On December 5, 2006, in a case of first impression at the appellate level, the Second Department drastically limited the ability of defense counsel to conduct ex parte interviews with a plaintiff’s treating physicians. The decision will have major implications for the manner in which defendants conduct pretrial discovery and prepare for trial.

**Background**

In *Arons v. Jutkowitz*, 2006 N.Y. Slip Op. 09139, 2006 N.Y. App. Div. LEXIS 14652 (2nd Dept. December 5, 2006), a medical malpractice action, plaintiff alleged that the defendants failed to diagnose and treat a progressive neurological condition in the decedent, resulting in brain damage and death. Discovery was uneventful, and plaintiff filed his note of issue when discovery was complete.

As part of their trial preparations, the defendants wanted to meet with a non-party physician who had treated the decedent. Such ex parte interviews were permitted under *Levande v. Dines*, 153 A.D.2d 671, 544 N.Y.S.2d 864 (2nd Dept. 1989) and subsequent case law so as to allow defendants equal access to potential trial witnesses. In accordance with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et seq.) (“HIPAA”), defense counsel requested that plaintiff provide them with an authorization to conduct the interview.

Plaintiff refused and motion practice ensued. The trial court ordered plaintiff to provide the authorization, but also required the defendants to add certain precautionary admonitions to the authorizations and, significantly, required that the defendants provide plaintiff with a summary of the interview. Neither party was satisfied with the decision, and both sides appealed.

**Issue**

It is well settled that by bringing a personal injury action, a plaintiff waives any right to keep his or her medical history private. *Kump v. Smith*, 25 N.Y.2d 287; 250 N.E.2d 857; 303 N.Y.S.2d 858 (1969). The scope of physician-patient confidentiality was traditionally a matter of state law. When HIPAA privacy rules became effective in 2003, however, federal confidentiality requirements were imposed upon health care providers for the first time. The *Arons* court was required to determine the extent to which federal HIPAA requirements overruled longstanding New York state law on physician-patient privilege.

**Decision**

While recognizing that a plaintiff waives physician-patient privilege with respect to the physical or mental conditions that he or she affirmatively places in issue in the lawsuit, and admitting that HIPAA does not prevent treating physicians from testifying in court, the *Arons* court ruled that ex parte interviews with the patient’s treating physicians are not authorized by state statute.

The Second Department noted that under HIPAA, physicians are required to keep protected health information confidential unless its release is authorized by the patient or court order. 45 CFR 164.508; 45 CFR 164.512. The court found, however, that, “compulsion of such unsupervised, private and unrecorded interviews plainly exceeds the ambit of article 31” of the Civil Procedure Law and Rules.
“Simply stated,” held the Second Department, “the relief requested by defense counsel [an order requiring plaintiff to consent to interviews with treating physicians] is simply not authorized by statute.”

The Appellate Division did not explicitly overturn Levande, though its continued viability is doubtful. Levande held that any bar against ex parte interviews did not apply after the discovery phase was complete. In Arons, however, the court re-interpreted the scope of its earlier decisions: “We did not declare that defense counsel have a right to such informal, post-note of issue interviews, nor did we require plaintiffs to consent to them. Rather, we merely held, under the circumstances, that the treating physician’s unique and highly relevant testimony would not be precluded.” *Arons*, 2006 N.Y. App. Div. LEXIS at 14657 at **7-8. It is not entirely clear how further interviews are permissible under *Levande* when, under *Arons*, there is no authority to compel plaintiffs to authorize them.

**Comment**

When possible, defense counsel prefer to use plaintiff’s treating physicians as trial witnesses over independently retained experts. The treating physician is much more familiar with the plaintiff’s history, injuries, and course of treatment than a specialist who performs a single examination. The treating physician may also be privy to information that is not contained in the medical records.

The *Arons* decision drastically limits the ability of defense counsel to meet with a treating physician and determine his or her suitability as a trial witness. Unlike lay witnesses, who can generally be interviewed at any time (*see*, Niesig v. Team I, 76 N.Y.2d 363, 374, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990)), contact with a plaintiff’s health care providers is now expressly limited to those methods formally authorized under the CPLR — namely, the non-party deposition pursuant to subpoena. This is an inadequate substitute, since there are limits on the testimony that can be elicited from a non-party. (*See*, *e.g.*, Wilson v. McCarthy, 53 A.D.2d 860, 385 N.Y.S.2d 581 (2nd Dept. 1976) (non-party physician may refuse to answer deposition questions that seek testimony in the nature of opinion evidence.)) Plaintiff’s counsel, moreover, faces no similar bar to an ex parte interview, and can meet with any physician at any time pursuant to his client’s authorization.

Despite its shortcomings, however, the non-party deposition is essentially now the only method expressly permitted by the Second Department for investigating the treatment of plaintiff’s non-party medical providers. Accordingly, pre-note of issue depositions should be pursued aggressively in light of the ban on post-note of issue discovery except under “unusual or unanticipated circumstances.” 22 NYCRR §202.21. Any deposed witnesses can then be called to testify at trial in accordance with established civil practice.

If you have any questions or need further details regarding this decision, please contact via e-mail Richard E. Lerner at richard.lerner@wilsonelser.com or Michael J. Gudzy at michael.gudzy@wilsonelser.com or by phone at our New York office at 212.490.3000.