Expert reports

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In 1996, article 4590i of the *Texas Revised Civil Statutes Annotated*, the statutory provision that governs health care liability claims in Texas, was amended to require claimants to file expert reports within 180 days as part of the prosecution of their claims. Sufficient expert reports include explanations of the standard of care, the deviation from that standard, and how the deviation caused the claimant's damages. Two provisions allow courts to grant a 30-day extension for filing expert reports. A good cause extension can be used to extend the filing deadline to 210 days; however, case law has not clearly defined what constitutes good cause. An accident or mistake grace period can be used to justify reports filed >210 days after the suit has been filed; judges determine whether the failure is due to a mistake or intentional indifference. As with any statute, the language is not as important as how the courts (judges) interpret that language. The statute may appear strict but room for interpretation exists.

Article 4590i of the *Texas Revised Civil Statutes Annotated* first made reference to the necessity for a claimant to file an expert report in 1994. The article was amended to require the claimant to either file a cost bond in the amount of \$2000 or have counsel file an affidavit attesting that a written report was obtained from a qualified individual, indicating that the acts or omissions of the defendant(s) were negligent and were a proximate cause of the injuries or damages claimed. The deadline for the bond or affidavit was 90 days after the suit was filed (1). Interestingly, the defendant could not discover the identity of this expert, or the specific opinion expressed, unless that individual was designated as the claimant's expert in the case (2). This scheme was open to abuse and did nothing to assure defendants of the credibility of the claims being filed and pursued.

In 1996, the expert report requirements were revised. Under the new scheme, the key dates are 90 days and 180 days after the suit is filed. By the 90th day, the claimant must post \$5000 in bond or escrow for each defendant or file an expert report for each defendant for whom the bond/escrow requirements have not been met (3). By 180 days, the claimant must provide an expert report and curriculum vitae against each defendant or voluntarily drop the suit against the health care providers against whom no report is filed (4).

I will examine what constitutes a sufficient report under the statute, as well as when and how extensions can be obtained and when a failure to comply with the statute may and may not be excused.

SUFFICIENT REPORTS

Article 4590i requires the expert report to provide

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 (5).

Contrary to a position taken by defense counsel, the expert does not need to be a physician licensed to practice medicine in Texas (6). The appropriate sanction for failure to file a report by the deadline is dismissal of the case by the court (2). A motion to dismiss for failure to provide a sufficient report is to be granted only if the report does not represent a good faith effort to comply with the requirements discussed above (7). The areas subject to interpretation by courts include the type of language or information needed to meet the report requirements, as well as what indicates a "good faith" effort to meet those requirements.

The requirements set forth in the statute are unambiguous (8). For that reason, there should be little disagreement between the courts in determining whether or not the report is sufficient. The appellate court decisions show that courts require reports to be in compliance with the language set forth above in order to be sufficient (9).

The area open to interpretation is the provision that holds that dismissal can be granted only if the report is not a good faith attempt at compliance. Three cases discuss this issue. Unfortunately, 2 cases are either too lax or too restrictive in interpretation of this provision. The third case deals with an egregious situation that clearly supported dismissal of the claim.

In *Palacios v. American Transitional Care Centers of Texas, Inc.*, the Houston Court of Appeals did everything possible to prevent dismissal of a claim for failure to file an adequate report (10). The case involved a patient who had fallen out of bed at a time when he was supposed to be restrained. The filed report discussed the facts as set out in the medical records and concluded that the care rendered was substandard and caused the injuries alleged. The court first applied a forgiving standard of review that was completely inconsistent with the standard applied by the other courts that have addressed this issue (11). Next, the court argued that the report could be construed as adequate, although the standard

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of care or how that standard was breached was not mentioned. Only a conclusion by the expert at the end of her report stated that care was substandard (12). This was also contrary to how this issue had been interpreted before (13). The court ruled that even if the report did not meet the statutory report requirements, it met the requirements of a good faith attempt at compliance. The court found that “reasonable inferences” from the language of the report put the facility on notice of what it did wrong, even though these deficiencies were never stated in the report (12).

The other extreme occurred in *Hart v. Wright*. This case involved the failure to diagnose a myocardial infarction on presentation to the emergency department. In this case, an expert report was filed that stated that the cardiac enzymes and electrocardiogram results from the presentation indicated the patient had an infarction and that the physician and facility “departed from the acceptable standard of care for the diagnosis, medical care, and treatment of a patient with an acute myocardial infarction.” This report was held to be insufficient because it did not state the standard of care or the deviation from that standard or report that the deviation caused the claimant’s damages (14). Likewise, the court held that the report was not a good faith effort to comply with the statute because it did not attempt to address these 3 matters and was only conclusory.

Our only other guidance on this issue comes from *Tibbetts v. Gagliardi*. In this case, the expert “report” was nothing more than a letter from the plaintiffs’ counsel to an expert that gave definitions of negligence and proximate cause and asked the expert to check a blank marked yes or no. The expert did not even sign off on the letter. This did not constitute an adequate expert report because it did not summarize opinions concerning the standard of care, the manner in which the standard was breached, or the issue of causation (15). Further, it did not represent a good faith attempt to comply with the statute. This finding appears to have been based in part on the facts that counsel was aware of the applicable statutory provisions and that the report’s deficiency was pointed out by opposing counsel.

These cases do nothing other than illustrate that one cannot overlook judicial interpretation as an important variable in application of the law. The *Palacios* and *Hart* cases show that similar types of situations can produce completely different results based on who is reviewing the evidence.

DEADLINE EXTENSIONS

As one might also guess, the 180-day deadline to file expert reports is not absolute. In fact, 2 statutory provisions provide some leeway for the court to grant extensions:

The 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 (16).

Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant’s attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by the claimant for relief under this subsection shall be considered timely

if it is filed before any hearing on a motion by a defendant under subsection (e) of this section (17).

Good cause extension

Under the first provision, an extension may be granted for good cause. This has been held to be the appropriate remedy if a claimant “needs a little extra time to comply” (18). This provision does not require the court to grant an extension, even if good cause is shown. Whether or not an extension is granted is left to the court’s discretion (19). A motion that requests this 30-day extension does not need to be filed before the 180-day deadline (20). This extension, however, can only extend the deadline to 210 days after the suit was filed (i.e., it can only add 30 days to the 180-day deadline) (18, 19). Thus, if >210 days has elapsed since the suit was filed, this provision will not provide any relief for the claimant’s failure to file an expert report (21).

Because the extension cannot move the deadline >210 days after the suit is filed and because the court may deny this extension even if good cause is established, case law has not provided us with any significant insight on what actually constitutes good cause for an extension sought under this subsection (22). The *Estrello* case provides our only guidance. While the factual information reported in the case is not completely clear, it appears that the claimant tried to establish good cause for a 30-day extension on the basis that she sought a report from her treating physician but could not obtain a timely report because she missed some appointments with counsel and because the doctor/expert did not return phone calls. The Fort Worth Court of Appeals stated that “these excuses do not suffice” (18).

Accident or mistake grace period

A separate provision allows a 30-day grace period for filing a report when the deadline is missed due to an accident or mistake of the claimant or counsel. Unlike the good cause extension, claimants can use this provision to justify a report filed >210 days after suit has been filed (23). This provision cannot be used to obtain an extension if the failure to timely file an expert report was intentional or the result of conscious indifference (21).

Because neither accident or mistake nor intentional or conscious indifference is defined by the statute, judges interpret this language and determine what conduct falls within these terms. Review of case law shows that courts focus on the knowledge and belief of the claimant or counsel in determining what constitutes an accident or mistake or intentional or conscious indifference. If claimants establish that they or their counsel were unaware of the statutory requirements or that the report was not filed, unless the defendant can produce evidence to the contrary, an extension will be granted.

In the following situations, the courts found that accident or mistake had been shown, thereby entitling the claimant to the 30-day extension. However, the opinions of the appellate courts in these cases all note that nothing put forward by the defense negated the factual bases used by the claimants to support their contentions of accident or mistake. Presumably, if such evidence were produced by the defense, the extension would not be indicated.

In *Presbyterian Healthcare Systems v. Afangideh*, the claimant’s counsel argued that an accident or mistake was established be-

cause the deadline to file the report was not calendared. The court agreed (24). In *McClure v. Landis*, counsel stated that they believed that the report had been timely filed. This belief that they had complied with the statute was sufficient to show accident or mistake (25). Similarly, in *Horsley-Layman*, accident or mistake was found to exist when counsel argued that he felt the reports filed were sufficient because they implicitly criticized the defendant in question (26). Lastly, in *Roberts v. Medical City Dallas Hospital*, counsel instructed office staff to file the report with the court and believed it had been filed. The fact that the report was not filed constituted accident or mistake (20).

Courts have found that accident or mistake did not exist in cases involving circumstances in which counsel knew of the need to file a report and the deadline to do so but did not file or simply did not offer a justification for their untimely actions. While a failure to read or be aware of the applicable statute does show accident or mistake (20), this does not excuse inaction when opposing counsel provides the claimant's attorney with reminders about the statute and the claimant's failure to comply (27). Further, failure to file the report because counsel was busy or received the case close to the deadline or because the case moved slowly and involved voluminous information does not show accident or mistake (28). Likewise, the claimant's failure to meet with counsel and the expert's failure to return phone calls are not sufficient (18). Lastly, and probably most obviously, the failure to comply for cost containment reasons is not accident or mistake (29).

CONCLUSION

Review of case law on the expert report requirement shows that courts do enforce this provision to the extent that reports need to be filed and need to address the issues of the expert's qualifications, breaches in the standard of care, and causation. One must realize, however, that the 180-day deadline provided for in the statute is far from absolute. Two provisions allow for an extension of time to file a report. From experience at the trial court level, good cause extensions are usually granted if reasonable basis for the request is present. However, the *Estrello* case shows that extensions may not be granted, and because this matter is within the discretion of the trial court, appellate courts very likely will affirm the actions of the trial court. The accident/mistake grace period can be used to validate or allow a report filed long after the 180- and/or 210-day deadline has passed. If accident or mistake is shown, this extension must be granted and is not discretionary.

Health care providers need to realize that judges are extremely wont to dismiss cases on technicalities, especially when the fatal flaw is due to the conduct of counsel and is not based on the merits of the case. Thus, when these issues do arise, understand that even though defense counsel may have very good grounds to obtain dismissal, the judge may not see things in a similar light or follow what appears to be the clear letter of the law. This is not only outside your control but is outside the control of even the best and most diligent defense counsel.

1. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (a), (b) (Vernon's Supp. 1994).
2. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (e) (Vernon's Supp. 1994).
3. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (a) (Vernon's Supp. 2000).
4. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (d) (Vernon's Supp. 2000).
5. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (r) (6) (Vernon's Supp. 2000).
6. *Lee v. Mitchell*, No. 05-98-00382-CV (Tex. App.—Dallas, July 10, 2000, no writ).
7. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (l) (Vernon's Supp. 2000).
8. *Schorp v. Baptist Memorial Health System*, 5 S.W.3d 727, 732 (Tex. App.—San Antonio 1999, n.w.h.); *Horsley-Layman v. Angeles*, 968 S.W.2d 533, 535 (Tex. App.—Texarkana 1998, no writ).
9. See *Schorp*, 5 S.W.3d at 732 (fatal failure of the report to set forth the author's name and qualifications); *Wood v. Tice*, 988 S.W.2d 829, 831–832 (Tex. App.—San Antonio 1999, writ den'd) (attempt to use codefendant's deposition testimony to meet requirements was not sufficient because testimony did not reference a specific defendant or negligence by a specific defendant and did not demonstrate causation or damages); *Tibbetts v. Gagliardi*, 2 S.W.3d 659, 662–663 (Tex. App.—Houston [14th Dist.] 1999, no writ) (letter from counsel to expert requesting yes/no check in response to inquiry about negligence and causation was not sufficient); *Horsley-Layman*, 968 S.W.2d at 535 (report that does not specifically reference defendant and is "impliedly critical" was not sufficient).
10. *Palacios v. American Transitional Care Centers of Texas, Inc.*, 4 S.W.3d 857 (Tex. App.—Houston [1st Dist.] 1999, no writ).
11. See *Schorp*, 5 S.W.3d at 731; *Wood*, 988 S.W.2d at 830; *Horsley-Layman*, 968 S.W.2d at 536.
12. *Palacios*, 4 S.W.3d at 861–863.
13. See *Wood*, 988 S.W.2d at 831–832; *Horsley-Layman*, 968 S.W.2d at 535–536.
14. *Hart v. Wright*, No. 02-99-234-CV (Tex. App.—Fort Worth, April 20, 2000, no writ).
15. *Tibbetts v. Gagliardi*, 2 S.W.3d 659, 662, 663 (Tex. App.—Houston [14th Dist.] 1999, n.w.h.).
16. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (f) (Vernon's Supp. 2000).
17. *Texas Revised Civil Statutes Annotated*, art. 4590i, Section 13.01 (g) (Vernon's Supp. 2000).
18. *Estrello v. Elboar*, 965 S.W.2d 754, 758 (Tex. App.—Fort Worth 1998, no writ).
19. *Knie v. Piskun*, No. 07-99-0277-CV (Tex. App.—Amarillo, April 25, 2000, no writ).
20. *Roberts*, 988 S.W.2d at 402–404.
21. *Knie*.
22. See *Knie*; *Schorp*, 5 S.W.3d at 732 (decision to grant extension under court's discretion, specifics of good cause not addressed); *Roberts*, 988 S.W.2d at 402 (decision to grant extension under court's discretion, specifics of good cause not addressed); *Estrello*, 965 S.W.2d at 758 (extension not sought within 210 days after suit was filed).
23. *Knie*; *Broom v. MacMaster*, 992 S.W.2d 659, 663 (Tex. App.—Dallas 1999, no writ); *Horsley-Layman*, 968 S.W.2d at 535–537; *McClure v. Landis*, 959 S.W.2d 679, 681–682 (Tex. App.—Austin 1997, writ den'd).
24. *Presbyterian Healthcare Systems v. Afangideh*, 993 S.W.2d 319, 322–323 (Tex. App.—Eastland 1999, writ den'd).
25. *McClure*, 959 S.W.2d at 682.
26. *Horsley-Layman*, 968 S.W.2d at 536.
27. *Nguyen v. Kim*, 3 S.W.3d 146, 154 (Tex. App.—Houston [14th Dist.] 1999, no writ).
28. *Finley v. Steenkamp*, No. 02-99-127-CV (Tex. App.—Fort Worth, May 18, 2000, no writ).
29. *Schorp*, 5 S.W.3d at 733.