Expert Testimony by Non-Party Medical Treaters in Medical Negligence Cases

By: Jared R. Green & Elie A. Maalouf

I. Introduction

Can counsel for a non-party deponent in medical negligence cases instruct the deponent not to answer deposition questions simply because they arguably elicit expert testimony? According to several New Hampshire superior court orders, the answer is no. This article will discuss the law governing this issue and it will review the numerous superior court decisions which have found that non-party deponents must answer deposition questions calling for expert opinions.

II. Governing Law

New Hampshire has consistently favored broad and liberal pretrial discovery in order to facilitate the search for the truth.[1] Thus, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . ."[2] To that end, Superior Court Rule 26(j) requires deponents to answer all questions that are not subject to a recognized privilege. The rule, which has been in effect for decades, states:

> The deponent . . . shall ordinarily be required to answer all questions not subject to privilege or excused by the statute relating to depositions, and it is not grounds for refusal to answer a particular question that the testimony would be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence and does not violate any privilege.[3]

A defense attorney's instruction not to answer questions eliciting expert testimony, therefore, is inconsistent with Superior Court Rule 26(j) because New Hampshire does not recognize a privilege that protects witnesses from answering such questions. Many years ago, the New Hampshire Supreme Court elected to do away with common law privileges, and instead chose to limit privileges to those expressly set forth in the constitution, statutes, and court rules.[4]

The abrogation of common law privileges in New Hampshire is based on the recognition that privileges interfere with the search for the truth and run contrary to our preference for broad discovery.[5] Thus, at least in this state, new privileges will not be assumed, nor will existing privileges be broadened in the absence of a clear legislative mandate.[6] Since there is no constitutional

provision, statute, or rule in New Hampshire that expressly permits a deponent to decline providing expert testimony, a non-party treater's refusal to answer questions eliciting such testimony is improper under the plain language of Superior Court Rule 26(j). If the legislature or the Supreme Court wanted to permit such a refusal, they would have said so explicitly.

III. Superior Court Orders

This issue has been litigated repeatedly starting in the early 1990s and several New Hampshire courts have found that non-party medical treaters must answer deposition questions that call for expert opinions.

In 1991, Judge Sullivan granted a motion to compel a Hitchcock Clinic physician, who was not a defendant in the case, to answer expert questions posed by plaintiff's counsel in a discovery deposition in Reed v. Hitchcock Clinic, Inc.[7] Citing the predecessor to today's Superior Court Rule 26(j), Judge Sullivan held that the questions "are not subject to any privilege and are not excused by the statute governing deposition. They are, however, reasonably likely to lead to the discovery of admissible evidence."[8] Accordingly, Judge Sullivan found that "there was no justification for defendants' counsel ordering a non-party witness not to answer the questions."[9] Defense counsel was sanctioned and ordered to cooperate in the immediate rescheduling of the witness's deposition.[10]

Five years later, in Swenson v. Sise,[11] Judge Brennan rejected an attempt to prevent a treating physician from providing opinion testimony at his deposition.[12] Judge Brennan explained that "[i]t is true that the questions go to opinion testimony, but that fact does not categorize the defendant as an expert witness for discovery purposes."[13]

Shortly thereafter, in Donovan v. Osachuk,[14] Judge Hollman granted a motion to compel a defendant radiologist to answer whether he agreed at the time of the deposition that the x-ray he interpreted showed some soft-tissue thickening in the nasopharynx.[15] Judge Hollman ordered the defense to pay the stenographer's fee for resuming the deposition.[16]

In 1997, Judge Smukler granted a motion to compel deposition testimony by a defendant dentist that called for the dentist's opinions in Poire v. Bailey.[17]

Judge Mohl followed suit less than two months later in Nary v. Orthopaedic & Trauma Specialists, P.A..[18] In his order granting the motion to compel, Judge Mohl explained that "[i]t is not objectionable (and certainly not within work product or attorney-client privileges) to ask the treating physician in deposition, that looking at the x-ray now, the treating physician agrees (or disagrees) that the plaintiff's condition or diagnosis was apparent."[19] He emphasized that the defendant's objection was without merit and the deposition questions were plainly appropriate.[20] In rejecting the defendant's

motion for reconsideration, Judge Mohl explained that there is no privilege protecting the witness from answering opinion questions.[21]

In 2000, Judge Barry engaged in an extensive analysis of this issue in Jenkins v. The Hitchcock Clinic.[22] In Jenkins, plaintiff's counsel deposed a non-party nurse and asked her questions about the medical care the plaintiff received after the nurse's shift had ended. Defense counsel objected and instructed the non-party nurse not to answer because the question called for expert testimony. Judge Barry granted the plaintiff's ensuing motion to compel, concluding, like the other judges before him, that the instruction not to answer "was without legal basis, totally unjustified and egregiously wrong."[23] He ordered the deposition to be rescheduled and all costs, including plaintiff's attorneys' fees, to be paid by the defense.[24]

More recently, in Madan v. Tsapakos,[25] Judge MacLeod granted the plaintiff's motion to compel a non-party treating physician employed by one of the defendants to answer deposition questions eliciting expert testimony. In Madan, plaintiffs' counsel asked the non-party physician at his deposition whether it was his expectation that one of the defendant physicians would share her knowledge of the plaintiff's medical history with the other defendant physician. The non-party physician's attorney objected and instructed him not to answer because the question called for impermissible expert testimony because the non-party physician had not been retained as an expert witness. Plaintiffs' counsel also attempted to ask the non-party physician hypotheticals about the plaintiff's medical treatment and defense counsel objected and instructed his client not to answer for the same reasons, prompting the plaintiffs' motion to compel. In granting the plaintiffs' motion, Judge MacLeod was unpersuaded by the defendants' citations to cases in other jurisdictions which held that non-retained experts cannot be compelled to provide opinion testimony absent a showing of necessity.[26] He explained:

> While it appears from the pleadings submitted that other jurisdictions have established or recognized a privilege that protects a third-party fact witness from being compelled to provide expert opinion testimony absent extraordinary circumstances and/or in the absence of being paid for their services, this court agrees with the superior courts cited by the plaintiffs that no such privilege has been recognized in New Hampshire either by the Supreme Court or the legislature.[27]

Moreover, Judge MacLeod explained that there "is no prohibition in this jurisdiction against a plaintiff designating an employee of a defendant as an expert witness, if that individual is otherwise qualified to give such testimony" and it is "irrelevant in a deposition whether or not [the non-party treater] will be called to testify at trial as an expert witness." Rather, "[d]iscovery is proper

so long as the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[28] Accordingly, Judge MacLeod ordered the non-party treater to answer the questions he was instructed not to answer as well as any related or follow-up questions that were not subject to a recognized privilege.[29]

IV. Conclusion

As the foregoing cases demonstrate, many New Hampshire courts are unwilling to permit non-party medical treaters and their attorneys to side-step their discovery obligations under the Superior Court Rules. Unless a recognized privilege applies, deponents must answer any and all questions posed to them during their depositions, even if those questions seek an expert opinion. When defense attorneys inappropriately instruct their clients not to answer deposition questions, they usurp the court's role in governing discovery; they improperly delay discovery; and they impede the search for the truth.

---

[1] *See Sawyer v. Bouffard*, 113 N.H. 627, 628 (1973).
[2] N.H. Sup. Ct. R. 21(b).
[3] N.H. Sup. Ct. R. 26(j).
[4] *See* N.H. Evid. R. 501.
[5] *See United States v. Nixon*, 418 U.S. 683, 710 (1974).
[6] *See Marceau v. Orange Realty, Inc.*, 97 N.H. 497, 499-500 (1952).
[7] No. 89-C-813, Order on Plaintiff's Motion to Compel Deposition Answers (Hillsborough County Superior Court, October 29, 1991).
[8] *Id.* at 4 (citation omitted).
[9] *Id.* at 6.
[10] *Reed*, No. 89-C-813, at 7.
[11] No. 95-C-109, Order on the Plaintiffs' Motion to Compel (Cheshire County Superior Court, February 22, 1996).
[12] *See id.*
[13] *Id.*
[14] No. 94-C-497, Order on Plaintiffs' Motion to Compel Deposition Answers (Hillsborough South, August 7, 1996).
[15] *See id.*
[16] *Id.*
[17] No. 96-C-0084, Order on Motion to Compel (Belknap County Superior Court, April 23, 1997).
[18] No. 96-C-308, Order on Plaintiff's Motion to Compel Deposition Answers and for Additional Relief (Strafford County Superior Court, June 3, 1997).
[19] *Id.* at 1.
[20] *See id.*
[21] *Nary v. Orthopaedic & Trauma Specialists, P.A.*, No. 96-C-308, Order on Motion for Reconsideration (June 19, 1997) at 1.
[22] No. 98-C-269, Order at 9 (Hillsborough North, May 26, 2000).
[23] *Id.*
[24] *See id.* at 10.
[25] No. 15-CV-005, Order on Plaintiffs' Motion to Compel Deposition Testimony (Grafton County Superior Court, February 3, 2016).
[26] *See id.* at 3.
[27] *Id.* at 4.
[28] *Id.* (explaining that a party may not limit the scope of an opposing party's discovery requests absent a claim of privilege).

[29] *Madan*, No. 15-CV-005 at 5.