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The Privileged Physician and Medical Malpractice: Why a Qualified Expert Testimonial Privilege Should Not Apply to Defendant Treating Health Care Providers

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In Redding Life Care, LLC v. Town of Redding, the Connecticut Appellate Court recognized a qualified expert testimonial privilege that precludes discovery of an unretained expert's opinion. That decision threatens to eliminate relevant and irreplaceable testimony of defendant treating health care providers in medical malpractice cases. The Appellate Court set forth a balancing test to determine if a party can overcome the qualified privilege as applied to a particular unretained expert: (1) whether the expert reasonably should have expected to be called upon to provide opinion testimony in subsequent litigation; and (2) whether there exists a compelling need for expert opinion testimony in the case.

This Note analyzes the balancing test set forth in Redding as applied to defendant health care providers who participated in the treatment relevant to malpractice litigation. First, this Note considers whether the need for defendant health care providers' testimony should overcome the Redding qualified testimonial privilege. Second, this Note explores whether the testimonial privilege violates Connecticut's liberal rules of discovery as applied to defendant health care providers' deposition testimony.

Part I begins by discussing the risk of losing the expert opinion testimony of defendant treating physicians in medical malpractice litigation, addressing Connecticut's requirements for expert testimony of treating physicians and the unique role of defendant health care providers. Part II presents a compelling need for defendant health care providers' expert testimony in medical malpractice litigation, balancing the rights of expert witnesses to be free from testifying with the needs of courts and litigants for their evidence. Part III concludes by challenging the application of a qualified expert testimonial privilege to the discovery stage of medical malpractice litigation, considering the practical difficulties imposed by the Redding privilege in light of Connecticut's liberal rules of discovery.

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INTRODUCTION

Imagine that your mother suddenly falls ill. She begins experiencing excruciating chest pain, shortness of breath, and fatigue. A cardiologist discovers an abnormal accumulation of fluid and swelling around your mother's heart and diagnoses her with "pericarditis." You and your mother consult with the cardiologist to assess her treatment options. The cardiologist informs you and your mother that a conservative treatment of anti-inflammatory medications is an option but instead recommends immediate surgical intervention. Your mother trusts the cardiologist and agrees to go forward with the operation.

A nurse escorts your mother into the operating room where the cardiologist awaits. The cardiologist then begins operating. After hours of anticipation, a nurse notifies you that the operation has come to an end. The cardiologist soon arrives to provide the tragic news that the surgery was unsuccessful and your mother has passed away.

Heartbroken and angry, you consult with an attorney about the loss of your mother. The attorney advises you to file a lawsuit alleging medical malpractice against her treating cardiologist. Desperate for answers, you do so on behalf of your mother. It is now the discovery stage of litigation—an opportunity for your attorney to inquire about your mother's medical treatment and the events leading up to her death. Your attorney promptly schedules a deposition with the defendant cardiologist who treated your mother.

During the defendant's deposition, your attorney ascertains the facts of your mother's treatment—which examinations the cardiologist relied upon, the cardiologist's diagnosis, the procedures the cardiologist employed during your mother's operation, and the result of the operation. But the cardiologist limits all deposition testimony to the facts of your mother's

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treatment and claims a privilege from providing medical opinion testimony. Your attorney is unable to discover the cardiologist's medical opinion as to why immediate surgical intervention was recommended, the standard of care owed to your mother throughout treatment, or the cause of your mother's death. As a result, your attorney must postpone the deposition for the court to determine whether the defendant cardiologist's expert opinion testimony should be privileged from discovery and, if so, which particular questions would prohibitively call for such testimony.

The pattern described above is now a common occurrence in Connecticut medical malpractice litigation. During the discovery stage of litigation, there is generally no issue when litigants compel defendant treating health care providers to provide *factual testimony* as to the relevant treatment they provided. However, defendant parties frequently pursue protective orders to preclude compelling *opinion testimony* from these treating health care providers. The Connecticut Appellate Court (Appellate Court) recently approved this practice by recognizing an evidentiary privilege for unretained experts.

In *Redding Life Care, LLC v. Town of Redding (Redding)*, the Appellate Court recognized a qualified expert testimonial privilege that precludes discovery of an unretained expert's opinion.¹ That decision threatens to eliminate the most relevant and irreplaceable testimony in medical malpractice cases when applied to defendant treating health care providers. The Appellate Court set forth a balancing test to determine if a party can overcome the qualified privilege as applied to a particular unretained expert: (1) whether the expert reasonably should have expected to be called upon to provide opinion testimony in subsequent litigation; and (2) whether there exists a compelling need for expert opinion testimony in the case.²

The Connecticut Supreme Court granted certification to address this qualified expert testimonial privilege but determined that the Appellate Court lacked subject matter jurisdiction.³ As the Connecticut Supreme Court did not reach the merits of the decision, the *Redding* court's reasoning for and inclination toward establishing a qualified expert testimonial privilege loom. Consequently, while this issue remains at large in Connecticut courts, the occasion for the Connecticut Supreme Court to rethink the merits of this evidentiary privilege awaits another day.

This Note analyzes the balancing test set forth in *Redding* as applied to defendant health care providers who participated in the treatment relevant to malpractice litigation. First, this Note considers whether medical malpractice plaintiffs present a "compelling need" for the expert testimony

¹ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 181 (Conn. App. Ct. 2017).

² *Id.* at 187–88.

³ *See Redding Life Care, LLC v. Town of Redding*, 207 A.3d 493, 495 n.1, 511 n.13 (Conn. 2019) (determining that "[b]ecause the writ of error should have been dismissed for lack of a final judgement, we do not reach and are not prepared to recognize whether a qualified unretained expert privilege exists").

of defendant health care providers to overcome the *Redding* qualified testimonial privilege. Second, this Note explores whether the *Redding* qualified testimonial privilege violates Connecticut's liberal rules of discovery as applied to defendant health care providers' deposition testimony.

Part I of this Note begins by discussing the risk of losing the expert opinion testimony of defendant treating physicians in medical malpractice litigation, addressing Connecticut's requirements for expert testimony of treating physicians and the unique role of defendant health care providers. Part II presents a compelling need for defendant health care providers' expert testimony in medical malpractice litigation, balancing the rights of expert witnesses to be free from testifying with the needs of courts and litigants for their evidence. Part III concludes by challenging the application of a qualified expert testimonial privilege to the discovery stage of medical malpractice litigation, considering the practical difficulties imposed by the *Redding* privilege and Connecticut's liberal rules of discovery.

I. RISKING THE LOSS OF REQUIRED AND RELEVANT EXPERT EVIDENCE

"Medical malpractice occurs when a . . . doctor or other health care professional, through a negligent act or omission, causes an injury to a patient."⁴ The negligence at issue might be the result of errors in diagnosis, treatment, aftercare, or health management.⁵ Litigating these cases is unique in that they always involve a particular expert specialty—namely that of the defendant treating health care provider—and require plaintiffs to produce expert opinion testimony to support their claims of negligence.

A. *Connecticut's Requirements for Expert Testimony of Treating Physicians*

A jury deciding a case involving a particular expert specialty will ordinarily require some form of assistance to understand the underlying facts. The vehicle for providing such assistance is an expert witness—a person who possesses specialized knowledge that is relevant to the subject matter of the litigation.⁶ According to Connecticut's Code of Evidence, an expert witness is an individual who has acquired scientific, technical, or other specialized knowledge through "skill, experience, training, [or] education" that "will assist the trier of fact in understanding the evidence or

⁴ *What Is Medical Malpractice?*, AM. BOARD PROF. LIABILITY ATTORNEYS, <https://www.abpla.org/what-is-malpractice> (last visited Aug. 10, 2019).

⁵ *Id.*

⁶ Daniel W. Shuman, *Testimonial Compulsion: The Involuntary Medical Expert Witness*, 4 J. LEGAL MED. 419, 420 (1983).

in determining a fact in issue.”⁷ Health care providers, such as defendants in medical malpractice litigation, fall within the scope of these expert qualification standards.

The jury’s need for expert testimony to understand the underlying facts of medical malpractice cases leaves plaintiffs dependent on the testimony of health care providers to meet their burden of proof. In the vast majority of these cases, “a layman does not and cannot have the requisite knowledge as to whether the proper treatment was given, procedure followed, or care used.”⁸ Without the assistance of expert testimony, the jury is therefore unable to accurately determine three of the four elements at issue in medical malpractice litigation: the treating physician’s duty to the patient, a breach of the legal duty, and the cause of the patient’s injury.⁹

Given the technical requirements for establishing the elements of this claim, courts have imposed a rule in medical malpractice cases that an expert health care provider must perform three separate functions. First, to establish the treating physician’s duty to the patient, “[t]he expert must tell the jury the standard of skill in the community.”¹⁰ Second, to establish a breach of the physician’s legal duty, the expert must tell the jury “that the defendant’s conduct failed to meet this standard.”¹¹ Finally, to establish the cause of the patient’s injury, the expert must tell the jury that the defendant’s failure to abide by the standard of care “was the proximate cause of the injuries sustained.”¹² If a medical malpractice plaintiff cannot obtain this supporting expert testimony, then that plaintiff cannot succeed in her claim.

Certain rules apply to medical malpractice litigants in seeking testimony from an expert with specialized knowledge. Of significance, Connecticut’s Practice Book requires parties to disclose each person qualified to testify as an expert witness at trial.¹³ Connecticut courts have held on several occasions that “the disclosure requirements of [Connecticut’s] Practice Book . . . apply with equal force to *treating physicians* as well as to independent experts.”¹⁴ Even if treating physicians only testify to their care

⁷ CONN. CODE EVID. § 7-2 (Westlaw through amendments received through May 1, 2019); *see also* FED. R. EVID. 702(a) (defining an expert witness as one who has “skill, experience, training, or education” that “will help the trier of fact to understand the evidence or to determine a fact in issue”).

⁸ *Chubb v. Holmes*, 150 A. 516, 518 (Conn. 1930).

⁹ *See* Robert M. Dombroff, *Medical Malpractice in Connecticut*, 47 CONN. B.J. 40, 46 (1973) (stating that “[i]n a medical malpractice action, the successful plaintiff must establish: (1) the existence of the doctor-patient relationship, (2) a duty upon the physician to protect the patient from injury, (3) a breach of the legal duty owing the patient, and (4) an injury to the patient with a causal relationship between the tortious act and the result”).

¹⁰ *Id.* at 49.

¹¹ *Id.*

¹² *Id.*

¹³ CONNECTICUT PRACTICE BOOK § 13-4(a) (West 2017).

¹⁴ *See* *Gemme v. Goldberg*, 626 A.2d 318, 323 (Conn. App. Ct. 1993) (emphasis added) (stating that “Practice Book [§ 13-4] employs the term expert witness and does not draw a distinction between

of the plaintiff, it is well established that litigants must disclose them as expert witnesses.¹⁵ These disclosure requirements therefore apply to all expert health care providers, regardless of whether they are independently retained by parties or named as a defendant in medical malpractice litigation.

Once disclosed as experts, defendant treating health care providers are no longer limited to providing factual testimony. Connecticut's Practice Book expressly permits any health care provider who rendered care or treatment to a party to offer their expert testimony *at trial*, including any opinion testimony based upon that physician's care or treatment or to which fair notice is given in the disclosed medical records or reports.¹⁶ Furthermore, as this Note later explores more deeply, litigants are entitled to broader access to a treating health care provider's expert opinion testimony during discovery proceedings than what is admissible at trial.¹⁷

Collectively, the need for expert opinion testimony, the requirement to disclose treating health care providers as expert witnesses, and the express authorization for treating health care providers to offer their expert testimony at trial prompts medical malpractice plaintiffs to depose defendant physicians in an attempt to discover their expert opinion testimony. Although plaintiffs in Connecticut medical malpractice litigation have long relied upon the expert testimony of defendant treating health care providers in meeting their burden of proof,¹⁸ these unretained health care providers have recently been resisting inquiry into their expert opinion. Upon expert disclosure, defendant treating physicians now frequently file protective orders, claiming a privilege from providing their expert opinion. Defendants may call upon the *Redding* court's reasoning in attempt to preclude expert witness testimony.

B. *Privileging the Unique Expert Testimony of Defendant Physicians*

Connecticut provides no constitutional or statutory privilege against the compulsion of expert testimony.¹⁹ In the absence of such, privileges are

treating and independent experts"); *Bank of Bos. Conn. v. Ciarleglio*, 604 A.2d 359, 362 (Conn. App. Ct. 1992), *cert. denied*, 608 A.2d 685 (Conn. 1992).

¹⁵ *Rosenberg v. Castaneda*, 662 A.2d 1308, 1310 (Conn. App. Ct. 1995).

¹⁶ CONNECTICUT PRACTICE BOOK § 13-4(b)(2) (West 2017). *E.g.*, *Gemme*, 626 A.2d at 325 (discussing plaintiff's burden "to establish by expert testimony the standard of medical practice regarding informed consent and the fact that the defendant breached that standard"); *Williams v. Chameides*, 603 A.2d 1211, 1213 (Conn. App. Ct. 1992).

¹⁷ *See* CONNECTICUT PRACTICE BOOK § 13-2 (West 2012) (stating that evidence may be elicited at a discovery deposition even though the information sought will be inadmissible at trial).

¹⁸ *Gemme*, 626 A.2d at 325; *see also Williams*, 603 A.2d at 1213 (finding that the "plaintiff may rely on the defendant's testimony to meet [her] burden of producing positive evidence of an expert nature from which the jury could reasonably and logically conclude that the defendant was negligent").

¹⁹ Brief of Plaintiff-In-Error-Appellee David R. Salinas at 12, *Redding Life Care, LLC v. Town of Redding*, 207 A.3d 493 (Conn. 2018) (No. 20054).

governed by the principles of common law.²⁰ In *Redding*, the Appellate Court for the first time addressed the question of whether an unretained expert testimonial privilege exists under Connecticut common law.²¹ Issuing a groundbreaking decision, the Appellate Court held that Connecticut recognizes a broad qualified privilege against compelled testimony by unretained expert witnesses,²² regardless of whether they are familiar with or unrelated to the facts at issue in a case.

Redding involved an expert appraiser who was neither a party to the proceedings nor retained by a party.²³ Although unrelated to the dispute, the appraiser had earlier appraised the property at issue and provided his opinion to banks regarding the value.²⁴ The *Redding* court granted the unretained expert's motion for protective order, prohibiting discovery of the appraiser's previously formulated opinion.²⁵ The Appellate Court's message was clear; if you want to support your case with expert testimony, you have to pay for it rather than compel it, even if the expert in question already has familiarity with relevant case-specific facts.²⁶

Courts have since applied this decision to privilege the opinion testimony of defendant treating health care providers.²⁷ The basis for preclusion is that medical malpractice plaintiffs, necessarily equipped with retained experts of their own,²⁸ are without a compelling need for the testimony of defendant treating health care providers and therefore fail the

²⁰ CONN. CODE EVID. § 5-1 (West 2019).

²¹ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 183 (Conn. App. Ct. 2017).

²² *Id.* at 181.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ In determining that an unretained expert privilege exists under Connecticut law, the *Redding* court relied primarily on a provision in the Connecticut Practice Book. *See id.* at 185–86 (identifying a similarity between the Connecticut Practice Book and a Wisconsin statute that served as a basis for an unretained expert privilege under Wisconsin law). Practice Book § 42-39 provides in relevant part that “[a]n expert witness shall not be appointed by the judicial authority unless the expert consents to act.” CONN. PRACTICE BOOK § 42-39 (West 2020). The Appellate Court noted that “if a court cannot compel an expert witness to testify, it logically follows that a litigant should not be able to so compel an expert . . . [and] implies a privilege to refuse to testify if the expert is called by a litigant.” *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 185–86 (Conn. App. Ct. 2017) (citing *Burnett v. Alt*, 589 N.W.2d 21, 26 (Wis. 1999)).

²⁷ *See Lavoie v. Manoharan*, No. CV146027376, 2017 WL 6417834, at *3 (Conn. Super. Ct. Nov. 20, 2017) (citing *Redding* in a decision to privilege opinion testimony of a defendant treating physician); *Order 207.10, Vastarelli v. ProHealth Physicians*, NNH-CV-16-6060491-S (Conn. Super. Ct. Aug. 9, 2018) (overruling plaintiff's objection to a protective order privileging opinion testimony of a defendant treating physician).

²⁸ *See* CONN. GEN. STAT. ANN. § 52-190a (Westlaw through 2019 Supplement to the Connecticut General Statutes) (requiring medical malpractice plaintiffs to include in their initial filings a certificate of good faith written and signed by a retained expert health care provider).

second prong of the *Redding* test.²⁹ As a result of Connecticut's recognition of this privilege, the role of defendant health care providers in medical malpractice litigation may be reduced to that of a lay witness.³⁰ Unlike lay witnesses, however, defendant health care providers possess specialized knowledge and experience pertaining to the facts at issue in the case that renders their opinion of particular assistance to the trier of fact.³¹ By limiting the testimony of defendant health care providers to the facts and circumstances of their treatment, the *Redding* privilege would deprive juries from the assistance of the defendant's medical opinion in understanding his or her own care of the plaintiff.

Treating health care providers later named as defendants in medical malpractice litigation are unique witnesses by virtue of the doctor-patient relationship which they entered into with the plaintiff. These health care providers assumed responsibility for the complex process of monitoring, diagnosing, and treating the plaintiff's medical condition.³² This process "involves information gathering and *clinical reasoning* with the goal of determining [and resolving] a patient's health problem."³³ Although the *Redding* privilege would allow defendant health care providers to testify to the factual information gathered in treating the plaintiff, it threatens to preclude access to the clinical reasoning that the defendant employed in diagnosing the plaintiff and establishing a plan of care. In other words, a plaintiff in medical malpractice litigation may not inquire into the standard of care followed by the defendant health care provider in assessing the information gathered during treatment.³⁴

²⁹ See *Lavoie*, 2017 WL 6417834, at *3 (finding that the plaintiffs, who disclosed three experts as well as the expert who authored the certificate of good faith, will suffer no prejudice in the absence of the defendant treating health care provider's expert testimony).

³⁰ See *Arnone v. Town of Enfield*, 831 A.2d 260, 277 (Conn. App. Ct. 2003) ("A lay witness provides facts that are within his personal knowledge without providing his opinion concerning such facts."), *cert. denied*, 837 A.2d 804 (Conn. 2003).

³¹ See *id.* at 277–78 ("The test for determining whether a witness is an expert is whether the witness has any peculiar knowledge or experience, not common to the world, that renders his *opinion* of assistance to the trier of fact.").

³² AM. MED. ASS'N, CODE OF MEDICAL ETHICS OPINIONS ON PATIENT-PHYSICIAN RELATIONSHIP § 1.2.6, <https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-patient-physician-relationships> (last visited Apr. 26, 2019).

³³ INST. OF MED., COMM. ON DIAGNOSTIC ERROR IN HEALTH CARE, IMPROVING DIAGNOSIS IN HEALTH CARE 32 (Erin P. Balogh et al. eds., 2015) (emphasis added), <https://www.nap.edu/read/21794/chapter/4#32>.

³⁴ See *Lavoie v. Manoharan*, No. CV146027376, 2017 WL 6417834, at *3 (Conn. Super. Ct. Nov. 20, 2017) (holding that a defendant treating health care provider "cannot be compelled to provide expert opinion testimony regarding the standard of care, but [can] be questioned about the facts and circumstances of his treatment of the plaintiffs' decedent").

The standard of care defines the parameters of the legal duty that a health care provider accepts when treating a patient.³⁵ These standards of care are recognized by the profession as being acceptable medical treatment by reasonably prudent health care professionals under like or similar circumstances.³⁶ In order to abide by their legal duty, a health care provider must employ clinical reasoning in diagnosing and treating a patient that is in accordance with the standard of care.³⁷ At the essence of forming a doctor-patient relationship, each patient entrusts their treating health care provider with appreciating and honoring this duty.

Medical malpractice actions are evaluated by the integrity of the processes that the defendant treating health care provider observed.³⁸ The integrity of these processes, in turn, is adjudicated by the adherence to standards of care.³⁹ While plaintiffs in medical malpractice often rely on retained expert testimony to render new opinions for the purposes of trial,⁴⁰ such as a breach of the defendant's legal duty and the cause of the patient's injuries, plaintiffs must first establish the applicable standard of care before assessing liability for medical malpractice.⁴¹

The standard of care for medical treatment, however, is elusive since it may vary among jurisdictions in the United States.⁴² For example, if a particular community does not have facilities for emergency surgery, physicians operating in that community cannot be found negligent for failing to perform this surgery within the amount of time that might constitute the standard in a well-equipped urban hospital.⁴³ As practice guidelines often fail to provide sufficient clarity because of age, conflicting recommendations, various levels of evidential support, and underutilization by practitioners, the standard of care is often determined *de novo* and is a moving target.⁴⁴

Without access to defendant treating health care providers' expert testimony, this moving target proves difficult for medical malpractice plaintiffs to pin down. As courts are reluctant to allow plaintiffs to rely on expert testimony from health care providers within a defendant's working group, independently retained physicians are unlikely to be familiar with the

³⁵ Brian K. Cooke et al., *The Elusive Standard of Care*, 45 J. AM. ACAD. PSYCHIATRY & L. 358, 358 (2017), <http://jaapl.org/content/45/3/358>.

³⁶ *What Is Medical Malpractice?*, *supra* note 4.

³⁷ *Id.*

³⁸ Cooke et al., *supra* note 35, at 359.

³⁹ *Id.*

⁴⁰ FED. R. CIV. P. 26(a)(2)(B).

⁴¹ Cooke et al., *supra* note 35, at 359.

⁴² *Id.* at 363.

⁴³ *Id.* at 361.

⁴⁴ *Id.* at 363.

resources and capabilities of the facility responsible for the plaintiff's care.⁴⁵ The clinical reasoning of defendant treating physicians is therefore indispensable to establish the range of acceptable treatment modalities available during the plaintiff's care. If juries were precluded from considering defendant treating health care providers' clinical reasoning as to their interpretation of the medical facts and choice of available treatment options, they would not have the technical expertise needed to "distinguish malpractice (an adverse event caused by negligent care or 'bad care') from maloccurrence (an adverse event or 'bad outcome')." ⁴⁶

II. PRESENTING A COMPELLING NEED IN MEDICAL MALPRACTICE

The qualified expert testimonial privilege recognized in *Redding* leaves unresolved the question of when an expert testimonial privilege should apply and in what instances it should not. Without further clarification from the Connecticut courts, its application to medical malpractice litigation would pose complications.

According to the Appellate Court in *Redding*, "[t]he appropriate scope of an expert privilege requires a balance between the right of expert witnesses to be free from testifying against their will and the needs of the court and litigants for testimony."⁴⁷ In order to determine the proper scope of the *Redding* qualified expert testimonial privilege, it is therefore pertinent to assess this balance as applied to defendant treating health care providers in medical malpractice litigation.

A. Policy Justifications for Defendant Physicians

Courts have recognized two general categories of evidentiary privileges in common law and delineated the policy considerations justifying their recognition. The first category includes interpersonal privileges. These privileges exempt from discovery certain communications between individuals where there exists an "imperative need for confidence and trust."⁴⁸ Some examples of the circumstances justifying exemption involve attorney-client, spousal, and psychotherapist-patient communications.⁴⁹

⁴⁵ See *Hill v. Lawrence & Mem'l Hosp.*, No. HHDX04CV4034622S, 2008 WL 2802907, at *2 (Conn. Super. Ct. June 30, 2008) (precluding the plaintiff from compelling standard of care testimony from the defendant health care provider's colleagues).

⁴⁶ Am. Acad. of Pediatrics, Comm. on Med. Liab., *Guidelines for Expert Witness Testimony in Medical Malpractice Litigation*, 109 PEDIATRICS 974, 974 (2002) (citations omitted), <https://pediatrics.aappublications.org/content/109/5/974#ref-4>.

⁴⁷ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 187 (Conn. App. Ct. 2017).

⁴⁸ *Trammel v. United States*, 445 U.S. 40, 53 (1980).

⁴⁹ See *Upjohn Co. v. United States*, 449 U.S. 383, 387 (1981) (stating that the purpose of attorney-client privilege is to "encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in observance and administration of justice"); see also *Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (recognizing that psychotherapist-patient privilege serves

In these narrow circumstances, courts have found that protecting such communications “promotes sufficiently important interests to outweigh the need for probative evidence,”⁵⁰ and is “essential” to the “satisfactory maintenance of the [protected] relationship.”⁵¹ Furthermore, courts have stated that “the likely evidentiary benefit that would result from the denial of the privilege is modest.”⁵² The assumption is that individuals involved in these relationships would neither consult with nor divulge this evidentiary information to a confidant, but for the assurance of confidentiality furnished by a formal evidentiary privilege.⁵³ Accordingly, the excluded evidence would not have come into existence without the privilege.⁵⁴ The limited recognition of such narrow privileges is the common law’s reaction to societal demands to encourage and safeguard particular communications.

The second category involves personal privileges. These are privileges that preclude litigants from compelling an individual to divulge certain information about oneself. Examples of these exceptional circumstances include the privilege against self-incrimination,⁵⁵ the privilege against revealing one’s political vote,⁵⁶ and the privilege for a party to a civil action not to testify if called by his opponent.⁵⁷

A basis for justifying these personal privileges may be a theory of promoting the right to informational privacy and freedom from scrutiny.⁵⁸ “The essence of the right to privacy is control over the dissemination of information about oneself.”⁵⁹ However, such instances seem to stand at odds with the policies underlying our adversarial system and sacrifice a greater evidentiary benefit than interpersonal privileges. Unlike the interpersonal privileges, an absence of the protection afforded by personal privileges would not chill the evidence sought from coming into existence. Furthermore, personal privileges do not encourage socially desirable relationships between individuals. This could explain why the privilege against self-incrimination is limited to the protection of criminal defendants

the public interest of “[t]he mental health of our citizenry, . . . [which] is a public good of transcendent importance”); *Trammel*, 445 U.S. at 53 (spousal privilege is based on “the important public interest in marital harmony”).

⁵⁰ *Trammel*, 445 U.S. at 51.

⁵¹ Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317 (2003) (citing 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2285, at 527 (McNaughton rev. 1961)).

⁵² *Jaffee*, 518 U.S. at 11.

⁵³ Imwinkelried, *supra* note 51, at 317.

⁵⁴ *See id.* at 318 (discussing the chilling effect resulting from the lack of protection over confidential communications).

⁵⁵ *State v. Asherman*, 478 A.2d 227, 239–41 (Conn. 1984).

⁵⁶ *Mansfield v. Scully*, 29 A.2d 444, 449 (Conn. 1942).

⁵⁷ *Banks v. Conn. Ry. & Lighting Co.*, 64 A. 14, 14 (Conn. 1906).

⁵⁸ Imwinkelried, *supra* note 51, at 325.

⁵⁹ Thomas G. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 651 (1976).

and the testimonial privilege for a party to a civil action was eliminated by Connecticut statute in 1848.⁶⁰

The *Redding* qualified expert testimonial privilege falls within the latter category of personal privileges. *Redding* raises questions regarding the existence and scope of an “involuntary expert privilege.”⁶¹ The Appellate Court explained that “the phrase ‘unretained expert privilege’ . . . mean[s] a privilege that may be invoked by an expert to prevent the compelled disclosure of his or her opinion.”⁶²

Justifications for this privilege do not seem to fall within the theory of informational privacy. Instead, the most compelling basis for this privilege law is the right to autonomy.⁶³ The time that experts spend in litigation proceedings is time that is not being spent practicing their chosen profession. Accordingly, the “physician’s time spent in [legal proceedings] may be less valuable to society than the physician’s time spent healing the sick.”⁶⁴ Courts have similarly reasoned: “We do not force lawyers to provide services to anyone who walks in the door. We do not force other professionals to provide their services absent compelling circumstances. We see no reason to treat experts in a court of law any differently.”⁶⁵ Thus, proponents of the *Redding* qualified expert testimonial privilege suggest that courts should afford experts latitude to develop their faculties, stressing the social utility of leaving experts uninterrupted in their specialized role.⁶⁶

When the expert in question is also a defendant to the litigation, the justifications for this privilege dissipate. This is commonly the occurrence of treating health care providers in medical malpractice litigation. In these instances, the expert witness must spend time in the litigation proceedings—there exists no right to be exempt from participating.⁶⁷ Expert factual witnesses are subject to the same discovery about their knowledge of events as are non-expert witnesses.⁶⁸ “The law makes no accommodation for expert occurrence witnesses even though discovery may be particularly inconvenient or may entail larger financial loss to an expert than does the

⁶⁰ CONN. GEN. STAT. § 51-710 (1902); *Banks*, 64 A. at 14; C. TAIT & E. PRESCOTT, CONNECTICUT EVIDENCE § 5.11, at 257 (5th ed. 2014).

⁶¹ Brief of Plaintiff-In-Error-Appellee David R. Salinas at 1, *Redding Life Care, LLC v. Town of Redding*, 175 A.3d 1247 (Conn. 2018) (No. 20054).

⁶² *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 182 n.3 (Conn. App. Ct. 2017).

⁶³ Imwinkelried, *supra* note 51, at 327.

⁶⁴ Shuman, *supra* note 6, at 428.

⁶⁵ *In re Imposition of Sanctions Alt v. Cline*, 589 N.W.2d 21, 27 (Wis. 1999).

⁶⁶ Imwinkelried, *supra* note 51, at 327.

⁶⁷ See CONN. GEN. STAT. ANN. § 52-178 (Westlaw through 2020 Supplement to the Connecticut General Statutes) (noting that a party can only compel his adversary to testify “in the same manner and subject to the same rules as other witnesses”).

⁶⁸ See *id.* (noting that a deposition of an “adverse party” must occur “in the same manner and subject to the same rules as those pertaining to the taking of other depositions”).

same discovery of non-expert occurrence witnesses.”⁶⁹ Furthermore, any particular witness may be subject to great inconvenience or financial sacrifice for their time spent in litigation proceedings, “all suffer[ing] the same relative loss: a day’s wage.”⁷⁰ “[Y]et the court has power to subject them to discovery for the same reason it can compel testimony, to promote the integrity and efficacy of the judicial process of fact-finding.”⁷¹

A second potential rationale for the *Redding* qualified expert testimonial privilege may be that courts should preclude compelling unwilling experts based in a theory of unfairness. This theory assumes that “the expert, unlike an ordinary eyewitness, has no unique knowledge . . . [Therefore], the other side, at least in theory, can obtain the same information merely by engaging [another] expert.”⁷² This argument rests on the distinction between lay witnesses and expert witnesses. While “the function of the lay witness is to testify about the facts relevant to events the witness has perceived,”⁷³ “[t]he expert’s assistance to the fact finder does not derive from having been at a particular location, at a particular time, looking in a particular direction.”⁷⁴ Based on this distinction, litigants have argued that lay witnesses are unique and irreplaceable and expert witnesses are not.⁷⁵

“The appeal of this argument turns on the assumption that witnesses are clearly identifiable as lay or expert.”⁷⁶ The testimony of an expert defendant health care provider does depend upon having been at a particular location, at a particular time, looking in a particular direction. Arguably, the role of a defendant treating health care provider in medical malpractice litigation is therefore unique and irreplaceable.⁷⁷ Furthermore, “[t]he courts assert that the question of unfairness to individuals should not be controlling, since the inquiry is directed to one who has been a participant in the occurrence and withholding relevant testimony by litigants obstructs the administration of

⁶⁹ Virginia G. Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71, 107 n.147 (1984); see also *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 350 (D. Colo. 1995) (stating that a treating doctor is an ordinary witness and not entitled to be paid an expert’s fee for time spent in his deposition).

⁷⁰ Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 LAW & CONTEMP. PROBS. 51, 59 (1996).

⁷¹ Maurer, *supra* note 69, at 107.

⁷² Jack H. Friedenthal, *Discovery and Use of an Adverse Party’s Expert Information*, 14 STAN. L. REV. 455, 482–83 (1962); see Shuman, *supra* note 6, at 430 (stating that “anyone who received similar education and training could provide the same assistance”).

⁷³ Shuman, *supra* note 6, at 429.

⁷⁴ *Id.* at 430.

⁷⁵ See *id.* at 429 (arguing that “lay witnesses are unique and irreplaceable” because “[o]nly those persons who were in the right place at the right time can now tell us of this past event. No additional eyewitnesses can be created”).

⁷⁶ *Id.* at 430.

⁷⁷ See *id.* at 431 (“[T]he expert may have perceived some aspect of the events at issue. Thus, the expert’s knowledge of the events is unique and not fungible with that of other experts in the field.”).

justice.”⁷⁸ Judicial proceedings rely on accurate knowledge of the past event to decide an issue correctly that may have resulted in the loss of life, liberty, or property.⁷⁹ Such knowledge is uniquely held by defendant treating health care providers.

A third justification may support the *Redding* qualified expert testimonial privilege. Courts have suggested that “compelling expert testimony would in essence involve a form of involuntary servitude that should normally not be inflicted upon a person merely because of his professional expertise.”⁸⁰ In recognition of this argument, the Federal Rules of Civil Procedure offer protection to nonparties to litigation against subpoena power.⁸¹ The Advisory Committee explains that the purpose of these protections is the recognition that compelling an unwilling witness to provide an expert opinion implicates the individual’s intellectual property rights.⁸² “Arguably the compulsion to testify can be regarded as a ‘taking’ of intellectual property.”⁸³ As the Second Circuit stated, discretion in these matters should be informed by factors such as “the degree to which the expert is being called because of his knowledge of facts relevant to the case . . . [and] the difference between testifying to a previously formed or expressed opinion and forming a new one.”⁸⁴

This justification for the *Redding* qualified expert testimonial privilege evaporates in instances where the expert is also a defendant party and participant to the events giving rise to the litigation. In medical malpractice litigation, “the [defendant health care provider] is merely being required to provide testimony authenticating work already performed and opinions already voluntarily rendered.”⁸⁵ There seems to be no difference in principle between compelling experts to produce a document in their possession and compelling them to testify to information that lies within their knowledge,⁸⁶ regardless of whether such information is factual or opinion in nature. Furthermore, courts and commentators have rebutted the takings argument, noting that experts have no generally recognized property rights to their own knowledge.⁸⁷

⁷⁸ *Anderson v. Florence*, 181 N.W.2d 873, 879 (Minn. 1970).

⁷⁹ Shuman, *supra* note 6, at 427.

⁸⁰ *Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985).

⁸¹ FED. R. CIV. P. 45(d)(3)(B)(ii) (West 2013).

⁸² FED. R. CIV. P. 45 advisory committee’s notes to 1937 adoption (West 2013).

⁸³ *Id.*

⁸⁴ *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976).

⁸⁵ Brief of Defendant-In-Error/Appellant Town of Redding at 13–14, *Redding Life Care, LLC v. Town of Redding*, 175 A.3d 1247 (Conn. 2018) (No. 20054). *See also* 8 J. WIGMORE, EVIDENCE § 2203, at 137 (1961) (the expert who was asked to testify was not “render[ing] a professional service,” but was “asked merely, as other witnesses are, to testify as to what he knows or believes”).

⁸⁶ 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2193, at 74 (McNaughton rev. 1961).

⁸⁷ Maurer, *supra* note 69, at 108; *see also Kaufman*, 539 F.2d at 821 (“To clothe all such expert testimony with privilege solely on the basis that the expert ‘owns’ his knowledge free of any testimonial easement would seal off too much evidence important to the just determination of disputes.”).

Considering the needs of medical malpractice litigants for the unique expert testimony of defendant health care providers, these defendants require more compelling policy interests to justify the *Redding* privilege exempting discovery of their expert opinion.

B. *The Needs of Courts and Litigants*

In light of the technical nature of medical malpractice litigation, the requirement of expert opinion testimony, and the unique role of defendant health care providers, medical malpractice plaintiffs will suffer an undue burden in proving their *prima facie* case when courts apply the *Redding* qualified expert testimonial privilege to defendant treating health care providers.

In the field of medical malpractice litigation, a court will not ordinarily permit a plaintiff to have a jury deliberate on the case unless an expert provides supporting testimony.⁸⁸ As the law currently stands, courts are likely to protect unwilling health care providers who are strangers to the subject treatment being litigated from being compelled to testify.⁸⁹ In these instances, health care providers who provided no treatment to the plaintiff in a medical malpractice litigation will have formed no prior opinion as to that treatment. Not only would these experts who are strangers to litigation be required to become familiar with the relevant facts and formulate new opinions, compelling these non-treating health care providers to testify would require them to opine on the treatment of other health care providers or colleagues—a circumstance that the Connecticut Superior Court expressly sought to prevent.⁹⁰ Due to the courts' preference against compelling testimony of non-treating expert physicians, any concession to the interest of defendant health care providers will detriment the plaintiffs' interests in seeking necessary testimony from qualified experts.⁹¹

Testimony from defendant treating health care providers does not raise these same concerns. Familiar with the treatment at issue in litigation, defendant health care providers can provide their expert opinion without the imposition of additional study or preparation. Furthermore, the more specialized a particular medical field and the more limited the specialists, a

⁸⁸ Shuman, *supra* note 6, at 421.

⁸⁹ *Kaufman*, 539 F.2d at 820–21, 824 (precluding a litigant from compelling an expert “to express an opinion about facts of which [they] ha[ve] no personal knowledge” or cases in which they are an “utter stranger[] to the subject matter of the litigation”).

⁹⁰ *Hill v. Lawrence & Mem'l Hosp.*, No. HHD04CV-4034622S, 2008 WL 2802907, at *3 (Conn. Super. Ct. June 30, 2008) (considering policy reasons such as imposing a “heavy strain on relationships in health care facilities when one health care provider is required to make a public assessment under oath about another’s professional performance”); *Drown v. Markowitz*, No. CV054010740, 2006 WL 2604986, at *2 (Conn. Super. Ct. Aug. 18, 2006) (prohibiting a litigant from compelling opinion testimony from a health care provider as to “anyone except herself”).

⁹¹ Shuman, *supra* note 6, at 421.

litigant's need for expert testimony becomes ever more compelling. In such circumstances, the defendant health care provider may be the only feasible option for plaintiffs in proving their medical malpractice claim. Nevertheless, the *Redding* qualified expert testimonial privilege presumes to exempt their testimony unless courts find an exception.

Whether the "courts will compel cooperation of an expert, either at trial or in pretrial discovery, varies with the relationship of the expert to the parties and to the facts of the case."⁹² Many of the earliest cases distinguished between the ordinary expert witness and occurrence expert witnesses, resolving this issue by generally compelling expert testimony of occurrence expert witnesses.⁹³ The occurrence expert witness is the expert present at some phase of the event at issue.⁹⁴ The defendant in a medical malpractice action who witnessed the events giving rise to the litigation falls within this category of experts.

Plaintiffs in medical malpractice present a compelling need for the opinion testimony of defendant treating physicians, as these occurrence experts are unique and irreplaceable. Not only do treating health care providers possess specialized skill and knowledge that may be helpful to the trier of fact, they perceive first-hand the events that are pertinent to litigation. These specialized witnesses may be "called upon to fill three possible roles during discovery and at trial, namely, those of an adverse party, an eyewitness, and an expert witness."⁹⁵ The *Redding* test threatens to sever the third role from this list.

If the *Redding* qualified expert testimonial privilege were to apply to defendant treating health care providers, courts would deprive a medical malpractice litigant of the clinical reasoning and medical judgment employed by defendants in assessing the information gathered during treatment. It is impractical to obtain opinions on the same subject by other means, as their opinions are uniquely informed by their real-time involvement in the events at issue. The needs of the jury and the courts to consider the opinions formed contemporaneously with the defendant physician's treatment provide medical malpractice plaintiffs with a compelling need to preserve this testimony from being privileged.

III. VIOLATING CONNECTICUT'S LIBERAL RULES OF DISCOVERY

The United States Supreme Court has long emphasized, "[f]or more than three centuries[,] it has . . . been recognized as a fundamental maxim that the

⁹² Maurer, *supra* note 69, at 81.

⁹³ Shuman, *supra* note 6, at 434. *E.g.*, *Ex parte Dement*, 53 Ala. 389, 389–90 (1875); *Bd. of Comm'rs v. Lee*, 32 P. 841, 841–42 (Colo. App. 1893).

⁹⁴ Shuman, *supra* note 6, at 434.

⁹⁵ *Anderson v. Florence*, 181 N.W.2d 873, 878 (Minn. 1970).

public . . . has a right to every man's evidence."⁹⁶ This maxim, though, is not absolute. In exceptional circumstances, courts have also recognized evidentiary privileges that excuse certain individuals from giving testimony or producing documents. Privileges are established only in instances in which "exclusion [of relevant evidence] is thought to further some other societal interest more important than accurate judicial factfinding."⁹⁷ These evidentiary exclusions are "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for the truth."⁹⁸

Adhering to the preference for admitting relevant evidence, courts are reluctant to craft evidentiary privileges. Due to the inhibiting role that privileges play in our judicial system's search for truth, they "are not lightly created nor expansively construed."⁹⁹ Accordingly, courts examine various claims of privileges "start[ing] with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any [privileges] which may exist are distinctly exceptional."¹⁰⁰

There has been significant disagreement by courts as to which circumstances give rise to sufficient justifications for excluding evidence from judicial factfinding. The United States Supreme Court (U.S. Supreme Court) endeavored to resolve the disagreement with the authority Congress granted to it under the Rules Enabling Act.¹⁰¹ The U.S. Supreme Court considered codifying evidentiary privileges to bring unity and consistency to the law.¹⁰² Throughout this great debate as to which evidentiary privileges are prevalent enough to put into code, a testimonial privilege personal to expert witnesses was without mention.

An Advisory Committee that the Court appointed promulgated thirteen proposed rules to determine when courts should recognize evidentiary privileges.¹⁰³ The Advisory Committee drafted rather elaborate rules that established precisely what circumstances permitted invocation of a

⁹⁶ *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

⁹⁷ *Shuman*, *supra* note 6, at 428; *see also Jaffee*, 518 U.S. at 9 ("Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980))).

⁹⁸ *State v. Andrews*, 726 A.2d 104, 110 n.21 (Conn. 1999) (quoting *Bryan*, 339 U.S. at 331–32).

⁹⁹ *United States v. Nixon*, 418 U.S. 683, 710 (1974), *superseded by statute on other grounds*, FED. R. EVID. 104(a); *PSE Consulting, Inc. v. Frank Mercede & Sons, Inc.*, 267 Conn. 279, 330 (2004) (finding that the privilege should be construed strictly).

¹⁰⁰ *Jaffee*, 518 U.S. at 9 (citing *Bryan*, 339 U.S. at 331).

¹⁰¹ Act of June 19, 1934, 28 U.S.C. § 2072 (1970).

¹⁰² *Krattenmaker*, *supra* note 59, at 636.

¹⁰³ *Id.* at 615, 655 n.255 (discussing the Advisory Committee's proposed Federal Rules of Evidence 501 through 513).

privilege.¹⁰⁴ In response, “[a] storm of controversy arose after the Supreme Court promulgated the *Proposed Rules*, and no other portion of the rules encountered more criticism than the article dealing with testimonial privileges.”¹⁰⁵ The question of how to treat testimonial privileges proved to be especially controversial throughout the judicial and legislative branches in formulating these new rules of evidence.¹⁰⁶ “Rather than permit[ing] the proposed rules to become effective automatically, Congress passed a bill requiring affirmative congressional approval of the *Rules* before they could take effect.”¹⁰⁷

Since it was clear that no agreement was likely as to the content of specific privilege rules proposed by the Court,¹⁰⁸ Congress intervened in response to the intensified public dissension and widespread hostility.¹⁰⁹ Congress ultimately resolved the issue by eliminating all of the Court’s specific rules on privileges and substituting a single rule in their place—Rule 501.¹¹⁰ Rule 501 provides that privileges shall be governed by the principles of the common law as interpreted by the courts of the United States “in the light of reason and experience.”¹¹¹ Congress’s intervention in adopting this Rule has been “understood as reflecting the view that the recognition of a privilege . . . should be determined on a case-by-case basis” by trial judges.¹¹²

The enactment of Rule 501 is revealing. First, it displays that “neither [the adopted Federal Rules of Evidence] nor the proposed rules on privilege . . . contain any suggestion that an expert enjoys either an absolute or a qualified privilege against being called by a party against his will.”¹¹³ In consideration of the societal interests found, through centuries of experience,

¹⁰⁴ Krattenmaker, *supra* note 59, at 637.

¹⁰⁵ *Id.* at 638.

¹⁰⁶ *Id.* at 615.

¹⁰⁷ Act of Mar. 30, 1973, An Act to promote the separation of constitutional powers by suspending the effectiveness of the Rules of Evidence for United States Courts and Magistrates, the amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure transmitted to the Congress by the Chief Justice on February 5, 1973, until approved by Act of Congress, Pub. L. No. 93-12, 87 Stat. 9 (1973); Krattenmaker, *supra* note 59, at 636.

¹⁰⁸ S. REP. NO. 93-1277, at 6 (1974).

¹⁰⁹ Krattenmaker, *supra* note 59, at 615.

¹¹⁰ FED. R. EVID. 501 advisory committee’s note to 1974 enactment; S. REP. NO. 93-1277, at 11 (1974); *A Bill to Establish Rules of Evidence for Certain Courts and Proceedings: Hearing on H.R. 5463 Before the Comm. on the Judiciary*, 93d Cong. 356–57 (1974) (amendments by the House Judiciary Subcommittee to the Federal Rules of Evidence).

¹¹¹ FED. R. EVID. 501.

¹¹² FED. R. EVID. 501 advisory committee’s note to 1974 enactment; S. REP. NO. 93-1277, at 13 (1974); *see also* Krattenmaker, *supra* note 59, at 640–41 (“[A] number of influential individuals and groups stridently insisted that the concept of codifying federal evidence law itself was a grave mistake; they argued that evidentiary issues should be worked out on a case-by-case basis by trial judges.”).

¹¹³ *Kaufman v. Edelstein*, 539 F.2d 811, 818 (2d Cir. 1976).

to outweigh the public interest in the search for the truth, such a privilege was not of concern.

Second, the enactment demonstrates two policy issues that have dominated the debate over privileges: (1) the extent to which a testimonial privilege substantially protects the liberties of the individual rather than simply setting up a roadblock to the factfinding functions of the trial process; and (2) the extent to which trial judges should be granted deference in determining privileges.¹¹⁴ Ultimately, Congress decided that overarching rules governing the privilege of evidence risk a disparate impact on litigants and that the ruling on privileges is best left to the informed discretion of trial court judges.

A. *Practical Difficulties for Trial Judges*

The practical implications of the *Redding* qualified expert testimonial privilege remove substantial discretion and flexibility from trial court judges. No longer are trial court judges to consider the determining factors set forth in previous Superior Court cases—whether an expert previously formed an opinion and whether the expert is testifying as to events in which he or she was previously involved.¹¹⁵ Such factors have traditionally had significant influence on the determination of privileges as applied to treating health care providers in medical malpractice litigation. Furthermore, the privilege set forth in *Redding* presents trial court judges with the complicated task of distinguishing between factual and opinion testimony of medical expert witnesses. Given these practical implications of the *Redding* test, it would undoubtedly impose undue burdens on parties in medical malpractice litigation.

As the law currently stands, parties may file protective orders asking the court to preclude opposing counsel from compelling opinion testimony from disclosed experts.¹¹⁶ These orders may specify the extent of protection necessary in the circumstances of that case, tailoring each order to strike a proper balance between the needs of litigants and experts. Absent a qualified expert testimonial privilege, these means of protecting litigants from undue

¹¹⁴ Krattenmaker, *supra* note 59, at 646.

¹¹⁵ See *Drown v. Markowitz*, No. CV054010740, 2006 WL 2604986, at *2 (Conn. Super. Ct. Aug. 18, 2006) (prohibiting a litigant from compelling opinion testimony from a health care provider as to “anyone except herself”). See also *Baker v. Mongelluzzo*, No. UWYCV126016555S, 2016 WL 9462318, at *2 (Conn. Super. Ct. June 28, 2016) (holding that the expert “may not be compelled to give . . . opinion testimony regarding treatment by other health care providers . . . [but] may be questioned concerning opinions he already formulated, as expressed in medical records”); *Hill v. Lawrence & Mem’l Hosp.*, No. HHD04CV-4034622S, 2008 WL 2802907, at *3 (Conn. Super. Ct. June 30, 2008) (considering policy reasons such as imposing a “heavy strain on relationships in health care facilities when one health care provider is required to make a public assessment under oath about another’s professional performance”).

¹¹⁶ CONNECTICUT PRACTICE BOOK § 13-5 (West 2012).

discovery provide judges with the necessary flexibility and discretion to fairly administer trials.

Connecticut's Practice Book grants courts the authority to issue these protective orders under broad circumstances.¹¹⁷ It provides, in relevant part, "*for good cause shown*, the judicial authority may make any order *which justice requires* to protect a party from annoyance, embarrassment, oppression, or undue burden or expense."¹¹⁸ The party that seeks a protective order under Connecticut's Practice Book bears the heavy burden of establishing the requisite "good cause."¹¹⁹ The rules are clear; no court orders shall be made unless justice demands a party's protection. In its determination of whether good cause is shown to justify precluding a party's access to information in discovery proceedings, "the court is obligated to take a reasoned and logical approach to the relevant contest between the parties."¹²⁰ The trial court's discretion to rule on a protective order "applies to decisions concerning whether the information is *material, privileged, substantially more available to the disclosing party, or within the disclosing party's knowledge, possession or power*."¹²¹

Under the *Redding* test, the trial court could no longer consider these traditional factors of "good cause" in determining whether to privilege expert opinion testimony. Instead, courts would be required to make this determination based on the expectations of the expert witness—a consideration difficult to tangibly ascertain.¹²² Additionally, the party moving for a protective order would no longer bear the "heavy burden" of precluding discovery of relevant evidence. The qualified expert testimonial privilege, as recognized in *Redding*, presumes the privilege to apply to all unretained experts.¹²³ The party seeking disclosure, therefore, would bear the burden of establishing "a compelling need" for the expert's opinion testimony.

The *Redding* qualified expert testimonial privilege may also prove complicated for judges to effectively apply. In medical malpractice litigation, "it is difficult to distinguish between fact and opinion, as is often experienced by trial judges endeavoring to adhere to the rule prohibiting

¹¹⁷ *Id.*

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Babcock v. Bridgeport Hosp.*, 742 A.2d 322, 355 (Conn. 1999); *TelAid Indus. v. Tricomm Grp., Inc.*, No. 064006190, 2007 WL 586783, at *2 (Conn. Super. Ct. Feb. 2, 2007).

¹²⁰ *TelAid Indus.*, 2007 WL 586783, at *2.

¹²¹ *Standard Tallow Corp. v. Jowdy*, 459 A.2d 503, 508–09 (Conn. 1983) (emphasis added).

¹²² *See Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 187–88 (Conn. App. Ct. 2017) (stating that courts should consider "whether [the expert] reasonably should have expected [to] be called upon to provide opinion testimony in subsequent litigation").

¹²³ *Id.* at 187.

eliciting expert-opinion testimony from a defendant [treating health care provider].”¹²⁴

Precluding inquiring into all matters they deem to be of “an expert nature”—anything other than the actual care and treatment of the health care provider—presents the issue that what one party considers to be expert questioning will not be the same as what the other party considers to be expert questioning. As there is no credible way to separate the health care provider’s actual treatment from his or her specialized background, it is an arbitrary distinction to call a health care provider a mere “fact witness” as opposed to an “expert witness.”¹²⁵ “The doctor’s knowledge of the proper medical practice and [their] possible awareness of [their] deviation from that standard in the particular case are, in a real sense, as much matters of ‘fact’ as are the diagnosis and examination [the doctor] made or the treatment upon which [the doctor] settled.”¹²⁶

Because of this, when courts preclude all questioning of “an expert nature” at the deposition of a treating health care provider, lawyers argue over the nature of the questions.¹²⁷ Such confusion over the nature of questions creates significant expense and delay, and litigants cannot complete depositions until the court issues a decision on the propriety of each question.¹²⁸ Furthermore, “[r]igid application of the fact/opinion distinction might result in the exclusion of the physician’s testimony about perception cast in opinion terms.”¹²⁹

¹²⁴ *Anderson v. Florence*, 181 N.W.2d 873, 877 (Minn. 1970); see also Shuman, *supra* note 6, at 433 (“Although experts may be compelled to testify to their perceptions in factual terms, it is likely that in the area of their expertise, their factual perceptions will be interwoven with their opinions.”).

¹²⁵ See Herman Edgar Garner, Jr., *Opinion and Expert Evidence Under the Federal Rules*, 36 LA. L. REV. 123, 125 (1975) (“The theoretical distinction between fact and opinion leads to confusion in the courts and is criticized severely by scholars.”).

¹²⁶ *Anderson*, 181 N.W.2d at 878.

¹²⁷ For a sampling of these debated questions, see *Lavoie v. Manoharan*, No. CV146027376, 2017 WL 6417834, at *1 n.2 (Conn. Super. Ct. Nov. 20, 2017) (“[D]id the standard of care require that you perform an initial general psychiatric evaluation of [the decedent?]”). See also Plaintiffs’ Objection to Defendants’ Motion for Protective Order at Exhibit A, *Vastarelli v. ProHealth Physicians*, NNH-CV-16-6060491-S (Conn. Super. Ct. July 18, 2018) (“[I]f [a Doppler/ultrasound] is negative, does that rule out a pulmonary embolism?”; “What are the ways available to you to rule out a pulmonary embolism?”; “How would you characterize the findings on the chest x-ray and the lower extremity Doppler?”; “Do you have an understanding as to why [a physician] ordered the Doppler?”; “What is a normal O2 saturation?”; “Would it give you any concern if [the patient] had shortness of breath walking?”).

¹²⁸ See *Redding Life Care, LLC v. Town of Redding*, 207 A.3d 493, 508 (Conn. 2019) (suggesting that parties “make a record of the specific questions that seek allegedly privileged information, and then request a further ruling from the trial court on particular questions”).

¹²⁹ Shuman, *supra* note 6, at 438–39; see also Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 935 (1976) (“An expert’s testimony as to the facts that he observed, moreover will often indicate his expert opinions and conclusions.”).

To avoid the substantial difficulty that trial judges will face in determining whether the testimony in question is fact or opinion,¹³⁰ the *Redding* qualified expert testimonial privilege should not apply to treating health care providers in the discovery stage of medical malpractice litigation. Otherwise, courts may inadvertently preclude discovery of admissible evidence to the detriment of litigants in their search for justice.

B. Connecticut's Liberal Rules of Discovery

Connecticut's rules of discovery allow significantly greater access to information than the rules governing the admissibility of evidence at trial.¹³¹ So long as parties have reason to believe that their discovery requests may lead to admissible evidence, they are entitled to the discovery of such evidence. The *Redding* test seems to ignore the distinction between the discovery of evidence and the admissibility of such evidence at trial. As a result, the *Redding* qualified expert privilege may deprive medical malpractice litigants of expert testimony from treating health care providers that can help direct the discovery of relevant and admissible evidence.

The purpose of discovery is to minimize the likelihood and effects of unfair surprise at trial and to provide an informational basis for factfinding and analysis at trial or for fair settlement of the dispute.¹³² Connecticut's Practice Book entitles parties to liberal discovery of information. This rule informs the courts that "[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure."¹³³ This open exchange of information is the fuel that powers the adversarial system. Without it, the search for truth and justice would come to a grinding halt.

The qualified testimonial privilege recognized in *Redding* is not limited to the admissibility of an unretained expert's opinion at trial. Instead, the *Redding* privilege would preclude a medical malpractice litigant from pretrial discovery of a treating health care provider's opinion testimony as

¹³⁰ See Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 416 (1952) ("[F]ew rules have caused the courts more trouble than their legalistic struggle to determine whether the testimony in question is fact or opinion.").

¹³¹ See *Sanderson v. Steve Snyder Enters., Inc.*, 491 A.2d 389, 392 (Conn. 1985); *Millium v. New Milford Hosp.*, 20 A.3d 36, 51 (Conn. App. Ct. 2011), *aff'd*, 80 A.3d 887 (Conn. 2013); CONNECTICUT PRACTICE BOOK § 13-2 (West 2012) (stating that evidence may be elicited at a discovery deposition even though "the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence").

¹³² *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 456–57 (2d Cir. 1975) ("The policy which prompted amendment to Rule 26(b)(4) . . . to allow more liberal discovery of potential expert testimony was not merely for convenience of the court and the parties, but was intended to make the task of the trier of fact more manageable by means of an orderly presentation of complex issues of fact.").

¹³³ CONNECTICUT PRACTICE BOOK § 13-2 (West 2012).

well. In consideration of the liberal rules of discovery, the medical opinion of treating health care providers should be discoverable. Obtaining such information would assist a medical malpractice plaintiff in gathering the specialized evidence required for a *prima facie* case and could guide the plaintiff's discovery of such relevant information from non-treating expert physicians retained for litigation. Additionally, obtaining equivalent medical opinion testimony from a non-treating expert imposes substantial burdens of time and expense on a medical malpractice plaintiff. A defendant treating health care provider can surely offer such testimony with substantially greater facility than it could otherwise be obtained by a plaintiff.

To uphold and protect this system of liberal discovery, Connecticut has set forth Rules of Professional Conduct governing the role of lawyers in the exchange of information. These rules hold lawyers to a standard of honesty and cooperation to promote accurate and open disclosure. "Fair competition in the adversary system is secured by prohibitions against . . . concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."¹³⁴ Without such Rules of Professional Conduct, the adversary system would not function fairly nor would it lead to just results.

"[A]lmost all the limits upon advocacy specified in . . . the Rules of Professional Conduct are designed to protect the integrity of the justice system,"¹³⁵ such as by regulating the discovery of information. In particular, the Rules of Professional Conduct provide that: a lawyer shall not "[u]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."¹³⁶ Commentary makes it clear that this rule also concerns obstructive tactics in discovery procedure, "such as at a deposition, by which an attorney improperly seeks to hamper a party in its effort to obtain evidence."¹³⁷ Lawyers' attempts to preclude parties from discovery of information create inefficiencies, generate expenses associated with obtaining alternative evidence, and limit the examination of information that may be critical to the case. For these reasons, conduct that interferes with the discovery system is *per se* sanctionable.

In reference to Connecticut's liberal rules of discovery, the Appellate Court refused to identify an absolute testimonial privilege for treating physicians.¹³⁸ The Appellate Court found that "a categorical rule permitting

¹³⁴ *Faile v. Zarich*, No. HHDX04CV065015994S, 2009 WL 3285986, at *6 (Conn. Super. Ct. Sept. 10, 2009).

¹³⁵ *Id.* at *8; 2 G. HAZARD & W. HODES, *THE LAW OF LAWYERING* § 65.6, at 65–11 (3d ed. Supp. 2007).

¹³⁶ CONNECTICUT RULES OF PROF'L CONDUCT 3.4(1) (Westlaw through amendments received May 1, 2019).

¹³⁷ *Faile*, 2009 WL 3285986, at *7.

¹³⁸ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 183 n.5 (Conn. App. Ct. 2017);

treating physicians to refuse to testify at a deposition is not in harmony with our liberal discovery rules” and “finds no support in our appellate jurisprudence or our long history of trial practice.”¹³⁹ In refusing to adopt an absolute expert privilege, the Appellate Court considered the potential abuse of this power—namely, allowing litigants to argue that information is privileged even if the expert witnesses themselves do not claim protection from disclosing their opinion testimony.¹⁴⁰ Accordingly, the Appellate Court noted that “[e]ven if [the court] were to assume, arguendo, that there was such a privilege [of expert witness testimony], it would be personal to the witnesses and not within the scope of any party’s rights to assert.”¹⁴¹ The Appellate Court’s dictum and the Rules of Professional Conduct emphasize this potential abuse by attorneys and ensure that any claim of privilege by experts must be made personally and based on their own unwillingness to provide opinion testimony.

Connecticut courts have explained that “[t]he rules of discovery are designed to make a ‘trial less a game of blindman’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.’”¹⁴² In pursuit of this goal and in the administration of justice, “courts must have the power to discover and compel the disclosure of evidence. Otherwise truth can be concealed and justice can be thwarted at the whim of anyone who prefers not to divulge what he knows.”¹⁴³ The question here is: to what extent does the power to compel disclosure of evidence allow access to a defendant treating health care provider’s expert opinion testimony?

C. *Restricting Discovery in Medical Malpractice Litigation*

While Connecticut rules governing the admissibility of evidence at trial permit any health care provider who rendered care or treatment to a party to offer their expert testimony,¹⁴⁴ Connecticut rules governing the discovery of evidence allow for significantly greater access to information.¹⁴⁵ These rules

Milliun v. New Milford Hosp., 20 A.3d 36, 51 (Conn. App. Ct. 2011), *aff’d*, 80 A.3d 887 (Conn. 2013).

¹³⁹ See *Milliun*, 20 A.3d at 51 (holding that nonparty physicians could be compelled to testify as expert witnesses regarding the bases for medical opinions they previously formed after treating).

¹⁴⁰ See *id.* (noting that the court “fail[ed] to see how the defendant has any standing to assert the witnesses’ rights”).

¹⁴¹ *Id.*

¹⁴² *Sturdivant v. Yale-New Haven Hosp.*, 476 A.2d 1074, 1076 (Conn. App. Ct. 1984) (citing *United States v. Proctor & Gamble*, 356 U.S. 677, 682 (1958)).

¹⁴³ *United States v. Seewald*, 450 F.2d 1159, 1162 (2d Cir. 1971).

¹⁴⁴ *E.g.*, *Gemme v. Goldberg*, 626 A.2d 318, 325 (Conn. App. Ct. 1993); see also *Williams v. Chameides*, 603 A.2d 1211, 1213 (Conn. App. Ct. 1992) (“[The] plaintiff may rely on defendant’s testimony to meet its burden of producing positive evidence of an expert nature from which the jury could reasonably and logically conclude that the defendant was negligent.”).

¹⁴⁵ See *Sanderson v. Steve Snyder Enters., Inc.*, 491 A.2d 389, 392 (Conn. 1985) (noting that “the allowable scope of inquiry at a discovery deposition clearly exceeds the boundaries of admissible evidence”); *Milliun v. New Milford Hosp.*, 20 A.3d 36, 51 (Conn. App. Ct. 2011), *aff’d*, 80 A.3d 887

lie at the heart of Connecticut's liberal discovery system and stand at odds with the *Redding* court's qualified expert testimonial privilege.

The *Redding* qualified expert testimonial privilege departs from Connecticut's liberal rules of discovery in several respects. First, the *Redding* privilege does not distinguish between the discovery and admissibility of expert testimony.¹⁴⁶ Connecticut's liberal rules of discovery depend upon this distinction to minimize the likelihood and effects of unfair surprise at trial and to provide an informational basis for factfinding. By precluding discovery of a defendant treating health care provider's expert opinion, medical malpractice plaintiffs would be substantially limited in the information they are able to consider in preparing and litigating their claim.

Second, consistent with the Connecticut Supreme Court's holding that courts should decide whether to grant an expert testimonial privilege on a case-by-case basis,¹⁴⁷ the Connecticut rules grant trial judges the discretion to issue protective orders once litigants disclose treating health care providers as experts. In such instances, it is the party seeking the protective order that bears the heavy burden of proof. The *Redding* qualified expert testimonial privilege shifts this burden, requiring the party seeking disclosure to demonstrate a compelling need *and* that the witness reasonably expected to provide expert testimony in subsequent litigation.¹⁴⁸ The burden that the *Redding* test places on litigants seeking disclosure creates, in effect, "a categorical rule permitting treating physicians to refuse to testify at a deposition [that] is not in harmony with our liberal discovery rules."¹⁴⁹

Third, Connecticut's rules of discovery place the use of protective orders and the extent of discovery within the discretion of the trial judge.¹⁵⁰ This discretion allows trial judges to tailor discovery in a manner that strikes the proper balance between a litigant's need for testimony and a witness's protection from annoyance, embarrassment, oppression, undue burden, and expense. Unlike the *Redding* privilege that excludes all testimony of an "expert nature," Connecticut's rules of discovery authorize trial judges to designate the particular scope and manner of discovery in consideration of the facts in dispute.¹⁵¹

Finally, the policy considerations set forth in Connecticut's rules of discovery underlying the granting of protective orders do not justify precluding discovery of defendant treating health care providers' opinions.

(Conn. 2013); CONNECTICUT PRACTICE BOOK § 13-2 (West 2012) (stating that evidence may be elicited at a discovery deposition even though "the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence").

¹⁴⁶ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 183 (Conn. App. Ct. 2017).

¹⁴⁷ *Town of Thomaston v. Ives*, 239 A.2d 515, 518 (Conn. 1968).

¹⁴⁸ *Redding Life Care, LLC v. Town of Redding*, 165 A.3d 180, 181 (Conn. App. Ct. 2017).

¹⁴⁹ *Milliun*, 20 A.3d at 51 (holding that nonparty physicians could be compelled to testify as expert witnesses regarding the bases for medical opinions they previously formed after treating).

¹⁵⁰ *Standard Tallow Corp. v. Jowdy*, 459 A.2d 503, 508 (Conn. 1983).

¹⁵¹ CONNECTICUT PRACTICE BOOK § 13-5 (West 2012).

Treating health care providers possess direct knowledge and familiarity regarding their care and treatment of a party. This knowledge includes information with respect to the condition of the party at the time they rendered such treatment, as well as the party's prognosis for future treatment, all of which is material to the litigation. Furthermore, treating health care providers have the luxury of relying on, in addition to their education, training, and experience in their specialized fields, their examinations of the patient's medical histories, present condition, and response to treatment. The unique position of these treating health care providers offers knowledge of parties' injuries that is superior to any other non-treating health care provider. Because of this, they are in the best position to testify to the applicable standard of care for the treatment of the party, departures from that standard of care, and the causal relationship between those departures and the injuries suffered by the party.

Possessing such personal knowledge and experience, treating health care providers may therefore provide expert opinion testimony without the imposition of additional study, preparation, undue burden, or expense. As the Second Circuit has recognized, states generally "compel[] experts to testify to opinions which they are able to give without study of the facts or other preparation," precluding such testimony only when experts are asked to "express an opinion about facts of which . . . [they] ha[ve] no personal knowledge" or cases in which they are "utter strangers to the subject matter of the litigation."¹⁵² In fact, the law is settled that medical malpractice plaintiffs may rely on the defendant treating health care provider for testimony regarding the standard of care.¹⁵³ Precluding inquiry into a treating health care provider's opinions would substantially impede the evidentiary obligations of a party in proving their claim and would interfere with the relevant contest between parties in accessing information.¹⁵⁴ Such information is not substantially more available to the plaintiffs, for it is

¹⁵² *Kaufman v. Edelstein*, 539 F.2d 811, 820–21, 824 (2d Cir. 1976). *See* *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536 (2d Cir. 1972) (finding that "though [the court] cannot require [an expert witness] to conduct any examinations or experiments to prepare himself for trial, it can require him to state whatever opinions he may have previously formed"); *see also* CONNECTICUT PRACTICE BOOK § 13-2 (West 2012) (stating that a party may obtain discovery of material information which is "within the knowledge, possession or power of the . . . person to whom the discovery is addressed").

¹⁵³ *See* *Williams v. Chameides*, 603 A.2d 1211, 1213 (Conn. App. Ct. 1992) (stating that, "[t]he plaintiff may rely on the defendant's testimony to meet its burden of producing positive evidence of an expert nature from which the jury could reasonably and logically conclude that the defendant was negligent"); *see also* *Gemme v. Goldberg*, 626 A.2d 318, 325 (Conn. App. Ct. 1993).

¹⁵⁴ *See* Order 134.30, *Sabetta v. Guilford Family Practice*, NNH-CV-15-6058837-S (Conn. Super. Ct. Nov. 14, 2016) (compelling expert testimony of defendant treating physician under the liberal rules of discovery in Practice Book § 13-2); *see* *Standard Tallow Corp. v. Jowdy*, 459 A.2d 503, 510 (Conn. 1983) (finding an abuse of the court's discretion in denying the plaintiff opportunity for discovery of information which the "court had already recognized . . . was necessary").

uniquely held within the knowledge, possession, and power of a treating health care provider.¹⁵⁵

The *Redding* privilege presents a substantial departure from Connecticut's liberal rules of discovery. Plaintiffs in complex and specialized cases such as medical malpractice litigation depend on expert testimony to succeed on their claim and have utilized Connecticut's liberal rules of discovery to meet their burden of proof with the expert opinions of treating health care providers. The *Redding* privilege would unduly impede medical malpractice plaintiffs in their search for the expert evidence that the law requires. In an adversarial system designed to promote the search for truth and access to justice, the *Redding* court's qualified expert testimonial privilege violates Connecticut's liberal rules of discovery as applied to treating health care providers.

CONCLUSION

The *Redding* qualified expert testimonial privilege as applied to defendant treating health care providers would impose an undue burden on litigants involved in medical malpractice actions. Given the requirement for expert testimony in complex cases of medical malpractice and litigants' demand for the unique expert opinion of treating health care providers, a compelling need for the expert testimony of defendant treating physicians is likely to outweigh an expert party's need for protection. Furthermore, applying this privilege to preclude defendant health care providers from offering their opinion testimony during discovery depositions would result in practical difficulties imposed on courts and litigants alike, in turn violating Connecticut's liberal rules of discovery. Accordingly, if the *Redding* privilege is reestablished in the Connecticut courts, trial judges should find exception to the applicability of this qualified expert testimonial privilege to defendant treating health care providers. Such an exception would be necessary to avoid inaccuracies in judicial factfinding and impediments to justice in medical malpractice litigation.

¹⁵⁵ See C. R. McCorkle, Annotation, *Compelling Expert to Testify*, 77 A.L.R.2d 1182 § 2 (1961) ("An expert may be compelled to testify as to a matter of fact within his knowledge, notwithstanding that such knowledge may have been acquired as the result of special study, learning, skill, or experience."); see also *Celentano v. Home Ins. Co.*, No. CV91 03 42 27S, 1992 WL 335759, at *4 (Conn. Super. Ct. Nov. 5, 1992) (compelling expert testimony of a witness who observed the mechanism of plaintiff's injuries as it would be "impracticable for the plaintiff to obtain facts and opinions on that subject by other means").