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31 MAP 2023

IN THE SUPREME COURT OF PENNSYLVANIA

No. 31 MAP 2023

Bobbi Ann Mertis and Joeph Mertis

v.

Dong-Joon Oh, M.D., North American Partners in Anesthesia (Pennsylvania), LLC, Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital and Commonwealth Health

Appeal of: Dong-Joon Oh, M.D.

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE PENNSYLVANIA MEDICAL SOCIETY AS AMICI CURIAE IN SUPPORT OF APPELLANT

On Allowance of Appeal of the August 2, 2022 Order of the Superior Court in Case No. 1547 MDA 2021 (reargument denied October 17, 2022), Reversing the October 28, 2021 Order of the Court of Common Pleas of Luzerne County in Case No. 2017-9655

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Statement of Interest of Amici Curiae[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Pennsylvania. In support of its mission, the AMA regularly participates as amicus curiae in state and federal courts, including Pennsylvania courts.

The Pennsylvania Medical Society (PAMED) is a Pennsylvania nonprofit corporation that represents physicians of all specialties and is the Commonwealth's largest physician organization. PAMED regularly participates as amicus curiae before the Pennsylvania Supreme Court

[1] No other person or entity other than the AMA or PAMED, their members, or their counsel, paid in whole or in part for preparing this Amici Curiae Brief. *See* Pa.R.A.P. 531(b)(2).

in cases raising important healthcare issues, including issues that have the potential to adversely affect the quality of medical care.

The AMA and PAMED appear for themselves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of all states and the District of Columbia. The mission of the Litigation Center is to represent the interests of patients and physicians in the courts of the United States, according to policies of the AMA.

The AMA and PAMED submit this Brief in support of Appellant, Dong-Joon Oh, M.D. Amici have a substantial interest in the outcome of this case. Pennsylvania courts should not apply procedural discovery rules in medical-malpractice litigation in a way that cabins the constitutional right of physicians like Dr. Oh and Dr. Eugene Kim, M.D., to choose counsel to represent them. This Court should reverse the Superior Court's order, and correct its misinterpretation and misapplication of Pa.R.Civ.P. 4003.6.

Summary of the Argument

The Court should reverse, and quelch the widespread, potentially deleterious effects of the Superior Court's precedential decision.

First, the Superior Court usurped this Court's authority as promulgator and interpreter of procedural rules. The Superior Court erroneously interpreted Rule 4003.6, a discovery rule, as a rule of attorney disqualification. Arguments to make it an ethics rule are unsustainable and illogical.

Second, the Superior Court's decision improperly fetters Pennsylvania physicians' constitutional right to counsel of their choice when they are involved in litigation.

Third, if patient privacy is a chief concern underlying Rule 4003.6, federal law also protects health information. This federal protection renders unnecessary the need to transmogrify the Rule into an attorney-disqualification rule.

Argument

This case gives the Supreme Court the opportunity to remind lower courts to enforce straightforward text when applying unambiguous discovery rules, and not to apply a judicial gloss that

obscures rules' meaning. The Superior Court engrafted an extra-textual requirement onto Rule 4003.6 that dims the right of Pennsylvania physicians to choose their lawyers when involved in litigation.

Claiming injury resulting from anterior cruciate ligament (ACL) knee reconstruction surgery, Appellee, Bobbi Ann Mertis, sued Dr. Oh, the anesthesiologist for the surgery, and other defendants for medical malpractice. Mertis claims that she sustained a permanent injury because Dr. Oh and others failed to obtain informed consent to perform a femoral nerve block, an analgesic procedure, for her knee surgery.

Mertis did not sue Dr. Kim, the orthopedist who performed the surgery, but her complaint was critical of Dr. Kim's care:

> 30. Dr. Kim did not identify an anesthetic plan for the procedure.
>
> * * *
>
> 35. Mrs. Mertis was not advised of any of the risks associated with femoral nerve blocks.
>
> * * *
>
> 41. At no time was Mrs. Mertis[] advised of any alternatives to a femoral nerve block.
>
> 42. Neither the defendant physicians, nor Dr. Kim, warned Mrs. Mertis of the risks associated with femoral nerve blocks.
>
> * * *

> 87. Dr. Kim told Mrs. Mertis that the *ACL reconstruction* was doing well, but this time he did not provide Mrs. Mertis with an outlook or prognosis for recovery from her femoral nerve injury.
>
> 88. Instead, Dr. Kim volunteered to Mrs. Mertis that *he* did not cause her symptoms and that *he* did not do anything wrong during the ACL reconstruction.

(R. 46a, 47a, 52a (emphases in original).) Mertis attached to her motion a post-operative note from Dr. Kim noting issues about her femoral nerve block. (R. 75a-76a, 78a-79a.) And she subpoenaed Dr. Kim for deposition. (R. 83a-84a.) Dr. Kim requested that he be represented by the same law firm that was defending Dr. Oh. Mertis objected raising an alleged "conflict of interest."

Mertis moved to disqualify defense counsel, alleging that Rule 4003.6—a procedural discovery rule—required the trial court to disqualify defense counsel. Although unclear at other points, Mertis's motion unambiguously sought to disqualify defense counsel from representing "any party *or witness* in this case." (R. 23a (emphasis added).) Mertis did not request an evidentiary hearing, and the trial court did not hold one. The trial court denied the motion after hearing oral argument. The Superior Court reversed, holding that permitting the same law firm to represent a defendant-doctor and a nonparty-

doctor violated Rule 4003.6's alleged prohibition of ex parte communications with a party's treating physician. (*See* Appellant's Br. App. C.)

I. The Superior Court erroneously interpreted Rule 4003.6 and neglected to apply its plain text.

Rule 4003.6 is a civil discovery rule. It does not limit what parties may obtain in discovery or who lawyers may represent. Thus, the Rule does not mention attorney ethics:

> Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule shall not prevent an attorney from obtaining information from
>
> (1) the attorney's client,
>
> (2) an employee of the attorney's client, or
>
> (3) an ostensible employee of the attorney's client.

Pa.R.Civ.P. 4003.6.

This Court promulgated Rule 4003.6 in 1991 on an emergency basis under Pa.R.J.A. 103(a)(3), which permits adoption of rules without a proposed notice of rulemaking or receipt of comments in some cases. *See* 21 Pa. Bull. 2337-38 (May 18, 1991). Thus, no committee report exists. The Court does not need such legislative history, though, to conclude that the Rule neither dictates who attorneys may represent

nor permits attorney disqualification as a remedy.

Rule 4003.6 controls *how* parties may obtain discovery from treating physicians and aims to protect that patient-physician relationship. *Marek v. Ketyer*, 733 A.2d 1268, 1270 (Pa. Super. 1999). It also levels the playing field since, in litigation, plaintiffs' attorneys have unfettered access to their own client's treating physicians. As a procedural discovery rule, however, Rule 4003.6 does not discuss or delineate the statutory physician-patient privilege. It does not regulate the practice of law. And it neither suggests nor imposes ethical restraints on lawyers, who lawyers may take on as clients, or who physicians may choose as lawyers.

A. Mertis's privacy rights are not at issue.

Rule 4003.6 protects a patient's privacy and recognizes a physician's duty of loyalty to a patient. *Marek*, 733 A.2d at 1270. But when Mertis sued Dr. Oh., she waived any physician-patient privilege for information about the knee surgery performed by Dr. Kim. 42 Pa.C.S. § 5929. And Mertis did not—and could not—claim that Dr. Oh's attorneys obtained otherwise privileged or non-discoverable information when Dr. Kim asked that those same attorneys also represent him.

This is so, because Mertis's medical-malpractice claim arises from a discrete event: ACL reconstruction surgery. Dr. Oh was the anesthesiologist, and Dr. Kim was the orthopedist for that surgery. Neither doctor had a long-term patient-physician relationship with Mertis. The Superior Court divined a purpose in Rule 4003.6, "to protect the confidential nature of physician-patient relationships." *Marek*, 733 A.2d at 1270. But that purpose was not at issue. Mertis's only contact with Dr. Oh and Dr. Kim was a single event: the knee surgery that gave rise to her suit. Thus, no danger of "unfettered disclosure" of "irrelevant medical testimony" existed, *id.*

B. Ethical rules already constrain unscrupulous attorneys from manipulating witnesses.

In the lower courts, Mertis argued that her interpretation of Rule 4003.6 is necessary to prevent defense attorneys from contacting ex parte a plaintiff's physicians to mold or shape those physicians' testimony. (*See* R. 251a.) By this argument, Mertis insults both doctors and lawyers.

No evidence of actual witness tampering exists. In fact, Mertis presented no evidence of any kind in the trial court to support her motion to disqualify, but offered argument only about hypothetical

improper influence. (R. 251a.) The trial court denied the motion after hearing only oral argument. Mertis's supposition and conjecture are not stand-ins for actual proof. And her hypothetical withers under scrutiny.

Non-medical witnesses have no discovery-rules-based protection. Attorneys may contact non-physician nonparties at their leisure, subject to existing ethical restraints. Mertis never explained why physicians are especially vulnerable and need to be treated differently than non-physicians in this particular instance. She never explained why doctors could be hoodwinked into providing certain evidence or testimony. And other reasons dissuade doctors from discussing confidential patient information with lawyers. More on that below.

Mertis's argument also assumes the worst from lawyers: that they will scour hospital corridors seeking to cajole treating physicians to suggestively shape their testimony. This depressingly cynical view of lawyers cannot support an extra-textual gloss on a discovery rule.

Another problem exists with Mertis's dim view of attorneys. Rule 4003.6 permits ex parte interviews with treating physicians if the patient consents. Of course, all plaintiffs in medical-malpractice

litigation will consent to have their own attorneys contact and speak with their own physicians. If a danger exists that attorneys will influence physicians into testifying a certain way, it exists on both sides of the litigation "v." Yet, given how litigation works, Rule 4003.6 will never prevent attorneys from informally interviewing their own clients' doctors. If Rule 4003.6 were designed to prevent witness tampering, then it would prohibit *all* attorneys from ever contacting a doctor outside of formal discovery.

Even taking Mertis's Mephistophelean view of lawyers, rules already exist to curtail unscrupulous conduct with witnesses. Pa.R.P.C. 4.2 prevents lawyers from communicating directly with represented persons absent consent or authorization by law or court order. Rule 4.3 contains requirements when dealing with unrepresented persons. And Rule 4.4(a) prevents lawyers from obtaining evidence that violates a third person's rights.

Courts may use these rules to curtail actual witness tampering or improper conduct if it happens. And they have. In *McCarthy v. SEPTA*, 772 A.2d 978, 989-90 (Pa. Super. 2001), the plaintiff's attorney surreptitiously obtained witness statements from current and former

employees of SEPTA, the defendant in the lawsuit. The trial court disqualified the attorney for violating Rule 4.2. The Superior Court, however, held that disqualification was an abuse of discretion. *McCarthy*, 772 A.2d at 989. Though *McCarthy* involved lay witnesses, it shows that framework already exists if attorneys use improper means to unduly influence *any* witness, including treating physicians.

C. Purpose and spirit cannot override a rule's text, especially if they lead to absurd results.

Mertis also argued that the Superior Court should enforce the "purpose and spirit," or the "spirit and policy" of Rule 4003.6. This euphemistic argument is the last refuge of a litigant seeking a non-textual interpretation of a rule or a statute. It shows the flaw in Mertis's position and the Superior Court's decision. The Superior Court added language to Rule 4003.6 based on its vision. That added language *requires* that different law firms represent a non-party treating physician and a defendant treating physician. The Superior Court could not cite Rule 4003.6's text, and cited no other authority, to support its interpretation.

Worse, this interpretation has it backwards. When interpreting procedural rules, as with statutes, courts must apply the plain text.

Pa.R.Civ.P. 127(b). Courts cannot forsake that plain text in search of a rule's supposed "spirit." *Id.* After all, the rules-interpretation is supposed to "ascertain and effectuate" this Court's intention. Pa.R.A.P. 127(a). By its plain, simple text, Rule 4003.6 does not prohibit the same attorney from representing a physician-defendant and a physician-non-party in the same lawsuit.

The Superior Court's decision also creates the potential for absurd results. *Cf.* Pa.R.Civ.P. 128(a) (requiring courts interpreting rules to presume that this Court does not intend an absurd result). In modern medicine, patients often encounter multiple medical providers. This situation occurs even for simple medical care. During a routine visit to a primary care physician, a patient may encounter technicians, registered nurses, physician's assistants, and doctors. Or, as here, a patient who undergoes a single procedure may require the services of nurses, an anesthesiologist, the orthopedic surgeon and team that perform the surgery, and another team of professionals who handle post-operative care and physical therapy. These people may be employees or ostensible employees of the same medical provider. Or, as here, they may be employees or ostensible employees of different medical systems.

In litigation arising from these common situations, the Superior Court's decision would prevent the same attorneys from representing two treating physician-*defendants*. Under the Superior Court's formulation, if Rule 4003.6 never "envisioned" the same attorney representing a treating physician defendant and a treating physician non-party, it also did not envision the same attorney representing two physician-defendants who are not employees or ostensible employees of the attorney's healthcare-provider client. Again, the Superior Court cited no authority for this interpretation of Rule 4003.6. There is none. Discovery rules are just that: rules about discovery in civil actions. They do not, by their terms, govern attorney ethics or when and how an attorney may represent multiple clients in litigation.

Finally, even taking as correct the Superior Court's interpretation of Rule 4003.6 and the finding of a violation, the decision conflicts with other cases. The Superior Court ordered the trial court to levy sanctions (what sanctions it did not say) based solely on the alleged Rule 4003.6 violation. Other cases require actual prejudice for a court to impose sanctions under Rule 4003.6. *See Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 611 (Pa. Super. 2005). In *Alwine*, the Superior Court refused

to order a new trial even though defense counsel spoke to the plaintiff's treating physician outside of formal discovery. *Id.* The *Alwine* court contrasted its holding with *Marek*, in which defense counsel hired the plaintiff's treating physician as a defense expert to testify at trial. *Id.* *Alwine* tracks how courts generally address discovery violations. Discovery sanctions "must be appropriate when compared to the violation," and a court must consider the prejudice caused to the opposing party and whether it can be cured. *Reilly v. Ernst & Young, LLP*, 929 A.2d 1193, 1200 (Pa. Super. 2007).

The Superior Court did not distinguish *Alwine*, which requires a showing of prejudice for the routine remedy of evidentiary exclusion based on a Rule 4003.6 violation. By stronger reasoning, prejudice must be required for the most extreme sanction of disqualifying counsel. Disqualification of counsel is a last resort, not a first option. *See Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 80 (Pa. Super. 2005).

D. The Rules do not include disqualification of counsel as a remedy for discovery violations.

One final principle undermines the Superior Court's decision. Courts must interpret rules on the same subject *in pari materia.* Pa.R.Civ.P. 131.

Rule 4003.6 falls within the chapter on depositions and discovery. That same chapter addresses discovery sanctions. Pa.R.Civ.P. 4019(c) lists sanctions available to a trial court to punish discovery violations. The Rule 4019(c) subsection does not include disqualification of counsel as a permissible sanction. And, as mentioned above, disqualification is a last resort. *Weber*, 878 A.2d at 80. Rule 4019(c)(5) has a catchall provision, but it refers to the "failure to make discovery," not more broadly to a violation of the discovery rules.

Courts should interpret rules on discovery like Rules 4003.6 and 4019 *in pari materia*. Pa.R.Civ.P. 131. Rule 4003.6 limits the methods of obtaining discovery from treating physicians. Rule 4019(c) lists available sanctions for discovery violations. Construing the two rules *in pari materia* suggests that, if this Court wanted to allow a trial court to disqualify counsel for a violation of Rule 4003.6 (or any discovery violation), it would have said so in Rule 4019(c) or 4003.6. Amici do not challenge courts' authority to remove counsel from a case for an *ethical* violation if disqualification is necessary to ensure a fair trial. But Mertis did not argue that an ethical violation occurred. And a "violation" of Rule 4003.6 is not automatically an ethical violation. Like

Rule 4003.6, Mertis's requested remedy finds no textual support in Rule 4019(c).

* * *

In divining the supposed spirit of Rule 4003.6, the Superior Court erroneously engrafted extra-textual substance onto that rule. Mertis's arguments cannot sustain her endeavor. Patient privacy, ethical concerns, or the Rule's supposed spirit cannot support the Superior Court's interpretation. This Court should reverse.

II. The Superior Court's decision improperly restricts physicians' constitutional right to choose counsel to represent them in litigation.

The Superior Court's decision also arbitrarily limits Pennsylvania physicians' constitutional right to choose counsel. Thus, the Superior Court's extra-textual interpretation unwittingly creates constitutional concerns.

The First Amendment to the United States Constitution, applicable to the states by the Fourteenth Amendment, protects the right to consult and hire counsel of one's choosing in civil litigation. *Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 509 F. Supp. 3d 212, 230 & n.8 (M.D. Pa. 2020), *appeals pending*, Nos. 18-2297, 18-2323, 19-1058,

21-1099 & 21-11155 (3d Cir. Jan. 19, 2021), *pet. to certify question*, 2023 WL 2421665, 2023 U.S. App. LEXIS 5771 (3d Cir. Jan 19, 2023), *pet. granted*, No. 7 EAP 2023 (Pa. Mar. 8, 2023). Although people have no right to court-appointed and paid-for counsel in most civil cases,[2] they do have a right to choose and pay for a qualified attorney to represent them.

The right to choose counsel flows from the constitutional guarantee of freedom of speech, association, and petition. *Denius v. Dunlap*, 209 F.3d 944, 953-54 (7th Cir. 2000). The right to retain and consult an attorney implicates these "clearly established First Amendment rights." *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

A person has a right to choose counsel regardless of whether they

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[2] In Pennsylvania, parents have a due process right to court-appointed counsel in proceedings to involuntarily terminate their parental rights. *In re Adoption of R.I.*, 312 A.2d 601, 602 (Pa. 1973).

Pennsylvania grants the right to court-appointed counsel in other matters by statute or rule. For example, proceedings under the Post Conviction Relief Act are "civil in nature." *Commonwealth v. Haag*, 809 A.2d 271, 284 (Pa. 2002) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987)). Yet, PCRA petitioners have a rules-based right to counsel. *See* Pa.R.Crim.P. 904. Similarly, indigent parties in dependency or delinquency proceedings under the Juvenile Act are entitled to court-appointed counsel. 42 Pa.C.S. §§ 6337-37.1. Also, persons subject to involuntary mental-health commitment have the right to counsel. 50 P.S. § 7304(e)(1).

are an involved litigant or a third party to the litigation—disinterested or otherwise. The First Amendment protects individuals' and groups' rights to "consult with an attorney on any legal matter." *Denius*, 209 F.3d at 954. Thus, a person need not be a defendant named in litigation to have the right to choose and consult counsel. *See NAACP v. Button*, 371 U.S. 415, 435-36 (1963). In *Button*, the NAACP provided or obtained pro bono attorneys to represent certain litigants to further the organization's goals of eliminating segregation and securing racial equality. The NAACP argued that a Virginia law prohibiting solicitation of legal business by an organization unconnected to the litigation, like the NAACP, was unconstitutional. *Id.* at 423. The Supreme Court agreed, finding it "apparent" that the Virginia law violated the NAACP's First Amendment freedom of association. *Id.* at 437; *see also In re Abrams*, 465 N.E.2d 1, 7 (N.Y. 1984) (noting that, in a grand jury investigation, witnesses' right to choose counsel implicated the First Amendment guarantee of freedom of association and the Sixth Amendment right to counsel).

This constitutional right prevents a state from arbitrarily restricting the right to choose counsel. In *Wolf*, for example, the court

held that Pennsylvania could not require the Joint Underwriting Association to yield to representation by the Office of Attorney General in litigation.[3] *Wolf*, 509 F. Supp. 3d at 230-31. Pennsylvania has also long recognized the right of litigants in civil cases to be represented by counsel as an "integral part" of due process. *Nestor v. George*, 46 A.2d 469, 473 (Pa. 1946). The Judicial Code codifies the right of civil litigants to choose their counsel:

> In all civil matters before any tribunal every litigant shall have a right to be heard, by himself and his counsel, or by either of them.

42 Pa.C.S. § 2501(a). This provision reenacts almost verbatim a 200-year-old statute, which provided:

> In all civil suits or proceedings in any court within this commonwealth, every suitor and party concerned, shall have a right to be heard, by himself and counsel or either of them. . . .

An act to regulate Arbitrations and Proceedings in the Courts of Justice, Act of Mar. 21, 1806, P.L. 558, 565, No. 174, § 9 (4 Sm. Laws

[3] The Joint Underwriting Association offers medical professional liability insurance to healthcare providers that cannot conveniently obtain such insurance through ordinary methods at market rates. *See* 40 P.S. § 1303.732(a). By the Act of June 28, 2019, P.L. 101, No. 15, § 7, the General Assembly sought to classify the Association as a Commonwealth agency, which required that the Office of Attorney General represent it in litigation. This Court is considering whether the Joint Underwriting Association is a public or private entity at No. 7 EAP 2023, on certification from the Third Circuit.

326, § 9), *repealed*, Judiciary Act Repealer Act, Act of Apr. 28, 1978, P.L. 202, No. 53, § 2(a). Implicit in Pennsylvania's centuries-old law is litigants' right to choose whatever qualified attorneys they want to represent them. The right to be represented by counsel would be a hollow promise if it did not include the right to *choose* that counsel.

Amici have no problem acknowledging that this right to choose counsel is not absolute. *McCarthy*, 772 A.2d at 1005 (quoting *Snyder v. Port Author. of Allegheny County*, 393 A.2d 911, 995 (Pa. Super. 1978)). But any qualified right melts away if subject to arbitrary, non-textual limitations like the Superior Court's interpretation of Rule 4003.6. Indeed, the disqualification standard recognizes the constitutional and statutory rights to choose counsel. Disqualification is proper only when needed to "ensure that the parties receive the fair trial that due process requires." *McCarthy*, 772 A.2d at 989. Disqualification also requires that a court find an ethical violation before disqualifying counsel. *Id.*

So even an alleged violation of ethics rules does not, by itself, require disqualification. *Id.* at 991-92. No evidence of *ethical* impropriety exists here. Further nothing in Rule 4003.6 anticipates disqualification as a potential remedy for any violation (again,

assuming a violation).

Dr. Kim is not a defendant, because Mertis did not name him in her complaint. Mertis, though, implicated his care in her pleadings. It is understandable why Dr. Kim wanted an attorney present when questioned under oath about his treatment of Mertis. It is also understandable why Dr. Kim wanted the same lawyer who represented him in another matter to represent him. Dr. Kim had a constitutional right to select counsel of his choice. Yet the Superior Court summarily dismissed Dr. Kim's request, remarking in passing that his choice "should be afforded appropriate deference." In fact, the court gave no deference to Dr. Kim's choice of counsel.

The Superior Court's decision prevents Dr. Kim from exercising his right to counsel of his choice. The decision also potentially prevents Dr. Oh's counsel—who have been his attorneys for years of litigation—from continuing to represent him. Thus, well into this case, Dr. Oh confronts the potential need for a new law firm to defend him.

The Superior Court should not have summarily dismissed a physician's right to choose counsel for litigation. Five reasons show why.

First, medical-malpractice litigation has special substantive and

procedural rules, and a specialized bar that represents plaintiffs and defendants. The healthcare industry is highly regulated, and effectively representing litigants in medical-malpractice litigation requires training, experience, and knowledge of special rules. Physicians are subject to innumerable laws and regulations that govern everything from what clothes they may wear, how they may care for patients, and how they may bill for services. These laws and regulations in turn affect the claims that patients may file against doctors.

Second, some Pennsylvania laws apply only to medical-malpractice litigation, including the MCARE Act.[4] Also, special procedural rules apply only to medical-malpractice cases. For example, Pa.R.Civ.P. 1042.21 permits a healthcare provider to move for a settlement conference or mediation before exchange of expert reports. Rule 1042.71 provides for damages findings by the factfinder at trial. And Rule 1042.3 requires plaintiffs filing professional-liability actions (including medical-malpractice actions) to obtain a certificate of merit from an appropriate professional. Medical-malpractice plaintiffs almost

[4] Medical Care Availability and Reduction of Error (MCARE) Act, Act of Mar. 20, 2002, P.L. 14, No. 13, *as amended*, 40 P.S. § 1303.101, *et seq.*

always need expert testimony to prove liability. *See Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225, 1230 (Pa. Super. 2014) (citing *Jones v. Harrisburg Polyclinic Hosp.*, 437 A.2d 1134, 1137 (Pa. 1981)). Indeed, this Court recognizes the special nature of medical-malpractice litigation, because it collects data on those cases. *See* Pa. Sup. Ct., *Medical Malpractice Statistics*, https://www.pacourts.us/news-and-statistics/research-and-statistics/medical-malpractice-statistics.

Third, physicians implicated in a lawsuit (whether directly like Dr. Oh, or indirectly like Dr. Kim) have a lot at stake. Litigation entails obvious stress. Even a meritless malpractice claim could raise a physician's insurance premiums. Such claims could make a physician less attractive to employ. This factor affects the physician's livelihood. For this reason and others, many medical professional liability insurance policies require the physician's consent to settle a claim. *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 837 (3d Cir. 1995). Plus, federal and state law mandate reporting of settlements of all medical-malpractice claims. 42 U.S.C. § 11131; 40 P.S. § 1303.746.

Fourth, medical professionals are vital to society. All Pennsylvanians will need the care of a physician at some point in their

lives. Physicians perform an essential function in providing necessary services to Pennsylvanians. Simply put, the practice of medicine is, many times, a matter of life or death.

Fifth, becoming a physician is not easy. Aspiring doctors must attend and graduate from a four-year college. While in college, they must prepare for and take the Medical College Admission Test. Then, they must apply and be accepted to a medical school, and undergo another four years of education. Prospective physicians must pass the United States Medical Licensing Examination or the Comprehensive Osteopathic Medical Licensing Examination, match with a residency, graduate from medical school and serve three to five years as a resident. Residents generally work long hours and earn less than attending physicians or general practitioners. Becoming a physician is a journey that requires years of study, preparation, and investment.

Malpractice claims threaten that investment, and expose physicians to ignominy and loss of livelihood. Physicians have a vested interest in aggressively defending against those claims. They also have many reasons to want a good lawyer—a lawyer who specializes in medical malpractice, a lawyer who they know and trust.

In this case, Dr. Kim performed Mertis's knee surgery. She did not sue him, but she still criticized Dr. Kim's care in a public court filing. For example, in ¶ 42 of her second amended complaint, Mertis claims that Dr. Kim never informed her of the risks associated with femoral nerve blocks, the specific procedure that Mertis claims led to her injuries. (R. 47a.) And as part of her lawsuit against the Dr. Oh, Mertis demanded that Dr. Kim appear for a deposition and bring with him all records related to the surgery.

Dr. Kim requested that his insurance carrier appoint Dr. Oh's attorney not for some nefarious reason, but because those attorneys had represented him in another matter. They are good attorneys. The record contains no evidence that Dr. Oh's lawyers agreed to represent Dr. Kim to gain an advantage. Also notable: Dr. Kim requested that defense counsel represent him—not vice versa. In this regard, the Superior Court's decision conflicts with *Alwine*, a case with an actual Rule 4003.6 violation, and suggests a sanction more severe than in *Marek*, a case with an actual violation plus actual prejudice.

To be sure, the constitutional right to choose counsel is not unlimited. Courts may restrict a person's ability to choose a lawyer by

"regulation designed to provide for overriding state interest." *Powell v. Unemp. Comp. Bd. of Rev.*, 157 A.3d 884, 894 (Pa. 2017). In *Powell*, for example, this Court held that a claimant in unemployment-compensation proceedings could not choose as his counsel a formerly admitted attorney. But, contrasted with this case, *Powell* involved a violation of Pennsylvania Rule of Disciplinary Enforcement 217(j), under which formerly admitted attorneys cannot practice law.

This case lacks an "overriding state interest" that could justify an arbitrary restriction on the right to choose counsel. Unlike *Powell* and *McCarthy*, this case is about a procedural discovery rule that regulates how parties may seek discovery from treating physicians. No "overriding state interest" to justify restrictions on the right to choose counsel appears in Rule 4003.6's plain text. That text places no restrictions on attorneys' ability to represent clients, or on prospective clients' right to choose attorneys to represent them.

Despite no evidentiary record, the Superior Court rejected Dr. Kim's request that Dr. Oh's lawyers represent him at his deposition. The Superior Court's decision prevents Dr. Kim from having his counsel of choice. It threatens to remove Dr. Oh's lawyers even though they

represented him for years of litigation. It upends physicians' ability to have the lawyer of their choice at their side when their livelihoods and professional reputations are at stake.

Finally, the Superior Court's opinion does not address the possibility that litigants may use disqualification motions under Rule 4003.6 as a tactical maneuver. What better strategy to win a football game than to force the other team to bench its star quarterback? In fact, in the trial court, Dr. Kim accused Mertis's attorneys of using tactical disqualification motions in other cases. (R. 136a, 252a.) Timing emphasizes the apparent tactical nature of Mertis's motion. She raised no objection to Dr. Kim's choice of counsel for over half a hear after learning that he was represented by the same law firm as Dr. Oh. (*See* R. 131a, 177a,, 252a.)

Rule 4003.6 is not an ethics rule and thus contains no guidance on when one must seek disqualification. But generally, a party who intends to raise a conflict must do so "at the earliest possible moment." *Cf. Lomas v. Kravitz*, 170 A.3d 380, 389 (Pa. 2017) (holding that appellant waived request to disqualify trial judge when he waited one year to request recusal). Judicial disqualification motions are not a

perfect analogy, but they are close enough to attorney disqualification motions. An attorney who seeks to disqualify opposing counsel should not be able to delay when filing such a motion. In short, the delay in time here suggests a tactical nature to the motion to disqualify.

* * *

Besides the plain text of Rule 4003.6, proper analysis of a disqualification request should include a regard for physicians' constitutional right to choose litigation counsel. Nothing in Rule 4003.6's text limits that right. The Superior Court did not consider physicians' right to choose counsel, or the effects of its decision to engraft language onto the Rule. This Court should reverse.

III. Because federal law also protects patient privacy, no need supports turning Rule 4003.6 into an attorney-disqualification rule.

The Superior Court interpreted Rule 4003.6 to "implicitly" reflect concern for the privacy of the patient-physician relationship. (Appellant's Br., App. C.). Using that concern, however, to elevate Rule 4003.6 to an attorney ethics rule permitting disqualification is unnecessary. Federal law also protects private health information, obviating a need for an interpretation that strays from Rule 4003.6's

text.

Five years after this Court promulgated Rule 4003.6, Congress passed the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[5] HIPAA is not a privacy statute, and it does not confer privacy rights or a cause of action on patients filing state-law malpractice suits. Instead, its Privacy Rule prevents unauthorized access and disclosure of private medical information by covered entities. *See* 42 U.S.C. § 1320d-6; 45 C.F.R. Part 160, Part 164, Subparts A & E. Physicians fall within HIPAA's definition of "covered entity," because they are healthcare providers. *See* 45 C.F.R. § 160.103 (defining "covered entity" to include, "[a] health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter"). HIPAA thus regulates how and when physicians may disclose private information about their patients, including in litigation.

Patients waive physician-patient privilege when they sue for medical malpractice in states that recognize such a privilege. *See* 42 Pa.C.S. § 5929. By contrast, HIPAA's Privacy Rule does not disappear

[5] Pub. L. No. 104-191, 110 Stat. 1936 (codified at 42 U.S.C. § 1320d, *et seq.*).

merely if an individual files a lawsuit. HIPAA instead regulates how a covered entity may disclose protected health information in response to a judicial subpoena. *See* 45 C.F.R. § 164.512(e). A covered entity may disclose protected health information in response to a court order expressly authorizing disclosure. *Id.* § 164.512(e)(1)(i).

For subpoenas without an accompanying court order, the regulations have complex requirements. A covered entity may disclose protected health information:

> **(ii)** In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> > **(A)** The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
> >
> > **(B)** The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.
>
> **(iii)** For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party

seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

> **(A)** The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);
>
> **(B)** The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and
>
> **(C)** The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
>
> > **(1)** No objections were filed; or
> >
> > **(2)** All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

> **(A)** The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

> **(B)** The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
>
> **(v)** For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> > **(A)** Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
> >
> > **(B)** Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 C.F.R. § 164.512(e)(1)(ii) – (iv). Reduced somewhat to plain English, a party seeking the protected health information must make reasonable efforts to notify the individual of the request, or obtain a qualified protective order to the satisfaction of the covered entity.

Further, HIPAA regulations define "health information" to include information in any form, including "oral" that is created or received by, among other entities, a healthcare provider; and relates the "past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past,

present, or future payment for the provision of health care to an individual." 45 C.F.R. § 160.103. This definition is broad enough to cover most patient-physician confidences, and it is broader than Pennsylvania's statutory physician-patient privilege.

HIPAA imposes criminal penalties for knowing unauthorized disclosure of "individually identifiable health information":[6] up to one year in prison and a fine of up to $50,000. 42 U.S.C. § 1320d-6(b)(1). More severe punishments exist for offenses committed under false pretenses or with the intent to sell, transfer, or use the individually identifiable health information for commercial advantage, personal gain, or malicious harm. *Id.* § 1320d-6(b)(2) and (3); *see, e.g.*, *United States v. Luthra*, 970 F.3d 8 (1st Cir. 2020) (upholding criminal conviction of doctor who violated § 1320d-6 by showing patient records to pharmaceutical representative). HIPAA also imposes civil penalties for failure to comply with requirements and standards. 42 U.S.C. § 1320d-5.

HIPAA does not create a physician-patient privilege. *T.M. v.*

[6] "Individually identifiable health information" is information created by a healthcare provider or other covered entity that relates to a person's physical or mental health, and identifies the individual or has information for which there is a reasonable basis that could be used to identify the individual. 42 U.S.C. § 1320d(6).

Elwyn, Inc., 950 A.2d 1050, 1059 (Pa. Super. 2008). And it neither permits nor prohibits ex parte interviews of treating physicians. *EEOC v. Boston Mkt. Corp.*, No. 03-4227 2004 WL 3327264, at *5, 2004 U.S. Dist. LEXIS 27338, at *16 (E.D.N.Y. Dec. 16, 2004). But in jurisdictions that permit them, ex parte interviews are still subject to HIPAA regulations. *See Caldwell v. Chauvin*, 464 S.W.3d 139, 159-60 (Ky. 2015); *Holman v. Rasak*, 785 N.W.2d 98, 107-08 (Mich. 2010); *Holmes v. Nightengale*, 158 P.3d 1039, 1044 (Okla. 2007); *see also Smith v. Am. Home Prods. Corp*, 855 A.2d 608, 610 (N.J. Super. Law Div. 2003) (holding that HIPAA does not preempt New Jersey's procedures for obtaining informal discovery from treating physicians). Though HIPAA neither creates privacy rights nor prohibits informal interviews, it does require that interviewee-physicians comply with regulations about disclosure.

HIPAA overlaps, in part, with Rule 4003.6. Rule 4003.6 requires formal discovery or consent to obtain information from a party's treating physician. HIPAA prevents those same treating physicians from divulging protected health information in litigation absent compliance with the applicable regulation. If patient privacy is a chief

concern of Rule 4003.6, HIPAA addresses that concern by prohibiting willy-nilly disclosure of protected health information by treating physicians. HIPAA backs up its regulations with the force of the federal government, a formidable deterrent. Thus, no need supports engrafting attorney-disqualification language onto Rule 4003.6.

Returning to Mertis, this case implicates no privacy concerns. Mertis could not assert a privacy infringement. Dr. Kim treated her only for the ACL reconstruction surgery and post-operative treatment, and Dr. Oh performed only surgical anesthesia. Mertis was not Dr. Kim's or Dr. Oh's longtime patient, so neither doctor possessed privileged information irrelevant to her lawsuit. Mertis further could not credibly claim protections under HIPAA. After all, she subpoenaed Dr. Kim and required him to produce at the deposition any documents pertaining to her surgery. (R. 83a.) She also could have consented to allow her own attorneys to contact Dr. Kim.

Thus, the privacy concerns underlying Rule 4003.6 do not apply here. They are less useful generally, given HIPAA's Privacy Rule, which regulates disclosure of healthcare information. Privacy concerns thus do not support the Superior Court's decision to effectively bar the same law

firm from representing a defendant-doctor and a witness doctor in litigation.

Conclusion

The Supreme Court should reverse the Superior Court's order and remand with instructions to reinstate the trial court's order denying Mertis's motion to disqualify Dr. Oh's counsel.

Respectfully submitted,

Dated: May 2, 2023

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Combined Certificates of Compliance

This Brief contains 6,862 words (exclusive of supplementary matter). In preparing this certification, I relied on the word count of the word processing system used to prepare the brief.

I certify that this Brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information differently than non-confidential information.

Dated: May 2, 2023

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Certificate of Service

The Brief of Amici Curiae, The Pennsylvania Medical Society and the American Medical Association, is being filed by electronically under Pa.R.A.P. 125.

This Brief is being served on all counsel of record by first-class mail, electronic filing, facsimile, or email, which satisfies the requirements of Pa.R.A.P. 121.

Dated: May 2, 2023

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IN THE SUPREME COURT OF PENNSYLVANIA

Bobbi Ann Mertis and Joeph Mertis	:	31 MAP 2023
v.	:	
Dong-Joon Oh, M.D., North American Partners in Anesthesia (Pennsylvania), LLC, Wilkes-Barre Hospital Company, LLC d/b/a Wilkes-Barre General Hospital and Commonwealth Health	:	
Appeal of: Dong-Joon Oh, M.D.		

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