

*Litigating the Peer-Review Privilege in a Post-Stull World, Tort Reform Under Attack,
Practical Effects of H.B. 179, &
Other Key Litigation Updates*

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Agenda



1. Peer Review Privilege
 - i. R.C. 2305.252
 - ii. Stull v. Summa
2. H.B. 179: Changes to Ohio's Vicarious Liability Rules for Healthcare Facilities
3. Non-economic Damages Cap
 - i. R.C. 2323.43
 - ii. Paganini v. The Cataract Eye Center of Cleveland
4. Other Litigation Updates
 - i. Lewis v. MedCentral / R.C. 2323.451

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Peer Review Privilege

R.C. 2305.252



Confidentiality: Records and proceedings of peer review committees of health care entities are confidential.



Inadmissibility: These records cannot be disclosed or used as evidence in civil actions.



Scope: Applies to “peer review committees” of “health care entities.” Health care entities conduct professional credentialing or quality review activities involving the competence, professional conduct, or quality of care provided by a health care provider. Peer review committees include utilization review committees, quality assessment committees, performance improvement committees, tissue committees, credentialing committees, and others.



Purpose: Encourages candid discussions and internal quality reviews by protecting participants from legal exposure.

Stull v. Summa (Background)

1. Medical treatment of head injuries sustained during a car crash
2. Difficult intubation → a brain injury
3. The resident's "entire resident file, including every evaluation completed for every rotation"
4. Objection based on Ohio's peer-review privilege
5. Motion to compel
6. An affidavit from a residency program director
7. Trial court ruled in the plaintiffs' favor; Ninth District Court of Appeals affirmed
8. Supreme Court of Ohio accepted the appeal
9. Medical associations filed amicus brief

Stull v. Summa (Decision)

1. Supreme Court of Ohio issued its decision on December 10, 2024
2. Agreed with the lower courts' decision that the hospital's affidavit alone was insufficient to establish the privileged nature of the residency file
3. Rejected the plaintiffs' contention that an insufficient affidavit justifies a blanket order to disclose the entire contents of the residency file
4. Placed the power in the hands of the trial court to review the requested file in-camera
 - i. "The trial court had the power to take a more active role and control the discovery process related to the peer-review privilege [...]."

Stull v. Summa (Implication)



The Court's decision to require trial courts to engage more actively in the discovery process, and to review potentially privileged materials to determine whether they are privileged, may result in trial courts being called upon more frequently to conduct in-camera reviews of arguably privileged materials.



The facts of each case will vary, but it seems reasonable to expect that parties may request in-camera reviews more often than they have historically done.



The court's rejection of a rigid "either-or" approach to claiming privilege – either by only presenting an affidavit describing the privileged document, or by only engaging in an in-camera review – means that courts are more likely to conduct hearings to determine whether a document is shrouded by the peer-review privilege.



Hospitals should consider how they structure the committees that oversee the training, process improvement, evaluation, peer review, and quality improvement of resident physicians.

Peer Review/Quality Information vs. Attorney “Residency File” & Practical Considerations



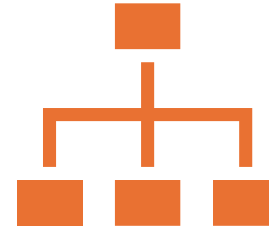
An in-house counsel’s perspective:

Residency files are not traditionally part of peer review files.

Residency files are often included in HR files.

“Incident reports” pertaining to resident physicians are part of peer review files.

Risk Management/claim information protected under attorney-client privilege should be excluded.



Practical considerations:

Files with quality review information need to be SEPARATED from HR files.

Documents need to be labeled.

Assess the structure of the peer review committee.

Clarity. Separation. Confidentiality.

H.B. 179: Changes to Ohio's Vicarious Liability Rules for Healthcare Facilities

H.B. 179 (Changes)

1. Vicarious Liability

- i. Provides that if tort liability arises against both a principal and agent, master and servant, employer and employee, or other persons having a vicarious liability relationship, the injured party may sue either the primarily liable agent, servant, employee, or person or the secondarily liable principal, master, employer, or person, or both.
 - a. **A primarily liable person is not a necessary party to the tort action alleging vicarious liability against a secondarily liable person, with certain exceptions.**
 - b. The only exceptions are for
 - Physicians
 - Podiatrists
 - Physical therapists
 - Dentists
 - Chiropractors
 - Optometrists
 - Podiatrists
 - Attorneys

H.B. 179 (Changes)

- Statutes of Repose
 - Provides that the tolling of the limitations period during the defendant's absence or concealment does not apply to statutes of repose.
 - Declares that the General Assembly's purpose is to expressly overrule the decision of the Ohio Supreme Court in the case of *Elliot v. Durrani*.



H.B. 179 (Impact)

- Plaintiffs can pursue vicarious liability claims in medical malpractice cases against hospitals or similar entities for certain non-physician employees and agents without having to name the individual employees. These employees may include advanced nurse practitioners, physician assistants, nurses (including travel nurses), certified registered nurse anesthetists, etc.



H.B. 179 (Practical Considerations)



Consider all your agreements with hospital-based groups (e.g., radiology, anesthesiology, pathology, ER and hospitalists). While physicians, podiatrists and PTs must be specifically named under H.B. 179, any advanced practice providers they use do not. Ensure you have strong clauses requiring assumption of defense/liability and indemnification/hold harmless provisions.



Contracts with Traveler agencies and other related health care providers should similarly be modified.

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Non-Economic Damages Cap

R.C. 2323.43



Economic Loss: Compensatory damages representing economic loss (e.g., lost wages, medical expenses) are not subject to limitation.



Noneconomic Loss: Compensatory damages for noneconomic loss (e.g., pain and suffering) are limited to the greater of \$250,000 or three times the plaintiff's economic loss, up to a maximum of \$350,000 per plaintiff or \$500,000 per occurrence.



Exceptions for Catastrophic Injuries:

Permanent and Substantial Physical Deformity, Loss of Use of a Limb, or Loss of a Bodily Organ System
Permanent Physical Functional Injury

Paganini v. The Cataract Eye Center of Cleveland (Background)

1. Permanent loss of an eye following a cataract surgery due to an infection
2. Jury trial → a loss of a “bodily organ system” and a “substantial physical deformity” → over \$1 million for past and future noneconomic damages
3. Cap of \$500,000 on the noneconomic damages does not apply (statute is unconstitutional as applied to this case)
4. Motion for Judgment Notwithstanding the Verdict denied
5. Appealed to the Court of Appeals (Eighth Appellate District)
6. Appealed to The Supreme Court of Ohio in March 2025
 - i. 3/17/2025: Appellants (The Cataract Eye Center of Cleveland) filed memo in support of jurisdiction
 - ii. 3/18/2025: Jurisdictional memo of amici curiae Ohio Association of Civil Trial Attorneys in support of Appellants
 - iii. 3/18/2025: Jurisdictional memo of amici curiae (including OHA and several medical associations) in support of Appellants
 - iv. 4/16/2025: Appellee (Paganini) filed a response

Paganini v. The Cataract Eye Center of Cleveland, et al. (Decision)

1

Court of Appeals: “The cap on noneconomic damages imposed on one of the most severely injured people is arbitrary and not reasonably calculated to obtain the legislature’s objective of reducing medical-malpractice insurance premiums.”

2

Court of Appeals: “In enacting R.C. 2323.43, the General Assembly expressly stated that the statute was designed to ‘stabiliz[e] the cost of health care delivery by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions.’”

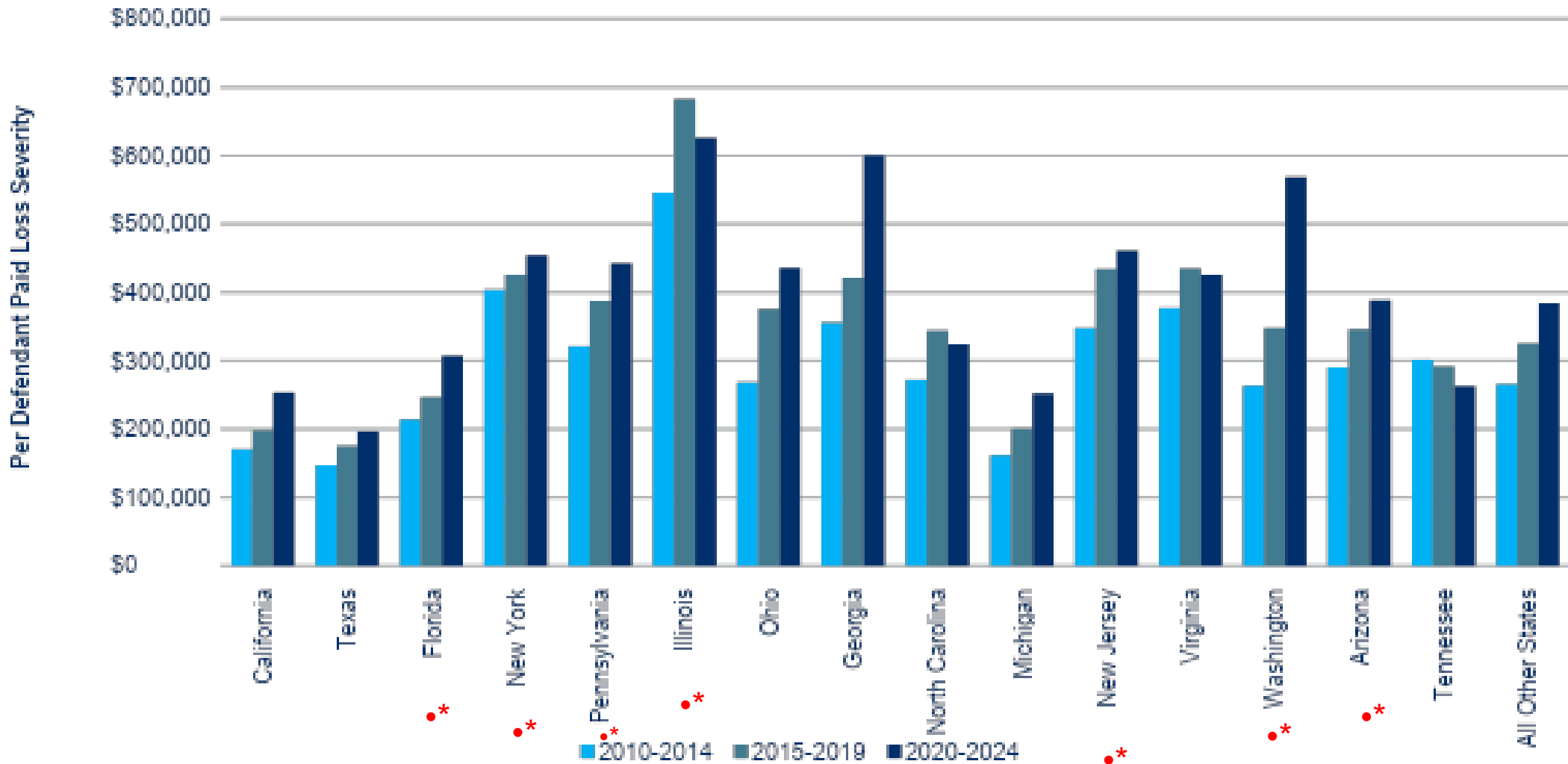
3

Court of Appeals: “The reduced risk of large noneconomic damage awards is aimed at keeping medical malpractice insurers in Ohio and thus also keeping good doctors in Ohio. Obviously, the goal of lowering medical-malpractice insurance rates is related to the general welfare of the public.”

4

Court of Appeals: “However, it is not clear from the legislative findings how the cap on noneconomic damages for catastrophic injuries will have any impact in reducing malpractice insurance rates since there have been so few cases involving these types of injuries.”

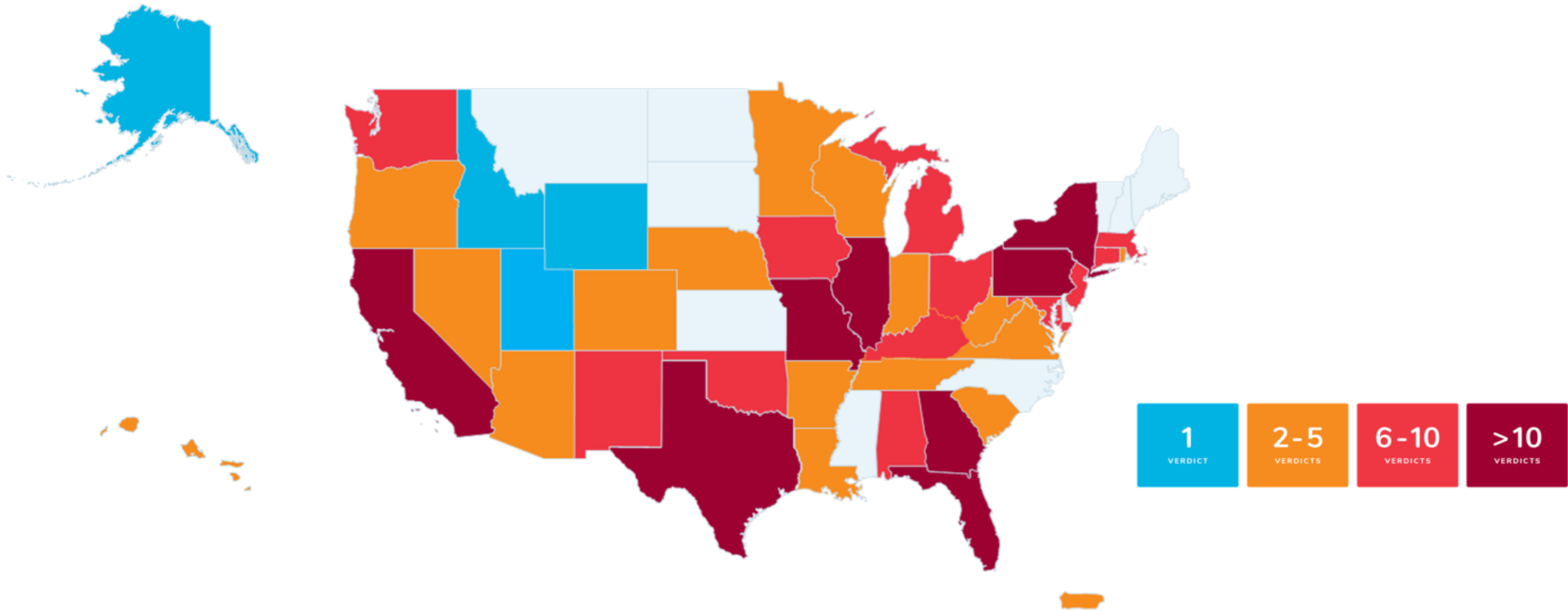
Top 15 States by Population: Average Paid Loss Severity



* = No Med-Mal Cap

Source: Crittendon Medical Conference 2025 and National Practitioner Data Bank Public Use Data File, December 31, 2024, Physicians & Surgeons by State.

Nuclear verdicts (\$10+) have returned to (and surpassed) pre-pandemic levels ... nationwide



Source: Crittendon Medial Conference 2025; TransRe and various internet articles with publication dates between 01/01/2015 and 03/01/2025. 2020 and 2021 materially impacted by CV19.

SOME NOTABLE OHIO VERDICTS

2022-2023

\$5.3 Million Fuel Spill (brain injury) December 2022 Lucas	\$6 Million House Fire (death 85/M) April 2022 Washington	\$7.6 Million Med Mal (paralyzed) June 2023 Cuyahoga
\$4.4 Million Civil Rights (death 23/M) November 2022 Cuyahoga	\$6.5 Million Med Mal (death 52/F) April 2022 Lorain	\$26 Million Med Mal (death 69/M) May 2023 Trumbull
\$17 Million Road Const. (death 54/M) October 2022 Cuyahoga	\$6.19 Million Med Mal (brain injury) September 2023 Erie	\$7 Million Truck Crash (hip surgery) May 2023 Clark
\$4.25 Million Med Mal (death 43/F) September 2022 Stark	\$2.6 Million Employment Discrimination August 2023 Franklin	\$25 Million Med Mal (neuro injury) April 2023 Franklin
\$4.4 Million Toxic Exposure (lung damage) August 2022 Warren	\$7 Million Med Mal (death 53/M) October 2023 Mahoning	\$6.7 Million Tire Explosion (brain injury) February 2023 Franklin
\$5 Million Nursing Home (death 84/M) June 2022 Knox	\$5 Million Nursing Home (death 70/M) August 2023 Cuyahoga	\$6 Million Med Mal (death 68/F) February 2023 Cuyahoga
\$5.8 Million Auto Crash (death 54/M) May 2022 Allen	\$2.6 Million Med Mal (nerve damage) August 2023 Richland	\$2.15 Million Med Mal (death 77/M) January 2023 Hamilton

Non-Economic Damages Cap (Practical Considerations)

1. In spite of tort reform:
 - i. “Nuclear Verdicts” are alive and well in Ohio.
 - ii. Use of life care planners and economic experts have allowed the plaintiff’s bar to score these record verdicts in spite of tort reform.
 - iii. In Ohio, we must nevertheless evaluate claims not only based on liability, but also damages.
2. Aggressive defense of claims helps. This means the cost of defense in malpractice cases has gone up considerably, as we have to not just defend the medicine, but also to temper damage claims through challenging life care planners and economic experts.
3. Ohio’s tort reform still seems reasonable when compared to some states with Patients’ Compensation Funds (“PCFs”) (e.g., Indiana – max recoverable is \$1.8M). It keeps the damages reasonable in spite of “social inflation.”

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Other Litigation Updates

Lewis v. MedCentral / R.C. 2323.451

- Patient was treated in MedCentral Health System's ER
- Patient was seen by an ER doctor named Dr. Patel (separately employed)
- Patient fell out of her bed in the ER and fractured her neck
- Plaintiff filed a lawsuit against the hospital and ten John Doe Defendants (October 18, 2022)
 - The John Doe defendants were identified as “physicians, nurses, hospitals, corporations, health care professionals, or other entities that provided negligent medical care to [patient] individually or by their agents, apparent agents, or employees, names unknown.”
- Plaintiff filed an amended complaint eliminating the John Doe Defendants and adding Dr. Patel, his employer and several nurses (April 14, 2023)
 - The amended complaint recited the action was filed pursuant to R.C. 2323.451(C) and (D).

Lewis v. MedCentral / R.C. 2323.451

- Dr. Patel and his employer filed a motion to dismiss arguing that the one-year statute of limitations expired on February 14, 2023
- Trial court granted the motion to dismiss → case appealed to the Court of Appeals (Fifth Appellate District)
- Plaintiff: Pursuant to R.C. 2323.451, a plaintiff pursuing a medical claim may join additional defendants within 180 days following the conclusion of the one-year statute of limitations.
- Dr. Patel and his employer: R.C. 2323.451 requires compliance with Civ. R. 15(D), and because Appellant failed to serve the John Doe defendants as required by the Rule, the amendment was untimely as to Appellees.
- Court of Appeals reversed the trial court judgment and remanded the case → case appealed to the Supreme Court of Ohio
- Several amici curiae (including OHA and several medical associations) filed a joint amicus brief in support of Dr. Patel and his employer
- Oral argument took place on March 13, 2025

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Time for Questions