

In The Matter Of:

*EVANSTON NORTHWESTERN HEALTHCARE CORPORATION
AND ENH MEDICAL GROUP, INC.*

Trial Volume 24

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Exhibit 2

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PROCEEDINGS

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[3] JUDGE MCGUIRE: Counsel, good morning. I hope
[4] everyone had a good Easter weekend.
[5] Before we get started today, are there any
[6] housekeeping items that we need to take up?
[7] If not, I did want to speak to the issue that I
[8] had held in abeyance last week regarding ENH's motion to
[9] exclude certain testimony in this proceeding from
[10] Dr. Baker, and you know, I reviewed the parties' briefs
[11] that they filed, and it appears that complaint counsel
[12] is seeking to include these statements, which I think
[13] we've already had at trial, and under both Rule
[14] 801(D)(2)(d) involving the agency question and also for
[15] impeachment purposes.
[16] Now, it is not clear to me, because both sides
[17] cited case law on the point, as to whether an expert can
[18] be deemed to be an agent for purposes of 801(D)(2)(d),
[19] but it would appear that such prior statements could be
[20] offered for purposes of impeachment. So, on that basis,
[21] I will entertain that evidence into the record.
[22] On the other hand, to ensure that there's no
[23] harm to ENH on this issue, I will give them an
[24] opportunity as well to offer, for impeachment purposes
[25] only, any prior statements by any expert of complaint

[1] counsel that they would also offer.
[2] Now, I think at this juncture it's probably best
[3] if the parties confer on this question and then offer
[4] the Court those statements that they would otherwise
[5] have included in this record, and if it's still a
[6] problem at that point, then I will take this up again.
[7] Are we clear on this issue at this juncture?
[8] MR. BROCK: Your Honor, I'd like to make sure I
[9] understand the Court's ruling on this matter. We did
[10] present the cases that said that the statements in the
[11] reports could be admitted for the purposes of the truth
[12] of the matter asserted therein, and I do want to make
[13] sure I understand whether the Court is allowing the
[14] reports of the experts, the designated portions of the
[15] report, to be introduced for that purpose.
[16] JUDGE MCGUIRE: To the extent that they impeach
[17] only. Are we clear? I mean, you even said in your own
[18] brief that you would not offer them for the truth of the
[19] matter asserted but for purposes of impeachment.
[20] MR. BROCK: I believe, Your Honor, that the
[21] first section of our brief attributed the statements to
[22] the respondent through the agency, and as such, the —
[23] those statements could be introduced for the purposes of
[24] the truth of the matter asserted therein.
[25] JUDGE MCGUIRE: Okay.

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[1] MR. BROCK: And the secondary argument was that
[2] even if they were not admissible for that purpose, that
[3] they could still be admitted for impeachment purposes.
[4] JUDGE MCGUIRE: Well, that's what I'm saying. I
[5] am not clear as to whether these statements could come
[6] in otherwise under 801(D)(2)(d) as an agent of a party,
[7] but yet I will consider them for impeachment purposes.
[8] I have not made a determination as to whether they would
[9] come in under an 801 type of question.
[10] MR. BROCK: Okay.
[11] JUDGE MCGUIRE: I mean, does that help clarify
[12] it?
[13] MR. BROCK: Yes, thank you, Your Honor.
[14] JUDGE MCGUIRE: Did you all want to add any
[15] comments to that?
[16] MR. KLEIN: No, I don't think so.
[17] JUDGE MCGUIRE: Okay. I don't think there's any
[18] urgency on the parties conferring and trying to get
[19] these things offered, but obviously we should do it as
[20] we can.
[21] MR. SIBARIUM: I guess the only question, Your
[22] Honor, would be when we do our findings, our findings
[23] after the trial, if it's — if the ruling is that it's
[24] in for impeachment, then it cannot be cited as an
[25] affirmative finding of fact. If the ruling is that it's

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[1] in for the truth, that's a different story. So,
[2] obviously since we don't believe they should come in at
[3] all, if they come in, our preference would be that they
[4] only come in for impeachment and not for the truth.
[5] JUDGE MCGUIRE: Well, again, I haven't made the
[6] determination as to whether they should be coming in for
[7] the truth of the matter. Is that an issue that the two
[8] sides are apt to be able to come to terms on? It sounds
[9] like you're not, because —
[10] MR. BROCK: Well, we're always willing to talk
[11] to the other side —
[12] JUDGE MCGUIRE: Well —
[13] MR. BROCK: — and we could see whether we could
[14] resolve it. In all seriousness, we could —
[15] JUDGE MCGUIRE: See if you can get it resolved.
[16] If you can't, then I will resolve it under the 801
[17] issue, the 801 question.
[18] MR. BROCK: Okay. The only other concern that I
[19] would have, Your Honor, is that typically the materials
[20] like this, when they are presented for impeachment
[21] purposes, are presented in a manner that would allow the
[22] witness to answer the questions. We are now through
[23] that testimony.
[24] JUDGE MCGUIRE: Right.
[25] MR. BROCK: Notwithstanding the Court's earlier

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[1] ruling, respondents always had the opportunity to use
[2] the reports for impeachment purposes, and in fact, they
[3] did take advantage of that opportunity in some of the
[4] cross examination of the other experts, and as a result,
[5] I don't think that the Court should — I would suggest,
[6] respectfully suggest, that the Court not open the door
[7] to them now introducing this information when the
[8] witness doesn't have the opportunity to explain how that
[9] testimony may or may not be relevant.
[10] JUDGE MCGUIRE: Well, at this juncture, you
[11] know, I have indicated that I will not put them in a
[12] position where they might be unduly harmed by this
[13] ruling, so I will give them that opportunity. So, you
[14] can as well offer those statements by any expert from
[15] complaint counsel for the same purpose.
[16] Are we clear or are we not?
[17] MR. SIBARIUM: Clear, Your Honor.
[18] MR. KLEIN: Clear. The only point I would add,
[19] Your Honor, is they did cite to a third case that was
[20] not given to us earlier —
[21] JUDGE MCGUIRE: I'm sorry, Mr. Klein, could you
[22] step up to the microphone?
[23] MR. KLEIN: The only thing I would add is they
[24] did cite the Glendale case that they did not bring up
[25] during the hearing, and to the extent the Court were to

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[1] revisit the 801(D)(2) issue, we would like the
[2] opportunity to respond to that case, because we don't
[3] believe it was characterized properly.
[4] JUDGE MCGUIRE: Well, I'm not going to rule on
[5] that at this time. You have had — you have both had
[6] opportunity to file your briefs on this matter, and I
[7] don't think we need any other briefing.
[8] MR. KLEIN: Very well, thank you.
[9] MR. BROCK: Thank you, Your Honor.
[10] JUDGE MCGUIRE: Okay, is there anything else
[11] then we need to take up?
[12] If not, ENH may call its next witness.
[13] MR. SIBARIUM: Your Honor, respondents call
[14] Dr. Mark Chassin.
[15] JUDGE MCGUIRE: All right, Doctor, please come
[16] to the Bench, and you'll be sworn in by the court
[17] reporter.
[18] Whereupon —
[19] MARK R. CHASSIN, M.D.
[20] a witness, called for examination, having been first
[21] duly sworn, was examined and testified as follows:
[22] DIRECT EXAMINATION
[23] BY MR. SIBARIUM:
[24] Q: Good morning, Dr. Chassin.
[25] A: Good morning.