

## MEDICAL DEFENSE AND HEALTH LAW

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*This article discusses an Illinois Appellate Court decision that addressed whether a controlled expert witness who had been disclosed as a trial witness could subsequently be designated as a non-testifying expert consultant to prevent disclosure of his opinions.*

## Illinois Appellate Court Holds Experts Redesignated as Consultants are Entitled to Consultant's Privilege Against Disclosure

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The First District Appellate Court of Illinois (First District) recently held that a party who previously disclosed a witness pursuant to 213(f)(3) as a controlled expert may later redesignate that witness to be a consultant pursuant to Rule 201(b)(3). *Dameron v. Mercy Hospital & Medical Center*, 2019 IL App (1st) 172338. As discussed in greater detail below, the implications of the *Dameron* case are significant.

### Facts and Procedure

In *Dameron*, the plaintiff filed a medical malpractice claim against Mercy Hospital and Medical Center and several medical professionals, alleging that she sustained injuries following a surgical procedure. *Dameron*, 2019 IL App (1st) 172338, 4. Throughout the discovery process, the plaintiff answered the defendants' interrogatories and disclosed Dr. David Preston as a controlled expert witness pursuant to Illinois Supreme Court Rule 213(f)(3). *Id.* 5; see Ill. S. Ct. R. 213(f)(3). In accordance with the rule, the plaintiff further disclosed that Dr. Preston would testify as to the results of the plaintiff's comparison electromyogram (EMG) and/or nerve conduction study (EMG study), which were scheduled to be performed in the following days. *Dameron*, 2019 IL App (1st) 172338, 5. Because the tests had not yet been conducted, the plaintiff did not disclose a written report prepared by Dr. Preston pursuant to the rule. *Id.*

Several months later, the plaintiff advised opposing counsel that the disclosure of Dr.

Preston as a controlled expert witness was inadvertent and filed a motion to designate Dr. Preston as a non-testifying expert consultant pursuant to Illinois Supreme Court Rule 201(b)(3). *Dameron*, 2019 IL App (1st) 172338, 6-7, citing Ill. S. Ct. R. 201(b)(3). The plaintiff contended that because Dr. Preston was redesignated as a consultant, his opinions were privileged from discovery. *Id.* 7. The trial court denied plaintiff's motion to redesignate Dr. Preston as a consulting expert and ordered counsel to produce Dr. Preston's records relating to the plaintiff's EMG study. *Id.* 7, 9. The plaintiff refused to comply with the court's order and the court found her in contempt. *Id.* 9. The plaintiff appealed. *Id.* 10.

### Analysis

In this case of first impression, the First District analyzed whether a party who previously disclosed a witness as a testifying, controlled expert may thereafter redesignate that witness as a consultant whose opinions and work product are privileged from discovery, absent a showing of exceptional circumstances by the opposing party. *Dameron*, 2019 IL App (1st) 172338, 12. The court first observed the law in Illinois, which provides that a party may withdraw an expert witness so long as the opposing party is given clear and sufficient notice to allow it to take the necessary action in light of the abandonment of the witness. *Id.* 19, citing *Taylor v. Kohli*, 162 Ill. 2d 91, 97 (1994). However, the court noted that the plaintiff in this case also sought to redesignate Dr. Preston from a controlled

expert witness to a non-testifying consultant whose reports and opinions are protected from discovery pursuant to the privilege set forth in Rule 201(b)(3). *Dameron*, 2019 IL App (1st) 172338, 19. Therefore, the court looked to federal cases for guidance. *Id.* 22.

### Review of Federal Cases

The court noted that similar to Illinois rules, the Federal Rules of Civil Procedure also distinguishes an expert whose opinions may be presented at trial and a non-testifying expert employed only for trial preparation. *Dameron*, 2019 IL App (1st) 172338, 22, citing *San Román v. Children's Heart Center, Ltd.*, 2010 IL App (1st) 091217, 23. Prior to 2009, the majority of federal courts concluded that a party had the ability to change the designation of an expert witness. *Dameron*, 2019 IL App (1st) 172338, 23, citing *Davis v. Carmel Clay Schools*, No. 1:11-cv-00771-SEB-MJD, 2013 U.S. Dist. LEXIS 70251, at \*3 (S.D. Ind. May 17, 2013). Furthermore, in 2009, the Seventh Circuit Court of Appeals recognized that “[a] witness identified as a testimonial expert is available to either side; such a person can’t be transformed after the report has been disclosed, and a deposition conducted, to the status of a trial-preparation expert whose identity and views may be concealed.” *Dameron*, 2019 IL App (1st) 172338, 24, citing *Securities & Exchange Commission v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). However, none of the federal cases distinguished situations where only the expert’s identity was disclosed from those where the expert’s report had been

disclosed. *Dameron*, 2019 IL App (1st) 172338, 24.

In *Davis*, the court determined what constituted a “designation” of an expert witness. *Dameron*, 2019 IL App (1st) 172338, 25, citing *Davis*, 2013 U.S. Dist. LEXIS 70251, 2013 WL 2159476, \*2. In doing so, the *Davis* court held that once the expert’s report was disclosed to the opposing party, the expert ceased to enjoy protection from discovery by the opposing party. *Dameron*, 2019 IL App (1st) 172338, 25. However, the court in *Davis* concluded ‘it is clear that prior to producing the expert report, courts [have found] that a party can change a testifying expert to a non-testimonial expert without losing the protections’ from discovery, absent exceptional circumstances.” *Id.*, citing *Davis*, 2013 U.S. Dist. LEXIS 70251 at\*7.

Keeping the *Davis* holding in mind, the court in *Dameron* noted that Illinois Rule 213(f)(3) provides that for a “controlled expert witness, the party must identify: \*\*\* (iv) any reports prepared by the witness.” Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2018). *Dameron*, 2019 IL App (1st) 172338, 26. In *Dameron*, the plaintiff disclosed the identity of her expert, Dr. Preston, but had not yet disclosed his report because at the time she submitted her answers to interrogatories, Dr. Preston had not yet conducted the examination of the plaintiff. *Id.*

The defendants raised several arguments in support of their contention that they were entitled to the results of the EMG study since

Dr. Preston was previously disclosed as a testifying expert. *Dameron*, 2019 IL App (1st) 172338, 27. The court rejected each, holding: (1) Dr. Preston could not be considered one of plaintiff's treating physicians, (2) the plaintiff's disclosure of Dr. Preston was not considered a judicial admission, and (3) the plaintiff did not waive the consultant's privilege by disclosing Dr. Preston as her testifying expert witness. *Id.* 28-42. In addressing the waiver argument, the court found that in *Dameron*, the court ordered plaintiff's attorney to produce "Dr. Preston's records regarding his June 1, 2017 comparison EMG study" on the plaintiff. However, the EMG study was absent from the record on appeal and therefore the court could not conclude that the material sought was of a purely concrete nature or that the production of the EMG study had the potential to expose Dr. Preston's thought processes. *Id.* 50. Therefore, the court held that Dr. Preston's EMG study was protected by the consultant's work product privilege. The court also rejected the argument that the fundamental fairness exception required disclosure of Dr. Preston's EMG study of the plaintiff. *Id.* 52.

### Conclusion

Similar to the analysis provided by the federal courts, the First District held that a testifying expert witness who has been disclosed but timely withdrawn by a party

prior to disclosure of his or her report may be redesignated a Rule 201(b)(3) consultant and entitled to the consultant's privilege against disclosure, absent exceptional circumstances. *Dameron*, 2019 IL App (1st) 172338, 55. The *Dameron* court reversed the trial court's order denying the plaintiff's motion to redesignate Dr. Preston as a Rule 201(b)(3) and produce Dr. Preston's EMG study. *Id.* 56.

The court in the *Dameron* case made clear that its ruling would have been different had Dr. Preston's report been in existence at the time the plaintiff disclosed him as the controlled expert. *Id.* 41. Thus, counsel should give careful consideration in providing 213(f)(3) disclosures and reports prior to a potential controlled expert's complete assessment. Premature disclosures may require counsel to redesignate a previously disclosed controlled expert to a non-testifying consultant, which could further result in a waiver of the consultant's privilege, depending on whether a report was in existence or had already been disclosed. The holding in *Dameron* reiterates the importance in contemplating who and when to disclose an expert in medical malpractice cases.

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