IOWA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

Under Iowa law, an injured plaintiff may recover the reasonable value of necessary medical care.[136] The burden is on the plaintiff to establish the reasonable value of such medical treatment.[137] A plaintiff can establish the reasonable value of medical care through evidence of the amount actually paid for the medical services or through testimony by a qualified expert witness.[138] The amount billed, without more, is not evidence of the reasonable and fair value of the medical care rendered to plaintiff.[139] "The billed amount is relevant only if that figure was paid or an expert witness has testified to the reasonableness of the charges."[140]

An injured plaintiff may also recover the present value of medical expenses which will be incurred in the future.[141] To recover damages for these expenses, a plaintiff must offer substantial proof of the need for future medical treatments and the costs arising from those treatments.[142]

[136] *See* Iowa Civil Jury Instruction 200.6.
[137] Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150, 156 (Iowa 2004).
[138] *Pexa*, 686 N.W.2d at 156 (citations omitted); Stanley v. State, 197 N.W.2d 599, 606 (Iowa 1972).
[139] *Pexa*, 686 N.W.2d at 156.
[140] *Id*. (citation omitted).
[141] *See* Iowa Civil Jury Instruction 200.7.
[142] Mossman v. Amana Soc'y, 494 N.W.2d 676, 679 (Iowa 1993); Nesbit v. Myers, 576 N.W.2d 613, 614 (Iowa Ct. App. 1998).

B. Collateral Source Rule and Exceptions

Iowa courts have traditionally recognized the common law collateral source rule. "The collateral source rule is a common law rule of evidence that bars evidence of compensation received by an injured party from a collateral source."[143] "The rule prevents the jury from reducing the tortfeasor's obligation to make full restitution for the injuries caused by the tortfeasor's negligence."[144] However, the common law rule has been partially abrogated by Iowa's comparative fault statute.[145] Iowa Code section 668.14 was enacted to prevent an injured party from recovering twice for the same injury, [146] and provides as follows:

> In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant's immediate family.[147]

Section 668.14 therefore allows the introduction of evidence of payments by a collateral source of charges for medical care, rehabilitation services, and custodial care in most, but not all, circumstances.[148] If such evidence is introduced, the court must further permit evidence as to any existing indemnification or subrogation rights, or costs of procurement associated with the previous payments or future right of payment.[149] The jury will also be instructed to answer special interrogatories indicating the effect of the evidence relating to these payments.[150] Notably, the common law collateral source rule remains applicable to claims falling outside of the Comparative Fault Act.[151]

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[143] *Pexa*, 686 N.W.2d at 156.
[144] *Id*.
[145] *See* IOWA CODE § 668.14.
[146] Loftsgard v. Dorrian, 476 N.W.2d 730, 734 (Iowa Ct. App. 1991).
[147] IOWA CODE § 668.14(1). Iowa Code section 147.136 abrogates the collateral source rule in medical malpractice actions. *See* Iowa Code § 147.136; Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417, 423 (Iowa 1985).
[148] Graber v. City of Ankeny, 616 N.W.2d 633, 645 (Iowa 2000).
[149] IOWA CODE § 668.14(2).
[150] IOWA CODE § 668.14(3).
[151] *See* Carson v. Webb, 486 N.W.2d 278, 280 (Iowa 1992) (noting that Section 668.14 did not apply to claims for intentional torts).

C. Treatment of Write-Offs or Write-Downs

Section 668.14 expressly prohibits the introduction of evidence that a "previous payment or future right of payment is pursuant to a state or federal program."[152] The statute does not, however, prohibit a jury from hearing evidence as to the *amount* of payments, adjustments or write-offs which reflect the actual value of medical services, without identifying the government source.[153] In *Wildner*, the Iowa Court of Appeals held that the admission of evidence relating to "payments, write-offs, and adjustments…made by and pursuant to agreements with Medicaid" was permitted to establish the reasonable value of medical services rendered to plaintiff.[154] The Iowa Supreme Court has also held that the collateral source rule did not preclude a jury instruction regarding the post-adjustment value of medical services, where the adjustments had resulted from arrangements with Medicare and the plaintiff's private insurer.[155] The Court explained:

> We do not think [the collateral source] rule is implicated in the present case because the court did not reduce the plaintiff's recovery by the amounts paid by a collateral source; rather, the court limited the plaintiff's recovery to those amounts. A proper calculation of the plaintiff's medical expenses must precede a determination of their recoverability; only the latter issue implicates the collateral source rule.[156]

Consequently, Iowa courts appear to permit evidence of write-offs or write-downs by federal or state programs, or by private insurers, so long as the evidence is limited to the amount of payments or adjustments and is introduced to establish the proper value of medical expenses.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

There is no common law physician-patient privilege recognized in Iowa.[157] Rather, the privilege is strictly statutory.[158] Iowa Code section 622.10 provides, in pertinent part:

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[152] IOWA CODE § 668.14(1).
[153] *See* Wildner v. Wendorff, No. 05-1998, 2006 WL 2265453, at *4 (Iowa Ct. App. 2006).
[154] *Wildner*, at *4 (the trial court precluded any references to Medicaid). *Id.* at *1.
[155] See *Pexa*, 686 N.W.2d at 156.
[156] *Id.*
[157] Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson and Sanger, LLP, 764 N.W.2d 534, 537 (Iowa 2009).
[158] *Harder*, 764 N.W.2d at 537.

> A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.[159]

"The physician-patient privilege is intended to promote free and full communication between a patient and his or her doctor so that the doctor will have the information necessary to completely diagnosis and treat the patient."[160] The privilege applies "not only to confidential communications to the physician, necessary and proper to enable him to treat the patient, but also to knowledge and information the physician gained by observation and examination of the patient in the discharge of the physician's duty."[161] Moreover, while Iowa courts initially appeared to limit the privilege to testimony, recent decisions suggest the privilege also affords protection to medical records.[162] The Court in *Heemstra* also pointed out that mental health records enjoy a heightened level of protection from disclosure.[163]

Three elements are required for the physician-patient privilege to attach: (1) existence of a doctor-patient relationship; (2) the acquisition of information or knowledge during this professional relationship; and (3) the necessity of the information to enable the doctor to skillfully provide medical care to the patient.[164] Additionally, because the privilege applies only to those communications which are "confidential," communications made by a patient in the presence of a third party are not generally protected.[165] Nevertheless, "[i]f the third person is present to assist the physician in some way or the third person's presence is necessary to enable the defendant to obtain treatment, then the privilege protects confidential communications made in the presence of the third person."[166]

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[159] IOWA CODE § 622.10(1).
[160] State v. Henneberry, 558 N.W.2d 708, 709 (Iowa 1997).
[161] Shepherd v. McGinnis, 131 N.W.2d 475, 481 (Iowa 1964) (citation omitted).
[162] *See* State v. Heemstra, 721 N.W.2d 549, 560 (Iowa 2006) (citations omitted). *Id*. at 561 ("Sound public policy supports a more protective treatment for mental health records than those in other doctor-patient situations.").
[163] *Heemstra*, 721 N.W.2d at 561 ("Sound public policy supports a more protective treatment for mental health records than those in other doctor-patient situations.").
[164] *Henneberry*, 558 N.W.2d at 709.
[165] *See* State v. Deases, 518 N.W.2d 784, 787 (Iowa 1994).
[166] *Deases*, 518 N.W.2d at 788.

A patient may waive the physician-patient privilege through disclosure or consent to disclosure of privileged medical information.[167] A patient also waives the privilege by testifying regarding a particular condition or injury, by offering witness testimony disclosing the condition, or by failing to object when privileged testimony is offered.[168] Further, "[w]here the plaintiff places one of two or more consulting physicians, who have been or are engaged in a unified course of treatment, on the stand…the privilege is waived…as to all other physicians…for the particular condition disclosed."[169] Importantly, while Iowa law technically recognizes waiver of the physician-patient privilege in these instances, the statutory protocol for obtaining medical information is so restrictive that a patient's waiver is effectively meaningless apart from these statutory procedures. Section 622.10 further provides that the physician-patient privilege is waived when the mental or physical condition of the plaintiff serves as an element of plaintiff's claim or as an element of the defense, but again, is qualified insofar as the method of *obtaining* the information.[170]

B. Interaction Between Waiver of Physician-Patient Waiver and HIPAA

The Iowa Bar Association has developed an Authorization to Release Information form for the release of medical records which complies with HIPAA requirements and Iowa law.[171] Though not required, this form is commonly utilized by counsel in Iowa to obtain patient records. The form can be accessed through the Iowa Bar Association website at: http://www.iowabar.org.

C. Authorization for Ex Parte Communication by Plaintiff

Iowa Code section 622.10(3) requires a plaintiff to execute a patient waiver that permits the defendant's attorney to "consult" with plaintiff's medical providers regarding plaintiff's medical history

[167] State v. Demaray, 704 N.W.2d 60, 65 (Iowa 2005) (holding that patient waived physician-patient privilege when he executed a written release authorizing disclosure of his medical records); *see also* Iowa Code § 622.10(2); State v. Stratton, 519 N.W.2d 403, 405 (Iowa 1994) (noting that only the patient can waive the physician-patient privilege).
[168] *See* Barnard v. Cedar Rapids City Cab Co., 133 N.W.2d 884, 895 (Iowa 1965); State v. Koenig, 36 N.W.2d 765, 766 (Iowa 1949).
[169] *Barnard*, 133 N.W.2d at 895.
[170] *See* Iowa Code § 622.10(2).
[171] *See* Iowa State Bar Association, Official Form No. 145.

and condition, but only under certain procedures and not ex parte.[172] Defense counsel must provide written notice to plaintiff's attorney at least ten days prior to any meeting with plaintiff's medical providers.[173] Most significantly, Plaintiff's attorney also has the right to be present at all such meetings, or participate in telephonic communication with the physician.[174] Given these restrictions, the statutory procedure permitting "consultation" in non-workers' compensation civil cases is of limited practical benefit and is seldom used.

D. Authorization for Ex Parte Communication by Courts

Code section 622.10 is silent on the issue of whether, or under what circumstances, a court may specifically authorize an ex parte communication with a plaintiff's treating physician, but case law provides some guidance on this subject.[175] In *Roosevelt Hotel,* the Court opined that "[t]he addition of a new discovery method, the court enforced waiver of privilege leading to ex parte informal interview with physicians, should be accomplished by a change in the Rules of Civil Procedure, rather than by judicial fiat."[176] It should be noted that section 622.10, as it existed at the time of *Roosevelt Hotel,* did not address the issue of informal consultations.[177] However, the statute provides generally that if a plaintiff fails to execute a patient waiver within the time period prescribed, the court may order disclosure or compliance and that "failure of a party to comply with the court's order may be grounds for dismissal of the action or any other relief authorized under the rules of civil procedure."[178]

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[172] IOWA CODE § 622.10(3)(a)(2).
[173] IOWA CODE § 622.10(3)(e) (the written notice should be provided in a manner consistent with the Iowa Rules of Civil Procedure for notice of deposition); *see* IOWA R. CIV. P. 1.707 (addressing notice for oral depositions).
[174] IOWA CODE § 622.10(3)(e) ("Prior to scheduling any meeting or engaging in any communication with the physician…, attorney for the defendant shall confer with plaintiff's attorney to determine a mutually convenient date and time for such meeting or telephonic communication.").
[175] *Roosevelt Hotel Ltd. P'ship v. Sweeney*, 394 N.W.2d 353, 356 (Iowa 1986) (holding that a defendant could not, through a court order, force the plaintiff in a personal injury action to execute a patient's waiver allowing defendant's counsel to communicat ex parte with plaintiff's health care providers); *see also Morrison v. Century Eng'g*, 434 N.W.2d 874, 876-77 (Iowa 1989).
[176] *Roosevelt Hotel Ltd. P'ship,* 394 N.W.2d at 356.
[177] *See* Keefe v. Bernard, 774 N.W.2d 663, 668 (Iowa 2009) (explaining that the provision regarding informal consultations was added in 1997).
[178] IOWA CODE § 622.10(3)(b).

E. Local Custom and Practice Pointers

Defense counsel seeking to informally "consult" with plaintiff's treating physician should be mindful of the statutory notice requirements before doing so. Recently, in *Keefe*, the Iowa Supreme Court sanctioned the defendant's attorney for conducting an ex parte meeting with one of plaintiff's treating physicians, without providing proper notice to plaintiff.[179] The Court noted that while Section 622.10 does not provide a specific remedy for noncompliance with the notice requirement, a trial court could exercise its broad discretion to impose "a variety of sanctions" for violations of the notice provision.[180] The Court suggested that sanctions could include monetary sanctions, exclusion of witnesses, or refusal to admit evidence.[181]

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Section 622.10 technically provides that if a defendant desires to take the deposition of the plaintiff's physician who has not been specifically retained for purposes of the litigation as a testifying expert, or desires to call the physician as a witness at trial, the defendant must file an application with the court seeking permission to do so.[182] Upon hearing, the court shall grant the defendant's request unless the court determines that the evidence sought by defendant does not relate to the condition alleged.[183] In practice, however, depositions of plaintiffs' treating physicians are typically arranged cooperatively between counsel and the physicians, without the need of any application to the Court.

B. Witness Fees

Iowa Rule of Civil Procedure 1.508 governs general expert fees incurred during discovery. The rule provides that "[u]nless manifest injustice would result, the court shall require that the party seeking

[179] *Keefe v. Bernard*, 774 N.W.2d at 666.
[180] *Id*. at 669.
[181] *Id*. (holding that appropriate sanction for defense counsel's violation of section 622.10 was partial disclosure of a memorandum relating to the ex parte consultation with plaintiff's treating physician).
[182] IOWA CODE § 622.10(4).
[183] *Id.*

discovery pay the expert a reasonable fee for time spent in responding to discovery…."[184] The rule further provides that an expert's fee "shall not exceed the expert's customary hourly or daily fee."[185] However, this limitation does not, with regard to a treating physician, restrict the "customary fee" to the hourly or daily fee charged by the physician for medical treatment and consultation.[186] Rather, the provision has been interpreted merely to "prevent an expert from charging more for deposition time to one side of the litigation rather than the other."[187] As to treating physicians, Iowa Code section 622.10(4) provides that "[a]t the request of any party or…deponent, the court shall fix a reasonable fee to be paid to a physician…by the party taking the deposition or calling the witness."[188]

The Iowa Supreme Court has stated that "a treating physician's deposition fee should bear some reasonable relationship to the physician's customary hourly charge for patient care and consultation."[189] The Court explained that reasonableness of an expert fee should be determined using the following factors: "(1) the witness's area of expertise; (2) the education and training required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the [relevant] interests."[190] Moreover, "[i]n the case of a treating physician, that fee should ordinarily be commensurate with the reasonable compensation lost by virtue of the doctor's required participation in the legal proceedings."[191]

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[184] IOWA R. CIV. P. 1.508(6) ("[I]n connection with a party's deposition of another party's expert, [the fee] shall include the time reasonably and necessarily spent in connection with such deposition, including time spent in travel to and from the deposition, but excluding the time spent in preparation.").
[185] *Id*.
[186] Pierce v. Nelson, 509 N.W.2d 471, 474 (Iowa 1993).
[187] *Id*.
[188] IOWA CODE § 622.10(4).
[189] *Pierce*, 509 N.W.2d at 474 ("Allowing treating physicians to set litigation fees greatly in excess of fees received in their daily practice raises the specter of a troublesome whatever-the-market-will-bear approach to deposition testimony.").
[190] *Id.* (citation omitted).
[191] *Id*. at 475.

Additionally, for purposes of determining the recoverable court costs following litigation, Iowa Code section 622.72 caps an expert's witness fee at $150.00 for each day of court attendance during trial.[192]

C. Local Custom and Practice

As a practical matter, treating physicians are seldom called to offer live testimony at trial. Rather, the parties typically agree to conduct perpetuation depositions of the experts, which are then introduced into evidence at trial. This practice is often necessary to accommodate the time constraints of the physicians involved.

[192] *See* IOWA CODE § 622.72; *see also* Iowa Code § 622.69 (stating that witnesses generally receive $10.00 compensation for each full day of court attendance, and $5.00 for each attendance less than a full day, plus mileage expenses); Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992) (noting that "experts testifying at trial are entitled to an ordinary witness fee of ten dollars a day and their mileage…and an additional expert fee not to exceed $150…Experts giving deposition testimony are entitled only to the $150 fee."); *Pierce*, 509 N.W.2d at 473, fn. 2.