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Respondents in Discovery: A Pre-Suit Answer to the Medical Malpractice Crisis?

Spiralling medical malpractice litigation has caused many state legislatures to enact a variety of remedial measures.¹ The Illinois General Assembly responded by passing the Respondents in Discovery Statute,² a mechanism designed to curtail the number of medical malpractice suits through the use of pre-suit discovery. This statute has been recognized as a discovery device since “discovery may be had against certain named ‘respondents in discovery’ to the same extent as if they had been made parties, even though they are not parties.”³

Before the enactment of section 21.1, Illinois Supreme Court Rule 217 was the sole means for obtaining pre-suit discovery. This rule, however, was limited to the taking of depositions for the perpetuation of testimony⁴ and could only be used if a court order was

   The plaintiff in any action based on an allegation of negligence in the performance of health care services may designate as respondents in discovery in his pleading those individuals, other than the named defendants, believed by him to have information essential to the determination of who should properly be named as additional defendants in the action.
   Persons so named as respondents in discovery shall be required to respond to discovery by the plaintiff in the same manner as are defendants and may, on motion of the plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such action.
   A person named a respondent in discovery may upon his own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.
   A copy of the complaint shall be served on each person named as a respondent in discovery.
   Each respondent in discovery shall be paid expenses and fees as provided for witnesses.
   A person named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after he is named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him may have expired during such 6 month period.

(hereinafter referred to and cited as “21.1” or “the statute”).
obtained. Section 21.1 represents a dramatic furthering of the right to pre-suit discovery since it is the first time that a party has been given the right to full disclosure prior to suit at his or her option.

This article will examine the statute to determine whether it is an effective weapon in curtailing the incidence and consequences of medical malpractice litigation. The constitutionality of Section 21.1 following the Illinois Supreme Court decision of Anderson v. Wagner will be analyzed in order to hypothesize on the validity of the statute. Finally, this article will explore the operation of section 21.1 in conjunction with the discovery devices provided in the Supreme Court Rules.

THE NATURE OF THE PROBLEM

The Prevalence of a Medical Malpractice "Crisis"

Medical malpractice litigation has been increasing at a staggering rate. Commentators have alluded to a wide variety of causes of this so-called malpractice "crisis." The types of injuries for which...
legal redress is sought\(^{11}\) as well as the grounds on which these claims are based\(^{12}\) are both numerous and diverse.

The effects of this crisis are severe. Because of the rise in the number of malpractice suits being brought, insurance companies have substantially increased the premium rates for obtaining malpractice insurance.\(^ {13}\) This extreme escalation in premium rates ac-

ment or surgery. Therefore certain medical specialists such as orthopedic surgeons, neurosurgeons, anesthesiologists, obstetricians, and gynecologists take greater risks.

(b) A growing national trend toward court actions for grievances that were not generally the subject of court actions. Contributing to this is the high mobility of the public which inhibits growth of trust in physicians.

(c) Today's poor public image of physicians, ranging from 'country doctor making house calls in the rain' to 'super-successful businessman.' This attitude of the public leads to more suits and higher jury awards.

(d) The breakdown of rapport between physician and patient. The family doctor is no longer the family friend. Busy physicians have made the medical practice very impersonal. Growing specialization contributes to this breakdown.

(e) The increased medical load carried by physicians is a definite factor in the rise of malpractice claims. Therefore the potential for error increases. In addition, Medicare and Medicaid have produced skyrocketing demands for medical services, while the number of physicians has not increased.

(f) Other factors include the publicity given to higher malpractice judgments and exposure via television of malpractice stories.

Cite the law journal from which quote is taken. See Senate Subcommittee on Executive Reorganization, 91st Cong., 1st Sess., A Study on Medical Malpractice: The Patient versus the Physician I, 1-6 (1969).

11. The HEW Study reported that "[o]f the 12,000 injuries alleged in the survey of claim files closed in 1970, 19% left permanent effects and 18% resulted in death. At the other extreme, 12% of the alleged injuries were primarily psychological. Excluding patients who died, two-thirds of the alleged injuries were temporary in nature." HEW Study, supra note 9, at 11.

12. A wide variety of grounds can be used to establish medical negligence.

For example, a malpractice lawsuit can be based upon res ipsa loquitur; the failure to give informed consent; the failure to diagnose; the failure to seek consultation or refer plaintiff to a specialist; the rendering of insufficient pre-operative and post-operative care; the failure to use proper follow-up procedures when the complications complained of were, in fact, foreseeable; or an omission of whatever sort which relates to the injury complained of."


13. (I)n the United States, the number of medical malpractice claims has increased greatly, as has the average size of awards and settlements made on those claims. The increase in the number of claims is said to reflect the increase in damage to patients as riskier cases are accepted for treat-and an increase in the propensity to bring suit against medical care providers. As a result of the rising incidence of claims, companies selling professional liability insurance have substantially increased the premium rates they charge.

S. Rottenberg, Economics of Medical Malpractice, 14 (1978). Moreover, from 1960 to 1970, the "total malpractice premium volume grew 507 percent, with surgeons growing 949 percent; physicians, 537 percent; hospitals, 263 percent; and dentists, 116 percent." HEW Study, supra note 9, at 509app.
Accordingly has been passed on to the health care consumer. Another more drastic and devastating effect of the crisis is that some physicians "will be unable to find a commercial insurer that will carry them, and rather than self-insure, will abandon practice."

**Legislative Responses**

The Illinois General Assembly sought originally to alleviate the medical malpractice problem in 1975 by enacting a program requiring screening panels, mandatory arbitration and a $500,000 ceiling on damages in all medical malpractice actions. In *Wright v. Central DuPage Hospital Ass'n*, however, the Illinois Supreme Court declared the legislative scheme unconstitutional, thus leaving Illinois with no remedy to this crisis. The General Assembly, in response to the *Wright* decision, enacted section 21.1 and a special statute of limitations for medical malpractice actions.

**SECTION 21.1—A POTENTIALLY EFFECTIVE RESPONSE TO THE CRISIS**

**As a Deterrent to Excessive Malpractice Litigation**

Section 21.1 was enacted for the purpose of reducing the number of malpractice suits by providing for pre-suit discovery. Although pre-suit discovery should logically lead to a reduction in the amount of litigation, other factors may militate against this result. For example, section 21.1 is an optional device which is rarely used. This lack of use might occur because once a Respondent in

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17. 63 Ill.2d 313, 347 N.E.2d 736 (1976).
18. Ill. Rev. Stat., ch. 83 § 22.1 (1977) provides in pertinent part:

No action for damages for injury or death against any physician or hospital duly licensed under the laws of this State . . . arising out of patient care shall be brought more than two years after the date on which claimant knew, or through the use of reasonable diligence should have known . . . but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

19. If the potential plaintiff, during the six month discovery period, discovers information which indicates that his chance for success at trial is remote, he would have an incentive not to name the RID as a defendant because he would be unable to meet the "probable cause" standard for impleading the RID. For a discussion of the probable cause standard, see notes 70 and 71, *infra*, and accompanying text. Conversely, if he discovers information that would lead to a successful claim, the RID theoretically would be willing to settle before suit is filed, thus reducing the number of lawsuits initiated.

20. Through 1979, only two appellate court decisions on § 21.1, *supra* note 2, have been
Discovery ("RID") is named, the complaining party only has six months within which he may name the RID as a defendant, rather than the normal two years granted by the statute of limitations. The failure to use section 21.1 seemingly demonstrates this preference. The important consideration, however, is that if parties do not use the statute, it will not serve to reduce the amount of malpractice litigation.

Another apparent defect is that section 21.1 may actually increase the amount of malpractice litigation. A plaintiff, who is unsure of the strength of his claim, can name a health professional as a RID with little risk and engage in full discovery for six months. During that period, he may discover certain information which would make his claim more solid and accordingly name the RID as a party defendant. Whereas he would not have originally filed suit and risked the imposition of Rule 41 sanctions by naming a RID he may be able to develop a more certain case and would therefore file suit.

The statute may also work to escalate the number of medical malpractice actions due to its attractiveness to plaintiffs with small claims. These plaintiffs generally do not bring suit. Because the award is small and recovery uncertain, they often are not able to locate attorneys. By filing under section 21.1, however, such a plaintiff could name a RID and develop a more firm basis for recovery before the suit is initiated. Since the award, and accordingly, the fee, is more certain, an attorney would be more willing to

21. Section 21.1, supra note 2, provides in the last paragraph: "A person named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after he is named a respondent in discovery. . . ."


23. The only risk involved arises if the plaintiff subsequently names the RID as a defendant and his claim against this person is unfounded. The plaintiff may then be subject to Rule 41 sanctions. See note 24, infra. No sanctions are provided, however, for the improper designation of an individual as a RID. Thus, there is no risk in engaging in the RID procedure—only in naming the RID as a party defendant.

24. Ill. Rev. Stat., ch. 110, § 41 (1977) provides in pertinent part: "Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee. . . ."

25. "An attorney working on a contingent fee (usually 33-1/3 percent of the amount received) will accept the case of a claimant only when he believes that there is a good chance of winning an amount sufficiently large to compensate him for the time and expense that he will invest." HEW Study, supra note 9, at 19 (footnote omitted).
represent the plaintiff. Thus, many small malpractice claims which might not have been initiated could now be filed under section 21.1 and perhaps even brought to trial. Consequently, the impact of section 21.1 on the incidence of medical malpractice litigation is questionable.

As a Limitation on the Number of Defendants in Medical Malpractice Suits

A major problem with medical malpractice suits is that it is common for a plaintiff to name as defendants anyone even remotely connected with the negligent act giving rise to the suit. If the plaintiff fails to join all potential defendants, "a person who is partially or totally responsible in law for the injury might go undetected or be protected from liability by the running of the statute of limitations." Thus, "it is risky not to join all persons who have apparently had contact with the injured patient." A significant purpose of section 21.1 is "to reduce the number of individuals actually made defendants in such actions by giving the plaintiff a mechanism for conducting efficient and effective discovery concerning a malpractice claim before he has to make a decision on whom to sue." Many non-meritorious suits brought against "marginal multiple defendants could be eliminated by the development of procedures and rules authorizing pre-suit (as opposed to pre-trial) discovery," such as that employed in section 21.1.

26. The reason for "shotgun" suits, other than shared liability among two or more parties, "is the limited opportunity for the contentious attorney to become adequately informed about the case prior to the entry of suit and the use of discovery." American Bar Association, Report of the Commission on Medical Professional Liability, 54 (1977).
27. Id.
28. Id. Moreover, due to this indiscriminate joinder, the number of defendants in a malpractice action is great and "persons who have had little or no involvement in the medical treatment at issue are subjected to the inconvenience and emotional trauma of being included in, and having to defend, a lawsuit." Id. at 53-4. In Illinois, for example, the average number of defendants in a medical malpractice action is eight. Telephone interview, Illinois State Medical Society in Chicago (October 15, 1979).
29. ILL. ANN. STAT. ch. 110, §21.1 (Supplement to Historical Notes & Practice Notes).
31. "This suggestion is very similar to a new provision in the Illinois Civil Practice Act which allows physicians to be added as 'respondents' in a lawsuit to permit discovery without actually having to name the additional physicians as formal defendants." Id. at 55, n. 53.

Logically, however, this conclusion is also warranted. A plaintiff, upon finding that his claim does not concern certain RIDSs, would proceed to file suit against a limited number of them for two reasons. Initially, he may not be able to meet the "probable cause" standard
The statute, however, is potentially a very effective device in reducing the number of defendants. The RID mechanism insulates potential defendants by allowing them to establish their lack of culpability during the pre-suit stage. A serious drawback to the effectiveness of section 21.1 in reducing the number of defendants is that it is optional. Most plaintiffs have proceeded through normal channels and sued many health care personnel rather than using section 21.1 and limiting the number of defendants. Consequently, the actual effect of section 21.1 in reducing the number of suits has been nominal. If the true legislative goal is to reduce or limit the number of defendants in malpractice actions, the procedure should be made mandatory.

As a Limitation on the Cost of Health Care

The excessive amount of medical malpractice litigation has driven up the costs of obtaining health care. As physicians become increasingly wary of being sued, medical procedures are altered in order to reduce the risk of liability in subsequent litigation. This phenomenon is formally known as practicing defensive medicine, and occurs in a variety of forms.

imposed by the statute to name a RID as a defendant. See note 19, supra, and notes 70 and 71, infra, for a discussion of the probable cause standard. Further, rather than risking the imposition of Rule 41 sanctions, see note 24, supra, by maintaining a suit against all of the RIDs, he would find it more desirable to proceed with a good claim against a limited number of the RIDs.

32. Section 21.1, supra note 2, provides in pertinent part, "The plaintiff . . . may designate as respondents in discovery . . . those individuals . . . believed by him to have information essential to the determination of who should properly be named as additional defendants in the action." (emphasis supplied)

33. See note 20, supra.

34. Put more precisely, "defensive medicine is the alteration of modes of medical practice induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are initiated." American Trial Lawyers Association, Quality of Medical Care—The Citizen's Right, 37 (1976). See S. Rottenberg, Economics of Medical Malpractice, 11 (1978).

There are two categories of defensive medicine. "Negative defensive medicine occurs when a physician does not perform a procedure or conduct a test because of the physician's fear of a later malpractice suit, even though the patient is likely to benefit from the test or procedure in question." (emphasis original) HEW Study, supra note 9, at 14. "Positive defensive medicine is the conducting of a test or performance of a diagnostic or therapeutic procedure which is not medically justified but is carried out primarily (if not solely) to prevent or defend against the threat of medical-legal liability." (emphasis original) Id. For the purpose of this article, both of the categories will be referred to as "defensive medicine."

35. Physicians, practicing defensive medicine, "require x-rays and laboratory tests, office visits, consultations, and hospitalizations to excess." S. Rottenberg, Economics of Medical Malpractice, 11 (1978). The six most prevalent forms of defensive medicine are:
With increased utilization of section 21.1, the incidence of defensive medicine should increase, for defensive medicine "is a by-product of medical-legal liability problems. . . ." Despite decreasing the possibility of health care personnel being named as party defendants, section 21.1 would result in greater liability for medical professionals because plaintiffs would have a greater opportunity to discover information leading to a recovery of damages. Physicians would react to this more certain liability by taking more defensive measures. With an increased practicing of defensive medicine, the costs of obtaining health care would correspondingly rise. Thus, the role of section 21.1 in reducing costs is uncertain.

As a Protective Device for Health Care Personnel

A major goal behind any legislation dealing with the medical malpractice crisis is that it should provide protection for those members of the health care profession whose exposure to liability is excessive. Many devices have been used to accomplish this objective. The common theme implicit in these devices is that they

1. excessive utilization of x-ray and routine diagnostic procedures;
2. excessive utilization of laboratory tests;
3. additional office visits to follow up medical conditions which might give rise to complications;
4. excessive utilization of medical consultations;
5. more instances of hospitalization for borderline cases which might be treated as well at home;
6. extended hospitalization of patients following surgery to avoid the possibility of premature discharge and possible complications at home.

HEW Study, supra note 9, at 39app. The HEW Study also found that "between 50 and 70 percent of all physicians claim they practice defensive medicine of one sort or another with varying degrees of regularity." Id.

36. HEW Study, supra note 9, at 15 (emphasis in original).
37. See notes 19-25, supra, and accompanying text. Furthermore, in many respects, § 21.1, supra note 2, merely extends the imposition of liability to the pre-suit stage, which, once again, would result in the greater incidence of defensive medicine. Given the fact that the claim is settled before the complaint is filed due to information found during the RID period, liability is not reduced. The medical professional would still be liable for the amount of damages specified in the settlement agreement—the liability is simply not judicially-imposed. Consequently, the imposition of liability would merely shift to the pre-suit stage. Because the imposition of liability is extended to the pre-suit stage under § 21.1, supra note 2, health care providers would take even more defensive measures.

38. The significant extent to which defensive medicine is practiced "has added to the overall rise in health care costs. Some of these costs are direct costs passed on to patients and their insurers, while others are indirect costs resulting from misallocation of vital health care resources—manpower, facilities, and equipment." HEW Study, supra note 9, at 40app.
39. Some states have enacted screening panels which provide for review of the claims by law people before they reach the courts and for dismissal of those which are non-meritori-
cut off plaintiffs’ claims or insulate the medical profession from liability.\textsuperscript{40} It appears, however, that section 21.1 does little to further these aims because the statute is so susceptible to abuse.

**The Failure of Insulation—Abuse of Section 21.1 Through Forced Settlements**

The potential for misuse of section 21.1 by plaintiffs through the use of forced settlements is great. Two distinct pressures exist to induce the RID to settle perhaps even non-meritorious claims.

The “insurance crisis” creates a favorable climate for marginal plaintiffs to force settlements. As the size of claims increase and insurance premiums correspondingly rise,\textsuperscript{41} medical professionals have become more fearful of the threat of litigation.\textsuperscript{42} If a RID is forced to disclose all information sought by the plaintiff, he may become more willing to resolve even a marginal claim rather than risk the possibility of having a suit being filed and having his premium rates increase.

The pressure to settle is exacerbated by the lack of judicial interference in the discovery process. Because Illinois discovery procedure encourages settlement by granting parties easy access to information,\textsuperscript{43} disputes may be resolved with a minimal amount of judicial intervention. This ease accorded to participants in a section 21.1 proceeding, when combined with the pressures created by the insurance crisis, could result in “forced settlements” of non-meritorious or marginal claims.\textsuperscript{44} The additional bargaining power

\textsuperscript{40} See note 1, supra. Special limitations periods have also been enacted which shorten the period within which plaintiffs may file suit against health care providers. \textit{Id}. A third common device is to impose mandatory or optional arbitration. \textit{Id}.


\textsuperscript{42} \textit{See note 13, supra.}

\textsuperscript{43} \textit{See notes 34-36, supra, and accompanying text.}

\textsuperscript{44} \textit{The HEW Study noted that “notice prior to the initiation of a suit would facilitate negotiation without any suit necessarily being filed at all. For the physician, such notice can give forewarning and possible resolution without court intervention in meritorious cases.”} (emphasis supplied) HEW Study, \textit{supra} note 9, at 37. Such a result is clearly desirable when
afforded a plaintiff in a section 21.1 situation by granting him access to all information would contribute to an optimal amount of leverage in effectuating settlements.

The RID has limited recourse and protection in this situation. He can file a countersuit for abuse of process or malicious prosecution. Another possibility is that "the particular allegations made against a defendant who was initially a 'respondent in discovery' may be more readily made the basis for recovery under Section 41 if they are later found to be untrue." In order to invoke any of these options, however, the medical professional must have been named a party defendant and have gone to the expense of defending a lawsuit. None of the procedures reaches the problem of forced settlements prior to suit being filed. Section 21.1 appears to be particularly susceptible to this form of abuse because no mechanism currently exists to check its misuse.

The Failure of Insulation—The Defendant/Expert Witness Dilemma

In complying with section 21.1 and the demand for full disclosure, the RID runs the risk of either implicating himself, or another medical professional and subsequently being called as an expert witness in that trial. Discovery is a complex process which requires the assistance of an attorney. Some malpractice policies, however, may not provide for coverage of legal actions prior to the commencement of the suit. The potential for divulging informa-
tion that is normally unavailable to the plaintiff is enhanced if the RID fails to obtain counsel due to limitations on the insurance policy. This information eventually could lead to the imposition of liability on the RID.\textsuperscript{49}

Since the absence of an attorney during pre-suit discovery could easily result in self-incrimination by the RID, the medical professional most likely will find himself engaged in litigation as a defendant. The subsequent impleading of the RID is easily accomplished.\textsuperscript{50}

Another aspect of this lack of insulation is that the RID could implicate another medical professional, thus also defeating the

\textsuperscript{49} There is reason to believe that the insurance companies would indeed meet the defense demands that § 21.1, \textit{supra} note 2, creates. The HEW Study states, "most carriers opened a file when they learned of any incident which might lead to a claim or suit against their insured. Carriers reported that often their first knowledge of a claim occurred when they were notified by counsel for the plaintiff that suit was being contemplated." HEW Study, \textit{supra} note 9, at 546app. Additionally, the market for malpractice insurance is very competitive. \textit{Id.} at 38, 498app., causing insurance companies to offer a wide variety of insurance plans. \textit{Id.} at xx, 39, 505app. 508app. If these accounts are true, then the health care provider could conceivably "shop around" to purchase a policy which extends coverage to the RID period. If companies are to maintain their competitive edge, they would alter their policies in order to cover this additional period.

Regardless of the status of present policies, the net effect of the insurance problem is to increase health care costs. One of three situations could occur. First, if the policy does not cover the six month period, the RID could respond to discovery without any legal assistance, which greatly increases the opportunity for making incorrect or incriminating, binding answer which would be admissible at a subsequent trial. The RID, if the policy does not provide coverage, could hire his own attorney, incur the costs of the fees and pass them on to the consumer in the form of high medical fees. Finally, if the policy does cover the RID period, the insurance company would raise the premium rates and the medical professional would, once again, pass on the costs to the consumer.

\textsuperscript{50} The ease with which the plaintiff may name the RID a party defendant is remarkable. He must merely do so within six months of designating that person as a RID. Also, § 21.1, \textit{supra} note 2, circumvents the ordinary joinder provision, for "if 'probable cause' is found under this section addition of the respondent in discovery as a defendant is automatic and if otherwise timely the addition cannot be conditioned in the manner contemplated in Section 26 [joinder provision]." ILL. ANN. STAT. ch. 110, § 21.1 (supplement to Historical & Practice Notes). The plaintiff need not even name the RID as a party defendant on a motion. In Whitley v. Lutheran Hospital, 73 Ill.App.3d 763, 392 N.E.2d 729 (1979), one of the two appellate court decisions which discuss § 21.1, \textit{supra} note 2, the court considered the validity of plaintiff's naming of a RID as a defendant when "(t)he plaintiff did not file a motion for leave [to name the RID as a defendant], nor did the court enter any order permitting it." 73 Ill.App.3d at 76-5 392 N.E.2d at 732. The court held that the joinder was valid. The court need not reassert personal jurisdiction after the RID is named a party defendant. Jurisdiction attaches when the notice is served upon the medical professional that he has been designated as a RID. "Once the court acquires jurisdiction over the person, that jurisdiction continues until all issues of fact and law are determined." 73 Ill.App.3d at 766, 392 N.E.2d at 733.
purpose of protecting that individual from excessive liability. This
result, though, is not necessarily detrimental. Once the RID has
implicated another member of the health profession, he will gen-
erally be called to testify against the implicated professional. A
possible benefit of this result is that it will perhaps eliminate the
"conspiracy of silence" which pervades medical malpractice litiga-
tion and allow injured patients to establish claims. The fact re-
mains, however, that section 21.1 does not insulate the medical
professional from excessive liability and accordingly does not meet
the legislature's goal in enacting the statute.

As a Limitations Device

Section 21.1 was enacted in conjunction with the special statute

51. One problem that will arise that this anomalous situation will cause a great deal
of animosity among members of the health profession. For example, physicians frequently
discuss their problems with the care of particular patients or converse about new techniques
of which they learn. HEW Study, supra note 9, at 69. If, however, they fear that statements
made to another doctor may be disclosed in a RID proceeding, this candor may be put to an
end. The unfortunate result would be a reduction in the quality of medical care as medical
professionals no longer share their ideas. Thus, the alleged conspiracy of silence would
merely shift from trial to everyday medical practice.

52. Many reasons exist as to why doctors, in particular, are reluctant to testify against
one another.

[T]here are a number of plausible reasons why physicians might well be reluctant
to testify in malpractice cases:

1. The reluctance to suffer loss of time and income from practice that
may be involved in a court appearance;
2. The inability to provide care to patients while away in court;
3. The fear and resentment of physicians regarding cross-examination
under the adversary legal system;
4. The natural reluctance to injure friends and fellow craftsmen, cou-
pled with the feeling that 'there but for the grace of God go I'; and
5. The common belief that the most malpractice claims are without
sound basis.

HEW Study, supra note 9, at 36-37.

This failure to testify becomes important in that "it is necessary in a malpractice action
for a plaintiff to produce one or more physicians in court to give expert testimony as to the
applicable standard of care and the extent to which the defendant physician departed there-
from." Id. at 36. If plaintiffs are unable to locate a physician who will testify, "aggrieved
patients cannot prove, or have difficulty in proving, the negligence which has resulted in
their injuries." Id. Thus, many legitimate claims cannot be established due to a failure to
elicit testimony.

The statute will also aid in providing the mandatory expert testimony. When the RID
responds to interrogatories in a § 21.1, supra note 2, proceeding, and implicates another
physician, these answers are admissible in court. See notes 128-131, infra, and accompany-
ing text. The injured patient is therefore provided with the requisite expert testimony to
establish his claim.
of limitations for medical malpractice actions,\textsuperscript{53} which provides that a plaintiff must file suit within two years of the date he knew or should have known of the existence of the injury, but in no event more than four years from the date of the injury.\textsuperscript{54} The purpose of the strict limitations period was to restrict the number of malpractice suits initiated.\textsuperscript{55} Section 21.1 also operates as a type of limitations device in that a plaintiff must name a RID as a party defendant within six months of designating him as a RID.\textsuperscript{56}

While section 21.1 generally furthers the legislative goal of reducing the number of suits initiated,\textsuperscript{57} it could also serve to extend the statutory period beyond the four year outside limitation.\textsuperscript{58} Because Illinois has adopted the so-called “discovery rule,”\textsuperscript{59} the courts have construed the statute not to mean that a plaintiff must bring suit within two years when the plaintiff knew or should have known of the injury, but rather that he had a cause of action for the injury.\textsuperscript{60} He is able to maintain a suit as long as it is initiated within the four year outside limitation.\textsuperscript{61} For a plaintiff who failed to discover an actionable injury until shortly before the four year

\textsuperscript{53} See note 18, supra, for the text of ILL. REV. STAT., ch. 83, § 22.1 (1977).

\textsuperscript{54} For a discussion of the operation of the discovery rule in conjunction with § 22.1, see notes 59 and 60, infra, and accompanying text.

\textsuperscript{55} The statute of limitations accomplishes this goal by absolutely barring plaintiffs who fail to bring suit within four years from the date of injury, regardless of when they in fact discover the injury. Anderson v. Wagner, 79 Ill.2d 295, 310, 402 N.E.2d 560, 567 (1979).

\textsuperscript{56} Section 21.1, supra note 2, provides in part: “A person named as a respondent in discovery in any civil action may be made a defendant in the same action within 6 months after he is named a respondent in discovery. . . .”

\textsuperscript{57} If, for example, a plaintiff names a physician as a RID one year after the date of the infliction of the injury, he has only six months to name that person as a party defendant, rather than the additional year that he would be afforded by the statute of limitations to file suit against the physician.

\textsuperscript{58} See notes 62-63, infra.

\textsuperscript{59} The discovery rule is a device by which the limitations period is extended so that the statute begins to run on the date that the plaintiff learns that he has a cause of action for the injury. The Fifth District, in Roper v. Markle, 59 Ill.App.3d 706, 375 N.E.2d 934 (1978) maintained that the special statute of limitations, therefore, did not begin to run until “there is a concurrence of the actual or constructive knowledge of both the physical problem and the possibility that someone is at fault for its existence.” 59 Ill.App.3d at 710. See Lipsey v. Michael Reese Hospital, 46 Ill.2d 32, 262 N.E.2d 450 (1970); Roper v. Markle, 59 Ill.App.3d 706, 375 N.E.2d 934 (1978); Kristina v. St. James Hospital, 63 Ill. App.3d 310, 380 N.E.2d 816 (1978); Fure v. Sherman Hospital, 64 Ill.App.3d 259, 380 N.E.2d 1376 (1978); Martinez v. Rosenzweig, 70 Ill.App.3d 155, 387 N.E.2d 1263 (1979); Licka v. William A. Sales, Ltd., 70 Ill.App.3d 929, 388 N.E.2d 1261 (1979); Bebee v. Fields, ___ Ill.App.3d ___ (Docket No. 78-2042, December 31, 1979); Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979).


period expired, he could designate various individuals as RIDs and receive an additional six months—beyond the four year limit—within which to file a complaint. Consequently, the limitations period could be increased to as long as four and one-half years from the date of injury.

As a Constitutional Question

Although neither the Illinois Appellate Courts nor the Illinois Supreme Court has ruled on the constitutionality of section 21.1, if the issue is addressed, the statute will probably be attacked on two grounds: equal protection and due process.

The Equal Protection Question

Section 21.1 may be violative of equal protection due to the classification of health care personnel established by the statute. This classification providing protection for the medical profession may be unreasonable because the same advantage is not granted to other professions which also face severe malpractice problems.

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62. Section 21.1, supra note 2, expressly provides for the extension beyond the four year outside limitation in the event that a plaintiff discovers that his injury is actionable at an extremely late date. Consequently, the two statutes are contradictory. The operation of § 21.1, supra note 2, and the special statute of limitations for medical malpractice together should be considered by the courts in order to determine the precise intentions of the General Assembly, i.e., whether the goal of the legislature in providing a four year outside limitation is to cut off claims absolutely and is therefore the predominant interest.

63. Two problems exist with this situation. First, it conflicts with the General Assembly's goal of cutting off medical malpractice claims. A party nearing the end of the limitations period would be wise to utilize § 21.1, supra note 2, in order to circumvent the absolute bar of the statute of limitations. Second, this effect also may thwart the goal of the Illinois Supreme Court, as enunciated in Anderson v. Wagner, to limit the effects of the discovery rule in malpractice litigation. See 79 Ill.2d 295, 305-07, 311, 402 N.E.2d at 564-65, 567.

These undesirable consequences may be of little import. Most claims are initiated more than six months before the four year outside limitation and consequently, the six months within which the plaintiff may name a RID as a party defendant would not extend the limitations period. Moreover, most medical malpractice suits are not initiated via § 21.1, supra note 2, and thus, the problem rarely arises. Perhaps the reason for the lack of use of § 21.1, supra note 2, is an attempt by plaintiffs to avoid the strict six month limitations period.

64. The only appellate court decisions regarding § 21.1, supra note 2, Whitley v. Luthern Hospital, 73 Ill.App.3d 763, 392 N.E.2d 729 (1979), and Evans v. Bachman, 78 Ill.App.3d 1107, 398 N.E.2d 114 (1979), did not consider the constitutionality of the statute. In Whitley, the court limited its discussion to the issue of personal jurisdiction. The court in Evans found that the statute was applicable only to health care personnel.

65. The problem accompanying the influx of professional liability claims has not been limited to the medical profession, but rather affects all professional groups in a devastating manner. For example, claims against architects and engineers rose 63% from 1960 to 1970.
Moreover, the protection afforded by the statute only applies to health care personnel—hospitals and medical institutions are not covered. It is unreasonable to exclude hospitals and other medical institutions because the incidence of claims against hospitals has been almost as great as those against medical professionals.

HEW Study, supra note 9, at 637-38 App. The ultimate incurred loss from 1965-1970 increased 205% and average premium rates increased more than 17% for architects and engineers. HEW Study, supra note 9, at 16. Furthermore, the incidence of legal malpractice claims and claims for accountants’ malpractice have also risen dramatically. Id. at 17. Therefore, although physicians’ rates had increased at a greater rate than other professionals’ rates in the last ten years, the rates paid and the claims incurred by other professionals were likewise increasing rapidly—and the rate of increase for some non-medical professionals may well be as great or greater than medical professionals in more recent years.

The HEW Study also found, however, that “malpractice premium rates for physicians and surgeons do appear to have increased substantially more than premium rates for other professionals.” Id. at 643app. Since the effects of the crisis are felt most acutely by the medical profession, the courts may sustain § 21.1, supra note 2, in spite of an equal protection attack. If the court adopts the minimal scrutiny test sometimes used in equal protection cases, the court may view the statute as a valid attempt by the General Assembly to address “itself to the phase of the problem which seems most acute to the legislative mind.” See Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), where the Supreme Court considered the constitutionality of a statute requiring prescriptions for obtaining all eyeglasses. The Court maintained, “The problem of legislative classifications is a perennial one, admitting of no doctrinaire definition . . . [T]he [legislative] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Id.


67. “The number of professional liability or malpractice claims against hospitals either as sole defendant or as co-defendant increased from the 1967 year of incidence to the 1970 year by more than 75%, going from 1.026 to 1.862 claims filed per hospital.” HEW Study, supra note 9, at 610app. Additionally, the National Association of Insurance Commissioners found that 36% of all malpractice claims are against hospitals. Anderson v. Wagner, 79 Ill.2d 295, 317, 402 N.E.2d 560, 570 (1979).

All hospitals may not be exposed to excessive liability, and hence, the problem confronting them may not be as acute as that of the medical professional. The HEW Study found, “Fifteen percent of the hospitals accounted for more than half of the claims (against all hospitals).” HEW Study, supra note 9, at 19. Therefore, the prior statistics indicating the percentage of hospitals affected may be misleading, for although the number of claims may be high, the actual number of hospitals affected is quite low. Furthermore, the courts, once again, may perceive § 21.1, supra note 2, as being a valid step in a piecemeal approach to remedy the malpractice crisis. Because physicians and health care personnel are the more frequent targets for malpractice litigation, the General Assembly may be “addressing itself
Thus, section 21.1 may be found to be violative of equal protection since it grants immunity to a limited portion of one of the professional groups that have been particularly susceptible to malpractice litigation.

The Due Process Question

Section 21.1 may also constitute a denial of due process of law for the health professional. It first could be argued that the statute is unduly vague and it impairs the individual's right to liberty and property without due process of law. Legislative enactments prescribing or mandating certain actions must make such requirements in sufficiently definite terms so that people of ordinary intelligence will know the meaning of the terms, and accordingly, the type of behavior that the statute seeks to regulate. If the statute is so vague, uncertain or indefinite that the average person would have to guess at its meaning, the statute will be declared unconstitutional on due process grounds.68

At first view, it appears that section 21.1 may fail to meet this sufficiently definite standard. Nowhere are the rights of the RID either defined or addressed.69 Additionally, the statute is also vague with respect to the rights of the patient in naming a health professional as a RID. The statute provides that the plaintiff may only name a RID as a party defendant "if a 'probable cause' test is met."70 No definition is provided, however, as to what constitutes probable cause.71 Because section 21.1 is unclear as to the rights of the RID and the procedure by which a RID is named a party defendant, the statute regulates behavior and procedure without due process of law.

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70. § 21.1, supra note 2 (Historical Notes).
71. This standard is particularly troublesome because it has traditionally only been used in criminal cases. In that context, a plethora of case law exists defining the parameters of the standard. In a civil context, however, no case law exists establishing the definition of probable cause, and the statute itself fails to define the standard. The Historical Notes suggest that "probable cause to make a person a defendant may not necessarily mean that all of the allegations against the defendant are made 'with reasonable cause' within the meaning of that phrase in Section 41." ILL. ANN. STAT., ch. 110, § 21.1 (Supplement to Historical Notes & Practice Notes). The hesitancy in the Note indicates the uncertainty that surrounds the meaning of "probable cause" in this context.
If such an attack is made, it can be argued, however, that the statute does speak with sufficient specificity to enable the RID and the plaintiff to act properly. As long as terms of art are used in the statute which have acquired an accepted or definite meaning in imposing a duty, the statute will not be stricken on vagueness grounds. Because the language in section 21.1 has been defined in a variety of circumstances, it may not constitute a deprivation of due process.73

Another due process argument against the constitutionality of section 21.1 is that the statute may also be unconstitutional be-

72. A statute imposing a duty in general terms is not void for uncertainty if the words used have either a technical or special meaning sufficiently known and understandable to enable compliance therewith or have acquired an established meaning through common law or established precedents, but if the duty imposed is defined in novel or unfamiliar terms, which have not acquired any definiteness or certainty, and if it is not possible to give the statute a precise and intelligible application under the conditions intended for it to operate, then the statute is void even though it appears on its face to have a meaning. Boshuizen v. Thompson and Taylor Co., 360 Ill. 160, 195 N.E. 616 (1935).

73. Section 21.1, supra note 2, defines the role of the RID. The statute likens the status of a RID to that of a party defendant. Because discovery statutes and the case law construing them have delineated the duties of defendants in the discovery process, the responsibilities of the RID are stated with sufficient specificity.

The probable cause standard also is not so uncertain that the statute should be declared unconstitutional on vagueness grounds. If the plaintiff can establish the elements of a cause of action for medical malpractice, he probably has met the probable cause standard, and the subsequent naming of the RID as a defendant would be proper. The plaintiff must establish a standard of care against which the defendant's actions are measured. Borrowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975). The plaintiff must also prove by affirmative evidence that the defendant's lack of skill or care caused the plaintiff's injury. Schaeder v. Reinevein, 41 Ill.App.3d 1055, 355 N.E.2d 351 (1976). If a plaintiff can establish these factors, a court could hold that the probable cause standard had been fulfilled and that the naming of the RID as a party defendant is proper.

Finally, it can be argued that the General Assembly could not be more specific in delineating the standard of § 21.1, supra note 2. Because burdens of proof and standards of care differ from case to case, a more specific standard would be difficult to establish, and would also result in unfairness in excluding some plaintiffs. "While due process of law requires that a statute shall not be vague, indefinite or uncertain, . . . this constitutional tenet does not require that a statute be more specific than is possible under the circumstances." Ladewig v. People, 34 Ill. App.3d 393, 397, 340 N.E.2d 150, 153 (1975).

The issue of vagueness, however, is unclear. In some respects, the statute simply does not define with sufficient accuracy the procedure in question. See note 71, supra. Also, the failure to specify the rights of the RID is a glaring problem. But simply because a statute has ambiguities as to the duties of the participants in the § 21.1, supra note 2, procedure that are left to judicial interpretation, the statute is not necessarily unconstitutional on vagueness grounds. If that would be the appropriate test for vagueness, most legislation would be declared unconstitutional immediately after its enactment. The question of whether § 21.1, supra note 2, is too vague to operate effectively, however, is still open for judicial determination.
cause it impairs the rights of the RID to liberty and property without due process of law. The due process guarantee requires that each individual be afforded the protection of law in denying that person the right to property and liberty.\textsuperscript{74} In order to provide this protection, various legal procedures have been enacted to enforce these private rights.\textsuperscript{76}

A variety of rights and liberties are denied the RID under section 21.1 without due process of law. No provision is made in the statute to inform the RID of the accusations or allegations made against him. Consequently, the RID is forced to comply with the full disclosure requirements of the discovery rules\textsuperscript{77} without any knowledge of the reason for such action.\textsuperscript{78} The RID is also deprived of the same right to engage in discovery which is granted to the plaintiff. Moreover, RIDs are denied the right to priority of discovery in order to determine the allegations against them.\textsuperscript{79} Furthermore, a defendant in a suit may seek protective orders\textsuperscript{80} in order to guarantee that the information that he possesses, if eventually given to the plaintiff, is only turned over with due process of law. Section 21.1 does not provide the RID with the right to obtain protective orders, and therefore, his information may be taken without any legal protection.\textsuperscript{81} The RID is also denied the right to make motions against the plaintiff, such as challenging the sufficiency of the complaint, and is denied the various privileges afforded by the discovery rules.\textsuperscript{82} The RID statute further does not grant the RID the right to seek sanctions against the plaintiff for

\begin{itemize}
  \item[74.] Durkin v. Hey, 376 Ill. 292, 33 N.E.2d 463 (1941).
  \item[76.] See note 118, infra, and accompanying text.
  \item[77.] This argument may be unfounded, since the plaintiff is required to serve the RID with a copy of the complaint. This complaint provides the RID with notice as to the nature of the case and the liability that is sought to be imposed. Although the RID would not know the specific allegations made against him, the respondent would have sufficient notice to comply with the discovery process.
  \item[78.] See Ill. Rev. Stat., ch. 110A, § 201 (1977) where the right to priority of discovery is conferred on other participants in the discovery procedure.
  \item[79.] Ill. Rev. Stat., ch. 110A, § 201(c)(1). See notes 115-117, infra, and accompanying text for further discussion of protective orders.
  \item[80.] It appears that the only recourse for the RID is to name himself as a defendant in order to protect the information. The statute provides in pertinent part: “A person named as a respondent in discovery . . . may be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.” Ill. Rev. Stat., ch. 110, § 21.1 (1977).
\end{itemize}
the improper or vexatious designation of that person as a RID.82

A final deprivation of due process is that the RID is denied the protection afforded party defendants by the statute of limitations in the situations where section 21.1 extends the limitations period.83 In the case where a plaintiff did not employ section 21.1 and failed to name a defendant within four years of the date of injury, the defendant would have the right to have the claim barred and would be protected from suit. For the RID, however, this right is denied.84 Claims which would normally be barred could still be brought to trial against the RID solely because of his status as a respondent.85 Accordingly, section 21.1 may constitute a denial of due process of law since it denies the RID certain rights and protections afforded to parties when he is not even a party to the lawsuit.

Overall, the statute presents many policy, procedural and constitutional problems. It is thus important to determine whether section 21.1 serves the purposes for which it was enacted. The Illinois courts will probably gauge its effectiveness in determining whether

82. Because the respondent is neither a plaintiff nor a defendant, Rule 41 sanctions, see note 24, supra, may be unavailable. Moreover, he may be unable to file a suit for malicious prosecution against the plaintiff because he is not a party to the action. See note 45, supra, and accompanying text. Again, the only course of action for the RID may be to implead himself as a party defendant in order to obtain these forms of relief.

Plaintiffs may contend that these rights which arise in the discovery procedure are not denied to the RID. To the extent that the RID is a defendant for discovery purposes, he is afforded the right and opportunity to act in all respects as a party defendant. Given this status, he is permitted to seek protective orders, discovery and knowledge of the potential allegations. Although this interpretation is possible, it seems unlikely that the result was intended. To provide for full disclosure for both participants in the RID procedure would cause delay, which would thwart the statutory provision requiring the plaintiff to name the RID as a defendant within six months. Additionally, one of the express goals of the legislation is to permit the plaintiff to determine which person is the appropriate defendant in the pending action. To allow the RID to exact information from the plaintiff would not serve to expedite the attainment of this goal.

83. In a limited number of cases, the plaintiff may designate a RID just before the four year outside limitations period expires because he did not discover the injury until that point. In such a case, the plaintiff would have an additional six months beyond the four year limitation within which he could name a defendant to the suit. See notes 58-62, supra, and note 97-99, infra, for discussions of the discovery rule as applied to the statute of limitations for medical malpractice.

84. During that six month period, the plaintiff may obtain evidence from the RID's testimony to build his case against the respondent. The plaintiff, after gathering this information, could then name the RID as a defendant even though the medical malpractice statute of limitations had run.

85. It can be argued, however, that because the statute of limitations is a creature of the legislature, it is within the prerogative of the General Assembly to extend the limitations period as it sees fit.
the law is constitutional.

THE VALIDITY OF § 21.1 IN LIGHT OF ANDERSON v. WAGNER

An indication of how Illinois courts may handle a constitutional attack on section 21.1 can be found in Anderson v. Wagner, where the Illinois Supreme Court held that the special statute of limitations for medical malpractice actions was constitutional. Although only the statute of limitations was addressed, the court examined many of the considerations which also arise as to section 21.1.

The case is significant since the court upheld legislative classifications for the health profession in spite of strong equal protection arguments using the minimal scrutiny analysis. The Illinois Supreme Court noted the many statutory provisions geared toward medical malpractice, discussed the problems confronting the medical profession and recognized the existence of a medical malpractice crisis. The court stated that the purpose of the General Assembly in enacting the statute of limitations “was to insure the continued availability of this type of insurance to those who were affected by the crisis and thus to insure the continuation of health services from these affected groups.”

The court considered equal protection and special legislation.

86. 79 Ill.2d 295, 402 N.E.2d 560 (1979).
87. See note 18, supra.
88. The Court cited Youhas v. Ice, 56 Ill.2d 497, 309 N.E.2d 6 (1974), which states, “If the law presumably hits the evil where it is most felt, it is not to be overthrown merely because there are other instances to which it might have been applied. [Citation]” Id. at 502, 309 N.E.2d at 9 as cited in Anderson v. Wagner, 79 Ill.2d 295, 319, 402 N.E.2d 560, 571 (1979).
90. The court concluded, “The crisis resulted from the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies.” Id. at 301. The impact of the problem of “obtaining insurance at reasonable rates” is that “many health-care providers” were forced “to curtail or cease to render their services.” Id.
91. Id. at 317.
92. It was argued that the statute was violative of the special legislation clause of the Illinois Constitution. Art. IV, § 13 of the 1970 Constitution provides: “The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.” ILL. CONST. art. IV, § 13.

Because the statute is couched in equal protection terms, the special legislation clause has been confused with the equal protection clause. In Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979), the court distinguished between “real” special legislation questions and “nonreal” special legislation. “Real” special legislation consists of various specific benefits that were conferred on a select group of individuals prior to the enactment of any type of
attacks on the statute. With respect to the equal protection argument, the court concluded that the classifications within the medical profession would be upheld if they have a reasonable basis in fact and if they further the legislative goal. The court employed a statistical analysis in order to gauge the reasonableness of the legislative classification of licensed physicians and hospitals. Since the vast majority of malpractice claims arise against the portion of the medical profession to which the statute confers immunity, the court found that the classification was reasonable. In finding the classification reasonable, the court applied the minimal scrutiny test to the statute of limitations.

The court next considered whether the statute of limitations furthered the legislative goal, noting the problems that the use of the

equal protection clause. The special legislation clause was enacted to prohibit the granting of these benefits. The list of benefits or immunities which the special legislation clause proscribed, however, is very limited. Id. at 313-14.

With the enactment of the equal protection clause, the courts were to consider arbitrarily conferred benefits in light of this statutory provision, except when the advantage was one which was specifically covered by the clause. Claimants, however, continued to use this provision to effectuate their equal protection arguments. Thus, "[n]onreal special legislation was simply general legislation challenged on equal protection grounds." Id. at 313-14. In order to remedy this situation, the Anderson court stated that "nonreal" special legislation challenged on the basis of the special legislation clause would be reviewed utilizing the "traditional deference . . . given to a legislative classification in this area. . . ." Id. at 315. When a nonreal special legislation question arises, i.e., one that does not fall within the carefully drawn proscriptions, the equal protection test that is normally applied to that type of legislation will be employed.

The court accordingly found that the special legislation provision "does not prohibit classification of persons and objects" such as the one contained within the statute of limitations. Id. at 320. In fact, "much constitutionally valid classification already exists in the medical field. . . ." Id. at 318. The appropriate test under the special legislation provision is that "the classifications must be reasonably related to the legislative purpose and it must appear that there is a sound basis for regarding the class as distinct and separate for the purpose of the legislation." Id. at 320.

93. Id. at 317-18.
94. The court noted the results of the 1977 study of the National Association of Insurance Commissioners, which concluded that "physicians and hospitals together accounted for 95% of the total number of medical malpractice claims and 98% of the dollar amount of those claims paid." Id. at 317. Based on this statistical survey, the court concluded that there was a reasonable basis for differentiating between physicians and hospitals and other members of the general class of health-care providers for the purpose of this particular legislation. The General Assembly in responding to the medical malpractice insurance crisis drew the statute very narrowly and encompassed within the classification to whom the statute applied only those segments of the health-care providers most acutely affected by the crisis.

Id. at 318-19.
95. Id.
96. See note 88, supra.
discovery rule presented. It found that "statutes of limitation no longer constituted statutes of repose for a defendant in a malpractice action. By the application of the discovery rule a medical malpractice action was not deprived of its vitality simply by the passage of the statutory period." Because the statute limited the effectiveness of the discovery rule and accordingly met the legislative goal of limiting liability for the medical profession, the court found the statute to be constitutional.

In applying the Anderson rationale to section 21.1, the implication of the decision is that the court would uphold a remedial measure designed to curb malpractice litigation. If an equal protection attack is made, the court could apply its two step analysis of determining whether the classification is reasonable and whether it furthers the legislative goal.

By using deference in analyzing the legislative classification of all health care personnel, the courts may find that the classification is reasonable, because it addresses the most serious aspects of the problem. The General Assembly may initiate reform "one step at a time," and it may afford protection to the group most seriously affected by the crisis, which appears to be medical professionals rather than medical institutions.

Additionally, the argument that other professions face the ensuing problems associated with excessive malpractice litigation probably will not be determinative in assessing the reasonableness of the classification. The incidence of claims for medical malpractice

97. See notes 59 and 60, supra, and accompanying text for a discussion of the discovery rule.
98. Anderson v. Wagner, 79 Ill.2d 295, 305, 402 N.E.2d 560, 564 (1979). The court also discussed the impact of the discovery rule on the medical malpractice crisis. "[T]he discovery rule was thought to have played a significant role in the medical malpractice crisis. Because it created what came to be called the 'long tail' of liability, the discovery rule reduced an insurance company's ability to predict future liabilities." Id. at 307. In order to alleviate the effects of the discovery rule, "a substantial number of States" enacted "limitation statutes placing an outside limit on the applicability of the discovery rule in medical malpractice cases." Id. at 308.
99. The statute only applies to actions dealing with licensed physicians and hospitals. Other health care personnel and unlicensed medical institutions are not afforded the protection of the special limitations period.
100. The deferential analysis was employed because the General Assembly, in enacting the statute of limitations "was directly addressing itself to a medical malpractice problem." Id. at 316.
101. See note 67, supra.
103. See note 67, supra.
is far greater than suits initiated against other professions.\textsuperscript{104} Because reform may occur in a piecemeal fashion, the classification is reasonable since health care personnel are most severely affected by the crisis.\textsuperscript{105} Moreover, the Supreme Court ignored this particular equal protection argument in Anderson.\textsuperscript{106} Nothing suggests that it will carry any greater weight in proceedings in section 21.1. Consequently, the statute should meet the first criterion in the equal protection analysis in that the classification is reasonable.

The ability of section 21.1 to meet the second standard of furthering the legislative goal, however, is uncertain. Section 21.1 as a limitations device meets the goal of the General Assembly of curbing malpractice litigation. Because section 21.1 contains a six month limitations period for plaintiffs to name a RID as a party defendant, the statute generally reduces the limitations period. Accordingly, section 21.1 will limit the application or effects of the discovery rule. In the small number of cases where it may actually extend the limitations period, the courts may hold that the four year limitation period cannot be extended despite an express statutory provision. Since the number of cases in which this problem will be a major consideration is extremely small, the limitations facet of the statute will probably be seen as furthering the legislative goal.

The other characteristics of the statute, however, do not further the legislative aim. Section 21.1 may in fact lead to a greater incidence of medical malpractice litigation, thus defeating the desire to reduce litigation.\textsuperscript{107} Because the statute may lead to a greater prevalence of the practice of defensive medicine due to increased exposure to liability, section 21.1 does nothing to reduce the high costs of health care.\textsuperscript{108} Moreover, the statute is particularly susceptible to abuse by plaintiffs and accordingly affords little or no protection to the health professional.\textsuperscript{109} Finally, although section 21.1 may be a very effective weapon in reducing the number of defendants in a malpractice action, the fact that it is an optional device

\textsuperscript{104} See note 65, supra.
\textsuperscript{105} See notes 65 and 67, supra.
\textsuperscript{106} The issue was raised in Woodward v. Burnham City Hospital, 60 Ill.App.3d 285, 377 N.E.2d 290 (1978), a case which was joined with Anderson v. Wagner, 61 Ill.App.3d 822, 378 N.E.2d 805 (1978). The Supreme Court considered the opposing holdings of each case in upholding the special statute of limitations.
\textsuperscript{107} See notes 19-25, supra, and accompanying text.
\textsuperscript{108} See notes 34-38, supra, and accompanying text.
\textsuperscript{109} See notes 39-51, supra, and accompanying text.
ameliorates any beneficial effect that it may have. Thus, the statute does not appear to meet the goals of the legislature and serious questions as to its desirability exist. These problems cast aspersions on the constitutionality of section 21.1 if it is exposed to an equal protection attack even if the court were to employ the deferential analysis used in Anderson.

The equal protection attack is only one constitutional attack that can be launched against section 21.1. The due process arguments, which strongly support the invalidation of the statute, did not arise in Anderson v. Wagner. Thus, Anderson does not serve as a guide to the court's disposition of the case under a due process attack.

The statute should be stricken on due process grounds. That a RID is left with no protection due to the failure of section 21.1 to delineate the rights of the RID is a serious defect of the statute. The RID is forced to comply with potentially extensive and open-ended discovery requests with virtually no protection against over-reaching discovery. The RID is further afforded no opportunity to engage in discovery himself during the pre-suit stage. Because section 21.1 affords this great advantage to plaintiffs at the expense of the RIDs' due process rights, the statute should be declared unconstitutional. Thus, the statute should fall because it does not meet the second criterion of the equal protection test and because it deprives the RID of due process.

THE OPERATION OF SECTION 21.1 AND THE DISCOVERY DEVICES

If section 21.1 is upheld as a valid remedial measure to the medical malpractice crisis, its operation in conjunction with the discovery devices is important. The RID statute is primarily a discovery device, which sanctions full pre-suit discovery. Because the RID is considered to be a defendant for discovery purposes, he is exposed to the wide variety of discovery devices available only against parties, even before a suit has been initiated. Two general problems arise as to the operation of section 21.1 in conjunc-

110. See notes 32 and 33, supra, and accompanying text.
111. See notes 74-85, supra, and accompanying text.
112. See note 3, supra, and accompanying text.
113. The options for discovery are not limited to the taking of depositions and the RID must comply with discovery as if he were a party defendant. See note 3, supra.
114. In Whitley v. Lutheran Hospital, 73 Ill.App.3d 763, 392 N.E.2d 729 (1979), the court ruled that a plaintiff could engage in the § 21.1, supra note 2, procedure before naming any defendant.
tion with the discovery devices. Although the RID is treated as a defendant for discovery purposes, the statute is silent as to the rights of the RID. No provision exists enabling the health care provider to conduct discovery of the plaintiff. Additionally, the statute fails to state whether the RID may seek protective orders.\(^{116}\) Thus, the RID must comply with the full disclosure requirements of the discovery rules,\(^{116}\) but cannot seek any form of protection from vexatious discovery.\(^{117}\) The pre-suit discovery procedure is therefore peculiarly onesided.

Regarding the scope of discovery, Supreme Court Rule 201(b)(1) provides for full disclosure of "any matter relevant to the subject matter . . . in the pending action."\(^{118}\) Relevancy has been held to include not only that which is admissible at trial, but also those matters which are calculated to lead to admissible evidence.\(^{119}\) In order to facilitate discovery procedures under section 21.1, however, the "relevancy" test must be redefined and expanded. The present definition contemplates the existence of a cause of action filed with the court. Under section 21.1, however, plaintiffs may use the statute not only to discover information leading to admissible evidence, but also to determine whether their claims against some potential defendants have merit.\(^{120}\) Accordingly, the definition of "relevancy" must be broadened to accommodate the purposes of the RID provision.

**Depositions**

Depositions are the most flexible of all the discovery devices, for a party may take the deposition of both parties and non-parties.\(^{121}\) Moreover, the deposition has been the only device with which parties have been permitted to conduct pre-suit discovery in


\(^{117}\) As previously noted, this problematic situation enhances the possibility of abuse of § 21.1, supra note 2. See notes 39-51, supra, and notes 115-116, supra.


\(^{120}\) This idea is implied in Whitley v. Luthern Hospital, 73 Ill.App.3d 763, 392 N.E.2d 729 (1979). See note 114, supra.

other contexts. Consequently, the taking of depositions in the RID procedure is consistent with the flexibility of this device and its current employment in the limited pre-suit discovery process.

**Interrogatories**

Perhaps the most effective device available to plaintiffs using section 21.1 is that of written interrogatories. Although plaintiffs generally may only propound interrogatories to other parties within the suit, plaintiffs may employ this device in the section 21.1 procedure. Interrogatories are particularly useful because they are directed not only to the actual knowledge of the respondent, but also the information available to him. Consequently, plaintiffs may use interrogatories to obtain a wide variety of information. Because the RID is considered to be a defendant for discovery purposes, he has to comply with the requests contained within the interrogatories or risk the imposition of sanctions. The use of interrogatories in a pre-suit discovery procedure is troublesome. The responses to pre-suit interrogatories are admissible at trial, since the answering party must sign and swear to the statement. Even if subsequently amended, incorrect pre-suit

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124. See § 21.1, supra note 2, and note 3, supra, and accompanying text.
126. By using written interrogatories, the plaintiff may request the identities and locations of all individuals having “knowledge of relevant facts,” Ill. Rev. Stat., ch. 110A, § 201(b)(1); City of Joliet v. Fenneweld, 31 Ill.App.3d 899, 278 N.E.2d 821 (1972), and accordingly discover additional witnesses. Plaintiffs may also use interrogatories to locate experts to testify at trial. Ill. Rev. Stat., ch. 110A, § 201(b). Finally, plaintiff use interrogatories to discover the extent of insurance coverage possessed by the RID. This use is valuable in determining the amount of damages to be sought in a subsequent trial. In People ex rel. Terry v. Fisher, 12 Ill.2d 231, 145 N.E.2d 588 (1957), the court held that discovery interrogatories respecting the existence and amount of defendant’s insurance may be deemed to be ‘related to the merits of the matter in litigation,’... since they apprise injured plaintiffs of rights arising out of the accident, otherwise unknown, and which the public policy of this State protects, give counsel a realistic appraisal of his adversary and of the case he must prepare for,...
127. See note 140, infra.
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answers are binding on the RID\textsuperscript{130} and are admissible at trial in their original form.\textsuperscript{131}

Answering parties generally are protected from vexatious questions in written interrogatories by their right to file objections.\textsuperscript{132} If the interrogatories seek information not material to the issues in the pending case, the objections are deemed proper.\textsuperscript{133} The statute is unclear, however, as to whether the RID may file objections, for no provision is made for action by the RID.\textsuperscript{134}

\textbf{Production of Documents}

Discovery of documents, objects and tangible items may be had against a RID.\textsuperscript{135} Section 21.1 bypasses the normal requirement of

\begin{itemize}
\item \textsuperscript{130} The binding nature of answers to interrogatories opens up the possibility of misuse of the § 21.1, \textit{supra} note 2, procedure. \textit{See} notes 39-51, \textit{supra} and accompanying text.
\item \textsuperscript{131} \textit{See} IL. Civ. Disc. Prac. (III. Inst. for CLE, 1979) at 3-23. This undesirable result is more likely to occur in a § 21.1, \textit{supra} note 2, procedure since the RID may have to answer complicated questions without the assistance of an attorney. \textit{See} note 48, \textit{supra}, and accompanying text. An extreme result is that a physician could be found liable on the basis of incorrect answers to written interrogatories propounded during pre-suit discovery because he could neither afford an attorney nor was one provided by his insurance policy.
\item An alternative exists, however, for the answering party. If the RID has not completed his investigation and does not want to assume the risk of making an incorrect binding statement, he "may respond by stating that the answer is undetermined at the present time and that the investigation continues." IL. Civ. Disc. Prac. (III. Inst. for CLE, 1979) at 3-24. This solution is problematic in two respects: Primarily, the RID, unassisted by an attorney in responding to interrogatories probably is not aware of this option. Secondly, the RID may frustrate the purpose of § 21.1, \textit{supra} note 2, proceedings. Because the plaintiff has six months within which he must name the RID as a party defendant, swiftness in serving and answering interrogatories is of the utmost importance. Although III. Rev. Stat., ch. 110A, § 213(c) mandates that responses be filed within 28 days of the service of the interrogatories, that time may be extended, perhaps even beyond the six month limitation by the claim of a continuing investigation.
\item \textsuperscript{132} III. Rev. Stat., ch. 110A, § 213(c) (1977).
\item \textsuperscript{134} In order to avoid answering improper questions, the health care provider may be compelled to name himself as a party defendant. Even if the RID is permitted to file objections, he will encounter difficulty in proving those objections.
\item General objections such as that the interrogatories will require the party to conduct research to compile data; that they are unreasonable, burdensome or vexatious; that they seek information that is as easily available to the interrogating party; that they would cause annoyance, expense and oppression without serving any purpose relevant to the action; that they are duplicative of material already discovered; that they are irrelevant and immaterial; or that they call for conclusions, are insufficient objections without adequate support based on the factual and legal issues involved in the case.
\item \textsuperscript{135} III. Civ. Disc. Prac. (III. Inst. for CLE, 1979) at 3-21. For a discussion of the due process problems associated with this situation, \textit{see} notes 74-85, \textit{supra}, and accompanying text.
\end{itemize}
obtaining a subpoena duces tecum in order to compel delivery from a non-party by providing that a RID is a defendant for discovery purposes. The requirements for obtaining production are quite lenient. The plaintiff need not make the request with a great deal of exactness and may seek the materials for virtually any reason. Because the plaintiff has easy access to a wide variety of documents, even if they fail to establish the liability of the RID before suit is filed, the information extracted from the documents would certainly grant the plaintiff a great deal of leverage in effectuating a settlement agreement.

Sanctions

Failure to comply with discovery or with a discovery order will result in the imposition of sanctions on the evasive individual. The trial court is given broad discretion in imposing and fashion-

136. Id. (Historical Notes).

[T]o produce for inspection, copying, reproduction, photographing, testing or sampling . . . or to permit access to real estate for the purpose of making surface or sub-surface inspections or surveys or photographs, or tests or taking samples, or to disclose information calculated to lead to the discovery of the whereabouts of any of these items . . .

139. It is significant the Rule 214 production requirement may violate the RID's right to privacy in a § 21.1, supra note 2, proceeding. A requirement of production is probably not an intrusion on the right to privacy of an actual defendant because a claim has been filed with the court implicating the defendant. Consequently, the interest in a swift disposition of the claim outweighs the defendant's interest in privacy. In the RID situation, however, no claim has been filed against the RID, and he has accordingly not been implicated as perhaps being responsible for plaintiff's injury. The interest of the plaintiff is only to determine who is the proper defendant. The procedure in no benefits the RID. Hence, the RID's interest in privacy remains the predominant interest with nothing to offset it.

The RID's only means to protect himself from this pre-suit intrusion is to object to the request. Ill. Rev. Stat., ch. 110A, § 214 (1977). Two problems exist with respect to this remedy. First, given the liberal nature of the discovery rules, the trial court is not likely to grant the objection. Second, the courts generally only grant the objection and deny the request for production for very limited reasons.

A party may object to a request for production for a variety of reasons, including the following.

1. the request calls for materials which are irrelevant to the pending action;
2. the request is overly broad in that it is not limited to a reasonable time period;
3. the material sought is the 'work product' of the attorney; and
4. that the material sought is not in the custody or control of the responding party.

ing sanctions, and its decision will not be overturned unless it consti-
tutes a clear abuse of discretion.\textsuperscript{141} The types of sanctions that are available to the trial court are quite diverse.\textsuperscript{142}

Because sanctions may be imposed in a section 21.1 proceeding, a RID may be punished for an action or lack thereof that he took before being named a party. It appears unfair that a RID may have certain portions of his pleadings stricken before he has been named as a party defendant. In addition, he may be barred from presenting certain witnesses concerning actions taken prior to suit.\textsuperscript{143} Since the trial court is granted broad discretion in fashioning and imposing sanctions, this particularly harsh and unfair result against a RID would be extremely difficult to overturn.

\textbf{CONCLUSION}

Section 21.1 is potentially a very effective remedy to the medical malpractice crisis. As a limitations device, it furthers the legislative goal of cutting off claims of plaintiffs who fail to act quickly, thereby reducing the number of suits being brought. Fewer medical professionals will probably be sued if the pre-suit discovery procedure is followed. Although insurance premiums would in-


\textsuperscript{142} The most common forms of sanctions involve staying the proceedings until compliance is obtained or assessing costs for the waste of judicial time. Ill. Civ. Disc. Prac. (Ill. Inst. for CLE, 1979) 11-24. In a § 21.1, \textit{supra} note 2, proceeding, however, it may be undesirable to stay the proceedings until compliance is obtained because to do so could cause the six month limitations period to expire, thus barring the plaintiff from naming the RID as a party defendant. The costs sanction presents due process problems since the RID is deprived of his money before he is a party before the court. See notes 68-85, \textit{supra} and accompanying text for a discussion of the due process considerations concerning § 21.1, \textit{supra} note 2.

Another sanction which is frequently employed is the barring of testimony of certain witnesses if the respondent fails to disclose their existence. Dempski v. Dempski, 27 Ill.2d 69, ___ N.E.2d ___ (1963); Mason v. Village of Bellwood, 37 Ill.App.3d 543, 346 N.E.2d 175 (1976). Relevant factors in deciding whether this particular penalty should be imposed include a determination of the prejudicial effects of that person's testimony, whether the plaintiff seeks the witness' identity in good faith, and the nature of the testimony sought. Kirkwood v. Checker Taxi Co., 12 Ill.App.3d 129, 298 N.E.2d 233 (1973).

Finally, the court may strike portions of the pleadings, enter a default against or dismiss the offending party, and hold him in contempt of court. Ill. Civ. Disc. Prac. (Ill. Inst. for CLE, 1979) at 11-25 and 11-27. These sanctions are rarely used due to their extremely harsh consequences.

\textsuperscript{143} Although these penalties are obviously the most harsh and extreme form of sanctions and are rarely imposed, the possibility does exist that they will be applied to a RID. The statute does not provide for any specific punishment for the failure of a RID to comply with discovery.
crease if coverage were extended to accommodate pre-suit discovery, over an extended period, the rates may actually fall.\textsuperscript{144} In the long run, the costs of obtaining medical care should decline.

The only way for section 21.1 to be an effective response to the malpractice crisis, however, is for it to be made mandatory. The potential benefits of the statute will never be realized as long as plaintiffs can continue to avoid using the procedure. Thus, if the true intent of the General Assembly is to provide an effective weapon to combat the problems of excessive malpractice litigation, the statute should be amended to make the procedure mandatory.

A more pressing problem with the statute as it currently exists is that it appears to be unconstitutional. The statute deprives the RID of due process. The RID is merely directed to divulge all information without any safeguards to protect his rights and he is not permitted to engage in discovery during the section 21.1 period. Unless the statute is amended to incorporate some measure of protection for the RID, it should be declared unconstitutional due to its own procedural inadequacies and because it constitutes a denial of the constitutional rights of the RID.

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\textsuperscript{144} Since malpractice litigation should decline because of either the shortened limitations period or due to the greater selectivity in choosing defendants in a § 21.1, \textit{supra} note 2, procedure, the premium rates will probably fall. Moreover, once the health professional recognizes his exposure to liability has diminished, he would be less inclined to practice defensive medicine.