

MEDICAL MALPRACTICE IN TEXAS, 2011

PAULA SWEENEY
Howie & Sweeney, L.L.P.
(214) 523-8800

State Bar of Texas
18th ANNUAL
ADVANCED MEDICAL MALPRACTICE COURSE
March 17-18, 2011
Santa Fe

CHAPTER 8

TABLE OF CONTENTS

I. SCOPE OF THE ARTICLE 1

II. THE GOVERNING STATUTES ARTICLE 4590I AND CHAPTER 74 1

A. Chapter 74..... 1

 1. Definitions..... 1

B. Article 4590i 3

 1. Definition of “Health Care Provider” 3

 2. Definition of “Health Care Liability Claim” 5

 3. Definition of “Physician” 10

 4. Chapter 74 Conflict with Other Law..... 10

C. Chapter 74 and Sovereign Immunity 10

D. Chapter 74 - The Deceptive Trade Practices Statute 10

E. Section 4.01 and Notice of Claim 10

F. AD DAMNUM CLAUSE..... 14

G. INFORMED CONSENT, CHAPTER 74 SUBCHAPTER C AND ARTICLE 4590I, SUBCHAPTER F..... 14

H. The “Bad Result” Instruction: Article 4590i, Section 7.02 and Chapter 74 §74.303 (e)(2) 15

I. Subchapter D, Emergency Care 15

J. CHAPTER 74.154 - NEW JURY INSTRUCTION..... 19

K. RES IPSA LOQUITUR 20

L. STATUTE OF LIMITATIONS AND REPOSE 21

 1. Limitations Under Article 4590i..... 21

 2. The Open Courts Exception to the Statute of Limitations Since 1977 24

 3. Tolling of the Statute of Limitations Since 1977 35

 4. Interaction of Article 4590i and Chapter 74 With Other Statutes..... 41

 5. Tolling Provision and the Effect of Defective Pleadings 43

 6. Statute of Limitations and Its Effect on Derivative Claims 43

 7. Weekends and Holidays Do Not Extend The Statute 44

 8. Minority Tolling and Corporate Dissolution 44

 10. The Effect of Chapter 74, Section 74.251..... 44

M. LIMITATION ON DAMAGES - CPRC 74.301, 74.302 & 74.303 AND ARTICLE 4590I, SEC. 11.02..... 50

 1. CPI Adjustment to the Death Cap..... 51

 2. The Constitutionality of the Damage Caps 52

 3. Article 4590i’s Damages Cap and Its Interaction with Other Damages Provisions 55

 4. Unanswered Questions..... 57

N. SUBCHAPTER M, ARTICLE 4590I, §13.01 AND SUBCHAPTER H, CHAPTER 74, THE EXPERT REPORT REQUIREMENT..... 58

 1. CPRC Section 74.351, The Expert Report..... 59

 2. Rule 202 Depositions 61

 3. Deadline is 120 Days 61

 4. Defense Deadline is 21 Days 61

 6. Parties May Agree to Extend 62

 7. Court May Grant 30-Day Extension 62

 8. Interlocutory Appeal 63

 9. Is the Deposition of the Defendant physician Precluded Prior to the Filing of the 120 day Report?..... 63

 10. What is “Service” Under Chapter 74? 63

 11. One Service is Enough..... 65

 12. The Report Need Not be Signed. 66

 13. C.V.’s 66

 14. Are “Magic Words” Required Regarding Causation? 66

 15. Inconsistent Statements Within the Report 67

 16. If the Court Can Determine the Basis of Plaintiff’s Complaint, the Report is Adequate. 67

17.	“Good Faith Efforts” is the Standard.....	67
18.	How Many Reports Are Required?.....	67
19.	A Report Cannot Be Entirely Conclusory.....	67
21.	The Standard of Review.....	68
22.	No “Good Cause” “Accident” or “Mistake” is Required.....	68
23.	In Emergency Room Cases, the Report Need Not Speak to “Willful and Wanton Negligence.”.....	69
24.	Expert Reports in Res Ipsa Loquitur Cases.	69
25.	Non-suit and the 120 Day Clock.....	69
26.	Nonsuit Does Not Cancel Motions for Sanctions or Interlocutory Appeals.....	70
27.	Qualifications Must Be Shown Within the Body of the Report.....	70
28.	Distinction Between Defendants Who Are Individuals and Defendants Who Are Not	71
29.	74.351(l), 74.351(d) and Interlocutory Appeal	71
30.	Defendant’s Failure to Answer or Have a Registered Agent Does Not Vitiating the Duty to Serve a Report But May Result in Tolling of the 120 Day Clock	73
31.	An Expert May Apply the Same Standard of Care to Two Physicians.....	73
32.	Docket Control Orders.....	73
33.	Must a Report During the Grace Period be from the Same Expert?	73
34.	Sanctions and Court Costs	74
35.	The Importance of Requesting a Grace Period Extension	74
36.	The Expert Report and Damages	75
37.	Interplay Between “Deficient Report” and “No Report”	75
38.	Effect of Amending Claims or Adding Parties	75
39.	Threshold Means Threshold	76
40.	Constitutionality of the Expert Report Requirement	77
41.	Plaintiff’s Experts May Rely on Talking with the Patient	77
42.	Chapter 74 Report Cannot be Based on Assumptions	77
43.	Must Plaintiff’s Experts be from Texas?	78
44.	Must Use Defendant’s Name	78
45.	Experts from Different Fields Permitted?.....	78
46.	Plaintiff’s Counsel May Write the Chapter 74 Report.....	79
47.	Plaintiff Does Not Forfeit the Opportunity to Cure Deficiencies by Responding to the Objections Made by Defendant.....	79
48.	Reports in Informed Consent Cases.....	79
49.	The Chapter 74 Report in Federal Court.....	79
50.	Daubert Striking of Expert Does Not Invalidate the Report.....	80
51.	Plaintiff Must Have a Specialized Expert to Maintain a Negligent Credentialing Claim.....	80
52.	The Report Requirement When Defendant Defaults	80
53.	Vicarious Liability Claims Do Not Require Separate Expert Reports.....	81
54.	Court Must Rule.....	82
2.	Article 4590i and the Expert Report Requirement.....	82
1.	Failure to File: Accident or Mistake vs. Conscious Indifference.....	83
2.	Adequacy of the Expert Report.....	87
3.	Mandamus and Interlocutory Appeals in the Expert Report Context	90
4.	The Standard of Review.....	90
5.	The Constitutionality of Section 74.351 and 13.01	90
6.	Effect of Non-Suit on the Expert Report Requirement.....	92
7.	The Expert Report as Summary Judgment Evidence.....	92
8.	Effect of Abatement on Section 13.01 and Chapter 74 Requirements.....	93
9.	Effect of Bankruptcy on Section 13.01 Requirements.....	93
10.	The Distinction Between Section 13.01(f) & Section 13.01(g) “Extensions”	94
11.	Can the Defense Waive A Complaint About §13.01 Reports?.....	96
12.	The Defense Is Not Required to Inform Plaintiff of the Nature of Any Deficiency In Its §13.01 Report.....	97
13.	Health Care Claims Not Requiring §13.01 Reports.....	97
14.	Experts From Different Schools	98

15.	What is to “Furnish” a §13.01 Report?	98
16.	Effect of Amending Claims	99
17.	§13.01 and Privilege	99
18.	Four Corners of the Report	99
19.	Vicarious Liability Claims Do Not Require Separate Expert Reports.....	99
20.	§13.01 Reports in Federal Court.....	100
21.	Other Provisions of §13.01	101
O.	CHAPTER 74.352 - DISCOVERY PROCEDURES.....	101
P.	SUBCHAPTER 1 OF CHAPTER 74 AND §14.01 EXPERT WITNESSES	101
1.	The General Rule	103
2.	Experts Not From Texas	104
3.	Case Law.....	104
4.	Instances in Which Expert Testimony Many Not Be Required.....	110
5.	Daubert and Its Progeny.....	111
6.	Personal Preference or Opinion	112
7.	Expert Opinion Under Rule 704 Admissible On Ultimate Issues of Mixed Law and Fact .	112
8.	Physician Acting as a Specialist.....	113
9.	The Physician Must Exercise His Skill With Reasonable Care and Diligence.....	113
10.	The “Same School” Rule	113
11.	Evidence-Custom Admissible, But Not Conclusive On the Standard of Care in Medical Malpractice Cases	114
12.	Professional Standards	115
13.	Basis for Expert’s Opinion.....	115
Q.	Arbitration Agreements, Chapter 74, Subchapter J., and Article 4590i, Subchapter O, Section 15.01.	116
1.	The Statute	116
2.	Case Law.....	117
R.	PAYMENTS FOR FUTURE LOSSES, CHAPTER 74, SUBCHAPTER K, SECTIONS 74.501–74.507.....	117
S.	A NOTABLE OMISSION	119
III.	THE TEXAS TORT CLAIMS ACT	119
A.	LEGAL LIMITATIONS ON LIABILITY OF GOVERNMENTAL ENTITIES	119
1.	State and County Hospitals	119
2.	The Mandatory Election Clause, Section 101.106.....	119
IV.	PLEADING AND PROVING THE MEDICAL MALPRACTICE CASE.....	129
A.	PLEADINGS OF PLAINTIFF	129
1.	Notice of Claim.....	129
2.	Ad Damnum.....	129
B.	PLEADINGS OF DEFENDANT	130
1.	Limitations Defense	130
2.	Lack of Notice.....	130
3.	Damages Limitations	130
4.	Contributory Negligence of Plaintiff	130
C.	THE CAUSE OF ACTION	131
1.	Establishing the Existence of a Duty: The Patient-Physician Relationship.....	131
2.	Liability of Physician for Acts of Hospital Personnel	137
3.	Liability for Residents.....	138
4.	Liability of Physician for Acts of Another Physician	138
5.	Breach of Warranty.....	139
6.	Theories of Recovery-Negligence	139
7.	Battery.....	141
8.	Lack of Informed Consent	141
9.	Abandonment.....	146
10.	Fraud	146
11.	Contract to Cure.....	147

12.	Texas Deceptive Trade Practices Act	148
13.	Malicious Prosecution.....	148
14.	False Imprisonment.....	149
15.	Strict Liability	149
16.	Unauthorized Disclosure of Confidential Information	149
17.	Experimental Medicine.....	150
18.	Unnecessary Surgery	151
19.	Prenatal Injuries	151
20.	Wrongful Pregnancy or Conception	152
21.	Wrongful Birth.....	152
22.	Wrongful Life	152
23.	“Wrongful Continued Life”	152
24.	Spoliation	153
25.	Wrongful Death and Survival Actions.....	153
26.	Physician - Patient Relationship Requirement for Wrongful Death Action	154
27.	Liability for Infection.....	154
28.	Loss of a Chance.....	154
29.	Civil Rights Violation.....	154
30.	Sexual Exploitation.....	154
31.	Negligent Infliction of Emotional Distress	155
32.	Bystander Recovery	155
33.	Intentional Infliction of Emotional Distress.....	155
34.	Negligent Misrepresentation	155
35.	Failure to Consult a Specialist	156
36.	Physician Liability Arising from Worker’s Compensation Examinations or Care.....	156
37.	Negligence of Dentists.....	156
38.	Liability of Original Tortfeasor for Subsequent Medical Malpractice	156
39.	“Patient Dumping” or the Duty to Treat in the Emergency Room	157
40.	Sexual Abuse & Repressed Memories.....	159
41.	Fear of AIDS.....	159
42.	Negligent Disregard of Patient’s DNR Directive	159
43.	Long-Arm Jurisdiction, Out-of-State Physicians.....	160
V.	PLEADING AND PROVING THE HOSPITAL LIABILITY CASE	160
A.	PROVING THE PLAINTIFF’S CAUSE OF ACTION	160
1.	Vicarious Liability	160
2.	Direct Corporate Liability.....	164
VI.	NURSING HOME LIABILITY	169
A.	REPEAL OF TEXAS HUMAN RESOURCES CODE §32.021(1), (K) AND TEXAS HEALTH AND SAFETY CODE §242.050.....	169
B.	CHANGES TO THE PUNITIVE DAMAGES STATUTE.....	170
VII.	PRELIMINARY DISCOVERY	170
A.	Discovery Tools In Medical Malpractice Cases	170
B.	Rule 202 Depositions.....	170
C.	Incident, Unusual Occurrence Or Variance Reports.....	170
D.	Compelling Physical and Mental Examinations	171
1.	Expert Witnesses.....	171
2.	Depositions of Hospital Corporate Officials.....	172
3.	Photographs.....	172
4.	Financial Condition of a Hospital	172
5.	Privileges	173
B.	MANDAMUS AS A REMEDY	179
VIII.	SUMMARY JUDGMENT PRACTICE	180
A.	SUMMARY JUDGMENT PRACTICE IN TEXAS.....	180

1.	Adequate Time for Discovery	180
2.	How Much Evidence is Enough?.....	180
3.	Applicability of Rule 166A(i).....	181
B.	SUMMARY JUDGMENT PROOF.....	181
1.	Affidavits	181
2.	Depositions	182
3.	Answers to Interrogatories and Requests for Admissions	182
4.	Medical Records	183
C.	DETERMINING IF SUMMARY JUDGMENT IS PROPER.....	183
1.	Has the Movant Negated an Essential Element of the Claimant’s Claim or Defense?.....	183
2.	Has a Fact Issue Been Raised?.....	183
3.	The Movant Must Raise All Grounds at the Trial Court Level	183
4.	Expert Testimony Must Be Sufficient	184
5.	Expert Must Be Familiar with the Standard of Care.....	184
6.	The Standard of Care Must Be Specifically Stated.....	184
7.	Causal Link Must Be Established	185
8.	Fact Issue on Unpleaded Theories is Sufficient.....	186
9.	Respondent’s Summary Judgment Proof.....	186
10.	Continuances.....	186
D.	APPEALING THE GRANT OR DENIAL OF SUMMARY JUDGMENT.....	186
IX.	CROSS EXAMINATION OF MEDICAL EXPERTS IN THE MEDICAL MALPRACTICE CASE.....	187
A.	QUALIFICATIONS OF EXPERT	187
1.	Professional Qualifications	187
2.	Lack of Medical Specialty Board Certification	187
3.	Hospital Medical Staff Privileges	187
B.	USE OF MEDICAL TREATISE AND LITERATURE.....	187
C.	USE OF MEDICAL RECORDS	187
D.	BIAS, PREJUDICE, REPUTATION OR PECUNIARY INTEREST.....	188
1.	Bias and Prejudice.....	188
2.	Financial Interest of Expert in Success or Outcome of Case	188
3.	Professional Reputation or Character	188
4.	Prior Litigation Testimonial Experience or Expert.....	188
5.	Specific Financial, Accounting and Income Records of Expert – Not Discoverable or Admissible for Impeachment Purposes	188
6.	Insurance Carriers	188
7.	Ex Parte Conferences.....	188
E.	Other Suits	189
F.	Prior Complaints Against Experts.....	189
G.	Prior Criminal Record of Expert.....	189
X.	DAMAGES IN MALPRACTICE CASES	190
A.	DAMAGES LAW IN TORT CASES APPLY TO MALPRACTICE ACTIONS	190
B.	DAMAGES UNIQUE TO MALPRACTICE CASES	190
XI.	THE PLAINTIFF’S APPROACH TO THE COURT’S CHARGE	191
A.	THE COURT’S CHARGE IN TEXAS	191
1.	General Rules and Trend Toward Simplification	191
2.	The Charge in Malpractice Cases	191
B.	INSTRUCTIONS AND SPECIAL ISSUES - LEGAL AUTHORITY	192
1.	“Negligence” – Conveying the Legal Standard of Conduct for Physicians to the Jury	192
2.	“Proximate Cause” Definition	193
3.	“Occasion In Question” Definition	193
4.	Inferential Rebuttals.....	194
5.	Informed Consent.....	195
6.	Submitting Res Ipsa Loquitur by Instruction.....	196
7.	Damages Limit Instruction	196

8. Bad Result Instruction..... 197

9. Establishment of Facts: Direct or Circumstantial Evidence 197

10. Burden of Proof: Preponderance of Evidence by Definition 197

11. Instruction on Spoliation..... 197

12. Disapproved Instructions and Definitions..... 198

13. Submission of Emergency Room Cases 198

XII. INSURANCE COVERAGE..... 199

 A. MULTIPLE CLAIMS AND DEFENDANTS 199

 B. THE IMPORTANCE OF THE “CLAIM” DATE 199

APPENDIX “A” 201

APPENDIX “B” 210