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ADVISORY

JUNE 27, 2017

UNRETAINED HEALTH CARE PROVIDERS MAY NOT BE COMPELLED TO RENDER OPEN TESTIMONY

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Physicians, skilled nursing care providers, rehabilitation facilities, mental health providers, and other health care professionals are often confronted with a time consuming and uncomfortable situation. A patient becomes a plaintiff in a lawsuit and asks her treating provider to testify in an adversary proceeding regarding expert issues in the case, including the standard of care, the cause of injuries, and future prognosis. If the treating provider does not want to get involved, he or she is often subpoenaed by a party's counsel, who will then try to elicit opinion testimony during the treating provider's deposition. Frequently, providers are not even compensated for their time.

Six years ago, in *Milliun v. New Milford Hospital,* the Connecticut Appellate Court decided that nonparty physicians did not have an absolute privilege to refuse to testify as expert witnesses regarding medical opinions formed during their treatment of a plaintiff. This month, in *Redding Life Care, LLC vs. Town of Redding* (AC 37928), the Appellate Court considered whether nonparty experts have a qualified privilege not to voice their opinions. In a carefully reasoned decision, the Appellate Court recognized a qualified privilege for unretained expert witnesses in Connecticut.

The *Redding* case arose in the context of a real estate tax appeal. The plaintiff in the tax appeal had been pursing financing of its property with two different lenders, both of whom ordered appraisals of the property. David Salinas, a professional real estate appraiser, provided opinions to both banks. The Town sought to compel Mr. Salinas to testify as to the property's value at a deposition in the tax appeal, which was wholly unrelated to the financing transaction. The trial court had granted the Town's motion for a commission to take Mr. Salinas's deposition, and it denied his motion for a protective order. Mr. Salinas filed a writ of error with the Connecticut Supreme Court, which transferred the case to the Appellate Court.

Although *Redding* involved a non-medical expert, the Appellate Court discussed several trial court decisions that had recognized a qualified unretained expert privilege for treating healthcare providers, including *Hill v. Lawrence & Memorial Hospital* (2008) and *Drown v. Markowitz* (2006). In *Hill,* which the Appellate Court cited extensively in its decision, the trial court noted policy reasons for recognizing a privilege for treating providers, including "the heavy strain on relationships in

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health care facilities when one health care provider is required to make a public assessment under oath about another's professional performance."

The Appellate Court also considered, as persuasive authority, the Wisconsin Supreme Court's decision in the medical malpractice case of *Burnett v. Alt.* The Appellate Court quoted the Wisconsin decision's reasoning that "[u]nlike factual testimony, expert testimony is not unique and a litigant will not be usually deprived of critical evidence if he cannot have the expert of his choice." Furthermore, because the court cannot compel a person to be an expert against his or her will, the Appellate Court noted that it would be illogical to allow litigants to be able to do so.

The unretained expert privilege is qualified in that a witness may be compelled to provide opinion testimony if (1) under the circumstances, the individual reasonably should have expected that, in the normal course of events, he or she would be called upon to provide opinion testimony in subsequent litigation; and (2) there is a compelling need for the individual's testimony in the case. The Court also noted that other considerations may be relevant, such as "whether he was retained by a party with an eye to the present dispute." Nevertheless, given the weight afforded the *Hill* decision in the Appellate Court's opinion, the parameters of the qualified privilege, and that the *Hill* court held that nonparty treating experts could not be compelled to offer expert testimony, the *Redding* decision is good news for treating providers who would prefer to spend their time and energy treating patients and do not want to be distracted by the litigation process. It is also an important clarification of the existing precedent in *Milliun,* which seemed to suggest the opposite.

Importantly, the unretained expert privilege must be invoked by the treating provider, and, like other privileges, can unwittingly be waived. Treating providers who are subpoenaed and who wish to assert the unretained expert privilege should consult with counsel immediately so that they can take appropriate steps to preserve this privilege.

If you have any questions about the unretained expert privilege or have received a subpoena from a third party's attorney, please feel free to contact Erika Amarante or Kevin Budge.