

## Recent Medical Malpractice Law Amendments

### Defendant's Perspective

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The provisions of T.C.A. § 29-26-121 and 122 have created new requirements that must be strictly observed, and there are a number of pitfalls for the unwary. However, this collection of new requirements has created a confusing array of questions, some of which I will attempt to point out. Sid's comment about navigating this "minefield" is apropos. He is focused largely on the notice requirements of subsection 121(a) and the statute of limitations and/or repose extension provisions of subsection 121(c). I agree with his advise about measures one should take to avoid inadequate "written notice." I also believe that Sid has given a reasonable series of interpretations of the rather confusing language contained in the subsection 121(c) relating to extensions of statute of limitations and/or repose. Other issues worthy of discussion include the following:

1. With regard to the remedy or sanction for failure to give notice, one should note that the statute is silent about the punishment. Interestingly, the legislature decided to mention that the remedy of dismissal applied for failure to give the Certificate of Good Faith set forth in subsection 122, but did not include that as a specified sanction relating to the notice provision. This may raise a question of statutory interpretation and will have to be fleshed out in future appellate opinions.
2. The sixty (60) day written notice provision period gives presumably both the claimant and the care provider time to investigate the potential issues and claim validity. I would recommend that defendants use the time effectively to determine if the case is one that might best be resolved on the front-end.
3. Although subsection 121(b) provides "All parties in an action covered by this section shall be entitled to obtain complete copies of the claimant's medical records from any other party," the use of the words parties/action/party would seem to suggest that such record production only applies once the lawsuit is filed. Absent further clarification to the contrary, I think it would be unwise of care providers or their attorneys to produce records in the absence of a specific written authorization. Likewise, to effectuate an investigation and merit consideration, counsel for the care provider under notice should get an authorization immediately and gather records for claim assessment and not rely upon the language from the act as a basis to secure the records. Note that records are to be produced within thirty (30) days from the receipt of the "written request;" this is less than the forty-five (45) days that a defendant ordinarily would have to respond to a written discovery request served with a Complaint.
4. If a lawsuit has been filed prior to the October 1, 2008 effective date of the new Notice and Certificate of Good Faith subsections, does an amendment to add a party after the effective date require compliance with these provisions? Similarly, if a case has been previously filed and non-suited prior to October 1, 2008, is compliance with the new subsections required upon refile after October 1, 2008? The answers to these questions are not revealed within the statutory language and therefore constitute an example of pitfall for the unwary. Appellate decisions or legislative clarification is needed to answer the questions.
5. Subsection 121(a) is the "Certificate of Good Faith requirement." It applies to plaintiffs and also to any defendant who wishes to allege fault against a non-party. The Administrative Offices of the Courts have a web site and you can secure the form for the Certificate as well as Notice and any related letter from this source. Experts upon whom plaintiffs or defendants rely must provide a signed written statement. I suggest that this be in affidavit form so that later, in the event that an expert abandons you in a deposition or in trial, you have a sworn affidavit to rely on to avoid the potential sanctions mentioned in subsection 122(d). While the plaintiffs have ninety (90) days after filing the Complaint to file the Certificate, a defendant must file one within thirty (30) days after a fault assignment in an Answer. Note that the sanction of striking the fault assignment is available to the plaintiff if the Certificate is not filed "...unless the plaintiff consents to waive compliance with this section." The obvious need for the waiver provision relates to circumstances where the plaintiffs will be benefited by the fault assignment from a defendant and thereby enabled to join another defendant to the litigation, and therefore the waiver provision may be more practical than it appears. It would be advisable for counsel to reacquaint themselves with the provisions of T.C.A. §20-1-119 relating to joinder of additional parties.
6. What information is needed in a written statement of an expert? The new law does not specify clearly anything other than a declaration that the expert is competent and that based upon review, there is a good faith basis to maintain the action. It will be up to practitioners to decide what more should go into this written statement. Once again, there is no clear roadmap, but I would advise that the proof elements set forth in T.C.A. §29-26-115 should be integrated into the affidavit of such an expert. Remember, to be competent to express opinions in a malpractice case in Tennessee, the expert must be from Tennessee or one of the eight contiguous bordering states and presumably from the language of subsection 122 referencing T.C.A. §29-26-115, this contiguous state requirement applies to the consultants upon whom parties rely for suit or fault assignment.

**Conclusion:** There are many more issues that will need to be addressed relating to these new subsections. Space limitations for this article don't permit a complete discussion of all the issues. Hopefully, we can answer some of the questions in a future edition when further clarification has been provided on some of these points through the Appellate Courts and/or the legislature itself. While medical malpractice litigation has always been best left to those who are experienced in it, the new "minefield" of requirements seems to add even greater vitality to that notion. Be careful, and good luck!