Protecting and Promoting the
Health of NFL Players:
Legal and Ethical Analysis and Recommendations

Chapter 4

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Second Opinion Doctors

"Second opinion doctors" is a generic term for doctors whom players may consult concerning an injury or medical condition to compare or contrast that opinion to that of the club doctor. In addition, some might be the players' primary caregiver or "personal doctor," as discussed in detail in Chapter 6, and thus fall under the same recommendations we make there. Second opinion doctors are an important component of a player's healthcare protected by the CBA. That said, second opinion doctors' care of players does not include the same type of structural conflicts that potentially hinder the care provided by club doctors, so our recommended changes as to them are more sparing.

While in other chapters we provided the stakeholder an opportunity to review a draft of the relevant chapter(s) prior to publication, because there is no well-defined representative for second opinion doctors, no one reviewed this chapter on behalf of second opinion doctors prior to publication.

(A) Background

A player's right to a second opinion has been part of the NFL-NFLPA CBAs since 1982. The current version of this right is contained in Article 39 of the 2011 CBA:

> A player will have the opportunity to obtain a second medical opinion. As a condition of the Club's responsibility for the costs of medical services rendered by the physician furnishing the second opinion, such physician must be board-certified in his field of medical expertise; in addition, (a) the player must consult with the Club physician in advance concerning the other physician; and (b) the Club physician must be furnished promptly with a report concerning the diagnosis, examination and course of treatment recommended by the other physician.[a] A player shall have the right to follow the reasonable medical advice given to him by his second opinion physician with respect to diagnosis of injury, surgical and treatment decisions, and rehabilitation and treatment protocol, but only after consulting with the club physician and giving due consideration to his recommendations.[1]

In addition, players are entitled to have surgery performed by the surgeon of their choice:

> A player will have the right to choose the surgeon who will perform surgery provided that: (a) the player will consult unless impossible (e.g., emergency surgery) with the Club physician as to his recommendation regarding the need for, the timing of and who should perform the surgery; (b) the player will give due consideration to the Club physician's recommendations; and (c) the surgeon selected by the player shall be board-certified in his field of medical expertise. Any such surgery will be at Club expense; provided, however, that the Club, the Club physician, trainers and any other representative of the Club will not be responsible for or incur any liability (other than the cost of the surgery) for or relating to the adequacy or competency of such surgery or other related medical services rendered in connection with such surgery.[2]

Thus, to be clear, players have the right to a second opinion doctor and the surgeon of their choice, the full cost of which must be paid by the club, provided the player consults with the club doctor and provides the club doctor with a report concerning treatment provided by the second opinion doctor.

The NFLPA maintains a list of dozens of doctors around the country it recommends for second opinions. Nevertheless, players are not required to use these doctors to obtain second opinions.

(B) Current Legal Obligations[b]

While we discussed the controversial role of club doctors in Chapter 2, the responsibilities of a second opinion doctor are much clearer. A second opinion doctor's first and only loyalty should be to the player and they are thus bound to provide care within an acceptable standard of care, as discussed in Chapter 2: Club Doctors, Section (C)(1)(a).

Second opinion doctors are also obligated to treat player medical information confidentially in accordance with HIPAA and state laws, including the exceptions therein, as discussed in Chapter 2: Club Doctors, Section (C)(3)(a). However, as discussed above, it is important to note that pursuant to the CBA, where the player wishes to have the club pay for the second opinion, the club doctor is entitled to a report of the second opinion doctor's "diagnosis, examination and course of treatment recommended." Thus, either the player must obtain the report and provide it to the club doctor, or grant permission for the second opinion doctor to provide the report directly to the club doctor.

(C) Current Ethical Codes

As discussed in Chapter 2: Club Doctors, Section (C)(1)(b), doctors treating players, such as second opinion doctors, are obligated by the AMA Code and the FIMS Code of Ethics to provide care that is in the player-patient's best interests.

It is also relevant to note that while the CBA does not obligate the club doctor to take any action concerning the second opinion, ethical codes do.

a Presumably, if a player did not want to consult with the club doctor first or provide the club doctor with a report from the second opinion doctor, the player could pay for the second opinion doctor's services by himself. We have been told anecdotally that this does happen but there are no data on how frequently.

b The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

FIMS' Code of Ethics obligates "[t]he team physician [to] explain to the individual athlete that he or she is free to consult another physician."[3]

AMA Code Opinion 1.2.3–Consultation, Referral & Second also directs a doctor to cooperate with a patient's right to a second opinion:

> Physicians' fiduciary obligation to promote patients' best interests and welfare can include consulting other physicians for advice in the care of the patient or referring patients to other professionals to provide care.
>
> When physicians seek or provide consultation about a patient's care or refer a patient for health care services, including diagnostic laboratory services, they should:
>
> (a) Base the decision or recommendation on the patient's medical needs, as they would for any treatment recommendation, and consult or refer the patient to only health care professionals who have appropriate knowledge and skills and are licensed to provide the services needed.
>
> (b) Share patients' health information in keeping with ethical guidelines on confidentiality.
>
> (c) Assure the patient that he or she may seek a second opinion or choose someone else to provide a recommended consultation or service . . . .
>
> * * *
>
> Physicians may not terminate a patient-physician relationship solely because the patient seeks recommendations or care from a health care professional whom the physician has not recommended.[4]

Similarly, the American Board of Physician Specialties obligates doctors to "[c]ooperate in every reasonable and proper way with other physicians and work with them in the advancement of quality patient care."[5]

(D) Current Practices

Second opinion doctors play a role in player health largely as a result of contract advisors.[c] While recognizing that there may be some variation in their usage, of the six contract advisors we interviewed, five stated that they obtain a second opinion every time or nearly every time a player is significantly injured, while the sixth stated he obtains a second opinion about 50 percent of the time.

The reasoning behind obtaining the second opinions ranges from general to specific distrust of club doctors.[d] Current Player 9 described the advantages of second opinion doctors:

> *I feel like they don't have any vested interest in keeping you on the field; their main job is that you're healthy and they check your medical condition, whatever that may be. And they don't have pressure coming from the coach or the GM [general manager] or the owner to get guys out there quickly . . . . What you have to understand is that the trainer's and the doctor's job is to get you on the field. Once you're part of the organization, it's their job to put you on the field.*[e]

Similarly, some contract advisors indicated that by almost always obtaining a second opinion, it removes any concern that the club doctor might have been making a recommendation that was in the club's interest and not the player's.[f] One contract advisor even stated that when assessing a player's injury, "the club doctor has nothing to do with it . . . the club doctor's input means nothing to us."[g] Some contract advisors also indicated that their experience with, and the reputation of, a particular club or club medical staff will color the decision of whether to obtain a second opinion or to proceed with the club doctor's recommended course of treatment.[h] Indeed, club doctors often serve as second opinion doctors for other clubs' players, often at the recommendation of contract advisors. Nevertheless, in such situations there is less concern about a structural conflict of interest since the club doctor is only serving as a second opinion doctor and not also providing advice to the club employing the player.

c Current Player 2: "I think that agents do a good job of helping players with . . . seeking second opinions[.]"

d Former Player 2: "Most of the time when I saw guys going to get second opinions . . . was because something had happened or something we heard about or the player had a multi-year contract and wanted to make sure that his diagnosis was correct."

e Current Player 10: [P]layers have the right to get a second or third medical opinion which I think is smart to do."

f Contract Advisor 1: "I've effectively removed any of that [concern]. I've said okay, where I feel like I need to get a second opinion almost every time, I get a second opinion. So it's become a nonissue." Contract Advisor 5: "I'm always concerned that the doctor is involved because he's, you know, an employee of the club."

g Contract Advisor 4: "[T]he team doctor is there to advise the team on how they should approach a player. The team doctor has nothing to do as far as I'm concerned with how the player should approach his own health . . . . The team doctor is a medical advisor to the team."

h Contract Advisor 2: "[I]t depends sometimes on the organization that we're dealing with."

The second opinion doctor typically only reviews the records, X-rays, and/or MRI films but occasionally will request to see the player in person if the doctor believes it is necessary. Contract advisors' estimates of how often a second opinion doctor's diagnosis differed from the club doctor's diagnosis were generally low ("10 to 20 percent," "as much as 20 percent," "about a third of the time," "not incredibly often"). In fact, those rates (while not necessarily representative) are slightly lower than the general population. "According to the Patient Advocate Foundation, 30 percent of patients who sought second opinions for elective surgery found the two opinions differed."[6] However, it is difficult to compare the figures because, as discussed above, players obtain second opinions almost as a matter of course while the average patient might only seek a second opinion about serious diagnoses.

The second opinion doctor's recommended course of treatment is almost always the one taken in today's NFL.

If the second opinion doctor's diagnosis or recommended treatment plan does differ, a decision then must be made as to which course of treatment to pursue and which doctor will perform the surgery (if necessary). In some cases, the contract advisor might arrange for the second opinion doctor to talk with the club doctor to see if a consensus can be reached.[i] Sometimes a third doctor will provide an opinion. Nevertheless, the prevailing sentiment among the contract advisors interviewed is that when there is a conflict, the second opinion doctor's recommended course of treatment is almost always the one taken in today's NFL. As discussed above, some contract advisors' regard the club doctor's opinion as meaningless, and others believe that in recent years clubs and club medical staff have resigned themselves to doing what the player wants to do (as recommended by the contract advisor and second opinion doctor). Of course, just because contract advisors believe this to be the case does not necessarily mean it is true. However, in the absence of more robust evidence (and we know of no publicly available study on the subject), these perceptions are helpful even if based on incomplete data.

In talking with players and contract advisors, most believed that club doctors are generally, but not always, cooperative with players obtaining second opinions, a marked departure from historical practice and even just 5 to 10 years ago.[j] Nevertheless, former NFL club executive Andrew Brandt in his peer review comments noted his belief that clubs and club doctors maintain some level of inherent distrust of second opinion doctors chosen by contract advisors and the NFLPA; much in the same way that players and the NFLPA maintain a level of inherent distrust of club doctors.[7] For example, clubs might believe the second opinion doctors are not sufficiently qualified to treat the player.

(E) Enforcement of Legal and Ethical Obligations[k]

A second opinion doctor, just like any doctor, is obligated to provide care to his or her patients within an acceptable standard of care in the medical community or potentially be subject to a medical malpractice claim.[8] The extent of these obligations is discussed in much greater depth in Chapter 2: Club Doctors, Section (C)(1)(a). In brief, though, the general elements of a medical malpractice claim are: (1) a standard of care owed by the doctor to the plaintiff; (2) a breach of that standard of care by the doctor; and, (3) the breach was the proximate cause of the plaintiff's injury.[9,l]

While medical malpractice liability potentially exists, our research has not revealed any cases in which an NFL player has sued a doctor from whom he obtained a second opinion.

The CBA does not provide players with any grievance or arbitration mechanism by which players could pursue claims against second opinion doctors. Second opinions are available to players at the club's expense under the CBA, but the CBA does not in any way dictate the second opinion doctor's obligations to the player.

i Yet Contract Advisor 1 explained that the club doctor "will have to make a very good argument" to the second opinion doctor to convince the second opinion doctor and contract advisor to follow the club doctor's recommendation.

j Contract Advisor 1: "I will say there was a lot more pushback early in my career about second opinions and going somewhere else."

k Appendix K is a summary of players' options to enforce legal and ethical obligations against the stakeholders discussed in this Report. In addition, for rights articulated under either the CBA or other NFL policy, the NFLPA and the NFL can also seek to enforce them on players' behalves.

l Many states require a doctor with the same board certification or similar expertise as the doctor against whom the claim is brought to opine as to the appropriate standard of care. *See* Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. Pa. L. Rev. 217 (2010) (identifying 25 states with statutes that require certificates of merit by another doctor for a medical malpractice claim). Thus, in the event a second opinion doctor was sued for medical malpractice, the claim likely could not proceed without a similarly qualified doctor — whether it be an orthopedist, neurologist or a doctor specializing in sports medicine — opining that the second opinion doctor deviated from the standard of care.

(F) Recommendations Concerning Second Opinion Doctors

Second opinion doctors are important advocates for players' health and do not suffer from the inherent structural conflicts of interest, faced by club doctors. While we do not have recommendations directed specifically toward second opinion doctors, we do have recommendations concerning how other stakeholders can promote and support the good work of these doctors.

Goal 1: To help players obtain the best possible healthcare.

Principles Advanced: Respect; Health Primacy; Empowered Autonomy; and, Managing Conflicts of Interest.

Recommendation 4:1-A: Clubs and club medical staff should support players in their right to receive a second opinion.

The right to and value of a second medical opinion is well accepted in our society, particularly for serious conditions. This right to a second opinion is all the more important for NFL players considering that their careers depend on their health and the complexity of their conditions. Consequently, no matter the club doctor's best intentions or practices, players should regularly obtain second opinions and clubs and club medical staff should support them in exercising that right. It would be advisable that club medical staff advise players of their right to obtain a second opinion at the beginning of training camp (a right of which the NFLPA should also be advising players at the same time). Supporting a player's right to a second opinion means, among other things, advising the player of his right to a second opinion, not resisting a player's desire to obtain a second opinion, and cooperating with the second opinion doctor by providing the necessary medical records and other information in a timely fashion. Indeed, AMA Code Opinion 1.2.3 requires such cooperation. Accepting a player's right to obtain a second opinion and cooperating with that right is important for players to receive the best possible healthcare. For this reason, the parties should also consider whether this recommendation should be included in the CBA.

Recommendation 4:1-B: In the event that club medical staff diagnose or treat a player for an injury that is beyond a threshold of severity, the medical staff should remind the player of his right to obtain a second opinion at the club's expense.

As discussed above, a player's right to a second opinion is important to his health. Nevertheless, many players, particularly younger players, do not avail themselves of this right. Some players might not be aware that they have the right in the CBA to a second opinion at the club's expense or are worried about offending the club doctor and thus the club. By requiring club medical staff to advise players of their right to a second opinion in more serious situations, it is likely that players will increasingly take advantage of this right and thus also protect their own health. When a player misses a game or a week of practice it might indicate a sufficiently severe injury to trigger this obligation. Again, a player's right to receive a second opinion is important for players to receive the best possible healthcare and thus the parties should also consider whether this recommendation should be included in the CBA.

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In reviewing a draft of this report, the NFL claimed that "[t]hese recommendations are already incorporated in Article 39 of the CBA."[10] While it is true that Article 39 does provide a right to a second opinion, our recommendation is not about that specific right, but about club medical staff assisting players in obtaining a second opinion. We do not read Article 39 to include these recommendations and thus believe they are important to make.

Endnotes

1 CBA, Art. 39, § 4.
2 CBA, Art. 39, § 5.
3 Féderation Internationale de Médicine du Sport, Code of Ethics, ¶ 4.
4 *Opinion 1.2.3 – Consultation, Referral & Second Opinions,* Am. Med. Ass'n, available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page (last visited Aug.1, 2016), *archived at* https://perma.cc/4QS7-F5FT.
5 *Code of Ethics*, Am. Bd. of Physician Specialties, http://www.abpsus.org/code-of-ethics (last visited Aug. 7, 2015), *archived at* http://perma.cc/BU3D-VAQZ.
6 Jerry Cianciolo, *Get a Second Opinion*, Bos. Globe, Jan. 25, 2015, *available at* 2015 WLNR 2386857.
7 Andrew Brandt, Peer Review Response (Oct. 30, 2015).
8 *See* Thierfelder v. Wolfert, 52 A.3d 1251, 1264 (Pa. 2012) (discussing elements of a medical malpractice claim); Hamilton v. Wilson, 249 S.W.3d 425, 426 (Tex. 2008) (same); Sullivan v. Edward Hosp., 806 N.E.2d 645, 653 (Ill. 2004) (same).
9 *Id.*
10 NFL Comments and Corrections (June 24, 2016).