

## DELAWARE

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### I. MEDICAL EXPENSES

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

In Delaware, “[w]hen it is alleged that a tortfeasor is responsible for medical services, the plaintiff bears the burden of proof on two distinct issues. First, the plaintiff must demonstrate that value claimed for those medical services was reasonable. Second, the plaintiff must establish that the need for those medical services was proximately caused by the negligence of the alleged tortfeasor.” *Mitchell v. Haldar*, 883 A.2d 32, 35 (Del. 2005).

##### 1. Past Medical Expenses

Though not expressly required by Delaware case law, the “reasonableness” and “causal linkage” elements of the admissibility test described in *Haldar*, 883 A.2d 32 must be supported by expert medical testimony in virtually all circumstances. Admissibility of evidence of past medical expenses therefore most often becomes a *Daubert* issue as described in Section I.A.2 below, governed by Delaware Rule of Evidence 702 and its case law progeny. The one notable exception is a defendant’s decision to defend solely on liability. In such case, Plaintiff’s evidence of past medical expenses may enter the record un rebutted (though a plaintiff will almost certainly have expert testimony anyway). *See e.g. Payne v. Home Depot*, 2009 WL 659073 (Del. Super. 2009). Such strategy is extremely rare in Delaware as it has been held by courts to be a legitimate basis for denying motions for a new trial or remittitur. *Id.*

## 2. Future Medical Expenses

Evidence of future medical expenses must be supported by expert testimony, or else would be merely speculative. *See e.g. Weiner v. Wisniewski*, 213 A.2d 857 (Del. 1965)(necessity of future surgery could only be proven through expert testimony). Per D.R.E. 702, Delaware is a *Daubert* jurisdiction, but “[a] trial judge has broad discretion in determining the reliability of expert testimony and has discretion to deviate from the *Daubert* factors to determine reliability in a particular case if the facts so require.” *Kerr v. Onusko*, 2004 WL 2735456 at \*1 (Del. Super. 2004); citing *M.G. Bancorporation, Inc.*, 737 A.2d 513, 522 (Del. 1999).

Factors governing the admissibility of testimony regarding future medical expenses are : 1) the witness [must] be a qualified expert, 2) the testimony [must] be relevant and reliable; 3) the testimony [must] be based upon information reasonably relied upon by experts; 4) the testimony will assist the trier of fact; and 5) the testimony will not create unfair prejudice or confuse or mislead the jury. *Kerr*, 2004 WL 2735456 at \*2.

Medical experts are permitted to testify that medical costs are likely to increase in the future, but are barred from placing a value on the likely magnitude of that increase. *Giles v. Nationwide Ins. Co.*, 2003 WL 1580604 at \*1 (Del. Super. 2003). Additionally, medical experts are permitted to testify to the future expenses an average person with the plaintiff’s injury would incur, and leave it to the jury to place the plaintiff’s specific case in the context of that hypothetical average person. *Kerr*, 2004 WL 2735456 at \*2; *aff’d Onusko v. Kerr*, 880 A.2d 1022 (Del. Supr. 2005).

As a matter of practice, evidence of future medical expenses is most commonly handled through a motion in limine to exclude plaintiff’s expert on *Daubert* grounds. Delaware trial courts have discretion to conduct a *Daubert* hearing or instead to decide admissibility solely on the basis of the expert reports. *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 845 (Del. Ch. 2000).

### B. Collateral Source Rule and Exceptions

Delaware rigorously applies the collateral source rule to affect the deterrent purpose of tort law, i.e. that it is better for an innocent plaintiff to receive a windfall through double recovery from a collateral

source than for a tortfeasor to receive a windfall by escaping the full cost of his tortious act. The Delaware Supreme Court has expressly rejected the burden-sharing and risk-spreading theories that neighboring states have used to limit the scope of the traditional collateral source rule. *See State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989)(comparing the statutory bases for New York and New Jersey collateral source rule).

The Delaware Supreme Court expressly adopted the collateral source rule in *Yarrington v. Thornburg*, 205 A.2d 1 (Del. Supr. 1964), although the Court there stated that the rule was already “firmly embedded” in Delaware law, citing decisions to 1932. Recent Delaware Supreme Court opinions reiterate the rule as a cardinal principle of Delaware tort law. *See e.g. Haldar*, 883 A.2d 32 (medical malpractice); *Onusko*, 880 A.2d 1022 (negligence).

Requisites for applying the collateral source rule are few. First, the source must be unrelated to the tortfeasor. The tortfeasor is entitled to present evidence of a collateral source to which it contributed. *See Yarrington*, 205 A.2d 1 (tortfeasor entitled to present evidence that his auto insurance policy paid part of damages).

Second, the plaintiff must have paid consideration for the source, although “even the slightest amount of consideration will suffice.” *See Kerr*, 2004 WL 2735456 (discount from treating physician for cash payment by plaintiff was collateral source, so plaintiff could recover the full price of medical services, excluding the discount, from the tortfeasor); *aff’d Onusko*, 880 A.2d 1022 (approving Restatement (Second) of Torts § 920A(2) (1979) in this context). Sources for which the employee paid nothing cannot provide a double recovery. *See Nalbone*, 569 A.2d 71 (plaintiff could not recover for lost work time when she was paid for such time by her employer’s sick leave policy, for which she paid no consideration); *Ameer-Bey v. Liberty Mut. Fire Ins.*, 2003 WL 1847291 (Del. Super. 2003)(same). Delaware case law recognizes an exception to the requirement of consideration for Medicaid payments, as discussed in Section C.1 below. Also, the Delaware Supreme Court in dicta recently cited Minnesota law for the principle that “[U]nder the collateral source rule, a plaintiff could recover from a tortfeasor for the reasonable value of medical services provided even if those services were provided gratuitously.”

*Haldar*, 883 A.2d 32, citing *Hueper v. Goodrich*, 314 N.W.2d 828 (Minn. 1982), *superseded by statute as recognized in Imlay v. Lake Crystal*, 453 N.W.2d 326 (Minn. 1990). Thus, the requirement of consideration may be weakening.

The General Assembly has established limited exceptions to the collateral source rule. Medical malpractice plaintiffs may not reap a double recovery from a public source such as Social Security or Medicare. 18 Del. C. §6862. Delaware’s no fault statute for auto insurance prevents a plaintiff from presenting evidence of lost earnings and future medical procedures covered by the collateral source of PIP coverage. 21 Del. C. §2118(h). The No-Fault exception does not apply to Uninsured Motorist Coverage. *Lomax v. Nationwide Mut. Ins. Co.*, 964 F.2d 1343 ( 3<sup>rd</sup> Cir. 1992).

The collateral source rule is best addressed through a motion in limine citing the aforementioned case law. Delaware does not have a rule of evidence that codifies the collateral source rule.

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

Evidence of write-downs and write-offs is inadmissible under Delaware law. *Haldar*, 883 A.2d 32 at 39; *Onusko*, 880 A.2d 1022. Except for a statutory exception governing medical malpractice cases, Delaware makes no distinction between discounts stemming from public sources such as Medicaid, private insurance policies, or even discounts provided by a medical provider favoring certain payment mechanisms.

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

The Delaware Superior Court has held that Medicaid is “health insurance for the needy” and therefore must have the same effect as an insurance policy for which the plaintiff paid consideration. *See Pardee v. Suburban Propane, L.P.*, 2003 WL 21213413 (Del. Super. 2003). Thus, Medicaid payments are a valid collateral source, and evidence of discounts that medical providers must give to the Medicaid program are inadmissible. *Id.* This reasoning has not yet been adopted by the Delaware Supreme Court, and arguably represents a substantial exception to the general rule that plaintiffs may reap a double recovery only from sources for which they have paid consideration. However, *Pardee* fits dicta in

*Haldar*, 883 A.2d 32 at 37 stating that medical services can present a double recovery even if provided gratuitously.

Though no Delaware tort case is directly on point, this logic applies equally to Medicare. Delaware workmen's compensation cases have treated Medicare payments as a collateral source. *See e.g. Porter v. Insignia Management Group*, 2003 WL 22455316 (Del. Super. 2003). But the workmen's compensation test considers only whether the employer paid for the medical expenses, and not whether the employee paid any consideration for coverage from a collateral source. *Id.* Delaware law therefore is not quite settled on the question of whether the collateral source rule covers Medicare payments, although under *Pardee*, 2003 WL 21213413, the answer is probably "yes". Write-offs or discounts required under the Medicare program are highly likely to be treated identically to discounts from the Medicaid program, i.e. as inadmissible.

## **2. Private Insurance**

Delaware plaintiffs are entitled to "board" the full value of their medical expenses, "regardless of whether a balance is owed or a reduced rate satisfied the bill". *Haldar*, 883 A.2d 32 at 39 (full value of medical bills admissible even though private insurance paid at discounted rate); *Schulze v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 1638609 (Del. Super. 2009)(same); *Onusko*, 880 A.2d 1022 (full value of medical bills admissible even though discount came from medical provider in exchange for cash payment). Evidence of billing discounts or write-offs is clearly inadmissible under Delaware law.

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

Delaware case law encourages *ex parte* contact between defense counsel and non-party treating physicians. *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Super. 1985). Delaware courts reason that such "informal" discovery results in earlier evaluations of cases and therefore facilitates settlements. *Id.* at 1259. However, the imposition of federal liability for privacy violations under HIPAA Title II all but eliminates this avenue of discovery as a practical matter.

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

Under D.R.E. 503(d)(3), a plaintiff waives all claim of physician-patient privilege by filing a personal injury action. *Id.* at 1257. A plaintiff may not refuse written consent to release the physician-patient privilege (released as a matter of law anyway), nor imply to the treating physician that contact with the opposing party is unauthorized or a violation of the plaintiff's privacy. *Id.* at 1258-9, citing *Doe v. Lilly & Company, Inc.*, 99 F.R.D. 126, 128 (D. D.C. 1983). A plaintiff that forces a defendant to petition the court for a formal waiver of the physician-patient privilege is liable for the cost and fees incurred to pursue such a motion. *Id.* at 1259.

Mere waiver of the physician-client privilege does not compel a third-party treater to speak to defense counsel; it merely permits a willing physician to speak absent a subpoena. *Id.* at 1258. Recalcitrant physicians must be addressed through the formal subpoena process under Del. Super. Civ. Ct R. 45. *Id.*

Delaware law will not require a physician to produce medical records of other patients with the names redacted, to assist a plaintiff in proving a pattern of conduct. *Ortiz v. Ikeda*, 2001 WL 660107 (Del. Super. 2001). The physician may assert the physician-patient privilege on behalf of his other patients. *Id.* This rule is somewhat fluid. See e.g. *Kanaga v. Gannett Co., Inc.*, 2002 WL 143819 (Del. Super. 2002)(physician that won libel suit against newspaper could not quantify "lost patient" damages without producing medical records, so such production was ordered under Super. Ct. Civ. R. 26(b)).

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

The codification of the Health Insurance Portability and Accountability Act ("HIPAA"), Title II changed the playing field for discovery of information from third-party treating physicians. Until Title II became effective in 2003, physicians arguably had carte blanche to discuss medical information with defense counsel after the filing of a personal injury action. See *Green*, 501 A.2d 1257. HIPAA's creation of federal privacy rights overrides that state law.

As a practical matter, treating physicians will not disclose medical records or discuss a case without a signed release or a court-order protecting them from liability. A subpoena *duces tucem* issued

pursuant to Super. Ct. Civ. R. 45 has been held to provide such protection, thereby absolving the medical provider from HIPAA liability. *Kanaga*, 2002 WL 143819.

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

Delaware encourages informal *ex parte* interaction between defense counsel and non-party treating physicians, to encourage early evaluation of cases for settlement. *Green*, 501 A.2d 1257. A Plaintiff must provide reasonable written authorizations for such contact. Plaintiffs that fail to provide authorization for the release of medical records and for physicians to speak to defense counsel are liable for costs spent to pursue such authorizations by motion. *Id.* at 1259.

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

*Ex parte* communication between defense counsel and physicians is implicitly authorized by D.R.E. 503, which states that filing a personal injury action automatically waives the physician-patient privilege. No specific authorization for *ex parte* communication with treating physicians is necessary. *Green*, 501 A.2d 1257.

### **E. Local Practice Pointers**

Waiver of the physician-patient privilege, with corresponding written releases for medical records, are presented as a matter of course at the outset of litigation. Delaware courts have recognized that the Delaware plaintiffs bar generally wants to exchange such information in order to facilitate settlement, and have implied that plaintiffs' attorneys that decline to do so are not sophisticated enough to understand the rigors of Delaware personal injury practice. *See e.g. Dunlap v. State Farm Fire and Cas. Co.*, 955 A.2d 132 (Del. Super. 2007)(noting that plaintiffs' attorneys procure HIPAA releases at the outset of litigation as a matter of course). Delaware courts have little patience for plaintiffs that attempt to sabotage the discovery process by delaying such authorizations. *Green*, 501 A.2d 1257.

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

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

In general, non party treating physicians are treated as any other fact witness. Guaranteeing their testimony and production of documents is handled through a subpoena *duces tecum* per Super. Ct. Civ. R.

45. In Delaware, subpoena are requested as a matter of course, in order to prevent a treater from answering questions at a deposition by stating “I would have to look at the file.”

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

Third party treating physicians commonly demand to be compensated for their time in presenting evidence, whether by organizing records, undergoing deposition, or participating in a trial. Delaware Lawyers’ Rules of Professional Conduct permit such compensation, as long as it is for lost work time or out-of-pocket expenses. The burden of paying such compensation can be shifted pursuant to a statutory offer of judgment.

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

Compensating a third-party fact witness for the time he spends involved in a legal proceeding presents questions of “inducement” under Delaware Lawyers Rule of Professional Conduct 3.4(b) (prohibiting attorneys from offering “an inducement to a witness that is prohibited by law.”). Comment 3 to that rule specifically permits payment of out-of-pocket expenses for any witness, as well as normal expert witness fees. Comment 3 expressly bars contingent fee arrangements for experts, or an “occurrence” (i.e. outcome-based) fee for a fact witness. DLRPC 3.4(b) does not expressly address compensating fact witnesses for lost time, but that issue has been addressed in an ethics opinion by the Delaware State Bar Association, discussed more fully in part III.B.2 below.

10 Del. C. §8906 grants the trial court the power to determine the reasonableness of any expert witness fee. This statute does not address fees paid to fact witnesses.

The burden of compensating witnesses can be shifted by a statutory offer of judgment. Del. Super. Ct. Civ. R. 68 permits either side to make an offer of judgment to settle litigation. If the offer of judgment is rejected, and the offering party attains a verdict better than the offer (higher for plaintiffs, lower for defendants), then the offering party shifts all the burden of costs he incurs after the offer onto the rejecting party. Such costs include witness fees. No reported Delaware decision has specifically addressed whether fact witness fees can be shifted through an offer of judgment, but such fees presumably can be shifted via the reasoning applicable to Super. Ct. Civ. R. 54(g), discussed below.



Additionally, Super. Ct. Civ. R. 54 allows the prevailing party to recover trial costs. Rule 54(g) permits recovery of “witness fees”, not just expert witness fees. The very next subsection reiterates that “expert witness fees” are subject to the discretion of the trial court pursuant to 10 Del. C. §8906. Rule 54 only permits recovery of witness fees and expenses related to the actual trial, however; prep time is not recoverable. *See e.g. Payne*, 2009 WL 659073 at \*6.

## 2. Case Law

While no Delaware case has specifically addressed compensation for fact witnesses, the Delaware State Bar Association issued an ethics opinion on this subject in 2003. *See Delaware State Bar Association Ethics Opinion 2003-3*, available at <http://www.dsba.org/ethics/years.htm#2003>. The DSBA noted that the Delaware Supreme Court amended DLRPC 3.4 in 2003 to eliminate an express provision permitting “[r]easonable compensation to a witness for his loss of time in attending or testifying”. The DSBA interpreted this change as a mere form amendment that was not intended to limit the right of fact witnesses to demand compensation for “lost economic opportunity”. Relying on commentary from the ABA model rule, the DSBA held that fact witnesses may be compensated for “address time spent by the fact witness in review and research of records that are germane to his or her testimony, pretrial interviews in preparation for testifying, as well as in deposition or at trial.” *Id.* at 8.

The DSBA further held that such compensation must be “reasonable”. Where a witness is employed at an hourly rate, his “reasonable” rate is easily determined, and compensation at the witness’s normal rate is appropriate. *Id.* at 9. However, again adopting commentary to the ABA Model rules, the DSBA stated that, for an unemployed or retired witness, “the lawyer must determine the reasonable value of the witness’s time based on all relevant circumstances.” *Id.* at 10. In dicta, the DSBA mused that a retired employee is not likely to be worth the rate he commanded when he left the job market, and should therefore be compensated at some undefined lesser rate. *Id.* at Note 5. Neither the Delaware Courts nor the DSBA have addressed how a salaried fact witness may be compensated for time spent as a witness in civil litigation.

As noted in Section III.B.1 above, Delaware courts are empowered to determine reasonable expert witness compensation under 10 Del. C. §8906. Courts commonly rely on information published by the Delaware Medico-Legal Affairs Committee to determine proper rates for varying medical specialties. *See e.g. Payne*, 2009 WL 659073 at \*7; *Dunkle v. Prettyman*, 2002 WL 833375 at \*3 (Del. Super. 2002.). Since the last such published study was in 1995, courts have attempted to adjust those rates by applying Medicare repayment rates or multiplying by increases in the consumer price index. *Id.*

Again, Sup. Ct. R. 68 allows either side to shift the risks of costs, including witness fees, to the other party through a statutory offer of judgment.

Finally, Sup. Ct. Civ. R. 54 allows the prevailing party to recovery costs even absent statutory offer of judgment. “Generally, the prevailing party may only recover those expert witness fees associated with time spent testifying or waiting to testify, along with reasonable travel expenses.”. *Payne*, 2009 WL 659073 at \*6.

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

Third-party treating physicians usually demand compensation for their time spent in civil litigation. In the easiest case, medical offices often demand copying fees to produce the plaintiff’s medical records - an out-of-pocket expense that is plainly reimbursable under DLRPC 3.4 Comment C. Also fairly simple are cases of private practice physicians that can estimate the approximate daily value of their practices. Such physicians are normally compensated for one day’s lost work for depositions assuming the standard 7.5 hour maximum is reserved, as it usually is. Retired and otherwise unemployed physicians generally demand compensation at their former hourly/daily rate, which lawyers usually pay despite the warning in DSBA Ethics Opinion 2003-3 Note 5. It is not clear how a salaried third-party treating physician (such as a hospital employee) should be compensated. Arguably under the DLRPC 3.4(b), he should either go uncompensated because he suffers no “lost economic opportunity”, or the compensation should go to his employer and not to the physician personally. However, this issue has not yet been litigated in Delaware.

This issue has not arisen often in Delaware (it is not the subject of a single reported decision), mainly because neither party would have any great cause to complain that a necessary fact witness is reasonably compensated for his time.