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PERSPECTIVE

'Arons' Levels the Playing Field

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The Court of Appeals' decision in *Arons v. Jutkowitz*^[FN1], and the companion cases of *Kish v. Graham* and *Webb v. New York Methodist Hospital*, has been the subject of some discussion and debate in the weeks following the decision. In *Arons*, the Court of Appeals held that defense counsel may conduct *ex parte* interviews of the plaintiff's treating physicians when the plaintiff has placed his or her medical condition in controversy. The Court also held that the trial court may direct the issuance of HIPAA-compliant authorizations permitting the physicians to speak to defense counsel if they are inclined to do so. Having participated as appellate counsel for the defense in the *Arons* and *Kish* cases, we write to discuss the basis of the Court's holding and to respond to certain implications raised by some commentators from the plaintiffs' bar.

First, and most important, the basis of the Court's decision was the fundamental concept of fairness — that parties should have equal access to relevant and material information. Notably absent, however, from recent commentary on the case is any discussion of that principle. As the Court recognized, a litigant is deemed to have waived the physician-patient privilege when, in bringing a personal injury action, that person affirmatively places his or her mental or physical condition in issue.^[FN2]

Insofar as the condition at issue is concerned, this places a subsequent treating physician in the same position as any other fact witness; however, because of concerns regarding the possible imposition of penalties under HIPAA, an authorization is almost always necessary before the physician will agree to talk to defense counsel. The Court's decision removes this practical impediment to the interviews by recognizing that the trial court has the power to direct the issuance of a HIPAA-compliant authorization permitting a treating physician to meet with defense counsel.

While the Appellate Divisions also recognized the waiver of the physician-patient privilege, they failed to appreciate that their decisions effectively gave plaintiffs' counsel an unfair and disproportionate advantage in trial preparation. Pursuant to these decisions, plaintiffs' counsel, at their leisure, would have been able to conduct private, informal interviews of treating physicians in order to prepare for trial. Defense counsel, by contrast, would have been limited to costly formal discovery devices, like depositions, at which opposing counsel would almost certainly be present.

Such an unfair result is at odds with the Court's prior recognition of the value of informal interviews: '[c]ostly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly in-

interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information.[FN3] Additionally, the Appellate Division decisions permitted plaintiff's counsel to use the physician-patient privilege as a trial tactic, by which they could 'control to [their] advantage the timing and circumstances of the release of information [they] must inevitably see revealed at some time. '[FN4]

With Arons, Kish and Webb, the Court of Appeals has corrected these imbalances. As the Court stated, '[a] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover Facts critical to disputing the party's claim.[FN5] Thus, the Court's decision leveled the playing field by ensuring defense counsel equal access to relevant evidence and witnesses. Notably, the decision does not, nor could it, require treating physicians to speak to defense counsel. It merely ensures that defense counsel have the same right as plaintiffs' counsel to seek to meet privately with these potentially crucial witnesses. The physicians have the right to say 'no' to both sides or either side. Furthermore, it should be emphasized that all that is involved is the mere execution of an authorization. This is no more onerous than the issuance of authorizations for medical and employment records and the like.

Implications

In discussing the implications of the Arons decision, some members of the plaintiffs' bar have suggested that 'there is nothing stopping plaintiffs from informing doctors directly that while they are authorized to speak to defense counsel, it is their preference that they not do so.[FN6] This suggestion, at a minimum, implies that plaintiffs' attorneys should advise their clients to express such 'preferences' to their treating physicians. More seriously, the statement can be seen as a direct call for plaintiffs to pressure their treating physicians not to talk with defense counsel.

If this is indeed the intent of the statement, then it is at odds with the very purpose of the Arons decision, since it is clearly intended to limit defense counsel's access to treating physicians and effect a de facto return to the 'un-level playing field.'

Moreover, it is ironic that, at least implicitly, some plaintiffs' attorneys are recommending that treating physicians be pressured not to speak to defense counsel. The plaintiffs' bar has long made the unsubstantiated claim that defense counsel, in the context of ex parte interviews, will bring undue pressure to bear on treating physicians in order to dissuade them from testifying favorably for plaintiffs. Apparently, they see no logical inconsistency between this view and their tacit suggestion that it is acceptable for physicians to be pressured to withhold relevant information from the defense. Their real concern is not that physicians might be subject to undue pressure in a private meeting with defense counsel, but that they might offer candid opinions that support the defense. This, however, is hardly a justification for an uneven playing field.

Recently, some plaintiffs' attorneys have gone so far as to ask the courts to add to HIPAA authorizations that the plaintiff prefers his or her physician not to speak with defense counsel. Such a provision would not be permitted under Arons since its purpose was to give the parties equal access to relevant information. The decision to speak with defense counsel is that of the physician and it should be made free from influence by either side. Moreover, the Arons decision states that there is no need for placing additional conditions in the authorization because the execution of a valid authorization and the fact that the physician, under HIPAA, is permitted, but not required, to grant the interview will address any such concerns in the future.[FN7]

Likewise, there is no reason to think that the constraints imposed by HIPAA and the Public Health Law, together with treating physicians' own sense of discretion and obligation to their patients, would not provide adequate protection against the disclosure of still-privileged information. Indeed, the Court of Appeals noted that the danger that privileged matter might be disclosed is surely no greater than in the case of interviews of an opposing party's employees, since the subject matter of the interview or discussion — a patient's contested medical condition — will be readily definable and understood by a physician or other health care professional.

As the Court of Appeals recognized, where a plaintiff has placed his or her physical or mental condition at issue, treating physicians possess relevant and material information that is crucial to the case. No party, however, has a proprietary interest in that information and all parties must be afforded equal access to it. In the context of litigation, once the plaintiff has signed a HIPAA-compliant authorization, physicians are free to speak about the case with either side, just as other fact witnesses may meet with either side. They should be able to make that choice free from influence. Moreover, plaintiffs' counsel who seek to prevent defense counsel from conducting ex parte interviews ignore the fact that in some cases, a private meeting between a subsequent treating physician and defense counsel will facilitate the resolution of the case. If the physician offers a candid opinion that the defendant departed from accepted practice and thereby caused the injury at issue, the case is likely to settle quickly and obviate the need for a trial, a result that benefits both sides as well as the judicial system.

In sum, as has often been said, a trial is the search for the truth. The Arons decision simply reaffirms that principle.

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FN1. Arons v. Jutkowitz, – N.E.2d. –, 2007 WL 4163865 (N.Y. 2007).

FN2. See id.

FN3. Niesig v. Team, I, 76 NY2d 363, 372 (1990).

FN4. Doe v. Eli Lilly & C., 99 F.R.D. 126, 128-129 (D.D.C. 1983).

FN5. – N.E.2d. –, 2007 WL 4163865, quoting Dillenbeck v. Hess, 73 NY2d 278, 287 (1989).

FN6. See Thomas A. Moore and Matthew Gaier, 'Court OKs Ex Parte Interviews of Treating Doctors,' NYLJ, Dec. 4, 2007, page 3; see also Robert Tolchin, 'Advising Physician Client After 'Arons'', NYLJ, Dec. 5, 2007.

FN7. Arons at n. 6.
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