

# Healthcare Negligence Investigations: Court Sets The Rules For Contact With Plaintiffs' Lawyers.

In a lawsuit alleging wrongful death of a nursing home patient due to nursing negligence, that is, a morphine overdose, the nursing home's parent corporation sought a court order to prevent the lawyers for the family of the deceased from contacting former employees who had worked at the nursing home, as potential witnesses in the case.

The Supreme Judicial Court of Massachusetts went to great lengths to explain the lawyers' ethical rules that apply in these situations.

## Current versus Former Employees

Current employees of a healthcare employer are strictly off limits to private contacts by plaintiffs' lawyers. Current refers to the moment in time when contact is to occur with the lawyer. Employees of a corporation, management or rank-and-file, are considered to have legal representation by the corporation's legal counsel in all matters where the corporation is a defendant or potential defendant.

It is strictly unethical for a lawyer to contact a person privately who is represented by legal counsel without going through the legal counsel for permission or without serving a subpoena to require testimony.

**Former employees of a healthcare facility are permitted but are not required to speak with plaintiffs' lawyers about a negligence claim, whether it is still under investigation or suit has actually been filed.**

**Such persons are often a valuable source of information and actual testimony that can aid a victim of malpractice in carrying the day in court.**

**A lawyer is ethically bound to identify himself or herself, state that he or she is a lawyer, identify whom he or she represents and what the case involves, ascertain that the potential witness is not and does not want to be represented by a lawyer of the witness's own choosing and must ask permission to speak with the potential witness.**

**When not under subpoena to testify, a witness has the option to refuse to talk.**

SUPREME JUDICIAL COURT  
OF MASSACHUSETTS  
October 29, 2003

Former employees are allowed to speak with lawyers whose clients have claims against the former employer. That is, a nurse who worked at the nursing home when the incident occurred, who no longer works at the nursing home or for the corporate parent at the time the lawyer makes contact, can but does not have to speak with the patient's lawyers.

## Subpoena

When served with a subpoena to testify in a pre-trial deposition or in court, a witness must appear as ordered and must testify, unless a court order is entered beforehand dissolving the subpoena.

Technical issues about the validity of a subpoena and the required manner of service vary from locality to locality and must be left to knowledgeable legal counsel. There is no right simply to ignore a subpoena because it is believed the subpoena is invalid or was not properly delivered or because the witness does not believe he or she has to testify or should have to testify or does not want to testify.

## Medical Confidentiality Rules Apply To Caregivers

The lawyer must be able to show that he or she has permission from the patient or the patient's guardian or probate administrator to discuss confidential matters about the patient's healthcare.

A caregiver cannot violate the caregiver's own obligation to preserve other patients' medical confidentiality even when everything is kosher with respect to the client whom the lawyer represents. **Clark v. Beverly Health and Rehabilitation Services, Inc., 440 Mass. 270, 797 N.E. 2d 905, 2003 WL 22434624 (Mass., October 29, 2003).**

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