

January 22, 2009

**A.1254 (Laneman)**

AN ACT to amend the civil practice law and rules, in relation to ex-parte interviews of non-party treating physicians and health care providers in certain circumstances

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The New York State Trial Lawyers Association (NYSTLA) strongly supports this bill, which would remedy the grave inequities in existing law created by the New York State Court of Appeals' decision in Arons v. Jutkowitz and help prevent coercion of treating physicians. Specifically, this bill would provide that in an action involving personal injury, medical, dental, or podiatric malpractice or wrongful death, a party or his or her representative shall be prohibited from conducting covert, *ex-parte* interviews with the treating physician or other health care provider of any other party. In addition, the bill was recently amended to include an important protection to ensure that the bill's provisions would not affect the ability of the patient's attorney or his or her agent to talk privately with the patient's treating physician or other health care provider.

NYSTLA believes that this bill is crucially necessary to rectify a significant change in New York jurisprudence as a result of the recent Court of Appeals' decision in Arons v. Jutkowitz. See 9 N.Y.3d 393 (2007). In Arons, the Court of Appeals held that a defense attorney may have private interviews of a plaintiff's treating physicians without the patient or any patient representative present to protect the patient's interests or remaining privilege of privacy. In fact, the Court of Appeals made the unprecedented ruling that a plaintiff may be required to assist defense counsel in obtaining these *ex parte* interviews by being forced to expressly authorize them in writing.

It is important for the Legislature to promptly pass this important bill because it would address issues of unfairness and potential unintended consequences resulting from the Court of Appeals' decision in Arons. Additionally, this bill would reaffirm a sound and fair public policy which will protect a plaintiff's physician from undue and coercive pressure from the defendant or his or her representatives. For instance, in a medical malpractice case, a plaintiff will typically, and for obvious reasons, be treated by a doctor who was not responsible for his or her injury. The plaintiff relies on this treating physician to provide diagnosis and medical treatment related to the injury. If as the majority in Arons held, a defendant were allowed unfettered and unmonitored access to this physician, he or she would be able to use any number of threats -- increases in medical malpractice insurance rates, limited hospital privileges, alienation within the medical community, and threats of professional investigation -- to obtain a physician's cooperation or to limit his or her cooperation for the plaintiff.

By prohibiting *ex parte* interviews of the plaintiff's treating physician, this bill would reduce the opportunities for these types of unfair and coercive tactics and ensure that the playing field is not unfairly skewed in favor of defendants in malpractice actions.

Further, by enacting this legislation and prohibiting *ex parte* interviews, the Legislature would ensure that patients continue to feel safe that when they reveal confidential health information to their physicians that this sensitive remains confidential. If a patient's physician were required to submit to these interviews, there is a risk that these interviews could be used as a means to get a patient's doctor to disclose confidential and private information – information protected by the doctor-patient privilege – which has not been waived by the lawsuit.

It should be noted that if this bill were passed, defendants would still continue to have the full range of discovery devices available in the CPLR Article 31 and the Uniform Rules for the State Trial Courts that require the sharing of information and testimony from another party's treating physician, including depositions, interrogatories, and inspection of documents. The key distinction is that with the CPLR Article 31 devices, an attorney or representative for the plaintiff has the right to be present to observe or monitor the testimony and/or provision of information to ensure the interests of the physician, and by extension, the plaintiff are protected.

The Court of Appeals' decision in Arons authorizes the defense attorney to meet privately with and interview the plaintiff's treating physician or health care provider. Allowing such *ex parte* interview authorizations to be utilized as a discovery device is not only inequitable, but would also have the unintended result of increasing the frequency by which defense attorneys would utilize this device to interview every health care provider of a plaintiff or a decedent has ever visited. This cannot be the result that the Arons Court intended. For the foregoing reasons, NYSTLA strongly supports this legislation and urges the Legislature to promptly pass this important bill and restore a sense of fair and equal playing field in medical malpractice litigation.

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# GNYHA STATEMENT OF OPPOSITION

January  
Twenty-One  
2009

TO: Members of the New York State Assembly Judiciary Committee

FROM: Greater New York Hospital Association

RE: A.1254 – Prohibits interviews of other parties' treating physicians or health care providers in personal injury medical, dental, or podiatric malpractice or wrongful death actions

A. 1254 prohibits a party in a medical malpractice lawsuit from informally interviewing a plaintiff's treating physician or physicians. GNYHA strongly opposes this bill, which seeks to overturn a recent New York State Court of Appeals decision on this issue, because GNYHA believes it will *increase* costs associated with our medical liability system at a time when the State and providers are searching for ways to *reduce* such costs. Further, the bill unfairly eliminates rights from defendants in such cases, rights that are granted to defendants in nearly every other type of litigation and that plaintiffs themselves enjoy.

On November 27, 2007, New York's highest court, the New York State Court of Appeals, in *Arons v. Jutkowitz*, upheld the longstanding principle that informal discovery of information can serve both litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes, both in medical malpractice cases as well as other cases. It affirmed earlier rulings that held that formal depositions or even somewhat less formal interviews attended by an adversary's counsel are often no substitute for such off-the-record private efforts to learn and assemble information. The Court of Appeals also recognized that, while a party cannot compel a treating physician to engage in such off-the-record conversations, as long as the request is authorized in a way that is compliant with the Federal Privacy Rule under the Health Insurance Portability and Accountability Act, or HIPAA, a request for an informal interview may be made and granted.

Over the last eighteen months, the Governor's Office—along with the the NYS Assembly and the NYS Senate-- has been engaging discussions of our medical liability system with consumer groups, the plaintiff's bar, health care providers, and other stakeholders in an effort to address the fact that skyrocketing medical liability insurance costs are causing extreme difficulty and financial hardship for health care providers, particularly doctors and hospitals. These discussions began under the auspices of the Governor's Task Force on Medical Liability and have continued until the present. Today's economic turmoil and the massive Medicaid cuts that have been proposed by the State make the need for relief from these extraordinarily high medical liability coverage costs even greater. A.1254 would only *increase the costs of coverage* for providers, making it more difficult and costly to defend themselves against medical liability claims. Given this situation, it would be unconscionable for the Legislature to take away this long-standing right of defendants in medical liability cases, which has been so clearly granted to all defendants in New York State and was so recently affirmed by the New York State Court of Appeals, particularly in the middle of serious concerns about the high cost of medical liability coverage in the State.

GNYHA therefore strongly opposes A.1254 and urges its defeat.



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