

***Appellate Decisions of Interest***  
*Arons v. Jutkowitz*  
Court of Appeals (November 27, 2007)

Guiding Principle: Physicians may informally meet with and grant private interviews to defense attorneys who are defending another physician in a medical malpractice case, provided that the defense attorney provides the physician with a HIPAA-compliant authorization signed by the patient allowing the meeting to take place.

Summary of the facts: This appeal actually involved three separate cases. In each case, the plaintiff-patient had brought a medical malpractice action against a physician. The attorneys defending the physicians sought to privately meet with and interview the patients' treating physicians, rather than attempting to take their formal depositions. The plaintiff-patients refused to provide the defense attorneys with HIPAA-compliant authorizations allowing the meetings to take place. The defense attorneys then asked the court to require the patient-plaintiff to provide the authorizations. The lower courts disagreed on whether these meetings were permissible. The Court of Appeals was called upon to decide the issue.

Ruling of the court: The Court of Appeals – the highest court in the New York State judicial system – held that private interviews may take place, as long as defense attorneys follow certain guidelines.

Reasoning: In cases other than medical malpractice, defense attorneys traditionally have been free to informally interview individuals who witnessed events important to the lawsuit. Thus, for example, in a typical auto accident case, defense attorneys often contact and interview witnesses to the accident. This type of informal discussion can uncover relevant facts in a quick and inexpensive manner.

Before HIPAA, the courts permitted defense counsel in medical malpractice actions to conduct private interviews with the patient's treating physicians once the case was certified as ready for trial. Once HIPAA was enacted, however, physicians and courts were uncertain about whether these type of informal interviews were permissible. The Court of Appeals has now made clear that informal interviews are indeed permissible, as long as certain steps are followed, as discussed below. The Court of Appeals noted that when a patient becomes a litigant in a personal injury lawsuit, he or she waives the physician-patient privilege, because by bringing suit, the patient's mental or physical condition is placed in issue. Therefore, the patient cannot refuse to sign an authorization permitting defense counsel to informally meet with a treating physician.

In sum, defense counsel may interview a treating physician at any time during the course of the litigation. The attorney must inform the physician whom he or she represents, that the discussion is entirely voluntary on the physician's part, and that the discussion will be limited in scope to the particular medical condition at issue in the litigation. The treating physician is free to decide whether or not to grant an informal interview.

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