

Edward Flink to Third District members: Happy Spring! On behalf of the TICL Executive Committee, I am passing on a copy of the above Bill and Sponsors' memorandum. I think this Legislation is significant, and at a minimum, we thought our members should be aware of it. As you will note below, the NYSBA has asked our Section for comment. The Bill will be on the Agenda of the Exec Comm meetings in San Diego this week. If you would like to express an opinion, please "Reply to All" by the end of the week, April 11, so that your comments can be considered. Thanks.

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Edward Flink: ...Actually, "for the record," I oppose this bill. As long as I have been trying cases, it has been the law that when a subpoena is served by defense counsel on a plaintiff's physician, defense counsel can speak to the medical witness to prepare for trial just like he/she can speak to any other witness. I am not hitting the books for a cite, but I recall having this come up with a couple of plaintiff's attorneys, and having at least one judge tell counsel that I was within my rights, given the subpoena. My partner Jay Smith also had this issue, with same result. Now, in order to serve a subpoena, one needs a HIPAA authorization, so there is no reason not to allow defense counsel to speak to the subpoenaed witness to defend the case. While as a plaintiff's attorney I would not mind tying one of my adversary's hands behind his/her back, that does not advance the search for truth.

If the sponsors want to propose a bill prohibiting discovery interviews, they should prepare a bill that is limited to that practice, although argument could be made against such a prohibition. That, however, is a much narrower issue. This bill is overbroad in that it would prohibit counsel who serves a subpoena on a medical witness from talking to the witness before trial.

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Christopher Dressler: I too oppose the bill. The defense attorney should have the same right of access to any of the plaintiff's treating physicians as the plaintiff's attorney. Any other system is unfair in that it allows the attorney for one party to have access to information from a non litigant while preventing such access to the other. It allows the plaintiff attorney to interview the various doctors so that he/she can determine whether a given doctor will or won't help the case and thereby allow that attorney to call only the witnesses whom he/she knows will help. The defense attorney is left totally in the dark and has to decide whether to call a witness based solely on the medical records provided. Such a system creates a huge advantage to the plaintiff's bar and is totally inconsistent with the concept of "fair play" which must be inherent in a system of justice. I question the constitutionality of such legislation.

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Melissa Smallacombe: I too oppose this bill for the same reasons so eloquently stated by both Attorney Flink and Attorney Dressler.
Thank you.

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William Yoquinto: In my agreement with those who have stated opposition to the proposed bill, I want to briefly pick up on an idea where Chris Dressler left off- the constitutionality. This bill would deny a class of people, defendant doctors, an opportunity to conduct trial preparation while it would grant another class, medical malpractice plaintiffs, not only the right to prepare for litigation, but one enhanced by the fact that their adversaries have been hamstrung by the same act. This seems to me to be an denial of the equal protection of the laws, and that whether we attorneys represent plaintiffs or defendants in these matters we should find such an act to be abhorrent. The reference to HIPAA by way of justification is either ignorant or shamefully disingenuous. If the concern were truly a matter of patient privacy, and forgetting for a moment the waiver of privilege, then it would not have been important to carve out the exception which would allow the plaintiffs' counsel to continue to conduct ex parte interviews. While I believe that justice is better served by full access to information by both sides to litigation and that, therefore, both plaintiffs and defense attorneys should be permitted to continue to interview treating physician witnesses, I could respect a bill that would prohibit the activity to both sides. The real purpose of this bill to advantage one class at the expense of another is quite evident and, in my opinion not constitutionally sound. For this reason among others stated, the bill should be opposed.

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