Legal Update
ROPER, P.A.
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New Florida Medicaid Minimum Wage Requirements for Providers Effective October 1, 2022

On June 2, 2022, Governor Ron DeSantis signed the Freedom First budget for State Fiscal Year (SFY) 2022-2023. The Freedom First Budget provided over $600 million in funding to the Agency for Health Care Administration (Agency or AHCA) for the sole purpose of increasing the minimum wage for employees of Medicaid providers to at least $15.00 an hour.

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Based upon the information available on the AHCA website, the new Florida Medicaid Minimum Wage Requirement **applies** to the direct care providers (ambulance drivers, EMTs, paramedics) of cities, counties and special districts that are Medicaid Providers that provide ambulance transportation.

Outline of New Florida Medicaid Minimum Wage Requirements on Providers

- The Agency shall enter into a supplemental wage agreement with each provider [that is on the list of providers covered under the Medicaid Fee-for-Service Fee Schedules on the AHCA website: https://ahca.myflorida.com/Medicaid/Finance/finance/enh_wage/ew_feesched.shtml] to include this minimum wage requirement to ensure compliance.

- Transportation Services providers (emergency medical transportation and nonemergency medical transportation) is a fee schedule that is included in the AHCA list.

- The agreement must require the applicable providers to agree to pay each of its [direct care] employees at least $15.00 per hour. AHCA defines Direct Care Worker as an individual that has direct contact with a Medicaid recipient for purposes of providing a Medicaid reimbursable service. Direct care workers do not include individuals who do not provide a Medicaid reimbursable service, whose primary

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duty is maintaining the physical environment of the workplace, or whose duties are primarily administrative. The Agency's definition and illustrative examples of "direct care worker" include, but are not limited to Paramedic, EMT, Ambulance drivers and attendants, Social and Human Service Assistants, Community and Social Service Specialists. Please review question 12 of the FAQs at for a complete list of all examples of "direct care workers": https://ahca.myflorida.com/Medicaid/Finance/finance/enh_wage/ew_faq.shtml

- The agreement shall include an attestation under penalty of perjury under Section 837.012, Florida Statutes, stating that every employee of the provider, as of **October 1, 2022**, will be paid at least $15.00 per hour.

- Beginning **January 1, 2023**, an employee of a provider receiving an increased rate that is not receiving a wage of at least $15.00 per hour may bring a civil action in a court of competent jurisdiction against his or her provider and, upon prevailing, shall recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement in employment and/or injunctive relief. Such actions may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure.

- The Agency shall enter into a supplemental wage agreement with all managed care plans to ensure these funds are used to raise the wages of direct care employees under contract with the managed care plan. The managed care plan shall provide attestation to the Agency that they have amended each provider's contract reimbursement rate to comply with this provision by **January 1, 2023**.

- The state will be increasing the Medicaid Fee Schedule for Transportation Services providers (emergency medical transportation and nonemergency medical transportation) should be increased to help offset the costs but details on that are not available yet.

The ACHA published the Supplemental Wage Agreement on August 4, 2022, to the Medicaid Provider Secure Web Portal at https://home.flmmis.com. A provider who logs in to their Secure Web Portal account on or after August 4, 2022, will be able to review and sign the supplemental wage agreement.

It is strongly suggested that you review all of the sections of the websites and prepare for this upcoming mandate if you are a County, City and/or Special District as this goes into effect on October 1, 2022. Civil actions for failure to comply with these requirements are effective as of January 1, 2023.

By: Cindy A. Townsend

ATTORNEY-CLIENT PRIVILEGE PRESERVED BY THE FIFTH DCA

In the past several years, the plaintiffs' bar has continuously attempted to chip away and narrow attorney-client privilege. More specifically, this has become a pattern in corporate representative depositions taken under Florida Rule of Civil Procedure 1.310(b)(6). In a recent opinion by the Fifth District Court of Appeal ("Fifth DCA"), the Court found that attorney-client privilege is not waived unless the substance of the privileged communication is disclosed.

In *Papa John's USA, Inc. v. Paula Moore*, 2022 WL 2759871 (Fla. 5th DCA July 15, 2022) Ms. Gonzalez, a delivery driver for Papa John's, was involved in a motor vehicle accident in 2015, wherein Ms. Moore was allegedly injured. In June of 2021, plaintiff's counsel took the deposition of Papa John's corporate representative. During the deposition, the representative testified that he never spoke to Ms. Gonzalez about the subject accident. However, in preparation for the deposition, the representative read her deposition testimony and reviewed other relevant materials. On cross examination, defense counsel elicited more information regarding why the representative had never spoken to Ms. Gonzalez. The representative explained that he had asked one of his defense counsels to contact Ms. Gonzalez on his behalf to gather additional facts. Once he obtained the additional facts from defense counsel, the representative did not have any additional questions, and did not find the need to discuss with Ms. Gonzalez. Plaintiff's counsel then questioned the witness and sought "everything" that the representative had discussed with defense counsel relating to the conversation with Ms. Gonzalez in preparation for the deposition. Defense counsel promptly objected on the basis of attorney-client privilege, and instructed the witness not to answer the questions.

Plaintiff proceeded to file a motion for sanctions, to compel, and to invoke the rule of sequestration against defense's co-counsel. The motion inaccurately asserted:

> *The Florida Rules of Civil Procedure do not provide any basis for an attorney to instruct a witness not to answer a question during a deposition. Instead, Rule 1.310(c) of the Florida Rules of Civil Procedure provides that the reporter shall note all objections on the record and that: "Evidence objected to shall be taken subject to the objections."*

Counsel also cited *Quest Diagnostics Inc. v. Hall*, 2020 WL 4577192 (Fla. 5th DCA Aug. 7, 2020), where the Fifth DCA held that the work product privilege was waived where the substance of an incident report was brought out by opposing counsel during the corporate representative's deposition.

In defendant's motion in opposition, they cited to Florida Rules of Civil Procedure 1.310(c) "specifically provides for such an instruction in certain circumstances: 'A party may instruct a deponent not to answer only when necessary to preserve a privilege.'" Defendant asserted that plaintiff's questions were improper as they were requesting the substance of the conversation, and not the facts learn. Interestingly, defense counsel even posed four questions

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which plaintiff's counsel could have asked which would not have invaded and subsequently waived attorney-client privilege:

Q(1). What was the additional information that you determined you needed from Ms. Gonzalez which you had not already learned by reading her complete deposition, the other depositions that you reviewed, and the additional pleading, discovery, and filing materials that you had reviewed in preparation for this deposition?

Q(2). What were the facts that you received in response to that inquiry?

Q(3). Were those the complete facts that you received in response to that inquiry?

Q(4). Did you determine that you needed any additional information beyond this from Ms. Gonzalez for purposes of preparing for this corporate representative deposition on behalf of Defendant Papa John's?

The trial court granted plaintiff's motion, ruling that defense counsel voluntarily waived attorney-client privilege as a direct result of counsel's questioning. Therefore, plaintiff was permitted to question the corporate representative as to what defense counsel told him about the communication with Ms. Gonzalez.

On Defendants' petitioner for certiorari, the Fifth DCA found that defense counsel's questions of the representative did not seek the substance of the privileged communications, nor did the witness's answers reveal same. Therefore, attorney-client privilege was not waived and plaintiff counsel could not inquire as to the entirety of the conversation between the representative and defense counsel. The Court also found that the trial court erred in permitting plaintiff's counsel to inquire into more than just the factual information the representative learned during the communication with defense counsel. The Court conceded that Plaintiff is allowed to inquire into the factual information learned through the communications only.

At a minimum, the *Moore* case highlights that is imperative that the selected corporate representative extensively prepare for a deposition with defense counsel, particularly where there are concerns of waiver of any type of privilege, *i.e.* attorney-client or work-product privilege.

By: April H. Rembis

DOCUMENTS AND COMMUNICATIONS PRODUCED IN RESPONSE TO A DISCOVERY REQUEST ARE NOT PRIVILEGED

In *Burkhart v. Anthrax, Inc.*, No. 2D21-2223, 2022 WL 2374443 (Fla. 2d DCA July 1, 2022), Dr. Burkhart appealed an order entered by the trial court that disqualified his counsel, directed the return of certain communications produced in response to Arthrex's request for production, and barred Dr. Burkhart from utilizing those communications during the litigation.

Upon appeal, the Second District Court of Appeal ("DCA") ruled that the trial court erred in declaring that documents produced by plaintiff in response to a discovery request, which included communications exchanged between plaintiff and counsel for defendant over the course of years, were privileged. The appellate court further ruled that the trial court erred in determining that plaintiff's counsel should be disqualified based upon his firm's review and production of the allegedly privileged documents.

The Second DCA, based its decision on the fact that the defendant intended the communications to be disclosed to plaintiff and his attorneys, found the communications were not "confidential communications" and thus were not protected by attorney-client privilege.

Section 90.502, Florida Statutes (2021), governs the attorney-client privilege and confers a privilege on a client "to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client." *See* FLA. STAT. § 90.502(2). Those "confidential communications" of which a client has a right to prevent disclosure are defined as "communication[s] between lawyer and client" that are "not intended to be disclosed to third persons." § 90.502(1)(c). In essence, a communication can still be deemed confidential if the communication was intended to be disclosed to third parties to whom disclosure is in furtherance of the rendition of legal services to the client and to those reasonably necessary for the transmission of the communication.

The Second DCA found this was not applicable in the instant case because these were not communications between an attorney and a client that were inadvertently disclosed to a third party; these were communications with a third party. They were not communications between Arthrex and its attorney to which Dr. Burkhart might have been privy either incidentally or accidentally, nor even by design on the basis that disclosure to him was "reasonably necessary for the transmission of the communication" or "in furtherance of the rendition of legal services to" Arthrex. Instead, these were communications from Arthrex to Dr. Burkhart on which Arthrex's counsel was copied; communications from Dr. Burkhart to Arthrex on which Arthrex's counsel was copied; or communications to and from Dr. Burkhart and Arthrex's counsel. They were not "confidential" communications that were "not intended to be disclosed to third persons." *See* § 90.502(1)(c). These were conversations between Arthrex and its lawyers and Dr. Burkhart and his lawyers. And these were not "communication[s] between lawyer and client" intended only "to be disclosed to third persons . . . to whom disclosure is in furtherance of the rendition of legal services to the client." *See* § 90.502(1)(c). Rather, these were communications among a group of individuals that included Dr. Burkhart and Arthrex

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and their respective attorneys. Dr. Burkhart does not fall into the category of "[t]hose to whom disclosure is in furtherance of the rendition of legal services to the client," *see* § 90.502(1)(c) 1, because Arthrex did not disclose the communications to Dr. Burkhart at all; rather, Dr. Burkhart was a part of the communications from the time of their creation.

Consequently, the Court also rejected the argument that the relationship between the parties was tantamount to an employer-employee relationship and held that their communications did not give rise to a privilege that could be asserted by Arthrex against Dr. Burkhart in the manner that it attempted, much less one that supports the disqualification of Dr. Burkhart's lawyers.

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