

# A Scourge of Doctors Garners Their Respect

BY GARY TAYLOR

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HOUSTON — Secretly, some doctors undoubtedly branded it an act of arrogance. Others probably laughed and compared it to the case of the country club tennis champion who taught his most significant challenger a more powerful serve.

But when Richard Warren Mithoff donated \$100,000 to the University of Texas Medical School at Houston three years ago, the young attorney wasn't being cocky. And he certainly wasn't fearful of eliminating his largest source of income by assisting the professional class he most often helps clients sue.

More than anything else, Mr. Mithoff, of the Law Offices of Richard Warren Mithoff here, wanted to express his concern about a medical problem with which he'd become expertly familiar. In creating an endowment to improve medical training in delivery room techniques, Mr. Mithoff also made a point about the social responsibilities of the two professions so often at war.

"I'm convinced he believes that this might be an effective way to protect the health of consumers," notes Dr. Eugene Adcock III, vice chairman of clinical affairs at the medical school's department of pediatrics.

The gift came just a month after Mr. Mithoff had engineered a \$50 million settlement from a North Texas hospital for one of his clients — a child who suffered brain damage from malpractice during delivery. Hardly the litigator's first multimillion-dollar medical malpractice award, it also was not his last. *Adams v. Veggeberd*, 78-10718 (D.C., Harris Cty.).

In the past 18 months alone, Mr. Mithoff has won more than \$23 million in jury awards and settlements for his clients and has scheduled at least five more jury trials this year. And he's considered among a select group of independent young trial attorneys who will someday succeed Joe Jamail of Jamail & Kolius as the region's premier plaintiffs' lawyer.

But while he has built a national reputation as a medical malpractice specialist, Mr. Mithoff has managed to cultivate a surprising relationship of respect with the state's powerful and aggressive medical community.

"I'd be surprised if you'd find any doctors to say anything bad about him," says Terry O. Tottenham,



Blair Pittman

**TRIAL AID?** Richard Warren Mithoff keeps artificial knees, skeletons and other paraphernalia in his office — to help on cases, he says.

of the Austin office of Houston's Fulbright & Jaworski. A frequent opponent of Mr. Mithoff who represents many hospitals and doctors, Mr. Tottenham concludes, "He's well-respected as a worthy adversary by the medical profession."

"He doesn't run to the courthouse with every case that comes his way, and I'll take some of the credit for that," says Mr. Jamail, who won international fame as the architect of the \$10 billion Pennzoil-Texaco verdict.

Mr. Jamail can make that claim because he gave Mr. Mithoff his start. In fact, Mr. Mithoff's name once appeared alongside Mr. Jamail's as his partner. In launching his own office five years ago, Mr. Mit-

hoff managed to surpass his mentor in one respect: The floor of his office in the penthouse of One Allen Center doubles as Mr. Jamail's ceiling.

"We've laughed about installing a fireman's pole," quips Mr. Mithoff. "We still have a good relationship."

Indeed, a photo of Mr. Jamail looks down on Mr. Mithoff's desk — right behind the skeleton that stands beside his chair.

"I like having stuff out," explains Mr. Mithoff as he points to the anesthesia tubes on the credenza and an artificial knee atop the coffee table. But lest a visitor confuse his office with a medical supplies warehouse, he notes, "I use it to prepare for trial."

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A native of Lufkin and reared in El Paso, Mr. Mithoff as a youth enjoyed reading books about lawyers. That fascination didn't blossom into a career goal, however, until his senior year at the University of Texas; he confesses to three years of "partying in Austin" before growing serious about his future.

His start was in the public-interest arena. As a law student he worked with consumer advocate Ralph Nader on a tax project in West Texas. Then, instead of accepting a spot with one of Houston's large firms after his 1971 graduation, he chose to clerk in Tyler for U.S. District Judge William Wayne Justice and have a front-row seat to view trial specialties. And as a clerk, Mr. Mithoff took part in several significant cases. He recalls drafting the order that launched the Texas Department of Corrections on a decade of restructuring. It was Mr. Mithoff who plucked an inmate named David Ruiz from obscurity by placing his name first on a list of inmate plaintiffs with grievances against the prison system.

Ready to launch his career in private practice in 1974, Mr. Mithoff sent a letter to Mr. Jamail, who had appeared before Judge Justice in a recent case. The two became friends after the first interview and Mr. Mithoff joined Mr. Jamail's firm, where his first responsibility was to screen cases.

"Joe loves stories and so do I," says Mr. Mithoff. Mr. Jamail, he says, kept things informal. "It was loose and fun. In the 10 years I was there we never had a firm meeting. Joe's attitude was, 'Take the file and try the case. Have fun,' he always said."

Mr. Mithoff soon found himself sifting through the wide range of medical malpractice complaints crossing Mr. Jamail's desk.

As Mr. Jamail recalls, "We could have taken 1,000 malpractice cases per year. Everyone thinks they've got a case but very few can be tried."

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Attracted to the medical area, Mr. Mithoff learned his skills the hard way: traveling to small Texas towns developing cases, several of which backfired in his face.

One example involved a woman in Big Spring who complained that a doctor had improperly set her broken ankle. But it wasn't as simple as that. The woman, who "called herself a barmaid," according to Mr. Mithoff, had broken the ankle in a fight with her boyfriend and checked into the hospital drunk. The doctor — one of the town's leading citizens and whose name graced the hospital clinic — was represented by a prominent lawyer whose mother had been delivered by the doctor's father.

"You couldn't invent a set of facts like this," Mr. Mithoff recalls. "But I was full of the crusader and thought I had a great chance.

"I would have lost that case but the other side decided to settle confidentially," he adds. "I learned a

lot about what really matters in winning these lawsuits: The doctor just didn't want a lot of publicity."

But the most important lesson came in a case that produced his first million-dollar verdict. A client became paralyzed below the knee of one leg after orthopedic surgery. Convinced that malpractice was to blame, Mr. Mithoff struggled to coax testimony from two reluctant surgeons. One had been present during the operation but still refused.

"Both asked me to find someone else," Mr. Mithoff recalls. "But I spent a lot of time. I made appointments with them after-hours, talking to them about the case."

They finally agreed and in the process he learned how to deal with doctors as witnesses. Over the years he's improved that ability to develop a network of physicians he can call for expert testimony or — more often — advice. The effort to maintain such contacts has become the foundation of his success.

"I can tell these guys that I screen these cases carefully," says Mr. Mithoff, who employs a nurse on his law firm staff to monitor some of the technical aspects of client complaints. "It impresses them to learn that I'm not out there just to make a buck. I can pick up the phone and call a doctor to talk to me off the record. And I'll abide by their decision."

Mr. Mithoff says he has even called the doctor against whom the client is complaining — "if I know him and wouldn't be able to take the case anyway" — while the aggrieved patient is still in the lawyer's office. "Usually I can satisfy the client that there was no negligence."

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Fortunately, Mr. Mithoff can afford a high degree of case selectivity — something courtroom opponents cite as the key to his reputation. He accepts about one of every 75 cases offered to his firm and won't tackle a medical malpractice complaint unless he believes the fee potential is \$500,000 or more.

"There's not a lot of guesswork when he files one," says Mr. Jamail. "The case will have merit or he won't take it."

Mr. Mithoff gained the most notoriety from another case tried while associated with Mr. Jamail. His female client had a leaking breast implant and he sued the manufacturer — rather than the surgeon — claiming a defect in the product. *Corley v. Dow Corning Corp.*, 570 S.W.2d 140 (1st Ct. App., Texas).

"Joe gave me the file on a Friday and said to try it on Monday," recalls Mr. Mithoff. "The manufacturer tried to blame it on the doctor. They brought experts and a whole box of breasts as evidence. One witness took the rubber breasts and pounded on them to show how tough they were. Then he intentionally made a pinhole prick in one to make it leak."

Mr. Mithoff turned that testimony around to show jurors a defect was more likely to blame than any rough handling during surgery. They awarded only \$170,000 damages — \$165,000 more than had been offered as settlement — but the verdict brought Mr. Mithoff more mail than any million-dollar case. For some time he filled an album with photos of "allegedly defective breast implants" sent him by women with similar complaints. But he never found any of those cases meritorious enough to take on.

With just three other lawyers in his firm, Mr. Mithoff says he plans to keep the office small. He'll remain the center of the practice and build onto the medical malpractice specialty that now accounts for half his cases.

And, he says, he'll continue making donations to worthy causes.