New York State Bar Association
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Memorandum in Opposition

NYSBA #17-A

January 15, 2020

A. 2370
S. 6194

By: M. of A. Dinowitz
By: Senator Parker
Assembly Committee: Codes
Senate Committee: Judiciary
Effective Date: 30th day after it shall have become a law

AN ACT to amend the civil practice law and rules, in relation to enacting the "patient privacy projection act."

THE NEW YORK STATE BAR ASSOCIATION OPPOSES THIS LEGISLATION

The New York State Bar Association ("NYSBA") has a long history of activity regarding proposals to change the operation of our civil justice system, sometimes referred to as "tort reform", and it has traditionally sought to speak with "the voice of reason" during the debate over such proposals. Since our membership includes attorneys who practice on all sides of the tort system, NYSBA's goal is to provide objective analysis and a balanced perspective regarding legislative proposals for changing the civil justice system.

This legislation would overrule the Court of Appeals decision, *Arons v. Jutkowitz,* 9 NY3d 393 (2007). The *Arons* decision held that plaintiffs who put their medical conditions in issue must, upon demand, furnish HIPAA-compliant authorizations to allow defense attorneys to conduct *ex parte* interviews of the plaintiffs' treating physicians. The decision makes it clear that, despite the plaintiff's obligation to furnish authorizations, physicians are free to decline defense requests for such interviews.

We recognize that there are strongly-held competing views on this topic, particularly with regard to litigation involving claims for medical malpractice. In fact, we vigorously debated this topic, with views expressed by plaintiffs' attorneys, defense attorneys and attorneys without affiliation to either side. After the issue was fully examined, NYSBA's Executive Committee determined that while there are valid reasons for improvement in this area and to enact legislation that would address certain issues raised by the *Arons* decision, we believe there are significant concerns surrounding the remedy that this bill would implement.

This bill would add the following new subdivision ("c-1") to CPLR 3102:

> In any action involving personal injury, medical, dental or podiatric malpractice or wrongful death, no party or anyone acting on behalf of a party may either directly or indirectly conduct ex parte interviews with the treating physicians or other health care

providers of any other party. Nothing in this subdivision shall prohibit an attorney or the agent or employee of an attorney who represents the patient, the estate of the patient, or the natural or duly appointed guardian of the patient whose condition is at issue in the action from conducting ex-parte conversations with a treating physician or other health care provider of the patient.

We submit that the bill is overbroad as drafted in that it would not only eliminate the plaintiff's obligation to furnish interview authorizations, but it would impose a blanket prohibition on **all** ex parte interviews by adversary counsel even in circumstances in which a party authorizes such interviews.

The Sponsor's memo suggests that the availability of disclosure devices in the Uniform Rules and the CPLR are not only sufficient, but should mark the boundaries beyond which counsel may not venture in obtaining information for litigation. However, this rationale fails to distinguish between "disclosure" and "investigation" (or, as the Court of Appeals calls the latter, "informal discovery", citing *Niesig v Team I,* 76 NY2d 363 (1990) and *Siebert v Intuit,* 8 NY3d 506 (2007). There is no question that every litigant has the right to investigate facts relevant to his or her lawsuit, and that investigative methods – including witness interviews – are not subject to disclosure limitations set forth in the Uniform Rules or CPLR. This bill's wholesale prohibition against one particular investigative method is unwarranted and unwise.

It is important to note that HIPAA does not forbid disclosure of medical information; it merely provides safeguards against unauthorized disclosure. Until the Court of Appeals decided *Arons*, the only obstacle to defendants' attempts to speak with plaintiffs' treating physicians were the plaintiffs themselves, who relied on HIPAA to prevent their doctors from talking to adversaries. *Arons* now prohibits plaintiffs from relying on HIPAA's privacy rules as a shield against disclosure. Compelling a plaintiff to furnish an authorization to allow defense counsel to speak to a treating physician is no more an invasion of privacy than compelling the production of an authorization to allow defense counsel to obtain a plaintiff's medical records. It is also important to note that – unlike the production of medical records – *Arons* does not require physicians to grant informal interviews.

In the end, *Arons* attempts to compel a party to waive confidentiality with respect to medical information that must be waived anyway, so long as the party's medical condition is in issue. *Koump v. Smith*, 25 NY2d 287 (1969). It is, of course, necessary to attain the right balance between a patient's right to privacy and a litigant's right to investigate the patient's claims.

We understand the concerns over potential activity within the parameters of *Arons* in order to unduly influence a non-party treating physician; however, the extent to which this practice actually occurs is unclear. Nevertheless, we would support efforts to prohibit abuse of the law.

Based on the forgoing, the NYSBA **OPPOSES** this legislation.