

★ JUNE, 2006 ★

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**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 14,000 supporters is to make Texas the Beacon State for Civil Justice in America.

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## Restoring the Integrity of the Jury System

The jury system is a bulwark of democracy, but like any other democratic process, it can be rigged. In parts of Texas, some lawyers have developed the art of trick questions during jury selection (known as “voir dire”) that are designed to eliminate fair-minded jurors. When these questions winnow out enough responsible citizens, those who remain on the jury bear little resemblance to the community they are supposed to represent.

For example, if you were called to jury duty, how would you react to a lawyer’s question seeming to suggest that you should disregard the fact that a child killed in an accident was not wearing a seat belt? This was the question raised in a recent landmark case decided by the Texas Supreme Court. On its face, the lawyer’s question seems innocent enough—merely whether jurors “could not be fair...if they knew [the child] had not been wearing a seat belt.” But, in context, this is a “commitment” question calculated to eliminate safety-minded jurors—as proven by the fact that this line of voir dire questioning in fact eliminated not one but two complete panels of prospective jurors.

In this kind of “commitment” question, the plaintiff lawyer was clearly attempting to identify and disqualify jurors who, having heard a sketchy description of the facts in voir dire, and before hearing all of the evidence, would admit having an opinion about driving with children unbelted.

The Texas high court fortunately brought this kind of abuse to a stop, ruling in *Hyundai v. Vasquez* that jurors may not be disqualified because of their answers to these so-called “commitment” questions, even if the judge permits such questions to be asked. In effect, the Supreme Court ruled that a juror who admits having common sense is not to be dismissed “for cause” as “prejudiced.” Texans for Lawsuit Reform had advocated this result through an *amicus* brief we filed in the case. For those readers who want more detail about the facts of this case and the Court’s reasoning, please see the article on page 6 of this *Advocate*.

Juries are supposed to be selected in a neutral process from a cross-section of the citizenry. When that selection process is subverted, the abuses must be corrected in order to preserve the jury system. By eliminating an abusive practice that prejudiced the neutrality and fairness of the jury selection process, the *Hyundai* decision represents a major step toward restoring the integrity of the jury system.



Hugh Rice Kelly  
 TLR General Counsel

## Justin Unruh and Sherry Sylvester Join the TLR Team



**JUSTIN B. UNRUH** is the new Director of the TLR Political Action Committee, effective June 1, 2006. “Justin is well qualified to become an integral member of the TLR team,” said Dick Trabulsi, TLR PAC Chairman. “We conducted an exhaustive search for just the right person with the energy, experience, judgment, philosophical commitment to our cause, and work ethic to continue the successes of TLR PAC. We found that person in Justin Unruh. For the last seven years, Justin has been Chief of Staff and Legislative Director for Geanie Morrison,

one of the most able and respected Members of the Texas House of Representatives. While Rep. Morrison was very reluctant to see so trusted and capable an advisor leave her staff, she recognized that this is a great opportunity for both Justin and TLR and graciously assented to Justin’s move.”

Michael Stevens, TLR PAC Board Member, noted Justin’s qualifications: “Justin Unruh brings a wealth of experience to the PAC Director’s job. He has been active in political campaigns and legislative policy throughout his career. Justin received his Bachelor of Arts in Government from the University of Texas at Austin. We all look forward to working with Justin as our PAC continues to support candidates who share our views on the Texas civil justice system.”



**SHERRY SYLVESTER**, an award-winning journalist and political operative, has joined TLR’s communication strategies team. A former political writer for the San Antonio Express-News, Sherry left the newsroom in 2003 to found Texas Media Watch, the country’s first media monitor to target statewide metropolitan dailies. In 2005, Sherry took a working sabbatical to run the communications operation for the GOP nominee for governor in New Jersey. Recently, she was named Alumni of the Year by her alma mater, the Graduate

School of Political Management at George Washington University, for her achievements in both politics and media.

“The leadership and volunteers of Texans for Lawsuit Reform are the Jedi knights of Texas politics,” Sherry observed. “Their integrity, commitment, strategic skill and discipline are unparalleled in the state. I am delighted to be part of the team.”

Hugh Rice Kelly, TLR’s General Counsel, commented, “Sherry brings wide experience, honed skills, and sound judgment to the important task of communicating the compelling arguments for establishing a civil justice system in Texas in which every litigant in every courthouse can receive fair and balanced treatment, with an efficient and reasonable outcome.”

*“The leadership  
and volunteers of  
Texans for Lawsuit  
Reform are the Jedi  
knights of  
Texas politics.”*

— Sherry Sylvester

## Matt Welch and Ken Hoagland Establish Consulting Practices

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**MATT WELCH**, TLR's longtime Political Action Committee Director, and Ken Hoagland, TLR's veteran Public Relations Director, have left the full-time employ of TLR to establish independent consultant practices. Fortunately, each will continue in a consulting capacity with TLR.

Matt is establishing Horizon Public Affairs, an Austin-based public affairs and legislative advocacy consulting firm. In leaving his role as TLR PAC Director, Matt reflected, "It has been an honor to be part of a team of Texans with such incredible integrity, character and civic virtue as the leadership and staff of TLR." TLR PAC Chairman Dick Trabulsi observed, "Matt Welch has had a dramatic impact on Texas politics. He has been active in a myriad of campaigns, including statewide, legislative and judicial races. There is not a person in our state who is more knowledgeable and skilled about Texas politics or more respected by elected officials."

Richard W. Weekley, Chairman & CEO of TLR, commented, "Matt has been a key to TLR's success. He is conscientious, principled and exceptionally capable. All of us value Matt's contribution to our organization – he is a person you can count on, no matter how tough the going or how strenuous the effort. We are thankful that Matt has been with us as PAC Director and we look forward to his contributions to the Texas civil justice system as a consultant to Texans For Lawsuit Reform."



**KEN HOAGLAND** has overseen the full scope of TLR's communications efforts and media relations, and has been TLR's most active participant on the speaking circuit, including radio talk shows and face-to-face debates with plaintiff lawyers. Under his leadership, TLR has gone toe-to-toe with the well-funded media efforts of the plaintiffs' bar, and our message has been vigorously presented to the Texas and national media. Ken established his consulting practice earlier this year.

TLR's Senior Chairman, Leo Linbeck, Jr., observed, "Ken's leadership in public relations has been a crucial ingredient in achieving the legislative successes of the last decade that are making our civil justice system more fair and balanced. You cannot win in the Legislature if you do not first win in the minds of the citizens of Texas. Ken has not only been brilliant in countering the misinformation campaign by the plaintiffs' bar but in stating the positive message that tort reform improves respect for the law, encourages job creation and product innovation, and favors consumers by reducing the 'tort tax' on products and services."

Dick Weekley commented, "I am delighted that Ken will continue representing TLR on the speaking circuit and will be a key advisor on all public relations matters."

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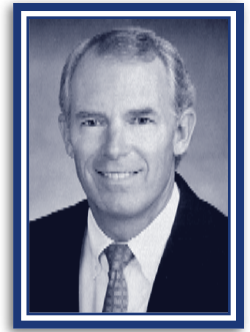
*"It has been an honor to be part of a team of Texans with such incredible integrity, character and civic virtue as the leadership and staff of TLR."*

— Matt Welch

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# Texas Ranks “Best in the Nation” in Tort Liability Index but Report Shows More Reforms are Needed

By Dick Weekley



A cutting edge report just released shows that while Texas still has some glaring civil justice problems to address – most notably the state’s notorious “judicial hellholes” – Texas tort reforms have strengthened the state’s economy in a variety of ways and are improving the quality of life for every Texan.

For example, the benefits of the medical liability reforms in HB 4 enacted in 2003 became apparent almost immediately, particularly in South Texas, where doctors had become increasingly scarce and specialists were practically non-existent.

Liability insurance rate relief turned that situation around and doctors are now establishing practices in previously underserved areas throughout the state. The Texas Medical Board is anticipating a record 4,000 applications for new physicians’ licenses next year – twice last year’s total and 30 percent more than the previous best year for the state.

But improved patient access to health care and lower insurance costs for doctors, hospitals and nursing homes are not the whole tort reform story.

The Pacific Research Institute (“PRI”) in San Francisco has completed the first “U.S. Tort Liability Index: 2006 Report,” a comprehensive analysis comparing the tort systems of all fifty states. After weighing 39 variables ranging from caps on punitive damages to appeal-bond caps, Texas was ranked best in the nation. Had the study

been done before the 2003 tort reforms, researchers say the state would have ranked 26th.

A fair and predictable civil justice system is key to our state’s strong economic competitiveness. Texas reforms have already started to bring about lower prices, higher job creation, better wages, and more product innovation throughout the state.

Texas ranked highest (best) in categories of the study that measured declining financial losses linked to non-meritorious lawsuits. Hospital liability insurance costs drive this point home. After a 54 percent rate hike in 2003, Texas hospitals got a 17 percent cut in 2004 and more premium reductions have followed.

Thirty new companies are now writing physician liability coverage in Texas and Texas doctors are expected to save \$42 million on their 2006 liability insurance premiums.

Non-meritorious health care lawsuits have been cut in half and hospital savings are being plowed into a variety of health care service enhancements ranging from the development of electronic medical records systems to the recruitment of more specialist physicians.

Nationally, the researchers at PRI found that excessive tort costs in the United States impose a “tort tax” of \$2,654 per year for a family of four. But Texans are now paying a smaller “tort tax,” due to our lawsuit reforms, and this should improve since there are still many lawsuits in the system that commenced before the reforms took effect.

It is important to note that the PRI study is not all rosy for Texas. The report particularly lamented Texas’ “judicial hellholes” – those courthouses in the state that plaintiff attorneys choose to file lawsuits because they consider the judges and juries to be particularly “friendly” to their claims. These “judicial hellholes,” two of which are identified as the Rio Grande Valley and the Gulf Coast of Texas, are described in the report as far

*“The surest way to have the laws respected is to make them respectable.” — Frederick Bastiat*

continued from page 4

more likely to grant improper certification of class action law suits, to allow the presentation of junk science and other improper evidence to the jury, and to tolerate strong alliances between plaintiffs' lawyers and judges. The U.S. Chamber of Commerce and the American Tort Reform Association also criticize Texas for allowing these "judicial hellholes."

Texas ranked last (worst) on several other factors measured by the tort liability study, including the state's failure to impose limits on attorneys' contingency fees and the failure to inform jurors about payments made to the plaintiff from various sources, such as payments received from insurance companies or government programs such as Medicare.

Our partisan election of judges also earned Texas the worst rank of "50" on the liability index. According to the report, "when judges act as politicians in robes, the civil-justice system is further eroded." Certainly, most men and women of high integrity and sound judicial temperament loath the need to solicit campaign funds in order to win or hold a judicial position.

The report should make all TLR supporters proud of the reforms that we have advocated, but the pressing concerns highlighted in the report must also steel our commitment to finishing the work of lawsuit reform in Texas. The U.S. Tort Liability Index highlights key incentives for creating a fair and balanced civil justice system – the integrity of the system itself, economic prosperity, and a better life for every Texan. Much has been done, but there is much yet to do.

## TLR'S HOUSTON OFFICE HAS MOVED

Our new address is  
1701 Brun Street, Suite 100  
Houston, Texas 77019.

*Our telephone and fax  
numbers are unchanged.*

## TLR Around the State



*Cameron Godfrey, Bill Daniel,  
David Farabee and Dick Trabulsi*

In April, TLR traveled to Wichita Falls to honor Rep. David Farabee. Approximately 120 guests joined TLR and the Wichita Falls Board of Commerce and

Industry in presenting the TLR Civil Justice Leadership Award to Rep. Farabee for his solid support of reforms that are helping to restore fairness, balance and predictability to the Texas civil justice system. TLR's Regional Co-Chairmen, Bill Daniel and Dr. Cameron Godfrey, were instrumental in assuring a strong turnout for the event.

Our Speaker's Bureau gave 20 speeches in May alone, and 40 speeches are already scheduled for the summer. We have given over 100 speeches this year all over Texas. Kudos to our volunteer Speakers who keep this momentum going and who are instrumental in building TLR's grassroots strength in towns and cities throughout our state. And congratulations to longtime TLR Speaker Patricia Harless, who won the Republican nomination for the Texas House of Representatives seat in north Harris County being vacated by the retirement of Rep. Peggy Hamric, who has been a strong supporter of tort reform throughout her career.

TLR supporters help our cause in many ways. Some contribute their time and talent, as they do when they speak to interested groups or visit with their legislators at home or in Austin. Thousands of Texans support TLR through financial contributions. We are often asked, "What is the source of your funding?" We proudly answer that our funds come from small businesses and Fortune 500 companies, from professionals, and from working men and women throughout Texas.

Dick Weekley has been busy this spring raising money for the TLR Political Action Committee. All funds contributed to the PAC must come, by law, from individuals – no corporate contributions are permitted to political action committees. We are grateful to those who have opened their homes to our fundraising efforts so far this year: in San Antonio, Peggy and Lowry Mays, with Senator John Cornyn as special guest; in Dallas, Myra and Bob Schelegel, with Speaker Tom Craddick and Nadine Craddick as special guests; and in Austin, Beth and Tom Granger, with Governor Rick Perry as special guest. Thank you, all!

The summer convention season kicks off with the Republican Party of Texas in June in San Antonio. Beverly Kishpaugh, Justin Unruh, and Mary Tipps will man the booth, and they look forward to visiting with many of the 10,000 political activists who are expected to attend.

In July, TLR will travel to San Francisco for the American Legislative Exchange Council convention, where we will host a dinner for Texas legislators. In August, it's on to Nashville for the National Conference of State Legislators convention. Texas' own Leticia Van de Putte, state senator from San Antonio, is president of the NCSL this year. These conferences provide invaluable opportunities for TLR members to visit with our state legislators in a relaxed setting.

# Texas Supreme Court Improves Process for Selecting Jurors

## INTRODUCTION

Texans For Lawsuit Reform believes that there are three ingredients to a fair and efficient civil justice system: balanced and sensible statutory law, impartial, competent and honest judges, and unprejudiced juries. TLR pays close attention to each of the three ingredients, which is why we filed an *amicus curiae* (“friend of the court”) brief to the Texas Supreme Court in *Hyundai Motor Co. v. Vasquez*. The TLR brief addressed the significant issue of whether a prospective juror can be disqualified based on a “voir dire” question that tests the juror’s possible verdict on a single, case-specific fact. “Voir dire” refers to the questioning of prospective jurors by the attorneys prior to the selection of the actual jury that hears the case.

The purpose of voir dire examination is to protect the right to an impartial jury by exposing possible improper juror biases that, by law, require the disqualification of the juror (known as a “for cause” removal of a juror). Thus, as the Texas Supreme Court has observed, “the primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath.”

The reason TLR weighed in on the issue of voir dire questioning of prospective jurors is that some lawyers use

do not leave their knowledge and experience behind” and held that a prospective juror is not disqualified from service simply because he or she believes that some facts are more important than other facts.

The *Hyundai* opinion substantially limits the ability of lawyers to unfairly shape a civil jury by disqualifying prospective jurors who view some evidence as more important than other evidence. TLR concurs with the Court’s reasoning, which is consistent with the basic approach advocated in TLR’s amicus brief.

## FACTUAL AND PROCEDURAL BACKGROUND

Sadly, four-year old Amber Vasquez, who was riding in the front passenger seat of a Hyundai automobile, was killed in a low-speed accident when the passenger-side airbag deployed with enough force to break her neck. It was undisputed that Amber was not wearing her seat belt at the time of the accident, even though state law requires that passengers in the front seat be belted. Upon impact, Amber was thrown forward because she was not wearing a seat belt, the airbag deployed, and Amber’s neck was broken.

Amber’s parents sued Hyundai, contending that the airbag deployed with too much force. Hyundai responded that the airbag was not defective and that a child

*Texans For Lawsuit Reform believes that there are three ingredients to a fair and efficient civil justice system: balanced and sensible statutory law, impartial, competent and honest judges, and unprejudiced juries.*

voir dire examination to unfairly manipulate the jury selection process. They do this by asking cleverly selected questions about case-specific facts and then getting the trial judge to dismiss jurors “for cause” who give undesirable answers. This manipulation of voir dire often produces a jury that is skewed from the outset to favor the plaintiff instead of producing a jury that is fair and impartial.

The Supreme Court’s decision in *Hyundai* holds that a trial court has the discretion to prohibit voir dire questions that preview relevant evidence and inquire of prospective jurors whether that evidence is outcome determinative. Appropriately, the Court found that “fair jurors

wearing a seat belt would not have been injured by the airbag’s deployment.

During voir dire examination of the jury panel, the plaintiffs’ lawyer asked the potential jurors: “Is there anyone here that regardless of what the evidence is, once you hear [Amber] wasn’t wearing a seat belt, your mind is made up?” Twenty-nine of 48 prospective jurors answered affirmatively. The trial judge dismissed all jurors and seated an entirely new panel.

During the voir dire of the second panel, the trial judge told the prospective jurors that Amber was not wearing a seat belt and asked if any of the jurors would decide

the case “based on that one fact alone.” Eighteen of 52 jurors responded affirmatively. Once again, the trial court dismissed all prospective jurors and seated a new panel.

During voir dire of the third panel, the trial judge allowed the lawyers to ask “general questions” about seat belt use (such as, did the jurors fasten their seat belts before leaving their driveways), but would not allow case-specific questions about Amber’s non-use of a seat belt. This time, a jury was empaneled and ultimately returned a verdict in favor of defendant Hyundai. The court of

facts that the lawyers reveal in voir dire. In responding to voir dire questions, jurors base their responses only on the facts presented to them during voir dire and do not have before them other relevant facts that will emerge during trial, yet those additional facts, if known, might alter their responses to voir dire questions, as well as their ultimate determination of the case if they sit on the trial jury.

Based on these considerations, the Supreme Court held that a trial court can refuse to allow a question that seeks to determine the weight to be given, or not given, a

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*“The primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath.”* — Texas Supreme Court

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appeals reversed, holding that the trial court erred in disallowing questions about Amber’s non-use of a seat belt. The Supreme Court reversed the court of appeals decision and upheld the trial judge’s refusal to allow the voir dire question requested by the plaintiffs’ lawyer.

#### **TEXAS SUPREME COURT’S ANALYSIS**

The Texas Supreme Court began its analysis by noting that Texas law provides that a person is disqualified from jury service if the person “has a bias or prejudice in favor of or against a party in the case” and that voir dire is properly used by attorneys to identify whether prospective jurors have a disqualifying bias or prejudice. The Court also noted that it had previously held that it is improper to ask prospective jurors what their verdict would be if certain facts were proved, but that it had not previously considered whether it is improper for an attorney to ask questions addressed to the weight a juror would give a relevant fact. In other words, the issue before the Court in *Hyundai* was whether a trial judge could disallow a question asking a prospective juror whether he or she would give greater weight to a particular fact than to another fact or to all other facts combined.

The Court concluded that questions about the weight jurors will give a particular piece of evidence can represent an effort to skew the jury. Additionally, inquiring whether jurors can be fair after isolating one relevant fact confuses jurors. Courts properly instruct jurors that statements made by lawyers in voir dire do not constitute evidence, yet jurors must answer whether they can fairly listen to all of the evidence based only upon the selected

particular relevant fact or set of facts. If the trial court allows such a question, however, then the jurors’ responses cannot be used to disqualify them because the answers do not reveal an improper bias or prejudice. According to the Court, it is within a juror’s province to conclude that a single admissible, relevant fact overcomes all others. “Fair jurors do not leave their knowledge and experience behind.” They simply “must approach the evidence with an open mind.”

#### **CONCLUSION**

A trial court has the discretion to prevent questioning of prospective jurors that is designed to pre-test jurors’ opinions about case-specific evidence. But if the court allows that questioning, a lawyer cannot use a juror’s response to disqualify an otherwise qualified juror – in other words, the lawyer cannot have that juror dismissed “for cause” but, rather, must use one of his limited peremptory “strikes” to exclude that juror, if he so chooses. The *Hyundai* decision complements the Court’s ruling in *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005), which adopted the general rule that it is improper for lawyers in voir dire to ask prospective jurors what their verdict would be if certain facts were proved.

These two Supreme Court cases go a long way toward allowing honest and competent trial judges to curb some of the worst abuses in the voir dire process. The purpose of voir dire, when properly conducted, is to empanel a fair and impartial jury, not to manipulate “for cause” challenges in a way designed to choose a jury that favors a particular party.

# Doctors Ranks Grow with the Passage of Proposition 12

By Drs. Howard Marcus and Bruce Malone

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*A year ago April, the American Medical Association removed Texas from its list of states in liability crisis, making it the only state ever to be removed from the list.*

Clearly, Texas' 2003 health care liability reforms are delivering on their promise: stabilized insurance rates for physicians and increased patient access to care. Sick or injured Texans today can see far more medical specialists and emergency care physicians than they could two and a half years ago.

Prior to the passage of Prop 12, Texas was losing high-risk specialists such as orthopedic surgeons, neurosurgeons and obstetricians. To avoid the risk of a lawsuit, many physicians cut back on high-risk and life-saving care or steered clear of emergency calls. Even worse, some doctors found it prudent to step away from their practice.

For example, in the two years before Prop 12 passed, 16 obstetricians retired, left the community or stopped delivering babies in Austin alone. On May 19, 2002, the *Austin American-Statesman* reported about a Central Texas man who "fell from an oak tree and broke his back [and then] took a bewildering journey that ended nearly nine hours later in a city 65 miles away" because a neurosurgeon was not on-call for an Austin hospital emergency room that day. The *Statesman* endorsed Prop 12, "in hopes that it would work as advertised – reduce medical malpractice insurance premiums...that have limited the willingness of some doctors to practice in certain areas of the state or certain types of high-risk medicine." Those hopes have been realized. Austin has regained the 16 obstetricians it lost and has added, among others, three pediatric cardiologists, two cardiovascular surgeons, a neurosurgeon and 24 emergency medicine specialists.

Hospitals across the state were turning away ambulances due to a critical shortage of doctors and nurses as liability costs rose as much as 50 percent in a single year. This was especially true in medically underserved areas of the state like Beaumont, Corpus Christi, Victoria and the Rio Grande Valley. But an amazing turnaround is occurring across Texas, with a statewide gain of 127 orthopedic

surgeons, 146 obstetricians, and 25 neurosurgeons. We've also seen substantial increases in hard-to-recruit children's doctors such as pediatric cancer physicians, pediatric endocrinologists, child neurologists, and doctors who specialize in newborns and premature infants.

The ranks of Texas physicians are on the rise primarily because the liability rates they pay are on the decline. All five of Texas' leading physician liability carriers have cut their rates since passage of Prop 12 – most by double-digits.

Be assured, patients are free to seek the services of attorneys now just as they were before the passage of the 2003 reforms. The new law has no limitation at all on damages for past and future medical bills, lost earnings, in-home assistance or other economic damages. The cap

is only on non-economic damages such as physical pain and emotional distress, which are highly subjective and are referred to as "soft damages." The "soft damages" component of verdicts had increased dramatically prior to the passage of the 2003 reforms. But the state's largest insurer of physicians reports that its average paid claim falls well below Prop 12's cap on non-economic damages, indicating that Prop 12 does not impact most medical liability claims. If some plaintiff lawyers are now taking

fewer cases it is because the chances for a runaway verdict in medical cases have been reduced.

Physicians want to take on the challenge of caring for the seriously ill. Obstetricians want to deliver babies and trauma specialists want to help injured patients. Because our elected officials enacted tort reforms and because the people of Texas confirmed the reforms by voting in favor of Prop 12, Texas doctors today can confidently do what we do best – treat patients.



*Howard Marcus, M.D.*

*Dr. Howard Marcus is an Austin internist and the chairman of the Texas Alliance For Patient Access. Dr. Bruce Malone is an Austin orthopedic surgeon and member of the Texas Medical Association Board of Trustees.*