



Chapter 5

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Neutral Doctors



In the NFL, a third kind of doctor, what the CBA describes as a “neutral” doctor, is sometimes used when there are conflicting opinions or interests. Neutral doctors, particularly when providing care, can be an important component of a player’s healthcare. As with second opinion doctors, neutral doctors’ responsibilities do not include the same type of structural conflicts that potentially hinder the care provided by club doctors. Consequently, our recommendations 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 neutral doctors, no one reviewed this chapter on behalf of neutral doctors prior to publication.

(A) Background

The 2011 CBA demarcates three situations where neutral doctors are required. Preliminarily, it is important to note that in each of these situations, the neutral doctor is usually a different person, *i.e.*, there is not one neutral doctor who serves in each of these situations.

First, Article 39, § 1(e) concerns neutral doctors at NFL games. Section 1(e) requires that “[a]ll home teams shall retain at least one [Rapid Sequence Intubation] RSI physician who is board certified in emergency medicine, anesthesia, pulmonary medicine, or thoracic surgery, and who has documented competence in RSI intubations in the past twelve months. This physician shall be the neutral physician dedicated to game-day medical intervention for on-field or locker room catastrophic emergencies.” As far as we can ascertain, there has never been a “catastrophic emergenc[y]” requiring intubation or similar emergency care.

Second, Article 44 enlists the neutral doctor in the Injury Grievance mechanism. “An ‘Injury Grievance’ is a claim or complaint that, at the time a player’s NFL Player Contract or Practice Squad Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.”¹ Pursuant to Article 44, the player is entitled to a neutral arbitration to determine whether the player was physically unable to perform at the time his contract was terminated. A neutral doctor plays an instrumental role in the outcome of the arbitration:

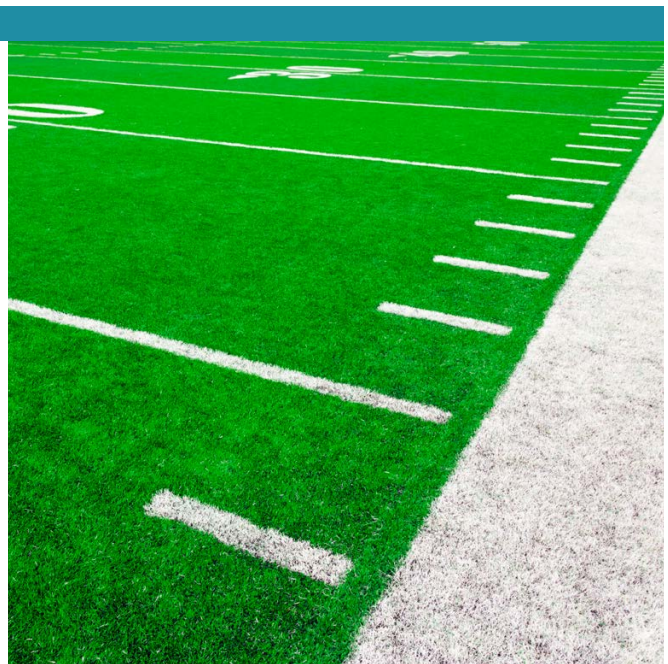
The player must present himself for examination by a neutral physician in the Club city or the Club city closest to the player’s residence within twenty (20) days from the date of the filing of the grievance. This time period may be extended by mutual consent if the neutral physician is not available. Neither Club nor player may submit any medical records to the neutral physician, nor may the Club physician or player’s physician communicate with the neutral physician. The neutral physician will not become the treating physician nor will the neutral physician examination nor will the neutral physician examination involve more than one office visit without the prior approval of both the NFLPA and Management Council. The neutral physician may not review any objective medical tests unless all parties mutually agree to provide such results. The neutral physician may not perform any diagnostic tests unless all parties consent. The neutral physician is required to submit to the parties a detailed medical report of his examination.²

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The arbitrator will consider the neutral physician’s findings conclusive with regard to the physical condition of the player and the extent of an injury at the time of his examination by the neutral physician.³

Third, Article 50, § 1 concerns the Joint Committee on Player Safety and Welfare (Joint Committee), which also makes mention of the neutral physician. The Joint Committee consists of members from both NFL clubs and the NFLPA and is designed to discuss “the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships,

We recommend that if the Unaffiliated Neurotrauma Consultant diagnoses a player with a concussion, the player cannot return to the game.



and any other relevant subjects.”⁴ The Joint Committee, at the NFLPA’s behest, can also engage neutral doctors:

The NFLPA shall have the right to commence an investigation before the Joint Committee if the NFLPA believes that the medical care of a team is not adequately taking care of player safety. Within 60 days of the initiation of an investigation, two or more neutral physicians will be selected to investigate and report to the Joint Committee on the situation. The neutral physicians shall issue a written report within 60 days of their selection, and their recommendations as to what steps shall be taken to address and correct any issues shall be acted upon by the Joint Committee.⁵

In addition to these CBA provisions requiring a neutral doctor, the NFL and NFLPA have agreed on protocols regarding the diagnosis and management of concussions (“Concussion Protocol,” *see* Appendix A). The Concussion Protocol requires an “Unaffiliated Neurotrauma Consultant” to be assigned to each club for each game. The Unaffiliated Neurotrauma Consultant must “be a physician who is impartial and independent from any Club, is board certified or board eligible in neurology, neurological surgery, emergency medicine, physical medicine and rehabilitation physician, or any primary care CAQ [Certificate of Added Qualification] sports medicine certified physician and has documented competence and experience in the treatment of acute head injuries.” The Unaffiliated Neurotrauma Consultant is present on the sideline during the game and “shall be (i) focused on identifying symptoms of concussion and mechanisms of injury that warrant concussion evaluation, (ii) working in consultation with the Head Team Physician or designated [Traumatic Brain Injury] TBI team physicians to implement the Club’s concussion evaluation and management protocol (including the Sideline Concussion Assessment Exam) during the games, and (iii) present to observe (and collaborate when appropriate with the Team Physician) the Sideline Concussion Assessment Exams performed by Club medical staff.”

Despite the important role of the Unaffiliated Neurotrauma Consultant, “[t]he responsibility for the diagnosis of concussion and the decision to return a player to a game remains exclusively within the professional judgment of the Head Team Physician or the Team physician assigned to managing TBI [traumatic brain injury].” In Chapter 2: Club Doctors, Recommendation 2:1-D, we recommend that this be changed and that if either the Unaffiliated Neurotrauma

Consultant or club doctor diagnoses a player with a concussion, the player cannot return to the game.^a

(B) Current Legal Obligations^b

The neutral doctor’s role is different in each of situations described above. As a game-day doctor under Article 39 or as the Unaffiliated Neurotrauma Consultant, the neutral doctor is actually treating the player. As part of an Injury Grievance, the neutral doctor is examining, but not treating, the player. And finally, in conducting an investigation at the behest of the Joint Committee, the neutral doctor’s role is less clear as the doctor might examine the player but seems unlikely to treat him.

The different contexts create different obligations on the neutral doctor.

Where the neutral doctor is treating the player, the doctor’s first and only loyalty should be to the player and the doctor is thus bound to provide care within an acceptable standard of care, as discussed in Chapter 2: Club Doctors, Section (C)(1)(a).

Where the neutral doctor is evaluating the player, the doctor’s obligations are the same as if the doctor were performing a fitness-for-play examination. As discussed in Chapter 2: Club Doctors, Section (D)(1)(a), doctors performing such evaluations have a limited patient-doctor relationship that obligates them to exercise care consistent with their professional training and expertise so as not to cause physical harm by negligently conducting the examination.⁶

If the neutral doctor conducting an investigation on behalf of the Joint Committee actually examines a player, then the neutral doctor will have the same obligations as if the doctor were performing a fitness-for-play evaluation as discussed above. However, if the neutral doctor does not examine (or treat) the player in any way as part of the investigation, the neutral doctor will not develop any legal responsibilities toward the player as a result of the doctor’s role with the Joint Committee.

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- a In the explanation for this recommendation, we acknowledge that because the club doctor is likely to have greater familiarity with the player, he or she might be able to better determine whether a player has suffered a concussion. Nevertheless, we believe this recommendation is a common sense protection that errs on the side of player health.
- b The legal obligations described herein are not an exhaustive list but are those we believe are most relevant to player health.

(C) Current Ethical Codes

Where the neutral doctor is treating the player, a doctor-patient relationship is formed and the doctor is obligated to treat the player in accordance with applicable legal and ethical standards, as discussed at length in Chapter 2: Club Doctors, Section (C)(1)(b).

In a situation where the neutral doctor is *evaluating* but not treating the player, AMA Code Opinion 1.2.6 explains that “[s]uch industry-employed physicians or independent medical examiners establish limited patient-physician relationships. Their relationships with patients are limited to the isolated examination; they do not monitor patients’ health over time, treat them, or carry out many other duties fulfilled by physicians in the traditional fiduciary role.”⁷ In such a situation, the doctor has the following obligations:

- (a) Disclose the nature of the relationship with the employer or third party and that the physician is acting as an agent of the employer or third party before gathering health information from the patient.
- (b) Explain that the physician’s role in this context is to assess the patient’s health or disability independently and objectively. The physician should further explain the differences between this practice and the traditional fiduciary role of a physician.
- (c) Protect patients’ personal health information in keeping with professional standards of confidentiality.
- (d) Inform the patient about important incidental findings the physician discovers during the examination. When appropriate, the physician should suggest the patient seek care from a qualified physician and, if requested, provide reasonable assistance in securing follow-up care.⁸

(D) Current Practices

Neutral doctors are a less common but nonetheless important component in the ecosystem of player health. Again, it is important to remember that neutral doctors are different professionals who are involved only in specific situations.

As discussed above, the 2011 CBA requires a neutral doctor to be present at every game. Specifically, the CBA specifies that responsibility for “catastrophic emergencies” will lie with a neutral doctor. Nevertheless, it is unclear how often, if ever, their services are required.

The reality is quite different for the Unaffiliated Neurotrauma Consultant. According to the NFL Injury Surveillance System, between 2009 and 2015, approximately 158.7 concussions occurred during games each NFL season.⁹ Additionally, as discussed in greater detail in Chapter 1: Players, there is considerable evidence that NFL players underreport their medical conditions and symptoms.¹⁰ And, in an effort not to miss playing time, players might try to intentionally fail the Concussion Protocol’s baseline examination,¹¹ try to avoid going through the concussion diagnosis protocol,¹² or avoid telling the club that he suffered a substantial blow to the head.¹³ Thus, the Unaffiliated Neurotrauma Consultant is a critical component of player health. There are no known instances in which the Unaffiliated Neurotrauma Consultant disagreed with the club doctor concerning whether a player should return to the game.^c

In 2014, the NFL and NFLPA litigated 31 Injury Grievances that would have required examination by a neutral doctor.¹⁴ The neutral doctors involved in Injury Grievances are selected from a list of doctors jointly approved by the NFL and NFLPA.¹⁵ Each year, the NFL and NFLPA have the right to remove two doctors from the list.¹⁶ In 2012, the NFLPA commenced the first and only Joint Committee investigation.¹⁷ The nature and results of that investigation are confidential per an agreement between the NFL and NFLPA,¹⁸ so we are unable to evaluate what role, if any, neutral doctors played there.

(E) Enforcement of Legal and Ethical Obligations^d

In a situation where the neutral doctor provides care to the player (such as the rapid sequence intubation doctor or the Unaffiliated Neurotrauma Consultant), the doctor is obligated to provide care within an acceptable standard of care in the medical community or potentially be subject to a medical malpractice claim.¹⁹ This is discussed in much greater depth in Chapter 2: Club Doctors, Section (C)(1)(a). But briefly, in general the 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.²⁰

c The Unaffiliated Neurotrauma Consultant also prepares a report after each game detailing any examinations performed.

d 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.

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.²¹ Thus, in the event a neutral doctor were 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 neutral doctor deviated from the standard of care.

The CBA may limit players bringing a medical malpractice claim against a neutral doctor. This is because the Labor Management Relations Act (LMRA)²² bars or “preempts” state common law^e claims, such as negligence, where the claim is “substantially dependent upon analysis of the terms” of a CBA, *i.e.*, where the claim is “inextricably intertwined with consideration of the terms of” CBA.²³ In order to assess the neutral doctor’s duty to an NFL player—an essential element of a negligence claim such as medical malpractice—the court may have to refer to and analyze the terms of the CBA, *e.g.*, the neutral doctors’ obligation, resulting in the claim’s preemption.²⁴ Preemption occurs even though the neutral doctors are not parties to the CBA and thus likely cannot be a party in any CBA grievance procedure. So long as the player’s claim is “inextricably intertwined” with the CBA, it will be preempted. In these cases, player complaints must be resolved through the enforcement provisions provided by the CBA itself (*i.e.*, a Non-Injury Grievance against the NFL), rather than litigation. Nevertheless, research has not revealed any litigation between a player and a neutral doctor so how a court would resolve these issues is unclear.

The player could also consider bringing a Non-Injury Grievance relating to the neutral doctor’s care pursuant to the CBA.^f The 2011 CBA directs certain disputes to

designated arbitration mechanisms^g and directs the remainder of any disputes involving the CBA, a player contract, NFL rules, or generally the terms and conditions of employment to the Non-Injury Grievance arbitration process.²⁵ Importantly, Non-Injury Grievances provide players with the benefit of a neutral arbitration and the possibility of a “money award.”²⁶ However, Non-Injury Grievances must be filed within 50 days “from the date of the occurrence or non-occurrence upon which the grievance is based.”²⁷ Additionally, it is possible that under the 2011 CBA, the NFL could argue that complaints concerning medical care are designated elsewhere in the CBA and thus should not be heard by the Non-Injury Grievance arbitrator.²⁸

A player could conceivably bring a medical malpractice claim against a neutral doctor who examined the player as part of an Injury Grievance or for the Joint Committee. However, such a claim would be limited to whether the neutral doctor exercised care consistent with the doctor’s professional training and expertise so as not to cause physical harm by negligently conducting the examination.²⁹ Additionally, the claim might be preempted by the LMRA, as discussed above.

Research has not revealed any litigation between a player and a neutral doctor.

e Common law refers to “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions.” Black’s Law Dictionary (9th ed. 2009). The concept of “preemption” is “[t]he principle (derived from the Supremacy Clause [of the Constitution]) that a federal law can supersede or supplant any inconsistent state law or regulation.” *Id.*

f The term “Non-Injury Grievance” is something of a misnomer. The CBA differentiates between an Injury Grievance and a Non-Injury Grievance. An Injury Grievance is exclusively “a claim or complaint that, at the time a player’s NFL Player Contract or Practice Squad Player Contract was terminated by a club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract.” 2011 CBA, Art. 44, § 1. Generally, all other disputes (except System Arbitrations, *see* 2011 CBA, Art. 15) concerning the CBA or a player’s terms and conditions of employment are Non-Injury Grievances. 2011 CBA, Art. 43, § 1. Thus, there can be disputes concerning a player’s injury or medical care which are considered Non-Injury Grievances because they do not fit within the limited confines of an Injury Grievance.

g For example, Injury Grievances, which occur when, at the time a player’s contract was terminated, the player claims he was physically unable to perform the services required of him because of a football-related injury, are heard by a specified Arbitration Panel. 2011 CBA, Art. 44. Additionally, issues concerning certain Sections of the CBA related to labor and antitrust issues, such as free agency and the salary cap, are within the exclusive scope of the System Arbitrator, 2011 CBA, Art. 15, currently University of Pennsylvania Law School Professor Stephen B. Burbank.

(F) Recommendations Concerning Neutral Doctors

Neutral doctors play a limited but important role in player health. Perhaps most importantly, the Unaffiliated Neurotrauma Consultants are crucial to the effective operation of the Concussion Protocol, a signature component of player health. There is no indication that neutral doctors have done anything other than perform the roles assigned to them by the CBA and Concussion Protocol. Consequently, we make no recommendations concerning neutral doctors. Indeed, as the prior chapters suggest, the *neutrality* of these doctors is a positive benefit to players, and we should look for additional opportunities to have *more* neutral doctor input and involvement.

There are additional recommendations relevant to the work conducted by neutral doctors that are made in other chapters:

- Chapter 2: Club Doctors—Recommendation 2:1-D: The Concussion Protocol should be amended such that if either the club doctor or the Unaffiliated Neurotrauma Consultant diagnoses a player with a concussion, the player cannot return to the game.
- Chapter 7: The NFL and NFLPA—Recommendation 7:4-A: The NFL and NFLPA should continue and intensify their efforts to ensure that players take the Concussion Protocol seriously.

Endnotes

- 1 CBA, Art. 44, § 1.
- 2 CBA, Art. 44, § 4(a).
- 3 CBA, Art. 44, § 4(d).
- 4 CBA, Art. 50, § 1.
- 5 CBA, Art. 50, § 1(d).
- 6 Dyer v. Trachtman, 470 Mich. 45, 51–54 (Mich. 2004) (collecting cases); Greenberg v. Perkins, 845 P.2d 530, 535 (Colo. 1993) (“physician owes a duty of care to a nonpatient examinee to conduct the examination in a manner not to cause harm to the person being examined”) (internal quotations and citations removed).
- 7 *Id.*
- 8 *Id.*
- 9 See Chapter 1: Players, Table 1-F.
- 10 See Mark Fainaru-Wada & Steve Fainaru, League of Denial: The NFL, Concussions, and the Battle for Truth 26 (2013) (stating that former Pittsburgh Steelers center Mike Webster’s “rarely acknowledged his injuries, much less reported them.”); Derk A. Van Kampen et al., *The “Value Added” of Neurocognitive Testing After Sports-Related Concussion*, 34 Am. J. of Sports Med. 1630 (2006) (concluding that “reliance on patients’ self-reported symptoms after concussion is likely to result in an underdiagnosis of concussions and may result in premature return to play”); Q. and A.: *Responses From an Ex-Enforcer and an Expert*, N.Y. Times, Dec. 7, 2011, <http://query.nytimes.com/gst/fullpage.html?res=980DE3D71139F934A35751C1A9679D8B63>, archived at <http://perma.cc/5P5D-TRBX> (discussing underreporting of concussion symptoms by football players); Tony Grossi, *Injury that Dazed McCoy Puts Focus on Concussions*, Cleveland Plain Dealer, Dec. 18, 2011, available at 2011 WLNR 26179502 (mentioning underreporting of concussion symptoms by NFL players).
- 11 Michael David Smith, *To Avoid Concussion Rules, Some Players Sandbag their Baseline Tests*, ProFootballTalk (Apr. 22, 2011), <http://profootballtalk.nbcsports.com/2011/04/22/to-avoid-concussion-rules-some-players-sandbag-their-baseline-tests/>, archived at <http://perma.cc/94KW-SK7W>. Experts nonetheless insist that the baseline examination cannot be cheated. See also Bill Pennington, *Flubbing a Baseline Test on Purpose Is Often Futile*, N.Y. Times, May 5, 2013, <http://www.nytimes.com/2013/05/06/sports/sandbagging-first-concussion-test-probably-wont-help-later.html>, archived at <http://perma.cc/K8EF-G4F8>.
- 12 Michael David Smith, *Jamaal Charles: I Didn’t Want To Go Through The Concussion Protocol*, ProFootballTalk (Oct. 22, 2014), <http://profootballtalk.nbcsports.com/2014/10/22/jamaal-charles-i-didnt-want-to-go-through-the-concussion-protocol/>, archived at <http://perma.cc/6BA2-RUPJ>.
- 13 Michael David Smith, *LaAdrian Waddle: Don’t Blame Lions for Me Playing with a Concussion*, ProFootballTalk (Oct. 25, 2014), <http://profootballtalk.nbcsports.com/2014/10/25/laadrian-waddle-dont-blame-lions-for-me-playing-with-a-concussion/>, archived at <http://perma.cc/RMX9-VPXE>.
- 14 See *Transcript from NFLPA Super Bowl XLIX Press Conference*, NFL Players Ass’n, <https://www.nflpa.com/news/all-news/transcript-from-nflpa-super-bowl-xlix-press-conference> (last visited Aug. 7, 2015), archived at <http://perma.cc/5UJN-AGRQ>.
- 15 CBA, Art. 44, § 5. The list requires “at least two orthopedic physicians and two neuropsychologists in each city in which a club is located.” *Id.*
- 16 *Id.*
- 17 This information was provided by the NFLPA.
- 18 *Id.*
- 19 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).
- 20 *Id.*
- 21 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).
- 22 See 29 U.S.C. § 185.
- 23 *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 213, 200 (1985).
- 24 See, e.g., *Givens v. Tennessee Football, Inc.*, 684 F. Supp. 2d 985 (M.D. Tenn. 2010) (player’s tort claims against club arising out of medical treatment preempted); *Williams v. Nat’l Football League*, 582 F.3d 863 (8th Cir. 2009) (players’ tort claims arising out of drug test preempted).
- 25 See 2011 CBA, Art. 43, § 1.
- 26 See 2011 CBA, Art. 43, § 6 (discussing constitution of Arbitration Panel); 2011 CBA, Art. 43 § 8 (discussing Arbitrator’s authority, including to grant a “money award”).
- 27 CBA, Art. 43, § 2.
- 28 The Non-Injury Grievance arbitrator has the authority to determine whether a complaint against a doctor fit within his or her jurisdiction under Article 43. See 2011 CBA, Art. 43, § 1 (discussing scope of Non-Injury Grievance arbitrator’s jurisdiction).
- 29 Dyer v. Trachtman, 470 Mich. 45, 51–54 (Mich. 2004) (collecting cases); Greenberg v. Perkins, 845 P.2d 530, 535 (Colo. 1993) (“physician owes a duty of care to a nonpatient examinee to conduct the examination in a manner not to cause harm to the person being examined”) (internal quotations and citations removed).

