity litigation against restaurants and fast-food companies.

31. In other words, some of the low-prestige lawyers seemed to be less "low-prestige" than others.

32. See Daniels & Martin, *People's Ears*, *supra* note 8; Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Daniels & Martin, *We Live on the Edge*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Parikh, *supra* note 8.

33. I do not mean to imply that this was a problem with the Heinz and Laumann study. It was, in fact, their purpose. See HEINZ & LAUMANN, *supra* note 22, at 4.

34. See KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8, at 1-2. Kritzer states that the vast majority of plaintiffs' personal injury lawyers rely exclusively on contingency fees, and few, if any, other legal fields use them. This means that, if they win a case, they are paid a percentage of the award, typically 33%. However, if they are unable to win, they are paid nothing for their time or effort, and their own firm or practice must bear all of the expenses associated with the case. Kritzer uses "contingency fee lawyers" synonymously with "personal injury lawyers." Likewise, the other studies discussed in this section also use these terms synonymously.

35. Daniels & Martin, *It Was the Best of Times*, *supra* note 8.

36. *Id.* at 11. By "average case values," Daniels and Martin mean what the likely verdict or settlement amount of the case would be, before a lawyer recoups his or her contingency fee. This is the definition used throughout the rest of this article.

37. Of course, contact volume and case values are highly correlated: most high-volume lawyers work on low value cases, and most low-volume lawyers work on high-value cases. See Parikh, *supra* note 8, at xvi; see also Jerry Van Hoy, *Work in Progress Markets and Contingency: How Clients Markets Infl-*

yers: two groups of what they call “bread and butter” lawyers, who were most likely to have local practices³⁸ consisting of low-value cases, and two groups of “heavy hitters” who had higher value cases and were more likely to have regional or national practices.³⁹

Both groups of “bread and butter” lawyers spent the bulk of their time handling auto accident cases and a very small percentage of their time on medical malpractice or product liability cases (if they handled any at all).⁴⁰ The first group (“BB1”) had an average case value of \$14,999 or less, while the second group (“BB2”) had an average case value between \$15,000 and \$37,000.⁴¹ Both groups are characterized by their handling of a high volume of low-value cases.⁴²

The “heavy hitters” spent a much smaller percentage of their time handling routine auto accident cases, and considerably more time working on complex personal injury cases such as product liability and medical malpractice.⁴³ The first group of heavy hitters (“HH1”) had an average case value between \$37,001 and \$200,000, while the second group’s (“HH2”) average case value was greater than \$200,000.⁴⁴ While this captures the monetary differences between the low-end and the high-end of the personal injury bar, it does little to capture distinctions among the very top end of the bar (the HH2s). In Daniels and Martin’s classification scheme, lawyers with an average case value of \$200,001 are treated the same as those with average case values of \$1 million, \$10 million, or more.⁴⁵ The lawyers who fall into the HH2 category are those who are most likely to handle products liability and medical malpractice cases. Is there no way to distinguish between these high-end specialists?

Sara Parikh is one researcher who has started to distinguish between high-end specialists within the Chicago area.⁴⁶ Like Daniels and Martin, Parikh

ence the Work of Plaintiff’s Personal Injury Lawyers, 6 INT’L J. LEGAL PROF. 345, 346, 357–60 (1999). In other words, both the Kritzer and the Daniels & Martin studies may be capturing the same distinctions among lawyers, even though they use different tools to capture those distinctions. See Daniels & Martin, *People’s Ears*, *supra* note 8, at 476.

38. That is, cases in the Texas city from which the lawyer is based.

39. This means that while the lawyer is based out of a particular city in Texas, that the lawyer often handled cases outside his or her local jurisdiction.

40. See Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1789.

41. *Id.*

42. *Id.*

43. Throughout the rest of this article, I will use the phrases “complex personal injury cases” and “complex cases” to refer to medical malpractice and products liability cases. These subfields are considered complex because of the background knowledge required in working up the cases (e.g., medicine, engineering, chemistry). In addition, the injuries associated with medical malpractice and products liability cases (e.g., brain damage, paralysis) are often — though not always — considered to be more complex than those associated with other types of personal injury cases like car accidents (e.g., soft-tissue injuries, broken bones).

44. Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1786.

45. *Id.*

46. Parikh, *supra* note 8.

developed classifications of lawyers based on the value of the range of cases they handle.⁴⁷ However, she also gathered data on the largest value case that each lawyer had ever handled.⁴⁸ She divided up her sample of Chicago personal injury lawyers into three groups: low-end and high-end lawyers, who were distinguished by the average values of their cases, and elite lawyers, who were identified by reputation.⁴⁹ The average case values of the low-end lawyers ranged from \$10,000 to \$35,000, high-end lawyers ranged from \$89,000 to \$2.6 million, and elites ranged from \$124,000 to \$4.2 million.⁵⁰

In sum, scholars who have made distinctions among lawyers have done so primarily by examining the kinds of cases they handle: whether they handle cases from individuals or corporations,⁵¹ whether they have a high-volume or low-volume of cases,⁵² or whether their cases involve significant, complex injuries with high values, or routine, minor injuries with low values.⁵³ In the next section, I briefly review how these distinctions impact case evaluation.

II. CASE SELECTION: PREVIOUS RESEARCH

The studies I have reviewed consider three main factors about case screening: the percentage of cases that come to personal injury lawyers that they end up accepting, whether or not they accept any soft-tissue injury cases, and whether they handle any medical malpractice cases. Interestingly, as I will discuss, several of the studies' findings are counter-intuitive and/or contradictory. Looking at acceptance rates, Kritzer found a strong relationship between volume and selectivity: low-volume lawyers accept approximately half of the cases that come to them,⁵⁴ medium-volume lawyers accept about 40%,⁵⁵ and high-volume lawyers accept only about 10% of potential cases.⁵⁶ Kritzer also found that among low-

47. *Id.* at xvi.

48. *Id.*

49. *Id.* at 49 (stating that "elite" lawyers were identified as such by members of the personal injury bar, the defense bar, and local law school faculty).

50. Parikh notes the absence of a "middle class" of lawyers. *Id.* at 65–67. Practices comprised of mainly middle-value cases are difficult, she argues, due to "competition from the high-end sector who need the moderate cases to sustain their practice, and competition from the low-end sector who also covet these cases." *Id.* at 67.

51. *See generally* HEINZ & LAUMANN, *supra* note 22.

52. *See generally* KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8.

53. *See generally* Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Parikh, *supra* note 8, at 65–67.

54. Specifically, lawyers with 1–10 contacts per year accepted 46% of cases, those who received 11–25 contacts accepted 49% of cases, and those with 26–75 contacts accepted 51% of cases. *See* Kritzer, *Contingency Fee Lawyers*, *supra* note 8, at 24.

55. Specifically, lawyers with 76–200 contacts per year accepted 40%, and those with 201–1000 contacts accepted 38% of cases. *Id.*

56. Lawyers with more than 1000 contacts per year accepted 11% of those cases. *Id.*

volume lawyers (those who receive fewer than 75 contacts⁵⁷ per year), women are more selective than men,⁵⁸ and that *more* experienced lawyers are *less* selective than those with less experience (“experienced” lawyers are those who have been out of law school for more than 20 years).⁵⁹ Kritzer found that medium-volume lawyers (those who receive 76–1000 contacts per year) whose dockets are composed of at least 10% medical malpractice cases are more selective than lawyers who handle very few or no medical malpractice cases.⁶⁰ Unfortunately, Kritzer offers little insight about these patterns. Why, for example, should a lawyer’s gender make a difference in case selection? Moreover, his findings regarding experience and volume are counterintuitive, and they also contradict the findings of Daniels and Martin and Parikh, and thus call for greater explanation.⁶¹

Daniels and Martin found that lawyers on the top of the hierarchy, that is those with a low volume of high-value cases, are the *most* selective when it comes to screening.⁶² While BB1 lawyers accepted about 35% of cases that came to them, the HH2 lawyers accepted only 18%.⁶³ High-end lawyers were more likely to accept medical malpractice cases than low-end lawyers⁶⁴ (due to cost⁶⁵), and less likely to accept soft-tissue, auto-accident injury cases (due to low values).⁶⁶

Parikh’s findings are similar in that she also found that high-end attorneys are more selective than low-end attorneys. Based on self-reports, low-end lawyers accepted about half of the potential cases that came to them, while high-end lawyers accepted only about one-third. Elite lawyers accepted the fewest cases of

57. “Contacts” refer mainly to phone calls about potential cases, either from potential clients or from referring attorneys. *Id.* at 26–27.

58. Women accepted 42% of cases, while men accepted 50%. *Id.* at 25.

59. Lawyers with more than 20 years of experience accepted 56% of cases, while those with 10 or fewer years accepted only 45% of cases. *Id.*

60. Lawyers with less than 10% of medical malpractice cases accepted 42% of all cases, while those who handled more than 10% medical malpractice cases only accepted 28% of all cases. *Id.*

61. One might assume, for example, that greater experience would lead to greater selectivity. And, as explained in the following paragraphs, low-volume lawyers tend to handle high-value cases, and these are the most selective lawyers in the Daniels & Martin and Parikh studies. See Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Parikh, *supra* note 8.

62. Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1789.

63. BB1 lawyers signed 35.1% of calls to contract, while HH2 lawyers signed only 17.9% to contract. BB2 lawyers signed 27.0% and HH1 signed 26.8%. *Id.*

64. Only 3.2% of the BB1 caseload was medical malpractice, compared to 20.7% of the HH2 caseload. *Id.*

65. Medical malpractice cases are very expensive to handle, so many low-end lawyers cannot, or are unwilling to invest time and money in them.

66. Only 7.4% of BB1 lawyers handled no auto accident cases, compared to 44.9% of HH2 lawyers. See Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1789. Soft tissue auto accident cases tend to have small monetary values, making them unattractive to many high-end lawyers.

all, only about 25%.⁶⁷ Parikh argues that high-end and elite lawyers are more selective because they place thresholds on the value of the cases they will handle (e.g., they reject cases that have low damages).

I now turn to an analysis of data that I collected on the screening practices of medical malpractice and product liability lawyers. As part of a larger project on the effects of tort reform on the case screening process, I conducted face-to-face, in-depth interviews with eighty-three personal injury lawyers in four U.S. states (Texas, Colorado, Pennsylvania, and Massachusetts⁶⁸) during the spring of 2005, all of whom specialize in medical malpractice or products liability.⁶⁹ I first examine how well these categories of stratification fit the lawyers I interviewed. I then use the findings from these studies to develop and test a number of hypotheses about case screening.

III. STRATIFICATION WITHIN THE PERSONAL INJURY BAR

In order to compare my results with those from previous studies, I asked the lawyers I interviewed to tell me the following: the number of new cases they accept over the course of a typical year, the dollar range most of their cases fall in, the value of the largest case they had ever won (either by settlement or jury award), the percentage of potential cases that they end up accepting, and the percentage of the total cases they handle that fall into the different categories of torts: medical malpractice, product liability, automobile accidents, and general personal injury.

Table 1 shows the range of the dependent variable, case selection rates. I asked each lawyer to tell me approximately what percentage of potential cases they end up accepting. There is an enormous amount of variation in these screening rates, from lawyers accepting as few as 1% of potential cases, to lawyers who accepted 50% or more.

One problem with these percentages, a problem I did not become fully aware of until I was reading the transcripts of completed interviews, is that not all lawyers were thinking of the same denominator when they were telling me the percentage of cases they accept. That is, some lawyers were telling me the percentage of cases that come to them from all possible contacts, including phone calls. Some lawyers who advertised received literally hundreds of phone calls per day, while others who relied on referral networks received only a few calls per week.

67. Low-end lawyers accepted 49% of cases, high-end accepted 36%, and elites accepted 24%. *See* Parikh, *supra* note 8, at 78.

68. In order to minimize intra-state variation, I sampled lawyers from only one of the largest cities in each state (San Antonio, Denver, Philadelphia, and Boston). Two of these states were chosen based on the large number of tort reforms passed (Texas and Colorado), while the other two were chosen because they had passed relatively few tort reforms (Massachusetts and Pennsylvania).

69. I targeted lawyers who primarily handled medical malpractice and/or products liability cases (meaning about half of their average case load). Figure 2, below, shows specialization in greater detail. Further details about the sampling strategy and methods used can be obtained from the author.

TABLE 1. CASE SELECTION RATES

What percentage of cases that come to you do you end up accepting?	Number of lawyers with case selection rate
1.0% of cases	8 lawyers
1.5%	2
2.0%	3
3.0%	2
3.5%	1
4.0%	2
5.0%	18
7.5%	2
10.0%	17
15.0%	2
16.0%	1
20.0%	7
25.0%	2
27.0%	1
30.0%	2
33.0%	3
35.0%	1
40.0%	2
50.0% or more	2
TOTAL	78

Other lawyers did not include phone calls in their denominator, only the cases they accepted that had resulted in a face-to-face meeting with the lawyer. Another problem was with how lawyers interpreted the word “accepted.” Some interpreted “accepted” to mean cases they signed up to investigate, even if they later dropped the case for one reason or another. Others interpreted “accepted” to mean cases they filed into suit and pursued through completion.

While these are major problems with the dependent variable in this study, I want to stress that I believe these to be problems with *each* of the previous studies as well, particularly for the Kritzer and Daniels and Martin studies, both of which collected data on case screening rates through mail surveys.⁷⁰ We cannot ascertain exactly what lawyers had in mind when they answered questions about “accepting” cases that “came to them.”⁷¹ Parikh acknowledges some of the difficulties inherent in comparing case screening rates, as many of the lawyers

70. Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1784; *see also* KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8, at 26–27.

71. Daniels and Martin asked lawyers to give the percentage of phone calls that ended up in signed contracts. Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1789. Yet even this may be open to interpretation, as I just discussed.

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who got their cases through referrals from other lawyers only received potential cases that had been pre-screened by the referring lawyer.⁷²

So that I may make comparisons with previous studies, Table 2 shows the three major hierarchies within the plaintiffs' bar identified by Kritzer, Parikh, and Daniels and Martin, as discussed in the preceding section.

TABLE 2. HIERARCHIES WITHIN THE PERSONAL INJURY BAR

Study, Sample Description	Method of Differentiation	Description of Categories	Trautner Data Compared
Kritzer (1997b) 391 Wisconsin Contingent Fee Lawyers	Contact Volume (number of potential cases to be screened over the course of one year)	Low: 75 or fewer contacts (72% of sample) Medium: 76-1000 contacts (27%) High: 1000++ contacts (1%)	Low: 1-19 cases (53%) Medium: 20-50 (33%) High: 50++ cases (14%)
Daniels & Martin (2001) 552 Texas Personal Injury Lawyers	Average Case Value	BB1: \$14,999 or less (25%) BB2: \$15,000 - \$36,999 (26%) HH1: \$37,000 - \$200,000 (24%) HH2: Over \$200,000 (25%)	BB1: 0% BB2: 3% HH1: 19% HH2: 78%
Parikh (2001) 63 Chicago Personal Injury Lawyers	Average Case Value; Value of Largest Case; Reputation	Low end: \$10,000 - \$35,000 (51%) High-end: \$89,000 - \$2.6 million (32%) Elites: \$124,000 - \$4.2 million (17%)	Low end: 3% High-end: 63% Elites: 34%

Since I intentionally sampled lawyers who work with medical malpractice and products liability cases (lawyers who are primarily located in the upper echelons of the stratification systems⁷³), there appears to be very little variation among the lawyers in my sample. Yet, as I will demonstrate, there is actually a great deal of variation between the lawyers at the top end of plaintiffs' hierarchy. This variation is obscured by the use of classification systems which are designed primarily to distinguish high-end lawyers from low-end lawyers.⁷⁴ If we want to make sense of the high-end stratum, we must be able to differentiate among its

72. See Parikh, *supra* note 8, at 77.

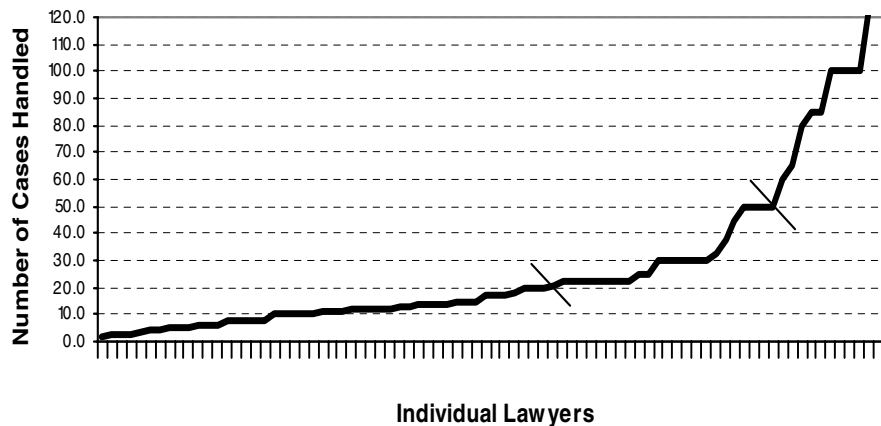
73. See generally Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Parikh, *supra* note 8.

74. *Id.*

members. There are a number of ways in which to do this, following the variables that these other studies have found to be important.

Following Kritzer, we might think about dividing up lawyers based on case volume. However, rather than using the number of contacts that lawyers receive about potential cases, as he did, we could use the *volume* of cases that lawyers routinely handle. As shown in Figure 1, there is a great deal of variation in the numbers of cases lawyers at the top end of the personal injury bar routinely accept in a year. These numbers range from 2 to 2000 (the Y-axis on the figure ends at 120 in order to show the sample's variation). Only three lawyers accepted more than 120 cases per year). I have divided my sample into three general groups: low-volume lawyers who handle fewer than 20 cases per year; medium-volume lawyers who handle between 20 and 50 cases, and lawyers with high-volume practices, who handle more than 50 cases per year.⁷⁵

FIGURE 1. VOLUME OF CASES HANDLED IN A YEAR

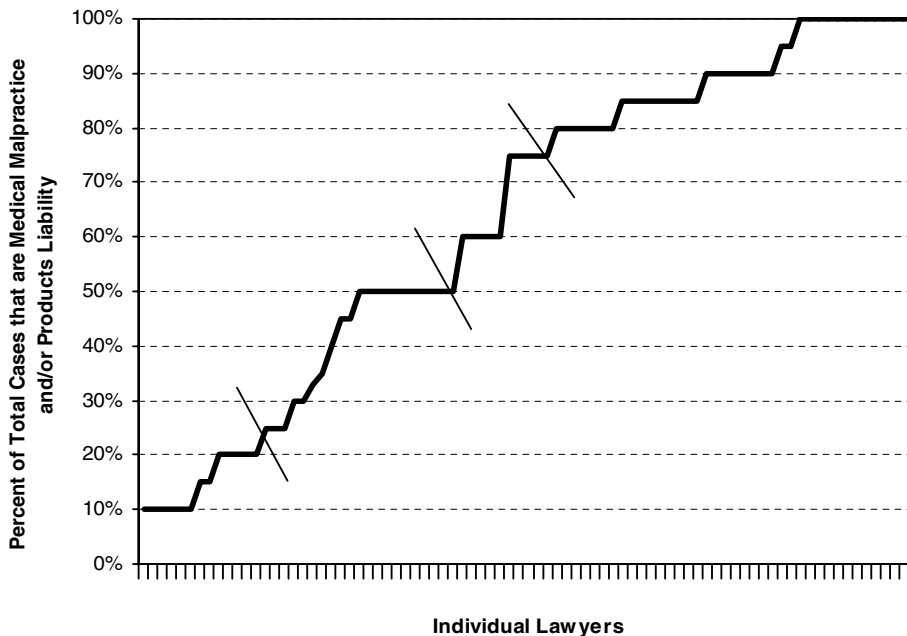


Another measure we could use to differentiate among the top end of the bar is the degree to which the lawyers are specialists in medical malpractice and/or products liability. That is, what percentage of their docket is composed of these sorts of cases? Kritzer, Parikh, and Daniels and Martin all find that high-end lawyers are more likely to work on complex personal injury cases like medical malpractice and products liability than are low-end lawyers. Figure 2 shows the spread of specialization across my sample. All of the lawyers in my sample spent at least 10% of their time on complex personal injury cases. Sixty of the 83 lawyers (72%) spent at least 50% of their time on complex personal injury cases, and such cases composed 80% of the docket for 39 (45%) of the lawyers. Thirteen

75. I use these groupings in order to distinguish among my sample. Kritzer's classification system, as demonstrated in Table 2, does not capture much variation within the top-end of the personal injury bar.

lawyers (16%) devoted 100% of their time to medical malpractice and/or products liability cases.

FIGURE 2. LAWYER SPECIALIZATION IN COMPLEX PERSONAL INJURY CASES



This figure demonstrates the variation within the upper echelon that is obscured by other studies. Kritzer, for example, asked if lawyers spent more or less than 10% of their time on medical malpractice or product liability cases. As noted previously, he found that high contact volume lawyers were unlikely to have medical malpractice or product liability cases on their docket, while about 50% of low contact volume lawyers spent at least 10% of their time on these types of cases. Daniels and Martin found that medical malpractice cases were, on average, 21% of the caseload for HH2 lawyers, 13% for HH1 lawyers, and less than 10% for BB1 and BB2 lawyers.⁷⁶ Given that *all* of the lawyers I interviewed spent at least 10% of their time on these cases, with the majority spending at least 50% of their time on them, the 10% distinction is not as useful in differentiating among the top lawyers as it is at distinguishing the top from the bottom. But because specialization is considered by others to be an important variable, I have divided my sample into four main groups: non-specialists who spend less than 25% of their time on either or both of these types of cases; semi-specialists who spend between 26% and 50% of their time on these cases; specialists who spend between 50% and 75% of their time on them; and super-specialists, who devote

76. See Daniels & Martin, *It Was the Best of Times*, *supra* note 8, at 1789.

more than 75% of their time exclusively to products liability and/or medical malpractice cases.

A third way in which to stratify personal injury lawyers, following Parikh as well as Daniels and Martin, is based on the average values of the cases they normally handle. As I demonstrate in Table 2, nearly all of the lawyers in my sample fall into the highest categories developed by both of these previous studies. Thirty-one percent of them (n=26), in fact, reported average case values with lower values of at least \$500,000.⁷⁷ Only five lawyers reported that the lower end of their average case values start at under \$100,000, and none of those five reported that the upper end of their case range was under \$1 million. That is, they would say that their average cases range anywhere from (for example) \$50,000 to \$4 million. In Table 3, I show the low end of the ranges handled by the lawyers in my sample. While the categories used by Parikh and Daniels and Martin do not distinguish among lawyers at the top, the *concept* of average case values might. We might think of a very upper echelon of lawyers who usually handle only million-dollar cases, a sturdy high-end that handle cases worth only at least \$500,000, a middle group which has a lower cut-off of at least \$200,000, and the rest would fall into a lower group.

TABLE 3. AVERAGE CASE VALUES (LOWER END)

Lowest end of the range of values of cases lawyers normally handle	Number of lawyers	Percent of total respondents (n=61)	Percent of total sample (n=83)
\$0 ⁷⁸	1	2%	1%
\$3,000	1	2%	1%
\$50,000	2	3%	2%
\$75,000	1	2%	1%
\$100,000	5	8%	6%
\$150,000	3	5%	4%
\$200,000	7	11%	8%
\$250,000	6	10%	7%
\$300,000	6	10%	7%
\$350,000	2	3%	2%
\$400,000	1	2%	1%
\$500,000	14	23%	17%
\$750,000	2	3%	2%
\$1,000,000	10	16%	12%
TOTAL	61	100%	73% ⁷⁹

77. This variable is missing responses from twenty-two lawyers. Some lawyers responded in ways that could not be coded. For example, some said they handled “big cases” or ones that ranged “from the smallest to the biggest.” Others did not answer the question at all, and others did not get asked the question.

78. This lawyer said that his cases ranged from \$0 to \$10 million, given that he sometimes loses. *See generally* Kritzer, *Contingency Fee Lawyers*, *supra* note 8.

79. Percentages do not add up due to rounding. That is, the sum of the percentages listed in this column is 71, not 73. *See generally* Daniels & Martin, *We Live on the Edge*, *supra* note 8.

Finally, one could base stratification among lawyers on the value of the *largest* case a lawyer has ever handled, the range of which is shown in Figure 3. Parikh found what really set elite personal injury lawyers apart from the high end was not so much the average values of most of their cases, but “how big their big cases get.”⁸⁰ The average largest case for the elite lawyers in Parikh’s sample averaged \$27 million (median value was \$25 million), compared to the high end lawyers, whose largest case averaged just \$8 million (median value \$4.2 million).⁸¹ As mentioned previously, Parikh did not identify the elite lawyers based on characteristics that emerged from her interviews; they were purposely selected based on reputation.⁸² Given the relationship between reputation and large case size, Parikh posits that reputation is at least in part built on large case awards.⁸³ That is, exceptionally large jury awards (or non-confidential settlements) attract the attention of other practitioners (as well as potential clients), who then hold the lawyers of those awards in high regard, and/or consider them to be “experts” in that area of law.⁸⁴

Given the spread of the dollar amounts of the largest case amounts, Figure 4 shows the natural log values⁸⁵ of the largest case for each lawyer in my sample, which range from a low of 12.61 (\$300,000) to a high of 18.42 (\$100,300,000). Three major “groups” of case values are apparent in the figure: a small group with low values (log values range from 12.61 to 14.60, with corresponding dollar values of \$300,000 to \$2,200,000), a large middle group with mid-sized values (log values range from 14.91 to 15.93, with corresponding dollar amounts of \$3,000,000 to \$8,300,000), and a smaller upper group, with much higher values (log values range from 16.11 to 18.42, with corresponding dollar values of \$10,000,000 to \$100,300,000).

80. Parikh, *supra* note 8, at 61.

81. *See id.* at 61 tbl.3.

82. *See id.* at 49.

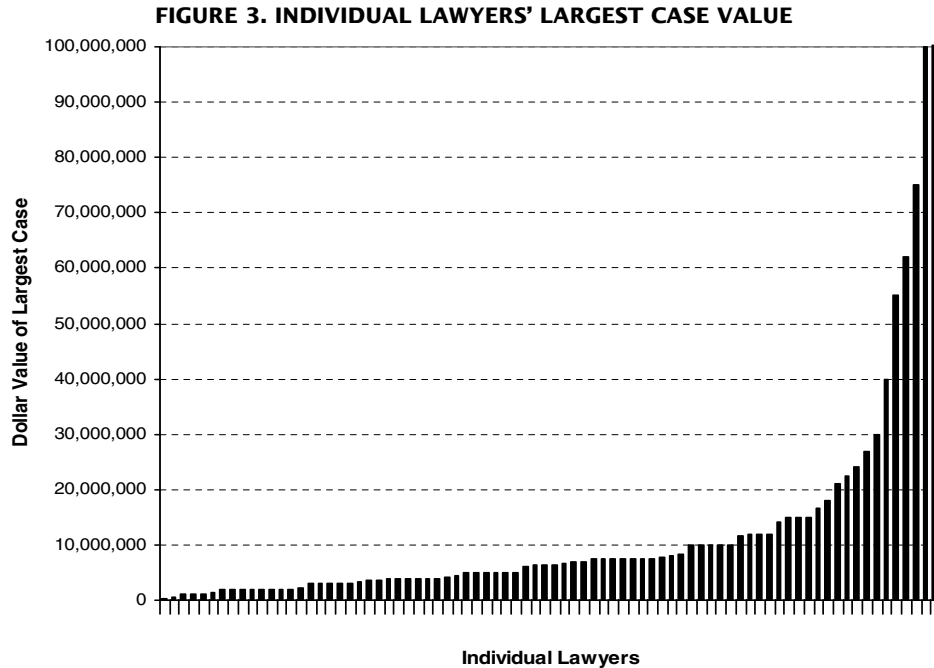
83. *Id.* at 61.

84. Indeed, one lawyer I interviewed, who specializes in defective airbag litigation, describes in very similar terms how he came to be specialist after winning an early victory against an airbag manufacturer:

It was a big victory. It was a very large verdict. And everybody heard about it. . . . [It was] one of the first cases that were ever won with an airbag case. . . . And lawyers who followed this stuff got my name off of, I mean, it just got around on the Internet. Tracking on the Internet really was the impetus then for other people hearing about it and calling. And that’s what started happening. People who were — [a] lady whose mother was killed down here in Texas when they were visiting, in Minnesota found this, searching the Internet and found that verdict in Texas. And called me, and that was the next case I had. And it just kind of snowballed from there. So it built up. And the fact was that, I didn’t think these cases would last long. . . . But they kept coming in and kept coming in.

Interview with ID# SA-11, Texas lawyer, in San Antonio, Tex. (Jan. 2005).

85. Taking the natural log is one commonly recognized way of better comparing extreme values (e.g., \$100,000,000) with more typical values (e.g., \$5,000,000).



Based on the major findings from previous studies of the plaintiffs' personal injury bar, I have thus far suggested a number of ways in which the top end of this bar might be divided. In the section below, I use these studies to form and test a number of hypotheses about how stratification impacts case screening.

A. Case Screening Rates: Developing and Testing Hypotheses

The research I have discussed above presents a number of findings about case selection rates; that is, the percentage of cases that come to lawyers, which they end up accepting and filing suit. In this section, I treat those findings as hypotheses about how high-end lawyers might screen cases, using the new stratification categories I developed from their findings above.

Hypothesis 1: High-volume lawyers are more selective than low-volume lawyers.

Kritzer found that those lawyers who received the most contacts per year were the most selective when it came to accepting cases (likely due to advertising). Should we also look at case volume to distinguish among the high-end of the personal injury bar? Using the categories of case volume developed above (see

FIGURE 4. LOG VALUES OF LARGEST CASE EVER HANDLED

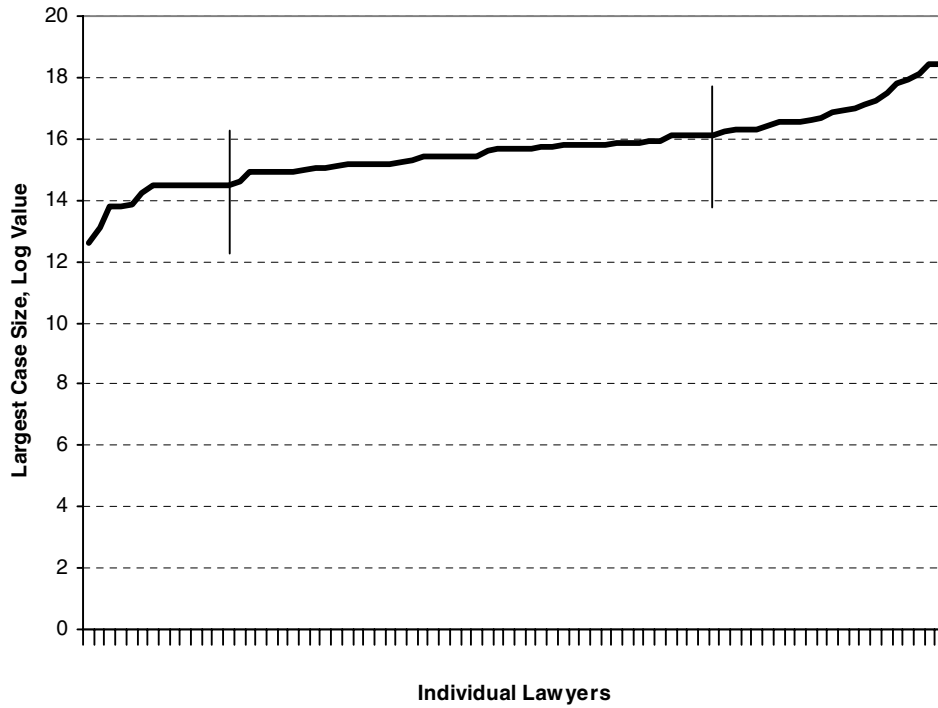


Figure 1), I performed an ANOVA test⁸⁶ to assess whether there is a relationship between volume and selectivity rate. Table 4 presents the results of that test.

The average case selection rates for the three groups of lawyers are relatively the same. High-volume lawyers accept, on average, 10.5% of cases that come to them, medium-volume lawyers accept 13.5%, and low-volume lawyers accept 11.7% of potential cases. These differences are not statistically significant. The within-group variation descriptively explains more of the total variation than does the between-group variation. By dividing the between-group variation by the total variation, we can see that between-group variation explains only 0.7%⁸⁷ of the total variation in case selection, while within-group variation explains 99.3%. Thus, while case volume may be important in defining major divisions among contingent fee lawyers as a whole, as Kritzer found with his Wisconsin lawyers, Table 4 suggests that case volume does little to distinguish among only the top-end lawyers.

86. The ANOVA test (*AN*alysis *Of* *VA*riance) tests the amount of variation *between* sample groups and *within* sample groups.

87. Between-group variation divided by the total variation is equivalent to the R² coefficient in a regression.

TABLE 4. ANOVA TEST OF CASE VOLUME AND CASE SELECTION RATES

Volume of Cases	Count	Mean	Variance
High Volume	10	0.105	0.02145
Medium Volume	26	0.134615	0.016704
Low Volume	42	0.117024	0.011351

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.008035	2	0.004017	0.280001	0.75657	3.118642
Within Groups	1.076049	75	0.014347			
Total	1.084084	77				

NOTE:

SS is the "sum of squares of deviations," informally called the variation.

df refers to the degrees of freedom.

MS is "mean square," informally called variance (SS divided by df).

F is the variance ratio (explained variance divided by the unexplained variance).

P-value is the significance value.

Hypothesis 2a: Women are more selective than men.

Hypothesis 2b: Low-volume women are more selective than low-volume men.

Kritzer found a relationship between gender and cases selection: for low-volume lawyers, women were more selective than men.⁸⁸ Here I test the hypothesis that within the top-end, women are more selective than men. I also test for this relationship within just the group of low-volume lawyers. The ANOVA tests, the results of which are presented below in Tables 5 and 6, show no significant differences between men and women in their rates of case acceptance.

Table 5 *appears* to show that women are more selective than men: their average case selection rate is 9.8%, while men's is 12.6%. However, the difference between men and women accounts for only 0.8% of the total variation in

88. KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8, at 93. Kritzer unfortunately offers no explanation as to why this might be the case. *Id.* at 91. This is especially unfortunate given that neither Parikh, nor Daniels & Martin, reported any information on gender (perhaps, given the small number of women in each of their samples, they did not examine gender as a potential point of variation). See Daniels & Martin, *We Live on the Edge*, *supra* note 8, at 149; Parikh, *supra* note 8. In an expanded write-up of the 1997 study, Kritzer further examines how strategies for obtaining clients (such as through advertising or referrals) influence acceptance rates, and, finding the same pattern for gender, he simply states, "I do not have an explanation for this gender-related pattern." KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 8, at 91. My guess is that the gender difference is actually capturing some underlying, unmeasured variable, but a follow-up study which explicitly examined the role of gender in the case screening process in addition to other aspects of personal injury work in general could potentially be very fruitful and interesting.

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TABLE 5. ANOVA TEST OF GENDER AND CASE SELECTION RATES

Gender	Count	Mean	Variance
Men	65	0.126077	0.015661
Women	13	0.097692	0.006086

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.008728	1	0.008728	0.616864	0.434657	3.96676
Within Groups	1.075355	76	0.014149			
Total	1.084084	77				

case selection, a difference which is not statistically significant.⁸⁹ Within-gender variation accounts for over 99% of the total variation. A similar pattern holds for only the low-volume lawyers, as seen in Table 6.

TABLE 6. ANOVA TEST OF GENDER AND CASE SELECTION, LOW-VOLUME LAWYERS ONLY

Gender	Count	Mean	Variance
Men	37	0.123378	0.012496
Women	5	0.07	0.00075

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.01255	1	0.01255	1.108552	0.298716	4.084746
Within Groups	0.452853	40	0.011321			
Total	0.465403	41				

Among the low-volume lawyers, gender accounts for 3% of the variation in case selection rates; this is still not enough to be statistically significant. These hypotheses about how gender affects case selection are not supported by my data.

89. Standard tests of significance call for p-values of < 0.05.

Hypothesis 3a: More experienced lawyers are less selective than those with less experience.

Hypothesis 3b: Low-volume lawyers with less experience are more selective than low-volume lawyers with more experience.

Kritzer found years of experience to be negatively related to case selection rates. He grouped his lawyers into three categories: those with 10 or fewer years of experience, those with 11–20 years, and a third group who had been practicing for at least 21 years.⁹⁰ In his study, those (low-volume) lawyers in the group with the fewest years of experience were the *most* selective, while those with the most experience were the *least* selective.⁹¹ I test two hypotheses among the top end lawyers in my sample using the same yearly cut-off points as Kritzer — one for all the lawyers in my sample, and a second test for only the low-volume lawyers — but the ANOVAs show no significant results, as presented in Tables 7 and 8.

TABLE 7. ANOVA TEST OF YEARS OF EXPERIENCE AND CASE SELECTION RATES

Years of Experience	Count	Mean	Variance			
10 or fewer	5	0.116	0.01018			
11-20 years	24	0.09875	0.010114			
21 and more years	49	0.132959	0.016495			

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.019005	2	0.009503	0.669149	0.515175	3.118642
Within Groups	1.065078	75	0.014201			
Total	1.084084	77				

Although the differences between groups are not significant (and account for less than 2% of the total variation in case selection), the average case selection rates do not follow the same pattern as Kritzer's data: the most selective lawyers in my sample are those in the middle, with 11–20 years of experience (who accept just 9.9% of potential cases, on average), followed by the least experienced (11.6%), and the most experienced lawyers (13.3%).

In contrast, the case selection rates for just the low-volume lawyers in my sample *do* follow Kritzer's pattern. Those with the fewest years of experience accept just 7.8% of cases, those in the middle group accept 8.9%, and those with

90. Kritzer, *Contingency Fee Lawyers*, *supra* note 8, at 25 tbl.3.

91. *Id.*

21 or more years of experience accept 13.6%. Yet the ANOVA results show no statistically significant differences between the groups, as shown in Table 8.

TABLE 8. ANOVA TEST RESULTS FOR YEARS OF EXPERIENCE FOR LOW-VOLUME LAWYERS

Years of Experience	Count	Mean	Variance
10 or less	4	0.0775	0.003692
11-20 yrs	12	0.08875	0.003928
21 and more	26	0.136154	0.015431

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.025356	2	0.012678	1.123628	0.335395	3.238096
Within Groups	0.440047	39	0.011283			
Total	0.465403	41				

The variation between the groups accounts for just 5% of the total variation in case selection. These hypotheses about the relationship between years of experience and case selection are not confirmed by my data.

Hypothesis 4: The greater the specialization in medical malpractice and/or products liability, the more selective the lawyer.

Kritzer found that among the lawyers he studied, those who regularly handled 10% or more medical malpractice cases were significantly more selective than those who did not work on medical malpractice cases (for medium-volume lawyers). Based on this finding, and the similarity of products liability to medical malpractice (in that they are both complex, specialized, and highly expensive sub-fields of personal injury), I hypothesize that among all lawyers who regularly handle either or both of these types of cases, increasing specialization will result in higher selectivity rates. As shown in Figure 2, I divided my sample of lawyers into quartiles based on the percentage of medical malpractice and/or products liability cases they regularly handle. Table 9 presents the ANOVA results.

The “non-specialists,” that is, those who are least likely to work with these sorts of complex cases, are indeed the least selective — they accept nearly 25% of cases that come to them on average. The hypothesis also holds true for the next two quartiles: semi-specialists and specialists are increasingly selective, accepting 9.7% and 7.3% of cases, respectively. However, the pattern ends with super specialists, who are *less* selective than the previous two quartiles: they accept nearly 13% of cases that come to them.

The between-group differences are significant (at the .02 level), and account for 13% of the variation in total case selection rates. Based on data from my

TABLE 9. ANOVA TEST OF SPECIALIZATION AND CASE SELECTION RATES

Specialization	Count	Mean	Variance
10-25%	14	0.246071	0.055693
26-50%	17	0.097059	0.010919
51-75%	10	0.0725	0.002946
76-100%	37	0.127568	0.018347

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.238293	3	0.079431	3.706805	0.015251	2.72828
Within Groups	1.585705	74	0.021428			
Total	1.823999	77				

interviews, I suspect that the decrease in selectivity among the super-specialists is related to this group's reliance on referrals from other lawyers. The super-specialists are the least likely among all four groups to advertise (only 15% run ads in the yellow pages or elsewhere, compared to 38% of the non-specialists, 50% of the semi-specialists, and 40% of the specialists). Thus, the cases that come to them have already been pre-screened by another attorney who thought the case was worth a super-specialist's time. For example, one of the super-specialists, who accepts about 50% of the cases that come to him, says:

Typically, the referrals we get are usually for pretty complex cases. I think we've got a reputation of doing complex, multiple party types of cases, very tough cases. So the products cases that come to us, I think, are pretty complicated, pretty severe cases to begin with. And even so, it's probably fifty percent. Which is probably, if you have somebody who had just a normal personal injury practice, . . . I bet that their acceptance rate of cases is much lower than that.⁹²

In other words, the super-specialists likely receive fewer calls overall, and fewer cases without merit than do lawyers in the other three categories, so they are able to accept more of the cases that come to them. Another Denver lawyer with a 50% acceptance rate explains, "The reason it's so high is because normally the cases that lack merit have been weeded out by the in-taking attorney first before they call me."⁹³ There is still, however, 87% of the variation in screening rates left to be explained.

92. Interview with ID# D-3, Colorado lawyer, in Denver, Colo. (Mar. 2005).

93. Interview with ID# D-5, Colorado lawyer, in Denver, Colo. (Mar. 2005).

Hypothesis 5: Lawyers with higher average case values are more selective than those with lower average case values.

Both Daniels and Martin and Parikh found that those lawyers at the top-end of the hierarchy (lawyers with the highest average case values) were more selective than those with lower case value averages.⁹⁴ To see if this relationship exists between top-end lawyers, I tested the relationship between average case values and case selection using four groups (as constructed from Table 2): a very upper echelon of lawyers who usually handle only million-dollar cases, a sturdy high-end which only handles cases worth at least \$500,000, a middle group which has a lower cut-off of at least \$200,000, and the rest of lawyers who fall into a lower group. Table 10 presents the ANOVA results.

TABLE 10. ANOVA TEST OF AVERAGE CASE VALUES AND CASE SELECTION RATES

Average Case Value	Count	Mean	Variance			
Under \$200,000	14	0.121429	0.014413			
\$200,000 and up	21	0.087619	0.008777			
\$500,000 and up	16	0.113438	0.015609			
\$1 million and up	10	0.134	0.014199			

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.018293	3	0.006098	0.479516	0.697808	2.766438
Within Groups	0.724828	57	0.012716			
Total	0.743121	60				

There appears to be no real variation in the average case selection rates across the four groups. The highest echelon of lawyers accepts about 13% of cases, while the next highest groups accept 11.3%, 8.8%, and 12.1%, respectively. The ANOVA test shows no significant differences between groups, and the bulk of variation in case selection — 97.5% — is again found within groups, not between them. Although Parikh and Daniels and Martin found average case values to distinguish the top-end lawyers from the bottom-end lawyers, these values do not differentiate among the top-end of lawyers, at least not in regard to case selection rates.

Hypothesis 6: The higher the value of the largest case handled, the more selective lawyers will be.

The last hypothesis derived from previous studies is related to the value of the largest case an individual lawyer has handled. The idea here, following the argument made by Parikh, is that a lawyer's reputation is in part driven by the

94. See Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Parikh, *supra* note 8.

size of the cases that lawyers handle. The larger the biggest case, the higher a lawyer's reputation, and the more ability he/she has to pick and choose the very best cases among the ones that come to him or her. Based on the log-value cutoffs marked in Figure 4, there are three categories of largest case value: a group whose largest case has a "low" value (\$300,000 to \$2,200,000), a middle group with mid-sized values (\$3,000,000 to \$8,300,000), and an upper group with much higher values (\$10,000,000 to \$100,300,000).

TABLE 11. ANOVA TEST OF LARGEST CASE VALUE AND CASE SELECTION RATES

Largest Case	Count	Mean	Variance			
Low value	15	0.153	0.019121			
Medium value	37	0.108514	0.010837			
High value	24	0.109375	0.015303			

ANOVA						
Source of Variation	SS	df	MS	F	P-value	F crit
Between Groups	0.0234758	2	0.011738	0.848552	0.432212	3.122103
Within Groups	1.0097989	73	0.013833			
Total	1.0332747	75				

Table 11 shows that the lowest group appears to be slightly less selective than the two higher groups (they accept 15% of cases, whereas the two other groups accept only 10.9%), but the ANOVA test finds no significant differences between these three groups, showing that the bulk of variation is found within each group, not across them.

In this section, I have attempted to use the findings from previous studies to develop hypotheses about how we might distinguish between top-end personal injury lawyers. My data show support for only one hypothesis — that among high-end personal injury lawyers, increasing specialization in medical malpractice and products liability leads to increasing selectivity. Overall, I find that the independent variables that are important in separating low-end personal injury lawyers from high-end personal injury lawyers are not important in explaining case selection rates among high-end lawyers. However, another interpretation of these findings is possible: perhaps *case selection rates*, the dependent variable in each of these studies, is not patterned in such a way as to meaningfully distinguish among the top-end lawyers.

IV. SUMMARY AND CONCLUSION

In this article, I have reviewed the three major studies that have considered how personal injury lawyers screen cases.⁹⁵ These studies have largely distinguished low-end and high-end practitioners from one another, and have left variation *within* the low-end and high-end unexamined. My analyses show that the variables that separate the high-end from the low generally do *not* make distinctions among the high-end lawyers.

Given the problems with case selection rates that I identified earlier, I believe that rates of case selection may be too variable (and perhaps too arbitrary) to merit the focus of our continued attention. The reason why scholars (including myself) care about case screening, after all, is because we care about the gatekeeping process and citizen's access to justice. Rates of case selection do not tell us much about either of these, although they do give us some ideas about the number of people who would like to pursue tort cases but are unable to do so.⁹⁶ But as Kritzer, among others, points out, analyses of rates cannot answer some of the most interesting questions that might be raised about the case screening process, such as whose cases get in and whose do not, what sorts of cases are most likely to be declined, the difference in screening meritorious versus non-meritorious claims, and why some cases appeal to some lawyers but not others.⁹⁷ Given that scholars have established that lawyers accept many fewer cases than which they are presented, we can move on to address additional questions about case screening. Rather than continuing to examine rates, we should instead start to understand the *process* of case selection. How do lawyers *think* about screening? What sorts of factors are most important to them as they make their decisions? Do all lawyers draw on the same cognitive maps and tools to make sense of the potential cases that come to them?

95. Daniels & Martin, *It Was the Best of Times*, *supra* note 8; Kritzer, *Contingency Fee Lawyers*, *supra* note 8; Parikh, *supra* note 8.

96. I would like to emphasize that I believe these works to be of critical importance in the foundation they have laid for further studies of legal decision-making.

97. See, e.g., Kritzer, *Contingency Fee Lawyers*, *supra* note 8, at 25.