Practice Tips: Preventing *Ex Parte* Communications in Medical Malpractice Cases

By

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I. Introduction

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, whether or not those treaters are employed by a corporate defendant. Yet, defense attorneys and their clients routinely ignore this clear prohibition. Since this is a matter of critical importance in our practice, we feel it is necessary to regularly publish articles on this issue in an effort to tackle the problem as a unified front. Accordingly, this article will recap the New Hampshire law governing *ex parte* communications between defense counsel and plaintiff's non-party treaters and it will provide recommendations to employ in your cases to put defense counsel on notice that they are not permitted to communicate privately with non-party medical treaters and to ascertain whether such contact has already taken place.

II. New Hampshire Law

Ex parte communications between defense counsel and the plaintiff's non-party treating physicians have long been prohibited in New Hampshire. This issue was first addressed by the New Hampshire Supreme Court in *Nelson v. Lewis*,[i] where the Court held that the physician-patient privilege is only partially waived by the plaintiff in a medical negligence action "to the extent necessary to provide essential information" to defend the action.[ii] Importantly, this partial waiver "does not waive the physician-patient privilege so as to permit the defendants to interview treating physicians *ex parte*."[iii] Thus, under *Nelson*, a plaintiff maintains "the right to refuse a defendant private interviews with [her] treating physicians and . . . there are no circumstances under which a trial court may order a plaintiff to permit such interviews."[iv]

Although the Court expressly considered, and acknowledged, potentially beneficial aspects of such *ex parte* interviews with non-party treaters, it disregarded those benefits as inconsequential compared to the plaintiff-patient's interest in preventing the disclosure of the patient's unrelated and conceivably embarrassing medical information.[v] Moreover, the Court disagreed that precluding such *ex parte* contact would "significantly hamper[]" the defendant's ability to engage in necessary discovery, finding that interviews

conducted "within the scope of formal discovery procedures" – e.g., discovery depositions attended by both parties – offer a sufficient method for the defendant to obtain any treatment-related information essential to mounting a defense.[vi]

Conversely, physician-patient confidentiality is particularly susceptible to breach in a private and informal *ex parte* setting.[vii] Physicians, the Court opined, are "largely unschooled in legal matters," and may inadvertently disclose information which is irrelevant to the lawsuit, or which is still protected by the physician-patient privilege.[viii] Thus, formal discovery procedures protect against that risk by requiring the presence of the plaintiff's attorney in all interviews or depositions with the non-party physician: the determination of what information is relevant to the lawsuit is best made in a setting where counsel for both sides are present.[ix] Several New Hampshire decisions since *Nelson* have reiterated that using formal discovery processes is fundamentally fair and allows for the discovery of non-privileged information that is relevant to the lawsuit.[x]

Though the Court's decision in *Nelson* did not address the situation where the plaintiff's non-party treating physician was employed by a corporate defendant, four superior court decisions since *Nelson* have found that *Nelson*'s prohibition nevertheless applies under those circumstances.[xi] As Judge Smukler wrote in *Omanovic v. Pariser:*[xii]

> [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.'[xiii]

More recently, in the *Estate of Cheryl Garrett v. Lakes Region General Hospital, et. al.*,[xiv] Judge O'Neill stressed 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."[xv]

Judge O'Neill also held that *ex* parte communications are prohibited even if the non-party treater's treatment was contemporaneous to the alleged negligent medical care. He 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]

III. Practice Tips

Since defense attorneys commonly disregard *Nelson*'s prohibition of unauthorized *ex parte* communications and regularly meet with non-party treaters in the preparation of their clients' defense, it is crucial that plaintiff's attorneys handling multi-party medical negligence cases put defense counsel on notice at the outset of the lawsuit that they are not permitted to communicate with any of the plaintiff's non-party health care providers. Preventing *ex parte* communications serves several purposes: safeguarding your client's physician-patient privileged information; precluding defense counsel from influencing – either advertently or inadvertently – the non-party treater's testimony; and stopping defense counsel from gaining an unfair advantage through their unfettered access to your client's treating physicians—access which is routinely denied to plaintiff's counsel.

To ensure that defense counsel has not and will not engage in any unauthorized communications in your cases, we recommend sending a letter to defense counsel as early in the litigation as possible, notifying them that they are not authorized to communicate, in any fashion, with your client's non-party health care providers. The letter should also inquire as to whether such communications have already occurred. 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 immediately file a motion with the court to compel the defendant to disclose whether any *ex parte* communications have occurred and all information pertaining to those communications.

IV. Conclusion

Medical malpractice attorneys must be proactive in preventing impermissible *ex parte* interviews and diligent in determining whether such interviews have taken place. All of the orders cited in this article are posted in the "Attorney Toolbox" on the New Hampshire Association for Justice website. Additionally, some of our successful pleadings on this issue can also be found in the toolbox. We urge you to utilize these resources should this issue arise in

your practice so that we can collectively put an end to the defense bar's continued violation of *Nelson*'s prohibition of *ex parte* communications.

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[i] 130 N.H. 106 (1987).
[ii] *Id*. at 109-110.
[iii] *Id. at 111.*
[iv] *Id. at 108.*
[v] *Nelson*, 130 N.H. at 111.
[vi] *Id.*
[vii] *Id*. at 111 (warning about risks of inadvertent disclosure).
[viii] *Id.*
[ix] *Id*.
[x] *See*, *e.g.*, *Omanovic v. Pariser*, 218-2017-CV-0229, Hills. Super. Ct. – No. Dist. (May 24, 2017) (Order, Smukler, J.) (finding that *Nelson's* probation did not prevent institutional defendants from investigating the negligent incident because they can do so through the formal discovery process); *Lizotte v. Gladstone*, Docket No. 01-C-790, Rockingham Super. Ct. (April 22, 2002) (Order, McHugh, J.) (noting that the testimony of the non-party treating physician had to be taken in a formal setting with plaintiff's counsel present and that the defendant would not be prejudiced by this arrangement); *McHugh v. Miner*, No. 226-1997-C-97, Hills. Super. Ct. – So. Dist. (Jun. 4, 1997) (Order, Dalianis, J.) (requiring that "[a]ny 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 defendans obtain all the information [to which] they are legally entitled).
[xi] *See, e.g.*, *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.) (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); *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).
[xii] 218-2017-CV-0229, Hills. Super. Ct. – No. Dist. (May 24, 2017) (Order, Smukler, J.)
[xiii] *Id.* at *4 (citing *Nelson*, 130 N.H. at 111).
[xiv] No. 211-2020-CV-00074, Belknap Super. Ct. (9/17/2020) (Order, O'Neill, J.).
[xv] *Id.* at 3.
[xvi] *Id.* at *4.