

Revisiting the Treating Physician Rule: PA Supreme Court Limits Ability of Defense Counsel to Represent Nonparty Treating Physician

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Last month, in *Mertis v. Oh*, the Supreme Court of Pennsylvania held that a physician subpoenaed for deposition in a malpractice case does not have unfettered discretion in choosing his or her attorney. Rather, the Supreme Court held that, under Pennsylvania Rule of Civil Procedure 4003.6 – commonly known as the “treating physician” rule – an attorney (and, by imputation, possibly their law firm) who represents a physician cannot communicate with, represent or even receive records from a nonparty treating physician without following authorized discovery procedure. In *Mertis*, the Court strictly applied this limitation to disqualify defense counsel from representing both the named physician defendant and a nonparty treating physician fact witness at deposition even though the nonparty physician sought representation for the deposition and waived any potential conflict. Significantly, the Court declined to decide whether a proper ethical screen, as defined by Pennsylvania Rule of Professional Conduct 1.0(k), could have cured the violation and permitted the representation.

Mertis concerned the alleged negligence of an anesthesiologist in the administration of a nerve block during an orthopedic procedure. Plaintiff’s counsel sought the fact deposition of the nonparty orthopedic surgeon. For representation at the deposition, the surgeon hired an attorney practicing at the same law firm as the anesthesiologist’s attorney. The surgeon signed a conflict waiver, and the orthopedic surgeon’s attorney wrote to plaintiff’s counsel to provide notice that he would be representing the surgeon at the deposition.

Plaintiff’s counsel moved to disqualify the entire law firm from representing the anesthesiologist defendant based on Pennsylvania Rule of Civil Procedure 4003.6. Although the Luzerne County Court of Common Pleas initially denied Plaintiff’s motion, the Superior Court reversed the trial court’s order. On appeal, the Supreme Court affirmed the Superior Court and held that entering into an attorney-client relationship with a nonparty treating physician did not enable an attorney to obtain information from that physician in circumvention of Rule 4003.6. The Supreme Court determined that there was no evidence an ethical screen was put in place at the law firm, so all information provided to an attorney in the firm was imputed to all attorneys in the firm. The Supreme Court did not address whether disqualification was an appropriate sanction for a Rule 4003.6 violation.

Unfortunately, the Supreme Court also declined to address whether the law firm *could* have erected an adequate ethical screen to prevent the imputation of confidential information and, consequently, the violation of Rule 4003.6. Under current Pennsylvania law, important factors in evaluating the adequacy of an ethical screen would include the size of the firm, the restrictions in place, the timing of the screen, and the firm policy against breach of the restrictions. The Supreme Court did not apply this analysis and left some important questions unanswered. Absent this guidance, there is likely to be an uptick in motions to disqualify counsel and their firms from representing nonparty physicians. This guidance was particularly needed because Rule 4003.6 explicitly permits defense counsel to obtain information from their client’s employee or ostensible employee. Without further clarification, *Mertis* constitutes yet another wrinkle in the evolving and complex medical malpractice landscape in Pennsylvania.

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