

Volume 2 Issue 7

September 2003



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## FRIENDS & CLIENTS NEWSLETTER

### !!! CONSTITUTIONAL ELECTION NOTICE !!!

BY SHERRY BROWN AND STEPHEN HOWARD

On September 13, 2003, the Legislature has scheduled a special election breaking tradition from regular constitutional amendment elections. This election is particularly focused on a new law that will wipe out or seriously dilute protections that were created to prevent the recurrence of historic horrors. This particular amendment is Proposition 12. Although published as a Medical Malpractice Reform, this amendment would actually affect all damage claims.

Everyone has heard of the McDonald's coffee case. This case is why everyone thinks that caps are needed. However, every jury verdict is made not by attorneys, but by people like you and me who hear evidence and decide what they think is fair. This amendment takes away this right. Consider the following:

Lately, you have heard about bus drivers who have had accidents due to intoxication or falling asleep at the wheel. Companies knew or should have known that these employees were dangerous and the company should be responsible for their employees actions. If you pass Proposition 12, the most that families or the victims of these tragic accidents could recover for their lost or permanently scarred children would be \$250,000.00.

You probably have also heard of the double mastectomy tragedy. A woman was given a bilateral mastectomy and was told forty-eight hours later that there had been a mix up and that she did not have cancer at all. She and someone else's name had been switched on the slides and pathology reports. If this happened in Texas after Proposition 12 passes, the most she could recover for a careless mistake would be \$250,000.00, regardless of the permanent disfigurement and mental anguish she would have to endure for the rest of her life.

These are just two examples of how crucial this election is. The amendment has to be approved by the voters, and that is why the election date is important. By scheduling the election on medical malpractice reform September 13 rather than November 4<sup>th</sup>, the traditional date, the Legislature has all but guaranteed a low voter turnout, thus increasing the chance that Proposition 12 will pass. September 13 is a Saturday (also the beginning of football season,) and it will be difficult to convince people that they have a vital stake in what is being presented in this election.

Many think that no amount of money could fix such terrible damages, and they could be right. How do you put a price on a loved one, or on a lifetime with permanent disfigurement or disabilities? But, without the fear of high damage awards, what will prevent a company from hiring drunk drivers? What will prevent day cares from hiring pedophiles? What will prevent car companies from building cars that rollover or explode?

Since this issue could affect all of us or someone we know and love at some point in our lives, we encourage you to vote "NO" to Proposition 12. Don't let the Legislature decide what your loved ones are worth.

**GET OUT AND VOTE**

## Expunction and Nondisclosure of Criminal Records

By Jonathan M. Bailey

*“I recently applied for a job, but the company would not hire me. They said it was because they ran a criminal background check and found a prior arrest. The court gave me deferred adjudication on the case, I successfully completed the probation, and the court dismissed the case. Why is the arrest and court disposition still on my record and what can I do to have this information removed from my record?”*

I am frequently asked this type of question, and the response can be fairly complex. Once a person is arrested and charged with a crime by the police, those records are permanently available for public disclosure and distribution. This is true even if the arrest is later found to be unlawful, the case is dismissed, or the person is acquitted at trial. These records often surface during a criminal history search, and create problems when a person applies for a job, an apartment, a professional license, etc.

In the past, the only way to prevent public disclosure of criminal records was through the expunction process. An expunction is essentially a court order directing law enforcement to destroy all records related to a specific arrest and charge. But the law only permits an expunction under certain circumstances, and a person who serves probation, including deferred adjudication, is not eligible for expunction. This means that a person who successfully completes deferred adjudication, and subsequently receives a dismissal of the case, will still have records of that arrest and charge disclosed to the public.

Effective September 1, 2003, there will be a solution to this problem. A new law allows a person who successfully completes a deferred adjudication to request an “order of nondisclosure” from the court. If granted, this order of nondisclosure prohibits criminal justice agencies from disclosing records to the public related to that arrest and charge.

A person may seek an order of nondisclosure immediately following completion of deferred adjudication for some misdemeanor offenses, but must wait an additional five years for other misdemeanor offenses, and ten years for all felony offenses. If such a waiting period is required, a person loses eligibility for an order of nondisclosure if they receive a conviction or deferred adjudication for any other offense (except traffic violations) *during* the waiting period. A person is ineligible for an order of nondisclosure if they have a *prior* conviction or deferred adjudication for certain offenses.

If a person does receive an order of nondisclosure, the Texas Department of Public Safety is required to send a copy of the order to all state and federal law enforcement agencies that have criminal records subject to the order. These records are exempt from disclosure under the Public Information Act. Further, the person may deny the occurrence of the arrest and prosecution for that offense unless the records are being used in a subsequent criminal proceeding. Most importantly, these records *may not be* collected or disclosed to the public by a private entity. A first violation will subject the entity to a warning, and to a civil penalty of \$500 for each subsequent violation.

If you or someone you know would like more information on expunction or nondisclosure of criminal records, please contact this office for a free consultation.

**We're on the web at [www.kuzmichlaw.com](http://www.kuzmichlaw.com)**

# Medical Malpractice and Proposition 12

By Janice Fulks R.N.

On September 13, 2003 we will go to the polls to vote on **Proposition 12**, which calls for a change in the Texas Constitution. **Patients need protection from malpractice, not doctors!** Before you go to the polls on September 13, consider these facts:

- ◆ Between **44,000 and 98,000** hospital patients are killed each year from medical errors
- ◆ There is between **17 and 29 million** dollars in total cost each year from **preventable deaths** and injuries due to hospital errors
- ◆ Each year, the estimated cost of medical errors in Texas alone is **\$1.2 billion**
- ◆ Surgeons operated on the wrong body part **150 times between 1996 and 2001**
- ◆ **1 in 5 Americans** reported that they or a family member had experienced a medical or prescription drug error
- ◆ There were **6,038 medical malpractice claims** reported to the Texas State Board of Medical Examiners between January 2001 and May 2002
- ◆ Of those 6,038 medical malpractice claims, **0 were investigated** by the Texas Medical Board
- ◆ There have been **0 doctors** in Texas who had their licenses revoked for medical errors **since 1997**
- ◆ There were **only 6 doctors in Texas** who had their licenses revoked in 2002 for drug abuse and sexual misconduct, **not medical negligence**
- ◆ **5%** of doctors are responsible for **54% of all malpractice in the United States.**

If the proposition passes, the Texas Constitution will limit medical malpractice awards to \$250,000 on non-economic damages. Non-economic damages are damages such as pain and suffering, physical impairment, physical disfigurement, and loss of family relationships. Regardless of how many healthcare providers or doctors caused the injury or the severity of the injury, the “cap” will be \$250,000. A good example is a baby’s death. The parents of that baby will only be able to collect a maximum of \$250,000 from that doctor or healthcare provider who caused their baby’s death and, in all likelihood, **that doctor will continue to practice medicine.** In addition, a non-profit hospital, that is hospitals that are charitable institutions or “faith based,” will only have to pay a maximum of \$100,000 in damages. Not only will the passage of Proposition 12 limit awards for damages, it also serves to make filing a medical malpractice lawsuit more difficult, **reducing your ability to protect yourself or your family from bad doctors or other healthcare providers.**

Insurance companies claim the new laws will reduce doctor’s medical malpractice premiums and, in turn, reduce health care costs for the consumer. In reality, medical malpractice premiums account for less than **one percent** of health care costs. Studies that track the cost of insurance premiums that doctors pay for medical malpractice show the cost of premiums rise and fall according to the state of the economy. When the economy is slow and investment returns are low, insurance companies raise their premiums in order **to make more money.** Most citizens forget that insurance companies are still a business and want to make as much profit as possible. If you, like many, believe that claims such as medical malpractice are clogging our courts, consider that from September 2001 to August 2002, criminal matters made up 50.2% of all court filings with family matters second at 19.5%. Only **1.6%** of all court filings are for injuries or damages other than motor vehicle accidents, **that 1.6% include medical malpractice claims.**

Numerous hospital and medical procedures have been made safer as a result of lawsuits including; anesthesia procedures, catheter placements, drug prescriptions, hospital staffing levels, infection control, nursing home care and trauma care. Please go to the polls and vote to protect all of us from dangerous doctors and healthcare providers. Consumers must continue to hold physicians and other healthcare providers responsible for their negligence. Send a message to the state legislature that it is time to **stop protecting dangerous doctors. Vote NO to Proposition 12 on September 13.**