

TAPA NEWS & NOTES

The Official Newsletter of the Texas Alliance for Patient Access

October 2024



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Preparing for the 89th Regular Legislative Session

The Texas Legislature meets every other year, and by law each regular session lasts 140 days beginning the 2d Tuesday in January of odd numbered years. The Governor can call “special sessions” after the regular session ends, but each special session can only last 30 days and must address specific issues set forth by the Governor beforehand. TAPA is currently preparing for the 89th Regular Session of the Texas Legislature, which is set to kick off on January 14, 2025, and end on June 2, 2025.

We know we will have at least 32 new members in the 150 member Texas House, with an estimated split of 86 Republicans and 74 Democrats. What we don't know is who will be the Speaker of the House, and that is important as the Speaker has significant power over what bills have a chance to pass on the House floor. The Speaker also appoints members to House committees as well as the chairs of those committees, and the chair of each committee can either make or break a bill's chance to become law.

Representative Dade Phelan (R) from East Texas served as Speaker in both the 2021 and 2023 legislative sessions, but he faces stiff opposition to re-election as Speaker in 2025. As of now, his main opponent is Representative David Cook (R) from Mansfield, who claims to have the support of 48 current/future House members. It takes a simple majority of 76 house member votes to be elected Speaker, so although the Democrats are outnumbered, they could still have a say in who will be Speaker if 12 Republicans side with all 64 Democrats. In order to prevent that from happening, the Republicans have a long-standing Republican Caucus, the rules of which requires all Republicans to support the endorsed Speaker candidate of the Caucus if he/she receives 60% of the caucus vote. That means that approximately 52 Republicans can control who is the next Speaker and the Democrats would have no say. But the caucus endorsed candidate hasn't always received 100% of the Republican votes, cracking the door for a candidate to win with 76 total votes coming from both sides of the aisle. Things continue to get more and more interesting on the House side. Next Quarter we will update news on the House Speaker race and also break down the outlook for the Texas Senate.

One thing that doesn't require speculation...we know it will happen... is that the Plaintiffs' lawyers will work harder than ever to eliminate or at least dramatically water down our medical liability reforms. They will try and raise the cap on non-economic damages. They will work to eliminate protections for medical schools and hospital districts contained in the Texas Tort Claims Act. They will try to create additional causes of action related to new Federal staffing requirements for Long Term Care Facilities. In 2023, there were 61 bills filed that would have created new ways to sue healthcare providers. Only 2 passed, with TAPA eliminating the other 59 and making sure that the 2 that passed were reasonable and not burdensome. We will be ready.



On the Courthouse Steps

In re Regency IHS of Brenham, LLC., TX 14th Court of Appeals

- Houston. The 14th Court of Appeals granted a health care provider's petition for writ of mandamus, reversing a Washington County district court order denying the provider the gross negligence defense under the Pandemic Liability Protection Act ("PLPA"). TAPA was instrumental in drafting and passing the medical portion of the PLPA. Passed into law while Governor Abbot's COVID-19 Disaster Declaration was still in place, the PLPA gives physicians, nurses, hospitals and nursing homes protections from COVID lawsuits, and those protections were desperately needed to keep the Texas healthcare system viable.

The PLPA includes a requirement that to prevail in a lawsuit involving COVID, Plaintiffs must prove that the healthcare provider was grossly negligent. Unfortunately, a District Court Judge in Washington County refused to recognize the PLPA and only required Plaintiffs in the *Regency HIS* case to prove ordinary negligence to win their case. The 14th Court of Appeals overruled and reversed that erroneous ruling and ordered the Washington County District Court to use the gross negligence standard. That same Washington County District Court made that same incorrect ruling in a different medical malpractice lawsuit, but the 14th Court of Appeals overruled and reversed that decision as well (see *In re Brenham Nursing and Rehabilitation Center and Regency HIS of Brenham, LLC* (No. 14-23-00949-CV; July 18, 2024).



Pankaj v. Hernandez, TX 1st Court of Appeals - Houston (July 23, 2024).

The Texas 1st Court of Appeals recently ruled that a physician is not automatically qualified to testify on nursing care as an expert witness in a medical malpractice case. Plaintiffs often designate one physician as their expert witness and then seek to have him/her criticize the care and treatment of both the defendant doctor and the nurses. Attorneys defending nurses have advocated that many physicians aren't qualified to testify as to nursing care, as they didn't attend nursing school and are usually unfamiliar with the Texas Nurse Practice Act. Instead, Plaintiffs should retain an actual nurse to serve as an expert regarding the appropriateness of nursing care. The 1st Court of Appeals recently ruled that although it is possible for an

expert physician to also qualify as an expert on nursing care, it isn't automatic. Plaintiffs must show that the physician is also familiar with the standard of care for nurses as to the care and treatment of the medical condition in question, including through the supervision or training of nurses in this context. If the potential expert cannot show that familiarity or a history of supervising/training nurses specifically, then they fail to qualify as an expert that can provide testimony critical of nurses in a malpractice case.

Demerson v. Smith, TX 1st Court of Appeals - Houston (June 25, 2024).

The Texas 1st Court of Appeals recently ruled that a Plaintiff sufficiently served an expert report on a defendant doctor by sending a copy to the doctor's liability insurance carrier before suit was filed and also by serving the doctor's attorney through the court's electronic filing system. The Appeals Court reasoned that since

the insurance carrier accepted the expert report and represented that they would forward it to their insured physician, the carrier was an agent capable of accepting service. As to the electronically filed copy of the report, the doctor's attorney claimed she didn't receive that copy of the report because she hadn't added her email address to the court's electronic filing system until 5 days after she filed an Original Answer through that same system. The Appeals Court ruled that they weren't "at liberty to attribute physician counsel's lack of diligence in adding herself to the service list as a failure of Plaintiff to serve the expert report timely..." Accordingly, the Court of Appeals denied the doctor's request to have the case dismissed for failure to timely serve the required expert report. This is a complicated matter and the Appeals Court seemed troubled as to how an attorney could file an Answer to a lawsuit through the electronic filing system without entering their email address. But the more important issue to TAPA is whether a Plaintiff can satisfy their burden to serve an expert report by sending a copy to the physician's liability carrier BEFORE suit is even filed. It reeks of gamesmanship and could shortchange a defendant's ability to timely evaluate and object to an expert report. That portion of the Appellate ruling is under consideration by TAPA for action if the Texas Supreme Court decides to review the matter.

TAPA ANNUAL MEETING

and Discussion of Medical Liability Tort Reforms

All TAPA members and prospective members are invited to attend TAPA's Annual Meeting at the **Austin Airport Hilton Hotel, 9515 Hotel Dr., Austin, TX on Friday, November 8, 2024, at 9:30 am.** This year's program includes analysis of the 2024 election, a preview of the 2025 Texas Legislative Session, a re-cap of important medical malpractice cases, and a look at how Texas medical liability reforms have created more access to quality healthcare. A virtual option will be offered again this year for those who can't attend in person. Email bjackson@TAPA.info for more details.

FEATURED SPEAKERS



Evan Smith
 PBS Host
 "Overheard with Evan Smith"
 Founder Texas Tribune
 Former Editor/
 President Texas Monthly



Robert Howden
 Senior Advisor
 Legislative Director
 Office of Texas
 Governor Greg Abbott



William Large
 President
 Florida Justice
 Reform Institute

Brent Cooper
 Cooper and Scully

Brian Yarbrough, Ashley Morgan and Janiece Williams
 Erben and Yarbrough

Dr. Robert Hancock
 TAPA Board Chairman

Dr. Liam Fry
 TAPA Board Vice-Chair

Brian Jackson
 TAPA Executive Director



The Texas Alliance for Patient Access (TAPA) is an association of over 250 health care interests providing medical care to Texas residents and services to Texas medical providers. Its members include physicians, hospitals, long-term care facilities, physician groups, physician/hospital liability carriers, and charity clinics, as well as other entities that have an interest in assuring timely and affordable access to quality medical care. TAPA seeks to improve access to health care by supporting meaningful and sustainable health care liability reforms.



TEXAS ALLIANCE FOR PATIENT ACCESS

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Physician Growth Far Exceeds Population Growth

In-state physicians per capita

Since 2003, Texas has added 18,437 more physicians with in-state licenses than can be accounted for by population growth.

The population trend line would have produced 50,758 (171.9 x 29,527,941) Instead, we have 69,195 in-state physicians (234.3 x 29,527,941)

In-State Physicians: <https://www.tmb.state.texas.us/dl/C461C18D-3391-F385-6C04-D1F987AE089D>

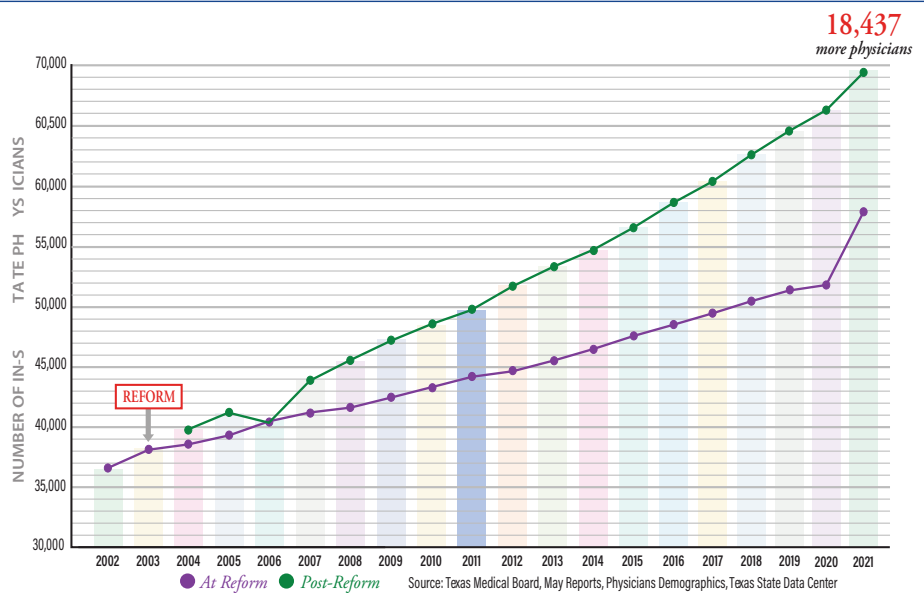
Population: <https://www.dshs.texas.gov/chs/hprc/tables/2020/dpc20.aspx>

Source: Texas Medical Board, May Reports, Physicians Demographics, Texas State Data Center

The bottom line holds the 2003 physicians per capita number constant adjusting for population growth. The top line is the actual number of in-state active physicians.

According to the 2018 Survey of "America's Physicians: Practice Patterns and Perspectives" by Physicians Foundation, physicians, on average, have 20.2 patient encounters daily, which equates to more than 4,900 patient encounters each year.

Multiple the delta 18,437 more physicians (69,195-50,758 x 4,900 patient visits = the opportunity for 90.3 million





TAPA Upcoming Events

- October 1:** TAPA will speak at the Preferred Management Company's Strategic Planning retreat in San Antonio. Preferred operates a network of 9 hospitals and all 9, including the Board members from each facility, will attend.
- October 9:** TAPA will speak at the Hot Topics Conference in Abilene, sponsored by the Texas Hospital Insurance Exchange.
- November 8:** TAPA's ANNUAL MEETING!!
- December 12:** TAPA will attend the Texas Hospital Insurance Exchange Board meeting in Austin.

If you are a current or potential TAPA member and believe your staff, board, or meeting attendees would benefit from an in person or virtual presentation on the importance of medical liability reforms, the status of those reforms in the courts, and/or the outlook at the Texas Legislature, please contact us at bjackson@tapa.info. We greatly appreciate those opportunities.