

In *Lovelace v. Washington Hospital Center*, 2020 WL 2934917 (D.D.C. June 2, 2020), U.S. District Court Judge Ellen Huvelle allowed a hospital medical malpractice defendant to conduct *ex parte* communications with plaintiff's treating physicians pursuant to a protective order because of the substantial efficiency gains from such a process and the lack of any nonspeculative evidence that healthcare providers would be intimidated by such a process.

Plaintiff Lisa Lovelace (Lovelace) was admitted to the Washington Hospital Center's burn intensive care unit (ICU) in January 2016 after she presented symptoms of Stephens-Johnson Syndrome. *Id.* at *1. Lovelace alleged that the physicians who treated her negligently failed to treat her eyes, leaving her permanently blind, and she sued the hospital for medical negligence, negligent hiring, training, supervision, and retention and for lack of informed consent. Because 36 physicians and counselors attended to Lovelace during and after her treatment — including some individuals who were outside the court's subpoena power — the hospital moved to interview the physicians *ex parte* under a protective order. Lovelace objected that the interviews would be an improper intrusion into her private medical history, would intimidate her healthcare providers, and should be denied for failure to show good cause.

As a threshold matter, the court examined the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and case law and concluded that the law permitted *ex parte* disclosure of a party's medical information in a judicial proceeding where the party has made its medical history an issue in the case but noted that the scope of disclosure was limited to medical information with a direct bearing on the case. Judge Huvelle observed that nothing in HIPAA compelled the court to order *ex parte* communications and that although there is no uniform standard for evaluating such decisions, she relied on prior case law analyzing such a request under the "good cause" standard of Fed. R. Civ. P. 26. *Id.* at *1-*2 (citing *Lovecchio v. WMARTA*, 319 F. Supp. 3d 262, 265 (D.D.C. 2018)).

Judge Huvelle recounted prior *ex parte* orders entered by other district courts under the good-cause standard and found their facts were analogous to this case. She held that good cause existed for *ex parte* communications because several witnesses were beyond the court's subpoena power, and the large number of treating physicians meant the "efficiency gains of *ex parte* interviews" would be "substantial." *Id.* at *2 (citing *Lovecchio*, 319 F. Supp. 3d at 265). Judge Huvelle rejected Lovelace's argument that an *ex parte* order would be overly intrusive, because Lovelace's privacy concerns would be addressed in the protective order limiting the nature of what the physicians could disclose, and she found the claim that *ex parte* communications would intimidate her healthcare providers was "little more than speculation."

Based on her determination of good cause, Judge Huvelle entered an order authorizing the hospital to conduct *ex parte* interviews of Lovelace's treating physicians but limited the scope of such interviews to discussion to Lovelace's treatment in the ICU and her subsequent treatment for the injuries she suffered while in the hospital's care. *Id.* at *3. This limitation reduced the number of potential interview subjects to 14. Judge Huvelle further prohibited any disclosure of Lovelace's psychological history, potential history of substance abuse, and her HIV status. The order gave the physicians the unfettered right to refuse to participate and also authorized the physician to request Lovelace and/or her attorneys to be present at the interview and allowed the physicians to bring their own counsel to the interviews. Finally, Judge Huvelle ordered the hospital to inform plaintiff's counsel of the names of any physician with whom it spoke.