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I. MEDICAL EXPENSES

A. Requirements for Recovery of Past Medical Expenses

A plaintiff who establishes liability in a personal injury lawsuit may recover past medical expenses as special damages under New York law if he or she proves: (1) the actual costs incurred for any medical, hospital and nursing services; and (2) that those costs incurred were reasonable and necessary. *Aragones v. State*, 668 N.Y.S.2d 772, 774 (N.Y. App. Div. 1998).

To prove the costs incurred for healthcare services, a plaintiff must provide a bill of particulars itemizing the total dollar amounts claimed as special damages for physicians' services, medical supplies, hospital expenses, and nurses' services. N.Y. C.P.L.R. 3043(a)(9) (2009). Moreover, plaintiffs must calculate these damages. They are not allowed to shirk this responsibility by merely providing the defendant(s) with documentation (*e.g.*, billing records) for the defendant(s) to determine the damages, for "plaintiffs, not defendant, bear the burden of calculating the special damages claimed by them." *Bass v. Kansas*, 603 N.Y.S.2d 361, 362 (N.Y. App. Div. 1993) (directed plaintiffs to calculate and serve a detailed specification of the medical expenses incurred and claimed as damages); s*ee Cardella v. Henke Mach. Inc.*, 283 A.D.2d 894, 900 (N.Y. App. Div. 2001) (disallowing claim for past medical expenses where plaintiff failed to submit any bills or records attributing medical expenses to the injuries at issue). *But see Godfrey v. Soto*, 2007 WL 2693652, at *5 (E.D.N.Y. Sept. 10, 2007) (federal court applying New York law awarded $580 as damages for past medical expenses based solely on the strength of plaintiff's

testimony) (citing *Sabatino v. Emeana*, 2000 WL 34017111, at *3-*4 (E.D.N.Y. Aug. 1, 2000) (finding plaintiff's testimony sufficient to support $7,000 in medical expenses)).

To prove the reasonableness and necessity of the medical services received, plaintiffs may offer the testimony of treating physicians and/or expert testimony in addition to bills or records documenting the costs of the services. *Aragones*, 668 N.Y.S.2d at 774. In *Aragones*, the plaintiff submitted expert testimony demonstrating the reasonableness and necessity of her past medical expenses to treat her injury, which had been caused by the defendant. *Id.* Accordingly, the court found that plaintiff had met her burden of proof and was entitled to recover her past medical expenses because the expert testimony provided presumptive proof of the reasonableness of her claim and the defendant had failed to provide any contradictory evidence. *Id.*

B. Requirements for Recovery of Future Medical Expenses

A plaintiff seeking to recover future medical expenses in a personal injury lawsuit must offer credible, non-speculative testimony regarding the likelihood of future medical care, and this testimony must be supported by competent evidence. *Stylianou v. Calabrese*, 748 N.Y.S.2d 36, 37 (N.Y. App. Div. 2002). The plaintiff must prove any future expenses with reasonable certainty. *Hyatt v. Metro-North Commuter R.R.*, 792 N.Y.S.2d 391, 393 (N.Y. App. Div. 2005). In *Stylianou*, the court denied plaintiff's claim for future medical expenses because the plaintiff's testifying physician failed to state the basis for his opinion regarding the necessity of any future surgery the plaintiff claimed she would be required to undergo. 748 N.Y.S.2d at 37; s*ee St. Hilaire v. White*, 759 N.Y.S.2d 74, 75 (N.Y. App. Div. 2003) (denied claim for future medical expenses when claim of future surgery was against the weight of the evidence and all other items of future medical expense were "speculative"); *Placakis v. City of New York*, 736 N.Y.S.2d 379, 382 (N.Y. App. Div. 2001) (affirmed trial court's refusal "to submit the issue of future medical expenses to the jury since the plaintiffs failed to establish 'a probability supported by some rational basis,' upon which the jury could render a nonspeculative verdict") (citation omitted).

C. The Collateral Source Rule

Under the common law collateral source rule, "a personal injury award may not be reduced or offset by the amount of any compensation that the injured person may receive from a source other than the tortfeasor." *Inchaustegui v. 666 5th Ave. Ltd. P'ship,* 749 N.E.2d 196, 199 (N.Y. 2001) (internal citation and quotation marks omitted). This common law rule has been widely criticized because it allows plaintiffs to recover more than their out-of-pocket expenses and permits double recovery. *Oden v. Chemung County Industrial Dev. Agency,* 661 N.E.2d 142, 144-45 (N.Y. 1995). To address the inequity of a double recovery, the New York legislature statutorily modified the common law collateral source rule by permitting the reduction of damage awards "by the amount of collateral source payments in certain instances." *Inchaustegui,* 749 N.E.2d at 199 n.3; N.Y. C.P.L.R. 4545 (2009). Among those instances are actions in which a plaintiff seeks to recover the cost of any past or future medical services.

New York law provides that in any action in which a plaintiff seeks to recover the cost of any past or future medical services, the court may reduce the amount of the damages award by any amount plaintiff is entitled to receive from collateral sources. N.Y. C.P.L.R. 4545(a). These sources have generally included insurance policies (except for life insurance policies), most social security benefits, workers' compensation awards, and employee benefit programs. New York's collateral source rule, however, only applies to verdicts; it does not apply to settlements. *Fasso v. Doerr,* 903 N.E.2d 1167, 1173 (N.Y. 2009).

In calculating any recovery reduction for collateral sources, courts subtract the total amount of premiums paid by the plaintiff in the two years prior to accrual of the cause of action and an amount equal to the projected future cost of maintaining the benefit. N.Y. C.P.L.R. 4545(a). In order to reduce a judgment to account for future medical expenses, the court must find that any future cost or expense will be replaced or indemnified by the collateral source and that the plaintiff is legally entitled to "the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement." *Id.*

The defendant bears the burden of proving entitlement to collateral source set-offs. *Firmes v. Chase Manhattan Auto. Fin. Corp.*, 852 N.Y.S.2d 148, 160 (N.Y. App. Div. 2008). The defendant must prove entitlement to a collateral source set-off with "reasonable certainty," which is "more than a preponderance of the evidence but less than proof beyond a reasonable doubt," also defined as "clear and convincing evidence that the result is 'highly probable.'" *Id.*

Under New York law, a plaintiff's recovery for medical expenses in a personal injury action can be limited when part or all of those expenses were paid through private insurance. *Meegan v. Progressive Ins. Co.*, 838 N.Y.S.2d 748, 751 (N.Y. App. Div. 2007) ("[P]laintiff's recovery of past and future medical expenses . . . may be limited by exclusions, conditions, limits, or other provisions of the [private insurance] policy."). Notably, however, nothing in N.Y. C.P.L.R. 4545 alters the equitable subrogation rights of insurers against the alleged tortfeasor to recover costs paid on behalf of the insured. *Fasso*, 903 N.E.2d at 1173.

It is well established under New York law that when an insurer pays for losses sustained by its insured that were caused by a wrongdoer, the insurer is entitled to seek recovery of those payments under the doctrine of equitable subrogation. *Id.* at 1170. Accordingly, if an injured plaintiff recovers monies from the defendant attributable to expenses that were paid by the plaintiff's insurer, the insurer may recoup its disbursements from the plaintiff; however, when the defendant does not pay damages for an insured plaintiff's medical expenses, generally the insurer, as subrogee, is allowed to seek recovery directly from the tortfeasor defendant. *Id.* This means that even when a plaintiff has settled or obtained a verdict against a defendant, the defendant may still be held responsible for payments made by a private insurer on behalf of the plaintiff that were not already considered in the settlement or jury award. *Id.* at 1171. It is thus important for personal injury defendants to request information about subrogation rights during the discovery phase of the litigation, even if the parties decide to enter into a settlement. This is because once an insurer has paid a claim and the defendant knows or should have known that a right to subrogation exists, the defendant and the insured plaintiff cannot agree to terminate or ignore the insurer's

claim without its consent, and such an agreement cannot be asserted as a defense to the insurer's cause of action. *Id.*

New York's collateral source rule operates differently, however, when the issue is one of *public* insurance. N.Y. C.P.L.R. 4545(a) includes notable exceptions to the types of collateral sources that can be indemnified; among those exceptions are "life insurance and those payments as to which there is a statutory right of reimbursement." Both Medicaid and Medicare are sources entitled by statutory law to reimbursement, specifically liens against a plaintiff's recovery. N.Y. Soc. Serv. Law § 104-b(1) (2009) ("If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred."). Accordingly under N.Y. C.P.L.R. 4545, a damages award in favor of a plaintiff will not be reduced to account for payments made on behalf of the plaintiff for medical services by Medicare and Medicaid. *Singh ex rel. Singh. v. Long Island Jewish Med. Ctr.*, 2006 WL 431635, at *2 (N.Y. Sup. Ct. Queens County Feb. 17, 2006). Rather, recovery for medical expenses by plaintiff would be subject to liens by the applicable public welfare official. *See Id.* ("If this case were to go to trial CPLR 4545(a) would bar the plaintiffs from recovering from the defendant the cost of any medical care that was or in the future would be replaced from any collateral source such as insurance except such collateral sources (such as medicaid or medicare) entitled by law to liens against any recovery of the plaintiff.").

In addition to collateral sources, any medical expense write-offs on behalf of plaintiffs are taken into account when determining past medical expenses. For example, in 2002, a New York court ruled that a defendant could not be held liable for medical expenses that were ultimately written off by the plaintiff's treating hospital. *Kastick v. U-Haul Co. of W. Michigan*, 740 N.Y.S.2d 167, 169 (N.Y. App. Div. 2002). The court reasoned that "[a]lthough the write off technically is not a payment from a

collateral source within the meaning of CPLR 4545, it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefor." *Id.*

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

A. Scope of Physician-Patient Privilege

Ordinarily a lawyer representing a party to a lawsuit has the right to communicate with prospective witnesses as long as no legal privilege applies. In the context of a personal injury action, the plaintiff's non-party treating physician is one of the most significant witnesses -- if not *the* most significant witness -- in the litigation. Consequently, defense attorneys generally wish to engage in *ex parte* discussions with the plaintiff's non-party treating physician. However, attorneys must be careful to make sure that *ex parte* contact with the plaintiff's treating physician is permissible under state law and not restricted by the physician-patient privilege or other applicable laws.

New York law recognizes the physician-patient privilege and provides that a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry, or chiropractic may not disclose any information that he or she "acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." N.Y. C.P.L.R. 4504(a) (2009). The privilege was adopted to promote public health. *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1130 (N.Y. 1989) ("[New York]'s codification of the physician-patient privilege was based largely 'on the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help and securing adequate diagnosis and treatment'") (citation omitted).

In New York the physician-patient privilege protects such information from disclosure through any means, including depositions (called "examinations before trial" or "EBTs" in New York), other oral testimony, and documents such as hospital and medical records, which are drafted based on communications between the patient and the treating physician. *In re D'Agostino, M.D.*, 695 N.Y.S.2d 473, 476 (N.Y. Sup. Ct. Richmond County 1999). The privilege not only applies to words uttered by the plaintiff-patient, but also to information acquired from the patient, statements of others who may be

present at the time of his or her medical treatment, and information gleaned from observation of the patient's appearance and symptoms. *Hughson v. St. Francis Hosp. of Port Jervis*, 463 N.Y.S.2d 224, 229 (N.Y. App. Div. 1983). Furthermore, the privilege applies to information obtained by physicians in administering tests, because such information represents the product of professional skill and knowledge and would not have been ascertainable to a layperson who has not been trained in the field of medicine. *Dillenbeck v. Hess*, 536 N.E.2d 1126, 1130 n.4 (N.Y. 1989).

Although the physician-patient privilege covers a large array of information, there are limits on what it encompasses. Broadly speaking, for the privilege to apply, "the communication must have been confidential in nature and the patient must have contemplated that it would be kept so." *Bernstein v. Lore*, 398 N.Y.S.2d 388, 389 (N.Y. App. Div. 1977). For instance, the privilege does not apply to non-substantive facts concerning a person's medical history. *Neferis v. DeStefano*, 697 N.Y.S.2d 108, 110 (N.Y. App. Div. 1999) (name of plaintiff's treating psychiatrist was not privileged information). Similarly, the privilege does not prohibit a healthcare provider from testifying "to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge." *Hughson*, 463 N.Y.S.2d at 229 (citation and internal quotation marks omitted). For example, a physician is not prohibited by the privilege from testifying that a person was a patient of the physician, that he or she treated the person as a patient, and how many times he or she treated the patient. Instead, the purpose of the physician-patient privilege is to protect "that which falls within the ambit of information relating to the nature of the treatment rendered and the diagnosis made." *Id.* at 230.

B. Waiver of Physician-Patient Privilege and Impact of HIPAA

A patient may waive the physician-patient privilege; indeed, *only* a patient or his or her authorized representative may waive the privilege and permit disclosure of privileged information. N.Y. C.P.L.R. 4504; *Dillenbeck*, 536 N.E.2d at 1133. Under New York law, it is well established that a plaintiff effectively waives the physician-patient privilege when, in bringing a personal injury action, he or she places his or her medical or physical condition in issue. *Arons v. Jutkowitz*, 880 N.E.2d 831, 837 (N.Y. 2007). Accordingly, defense attorneys in New York have traditionally been able to engage in *ex*

parte communications with a plaintiff's non-party treating physician, although only after a note of issue – denoting the completion of discovery – has been filed. *Id.* at 838-39 (citing numerous cases in support of this long-standing practice); *see Hotzle v. Healthlaw Serv. Corp., Inc.*, 2005 WL 1252597, at *3 (N.Y. Sup. Ct. Niagara County, May 24, 2005) ("the appellate divisions have held that there is no ethical or other legal prohibition against interviewing plaintiff's treating physicians in personal injury actions when the interviews occur after the note of issue has been filed") (citing *Levande v. Dines*, 544 N.Y.S.2d 864 (N.Y. App. Div. 1998); *Zimmerman v. Jamaica Hosp., Inc.*, 531 N.Y.S.2d 337 (N.Y. App. Div. 1988); *Tiborsky v. Martorella*, 591 N.Y.S.2d 547 (N.Y. App. Div. 1992)).

Defense counsel would prefer to talk to treating physicians before the end of discovery. However, New York law generally prohibits *ex parte* interviews in lieu of discovery devices established by Article 31 of the N.Y. C.P.L.R. *Arons*, 880 N.E.2d at 839. Before post-note of issue discussions with treating physicians were permissible, defense attorneys typically served the physician with a trial subpoena or authorization for medical records and attempted to speak with the physician as part of trial preparation. *Id.* However, physicians would rarely cooperate with attorneys, especially in medical malpractice actions. *Id.* Thus, acknowledging that pretrial interviews can be important to obtain the assistance of treating physicians at trial, citing the increased cost and time involved with depositions, and yet wishing to abide by the general rule prohibiting *ex parte* interviews in lieu of Article 31 discovery devices, New York courts eventually permitted the practice of such interviews after the filing of a note of issue. *Id.* The judicial reasoning was that at that phase of the litigation "there is no longer any basis for judicial intervention to allow further pretrial proceedings absent 'unusual or unanticipated circumstances' and 'substantial prejudice,' (N.Y. Comp. Codes R. & Regs. tit. 22, §202.21(d))." *Id.* In other words, as the filing of the note of issue means that discovery has been completed, allowing *ex parte* interviews at that juncture will not provide a party with the opportunity to begin yet another phase of discovery; it may merely be utilized to assist attorneys in their preparation for trial. Moreover, it ensured fundamental fairness and a level playing field since plaintiffs, unlike defendants, were permitted to interview the doctors in preparation for trial.

After the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted by Congress, however, courts and practitioners questioned the practice of personal injury attorneys having post-note of issue interviews with non-party physicians. As the New York Court of Appeals noted regarding the impact of HIPAA on this issue, "the prevailing 'state of affairs' in New York was thrown into considerable confusion 'when the 800-pound gorilla, also known as HIPAA . . . entered the arena." *Arons*, 880 N.E.2d at 839 (citation omitted).

The debate about how waiver of the physician-patient privilege is affected by HIPAA, specifically in the context of *ex parte* communications with non-party treating physicians, was addressed by the state's highest court, the New York Court of Appeals, in 2007. *Arons*, 880 N.E.2d 831. In *Arons*, the Court held that there is no conflict between HIPAA and New York law and that HIPAA does not change New York's law which permits attorneys to have *ex parte* communications with the opposing party's treating physicians after the note of issue has been filed. *Id.* at 842.

Arons involved appeals brought by defendants from two different lower court cases. In both cases, the defendants had provided HIPAA-compliant authorizations to the plaintiffs for them to sign. The authorizations would have permitted the plaintiffs' treating physicians to have *ex parte* communications with defense counsel about plaintiffs' medical conditions as relevant to the litigations. The plaintiffs, however, refused to sign the authorizations. Consequently, the defendants petitioned the trial courts for orders compelling the plaintiffs to sign the authorizations. The courts granted the defendants' motions to compel, and the plaintiffs appealed. The intermediate appellate courts then reversed the decisions of the trial courts, and the defendants appealed to the highest court of the state.

The Court of Appeals noted that under the provisions of HIPAA a healthcare provider may use or disclose an individual's protected health information to third parties with an authorization that meets the following prerequisites: (1) It must be written in plain language; and (2) It must contain specific "core elements and requirements." *Id.* at 841. The specific "core elements and requirements" include: (a) a specific and meaningful description of the protected health information to be used or disclosed; (b) the identity of those persons or classes of persons authorized to make and receive the requested use or

disclosure of protected health information; (c) an expiration date or event; (d) "the individual's signature;" and (e) a statement notifying the signatory of the right to revoke the authorization in writing. *Id.*

After consideration of whether HIPAA in any way preempted New York law, the Court of Appeals found that there was no conflict between New York law and HIPAA on the subject of *ex parte* interviews of treating physicians because the federal statute fails to address the subject. Accordingly, the Court held that HIPAA "does not prevent this informal discovery from going forward, it merely superimposes procedural prerequisites." *Id. at 842.*

Significantly, the Court also explicitly held that when a plaintiff refuses to sign a HIPAA authorization granting defense counsel the right to conduct *ex parte* interviews with his or her non-party treating physicians after the note of issue has been filed, a defendant may move the trial court to compel the authorization. *Id.; see Poser ex rel. O'Brien v. Vanovitsky,* 849 N.Y.S.2d 118, 118-19 (N.Y. App. Div. 2007) (granting motion to compel plaintiff to execute valid HIPAA releases on the ground that plaintiff has put her medical condition in controversy).

Examining the HIPAA prerequisites as applied to the facts of the cases before it, the *Arons* Court ruled that a trial court could not require defense counsel to produce to the plaintiffs "copies of all written statements and notations obtained from the physician during the private interviews, any audio or video recordings or transcripts, and interview memoranda or notes (excluding the attorney's observations, impressions or analyses)." 880 N.E.2d at 843. However, the Court found that defense counsel could be required to identify themselves and their interest, to limit inquiries to the medical condition at issue in the litigation, and to advise the plaintiff's treating physicians that they were in no way required or obligated to grant an *ex parte* interview. *Id.* at 843 n.6. In fact, the Court emphasized that HIPAA-compliant authorizations and HIPAA court orders cannot force a healthcare professional to engage in *ex parte* communications with anyone; "they merely signal compliance with HIPAA or ... as is required before any use or disclosure of protected health information may take place." *Id.* at 842-43.

C. HIPAA Authorization of Ex Parte Physician Communication

As a practical matter, under New York law, an attorney who wishes to contact an adverse party's treating physician must first obtain either a valid HIPAA authorization from the plaintiff or a court or administrative order; alternatively, the attorney must issue a subpoena, discovery request or other lawful process. *Arons*, 880 N.E.2d at 842. To ensure the legality of having *ex parte* communications with a plaintiff's non-party treating physician, many personal injury defense attorneys now submit to the court a proposed HIPAA authorization form with a stipulation for protective order for the plaintiff to execute, and the authorization explicitly grants defense counsel the right to engage in such communications.

In a recent appellate decision interpreting *Arons*, the court pointed out the "primary importance for the treating physician (or other health care professional) to be informed that the purpose of [any *ex parte* non-party] interview is to assist defense counsel during the litigation and that his or her participation is voluntary." *Porcelli v. N. Westchester Hosp. Ctr.*, 882 N.Y.S.2d 130, 136 (N.Y. App. Div. 2009). Moreover, the court ruled that providing a description of the protected health information to be used or disclosed ensures that an individual who agrees to be interviewed "will not unwittingly disclose privileged information regarding a medical condition not at issue in the litigation." *Id.*

The *Porcelli* court also ruled that it does not matter which party conveys the message to the non-party physician about the purpose of the *ex parte* interview, the protected health information which may be disclosed, and the fact that the interview is entirely voluntary; it also does not matter in what manner the message is conveyed. *Id.* Hence, consistent with *Arons*, a plaintiff could place a written message directly on the HIPAA-compliant authorization, defense counsel may append a document to the plaintiff's authorization with the message, or the information could even be orally conveyed to the treating physician by defense counsel prior to the interview. *See Id.* The crux of the matter is that the physician must be notified in accordance with the HIPAA prerequisites. The substance of those prerequisites predominates over form.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

For defense counsel seeking testimony from non-party treating physicians, obtaining HIPAA authorizations only represents an initial step. Because non-party treating physicians cannot be forced to communicate about a plaintiff's protected health information, there is a possibility that such physicians will refuse HIPAA-compliant authorization requests to testify in an EBT (deposition) or at trial. Accordingly, if a physician receives an authorization to disclose protected health information but refuses to offer testimony voluntarily, defense counsel can seek a subpoena to compel the physician's testimony. *Capati v. Crunch Fitness Int'l., Inc.*, 743 N.Y.S.2d 474, 475 (N.Y. App. Div. 2002).

The standard for acquiring such testimony is proof that the sought-after testimony is "material and necessary in the prosecution or defense of th[e] action . . . and may furnish information not available from the medical records." *Id.* (internal quotation marks omitted); *see* N.Y. C.P.L.R. 3101(a)(4) (2009) ("There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."). Additionally, the defense attorney seeking discovery from a non-party witness must show "special circumstances." *Tannenbaum v. Tenenbaum*, 777 N.Y.S.2d 769, 769 (N.Y. App. Div. 2004). To establish special circumstances, it is not enough to show that the information sought is relevant; instead, the party seeking a subpoena to compel physician testimony must demonstrate that the information sought cannot be otherwise obtained. *Id.*

A witness or party may seek a protective order from the court to avoid testifying if he or she believes that a subpoena has been issued improperly. N.Y. C.P.L.R. 3103(a) (2009). The New York rules dictate that a "court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Id.*

B. Witness Fee Requirements and Limits

The CPLR prescribes certain fees that automatically attach when subpoenaing a witness. For example, the person subpoenaed "shall be paid or tendered in advance authorized traveling expenses and

one day's witness fee." N.Y. C.P.L.R. 2303(a) (2009). Thus, "[a]ny person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return." N.Y. C.P.L.R. 8001(a) (2009). However, the person subpoenaed shall not receive a mileage fee for travel which takes place wholly within a city. *Id.*

In the event that preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall also receive "ten cents per folio upon demand." N.Y. C.P.L.R. 8001(c) (2009).

Notably, the witness fees must be paid "when the subpoena is served or within a reasonable time before it is returnable." *Jaggars v. Scholeno*, 776 N.Y.S.2d 684, 684 (N.Y. App. Div. 2004). In *Jaggars*, a custody proceeding dealing with a non-physician witness, the appellate court ruled that because the witness fees were not properly tendered either with the subpoena or before it was returnable, the non-party witness at issue could not be punished for disobeying the subpoena. *Id.*