Ex Parte Communications Under the Tennessee Health Care Liability Act:

A substantive argument for invalidating a procedural statute

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In 2008, the Tennessee Legislature enacted Tenn. Code Ann. § 29-26-121, creating pre-suit notice requirements for individuals seeking to assert a potential health care liability claim under the Tennessee Health Care Liability Act. Included in the statute is the requirement that, at least sixty days before filing a complaint, a person asserting a health care liability claim must give written notice of the claim to each health care provider that will be named as a defendant.[3]

Two years prior to the enactment of Tenn. Code Ann. § 29-26-121, the Tennessee Supreme Court held, in *Alsip v. Johnson City Medical Center*, that ex parte communications between defense counsel and non-party treating physicians in medical malpractice actions violated the implied covenant of confidentiality between physicians and patients.[4] In response to *Alsip*, the Legislature amended Tenn. Code Ann. § 29-26-121, in 2012, to add subsection (f).

Prior to the addition of subsection (f), Tenn. Code Ann. § 29-26-121 focused exclusively on pre-suit notice. After the addition of subsection (f), defendants in health care liability actions have means to conduct *ex parte* interviews with non-party treating health care providers, after the filing of a health care liability complaint, by providing that:

> Upon the filing of any "healthcare liability action," as defined in § 29-26-101, the named defendant or defendants may petition the court for a qualified protective order allowing the defendant or defendants and their attorneys the right to obtain protected health information during interviews, outside the presence of claimant or claimant's counsel, with the relevant patient's treating "healthcare providers," as defined by § 29-26-101. Such petition shall be granted under the following conditions . . .[5]

Since the enactment of Tenn. Code Ann. § 29-26-121(f) in 2012, courts across Tennessee have been asked to issue qualified protective orders permitting *ex parte* interviews with non-party treating health care providers. Although Tenn. Code Ann. § 29-26-121(f) is unquestionably an attempt by the Tennessee Legislature to abrogate the holding of *Alsip*, to date, no Tennessee appellate court has expressly overruled *Alsip* in light of Tenn. Code Ann. § 29-26-121(f), and there is a complete absence of appellate court authority as to the constitutionality of subsection (f).

This article argues that, by mandating, in direct contravention of the procedural framework of *Alsip*, that the trial court *shall* grant a petition for a qualified protective order allowing defendants to conduct ex parte communications with a claimant's treating health care providers, Tenn. Code Ann. § 29-26-121(f) divests the judiciary of its broad inherent authority over court proceedings and runs afoul of the separation of powers doctrine of the Tennessee Constitution.

Specifically, the argument for invalidating subsection (f) can be broken down into three parts: (1) the previous case law upholding Tenn. Code Ann. § 29-26-121 on separation of powers challenges does not control when analyzing subsection (f)'s procedural mandate; (2) because none of the substantive policy goals of presuit notice are furthered by subsection (f), it is purely a procedural mechanism; and (3) because subsection (f) cannot be said to supplement the pre-existing procedural framework established in *Alsip*, judicial comity is neither required nor appropriate.

Article II, sections 1 and 2 of the Tennessee Constitution provide for the separation of powers among the three branches of government. "[B]ecause the power to control the practice and procedure of the courts is inherent in the judiciary and necessary to engage in the complete performance of the judicial function, this power cannot be constitutionally exercised by any other branch of government."[6] Thus, "the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts."[7]

To be sure, Tennessee appellate courts have previously considered whether Tenn. Code Ann. § 29-26-121 violates the separation of powers doctrine.[8] Yet, both *Webb* and *Williams* involved health care liability actions filed prior to the 2012 amendment of Tenn. Code Ann. § 29-26-121 that added subsection (f) and its provision for *ex parte* communications. As such, both the *Webb* and *Williams* courts limited their analysis to whether the pre-suit notice provisions, contained in Tenn. Code Ann. § 29-26-121(a) and (b), impermissibly supersede the procedures for commencement of a lawsuit under Rule 3 of the Tennessee Rules of Civil Procedure.

In affirming the constitutionality of the pre-suit notice requirements, the *Williams* court noted that "[t]he pre-lawsuit notice requirements in Section 29-26-121 do not conflict with the Court's procedural rules, including Tenn. R. Civ. P. 3, because Section 29-26-121 requires notice of a potential claim 'before the filing of the complaint'" and, therefore, "before the lawsuit is 'commenced' pursuant to Rule 3 . . . Once the suit is 'commenced' under Rule 3, it then falls to the trial courts to hear the facts and decide the issues, including the issue of whether the action should be dismissed for failure to comply with the pre-lawsuit requirements."[9] By contrast, subsection (f) is not

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triggered until *after* a lawsuit is filed. Thus, *Webb* and *Williams* cannot be said to stand for the proposition that subsection (f) complies with the separation of powers doctrine.

Although there is little disagreement on this point, proponents of subsection (f) contend that *Webb* and *Williams* are, nonetheless, instructive in their articulation of substantive policy goals advanced by Tenn. Code Ann. § 29-26-121 generally. Yet, subsection (f) does not further any of the substantive policy goals of pre-suit notice articulated in *Webb* and *Williams* and cannot, therefore, constitute a valid exercise of the Legislature's police powers.

Specifically, the *Williams* court noted that, by enacting the pre-suit notice requirements, "the legislature intended to give prospective defendants notice of a forthcoming lawsuit . . . [and] the opportunity to investigate and perhaps even settle the case before it is actually filed."[10] In essence, pre-suit notice gives potential defendants information to which they were not previously entitled; it provides actual notice to potential defendants of a potential lawsuit of which they were previously unaware and, through the required HIPAA releases, it provides these potential defendants with access to medical records before the lawsuit is ever filed. When coupled with the mandatory 60-day standdown period, this information presumably promotes the possibility that needless litigation can be prevented.

By contrast, subsection (f) is not triggered until after a health care liability action has been filed. By that point, defendants are already aware of the lawsuit and have access to the information sought under subsection (f) via traditional discovery methods. Thus, subsection (f) does not provide defendants with access to any information to which they are not already entitled.[11] As such, subsection (f) cannot be said to further the substantive policy goals of pre-suit notice articulated in *Webb* and *Williams* and is, instead, purely procedural, regulating only the manner by which defendants obtain information.[12]

Although courts have "from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature," such instances of judicial comity are only appropriate when "legislative enactments (1) are reasonable and workable within the framework already adopted by the judiciary, and (2) work to supplement the rules already promulgated by the Supreme Court."[13] Here, the existing judicial framework is the Supreme Court's holding in *Alsip*, prohibiting *ex parte* communications. It simply cannot be said that subsection (f) is reasonable and workable within the framework of *Alsip*, or serves to supplement *Alsip*, as subsection (f) is directly contrary to *Alsip*. Thus, judicial comity is neither required nor appropriate with respect to subsection (f).

To be sure, numerous trial courts have granted petitions for qualified protective orders, declining to hold Tenn. Code Ann. § 29-26-121(f) unconstitutional. Yet, the mechanical entry of qualified protective orders by trial courts across the state should not be seen to reflect a consensus among trial courts that the Legislature has not overstepped its constitutional authority in this instance. Rather, it appears that, although trial courts may seriously question the constitutionality of subsection (f), such constitutional questions are viewed as best left to appellate courts to resolve.

In this connection, trial courts across Tennessee have begun to push back against subsection (f). The five Davidson County Circuit Court Judges, who regularly preside over health care liability actions, recently entered a Joint Presiding Judge Order, providing that, when considering a petition for qualified protective order pursuant to Tenn. Code Ann. § 29-26-121(f), the Supreme Court's opinion in *Alsip* must be considered in conjunction with any such request, and that the implied covenant of confidentiality recognized therein must be respected.[14] In addition, the authors of this article have been involved in two cases in recent months in which the trial court has granted motions for interlocutory appeal, under Tenn. R. App. P. 9, ruling that the constitutionality of Tenn. Code Ann. § 29-26-121(f) constitutes an important question of law that is appropriate for interlocutory appeal and that the resolution of this issue is necessary in order to prevent irreparable injury to plaintiffs created by the unnecessary risk of disclosure of irrelevant confidential medical information.[15]

Although it remains unclear as to whether appellate courts will ultimately choose to address the contradictory mandates of *Alsip* and subsection (f), a ruling from a trial court declaring subsection (f) unconstitutional may be the most compelling justification for such review. Accordingly, in the absence of any appellate authority to the contrary, plaintiffs should continue to challenge the constitutionality of subsection (f) when faced with petitions for qualified protective orders at the trial court level.

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3. TENN. CODE ANN. § 29-26-121(a)(1).
4. *Alsip v. Johnson City Medical Center*, 197 S.W.3d 722 (Tenn. 2006).
5. TENN. CODE ANN. § 29-26-121(f)(1).
6. *Corum v. Holston Health & Rehabilitation Ctr.*, 104 S.W.3d 451, 454 (Tenn. 2003); see also *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001) ("this inherent power exists by virtue of the establishment of a Court and not by largess of the legislature.").
7. *Mallard*, 40 S.W.3d at 480.
8. *See Williams v. SMZ Specialists, P.C.*, No. W2012-00740-COA-R9-CV, 2013 WL 1701843 (Tenn. Ct. App. Apr. 19, 2013); *Webb v. Roberson,* No. W2012-01230-COA-R9-CV, 2013 WL 1645713 (Tenn. Ct. App. Apr. 17, 2013).
9. *Williams*, 2013 WL 1701843, at *8.
10. *Id.* at *8-9 (internal citations omitted).
11. *See Alsip*, 197 S.W.3d at 727 ("A prohibition against . . . ex parte contacts regulates only how defense counsel may obtain information from a plaintiff's treating physician, i.e., it affects defense counsel's methods, not the substance of what is discoverable.").
12. *See In re: New England Compounding Pharmacy, Inc. Products Liability Litigation,* MDL No. 13-2419-RWZ (D. Mass. Mar. 11, 2016) (Order denying Tennessee Clinic Defendants' motion for qualified protective order) ("Section 121(f) is procedural, not substantive.").
13. *Mallard,* 40 S.W.3d at 481.
14. *See In re: Qualified Protective Orders Pursuant to Tenn. Code Ann*. § 29-26-121(f), Davidson County Circuit Court PJ16 (May 18, 2016).
15. *See Willeford v. Klepper, et al.*, Overton County Circuit Court No. 2015CV7; *Williams v. Shelbyville Hospital Corp. d/b/a Heritage Medical Center,* Bedford County Circuit Court No. 13012.