

★ SUMMER 2010 ★

IN THIS ISSUE

A Civil Society 1
 Why I Support TLR..... 2
 A Recent Jury Experience 3
 Mesothelioma Litigation 4
 Bill Edwards Interview 5
 Federal Health Care Bill 6
 NY Needs Texas Reforms 7
 Beverly Kishpaugh..... 8

OUR MISSION

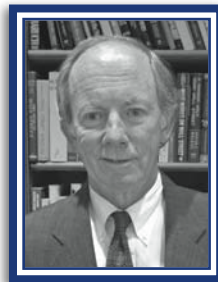
Texans for Lawsuit Reform is a volunteer-led organization working to restore fairness and balance to our civil justice system through political action, legal, academic, and market research, and grassroots initiatives. The common goal of our more than 17,000 supporters is to make Texas the Beacon State for Civil Justice in America.

1701 Brun Street, Suite 100
 Houston, Texas 77019

www.tortreform.com
 tlr@tortreform.com



Solving Problems In A Civil Society



Shad Rowe

This is a personal note. Dick Weekley and I have been close friends for 43 years. I would have helped with TLR out of friendship and loyalty – for a short while.

That “short while” is now 15 years. I have given some time and a little money. But the truth is that I have gotten far more than I have given.

Early on – as a figure of speech – I remarked to Dick that I did not want to end up like the old guy on the front porch yelling at cars to slow down. Without missing a beat, Dick said that he would never do that. He would call so-and-so and so-and-so and have a speed bump put in. Then he launched into a discussion of the futility of expending “negative” energy.

“Spinning your wheels,” “beating your head against the wall,” etc. are expressions of negative energy. TLR, since inception, has been about effective energy, preparation, planning, attainable goals and making Texas a better place to live and work. It has been about solving problems. It is an effective “think tank,” but far more importantly, it is an effective “do tank.”

TLR has effected positive change. It is non-partisan, it is goal-oriented, and for most of the people involved, it has been a great pleasure. Most people do not ever get a chance to be part of an effective enterprise that really works – particularly in the government / political world. I would urge anyone reading this note to join us and become involved.

TLR has been a big plus for the State of Texas, but at the end of the day, I believe that TLR will leave behind an even more important legacy. TLR was created to solve a big problem for 99.99% of the people in Texas. It succeeded, first because it is non-partisan and therefore inclusive of the vast majority of Texans who recognized a terrible problem and second, because TLR has the capacity to develop plans far more thorough than elected representatives have the time to develop themselves.

Clearly, there are stupendous problems facing our state and our nation. TLR provides the best organizational model so far for solving entrenched problems in a civil society.



Shad Rowe

Why I Support TLR

By Bob Weekley



Bob Weekley, a native Texan and brother of TLR founder, Dick Weekley, is a successful real estate developer and investment manager with Lowe Enterprises. A longtime supporter of TLR, Weekley believes it is important to work with pro-business and free market advocacy groups around the country and he actively encourages other donors to invest now rather than sometime in the future. Below are 11 Principles that guide his philanthropy:

1. If someone else is willing to do all the work, I should be willing to write the check.
2. If the people who have benefited most from this marvelous economic machine and legal system won't contribute to help save it, who will?
3. There are four things you can do with your money when you have been fortunate enough to create a large amount: 1) spend it, 2) give it to your children, 3) give it to the government, or 4) invest it in a good cause. Of the four, the *last* is probably the most important and long lasting.
4. When we accumulate some wealth *earlier* in our career, we usually continue to work to grow even more wealth. *Later* in our career, we would be wise to invest some of it to grow a better country.
5. At the end of the day, which of the things we've done in our life will have the *most lasting positive impact* on our state and our country? I suggest one of the most important is to help preserve and enhance the very legal and economic system that has been the primary cause of our nation's health and prosperity, and which prior generations provided for us.
6. Giving money *today* allows us to benefit in several ways: among them is personally seeing the money used effectively, feeling satisfaction, and gaining some recognition. Giving money *tomorrow*, after we're gone, allows *none* of these.
7. If we're investing time, energy, and money to provide our children with the education they need to prosper in the future, we best also invest to insure a future that allows them to reap the benefits from capabilities they have developed. It also sets a pretty good example.
8. Of the three: time, talent, and money, I should at a minimum give some money.
9. Wouldn't you rather decide *today* where, when, and how to most effectively spend your money for a better society, rather than have someone do it *after you're gone*, and without your insights, values, and judgment?
10. I give to religion, education, health, the arts, good causes, and philanthropy, but I think my giving to TLR is the *most* important. It is so because it helps preserve the very foundation upon which all wealth is created, (and hopefully retained by those who created it), which in turn enables all the other philanthropies to continue to exist.
11. After we've reached a certain level, our net worth should not only be measured in dollars, but in the positive impacts it has on the society in which we live.



My Recent Experience on a Jury

By Richard J. Trabulsi, Jr., TLR President



Trial by jury in both criminal and civil cases is a Texan's right. Service on a jury is a Texan's duty. I recently served on a jury in a murder trial in Harris County, in Judge Vanessa Velasquez's 183rd District Court, and the experience confirmed that the best of our Texas criminal judges have it right in how to select an impartial jury. They should serve as a model for how juries should be selected in civil trials. The Texas Supreme Court should enact rules for jury selection (called *voir dire*) in civil courts similar to the practices of jury selection in our best criminal courts. It is disappointing that the Court has not long ago done so.

I was called to the 183rd Court as part of a 65 person panel. From that panel would be selected, ideally, "twelve citizens true" who would listen to the evidence without prejudice, would follow the law conveyed to them by the judge, and would render a verdict and sentence according to the evidence, the law and the instructions of the judge.

To choose an impartial jury, Judge Velasquez led the way by taking a little over an hour to state the basic elements of the case, read the indictment and ask questions of the jury panel. To determine whether there were panel members who would not be impartial, she asked general questions such as whether any panel member knew her, the defendant or the lawyers; would be able to make a decision strictly on the evidence; or would feel *compelled* to render a life imprisonment sentence (vs. a term of years) if the defendant were found guilty. She also explained the basic law concerning criminal trials, including the defendant's right not to testify (the Fifth Amendment) and our nation's presumption of innocence of anyone accused of a crime.

The judge then allowed 45 minutes to the prosecutor to question the panel and an equal amount of time to the defense counsel. The only information that the lawyers had about the panel members was the sparse information contained on the "jury card," which was essentially name, address, and occupation. The prosecutor, to determine whether to ask the judge to dismiss a panel member for prejudice or whether to use one of his peremptory strikes to eliminate a panel member he believed would lean against the prosecution, asked general questions such as "could you render a guilty verdict even if the prosecu-

tion does not produce an eye witness to the murder?" The defense attorney also asked the jury panel general questions aimed at selecting impartial jurors, such as "are you convinced that my client is guilty because he was arrested for the alleged crime and was indicted by the grand jury or are you capable of judging him innocent if the proof at trial shows his innocence?"

So, after about three hours of *voir dire* and an additional 45 minutes while the lawyers decided on their peremptory strikes, a capable and impartial jury of Texans was selected to render a solemn judgment on another human being.

In contrast, *voir dire* in a civil trial might take a full day, or even several days. By tradition, the Texas civil judge takes very little role in *voir dire*, allowing great leeway to the lawyers for the parties in the lawsuit. The goal of the lawyers is to choose jurors they perceive to be *partial* (not impartial) to their respective clients. In important cases, the lawyers are often assisted by psychologists, handwriting experts, and private detectives (and, who

The goal of voir dire should be the selection, in an efficient and respectful manner, of an impartial jury, and not a jury which is a collection of partial jurors.

knows, perhaps astrologers as well). The lawyers, as a rule, are allowed to go into the facts of the case during *voir dire*, essentially making an opening argument and selectively presenting evidence to the entire jury panel. Often, the lawyers impose long questionnaires on panel members, asking privacy-invading questions, such as "what is your religion," "how often do you attend church," "what television programs do you watch," "what toothpaste do you use," "which political figures do you most admire," "which Presidents do you least admire," and other ques-

continued on page 9



Interim Hearing Sheds Light on Mesothelioma Litigation

By Mike Hull, TLR Counsel

A recent interim hearing in the House of Representatives revealed that Texas mesothelioma claimants receive large financial recoveries from litigation bankruptcy trusts and that the plaintiff lawyers' "contingency" fees are 40% of those recoveries, even though there is no risk and little work associated with the claims made on the bankruptcy trusts. On May 26, 2010, the House Judiciary and Civil Practices Committee (hereinafter referred to as "the Committee") held an interim hearing on the causation standard in mesothelioma litigation. The Committee, chaired by Representative Todd Hunter (R-Corpus Christi), met in response to an interim charge from the Speaker of the House directing the Committee to:

Review the burden of proof and damage calculation models for certain causes of action to determine appropriate applicability in Texas law.

As has been described in prior editions of the *TLR Advocate*, the 2009 session found TLR and its allies engaged in a pitched battle with the Texas Trial Lawyers Association, which sought to overturn the unanimous Texas Supreme Court decision in *Borg-Warner v. Flores*. Under *Borg-Warner* and subsequent appellate court decisions, a claimant who alleges that his or her mesothelioma (a fatal cancer) is caused by exposure to asbestos must prove that the claimant had sufficient exposure to a particular defendant's asbestos-containing product to cause the cancer. A court "must determine whether the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries" and that "there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." Importantly, the Supreme Court stated that while "substantial-factor causation separates the speculative from the probable," it "need not be reduced to mathematical precision."

Even though *Borg-Warner* is consistent with toxic tort causation jurisprudence, the mesothelioma plaintiff lawyers urged the Texas Legislature to overrule the Texas Supreme Court by enacting a vague and uncertain causation standard in mesothelioma lawsuits. The Legislature refused to do so, but the trial lawyers continue their advocacy for creating a loose causation standard.

The May 26, 2010 hearing included testimony by legal counsel who represent defendants and by plaintiff lawyers who represent mesothelioma claimants. Committee Members Jim Jackson (R-Carrollton), Dan Branch (R-Dallas) and Jerry Madden (R-Richardson) asked the witnesses insightful questions concerning the bankruptcy trusts and other matters. Numerous American companies have declared bankruptcy because of asbestos litigation. Many of the companies established "litigation trusts," allowing claimants with asbestos-related disease to fill out paperwork demonstrating employment at the workplace when asbestos-containing products were present at the workplace and then collect compensation from the bankruptcy trusts. Recovery from a bankruptcy trust does *not* require proof of causation.

Defense Counsel: There's no requirement that they [mesothelioma claimants] prove causation in the bankruptcy.

Rep. Jackson: So once [the claimant] goes to the trust, he fills out some forms and somebody makes some determination?

Defense Counsel: Correct. And he doesn't even have to fill out different forms for each trust. The trusts have gotten together and hired certain claims processors.

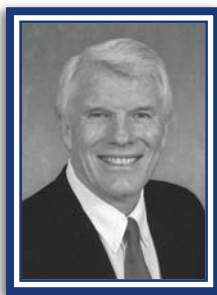
Rep. Jackson: Can he collect from more than one trust?

Defense Counsel: Absolutely. They will submit typically 20, 30, 40 claims to bankruptcy trusts.

It is undisputed that most, if not all, claimants with asbestos-related disease who have been exposed to asbestos

continued on page 10

An Interview with Bill Edwards



Bill Edwards

TLR conducted this interview with Corpus Christi attorney Bill Edwards after he testified before the House Judiciary and Civil Jurisprudence Committee in May. A prominent and successful trial lawyer, Mr. Edwards has been concerned about the problem of barratry in Texas and its corrosive effect on government and the courts for over twenty years. He has become the state's most outspoken advocate for more aggressive penalties for barratry.

TLR ADVOCATE: Can you define the problem of barratry that you discussed with the House Judiciary and Civil Jurisprudence Committee today?

EDWARDS: In common talk, what we're talking about is ambulance chasing. Case running.

It involves chasing down people who are injured or the families of someone who has been killed and then beating on their door trying to hustle the case. I guess you could call them case hustlers. They are looking to be paid money for hustling the case. They are looking to be paid money for getting the case signed up for somebody else or for themselves. We have statutes that say that is not only illegal, it's a felony.

It is been a policy in Texas, for long as we've been a state and back before we were a state, to discourage this kind of activity because it's intrusive. It takes advantage of people in a time of distress. If you are in the waiting room of an ICU, not knowing whether your loved one who is in there in critical condition is going to survive or not survive or if you are at a funeral home, before the body is even cold, to – figuratively speaking – you are not in any condition to be dealing with something as serious as hiring a lawyer, you are susceptible to being misled and hurt, to hearing half-truths and thinking they are real truths.

We know that the way barratry or case running has been going on in Texas, large amounts of money have been changing hands. And that money isn't just staying with some lawyers; it's spread around. It is a corrupting influence. Where I live in South Texas, we see where they are paying off sheriffs and constables and EMS personnel and nurses in hospitals and chiropractors, you name it. People from all walks of life have their fingers in this pie. And it's not doing the injured parties any good at all.

TLR ADVOCATE: Why aren't the perpetrators arrested and charged?

EDWARDS: It's a very difficult case to prove. It's white collar crime. Recall how hard it's been for the federal government to arrest people in the mafia, for example, and convict them. These folks operate like the mafia, they operate like drug cartels. The only difference is, while there are large amounts of money changing hands, it's not as dangerous. You don't get shot and killed in this business. For law enforcement, it's a difficult case to make.

TLR ADVOCATE: How long have you been working on this issue and what caused you to take on this difficult quest?

EDWARDS: Longer than I like to think about it, over twenty years, at the point in time when case running – barratry – started to become more prevalent. In the beginning of my practice, some fifty years ago, we didn't see this kind of thing, but it has gotten worse and worse. Basically, I'm a law and order guy. I don't like people who break the law.

TLR ADVOCATE: What have you learned in your investigations about this problem throughout Texas?

EDWARDS: First, that it's extensive. It is highly organized. There is a tremendous amount of money that changes hands. This money finds its way into political campaigns and finds its way into the hands of elected officials and the police officials and a lot of people who have no business with their hands on this money.

I believe South Texas may have been the incubator spot for this particular problem. But in the last ten to fifteen years, it has become state-wide. My investigations have revealed that it's now not only national-wide out of Texas, but international-wide, out of Texas.

continued on page 11



Liability Protections Absent from Federal Health Care Bill

By Jon Opelt

There are no effective lawsuit reforms in the federal health care bill. This is unfortunate because tort reform lowers health care costs.

As former Vermont Governor and former Democratic Party Chair Howard Dean candidly stated, “When you go to pass an enormous bill like that, the more stuff you put in it, the more enemies you make. The reason that tort reform is not in the bill is because people who wrote it did not want to take on the trial lawyers in addition to everybody else they were taking on, and that is the plain and simple truth.”

Here’s another plain and simple truth: House and Senate leaders on both sides of the aisle readily admit that the practice of defensive medicine, the ordering of procedures and tests to avoid a lawsuit, increases con-

will surely increase defensive medicine and drive up the cost of medical care for the average American.

And there’s more bad news: the health care bill could pre-empt the lawsuit reforms we passed in Texas, reforms that have brought thousands of primary care doctors and high-risk specialists to our state. If Congress or regulatory rules kill our lawsuit reforms, they will reduce patient access to doctors – particularly in high risk specialties and rural areas, drain budgets for improving care delivery, and ultimately drive up health care costs instead of curtailing them.

States should be permitted to fix their tort problems at the state level. Regulatory and/or administrative actions may likely flow from the national health care bill that could preempt state medical liability laws.

Texas Alliance For Patient Access, our California counterparts and the Texas Medical Association sought liability protections in both the House and Senate. California Congressman Henry Waxman was the first to oblige. Chairman Waxman introduced five amendments providing doctors with liability protections that were incorporated into the original 1,990 page House bill. Our attorneys, subsequently identified twenty-six sections of the House bill that could create new opportunities to sue, *in addition to* the five sections addressed by Congressman Waxman’s amendment.

We believed the best way to address these problem areas was not through section-by-section piecemeal amendments but rather by introducing a single, global amendment that closed all potential liability loopholes. Texas Congressman Henry Cuellar, a longtime friend of the medical community, authored the global amendment.

A global amendment made sense for a variety of reasons. First, it was simple in its construction and could fit anywhere in any present or future House or Senate version of the bill. Second, it is easier and more efficient to pass one global amendment than thirty-one separate clarifying amendments. Third, piecemeal amendments could get bogged down in debate. Lastly, any common

The federal health care bill could pre-empt the lawsuit reforms that have brought thousands of primary care doctors and high-risk specialists to our state.

sumer health care costs. The latest analysis from the non-partisan Congressional Budget Office estimates that government health care programs could save more than \$54 billion over the next 10 years if Congress enacted nationwide limits on jury awards for pain and suffering and other curbs similar to Texas law. Unfortunately, the federal health care reform legislation doesn’t include any of the effective tort reforms which have been proven in Texas, California and in other states to reduce frivolous litigation. Thus, the CBO’s projected cost savings will not be realized.

Even more alarming, ambiguous language in the enacted bill could create new opportunities to sue doctors and hospitals. A bill that aims to reduce total health care costs could do just the opposite. Encouraging new and novel theories to sue doctors, hospitals, and nurses

continued on page 12

New York's Medical Emergency: The Need for Lawsuit Reform

By Dr. Donna Montalto, MPP



Many northeastern states are crushed by the weight of lawsuit abuse and are looking to Texas as a model for reform. New Yorkers for Liability Reform has launched a campaign for medical liability reforms in order to increase access to doctors and health care in the same way we have in Texas.

In 2005, the New York State legislative process was identified as the most dysfunctional among all fifty states in a widely disseminated study compiled by the Brennan Center for Justice at NYU Law School. Accordingly, it is no surprise that a November 2009 report by the Pacific Research Institute (PRI) entitled “An Empire Disaster – Why New York’s Tort System Is Broken and How to Fix It” places New York’s Medical Malpractice System dead last in relation to all fifty states. The American Medical Association lists New York as a “crisis state”. And the PRI study reveals that the health of New York’s overall tort system did not fare much better with a rank of 48 (Best 1- Worst 50).

New York State’s Medical Malpractice System is the most expensive in the nation. Not surprisingly, New York’s medical community continues to appeal to New York’s lawmakers for relief from ever escalating malpractice premiums. While physicians in New York, along with businesses and local governments, have fought for more than forty years for medical malpractice reform, the personal injury trial bar has prevented adoption of the single most important reform – a \$250,000 cap on the hard to quantify awards for pain and suffering. A cap has proven to work well in other states including California and Texas. (Malpractice rates for physicians in California are approximately half the rate physicians’ pay in New York.) In total more than thirty states have caps in varying amounts.

In lieu of a cap in the mid-eighties New York lawmakers began providing physicians tax dollars to subsidize the cost of malpractice insurance. The subsidy now costs New Yorkers 137 million dollars a year and is secured via a tax on health insurance policies. New York is the only state in the nation which has resorted to subsidies of this magnitude for the medical community, rather

than enacting systemic legal reform to address malpractice costs. Additionally, New York lawmakers have artificially repressed medical malpractice rates forcing the few remaining medical malpractice insurance carriers to the brink of insolvency.

In 2009, in an effort to address the worst economic crisis since the Great Depression, New York’s lawmakers enacted the largest tax increase in the state’s history. As a result New York is the second most costly state in the nation in term of its state and local tax burdens just behind New Jersey. In 2010, New Yorkers simply cannot afford additional taxes, fees or taxes by any other name. From 2000 to 2008 New York experienced the largest out-migration of population of any state with more than one and half million people leaving its borders. This is a stark contrast to Texas, where approximately 1300 people move to the state daily.

Notwithstanding the unsustainable weight of the present tax burden on New Yorkers, lawmakers in Albany are poised in the 2010 Legislative Session to offer physicians medical malpractice relief in the form of new tax-based subsidies that would be in addition to the 137 million dollars currently provided. Sadly, this is New York’s version of medical malpractice reform. These new taxes on liability insurers and their policyholders, amounting to hundreds of millions of dollars of additional subsidies are not an acceptable alternative to reforms. The new proposals would; (i) increase the amount of taxpayer dollars paid to provide physicians excess malpractice insurance, (ii) fund deficits created by the artificial malpractice rate freezes, and (iii) create a new medical malpractice premium grant program for doctors practicing in high risk specialties and in areas of the state lacking physicians.

continued on page 12

TLR Salutes Beverly Kishpaugh on a Job Well Done

BEVERLY KISHPAUGH, the Director of TLR's Speakers Bureau, has decided to call it a career.

Beverly helped establish TLR's Speakers Bureau which currently includes over 30 volunteers. Under Beverly's direction, TLR Speakers have given over 1500 speeches throughout the state since TLR was founded.

It is impossible to overstate Beverly's impact in spreading the message of lawsuit reform throughout Texas, creating a network of committed and informed supporters that is over 17,000 strong.

Beverly's vigilant and unflagging efforts on behalf of lawsuit reform have been key in creating fair and honest civil justice policies and changing Texas from the lawsuit capitol of the world to a national model for reform.

"Beverly is a remarkable woman. Not only is she exceptionally dedicated and effective in all that she undertakes, but she is a person of virtue. She cares deeply about family and community, she is a true American patriot, and she loves the State of Texas," said **TLR President Dick Trabulsi**.

"She has spent a lifetime trying to better the lives of Texans and she has succeeded. While we will deeply miss her everyday involvement with us, we have no intention of letting her fade from the scene – she will continue to be our friend and we hope she will continue to be engaged with TLR in many ways. Thank you, Beverly, both for your role in the success of lawsuit reform in Texas and, especially, for teaching me so much."

TLR's Chairman Dick Weekley added, "Beverly was one of the very first people that TLR hired when assembling our team of committed and dedicated professionals. Beverly is one of the most devoted, kind, generous, thoughtful, and inspirational persons I have ever had the pleasure of working with. It is hard to imagine a TLR without Beverly. Having said that, now Beverly will

become one of TLR's committed volunteers and will continue to give advice and counsel to her TLR teammates."

TLR's Senior Chairman, Leo Linbeck, Jr., also called Beverly "an inspiration." "She makes a contribution through her actions every day, helping to make America the land of opportunity for this, and future generations. She is a wonderful role model for those who are not satisfied to just talk about patriotism, but are willing to get into the arena and lead the charge for a more efficacious civil order. We are all better for having been associated with her."

Before her work at TLR, Beverly was one of the leading grassroots organizers in the state and a committed advocate of conservative principles and policies. She has worked for a number of state leaders including Lt. Gov. Dewhurst, State Senator Florence Shapiro and State Senator Jane Nelson

"Texans for Lawsuit Reform has been successful over the years because they put the peoples' interests before special interests, and because they have extraordinarily talented people work-

ing with them. Beverly Kishpaugh is one of those people, and I am proud to have helped facilitate her initial employment and funding with the organization. She's a person who cares deeply about Texans and is one of the best grassroots builders in all of Texas, as well as one of the nicest, most kind-hearted women I've ever met," said **Lt. Gov. David Dewhurst**.

"Beverly taught many of us the fundamentals of grassroots politics and coached me in my first campaign. Texas is a better place because of Beverly Kishpaugh," said **State Sen. Jane Nelson**.

State Senator Florence Shapiro added, "Beverly served Texans for Lawsuit Reform with distinction. But for decades, her career has been service to others. I was



Beverly Kishpaugh with Senators Shapiro and Nelson

continued on page 9

Jury, continued from page 3

tions that are designed to reveal to the lawyers and their jury-selection consultants traits of personality or patterns of behavior that allow the attorneys to determine which panel members would be most inclined to support the position of their respective clients.

Now, my complaint is not with the lawyers who are conducting *voir dire* in the manner I have described, because they believe they are pursuing the best interests of their clients. My complaint is with the civil rules and procedures which allow *voir dire* to be conducted in a manner that clearly is outside of what was contemplated by our nation's Founding Fathers or the authors of the Texas Constitution. While there are strong individual trial judges in Texas who are active in jury selection and who will reign in the lawyers in *voir dire*, most civil trial judges in Texas simply grant wide discretion to the lawyers in jury selection (and, in some courts, the lawyers are given *carte blanche*).

The Texas Supreme Court has the authority, through its rule making process, to give guidelines to our civil judges in the conduct of *voir dire*. The judge, not the lawyers, should lay out the bare basics of the case to the jury panel and ask the panel members questions that truly are aimed at rooting out only those panel members who have a connection to the litigants or are clearly prejudiced. The lawyers should be given a strictly limited time in which to ask questions of the panel and the questions should not include ones that ask a panel member to pre-judge facts of the case (a juror should be asked to make a judgment only after hearing *all* of the evidence presented during the trial). Written questionnaires, if allowed at all, should be short and should not include questions that invade privacy or that are aimed at behavior patterns or general opinions.

In short, the goal of *voir dire* in civil cases should be the same as in the criminal case on which I served as a

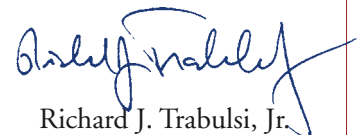
juror: the selection, in as efficient a manner as possible and in as short a time as possible, of an *impartial* jury – *not* a jury composed of some persons biased to one party and other persons biased to a different party. The *voir dire* process should also be respectful of the Texans who show up for jury duty – invading the privacy of jurors and engaging in a lengthy and tiresome *voir dire* of the entire jury panel is not respectful and is surely a major contributing factor to why so many people fail to respond to a jury summons.

Back to the murder trial in which I was a juror. Judge Velasquez is a no-nonsense jurist who obviously expects the lawyers in her courtroom to be precise, concise, professional and honorable. She herself was attentive, decisive, and articulate. The prosecutors and the defense attorney were competent and efficient. The law enforcement officers who responded to the 911 call and who found and arrested the perpetrator worked quickly and effectively.

My fellow jurors were representative of our society. They were good companions and, more importantly, good jurors. They paid close attention to the judge, the lawyers and the witnesses; they deliberated on the verdict and the sentence soberly and carefully. They were respectful of the process and of each other. In discussions in the jury room, the jurors spoke relevantly and articulately, without grandstanding and without wasted words.

The jury was empanelled on a Friday, the trial commenced on Monday morning and ended on Tuesday afternoon. We, the jury, found the defendant guilty of a brutal murder of a young woman and we sentenced him to life in prison.

The system worked.



Richard J. Trabulsi, Jr.
TLR President

Beverly, continued from page 8

fortunate to have Beverly on my team for a period of time. No one was more devoted to good public policy than Beverly. With her sweet and sensitive ways, Beverly was always demanding others to bring out the best in themselves. She challenged us all to be the best that we could

be. I can only imagine how appreciative everyone associated with TLR is of her contributions. Even with her retirement, Beverly's accomplishments will live on."

Everyone at Texans for Lawsuit Reform congratulates Beverly on a job that has been very well done. ■

in his or her work places and who fill out the paperwork, collect from the bankruptcy trusts.

Plaintiff's Lawyer: Certainly in the vast majority of cases we get some payments from some trusts...

The Committee hearing also showed that the plaintiff lawyers representing the claimants consciously time the submission of claims to the litigation trusts so that the settlements received from those trusts will not count as offsets against financial recoveries from other defendants. Most mesothelioma claims are against 20 to 100 defendants. The claims against the litigation trusts are easy to collect, do not require a trial, and do not require proof of causation. The claims against solvent defendants proceed in tort litigation. In tort litigation, if a claimant receives a judgment against a defendant, the judgment amount may be reduced by amounts that the claimant has received from other parties. This is consistent with the "make whole" philosophy of tort litigation – namely, that an injured party is to be made whole by the party causing the injury but is not to reap a windfall. By waiting until after a trial against a solvent defendant to file claims with the litigation trusts, the plaintiff lawyers subvert the established policy of settlement offsets.

The amount of the recovery from the bankruptcy trusts vary. While the exact amounts are difficult to ascertain, the plaintiff lawyers admit the recovery can be in the tens of thousands up to high six figures and the defense counsel contend the recovery is typically over one million dollars from the litigation trusts.

Rep. Jackson: When you say from any source, you know, I'll follow-up with the question to that. Have you received -- what's the least amount of compensation you've got?

Plaintiff's Lawyer: The least amount of compensation that a mesothelioma victim of mine has received? To date there are those that have received tens of thousands, hundreds of thousands, and there are certainly clients that have received over a million dollars.

Rep. Jackson: Give me a high and low then.

Plaintiff's Lawyer: I honestly don't know. I think the high, the most we've ever gotten for a plaintiff, and this would be a plaintiff who sustained exposure and had all kinds of products and all kinds of trades, might be in the very high six figures.

Rep. Jackson: Six figures does it best?

Plaintiff's Lawyer: High six figures, and that would be for someone who has a very unusual set of exposures.

Defense Counsel: [Claimants] would still be compensated from the bankruptcy trust on average over seven figures.

The plaintiff's lawyer who submits the paperwork to a bankruptcy trust receives a 40% "contingency" fee for recovering from the trusts even though there is no risk and no significant work associated with the claim to the bankruptcy trust.

Rep. Jackson: Say you get on contingency; you're going to get the same compensation or percentage from the trust money as you are from the court judgment [or] settlement?

Plaintiff's Lawyer: That depends on the contract, it depends on the state. There is no –

Rep. Jackson: What's average, 40%, 30%, 20%?

Plaintiff's Lawyer: No, it varies by state. Our typical –

Rep. Jackson: We're talking about Texas.

Plaintiff's Lawyer: 40% in Texas.

A case discussed at the hearing revealed a plaintiff recovering \$1.7 million *in addition to* recoveries from the bankruptcy trusts.

Rep. Jackson: Was Kelly-Moore the only plaintiff that – the only defendant that Smith had in the case, did he make any recovery?

Plaintiff's Lawyer: There was one defendant that the plaintiff proceeded to trial against. The judge denied a summary judgment motion as to one defendant.

Rep. Jackson: How many other defendants were there?

Plaintiff's Lawyer: There were settlements from three or four other defendants.

Rep. Jackson: How much were the settlements?

Plaintiff's Lawyer: The total settlements from the defendants were in between 1 and 2 million?.

Rep. Jackson: You didn't lose the case, you just lost the [particular] defendant. You did collect 1.7 [million dollars]...

continued on page 11

Bill Edwards, *continued from page 5*

In Mexico there are many many cases that have been inappropriately developed and then sent to lawyers in the United States, either because they are dealing with Mexican citizens or because they have sent their representatives to Mexico to sign these people up.

Farther away, I learned about a man who was working for a man who claimed to be a lawyer, but he was not. He had gone to Russia to sign up 38 death cases from a plane crash in Siberia.

Closer to home, the stories are heartbreaking. Recently, a family that I represent had just lost their mother in an automobile accident when an organization out of Dallas contacted them, claiming to be a ministry group of some kind. They were offering to get a lawyer, pay for the funeral and other expenses.

They said they only wanted to help, but the family was distraught. Their mother was still in the funeral home. When I contacted this so-called ministry group and asked them why an organization from Dallas would be calling to help a family in South Texas get a lawyer, they said “Don’t worry, we’ve got lawyers everywhere, geography is no problem.”

It is inconceivable that there would be an outreach program from Dallas coming to South Texas without substantial financing from these lawyers.

TLR ADVOCATE: What reforms do you believe are needed to rein in barratry?

EDWARDS: Barratry is a violation of the Texas Disciplinary Rules of Professional Conduct. Barratry is a serious offense that can result in disbarment for the attorney. The State Bar is supposed to police barratry, but the grievance process has proved to be inadequate. These cases are very expensive and the Bar does not have the staffing or the resources to handle them. The lawyer who is charged has his license, and therefore his livelihood, on the line and he or she will fight hard against any disciplinary action. I came to Austin to testify before the House Judiciary and Civil Jurisprudence Committee with the hope that the Legislature, in this next session in 2011, will pass a law that will create a civil cause of action to encompass everybody that might be engaged in this kind of activity.

I’m advocating a civil cause of action because a civil case gives us a tool we do not have now – to take depositions from people. Many times, in depositions like these, you get the necessary ammunition you need which could then be turned over to the bar or to prosecutorial authorities.

I am optimistic. I think that there is an excellent chance to get a bill passed, although I predict there will be a great push on the part of some folks to water it down, because there are some folks that just can’t stand that kind of legislation. Still, I am optimistic.

For more information on barratry, visit www.tortreform.com and search “barratry”. ■

Mesothelioma, *continued from page 10*

In sum, the Committee hearing demonstrated that exposure and dosing to asbestos-containing products is determinative of causation and therefore the Texas Supreme Court is right to require the plaintiff lawyers to prove their cases against each defendant. The hearing also demonstrated that the mesothelioma claimants recovered significant sums before the *Borg-Warner* decision and continue to do so today. Moreover, the plaintiff lawyer practice of manipulating the submission of claims to the bankruptcy trusts demonstrates that there is a need for the Legislature or the courts to require submission and resolution of bankruptcy trust claims *prior to* the start

of trials. And finally, if the plaintiff lawyers are attacking the *Borg-Warner* causation standard because they are concerned about their clients’ financial recoveries, then they should, at a minimum, significantly reduce their 40% fees for recoveries received from bankruptcy trusts and settling defendants.

You can access a video of the House interim hearing in the following manner: <http://www.house.state.tx.us/committees/broadcasts.php?session=81&committeeCode=330>. Go to the hearing tab for 5/26/10. When the video starts forward the video to 2:43:12. ■

Health Care Bill, *continued from page 6*

sense read of the bill, would suggest that no liability protections are implied unless specifically stated.

The healthcare community approached Blue Dog Democrats in both the House and Senate stressing the need for improved liability language in the final bill. Congressman Cuellar offered a revision to his global amendment stating that nothing in the federal health care proposal could “modify or impair state laws governing legal standards or procedures used in medical malpractice cases, including the authority of a state to make or implement such law.” The amendment gained support from fellow Texas Democratic Congressmen Gene Green and Charles Gonzalez. There was reason to believe that the amendment would be incorporated before the bill was passed.

Then, the unexpected occurred. Republican Scott Brown was elected to former Democratic Senator Ted Kennedy’s seat in Massachusetts. The Senate lost its Democratic 60-seat super majority. This gave Republicans a crucial 41st vote, which would allow them to temporarily change the direction of the proposed health care legislation.

For a while it appeared that the proposed healthcare legislation was at an impasse, as a number of Congressmen had issues with various aspects of the Senate bill. However, a promise was made that any legislation that passed would be amended and improved by subsequent legislation. As a result of this promise, the House voted to pass the Senate version of the bill.

The promise to amend the passed health care bill was kept to some extent. A “reconciliation bill” was drafted for this purpose. A reconciliation bill can only contain items

that have a budgetary impact. This method was employed since it only required 51 Senate votes. However, items not related to the budget were excluded from the amendment and, despite the cost of defensive medicine, none of the badly needed liability protections were included.

Future bureaucratically created medical standards are not exempted in the bill. Thus, the Department of Health and Human Services could hypothetically adopt rules applying to future federal health care payments and could pre-empt state reforms and caps – caps that have proven so valuable to doctors and their patients.

More can and must be done to protect doctors from creative lawyering by the plaintiffs bar. TAPA and its allies will continue fighting to protect doctors and hospitals against expanded theories of liability and preemption of state reforms and caps. There is no known timeframe for the federal “cleanup bill” which was previously promised by Congressional leadership. It is doubtful that such a vote would occur before the November general elections.

It may be years before we know the full liability implications of the federal health care bill. But know this: Without unequivocal protections, doctors are likely to be sued more often and see their liability premiums rise resulting in more defensive medicine and reduced access to care.

Opelt is the Executive Director of the Texas Alliance For Patient Access, a statewide coalition of doctors, hospitals, nursing homes and liability carriers, that lobbied for and has continued to protect Texas’ landmark medical liability reforms. ■

Medical Malpractice, *continued from page 7*

Unbelievably, instead of working to fix the system via substantive legal reform (a move that would lead to a lower tax burden, better health care, increased economic development and reduce the cost of health insurance), some state leaders are also looking to repeal some of the modest liability reforms currently in place. We are deeply concerned that a pro-trial lawyer bill, which would perversely permit a plaintiff, in cases involving multiple defendants, to recover more than the level of damages fixed by a jury, is being given serious consideration. We are also troubled by the fact that repeal of the sliding scale fee schedule applicable in medical malpractice cases is a top priority of the personal injury trial lawyers who have spent millions of dollars to influence lawmakers in Albany. Rather than repeal this law, which gives victims a greater percentage of the amount of a recovery or settlement, the law should be expanded to apply to all personal injury cases.

Instead of bailing out the doctors with the band-aid solution of taxpayer-paid insurance subsidies and continuing to allow windfalls to plaintiff lawyers, New York State’s political leadership should start worrying about average New Yorkers, and the businesses which hire them, who, in the absence of real reform, will continue to suffer and leave our State. Please visit our website NYLawsuitReform.org to learn more about the fight for New York.

Donna Montalto, MPP has served as the Executive Director for the American College of Obstetricians and Gynecologists, (ACOG), District II, since 1998 and also served as ACOG’s principle lobbyist from 1990-1994. ACOG one of New York State’s most trusted and credible voices on all aspects of health care for women and the organization is a proud, active member of the New Yorker’s for Liability Reform (NYLR) coalition. ■