

UPDATE: Violation! An Examination of *Ex Parte* Communications in the Context of Medical Negligence Cases in New Hampshire

By

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I. Introduction

In a previous article,² we cautioned that defense attorneys continue to engage in unauthorized *ex parte* communications with plaintiffs' treating physicians despite the longstanding New Hampshire law prohibiting this practice. Since the date of that publication, a Superior Court decision was issued by Judge Smukler in which the court rejected the latest attempt by a defense attorney to circumvent the proscription of such *ex parte* communications. This update will briefly recap the New Hampshire law on the subject and discuss Judge Smukler's decision.

II. New Hampshire Law Recap

Ex parte contact between defendants and plaintiffs' treating physicians has been prohibited in New Hampshire for over thirty years. In the seminal case, Nelson v. Lewis,³ our Supreme Court held that a plaintiff has the right to refuse to permit the defendant to engage in *ex parte* discussions and the court may not—under any circumstances—order the plaintiff to allow such communications to take place.⁴ The court clarified that although a plaintiff in a medical negligence action waives the physician-patient privilege to the extent necessary to provide the opposing party with information to defend the action, the plaintiff does not waive the privilege so as to allow *ex parte* interviews with the plaintiff's treating physicians.⁵

The importance of preserving the confidentiality afforded by the patient-physician relationship guided the Nelson court's decision. The court noted that this confidentiality was particularly susceptible to breach in an *ex parte* setting because physicians are "largely unschooled in legal matters" and may inadvertently disclose information irrelevant to the patient-plaintiff's lawsuit.⁶ The court explained that requiring the defendant to go through formal discovery channels to elicit treatment-related information from the nonparty physician serves the dual objectives of protecting the confidentiality of the physician-patient privilege while also providing the defendant an opportunity to procure any relevant evidence.⁷

Notwithstanding the explicit bar on *ex parte* conferences recognized in Nelson, defendants in New Hampshire have repeatedly attempted to evade this proscription. In Lizotte v. Gladstone,⁸ the defendants moved the court for permission to interview two nonparty treating physicians who belonged to the

cardiology group named as a defendant in the lawsuit.⁹ The defendants claimed the proscription of *ex parte* interviews did not apply because of the physicians' membership in the practice group.¹⁰ The court rejected this argument, reasoning that the "mere fact that [a] treating physician is a member of the same group as the defendant" does not weaken the privilege nor does it alter the reasoning in Nelson.¹¹

Similarly, In McHugh v. Miner,¹² the defendant requested the court's permission to speak with the plaintiff's nonparty treating physician, arguing that the physician's ownership stake in the defendant radiology group entitled the nonparty physician to speak with "his" attorneys *ex parte*.¹³ Consistent with New Hampshire's unwavering protection of the patient-physician privilege, the court refused to accept the physician's financial interest as a legitimate justification for *ex parte* communications.¹⁴ The fact that a defendant belongs to the same medical group as a non-party physician does not enable defense counsel to sidestep privilege and conduct *ex parte* interviews with any physicians in the medical group not named as defendants.

In Bhat v. Kirk,¹⁵ the court applied the holding in Nelson and granted the plaintiff's motion to preclude the testimony of a treating physician who engaged in *ex parte* communications with the defendant.¹⁶ The court found that the "trial court's only means of ensuring that this rule is rigorously observed is to preclude the use of any testimony obtained subsequent to a violation of the rule."¹⁷

III. Omanovic v. Pariser

As the aforementioned cases demonstrate, New Hampshire courts have consistently rejected attempts by defense attorneys to evade the prohibition of *ex parte* communications with nonparty treating physicians in an effort to safeguard the confidentiality of the physician-patient privilege. The court's recent decision in Omanovic v. Pariser et al.¹⁸ continued that trend.

In Omanovic, the plaintiff was injured during a surgical procedure performed by Dr. Pariser and Dr. DeMars, employees of Dartmouth Hitchcock Clinic.¹⁹ The plaintiff filed a medical negligence action against Dr. Pariser, among others, but Dr. DeMars was not named as a defendant.²⁰ During the course of the litigation, plaintiff's counsel contacted Dr. DeMars to discuss her recollection of the procedure.²¹ Dr. DeMars explained that she was working with the defense attorney for Dr. Pariser and Dartmouth Hitchcock and any requests for a meeting should be directed to that attorney.²² The defense attorney later informed plaintiff's counsel that he was also representing Dr. DeMars and refused to make her available without him being present.²³

Shortly thereafter, Dr. DeMars was deposed and testified that although she had no independent recollection of the procedure, the expert disclosure and deposition transcripts provided to her by her attorney during their *ex parte* meetings added to her understanding of the defendant's recollection of the procedure.²⁴ When plaintiff's counsel inquired about what had occurred during her private meetings with defense counsel, the defense attorney objected on the basis of attorney-client privilege and instructed Dr. DeMars not to answer.²⁵

Accordingly, the plaintiff filed a motion to preclude Dr. DeMars's testimony on the grounds that the defense attorney engaged in unpermitted, *ex parte* communications with Dr. DeMars in violation of the plaintiff's physician-patient privilege and the rule established in Nelson.²⁶ The defense argued that Nelson did not apply because it did not consider a situation in which the treating physician was employed by a defendant hospital.²⁷ More specifically, the defense attorney contended that he was entitled to speak with Dr. DeMars, *ex parte*, because the plaintiff's complaint alleged that Dartmouth Hitchcock Clinic breached its duty through the actions of its agents and employees, placing Dr. DeMars within the zone of liability in her capacity as an employee of Dartmouth Hitchcock Clinic.²⁸

Despite defense counsel's creative attempt to sidestep New Hampshire's prohibition of *ex parte* communications by invoking the attorney-client privilege, the court held that "the corporate attorney-client privilege must yield to the more vital physician-patient privilege in this context."²⁹ In reaching its decision, the court recognized the "inherent conflict" between the physician-patient privilege and the attorney-client privilege in the corporate context, acknowledging that a corporate entity only acts through its agents and employees.³⁰ In light of the decision in Nelson, however, the court found that "New Hampshire would more heavily weigh the physician-patient privilege."³¹ The court explained that Nelson applied to all treating physicians and refused to expand the partial waiver of the physician-patient privilege to a nonparty treating physician simply because that physician is employed by a corporate defendant.³²

The court, citing Bhat, reiterated that the appropriate remedy under these circumstances is to preclude the use of any of the treating physician's testimony obtained through unsanctioned *ex parte* communications.³³ The court found it difficult to believe that Dr. DeMars's testimony was not influenced by her meetings with defense counsel during which she was provided with the plaintiff's expert disclosure and pertinent deposition transcripts.³⁴ Moreover, the court explained that Dr. DeMars's testimony could not be "cleansed of this influence" because the plaintiff was not permitted to inquire about what occurred during the meetings with defense counsel and,

therefore, could not determine how the information that was provided to her impacted her testimony and credibility.³⁵ Given defense counsel's violation of the plaintiff's physician-patient privilege, the court found that any prejudice to the defendant resulting from preclusion of Dr. DeMars's testimony was outweighed by the prejudice to the plaintiff if Dr. DeMars were permitted to testify.³⁶

IV. Conclusion

Time and again, New Hampshire courts have held that the preservation of confidentiality trumps virtually all considerations in favor of *ex parte* interviews. Omanovic represents the most recent in an unbroken line of New Hampshire decisions that refuse to compromise the physician-patient privilege to allow defense counsel unfettered access to plaintiffs' treating physicians.

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² "Violation! An Examination of *Ex Parte* Communications in the Context of Medical Negligence Cases in New Hampshire" 43 TBN 7 (Winter, 2018).

³ 130 N.H. 106 (1987).

⁴ See *id.* at 109 (explaining that plaintiff's right to refuse defendant an *ex parte* interview is consistent with the physician-patient relationship).

⁵ See *id.* at 112.

⁶ *Nelson*, 130 N.H. at 111 (warning about risks of inadvertent disclosure).

⁷ See *id.* at 112.

⁸ No. #01-C-0790, Order on Plaintiff's Motion to Prohibit Defense Counsel from Engaging in *Ex-Parte* Contact with Nonparty Treating Physicians, Rockingham Super. Ct. (Apr. 22, 2002).

⁹ See *id.* at 2.

¹⁰ See *id.*

¹¹ *Id.* at 3.

¹² No. #97-C-97, Order on Plaintiffs' Motion to Preclude *Ex-Parte* Contact With Non-Party Treating Physician, Hillsborough Super. Ct. (June 4, 1997).

¹³ See *id.* at 2.

¹⁴ See *id.* at 3.

¹⁵ Order on Plaintiff's Motion to Preclude Testimony of Dr. Stay Walters, Grafton Super. Ct. (Sept. 10, 1999).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ No. 2017-CV-229, Order on Plaintiff's Motion to Preclude Testimony of Dr. Leslie DeMars, Hillsborough Super. Ct. (May 23, 2019).

¹⁹ See *id.* at 1.

²⁰ See *id.*

²¹ See *id.*

²² See Omanovic, at 2.

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ See Omanovic, at 2.

²⁷ See *id.*

²⁸ See *id.* at 3.

²⁹ *Id.* at 4.

³⁰ Omanovic, at 4.

³¹ *Id.*

³² *See id.*

³³ *See id.* at 4-5.

³⁴ Omanovic, at 4.

³⁵ *See id.*

³⁶ *See id.*