ILLINOIS TRIAL LAWYERS ASSOCIATION
PHILIP H. CORBOY CENTER FOR JUSTICE
401 WEST EDWARDS STREET • P.O. BOX 5000 • SPRINGFIELD IL 62705
TELEPHONE 217.789.0755 • 800.252.8501 • FAX 217.789.0810
www.ILTLA.com
EXECUTIVE DIRECTOR
JAMES M. COLLINS

Illinois Trial Lawyers Association Position on Proposal 18-01 To Amend Illinois Supreme Court Rule 218

The Amendment to Supreme Court Rule 218 offered in Proposal 18-01 requires any plaintiff whose medical condition is at issue to present an executed waiver of his/her constitutionally protected right to privacy over her entire medical history. See 218(b) of 18-01.

The waiver must be executed in a form mandated and attached to the proposal. The attachment requires the injured victim to sign the document attesting that she understands the failure to sign to the order exposes the injured victim to **sanctions up to and including the dismissal of the complaint**. The plaintiff also must stipulate the she has:

- read the order*; and
- understands the order*; and
- stipulates to the entire contents of the order*.

*Note the order refers to 5 statutes and regulations which the plaintiff must apparently read, understand, and stipulate to (the statutes total in excess of 100 pages, not including "Any and all other applicable state and federal law regulating or governing the disclosure, maintenance, use, and disposal of PHI.)

Proposal 18-01 mandates unlimited disclosure of protected health information without consideration of the medical issues being litigated. It forces a plaintiff to choose between pursuing her rights in court and waiving her constitutionally protected right to privacy of medical information wholly unrelated to the injury for which discovery is being sought. As such the proposal violates the right to privacy expressly set forth in our state constitution.

As our Supreme Court stated in *Kunkel v. Walton*:

> The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy. Physicians are privy to the most intimate details of their patients' lives, touching on diverse subjects like mental health, sexual health and reproductive choice. Moreover,

> some medical conditions are poorly understood by the public, and their disclosure may cause those afflicted to be unfairly stigmatized. Respect for the privacy of medical information is a central feature of the physician-patient relationship. Under the Hippocratic Oath, and modern principles of medical ethics derived from it, physicians are ethically bound to maintain patient confidences. *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997), *citing Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 589 (1986).

As stated, Proposal 18-01 contains no limitation whatsoever on the scope of the disclosure of Plaintiff's medical history. Under Proposal 18-01, the trial court is not allowed to impose basic evidentiary relevance standards in any way. The proposed release simply compels the disclosure of every detail of the plaintiff's entire medical history regardless of relevancy. Counseling for sexual abuse, gynecological care and treatment including reproductive choice, and the most intimate details of an individual's medical history are all subject to disclosure, without any limitation whatsoever. Not only does the proposed amendment trample on the constitutionally protected privacy rights of Plaintiffs in personal injury litigation recognized by a unanimous Illinois Supreme Court, it leads to absurdities. For example, a 72-year-old plaintiff would be forced to allow the production of birth and pediatric medical records. A 52-year female claiming a back surgery as a result of injuries from an automobile collision would be compelled to disclose her gynecological fertility treatment or marriage counseling records which occurred decades before.

The proposed amendment to Supreme Court Rule 218 runs directly afoul of the unanimous Illinois Supreme Court ruling in *Kunkel v. Walton*, 179 Ill. 2d 519, 689 N.E. 2d 1047 (Ill. 1997). In *Kunkel* the Supreme Court analyzed legislation which required every Plaintiff in any litigation in which their medical condition was at issue to execute a blanket medical authorization which would compel the production of the Plaintiff's entire medical record without limitation. *Id.* at 1049. The current proposed amendment likewise allows unlimited disclosure without consideration of the medical issues being litigated and forces a plaintiff to choose between pursuing the lawsuit or waiving constitutionally protected right to privacy of medical information wholly unrelated to the injury for which discovery is sought. See Proposed 18-01 (b) and Paragraph 5, Stipulation 4 in the proposed HIPAA order attached to proposed 18-01.

The Illinois Supreme Court invalidated the legislation as violative of the constitutional prohibition against unreasonable invasions of privacy. Relevant parts of the Court's opinion stated:

"Section 2-1003(a) provides, in pertinent part:

> **Any party who by pleading alleges any claim for bodily injury or disease,** including mental health injury or disease, **shall be deemed to waive any privilege between the injured person and each health care provider who has furnished care at any time to the injured person.** Any party alleging any such claim shall, upon written request of any other party who has appeared in the

action, sign and deliver within 28 days to the requesting party a separate Consent authorizing each person or entity who has provided health care at any time to the allegedly injured person to:

(1) furnish the requesting party or the party's attorney a complete copy of the chart or record of health care in the possession of the provider ***;

Section 2-1003(a) also specifically **provides that if a party claiming injury refuses to comply with a request for a consent, the trial court, on motion, shall issue an order** authorizing disclosure to the extent set forth in the statute **or dismissing the case**. 735 ILCS 5/2-1003(a) (West 1996).

Rule 201 and related rules governing specific discovery methods form a comprehensive scheme for fair and efficient discovery with judicial oversight to protect litigants from harassment. The consent procedure under section 2-1003(a) is inconsistent with this scheme and substantially undermines it. First of all, the consent procedure set forth in section 2-1003(a) is simply unauthorized by Rule 201(a), which specifies that information is obtainable "as provided in these rules" and enumerates the authorized methods of discovery. **More importantly, section 2-1003(a) circumvents the relevance requirement set forth in Rule 201(b)(1).** To be certain, the scope of information considered "relevant" under this court's discovery rules is expansive, including not only evidence that would itself be admissible at trial, but also information leading to the discovery of admissible evidence. See Monier v. Chamberlain, 31 Ill. 2d 400, 403, 202 N.E.2d 15 (1964); 166 Ill. 2d R. 201(b), Committee Comments. The concept of relevance facilitates trial preparation while safeguarding against improper and abusive discovery. In addition, the relevance requirement has a constitutional dimension which is discussed later.

Unlike our rules, however, section 2-1003(a) places no limitation whatsoever on the scope of medical information subject to disclosure. To the contrary, the mandated disclosure is described in the broadest possible terms. The plaintiff must consent to the disclosure of medical information by "each person or entity who has provided health care at any time," and must authorize them to furnish "a complete copy of the chart or record of health care in the possession of the provider."

There is no language in this provision in any manner restricting the consent requirement to the injury which is the subject of the lawsuit or to related medical conditions. Under section 2-1003(a), as a condition of proceeding with his or her lawsuit, an injured party must consent to the disclosure of medical information wholly unrelated the injury for which recovery is sought. Indeed, under the unqualified language of section 2-1003(a), **the injured party may have to consent to the release of complete medical records held by health care providers who have never treated the injured party for any condition even remotely related to the subject matter of the lawsuit.** The

consent procedure set forth in section 2-1003(a) goes well beyond the legitimate objectives of discovery as reflected in this court's rules. Instead, **section 2-1003(a) seems to be designed to discourage tort victims from pursuing valid claims by subjecting them to the threat of harassment and embarrassment through unreasonable and oppressive disclosure requirements.**

But section 2-1003(a) goes beyond merely delineating the scope of the physician-patient privilege: rather it essentially provides a mechanism for discovery of medical information that, by failing to meet the requirement of relevance, would not be discoverable regardless of the privilege. Stated differently, defendants and the Attorney General ignore the fact that the relevance requirement is an independent constraint on discovery: information does not become relevant-and thus subject to discovery-simply because it is not privileged.

Defendants and the Attorney General also insist that section 2-1003(a) affords the trial court discretion to limit disclosure, thereby safeguarding against the improper and abusive use of the consent procedure. They submit that the existence of such discretion is implicit in certain language in the statute and is supported by the legislative history of the provision. **Plaintiffs respond that section 2-1003(a) provides for no such judicial oversight. We agree with plaintiffs.**

Here, the language of the statute at issue is clear and unequivocal. In unqualified and unconditional terms, the statute directs personal injury plaintiffs to deliver signed consents to the release of medical information. **There is no reference whatsoever to any form of judicial oversight or any discretionary power to safeguard against abusive use of the consent procedure. As written, section 2-1003(a) envisions disclosure of medical information without limitation, and without regard to the relevance of the information or the oppressive nature of disclosure.**

The statutory language at issue here is clear. The plaintiff's obligation to consent to the disclosure of medical information is absolute and unqualified; nowhere is it provided that the trial court may regulate the scope of disclosure.

The trial court also concluded that section 2-1003(a) violates the right to privacy expressly set forth in our state constitution. We agree.

It is reasonable to require full disclosure of medical information that is relevant to the issues in the lawsuit. But as previously noted, section 2-1003 (a) **requires a blanket consent to disclosure of all medical information without regard to the issues being litigated. The scope of the required disclosure is unreasonable and unconstitutional.** *Id.* at 1056 (emphasis added)

The proponents of the amendment have yet to articulate why there should be a departure from the *Kunkel* precedent. Illinois courts have long acted as protectors of unreasonable

intrusions upon the rights of privacy of litigants. The disclosure of some medical information is inherent in a personal injury suit, but the law only requires that a plaintiff disclose the information that he or she has placed in issue. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 457 (1997) (holding that a plaintiff-patient does not, by simply filing suit, consent to ex parte discussions between his treating doctor and defense counsel, nor does he consent to disclosure of confidential information unrelated to the subject matter of the lawsuit).

The courts have also affirmed a strong public policy interest of keeping patient's medical records confidential. *See Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 591 (1st Dist. 1986) (holding that a patient's implicit consent to release medical information however is limited only to the release of the information relative to the lawsuit pursuant to the methods of discovery authorized by Supreme Court Rule 201(a) (87 Ill.2d R. 201(A))).

Courts have imposed reasonable relevance standards for compelling the production of documents and materials by litigants, *Firebaugh v. Traff*, 353 Ill. 82, 84 (1933). There must be sufficient cause shown that the evidence is pertinent to the issues in the case, and no right is given to compel the submission of records to a general inspection and examination, for fishing purposes or with the view of finding evidence to be used in other suits or prosecutions. *Id.* At 85.

It is apparent that the proponent of Proposal 18-01 is under the mistaken belief that the *Kunkel* Court held § 2-1003 unconstitutional solely because it "compelled the disclosure of medical records absent a plaintiff's consent." *See* Chicago Daily Law Bulletin May 9, 2019 letter. In *Kunkel*, the Supreme Court held that: "a blanket consent to disclosure of all medical information without regard to the issues being litigated" is "unreasonable and unconstitutional." *Kunkel*, 179 Ill. 2d at 539. This is, and should be, the protection that protected health information deserves. The *Kunkel* Court specifically held that conditioning a plaintiff's right to proceed with her lawsuit upon an unlimited waiver of her privilege was unconstitutional. The order referred to in Proposal 18-01 suffers from the identical constitutional defect.