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## **MEMORANDUM IN OPPOSITION**

May 1, 2009

### **A.1254 (Lancman) / S.1514 (DeFrancisco) - An Act to restrict informal discovery**

**New Yorkers for Lawsuit Reform**, a broad based coalition of businesses, professionals, municipalities, not-for-profits, insurers, and concerned citizens urges **OPPOSITION** to the above referenced bill. This legislation, if enacted, would bar the use of informal discovery techniques in civil litigation recognized by New York's highest court, the Court of Appeals. The law would needlessly add to the enormous frictional costs present in civil litigation respecting personal injury cases in New York today.

A 2008 study by the Pacific Research Institute examining tort laws in the United States, gave New York extremely poor marks in comparison to other states. In fact, New York ranked dead last in 18 of 28 categories used to measure the efficiency of each states' tort system and overall was ranked number 48 out of all 50 states. This bill, rather than improving New York's adjudicatory process, represents one more step in the wrong direction. The bill should be held.

Generally, an individual's medical condition and medical records are subject to stringent privacy protections under both federal and state law. Additionally, federal law (Health Insurance Portability and Accountability Act - HIPAA) sets forth procedural safeguards governing the release of medical information. At the same time, it has long been the rule in New York, and all other states, that an individual seeking to secure money damages for bodily injury waives medical privacy protections otherwise applicable with respect to medical information bearing on the injury.

Recently, the Court of Appeals in *Arons v. Jutkowitz* 9NY 3<sup>rd</sup> 393 (2007) was asked to revisit the scope of informal discovery and addressed the question of whether a defense attorney can informally interview a plaintiff's treating physician respecting the plaintiff's medical condition in addition to, or in lieu of, utilizing formal discovery techniques, such as a deposition. The Court, after considering the statutory scheme governing disclosure, observed that the law was silent on the question, and reasoned that voluntary informal interviews could aid in the discovery process and could obviate the expense of more formal depositions. The Court further observed that the treating physician is at liberty to accept or decline the invitation, and as long as the defense counsel identifies his role, and the limited nature of the Plaintiff's inquiry, privacy rights remain safeguarded, except to the extent of the waiver implicit in the commencement of the action. In reaching its determination, the Court cited earlier precedent stating "A party should not be permitted to affirmatively assert a medical condition in seeking damages... while simultaneously relying on a confidential physician-patient relationship as a sword to thwart the opposition in its effort to uncover facts critical to disputing the party's claim."

Finally, the legislation, if enacted, would continue to permit the gathering information by Plaintiff's attorneys via *ex parte* communication with treating physicians while expressly denying the defense bar the same opportunity. Fostering an unlevel playing field respecting the discovery of evidence has no salutary purpose.

For all the foregoing reasons, **New Yorkers for Lawsuit Reform** urges that this bill be held.

Respectfully submitted,

Mark C. Kriss  
Executive Director  
**New Yorkers for Lawsuit Reform**