Case Nos. 1130677 and 1130678

IN THE SUPREME COURT OF ALABAMA

EX PARTE SHAWN POFF and EX PARTE MOBILE INFIRMARY ASSOCIATION D/B/A/MOBILE INFIRMARY MEDICAL CENTER,

IN RE: BENNIE J. HOLLINS,
As the Personal Representative
Of the Estate of LeJuan C. Johnson, deceased,
Plaintiff,

v.

MOBILE INFIRMARY ASSOCIATION
d/b/a Mobile Infirmary Medical Center, et. al.,
Defendants.

On Appeal from the Circuit Court of Mobile County
CV-2013-902875

BRIEF OF *AMICUS CURIAE* ALABAMA DEFENSE LAWYERS ASSOCIATION

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SUMMARY OF THE ARGUMENT/ISSUES ADDRESSED BY *AMICUS CURIAE*

The issues presented in these appeals are of significant interest to the Alabama Defense Lawyers Association ("ADLA"), a non-profit association of approximately 1,100 Alabama lawyers who devote a substantial portion of their professional practice to the defense of civil lawsuits. ADLA sought leave to intervene in these appeals as *amicus curiae* to address the inequity created by this, or any, trial court's imposition of arbitrary discovery restrictions only on defense counsel with no legal or factual basis upon which to do so. Were this Court to hold that defense counsel are prohibited from meeting with medical witnesses without opposing counsel's presence, while allowing plaintiffs' counsel the right to do so without any similar restrictions, such a holding would undo decades of Alabama law and have a profound impact on all civil litigation in this state in which a party has placed his or her own medical condition at issue as part of a claim or defense.

While all would agree that trial courts in Alabama are afforded broad discretion regarding discovery, that discretion has never been boundless. The discovery process

is intended to allow all parties the right to examine and analyze relevant, non-privileged information while keeping expenses and burdens as low as possible. The trial court's role should be to ensure that the process does not favor one party over another or give any side an unfair advantage. ADLA respectfully urges this Court to require trial courts to apply the law equally to all parties and refrain from giving one side a tactical advantage that is neither supported by Alabama law nor required by HIPAA. No trial court should have the discretion to impose a one-sided restriction without demonstrating a solid legal and/or factual basis for the ruling.

The true dispute in these appeals is *not* whether the Defendants should have access to Mr. Johnson's health care information. The trial court's HIPAA Order recognizes the Defendants' right to Mr. Johnson's medical records and to communicate with the healthcare providers who cared for him regarding the course of his treatment and the issues in the lawsuit. The briefs of the Plaintiff and supporting amicus do not dispute that the Defendants have a right to this information. The true dispute, at its core, is whether Alabama's defense lawyers can and should be trusted to

abide by HIPAA's provisions and act as officers of the court in obtaining this information without their opposing counsel's presence in keeping with both long-standing Alabama law and in accordance with an appropriate HIPAA Order.

There has been no feasible explanation given to this Court of how the presence of Plaintiff's counsel at a meeting with Mr. Johnson's medical providers protects his health care information. It does not. The HIPAA Order entered in this case (like the one proposed by the Defendant) specifically prohibits communications regarding psychiatric treatment, drug and alcohol treatment, HIV testing, etc. The only reason to assume that there would be some inappropriate disclosure would be a presumption that defense counsel would behave unethically or improperly. The suggestions that physicians are unable to understand and abide by the limitations of a court order, or that defense counsel will not do so, are groundless. ADLA respectfully urges this Court to reject the one-sided argument that private meetings with defense counsel risk "improper influence,"[1] while allowing private meetings with

[1] AAJ Amicus Br., p. 28.

plaintiff's counsel with no presumption that there would be any such improper influence. This Court should continue to uphold its stated policy of refusing to presume misbehavior on the part of lawyers and should refuse to allow trial courts to apply such disparate standards to the parties without any legal or factual basis.

ADLA urges this Court to disallow Alabama trial courts from stretching HIPAA beyond its express provisions to rob defense lawyers of the ability to fully prepare cases without, at the same time, educating and informing their opposing counsel and disclosing work product. ADLA asks this Court to reiterate there is no basis upon which to presume that defense lawyers cannot be trusted to act as officers of the court to abide by HIPAA's protections when meeting with medical witnesses in keeping with the law of this state. ADLA also urges this Court to consider opinions from the majority of the states which, like Alabama, allowed *ex parte* meetings prior to HIPAA's enactment and continue to do so in recognition of: (1) the valid policy behind allowing defense lawyers to investigate their cases without the constant oversight of their opponents, and (2) the fact that HIPAA does not prohibit

those meetings, nor does it require such disparate treatment between the parties.

ARGUMENT

I. ALABAMA LAW HAS ALWAYS PERMITTED *EX PARTE* MEETINGS WITH THIRD PARTY MEDICAL WITNESSES BASED UPON STRONG POLICY CONSIDERATIONS WHICH SUPPORT EQUAL ACCESS BY ALL PARTIES TO VITAL WITNESSES AND RECOGNIZES THE IMPORTANT ROLE SERVED BY INFORMAL DISCOVERY.

As background for consideration of the impact of HIPAA in Alabama and *ex parte* meetings with treating health care providers, it is important to consider the long-standing policy in Alabama law recognizing the significance of equal access by all parties to vital witnesses. Contrary to the argument advanced in these appeals that "there is no legitimate benefit to be gained from *ex parte* contacts"[2] and the Plaintiff's attempts to cast *ex parte* meetings in an unfavorable light, this Court has for many years recognized the benefits and entirely appropriate reasons to allow all parties to conduct discovery by private interview. In *Romine v. Medicenters of Am., Inc.*, 476 So. 2d 51 (Ala. 1985), this Court examined the question of the appropriateness of *ex parte* interviews conducted by defense counsel with the plaintiff's treating medical providers and

[2] AAJ Amicus Br., p. 28.

rejected the notion that there is anything inherently "shady" or sinister about pursuing discovery in this informal manner. The *Romine* Court adopted the logic set out in *Doe v. Eli Lilly & Co., Inc.,* 99 F.R.D. 126 (D.D.C. 1983), as follows:

> [W]hile the Federal Rules of Civil Procedure have provided certain specific formal methods of acquiring evidence from recalcitrant sources by compulsion, they have never been thought to preclude the use of such venerable, if informal discovery techniques as the *ex parte* interview of a witness who is willing to speak.(citations omitted). The potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal, and what a litigant may justifiably fear is an attempt by an adversary at improper influence for which there are sanctions enough if it occurs. *See Gregory v. United States*, 369 F.2d at 188. And there are entirely respectable reasons for conducting discovery by interview *vice* deposition: it is less costly and less likely to entail logistical or scheduling problems; it is conducive to spontaneity and candor in a way depositions can never be; and it is a cost-efficient means of eliminating non-essential witnesses from the list completely.

Romine, 476 So. 2d at 55.[3] There has never been a presumption in Alabama that plaintiff's counsel's presence is required to police the actions of defense counsel.[4]

[3] The United States Supreme Court also discussed the valid reasons to conduct private meetings with witnesses in the landmark case of *Hickman v. Taylor*, 329 U.S. 495 (1947), stating:

It is well-settled law in Alabama that the physician's obligation of confidentiality is waived when a patient files a lawsuit placing his physical care and condition directly at issue. *See Ex parte Dumas,* 778 So. 2d 798, 801 (Ala. 2000)("This Court has held that when a party files a lawsuit that makes an issue of his physical condition, he waives his privacy rights in favor of the public's interest in full disclosure.")(citing *Mull v. String*, 448 So. 2d 952, 954 (Ala. 1984)); *See also, Marsh v. Wenzel*, 732 So. 2d 985, 990 (Ala. 1998). Given that waiver, this Court has

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> In performing her various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that she assemble information, sift what she considers to be the relevant from the irrelevant facts, prepare her legal theories and plan her strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. The work is reflected, of course, in interviews[.] *Id.* at 510-511.

[4] The concerns expressed by the Plaintiff and supporting amicus as potential problems with private meetings between defense counsel and medical witnesses are adequately covered by Alabama's Rules of Professional Conduct, which require candor (Rule 3.3), fairness to the opposing party and counsel (3.4), and truthfulness in statements to all others (Rule 4.1).

consistently upheld the right of counsel to conduct *ex parte* meetings with treating medical providers and has consistently rejected one-sided arguments regarding the threat of potential improprieties by an opponent -- arguments which could be raised by either side in any litigation. In *Zaden v. Elkus*, 881 So. 2d 993 (Ala. 2003), this Court reiterated that "[t]he law of this State is settled that *ex parte* communications under circumstances such as those presented by this case are allowable." *Id.* at 1013.

Here, the personal representative of Mr. Johnson's estate filed a wrongful death action placing the cause of Mr. Johnson's death at issue. It is a given that his private health information is discoverable. The HIPAA Order entered by the trial court (like the proposed Order submitted by the Defendant, Mr. Poff) contains protections and safeguards so that this protected health information will be used and disclosed only within the confines of the litigation and protects from disclosure treatment for mental or emotional conditions, alcohol or drug addiction, psychotherapy, or HIV testing. Thus, the issue here is not whether both sides will have access, within those confines,

to Mr. Johnson's private health information but whether HIPAA's privacy regulations require that only defense counsel will be deprived of the right to meet with medical witnesses in private.

What the Plaintiff really seeks is *not* to protect health care information which all recognize is discoverable, but rather the tactical advantage of gaining complete insight into which witnesses the defense wants to speak with and all of the questions asked or comments made during those meetings. Bestowing upon plaintiff's counsel the right to attend and take notes at those meetings would necessarily transform them into a type of formal, not informal, discovery. The right to ask a witness later what was discussed in a meeting with the other side is a far cry from: (1) unilaterally requiring only one side to disclose to the other which witnesses they deem important, and (2) permit their opponent to attend and take notes during all such meetings. One would have to ignore the realities of litigation to accept the suggestion that meetings in the presence of one's opposing counsel allow the same level of informal candor as a private meeting. As this Court has recognized, "Requiring the presence of opposing counsel at

interviews thwarts the exploratory purpose of conducting pretrial interviews by virtually transforming the interviews into informal depositions." *Ex parte Stephens*, 676 So. 2d 1307, 1312 (Ala. 1996), *rev'd in part by Ex parte Henry*, 770 So. 2d 76 (Ala. 2000)(see footnote 5 below).

The trial court's Order, which does away with a heretofore sanctioned method of obtaining discoverable information, is especially unfair because it only places these requirements on one party and gives no legal or factual basis for the disparate treatment. ADLA urges this Court to consider that the privacy concerns which have been raised to this Court (all of which presume some misbehavior on the part of defense counsel) do not outweigh defendants' right to an even playing field upon which to defend claims filed against them or "the public's interest in full disclosure to obtain a just disposition of the controversy." *Mull v. String*, 448 So. 2d at 954.

The Plaintiff and supporting amicus argue that there is no harm in limiting defense counsel to meetings policed and monitored by plaintiff's counsel based on the self-serving conclusion that a meeting in the presence of opposing counsel is just as effective. This Court came to a

different conclusion in *Ex parte Howell*, 704 So. 2d 479 (Ala. 1997):

> Pre-trial interviews play a major role in the way an attorney formulates the strategy of his case. In these interviews a lawyer attempts to find evidence to support his case or even to determine if he has a case. This requires that the attorney may in some instances reveal his mental impressions or conclusions in the case, often drawing from information he may have already developed from other sources; thus, the need for privacy while conducting these interviews. Requiring the presence of opposing counsel at interviews thwarts the exploratory purpose of conducting pretrial interviews by virtually transforming the interviews into informal depositions.

Id. at 481, *citing Ex parte Stephens*, 676 So. 2d 1307 (Ala. 1996), *rev'd in part by Ex parte Henry*, 770 So. 2d 76 (Ala. 2000).[5] Nothing in HIPAA compels this Court to abandon this

[5] *Ex parte Henry*, 770 So. 2d 76 (Ala. 2000), does nothing to negate this logic or this Court's statements of support for informal discovery, as suggested by the Plaintiff and supporting amicus. In *Ex parte Henry*, this Court upheld a trial court's Order which allowed the Plaintiff access to the names of other policy holders in Alabama and acknowledged that the Plaintiff could write to those policy holders requesting voluntary *ex parte* communications. *Id*. at 81. The case simply recognized the propriety of the trial court's right to oversee the method used by the Plaintiff in initiating those *ex parte* contacts. No part of *Ex parte Henry* casts dispersions upon the *ex parte* contacts which were allowed. No statement in *Ex parte Henry* leads to a conclusion that this Court grants trial courts unlimited discretion to unilaterally prohibit *ex parte* meetings with no factual or legal basis to support such a prohibition.

logic. Furthermore (and tellingly), while the Plaintiff and supporting amicus down-play any legitimate purpose behind defense counsels' desire to meet with witnesses *ex parte*, neither has suggested that a plaintiff's right to meet in private is unimportant, unnecessary, or should be supplanted with a requirement that defense counsel be present during their meetings with medical witnesses.

The argument that interviews without the presence of opposing counsel might lead to the disclosure of irrelevant information or place pressure on witnesses is no more logical than an argument that all plaintiffs' counsel should be prohibited from meeting with treating physicians based upon a presumption that plaintiffs' counsel will place undue pressure on witnesses to be more sympathetic to the plaintiff/patient. This Court rejected similar arguments that there should be a presumption of impropriety in *Ex parte Howell*, *supra*, and has continued to uphold plaintiffs' attorneys' right to *ex parte* interviews with other policy holders of a defendant insurance company, stating that "it cannot and should not be presumed that an officer of the court will act in an unethical manner." *Id*. at 482. *See also*, *Ex parte Clarke*, 582 So. 2d 1064, 1068

(Ala. 1991)(holding that the trial court's limitations on discovery created an awkward procedure preventing meaningful contact with persons who may have possessed needed "information," creating an abuse of discretion.)

II. THE LAW OF OTHER STATES SIMILAR TO ALABAMA REJECTS THE ARGUMENTS URGED BY THE PLAINTIFF AND CONTINUES TO ALLOW *EX PARTE* MEETINGS WITH MEDICAL WITNESSES.

The Plaintiff does not dispute the policy of this state allowing all parties to conduct *ex parte* meetings with medical witnesses but claims that HIPAA now preempts and nullifies this equitable approach. To the contrary, well-reasoned opinions from the majority of states which allowed *ex parte* meetings prior to HIPAA and which have re-addressed the issue since HIPAA have concluded just the opposite. These opinions hold that HIPAA is strictly procedural in nature and does not conflict with or supplant substantive state law allowing informal, private discovery or the strong policy considerations underlying it. The following excerpts demonstrate how other state and federal courts have rejected the very policy arguments advanced in the case at hand:

- *Arons v. Jutkowitz,* 880 N.E.2d 831, 838 (N.Y. 2007): "Plaintiffs complain that in a more casual setting, and without opposing counsel present, a

physician might unwittingly divulge medical information as to which the privilege had not been waived or might be gulled into making an improper disclosure. This is the same 'danger of overreaching' that we [previously] rejected ...finding it to afford no basis for relinquishing the considerable advantages of informal discovery." *See also, Niesig v. Team I,* 558 N.E.2d 1030, 1034 (N.Y. 1990)): "Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for off-the-record private efforts to learn and assemble, rather than perpetuate, information."

- *Pratt v. Petelin*, 2010 WL 446474, at *7 (D. Kan. Feb. 4, 2010): "*[E]x parte* communications with fact witnesses, such as treating physicians, creates a just result by allowing both parties equal, unfettered access to fact witnesses. To prohibit *ex parte* communications would allow one party unrestricted access to fact witnesses, while requiring the other party to use formal discovery that could be expensive, timely, and unnecessary."

- *Giegerich v. Nat'l Beef Packing Co., LLC,* 2014 WL 103455 (D. Kan. Jan. 9, 2014): "Verbal disclosure of protected health information is certainly subject to HIPAA requirements. However, as long as the verbal disclosure complies with appropriate procedure, this district has a firmly-established practice of allowing informal *ex parte* interviews of a party's treating physicians who are merely fact witnesses. *Ex parte* communications with fact witnesses have long been characterized as informal discovery and considered to be more convenient and less expensive for both witnesses and counsel."

- *Lowen v. Christi Hosps. Wichita, Inc.*, 2010 WL 4739431 at *3 (D. Kan. Nov. 16, 2010): *[E]x parte* interviews enable counsel to gather information without repeatedly resorting to more expensive, time-consuming formal discovery methods for up-to-

date information about a plaintiff's current condition or prognosis, which may change as the litigation progresses. Orders allowing *ex parte* interviews with health care providers have the potential to reduce costs and provide all counsel of record with the same avenues available to obtain relevant information."

- *Madrid v. Williams*, 2012 WL 2339829 at *1-2 (D. Kan. June 19, 2012): "Courts in this district have a well-established practice of allowing informal *ex parte* interviews of plaintiff's treating physicians who are fact witnesses as long as defendant complies with HIPAA and its related regulations."

- *Holman* v. *Rasak,* 785 N.W.2d 98 (Mich. 2010): "HIPAA does not preempt Michigan law permitting *ex parte* interviews because Michigan law is not contrary to HIPAA." *Id.* at 105.

- *Robeck v. Lunas Constr. Clean-Up Inc.,* 2011 WL 2139941 at *1 (Nev. May 27, 2011)(holding that defense counsel did not violate the plaintiff's medical privacy or HIPAA by contacting the plaintiff's treating physicians "to obtain information regarding [the plaintiff's] condition.")

- *Santaniello ex rel. Quadrini v. Sweet,* 2007 WL 214605 (D. Conn. Jan. 25, 2007): "[While] HIPAA does not expressly address the disclosure of medical information during an *ex parte* interview...several courts considering the issue have held that HIPAA permits the disclosure of medical records during an *ex parte* interview so long as there is a HIPAA compliant protective order in place." *Id*. at *3.

- *Wellstar Health Sys., Inc. v. Jordan,* 743 S.E.2d 375, 377 (Ga. 2013): "Parties to litigation or other judicial proceedings may conduct *ex parte* interviews of health care providers consistent with the requirements of HIPAA as long as they

first obtain a valid authorization or court order or otherwise comply with 45 C.F.R. §164.512(e)....[The Defendant] satisfied the requirements of 45 C.F.R. §164.512(e)when it secured a qualified protective order that, *inter alia*, prohibited the parties from using protected health information for any unauthorized purpose and required the return or destruction of protected health information at the end of the litigation." *Id*. at 378.

- *Valentine v. CSX Transp., Inc.,* 2010 WL 4683939 (S.D. Ind. Nov. 10, 2010): "This Court has found it unwarranted to prohibit *ex parte* communication with a plaintiff's physicians at least without a showing that an *ex parte* communication would substantially risk defense counsel learning sensitive medical information irrelevant to the litigation." *Id*. at *2. [6]

[6] *See also*, TENN. CODE ANN. § 29-26-121(f)(1), statutorily providing that in Tennessee, defendants may petition the court for a qualified protective order allowing interviews of plaintiff's treating health care providers outside the presence of plaintiff's counsel. This Tennessee statute is particularly noteworthy in light of the Amicus AAJ's reliance upon Tennessee law and citation of *Alsip v. Johnson City Med. Ctr*., 192 S.W.3d 772 (Tenn. 2006). (AAJ's Br, p. 29) Since *Alsip*, the Tennessee legislature adopted §29-26-121, and the Tennessee Supreme Court has upheld a portion of that statute based upon a "[presumption] that the General Assembly was aware of both HIPAA regulations and [Tennessee] precedents addressing the implied covenant of confidentiality between doctor and patient when it enacted TENN. CODE ANN. §29–26–121(a)(2)(E)." *Stevens ex rel. Stevens v. Hickman Cmty. Health Care Servs., Inc.*, 418 S.W.3d 547, 558 (Tenn. 2013).

III. HIPAA DOES NOT PROHIBIT *EX PARTE* MEETINGS, NOR DOES IT CONFLICT WITH OR PREEMPT ALABAMA LAW ON THE ISSUE.

There is no basis of support for the argument that HIPAA completely preempts Alabama law and prohibits all *ex parte* contact. To the contrary, HIPAA merely provides a procedure by which protected health information is gathered in litigation. Existing state law is not preempted unless it is "conflicting" or contrary to the federal objective regarding privacy protections of patient health information. The United States Department of Health and Human Services has pointedly advised that where "there is a State provision and no comparable or analogous federal provision," there is no possibility of preemption because, in the absence of anything to compare, "there cannot be...a 'contrary' requirement" and so "the stand-alone requirement – be it state or federal – is effective." 64 Fed. Reg. 59918, 59995.

The Plaintiff has informed this Court that HIPAA created a new "privilege." (Hollins' Brief in Opp'n to Petition, p. 23)("HIPAA subsequently provided the "privilege" that did not exist in *Romine*.") To the contrary, HIPAA is a procedural rule which sets forth the

proper procedures for disclosure of private health information. HIPAA does not reference *ex parte* meetings with medical witnesses, nor does it purport to create a new privilege or bar all disclosures. As Judge Posner explained in *NW. Mem. Hosp. v. Ashcroft*, 362 F. 3d 923 (7th Cir. 2004):

> All that 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority to use medical records in litigation....[T]he evidentiary privileges that are applicable to federal-question suits are given not by state law but by federal law - Fed. R.Evid. 501, which does not recognize a physician-patient (or hospital-patient) privilege. ... We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege.

Id. at *2 (emphasis added). *See also, Smith v. Rafalin*, 2005 WL 697581 (N.Y. App. Div. March 24, 2005)(explaining that HIPAA created a procedure for obtaining authority to obtain medical information and did not create a substantive federal privilege for such information). The assertion that Alabama law has been supplanted by a new "privilege" under HIPAA is without merit.

HIPAA's Privacy Rule does not prevent informal discovery; it merely superimposes procedural prerequisites upon it. As a practical matter, this means an attorney who wishes to contact a non-party medical witness must first

obtain a valid HIPAA Order or must issue a subpoena, discovery request, or utilize some "other lawful process" with satisfactory assurance relating to either notification or a qualified protective order. This practice is consistent with both Alabama law and with HIPAA, as the two are not contradictory.

This Court's discussion in *Ex parte John Alden Life Ins. Co.*, 999 So. 2d 476 (Ala. 2008) of the purposes behind HIPAA and litigants' right to contact and communicate with potential witnesses, *albeit* involving a different factual situation, bears consideration. In that case, the Plaintiff made allegations of fraud against an insurance company, and this Court was asked to hold that the trial court's order allowing the Plaintiff to discover the names of the Defendant's other policy holders and permitting Plaintiff's counsel to contact those policy holders violated HIPAA. This Court disagreed that there was any violation of HIPAA, cited the above-referenced New York case of *Arons v. Jutkowitz*, *supra*, (in which the New York court allowed *ex parte* meetings) and set out the following analysis of the history and purpose of HIPAA:

> In 1996, the United States Congress enacted, and the President signed into law...HIPAA. As another

court has noted, "Congress enacted HIPAA principally to increase the portability and continuity of health insurance and to simplify administrative procedures so as to reduce health care costs...HIPAA mandated national standards for electronic medical data management. At the same time, this shift away from paper-based to electronic records was perceived to threaten the confidentiality of sensitive patient information. As a result, HIPAA authorized the Secretary of the U.S. Department of Health and Human Services (HHS) to promulgate standards governing disclosure of patient health information.... When devising this Privacy Rule, HHS sought to 'strike a balance that permits important uses of information, while protecting the privacy of people who seek care and healing' and to fashion a scheme sufficiently 'flexible and comprehensive to cover the variety of uses and disclosures that need to be addressed' (United States Dpt. of Health and Human Services, Office for Civil Rights, *Summary of the HIPAA Privacy Rule*...) *Arons v. Jutkowitz*, 880 N.E. 2d 831, 839-40 (N.Y. 2007).

The HIPAA privacy rule generally forbids a covered entity, including a health-insurance issuer, from using an individual's protected health information except as provided by the rule. 45 C.R.R. 164.502(a)(2007)....The rule permits disclosure in [certain] circumstances. 45 C.F.R. 164.502(a)(1)....One of the exceptions provided for in the HIPAA privacy rule is for "judicial and administrative proceedings."...As the assistant Secretary for Planning and Evaluation of the Department of Health and Human Services has noted: "When a request is made pursuant to an order from a court or administrative tribunal, a covered entity may disclose the information requested without additional process....[T]he HIPAA privacy rule does not impede a covered entity from complying with a court order, nor does it impede responding to discovery when a qualified protective order has been entered...Given the plain language of the HIPAA privacy rule, this

> Court disagrees with the argument that in ordering [the insurer] to produce the information sought...the trial court disregarded a privilege created by HIPAA.

Ex parte John Alden Life Ins. Co., 999 So. 2d at 481-484. Likewise in the case at hand, the Defendants seek to obtain medical records from and meet with the medical witnesses in keeping with long-standing Alabama law *and* governed by an appropriate HIPAA protective order. This Court's allowance of *ex parte* meetings with other policy holders and recognition that HIPAA was not meant to impede such discovery as long as a qualified protective order has been entered is instructive. Neither the stated purpose underlying HIPAA nor the express wording of HIPAA demand that *ex parte* meetings with potential witnesses be prohibited. The parties here should be allowed to follow Alabama law and comply with a qualified HIPAA protective Order at the same time.[7]

[7] These meetings are also appropriate under 45 C.F.R §164.512(e)(1)(ii), which allows disclosure of health information in response to **"**other lawful process**"** without an accompanying order of a court, as long as there is a qualified protective order in place which complies with 45 C.F.R. §165.512(e)(1)(v). It is undisputed that *ex parte* meetings are permissible under Alabama law. These meetings therefore meet the definition of "other lawful process" under the law of Alabama when carried out under a "qualified protective order," prohibiting the parties from

The ability of state law to co-exist with the procedures set out in HIPAA's privacy rule was concisely articulated by the Superior Court of New Jersey in *Smith v. Am. Home Prods. Corp. Wyeth-Ayerst Pharm.*, 855 A.2d 608, 624 (N.J. Super. Ct. Law Div. 2003): "The plain fact is that informal discovery is not expressly addressed under HIPAA as either endorsed or prohibited. In the absence of such controlling legislation, the courts should be governed by state law." The *Smith* Court further explained:

> [Our] task is deciding the narrow issue of whether HIPAA preempts informal discovery techniques. The answer is plainly "no."...Nowhere in HIPAA does the issue of *ex parte* interviews with treating physicians, as an informal discovery device, come into view. The court is aware of no intent by Congress to displace any specific state court rule, statute, or case law on *ex parte* interviews.

Id. at 621-622.

Likewise, in *Arons v. Jutkowitz*, 880 N.E.2d 831 (N.Y. 2007)-- the case mentioned above as cited by this Court in 2008 -- the New York Court of Appeals held that HIPAA's privacy rule does not prevent informal discovery, reasoning that once a patient waives confidentiality by placing his

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using or disclosing the protected health information for any purpose other than within the litigation and that the information be returned or destroyed at the end of the litigation. (Discussed more fully below at p. 24 *et seq*.)

or her medical condition at issue, that waiver applies to medical information generally, not just to written medical records:

> The waiver does not depend on the form or medium in which relevant medical information is kept or may be found: information does not fall outside the waiver merely because it is captured in the treating physician's memory rather than on paper (see generally 65 Fed. Reg. 82462, 82620, explaining rationale for treating verbal communications the same as paper and electronically based information).

Id. at 842. The fact that the applicable federal regulations do not distinguish between verbal communications and paper medical records is an important point since neither the Plaintiff nor the trial court here have taken the position that Mr. Johnson's paper medical records are not discoverable.

Both federal and state courts in jurisdictions allowing *ex parte* meetings prior to HIPAA have recognized that HIPAA Privacy Regulations do not prohibit *ex parte* interviews with non-party treating medical providers. For example, in *Holmes v. Nightingale*, 158 P.3d 1039 (Okla. 2007), the Supreme Court of Oklahoma held that a court order permitting oral communications with healthcare providers entered as a result of an individual placing his or her

mental or physical conditions at issue by filing suit does not contravene HIPAA's confidentiality requirements. *Id.* at 1051. The Oklahoma Supreme Court held that a court order allowing disclosures of protected health information through *ex parte* communications conforms with HIPAA. *Id.* *See also, Lowen v. Via Christi Hosp. Wichita, Inc*., 2010 WL 4739431 (D. Kan. Nov. 16, 2010); *Congress v. Tillman*, 2009 WL 1738511 (E.D. Mich. June 16, 2009); *Parker v. Upsher-Smith Lab., Inc.*, 2009 WL 301938 (D. Nev. Feb. 6, 2009)(each holding that *ex parte* meetings between defense counsel and third-party medical witnesses are permissible with a HIPAA compliant protective order when allowed under state law); Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 Hous. L. Rev. 1091 (2006)("[S]tate law that permits disclosure can generally be reconciled with HIPAA...by adding the procedural protections that HIPAA mandates.")

The Plaintiff suggests that this Court should instead adopt Missouri's interpretation of HIPAA as set forth in *State ex rel. Proctor v. Messina*, 320 S.W.3d 145 (Mo.

2010).[8] (Petition p. 13-16) Under the "Missouri Approach," *ex parte* disclosures are considered wholly impermissible under HIPAA based upon an argument that they were not made "in the course of a judicial proceeding" as that term appears in 45 C.F.R. § 164.512(e)(1). However, more recently, the reasoning underlying this blanket prohibition on *ex parte* meetings was rejected in Kansas in the case of *Lowen v. Via Christi Hosps. Wichita, Inc.*, 2010 WL 4739431 (D. Kan. Nov. 16, 2010), wherein the Court stated:

> This district has rejected the reasoning [of the Missouri Supreme Court in *Proctor v. Messina*].... Although not directly supervised by the Court, an *ex parte* interview of a plaintiff's treating physician nevertheless proceeds *incidental to a pending law suit* and to that extent may be regarded as "*in the course of a judicial proceeding*." (Citing *Pratt v. Petelin*, 2010 WL 446474 (D. Kan. Feb. 4, 2010))

Lowen, 2010 WL 4739431 at *3, n. 10 (emphasis added).

The Supreme Court of Michigan has also held that informal meetings with medical witnesses constitute "other lawful process" as contemplated by HIPAA and that a qualified protective order under 45 C.F.R. § 64.512(e)(1)(v) is all that is necessary for these meetings

[8] Hollins' Brief, p. 3, 18-20.

to properly take place. In *Holman v. Rasak*, 785 N.W.2d 98 (Mich. 2010), that Court aptly stated:

> *[E]x parte* interviews are permitted under Michigan law as a means of informal discovery. Thus, even if a "discovery request" contemplates formal discovery, a request for an *ex parte* interview is at least "other lawful process" within the meaning of 45 CFR §164.512(e)(1)(ii). Therefore, as long as "the covered entity receives satisfactory assurance...that reasonable efforts have been made ...to secure a qualified protective order" that meets the requirements of subsection (e)(1)(v), disclosure of protected health information by a covered entity during an *ex parte* interview is consistent with both Michigan law and HIPAA. The HIPAA regulations were "not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information." 65 Fed. Reg. 82462-01, 82530, discussing 45 CFR 164.512(e).
>
> FN6 Other jurisdictions, which like Michigan, which permitted *ex parte* interviews before HIPAA are in accord in determining that HIPAA did not disrupt state law practice that this type of informal discovery request is permitted under HIPAA.

Holman, 785 N.W.2d at 443. ADLA asks this Court to consider the logic of these states' holdings and reject the Plaintiff's invitation to a wholesale adoption of the law of Missouri.

Similarly, the citations by the Plaintiff and supporting amicus to the Eleventh Circuit's holding in *OPIS*

Mgmt. Res., LLC v. Sec'y, Florida Agency for Health Care Admin., 713 F.3d 1291, 1296 (11th Cir. 2013), and to the Florida statute which that case addresses, are not determinative of the issue here. The Eleventh Circuit specifically held in that case that Florida's statute goes well beyond the goal of HIPAA of keeping protected health information within the confines of the subject litigation, explaining the over-breadth of Florida's law as follows:

> The unadorned text of the [Florida] state statute authorizes sweeping disclosures, making a deceased resident's protected health information available to a spouse or other enumerated party upon request, without any need for authorization, for any conceivable reason, and without regard to the authority of the individual making the request to act in a deceased resident's stead. *See* 45 C.F.R. § 164.502(g)(4) (providing that a person authorized to act on behalf of a deceased individual must be treated as a personal representative "with respect to protected health information *relevant to such personal representation* " (emphasis added)). We therefore agree with the district court that § 400.145 frustrates the federal objective of limiting disclosures of protected health information.

OPIS Mgmt. Res., LLC v. Sec'y, Florida Agency for Health Care Admin., 713 F.3d at 1296. The concerns regarding the over-breadth of Florida's statute do not apply here.

Likewise, ADLA asks this Court to summarily reject the improper invitation of the Plaintiff's supporting amicus to

consider three prior "no opinion" affirmances by this Court in other cases. (AAJ Amicus Brief, p. 13-15) Rule 53(d) of the Alabama Rules of Appellate Procedure states that no-opinion affirmances "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state." The circumstances of those cases, and the reasons each differs procedurally and factually from the case at hand, are not a part of the record here, and the 3 page argument suggesting that those cases provide guidance to the Court in ruling in this case is due to be stricken as violative of the rules. Regardless of the Court's reasons for affirming without issuing an opinion in prior cases, ADLA respectfully asks that the Court recognize in this case that the unilateral imposition of limitations on a defendant's right to investigate its case with no basis under HIPAA or Alabama law exceeds a trial court's discretion.

CONCLUSION

ADLA appreciates the Court allowing it an opportunity to speak to these important issues as *amicus curiae* and urges this Court to enter an opinion holding that: (1) it is an abuse of discretion for a trial court to treat litigants

unevenly without a valid justification under the law or the facts of the case, thereby giving one side an unwarranted advantage during the discovery process, and (2) that HIPAA privacy regulations do not preempt Alabama substantive law governing the propriety of *ex parte* communications with medical witnesses.

Respectfully submitted,

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