

THE “FILL-IN-THE-BLANK” EXPERT REPORT

Keeping Control on Going Forward with Your Case

Tim Riley

**RILEY LAW FIRM
1225 N. Loop W., Ste. 810
Houston, TX 77008-1757**

© 2004 Riley Law Firm

**15th Annual TTLA Medical Malpractice Conference
October 21-22, 2004**

Table of Contents

I.	INTRODUCTION	4
II.	BRIEF HISTORY OF THE EXPERT REPORT REQUIREMENT	4
	A. <u>Pre HB-4 Requirements</u>	4
	B. <u>Current Provisions</u>	5
	1. “Standard of Care” Expert Qualifications	5
	2. Causation Expert Qualifications	5
	3. The “Fair Summary”	6
	4. Identification of the Applicable Standard of Care and Identification of the Breach	6
	5. Satisfactory Explanation with Respect to Causation	6
	C. The “ <i>Palacios Spin</i> ”	6
	D. <u>Report Challenges</u>	7
	E. <u>Interlocutory Appeal</u>	7
III.	THREE BIG TRAPS	8
	A. <u>Waiving Protections by Claimant’s Use of Reports</u>	8
	1. Voluntary	8
	2. Involuntary	8
	B. <u>The Summary Judgment Trap</u>	8
	C. <u>Prior Drafts of Reports</u>	8
IV.	PREPARATION OF A REPORT THAT WILL WITHSTAND CHALLENGE	8
	A. <u>Closely Guiding the Expert</u>	10
	B. <u>The “Fill-in-the-Blank” Expert Report</u>	12
	C. <u>Counsel Preparation of the Report</u>	14
V.	EXAMPLES OF REPORT STATEMENTS THAT JUST DON’T MAKE IT	13
VI.	CONCLUSION	15

THE “FILL-IN-THE-BLANK” EXPERT REPORT

Keeping Control on Going Forward with Your Case

I. INTRODUCTION

Changes in expert report requirements have created treacherous ground. Avoiding pitfalls can mean the difference between settlement of your case and a legal malpractice lawsuit.

II. BRIEF HISTORY OF THE EXPERT REPORT REQUIREMENT

A. Pre HB-4 Requirements

The evolutionary history of the requirements regarding expert reports, currently contained in Chapter 74 of the Texas Civil Practices and Remedies Code, should be hauntingly familiar to every trial lawyer and perhaps even to the occasional reader of Texas newspapers. In 1977, amid vociferous complaints from health care providers and health care liability insurers – that malpractice premiums were threatening medical practices and driving physicians out of Texas – the Legislature passed a comprehensive medical malpractice statute, incorporated at article 4590i, Texas Revised Civil Statutes. The bill was expressly designed “to control” medical malpractice cases by reducing or eliminating the filing of what the 1977 Legislature was assured was a system-threatening avalanche of “frivolous” malpractice lawsuits, among other goals.

Notably, the original version of article 4590i contained no requirement for the provision of reports from qualified experts, at the case development stage, as a prerequisite for a plaintiff to proceed with her suit. However, as any medical malpractice plaintiff or defense practitioner of the era could attest, this generally was not a problem in ensuring, long before trial, that plaintiffs legitimately had experts available and ready to testify in support of their claims. It only meant that, if reports were desired (and they virtually always were), rather than statutorily requiring the production of reports defense counsel had to move for a docket control order requiring the production of reports with expert designations.

Alternatively, even very early in the case defense counsel could easily “smoke out” plaintiffs’ expert reports by filing a motion for summary judgment

based on the affidavit of their own client. *See, e.g., Johnston v. Vilardi*, 817 S.W.2d 794, 797 (Tex.App.-Houston [1st Dist.] 1992, writ denied). The risk in failing to meet such a motion with a controverting affidavit from one or more experts in support of their clients’ claims was generally sufficient to compel the production of expert affidavits. *See, e.g., Gordon v. Ward*, 822 S.W.2d 90, 91 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (lawyers sued for failing to file controverting affidavit in response to defendant physician’s affidavit in summary judgment motion).

Still dissatisfied, in 1993 physicians’ insurers went once again to the 73rd Texas Legislature to complain about the impending catastrophe to health care in Texas caused by the unabated proliferation of frivolous medical malpractice lawsuits. This time, the Texas Legislature added section 13.01 to article 4590i. For the first time, the prerequisite of expert reports as a condition of proceeding with suit was addressed.

This provision, however, was relatively benign. To comply, within 90 days of filing suit a plaintiff’s lawyer simply had to file an affidavit from himself, stating that he had: “obtained a written opinion from an expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim, and that the acts or omissions of the physician or health care provider were negligent and a proximate cause of the injury, harm, or damages claimed.” Art. 4590i, § 13.01, Tex. Rev. Civ. Stat. Production of the reports was not required, and for enforcement the provision relied on the ethics of practitioners to dissuade them from filing perjurious affidavits. Even if the lawyer were unwilling to file his own affidavit, compliance could be had simply by filing a cost bond. *Id.*

Yet unsated, physicians and their insurers once again appealed to the 74th Texas Legislature to tighten the rules on expert reports. Once again, their efforts were rewarded. This time, the Legislature amended section 13.01 to require the actual production of expert reports within 180 days of the suit-filing date, even if the lawyer filed

a cost bond within 90 days of suit being filed. The amendment was needed, according to the applicants, “to address the [apparently still] perceived problem that litigants were filing non-meritorious claims against medical practitioners which were not adequately investigated in a timely manner.” This, it is said, led doctors to settle such suits, regardless of the merits, and also to expend great amounts of money on defending against ultimately “frivolous claims.” *See, Horsley-Layman v. Angeles*, 968 S.W.2d 533, 537 (Tex.App.-Texarkana 1998, writ denied) (citing HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 971, 74th Leg., R.S. (1995).

B. Current Provisions

The most sweeping changes in medical malpractice lawsuits were enacted by the 78th Legislature in 2003. As the basis for such changes, once again health care providers and liability insurers contended they had: “seen an increase in frivolous lawsuits filed against them and an increase in the cost of malpractice insurance.” Molina, M., *Doctors Say Malpractice Lawsuits are Hurting City*, El Paso Times (March 18, 2003). Indeed, according to this group, as a result of the failure of prior legislatures to curtail frivolous medical malpractice lawsuits, many physicians had: “limited their areas of practice, retired early or moved to other areas.” *Id.* In their best-rehearsed Chicken Little fashion, the lobby argued vociferously that, “[i]f this [medical tort reform legislation] doesn't happen soon, [it] will be a disaster.” *Id.*

Yet again, the efforts of these groups were richly rewarded by the Legislature. First, the entirety of article 4590i was repealed and major sections of it were moved to the newly created Chapter 74 of the Texas Civil Practices and Remedies Code. With regard to the pre-suit requirements for expert reports, the bond provision was eliminated. In its place, reports and *curricula vitae* of experts are required to be served (but not filed with the court), within 120 days of the time suit is filed, although that time limit can be extended by agreement. § 74.351(a), Tex. Civ. Prac. & Rem. Code.

1. “Standard of Care” Expert Qualifications

The reports must be from “qualified” medical experts. To be qualified with respect to the standard of care of a defendant physician, the expert must: (a) be practicing at the time of the report or when the incident in issue arose; (b) have knowledge of the applicable standards of care; *and* (c) be qualified, by training and experience, to offer an opinion on those care standards. *Id.* at § 74.351(r)(5)(A) (incorporating “expert” definition in § 74.401(a)). Moreover, the standard of care expert, although not necessarily required to be of the “same school” as the defendant, must nonetheless be practicing in a specialty field that: “involves the same type of care or treatment as that delivered by the defendant health care provider.” *Id.* at § 74.351(r)(5)(B), incorporating the requirements of § 74.402, including those of § 74.402(b)(1).

2. Causation Expert Qualifications

With regard to causation, the expert need only be qualified in accordance with the requirements of the Texas Rules of Evidence. § 74.351(r)(5)(C). The requirements under the Rules of Evidence with regard to medical causation testimony generally are those contained in Rule 702. That rule generally allows any person, qualified by education, training, or experience in a scientific, technical, or otherwise specialized field, to provide opinions if those opinions would be helpful to the jury in determining a contested issue of fact. Tex. R. Evid. 702.

Despite the seeming simplicity of the language of Rule 702, the line can sometimes be difficult to draw as to when an expert qualifies on causation. For example, a neuroscientist, who was not a physician but who was otherwise trained with regard to the cause of brain damage, was deemed qualified to testify with respect to causation. *See, Ponder v. Texarkana Mem. Hosp., Inc.*, 840 S.W.2d 476, 477-78 (Tex.App.-Houston [14th Dist.] 1991, writ denied). However, a nurse may or may not be qualified, without regard to her training. *Compare, Costello v. Christus Santa Rosa Health Care Corp.*, ___ S.W.3d ___, 2004 Tex.App. LEXIS 5500 (Tex.App.-San Antonio, 2004, no pet.) (nurse not qualified to testify on medical causation because that involves a

“medical diagnosis,” which only a licensed medical doctor can give), and *Lesser v. St. Elizabeth Hosp.*, 807 S.W.2d 657, 659 (Tex.App.-Beaumont 1991, writ denied) (nurse might be qualified to testify on causation, depending on training and experience). In any event, for an excellent discussion of the Rule 702 considerations in determining the qualifications of the medical causation expert (in an otherwise indefensibly abominable majority opinion), see, *Roberts v. Williamson*, 111 S.W.3d 113, 120-21 (Tex. 2003).

3. The “Fair Summary”

The expert report must contain: “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.” § 74.351(r)(6).

4. Identification of the Applicable Standard of Care and Identification of the Breach

It is insufficient for the report to fail to identify specifically the standard of care involved for the illness or injury encountered. A mere statement that the defendant's conduct fell below the applicable standard of care is insufficient as a matter of law. See, e.g., *Fischer v. Tenet Hosps.*, 106 S.W.3d 110, 116 (Tex.App.-Dallas 2002), *rev'd on other grounds*, 111 S.W.3d 67 (Tex. 2003). Similarly, a failure to specify precisely how the defendant's conduct breached the applicable standard of care is fatal. See, e.g., *Eichelberger v. St. Paul Med. Center, Inc.*, 99 S.W.3d 636, 639 (Tex.App.-Dallas 2003, pet. denied).

5. S a t i s f a c t o r y Explanation with Respect to Causation

A conclusory report, which does not set out the factual bases of the opinions rendered, is insufficient. See, e.g., *Bowie Mem. Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (failure of expert to explain how lack of procedure for timely interpreting x-rays was actual cause of plaintiff's

injury). See also, *Costello*, ___ S.W.3d at ___ (statement by expert physician that, had child been properly triaged and evaluated in ER, child probably would have survived, deemed insufficient for failure to set out factual summary of how different triage and evaluation would have obtained different result), and *Windsor v. Maxwell*, 121 S.W.3d 42, 47-48 (Tex.App.-Fort Worth 2002, pet. denied) (statement by expert that risk of injury increased with subpar treatment insufficient).

C. The “Palacios Spin”

By far the most significant case construing expert report requirements is *American Transitional Care Centers, Inc. v. Palacios*, 46 S.W.3d 873 (Tex. 2001). In *Palacios*, the Court was asked to construe the provisions of the 1995 version of article 4590i § 13.01.

The Court issued three principal holdings, the first two of which are only peripherally relevant to the subject of this paper. First, the decision as to whether a report is sufficient is subject to an abuse of discretion review. *Id.* at 875. The second holding related to criteria by which a trial court might extend the time limit for filing reports, which exceeds the scope of this paper. Basically, though, the *Palacios* Court held that the trial court is limited to an objective determination of whether the report constituted a “good faith” compliance attempt; *i.e.*, only the information within the four corners of the report itself could be considered.

The chief holding of *Palacios* relevant to this paper, though, was that, to be deemed sufficient, a 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.* The Court based its holding in this regard on the stated legislative purpose of reducing frivolous claims. *Id.* at 879. Despite the logic and supportability of the Court's position, it is this aspect of *Palacios* which has proven to be the genesis of the myriad of opinions and traps with regard to expert reports. Moreover, despite the fact that it interpreted a superseded statutory provision, *Palacios* remains good law as the language it interpreted in section 13.01 of article 4590i is materially identical to the recodification of article 4590i in Chapter 74, Texas Civil

Practices and Remedies Code.

D. Report Challenges

Not quite all of Chapter 74 was bad news for the plaintiffs' bar. In what can only be charitably classified as a completely misdirected opinion, the Texas Supreme Court in 2003 held that, under the old article 4590i expert report requirements, there is essentially never a waiver of the right to challenge a report by the defense, absent some express statement of the defendant's intent to waive any challenge. *Jernigan v. Langley*, 111 S.W.3d 153, 157 (Tex. 2003) (*per curiam*). In *Jernigan*, the defendant physician waited more than 600 days after the report was filed and participated in discovery before raising an objection to the adequacy of the 180 day report.

Apparently even the very conservative 78th Texas Legislature recognized the injustice in allowing a defendant to lay behind the log indefinitely on a challenge to an expert report, as was mysteriously sanctioned by the *Jernigan* Court. Accordingly, Chapter 74 now requires a defendant to raise a challenge to the sufficiency of the expert report within 21 days of its being served or all objections to the sufficiency of the report are deemed waived. § 74.351(a), Tex. Civ. Prac. & Rem. Code. Because an answer to the suit is not due until the first Monday after the 20th day of service of the petition, some plaintiffs' lawyers are now making it their practice to serve the expert report with the petition. Because of the typical delays in getting counsel assigned and answers prepared and filed, it is thought that doing so might often result in no challenge being timely filed.

In addition, the *Palacios* decision at a minimum left open a question as to whether a trial court could grant a 30 day extension under old article 4590i if the decision regarding the adequacy of the report was not made until after the 180 day deadline had passed. That issue was also resolved in favor of claimants in Chapter 74. Now as before, if the report is found deficient the trial court still can grant the claimant a 30 day extension to serve a compliant report. § 74.351(c). However, if the claimant's attorney does not receive notice that the court has deemed the report insufficient within the 120 day time period, the 30 day extension must run from the date the plaintiff first receives notice of the judicial determination. *Id.* Remaining not completely answered, though,

is the situation where the trial court deems the report insufficient less than 30 days prior to the 120 day deadline but the claimant's counsel receives contemporary notice of the decision. While a common sense application of § 74.351(c) would dictate that the 30 days simply runs from the date of notice even if that would allow the report to be served beyond 120 days of the date suit was filed, the *Palacios* opinion leaves some reason for concern.

E. Interlocutory Appeal

For a long time it was not clear whether a trial court's refusal to dismiss a case for the failure to file an adequate expert report under article 4590i could be subject to a mandamus proceeding. *See, In re Schneider*, 134 S.W.3d 866, 869-70 (Tex.App.-Houston [1st Dist] 2004) (orig. proc.). However, that question was apparently recently answered in the negative by the Texas Supreme Court. *See, In re Woman's Hosp. of Texas*, ___ S.W. 3d ___, 2004 Tex. LEXIS 1896 (Tex. 2004) (Owen, J., dissenting), and *In re Schneider*, 134 S.W.3d at 869-70. *But see, In re Windisch*, 138 S.W.3d 507, 510 (Tex.App.-Amarillo 2004) (orig. proc.).

Not to worry. The same Legislature which gave the state Chapter 74 of the Texas Civil Practices and Remedies Code in 2003 also saw to it that defendants would not be denied a second bite at the dismissal apple before actually being subjected to a jury. Under current law, any decision of a trial court denying a motion to dismiss a case, *in whole or in any part*, for failure to file an adequate expert report pursuant to § 74.351(b), is now subject to an interlocutory appeal. *See, Tex Civ. Prac. & Rem. Code § 51.014(a)(9).*

Other than the legal costs involved, the defense has little or no reason to decline to file an interlocutory appeal. An interim appeal delays trial, which is almost always consistent with the desires of the defense. Moreover, with the trends of Texas' current ultra conservative appellate courts, it can reasonably be anticipated that even closer scrutiny will be placed on the adequacy of expert reports in these interlocutory appeals.

Why not give at least a little downside risk to the defense if it elects to pursue a clearly frivolous appeal? If it appears that the appeal has no merit whatsoever, consider filing a motion for sanctions

due to a frivolous appeal. *See*, Tex. R. App. Proc. 45.

III. THREE BIG TRAPS

A. Waiving Protections by Claimant's Use of Report

Once the expert report has been served as required under the statute, the report cannot be used *by any party or for any purpose* during the course of the litigation. That means the report cannot be used for any purpose during a deposition or at a hearing or trial. Moreover, the report cannot be utilized to cross examine the author or any other witness in deposition, in a hearing, or at trial. Tex. Civ. Prac. & Rem. Code § 74.351(k). In fact, the report cannot even be “referred to” during the course of the action for any purpose. *Id.* at § 74.351(k)(3).

1. Voluntary

Notwithstanding the strict restrictions on use of a report as set out in § 74.351(k), the Legislature apparently did not really mean what it said, because if *the claimant's attorney* uses the Chapter 74 report of his expert for any purpose, then none of the restrictions of § 74.351(k) apply. Of course, the plaintiff's counsel might well decide that there are no problems with the report, making it immaterial whether the report is used for some other purpose. But that often is simply not the case.

Keep in mind that the report must be filed very early in the case. Moreover, recent case law makes it abundantly clear that the depositions of the defendants absolutely cannot be taken before the report is produced. *See, In re Miller*, 133 S.W.3d 816, 819 (Tex.App.-Beaumont 2004, no pet.). Accordingly, the Chapter 74 expert reports generally must be produced before the defendants have been asked to explain the entries in their records or their thinking processes with regard to presentation, diagnosis, or recommendations. That testimony could drastically alter the opinions of the expert.

Moreover, often the medical records have erroneous information. For example, it is not uncommon to draw reasonable conclusions as to the identities of staff nurses or attending physicians from readable medical chart entries. However, on later deposition, it is determined that

the staff nurse or attending physician was in actuality someone other than the person indicated in the chart. While that may be explicable to a lay jury, why would anyone want to waste time explaining away a major error by their expert with regard to the base facts of the case in front of the jury. Your expert will immediately suffer damage to his credibility if that course must be followed.

Be careful then, in using the same report filed under Chapter 74 as a Texas Rule of Civil Procedure 195.5 court-ordered expert report, or a voluntarily-produced report under Tex. R. Civ. Proc. 195.3(a)(1). Be equally careful in attaching a Chapter 74 report to a response to a motion, as that “use” of the report waives the protection built in for the claimant's attorney in § 74.351.

Finally, be equally careful not to allow your expert to review his statutory report to refresh his recollection in preparing a non-statutorily-mandated report or in preparing for his deposition. Otherwise, you will probably be deemed to have used the report, making it admissible.

2. Involuntary

Suppose for a moment that the plaintiff's attorney files a fully-compliant Chapter 74 report, but that the defense lawyer would like to use the report to cross-examine the expert because it has an error due to the lack of available discovery when the report was prepared. How neat a trick would it be in that instance for the defense to file a motion not to challenge the adequacy of a report pursuant to § 74.351(l), but rather a motion to dismiss pursuant to § 74.351(b), on the basis of the failure to file an adequate Chapter 74 report by plaintiff's counsel, making no express mention of the produced report? Would the plaintiff's attorney then be forced to file a copy of the report in the response, thus being forced involuntarily into waiving the statutory protection for the report? Probably. The suggestion here is that, if defense counsel should pursue such a tactic (and it has already been done in at least one instance of which the author is aware), the plaintiff's attorney should file a Rule 13 motion to force the withdrawal of the motion to dismiss, or at least to preserve the complaint about the tactic on appeal if the report is ultimately used effectively to cross-examine the expert at trial.

B. The Summary Judgment Trap

Under article 4590i § 13.01, it was impermissible for a claimant to use an expert report, *even if it was an affidavit*, in response to a summary judgment motion. *Coleman v. Woolf*, 129 S.W.3d 744, 748 (Tex.App.-Fort Worth 2004, no pet.); *Patriarca v. Frost*, 93 S.W.3d 303, 306-07 (Tex.App.-Houston [1st Dist.], no pet.); *Trusty v. Strayhorn*, 87 S.W.3d 756, 761-62 (Tex.App.-Texarkana 2002, no pet.); *Keeton v. Carrasco*, 53 S.W.3d 13, 22 (Tex.App.-San Antonio 2001, pet. denied); *Garcia v. Willman*, 4 S.W.3d 307, 311 (Tex.App.-Corpus Christi 1999, no pet). However, the defect is one of form. When faced with such a challenge, it is incumbent on the plaintiff's attorney to move for a continuance or leave of court to rectify the responsive affidavit. *See, e.g., Coleman*, 129 S.W.3d at 748.

Virtually identical to Chapter 74, under article 4590i, the report could not be used at any deposition, hearing, or trial. *Compare* art. 4590i § 13.01(k)(2), *and* Tex. Civ. Prac. & Rem. Code § 74.351(k). It would appear that the allowance of the plaintiff's attorney to waive the protections of § 74.351(k) by utilizing the report would differentiate the facts under a "new law" case from the decisions in *Coleman*, *Patriarca*, *Trusty*, *Keeton*, and *Garcia*. Prudent counsel would be poorly served, however, in relying on the appellate courts to reach that common-sense interpretation of the change in the statutory provision. It is recommended that, until the issue has been definitively resolved under Chapter 74, a new affidavit be prepared for the expert to respond to a summary judgment motion.

C. Prior Drafts of Reports

While reports from experts produced pursuant to Chapter 74 are exempt, subject to the traps discussed above, from being used to cross-examine expert witnesses, what about prior drafts of the same report?

The statute only prohibits the use of expert reports "served" pursuant to the statute. § 74.351(k). The scope of discovery allowed in Texas is broad, allowing the discovery of any evidence which is reasonably calculated to lead to the discovery of admissible evidence. *See* Tex. R. Civ. Proc. 192.3(a). *See also, In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003). And any evidence which

may disclose a bias of the witness is historically discoverable under the common law, and was made expressly discoverable in the 1999 revisions to the Texas Rules of Civil Procedure. *See*, Tex. R. Civ. Proc. 192.3(e)(5), *and Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Finally, all "documents" or "reports" that have been "provided to, reviewed by, or prepared by or for the expert" are made expressly discoverable pursuant to Tex. R. Civ. Proc. 192.3(e)(6).

Even if the prior reports were deemed not included within the broad scope of Rule 192.3(e)(6), if the expert later issues a non-Chapter 74 report, which is in any way different from any aspect of the draft(s) of the Chapter 74 report, it would be fair game to question the expert with respect to his prior inconsistent statement. Tex. R. Evid. 613. So, it is arguable that drafts of any report are discoverable. Moreover, it is also somewhat arguable that, pursuant to Texas Rule of Evidence 613, prior drafts of any report should be usable for cross-examination purposes if they reflect any change from a usable report or testimony of the expert.

Of course, the counter argument is that the admission of prior drafts of a report that cannot itself be used violates the spirit if not the intent of Tex. Civ. Prac. & Rem. Code § 74.351(k). In making the statutory reports unusable for cross-examination of an expert, the Legislature must have recognized that the circumstances under which it dictated the report must be produced – essentially solely on the records and without any meaningful discovery – made it unfair for the witness to be cross-examined from same. If it is the public policy of Texas to protect an expert from use of such a report, it would violate the spirit of that protection to allow the expert to be questioned from *prior* drafts or working copies of the same report.

IV. PREPARATION OF A REPORT THAT WILL WITHSTAND CHALLENGE

The statute provides that the claimant's attorney must produce a qualified written report "by the expert." By contrast, the federal rule on expert designation requires the production of a written report "prepared and signed" by the expert. Fed. R. Civ. Proc. 26(a)(2)(B). The difference may be significant. And the difference is perhaps

explicable because the Chapter 74 report is not produced as a discovery tool, but merely to satisfy the court that the claim has merit. By contrast, the federal report is a part of the formal discovery obligation of counsel, and the opposing counsel is free to use the report in any way permissible under the rules, including to impeach the expert. Indeed, occasionally the expert report is the only discovery of the expert's opinions in federal cases, while there are significant restrictions on the use of statute-mandated expert reports in Texas state court suits, as explained above.

Experts are notorious for delaying the preparation and production of their reports. Typically it is not until counsel advises the expert that there is a mandatory deadline approaching that the expert's attention is fully engaged.

Most physicians have a relatively poor opinion of the intellectual capacities of lawyers, particularly concerning medical issues. Accordingly, it can often be quite difficult to get a physician expert to take much guidance in the preparation of a medical report.

However, because of the complexities involved, it is the rare report prepared by a physician expert without direction that would satisfy the requirements of *Palacios* and section 74.351. The risk of failing to meet those requirements is with the client, and ultimately will fall squarely on the shoulders of chosen counsel. Therefore, it is imperative that counsel provide the expert with sufficient guidance as to how the report should be prepared.

There are basically three ways to assist an expert in preparing a report that will withstand challenge: (1) closely guide the expert in the preparation of his report; (2) use a "fill-in-the-blank" expert report; and (3) prepare the report for the expert.

A. Closely Guiding the Expert

There is nothing expressly in Chapter 74 that addresses whether medical assistants, consultants, or counsel may assist the expert in drafting her report. However, with that said, there is no viable argument that the Texas Legislature meant something less in Chapter 74 than for the served report to be in fact the supportable opinions of the expert to whom authorship is attributed.

Generally witnesses are allowed to "adopt" the testimony or statements of others as their own. *See generally*, Tex. R. Evid. 801(e)(2)(B) (as to parties only). *See also*, *Tarbutton v. Ambriz*, 282 S.W. 891, 894 (Tex. 1926), and *Spears v. Brown*, 567 S.W.2d 544, 547(Tex.App.-Texarkana 1978, writ ref'd n.r.e.). It would appear then that there would be nothing prohibiting medical assistants, consultants, or even counsel from closely guiding the expert in her report, so long as the expert closely reviews the report, adopts it, and signs it as her report.

It is important to keep in mind, though, that if the expert makes any changes in a provided report, the prior report may be discoverable and may be admissible to impeach the expert, as discussed in paragraph III(C) above. Accordingly, if this route is chosen, the strongly recommended course would be for the proposed author of the report to meet with the expert, get the expert's full opinions regarding the issues verbally, and obtain pre-drafting approval from the expert of what will be in the report before anything is committed to paper or electronic draft.

The preferable way to guide the expert would be to sit in the expert's presence while he dictates the report. That way, counsel can ensure that the expert covers all the required bases in the report and avoids equivocating statements that might give rise to a challenge. Obviously, counsel should have a good general outline, with detailed particulars, as to what is needed in the report. The expert should pause between each sentence of the report so that counsel can ensure that what is dictated comports with what is required. Once the initial draft is prepared, the expert, assisted by counsel, should read the report together online so that any necessary changes can be made.

Even though they cannot be cross-examined from this report, many experts are reluctant to have counsel this involved in the preparation of the expert's report. In that instance, a carefully drafted letter, expressly setting out the elements needed, can be quite helpful. Hopefully, the expert will follow very closely counsel's instructions in the letter.

Keep in mind that the letter to the expert may be discoverable, perhaps even admissible, as discussed above. Accordingly, it is important that the letter contain nothing that counsel would be

concerned about the jury seeing at the time of trial. A sample guidance letter to an expert might read as follows:

Dear Dr. _____:

As I mentioned to you today, we need your report by the end of next week. Of course, the report must contain your opinions and your opinions only. However, by way of a general guideline with regard to the form of the report, an expert report under the applicable statute must generally contain the following:

- A description of the expert's background sufficient to demonstrate his or her qualifications to render opinions in the specific case.
- A statement that the physician is familiar with the requisite standards of care, both for the subspecialty of the provider and the treatment involved in the case, and a specific explanation as to how and why the expert is aware of and familiar with those minimum care standards.
- If the expert is from a different geographic area than where the medical treatment took place, a statement that the standards espoused by the expert are applicable in the community where the medical treatment was provided, or in most cases, a statement that the standards with regard to the treatment in issue are national standards and are the same in all medical communities in the U.S.
- A statement that the opinions to follow are all in terms of reasonable medical probability.
- A brief outline summary of the records or materials reviewed to form the basis of the opinions.
- A brief summary of the relevant

medical facts from the records, depositions, etc.

- An explanation as to what conduct is required under the applicable standard of care with regard to each area in which the expert is critical.
- An explanation as to what the defendant did precisely in that circumstance, and how the defendant's conduct in each particular regard failed to meet the requisite standard of care.
- If the report is also to address causation, a very thorough and lay-understandable explanation as to how each identified deviation in the standard of care proximately caused the injury or death in issue.

Please also keep in mind that the courts can be very strict with regard to disqualifying "conclusory" statements. For example, a statement to the effect of: "the physician fell below the standard of care in many respects," would probably be found insufficient. However, the following would probably be found sufficient:

"It is my opinion, based on review of the medical records as well as my education, training and experience that the treatment _____ received at _____ fell significantly below the lowest level of acceptable care. More specifically, with respect to _____, M.D., and her employer, _____, the minimum standard of care compelled that (state applicable).

Dr. _____ failed to (as applicable). Thus, it is my opinion, in terms of reasonable medical probability and based on my review of the medical records as well as my education, training, and experience, that the treatment provided by _____, M.D., and her employer, _____, was far below the accepted standards of care."

With regard to causation, the following conclusory statement: "These deviations in the standard of care, in my opinion, caused or contributed to the patient's demise," would be insufficient. Instead, the following would probably be held compliant with the requirements:

"Human tissue requires adequate oxygen for survival. When the tissue is deprived of adequate oxygen for even a short period of time, a few minutes, the tissue will begin to die. This is known as anoxia if there is a total loss of oxygen or hypoxia if there is a partial loss of oxygen. When a physician fails to (as applicable), as a result the patient is deprived of sufficient oxygen to vital tissues, including the brain, as the brain is the organ most sensitive to hypoxia. Brain damage secondary to hypoxia is permanent and irreversible. Sufficient brain damage secondary to hypoxia generally causes brain swelling. Significant brain swelling causes death.

In this instance, it is my opinion, in terms of reasonable medical probability, that Dr. ____'s failure to (as applicable), directly caused very low blood volume, which resulted in severe hypoxia, which directly caused death of a large amount of Ms. ____'s brain tissue. The death of Ms. ____'s brain tissue caused severe swelling of her brain, which proximately caused Ms. ____'s death."

Again, these are just general guidelines, which I thought you might find of some interest. Please call me, at 713.646.1000, if you have any questions. Thank you.

B. The "Fill-in-the-Blank" Expert Report

Closely akin to the guided report is the "fill-in-the-blank" report. While the statute sets out what must be contained in a Chapter 74 report, the statute is silent as to any required form of report. Rather, all that is required is: "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." § 74.351(r)(6).

For that reason, there should be no problem in an expert simply answering questions to satisfy the requirements of § 74.351 and *Palacios* in preparing his report. In other words, it should be satisfactory for the expert in his report to answer the following questions:

Please state whether you are familiar with the minimum standards of care applicable to surgeons performing cataract surgery in Houston, Harris County, Texas, on or about January 1, 2004:

_____.

Please state the nature and extent of your education, training, and experience in the field of cataract surgery which provides you the basis to comment on the standards of care of a reasonably prudent ophthalmologist performing cataract surgery.

_____.

Please list all medical records or other materials you reviewed in your preparation of this report:

_____.

Please state whether these are the type of records ordinarily relied on by experts in your field in rendering opinions as to the quality of care provided by ophthalmologists:

_____.

Based on your review of these materials, please explain the presenting symptoms of Ms _____ when she first came to visit Dr. _____ and his professional association, Dr. _____, M.D., P.A.:

_____.

In making recommendations to a patient

with the presenting symptoms of Ms. _____, what further diagnostic tests are required under the applicable minimum standards of care for a reasonably prudent ophthalmologist, with regard to further investigating the cause of the presenting complaints:

_____.

What did Dr. _____, while working for his professional association, Dr. _____, M.D., P.A., recommend to Ms. _____ after he initially examined her:

_____.

In terms of reasonable medical probability, were the recommendations of Dr. _____, while working for his professional association, Dr. _____, M.D., P.A., to Ms. _____ after the initial examination within or below the minimum requisite standard of care for a reasonably prudent ophthalmologist acting under the same or similar circumstances? If the recommendations were below the applicable standard of care, please explain specifically why those recommendations fell below the minimum standard that would be expected of a reasonably prudent ophthalmologist under the same or similar circumstances:

_____.

Please assume that the term "negligence," when used with respect to the conduct of Dr. _____ acting for his professional association, Dr. _____, M.D., P.A., means failure to use ordinary care, that is, failure to do that which an ophthalmologist of ordinary prudence would have done under the same or similar circumstances, or doing that which an ophthalmologist of ordinary prudence would not have done under the same or similar circumstances. Please assume further that the term "ordinary care," when used with respect to the conduct of

Dr. _____ acting for his professional association, Dr. _____, M.D., P.A., means that degree of care that an ophthalmologist of ordinary prudence would use under the same or similar circumstances. Assuming those definitions, please state and explain your opinion, in terms of reasonable medical probability, as to whether the recommendations of Dr. _____ and his professional association, Dr. _____, M.D., P.A., to Ms. _____ were negligent:

_____.

(Same series of questions as to manner in which surgery was carried out, post-operative care, etc., as may be applicable under the case).

Please explain the injuries Ms. _____ suffered after the treatment of her left eye by Dr. _____, while acting in the course and scope of his employment for his professional association, Dr. _____, M.D., P.A.:

_____.

Please state the nature and extent of your education, training, and experience in the field of cataract surgery that provides you the basis to comment as to whether the conduct of Dr. _____, while working for his professional association, Dr. _____, M.D., P.A., caused the loss of vision in the left eye of Ms. _____"

_____.

Please explain exactly your opinion, in terms of reasonable medical probability, thoroughly and in lay terms, as to how the recommendations (or surgery, post-operative care, etc.), by Dr. _____, while working for his professional association, Dr. _____, M.D., P.A., caused the loss of vision in Ms. _____'s left eye:

_____.

Please assume that the term "proximate

cause” means that cause which, in a natural and continued sequence produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that an ophthalmologist using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event. Assuming that definition, please state and explain thoroughly your opinion, in terms of reasonable medical probability, as to whether the recommendations (or surgery, etc.), by Dr. _____, acting for his professional association, Dr. _____, M.D., P.A., were a proximate cause of the loss of vision in the left eye of Ms. _____:

Please explain how you can rule out, in terms of reasonable medical certainty, other possible causes of the loss of vision in Ms. ____’s left eye:

_____.

Do you adopt the responses to these questions as your expert report in this case:

_____.

Does this report constitute a fair summary of your opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by Dr. _____ and his professional association, Dr. _____, M.D., P.A., failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed?

_____.

C. Counsel Preparation of the

Report

Just as there is no prohibition applicable to preclude counsel from guiding the expert in preparation of a report, there is likewise no prohibition on counsel actually preparing the report, so long as the expert carefully reviews the report and adopts it expressly as a fair summary of his opinions relative to the case. Indeed, counsel preparing the report is probably the most reliable way to ensure that all the statutory and *Palacios* bases are covered in the report.

But it is important to keep in mind that counsel cannot ethically destroy prior report drafts, and that those drafts may be discoverable and perhaps admissible if they exist. Counsel’s work product in the report is privileged, but that privilege is probably waived by sharing the work product with a third party. In any event, the expert’s work product is not privileged from discovery. If discovered and made admissible for impeachment purposes, it could be devastating to the case for opposing counsel to cross-examine the expert as to items he removed from the proposed report prepared by plaintiff’s counsel.

Accordingly, it is by far best if the final draft of the report as prepared by counsel is the only draft ever seen by the expert and is signed “as is,” and without change, deletion, or alteration. The best way to accomplish that is to have a lengthy in-person or telephone interview with the expert, covering in great detail every aspect of the case, before the report is prepared. Tell the expert at each step what you intend to put in the report, perhaps using the “fill-in-the-blank” or report preparation guidelines as set out above. Take very careful notes, or have an assistant do so, and then prepare a report that does not deviate even slightly from what the expert committed with respect to what he was willing to say under oath with regard to the case.

V. EXAMPLES OF REPORT STATEMENTS THAT JUST DON’T MAKE IT

Hart v. Wright, 16 S.W.3d 872, 876 (Tex.App.-Fort Worth 2002, pet. denied):

“I am currently practicing medicine and was practicing medicine on January 22, 1996.

“I am board certified in Internal Medicine, Pulmonary Disease, Cardiology, and Critical Care Medicine.

“I examined Bobby Hart at Harris Methodists Fort Worth Hospital on January 23, 1996.

“Based on the history obtained from the patient and his family members along with the supporting evidence of laboratory evaluation which showed an elevated creatine kinase of 1854 U/L, CK-MB 219.7 ng/ml and % relative index 11.9 at 10:41 a.m. along with an EKG which shows an inferior infarction with Q-waves, in my expert opinion, Mr. Hart was experiencing an acute myocardial infarction at approximately 5:00 p.m. on January 22, 1996 while a patient in the emergency room at Huguley Memorial Hospital.

“Based on the above analysis, Dr. Wright, the treating physician at Huguley Memorial Hospital, and Huguley Memorial Hospital departed from the acceptable standard of care for the diagnosis, medical care, and treatment of a patient with an acute myocardial infarction.”

Held: Insufficient for failure: (a) to demonstrate familiarity with applicable standard of care; (b) to explain applicable standard of care; and (c) to explain how breach of the standard of care caused injuries in issue. This report was deemed not even a good faith effort to comply with the statutory requirements. *Id.*

American Transitional Care Centers, Inc. v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001):

“Based on the available documentation I was able to conclude that: Mr. Palacios fell from his bed on 5/14/94 while trying to get out of it on his own. The nursing notes document that he was observed by nursing on the hour for two hours prior to the fall. In addition, ten minutes before the fall, the nursing notes documents [sic] the his wrist/vest restraints were on. Yet, at the time of his fall he was found on the floor with his vest/wrist restraints on but

not tied to the bed. It is unclear how he could untie all four of the restraints from the bedframe in under ten minutes. Obviously, Mr. Palacios had a habit of trying to undo his restraints and precautions to prevent his fall were not properly utilized.

“All in all, Mr. Palacios sustained a second brain injury with a left subdural hematoma while he was an inpatient at [the Hospital]. . . . In my opinion, the medical care rendered to Mr. Palacios at the time of his second brain injury was below the accepted and expected standard of care which he could expect to receive. Moreover, this [sic] below the accepted standard of care extends to both the cause of the second injury as well as the subsequent treatment”

Held: Insufficient for failure to identify applicable standard of care.

Hutchinson v. Montemayor, ___ S.W.3d ___, 2004 Tex. App. LEXIS 6796 (Tex.App.-San Antonio 2004, no pet.):

“If an arteriogram had been done, there would have been a possibility that Mr. Hutchinson may have had bypassable lesions and that the amputation may have been avoided. Within reasonable medical probability these doctor's [sic] breaches caused injury to Mr. Hutchinson.”

Held: Insufficient for failure to explain how performance of arteriogram would have avoided bypass. Not a good faith effort to comply.

In re Windisch, 138 S.W.3d 507, 514 (Tex.App.-Amarillo 2004) (orig. proc.):

“I have knowledge of the accepted standard of care for the treatment of the condition in question. I am qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. I am actively practicing medicine in rendering medical care services relevant to this case and in the medical specialty of Radiology.

“...I have been board certified in the

medical specialty of Radiology since 1978. I also have [an] extensive educational background in the field of Neuroradiology and have been a member of the American Society of Neuroradiology since 1979.... The opinions that I have stated in this report . . . are based on my training and experience as a board certified Radiologist with an extensive background in Neuroradiology, and upon reasonable medical probability.”

Held: Insufficient for failure to adequately establish expert’s qualifications in neuroradiology!!!

Hawkins v. Gomez, ___ S.W.3d ___, 2004 Tex. App. LEXIS 1620 (Tex.App.-Houston [1st Dist.] 2004, no pet.):

“I am] familiar with the standard of care at the times in question that a reasonably prudent dentist would provide in evaluating and performing treatment on patients with histories and symptoms similar to Carla Hawkins . . . the standard of care would be uniform throughout the United States. I am familiar with what a reasonably prudent dentist would do and refrain from doing in such circumstances.”

Held: Insufficient for failure: (a) to demonstrate how author is familiar with standard of care; *and* (b) to identify specifically applicable standard of care.

Lopez v. Montemayor, 131 S.W.3d 54, 60 (Tex.App.-San Antonio 2003, pet. denied):

“Additionally, it is the aspiration of the bridge section which caused and precipitated the medical circumstances leading to the patient's demise.”

Held: Insufficient for not adequately explaining how the breach proximately caused the patient’s death.

DeLeon v. Vela, 70 S.W.3d 194, 199 (Tex.App.-San Antonio 2001, pet. denied):

“My assessment, after reviewing the patient's medical records, is that so many surgeries were not indicated...”

Held: Insufficient for failure to identify standard of care or how breach caused any injuries. (A curious holding, as one might otherwise have thought it obvious that unnecessary surgery causes unnecessary injury from the scalpel invasion of the patient’s body.)

Whitworth v. Blumenthal, 59 S.W.3d 393, 396-97 (Tex.App.-Dallas 2001, pet. dismissed by agr.):

“ ‘the health care providers’ failed to meet the standard of medical care to which Debbie was entitled...”

Held: Insufficient due to failure to specifically name health care providers.

VI. CONCLUSION

The expert report requirement started out as an arguably admirable effort to stem lawsuits filed against health care professionals in which the claimants’ counsel could not even secure an expert. But it has evolved, through statutory amendment and case law interpretation, into the best “technical gotcha” defense that medical professional liability insurance carriers have ever had.

Since the Legislature has seen fit to allow interlocutory appeals of denials of motions to dismiss, it is to be expected that many more interlocutory appeals will be seen in the future. The defense has little to no downside in filing an interlocutory appeal, if they can make any plausible argument that the report is insufficient.

Far too many meritorious cases are being dismissed for an inadequate report. In many of those cases examination of the rejected report language makes it obvious that, with a little more effort before the report deadline, the report could have been modified easily to meet the requirements.

The burdens that have been placed on expert reports by the Legislature and the appellate courts are substantial, but they can be overcome. With the built-in incentive to pursue an interlocutory appeal by the defense, combined with the current

ultra conservative trend in the appellate courts, it is critical that close adherence to the statutory requirements be maintained. That can only be done by closely guiding the expert in the preparation of her report.

It would be difficult to defend a case for legal malpractice arising from a deficient report that unnecessarily and obviously failed in any of the respects demanded by the statute and by *Palacios*. That is reason enough alone to be careful in preparing and filing the reports. But ultimately the clients' cases are at risk, and the duty of protection that arises from that risk compels great care.