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House Bill 4
After Five Years—
A Defense Perspective



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PRESIDENT'S *Message*

Rhonda Brashears

This report finds me feeling very blessed. I am blessed for so many reasons, but some of those being because I have not suffered from so many unfortunate events that have affected so many of my friends and acquaintances. Several people across the state have been laid off, salaries have been reduced, or businesses and firms have enacted spending freezes on continuing legal education among other spending requests. This is where the Paralegal Division can become a very important and wonderful asset to those who find themselves a victim of any of these unfortunate events. The Paralegal Division provides its members with so many member benefits, a few of which are:

- Some of the most inexpensive online CLE available;
- A job bank;
- An e-group that regularly has posts regarding potential job opportunities;
- A quarterly magazine, the *Texas Paralegal Journal* which is full of substantive articles that can help you meet

your self-study allowance for continuing legal education each year;

- CLE in your District that is held at little or no cost. Approximately 30 hours of District CLE have either taken place or are planned in Districts around the state (you can find all of these on the CLE Calendar at www.txpd.org);
- Over the next 4 months the Paralegal Division will be offering three one hour CLE webinars at no cost to the PD members, yes, I said at no cost (watch for upcoming information on these webinars).

The Paralegal Division wants to help you continue to succeed in this tough economy, whether that means helping you find your next job, keep in contact with other paralegals in the market to find out when job opportunities open, or by providing you with two hours of self-study and three hours of CLE (this is five



hours of your required six hours to renew your membership) at absolutely no additional cost to you above your current membership fee.

In addition, and thanks to Stephanie Hawkes, your President-Elect, the Paralegal Division is keeping up with the ever changing world of technology available to us. Stephanie has set up a group on Linked In. This is another way for you to link with other Paralegals across the state to help you with any needs that you may have in this ever changing market. Join us on Linked In! The URL is www.linkedin.com and enter "Texas Paralegal Division" in the Search Groups box.

The Paralegal Division is working very hard to ensure that the Paralegal Division is worth every dime that is spent on your membership dues. If there is anyway that you think the Paralegal Division can help you meet your CLE or professional enhancement needs I would love to hear from you. You can contact me at president@txpd.org.

Rhonda J. Brashears
President Paralegal Division

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The skills, duties and responsibilities of the partners are distinct, lending to the strength of the organization. Randy Crews, the managing partner, is responsible for business services, including contracts and general administration. He also has experience as a facility manager and a project manager. Tom Miller is a uniquely experienced senior technical consultant and programmer. Clients often incorporate Tom as an important and trusted member of their legal team. Bob Sweat is a project manager and responsible for client services and overall customer satisfaction. His unique perspectives come as a former paralegal and manager of processing facilities with as many as 250 employees. Clients enjoy his hands-on support and appreciate his estimating, budgeting and reporting skills. Bob and Tom have written several articles, co-authored books on litigation support, and have given multiple CLE presentations over the past 15 years. ODS's support staff is made up of personnel highly experienced at converting

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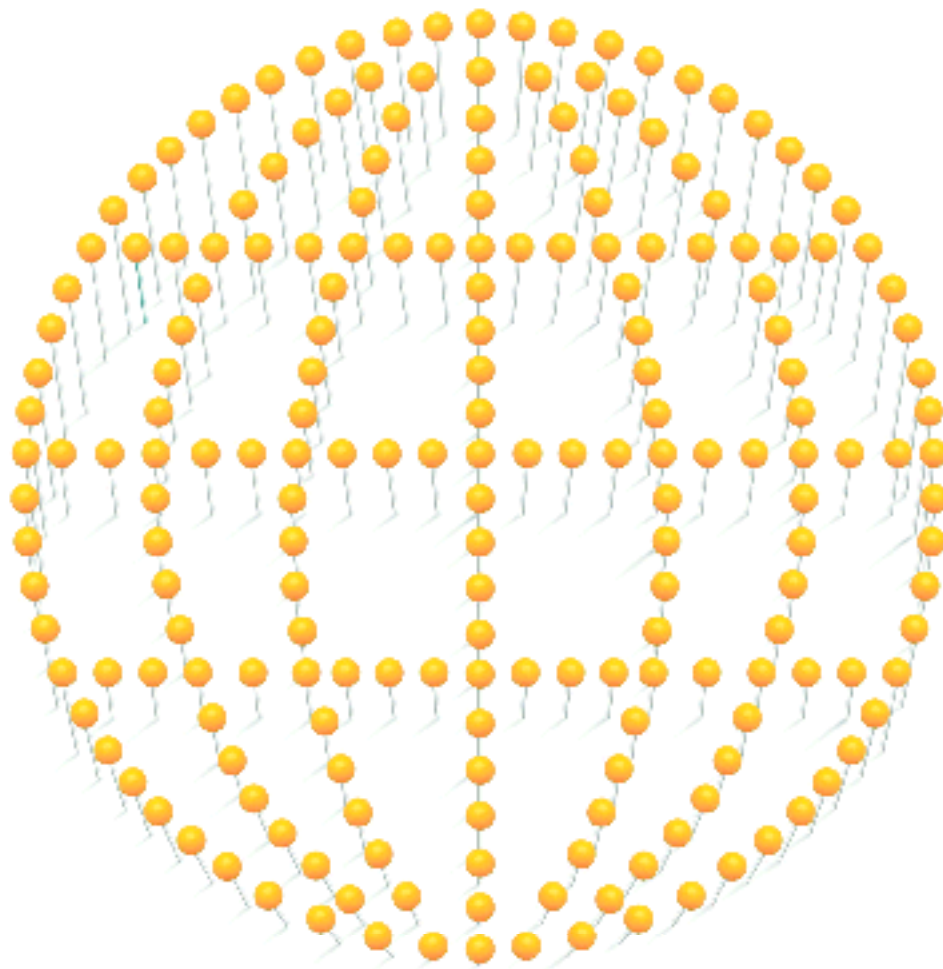


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House Bill 4 After Five Years— A Defense Perspective¹

by Michael Wallach and Wade Birdwell

Through the enactment of House Bill 4 in 2003, the Texas Legislature significantly overhauled the manner in which health care liability claimants may recover damages from physicians and other health care providers for injuries and death proximately caused by professional malpractice. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 66 10.01 *et seq.*, 2003 Tex. Gen. Laws 847, 847-885, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, 6 1, 2005 Tex. Gen. Laws 1590, 1590. Describing the circumstances prompting the legislation as a “medical malpractice insurance crisis” adversely affecting the availability and delivery of medical and health care statewide, the Legislature specifically found a causal relationship between the increasing cost and decreasing availability of professional liability coverage and an “inordinate” increase in both the number of health care liability claims and the amounts paid by insurers in judgments and settlements. *Id.* at 66 10.11(a)(1), (3), (4), (5) & (6). The Legislature further found that the rising cost of malpractice insurance materially increased the cost of, and diminished the availability of, health care for Texas patients. *Id.* at 66 10.11(a)(7)-(11). To address this crisis, the Legislature enacted House Bill 4 to (1) reduce excessive frequency and severity of health care liability claims, (2) decrease the cost of such claims and ensure awards rationally-related to actual damages, (3) increase the availability of professional liability coverage at reasonably affordable rates, and (4) “make affordable medical and health care more accessible and available to the citizens of Texas.” *Id.* at 66 10.11(b)(1), (2), (4) & (5). Five years later, a retrospective review of the impact of House Bill 4 reveals not only that the appellate courts are generally, though not always, interpreting and applying most of its provisions in a manner consistent with its original intent, but that physicians, hospitals and other health care providers, and the patients they serve, are realizing most of the intended benefits of the legislation.

I. BENEFITS REALIZED

Five years after the enactment of House Bill 4, medical malpractice liability insurance is demonstrably more available and affordable for the vast majority of medical professionals in Texas. During testimony before the Senate Committee on State Affairs this past spring, the Commissioner of Insurance of the Texas Department of Insurance substantiated the renewed vigor of the medical malpractice insurance market in direct response to the enactment of House Bill 4. *See* Hearing Before the Senate Comm. on State Affairs, Interim Charge No. 6: Study the Economic Impact of Recent Civil Justice



Reform Legislation (April 18, 2008), at 11-12 (testimony of Mike Geeslin, Commissioner of Insurance, Texas Department of Insurance). He testified that the market actually responded faster than expected, with professional liability rates dropping, on average, by 25 percent, compared with the estimated 12 percent reduction projected in 2003. *See id.* at 11. He further numbered eight new professional liability insurers, approximately 27 more risk retention groups, and approximately six additional surplus lines insurers providing medical malpractice coverage since the enactment of House Bill 4. *See id.* at 11-12. Finally, he cited an almost 90 percent reduction in the number of providers forced to obtain their coverage from the state-mandated market of last resort, *i.e.*, the Texas Medical Liability Insurance Underwriting Association, the joint underwriting association known as “the JUA,” observing that the number of JUA policyholders dropped from almost 2,700 in September 2003 to 350 as of March 2008. *See id.* at 12.

Moreover, the enactment of House Bill 4 is responsible for a sizeable increase in the number of physicians licensed in and actually practicing in Texas, including practitioners in critical specialties such as obstetrics and neurosurgery. As substantiated during the same hearing by Howard Marcus, M.D., the Chairman of the Texas Alliance for Patient Access, the number of physicians newly licensed to practice in Texas in the first four years since the enactment of House Bill 4 was approximately 11,000, representing a 30 percent increase from the previous four years, a net increase of approximately 2,500 new physicians, 11 million more patient visits and \$1.74 billion added to the state’s economy. *See id.* at 68-69 (testimony of Howard Marcus, M.D., Chair, Texas Alliance for Patient Access). Dr. Marcus further noted that Texas thereby improved its national standing from 48th to 43rd in the American Medical Association’s measurement for patient care per capita. *See id.* at 70. Moreover, the anticipated 4,000

physicians to be newly licensed in 2008 represents three times the combined graduating classes of all Texas medical schools. *See id.* at 69. As to the increase in physicians and, more importantly, specialists in underserved communities, Dr. Marcus testified:

Since 2003 the specialists are growing and before tort reform, Abilene, Beaumont and Victoria had a net loss of doctors now they are posting gains. And for example, Corpus Christi, San Angelo, McAllen and Beaumont have each added a neurosurgeon. Galveston has added two and, Mr. Chairman, Lubbock has added three.

See id. at 70.

Moreover, the decrease in premiums engendered by House Bill 4 released funds for physicians and other providers across the state to expand their services to provide better patient care. *See id.* at 70-72. Sister Michele O’Brien, a representative of CHRISTUS Health, a Catholic-owned hospital system with approximately 30 hospitals and patient-care facilities in Texas, testified that liability savings from House Bill 4 permitted CHRISTUS Health to launch new services and safety programs, improve patient satisfaction and expand charity care, including, as an example, a new clinic for indigent care at CHRISTUS Spohn Hospital in Corpus Christi. *See id.* at 79-80 (testimony of Sister Michele O’Brien, CHRISTUS Santa Rosa Hospital). Other expanded programs included a diabetes excellence program, advanced software programs to monitor and track infection rates, wound care programs to prevent the development of pressure sores, additional obstetrical monitoring, and additional staffing and training, including crisis simulation training to address the need for care during natural disasters. *See id.* at 80-81. Moreover, CHRISTUS Health substantially increased its delivery of charity and unpaid indigent care, for example, to 12.9 percent of net patient revenues at CHRIS-

TUS Santa Rosa Hospital in San Antonio. *See id.* at 81-82. Overall, Texas hospitals, not just those in the CHRISTUS Health system, delivered \$594 million more in charity care in 2006 — on an actual cost as opposed to a charged basis — than provided in 2003: a figure that “would have been impossible to absorb without the savings [obtained] as a result of the tort reform and the attending liability savings.” *See id.* at 82.

II. PROPOSITION 12 AND THE STATUTORY CAPS ON NON-ECONOMIC DAMAGES

An important part of the success of House Bill 4, the ratification of Proposition 12 by the voters, amended the Texas Constitution and thereby authorized the Legislature to place limitations or “caps” on the recovery of non-economic damages recoverable for health care liability claims. Article III, Section 66 of the Texas Constitution now provides:

Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or any combination of theories of liability. The claim or cause of action includes a medical or

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health care liability claim as defined by the legislature.

TEX. CONST. art. III, § 66(b). Before its ratification, the Supreme Court of Texas had held such limitations constituted an unconstitutional abridgement of a well-established common law right as applied to personal injury actions, but upheld them as applied to statutory survival and wrongful death actions. *Compare Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (personal injury), with *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 902 (Tex. 2000) (survival), and *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (wrongful death).

Section 74.301(a) of the Texas Civil Practices and Remedies Code establishes a “per claimant” cap of \$250,000 on non-economic damages awarded against any and all non-institutional health care providers, most commonly physicians. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a) (Vernon 2005). Section 74.301(b) establishes a “per claimant” cap of \$250,000 for non-economic damages per health care institution, typically a hospital or nursing home. *Id.* at § 74.301(b). If a “claimant” prevails against more than one health care institution, Section 74.301(c) limits the aggregate amount of non-economic damages recoverable against all such institutions to \$500,000, while continuing the individual institutional limit at \$250,000. *Id.* at § 74.301(c). Since these caps are “per claimant” in nature, and since House Bill 4 defines “claimant” to include all derivative plaintiffs, the aggregate cap on all non-economic damages in a health care liability claim is \$750,000: \$250,000, if only non-institutional providers are liable, up to \$500,000, upon the addition of one liable institutional defendant, and up to \$750,000, upon the addition of more than one liable institutional defendant. *Id.* at § 74.301.

In survival and wrongful death actions, House Bill 4 enacted an overall cap on damages, similar, though not identical to the one upheld by the Supreme Court in


Rose and Auld, but changed the cap to include punitive damages within its application and to make the cap “per claimant” in nature. *Id.* at § 74.303. Adjusted for inflation, now calculated employing the consumer price index published by the Bureau of Labor Statistics of the United States Department of Labor, the original \$500,000 cap is approximately \$1.6 million. *See id.* at § 74.303(b).

To date, there are no reported decisions actually applying the caps on non-economic damages to a health care liability claim. In *Rivera v. United States*, 2007 U.S. Dist. LEXIS 30959 (W.D. Tex., March 7, 2007), however, the district court upheld


the caps against a constitutional challenge predicated upon their alleged inconsistency with the equal protection afforded by Article I, Section 3 of the Texas Constitution. *Id.* at *13-19. Specifically, the claimants asserted that not just Section 74.303, but Chapter 74 as a whole, granted health care providers “exclusive privileges” not available to other Texas citizens, and that the ratification of Article III, Section 66 created an impermissible conflict with the state equal protection clause. *Id.* at *7-8. Acknowledging that Chapter 74 grants “special legal privileges” to Texas health care providers that other professionals do not enjoy, the district court nevertheless

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conceded the Legislature's authority to grant such privileges in a highly regulated area of the economy, especially given the authority granted by the ratification of Article III, Section 66 and the stated objectives of House Bill 4. *Id.* at *17-19. "The frustrations felt by [claimants] may be a valid reason to induce the Legislature to repeal Chapter 74, but such hardships do not render the Legislature's acts unconstitutional." *Id.* at *19.

III. "ACTUALLY PAID OR INCURRED"

In *Daughters of Charity Health Services of Waco v. Linnstaedter*, 226 S.W.3d 409 (Tex. 2007), the Supreme Court observed that "[f]ew patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates." *Id.* at 410. Recognizing this reality, the Court denied Texas hospitals the right to execute on statutory liens for "full medical charges" billed to injured employees rather than the reduced amounts actually paid by workers' compensation carriers. *Id.* at 412. In so holding, the Court confirmed that such recovery would constitute a "windfall" for both the hospitals and the injured employees, in the event the latter recovered personal injury damages against a third-party tortfeasor, because the employees themselves have "no claim" for the excess amount. *See id.*

Through its enactment of Section 41.0105 of the Texas Civil Practice & Remedies Code, House Bill 4 statutorily adopted this position:

In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

Id. at 412 n. 22 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (Vernon 2008)); *see Christus Health Southeast Texas v. Hall*, 2008 Tex. App. LEXIS 5316, at 18-19

n.3 (Tex. App.—Beaumont, July 17, 2008, n.p.h.) ("The statute is a limitation on recovery of medical expenses."). Over the last five years, there has been no dispute concerning its application to limit the recovery of medical and other health care expenses to those "actually paid or incurred" by each claimant. *Gore v. Faye*, 253 S.W.3d 785, 789 (Tex. App.—Amarillo 2008, no pet.) ("By its language the limitation on damages prescribed by section 41.0105 is mandatory."); *Mills v. Fletcher*, 229 S.W.3d 765, 767-71 (Tex. App.—San Antonio 2007, no pet.) (holding amounts "written off" by providers unrecoverable and rejecting substantive due process, open courts and vagueness challenges); *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 488-89 & 492-93 (Tex. App.—Amarillo 2006, no pet.) (trial court's judgment reduced by \$241,286.02, reflecting amount evidenced by inadmissible statutory affidavit, after acknowledging apparent propriety of trial court's post-verdict reduction of \$139,531.68 for amounts not paid by claimant); *see also Tholcken v. United States*, 2008 U.S. Dist. LEXIS 47947, at *2-4 (E.D. Tex., June 19, 2008) (following *Mills*); *Goryews v. Murphy Exploration & Prod. Co.*, 2007 U.S. Dist. LEXIS 57719, at *8-13 (S.D. Tex., August 8, 2007) (following *Mills*).

The evidentiary impact of Section 41.0105 remains unresolved, however. For example, in *Gore v. Faye*, 253 S.W.3d 785 (Tex. App.—Amarillo 2008, no pet.), the court of appeals expressly declined to consider whether Section 41.0105 abrogated the collateral source rule, thereby permitting the jury to consider evidence of "write offs" and "adjustments" made to reduce the amounts actually paid for medical services provided to the claimant. *Id.* at 789-90. During trial, the trial court admitted into evidence, without objection, itemized statements from the claimant's health care providers, redacted to obscure any reference to an amount discounted, written off or adjusted by the provider. *Id.* at 787. When the defendant subsequently sought to introduce evidence of the

adjustments, the trial court refused to permit such an offer before the jury, holding that the application of Section 41.0105 was a post-verdict, prejudgment matter. *Id.* at 787-88. Avoiding the implications for the collateral source rule, the court of appeals ultimately found no abuse of discretion in the trial court's ruling due to the absence of any procedural directive in the language of Section 41.0105. *Id.* at 790; *del Carmen Contreras v. KV Trucking, Inc.*, 2007 U.S. Dist. LEXIS 70140, at *5-6 (E.D. Tex., September 21, 2007) (excluding evidence of discounts, adjustments or write offs through collateral source payments); *Goryews*, 2007 U.S. Dist. LEXIS 57719, at *12 (avoiding collateral source implications since no evidence of collateral source offered during trial); *Coppedge v. K.B.I., Inc.*, 2007 U.S. Dist. LEXIS 48407, at *6-9 (E.D. Tex., July 3, 2007) (excluding evidence of discounts, adjustments or write offs through collateral source payments).

By way of contrast, in *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.), the court of appeals found the requirements of Section 41.0105 to be contrary to the collateral source rule, and noted the Legislature's authority *and intent* to abrogate the rule. *Id.* at 769 n.3. The court did not actually address the evidentiary implications of Section 41.0105 in so holding, however.

IV. PAYMENT FOR FUTURE LOSSES

As an alternative to the payment of future damages in a lump sum, House Bill 4 authorized both mandatory and permissive periodic payments of future damages. TEX. CIV. PRAC. & REM. CODE ANN. § 74.503 (Vernon 2005). At present, there are no reported decisions interpreting these provisions.

As an initial matter, the option of periodic payments is only available when the present value for an award of future damages against a physician or health care provider, as determined by the trial court, equals or exceeds \$100,000. *Id.* at § 74.502. Meeting this threshold, if the defendant



requests periodic payments for future damages, either in whole or in part, such payments are mandatory for “medical, health care, or custodial services awarded” and permissive for all other such damages, and the trial court must specify the amounts, recipients, number and interval between such payments. *Id.* at 674.503. As a further condition to authorizing such payments, however, the trial court must require a requesting defendant who is not adequately insured against the loss to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment. *Id.* at 674.505. “The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the claimant.” *Id.* at 674.504.

In the event of the death of the recipient of periodic payments, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient without reduction, and the trial court retains the discretion to modify the judgment to award and apportion such payments as remain unpaid in an appropriate manner. *Id.* at 674.506(a) & (c). All other periodic payments terminate on the death of the recipient. *Id.* at 674.506(b).

V. MEDICAL AUTHORIZATIONS AND STATUTES OF LIMITATIONS AND REPOSE

House Bill 4 codified in virtually identical language the statute of limitations for health care liability claims set forth in former Article 4590i, 610.01, and added a 10-year statute of repose for all such claims. TEX. CIV. PRAC. & REM. CODE ANN. 674.251(a) & (b) (Vernon 2005); *Rankin v. Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P.*, 2008 Tex. App. LEXIS 1577, at *3 n.1 (Tex. App.—San Antonio, March 5, 2008, n.p.h.) (Section 74.251(a) “substantially the same as its predecessors”); *Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex. App.—San Antonio 2005, pet. denied) (Section 74.251(a) “virtually identical to its

predecessor”). “A statute of limitations bars enforcement of a right while a statute of repose takes away the right altogether. The period set out in a statute of repose is independent of the claim’s accrual or discovery and may cut off a right even before it accrues. It sets an outer limit beyond which no action can be maintained.” *Borth v. Saadeh*, 2006 Tex. App. LEXIS 2115, at *4-5 (Tex. App.—Amarillo, March 16, 2006, no pet.) (citations omitted).

A. Statute of Limitations

To date, the statute of limitations appears to remain subject to non-enforcement if the claimant demonstrates a violation of the open courts doctrine. In *Adams v. Gottwald*, 179 S.W.3d 101 (Tex. App.—San Antonio 2005, pet. denied), the court of appeals held that the statute of limitations violates the doctrine when applied to the health care liability claim of a minor. *Id.* at 102-03 (following *Weiner v. Wasson*, 900 S.W.2d 316, 319 (Tex. 1995), and *Sax v. Votteler*, 648 S.W.2d 661, 665-67 (Tex. 1983)); but see *Borth v. Saadeh*, 2006 Tex. App. LEXIS 2115, at *7-8 (absent due diligence on part of claimant, open courts doctrine inapplicable to statute of limitations). Despite the fact that the Supreme Court denied the defendant’s petition in *Adams*, there is some reason to argue that the mere fact of a claimant’s legal disability, such as minority or mental incapacity, is no longer sufficient to facially invalidate a statute of limitations through the invocation of the open courts doctrine.

In *Yancy v. United Surgical Partners Int’l, Inc.*, 236 S.W.3d 778 (Tex. 2007), the Supreme Court upheld the application of the predecessor statute of limitations despite evidence of the statute’s facial violation of the open courts doctrine due to the claimant’s lack of mental capacity to prosecute her claim on her own behalf. *Id.* at 785-86. In so holding, the Supreme Court not only employed an “as applied” analysis it had previously rejected, it extended the open courts analysis from the mentally incompetent claimant herself to include her mother/legal guardian, who

timely filed suit against some defendants, but not others:

Yancy offered no explanation for failing to name Valley View and United Surgical for almost twenty-two months after filing the original petition. The record does not establish when Yancy was appointed Yates’ guardian nor when Yancy retained a lawyer, but neither event was later than December 10, 2001, the day Yancy, on Yates’s behalf, filed suit against Dr. Ramirez and Dallas Pain and Anesthesia. The summary judgment evidence demonstrates that Dr. Ramirez spoke with Yancy on May 3, 2000 and informed her of Yates’s post-surgery condition. If, as Yancy alleges, Yates has been continuously incapacitated since that time, Yancy knew of her condition and retained a lawyer well within the limitations period. On this record, there is no fact issue establishing that Yancy (on Yates’s behalf) did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period or that she sued within a reasonable time after discovering the alleged wrong. Thus, the open courts provision does not save Yates’s time-barred negligence claims.

Compare *id.* at 785 with *Weiner v. Wasson*, 900 S.W.2d at 320 (rejecting “as applied” analysis), and *Adams*, 179 S.W.3d at 102 (*Weiner* rejected “as applied” analysis).

Critically, the Supreme Court’s reasoning appears to contemplate the extension of the open courts analysis of “reasonable opportunity” to not only instances when a parent or legal guardian actually commences an action on behalf of a minor or mental incompetent, but also when a parent or legal guardian becomes aware of information that would lead a reasonable person to investigate a claim on behalf of a child or ward within the two-year limita-



tions or 10-year repose period. The Supreme Court clearly thought the fact that the claimant's guardian received notice of her underlying post-surgery condition well before she filed suit is relevant to its analysis, and further observed that nothing in the record demonstrated her appointment as guardian at that time. *See id.* at 785. Finally, noting that the claimant "had a guardian, retained a lawyer, and filed suit, all within the applicable period," the Supreme Court concluded that the failure of her guardian to sue other defendants within the same time frame simply did not raise due process concerns. *Id.* at 786. Accordingly, *Yancy* suggests that the statutes of limitations and repose enacted by House Bill 4 may be less subject to challenge pursuant to the open courts doctrine.

B. Statute of Repose

In *Rankin v. Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P.*, 2008 Tex. App. LEXIS 1577 (Tex. App.—San Antonio, March 5, 2008, n.p.h.), the court of appeals held that the statute of repose enacted by House Bill 4 violates the open courts doctrine when the injury made the basis of the claim — in this instance, the leaving of a surgical sponge in the claimant's abdomen — is inherently undiscoverable within the ten-year period of repose. *Id.* at 20-21. Significantly, in so holding, the court declined to follow *Trinity River Authority v. URS Consultants, Inc.*, 889 S.W.2d 259 (Tex. 1994), wherein the Supreme Court rejected an open courts challenge to the 10-year statute of repose for actions brought against architects and engineers for personal injury or property damage arising from defective improvements to real property. *Id.* at 14-15.

In *Trinity River*, the Supreme Court concluded that, because the discovery rule had not been adopted for negligent design cases at the time the Legislature enacted TEX. CIV. PRAC. & REM. CODE ANN. § 16.008 (Vernon 2002), the statute of repose did not abrogate a right to bring a common law cause of action more than ten years after the plaintiff suffered some legal

injury. 889 S.W.2d at 261-63. By way of contrast, the Supreme Court observed that its adoption of the discovery rule in *Gaddis v. Smith*, 417 S.W.2d 577, 581 (Tex. 1967), established a right to bring a common law medical malpractice cause of action, predicated upon leaving a foreign object in a patient, whenever the legal injury became discoverable. *Id.* at 262. Keying on this observation, the court of appeals in *Rankin* concluded that Section 74.251(b) violated the open courts doctrine by abrogating a common law right. 2008 Tex. App. LEXIS 1577, at *7-8.

This holding is problematic in two ways. First, as recognized by the Supreme Court in *Morrison v. Chan*, 699 S.W.2d 205 (Tex. 1985), the Legislature abolished the discovery rule adopted by *Gaddis* by eliminating the accrual language upon which it relied. *Id.* at 208. To the extent *Gaddis* engrafted the discovery rule into a well-established common law cause of action, it did so based upon the interpretation of statutory language subject to amendment by the Legislature. *See id.* Though omitting any reference to the abolition of the discovery rule in medical malpractice actions in 1985, the reasoning of the Supreme Court in *Trinity River* suggests that the right to bring such actions based upon their accrual is no longer a well-established common law right subject to open courts analysis, at least as to a statute of repose such as Section 74.251(b).

Moreover, even if *Gaddis* had permanently engrafted the discovery rule into common law medical malpractice causes of action, it did so only as to actions predicated upon leaving a foreign body in a patient. In *Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977), the Supreme Court expressly declined to adopt the discovery rule in a misdiagnosis case because, unlike the foreign body case, the wrong and injury from a misdiagnosis is not subject to objective verification. *See id.* at 19-22. Applying the reasoning of *Trinity River* and *Robinson v. Weaver* together, therefore, Section 74.251(b) is not subject to the open courts doctrine in misdiagnosis cases.

Although *Rankin* rejected the argument that the abolition of the discovery rule for health care liability claims rendered the open courts doctrine inapplicable to Section 74.251(b), 2008 Tex. App. LEXIS 1577, at *8, the Supreme Court has been asked to reverse this ruling.

C. Medical Authorizations

Finally, in addition to codifying the pre-suit notice provision of its predecessor statute, House Bill 4 imposed an obligation upon each claimant to provide each defendant with a statutorily-crafted medical authorization to permit acquisition of their medical records and verbal inquiry concerning the care made the basis of the claim from treating physicians and providers. TEX. CIV. PRAC. & REM. CODE ANN. § 74.052 (Vernon 2005). Since House Bill 4 mandated the provision of this medical authorization with the service of pre-suit notice, it has been argued that a failure to so provide deprives the claimant of the additional 75 days appended to the two-year limitations period upon service of pre-suit notice. *See id.* at § 74.052(a) ("Notice of a health care liability claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section."). In *Hill v. Russell*, 247 S.W.3d 356 (Tex. App.—Austin 2008, no pet.), however, the court of appeals held that this requirement was immaterial to the 75-day tolling of the statute of limitations upon proper and timely pre-suit notice, despite the fact that each claimant was to include such an authorization with their notice, because the statute contemplated an abatement of the lawsuit in the event the claimant failed to provide the authorization, not a judgment on limitations grounds. *Id.* at 358-60. This issue will continue to persist until the Supreme Court resolves it.

VI. EXPERT REPORTS

Of all the provisions enacted by House Bill 4, the most litigated, interpreted and applied are those provisions dealing with



the expert report requirement created by Section 74.351. A condition of maintaining a health care liability claim, Section 74.351(a) currently requires that a claimant “serve on each party or the party’s attorney one or more expert reports” not later than the 120th day after the date of the filing of either the claimant’s claim or original petition, depending on the applicable version of the statute. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2005) (pursuant to House Bill 4, 120-day deadline triggered by filing of “claim”), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007) (pursuant to 2005 amendment to House Bill 4, 120-day deadline triggered by filing of “original petition”). Subsection (r)(6) defines an “expert report” as “a written report by an expert that provides a fair summary of the expert’s opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.” *Id.* at § 74.351(r)(6).

A. “Health Care Provider” Expanded

House Bill 4 expanded the definition of “health care provider” to include not only individual providers, such as registered nurses, dentists and pharmacists, and “health care institutions” such as hospitals, hospital systems and assisted living facilities, but also “an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician” and “an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12) (Vernon 2005); *see* *McDaniel v. United States*, 2004 U.S. Dist. LEXIS 23196, at *17 n.2 (W.D. Tex. Nov. 14, 2004) (physical therapist); *Outpatient Ctr. of Interventional Pain Mngmnt., P.A. v. Garza*, 2008 Tex. App. LEXIS 4801, at *8-9 (Tex. App.—Corpus Christi, June

26, 2008, n.p.h.) (clinic personnel); *Valley Baptist Med. Ctr. v. Azua*, 198 S.W.3d 810, 814 (Tex. App.—Corpus Christi 2006, no pet.) (hospital orderly).

B. “Health Care Liability Claims” Defined

A “health care liability claim” exists when the claimant’s cause of action arises from an alleged departure from an accepted standard of medical care, health care, or safety or professional administrative services directly related to healthcare. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon 2005). “A cause of action alleges a departure from accepted standards of safety if the act or omission complained of is an inseparable part of the rendition of medical services.” *Valley Baptist Med. Ctr. v. Azua*, 198 S.W.3d 810, 814 (Tex. App.—Corpus Christi 2006, no pet.). If the essence of the suit is a health care liability claim, a party cannot avoid the requirements of Section 74.351 through artful pleading. *In re McAllen Medical Center, Inc.*, 51 Tex. Sup. Ct. J. 893, 896 (May 16, 2008); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 851 (Tex. 2005); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541 (Tex. 2004). In determining whether the claim is subject to Section 74.351, the underlying nature of the claim controls, not the labels employed by claimants. *Azua*, 198 S.W.3d at 814. A claim may be a health care liability claim subject to the expert report requirement even if expert testimony is not necessary to prevail at trial. *Murphy*, 167 S.W.3d at 838.

1. Report required The following decisions reached the conclusion that the claimant’s allegations constituted a health care liability claim subject to the expert report requirement: *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 775-76 (Tex. App.—Corpus Christi 2006, pet. denied) (allegations that claimant injured by falling from treadmill held not directly related to rendition of health care though regular exercise recommended by physician); *Valley Baptist Med. Ctr. v. Azua*, 198

S.W.3d 810, 814 (Tex. App.—Corpus Christi 2006, no pet.) (allegation of negligence in assisting claimant into wheelchair held inseparable from rendition of medical services); *Lee v. Boothe*, 235 S.W.3d 448, 451-52 (Tex. App.—Dallas 2007, pet. denied) (allegations that claimant misled by deceptive advertisements, defrauded by promise of free surgery if vision not 20/20, and injured by excessive force during laser eye surgery held inseparable from rendition of medical care); *Outpatient Ctr. of Interventional Pain Mngmnt., P.A. v. Garza*, 2008 Tex. App. LEXIS 4801, at *6-10 (Tex. App.—Corpus Christi, June 26, 2008, n.p.h.) (claimant injured in fall from wheelchair due to failure of staff to lock and secure wheels); *Educare Cmty. Living Corp. v. Rice*, 2008 Tex. App. LEXIS 3813, at *3-8 (Tex. App.—Dallas, May 28, 2008, n.p.h.) (resident of intermediate care facility for mentally retarded allegedly burned with scalding water and beaten); *Victoria Gardens of Frisco v. Walrath*, 2008 Tex. App. LEXIS 2925, at *5-9 (Tex. App.—Dallas, April 24, 2008, n.p.h.) (claimant alleged breach of contract damages due to violations of nursing home regulations resulting in death of resident); *Watts v. Rodriguez*, 2008 Tex. App. LEXIS 2811, at *3-6 (Tex. App.—Austin, April 18, 2008, n.p.h.) (joint enterprise alleged against assistant surgeon for permanent spinal injury).

2. Report not required The following decisions reached the conclusion that the claimant’s allegations did not constitute a health care liability claim subject to the expert report requirement: *McAllen Work Rehab Ctr. v. Gomez*, 2008 Tex. App. LEXIS 5785, at * (Tex. App.—Corpus Christi, July 31, 2008, n.p.h.) (claimant allegedly kicked by Tai Chi instructor, caused to fall on back and injure head); *Pallares v. Magic Valley Electric Coop, Inc.*, 2008 Tex. App. LEXIS 3328, at *16-17 (Tex. App.—Corpus Christi, May 8, 2008, pet. filed) (claimant employer alleged fraudulent billing for medical care provided to employee).



C. Preemption by Federal Procedural Rules

Every district court within Texas to consider the applicability of the expert report requirement in federal diversity cases has held that the Federal Rules of Civil Procedure preempt the requirement. *Mason v. United States*, 486 F. Supp.2d 621, 623-26 (W.D. Tex. 2007); *Toler v. Sunrise Senior Living Servs., Inc.*, 2007 U.S. Dist. LEXIS 23720, at *9-12 (W.D. Tex. Mar. 21, 2007); *Sauceda v. Pfizer, Inc.*, 2007 U.S. Dist. LEXIS 1600, at *5-8 (S.D. Tex. Jan. 9, 2007); *Beam v. Nexion Health Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 71732, at *3-9 (E.D. Tex. Oct. 2, 2006); *Hall v. Trisun*, 2006 U.S. Dist. LEXIS 59005, at *1-2 (W.D. Tex. Aug. 1, 2006); *Wakat v. Montgomery County*, 2006 U.S. Dist. LEXIS 33546, at *2-4 (S.D. Tex. May 23, 2006); *Baker v. Bowles*, 2005 U.S. Dist. LEXIS 32942, at *36-39 (N.D. Tex. Dec. 14, 2005); *Garza v. Scott & White Mem. Hosp.*, 234 F.R.D. 617, 623 (W.D. Tex. 2005); *Brown v. Brooks County Detention Ctr.*, 2005 U.S. Dist. LEXIS 38522, at *4-8 (S.D. Tex. June 23, 2005); *Nelson v. Myrick*, 2005 U.S. Dist. LEXIS 5059, 2005 WL 723459, at *4-13 (N.D. Tex. Mar. 29, 2005); *McDaniel v. United States*, 2004 U.S. Dist. LEXIS 23196, at *18-30 (W.D. Tex. Nov. 14, 2004).

For example, the district court in *Garza v. Scott & White Mem. Hosp.*, 234 F.R.D. 617 (W.D. Tex. 2005), identified four ways in which the expert report requirement is in direct collision with the federal rules: (1) the mandatory sanction schemes imposed by Section 74.351 completely remove the court's discretion with respect to the imposition of Rule 11 sanctions for filing frivolous claims; (2) although former Article 4590i, 6 13.01 made expert reports unavailable for use at trial, depositions, or other proceedings, Section 74.351 removes these restrictions as soon as the plaintiff makes an affirmative use of the report; (3) the stay of discovery until the filing of claimant's expert reports is in "direct and unambiguous conflict with the federal rules, which plainly tie the opening of dis-

covery to the timing of the Rule 26(f) conference;" and (4) one of the purposes of Section 74.351 — namely the provision of notice to defendants — invades the province of Rule 26, which is also designed to provide notice to defendants. *Id.* at 623. Other district courts similarly hold that the expert report requirement of disclosure and sanctions must yield to the disclosure and sanction schemes provided by Rules 26 and 37 of the Federal Rules of Procedure. *Sauceda*, 2007 U.S. Dist. LEXIS 1600, at *5-8; *Beam*, 2006 U.S. Dist. LEXIS 71732, at *3-9.

D. "Service" Defined by Rule 21a

1. **Expert reports** House Bill 4 did not define what it means to "serve" an expert report in compliance with Section 74.351(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. 66 74.001 & 74.351(a) (Vernon 2005). A majority of the courts of appeals, however, have applied Rule 21a of the Texas Rules of Civil Procedure to the statutory service requirement for expert reports. *See, e.g., Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 872 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Herrera v. Seton Nw. Hosp.*, 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.); *Kendrick v. Garcia*, 171 S.W.3d 698, 704 (Tex. App.—Eastland 2005, pet. denied). Absent compliance with Rule 21a, service of an expert report is legally inadequate and dismissal of the claim with prejudice is mandatory. *See, e.g., Bohannon v. Winston*, 238 S.W.3d 535, 537-38 (Tex. App.—Beaumont 2007, no pet.); *Herrera*, 212 S.W.3d at 459; *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 853 (Tex. App.—Texarkana 2006, no pet.); *Kendrick*, 171 S.W.3d at 704.

2. **Objections** "Under section 74.351(a), [e]ach defendant physician or health care provider whose conduct is implicated in a report must file and serve *any* objection to the sufficiency of the report not later than the 21st day after the date it was served, *failing which all objections are waived.*" *Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165, 169 (November 30, 2007) (quoting

Section 74.351(a) with emphasis). Even if a timely expert report fails to address one or more elements of the underlying claim, Section 74.351(a) imposes upon each defendant named in the deficient report a duty to object in a timely manner; they cannot treat a deficient report like an absent report and avoid the objection deadline altogether. *See id.* at 168 & 169 (distinguishing between "deficient" and "absent" reports). Rule 21a similarly controls when "service" of a defendant's objections occurs. *See, e.g., Eikenhorst v. Wellbrock*, 2008 Tex. App. LEXIS 4392, at *16-18 (Tex. App.—Houston [1st Dist.], June 5, 2008, n.p.h.).

E. Extension by Agreement

Though the predecessor of the current statute formerly provided for a 30-day extension of the statutory deadline for good cause and a 30-day grace period when the claimant failed to meet the statutory deadline due to an accident or mistake, the Legislature removed those provisions when enacting House Bill 4. TEX. REV. CIV. STAT. ANN. art. 4590i, 66 13.01(f) & (g) (Vernon Supp. 2007) (repealed); *see Estate of Regis ex rel. McWashington v. Harris County Hosp. Dist.*, 208 S.W.3d 64, 67 (Tex. App.—Houston [14 Dist.] 2006, no pet.); *Mokkala v. Mead*, 178 S.W.3d 66, 75-76 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Under the current statute, the only means for a claimant to extend the 120-day deadline is by an agreement of the affected parties. TEX. CIV. PRAC. & REM. CODE ANN. 6 74.351(a) (Vernon 2005); *see Estate of Regis*, 208 S.W.3d at 67; *Mokkala*, 178 S.W.3d at 76.

For a scheduling order to constitute a written agreement extending the statutory deadline, the terms must expressly modify the deadline itself; an order that merely establishes designation deadlines for testifying experts, without more, does not constitute such an agreement. *King v. Cirillo*, 233 S.W.3d 437, 439-41 (Tex. App.—Dallas 2007, no pet.) (scheduling order setting mutual deadlines for production of written reports from retained testi-



fying experts); *Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 474-76 (Tex. App.—Fort Worth 2007, no pet.) (order expressly disclaimed any control over statutory expert report deadline); *Brock v. Sutker*, 215 S.W.3d 927, 929 (Tex. App.—Dallas 2007, no pet.) (order setting mutual deadlines for designating experts, written discovery and depositions, *Daubert* or dispositive objections or motions, amending pleadings, pretrial motions, special exceptions, etc., but without mentioning Section 74.351); *Care Ctr., Ltd. v. Sutton*, 2008 Tex. App. LEXIS 2743, at *6-12 (Tex. App.—Beaumont, April 17, 2008, pet. filed) (order setting deadline for designation of retained, testifying experts, without mentioning Section 74.351); *Rugama v. Escobar*, 2006 Tex. App. LEXIS 2697, at *7 (Tex. App.—San Antonio, April 5, 2006, no pet.) (docket control order signed by counsel, setting mutual deadlines for designation of testifying experts, but containing nothing either directly or by implication suggesting an agreement).

Nevertheless, in *McDaniel v. Spectrum Healthcare Res., Inc.*, 238 S.W.3d 788 (Tex. App.—San Antonio 2007, pet. granted), the court of appeals held that an agreed order directing that its deadlines were to take precedence over conflicting deadlines set by rule or statute, and providing that the parties were to begin discovery as soon as practicable, notwithstanding any limitations found in Chapter 74, constituted a written agreement extending the statutory deadline. *See id.* at 792-95.

F. Extension to Cure Defects

Alternatively, Section 74.351(c) gives the trial court the discretion to grant a single 30-day extension of the deadline, but the language of the provision makes it clear that the extension is available only to cure any deficiency the trial court finds in a timely expert report:

If an expert report has not been served within the period specified by Subsection (a) because the elements of the report are found deficient, the court may grant one 30-

day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

TEX. CIV. PRAC. & REM. CODE ANN. 6 74.351(c) (Vernon 2005); *see Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165, 167 (November 30, 2007) ("If no report is served within the 120 day deadline provided by 74.351(a), the Legislature denied trial courts the discretion to ... grant extensions ...").

1. Available only to cure timely, but defective reports According to the Supreme Court in *Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165 (November 30, 2007), a "deficient" report differs from an "absent" report precisely because Section 74.351(c) limits a trial court's discretion to grant a 30-day extension of the 120-day deadline to curing the former. *Id.* at 168. Moreover, every court of appeals to interpret this section has denied its application when the claimant utterly failed to serve any expert report. *See, e.g., Herrera v. Seton Northwest Hosp.*, 212 S.W.3d 452, 457 n.5 & 460 (Tex. App.—Austin 2006, no pet.) (Section 74.351(c) "is inapplicable because it permits extensions for expert reports that the court finds deficient in substance, not for reports that are filed untimely."); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 326 (Tex. App.—San Antonio 2006, pet. denied) ("[S]ince no report had been served by July 27th, the trial court's July 27th extension order could not possibly have been to enable Highsmith to cure a deficient report — the only purpose for which a trial court is authorized to grant an extension."); *Estate of Regis*, 208 S.W.3d at 67 ("Although Section 74.351(c) gives a court discretion to grant 30 days to amend a deficient expert report, this section applies only when an initial report is timely filed; it is not available to extend the deadline for first filing a report."); *Val-*

ley Baptist Med. Ctr. v. Azua, 198 S.W.3d 810, 815 (Tex. App.—Corpus Christi-Edinburg 2006, no pet.) ("[I]n the present case, an extension could not have been granted under section 74.351(c) because a trial court does not have authority to grant an extension when no report is served within 120 days of filing the claim."); *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 853 (Tex. App.—Texarkana 2006, no pet.) ("[T]he subsection (c) extension is available only when a timely-served report does not meet the statutory definition of an 'expert report' because it has one or more deficiencies in its contents; subsection (c) does not apply to a report not served by the deadline."); *Manor Care Health Servs. v. Ragan*, 187 S.W.3d 556, 560 n. 5 (Tex. App.—Houston [14th Dist.] 2006, pet. granted, judgment vacated, case remanded by agr.) ("The current version omits subsections of the prior law which permitted extensions where no report had been filed by the deadline."); *Garcia v. Marichalar*, 185 S.W.3d 70, 74 (Tex. App.—San Antonio 2005, no pet.) ("[W]hen no expert report is served within 120 days of filing the claim, a trial court has no authority to grant an extension."); *Miranda v. Martinez*, 2007 Tex. App. LEXIS 1802, at *14 (Tex. App.—Corpus Christi-Edinburg, March 8, 2007, pet. denied) ("This provision appears to serve as an after-the-fact extension, a second chance at getting the report right. That is, the claimant must still serve the expert report by the 120-day deadline, but if the trial court determines the timely-filed report is deficient, it may grant an extension in which the claimant may cure any deficiencies in the report."); *Soberon v. Robinson*, 2006 Tex. App. LEXIS 5666, at *6 (Tex. App.—Beaumont, June 29, 2006, pet. denied) ("Subsection (c) does not apply in this case because Robinson did not serve the expert report by the deadline."); *Tucker v. McConnell*, 2006 Tex. App. LEXIS 3351, at *2 (Tex. App.—Waco, April 26, 2006, no pet.) ("The statute provides no opportunity for an extension if no report is served within 120 days."); *see also Kendrick v. Garcia*, 171



S.W.3d 698, 705 (Tex. App.—Eastland 2005, pet. denied) (“As a result of the omission of the “accident or mistake” exception in Section 74.351, we conclude that the new statute precludes the existence of a good faith exception to the requirement of timely serving expert reports.”).

2. Extension or grace period? In *Leland v. Brandel*, 51 Tex. Sup. Ct. J. 1046 (June 13, 2008), the Supreme Court held that, since it is the “finding” of deficiencies in a timely-served expert report that authorizes the granting of a 30-day extension, and since this authorization is not expressly limited to the trial court, when a court of appeals finds one or more elements of a timely served expert report deficient, it may remand the case to the trial court for consideration of whether to grant or deny the extension to cure the deficiencies it found. *Id.* at 1048-49. In so holding, the Supreme Court sought to interpret Section 74.351(c) in a manner that afforded the claimant the opportunity to cure deficiencies when the trial court erred in failing to find them in the first place. *Id.* at 1049. To do otherwise, the majority reasoned, denied the claimant a remedy the Legislature clearly intended to create. *See id.*

In dissent, Justice Brister argued that the majority’s ruling completely frustrated the Legislature’s intent that a claimant demonstrate the *prima facie* merits of his or her claim within the first four or five months of filing a claim, effectively extending that deadline to four or five years by contemplating the possibility of two distinct interlocutory appeals — one challenging the original report and another challenging the report “cured” on remand. *See id.* at 1049-51. Conceding his shared reluctance to dismiss claims when reports are found deficient only on appeal, Justice Brister nevertheless warned: “Grace periods and extensions were concessions the Legislature made while trying to establish firm rules to stem a serious problem; continuing judicial reluctance to enforce those rules may eventually encourage the Legislature to grant no concessions at all.” *Id.* at 1051.

What neither the majority nor Justice Brister considered, however, is that the majority’s interpretation of Section 74.351(c) effectively interprets the term “extension” to mean “grace period” when the Legislature clearly intended to abolish the grace period under the predecessor statute. Though the term “extension” remains undefined by Section 74.351(c), both its common meaning and the particular meaning ascribed to it in the predecessor to the current expert report statute make it clear that the extension contemplated by the provision merely extends the original 120-day deadline to 150 days.

Proper interpretation presumes the Legislature intended the plain and common meaning of the language employed in the statute. *Mokkala v. Mead*, 178 S.W.3d 66, 70 (Tex. App.—Houston [14th Dist.], 2005, pet. denied). The plain and common meaning of the term “extension” is to lengthen or prolong an existing period of time. *City of Waco v. City of McGregor*, 523 S.W.2d 649, 656 (Tex. 1975) (“By definition an extension is that which expands, lengthens, prolongs, enlarges, adds to or annexes.”); *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798, 802 (Tex. 1967) (“An extension, as used in this context, generally means the prolongation or continuation of the term of the existing lease.”).

Moreover, it is a firmly established rule of statutory construction that once appellate courts construe a statute and the Legislature reenacts or codifies that statute without substantial change, an interpreting court must presume that the Legislature adopted the judicial interpretation. *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000). In every appellate decision interpreting the term “extension” in the predecessor to House Bill 4, the reviewing courts held that such an extension merely extended the original 180-day deadline to 210 days. *See, e.g., Sellers v. Foster*, 199 S.W.3d 385, 398 (Tex. App.—Fort Worth 2006, no pet.) (“A motion for an extension under section 13.01(f) filed more than 210 days after the

filing date of the claim is untimely.”); *Rosa v. Caldwell*, 159 S.W.3d 695, 699 (Tex. App.—Amarillo 2004, pet. denied) (“The extension provided for under subsection (f) will extend the deadline for filing expert reports to a maximum of 210 days after the initiation of the suit.”); *Villa v. Hargrove*, 110 S.W.3d 74, 80 (Tex. App.—San Antonio 2003, pet. denied) (subsection (f) extension unavailable more than 210 days from date of filing suit).

Of final significance, though clearly able to so provide, the Legislature declined to authorize a 30-day “grace period” completely untethered from the original deadline. As the court of appeals observed in *Broom v. MacMaster*, 992 S.W.2d 659 (Tex. App.—Dallas 1999, no pet.), former Section 13.01(g) of the predecessor to House Bill 4 did not “operate to extend” the original 180-day deadline, like former Section 13.01(f), but instead provided for a 30 day “window of time” within which the plaintiff could comply with the expert report requirement. *Id.* at 663. The court referred to subsection (g) as “a ‘safety valve’ to prevent the forfeiture of claims through an accident or mistake” that caused the plaintiff to fail to comply with statutory requirements in the first instance. *Id.* Omitted from Section 74.351(c), however, is any language even remotely similar to that included in former Section 13.01(g). *See Wells v. Ashmore*, 202 S.W.3d 465, 468 n.1 (Tex. App.—Amarillo 2006, no pet.). Since the rules of statutory construction presume the Legislature excluded grace period language from Section 74.351(c) for a purpose, the Supreme Court has effectively misinterpreted the term “extension” to authorize grace period relief abolished by House Bill 4.

3. Due diligence in investigating claim

A trial court may refuse to grant an extension absent a demonstration of due diligence on the part of the claimant in investigating the claim and obtaining the expert report. For example, in *Estate of Regis ex rel. McWashingtton v. Harris County*



Hosp. Dist., 208 S.W.3d 64 (Tex. App.—Houston [14th Dist.] 2006, no pet.), the court of appeals declined to find that the trial court abused its discretion in refusing a Section 74.351(c) extension, even though the claimant presented evidence that she was not able to obtain the medical records for two years, because the evidence also demonstrated that she waited more than a year after her first request for records, which was not accompanied by a proper authorization, before she made any attempt to follow up on her request. Further, she never sought any assistance from the court in obtaining the records, and she let the expert deadline pass without attempting to obtain an extension of the deadline. *Id.* at 68; *see also Bosch v. Wilbarger Gen. Hosp.*, 223 S.W.3d 460, 465-66 (Tex. App.—Amarillo 2006, pet. denied) (no abuse of discretion found since plaintiff moved for extension nine months after serving deficient expert report); *Hardy v. Marsh*, 170 S.W.3d 865, 871 (Tex. App.—Texarkana 2005, no pet.) (no abuse of discretion found since trial court could have determined that one year between pre-suit notice and filing of suit provided sufficient time to obtain adequate report).

4. Not subject to interlocutory appeal

In *Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165 (November 30, 2007), the Supreme Court held that an order granting a claimant a 30-day extension to cure deficiencies in a timely-served expert report that fails to establish one or more elements of a health care liability claim is not subject to interlocutory appeal. *Id.* at 167-69. In so ruling, the Supreme Court distinguished a “deficient” report from an “absent” report, *i.e.*, a report that either never existed or the claimant failed to timely serve, and thereby rejected the argument that a deficient report constitutes no report at all. *Id.* at 168. The Court further rejected the argument that an order denying a motion to dismiss is separate and distinct from an order granting an extension, thereby rendering the former subject to interlocutory appeal: “The

statute plainly prohibits interlocutory appeals of orders granting extensions, and if a defendant could separate an order granting an extension from an order denying the motion to dismiss when a report has been served, section 51.014(a)(9)’s ban on interlocutory appeals for extensions would be meaningless.” *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008)).

G. Interlocutory Appellate Jurisdiction

In *Lewis v. Funderburk*, 253 S.W.3d 204 (Tex. 2008), the Supreme Court held that an order denying a motion to dismiss a health care liability claim predicated upon the legal insufficiency of a timely served expert report is subject to interlocutory appeal. *Id.* at 207-08. As an initial matter, the Supreme Court observed that, of the rulings available to the trial court under Section 74.351, House Bill 4 provided for interlocutory review of only two: “First, an immediate appeal can be taken if a trial court *denies* relief sought under subpart (b). Second, an immediate appeal is allowed when the trial court *grants* relief under subpart (l).” *Id.* at 207 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) & (10) (Vernon 2008) with emphasis). Despite the fact that Section 51.014(a)(10) authorized an appeal solely in the event that the trial court *granted* relief pursuant to subpart (l), which permits a challenge to the legal adequacy of a timely served report, and made no mention of such an appeal for the *denial* of relief under that subpart, the Supreme Court held that any motion seeking dismissal and attorney’s fees due to an inadequate report sought relief under subpart (b), thereby making a refusal of such relief subject to interlocutory appeal pursuant to Section 51.014(a)(9). *Id.* at 207-08; *Moore v. Gatica*, 253 S.W.3d 219, 219-20 (Tex. 2008) (*per curiam*); *Diaz-Rohena v. Melton*, 253 S.W.3d 218, 218 (Tex. 2008) (*per curiam*); *Center for Neurological Disorders, P.A. v. George*, 253 S.W.3d 217, 217-18 (Tex. 2008) (*per curiam*); *Collini v. Pustejovsky*, 253 S.W.3d 216, 216-17 (Tex. 2008) (*per curiam*); *Hill Reg. Hosp. v.*

Runnels, 253 S.W.3d 213, 214 (Tex. 2008) (*per curiam*); *Metwest Inc. v. Rodriguez*, 253 S.W.3d 212, 213 (Tex. 2008) (*per curiam*); *Graham Oaks Care Ctr., Inc. v. Farabee*, 251 S.W.3d 63, 64 (Tex. 2008) (*per curiam*).

H. Standards of Review

1. **Applicability** The application and proper interpretation of Section 74.351 is a question of law subject to *de novo* review. *See, e.g., Parker v. Simmons*, 248 S.W.3d 860, 863 (Tex. App.—Texarkana 2008, no pet.); *Lee v. Boothe*, 235 S.W.3d 448, 451 (Tex. App.—Dallas 2007, pet. denied); *Intracare Hosp. North v. Campbell*, 222 S.W.3d 790, 794-95 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Oak Park, Inc. v. Harrison*, 206 S.W.3d 133, 137 (Tex. App.—Eastland, no pet.); *Hare v. Graham*, 2007 Tex. App. LEXIS 8290, at *5-6 (Tex. App.—Fort Worth, October 18, 2007, pet. denied).

2. **Qualifications** In *In re McAllen Medical Center, Inc.*, 51 Tex. Sup. Ct. J. 893 (May 16, 2008), the Supreme Court held that, in determining the merits of a challenge to the qualifications of the author of an expert report, the trial court may not infer such expertise, but must base such a finding upon factually specific information demonstrating such expertise in the record. *See id.* at 895 (“Nor can we infer that [the author] may have some knowledge or expertise that is not included in the record.”). The trial court’s determination of whether the author of an expert report possesses the requisite expertise to address the elements of the underlying health care liability claim is subject to review for an abuse of discretion. *Id.*; *Larson v. Downing*, 197 S.W.3d 303, 304-05 (Tex. 2006) (*per curiam*); *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996); *Moseley v. Mundine*, 249 S.W.3d 775, 779 (Tex. App.—Dallas 2008, no pet.); *Pacha v. Casey*, 2008 Tex. App. LEXIS 5490, at *4 (Tex. App.—Houston [14th Dist.], July 22, 2008, n.p.h.).

3. **Good Faith Effort** In *American Transitional Care Centers of Texas, Inc. v. Pala-*



cios, 46 S.W.3d 873 (Tex. 2001), the Supreme Court confirmed that, absent a “good faith effort” to meet the statutory definition of Subsection (r)(6), a trial court must dismiss an action asserting health care liability claims with prejudice. *Id.* at 878. As to what constitutes a good faith effort, the Court explained that “[a] report need not marshal all the plaintiff’s proof, but it must include the expert’s opinion on each of the elements identified in the statute.” *Id.* Further, the report must include sufficient factual information to both (1) inform the defendant of the specific conduct challenged by the plaintiff and (2) provide the trial court with a basis for concluding that the claims have merit. *Id.* at 879.

Whether the report presents *prima facie* proof of a meritorious health care liability claim depends on the trial court’s review of the substance within the “four corners” of the document. *Id.* at 878. Although it may be informal in that the information included need not meet the evidentiary requirements for admissibility, a report that merely states the expert’s conclusions about the standard of care, breach, and causation, or that omits any of these statutory elements, is not sufficient as a matter of law. *See id.* at 879.

In *Palacios*, the Supreme Court ultimately held that a trial court’s determination of a challenge to the legal sufficiency of a report is subject to review for an abuse of discretion. *Id.* at 877. In so holding, the Court placed particular emphasis on the Legislature’s description of the dismissal mandated by the predecessor to the current statute as a “sanction” for a claimant’s failure to furnish an expert report meeting statutory requirements. *Id.* at 877-78 (citing TEX. REV. CIV. STAT. ANN. art. 4590i, 6 13.01(e) (Vernon Supp. 2000)). Since one of the purposes of the expert report requirement was the deterrence of frivolous claims, and since the filing of a frivolous claim was subject to sanction, the Court concluded that “abuse of discretion” was the appropriate standard of review. *Id.* at 878.

Some commentators, however, question whether the Legislature intended to change the standard of review by removing all reference to sanctions from Section 74.351. *See* George C. Hanks, Jr. & Rachel Polinger-Hyman, *Redefining the Battlefield: Expert Reports in Medical Malpractice Litigation After HB 4*, 67 Tex. Bar J. 936, 943 (2004). Absent specific authority to the contrary, every court of appeals to consider the argument has now declined to so hold. *See Kendrick v. Garcia*, 171 S.W.3d 698, 702-03 (Tex. App.—Eastland 2005, pet. denied); *Center for Neurological Disorders v. George*, 2008 Tex. App. LEXIS 5196, at *7-8 (Tex. App.—Fort Worth, July 10, 2008, n.p.h.); *Meyers v. Golden Palms Retire. & Health Ctr., Inc.*, 2007 Tex. App. LEXIS 4098, at * 5-6 (Tex. App.—Corpus Christi, May 24, 2007, pet. denied); *Rugama v. Escobar*, 2006 Tex. App. LEXIS 2697, at *7 (Tex. App.—San Antonio, April 5, 2006, no pet.); *Anglin v. Marrero*, 2006 Tex. App. LEXIS 2049, at *4 & n. 3 (Tex. App.—Beaumont, March 16, 2006, no pet.); *Quint v. Alexander*, 2005 Tex. App. LEXIS 8868, at *4 n.2 (Tex. App.—Austin, October 28, 2005, pet. denied).

As a matter of law, though, the “abuse of discretion” standard is completely reconcilable with the “de novo” standard suggested by the Legislature’s omission. As the Supreme Court confirmed in *In re Jorden*, 249 S.W.3d 416 (Tex. 2008), even the abuse of discretion standard reverts to *de novo* review regarding matters of application and interpretation: “A trial or appellate court has no discretion in determining what the law is or in applying the law to the facts, even if the law is somewhat unsettled.” *Id.* at 424. Even those courts that rejected the *de novo* standard for a good faith effort, expressly recognized the lack of discretion on the part of the trial court in applying the law to undisputed facts. *See, e.g., Center for Neurological Disorders v. George*, 2008 Tex. App. LEXIS 5196, at *9. Simply put, either the factual observations and opinions of the author establish the *prima facie* merits of each element of a health care liability claim, or

they do not.

Indeed, in *Jernigan v. Langley*, 195 S.W.3d 91 (Tex. 2006) (*per curiam*), the Supreme Court implicitly held this standard of review applicable in expert report cases. First, citing *Palacios*, the Supreme Court reaffirmed that a trial court’s decision to dismiss under the older law is subject to review for an abuse of discretion. *Id.* at 93. Quoting from *Palacios*, the Court then reaffirmed the guiding rules and principles for determining whether an expert report represents a good faith effort in compliance with statutory requirements:

We held in *Palacios* that in order to constitute a good-faith effort under section 13.01(l), an expert report must “discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit.”

Id.

Finally, applying this *legal* analysis to the two reports furnished by the plaintiffs, the Court held them insufficient, *as a matter of law*, for their failure to describe or explain with sufficient specificity any act or omission on the part of the defendant physician that breached the applicable standard of care or the causal relationship between any such act or omission and the death of the patient. *Id.* at 94. Confirming this determination was a question of law subject to *de novo* review, the Court concluded that, since the reports omitted at least one statutory element of the health care liability claim alleged against the physician, the trial court “had no discretion” but to dismiss the claim with prejudice. *Id.*

In other words, the trial court had no discretion to misapply the statutory requirements of Section 74.351(r)(6) to the two expert reports and, in so holding, the Supreme Court effectively reconciled the abuse of discretion standard adopted by



Palacios as indistinguishable from the *de novo* standard originally adopted by *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding), with regard to the proper application of the law applicable to health care liability claims to the facts and opinions set forth in expert reports.

4. **Beyond the Four Corners In *Baptist Hosps. of Southeast Texas v. Carter***, 2008 Tex. App. LEXIS 5692 (Tex. App.—Beaumont, July 31, 2008, n.p.h.), the court of appeals recently held that, despite the admonishment in *Palacios* limiting the trial court's evaluation of an expert report to its "four corners," when the medical records upon which the author of the report rely establish a material fact directly contrary to one upon which the author's written opinions rely, then the trial court can take such information into account in determining the legal sufficiency of the report. *Id.* at *8 n.4.

I. ***Remand to Cure Defects, Including Authors*** As noted above, in *Leland v. Brandal*, 51 Tex. Sup. Ct. J. 1046 (June 13, 2008), the Supreme Court held that, upon an appellate finding that a timely-served expert report fails to adequately address one or more elements of the underlying health care liability claim, Section 74.351(c) authorizes a remand to the trial court for consideration of whether to grant the claimant a 30-day extension to cure the deficiencies found by the court of appeals. *Id.* at 1048-49.

In *Lewis v. Funderburk*, 253 S.W.3d 204 (Tex. 2008), the Supreme Court held that a claimant may "cure" an expert report rendered defective due to the lack of expertise of its author by obtaining a brand new report from a brand new expert. *Id.* at 208. In so holding, the Court interpreted the "cure any deficiency" language of Section 74.351(c) to include changing experts in mid-stream because Section 74.351(i) contemplated the satisfaction of any requirement of Section 74.351 by serving reports authored by separate experts. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. 6

74.351(i) (Vernon 2005)).

J. ***Rule 202 Depositions and the Availability of Discovery*** House Bill 4 Section placed reasonable limitations on the ability of a claimant to conduct discovery before satisfying the expert report requirement. Section 74.351(s) provides :

Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

- (1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;^v
- (2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and^{vi}
- (3) discovery from non-parties under Rule 205, Texas Rules of Civil Procedure.^{vii}

TEX. CIV. PRAC. & REM. CODE ANN. 6 74.351(s) (Vernon 2005). Upon filing of the lawsuit, therefore, virtually the entire panoply of discovery — including requests for production, interrogatories, requests for admissions, depositions on written questions, and oral depositions of non-parties — is available to a claimant, but solely for the purpose of acquiring documents and other information specifically related to the health care made the basis of the claim. *Id.*

In *In re Jordan*, 249 S.W.3d 416 (Tex. 2007), the Supreme Court held that the limitations imposed by Section 74.351(s) extend to pre-suit depositions of physicians and other health care providers sought pursuant to TEX. R. CIV. P. 202. *Id.* at 420-24. In so holding, the Supreme Court concluded that such depositions constituted a health care liability claim

because they sought to investigate a potential cause of action, and Section 74.351(s) defined "health care liability claim" to include a "cause of action" without reference to actually filing suit. *Id.* at 421-22. Additionally, the Court observed that Rule 202 depositions are not intended for routine use, and that the Legislature "expressly found that the benefits of deposing health care providers *do not* outweigh the burden and expense involved until after an expert report is served." *Id.* at 423 (emphasis in original). Finally, if the claimant experiences difficulty in obtaining health care information from medical and health care records, the Court noted the availability of depositions on written questions and other written discovery "to fill in whatever blanks may exist." *Id.*

VII. EMERGENCY MEDICAL CARE

Acknowledging the "high risk" nature of emergency medical care, often provided without medical history and under extreme time pressure, House Bill 4 adopted a lower standard of proof for health care liability claims "arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department" by requiring claimants to prove, by a preponderance of the evidence, that the defendant physician or health care provider departed from accepted standards of medical care or health care with willful and wanton negligence. TEX. CIV. PRAC. & REM. CODE ANN. 6 74.153 (Vernon 2005); see *Jackson v. Axelrad*, 221 S.W.3d 650, 655 (Tex. 2007) (describing wanton and willful standard of Section 74.153 as "lower standard of care"); but compare *Murff v. Pass*, 249 S.W.3d 407, 409 n.1 (Tex. 2008) (*per curiam*) (standard of proof for Section 74.153 is preponderance of the evidence), with *Bosch v. Wilbarger Gen. Hosp.*, 223 S.W.3d 460, 464 (Tex. App.—Amarillo 2006, pet. denied) (Section 74.153 does not establish standard of care,



but “provides the evidentiary standard of proof in emergency room medical care cases”). In *Dill v. Fowler*, 255 S.W.3d 681 (Tex. App.—Eastland 2008, no pet.), the court of appeals upheld this lower standard of care against an equal protection challenge. *Id.* at 683.

As to the application of this lower standard of care, House Bill 4 defined “emergency medical care” in the following manner:

“Emergency medical care” means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient’s health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a non-emergency patient or that is unrelated to the original medical emergency.

TEX. CIV. PRAC. & REM. CODE ANN. 6 74.001 (Vernon 2005).

Furthermore, in determining whether a physician or other provider committed willful and wanton negligence in providing such care, the judge or jury must consider the following:

(1) whether the person providing care did or did not have the patient’s medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) the presence or lack of a pre-existing physician-patient relation-

ship or health care provider-patient relationship;

(3) the circumstances constituting the emergency; and

(4) the circumstances surrounding the delivery of the emergency medical care.

Id. at 6 74.154. Unfortunately, House Bill 4 left “willful and wanton negligence” undefined, creating the potential for considerable confusion when a claimant seeks both compensatory and punitive damages. See TEX. CIV. PRAC. & REM. CODE ANN. 6 74.001(b) (Vernon 2005) (“Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.”).

At common law, “willful and wanton negligence” means that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it. See *Dunlap v. Young*, 187 S.W.3d 828, 836 (Tex. App.—Texarkana 2006, no pet.) (quoting *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981)); *Hernandez v. Lukefahr*, 879 S.W.2d 137, 142 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Wheeler v. Yettie Kersting Mem. Hosp.*, 866 S.W.2d 32, 50 & n. 25 (Tex. App.—Houston [1st Dist.] 1993, no writ); see also *Hood v. Phillips*, 554 S.W.2d 160, 166 (Tex. 1977) (quoting *McPhearson v. Sullivan*, 463 S.W.2d 174, 174 (Tex. 1971)). Thus, “willful and wanton negligence” and “gross negligence” employed the exact same definition at common law. See *Dunlap v. Young*, 187 S.W.3d at 836 (quoting *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981)).

By way of comparison, the current statutory definition of “gross negligence” provides:

“Gross negligence” means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE ANN. 6 41.001(11) (Vernon 2008). Moreover, a claimant may only recover punitive or exemplary damages upon a unanimous jury finding of gross negligence, proven by clear and convincing evidence. *Id.* at 66 41.003(a)(3) & (d).

As a result, when a claimant brings an emergency medical care claim for both compensatory and punitive damages, the jury can *potentially* find willful and wanton negligence by a preponderance of the evidence, without unanimity, and gross negligence by clear and convincing evidence, with unanimity. The only way to avoid the confusion of two distinct standards of care with two distinct burdens of proof is to (1) employ the *Moriel* statutory definition for gross negligence for willful and wanton negligence and (2) condition reaching the gross negligence question upon a unanimous finding of willful and wanton negligence. See *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 19-23 (Tex. 1994) (adopting statutory definition of gross negligence for common law claims for exemplary damages).

VIII. ELECTION OF REMEDIES UNDER THE TEXAS TORT CLAIMS ACT

After enactment of the Texas Tort



Claims Act, plaintiffs often attempted to avoid the damages caps imposed by the Act, as well as other strictures intended to limit the waiver of governmental immunity, by suing government employees individually. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 656 (Tex. 2008). To prevent such circumvention, the Legislature created an “election of remedies” provision barring re-litigation of a claim brought under the Act, and settled by or adjudicated against a governmental unit, against the employee of the governmental unit whose act or omission gave rise to the claim. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 1986) (repealed); see *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995) (“[A] judgment in an action against a governmental unit under the Tort Claims Act bars the simultaneous rendition of judgment against the employee whose actions gave rise to the claim.”). “Employees were thus afforded some protection when claims against the governmental unit were reduced to judgment or settled, but there was nothing to prevent a plaintiff from pursuing alternative theories against both the employee and the governmental unit through trial or other final resolution.” *Mission Consol.*, 253 S.W.3d at 656.

House Bill 4 amended the election of remedies provision to force a plaintiff to decide at the outset whether an employee acted independently and is, thus, solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (Vernon 2005)). This new election scheme protects governmental employees by favoring their early dismissal and substitution of their employer. *Id.* at 657. “[B]y forcing plaintiffs to make an irrevocable election at the time suit is filed, the Legislature intended to reduce the delay and expense associated with allowing plaintiffs to plead alternatively that the governmental unit is liable because its employee acted within the scope of his or

her authority but, if not, that the employee acted independently and is individually liable.” *Id.* These goals are particularly salient when a claimant brings a health care liability claim under the Tort Claims Act because a physician who exercises independent judgment in treating patients can be an employee of a governmental unit within the meaning of the Act. *Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (*per curiam*).

The election scheme itself denies recovery against an individual employee, and mandates suit against the governmental unit, when (1) the plaintiff files suit against the governmental unit only, or (2) against both the governmental unit and its employee, or (3) against the employee only, if based upon conduct within the general scope of the employee’s employment and the suit could have been brought against the governmental unit. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a), (e) & (f) (Vernon 2005). If the plaintiff sues the governmental unit and its employee, dismissal of the latter is mandatory upon the motion of the former. *Id.* at § 101.106(e). If, however, the plaintiff sues the employee only, the employee must demonstrate that the claim “could have been brought” against the governmental unit under the Act to obtain dismissal and substitution of the governmental unit pursuant to subsection (f).

In *Phillips v. Dafonte*, 187 S.W.3d 669 (Tex. App.—Houston [14th Dist.] 2006, no pet.), the court of appeals held that Section 101.106(f), effectively provides immunity to the employee of a governmental unit by granting him the option of forcing the plaintiff to substitute his employer or risk complete dismissal. *Id.* at 673. The court observed, however, that the prerequisites for such immunity through substitution included two elements: (1) the basis of the suit is conduct within the general scope of the defendant employee’s employment and (2) the suit against the employee “could have been brought” against the governmental unit “under this

chapter”. *Id.* at 675. The court found evidence that the defendant physicians were members of the medical staff at UTMB, were salaried employees of UTMB, received their paychecks from the State of Texas, and provided the care in question within the scope of their employment sufficient to satisfy the first element. *Id.* at 675-76.

As to the second element, though, the court held that the defendant physicians failed to demonstrate how the claimant’s allegations of negligence in the failure to disclose a diagnosis of breast cancer fell within one of the three areas where the Tort Claims Act waives sovereign immunity, *i.e.*, injuries caused by (1) an employee’s use of a motor-driven vehicle, (2) a condition or use of tangible personal or real property or (3) a premises defect. *Id.* at 676. “[I]t is not enough that a plaintiff’s allegation may be within the general scope of the employee’s employment; the claim must also be one that could have been brought under the Tort Claims Act against the governmental unit.” *Id.* Since failing to convey information such as a diagnosis does not fall into one of the areas of waiver, the court held that the defendant physicians were not entitled to immunity through substitution of their government employer. *Id.* at 676-77; see also *Escalante v. Rowan*, 251 S.W.3d 720, 728 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) (failure to diagnose and treat allegations fail to allege injury caused by condition or use of tangible property); *Lanphier v. Avis*, 244 S.W.3d 596, 606 (Tex. App.—Texarkana 2008, pet. filed) (failure to insert fetal scalp electrode and to properly employ fetal heart monitoring information); *Hall v. Provost*, 232 S.W.3d 926, 929 (Tex. App.—Dallas 2007, no pet.) (failure to properly evaluate and diagnose gastrointestinal bypass leak intra-operatively); *Turner v. Zellers*, 232 S.W.3d 414, 418-19 (Tex. App.—Dallas 2007, no pet.) (failure to timely diagnose and treat pulmonary hypertension resulting in death); *Kanlic v. Meyer*, 230 S.W.3d 889, (Tex. App.—El Paso



2007, pet. denied) (failure to diagnose and treat hip injury); *Clark v. Sell*, 228 S.W.3d 873, 874-75 (Tex. App.—Amarillo 2007, pet. filed) (failure to “arouse,” “fully assess,” or “periodically turn” patient resulting in injury to arm); *Franka v. Velasquez*, 216 S.W.3d 409, 412-13 (Tex. App.—San Antonio 2006, pet. granted) (though vacuum extractor initially used, failure to properly hand-deliver baby causing injury); *Williams v. Nealon*, 199 S.W.3d 462, 466-67 (Tex. App.—Houston [14th Dist.] 2006, pet. filed) (failure to properly perform diagnostic procedure); *but see Sheth v. Dearen*, 225 S.W.3d 828, 831-33 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (misplacement of orthopedic hardware device during surgery, resulting in injury, held misuse of tangible property); *Tejeda v. Rowe*, 207 S.W.3d 920, 925 (Tex. App.—Beaumont 2006, pet. filed) (use of drug Pitocin and forceps in delivery of babies, resulting in cerebral palsy, held use of tangible property).

IX. CONCLUSION

Through the enactment of House Bill 4, the Legislature significantly improved the availability and delivery of medical and health care in Texas, reducing the frequency and severity of health care liability claims, while decreasing the cost of such claims, and thereby increasing the availability and affordability of both medical and health care for all Texans and professional liability coverage for those who provide such care. Five years on, physicians, hospitals and other health care providers, and the patients they serve, are realizing most of the intended benefits of the legislation.

D. MICHAEL WALLACH is a native of Fort Worth and is an honor graduate of both Texas Christian University (B.A. 1975) and the University of Houston College of Law (J.D. 1979). He became Board Certified in Personal Injury Trial Law in 1984 by the Texas Board of Legal Specialization. He has been certified as a Civil

Trial Specialist by the National Board of Trial Advocacy since 1992. Mr. Wallach was a partner at Shannon, Gracey, Ratliff & Miller from 1983 to 1991. He left that firm to form Wallach, Jones & Moore, P.C., in 1991, now known as Wallach, Andrews & Stouffer, P.C.

J. WADE BIRDWELL received his B.S. from the University of Texas at Austin in Chemical Engineering in 1983 and his J. D. from the University of Houston College of Law in 1989. He became Board Certified by the Texas Board of Legal Specialization in Civil Appellate Law in 1998. Prior to joining Wallach, Andrews & Stouffer, P.C. in February 2000, he was an attorney in the medical malpractice/personal injury section at Cantey & Hanger, LLP in Dallas and Fort Worth and a member of the civil appellate/insurance defense section at Shannon, Gracey, Ratliff & Miller, LLP.

¹ The limited purpose of this article is to evaluate the impact of House Bill 4 from the defense perspective by assessing its efficacy in meeting its stated purposes and reviewing the interpretation and application of its unique provisions by the appellate courts. Provisions of House Bill 4 merely codifying its predecessor, Article 4590i, and decisions of the appellate courts addressing factually specific circumstances, for example, concerning the legal sufficiency of an expert report, are beyond the scope of this article. For a much more detailed discussion of House Bill 4, the authors recommend Michael S. Hull, R. Brent Cooper, Charles W. Bailey, Donald P. Wilcox, Gavin J. Gadberry, and D. Micael Wallach, *House Bill 4 and Proposition 12: An Analysis with Legislative History*, 36 TEXAS TECH L. REV. 1 (Supp. 2005).

ⁱ “The JUA is a joint underwriting association created by statute (the “JUA Act”) to provide insurance for health-care providers who are unable to obtain coverage in the voluntary market. The JUA consists of all insurers authorized to write liability insurance in Texas and is designed to be a self-supporting association. The JUA has the power to issue insurance policies on behalf of the insurance companies that are its members.” See *Scheffey v. Geeslin*, 2008 Tex. App. LEXIS 1137, at 2-3 (Tex. App.—Austin, February 15, 2008, pet. filed) (citations omitted).

ⁱⁱ The alternative caps established by Section 74.302 are the same as the primary caps of Section 74.301, except the former apply only in the event the courts declare of the latter unconstitutional and defendant providers demonstrate financial responsibility by carrying the requisite levels of professional liability insurance. TEX. CIV. PRAC. & REM. CODE ANN. 6 74.302 (Vernon 2005).

ⁱⁱⁱ Former Section 13.01(f) of Article 4590i, Texas Revised Civil Statutes, provided that “[t]he court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.” TEX. REV. CIV. STAT. ANN. art. 4590i, 6 13.01(f) (Vernon Supp. 2006) (repealed).

^{iv} As further evidence that statutory compliance is a question of law, in *Walker v. Gutierrez*, 111 S.W.3d 56 (Tex. 2003), the Supreme Court characterized an attorney’s mistaken belief that the expert report he furnished on behalf of his client complied with statutory requirements as a “mistake of law” (though not such a mistake as to entitle his client to grace period relief). *Id.* at 63-65. In so doing, the Supreme Court implicitly acknowledged that the issue of compliance involved a question of law about which the attorney could be mistaken, *i.e.*, did the expert report he furnished establish the *prima facie* merits of all three elements of his client’s health care liability claim?

^v “Written discovery means requests for disclosure, requests for production and inspection of documents and tangible things, requests for entry onto property, interrogatories, and requests for admission.” TEX. R. CIV. P. 192.7(a).

^{vi} Rule 200 allows a party to “take the testimony of any person or entity by deposition on written questions before any person authorized by law to take depositions on written questions.” TEX. R. CIV. P. 200(a). The notice may include a request for production of documents. *Id.* at 200.1(b).

^{vii} Rule 205.1 allows the following types of discovery from a non-party: (1) an oral deposition; (2) a deposition on written questions; (3) a request for production of documents or tangible things served with a notice of deposition on oral examination or written questions; and (4) a request for production of documents and tangible things without deposition, as provided by Rule 205.3. See TEX. R. CIV. P. 205.1(a),(b),(c) & (d). This article first appeared in the September 2008 issue of *Metropolitan Corporate Counsel*.



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Friday, June 26, 2009

11:30 am – 1:15 pm

Keynote Speaker –

BRAD WESTMORELAND, Stacy & Conder, LLP, Dallas

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State of the Division and Swearing in of new Officers and Directors

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9:00 AM – 10:00 AM

The Older and Better-Looking Sister of Diversity

Tonya Parker

Gruber Hurst Johansen & Hall LLP

Dallas

10:15 AM – 11:15 AM

Ethics and Discovery

Andrea Marshall

Kroll Ontrack, Dallas

1:30 pm – 3:30 pm

Legal Writing I and Legal Writing II

Wayne Schiess

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3:45 pm – 4:45 pm

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The Ethics of Making Mistakes

By Ellen Lockwood, ACP, RP

We all make mistakes. Big or small, disastrous or inconsequential, permanent error or easily rectified, mistakes happen. Anyone who claims never to make a mistake is either lying or always blames her mistakes on others.

If you discover an error it should be brought to the attention of the supervising attorney as soon as possible. Even if it appears that the error isn't time sensitive, the sooner it is brought to the supervising attorney's attention, the sooner she may determine how to correct it. Likewise, it is not a paralegal's place to determine whether an error is significant. All errors should be reported to the supervising attorney.

The worst thing you can do is try to cover up a mistake. Regardless of how serious the error is, you are more likely to be written up or fired if you try to cover up the error or fix it yourself. I once worked with a paralegal who accidentally faxed a privileged document to opposing counsel. Instead of notifying her supervising attorney, she contacted opposing counsel and tried to get the fax back. Of course, opposing counsel called her supervising attorney so then she was in more trouble for not notifying him than for sending the fax in the first place.

A friend worked with a secretary who was charged with sending urgent documents via overnight delivery. Unfortunately, when the secretary left for the day, she left the envelope on her desk. When the secretary got to work the next morning and realized her mistake, she took the

envelope down to the building's Fed Ex box. When the documents didn't arrive, she told the attorney that the Fed Ex pickup must have occurred earlier than the time posted on the box. The Fed Ex driver insisted he hadn't arrived early, so the attorneys reviewed the building security camera tapes which revealed the truth. The secretary was let go not for forgetting to put the envelope in the Fed Ex box, but for lying about it.

When you realize you have made a mistake, or when a mistake you made is brought to your attention, you should take the following steps:

- Admit your error to the supervising attorney and apologize, even if it was beyond your control. Be sure to take responsibility for your involvement in the situation, whether it was inadvertent, not taking time to double-check, relying on someone else who didn't do something, etc. Do not blame others for your part in the situation.
- When describing the error you shouldn't leave out any important details, but don't take more time than necessary to describe the error. You may always elaborate if asked. Don't make excuses.
- Offer suggestions on how to rectify mistake or minimize its impact. Making suggestions shows you have considered the situation and are willing to assist in rectifying it.
- Follow the attorney's instructions on what steps to take to deal with the mistake, even if the attorney does not take

any of your suggestions, or asks someone else to handle the corrective steps.

When the crisis is over and everyone is calmer, offer suggestions to your supervising attorney as to how the similar mistakes may be avoided in the future. Again, do not make excuses and do not blame anyone else for your role in the situation. Be sure to include suggestion on what you yourself can do, not just what others should do.

While you will, of course, be judged by the type and frequency of the mistakes you make, what likely will be more important is whether you handle your errors ethically and professionally. After all, we all make mistakes. What matters most is what you do about them.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past President of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook published by West Legalworks. She may be contacted at ethics@txpd.org.

A Powerful Remedy for Patent, Trademark, and Copyright Owners

A Tool Increasing in Popularity for Excluding Product from the United States Market

By William B. Nash, Mark A. J. Fassold and Linda Studer

The Power to Exclude and Enforce

In many instances, the power to exclude a competitor's product from the market place is significantly more valuable than the actual damages flowing from an infringed patent, trademark, or copyright.

The United States International Trade Commission ("Commission" or "USITC" or "ITC") has the power to issue "exclusion orders" denying the entry of products into the United States market – the largest market in the world. The department of United States Customs and Border Protection is tasked with enforcing those exclusion orders. Hence, a USITC complainant potentially has the power to exclude a competitor's product from the market place and the power of the United States Customs and Border Protection's ("USCBP") enforcement of that exclusion at each point of entry in the United States. That is, the USCBP both investigates violations of the exclusion order and enforces the exclusion order.

A United States District Court ("USDC") arguably offers similar remedies to a complainant; however, the USDC complainant must (a) prove additional elements to obtain the "similar remedy,"¹ (b) police, by itself, that remedy (i.e., the USDC complainant will have to determine for itself through its own investigation whether or not the remedy is being violat-

ed), and (c) enforce the "exclusion" through a contempt action² requiring yet another legal proceeding in which the complainant carries the burden of proof and runs the risk of incurring additional attorneys' fees.

The Growing Importance of the United States International Trade Commission in Patent Law: A Brief Introduction to the United States International Trade Commission

The U.S. International Trade Commission ("Commission" or "USITC" or "ITC") was originally established by Congress in 1916 as the U.S. Tariff Commission. The U.S. Tariff Commission was renamed through the Trade Act of 1974. The USITC was created to investigate and punish unfair trade acts. The USITC was given broad jurisdiction and remedial powers to stop unfair trade acts, and in particular, the authority to exclude the importation of infringing goods into the United States.

The USITC is an independent, nonpartisan, quasi-judicial federal agency empowered under Section 337 of the Tariff Act of 1930, 19 U.S.C. 6 1337 to investigate allegations of certain unfair practices in import trade. Originally enacted to protect U.S. domestic industries from unfair competition in the importation of goods made by foreign companies, it has evolved into

one of the primary means for U.S. companies to protect intellectual property rights at the U.S. borders in cases that involve infringing imports.

Today, the USITC has three important mandates: (1) Administer U.S. trade remedy laws within its mandate in a fair and objective manner, (2) provide the President, the United States Trade Representative (USTR), and Congress with independent, quality analysis, information, and support on matters of tariffs and international trade and competitiveness, and (3) maintain the Harmonized Tariff Schedule of the United States. The USITC fulfills its mission and serves the nation primarily through import injury investigations, intellectual property-based import investigations, industry and economic analysis programs, trade information services, and trade policy support.

The Commission consists of six members appointed by the President and confirmed by the U.S. Senate for nine-year terms, unless appointed to fill an unexpired term. The terms are set by statute and are staggered so that a different term expires every eighteen months. Statute provides that there cannot be more than three members of the same political party. The Chairman and Vice Chairman are designated by the President to serve two-year terms and must be from different political parties. The Chairman cannot be from the same political party as the preceding Chairman.

Section 337 cases are referred to the Office of the Administrative Law Judges once an investigation has been instituted. Cases are assigned to one of the five Administrative Law Judge's ("ALJ") on a rotating basis. The ALJ's hold formal evidentiary hearings in accordance with the Administrative Procedure Act, i.e., 5 U.S.C. 551, and make Initial Determinations ("ID"), including findings of fact and conclusions of law. Due to the significant increase in the number of Section 337 cases and related appellate court activity, the Commission recently added the fifth ALJ.³

The Office of the Secretary coordinates hearings and meetings of the Commission and is responsible for keeping the USITC's official records.

Dramatic Rise in Section 337 Investigations

The USITC has seen a significant increase in the number of Section 337 complaints. The number of complaints rose from 21 in 2003 to 31 new complaints instituted in Fiscal Year ("FY") 2007, as well as two ancillary proceedings. See USITC Performance and Accountability Report, Fiscal Year 2007, pg 67. During FY 2007, 73 Section 337 investigations and ancillary proceedings were active at the USITC compared to 41 active investigations in 2003. *Id at 71*. There were 80% more active cases in FY 2007 than there were in FY 2003. *Id at 71*.

Obtaining the Exclusion and Enforcement

A patent owner invokes the exclusion and enforcement powers of the USITC by instituting what is commonly called a "Section 337 Investigation." Section 337(a)(1)(B) of the Tariff Act of 1930 declares as unlawful the "importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that (i) infringe a valid and enforceable United States patent...; or (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." 19 U.S.C. 1337(a)(1)(B).

Standard Procedural Flow

Overview of a Section 337 Investigation

USITC proceedings are governed by the Administrative Procedures Act, 5 U.S.C. 551, the Commission Rules as set forth in 19 C.F.R. 6 210.1 *et. seq.*, and the Ground Rules of the ALJ assigned to the case. The Ground Rules supplement the Commission's Rules of Practice and Procedure, 19 C.F.R. 201 and 210 much like the local rules serve to supplement the Federal Rules of Civil Procedure in the federal district courts.

The filing of a complaint initiates a USITC action. Unlike a federal district court or state court action, the filing of a complaint does not mean the case will proceed. Upon receiving a complaint, the USITC has 30 days to determine whether or not to initiate an investigation. If the Commission determines that it will do so,

All forms of discovery provided by the Federal Rules of Civil Procedure are available to parties in Section 337 investigations—interrogatories, requests for production, requests for admission, depositions, and subpoenas. The difference between Section 337 proceedings and litigation in the federal district courts is in the short deadlines and the accelerated speed at which the discovery phase progresses.

the Commission then refers the investigation to an Administrative Law Judge ("ALJ") who sets the ground rules and discovery schedule for the investigation, as well as the target date for the final determination, typically 18 months from initiation. The ALJ must complete the investigation and issue an Initial Determination (court decision) no later than 16 months after the initiation. This means the evidentiary hearing (trial) will usually take place 8 to 12 months after the initiation of the investigation. Finally, the Commission issues its Final Determination by the due date set by the ALJ. The Commission's Final Determination stands unless the President disapproves it.

Requirements for Filing a Section 337 Complaint

U.S. companies seeking protection under Section 337 must meet three requirements, (1) there must be an importation or a sale for, sale after, or potential future importation of the infringing article into the United States, (2) an unfair act of competition relating to the imported article, and (3) existence of a U.S. industry relating to the article protected by the intellectual property right. The domestic industry is satisfied when the complainant shows that it has made:

- a significant investment in plant equipment;
- significant employment of labor or capital; or
- a substantial investment in its exploita-

tion, including engineering, research and development, or licensing.
See 19 U.S.C. 1337(a)(1)-(3).

Complaint Filed

A USITC complaint differs substantially in procedure and substance from a typical federal district court complaint. A complainant seeking relief under Section 337 must prepare a detailed complaint with the facts supporting the claims, including background information, a separate claim chart demonstrating the allegations of infringement, and certified copies of specific documents attached as exhibits. See 19 C.F.R. 210.12 (2008). The complainant must also identify the portions it considers the complainant's "confidential business information". Additionally, if the complaint is filed as a confidential document as defined by 6 201.6(a), a public version must also be filed concurrently with the confidential copy. See 19 C.F.R. 210.4 (2008).

The parties in a USITC action are (1) the Complainant, (2) Respondents, (3) Office of Unfair Import Investigations ("OUII") Staff Attorney, and (4) the ALJ. The respondents involved in a Section 337 case are typically the foreign manufacturers, foreign or domestic importers, and domestic sellers of the imported goods.

The Investigation

Within thirty days of the filing of a complaint, the Commission is required to examine the complaint and determine whether it complies with the applicable rules and to decide "whether an investigation should be instituted on the basis of the complaint." See 19 C.F.R. 210.9, 210.10 (2008). If an investigation is instituted, the Commission is required to serve the complaint, the notice of investigation (and any motion for temporary relief) on each respondent and the appropriate embassies. See 19 C.F.R. 210.11 (2008). An investigation is instituted by the publication of a notice in the Federal Register. See 19 C.F.R. 210.10(b). The Commission also assigns the case to one of the five ALJ's to oversee the case and to an investigative attorney ("Staff Attorney") from its Office of Unfair Import Investigations ("OUII") who provides his views to the ALJ. The

OUII attorney also represents the public interest during the course of the investigation.

Response

Once the complaint is served, respondents have twenty days from the date of service of the complaint and notice of investigation to file a written response. *See* 19 C.F.R. 210.13 (2008).

Discovery

All forms of discovery provided by the Federal Rules of Civil Procedure are available to parties in Section 337 investigations – interrogatories, requests for production, requests for admission, depositions, and subpoenas. The difference between Section 337 proceedings and litigation in the federal district courts is in the short deadlines and the accelerated speed at which the discovery phase progresses. In a typical Section 337 investigation with a sixteen month target date, the discovery period is usually around six to seven months – significantly shorter than the typical federal or state court case. Another difference over federal and state court litigation is the participation of the Staff Attorney as a party to the investigation.

Interrogatories. The USITC Rules of Practice and Procedure leave it to the ALJ to determine the deadline for responding to interrogatories. *See* 19 C.F.R. 210.29(b)(2). Currently all five ALJs set the deadline to respond as ten days from the date of service. Judge Bullock and Judge Essex limit the number of interrogatories in their Ground Rules to 175 interrogatories per party, including subparts. Judge Luckern and Judge Charneski do not provide a limit in their Ground Rules.

Requests for Production. The USITC Rules of Practice and Procedure leave it to the ALJ to determine the deadline for responding to requests for production. *See* 19 C.F.R. 210.30(b)(2). Currently all five ALJs set the deadline to respond as ten days from the date of service. With electronic discovery increasing the volume of production, an efficient and organized system must be quickly implemented to produce documents and to review documents produced by the other party.

Requests for Admission. The USITC Rules

of Practice and Procedure leave it to the ALJ to determine the deadline for responding to requests for admission. *See* 19 C.F.R. 210.31(b). Currently all five ALJs set the deadline to respond as ten days from the date of service. Judge Luckern permits service of requests for admissions within twenty days of service of the complaint and notice of investigation.

Subpoenas. The USITC procedures for issuance of subpoenas differs significantly from the federal and state court procedural rules. Attorneys are not authorized to sign and serve subpoenas in Section 337 investigations. Instead, attorneys must submit an ex-parte application to the ALJ. The ALJ ground rules provide form subpoenas for use by the parties. Once the subpoena is signed by the ALJ, it can be served on the third party. The ALJ's ground rules allow ten days after service of the subpoena to limit or quash the subpoena (Judge Bullock and Judge Charneski), or allow the parties to propose a time frame (Judge Essex and Judge Luckern).

Depositions. The ITC rules leave it to the ALJ to determine the permissible dates or deadlines for taking depositions. The ITC rules do not limit the number of hours for taking a deposition nor does the USITC incorporate the limit of ten depositions found in the federal rules. One ALJ requires the parties to meet and confer before issuing a deposition notice. The other three (Judge Bullock, Judge Essex, Judge Charneski) requires parties to allow ten days notice to take the deposition of witnesses in the U.S. and fifteen days notice for witnesses outside the United States. *See* 19 C.F.R. 210.28. Given the tight deadlines and short discovery period in Section 337 investigations, the most important consideration is the need to focus on your discovery and your depositions. Plan and prepare well in advance of the start of the discovery period to identify the most important areas to explore and develop in order to create a record that will permit you to win your case.

Resolution of Discovery Disputes. All five ALJ's require that the parties meet and confer before any discovery related motion is submitted to the ALJ for resolution. Judge Bullock and Judge Essex require that the Discovery Committee (comprised of

lead counsel for each party and the Staff Attorney) meet bi-weekly to discuss and attempt to resolve any outstanding discovery issues that arise and then file a report outlining the disputes discussed and recording whether the parties were able to resolve the discovery issues.

Evidentiary Hearing (Trial)

The USITC Rules of Practice & Procedure and the APA Rules regarding administrative hearings generally mirror the Federal Rules of Civil Procedure and the Federal Rules of Evidence with the exception of the hearsay rule which is more relaxed in USITC cases. Hearings (trial) usually lasts one to two weeks and proceed in the same manner as a bench trial in the federal district courts. Trial consists of live testimony (although written witness statements are often submitted in place of direct testimony), documentary evidence of the case (trial exhibits), and arguments which the ALJ considers in order to make a determination as to whether a violation of Section 337 occurred. *See* 19 C.F.R. 36.

Determination

After the evidentiary hearing (trial), the ALJ will issue a preliminary ruling (Initial Determination) as to whether or not a Section 337 violation occurred. The Initial Determination if filed three months before the target date if the date is fifteen months or less, and no later than four months before the target date if the target date is more than fifteen months from the date of the institution. An Initial Determination becomes the Final Determination 45 days after the date of service of the Initial Determination unless at least one Commissioner votes to review the determination. *See* 19 C.F.R. 210.42. The parties may also petition the Commission for a review of the Initial Determination. *See* 19 U.S.C. 1337(c); 19 C.F.R. 210.43.

Presidential Review

Statute requires that the Commission send the Final Determination to the President for review due to national security considerations. If the President does not specifically disapprove the Final Determination within the 60 day review process, the determination automatically becomes

final the day after the 60 day review period expires. See 19 U.S.C. 1337(j)

Appeal

Any party adversely affected by the Final Determination may petition the Commission for reconsideration of the determination within 14 days of service of the determination. See 19 C.F.R. 47.

Why the United States International Trade Commission is a Preferred Forum to Enforce a Patent Owner's Right to Exclude Product from the United States Market

The USITC offers numerous substantive and procedural advantages over a federal district court including the following.

Broad Jurisdiction. The USITC exercises *in rem* jurisdiction (i.e., power over the accused infringing goods) as opposed to the limited *in personam* jurisdiction (i.e., power over the accused infringers who often reside outside of the United States) of the federal district courts. Thus, U.S. companies can bring one Section 337 investigation against multiple respondents who may reside in different countries and who have never "touched U.S. soil." Additionally, the USITC may grant a general exclusion order that applies to all infringing imported goods even though the infringer cannot be identified or served with a complaint.

Expedited Schedule. Trial typically occurs within 8 to 12 months of complaint being filed. Although the 12 to 18 month time limits included in Section 337 for completion of investigations were removed from the statute by the Uruguay Round Agreements Act ("URAA"), the Commission, in accordance with the amended statute, seeks to "continue to complete these investigations as expeditiously as possible." See USITC Performance and Accountability Report, Fiscal Year 2007, pg. 70. The amended statute requires that investigations be completed "at the earliest practicable time", which is currently set at no later than sixteen months See 19 U.S.C. 1337(b)(1). The commission is required to establish a target date for its final determination 45 days after the investigation is initiated. See 19 U.S.C. 1337(b)(1).

No Jury Trials. Unlike federal district

court cases, the vast majority of the cases the Administrative Law Judges ("ALJ's") preside over involve allegations of patent infringement. Thus, the ALJ's, as well as the Office of Unfair Import Investigations ("OUII") Staff Attorneys, are experienced with the complexities of patent litigation. Their expertise is an added benefit in Section 337 investigations as opposed to jury members who may be totally unfamiliar with the technology involved and the complex and unique factual and legal issues related to patent law.

Preliminary Relief. As is the case with preliminary injunctions in federal courts, U.S. companies may request expedited temporary relief in USITC proceedings. The Commission has authority to exclude goods from entering the U.S. on a temporary basis or issue a cease and desist order while the investigation takes place. See 19 U.S.C. 1337(d); 19 C.F.R. 210.52-210.69.

Remedies. Monetary damages are not available in USITC proceedings. Instead, the remedies include "exclusion orders" and "cease and desist orders." A general exclusion order blocks entry into the U.S. all infringing goods of the kind determined to be infringing, regardless of the source. A limited exclusion order prohibits the importation of only those infringing goods originating from the parties named in the USITC investigation. See 19 U.S.C. 1337(d). A cease and desist order requires the termination of infringing activities. See 19 U.S.C. 1337(f).

No Counterclaims. As a result of the lack of a monetary damages remedy, counterclaims cannot be asserted during a Section 337 investigation.

Stay District Court Actions. If a defendant in a federal district court case is also a respondent in a Section 337 investigation the federal district court must, upon motion by the defendant, grant a stay. Thus eliminating the possibility of respondents being subjected to concurrent litigation. Furthermore, the record created in the USITC proceeding may be used in a federal district court lawsuit. See 28 U.S.C. 6 1659.

Protective Order. Because of the commercially sensitive information of cutting-edge technology involved in USITC investigations, the Commission vigorously

enforces a standard protective order to protect the parties' proprietary information. Immediately after being assigned to a case, an ALJ will issue a Protective Order to prevent the disclosure of confidential business information ("CBI") to opposing parties. Disclosure of a party's CBI is limited to outside counsel and their staff working on the investigation, the OUII Staff Attorney and the ALJ. Documents designated as CBI are not available to in-house counsel of the opposing party. See 19 U.S.C. 1337(n); 19 C.F.R. 210.5. CBI must be returned or destroyed immediately after the investigation has been concluded.

Conclusion

The USITC is an important tool to a legal team seeking to enforce a client's intellectual property rights. However, a Section 337 investigation is incredibly demanding on the legal team, and obtaining an exclusion order is a challenging task. The Section 337 Investigations present complex factual and legal issues, technical subject matter, and very tight deadlines making a Section 337 matter among the most complex and challenging forms of litigation practiced today.

William B. Nash is a partner in the Intellectual Property section of Jackson Walker L.L.P. in San Antonio.

Mark A. J. Fassold is a partner in the Litigation section of Jackson Walker L.L.P. in San Antonio.

Linda Studer, ACP, is paralegal in the Litigation section of Jackson Walker, L.L.P. in San Antonio.

¹ Arguably, a United States District Court can issue a permanent injunction but only after the patent owner satisfies a four-factored test: (1) a reasonable likelihood of success on the merits; (2) irreparable harm to the patentee without a preliminary injunction; (3) a balance of the parties' relative hardships; and (4) the public interest. See *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384 (Fed. Cir. 1987). The USITC complainant need not satisfy this four-factored test to obtain an exclusion.

² See e.g., *KSM Fastening Sys., Inc. v. H.A. Jones Co.*, 776 F.2d 1522, 1532 (Fed. Cir. 1985).

³ On July 7, 2008, the USITC announced Robert K. Rogers as the fifth ALJ.

Trends in Discovery Technology

By Connie Janise

Penned any heartfelt letters lately? You're not alone. The expediency of email, texting and cell phone calls are rapidly replacing paper-based communication. And the trend isn't new. Just ask your clients. Their electronic data is piling up faster than tedious articles can be written about collecting it. But what happens to all that material once you've figured out where it is and how to get it delivered to your desk?

No one likes to reinvent wheels, especially on the client's dime. Many legal teams have an entrenched paper-based discovery management system and little motivation to explore other options. But when a growing amount of relevant material originates in an electronic format and is never printed to paper in the ordinary course of business, adoption of an electronic discovery platform just makes more sense. And it may even save your client money.

Coding documents for production status, confidentiality and significance to the case in a searchable, electronic environment allows for instantaneous recall of key documents, reducing client costs in attorney and paralegal time otherwise spent scrambling through file cabinets in preparation for briefing, depositions, etc. Billable hours spent making production decisions are reduced as well, with average electronic review speeds estimated at 35 to 50 documents per hour. The rate of review can be further increased with built-in tools that can filter documents by date, key terms and other criteria, allowing document review to be prioritized based on relevance.

Many electronic discovery tools are



hosted online, allowing reviewers in any number of locations real-time access to the centralized database where the documents are housed. "Rocket docket" cases—or any situation in which vast quantities of data must be reviewed in a short time—can be won or lost based on the ability to coordinate a large-scale simultaneous review effort. Online platforms grant teams the freedom to outsource document review to cost efficient contract attorneys or bring in additional team members from satellite offices in order to get the job done on time. Virtual storage of case material also enables real-time collaboration with experts and client users.

Automation of document production is more and more important as volumes of data continue to grow. Manually Bates stamping documents is an increasingly unrealistic, not to mention grueling, task. Production from an electronic database saves many hours and is less prone to error, as the potential for common mis-

takes like gaps or duplication in numbering is eliminated. Redacting documents electronically is also cleaner and faster. Production sets housed in an electronic database can be transferred from most platforms in a variety of file types. Ideally, parties can reach an agreement regarding their individual format preferences before discovery commences. Then productions

can be exported from the producing party's database according to spec and automatically loaded into the receiving party's document management system, doing away with printing expenses for everyone.

The array of electronic discovery products can be dizzying. Identifying the one that will provide the best fit will depend on a variety of factors, especially how much support a firm has available to bring the management of the software in-house. While the user interface for these programs is often fairly intuitive, the learning curve for backend management of the data can be steep. The availability of devoted technical support should figure heavily into the decision to manage the software in-house or rely on an alternative solution for project

management. Firms with fewer in-house technical resources often turn to a vendor to host and manage their electronic databases.

Unless you're betting on a return to the analog age, it doesn't make sense to handle new media with outdated methods. Explore an electronic discovery solution with a manageable pilot case to get your team comfortable with this new way to achieve better results in less time. You won't realize cost savings overnight by taking your practice paperless (though you may enjoy some instantaneous "green" credibility). But you will gain added efficiency, on-the-spot recall of work product and foolproof discovery tracking, invaluable tools for the evolved legal team. And adaptation may just be what's required to win.

Connie Janise is a litigation/trial paralegal at the law firm of Fulbright & Jaworski L.L.P.

Paralegals as Mediators

by Sami K. Hartsfield

Mediation is defined as “a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution,” *Black’s Law Dictionary* 1003 (8th ed. 2004). As juxtaposed to an arbitrator, whose decision is usually binding on the parties, the mediator is “a neutral person who tries to help disputing parties reach an agreement,” *Id.* Because a mediator can be a non-attorney,¹ this is one area that paralegals may consider for further professional or pro bono vocation. A quick Google2 search turns up a plethora of informational resources; but sometimes the best way to get to the heart of the matter is to speak to someone who has already mastered the experience. For that, I turned to Mary Beth Jones, a volunteer paralegal mediator who has mediated cases through the Jefferson County Dispute Resolution Center (hereinafter “DRC”) since 1996, and asked her to share her experiences with us.

Mary Beth Jones has been a practicing paralegal since 1983, and is employed by the law firm of Jenkins & Martins, LLP. After completing the Paralegal Certificate Program at Lamar University in the spring of 1984, Mary Beth achieved the designation of CLA in January 1985. She received a Bachelor of applied Arts & Sciences in 2008 from Lamar University. In addition to mediating, she currently serves on the Ethics Review Committee, and is a member of the Speaker Bureau and Training Team of the Jefferson County DRC. Mary Beth is also an active member and volunteer of the Division.

Mary Beth explains that mediation is a process in which trained neutrals, such as herself in this case, work with parties involved in a dispute. Ideally, this is done to help them work through their issues and reach a mutually agreeable resolution. She believes the process is very satisfying

to those who participate, even though they may not get everything they want, or even any of the things they actually want. What they do all receive, however, is an opportunity to sit down in a non-adversarial setting and, with the help of trained mediators, participate in a meaningful dialogue regarding the situation at hand.² Says Mary Beth, “Because those at the table help to work out the solution, they feel a sense of ownership and satisfaction with the outcome.”

So how can we become involved with this process? Mary Beth explained that she’s been a paralegal for the same attorneys for 25 years, although the firm has undergone some changes over the years. Her work experience has been mostly in the area of various types of toxic tort cases, and she became familiar with the concept of mediation in that capacity. She appreciated the concept and saw it could work well. After her children left for college, she realized she had a little time available and, wanting to use it constructively, considered pro bono work. Perhaps serendipitously, she saw an interview with the Executive Director of the Jefferson County DRC, Cindy Bloodsworth, discussing an upcoming training session, as well as providing particulars about the application process. Mary Beth had received her sign. She applied to her local DRC, and was chosen for a 1996 training session.

How does one become involved with a local DRC? The first step is to find one’s local DRC. One can find a comprehensive list at the ADR Section of the State Bar of Texas web-site,³ located at <http://www.texasadr.org/links.html>. In addition to completing an initial application at the Jefferson County DRC, Mary Beth was required to write a short essay explaining why she wanted to become a mediator. While the requirements may differ for different

DRCs and/or locales, typically at least two letters of reference are obligatory, as well as a personal interview. Upon completion of these steps, the selection is made from the applicants based on the Center’s needs at the time. Generally, Jefferson County has a training class consisting of approximately 25 mediators every two years for basic 40-hour training.

Mary Beth explains that mediators are statutorily required to have 40-hour basic training, and an additional 24 hours of family training for cases involving familial issues. The Jefferson County DRC requires a further five hours of training for victim-offender cases, and another five hours of training for court-annexed cases. Finally, an annual continuing education requirement of 10 hours per year is assessed.⁴

The Jefferson County DRC also maintains an Ethics Review Committee and a Peer Review Committee. The members of each are elected by their mediator peers. This is yet another option for paralegal mediators, as Mary Beth has been honored to serve several terms on the Ethics Review Committee. She states it’s imperative to the Jefferson County DRC mediators that the high quality of their services remains faithful to its intended purpose.

So what does the paralegal mediator actually do?⁵ Mediators perform mediations, of course, but in addition to that, the Jefferson County DRC has an active Speakers Bureau, of which Mary Beth is also a member. When the need arises, members of the Speakers Bureau address various civic groups to provide information about mediation specifically, and about the DRC generally. One of the biggest challenges facing DRCs is getting the word out to residents that the DRCs are available to help. In that regard, members of the Speakers Bureau often man booths at various functions to distribute literature and speak to local residents, or at college classes, as well as many other functions. One of Jefferson County’s local television stations partners with the DRC once a year, allowing them to man a telephone bank at the station. This is a huge public service that is always well received by the community. Moreover, Mary Beth participates in the DRC training program as well by assisting in the training of new mediators.

The mediation process actually begins well before anyone gets to the table. Typically, interested parties initiate contact with a DRC and speak with a case manager, who subsequently notifies all parties involved of the time and place for a scheduled mediation. The mediators are provided with the paperwork requesting the mediation, along with a brief description of the type of case to be mediated. Once the parties arrive, they are shown to the area where the mediation will take place (in Jefferson County, it is often in one of the courtrooms), so the process can begin.

Mary Beth's usual procedure is to begin the session with a brief opening statement explaining the process and outlining how the negotiations will work. Mediators typically introduce themselves, welcome the parties, and let them know that their attendance is appreciated. Mediators characteristically assure the parties that they look forward to working with the parties in order to resolve the dispute that exists between them.

It is further stressed that mediation is an informal meeting, and everyone is encouraged to speak openly and freely. The proceeding is private and absolutely confidential, thus the mediators can confidently assure the parties that what happens in mediation will not be disclosed, nor can it be used against the parties in court⁶ by the mediators (other than to report whether an agreement was reached, or to report that, when ordered by the Court, the parties reported as scheduled).

Says Mary Beth:

Since many who come to mediation are not familiar with the process, we explain our role as trained neutrals, advising them that we are not attorneys (or for those who are – that we are not functioning as an attorney for this process), nor judges, and we will not make decisions for them. Our role is to help *them* clarify the issues that exist between or amongst them, and to explore options that might settle the matter for them.

Their role in the process is to tell

their side of the story, and to state how they would like to see the matter resolved. The mediators tell the parties that while we must know some of the past history, the reason we are at the mediation is to focus on the future – what can be done from this point forward to resolve the matter for them.

Once the parties reach an agreement (hopefully), the mediators will put it in writing, which all parties can then read and sign.

For Mary Beth, the amount of hours she has worked in mediation varies. She states she has been recognized for volunteering for 100+ hours per year in the past. In recent years, with her school commitments, she had to limit her mediations to about once a month, for a two- to three-hour period. Now that she has finished school, however, she may increase the number of times she mediates per month. One consideration for other paralegals interested in this area is the versatility, not to mention the utility.

Mary Beth swears by the mediation process. She feels gratified knowing people have come to a resolution of their own problems, and she can literally see the peace that it provides to them. What is the future for mediations? As far as trends go, Mary Beth is seeing an increase in family cases, as well as court-annexed and victim-offender cases. As stated earlier, one of the biggest challenges is making citizens aware of the services that DRCs provide. Regardless, she believes there are many opportunities for paralegals in the mediation field. It is different from what many of us are used to seeing in litigation in that it's not an adversarial practice. It is believed that we will continue to see the use of mediation as a method of alternative dispute resolution rise in the future, particularly in family matters, which often can be further aggrieved by the adversarial nature encountered in courts.

For Mary Beth, she believes that paralegal training will help in a mediation practice by giving a mediator a well-rounded view of many different types of situations

and, she avers, by helping the paralegal to relate to the parties that come to the mediation table.

If you think you might be interested in becoming a mediator, or feel that you might be temperamentally suited for it, Mary Beth enthusiastically suggests investigating that feeling. Many counties in Texas now have DRCs. Go online, check out your local bar association, or call your local DRC about the opportunities that may exist for you.

Says Mary Beth, "For me, it was one of the best decisions I have ever made."

Sami K. Hartsfield ACP is a paralegal with the Law Office Of Jennifer Black in Houston

NOTES

¹ Chapter 154 of the Texas Civil Practice and Remedies Code deals with "Alternative Dispute Resolution Procedures," and mediator qualifications are listed in 6154.052: QUALIFICATIONS OF IMPARTIAL THIRD PARTY (located on the web at <http://tlo2.tlc.state.tx.us/statutes/cp.toc.htm>).

² In 1987, the Texas Legislature enacted the Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. 154.001-.073. One of the major accomplishments of this legislation was the assurance of confidentiality, coupled with the non-adversarial nature of the negotiations, so as to facilitate a constructive agreement between parties.

³ Paralegals are welcome to join the ADR Section of the State Bar of Texas. For on online application, see http://www.texasadr.org/join_us.html.

⁴ For paralegals interested in mediation training, one option is taking the course at Texas Women's University, with campuses located in Denton, Dallas, and Houston, though classes are typically held at the Denton location. Information can be found on the Web at <http://www.twu.edu/ce/Mediation-Courses.asp>. Another option, as illustrated by Mary Beth Jones, is to apply for a training class at a local DRC. For a list of ADR centers currently operating in Texas, and for other ADR resources, please see the Alternative Dispute Resolution Section of the State Bar of Texas at <http://www.texasadr.org/links.html>. Interested candidates can also check with their local bar associations for other course options.

⁵ There is a plethora of web-sites with respect to mediation available, chief among them are the Texas Association of Mediators at www.tcmediator.org and the Alternative Dispute Resolution Section of the State Bar of Texas at <http://www.texasadr.org/index.html>.

⁶ See The 1987 Texas ADR Act listed in Note 2.

A Paralegal in The Lobby Environment

By Cynthia Minchillo, RP

In hopes of expanding my role as a paralegal, I jumped from a familiar law firm environment to an unfamiliar lobby environment across the street from the Capitol. Take away the intimidation factors of a new job, environment, town and career, and you are left with curiosity and interest. Like any other job, there is the daily barrage of information, and the key is upping the absorption rate. In doing so, I thought it would help me to learn by sharing part of the experience.

By the time you read this article, the Texas Legislature will have already convened the 81st session. And, by the time you read this, hundreds of bills will have already been assigned to committees for review. Time is of the essence since the legislature meets for a mere 20 weeks every other year (excluding special sessions and committee hearings). As a newbie in the legislative world, I am not sure what to expect.

Over the summer, I spent a lot of time learning the process, reading everything I could find, attending courses, and following committees as they worked through their interim charges to their final reports. I learned a lot from watching the process of the Texas Sunset Advisory Commission, which always seemed akin to a foreign body in graduate school. Now, I can say I have watched them in action, and understand their role and their importance. If you are curious about what the Commission has going on, you can find out at <http://www.sunset.state.tx.us/>. Committee hearings are also telecast online as well. You can follow those hearings through the Texas Legislature Online, <http://www/capitol.state.tx.us/>.

Unfortunately, summer is over as well as my extended vacation here in Austin. No more leaving the office early to swim in Barton Springs, explore the hill country, bike at Town Lake, or lie on the grounds of the Capitol on a blanket and get stalked by squirrels. Now both job and curiosity turn my attention to the hundreds of bills that have already been filed.

Every morning I get into the office, open my Mac, and scan through the list of new bills filed. I make a list of the ones that interest me the most, or the ones I need to pay special attention to (which are usually two different lists). It's like deciding whether to read the *New York Times* or the *National Inquirer*. You can do the same by going to the Texas Legislature

Online (*id.*)

Just to get you started, once you have made it to the home page, you will notice a search box at the top. For example, type SB445 in the search box. This is Senate Bill 445. It relates to allowing juries in civil cases to take notes about evidence during trial. It is an interesting bill, especially if you are a trial paralegal and your job includes watching and reading jurors. You will be able to view the bill in three separate formats, PDF, Word or plain Text. For those of you working in real estate, try SB 439, which changes the amount of time for foreclosure notices and how to deal with notice to tenants in the case of a foreclosure. If you work in the area of products liability, you might want to check out HB 526, which adds new sections for Pool Safety. Last, if you work in the area of worker's compensation or personal injury, check out HB 520, relating to the definition of a general contractor and more.

If you really want to track a certain piece of legislation through the process, you can sign on to "My TLO" by creating your own password and setting up alerts. Each day, you can run a report on My TLO of the bills you are tracking and it will tell you where the bill is in the process. It is an easy way to learn about the process without changing careers. Happy reading!

Cynthia Minchillo, RP, TBLS Paralegal-PI Trial Law, is the NFPA® ABA Approval Commission Representative.

Should education and training be required prior to being vested with the title paralegal?

By James D. Sheffer

It is a debate that ensues within the occupational field, the national paralegal organizations, and all areas of employment of paralegals. It has been my personal position at times, and expressed often by others, that "If an individual has experience and/or certification, they don't need formal education and should be exempt." While there is merit to this position, at what point do exemptions from formal education expire? How long should paralegal organizations continue to perpetuate

exemptions while promoting education as a hallmark of professionalism? Grandfather-type clauses are usually put in place to allow those already in a profession time to achieve new standards or complete their careers prior to full implementation. The paralegal profession has, by conservative calculations, surpassed the 30 year mark and practically all paralegal organizations maintain a clause that allows for exemption from formal education for membership.

Review of Occupational Outlook Statistics published by the U.S. Department of Labor reveals that the "Paralegals and Legal Assistants" occupation is firmly established and is "projected to grow 22 percent between 2006 and 2016, much faster than the average for all occupations." How is such growth to be managed? From where should the new paralegal come? On the job training, formal education, or a combination of both — what should the standard be? Who should train these paralegals and according to which criteria? Should paralegal organizations develop and recommend standards or should they rely upon institutions of higher learning? Pioneers, like the mem-

bership of the Paralegal Division of the State Bar have led and provided clear vision and leadership throughout the years. However, the profession is reaching a point of full maturity. The time has come for guidance in the area of training and education in order to receive proper recognition from institutions of higher learning and the working world. This recognition can only come through education and training that clarifies who is and who is not a paralegal.

Standards for education and training will allow career schools and institutions of higher learning to design coursework *based on input from those practicing in the profession* so they may better prepare paralegals to meet future employer demands. Currently there is no true academic model for paralegal training so attempts are made to fit training into historical academic models. Does paralegal education belong within the school of business, political science, criminal justice or should there be a discipline specifically dedicated to paralegals just as there is with nurses, educators, counselors, and other skill based occupations? Development of education standards supported by paralegals is the first step to finding paralegal education's proper place in the world of

academia because consulting paralegal organizations is usually the first step most take in learning how to become or train paralegals. Standardized education may also facilitate the promotion and development of new ideas and concepts, while refining knowledge, skills, and abilities expected from paralegals. Standard credentials for those who train paralegals could also be developed.

To date, many paralegal organizations have not developed and/or recommended specific standards for education and the result has been the proliferation of programs all over the map with various criteria that may confuse those contemplating entering the profession as well as those hiring paralegals. Paralegal training programs are housed within career schools, community colleges, four year universities, and continuing education programs. Proof of completion of a paralegal program comes in just as many varieties, to include Certificates with no other educational criteria, Associate of Applied Science Degrees, Bachelor Degrees, Certificates for College graduates, and even Master Degree programs. How does a prospective student, employer, or even a professional paralegal organization offering a path to certification decide which credentials are

legitimate and/or preferred? Clear guidance is needed and desired.

The American Bar Association and American Association for Paralegal Education have set substantial standards which are acceptable for membership in most of the paralegal associations.

Basic American Bar Association Guidelines require a paralegal program of education to be:

- At the postsecondary level of instruction;
- At least sixty semester hours, or equivalent, which must include general education and legal specialty courses; and
- Offered by an institution accredited by an institution accrediting agency acceptable to the committee.

The American Association for Paralegal Education advises that paralegal education programs should be able to demonstrate that their graduates possess:

- Critical Thinking Skills
- Organizational Skills
- General Communication Skills
- Legal Research Skills
- Legal Writing Skills
- Interviewing and Investigation Skills
- The Paralegal Profession & Ethical Obligations
- Law Office Management Skills

The guidance above is solid and appears to be industry standard. However, such standards are only embraced as long as they are recognized by the professionals within the paralegal occupation. The paralegal career field is on the cusp of full maturity and may only reach a full level of respect, full understanding of what a paralegal is versus what it is not, and proper place within the academic setting when clear standards are set as they are in other professions.

What is a profession? According to Encarta, it is "an occupation that requires extensive education or specialized training." Competent paralegals require extensive education and specialized training; therefore, education and training should be required prior to being vested with the title paralegal.

James D. Scheffer, Senior Chief Legalman, U.S. Navy (Ret.) is the Director of Admissions at the Center for Advanced Legal Studies in Houston, Texas.

PARALEGAL DIVISION VOTE 2009

District Director Elections

The PD's EIGHTH ONLINE ELECTION will take place April 3, 2009 through April 18, 2009.

District Director Elections:

The election of district directors to the Board of Directors will be held in even-numbered districts (Districts 1, 3, 5, 7, 11, 13, and 15).

Active members of the PD in good standing and listed on the official records of the Paralegal Division of the State Bar of Texas no later than two weeks prior to the date of any election are eligible to vote. **All voting must be completed on or before 11:59 p.m., April 18, 2009.**

Please take a few minutes to logon to the PD's website and cast your vote for district director (only odd-numbered districts vote in 2009). The process is fast, easy, anonymous, and secure.

Between April 3rd and April 18th, go to www.txpd.org

- In the Member-Only section, click on "Vote"
- Follow the instructions to login and vote (you will need your bar card number in order to vote).

If you do not have access to the Internet at home or the office, you can access the TX-PD website at your local library. No ballots will be mailed to members as *all voting will be online*. A postcard will be mailed to each Active voting member in April giving notification of the voting period. If you need any further information, contact the Elections Chair, Melanie Langford, at mlangford@akingump.com.

TAKE THE TIME, MAKE YOUR VOICE HEARD!

PARALEGAL DIVISION

STATE BAR OF TEXAS

EXCEPTIONAL PRO BONO SERVICE AWARD

The Paralegal Division of the State Bar of Texas is proud to sponsor an Exceptional Pro Bono Service Award. Its purpose is to promote the awareness of pro bono activities and to encourage Division members to volunteer their time and specialty skills to pro bono projects within their community by recognizing a PD member who demonstrates exceptional dedication to pro bono service. Paralegals are invited to foster the development of pro bono projects and to provide assistance to established pro bono programs, work closely with attorneys to provide unmet legal services to poor persons. This award will go to a Division member who has volunteered his or her time and special skills in providing uncompensated services in pro bono assistance to their community. The winner of the award will be announced at the Annual meeting, his/her expenses to attend the Annual Meeting will

be incurred by the Division, and a profile of the individual will be published in the *Texas Paralegal Journal*.

Please complete the following nomination form, and return it **NO LATER THAN MARCH 31, 2009** to the following:

Jodye L. Kasher, CP
Board Certified Paralegal - Personal Injury Trial Law
Texas Board of Legal Specialization
Fulbright & Jaworski L.L.P.
300 Convent St., Ste. 2200
San Antonio, TX 78205
210-270-9373 (d)
210-270-7205 (fax)
PDC@txpd.org

Individual's Name: _____

Firm: _____ Job Title: _____

Address: _____

Phone: _____ Fax: _____ Yrs. in Practice: _____

Work Experience: _____

Give a statement (on a separate sheet using "Nominee" rather than the individual's name) using the following guidelines as to how the above-named individual qualifies as rendering Exceptional Pro Bono Service by a Paralegal Division Member.

1. Renders service without expectation of compensation.
2. Renders service that simplifies the legal process for (or increases the availability) and quality of, legal services to those in need of such services but who are without the means to afford such service.
3. Renders to charitable or public interest organizations with respect to matters or projects designed predominantly to address the needs of poor or elderly person(s).
4. Renders legislative, administrative, political or systems advocacy services on behalf of those in need of such services but who do not have the means to afford such service.
5. Assist an attorney in his/her representation of indigents in criminal and civil matters.

Dollar Cost Averaging

Craig Hackler, Financial Advisor, Raymond James Financial Services

As more retirement savers begin to recognize the benefits of investing in the financial markets, the question often arises of when exactly to begin. Should an investor wait for a market downturn, a type of buying investments "on sale"? Should he/she invest as soon as possible so as not to miss the next possible market boom?

If interested in achieving long-term growth of capital, a seasoned financial advisor might recommend a strategy known as "dollar cost averaging" because, as too many investors have discovered, an undisciplined approach to investing can make portfolios overly sensitive to shifts in market value. The idea behind dollar cost averaging is simple. Instead of trying to time market highs and lows, the investor regularly invests a reasonable amount of money in a simple investment vehicle over a long period of time.

Such a strategy attempts to take market ups and downs out of consideration and turns them to your advantage through discipline. Since the focus of dollar cost averaging is on long-term results, investors should not be overly concerned with whether prevailing market conditions are strong or weak when they *begin* to invest. What matters, instead, is that they choose a realistic dollar cost averaging program based on their individual financial situation, begin that program and stick with it.

To illustrate how dollar cost averaging might work as an advantage, let's assume

that an investor decides to invest \$1000 in a mutual fund every three months. If shares in that mutual fund sell for \$10, and

\$4000 even though the purchase price was \$3000.

If this strategy is viewed from another perspective, you can see that the average cost per mutual fund share of the three quarters involved (\$10 plus \$5 plus \$10, divided by three) would be \$8.33. The average cost to the investor, however, would have been only \$7.50 (\$3000 divided by 400 shares).

The ability to stick with the original investment plan regardless of changes in prevailing market conditions is the key to success in dollar cost averaging, and investors should consider their ability to continue investing during periods of low prices. Of course, a profit is not guaranteed and dollar cost averaging will not protect against a loss in declining markets. However, following a dollar cost averaging plan

of action may help avoid getting out of the market when it's low and rushing in when it's high. Be sure to check with your financial advisor whether dollar cost averaging can help give you a discipline for success in the financial markets.

Craig Hackler holds the Series 7 and Series 63 Securities licenses, as well as the Group I Insurance license (life, health, annuities). Through Raymond James Financial Services, he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer your questions. Call him at 512.894.0574 or 800.650.9517.



no additional charges are involved, the first quarterly investment would purchase one hundred shares. Should the market then fall dramatically, reducing the value of fund shares to \$5, the \$1000 second quarterly investment would purchase 200 shares. If the market were to rebound and fund shares were to rise to \$10 in the third quarter, the next investment would again purchase 100 shares, valued at \$10 a piece.

Where would the investor stand after making the purchases outlined above? He would, of course, own 400 shares, purchased for a total investment of \$3000, with an ending market price of \$10 per mutual fund share. However, the shares would actually be worth more than was paid for them. The total current value is



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FEATURED 2009 SPEAKERS:

Robert S. Nichols is a partner at **Bracewell & Giuliani in Houston, Texas**. Mr. Nichols has defended many employment-related lawsuits in federal and state court and is board certified in labor and employment law. Mr. Nichols provides day-to-day legal advice to employers with respect to all aspects of the employment relationship.

Jonathan W. Gould, Ph.D., ABPP and **James R. Flens, Psy.D., ABPP**, both are licensed psychologists, members of the American Board of Professional Psychology, and are very involved in Forensic Psychology. Gould and Flens have worked together on many publications and presentations regarding Child Custody, Parenting Evaluations and Mental Health Care Experts.

WHY YOU SHOULD ATTEND:

Craig Ball, Attorney and Forensic Technologist, Certified Computer Forensic Examiner, Austin, TX (TAPS 2008 Speaker). TAPS is TOPS...in breadth of coverage, practical relevance and, above all, educational value. Every hour is jam-packed with useful tips from thoughtful leaders, helpful advice from peers and valuable takeaways. How do they deliver so much top-notch content and fun at such low cost?

J. Todd Hedgepeth, Chief, Air Force Regional Labor & Employment Law Office, San Antonio, TX (TAPS 2008 Speaker). Wow, I've both attended and spoke at numerous "attorney" continuing legal education courses, but the TAPS course goes to the head of the class! Never before have I seen the overwhelming majority of the participants paying such close, keen attention to the lectures and engaging in such substantive Q & A's with the presenters during and after each presentation. I, too, was in awe of the quality of my fellow guest speakers: judges, managing partners, etc. Lastly, the interchange between the attendees makes it clear that not only was this course a great learning experience for them, but an awesome networking opportunity as well. I would encourage all paralegals to make an effort to attend the next course.

NETWORK, NETWORK, NETWORK

(Additional cost to attend socials – Wednesday Social (a) \$15 attendees/\$75 guest, Thursday Social (a) \$15 attendees/\$45 guest)

Lounge by the Bay - Come Network and Play! - Grab your comfy PJ's (tasteful please) and slippers, and join us at the Wednesday Night Social "pajama party" at the hotel. It will be a casual evening full of fun and games guaranteed to make you laugh. Come see old friends and meet new ones! It's going to be "yachts" of fun overlooking the beautiful South Shore Marina!!

Anchors Aweigh – We're Cruisin' the Bay! –Come Aboard the FantaSea luxury yacht and enjoy a dinner cruise in the beautiful South Shore Harbour bay! We will set sail Thursday evening from the hotel for a memorable evening on the water. Space is limited on the yacht, so make your decision early to join us for the one-of-a-kind evening. Put on your favorite "cruise wear" and "boat shoes" and we'll float through the evening! If you want to check it out go to www.thehighwhiteboat.com.

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