



THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?

MAY 1, 2017, 8:00 AM - 3:30 PM | HOTEL MONACO, 506 SW WASHINGTON, PORTLAND, OR

Hotel Monaco

5th Avenue Room

10th Floor

506 SW Washington

Portland, OR

Registration begins at 8:30 AM

The Jury Trial & Remedy Guarantees: Fundamental Rights or Paper Tigers?

- 8:30 – 9:00 a.m. **Registration and check in**
- 9:00 – 9:05 a.m. **Welcome remarks and introductions**
- 9:05 – 9:15 a.m. **Setting the stage**
Hon. David Schuman (retired), University of Oregon School of Law
- 9:15 – 9:45 a.m. **Paper presentation: the jury trial and remedy clauses**
Dean Erwin Chemerinsky, University of California, Irvine
- 9:45 – 11:00 a.m. **Panel discussion: the jury trial right**
Dean Erwin Chemerinsky, University of California, Irvine
Bob Peck, Center for Constitutional Litigation, Washington, D.C.
Hon. Christine Durham, Utah Supreme Court
Hon. Michael Wolff (retired), St. Louis University School of Law
Paula Hannaford-Agor, National Center for State Courts
- 11:00 – 11:05 a.m. **Transition:** Judge Schuman
- 11:05 – 12:15 p.m. **Panel discussion: the remedy clause, reexamination of verdicts, and separation of powers principles**
Travis Eiva, Zemper Eiva, Eugene, Oregon
 Mr. Eiva is preparing a paper that will address the reexamination clause and separation of powers principles in the Oregon Constitution.
Susan Marmaduke, Harrang Long Gary Rudnick, Portland, Oregon; and
Gene Hallman, Hallman Law Office, Pendleton, Oregon
 Both of these practitioners will be preparing comments on the remedy clause issue presented by the *Horton* case.
Hon. David Schuman (retired), University of Oregon School of Law
- 12:15 – 1:30 p.m. **Keynote address: the vanishing jury trial**
Hon. Martha Walters, Oregon Supreme Court
- 1:30 – 1:45 p.m. **Break and transition:** Judge Schuman
- 1:45 – 2:55 p.m. **Panel discussion: the practical consequences of caps on damages**
Stephen Daniels, American Bar Foundation
 Mr. Daniels is preparing a paper on this question.
Catherine Sharkey, New York University School of Law
Dave Miller, Miller & Wagner, Portland, Oregon
Gordon Welborn, Hart Wagner, Portland, Oregon
- 2:55 – 3:05 p.m. **Closing remarks**

Master of Ceremonies:

Hon. David Schuman served as a judge of the Oregon Court of Appeals from 2001 to 2014. He received his B.A. from Stanford University, his Ph. D. from the University of Chicago, and his J.D. from the University of Oregon Law School. He served as a clerk to Justice Hans Linde, Oregon Supreme Court, in 1985; as Assistant Attorney General in the Oregon Department of Justice from 1985 to 1987; and was a professor at the University of Oregon Law School from 1987 to 1996. He was Deputy Attorney General in the Oregon Department of Justice from 1997 to 2001, when he was appointed to the Oregon Court of Appeals. Since 2014 he has been a Senior Judge in the Oregon Judicial Department, and Professor of Practice at the University of Oregon Law School.

Presentation:

Dean Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law, with a joint appointment in Political Science. Prior to assuming this position in 2008, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and before that was a professor at the University of Southern California Law School from 1983-2004, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. He also has taught at DePaul College of Law and UCLA Law School.

He is the author of ten books, including *The Case Against the Supreme Court*, published by Viking in 2014, and two books to be published by Yale University Press in 2017, *Closing the Courthouse Doors: How Your Constitutional Rights Became Unenforceable* and *Free Speech on Campus* (with Howard Gillman). He also is the author of more than 200 law review articles. He writes a weekly column for the Orange County Register, monthly columns for the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court. In January 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Chemerinsky holds a law degree from Harvard Law School and a bachelor's degree from Northwestern University.

The First Panel:

Hon. Christine M. Durham of the Utah Supreme Court received her A.B. with honors from Wellesley College and her J.D. from Duke University, where she is now an emeritus member of the Board of Trustees. After a number of years in private practice, she served as a trial court

judge before moving to the Utah Supreme Court in 1982; she was Chief Justice and Chair of the Utah Judicial Council from 2002 to 2012. She is the Past-President of the Conference of Chief Justices of the United States, and also the past-chair of the American Bar Association's Council on Legal Education and Admissions to the Bar, the entity that accredits American law schools. She is a member of the Council of the American Law Institute, the Board of Overseers for the Rand Corporation's Institute for Civil Justice, and is a Fellow of the American Bar Association. Past professional service includes the governing boards of the American Inns of Court Foundation, the Appellate Judges Conference of the ABA, the ABA's Commission on Women in the Profession, and the Federal Judicial Conference's Advisory Committee on the Rules of Civil Procedure. She is also a past president of the National Association of Women Judges, and was that organization's Honoree of the Year in 1997. Justice Durham has been active in judicial education, and was a founder of the Leadership Institute in Judicial Education. She helped create and lead the Utah Coalition for Civic Character and Service Education and served on the Utah Commission on Civic Education. She was an adjunct professor for many years at the University of Utah College of Law, teaching state constitutional law, and served for twelve years on the Utah Constitutional Revision Commission. She has received honorary degrees from four Utah universities and has been recognized nationally for her work in judicial education and efforts to improve the administration of justice. In 2007 she received the William H. Rehnquist Award for Judicial Excellence; in 2008 she received the "Transparent Courthouse" Award for contributions to judicial accountability and administration from the Institute for the Advancement of the Legal System at the University of Denver. In September 2012, Justice Durham received the Eighth Annual Dwight D. Opperman Award for Judicial Excellence from the American Judicature Society. Justice Durham recently served on the ABA's President's Task Force on the Future of Legal Education and served on the Advisory Board for the Educating Tomorrow's Lawyers Project of the Institute for the Advancement of the American Legal System at Denver University, and on the Board of Trustees of University of the People, an accredited tuition-free online institution (www.UoPeople.edu).

Paula L. Hannaford-Agor is Director of the Center for Juries Studies, at the National Center for State Courts (NCSC). She joined the NCSC in 1993 and regularly conducts research and provides technical assistance and education on the topics of jury system management and trial procedure; civil litigation; and complex and mass tort litigation. She has authored or contributed to numerous books and articles on the American jury, including *Jury Trial Innovations* (2d ed. 2006), *The Promise and Challenges of Jury System Technology* (NCSC 2003), and *Managing Notorious Trials* (1998). She is also an adjunct faculty member at William & Mary Law School, where she teaches a seminar on the American jury. She received her JD and a Masters in Public Policy from the College of William & Mary in 1995, and her BA from George Mason University in 1991.

Robert S. Peck, founder and president of the Center for Constitutional Litigation, is among the most sought-after appellate litigators within the plaintiffs' bar. He is credited with having developed groundbreaking constitutional challenges to laws impeding access to courts. He regularly appears before the U.S. Supreme Court and state supreme courts, litigating cases on the merits as well as at the petition stage. Bob's diverse practice includes state and federal constitutional law, complex civil litigation, federal preemption, punitive damages, products liability, mass torts, consumer protection, Section 1983, and ERISA and Medicare/Medicaid reimbursement. He has previously litigated election law and First Amendment issues.

Bob has taught advanced constitutional law and state constitutional law at The George Washington University Law School and American University Washington College of Law as a member of the adjunct faculty. He is chair of the Board of Overseers of the RAND Corporation's Institute for Civil Justice; Of Counsel to Herman Herman & Katz in New Orleans; co-chair of the Lawyers Committee of the National Center for State Courts; secretary and member of the executive committee of the Board of Directors of Justice at Stake; a member of the steering committee of the Sedona Conference's working group on mass torts and punitive damages; and a delegate in the American Bar Association's House of Delegates. Bob is a past president of the U.S. Supreme Court Fellows Alumni Association and the Freedom to Read Foundation, and a past national chair of Lawyers for Libraries.

Hon. Michael A. Wolff (retired) is an attorney, a former Missouri Supreme Court judge and chief justice, and a former professor and dean emeritus of Saint Louis University Law School. His current practice involves select matters related to litigation, governmental affairs, and public interest law.

Wolff served for 13 years on the Supreme Court of Missouri, from 1998 to 2011, including two years as chief justice (2005-2007). He returned to the faculty of Saint Louis University in 2011 and became dean of the law school in 2013, serving until 2017.

His honors include Lawyer of the Year (Missouri Lawyers Weekly), the Missouri Bar's Theodore McMillian Judicial Excellence Award; the William J. Brennan Jr. Memorial Lecture on State Courts and Social Justice, New York University; Benjamin N. Cardozo Award for Judicial Courage and Excellence (Missouri Association of Criminal Defense Lawyers), and the Donald P. Lay Champion for Justice Award from the National Employment Lawyers Association, Eighth Circuit.

Dean Chemerinsky will also participate in this discussion.

The Second Panel:

Travis Eiva took his bachelor's degree from Evergreen State College in Olympia, Washington, and then received his J.D. *cum laude* from Lewis and Clark Law School in Portland in 2005, where he was editor of the law review. He worked for several years as an appellate public defender. He then turned to civil practice, first with the Corson and Johnson Law Firm where he mentored with trial lawyer Don Corson and then opening his own firm (Zemper Eiva) in 2015), and specializing in complex litigation in both trial and appellate courts. He has written numerous articles for various legal periodicals, routinely presents CLE trainings for bar organizations, and regularly writes *amicus curiae* briefs to the Oregon Supreme Court on matters affecting the rights of Oregon citizens. He is currently a member of the Oregon Council on Court Procedures, is on the Executive Committee of the Constitutional Law Section of the Oregon State Bar, and is a member of the Oregon Trial Lawyers Association.

Susan Marmaduke practices law in the Portland office of Harrang Long Gary Rudnick, PC, with a focus on business litigation and appeals. She received her JD from Berkeley Law, and her BA from Portland State University, as well as a certificate in Arabic at the Bourguiba Institute of Modern Languages in Tunis. She served as Associate Country Director for the Peace Corps – Yemen, and wrote a book on technical training programs in Yemen for the United States Agency for International Development. Susan is admitted to practice in Oregon, California, and Washington. She has been listed in *The Best Lawyers in America*® in the fields of commercial litigation and appellate practice every year since 2009. She has written reference resources for lawyers, including the Oregon State Bar's Barbooks chapters on "Jurisdiction, Removal, and Remand," "Statutes of Limitations and Statutes of Repose," and "Special Writs: Writ of Review and Quo Warranto." She has given instructive presentations to lawyers on shareholder disputes, business valuation, judgments, and various other litigation and appellate topics. She has chaired the Local Rules Advisory Committee and the US Magistrate Selection Panel for the US District Court of Oregon. She served as a member of the amicus committee of the Oregon Association of Defense Counsel for more than a decade and is a member of the board of the Multnomah Bar Foundation. Susan received the Hon. James M. Burns Federal Practice Award in recognition of her work to improve the practice of law in the United States District Court of Oregon, and the Award of Merit given by the Multnomah Bar Association in recognition of her pro bono work.

Gene Hallman has done civil litigation and appeals in Oregon since 1975. He obtained his B.S. from Portland State University in 1971, and his J.D. *magna cum laude* from Willamette University College of Law in 1974; he was the editor-in-chief of the Willamette Law Journal between 1973 and 1974. The year before he entered practice he was law clerk to Oregon Supreme Court Justice Ed Howell. He was named Distinguished Trial Lawyer by the Oregon Trial Lawyers Association in 2008; he became a fellow of the American College of Trial Lawyers in 2003; he has been a member of the American Board of Trial Advocates since 2002, and was its state president from 2010 to 2012.

Judge Schuman will also participate in this discussion.

Luncheon Speaker:

Hon. Martha L. Walters, Justice, Oregon Supreme Court. Justice Walters received a B.A. with distinction from the University of Michigan in 1972, and her J.D. from the University of Oregon School of Law in 1977. She practiced law until 2006, when she was appointed to the Oregon Supreme Court. She was a member of the Judicial Conference of the Ninth Circuit between 1992 and 1995, and of the Oregon Trial Lawyers Board of Governors from 1993 to 1996. She is a former member of the National Employment Lawyers Association since 1992, Oregon Women Lawyers since 1994, Federal Bar Association since 1995, and American Law Institute since 2004; fellow, Fellows of the American Bar Foundation since 1998 and American College of Trial Lawyers since 1999; Oregon Commissioner (since 1992), chair of Executive Committee (2005-2007), and former President (2007-2009), Uniform Law Commission; She co-authored a law journal article, *When the Only Way to Equal Is to Acknowledge Difference: PGA Tour, Inc. v. Martin* for the Louis D. Brandeis School of Law at University of Louisville; she has been a speaker at numerous CLEs throughout Oregon.

The Third Panel:

Stephen Daniels is a Senior Research Professor at the American Bar Foundation. He holds a Ph.D. in political science from the University of Wisconsin-Madison. His research focuses on law and public policy, legal education, and the various aspects of the American civil justice system. He has written on law school curriculum and financing, trial courts, juries, plaintiffs' lawyers, and the politics of civil justice reform – including the areas of medical malpractice, products liability, and punitive damages. He is co-author (with Joanne Martin) of *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* (2015). He has testified before congressional and state legislative committees on the subject of civil justice reform, and served as an expert in cases dealing with large jury awards and/or constitutional challenges to civil justice reform.

Dave Miller is a veteran trial lawyer with over 35 years of experience. His career has included 18 years as a lead trial attorney defending physicians and other medical providers in courtrooms throughout Oregon, and in other states. Beginning in January, 2000, Dave shifted his practice from defending medical professionals to representing injured patients in cases against medical providers and the facilities at which they work. Since becoming a full-time plaintiff's attorney, Dave has been inducted into the prestigious American College of Trial Lawyers. Currently, Dave handles plaintiffs' cases in Oregon, Washington and Idaho and continues to educate medical and legal specialty groups on issues relating to medical malpractice litigation. In addition to his trial work, Dave has been a frequent lecturer for groups such as the Oregon Medical Association, the Oregon Anesthesia Group, the Oregon Section of the American College of Obstetricians and

Gynecologists, and other medical specialty groups. He has testified before the Oregon legislature, served on and consulted with legislative committees on issues affecting medical negligence litigation from both the physician's and the patient's point of view.

Catherine Sharkey is the Crystal Eastman Professor of Law at New York University and a Faculty Director of the Civil Jury Project at NYU. She is a leading authority on the economic loss rule, punitive damages, and federal preemption. She has published dozens of articles in the fields of torts, products liability, administrative law, remedies, and class actions. Sharkey is co-author with Richard Epstein of *Cases and Materials on Torts* (11th ed. 2016) and co-editor with Saul Levmore of *Foundations of Tort Law* (2nd edition, 2009). She is a founding member of the World Tort Law Society and an elected member of the American Law Institute. Sharkey is also an appointed public member of the Administrative Conference of the United States, an adviser to the Restatement Third, *Torts: Liability for Economic Harm*, and a 2011-12 Guggenheim Fellow.

Sharkey received her BA in economics *summa cum laude* from Yale University. A Rhodes Scholar, she received an MSc in economics for development, with distinction, from Oxford University, and her JD from Yale Law School, where she was Executive Editor of the Yale Law Journal. After clerking for Judge Guido Calabresi of the US Court of Appeals for the Second Circuit and Justice David H. Souter of the US Supreme Court, Sharkey practiced appellate litigation before joining the faculty of Columbia Law School. She came to NYU School of Law in 2007.

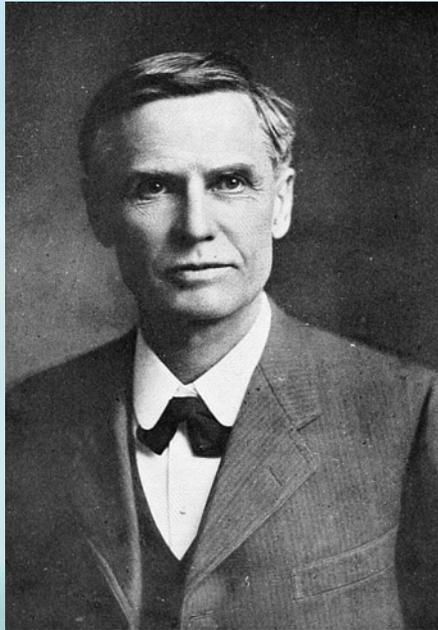
Gordon "Gordy" Welborn has been an active trial court practitioner since 1987, practicing in both Oregon and Washington. His practice focuses on the defense of professional negligence claims against physicians, hospitals and health systems, lawyers, dentists, real estate professionals, architects and engineers, construction professionals, and property managers. In addition, he has maintained an active practice involving claims of product liability, Board of Director claims, premises liability claims, automobile and trucking claims, governmental liability claims, trademark and copyright claims, real property disputes, general liability claims and business litigation.

“In actions at law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.”

Article VII (amended), section 3

When interpreting the law in Oregon we focus on the text and context, which includes the historical context.

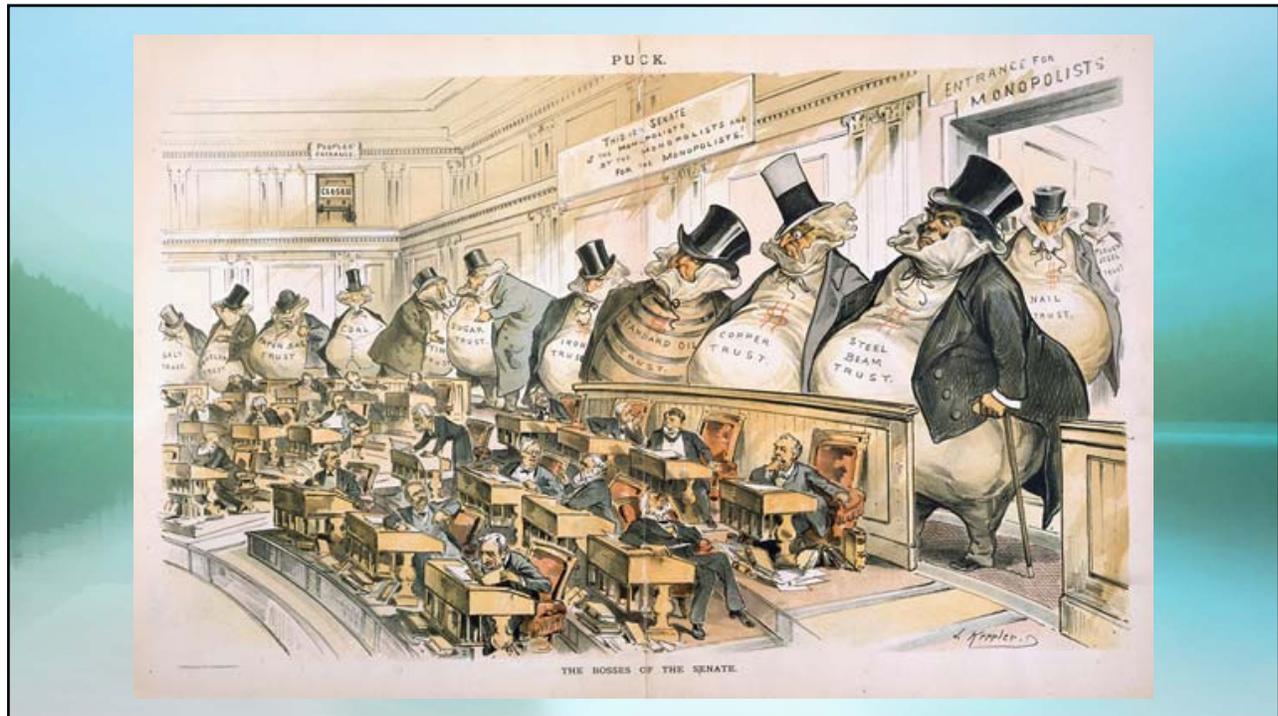
Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto, Inc., 322 Or 406, 415, 908 P2d 300, 306 (1995)



William S. U'Ren 1859-1949

“For those who owned the land also ruled. . . .They ruled the assemblies of the states, they made the state constitutions and appointed the judges who interpreted the constitutions; they even sent themselves or their attorneys to the United States Senate.”

Lincoln Steffens, U'REN THE LAW-GIVER: The Legislative Blacksmith of Oregon and the Tools He Has Fashioned for Democracy



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Article VII (amended), section 3

The purpose of the amendment was to “make the verdict effective,” because “twelve [persons] selected from the body of the community are more competent to pass upon and determine rightly a question of fact than any [other] member of the community[.] . . . **If the question of fact in an action of law is submitted to the jury, the verdict of the jury ought to settle it for all time.**”

Judge Thomas O’Day, Drafter of Article VII (amended), section 3.

“Oregon . . . saw that special privilege was the cause of corruption; that privilege always works through the agents of the people rather than through the people themselves; . . . **Oregon saw, before the rest of us, that the trouble was not with the law breakers but with the lawmakers.**”

OREGON, The Most Complete Democracy in the World

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Article VII (amended), section 3

Magna Carta, 1225 version, section 29:

“No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customers, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.”

Sir Edward Coke, The Second Part of the Institutes of the Laws of England 55 (1797):

“[E]very subject of this realme, for injury done to him in bonis, terries vel persona, by any other subject, be he ecclesiastical, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.”

The Oregon Constitution, Article I, section 10:

“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

"The Juice Isn't Worth the Squeeze in Those Cases Anymore:" Lessons from Texas

Stephen Daniels, American Bar Foundation
and
Joanne Martin, American Bar Endowment

Presentation for:
The Jury Trial & Remedy Guarantees: Fundamental Rights or Paper Tigers?
Oregon Law Review/Oregon Jury Project Foundation/ Pound Civil Justice Institute
Portland, OR
May 1, 2017

In the words of Texas plaintiffs' lawyers:

"There's no other case in the system as expensive as malpractice."

"We all know the hardest case to win is a med mal case at a trial."

"Last year we spent in excess of \$100,000 in cases that we didn't take."

"We always escrow \$300,000 for each case."

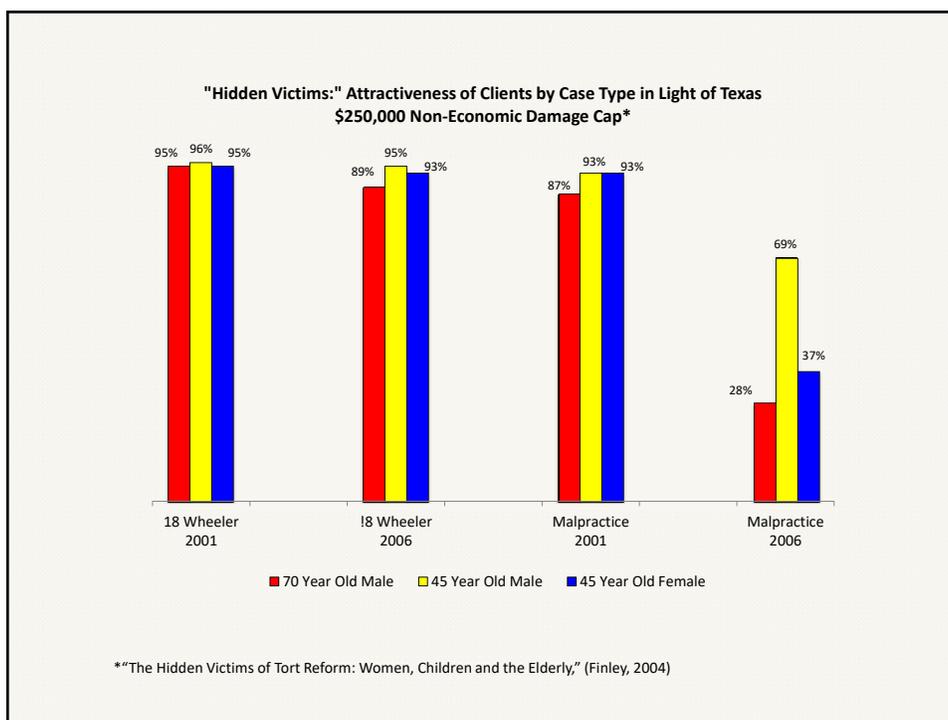
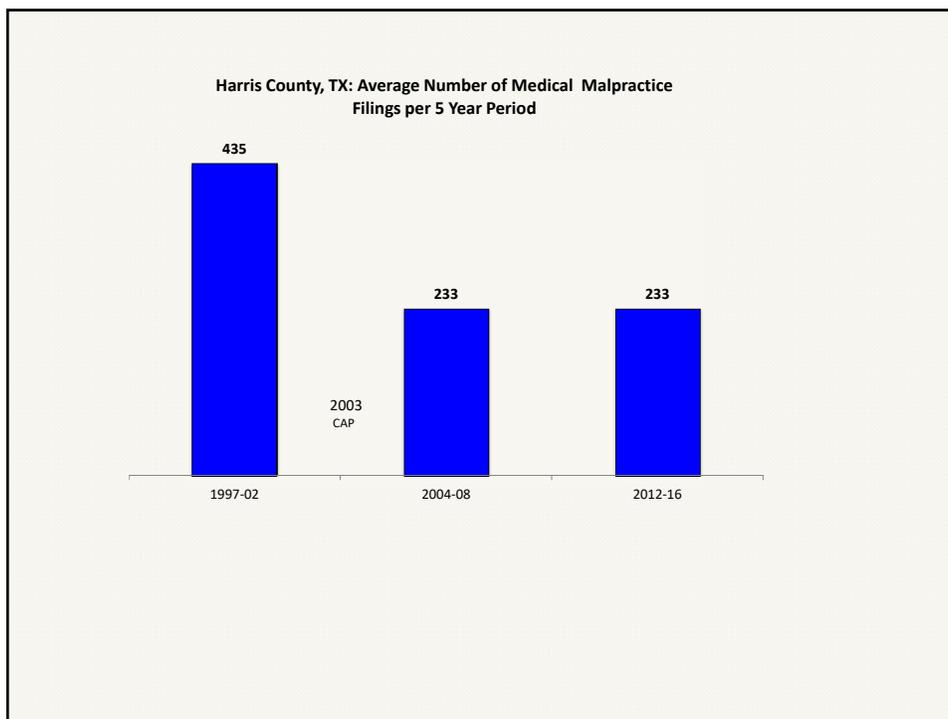
"I think the most I've had (invested in a med mal case) was around \$600,000 or \$700,000.
We prevailed on that one, thank goodness."

"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 that case than you can hope to get under the
caps ... For a while there it (med mal) was probably 90% of our practice ... We'd rather be at 50%."

"They essentially closed the courthouse door to the negligence that would kill a child,
a housewife, or an elderly person."

"Unless there's a way to make money practicing law, rights don't make any difference."

"It's the incentives, stupid." (Hyman and Silver, 2006)



“The (Texas caps) amendment wasn’t designed to cut-off bad – that is frivolous – lawsuits; it was designed to cut-off lawsuits by people with legitimate claims by restricting access to the courthouse ... This tort reform went too far ... I view this as something that deprives people of their constitutional rights.”

(Hon. Deborah Hankinson, Texas Supreme Court, 1997-2002)