

DRAFT CHOICE OF LAW AND FORUM CLAUSE:

NON-EMERGENCY

AGREEMENT AS TO GOVERNING LAW AND FORUM:

The patient, including patient's representative¹, and heirs or beneficiaries², and health care provider³, 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 only be brought in a Texas Court⁵ in the county/district⁶ 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 permissive⁷.

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 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 provider will need to decide if they would prefer state court over federal court. This will depend upon the venue they are in and the judges and juries in that venue.

⁶ The term “district” is used in case venue in federal courts is to be allowed.

⁷ 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).

This information should be used only in consultation with your attorney, who will advise you on how the language should be crafted for and used by your hospital, nursing home or physician practice.