

## MARYLAND

Daniel W. Whitney  
Melissa A. Graf  
**Whitney & Boorls, LLP**  
401 Washington Avenue  
Twelfth Floor  
Towson, Maryland 21204  
Telephone: (410) 583-8000  
Facsimile: (800) 893-1239  
dwhitney@whitneybogris.com  
mgraf@whitneybogris.com  
www.whitneybogris.com

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### I. MEDICAL EXPENSES

#### A. Requirements for Recovery of Medical Expenses

##### 1. Past Medical Expenses

Under Maryland law, a plaintiff is entitled to recover the reasonable value of all damages caused by a tortfeasor's conduct, including past medical expenses. *Lawson v. United States*, 454 P. Supp. 2d 373, 417 (D. Md. 2006) (citing *Walston v. Dobbins*, 10 Md. App. 490, 271 A.2d 367 (1970)). With respect to pleading, alleging entitlement to medical expenses as a result of injury is sufficient so long as "such statements of fact as may be necessary to show the pleader's entitlement to relief" are asserted. *Pepper v. Johns Hopkins Hospital*, 111 Md. App. 49, 69, 680 A.2d 532, 542 (1996) (quoting Mb. RULE 2-303(b)).

##### 2. Future Medical Expenses

Similarly, Maryland law also allows plaintiffs to recover the reasonable value of future medical expenses, *Lawson*, 454 F. Supp. 2d at 417 (citing *Mt. Royal Cab Co. V. Dolan*, 166 Md. 581, 171 A.2d 854 (1934)), when it is more likely than not that the expense will be incurred. *Burke v. United States*, 605 F. Supp. 981, 988 (D. Md. 1985). In a negligence action, the plaintiff may recover "not only for the consequences which have actually and naturally resulted from the tort, but also for those which may certainly or reasonably and probably result therefrom as proximate consequences" that are not merely speculative in nature. *Adams v. Benson*, 208 Md. 261, 270-271, 117 A.2d 881, 885 (1955).

## **B. Collateral Source Rule and Exceptions**

The collateral source rule has been applied in Maryland since 1899 to permit the recovery of provable damages in full notwithstanding the amount of compensation that the injured party may have received from sources unrelated to the wrongdoer. *Motor Vehicle Admin. v. Seidel Chevrolet Inc.* 326 Md. 237, 253, 604 A.2d 473, 481 (1992). The rule prohibits a defendant from introducing evidence that a plaintiff already has or will in the future recover medical expenses from sources "such as a private insurer, government insurance (Medicare), liability insurance, worker's compensation, and the like." *Narayan v. Bailey*, 130 Md. App. 458, 466, 747 A.2d 195, 200 (2000).

However, there are exceptions to the general rule. First, a narrow exception exists for medical malpractice actions, which permits evidence of this nature in post-verdict proceedings. See *Narayan*, 130 Md. App. at 471. This exception allows for a reduction in the damages awarded at the discretion of the judge or jury. M. In *Narayan*, the Court of Special Appeals looked to MD. CODE ANN., CTS. & IUD. PROC. §§ 3-2A-05(h) and 3-2A-06(f), which in this particular instance permit, respectively, the introduction of evidence related to recovery from collateral sources and requests that damages be reduced accordingly.

Another exception to the collateral source rule makes admissible any evidence of a plaintiff's insurance coverage in the event that the plaintiff "open[s] the door by asserting a misleading level of poverty," such as by offering testimony that the plaintiff delayed seeking medical treatment due to insufficient funds. *Abrishamian v. Barbell*, 2009 WL 3164137, \*4, --A.2d --- (Md. Ct. Spec. App. Oct. 5, 2009) (citing *Holscher v. CSX Transp., Inc.*, 381 Md, 119, 135, 848 A.2d 620 (2004)).

## **C. Treatment of Write-downs and Write-offs**

### **1. Medicare and Medicaid**

*Narayan* makes it clear that payments from government entities are generally not to be considered per the collateral source rule. 130 Md, App at 466.

## 2. Private Insurance

Payments received from private insurance are also generally prohibited from consideration in accordance with the collateral source rule. *Id.*

## II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

### A. Scope of Physician-Patient Privilege and Waiver

It has long been the settled law of Maryland that there is no physician-patient privilege. *Butler-Tulio v. Scrogains*, 139 Md. App. 122, 135, 774 A.2d 1209, 1216 (2001) (citing *Rubin v. Weissman*, 59 Md. App. 392, 401, 475 A.2d 1235 (1984) ("[c]ommunications made to a physician in his professional capacity are neither privileged under the common law of Maryland, nor have they been made so by statute")). However, a limited exception was created by the General Assembly in the instance of psychiatrists, psychologists and psychiatric-mental health nursing specialists. MD. CODE ANN., CTS. & JUD. PROC. §§ 9-109, 9-109.1.

Notwithstanding the absence of the protection offered by a physician-patient privilege, communications between physicians and defense counsel are restricted to a degree by Maryland statutes affording confidentiality to medical records. MD. CODE ANN., HEALTH-GEN. § 4-302(a) states that "[a] health care provider shall:

- (1) Keep the medical record of a patient or recipient confidential; and
- (2) Disclose the medical record only:
  - (i) As provided by this subtitle; or
  - (ii) As otherwise provided by law."

This protection does not extend to information "[n]ot kept in the medical record of a patient or recipient that is related to the administration of a health care facility." MD. CODE ANN., HEALTH-GEN. § 4-302(b)(1).

Despite these restrictions, MD. CODE ANN., HEALTH-GEN. § 4-305(b) permits a health care provider to "disclose a medical record without the authorization of a person in interest. . . .

(ii) To the provider's legal counsel regarding only the information in the medical record that relates to the subject matter of the representation; or

(iii) To any provider's insurer or legal counsel, or the authorized employees or agents of a provider's insurer or legal counsel, for the sole purpose of handling a potential or actual claim against any provider if the medical record is maintained on the claimant and relates to the subject matter of the claim."

Another important exception for counsel's purposes is found in MD. CODE ANN., HEALTH-GEN. § 4-306(b)(3), which provides that a "health care provider shall disclose the medical record without the authorization of a person in interest , , [t]o a health care provider or the provider's insurer or legal counsel, all information in a medical record relating to a patient or recipient's health, health care, or treatment which forms the basis for the issues of a claim in a civil action initiated by the patient, recipient, or person in interest."

In addition to permitting certain disclosures, Maryland shields health care providers from liability for some impermissible disclosures. MD. CODE ANN., HEALTH-GEN. § 4-308 specifies that "[a] health care provider, who in good faith discloses or does not disclose a medical record, is not liable in any cause of action arising from the disclosure or nondisclosure of the medical record."

However, even given the many exceptions to the confidentiality of medical records and the good faith shield from liability that is available to health care providers, MD. CODE ANN., HEALTH-GEM. § 4-309(c) provides that "[a] health care provider or any other person is in violation of this statute if the health care provider or any other person:

- (1) Requests or obtains a medical record under false pretenses or through deception; or
- (2) Discloses a medical record in violation of this subtitle."

Criminal and civil penalties may be assessed for violations of this statute (MD. CODE ANN., HEALTH-GEM. §§ 4-309(d), (0).

## **B. Interaction of Waiver of Physician-Patient Privilege and HIPAA**

As Maryland does not recognize a physician-patient privilege, the question of waiver is moot. Further, Maryland law does not prohibit *ex parte* communications between counsel and an adverse party's treating physician when that party's medical condition is placed at issue. *Butler- Rill*, 139 Md. App. at 150. However, Maryland case law has recognized that the Health Insurance Portability and Accountability Act ("HEPAA") prohibits such communications with a treating physician about the care provided to a litigant. *Law v. Zuckerrnan*, 307 F. Supp. 2d 705 (D. Md. 2004), While "mere contact" between a plaintiff's treating physician and opposing counsel are not regulated under HIPAA, *id.* at 708, the disclosure of protected health information is so regulated. Under the federal framework, the discovery of such information is only permitted in accordance with a court order or agreement between the parties that would restrict its use to the course of the litigation, and the information must be returned at its conclusion. *Id.* (citing *Helping Hand, LLC v. Baltimore County*, 295 F. Supp. 2d 585 (D. Md. 2003)). The Law decision found that Maryland law on the disclosure of protected health information is not more stringent than the requirements of HIPAA. 307 F. Supp. 2d at 711. Therefore, *as* the federal law is controlling, "all *ex parte* communications must be conducted in accordance with the procedures set forth in HIPAA." *Id.*

## **C. Authorization of *Ex Parte* Communication by Plaintiff**

As stated above, *ex parte* communications between counsel and a plaintiffs treating physician are not prohibited under Maryland law, *Butler-Tulio*, 139 Md. App. at 150, therefore authorization by the plaintiff *is* not necessary. However, counsel must still be careful not to run afoul of HIPAA.

## **D. Authorization of *Ex Parte* Communication by Courts**

Again, *Butler-Tulio* makes it clear that the courts do not prohibit such contact, *Id.*

## **E. Local Practice Pointers**

In addition to the foregoing considerations, counsel who seeks *ex parte* communications with an adverse party's treating physician should bear in mind the need to comply with state rules of professional conduct, The guidelines provided by Maryland's Rules of Professional Conduct may offer further insight

into how counsel should proceed in this instance. RULE 4.1(a) states that in the course of representing a client a lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a third person; or
- (2) fail to disclose a material fact to a third person when disclosure *is* necessary to avoid assisting a criminal or fraudulent act by a client."

The duties established by the rule apply even if compliance necessitates disclosure of information that would otherwise be deemed confidential. RULE 4.1(b). In addition, RULE 4.3 provides that when "dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." RULE 4.4 provides additional guidance, stating that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that the lawyer knows violate the legal rights of such a person." Finally, in defining professional misconduct, the Rules include "conduct involving dishonesty, fraud, deceit or misrepresentation" (RULE 8.4(c)) and "conduct that is prejudicial to the administration of justice" (RULE 8.4(d)).

### **III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS**

#### **A. Requirements to Obtain Testimony of Non-Party Treating Physician**

In Maryland, any party may compel a non-party treating physician, just as any other nonparty person, to testify at a deposition or at trial by issuing a witness subpoena. Md. RULE 2-510. A party seeking issuance of a subpoena need not justify the request or show cause that it should be issued. *Harris v. State*, 331 Md. 137, 160, 626 A.2d 946, 957 (1993). However, the party or attorney issuing the subpoena must take reasonable steps to avoid undue burden or cost on a person subject to the subpoena. MD RULE 2-510(h).

A person served with a subpoena to attend a court proceeding may promptly file a motion to quash or modify the subpoena and seek an order protecting the subpoenaed person from annoyance,

embarrassment, oppression, or undue burden or cost. Mn. RULE 2-510(e). A person served with a subpoena for a deposition may file a motion for protective order pursuant to MD. RULE 2-403. The videotaped deposition of a treating physician may be used for any purpose regardless of the availability of the physician at trial so long as the notice of deposition specified that it was to be taken for use at trial. MD. RULE 2-4-19(0(4).

Any witness subpoena that includes a demand to produce medical records or other records of health care providers must comply with the notice and certificate requirements of MD. CODE ANN., HEALTH-GEN. § 4-306.

Further, under Maryland law, there is no fiduciary duty on the part of a physician that would prohibit the giving of expert testimony against a patient. *Butler-Tulio*, 139 Md. App. at 138.

## **B. Witness Fee Requirements and Limits**

### **1. Statutes and Rules of Civil Procedure**

The Maryland Rules do not require payment of mileage or any witness fee for deposition or trial testimony by a fact witness. MD. RULE 2-510. The Maryland Rules do not address payment of fees to treating physicians that also serve as expert witnesses; however, see B.2., *infra*. Md. CODE ANN., HEALTH-GEN. § 4-304(0)(3) sets a statutory maximum fee permitted to be charged by health care providers for retrieval and copying of patient medical records.

### **2. Case Law**

Maryland case law recognizes that, where a treating physician serves as an expert witness, a party seeking testimony from the physician generally is responsible for paying a reasonable fee for that testimony, and may possibly be required to pay a reasonable fee for time spent preparing to testify. *Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600, 624, 665 A.2d. 723, 735 (1995).

## **C. Local Custom and Practice**

In order to satisfy MD. RULE 2-510 (4 a party desiring to take the testimony of a nonparty treating physician should attempt to accommodate the physician in scheduling deposition testimony. This may include scheduling the deposition after normal business hours and locating the deposition at the

physician's office. Where a party anticipates a need to call a non-expert, treating physician to testify at trial, use of a videotaped deposition pursuant to M.D. RULE 2-416 and 2-419(0(4) should be strongly considered. Any perceived need for live testimony by a treater/expert must be balanced against the physician's fee schedule for court testimony.