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Fall 2011

Tennessen Warnings: Requirements and Remedies

by Mark K. Hellie

The Minnesota Government Data Practices Act requires that a governmental entity provide a special notice to persons who are asked to supply private or public information about themselves to the governmental entity. *See* Minn. Stat. § 13.04, subd. 2 (2010). This special notice is referred to as a Tennessen Warning.

The Tennessen Warning requires that persons who provide private or confidential data about themselves must be informed of:

> (a) the purpose and intended use of the requested data within the collecting state agency, political subdivision, or statewide system; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data.

Minn. Stat. § 13.04, subd. 2.

When must a Tennessen Warning be given?

A. Data must be private or confidential data

A Tennessen Warning only needs to be given when a person is providing private or confidential data about herself or himself. *Id.*; *see also Washington v. Indep. Sch. Dist. No. 625*, 590 N.W.2d 655, 660 (Minn. Ct. App. 1999), review denied (Minn. June 16, 1999). In *Washington*, the court of appeals held that a discharged teacher was not entitled to a Tennessen Warning when the teacher was interviewed about the incident involving his alleged improper conduct because the information obtained during the interview was not private or confidential. Similarly, in *Edina Educ. Ass'n v. Board of Educ.*, 562 N.W.2d 306, 311 (Minn. Ct. App. 1997), the court of appeals held that a Tennessen Warning was not required when the Board's attorney interviewed the subject of a grievance about the facts that gave rise to the grievance because the School District was not gathering information about the subject. Rather, it was gathering information about "an incident within the course and scope of [the subject's] employment." *Id.*

B. Third Persons

A Tennessen Warning only needs to be given when the individual is being asked to provide data about herself or himself. Minn. Stat. § 13.04, subd. 2. If the data sought is about a third person, a Tennessen Warning is not necessary. *See id.*

C. Voluntary Information

Further, if a person voluntarily provides private or confidential data about herself or himself, a Tennessen Warning is not necessary. *See id.*; *In re Larson*, No. C6-97-2215, 1998 Minn. App. LEXIS 529, at *3-*7 (Minn. Ct. App. May 12, 1998) (holding that the district court did not

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This newsletter is a periodic publication of Jardine, Logan & O'Brien, P.L.L.P. It should not be considered as legal advice on any particular issue, fact or circumstance. Its contents are for general informational purposes only.

Comments or inquiries may be directed to Shannon Banaszewski.

Supreme Court Expands Medical Expert Disclosure

by Vicki A. Hruby

The Minnesota Supreme Court effectively extended the time period in which a claimant must disclose the identity of its expert witness in *Wesley v. Flor*, A10-0478 (Minn. Sept. 7, 2011).

Under Minnesota law, a party filing a medical malpractice action must serve two affidavits. *See* Minn. Stat. § 145.682 (2010). First, the plaintiff must serve an expert affidavit with the summons and complaint or within 90 days of service of the summons and complaint if the affidavit could not be obtained before the statute of limitations expired. *Id.*, subds. 2, 3. This initial affidavit, the affidavit of expert review, states that an attorney reviewed the case with an expert and that the expert believes the case has merit. *Id.*, subd. 3(a).

The second affidavit, the affidavit of expert disclosure, is more detailed and must be (1) signed by the plaintiff (or the attorney) and all experts; (2) identify the experts who are expected to testify; (3) provide the substance of the facts and opinions to which each expert is expected to testify; and (4) provide a summary of the grounds for each expert opinion. *Id.* The affidavit of expert disclosure must be served within 180 days of commencing the action.

A defendant may move for dismissal if there are "deficiencies in the affidavit." *Id.*, subd. 6(c). Moreover, dismissal is mandatory if:

> (1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
> (2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
> (3) before the hearing on the motion, the plaintiff does not serve an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

In *Wesley v. Flor,* Wesley commenced a dental malpractice claim against Dr. Flor by serving a summons, complaint and affidavit of expert review. Within 180 days of commencing the professional negligence action, Wesley submitted an affidavit disclosing the opinions of a doctor of internal medicine. As the expert identified was not a dentist, and thus not a qualified expert, Dr. Flor moved to dismiss. Within the 45-day safe harbor period, but after the expiration of the initial 180-day deadline, Wesley served an affidavit identifying and summarizing the expected testimony of another expert, a dentist.

The district court concluded that the first affidavit did not identify a proper expert and that a later affidavit identifying a new expert did not "amend" the first affidavit. Thus, the court dismissed the action because Wesley did not, and could not, properly correct the deficiencies. The court of appeals affirmed.

The Minnesota Supreme Court reversed determining that Minn. Stat. § 145.682, subd. 6(c) "does not limit the safe-harbor period only to certain types of deficiencies." Further, the court placed great emphasis on the detail provided in the first affidavit of expert disclosure, albeit from a non-qualifying expert. The court noted that the doctor of internal medicine was familiar with Wesley's condition and that much of the information in the affidavit identifying the non-qualifying expert carried forward into the affidavit identifying the qualifying expert. Thus, the supreme court concluded that the first affidavit was not a placeholder affidavit of expert disclosure.

The court suggested that defendants should not be concerned that its ruling would result in claimant's using placeholder affidavits of expert disclosure because:

> the statute requires that the affidavits signed by the plaintiff or the plaintiff's attorney must be 'made in good faith' or the signing individual is responsible for fees, costs, and disbursements. Serving an affidavit with no information would presumably raise the issue of whether the incomplete affidavit was a good faith attempt to comply with the statutory requirements, and could therefore result in sanctions.

Wesley, A10-0478, at 11 (internal citations omitted). Accordingly, the court determined that serving a placeholder affidavit is "a risky tactic for the purpose of gaining a relatively brief extension." *Id.*

Further, the court noted that the second affidavit of expert disclosure, disclosing a new expert, was not a second affidavit, but an "amended" affidavit. The affidavit of expert disclosure was deemed amended, instead of substituted, because the plaintiff had authored both affidavits of expert disclosure. As Minn. Stat. § 145.682, subd. 4(a) allows a plaintiff or her attorney to be affiant of the expert disclosure, the court concluded it is the plaintiff's affidavit that was amended, not the expert affidavit.

This decision may have a profound impact on medical malpractice actions as it essentially extends the plaintiff's time

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Firm News

Congratulations to **Jessica E. Schwie** who won an award for the full amount of attorneys fees incurred in cartway litigation proceedings. If you would like a copy of the order, please contact her at 651.290.6591. •

Jessica E. Schwie presented a nationwide seminar on the topic of *Section 1983 Liability and Government Immunity* on December 8, 2011 through NBI, Inc. For more information, see www.nbi-sems.com. •

Congratulations to **Darwin S. Williams** who was selected as the Vice Chair of the MDLA Product Liability Committee for 2012. •

The U.S. District Court - District of Minnesota recognized **Joseph E. Flynn** and **Marlene S. Garvis**, partners of Jardine, Logan & O'Brien, PLLP, with 2011 Distinguished Pro Bono Service Awards. The awards were presented by U.S. District Court Chief Judge Michael Davis at the November 30, 2011 Federal Bar Association meeting. •

***Tennessen* continued from page 1**

abuse its discretion when it allowed testimony to be used against a subject absent a Tennessen Warning because the subject provided his therapist the information during a voluntary therapy sessions.)

D. Criminal Investigative Data

A Tennessen Warning is not required when a person is asked to supply a law enforcement officer with "criminal investigative data," as defined in Minn. Stat. § 13.82, subd. 7. Under this provision, if a law enforcement officer requests criminal investigative data for an "active" case, a Tennessen Warning is not necessary.

What happens if a Tennessen Warning is not properly given?

If a governmental entity does not provide a Tennessen Warning when one should have been given, the governmental entity cannot use or store the information received for any purpose. *See* Minn. Stat. § 13.04, subd. 2. The district court could exclude otherwise admissible evidence if that evidence was obtained without providing a Tennessen Warning. *See* Minn. Stat. § 13.08, subd. 2 (stating that the district court "may make any order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate this chapter"); *see also Edina Educ. Ass'n*, 562 N.W.2d at 309, 311-12 (reversing the district court's injunction preventing the use of the information that the school district's attorney obtained because the information was not private or confidential).

Because failing to properly provide Tennessen Warnings could lead to the suppression of evidence for litigation, the warning should be given to preserve the governmental entities' right to use that information as evidence in a court proceeding. Further, it is best to have multiple Tennessen Warnings that are tailored to address the governmental entity's specific scope and need for the requested data. •

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period to disclose an expert opinion from 180 days to 225 days. In addition, the court's decision provides plaintiffs with two bites of the apple in identifying and disclosing an expert's opinions. If an affidavit of expert review discloses a non-qualifying expert, nothing prevents a plaintiff from subsequently identifying a qualifying expert. The erosion of the expert affidavit requirement by the safe harbor provision requires defendants to be more proactive, requiring defendants to carefully review expert disclosures to ensure compliance with Minn. Stat. § 145.682 upon receipt and move for dismissal without delay if deficiencies exist. Finally, this decision illustrates the necessity for defendants to demand expert disclosures as soon as possible to limit the length of time that a plaintiff has to identify their expert's opinion. •

Update

Most Private Sector Employers Must Post New Right to Organize NLRB Notice by 1/31/12

The National Labor Relations Board (NLRB) requires a new notice-posting rule that will affect most small and medium sized businesses even if they do not have a union. The notice highlights the workers' right to organize and will affect nearly all private-sector employers subject to the NLRB, but excludes agriculture, railroad and airline employers. Employers must post this notice where other Federal and State *Right to Know* posters are placed.

Originally the law required posting by November 14, 2011, so employers are in compliance if they have already posted. However, the effective date has been postponed to allow further questions and education as there was uncertainty about which businesses fall under the Board's jurisdiction. Failure to post the notice may be treated as an unfair labor practice.

It is recommended that employers go to the NLRB website, www.nlrb.gov, for further information. Employers can also obtain the 11 by 7 inch notice from the NLRB at its website, either by downloading it to print, or ordering by mail. As this new rule takes effect, employers should check the frequently asked questions on the NLRB website or contact them at 866-667-NLRB with any questions. •

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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Look for something new in the coming months.....

If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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