UPDATE #2: Violation! An Examination of *Ex Parte* Communications in the Context of Medical Negligence Cases in New Hampshire

By

Nick Abramson & Elie Maalouf[i]

I. Introduction.

New Hampshire courts have made the point crystal clear: a plaintiff in a medical malpractice action does not, as a consequence of that action, waive her privilege as to communications with, and information about the plaintiff's medical care from, medical treaters who are not parties to the case, even where those non-party medical treaters are employed by a hospital which is named as a defendant in the action. Nevertheless, defendants and their legal counsel continue to engage in *ex parte* communications with non-party medical treaters, thus violating the critical protections of the privilege. Accordingly, we feel compelled to publish on this issue yet again, particularly in light of a recent order issued by Belknap County Superior Court in a medical negligence action.

In the *Estate of Cheryl Garrett v. Lakes Region General Hospital, et. al.*[ii], we issued a letter, early in the case, informing the defense attorneys that our client did not waive her privilege with respect to non-party medical treaters. The letter further requested confirmation that such *ex parte* communications had not taken place. After counsel refused to confirm that the privilege had not been violated, we filed a motion to compel the production of information regarding any *ex parte* communications with non-party medical treaters. Consistent with every other New Hampshire court to address the issue (of which we are aware), Judge O'Neill held that *Nelson v. Lewis* and its progeny prohibited the defendant from communicating *ex parte* with our client's non-party medical treaters about the medical care they rendered to our client. The Court held that this was true even where the non-party medical treaters were employees of a named defendant hospital, and even where the care rendered by non-party treaters was contemporaneous to the alleged negligent care at issue in the case. The appropriate remedy for such a violation of the privilege, the Court concluded, was to authorize the plaintiff's counsel, via interview or deposition of the non-party treaters, to inquire about the occurrence, timing, nature, and substance of any such violative communications between the non-party treating physicians and the defendant's counsel.

This article will examine, in summary fashion, the most important aspects of this recent Superior Court order, and reinforce the importance of putting defense counsel in medical negligence cases on notice that they are not permitted to communicate privately with non-party medical treaters.

II. *Ex parte* communications are prohibited even if the non-party treaters are employees of the named defendant hospital.

New Hampshire law unequivocally precludes defendants and their legal counsel from communicating *ex parte* with **any** of the plaintiff's non-party treating health care providers about the plaintiff's medical care, absent authorization from the plaintiff. Indeed, "there are no circumstances under which a trial court may order a plaintiff to permit such interviews."[iii] Yet, defense attorneys in New Hampshire medical negligence cases have repeatedly sought to circumvent this well-established rule, in part by attempting to assert that the court, in *Nelson*, did not contemplate a situation where a plaintiff's non-party treating physician is employed by the hospital which is named as a defendant in the case. They claim that, because they represent the hospital in the underlying matter, they have a right to communicate with other hospital employees about the plaintiff's medical care, even when those employees are neither current nor putative defendants in the case. New Hampshire's trial courts have roundly rejected this argument, and broadly upheld *Nelson's* ruling.[iv] As Judge Smukler noted in *Omanovic v. Pariser*[v]:

> [W]hile the facts in *Nelson* did not involve a treating physician also employed by the defendant hospital, the court's holding broadly prohibited all *ex parte* conduct with a plaintiff's treating physicians. It did not limit this rule to the specific factual scenario of the case; rather, the court provided that '[t]he participation of the plaintiff's counsel in any interview between the defendant and the defendant's physician is essential to insure that private and irrelevant matters remain confidential.'[vi]

As the court explained in *Nelson*, this does not prevent medical institutions from investigating an alleged negligent incident: defendants can obtain all necessary information during the formal discovery process, where "[t]he presence of both parties' counsel at depositions and their mutual involvement in written discovery help[s] to insure that the [non-party treating] physician reveals only those statements that are no longer privileged."[vii] Thus, "[u]nder *Nelson*, the limited waiver of the privilege for named medical negligence defendants cannot be expanded to a non-party treating physician simply because that non-party physician is employed by a corporate defendant."[viii]

Several New Hampshire decisions since *Nelson* have extolled the fundamental fairness of eliciting information from non-party health care treaters through the formal discovery process. As Judge Smukler wrote in *Omanovic*:

> As noted in *Nelson*, this analysis does not prevent medical institutions from investigating an alleged negligent

> incident. Defendants can obtain all necessary information during the formal discovery process, where the presence of both parties' counsel at depositions and their mutual involvement in written discovery helps to insure that the physician reveals only those statements that are no longer privileged.[ix]

These sentiments were further reflected by Justice Dalianis, in *McHugh v. Miner*[x]:

> Any interview with [the non-party treating physician] about [the plaintiff's] medical care and treatment is to take place in a formal deposition setting so as to protect the rights of the plaintiffs while ensuring that the defendants obtain all the information [to which] they are legally entitled.[xi]

And by Judge McHugh in *Lizotte v. Gladstone*[xii]:

> As the Supreme Court made clear in Nelson, while defendant's counsel could not engage in *ex parte* communication with one of the plaintiffs' treating physicians, that fact did not prevent defense counsel from learning what the treating physician had to say relative to the plaintiffs' care. In other words, plaintiffs' counsel did not have the right to prevent a treating physician from testifying, for one party or the other, relative to the patient's care. However, the testimony of the treating physician had to be taken in a formal setting with all counsel being present. *In the Court's view, the defendant in this case is not prejudiced if the same procedure is followed*.[xiii]

The risk of prejudice to the plaintiff by allowing counsel for a defendant-hospital to conduct private, *ex parte* interviews with non-party treating hospital employees is substantial. These non-party treaters are employed by, or work closely with, the named defendant(s) in the case – and in those unmonitored, informal, and unrecorded meetings, there is a high likelihood that the theories of defense will be imprinted, and the witness biased, regardless of whether defense counsel engages with ill-intent. Conversely, the risk of prejudice to the defense by eliciting the very same information through a formal discovery deposition, at which both parties are present and may fashion their own inquiries to be answered under oath, is virtually non-existent; slightly more cumbersome, perhaps – but fundamentally fair to both sides, which is why every court in New Hampshire to consider the issue has evidently decided in the plaintiff's favor.

Like in *Omanovic*, the defendant in *Garrett* sought to sidestep the proscription of *ex parte* communications by arguing, in part, that the ruling in *Nelson* did not apply in situations where the non-party treater was employed by the defendant hospital. Failing to cite any New Hampshire law in support of this proposition, defense counsel contended that patients waive their physician-patient privilege with respect to their physicians' employers and the hospital where their physician is on staff and, therefore, the defendant is entitled to speak with its own employees. Persuaded by the holdings in *Omanovic* and *McHugh*, Judge O'Neill rejected this argument, reiterating that "there are 'no circumstances' in which a defendant could have unauthorized *ex parte* contact with a plaintiff's treating physicians **without any exceptions** for specific factual circumstances or theories of liability."[xiv] Accordingly, the court concluded that *Nelson* prohibited the defendant from communicating *ex parte* with plaintiff's non-party treaters.[xv]

III. *Ex parte* communications are prohibited even if the non-party treaters' treatment is contemporaneous to the medical care which grounds the allegations in the complaint.

Defense counsel further argued that *Nelson's* prohibition on unauthorized *ex parte* communications was limited to subsequent, rather than contemporaneous, treating providers. In *Nelson*, the defendant contended that the treaters with whom the defendant sought *ex parte* contact had treated the plaintiff in the *months following* the allegedly negligent medical care, and not *contemporaneously to* that allegedly negligent medical care. Thus, they claimed, the *Nelson* proscription does not apply to non-party medical treaters whose treatment occurred during, or in close proximity to, the care at issue in the underlying case. Defense counsel, however, failed to offer any compelling explanation for the perceived significance of this temporal relationship. In rejecting this argument, Judge O'Neill explained:

> The *Nelson* Court held that "a plaintiff who places her medical condition at issue in an action for medical negligence does not waive the physician-patient privilege so as to permit defendants to interview treating physicians *ex parte*." Thus, regardless of whether the non-party treating physicians' treatment are relevant to the underlying action or if the treatment was contemporaneous, as opposed to subsequent, the physician patient privilege is not waived to permit the defendant to interview same *ex parte*.[xvi]

IV. The remedy for such violations is, at the very least, the opportunity to inquire about the occurrence, timing, nature, and substance of any such *ex parte* communications.

Finding all of the defendant's arguments unpersuasive, the Court turned to the issue of whether the defendant had, in fact, communicated *ex parte* with the plaintiff's non-party treating physicians. To settle this issue, the court ordered that the plaintiff can ask the non-party treating physicians at issue whether the defendant had engaged in unauthorized *ex parte* communications.[xvii] If the non-party treaters answered affirmatively, then the plaintiff is entitled to ask about the circumstances and the substance of those communications.[xviii] The court left it up to the parties whether this questioning would take place in an interview or deposition but maintained that both parties must be present.[xix]

V. Conclusion: put defense counsel on notice.

Preventing *ex parte* communications in multi-party medical malpractice cases is critical, not only because it protects physician-patient privileged information – but also because it precludes defense counsel from gaining an unfair litigative advantage by accessing privileged information not readily available to the plaintiffs, in a manner which may allow them to coordinate testimony and develop defenses in the case based upon information to which the plaintiffs do not have access. The harsh reality is that, in practice, non-party treating physicians – particularly those who are employed by a named defendant-hospital – are rarely willing to speak independently with plaintiff's counsel (often by demand of the hospital's own legal counsel), even when presented with an authorization enabling them to do so. It would be patently unfair to allow defense counsel *ex parte* access to such privileged information, to which the plaintiff herself is entitled but not privy. To prevent this practice from occurring, plaintiffs' lawyers should take active steps to warn defense counsel not to engage in unauthorized *ex parte* communications as early as possible. Should defense counsel respond with anything but an assurance that he or she has not and will not communicate *ex parte* with the plaintiff's non-party treating physicians, plaintiffs' counsel should seek judicial intervention to ensure a level playing field.

[i] Nick Abramson and Elie Maalouf are attorneys at Abramson, Brown & Dugan in Manchester, New Hampshire. Their firm's practice focuses on representing plaintiffs in medical malpractice and personal injury litigation.
[ii] No. 211-2020-CV-00074, Belknap Super. Ct. (9/17/2020) (Order, O'Neill, J.).
[iii] *Nelson v. Lewis*, 130 N.H. 106, 107 (1987).
[iv] *See, e.g.*, *Omanovic v. Pariser*, 218-2017-CV-0229, Hills. Super. Ct. – No. Dist. (May 24, 2017) (Order, Smukler, J.) (refusing 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); *see also Lizotte v. Gladstone*, Docket No. 01-C-790, Rockingham Super. Ct. (April 22, 2002) (Order, McHugh, J.) (finding that "the mere fact that [a] treating physician is a member of the same group as the defendant" neither weakens the privilege, nor alters the reasoning in *Nelson*); *McHugh v. Miner*, No. 226-1997-C-97, Hills. Super. Ct. – So. Dist. (Jun. 4, 1997) (Order, Dalianis, J.) (refusing to accept the physician's financial interest or membership in the named practice group as a legitimate justification to vitiate the physician-patient privilege).
[v] 218-2017-CV-0229, Hills. Super. Ct. – No. Dist. (May 24, 2017) (Order, Smukler, J.)
[vi] *Id.* at *4 (citing *Nelson*, 130 N.H. at 111).
[vii] *Nelson*, 130 N.H. at 111.
[viii] *Omanovic*, at *4.
[ix] *Id.* at *4.
[x] No. 226-1997-C-97, Hills. Super. Ct. – So. Dist. (Jun. 4, 1997) (Order, Dalianis, J.)
[xi] *Id.* at *4.
[xii] Docket No. 01-C-790, Rockingham Super. Ct. (April 22, 2002) (Order, McHugh, J.).
[xiii] *Id.* at *3-4.
[xiv] *Estate of Cheryl Garrett v. Lakes Region General Hospital, et. al.*, No. 211-2020-CV-00074, Belknap Super. Ct. at *3 (9/17/2020) (Order, O'Neill, J.) (emphasis added).
[xv] *See id.*
[xvi] *Id.* at *4.
[xvii] *See id.* at *5.
[xviii] *See Garrett*, at *5.
[xix] *See id.*