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April 7, 2020

The Honorable Bill Lee
Governor of Tennessee
State Capitol, 1st Floor
600 Dr. Martin L. King, Jr. Blvd.
Nashville, TN 37243

Dear Governor Lee:

We are writing on behalf of the statewide member physicians of the Tennessee Medical Association (TMA) and the largest metropolitan medical societies in the state, the Memphis Medical Society, the Nashville Academy of Medicine, the Chattanooga-Hamilton County Medical Society, and the Knoxville Academy of Medicine. We urge you to issue an executive order, pursuant to your authority in T.C.A. § 58-2-107(l)(2), in order to protect the physicians and other health care professionals and facilities treating patients during the COVID-19 pandemic with regard to immunity from liability.

Your recent “stay-at-home” order and your administration’s efforts to provide increased personal protective equipment for health care professionals have been game-changers to flatten the curve of COVID-19 cases. Still, in the next 10-14 days, predictions are that the curve will reach an apex. We ask that you further protect health care professionals in response to this pandemic by providing limited immunity from civil and administrative liability for harm caused resulting from efforts to reduce the projected loss of lives.

In March, TMA asked that you provide by executive order, language to provide liability protection for triage and treatment decisions in case of shortages; and suspend the provisions of any law, order, rule or regulation of the civil tort laws which prescribe the procedures for conduct of state business or the orders or rules or regulations of the state medical licensing agencies that would in any way prevent, hinder, or delay necessary action in coping with the emergency. We sincerely hope that this virus does not reach such levels, but if it does, quick and difficult treatment decisions will still have to be made.

Through the course of treating the disease, other liability risks have emerged for physicians, health care professionals, and facilities. There is a need for liability protection for physicians and other health care professionals who are forced to practice outside of their normal specialty certification or normal practice scope. This can occur when physicians are asked to treat COVID-19 diagnosed patients because of a shortage of specialty physicians who routinely treat contagious respiratory disease (i.e. pulmonologists). This can also occur when specialists must

treat non-COVID-19 diagnosed patients outside of their specialty because of general physician shortages (i.e. surgeon restricted to non-elective procedures treating chronic conditions such as diabetes because of a need for primary care doctors to treat COVID-19 patients).

Liability protection is needed if the COVID-19 situation becomes so bad in some areas that there arises a shortage of medical equipment like ventilators and essential medical supplies like PPE, treatment medications, etc. and physicians are forced to make difficult choices about which patients receive them and which patients do not.

In addition, since this is a new disease with no established treatment protocols, medical professionals are experimenting with treatment options based on incomplete data, uncertain side effects, and must treat quickly with what we have available. Many solutions seem promising but with any protocols that are changing day to day, liability issues arise from these desperate efforts.

Finally, providing liability protections will help mitigate mental health concerns and burnout felt by practitioners from the stress of treating the virus.

What Federal Law Provides for in Terms of Immunity Protection During a Disaster or Emergency
On March 27, President Trump signed into law H.R. 748, the “Coronavirus Aid, Relief and Economic Security Act” (CARES Act). This new law includes Good Samaritan language that provides additional federal liability protections for *volunteer* health care professionals during the COVID-19 emergency response (see section 3215).

The Public Readiness and Emergency Preparedness Act (PREP Act) provides broad immunity protections to health care professionals who administer or use countermeasures covered by declarations issued by the Secretary of HHS. On March 17, the Secretary issued such a declaration regarding the COVID-19 outbreak. This applies immunity protections to physicians and other health care professionals who administer or use such countermeasures as antiviral medications, other drugs, biologics, vaccines, diagnostics and/or devices (e.g., COVID-19 testing and respiratory therapy) to treat, diagnose, cure, prevent or mitigate COVID-19 or the transmission of SARS-CoV-2 or a virus mutating therefrom.

The Volunteer Protection Act of 1997 (VPA) provides liability protections to volunteers, including physicians, who are performing services for nonprofit organizations or government entities during a public health emergency or national emergency declaration.

These are federal provisions applying only to volunteers, do not apply to facilities, or only apply to specifically enumerated health care activities that are not broad enough to address health care practice by non-volunteers in Tennessee.

What Tennessee Law Authorizes Tennessee's Governor
T.C.A. § 58-2-107(l)(1) and (2) subsection (1) states:

If the governor of Tennessee declares an emergency in response to a catastrophic or major disaster, *voluntary* health care providers, including hospitals and community mental health care centers, participating in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact are immune from liability in providing the health care to victims or evacuees of the catastrophic or major disaster, as long as the services are provided within the limits of the provider's license, certification or authorization, unless an act or omission was the result of gross negligence or willful misconduct." [*Emphasis added*].

You have declared an emergency in response to a major disaster, the COVID-19 outbreak. Thus, this provision has automatically kicked in. The problem is, it only applies to "voluntary health care providers" who are participating in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact. It would *not* apply to physicians in Tennessee treating COVID-19 patients within the normal course of their employment or exercise of their hospital privileges and would not address any of the issues cited above except for the "voluntary health care providers" who are participating in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact.

The relevant portion of the statute in subsection (2) provides:

If additional medical resources are required, the governor, by executive order, may provide limited liability protection to health care providers, including hospitals and community mental health care centers and those licensed, certified or authorized under titles 33, 63 or 68, and who render services within the limits of their license, certification or authorization to victims or evacuees of such emergencies; provided, however, that this protection may not include any act or omission caused by gross negligence or willful misconduct.

Read together with subsection (1), subsection (2) would apply when medical resources in addition to "voluntary health care providers" who are participating in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact are required. This is clearly the case and you have recognized this by ordering additional facilities to be set up and by ordering additional ventilators, PPE, etc. through TEMA and FEMA. You also recognized that additional medical, nursing, and other health care professional manpower is required to combat the COVID-19 outbreak in Tennessee as well as treat routine disease and injuries that arise. Because of the need for these additional manpower resources

who must practice through the issues enumerated above, we are asking you to invoke this provision by executive order to provide general limited liability for acts and omissions occurring during the COVID-19 emergency thirty (30) days at a time for which the statute provides.

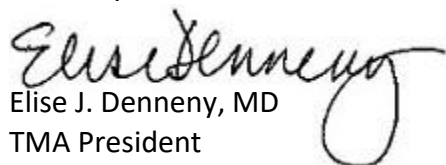
T.C.A. § 63-6-218, Tennessee's "Good Samaritan Law" is arguably inapplicable to the COVID-19 emergency. In the case of Lindsey v. Miami Development Corp., S.W.2d 856, decided by the Tennessee Supreme Court in 2016, the Court interpreted Tennessee's Good Samaritan statute as being directed toward persons who are not under some pre-existing duty to remedy aid, relying on Lee v. State, 490 P.2d 1206 (Alaska 1971). Accordingly, it has been held that a Good Samaritan Act does not protect a defendant who had a pre-existing duty to render aid to the plaintiff. Lee v. State, *supra*. Since physicians within the ordinary course of their employment are under an existing duty to treat patients who present to a hospital emergency department, medical office, or otherwise through their employment, Tennessee's Good Samaritan law does not protect these physicians.

What Needs to be Done to Address these Problems Facing the Health Care Workforce and Facilities?

1. TMA requests that you issue an executive order pursuant to T.C.A. § 58-2-107(l)(2) and reiterate that the current COVID-19 is a statewide major disaster requiring additional medical resources in the form of manpower, facilities, and treatment supplies such as medication, equipment, devices, and PPE.
2. TMA requests that the limited liability protection invoked by the executive order should mirror previously issued orders by other state governors in Illinois, New York, and Connecticut and TMA submits the following suggested language:
 - Pursuant to T.C.A. § 58-2-107(l), it is hereby directed that all physicians and other licensed or registered health care professionals and licensed health care facilities in this state shall be immune from civil or administrative liability for any injury or death alleged to have been caused at a time when such health care professional or facility was engaged in the course of providing health care services in support of the State's response to the COVID-19 outbreak, unless it is established that such injury or death was caused by the gross negligence or willful misconduct of such medical professional or facility.

On behalf of our 9,000 member physicians, we appreciate your efforts on behalf of all Tennesseans, and we will continue to fight the COVID-19 virus and assist you in any way possible. Thank you for your consideration of this request.

Sincerely,


Elise J. Denny, MD
TMA President

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