

January 2006

Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest – It's Even More True Now

Stephen Daniels
American Bar Foundation

Joanne Martin
American Bar Foundation

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [Litigation Commons](#), and the [Torts Commons](#)

Recommended Citation

Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest – It's Even More True Now*, 51 N.Y.L. SCH. L. REV. 286 (2006-2007).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

STEPHEN DANIELS & JOANNE MARTIN

Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest — It's Even More True Now*

ABOUT THE AUTHOR: Stephen Daniels and Joanne Martin are Senior Research Fellows at the American Bar Foundation in Chicago, Illinois. Funding for this research was provided by the American Bar Foundation. The views expressed are those of the authors and not of the American Bar Foundation.

* This assessment is from a plaintiffs' lawyer in Texas we interviewed in the late 1990s and again within the past year. He said, "I said this to you last time, that it was going to be survival of the fittest — it's even more true now."

Thank you for sending me the questionnaire involving the study of Texas Plaintiffs' Lawyers About a third of the way through the questions I felt my answers might skew your results so I decided . . . to respond to the questionnaire by writing a brief letter explaining my involvement practicing law in the last five years.

I was licensed to practice law in Texas in 1978, and began working in a small firm representing plaintiffs in personal injury and workers' compensation cases. In 1984, I became board certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. In November of 1986, I opened my own firm and continued to represent plaintiffs in personal injury suits . . . my practice was 99% plaintiffs' personal injury. In 1999, I decided to close my law office due to the fact that I found myself working harder for less money. My business expenses continued to increase and the value of cases continued to decline. On June 30, 1999, my lease expired and I laid off my remaining paralegal. I had about a dozen personal injury cases and continued to work those cases by myself out of my home. In the spring of 2001, I settled my last personal injury case, which also happened to be the last case I had when I closed my practice. In 2004, I decided not to renew my board certification

. . . .
I believe tort reform was a major factor in my decision to close my practice. I found jury verdicts decreased due to the propaganda disseminated by insurance companies and big business and this resulted in insurance adjusters offering less money to settle cases. I began to decline representation in cases I used to accept and was working harder and receiving less money on cases I took.

We received this letter in lieu of a completed survey questionnaire. The survey sought information on plaintiffs' lawyers in Texas and the impact on their practices of the various civil justice reforms enacted in Texas in recent years. It also sought information on the impact of the intense public relations campaigns that accompanied the political fights surrounding those changes. While our letter writer's professional demise most likely will warm the hearts of tort reform supporters everywhere, it was an extreme response. Few plaintiffs' lawyers are literally going out business. It does remind us, however, that plaintiffs' law is a precarious business that is sensitive to both changes in black letter law and in the broader political environment. Tort reform, in its various guises, makes it even more precarious.

This article describes some of the key ways in which tort reform has affected the practice of plaintiffs' law in Texas, a state in which we have been doing research on plaintiffs' lawyers and the civil justice system for over a decade.¹ We

1. We chose Texas because it is a large, diverse state with more than one major urban area and because it has had since the late 1940s a sizeable and diverse plaintiffs' bar. This allows us to look at a diverse set of lawyers in a diverse state working within one set of legal rules. In addition, Texas has been a major target for the tort reform movement since the middle 1980s, with a variety of reforms having been enacted. See American Tort Reform Association, Tort Reform Record, http://www.atra.org/files.cgi/7990_Record_12-31-05.pdf (last visited July 17, 2006) (listing a state-by-state summary of reforms passed in Texas and elsewhere since 1986). One pro-tort reform think tank, The Pacifica Research Institute, recently ranked Texas as number one in tort reform. See Dirk Vanderhart, *Report Ranks Texas as No. 1 in Tort Reform*, HOUSTON CHRON., May 12, 2006, at D2. Texas has also seen intense political battles and public relations campaigns surrounding the reform efforts since the middle 1980s. See Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!*, TEX. MONTHLY, Nov. 2005, at 164 (discussing some of the most recent activity). Understanding these campaigns is a key part of understanding tort reform and its effects. In short, Texas is an excellent laboratory for investigating our interests and a one-state, case study approach allows us to look at things in depth.

want to know how tort reform affects plaintiffs' lawyers because they play an important role in the civil justice system. As political scientist Herbert Jacob observed some years ago, these lawyers are the gatekeepers for the system.² They control meaningful access to the rights and remedies the law provides. Plaintiffs who proceed on their own rarely do so with success.³

The letter writer's story tells us that we need to do two things if we want to understand the effects of tort reform on plaintiffs' lawyers. First, we need to think about what is meant by "tort reform," because there is much more to the reform effort than just the formal changes in the law. In the 150-plus interviews we have done with plaintiffs' lawyers in Texas, we heard over and over again about the tort reform public relations campaigns and their likely effect on juries.⁴ One lawyer told us, "we don't try near as many cases anymore because I'm afraid to go to the juries." When asked why lawyers are afraid of juries, another said, "oh God, they're ugly!" And a third explained the source of the ugliness:

All the advertisements against lawsuit abuse . . . when the jurors actually get into the jury room, the trial lawyer is pretty much at a disadvantage because they've heard that everybody's getting sued and about that McDonald's case and . . . that the plaintiff is after a fast buck and, you know, the jackpot lottery, the lawsuit lottery. And our President doesn't help by bringing all that up.

A fourth lawyer observed, "it's gotten worse over the last five years, but I noticed the trend slowly starting, oh, I guess, in the late eighties . . . if you tracked the first anti-lawsuit push around the country, and especially in Texas, that's when I started seeing more difficulty in selecting juries." The public relations campaigns, as these lawyers highlight, help create and foster an environment that is extremely hostile to plaintiffs' lawyers, to their clients, and to the cases they bring to court.

Second, the letter writer's story tells us that we need to understand some key facts about the business of plaintiffs' law to understand the effects of tort reform. When all is said and done, the private practice of law is a business that needs to make a profit. Or at least, as many of the plaintiffs' lawyers would say, it is a business that needs enough money coming in to "keep the lights on" — to cover

2. See HERBERT JACOB, *LAW AND POLITICS IN THE UNITED STATES* 123 (1986); Stephen Daniels & Joanne Martin, *Access Denied: Tort Reform is Closing the Courthouse Door*, 33 *TRIAL* 26 (1997); Herbert Kritzer, *Contingency Fee Lawyers as Gatekeeper in the Civil Justice System*, 81 *JUDICATURE* 22 (1997).

3. See *infra* notes 56–58 and accompanying text.

4. As a part of our research in Texas, we have conducted 151 lawyer interviews over the past eight years. See Stephen Daniels & Joanne Martin, *It Was the Best of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 *TEX. L. REV.* 1781, 1826–28 (2002) [hereinafter Daniels & Martin, *The Precarious Nature*] (providing a detailed description of our methodology). All of the lawyers quoted in this article are among those we interviewed. Promises of confidentiality prevent us from revealing the identities of those interviewed.

the overhead. As one lawyer said in talking about his firm's problems in the wake of tort reform, "I hated to let people go, but if the cash flow's not there, the cash flow's not there." Regardless of the type of plaintiffs' practice — from high-end specialists handling complex medical malpractice cases to bread and butter lawyers handling very modest car wreck cases — lawyers emphasize the unique economics of a law practice based on the contingency fee and how that fee arrangement structures what they do.

To illustrate this, the lawyers we interviewed typically talked about a case he/she could not take even though it was a legitimate cause of action. One lawyer told us, "we cannot take soft tissue workplace injuries. [I]t costs too much to work the case up and it's not economically viable for us [C]onsequently . . . the smaller case people, I don't think they're getting representation like they used to."⁵ Even assuming that the client will receive an award, the expenses are likely to exceed the award. And of course, the lawyer's fee also comes out of any award. Similarly, a medical malpractice specialist said, "there are many cases we cannot take that are legitimate cases, but they're not economically viable because you're going to spend more working up the case than you can hope to get under the caps [on non-economic damages under Texas law] or the amount coming to the client would be so small that it doesn't make economic sense."

This article is divided into four parts. Part I provides an overview of the politics of tort reform. Part II addresses the business of representing plaintiffs. Part III discusses some key changes in plaintiffs' practice since 2000 in Texas that can be tied to tort reform generally. It focuses on sixty Texas plaintiffs' lawyers who responded to a survey we conducted in 2000 and to a similar survey conducted in 2006.⁶ Part IV addresses lawyer responses to a specific set of health care reforms enacted in Texas in 2003 as an illustration of one key consequence of the 2003 reforms — diminished access to the civil justice system.

I. TORT REFORM

A. *Tort Reform as Interest Group Politics*

Tort reform has become a near-permanent fixture on the American political agenda, even making its way into the politics of presidential elections.⁷ Its pro-

5. Soft tissue injuries often, although not always, are associated with minor auto accident cases. They are injuries involving bumps, contusions, strains, and the like. They are real injuries, but injuries not likely to show up on an x-ray or to require stitches to close or surgery to repair. As a lawyer we interviewed stated, "I try to stay away from the fender benders unless . . . you have got to be careful, but I try to stay away from the soft tissue injuries. . . . I would like to see some blood and broken bones."

6. See Daniels & Martin, *Precarious Nature*, *supra* note 4 (providing a detailed description of the methodology for the 2000 survey). The methodology of the 2006 survey is the same except that it uses a current list of likely plaintiffs' lawyers rather than the one used in the earlier survey.

7. See Glenn Justice, *Businesses Plan Attack On Edwards*, N.Y. TIMES, Aug. 24, 2004, at A14 ("The United States Chamber of Commerce and other business groups plan to spend roughly \$10 million attacking trial lawyers, including Senator John Edwards, by financing a new organization that will run televi-

ponents claim that civil lawsuits for money damages are “bad for business [and] 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.”⁸ The reformers seek sympathetic rule-makers and favorable rule changes relating to the way in which the law deals with and compensates injuries of one kind or another. Generally speaking, they want changes in the civil justice system that will make it harder for people to bring lawsuits, harder to win them, and harder to recover damages. In turn, such changes will, the reformers claim, cure a variety of social and economic ills ranging from job loss to the availability of medical services.

For instance, a widely circulated “Citizen Alert” from the pro-reform Texas Citizen Action Network sent shortly before the September 9, 2003 Texas Constitutional Amendment Election (involving an amendment that would allow caps on non-economic damages) said the following with regard to what the amendment would accomplish:

Proposition 12 would *remedy the health care litigation crisis* that is driving doctors’ insurance costs through the roof, causing them to leave Texas in droves. The result of Proposition 12 will be improved access to health care and lower patient costs. . . . States with limits in non-economic damages have *12% more physicians* per capita that those without such protection. . . . An analysis by the Perryman Group, an independent economic analysis firm, shows Prop. 12 would *add \$36.1 billion per year to the Texas economy* and *create over 240,000 permanent jobs*.⁹

Similar claims have been made by other pro-reform groups in Texas and elsewhere.¹⁰

sion and mail advertisements in critical swing states. That organization, the November Fund, was created this month in an effort to paint Mr. Edwards as among lawyers who, through a proliferation of lawsuits, have increased the cost of health care and insurance, damaging the business climate nationwide and as a result harming many communities.”); *see also* Andrew Blum, *The Hundred Years (Tort) War*, NAT’L L.J., Oct. 15, 1990, at 1 (characterizing tort reform as a long-term area of political controversy).

8. *See* American Tort Reform Association, ATRA’s Mission: Real Justice in Our Courts, <http://www.atra.org/about/> (last visited Oct. 9, 2006).
9. Texas Citizen Action Network sent a “citizen alert,” bulk e-mail with subject heading “Texas Early Voting Information — Join Your Doctor in Supporting Proposition 12 for Better Health Care.” Obtained from the Texas Trial Lawyers Ass’n (on file with authors) (emphasis added).
10. Another Texas pro-reform group, Yes on 12, circulated a “My Fellow Texan” letter from Governor Rick Perry that opened by saying, “On Saturday, September 13, Texans can help make health care *more affordable and accessible* for Texas families and employers and encourage health care professionals across Texas to remain in practice. *Your vote can make the difference*.” Obtained from Texas Trial Lawyers Ass’n. (on file with authors) (emphasis added). The email was entitled “An Important Message from Governor Rick Perry.”; *see also* American Tort Reform Association, How Tort Reform Works, http://www.atra.org/wrap/files.cgi/7964_howworks.html (last visited Oct. 9, 2006) (claiming, among other things, that a series of tort reform measures enacted in Texas in 1995 helped to reduce inflation and increase personal income).

While the reformers' argument may seem plausible — change the civil justice system and certain social and economic ills will be cured — there has always been a serious question as to the veracity of the argument. The record on the empirical connections underlying the argument has always been mixed — at best. For example, look at the caps on non-economic damages in health care cases, an issue we will address in Part IV of this article. Reformers justify the imposition of such caps on very practical grounds. Such damages are characterized as “the primary cost driver in medical liability”¹¹ because they are the source of “huge profits” for plaintiffs' lawyers, who work on a contingency fee basis.¹² Non-economic damages, the reformers claim, encourage lawsuits and negatively affect the availability and cost of insurance for health care professionals. In turn, this is leading health care professionals to do one or more of the following: abandon the field, change medical specialties, leave already underserved areas (like rural areas), or move to states with more favorable legal environments. The remedy, the reformers say, is capping non-economic damages.

While the availability of insurance and the availability of medical services are legitimate policy problems, the connection between damage caps and insurance rates, on the one hand, and between insurance rates and medical services, on the other hand, remains empirically murky.¹³ An influential 2003 GAO report took note of the murky situation saying:

Interested parties debate the impact these various measures may have had on premium rates. However, a lack of comprehensive data on losses at the insurance company level makes measuring the precise impact of the measures impossible. As noted earlier, in the vast majority

11. Letter from Harold L. Jensen, M.D., Chairman, ISMIE Mutual Insurance Company, to policy holders (Dec. 12, 2003) (on file with authors) (addressing malpractice policy holders, specifically “Don’t be taken in by the BIG LIE . . .” ISMIE is a major provider of medical malpractice insurance in Illinois).

12. *Id.*

13. There is substantial empirical literature dealing with medical malpractice that would suggest medical malpractice reform is *unlikely* to remedy the problems used to justify reform. See VASANTHAKUMAR N. BHAT, *MEDICAL MALPRACTICE: A COMPREHENSIVE ANALYSIS* (2001); STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995) [hereinafter DANIELS & MARTIN, *CIVIL JURIES*]; INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda Kohn et al. eds., 2000); FRANK A. SLOAN ET AL., *SUING FOR MALPRACTICE* (1993); U.S. GEN. ACCOUNTING OFFICE, *MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE* GAO-03-836 (2003) [hereinafter *IMPLICATIONS OF RISING PREMIUMS*]; U.S. GEN. ACCOUNTING OFFICE, *MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES* GAO-03-702 (2003) [hereinafter *MULTIPLE FACTORS*]; NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* (1995); PAUL WEILER ET AL., *A MEASURE OF MALPRACTICE* (1993); PAUL WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991); Daniel P. Kessler & Mark B. McClellan, *The Effects of Malpractice Pressure and Liability Reforms on Physicians' Perceptions of Medical Care*, 60 *LAW & CONTEMP. PROBS.* 81 (1997); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 *TEX. L. REV.* 1595 (2002); David M. Studdert et al., *Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado*, 33 *IND. L. REV.* 1643 (2000).

of cases, existing data do not categorize losses on claims as economic or noneconomic, so it is not possible to quantify the impact of a cap on noneconomic damages on insurers' losses. Similarly, it is not possible to show exactly how much a cap would affect claim frequency or claims-handling costs. In addition, while most claims are settled and caps apply only to trial verdicts, some insurers and actuaries told us that limits on damages would still have an indirect impact on settlements by limiting potential damages should the claims go to trial. But given the limitations on measuring the impact of caps on trial verdicts, an indirect impact would be even more difficult to measure.¹⁴

A companion GAO study on the connection between malpractice insurance problems and access to health care also found a mixed picture.¹⁵ Lucinda Finley's recent review of the efficacy of caps on non-economic damages comes to essentially the same conclusions as the GAO analyses.¹⁶ A short review we wrote ten years ago of earlier empirical studies assessing the impact of medical malpractice reforms passed in the 1970s, including caps, also noted the mixed picture.¹⁷

Ultimately, tort reform is not about "improving" the law or seeking to cure certain social and economic ills or even seeking a greater sense of justice. Over twenty years ago the editor of a legal newspaper wrote at the end of a series of stories on tort reform, "the current tort reform movement seeks not neutral efficiency-enhancing procedural changes, but substantive legal revisions to rewrite rules more in their [the reformers'] favor."¹⁸ Tort reform is about politics and "who gets what, when, and how."¹⁹ The specific changes can range from the politically high-profile issues like damage caps in health care cases, to the politically more obscure (but no less important) issues like venue and joint and several liability. Regardless of the specific changes, all are the result of organized political activity on the part of well funded interest groups trying to change the law in ways that benefit them to the detriment of their opponents.²⁰ By all accounts, the

14. MULTIPLE FACTORS, *supra* note 13, at 42–43.

15. IMPLICATIONS OF RISING PREMIUMS, *supra* note 13.

16. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1267–80 (2004).

17. DANIELS & MARTIN, CIVIL JURIES, *supra* note 13, at 105–14; *see also* David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 287–88 (2004).

18. Kenneth Jost, *Polemics Won't Solve Insurance Crisis*, L.A. DAILY J., Dec. 9, 1985, at 2.

19. *See* HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936) (noting the questions of who gets what, when, and how define politics).

20. *See* THOMAS BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 22–59 (2002); DANIELS & MARTIN, CIVIL JURIES, *supra* note 13, at 29–59; WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 32–52 (2004); JEAN STEFANIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 96–108 (1996).

reformers have been quite successful in Texas (our focus) and elsewhere in enacting such changes.²¹

To understand the full scope of tort reform's real-world effects, it must be viewed as more than just the formal legal changes, the usual focus of discussion and debate. Tort reform must be viewed more broadly as a successful example of interest groups mobilizing political support, setting the political agenda (getting the public and policy-makers to focus on the changes they favor), and then seeing those changes enacted. There are a myriad of interest groups, professional or trade groups, and think tanks devoting their energy and resources to changing the civil justice system in ways that serve their interests. These groups do much more than simply lobby legislators and their staffs directly — so-called “inside tactics.” They also engage in “outside tactics” — such as organizing and mobilizing grassroots groups, coordinating the activities of such groups, organizing letter-writing or e-mailing campaigns, lobbying the public through national and local public relations campaigns, and lobbying the media and academe.²²

B. Interest Group Activity and Agenda-Setting

We have discussed the idea of interest group activity and agenda-setting in the context of tort reform at length elsewhere.²³ The list of groups involved, the scope of their activities, and the money they have invested in their cause are all quite impressive.²⁴ The crucial initial task for the political interest groups wanting changes in the civil justice system is to convince the public and policy-makers there is a “problem” that can only be “solved” by the changes they desire. If they cannot convince the policy-makers, then nothing will change. As political scientist John Kingdon notes, the challenge is formidable because at “any time, important people in and around government could attend to a long list of problems Obviously, they pay attention to some potential problems and ignore others.”²⁵ Consequently, those wanting to get their issues and ideas on the agenda for governmental action must invest effort and resources in getting the attention of the public and important people in and around government, including the media.

21. See American Tort Reform Association, State and Federal Reforms, <http://www.atra.org/reforms/> (last visited Oct. 31, 2006) (providing an up-to-date-summary).

22. Political scientists have noted a marked increase in the use of “outside tactics” by interest groups generally in since the 1980s and 1990s. See WILLIAM P. BROWNE, GROUPS, INTERESTS, AND U.S. PUBLIC POLICY 84–108 (1998); KENNETH M. GOLDSTEIN, INTEREST GROUPS, LOBBYING, AND PARTICIPATION IN AMERICA 22–28, 39–41 (1999).

23. DANIELS & MARTIN, CIVIL JURIES, *supra* note 13; 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, *Between People's Ears*]; see also BURKE, *supra* note 20, at 22–59 (discussing the politics of tort reform).

24. See Daniels & Martin, *Between People's Ears*, *supra* note 23, at 461–72; STEFANIC & DELGADO, *supra* note 20, at 96–108 (giving a good overview of the major interest groups involved in tort reform).

25. JOHN KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 90 (2d ed. 1995).

Successfully placing an issue on the policy agenda and then getting a favored change enacted, says Kingdon, “requires changing the way people think about that issue.”²⁶

At the core of this process, argues Deborah Stone, is the identification of “problems.” Problems, she observes, “are not given, out there in the world waiting for smart analysts to come along and define them correctly. They are created in the minds of citizens by other citizens, leaders, organizations, and governmental agencies, as an essential part of political maneuvering.”²⁷ She calls this “strategic representation.” The process of gaining a place on the agenda and eventually moving a favored change to enactment is essentially “a struggle to control which images of the world govern policy.”²⁸ David Ricci, in his study of the rise of “think tanks” characterizes such a struggle as the “politics of ideas” — the aggressive marketing of ideas and images for political purposes.²⁹

This interest group/agenda-setting literature in political science tends to focus on activities (whether “inside” or “outside” tactics) aimed at the legislative process and on formal changes in the law or on the electoral process. Lobbying the public mind is a means to a broader political end — legislative or electoral gain. With regard to tort reform, however, there is an additional end — lobbying the pool of people who may eventually serve on a civil jury. This is a unique policy arena because there is another official decision-maker that decides “who gets what, when, and how” — the jury. In our legal system the jury can, in effect, help set policy in a given area by the verdicts it makes. Policy can be set by a single verdict in a mega-case (like one of the key Vioxx cases) or through a series of verdicts in a particular type of more modest case. Juries, in other words, help to set the “going rate” used to settle the vast number of cases that do not go to trial and in doing so provide incentives (or disincentives) for the future actions of affected players.³⁰

Tort reformers have been deeply engaged in the struggle over which image of the civil justice system will govern policy for many years and in a variety of ways. The American Tort Reform Association’s (“ATRA”) description of its mission provides an apt example of the political struggle Stone and Ricci write about as well the mixture of “inside tactics” and “outside tactics.” The following statement summarizes ATRA’s preferred picture of the civil justice system and the reasons for the kinds of changes ATRA desires:

26. *Id.* at 114–15.

27. DEBORAH STONE, POLICY PARADOX AND POLITICAL REASON 122 (1988).

28. *Id.* at 309.

29. DAVID RICCI, THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS 182–207 (1993).

30. *See generally* DANIELS & MARTIN, CIVIL JURIES, *supra* note 13, at 62–68 (discussing jury verdicts and going rates); Marc Galanter, *The Radiating Effects of Courts*, in KEITH BOYUM & LYNN MATHER, EMPIRICAL THEORIES ABOUT COURTS (1983).

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. This leads many companies to settle questionable lawsuits just to stay out of court.

These 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. 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. Some have compared the political and judicial influence of the personal injury bar to a fourth branch of government.

ATRA works to counter that influence by challenging this status quo and continually leading the fight for common-sense reforms in the states, the Congress, and *the court of public opinion*.³¹

Under the heading “A Track Record of Success” — as if echoing Kingdon’s observations — ATRA continues, saying:

ATRA’s goal is not just to pass laws. *We work to change the way people think about personal responsibility and civil litigation.* ATRA programs shine a media spotlight on lawsuit abuse and the pernicious political influence of the personal injury bar. ATRA redefines the victim, showing how lawsuit abuse affects all of us by cutting off access to health care, costing consumers through the “lawsuit tax,” and threatening the availability of products like vaccines.³²

To change the way people think in the court of public opinion, ATRA has conducted an ongoing series of public relations campaigns on its own or in conjunction with other tort reform groups.³³ In addition, some groups have conducted

31. American Tort Reform Association, ATRA’s Mission: Real Justice in Our Courts, <http://www.atra.org/about/> (last visited Oct. 9, 2006) (emphasis added).

32. *Id.* (emphasis added).

33. ATRA and most of the major tort reform groups rely heavily on “outside lobbying,” as the quotes above illustrate. According to ATRA, [o]ne of ATRA’s greatest assets is its network of tort reform advocates (state coalitions) that advance ATRA’s agenda in state capitals. Their work is bolstered by an “army” of more than 135,000 citizen supporters who have joined together in state and local grassroots groups. Together, the state coalitions and grassroots activists are an effective one-two punch in the fight for state tort reform.

Id.; see also GOLDSTEIN, *supra* note 22, at 22–28, 39–41 (providing general information on “outside” lobbying).

similar campaigns on their own.³⁴ Such campaigns can involve everything from roadside billboards, to television and radio spots, to lobbying the media with press releases and other materials, to direct mail, and so on. The idea is to sell a vision of the civil justice system that will serve the reformers' political goals to the public and key elites. The vision of the civil justice system found in those campaigns is a standardized, poll-tested image that has been aggressively marketed to national and state audiences since the 1970s (and probably earlier).³⁵ It is an all too familiar vision of a system gone terribly and dangerously wrong. The vision's basic or unifying theme is the idea of a system run amok for which "we all pay the price."

It is a vision full of evocative metaphors and threatening images. It describes a system in which, among other things, the number of personal injury suits is significantly higher than in the past (the litigation explosion); where more people bring lawsuits than should (frivolous lawsuits); where the size of awards is increasing faster than inflation (skyrocketing awards); where the size of most awards is excessive (outrageous awards); where the logic of verdicts and awards is capricious (the lawsuit lottery); where the cost of lawsuits is too high and the delays too great (an inefficient system); where there is no longer a fair balance between the injured person and the defendant (exploiting "deep pockets"); and ultimately where the cost to society is unacceptably high ("we all pay the price"). One need only think of the symbolic value of a cup of coffee from McDonald's in constructing this believable and damning picture of civil litigation in many people's minds.³⁶

C. *The Potential Impact of Interest Group Activity*

The impact of the public relations campaigns may go beyond the immediate interest of a particular election, legislative proposal, or ballot initiative. As we noted above, these campaigns may also affect what happens on juries — something not lost on the tort reform interests. Some earlier insurance industry public relations campaigns were blatantly aimed at potential jurors. For instance, an insurance company advertising campaign in early 1953 included a series of four advertisements that alternated between *Life* and *The Saturday Evening*

34. See Daniels & Martin, *Between People's Ears*, *supra* note 23, at 461–72 (providing examples).

35. See BURKE, *supra* note 20, at 22–59; DANIELS & MARTIN, *CIVIL JURIES*, *supra* note 13, at 29–59.

36. See Stephen Daniels, *The Question of Jury Competence and the Politics of Tort Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989) (providing a detailed examination of the public relations campaigns); see also DANIELS & MARTIN, *CIVIL JURIES*, *supra* note 13, at 29–59; HALTOM & McCANN, *supra* note 20, at 83–226; STEFANIC & DELGADO, *supra* note 20, at 104–06; Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 73, 78–99 (1998); Daniels & Martin, *Between People's Ears*, *supra* note 23.

*Post.*³⁷ Each advertisement was explicitly aimed at potential jurors in tort cases. The first advertisement ran in *Life* on January 26, 1953. It shows a stern-faced bailiff sitting in front of a room labeled “Jury Room.” The advertisement’s headline reads, “YOUR insurance premium is being determined now.”³⁸ It introduces a message — found in all four advertisements — that is strikingly similar to that found in the current tort reform rhetoric: there are too many excessive and unjustified jury awards which are caused by overly sympathetic jurors, which, in turn, cause insurance companies to lose money. Consequently, everyone winds up paying more, not only for insurance, but also for other goods and services as well. A similar campaign appeared in the middle 1970s.³⁹

A Texas plaintiffs’ lawyer we recently interviewed sees some of the insurance industry’s regular business advertising as being aimed at potential jurors, as well as potential customers. His example is a recent set of television advertisements by Allstate that tout the company’s efforts at fighting fraud in auto accident claims as a way of keeping premiums down. The actor in the advertisement goes so far as to explain the nature of the fraud and the idea of staged accidents. In talking about juries, the lawyer said:

you see the Allstate ads where the guy talks about . . . all these frauds and how they’re defeating frauds. They’re not selling insurance with those ads; they’re working jury pools . . . the crux of 80 percent of those ads, is to work the jury pools. And so, you spend . . . a full day with the jury pool, explaining to them that, you know, this person was injured as a result of this accident [and it’s not a fraud].

The most recent campaigns have been more general in their targeting, but it is reasonable to assume they may affect jurors nonetheless. Like the lawyer quoted above, plaintiffs’ lawyers in Texas and elsewhere certainly believe there has been an impact on jury pools.⁴⁰ This is their common sense notion of the way things are working, and plaintiffs’ lawyers work everyday on the basis of that

37. *Bill Set Me Straight on Jury Awards*, SATURDAY EVENING POST, Mar. 28, 1953, at 155; *A True Verdict Rendered According to the LAW and the EVIDENCE*, SATURDAY EVENING POST, Feb. 14, 1953, at 118; *Me? I’m Paying for Excessive Jury Awards?*, LIFE, Mar. 9, 1953, at 157; *YOUR Insurance Premium Is Being Determined Now*, LIFE, Jan. 26, 1953, at 91 [hereinafter *YOUR Insurance*]. All four advertisements were the work of one insurance company, American-Associated Insurance Companies.

38. *YOUR Insurance*, *supra* note 37.

39. See Elizabeth Loftus, *Insurance Advertising and Jury Awards*, A.B.A. J., Jan. 1979.

40. See *id.* Whether such advertising actually does affect jurors in the way plaintiffs’ lawyers believe is still an open question empirically. Loftus’ study did look at a public relations campaign similar to the current ones and found an effect on jurors. It tested the influence on jurors of insurance company magazine advertisements complaining of what were characterized as ridiculously high jury verdicts. Her work found that even a single exposure to one of these ads can dramatically lower the amount of award a juror is willing to give. Specifically, jurors awarded less for pain and suffering.

notion. It is the possible effect on jurors that provides the key to the impact of tort reform public relations campaigns on plaintiffs' lawyers.

Plaintiffs' lawyers in Texas see changes in the environment in which they work and believe these changes are caused by the tort reform public relations campaigns. All of the changes are ultimately tied to juries. In our 2000 survey, we asked whether the public relations campaigns had a positive effect on a lawyer's practice, a negative effect, or no effect. Over 90% of the respondents, not surprisingly, said the campaigns had a negative effect. When asked about change in the pre-trial settlement value for a typical case over the past five years, 84.5% of all respondents said the value decreased. With regard to the cost of bringing the typical case to conclusion, 87.8% said it had increased. As for the time it takes to bring the typical case to conclusion, 60.2% of all respondents said it had increased.

The lawyers' logic says the aggressive public relations campaigns in which the tort reformers have engaged have demonized plaintiffs' lawyers and their clients. The result has been a "poisoning" of the jury pool by which juries have become more pro-defense, more anti-plaintiff, and more anti-plaintiffs' lawyer. A lawyer we interviewed in the late 1990s summarizes the perceived connection between juries and the public relations campaigns:

The biggest problem I've seen is the effect on the juries. Tort reform, you can say it's a legislative agenda . . . and you can look at it from a statutory standpoint But what I see as the most severe impact is right over there [pointing in the direction of the courthouse], when you go to pick a jury. And juries have gotten mean, real mean. They've been convinced that everything in their lives, from heart attacks to hemorrhoids, is because of a system that is out of control. And when you have a tort reform advocate on the jury panel and you've been asking questions, all you have to do is listen to the phraseology. It's all the same: too many frivolous lawsuits, outrageous jury awards, greedy trial lawyers.⁴¹

The result is lower verdicts, which allows insurance companies and their attorneys to toughen their stance in the settlement process that disposes of the vast majority of cases.⁴² The insurance companies are less willing to settle, or to settle on terms favorable to the plaintiff, and they are more willing to litigate. As one interviewed lawyer said, expressing the sentiments of many others:

There used to be a settlement or an opportunity to settle the case because of the risk in picking the case up or appealing the case or going to

41. We quoted this lawyer at length in a previous article and his summary is still one the best at capturing the views of his peers. See Daniels & Martin, *Between People's Ears*, *supra* note 23, at 456.

42. See Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225, 1245-46 (2004).

trial. Now there's less risk, so . . . you cannot expect that case to settle. If it settles at all, it'll settle at the courthouse steps.

The whole process of resolving claims has become riskier, more time-consuming, and more expensive. And, it is the lawyer's own money that is on the line as well as any possible fee. In short, the "going rates" have changed and, given the nature of their business, plaintiffs' lawyers must find ways to respond if they are going to stay in business. In the next section we turn to the nature of their business and how tort reform can affect it.

II. THE BUSINESS OF PLAINTIFFS' LAW AND TORT REFORM

Plaintiffs' lawyers are specialists. They devote most, if not all, of their practices to representing clients who are — usually but not always — individuals suffering some kind of injury. Typical is a sole practitioner from an East Texas city, "I do probably 85% pure personal injury from the plaintiffs' standpoint and that's been true since the day I started practice in 1978 . . . 10% is probably just general business litigation, businesses suing each other, and 5% is transactional, doing wills and contracts and setting up corporations and so forth."⁴³ Some plaintiffs' lawyers, however, can be even more specialized, such as the lawyer who told us that medical malpractice "for awhile was probably 90% of our practice, maybe as high as 95% from time to time."

Plaintiffs' lawyers rely primarily, though not necessarily exclusively, on the contingency fee. In our 2000 survey of Texas plaintiffs' lawyers, the median percent of business made up by contingency fee work for all respondents (not just the sixty lawyers who responded to both of our surveys) was 90% and the mean was 75.3%. Two key facets of a practice structured by the contingency fee are particularly important. First, the lawyer gets a fee only if there is a monetary award. This makes a plaintiffs' lawyer's practice very sensitive to certain rule changes that may affect the kinds of cases on which a lawyer concentrates. Obviously, anything that lowers the likely award in a case — like a cap on damages or a change in the environment in which a lawyer works — can lower the lawyer's fee. More generally, anything that lowers the likelihood of an award — like more stringent standards to prevail or change in the rules dealing with comparative negligence or joint and several liability — can ultimately lower a lawyer's income. So too will rule changes that limit the lawyer's ability to bring certain cases — through more stringent filing requirements — or to bring them in particular jurisdictions — because of changes in the rules on venue.

One lawyer we interviewed from South Texas provides an illustration of how changes in the rules on venue can affect a plaintiffs' practice. He saw his

43. Similarly, a Fort Worth-area attorney said, "just about everything I do is contingency fee, although I've got a few types of clients now that are paying me on an hourly fee and I don't know if I am doing that out of fear or what."

income drop precipitously after a 1995 change in the rules dealing with venue that limited the jurisdictions in which a suit could be filed.⁴⁴ In his words:

We were doing a lot of local counsel, working with lawyers from other locations who would file a lawsuit [in which the injury occurred elsewhere in Texas] in [South Texas] and then seek assistance from plaintiffs' lawyers here, then we would get involved as co-counsel The changes in the venue laws really impacted lawyers bringing lawsuits here in [South Texas] and then it obviously impacted lawyers like me that based their practices on connections with lawyers who would bring those lawsuits. And so that was a very big blow.

The cases on which he co-counseled were higher-value cases. After these cases were gone he was left with the lower-value cases that occurred locally in his county. As that lawyer explained:

Now you've got somebody slipping and falling at the local grocery store or you've got fender benders . . . instead of handling an asbestos case, which were terrible, terrible cases, especially with the mesothelioma when they had the cancer. These were high dollar cases, as opposed to the kinds of cases now . . . the low-end cases.

The difference is between cases with damages in the thousands or tens of thousands and cases with damages in the hundreds of thousands or even millions. Part IV will provide another example of how rule changes — a cap on non-economic damages in health care cases — can affect lawyers' practices.

The second key facet of a contingency fee practice is that the lawyer typically finances the case with his/her own money or with money borrowed by the lawyer. As the lawyer just quoted said, "ultimately, it's my money that I'm investing because, you know, we do it all on a contingency." The money is literally the lawyer's or is borrowed from a bank on a line of credit. This lawyer borrows and his situation is dire: "Our ability to generate income off of personal injury type cases has gone down, way, way, way down. . . . I am borrowing from the bank . . . and my line of credit's topped out . . . just to try to stay in business." If there

44. The Texas Department of Insurance provides an excellent summary of the reforms passed by the Texas Legislature in 1995. With regard to venue it states:

74th Legislature, S.B. 32, entitled "An Act relating to venue for civil actions." Codified at Chapter 15, Civil Practices and Remedies Code. This Act limits the venue to the county of the principal office of a business, the residence of the defendant (if the defendant is a natural person) or the location where the injury took place. (Previously a suit could have been filed where the business had an office.) It abolished the establishment of venue through agents or representatives. It added a right to transfer venue as a matter of convenience to parties and witnesses; a requirement that each plaintiff establish venue independently of other plaintiffs; and, mandatory venue provisions for lawsuits created under the Federal Employee Liability Act and Jones Act cases. Effective date: For FELA and Jones Act cases, September 1, 1996. All other provisions, suits filed after September 1, 1995.

Texas Department of Insurance, News & Rules, <http://www.tdi.state.tx.us/commish/legal/tortlaws.html#laws> (last visited Nov. 1, 2006).

is no award, there is no reimbursement of out-of-pocket expenses and the lawyer has to absorb the loss. This, in turn, will affect the lawyer's cash flow and ability to pay bills and salaries, as well as the ability to finance future cases.

Merely being successful in a case may not be enough. Anything affecting the cost of handling cases or the time it takes to get an award may cause problems. A lawyer may still face financial problems if the compensation is not sufficient to cover both the client's needs and the lawyer's investment of time and money, or if the time it takes to get the award increases. In other words, a lawyer can "win" a case but still lose financially. Many lawyers have complained of the problem caused by the refusal of insurance adjustors to settle relatively small cases with clear liability and instead pushing plaintiffs' lawyers to file suit and even go to trial. If such a case goes to trial, the expenses and the contingency fee will almost always leave the client shortchanged — and that's assuming that the expenses and fee do not exceed the award. No lawyer wants to be in this situation, but the problem for many of them is that this is happening to the bread and butter cases that are the mainstay of their practice.⁴⁵

These factors make plaintiffs' practice a precarious business even in the best of times. Tort reform makes the practice of plaintiffs' law even more precarious by making it harder for plaintiffs' lawyers to stay profitable. Most obviously, tort reform's formal side does this by making changes in the law which, in turn, can do three things: make it more difficult for people to bring a claim, make it more difficult to prevail when they do, and limit the amount of money they collect when they actually prevail. The other side of tort reform — the public relations campaigns and other efforts to change the way people think about the civil justice system — also make it harder for plaintiffs' lawyers to stay profitable by creating and fostering a hostile environment that can affect the jury pool.

III. CHANGES IN PLAINTIFFS' LAWYERS PRACTICES

A. *Comparing Lawyers' Practices at Two Points in Time*

In the environment created by tort reform, the primary challenge for plaintiffs' lawyers is maintaining a steady stream of clients that the civil justice system will compensate adequately, at a reasonable cost, and in a reasonable time. If even one part of the challenge is not met, the lawyer may quickly have to find

45. Plaintiffs' lawyers loathe shortchanging clients because it harms the lawyer's reputation as someone who treats clients fairly. Reputation is extremely important for plaintiffs' lawyers because much of their business comes from client referrals. See HERBERT KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 66–67 (2004) ("Contingency fee lawyers want their clients to leave satisfied with the result the lawyer obtained on their behalf; more important, the lawyers want the clients to *stay* satisfied. A lawyer who settles cases too cheaply will have trouble maintaining the reputation necessary to create the flow of potential clients that is in the lawyer's long-term interest."); see also Stephen Daniels & Joanne Martin, *It's Darwinism—Survival of the Fittest: How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POLY 377 (1999).

another line of work. In this section we will explore how the practices of sixty Texas plaintiffs' lawyers have changed between 2000 and 2006. These sixty lawyers participated in each of the two surveys of Texas plaintiffs' lawyers we conducted — one in 2000 and a similar survey done in 2006. We will refer to them as the “repeaters” to distinguish them from the other respondents to those surveys.

Each of our surveys was designed to be a broad sample of Texas plaintiffs' lawyers in order to get a general picture of plaintiffs' practice. The comparison of the repeaters' practices at the two points in time is possible because the surveys have a number of questions in common. The surveys were not designed for the narrower purpose of comparing specific individuals over time. However, demographic and other data included in the two surveys have allowed us to identify sixty lawyers as respondents to both surveys. While not a representative sample of all Texas plaintiffs' lawyers, these sixty lawyers provide a unique opportunity to closely explore changes in plaintiffs' practice in Texas. We will supplement the discussion of the repeaters with information from interviews we conducted with Texas plaintiffs' lawyers during the past year.⁴⁶ Among these interviews are a small number of lawyers we have interviewed twice — once in the late 1990s and again during the past year.

In exploring changes in the practices of the repeaters, we will focus on the following:

- variables that speak generally to how well their practices are doing: the value of their typical contingency fee case, their income from their legal practice, and the number of calls from prospective clients;
- variables that speak more specifically to changes within lawyers' practices: the number of lawyers and staff, the number of cases, and the percentage of calls signed to a contingency fee contract; and
- variables that speak to the nature of their practice: the percentage of caseload composed of contingency fee work and the percentage of caseload composed of different types of contingency fee cases.

Taken together, these three sets of variables allow us to assess how well the repeaters appear to be meeting the challenge of maintaining a steady stream of clients that the civil justice system will compensate adequately, at a reasonable cost and in a reasonable time.

Rather than look simply at summary statistics for the respondents in each of the two surveys (like the mean and median responses), our approach also emphasizes comparisons between the responses of individual lawyers to a question in the 2000 survey and their responses to the same question as posed in the 2006 survey. This allows us to say the mean or median percentage of caseload composed of contingency cases decreased for the repeaters as a whole, as well as to say

46. See Daniels & Martin, *Prekarious Nature*, *supra* note 4, at 1826 (providing a detailed description of methodology).

more specifically the percentage decreased for x number of respondents. Again, our prime interest is in individual changes.

B. How Well Are Practices Doing?

1. Case Value and Lawyer Income

Two overall measures of the success of a lawyer's practice at a given point in time are the value of the typical contingency fee case handled and net income from the practice of law. Because they work on a contingency fee basis, all other things being equal, plaintiffs' lawyers would like to handle more valuable cases. The reason is simple — they earn more for their efforts. A Fort Worth-area attorney with a mid-level practice expressed the idea well: "If I could have ten cases a year that were big cases, I would be fine with that Unfortunately, there aren't right now enough of those big cases. They are great when they come along and we get them resolved, but you've got to have the other stuff going on." He also expresses the key problem lawyers face — there is not a plethora of good, high-value cases, and so there is competition for those cases. With regard to competition for a favorite type of high-value case — eighteen-wheeler truck accidents — another lawyer said there would be "15 to 20 lawyers lined up trying to get that case." Few lawyers can restrict their practices only to the high-value cases, and those who do are likely to be super-specialists who focus only on a particular kind of case like medical malpractice or major aviation accidents.

TABLE 1. Indicators of How Well Repeaters are Doing

	Individual Change			Overall Change*			
	More	Same	Less	2000		2006	
				Mean	Median	Mean	Median
Case Value (n=60)	33.3%	0%	66.7%	\$356,000	\$58,500	\$237,000	\$41,500
Income (n=53)	34.0%	9.4%	56.6%	\$150-175K	\$150-175K	\$150-175K	\$150-175K
Calls All Individual Lawyers (n=54)	38.9%	7.4%	53.7%	26.9	15.0	25.9	10.0
Calls Firms (n=27)	44.4%	3.7%	51.9%	54.6	40.0	57.0	30.0
Calls Solos (n=24)	37.5%	4.2%	58.3%	25.1	15.0	27.6	7.0

*dollar figures are in 2006 dollars

Looking at case value in Table 1, the repeaters are not doing as well as they did in the recent past. Both the mean and median (expressed in 2006 dollars) declined from the 2000 survey to the 2006 survey. The repeaters are, however, doing a little better than the all of the respondents to the 2006 survey (300). The median case value for all respondents in the 2006 survey is \$36,250 and the mean case value is \$233,400. In comparison, the median and mean case values

for all respondents (n=546) in the 2000 survey were \$37,000 and \$1,000,000, respectively.

More important than these summary statistics are the changes experienced by the sixty individual repeaters — What happened with each of them? This is the better indicator of change. As Table 1 shows, case value decreased for two-thirds of the repeaters when those values are expressed in 2006 dollars. For the other one-third, the typical case value increased. Here the message is clear: for most of the repeaters the value of the typical case decreased when viewed in constant dollars. Even if we do not look at case value in terms of constant dollars, almost one-half (46.7%) of the repeaters show a decrease in case value, with 36.7% showing an increase, and 16.7% showing the same value.

The reason for the decline in case value, in the view of some lawyers, is the idea that insurance companies are offering less to settle than in the past for comparable cases. One Houston lawyer summarized the situation as follows, “the insurance companies — you used to be able to get two or three times the medical bills on those cases without filing a lawsuit. Now, the offer will be if they have \$2,000 in medical bills, the offer will be \$2,100.” The insurance companies, in turn, are offering less because juries are awarding less. As another said, “the insurance companies are not paying anything close to fair and that’s a reflection of the jury verdicts that we’re getting.”

Case value alone may not provide the best measure of how well a lawyer is doing. For instance, a lawyer may have changed the nature of the practice. A lawyer may still be primarily handling contingency fee cases; but as is the situation for one lawyer we interviewed, perhaps this involves shifting from a small number of higher value medical malpractice cases to a larger number of lower value automobile accident cases. The lawyer’s case value will decrease but overall net income may increase. It makes sense, then, to also look at changes in net income (income from legal practice, deducting office overhead and other ordinary and necessary business expenses). When looked at in terms of constant dollars, Table 1 shows that the median income was unchanged in the \$150,000 to \$175,000 range. However, over one-half of the repeaters saw their income decrease, while only one-third saw their income increase. For some, the decrease was precipitous: “If you compare what we were doing three years ago, which was a million plus Last year . . . I was borrowing from the bank . . . just to try to stay in business.” In contrast, another lawyer is doing well enough to have built a new building for his practice. In general, taking both case value and income into consideration shows that most of the repeaters are not doing as well as they were in 2000, although a substantial minority have managed to do better.

2. Number of Calls from Potential Clients

Another and different way to gauge a lawyer’s success is to look at the number of calls coming in each month. The biggest challenge plaintiffs’ lawyers face is

maintaining a steady stream of clients with injuries the system will adequately compensate. The number of calls is the raw material a lawyer has to work with in making a law practice successful. The comments of a Houston lawyer make the point, "I've been very lucky to have continued to have the phones ring when a lot of the others are really having a hard time." A West Texas lawyer shows the other side, "my experience is that the more people you see [potential clients], the better off you are. And you know, we're not seeing as many people."

A number of factors go into determining how many potential clients will seek a lawyer's services. Some of them are, at least in part, within the lawyer's control, such as the ways a lawyer actually gets clients — like advertising or creating referral networks. Other factors are out of the lawyer's control — like the diminished potential for injuries because of changes in the surrounding market environment (i.e., a factory closes), the entry into the market of competitors, people's reluctance to make formal claims for compensation, or changes in the law itself. In addition to changing the law, tort reform can be a factor to the extent it helps create and maintain a cultural environment that is hostile to plaintiffs' lawyers and tort litigation.

For the sixty repeaters, we looked at the number of calls received per month from potential clients in three ways. First, we looked at the question in terms of the individual lawyer (regardless of whether the lawyer works in a firm) — how many calls were received per month. Second, for those lawyers who are not working as sole practitioners, we looked at how many calls their firm was receiving. Finally, we looked at calls for the sole practitioners. For individual lawyers, Table 1 shows that the median number of calls decreased noticeably from the 2000 survey to the 2006 survey (from fifteen to ten), while the mean changed only slightly. The marginal change in the mean is tied to the small number of lawyers reporting relatively high volumes of calls (50+). These are high volume practices typically based on aggressive advertising. Most importantly, just over one-half of the repeaters (53.7%) reported receiving fewer calls than in 2000, while 38.9% reported receiving more calls. For firms, the median number of calls also decreased, from forty to thirty. The mean, however, increased slightly from 54.6 to 57.0 — again because of a small number of very high volume firms. In terms of individual firms, one-half (51.9%) received fewer calls and 44.4% received more. Greater decreases are found among the sole practitioners — 58.3% received fewer calls.

Taken together, these three indicators suggest that most of the repeaters are not doing as well as they were in 2000. As we noted above, these lawyers believe they are working in a much less favorable environment in the wake of tort reform, and decreases in case value, income, and number of calls would be expected. The question arises as to the changes the lawyers are making in their practices in response to this environment. We address this next.

C. Changes Within Lawyers' Practices

1. Changes in Personnel

Lawyers could respond to the hostile environment in a variety of ways. One drastic response is the one represented by our letter writer. Stories told by lawyers we interviewed about lawyers they know suggest that some plaintiffs' lawyers did take this tack, but it appears that most did not. A less drastic approach is to significantly change the mix of one's business, and we will address this in the next section. Here we want to explore several different responses — responses that go to decreasing overhead cost and others that go to increasing the amount of business. Some obvious responses to the effects of a hostile environment that drives down case value and income would go to reducing overhead, especially in terms of the number of people who have to be paid every month. Like any service business, personnel is likely to be the first or second most expensive monthly cost, and one might expect legal businesses to respond to leaner times by cutting personnel. One of the questions the survey sought to address was, are there fewer lawyers working in the firm now and are there fewer support staff working in the firm?

TABLE 2. Changes Within Lawyers' Practices

	Individual Change			Overall Change*			
	More	Same	Less	2000		2006	
				Mean	Median	Mean	Median
N of Lawyers (n=57)	31.6%	31.6%	36.8%	3.8	3.0	3.3	2.0
N of Lawyers Firms Only (n=34)	35.3%	29.4%	35.3%	3.8	3.0	3.3	2.0
N of Staff (n=55)	34.5%	10.9%	54.5%	6.4	5.0	5.8	3.0
% Signed Individual Lawyers (n=55)	38.2%	7.3%	54.5%	21.6%	10.0%	23.6%	13.5%
% Signed Firms (n=28)	28.6%	21.4%	50.0%	20.5%	12.5%	23.0%	10.0%

With regard to the number of lawyers, Table 2 shows that the pattern for the sixty repeaters is mixed. The median number of lawyers in repeaters' practices dropped in 2006. The mean, however, stayed relatively unchanged. Even a small decrease, however, is noteworthy because plaintiffs' firms are relatively small to start with. In the 2000 survey, for instance, the median number of lawyers (all respondents, not just repeaters) in a firm was 2.0 and the mean was 5.3; in the 2006 survey the figures are 2.0 and 3.8, respectively. For 36.8% of the repeaters there are fewer lawyers in their practices in 2006 compared to 2000, for 31.6% there are more, and for 31.6% the number is unchanged. For firms only — taking out the sole practitioners — the picture remains a mixed one: for 35.3% there are fewer lawyers, for another 35.3% there are more, and

for 29.4% there is no change. In short, there is no clear pattern in terms of changes in the size of firms — only that firms generally remained small.

The pattern is clearer with regard to changes in the number of support staff. Table 2 shows that the median staff size dropped from five to three people, although there was little change in the mean — 6.4 people to 5.8. The marginal change in the mean is due to an increase in the number of repeaters with ten or more staff people — from ten such lawyers to fourteen — rather than a more general increase. This is shown by the fact that just over one-half of the repeaters had a smaller staff in 2006, whereas a third had a larger staff. It appears more economizing may be occurring through the reduction in support staff than through reduction in the number of lawyers — understandable assuming lawyers, unlike staff, may bring in additional revenue.

Some of the lawyers we interviewed indicated that substantial decreases in both staff size and the number of lawyers occurred for them in the early 1990s, before the time covered by the two surveys. For these lawyers, the decreases were in response to a fundamental change in the way in which workers' compensation cases are handled.⁴⁷ The change made the process more administrative, meaning that most cases would not go to court. The reform also cut the lawyer's fees sharply and changed the party paying them — the worker rather than the insurance company. Even though the cases were usually small, many Texas plaintiffs' lawyers handled some workers' compensation. The cases could be handled quickly and at low cost. The regular cash flow generated by these cases would help pay the practice's overhead and the workers represented were often a source of future clients — referring the lawyers to friends, family, fellow church members, etc. As one lawyer said, "if you do a good job and get the thing turned fairly quickly and take care of the clients, that's a good referral source." The cases would also be a source of third party cases the lawyer would then handle or refer to another lawyer for a fee. That same lawyer said, "I concentrated on third-party cases that we generated out of the workers' compensation cases, and that's what really, really hurt, is when we — when I lost the chance to talk to somebody who'd been hurt at work, to see if there's a third party there that might be a better target."

One attorney, whose firm had a substantial workers' compensation practice, told us the kinds of changes many firms experienced when, as he said, "comp died." He said, "[w]e have four partners and an associate; we have probably 20 employees. In 1989, we had six partners and we had 63 employees . . . we've scaled back . . . we had a large comp practice . . . so most of that is comp scaling back . . . we quit doing it [workers compensation] . . . we could lower our overhead by letting people go." A number of firms (not this one) actually broke up in the wake of the change in workers' compensation because they could no longer operate profitably.

47. See Tony Korioto, *Workers' Compensation Law*, 45 Sw. L.J. 697 (1991) (providing a summary and explanation of the 1991 changes in workers' compensation in Texas).

A similar dynamic may be occurring today in the wake of the 2003 health care reforms and the cap on non-economic damages for firms that built practices almost entirely on medical malpractice cases. One lawyer we interviewed completely closed down his medical malpractice practice and opened a smaller one in a different location. He began handling completely different types of cases:

We closed the doors on the downtown law firm. I had half a floor in a downtown office building, just all kinds of crap. And so we sort of started over again over here in just a sublet with me and two of my best paralegals. And we're not doing any more medical malpractice.

Another lawyer whose firm still does a substantial amount of medical malpractice observed:

A lot of the firms impacted [by the 2003 reforms], plaintiffs' firms, especially those heavy in med mal have laid off lawyers . . . we lost one that I could probably attribute to that [the 2003 reforms] . . . very few firms are hiring . . . you're seeing quite a reduction, I think statewide, in attorneys who were associates in firms, working for med mal firms.

However, he did say that there are firms adding lawyers, "there are some [firms] that are in a particular area of drug litigation or a product [liability] and they have a niche in that, you know, they need lawyers."

2. *Changes in Percentage of Calls Signed to a Contract*

Cutting overhead is one response to the hostile environment. Another response is trying to increase the number of calls coming into a practice. More lawyers are advertising and they are getting a larger percentage of their business from advertising.⁴⁸ In 2000, 30.5% of the repeaters did not advertise at all, and for those who did advertise, 46.3% reported getting no clients from advertising. In 2006, only 15% report that they did not advertise (of those who reported not advertising in 2000, eleven changed to advertising in 2006, only two changed to not advertising, and seven remained non-advertisers). For those who do advertise, only 33.3% reported getting no clients from their advertising.

In combination with more advertising being done in the face of fewer calls from potential clients, one might also expect lawyers to sign a higher percentage of the calls they get to a contingency fee contract. This could mean taking weaker

48. Some lawyers are targeting their advertising at particular types of cases. For instance, one lawyer seeks out clients whose homeowner's insurance carrier would not pay for a claim involving mold in the house. He said:

[T]here will be instances where I am looking for a specific claim . . . and I will run a specific targeting ad in the newspaper — I don't do any TV or radio spots — and try to get our claims that way. I am working on an idea now where I will probably try to target CPAs and some transactional lawyers with a specific letter. Those kinds of things I do bring in the business.

Others will not advertise much themselves, but instead will take cases on referral from those firms that do aggressively advertise.

cases to keep the same number of cases or it could be a strategy of having a higher volume practice involving different kinds of cases than in the recent past. Taking weaker cases seems an unlikely strategy in the current environment. No lawyer interviewed suggested such a strategy. As a West Texas lawyer put it, “the close cases are very, very difficult to deal with, because of the jury bias principally.” Instead, a lawyer may be taking a higher percentage of calls if changing the type of cases handled. Different types of cases are screened differently in light of the costs, the rules, and the risks. To use a somewhat extreme example, a lawyer we interviewed stopped doing medical malpractice cases altogether after 2003 and now is doing primarily smaller cases, like car wreck cases. He is signing a much higher percentage of calls because he is no longer taking malpractice cases — very, very few of which are ever signed to a contract. A much higher percentage of car wreck cases, although certainly not all, will be signed to a contract because the costs, rules, and risks are different.

An alternative view suggests that in a hostile environment, it makes more sense to be even more selective for any kind of case — to invest scarce resources in only those cases with the best potential as a way of increasing the chance of receiving an adequate award or better. Every lawyer we interviewed who is still doing medical malpractice is following this approach and screening those cases more carefully in light of the 2003 reforms. One firm has reduced its percentage of medical malpractice business significantly — going from over 90% to about 60% — and as a result is screening cases more stringently. A lawyer in this firm told us that they are “absolutely more selective as far as the med-mal.” He, like others, said that the more stringent screening of malpractice cases is likely to mean that there are some types of malpractice cases — like those involving the elderly — which almost no one will take because of the cap on non-economic damages. We will address this issue directly in Part IV of this article.

Returning to the more general question of changes in the percentage of calls signed to a contract, Table 2 shows that the repeaters evidence small increases overall in the percentage of claims signed to a contract: the 2000 median and mean were 10.0% and 21.6%, respectively compared to the 2006 median and mean of 13.5% and 23.6% respectively. However, when we look at changes in the practices of the individual lawyers, just over one-half of the repeaters indicate they are signing a smaller percent of calls to a contract, while 38.2% indicate a larger percent. For firms (not including sole practitioners), one-half report signing a smaller percentage of calls while 28.6% report signing more.

The key difference between those lawyers signing more calls to a contract (twenty-one lawyers) and those signing fewer (thirty lawyers) appears to be the size of a practice in terms of the number of cases handled. Those signing more calls in 2006 have a median number of 45 cases and a mean of 149.3. Those signing fewer calls have a median of 20 cases and a mean of 36.2. In other words, two of the strategies noted in the paragraph above may both be in use —

selecting fewer but better cases or signing a higher volume of lower-risk cases. There is scant evidence of lawyers signing weaker cases.

A lawyer may also respond to the more hostile environment by changing the nature of the practice itself. A rare few, like our letter writer, actually closed their practice to pursue other opportunities. In our interviews, lawyers told us of former partners or lawyer employees who left the practice of law. One lawyer said that in his part of the state it was the small plaintiffs' practices that seemed to have been hit the hardest, "they've either had to close their doors or go work for the D.A.'s office or go work for the Public Defender's office or just, you know, just retire and stop and change businesses." More frequently, lawyers remain in the practice of law but change the types of matters they handle. This may involve decreasing the percentage of business comprised of contingency fee cases and replacing it with hourly or flat fee work of one kind or another. It may also involve shifts within the contingency fee arena — consciously taking fewer of some kinds of cases thought to be problematic with regard to award potential, while seeking more of other cases thought to have better award potential. We address these issues next.

D. Changes in the Nature of Practice

1. Changes in Percentage of Contingency Fee Business

The lawyers we interviewed all seem to be making some changes in the types of cases they handle. They're either looking for a steady source of contingency fee business that can cover the overhead and hopefully yield a profit, or looking for an area that would provide the occasional higher-value case that will make the difference between a good year and a great year financially. Some lawyers we interviewed are even looking beyond contingency fee work. For instance, one lawyer in South Texas said, "I can tell you our ability to generate income off of personal injury type cases has gone down, way, way, way down . . . we're trying to expand a little bit into some family law business, into some consumer things." Others will take a small amount of hourly work, usually for smaller businesses. Another said he has "a few hourly fee clients that are repeat business. . . . They are more commercial . . . one of them is a commercial property management company."

Overall, while the repeaters are doing a little less contingency fee work, Table 3 shows that, in general, they remain plaintiffs' specialists with the vast majority of their business in the contingency fee arena. The median percentage of business made up by contingency fee work remained unchanged, although the mean dropped. The drop in the mean is tied to a somewhat lower percent of repeaters in 2006 that reported 90% or more of their business was contingency fee work (71.7% in 2000, 61.7% in 2006). Forty percent of the repeaters reported doing less contingency fee work in 2006, while 25% reported doing more. For the twenty-four repeaters reporting less contingency fee work, the mean decrease is

TABLE 3. Changes in the Nature of Practice

	Individual Change			Overall Change*			
	More	Same	Less	2000		2006	
				Mean	Median	Mean	Median
% Contingency Fee (n=60)	25.0%	35.0%	40.0%	82.1%	95.0%	77.4%	95.0%
% Auto (n=59)	30.5%	18.6%	50.8%	35.1%	25.0%	31.2%	20.0%
% Medical Malpractice (n=59)	13.6%	45.8%	40.7%	15.4%	5.0%	9.4%	0%
% Commercial (n=59)	37.3%	47.5%	15.3%	5.9%	0%	7.8%	0%

minus 19.5%. Even for these lawyers, a majority of their business (57.0%) remains contingency fee business.

2. *Changes in Auto Accident Cases*

While most of the lawyers are far from leaving plaintiffs' work, there are some interesting shifts within the contingency fee arena as lawyers look for new, more profitable market niches to exploit. Since the elimination of workers' compensation as a profitable area of practice for most plaintiffs' lawyers in the early 1990s, the mainstay of the plaintiffs' bar in Texas has been the automobile accident business. With the exception of those specializing in a particular type of complex, high-value case, both of our surveys show that most plaintiffs' lawyers handle some amount of car wreck cases. In the 2000 survey, only 19.8% of all respondents (not just the repeaters) reported handling no auto wreck cases.⁴⁹ In the 2006 survey the figure is 24.3%. In both surveys, the average amount of caseload made up by auto wreck cases was approximately one-third. In both surveys, just over one-third of the respondents (185 of 541 in 2000 and 105 of 300 in 2006) can be called auto accident specialists — because 50% or more of their business was comprised of auto wreck cases.

For the repeaters, Table 3 shows that the average amount of caseload made-up by auto wreck cases in 2000 was 35.1%. Among the repeaters, 13.8% reported doing no auto wreck business in 2000. In 2006, the mean amount of auto wreck business for the repeaters was 31.2% (median 20.0%), and 18.3% of the repeaters reported no auto wreck business. One half of the repeaters were doing less auto business than in 2000 and 30.5% were doing more.

Our interviews give us some idea of the reason behind this subtle shift away from auto accident cases. The plaintiffs' lawyers' perception of a more hostile environment created by the tort reform public relations campaigns may be that reason. Lawyers are more reluctant to handle low-value car wreck cases, espe-

49. In contrast, over one-half (295 of 541, 54.5%) of all respondents in the 2000 survey reported handling no medical malpractice cases.

cially those involving only soft tissue injury cases. When asked in the 2000 survey whether they would take a simple soft tissue auto accident case in which liability appeared to run to the other party who was adequately insured, only 36.2% of the repeaters said they would take the case. In 2006, the percentage was down to 33.9%.

As noted earlier, the perception among plaintiffs' lawyers is that insurance companies are paying less in these cases because juries are awarding less. The juries are awarding less because jurors, as one lawyer put it, "have bought into the myth that we had a litigation explosion and we had runaway juries and lawsuit abuse, and all the buzzwords that the tort reformers have used." As a result, another said "we cannot take a small car wreck case where there was disputed liability . . . it's not economically viable." He continued:

The insurance companies will not settle or will offer to settle for only a small amount of money, just daring you to file the lawsuit. You file the lawsuit, you may end up getting \$3,000, but by that time, you've paid money for depositions, which are 500 or 600 bucks, you've spent more time on it. And the client gets less money. And you just cannot — you can't make the math work and the insurance companies know that.

This lawyer says he was bothered by the fact he could no longer take such cases because it means that people involved in such lower-value cases will not get representation — a concern expressed by other lawyers as well. Still, hard reality often wins out in his view, "you know, doing the right thing and doing the economic thing are two different deals now."

While the lower-value cases may be becoming less popular because "you can't make the math work," there is another kind of accident case in which the math apparently works very well. Our interviews indicate that some lawyers are actively seeking commercial truck accident cases.⁵⁰ More specifically, they are seeking cases involving eighteen-wheeler, semi-tractor trailers. Such cases, unlike the typical auto case, may involve severe injuries and substantial damages. As one Austin lawyer put it:

Let me tell you. The one area that still has a lot of meat on the bones, is representing folks in accidents with trucking companies. . . . The egregious nature of the number of miles these guys drive, the lack of following the rules, the lying on the logs, driving 80 miles an hour in a construction zone just lead to horrendous accidents and unfortunately, business for me.

Even in more conservative counties lawyers say that juries are willing to award substantial damages in eighteen-wheeler cases with serious injuries. Said

50. We did not ask about eighteen-wheeler cases in our 2000 survey, so these cases are not included in Table 3. We did ask about these cases in the 2006 survey, and twenty-nine of the sixty repeaters (48.3%) report handling at least one of these cases.

another lawyer, “we do great on eighteen-wheeler cases. . . . Everybody seems to be able to connect with an eighteen-wheeler that’s out of control. You know, we hit one for \$20 million that we got paid on, and you know, even Republicans were voting for us on that one.”

3. *Changes in Health Care Cases*

Health care cases, which were targeted by a 2003 tort reform measure, are areas in which there is an obvious shift. In 2003, a \$250,000 cap was placed on non-economic damages in health care cases.⁵¹ Given the risk involved in these cases and the costs of preparing them, a low cap like this one can make health care cases financially unattractive to lawyers because it is less likely that lawyers can handle these cases profitably in what is already perceived to be a hostile environment.

Even before the 2003 changes, most lawyers did not handle medical malpractice cases. These cases are too complex, too risky, and too expensive. A successful lawyer in his early fifties said, “I don’t do medical malpractice cases and never have.” Like him, just over one-half of all respondents in the 2000 survey (54.5%) reported handling no medical malpractice. In 2006, the figure for all survey respondents was 57.3%. In contrast, before the 2003 changes, the repeaters were more likely to handle at least some medical malpractice — only 37.3% handled no medical malpractice in 2000. In 2006, however, they were much less likely to handle any malpractice. The percentage handling no medical malpractice in 2006 increased to 53.3%. More generally, as Table 3 shows, 40.7% of the repeaters reported handling less medical malpractice in 2006. Only 13.6% reported handling more. A substantial minority — 45.8% — reported no change (most of these, seventeen of twenty-seven, handled no medical malpractice in 2000 or in 2006) and eleven of the twenty-four repeaters doing less medical malpractice stopped handling these cases altogether. In contrast, only three of the eight handling more of these cases went from none in 2000 to handling at least some in 2006.

In 2000, six of the repeaters could have been considered medical malpractice specialists in that 50% or more of their business was medical malpractice. In 2006, only two of the six were still specialists and each of them reported that their entire practice was still medical malpractice. Of the four who are no longer specialists, two are no longer doing any medical malpractice at all and the other two have 20% or less of their business in medical malpractice. In 2006, only three of the repeaters could be considered medical malpractice specialists — the two noted above and one other who just barely makes our threshold for being considered a specialist — going from having 25% of his practice in medical malpractice to 50%.

51. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2005).

Three of the lawyers we interviewed in the past year who were medical malpractice specialists before the 2003 changes now handle no medical malpractice. One saw the handwriting on the wall:

Beginning in about 2001, I started trying to transform my practice. I had done primarily medical malpractice up until that time and about 2001, I felt like it was going south. And I started trying to transform my practice to get away from medical malpractice. But certainly since 2003 after [the cap] passed, I haven't touched it.

His reasoning was in part about the politics — “we had a taste in 1995 and 1997 of the tort reform people and they weren't going away. And the rumor had been that med mal was going to be the next big thing.” But it was also about what he was seeing in his own practice:

The insurance companies had really determined not to pay on the claims, at least in my opinion, and when they would pay, it would be so much less than what a comparable case with a different liability scheme might be . . . I would have someone with a particular injury in just a car wreck or a, I mean a serious car wreck or a product liability case or whatever, you just pick a case, and their injuries might be worth “x” and it would cost me ten, twenty, thirty thousand dollars to work the case up. Whereas on a medical malpractice case, the same type of injury, at least in my opinion, would be worth about half as much and it would cost me about twice as much to work the case up. And God forbid, in this county in which I live, you had to try the case, I think the verdicts were running about 90 percent defendant oriented . . . I have got to believe that there was going to be a serious problem of juries, from their mindset about holding doctors accountable. . . . I just got tired of beating my head against the wall.

After the 2003 reforms passed, others came to a similar conclusion — they could no longer handle malpractice cases profitably and stopped handling the cases altogether.

A different group of specialists have not left this field but are substantially reducing the amount of medical malpractice cases they handle. Three lawyers we recently interviewed are among them. Two were reducing malpractice from over 90% of their business to about 60% and the third wants to have only 50% of the firm's practice in medical malpractice. This last lawyer said:

We've changed our screening to take into consideration the caps. For example, if it's an elderly person or a child and it's a death case or it's a malpractice case against one doctor and no institutions, we know that the most we can get out of that case is \$250,000. That's a practical matter. . . . We can't afford to take the case when we have a \$250,000 cap.

This screening procedure points out what many other lawyers also said — that even if they would still take medical malpractice cases, they will not take cases that involve the elderly, children who die, or others that do not have substantial economic damages. As another one of the malpractice specialists we interviewed observed, “they [the reformers] essentially closed the courthouse door to the negligence that would kill a child, a housewife or an elderly person.”⁵²

In addition to lawyers not taking cases involving the elderly, and others with little or no economic damages, there is some indication that lawyers are more reluctant to take medical malpractice cases generally. A question that appeared on both of our surveys allows us to look at changes regarding medical malpractice in a situation in which the \$250,000 cap on non-economic damages is likely to have a less direct impact. The question asks whether a lawyer would take a “bad baby case” — a case involving severe brain damage to a newborn resulting from alleged negligence by the attending physician. Such a case would be an expensive and complex one to adequately prepare, but is one in which the potential economic damages could be high. Indeed, in our recent interviews some medical malpractice specialists noted that this kind of case is one that could still be viable — a potentially profitable one — regardless of the cap. For obvious reasons, many lawyers may not want to take on such a case regardless of the damage potential, but here we looked to see if any of the repeaters changed their minds about taking such a case as a way of gauging a general reluctance to take medical malpractice cases not directly affected by the cap. In 2000, 64.4% of the repeaters said they would take the case. In 2006 that percentage dropped to 45.8%. Between the two surveys, repeaters changed their minds in one direction only — from taking the case to not taking the case. None of the repeaters moved in the opposite direction. This suggests some general reluctance to take medical malpractice cases in the current environment.

Another type of case affected by the \$250,000 cap is nursing home cases. Though never a large percent of most lawyers' practices, if a lawyer had the expertise and resources to prepare nursing home cases, he was seen as a market niche with great potential. Before the 2003 cap on non-economic damages, even in more conservative jurisdictions, lawyers believed jurors would return good verdicts in nursing home cases. As one lawyer who was interviewed in the late 1990s noted at the time, “[t]he nursing home cases seem to be one area of personal injury work that really strikes a responsive cord with our local community The verdicts have gone up substantially for elderly people compared to what its

52. See Finley, *supra* note 16, at 1267–80; see also NICHOLAS M. PACE ET AL., CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE: CALIFORNIA JURY VERDICTS UNDER MICRA 30–33 (2004) (noting effects of caps by age and gender of plaintiff). However, another study examining California jury verdicts did not find the same effects with regard to age and gender. This study, nonetheless, did find a disparate impact with regard to the most severely injured people. See David Studdert et al., *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54 (2004).

been in the past.” In 2000, 27.1% of the repeaters (sixteen lawyers) handled at least some nursing home work. In 2006, the percentage dropped to 16.7% (ten lawyers). Of the fourteen repeaters doing less nursing home work, ten of them simply stopped handling these cases altogether. Only five reported doing more. Our recent interviews indicate that for most lawyers, nursing home cases have become unprofitable because of the \$250,000 cap — most of these cases involve elderly people with only non-economic damages. We will discuss some of the consequences of the cap in the next section.

While health care is an arena in which lawyers may be investing less of their business interest, there are other arenas in which lawyers are investing more of their interest. Perhaps the most interesting one involves commercial or business-related cases taken on a contingency fee basis. As Table 3 shows, it is an arena in which 37.3% of the repeaters are doing more work in 2006, while only 15.3% are doing less. Our interviews suggest that high-end litigators are being attracted to these cases as they look for market niches not easily affected by tort reform legislation or the tort reform public relations campaigns. For instance, one of the medical malpractice specialists noted above who is substantially reducing his involvement in medical malpractice, is looking to commercial litigation to fill the gap: “we’re replacing it with either commercial litigation or other kinds of cases . . . [it] would be commercial on a contingency.” In addition, they are attracted to these cases because the cases are seen as more cost efficient than many types of complex personal injury litigation. Commercial cases, for instance, cost much less to prepare than medical malpractice cases. Another lawyer noted, “The upside of it [handling commercial litigation cases] is they don’t cost as much in dollars to develop [as medical malpractice or nursing home litigation], because your expert expenses and the number of depositions are usually less.”

In summary, the repeaters are not doing as well in 2006 as they were in 2000. The value of their typical case has decreased, as has their income. The number of cases and the number of calls from potential clients are both down. While there is no clear pattern with regard to the number of lawyers in the practice, support staffs are smaller. Many lawyers are advertising more to get more calls. Some are signing more cases in higher volume practices, while others are signing fewer calls in a lower volume practices. While not leaving the plaintiffs’ practice, lawyers are doing somewhat less contingency fee work. There are numerous adjustments being made within the plaintiffs’ arena, but they are small adjustments with the exception of health care cases, where the change is more pronounced.

Plaintiffs’ lawyers are making changes in their practices as a response to what they see as an increasingly hostile environment. They are seeking ways to cut costs, to increase the number of calls for what they consider to be viable cases, to screen those calls more stringently, and to adjust their caseloads to the changing environment. Beyond the lawyers’ own interest, what difference do these changes

make? What broader implications may there be? Given their role as gatekeepers for the civil justice system, one clear consequence of the changes in their practices would involve diminished access to the rights and remedies the law provides for certain kinds of clients. If lawyers cannot economically handle cases involving certain types of clients, then access for those clients becomes problematic at best. This can be seen in terms of the changes in practices involving medical malpractice cases. We address this in the next section.

IV. IMPLICATIONS OF CHANGES IN LAWYERS' PRACTICES: MEDICAL MALPRACTICE

As noted earlier, in 2003 the Texas legislature passed a set of tort reform measures. Prominent among those provisions was a \$250,000 cap on non-economic damages in health care cases.⁵³ In addition, by referendum in 2003, the Texas voters amended the state's constitution to specifically allow the legislature to pass such caps.⁵⁴ The amendment was needed to forestall a constitutional challenge based on a Texas Supreme Court decision that had declared an earlier cap unconstitutional under the state constitution.⁵⁵ The issue is the response of plaintiffs' lawyers to the damage cap. It has led some lawyers to stop handling malpractice and nursing home cases altogether. Those still handling such cases appear to be avoiding particular clients — those suffering severe injury or death, but with minimal economic damages.

To test the idea that cases covered by the damage cap will limit access for certain types of clients, we included in the 2006 survey a series of questions (designed with the help of six Texas plaintiffs' lawyers) that asked lawyers to make decisions as to whether they would take cases with certain kinds of clients. The questions all use the same injury — a potential plaintiff who has sustained serious injuries, requiring six months rehabilitation and ultimately resulting in obvious permanent facial disfigurement. The idea was to create a situation in which non-economic damages — here for permanent facial disfigurement — would be a prominent factor for all three plaintiffs. At the same time, there would be differences as to the potential for economic damages. There are three variables in the questions:

1. Who the potential plaintiffs are — a 70-year-old retired male for whom economic damages would be minimal (no lost wages, dependents, etc.); a 45-year-old employed married male for whom economic dam-

53. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2005).

54. TEX. CONST. art. III, § 66(b).

55. See *Lucas v. United States*, 757 S.W.2d 687, 696 (Tex. 1988) (striking down similar caps as violating Article 1, section 13 of the Texas State Constitution: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.") (quoting TEX. CONST. art. I, § 13.).

- ages would be an issue (lost wages, dependents, etc.); and a 45-year-old married housewife (no lost wages, but dependents);
- 2. The cause of the injury — a physician in a medical malpractice case or an 18-wheeler in a car wreck case; and
- 3. The time period — 2006 (the time of the survey) and five years earlier.

Lawyers were asked whether they would take the case, take it but refer it to another lawyer, or not take the case at all. They were asked to answer the question for each of the three types of plaintiffs in each of the two situations at the time of the survey and five years earlier. Again, the key intervening variable is the 2003 cap on non-economic damages in health care cases (there is no cap applicable to eighteen-wheeler accident cases).

TABLE 4a. Taking Different Clients Before and After 2003 Damage Cap on Non-Economic Damages in Health Care Case:
Medical Malpractice Case

	Before Cap	After Cap
70-year-old retired male	N=55	N=59
Take Case	61.8%	13.6%
Take and Refer Case	25.5%	11.9%
Not Take Case	12.7%	74.4%
45-year-old employed male	N=55	N=59
Take Case	67.3%	37.3%
Take and Refer Case	25.5%	32.2%
Not Take Case	7.3%	30.5%
45-year-old housewife	N=54	N=57
Take Case	66.7%	24.6%
Take and Refer Case	25.9%	22.8%
Not Take Case	7.4%	52.6%

Tables 4a and 4b present the results for the repeaters to those questions. For the sake of clarity and consistency, we are using the sixty repeaters and not all three hundred respondents to date to the 2006 survey. While the survey is continuing at this time, we believe that the basic patterns in Tables 4a and 4b will not change. More specifically, as additional lawyers respond to the survey, the specific percentages in Tables 4a and 4b will change slightly. However, the

TABLE 4b. Taking Different Clients Before and After 2003 Damage Cap on Non-Economic Damages in Health Care Case: 18-Wheeler Accident Case

	Before Cap	After Cap
70-year-old retired male	N=53	N=58
Take Case	94.3%	86.2%
Take and Refer Case	1.9%	5.2%
Not Take Case	3.8%	8.6%
45-year-old employed male	N=53	N=59
Take Case	96.2%	93.2%
Take and Refer Case	1.9%	5.1%
Not Take Case	1.9%	1.7%
45-year-old housewife	N=52	N=59
Take Case	98.1%	90.0%
Take and Refer Case	1.9%	5.1%
Not Take Case	0	3.4%

general pattern in the findings will not change, and it is only that general pattern we want to talk here about and not the specific percentages. While there are some differences between the repeaters and all respondents (repeaters, for instance, are more likely to take cases rather than refer them), the basic pattern in the findings are the same.

The patterns in Table 4a for the medical malpractice case are clear. First, most of the sixty repeaters would have taken any of the three clients before the 2003 cap. It is worth noting, however, that the percentages are not as high as those for each client in Table 4b, and this reflects an idea discussed earlier: many lawyers simply do not take medical malpractice cases. Second, most repeaters would not take any of the clients in Table 4a after the 2003 cap. The least likely client to be taken, as a number of lawyers we interviewed claimed, is the elderly male, followed by the housewife. Neither have the substantial economic damages that make the case financially attractive to lawyers after the 2003 cap. Even though the employed, married male is the most likely client to be taken (there would likely be substantial economic damages), most repeaters would still not take the client. Again, this may reflect the general move away from medical malpractice, even by the specialists, in the post-2003 environment.

With regard to the eighteen-wheeler case, the patterns in Table 4b are also clear, as are the differences with Table 4a. First, there is little change between the two time periods for any of the clients. Second, there is little difference among the types of clients within time periods or between time periods — the sixty repeaters would take any of the clients in either time period. As noted in the previous section, our interviews indicated that this is the type of case lawyers are looking for — one with substantial damage potential, including non-economic damages.

Tables 4a and 4b show an important implication of the changes lawyers are making in their practices in response to tort reform and the more hostile environment. If lawyers cannot economically handle cases involving certain types of clients, then access for those clients becomes problematic even if they have legitimate claims.

V. CONCLUSION

This article has described some of the key ways in which tort reform has affected the practice of plaintiffs' lawyers in Texas in recent years — lawyers who function as the gatekeepers for the civil justice system. They provide meaningful access to the rights and remedies the law provides, but they will only do so if they can do so profitably. The key is "meaningful access." In the formal sense, "access" is always available regardless of whether plaintiffs' lawyers can make a profit representing those seeking access. The injured party is not literally barred from the courts. However, without representation by an attorney, especially one who specializes in the area in question, that party's chances of success are substantially decreased given that the defendant will almost always be represented by experienced counsel.

A 1993 analysis of the use of lawyers in closed medical malpractice claims in Wisconsin starkly shows the importance of legal representation and meaningful access.⁵⁶ Of the 2896 closed claims in the study, 59 involved pro se plaintiffs, and another 102 involved unrepresented plaintiffs.⁵⁷ Claimants were able to secure a monetary settlement in only one of the 59 pro se claims (a success rate of 1.7%), and in eight of the other 102 claims (a success rate of 7.8%). In contrast, the success rate for claimants represented by counsel was 34%. Interestingly, the success rate for claimants represented by the two most experienced plaintiffs' firms in the study — the specialists each handling one hundred or more claims among the

56. See Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635 (2006) (discussing generally the possible link between damage caps in health care cases and access); Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* (Am. B. Found. Working Paper No. 9210, 1993) (discussing the importance of lawyers for success in a medical malpractice case).

57. Daniels et al., *supra* note 56, at 6.

2896 in the study — was 50.2% (56.1% and 46.4%, respectively).⁵⁸ In other words, representation makes a difference and the best representation can make a substantial difference.

The contingency fee is what allows for meaningful access to the rights and remedies the law provides and is what plaintiffs' lawyers use almost exclusively. Practically speaking, the client pays (the lawyer's fee and the case expenses) only if upon a successful outcome. It is the lawyer who carries the risk, not the client. If the lawyer is unsuccessful in gaining a settlement or an award for the client, the lawyer receives no fee and almost always absorbs the costs of the case. As one lawyer simply put it, "I front the costs and if we lose, I eat the costs." Without such an arrangement, many — if not most people — could not afford to avail themselves of the rights and remedies the law provides. As political scientist Herbert Kritzer notes, "from the perspective of the average citizen, contingency fees *are* about 'access to justice' through the mechanism of civil litigation, or the threat of civil litigation."⁵⁹ A Texas plaintiffs' lawyer we interviewed explains why:

Ninety percent of the people out there make their living, they pay for their 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, you know, I think it's a fiction.

In short, anything making it more difficult for plaintiffs' lawyers working on a contingency fee basis to remain profitable or making certain kinds of cases financially unattractive to plaintiffs' lawyers has the potential to diminish meaningful access.

Our discussion of Texas plaintiffs' lawyers suggests that it is becoming increasingly difficult for many plaintiffs' lawyers to remain profitable in the wake of tort reform's formal changes in the law and in the hostile environment fostered by the aggressive tort reform public relations campaigns. As plaintiffs' lawyers act rationally and seek ways to stay profitable, the result may be that access to the rights and remedies the law provides will become problematic for some clients with legitimate claims (especially in the health care arena). Lawyers must make increasingly restrictive economic decisions about the cases they will handle, leaving access and the rights it provides to hang in the balance. A lawyer we quoted summarizes the situation well, "you know, doing the right thing and doing the economic thing are two different deals now."

58. *Id.* at 20.

59. KRITZER, *supra* note 45, at 254.