New Games With Reports:

•"Go Fish" - Discovery Before Reports Are Due.
•"Three Card Monte" - Objections And Motions To Dismiss
•"Texas Hold 'Em" - Are These Reports Good Enough?

Bill Liebbe
Law Office of Bill Liebbe, P.C.
125 St. Francis Place
3455 Highland Road
Dallas, Texas 75228
214-321-6100
email: bliebbe@lobl.com

Texas Trial Lawyers Association
14th Annual Medical Malpractice Conference

September 25 & 26, 2003
J.W. Marriott Hotel Exhibit Center, Houston, Texas

I. Introduction

I am proud to be a Texas Trial Lawyer. I am proud that I belong to an organization that seeks to protect justice and the rights of individuals including the right to trial by jury.

During this past legislative session the public and legislature were deceived and in many cases outright lied to by lobbyists and special interest groups. The legislature was told that the number of healthcare liability claims frequency had increased since 1995 inordinately. The legislature was told that the filing of legitimate healthcare liability claims in Texas is a contributing factor effecting medical professional liability rates. They were told that the amounts being paid out by insurers in judgements and settlements (severity) have likewise increased inordinately in the same short period. It was based upon these lies and deceptions that Texas families injured and killed by incompetent healthcare providers lost their right to justice and their right to trial by jury. Let me set the record straight with the following facts:

During the past two decades tort reform legislation significantly limited patient rights. Before the 2003 assault on patient rights, doctors and healthcare providers were the most protected class of litigants in Texas. They enjoyed caps on damages, a cost bond requirement, 60 day notice of claim, proof of merit within 180 days of filing suit, a rigid two year statute of limitations, prejudgement interest protection on future damages, peer review privileges, a malpractice requirement in negative credentialing cases and shielding from the public view of information gathered by the National Practitioner Data Bank.

The State Board of Medical Examiners had a dismal record when it came to policing bad doctors. The expose on the board by the *Dallas Morning News* proved that when it came to quality healthcare for Texas families, the State of Texas was more interested in protecting doctors than protecting families. I told Dr. Patrick that I would be more than happy to help the State Board of Medical Examiners get rid of bad doctors. I told him that I would take a case a year for free on behalf of the State Board of Medical Examiners to go after incompetent doctors who hurt innocent Texans. I told him that I could get fifty to one hundred of my brothers and sisters in TTLA to do the same. He turned us down.

Statistics that came from the State Board of Medical Examiner's Office (www.tsbme.state.tx.us/statistics/pls2003.pdf) prove that the number of claims filed since 1995 have not increased inordinately. The number of claims have decreased. The average amount paid in judgements and settlements on medical malpractice case has been stable. The average amount paid on all claims has declined. There has not been an explosion in medical malpractice cases and there has not been an explosion in the amounts paid to victims of malpractice.

The number of actual lawsuits filed has not increased. Currently, there are no statewide reporting requirements for healthcare liability lawsuits. The Office of Court Administration collects case filings information annually, and medical negligence cases fall into the category of "Injury or Damage Other Than Motor Vehicle." According to the OCA, the number of case filings in this category has consistently decreased from 31,050 in 1994 to 19,590 in 2001.

Dollar amounts paid by insurance companies have been stable for 30 years. In 2000 and 2001 there were a few extraordinary verdicts, but current caps were applied and the actual amounts paid were a fraction of the verdicts. The amounts actually paid in most cases are unknown, because healthcare providers and their insurers require that those amounts remain confidential. In research for Americans for Insurance Reform, former Texas Insurance Commissioner Robert Hunter found that over the past 30 years the amounts paid by medical malpractice insurance companies in jury awards, settlements and defense costs directly tracked the rate of medical inflation. Hunter, who also served as Federal Insurance Administrator under Presidents Ford and Carter, found that not only has there not been "an explosion" in medical malpractice payouts during the last 30 years, payments in inflation-adjusted dollars have been extremely stable since the mid-1980s.

While medical malpractice insurance premiums have risen, data suggests that the real problem is not claims by injured patients but actual malpractice and the failure of the medical profession to supervise its members. Hospital patients die at a rate of 44,000 to 98,000 annually because of medical error, at an estimated total cost of between $17 and $29 billion in preventable deaths and injuries. (Institute of Medicine, 1999). According to the Texas Association of Business & Chamber of Commerce, the annual estimated cost attributed to medical error in Texas alone is $1.2 billion. The *Dallas Morning News* reported that of the 6,083 malpractice claims filed with the Texas State Board of Medical Examiners between January 2001 and May 2002, the Board failed to investigate a single case. The *Dallas Morning News* also reported that since 1997, not a single Texas doctor had his or her license revoked because of medical error.

As a result of the economic downturn, all insurance companies are suffering losses. Of the professional liability insurers who left Texas after 1999, most if not all will return when a Democrat is in the White House and our economy is stronger again.

During this past legislative session there were reports of legislators being threatened. Many were taken into backrooms for some serious arm twisting. I personally brought the truth about the medical malpractice crisis to many members of the house and senate during the session. One house member told me in no uncertain terms that the truth did not matter. The special interest groups and lobbyists who were behind this assault on patient rights, justice for victims and the right to trial by jury had "paid" for this session through their campaign donations and it was time to pay them back.

II. Expert Reports - Legislative Changes

A. Section 74.351(a) makes obvious and substantial changes from Article 4590i Section 13.01. The first sentence of Section 74.351(a) is as follows:

> *In a health care liability claim, a claimant shall,* ***not late than the 120th day*** *after the date the claim was filed,* ***serve*** *on the party or parties attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.*

Note the following key changes:

1. Reports and curriculum vitae are due not later than the 120th day after the claim was filed:

- The 90 and 180 day deadlines have been replaced
- Cost bonds are eliminated.

2. The reports and curriculum vitae must be "served" not furnished.

- Comply with TRCP 21a - Methods of Service
- File a "Certificate of Service" with the court.

B. Section 74.351(a) continues with the following sentence:

The date for serving the report may be extended by written agreement of the affected parties.

Note the following key changes:

1. The "good cause" one-time discretionary 30-day extension under 4590i Section 13.01(f) is gone.

2. The floating "30-day" grace extension for "accident or mistake" under Article 4590i Section 13.01(g) is also gone.

3. The only way to extend the date for serving the report is by written agreement of the "affected parties."

- "Affected parties" is defined in Section 74.351(r) (1).
- **POTENTIAL GOTCHA**: Although the signing and filing provision of former Article 4590i Section 13.01(h) was eliminated, don't forget that you must comply with TRCP 11.
- **POTENTIAL GOTCHA**: Extending the date for serving the Curriculum Vitae by agreement is not specifically provided for by Section 74.351(a).

III. "Go Fish" - Discovery Before Reports are Due.

A. Sections 74.351(s) and (u) provide the "fishing gear" for discovery before expert reports and curriculum vitae are served. During the time between the filing of the case and the date the reports and curriculum vitae are served the plaintiff can utilize written discovery and take two depositions. The defendants are not allowed to engage in any discovery before the reports and curriculum vitae are served.

1. **Pre-report written discovery.** Section 74.351(s) provides as follows:

> *Until a claimant has served the expert report and curriculum vitae as required by Subsection (a),* ***all discovery in a healthcare 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 healthcare*** *through:*
>
> > *(1) Written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;*
> > *(2) Depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and*
> > *(3) Discovery from non-parties under Rule 205, Texas Rules of Civil Procedure.*

The scope of discovery is extremely broad. The key phrase is "information...related to the patient's health care." Consider the following points:

- The scope is not limited to medical or hospital records because of the phrase "including medical or hospital records"
- "information" may be acquired - information is a very broad term defined in the dictionaries to mean the communication or reception of knowledge or intelligence; knowledge obtained from investigation, study, or instruction; definite knowledge acquired or supplied about something or somebody. The key here is that the legislature specifically used the word "information" and did not limit pre-report discovery to documents and facts.
- "related to the patient's healthcare" is also extremely broad because the term *healthcare* is defined in Section 74.001(10) to mean "any act or treatment performed or furnished, or that should have been performed or furnished, by any healthcare provider for, to, or on behalf of a patient during the patients medical care, treatment, or confinement."

2. **Pre-report depositions.** Section 74.351(u) provides the following:

> *Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection(a).*

Note that the plaintiff has an absolute right to take two depositions before the expert report is required to be served. Clearly, it was the intent of the legislature that the plaintiffs' expert be given the opportunity to review these depositions for purposes of formulating their opinions and writing their reports. Therefore, these two depositions must be taken far enough in advance of the due date for the report so that the deposition testimony can be transcribed, corrections to the transcript can be made by the witness, and the deposition read by the expert before his report is prepared and served. The witness has 20 days after being provided the transcript to make changes. TRCP 203. It is likely the transcript will not be delivered to the witness until at least 5 days after the date of the deposition. It is reasonable to allow the expert at least ten days after receiving the deposition to review the transcript, formulate opinions, and write the report.

Therefore, these two depositions must reasonably be taken within the first 85 days after the suit is filed.

B. Strategies and Tactics

1. Before suit is filed:

(a). Prepare written discovery. TRCP 192.7

(1) Prepare case specific Request for Production, Request for Admission, and Interrogatories to be served with the petition.

(2) Tailor the discovery so as to force the defendant to take a position early on. For example, in a case where the emergency room physician diagnosed gastritis and sent the patient home instead of having the patient admitted to rule out MI, consider serving request for admissions along the following lines:

1. Admit or deny that you included angina in your differential diagnosis.

2. Admit or deny that you did not include angina in your differential diagnosis.

These are proper because they seek to acquire "information" that relates to the patient's "healthcare".

(3) Prepare Depositions on Written Questions for the fact witnesses who will not be deposed upon oral examination during the first 120 days after filing the suit.

(b). In consultation with your retained expert choose two individuals that you will depose during the 120 day discovery period. Learn what information the consulting expert needs to formulate opinions.

2. Immediately upon receipt of the answer:

(a). Serve Notice of Depositions upon Written Question under TRCP 200.

(b). Send a written request to opposing counsel seeking agreed dates to take the oral depositions of the two witnesses you want to depose. Specifically request dates not later than the 85th day after filing suit.

(c). If no agreement can be reached, notice the depositions and set opposing counsel's motion to quash for hearing.

(d). Agree to dates beyond the 85th day after filing only if opposing counsel will agree to extend the date for expert reports (and curriculum vitae?) until well after the depositions have been signed and returned.

(e). Move to quash any and all discovery served or filed by defendants before your expert report and curriculum vitae are served.

IV. Three Card Monte - Objections and Motions to Dismiss

A. Section 74.351(b) - Failure to Serve Report Timely

If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or heath care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

Note the following key points:

1. On motion of defendant the court shall:

(a). Award defendants attorneys fees and costs.

(b). Dismiss with prejudice.

2. No remedy is available.

(a). No "good cause" provision.

(b). No "accident or mistake" provision.

Tip: If you will not be able to serve a report timely then consider filing a motion for non-suit without prejudice. If limitations has not expired, you can re-file. Note that Section 74.351 does not require payment of Court costs or the filing of a bond upon re-filing as was required under Article 4590i Section 13.01©).

B. Section 74.351(c) - Failure to Serve an Adequate Report

If an expert report has not been served within the period specified by Subsection (a) because 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 rulings 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.

Note the following key points:

1. The granting of a motion to extend is discretionary.

2. If granted, plaintiff has until the 150th day after filing suit to cure the deficiency.

3. If the motion is not heard until after the deadline or the Court takes the motion under advisement and you do not receive notice of the Court's ruling granting the motion to extend until after the 120 day deadline has expired, you have 30 days from the date you received notice of the ruling to cure the deficiency.

Tips:

- If the report received from the expert is inadequate and additional time beyond the deadline is needed to cure, consider filing the inadequate report and request an extension if an objection to the adequacy of the report is timely filed.
- Always file a motion to extend if an objection to the report is filed.
- If the Court sustains the objection to the adequacy of the report consider asking the Court to defer ruling on the motion to extend if more than 30 days is needed to cure. (See Section 74.351(c))
- There is only one 30-day extension allowed.

C. Objections to Adequacy of Reports

1. Defendant must file and serve objections to the adequacy of a <u>report</u> not later than the 21st day after the <u>report</u> was served or all objections are waived. Section 74.351(a). *Note: Objections to qualifications of the expert are governed by Section 74.401(e), 74.402(f), and 74.403(d).

2. The objective "good faith" effort rule and case law remain the same. Section 74.351(l).

3. The definition of "expert report" and case law remains the same. Section 74.351(r)(6).

4. If the trial court denies a motion to dismiss the defendant may take an interlocutory appeal under CPRC Section 51.014(9). A plaintiff may take an interlocutory appeal of an order granting a motion to dismiss under CPRC Section 51.014(a)(10).

V. Texas Hold-Em - Are These Reports Good Enough?

A. No statutory changes to the definition of "expert report" and standard of review of adequacy were made.

1. The definition of "expert report" found in Section 13.01(r)(6) is verbatim of the definition of expert report in Section 74.351(r)(6).

2. The "make a good faith effort" standard under Article 4590i was also unchanged. Section 74.351(l).

B. Case law developed under article 4590i is therefore applicable. Here are a few reminders:

1. Standard of review - abuse of discretion. American Transitional Care Centers of Texas, Inc. vs. Palacios, 46 S.W. 2d 873, 877 (Tex. 2001).

2. The two prong Palacios test still applies.

C. Examples of reports that were held inadequate.

1. Failure to state how the standard of care was breached - The report should state "The defendant [doctor] breached the standard of care by failing to ________." Richburg vs. Wolf, 48 S.W. 3d 375, 378 (Tex-App-Eastland 2001, pet. denied).

2. The "check the yes box" reports are not adequate - Tibbetts vs Gagliardi, 2 S.W. 3d 659 (Tex-App-Houston[14th dist] 1999, pet. denied).

3. The "doctor was negligent" report - conclusary reports are not adequate. Hightower vs Saxton, 54 S.W. 3d 380, 383 (Tex-App-Waco 2001, no pet.).

4. Failing to address causation. Gonzales vs. El Paso Hospital District, 68 S.W. 3d 712 (Tex-App-El Paso 2001, no pet.); Bowie Memorial Hospital vs Wright 79 S.W. 3d 48 (Tex. 2002).

5. Failure to show qualifications - a report and CV must establish that the expert is qualified to testify about the issues contained in the report. Chisholm vs Maron 63 S.W. 3d 903 (Tex-App-Amarillo 2001, no pet.).

VI. Conclusion

The lobby-lead legislative assault on victims of malpractice was despicable. It is like punishing the child who was abused. We are the voice of justice. We will not be silenced. Our voices will be stronger.