

New Mexico Protects Patients' Access to Care in Texas



New Mexico Gov. Susana Martinez on March 3, 2016, signed into law New Mexico' House Bill 270, the out-of-state provider access bill. New Mexico lawmakers crafted this legislative solution to protect access to medical care for the residents of eastern and southern New Mexico. The bill goes into effect July 1, 2016.

To benefit from the statute, Texas physicians must have in their agreement with the patient a “choice of law and forum” provision. If the agreement with the patient doesn't contain such a provision, HB 270 will not apply.

Below are two versions of a proposed consent: one addressing voluntary care and the other, emergency care.

The footnotes pertain to why we chose to include language.

As a protective measure, physicians might find it advantageous to offer a consent whenever treating any out-of-state patient. TMA encourages physicians to consult with their respective counsel in deciding to implement the consent forms. Although HB 270 doesn't take effect until July 1, that does not mean a court would not uphold such a contract.

*NOTICE: The Texas Medical Association provides this information with the express understanding that 1) no attorney-client relationship exists, 2) neither TMA nor its attorneys are engaged in providing legal advice and 3) that the information is of a general character. **This is not a substitute for the advice of an attorney.** While every effort is made to ensure that content is complete, accurate and timely, TMA cannot guarantee the accuracy and totality of the information contained in this publication and assumes no legal responsibility for loss or damages resulting from the use of this content. You should not rely on this information when dealing with personal legal matters; rather legal advice from retained legal counsel should be sought. Any legal forms are only provided for the use of physicians in consultation with their attorneys.*

DRAFT CHOICE OF LAW AND FORUM CLAUSE



NONEMERGENCY

AGREEMENT AS TO GOVERNING LAW AND FORUM

The patient, including patient's representative¹ and heirs or beneficiaries,² and the health care provider,³ including employees and agents of the health care provider, rendering or providing medical care, health care, or safety or professional or administrative services directly related to health care⁴ to patient agree:

1. That all health care rendered shall be governed exclusively and only by Texas law, and in no event shall the law of any other state apply to any health care rendered to patient; and
2. In the event of a dispute, any lawsuit, action, or cause of which in any way relates to health care provided to the patient shall be brought only in a Texas court⁵ in the county/district where all or substantially all of the health care was provided or rendered, and in no event will any lawsuit, action, or cause of action ever be brought in any other state. The choice of law and forum selection provisions of this paragraph are mandatory and are not permissive.⁶

1 This language was added to cover situations where the patient is a minor or is otherwise incompetent to enter into a contract.

2 This language was added to cover situations where the patient is deceased and the person or persons bringing the lawsuit are the heirs or wrongful death beneficiaries of the patient

3 Some providers working for a health care provider may not fall within the definition of health care provider under Ch. 74. This provision attempts to prevent an end run around HB 270 by suing an employee or agent who is otherwise not a health care provider under Ch. 74.

4 The definition of health care liability claim in Texas is broad enough even to include administrative services and safety. This language is included to make sure the choice of law and choice of forum clause corresponds to the definition in Ch. 74.001(13).

5 There was much discussion about whether the forum should be limited to Texas district courts. In some cases, a county court may be better, and the protection of Ch. 74 would still apply. There also was discussion about excluding federal courts. If the patient is from New Mexico and the health care provider is from Texas, then diversity of citizenship would apply under 28 USC sec. 1332. Clearly the caps will apply in federal court. There is an issue regarding the applicability of the report requirements under Ch. 74.351. This issue is currently before the Fifth Circuit in *Passmore v. Baylor University Medical Center*. In some venues, the federal judges and juries are better than in state courts. The physician will need to decide if he or she would prefer state court over federal court. This will depend upon the venue the physician is in and the judges and juries in that venue.

6 A trial court abuses its discretion in refusing to enforce a **forum-selection** clause unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. See *In re AIU*, 148 S.W.3d at 112 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15-17, 92 S.Ct. 1907, 32 L.Ed.2d 513 [1972]); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex.2004). A **forum-selection** clause is generally enforceable, and the burden of proof on a party challenging the validity of such a clause is heavy. See *In re AIU*, 148 S.W.3d at 113. *In re Lyon Financial Services, Inc.*, 257 S.W.3d 228 (Tex. 2008).

EMERGENCY ROOM

The execution of this Agreement as to Governing Law and Forum is not directly or indirectly a condition or requirement to the provision of emergency medical care to the patient. Regardless of whether the patient executes this Agreement as to Governing Law and Forum, there will be no limit or restriction to amount, kind, or quality of the medical examination, medical screening, and medical care that the patient receives in an emergency setting.

AGREEMENT AS TO GOVERNING LAW AND FORUM

The patient, including patient's representative⁷ and heirs or beneficiaries,⁸ and the health care provider,⁹ including employees and agents of the health care provider, rendering or providing medical care, health care, or safety or professional or administrative services directly related to health care¹⁰ to the patient agree:

1. that all health care rendered shall be governed exclusively and only by Texas Law and in no event shall the law of any other state apply to any health care rendered to patient; and
2. in the event of a dispute, any lawsuit, action, or cause of which in any way relates to health care provided to the patient shall only be brought in a Texas Court¹¹ in the county/district where all or substantially all of the health care was provided or rendered and in no event will any lawsuit, action or cause of action ever be brought in any other state. The choice of law and forum selection provisions of this paragraph are mandatory and are not permissive.¹²

7 This language was added to cover situations where the patient is a minor or is otherwise incompetent to enter into a contract.

8 This language was added to cover situations where the patient is deceased and the person or persons bringing the lawsuit are the heirs or wrongful death beneficiaries of the patient.

9 Some providers working for a health care provider may not fall within the definition of health care provider under Ch. 74. This provision attempts to prevent an end run around HB 270 by suing an employee or agent who is otherwise not a health care provider under Ch. 74.

10 The definition of health care liability claim in Texas is broad enough even to include administrative services and safety. This language is included to make sure the choice of law and choice of forum clause corresponds to the definition in Ch. 74.001(13).

11 There was much discussion about whether the forum should be limited to Texas district courts. In some cases, a county court may be better and the protection of Ch. 74 would still apply. There was also discussion about excluding federal courts. If the patient is from New Mexico and the health care provider is from Texas, then diversity of citizenship would apply under 28 USC sec. 1332. Clearly the caps will apply in federal court. There is an issue regarding the applicability of the report requirements under Ch. 74.351. This issue is currently before the Fifth Circuit in *Passmore v. Baylor University Medical Center*. In some venues, the federal judges and juries are better than in state courts. The physician will need to decide if he or she would prefer state court over federal court. This will depend upon the venue the physician is in and the judges and juries in that venue.

12 A trial court abuses its discretion in refusing to enforce a **forum-selection** clause unless the party opposing enforcement of the clause can clearly show that (1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial. See *In re AIU*, 148 S.W.3d at 112 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)); *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 (Tex.2004). A **forum-selection** clause is generally enforceable, and the burden of proof on a party challenging the validity of such a clause is heavy. See *In re AIU*, 148 S.W.3d at 113. In *re Lyon Financial Services, Inc.*, 257 S.W.3d 228 (Tex. 2008).