Panel 2: Anatomy of a Malpractice Case from a Litigator's Perspective

Robert A. Clifford
MR. LANDSMAN: Have we got a treat for you. We have two of the very best lawyers in the city of Chicago to discuss our topic today. They’re both members of the same Inn of Court, the same Inn of Court
that I belong to, and I have seen each of them work in a lot of different contexts, and they truly are outstanding.

Our first speaker, reversing the normal flow where the plaintiff generally gets to go first, will be E. Michael Kelly. Mike went to Michigan State University and then to Northwestern University School of Law. He sort of missed the boat on DePaul, but we’ll probably forgive him for that.

He’s at Hinshaw & Culbertson where he’s been on the management committee since 1982. He’s a fellow of the American College of Trial Lawyers, and as I said, a founding member, actually, of the Chicago Inn of Court. Mike’s been involved in some of the most interesting, exciting, provocative litigation in the city of Chicago over the last 15 or 20 years. His record is extraordinary. He’s a wonderful lawyer. We’re really lucky to have him here today.

MR. KELLY: In real life Bob does get to go first, so whenever I have the opportunity, I jump him and try to take that spot. I’m not at all bothered that Steve is the Clifford Professor of Law here at DePaul. Normally Clifford’s idea of a panel is Clifford, three people who agree with him, and me. This is a much fairer setup, and I appreciate Steve being the moderator.

This morning you heard from Max Brown who was really a visionary in setting up the mediation program at Rush hospital. If you think of the number of cases that have been taken out of the circuit court system because of this mediation program and have been resolved in a sensible, economically driven way, really a win-win for both sides, it’s been a remarkable program and great accomplishment. You had two of the best co-mediators I think you could possibly see, Patti Bobb and Dick Donohue, two of my favorite people who I’ve known throughout our entire careers. In the fall, to give you an idea of how wonderful they are, I asked them to do the near impossible, to handle a series of co-mediations on behalf of a very historic health care institution in Chicago. They were charged with literally saving the institution, and they settled three-quarters of the cases.

You heard them talk this morning about the difficulty of dealing with the equation, which is really what a mediation or a trial is. You have different factors. In each of them you have to figure out that little puzzle. They not only did it in one case, which is an achievement, I believe they did it in 31 of 41 of cases. It gives you an idea of how superb they really are. On the other hand, not all of us are cut out to be
co-mediators. About three years ago, Judge Lerner, who along with Max thought out the co-mediation program, called and said, “Mike, let’s have lunch, me, you and Bob Clifford. You two should be co-mediators. You two have known each other for a long time. You’re friends in real life. You should be co-mediators.” We went to lunch at Gene & Georgetti’s. An hour later Judge Lerner was convinced that the two worst co-mediators would be me and Clifford.

MR. CLIFFORD: It’s true.

MR. KELLY: And he was absolutely correct. In handling medical malpractice cases, you have to begin with some truths, and these are not disputable. In every malpractice case that goes to verdict, in the jury instructions the judge says, “The burden of proof is on the plaintiff, and it is always on the plaintiff.” In a catastrophic medical malpractice case, if you believe that, you should not have an Illinois driver’s license. In a catastrophic case, the burden of proof in reality is not on the plaintiff.

One of Clifford’s favorite panels was this last summer at the ABA, and he had me next to one of his pals from Missouri, extremely nice guy, very good plaintiff’s attorney, and he was talking about the heavy burden of proving the case to a jury. The guy’s case, the Governor of the State of Missouri, his plane falls out of the sky, and he dies. Do you have to be Wigmore¹ to see an evidentiary advantage to one side or the other?

Bob’s cases over the 25, 30 years we’ve worked with and against each other have gotten progressively better. Mine have gotten progressively worse. It is a factor of defending cases. The first medical malpractice case in Cook County that went for a million dollar verdict was Hollinger versus Children’s Memorial Hospital in 1974. It was defended by John Moleman who was a senior partner in our firm at the time, the first million dollar loss. One million dollars today is a figure that is literally the coin of the realm in medical malpractice cases. Now, particularly these last 6 months or so, the plaintiff’s bar has become virtually delusional. Every case is $20 million.

During the mediations we had with Patti and Dick, it was a unique day when one plaintiff’s attorney came in and kind of advised us he wasn’t like other plaintiff’s attorneys. He only took gold-plated cases,

¹ A leading scholar on evidentiary law.
both liability and damages. He thought this case was worth a ton even though there wasn’t a ton to give him even if it was.

What he didn’t realize is I had talked to the attorney at the firm that had dumped the case to him about 8, 9 months earlier because they didn’t think it was worth a damn thing.

I can always be wrong about a case. Bob can be wrong about a case. But once you start getting too far away from two standard deviations to either side of the correct answer, then you’ve got a problem.

Plaintiff’s attorneys right now think that every case is worth $20 million. Marx taught us everything is a reflex of economics. If every case is worth $20 million, there will be no need for tort reform. Economics will simply take care of it. There will be no money in the system at all. The next person to get hurt after the well goes dry, it’s just too damn bad for that person. Do we need tort reform? I certainly think we do. I think the system right now is just not economically viable.

As much as Bob and I disagree about some philosophy, one of the things that’s always struck me over the years is we really don’t disagree all that much about most cases. Bob tends to be a little higher. I tend to be a little lower. For the most part, even when I think he’s high, I understand where he’s coming from.

Some of the people who I talk to on the plaintiff’s side, I sit there and think, “Where in the hell is this guy coming from or what is she possibly talking about?” After 30 years of doing this, do you really think you’re going to con me with a story about how much your case is worth?

There are problems in medical malpractice now that might necessitate tort reform. There was tort reform in 1975, and it was declared unconstitutional by the Illinois Supreme Court. There was tort reform in 1985 declared unconstitutional by the Illinois Supreme Court, and tort reform in 1995 declared unconstitutional by the Illinois Supreme Court. What year is it, gang? 2003. What do you think is going to happen in about 2005? The fourth run of tort reform. It probably could be done in a way if cool heads prevailed on both sides of the “v.” that actually benefited everybody. Whether it will happen or not only time will tell.

There was talk this morning, and Patti mentioned it, that ISMIS, one of my clients, doesn’t participate in the mediation. You remember what I said a few moments ago, Marx correctly taught us, everything is
a reflex of economics. If you’re insuring doctors, the limits are ordinarily $1 million/$3 million, $2 million/$4 million. That’s not the deep pocket. Hospitals have become the main players in the mediations because they have the deeper pockets. They have more economic exposure.

If your limit is $1 million or 3 at the most, or $2 million or 4 at the most, that is the economic purchase price of participating in a mediation that you make your decision to go or not go. If you’re on the hook where you might have $20 million in play or $30 million in play, that is a different economic equation that you have to try to figure out.

I think you will continue to see hospitals leading in terms of mediation. I think you’ll see people like physicians’ groups who have lower limits being less participatory. It isn’t even so much philosophy as it is pure economics.

I mentioned earlier the magnificent job Patti and Dick did last year. The big plus for mediation, even if it is a doctor’s company that has $1 million/$3 million or $2 million/$4 million, is you stop the costs of litigation. Litigation now costs a ton. When you call an expert on either side of the “v.” and you ask him or her, these critters who have CVs that are 50, 60 pages long to give you a large chunk of their time, it is probably going to come with a price tag close to a thousand dollars an hour. And you are not going to flyspeck their bills when they’re submitted to you. You’re going to pay them.

I had an actually rather nasty exchange with a national neurosurgeon about two months ago. I called and asked if he could review a case for me, and his secretary called back in a rather haughty tone and told me he was far too busy to look at my case. And I said, “Leave a message for the S.O.B. I only want doctors who are far too busy to look at my case. I don’t want mopes who are sitting around looking for something to do. And as long as he holds that distinguished chairmanship, it is irresponsible on his part not to look at cases and not to look at them on both sides.” When doctors take that attitude, be it towards plaintiff’s calls from Bob or defense calls from me, what the goofs don’t realize is they really abdicate their responsibility and hand it over to these sociopathic people who would tell us we’re not at DePaul today and we’re not talking. I guarantee there are board certified experts who will say none of us are really here. The frightening thing is they would do it fairly effectively. You know, when you’re not hemmed in by either truth or reality, it gives you a
certain freedom. And some of these experts, they might not be real doctors, they might not, but they sure as hell can play one on the stand.

MR. CLIFFORD: Did he call you back?

MR. KELLY: Pardon me?

MR. CLIFFORD: Did he call you back?

MR. KELLY: Not yet.

The important thing about mediation is picking your cases. The important thing about practicing as a defense attorney in trying cases is picking your cases. You can’t fight every case. You can’t spend inordinate amounts of money on every case. It’s an interdiction. You have to be able to figure out how to cut into the case and figure out where you stand and get a handle on it.

One of the things that I do and have done for 30 years, and I recommend it all to you, if you have access to the Daily Law Bulletin in the morning, read it. Turn to the section that has the new filings. Read the federal court and civil new filings and read the Law Division new filings. You will learn an immense amount. You’ll have no idea what it will be about. All kinds of weird things pop up. One popped up this morning that struck me as interesting enough to order a copy from our docket department just to read it. But you learn what’s going on.

For your regular clients, it’s a huge advantage. You know why? You’ll learn about the case about two, three weeks earlier.

What’s the worst thing about being a defense attorney? You start out behind. Clifford’s had the case for six months to a year. He’s been loading up ready to come after me. I don’t even know he’s doing it. We might be out at something. I don’t even know he’s going to pounce on me like a dog that hasn’t been fed.

If you see it, get a copy of the complaint and get after it even before there’s the service. Any advantage you can gain, any efforts you can make to make up for that built-in deficit where you’re starting behind, anything you can do, is time and effort well spent. Rule: start out behind but catch up.

Experts. We’ve talked about experts. They are truly the coin of the realm. You can never have too many experts. You can never play too many prejudices. You can never know enough about the expert and
how you might get an expert who would be on the bubble to tip your way if you know enough about them.

Five, ten years ago I had a neurosurgical case. I wanted the review by a wonderful doctor down in Texas, a place that has a lot of good neurosurgeons so you’ll never figure out who I’m talking about. He really was busy. He was older and had one of the most distinguished careers in the history of neurosurgery. And I called him and I said, “I need your help on this one.” He didn’t know my doctor. He really didn’t know the group, so that’s a negative for me.

He was lukewarm, lukewarm, lukewarm, and I said, “You know, plaintiff’s expert is this guy from DC.” It was almost like a Doberman’s ears perking.

He asked, “And who might he be?” I told him the name. He said, “Send me your case.” That doctor from DC had testified against the senior fellow in endovascular at that institution. I knew that scab was there. I knew it was raw, and all I needed to do was pick that scab. As lawyers, even if you’re wills draftsmen, not that I know anything about drafting wills, the more you know, the better we live and die on trivia.

Experts. This will sound odd but I love negative reviews, and I love losing motions. It’s the wisdom of 30 years of doing this. If you send a serious case out for two or three reviews, (and the serious catastrophic cases I’m talking about are the neurosurgical disasters, the obstetrical disasters, the maternal-fetal death cases where you start from the very beginning knowing that you have damages that can get away from you if you’re not careful), on those where I can, I like to get multiple reviews. It’s literally boxing the compass.

If somebody calls you back and they say, “I’m troubled by this.”

“Why are you troubled, Doctor? Can we talk more? Tell me why you’re troubled. What’s bothering you?”

If you get two or three reviews on the most serious of your cases, even on the plaintiff’s side, I think it would work. Frankly, I think everything a defense attorney can do is just a mirror image of what the plaintiff’s trying to do. If you’re going to try a case on either side of the “v.” you should prepare it exactly the same way. There is no sin in my view of over preparation. It doesn’t occur. If you get two or three reviews of a very serious complicated case, the negatives, I suspect, on either side will be of immense value to you. They are literally a road map of where you go off the road, where you get into trouble, areas you’re going to have to deal with one way or another. The sooner you know how to deal with those areas, the better off you’re going to be.
You’ll take better depositions. You’ll attend better depositions. Your ears will be more attune to what’s really important in the case.

I’m not real comfortable when a doctor calls me up and says, “Mr. Kelly, I looked at your case. It’s fine. I’ll defend it.” I didn’t send it to him to tell me that. I sent it to him to tell me, “Well, this is like a 90% winner. There are a couple little things. These are the things that trouble me, but, you know, if you look at this textbook and if you look at this article, it will explain why those aren’t problems in this instance.” That’s what I like. Sometimes lawyers think we actually know something about medicine. Judge Pincham at a conference we did a few months ago said the biggest mistake lawyers make is they think they’re the smartest people in the room when in fact they’re the stupidest. That’s the way we should all approach our craft. The more the experts can educate you as to what’s good and bad about your case, the better off you’re going to be.

Motions. For years I’ve been telling people there’s tremendous value in losing motions, particularly motions for summary judgment, motions in limine. I tried a case down in Peoria about 10 years ago, made about my usual 40 motions in limine, and I won two of them. The plaintiff’s attorney, who had billboards all over greater Peoria, (talk about depression: Peoria in winter with many billboards of your opponent around the city), was gleeful to the point of abusive about how he had just really kicked me around that courtroom. He beat me on 38 motions. What he didn’t realize, I won two. I didn’t expect to win any. I had a little bitty toe hold, a little, tiny, bitty toehold. I was two motions better off at the end of that day. Is it miserable to lose 38 motions? Yes. It’s not a real pleasant way to spend your time.

The last case I tried, the wonderful Judge Richard Elrod said, “Do you ever get discouraged?” I said, “Not really.” I said, “You know, every morning in the shower I try to remember Ronald Reagan’s story about the optimistic little boy with the miserable parents. Christmas morning comes and the optimistic little boy runs down the stairs, and these rotten parents put this huge pile of manure near the Christmas tree. The little boy is elated. The parents are befuddled. The little boy says, ‘There’s got to be a pony here somewhere.’”

That’s the way you have to think if you’re a defense attorney. Most of the days will not be overly pleasant. If you can win those two motions or even one, it’s worth the effort.

There’s no reason not to make motions for summary judgment from the defense side of the “v.” There’s no downside. If you can force
the issue early, flush out the plaintiff’s anonymous expert, try to limit the case any way you can. I tell people I lose certainly nine out of ten motions for summary judgment that I make. But what’s the correct answer? I win one. I win one. That’s one less case I have to deal with, one less case my clients have to pay me and eventually may even pay money to settle it or for trial.

In closing, a couple of things have been passed out. The primer on medical malpractice is something I’ve sent to every defendant that I’ve represented pretty much the entire 30 years. It gives them an overview of medical malpractice cases as a whole, and more importantly, my approach to them.

As you probably figured out already, I have some opinions. I’m probably not the guy to represent everybody. At a conference I spoke at in Kansas City about a year ago, I told the assembled defense multitudes, “If you always get along with your defense attorney, if he or she never annoys you, there’s never a disagreement or an argument, then fire him.” That isn’t our role. We are by our very nature often the messengers of unpleasant news. It should be a dynamic relationship, and I may push that maybe a little further than needs be.

The second document is interesting because it’s going to get revised in the next few weeks. It’s a questionnaire that I have required Hinshaw associates to fill out during discovery for any baby case we have. If you go through it and if you just fill it out, I’d suspect you’d be doing about 20% better than most experienced trial lawyers even if you haven’t done the work before. If you just go through it, and if you get an orthopedic case tomorrow and you want to figure out an orthopedic case, you can figure out what the parallel questions would be. You can’t just look at a case and skip a base. You have to touch them all.

Richard Donohue has given me grief for the last two years about my nucleated red blood cell defense. Guys, it’s the best I could come up with. After looking at a case for three years, I noticed the baby had nucleated red blood cells of 66,000. It’s supposed to be zero. I dutifully called our pathologist and said, “What does this mean?” He said, “Damned if I know.” Okay, this is real good. It’s a panic level and the pathologist doesn’t know what it means.

There’s literature that says you can time the injury based on the nucleated red blood cell level if it’s multifactorial, the time to clearance, the location of the lesion, the onset of seizures. The defense
resulted in a not guilty. The jury, to my absolute amazement, understood it.

To give you an idea of why I was amazed, I was using through most of the trial a five-point criteria, and there was a sixth that I didn’t realize until dinner the night before my expert was going to go on. And he said, “Well, what about the location of the lesion?”

I said, “What the hell are you talking about?”

He said, “No, no. There’s a sixth point in the criteria.”

Realizing I probably just malpracticed, I went home, sat at the kitchen table, which is where all good lawyering really occurs, and at about two o’clock I actually found in the deposition he had mentioned that. It was Rule 213\(^2\) eligible.

We will all go to our graves early because of Rule 213. It must appear somewhere, and somewhere in his deposition, damned if he didn’t say it. I missed it. The plaintiff’s attorney missed it.

The next day it came rolling out as a full-fledged sixth criteria (I had been using an exhibit with five -- I had to ditch that thing). When it rolled out as six, bitter objection, bitter objection, and I had it in my hand.

Don’t give up on these cases. It would have been wrong on my part not to have found that, albeit three years late. It would have been wrong if I had not pursued it. These are things you have to do.

On the defense side, if you want the lay-down, easy, one-foot putt, you’re not going to get it. You’re starting out way behind. Clifford has the catastrophically injured plaintiff. He’s going to work his fanny off on the case against you. You better realize that you’d better dig every bit as hard, you’d better try every bit as hard.

Thirty years of being a defense attorney I still tell people we’re very lucky to do what we do. We’re very lucky to be lawyers, and were very lucky to work with people like Steve and Bob. Thank you.

MR. LANDSMAN: Something I should note before we go any further is that there is a wonderful fellowship in the trial bar, in the civil trial bar in the city of Chicago. Mike and Bob truly are close friends, and to watch them work a program together and discuss an issue is really a delight because they bring different perspectives. But at the heart of

\(^{2}\) Illinois Supreme Court Rule 213 requires all opinions to have been expressed before the trial in either interrogatory answers or in deposition testimony. The burden of showing an opinion has been so disclosed is on the proponent of the evidence.
both their observations is the high value of the craft of lawyering, the
great pleasure that there is in being a good lawyer and preparing a case
well. And I think that it speaks well for our bar that we have leaders
like Michael and Bob.

It's a pleasure for me to be able to introduce Bob. He has been
described as one of the top lawyers in Chicago and in the country for at
least the past ten years, and those descriptions are absolutely accurate.
Last year he was the chair of the American Bar Association’s Litigation
Section. That's its largest section with now more than 70,000 members.
It was our good luck that he was there in the terrible year of the terrorist
attack on the Twin Towers. He chaired the American Bar Association
Task Force on Terrorism and the Law. He is one of the five or six
Americans responsible for making both the 9/11 Fund and the Patriotic
Act and the other things that followed it both sensible and fairer than
they otherwise would have been.

He's been the president of the Illinois Trial Lawyers Association.
He's been the president of our wonderful Inn of Court. He's on the
board of DePaul University and has helped run the institution, and he is
a terrific lawyer. If you ever get a chance to watch him do a little bit of
work in the courtroom, take a day out and go and watch him. I had the
good fortune of watching him do so on the Rachel Barton case, an
extraordinary piece of litigation, front page news every day for a
month, and it was really something to watch.

Something I didn’t know about Bob I read in the New York Times
the other day, and that was not only is he an expert with respect to
medical malpractice and airplane litigation and a number of other
things, but the Space Shuttle is not beyond his area of expertise. He
was quoted in a New York Times article with respect to that tragic
crash just yesterday.³

I'm delighted to introduce Bob and delighted to note that he's one
of DePaul's own and really makes me proud to be associated with
DePaul.

MR. CLIFFORD: Thank you, Steve, for those kind words, and good
morning, everyone.

³ On February 1, 2003, the Space Shuttle Columbia made national news when it did not
return safely from its journey. It broke apart on re-entry into the earth's atmosphere and
crashed.
Mike Kelly, he’s a good guy, but when you take him out of pocket, he gets confused. I thought we were going to talk about the anatomy of trial, not necessarily discuss tort reform and social policy and all that good stuff. But we’re going to talk about that a little bit in light of Mike’s remarks and those of my friend Max Brown.

Something struck me as I was listening to the remarks of Mike Kelly and some others. I don’t think, at the risk of being self-aggrandizing here, there are too many lawyers in America today who are more involved in some of the political and policy issues that are going on in the tort reform arena than myself. I regularly speak to members of Congress in both the House and Senate and just a whole lot of other things that I do in that respect, and so I take this stuff all very seriously. And one of the things that I find remarkable is that you’re all here, and that is to say, these are not popular times for lawyers, and yet you all want to be lawyers. And a couple of things have been said today that I think need to be put into context.

One, of course, is Mike just ended, and he said the words, “I’m lucky to be a lawyer.” And you know what? He is, and I feel the same way. You, too, will be lucky to be lawyers once you pass the bar. Steve spoke of the camaraderie between the bar, and that, too, is something that goes along with the privilege you’ll have to be lucky, and that is to learn that this is not nuclear war. We can disagree without being disagreeable. I have some very strong opposition to the remarks, let’s say, of my colleagues such as Max Brown or Tim Saunders who runs the claims for the Illinois State Medical Society, but I’d be the first guy to run to Max if I needed a favor, and I think he would do the same to me.

This is not nuclear war. When you are lawyers, you have a duty to our profession and our community to act in a civil manner. Never forget that. When I give your commencement speech -- you’re going to hear 70 year old Charlie Tannen -- and you’re going to hear more about this because you’ve got to stand up for our profession. You are the next generation about this.

We hear a lot about malpractice. We hear a lot about tort reform. I think these are very important things that do impact that anatomy of the trial. Max and Mike just a moment ago, they spoke of how the system will collapse. I’ve reached a conclusion. I’ve heard for years that the well is going dry. We are killing the goose that laid the golden egg. All these bad things are happening. The system is going to
collapse, and I’ve reached a conclusion. Maybe the system should
collapse, and that is to say, it’s an anecdote, but it’s very appropriate.

I’ve been on trial, and I almost didn’t get here but my case settled
yesterday. I took the money and ran. But my client’s husband is an
expert in advising health professionals and familiarity with the health
care system for one of the big accounting firms. And he has no
knowledge of the depth of my interest in this area, the tort reform stuff,
so I just happened to ask him. He has a Ph.D. in this stuff. I said,
“Why is it that the consumer care component -- the medical care
component of the Consumer Price Index -- is so dramatically outpacing
the normal CPI and these ever-escalating costs, and we’ve got doctors
clamoring, rightfully so, that they can’t pay their malpractice
premiums? What in the world is going on?”

He said, “The two systems are wacky. And the second thing is
that hospitals were built with an internal infrastructure, an
institutionalized infrastructure that requires certain levels of stay and
certain amounts of reimbursement that are going unfunded.”

And my point to you is that juxtaposition those two remarks --
forget whether they’re accurate -- against everything that you’re now
hearing about tort reform and doctors. You don’t hear about the fact
that one of the reasons they can’t afford their premiums is that they’re
not being reimbursed and not making what they used to make because
of those two things.

So my point is there’s a lot going on, and it is overly simplistic for
any of you to get anchored in the idea that the quick solution to the
doctors going on strike anywhere in America is capping the damages of
the people who are most severely injured.

In a recent report from the Illinois Department of Insurance, 60%
of the indemnity payout, (and Mr. Brown is still here, and I’m sure
he’ll tell me if I’m wrong), is going out on the cases involving the three
most severely injured categories of harm that’s caused in either
doctors’ offices or hospitals. So think that through. That means if you
pass this cap, $500,000, $250,000, a million bucks, it doesn’t matter,
the cap is going to impact that 60% of cases worse than any other part
of it. You are capping the damages of the most severely injured people.

Rebuttal’s a good thing to do in a trial, by the way. The one thing
Kelly forgot about the anatomy of a trial is that being the plaintiff is a
very good place to be. Why? Other than the fact that the scaffold falls
off the building,\textsuperscript{4} (I think I can win that case), I get rebuttal. Rebuttal is a very powerful thing. Kelly gave that up when he wanted to go first. I’m talking last, right?

And when Kelly tells you we need tort reform in Illinois and it’s been thrown out, well, that’s hyperbolistic. It’s overly broad. You have caps in Illinois on punitive damages because you can’t get them in malpractice cases. You have a requirement of the Certificate of Merit being filed with every lawsuit, and you’ve had that since 1984, and I wrote the bill. You have restrictions on attorney fees in Illinois. You have fewer cases in the system today than you had ten years ago, and the per cap of the payout going out is only I think $10,000 at least according to statistics.

Lies, damn lies, and statistics, right? The latest statistic that I’ve been given is that the payout today is 42,600 versus 39,093 ten years ago. Now, again, I don’t know that those numbers are right.

All I know is this. There is a lot more going on in the system than the superficial fixes that we’re hearing about. Because if that were untrue, tell me why it is that since 1975 in California where they have a thing called MICRA, caps on damages, a $250,000 cap on damages in California since 1975 that is not geared to any inflationary index, so in current dollars it’s about 83,000 bucks. For the health care providers, malpractice insurance is up 160%, and the only reason that it’s not at the current 500%, according at least to some experts, is because they have had insurance regulation where the insurers had to go in for approval. So caps on damages are an overly simplistic superficial way of addressing these very serious problems that are taking place today in America.

But that has an impact, though. You have to address that when you try a case. And now I’d like to talk a little bit about trying the case, the anatomy of the case. Mike is right. Remember one word, and he’s used it, I’ll use it, and it’s as much a truism today as when it was drilled into me 25 years ago: preparation. You want to do what I do for a living and you want to do it against me or him, bring your A game. Bring a prepared game. You want to be proud to be a lawyer? You want people to quit thinking ill of lawyers, then earn the right by representing them in a prepared, ethical, honest way.

\textsuperscript{4} On March 9, 2002, three people were killed and eight were injured when scaffolding, which had been hanging 43 stories up the 100 story John Hancock Building in Chicago, fell to the pavement below. This story received widespread media attention.
I was told that as a young lawyer, and as a law clerk, I went to the courthouse. And one of the old stalwarts in the courthouse was a Judge Philip Fleischman, and he was just a kindhearted, good man. He said, "You know what makes all these good lawyers great? They're prepared. They do their homework."

And I don't know a guy on either side or a gal on either side of the aisle who does what we do for a living who doesn't work very hard. I worked with Patti Bobb at one point in our career. She kills herself when she's on trial. I've seen Mike work. I've seen other lawyers work.

We finished this trial yesterday where we settled, and I called the young freshman lawyer into the office. I said, "One of the very first things you do to 'tie your shoes' is pack up that file today. Get it properly organized. Don't just throw the stuff in. You might have to organize it some day, or the client might want to come and look at the file. Treat it with the respect that it deserves." And I walk in my office, and there are boxes stacked high today.

The moral of the story is this: Prepare. A bus hit a lady, and there had to be seven banker boxes there. That's preparation. And when you try these cases, you're going to have to learn that persuasion comes from facts. It doesn't come from just mere rhetoric. It doesn't come from fancy words. It doesn't come from who's got the best-looking hairdo or tie. It comes from facts. Always remember that. That's why in opening statements I like as long of an opening statement as I possibly can get, and that's because I like to spend a lot of time with the jury in the beginning on detailed items, specific facts of the case so that they can start thinking of those things.

But there's a part of persuasion that you can learn about that I think is important for you to learn about, and my attitude and view of it comes from a lot of the work that I do with focus groups. I use a lot of focus groups. I'm a big believer in focus groups.

And you've heard a little bit about Rachel Barton, and you heard about it in the first panel (Max I think gives me undue credit, you

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5 In March of 1999, Rachel Barton was awarded what was then the staggering amount of $29.6 million in her lawsuit against Metra and the Chicago North Western Railroad/Union Pacific. Barton, a renowned violinist, severed her left leg in January of 1995, after being dragged close to 400 feet by a Metra train at her final destination of the Winnetka train station. The accident took place when her violin strap was caught in the closing train doors as she exited the train. Instead of leaving her half-million dollar violin behind, Barton chose to hold onto the strap until a train conductor spotted the situation. The jury initially awarded Barton
know), that Rachel Barton is maybe the thing that got this ball rolling down a hill with all of these big verdicts. Maybe he’s right. I don’t know the answer to that. But I’ll give you some background history of Rachel Barton.

You’ve got to separate the intellectual side of social policy and where do caps and all this other stuff fit from what your job is as a lawyer. It’s not my job to invoke my view of social policy in the representation of a case to say that my client should only get X number of dollars because that’s better for the system. That’s what the General Assembly is for. That’s what the Congress is for.

So in my view, in a system that allows no limits except those placed by the jury on non-economic damages, it’s not for me to say, “You know, I think this case is maybe worth 10 million bucks, but I don’t want the system to collapse so I’ll only ask for 5.” That’s not your job, and the minute you start thinking it is your job, you’re doing your client a disservice. Let that happen in the General Assemblies and the capitals and all that of our country.

So how do you go about as a plaintiff’s lawyer determining what is the right number? I don’t have a good answer for you there except to tell you that persuasion is grounded in fact. So for an example, in Illinois law we have non-economic damages in an injury case that are disability, disfigurement, pain and suffering. All of those things mean different things to different people. But always remember that people can absorb unending amounts of pain, suffering, sorrow, disability, and loss of life provided one thing prevails, and that one thing is that it happens to someone else, okay?

And if you want to stand in front of a jury as a plaintiff’s lawyer or as a defense lawyer and talk about these things, you’ve got to get very grounded in trying to speak about facts. So that as a plaintiff’s lawyer, you’ll hear me try to put a face on disability, as an example. I’ll spell out the word “disability,” and then in terms of my preparation, I’ll work with my client to, “Let’s talk about everything that goes on in your life that would fit under the category of D.”

“Dependent upon other people for cooking.”

“Give me something that goes along with I.”

“Inability to do X.” And then back into that stuff, and that’s part of your direct examination at the trial.

over $30 million for her injuries, but this amount was reduced by 4.5% after the jury decided she was 4.5% responsible for her injuries. Robert Clifford represented Rachel Barton.
And that's how you talk about these, and I don't use the term "non-economic losses" except when I do give my little spiel about it, if it comes up, tort reform. I'll get into that. I'll take it -- I hit it head on, okay. I make no apologies for representing people who see their daughter's brain on the front seat of a car like the lady in the back seat of that Hancock incident did. You think I need to make an excuse for representing her or for asking for a lot of money for her post-traumatic stress disorder? I don't think so. But I talk about these things in the context of human losses, not non-economic damages. And as a plaintiff, I think that's an important term.

The other thing that I do, and it's really an outgrowth of my work with focus groups, I think you've got to sit back and talk about the context of decision-making. And that is to say, there is a difference I think in how people evaluate a case, particularly a malpractice or a products liability case, if they have no framework for analysis for both sides of the case.

And that is to say, we all know how we're supposed to act in day-to-day affairs of life, crossing the street, ducking traffic. But we don't know how doctors are supposed to act. We don't know how medicine is supposed to be practiced, and yet, a lot of research tells you that people on juries reach very quick conclusions, even though they deny it and even though they take an oath to God and our flag to say that they're going listen to the instructions of law and the closing arguments and all the evidence before they conclude anything. I don't think that they do.

So as a plaintiff, one of the things that I now do in a lot of cases, and it's not limited to malpractice, is I try to educate the jury in a malpractice case about some of the medicine before they hear about in great detail the event.

So, I mean, think that through, okay? I recently resolved a case by settlement that involved the complex issues of in vitro fertilization, and it's very complex stuff. And we learned through our focus group work that the jurors were able to more readily hone in on the issues if we spent a little time teaching them the medicine.

So our first witness or among the first array of witnesses was going to be a professor of obstetrics and gynecology from Northwestern who was not offering any opinions regarding standard of care, but he was there to talk about medicine. And we tested that in the

\(^6\) See supra note 4.
focus group stuff. The case ultimately settled, and it really worked well.

In the Rachel Barton case that you’ve heard about, we learned in all of our focus group work that if we spent a measure of time in the beginning of the case teaching the jury about the rules of operation of the railroad, that they would when they heard detail about the event, would have a better way to assess and compare the conduct of the parties.

And yet when we didn’t do that, when we just told the jury upfront about what occurred, since they knew how they felt that she should act but had no context of decision-making about how they should act, her contributory negligence numbers shot up like a rocket, and yet the ultimate verdict was 4.5%.

Now, finally, because I only have three minutes left, one other thing that for those of you who are going to try medical negligence cases or try any case, remember this. Compare how you in 2003 and beyond get your information in the context of your daily lives and in school, and what you’re going to find is that it’s a lot different than what I dealt with. I said to Mike while we were sitting there and Steve was talking, “Look it. Were we this young once?” I’m starting to talk like my father. And Mike said, “I’ve got ties older than some of these people.”

I didn’t get my first fax machine until 1985, folks. Think about that, okay? The jury pools are changing. The demographics are different in terms of gender, the demographics are different in terms of ethnic background, and the demographics are different in terms of age. And all of those things impact how people want to get information from a persuasion perspective. And the data tells us that they want it more visually, they want it very rapidly, and they want it succinctly.

So you’ll see in both my trials and Mike’s, a lot more pizzazz. Man, I’ve got bells and whistles and wands, and I’ve got bar coding stuff, and it’s up, and that’s how they want it, okay? It’s driven up the cost of litigation a bit, but that’s a different subject.

But keep that in mind when you go to work on these cases and understand that impacts preparation because you can’t put that stuff together overnight.

That’s my story. I’m sticking to it. Professor, your program. Thank you.
MR. LANDSMAN: Well, we have two distinguished panel members, and I'm hoping that we have a number of questions.

AUDIENCE SPEAKER 1: I was wondering, you've discussed this ten-year reform cycle that Illinois seems to be on currently, but what to my knowledge hasn't occurred before are the physician strikes and boycotts that we're seeing across the country. And in Illinois I believe that a strike has been organized for next week on the 26th.

MR. CLIFFORD: Correct.

AUDIENCE SPEAKER 1: And I'm wondering how you think this may impact the current reform that we're heading towards.

MR. KELLY: I've told all of my clients and I firmly believe that it is a grave error for physicians to strike. We're not West Virginia. This is a different state. I think it is a real error if doctors do strike. God help us all if something bad happens during that strike where appropriate medical care is for some reason withheld or just unavailable. I don't think it's a good idea.

There are good arguments that can be made on our side of the issue. The cost for $1 million/$3 million for a mature neurosurgeon with a clean record, "clean" no-payout, record is about $160,000. For $2 million/$4 million it's about $230,000.

Imagine going to school for the eight, twelve years of formation to become a neurosurgeon, probably fellowship trained in cranial, and before you can flick the light on your office door that morning of January 2nd in whatever year, you have to have almost a quarter million dollars to pay just for a $2 million/$4 million level of coverage, which as I mentioned earlier, is really becoming an opening chip in some of these games of serious cases.

There are good stories that explain the problem. A number of the neurosurgeons in the far southwestern Chicago metropolitan area have dropped cranial privileges. Why? Everything is a reflex of economics.

If you have to pay $50,000-$60,000 to have cranial privileges to operate on a head injury case, and that means you're getting called in the middle of the night and get to go in and do four or five hours of surgery on the fly trying to save somebody's life and you're not going to get compensated for it because the doctors really are getting nickeled and dimed, which I'll touch on in one second, why would you do it?
Not only are you not going to make any money on it, it’s extraordinarily hard, and you might be exposing everything you own to being taken away. That’s a real economic disincentive, and it’s certainly a very bad thing from our society’s standpoint.

If you’re in an area where doctors are giving up cranial privileges, I wouldn’t want to be in that situation. And, also, I don’t want all of the cranial cases being done by a few people. They will wear down. They are human. The problem will come to a head somehow or other within the next couple of years.

As I said earlier, if cooler heads prevail, there will be some modifications. Clifford and I could settle this over a few drinks some night. Some changes will make sense. Whether that happens or not, who knows.

MR. CLIFFORD: I think most of the polling thus far indicates that the strikes and walkouts have been not well received by the community. And that struck me as interesting because I think that doctors have a special place in society where it’s a trust, and you can’t breach that trust. And the view is that that trust is being breached with the strikes and walkouts.

And Mike’s right, I mean, those numbers about the premiums he talks about are correct. But in Clintonesque, I feel your pain. But don’t blame the lady who had her breast removed wrongly in Minnesota for that or the 17-year old at Duke right now. They didn’t cause that. It’s more than those types of cases that is causing this problem.

And the thing that bothers me the most is, (and I don’t hear a lot -- and this is where politics comes into play), right now historically in Illinois and on a national level, tort reform on all fronts, general cases,

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7 On February 7, 2003, a 17-year old Mexican immigrant, Jesica Santillan, found herself in a battle for her life when doctors at Duke University Medical Center transplanted a set of organs into the girl that were a mismatch for her blood type. The organs supplied by the New England Organ Bank were removed from an individual with Type A blood and were intended for one or two other Duke University patients with compatible blood types. However, one of the patients was not medically ready for a transplant and the size of the heart was too big for the other patient. Jesica, who had Type O blood, ultimately received the organs. While in a coma-like state from the first operation, Jesica received a second set of donated heart and lungs on February 20. Although this set was described as “an incredibly good match” Jesica’s brain began to bleed and swell after the second operation, causing severe and irreversible brain damage. This tragic story came to an end on February 22 when Jesica was declared brain dead and removed from life support systems.
aviation, products, malpractice is very partisan. Republicans have wanted it. Democrats have opposed it.

And when I first started going to Springfield in the late '70s, there was a term I was taught down there, and it's called what a "Fetcher Bill." You say what is a Fetcher Bill? A Fetcher Bill is a bill that goes and does something radical, and it fetches the people who want it to come to that politician to slap him or her on the back and give them support, and it fetches the people who it harms to come and beg for it not to happen and slap them on the back and give them support.

What you're seeing right now at the national level is an effort being made that's opportunistic. The Republicans have a president. The Republicans have strong control of our House of Representatives, and they have very marginal control of our U.S. Senate. That's all three keys to the kingdom.

In Illinois in 1994, when that same phenomenon occurred at the state level, med-mal tort reform was bill number one that went through the General Assembly to a Governor only too willing to sign it. And it was thrown out as unconstitutional, but certain things have remained.

So from my perspective, I think these doctors are being abused. I am baffled by the fact that they're only lashing out about, at least from my perspective, the cases. I actually don't get it, which has caused me to ask: am I wrong about this? And I'm asking a whole lot of questions to a whole lot of different people about that, and the data that I'm being given is that there is a lot more to the story.

You only have to look to California, in my opinion, to talk about the efficacy of caps, or you only have to look to the malpractice insurers who are being quoted saying we will not lower premiums if you pass these caps. Well, then what the hell is going on?

And yet the hospitals up there are struggling with these deductibles, (you know, they're deductibles in essence in parlance), being tripled in the millions of dollars. They can't afford that any more than this doctor that Mike is describing can afford it.

And yet look at the data. In Illinois as an example, only one out of twelve physicians with two or more malpractice payouts have been disciplined. But in fairness to them, because I don't like to talk about that one too much, but it stuck in my mind, but they're no better than we are with the lawyers.
I’m kind of staying away from the E2 cases right now because the ambulance chasing is rampant in the south side of the city right now. Nobody’s going to do anything about that. And guys like me will talk about it, but it still goes on. That’s why you guys have to be civil and ethical.

All right. Other questions?

MR. LANDSMAN: I have an observation. Some of the toys that you talked about, both you Michael and Bob, are very expensive toys to play with, and they make this litigation very expensive. If you’re looking for the very best expert, and that expert is going to teach you at a $1,000 per hour, that’s going to be an expensive case. If you’re doing a focus group, and I’ve sat with Bob and watched these happen, we’re talking about $1,000 an hour easy, perhaps we’re talking about a whole lot more.

MR. CLIFFORD: Probably about four.

MR. LANDSMAN: Yes, 4 or $5,000 an hour. Now, these are expensive toys, guys. How can most people expect to play, considering the chips that you’ve got to put on the table to start?

MR. CLIFFORD: Well, one could argue that’s a point in favor of mediation. Especially in the clear-cut cases, I think mediation can be very effective there. I spent $1.2 million preparing the Rachel Barton case. I don’t think we’ve tried a malpractice case to verdict without spending at least $150,000 in the last 5 years, and that’s the low-end number. The number that popped in my mind was 250, but I know there’s been some lower.

And it’s the combination of the focus group. You see this court reporter here? One of the things we could have done with the court reporter is through that video camera recording us, we could digitally synchronize that film to the court reporter’s tape, so that if I wanted to pull a snippet of Kelly admitting harm, I could go, blip, with a little bar code chopping, and it would pop up on the screen. In the Rachel Barton case, I did that so much. I kept the wand in my pocket, and

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8 “E2” is a south side nightclub in Chicago, Illinois. It was the site of a human stampede that killed 21 people on February 17, 2003. This tragic event gained nationwide media attention.
every time I pulled the wand out of my pocket, the jury got up on the edge of their seats because they knew someone was about to get whacked.

It’s the cost of doing business nowadays, and yet, I’m not in this to lose. So I’ll do what I have to do to effectively communicate because I know Mike’s got an edge. He’ll deny it, but he has an edge. Number one, he calls that muckety-muck doctor, right, who’s too busy to talk to him. First, I don’t even know who that doc is, okay, because I’ve got to go do some homework to try to find that doctor. And second, I’m suing a doctor or hospital, and while the conspiracy of silence is not nearly as widespread as it was when I started as a young lawyer, it still exists today. There are certain physicians who, A, won’t get involved in any litigation like Mike was talking about at all, but B, won’t get involved if it involves the plaintiff. And that’s a reality, yet, it’s changed a lot because I believe we get better experts today as plaintiffs, and that’s because of the economics of the business. Because I know some doctors who are making as much money serving as expert witnesses as they do in their practices.

MR. LANDSMAN: Michael?

MR. KELLY: Steve’s question, a great question and great concept for you to get in your head now at the very beginning of your careers. There’s a difference between money well spent and money wasted. In the right case if you spend a lot of money, it’s a very good idea. There is no case where wasting money is a good idea.

I talked earlier about the fact that most of the cases I get tend to be miserable. People tend not to send me clean, happy cases that I can just walk in and win. Most of what I get is pretty tough to read from the get-go. Over 30 years I’ve figured out that there were some cases where I can pound that case, I can go to every expert, I can come up with every theory, and you know what, it won’t change the outcome a heartbeat. The smart thing to do there, and I’ve done it with Bob on a number of occasions over the last 25 years is call and say, “Hey, where are we going with this thing? If I can get my client to move it, you’ve got to give me a big discount because we’re not going to bang on each other for the next three years, and you’re not going to waste a bucket of money.”

MR. CLIFFORD: Discount?
MR. KELLY: You heard it.

MR. CLIFFORD: He wants a discount, and then when I've got a crappy case with thin liability, and I call him up and I say, "Hey, I need a favor here. You remember I gave you that discount? How about just a little money on this one so I make the lady happy?" Forget it.

MR. KELLY: It never happened.

But when you get a case that is simply not winnable, recognize it, explain it to the client and get it off your docket. These things do not get better with age. If your case is garbage on day one, I guarantee after three years of preparation and six weeks of trial against somebody like Bob, your case isn't going to be better. It's going get a lot uglier.

Questions?

AUDIENCE SPEAKER 2: The difference between cases that are garbage and cases where the liability isn't that great, and previously Patti Bobb said how 1 out of 50 cases that come to her she only takes because the damages just don't justify her involvement. What happens to those people who have suffered but the dollars don't warrant the amount of money it takes to try the case?

MR. CLIFFORD: My answer to that is what happens to them is what happens in California. They can't get lawyers. Cases fall through the cracks. They're too costly to prosecute, and that's exactly what the reformers want.

MR. KELLY: Well, I was taught 33 years ago in law school not all injuries are compensable, and that is to some extent the answer for part of them. Understand there will always be unfair results in any legal system human beings come up with. I'm not looking for perfection. I'm just looking for a system that works a little bit better than it did last year.

AUDIENCE SPEAKER 3: I'm a third-year law student at DePaul, and I think we live in a world right now where even our president would get up, and he knocks on lawyers. And I've seen a lot of rhetoric from both sides identifying the problem, but I really haven't seen a lot of the solutions to this type of problem that's been identified. So I was
wondering if you could give any fixed solution to any of the types of problems that we’re facing.

MR. KELLY: It’s an interesting question to some extent the fact that the dialogue has fallen to trial lawyers.

One of the things our firm does is a lot of ethics work. Bill Grogan, Father Bill Grogan, has worked with Max over the years. He’s very competent on ethical issues. I’m a trial lawyer. The last person you’d want making ethical decisions in a life-and-death situation, a pull-the-plug situation is a trial lawyer. What in my formation ever gave me the right to make that type of decision? It’s insane.

What’s happened is, again, the abdication by legislators, governors, congressmen, to some extent the Executive Branch in dealing with these issues. We’re trial lawyers.

Bob talked about doing our job. That’s been hard enough at least in my experience. I prefer not to deal with these great social issues.

MR. CLIFFORD: And, see, I don’t hold that view entirely. I think the remark that you don’t see anything happening is not quite accurate. The American Bar Association two weeks ago voted in favor, unprecedented with my assistance, in advocating restrictions on the filing of nonmalignant asbestos claims. I mean, that is a big deal. So you see lawyers participating in that subject in a meaningful way.

You’re hearing the makings now of a lot of discussion about the malpractice issues and the tort law issues. That all has been quiet on the waterfront for a long time, but that’s been changed because in my view of the reversals of fortune of the insurers which has caused them to raise their premiums to unprecedented levels. And you could argue all day long of whether that came about because of bad or good business practices because they were artificially keeping the rates low. And it’s the opportunistic atmosphere of the politics that is permitting these things to be discussed.

You’re starting to hear guys like me and others who say, fine, you want to put tort reform on the table, let’s put it on the table. Let’s put insurance reform on the table. Let’s put un-funded Medicaid reimbursement mandates on the table.

Whatever happened, by the way, to loser pays? Remember that one? It goes back to the last cycle. You know the old English law, doesn’t it make sense to stand in front? The loser of this frivolous lawsuit ought to reimburse Mr. Brown and his insurers for the cost of
this case. What happened to that? And what happened to it was somebody did the math, and they found out that there are far more meritorious cases in the system than not. I mean 98,000 preventable deaths occur in American hospitals per year. Tell me I'm wrong about that stat. I don’t think I am.

MR. BROWN (FROM AUDIENCE): Yes, you are wrong. Bob, I know what you’re reporting from, but those are old studies, and I’m sure that Mike will corroborate. Usually the headlines are 100,000 people killed each year.

MR. CLIFFORD: I mean, the New England Journal of Medicine, 98,000 people in hospitals a year, 43,000 die from auto accidents a year, 42,000 from breast cancer, and 15,000 from AIDS. So, fine, it’s not 98. It’s 80.

MR. BROWN (FROM AUDIENCE): There are two New York studies where they extrapolated the figures from those, and they were questionable to begin with. I mean, people are injured.

MR. CLIFFORD: Okay. But a lot of people die.

MR. BROWN (FROM AUDIENCE): Exactly.

MR. CLIFFORD: And he’s the first one to recognize that if an error occurs, it ought to be dealt with.

And so all I’m saying to you, to get back to your answer, I think there’s a lot more going on by way of concrete answers than not, but that’s why you vote for people. But equally true, the plaintiffs tend to be more defensive, if you will.

When the Democrats controlled the Congress and the Presidency, you didn’t see a lot of bills trying to expand rights, did you? It only comes to pass when we have the Republicans in control that we’re trying to restrict rights, correct? And who are some of the biggest

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9 Max Douglas Brown was a speaker in the preceding panel, "Panel 1: Alternative Dispute Resolution Strategies in Medical Malpractice," and speaks from the audience. He is the General Counsel at Rush-Presbyterian-St. Luke’s Medical Center in Chicago, Illinois.
supporters of the Republican Party nationally and locally? Insurance industry, business interests. There's a lot going on.

AUDIENCE SPEAKER 4: This is just a comment, and it picks up on your focus groups. You mentioned that the dynamics of the jury, what their composition, what they look like has changed in terms of ethnicity, gender, and age. And I find it interesting to look at from the other side, too, in terms of the plaintiffs who now have greater access. Because it would seem to me that you might better be able to explain this than I, given the work that you do, that perhaps we're seeing more of those people as well being able to have access to the system to address their harms.

When you look at some health disparities, we certainly see racial disparities. For example, one of the areas where African-Americans get more treatment than Whites is with amputations. There is a dramatic difference in the number of amputations as a means of surgery for African-Americans than there are for Whites. There are some that suggest that this is a result of medical malpractice. So is it perhaps that we're also seeing some greater awards coming from groups that perhaps previously weren't really in the legal loop?

MR. CLIFFORD: I haven't seen that, and as you were asking your long question, it reminded me of something. We always hear about these aberrant juries, right? When we do these mock trial deals, a lot of times I'll play the defense lawyer, and I did this three weeks ago. And I'm telling you, I said every scurrilous thing I could think of as a defense lawyer. I said, "This lawsuit is raising your insurance premiums. We are bankrupting America. This is the lottery gone amuck by a greedy ambulance-chasing lawyer who is charging obscene contingent fees." And they go in there and, "Okay, he said that." But, you know, that defense is no better than the plaintiff. I mean, wacky stuff going on.

I don't see what you're saying. And Max could be right, you know, the numbers are higher. And maybe it's the Rachel Barton mentality or maybe it's the lottery mentality, and yet, it's only one part of the whole deal as far as I'm concerned.

Let's put it all on the table. I'm fine, but I'll fight like heck nowadays I'm convinced. Because I used to listen to Mike when he used to say, "You guys are killing the golden goose. It's all bad things for the system," or "both sides of the 'v.'" as he calls it. "Both are
hurting about this.” Maybe it is. But I think the only way to get this all in perspective is to do a lot of muckraking.

And I’m going to fight this caps thing now. He told me I was crabby when I came over here today, I am, because I’m going to talk about how much more there is. Caps, you talk about caps. Caps discriminate against minorities; do you know that? That’s what the data shows.

AUDIENCE SPEAKER 4: Well, no, my question was, and perhaps I misstated it, was not about the caps. My question was about access; that perhaps there are greater awards and greater access now for people of color through the work that you’re doing and some others.

So I’m not talking about caps. I’m actually suggesting that perhaps what we’ve seen even with class action lawsuits. For example, the Zauderer case in Ohio that involved the women and the IUDs.

MR. CLIFFORD: Right.

AUDIENCE SPEAKER 4: Here you have a group of people who beforehand perhaps could never have brought a suit like that before, a group of women on something that’s created with sexuality and their bodies. And the result was that you had industry saying this is bad, this is bad. But here you had a group who prior to that never really had access and were able then to get access.

MR. CLIFFORD: I actually don’t think it’s an access thing. I think it’s because a lot of lawyers have become entrepreneurial.

MR. KELLY: Clifford really is crabby. You know, walking over he was trying to kick a couple of cabs.

Our friend Dan Webb probably put it best. On whichever side you’re working on as a trial lawyer, and if you go into the practice, don’t limit yourself to doing one type of trial work. Don’t limit yourself to medical malpractice. I represented the White Sox, the Chicago Police Department, and the Sheriff of Cook County. The more you do, the more you work at your craft, and it is a craft, you’ve got to get better at it. Don’t be as good a lawyer in 15 years. That’s insane. Get better every year. Work every year to improve your skills.

But remember Dan Webb’s comment, “We are all Willie Lohman without the vacuum cleaners.” We are salespeople. You have to be
able to sell to a jury something that they’ll be able to grapple with that hopefully will favor your position. No matter how many bells and whistles you use, that’s the basis of being a trial lawyer. Always was, always will be.

MR. LANDSMAN: A footnote as we end. Bob wrote me a note as we were sitting here, and it was the generous and totally supportive sponsor of the Clifford symposium writing to the organizer of the symposium, “Maybe we need a program entitled ‘Blow the System Up. Let’s Start All Over?’”

And it’s an answer to your question that next April, a year from now, we’re probably going to have that program. These are issues that we need to dig deeper into, and Bob has reminded us of that, and I think Michael has, too. I want to thank them both.

I’m told by the organizers that the idea now is to grab lunch. Come on back in. There will be a speaker talking about tort reform. Thank you all for coming.