TEXAS

Wendy D. May
Lindsey Iles
Stephanie Roark
HARTLINE, DACUS, BARGER, DREYER & KERN, L.L.P.
6688 N. Central Expressway, Ste. 1000
Dallas, TX 75206
Telephone: (214) 369-2100
Facsimile: (214) 369-2118
wmay@hdbdk.com
www.hdbdk.com

I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

To recover damages for past medical expenses, a Texas plaintiff must present evidence the medical expenses incurred were both reasonable and necessary. *Ibrahim v. Young*, 253 S.W.3d 790, 808 (Tex. App.—Eastland 2008, pet. denied) (citing *Quaker Petroleum Chems. Co. v. Waldrop*, 75 S.W.3d 549, 553-54 (Tex. App.—San Antonio 2002, no pet.)). Proof of "reasonable and necessary" can be made by expert testimony or by submitting affidavits from the medical provider in compliance with §18.001 of the Texas Civil Practice and Remedies Code. *See, e.g.*, *In re Mendez*, 234 S.W.3d 105, 108 (Tex. App.—El Paso 2007, no pet.) (citing *Walker v. Ricks*, 101 S.W.3d 740, 746 (Tex. App.—Corpus Christi 2003, no pet.); *Rodriguez-Narrera v. Ridinger*, 19 S.W.3d 531, 532-33 (Tex. App.—Fort Worth 2000, no pet.)). Under §18.001, "an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence. . .that the amount charged was reasonable or that the service was necessary" unless a controverting affidavit is filed. Tex. Civ. Prac. & Rem. Code Ann. §18.001 (Vernon 2009). By filing a controverting affidavit, the opposing party can force the offering party to prove reasonableness and necessity by expert testimony at trial. *Hong v. Bennett*, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.).

In cases involving a minor, the right to recover medical expenses, both past and future until the age of majority, belongs to the parents unless the costs are a liability for the minor's estate. *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983); *Morrell v. Finke*, 184 S.W.3d 257, 290-91 (Tex. App.—Fort Worth 2005, pet. denied).[544] This becomes significant when there is a reduction or bar to recovery for a parent plaintiff who is found contributorily negligent.[545] This is one reason to have the jury separately determine past medical expenses, future medical expenses between the time of trial and the date the minor plaintiff reaches majority, and future medical expenses after the minor plaintiff reaches majority. *Id.*

The recovery of past medical expenses in Texas is also limited to "the amount actually paid or incurred by or on behalf of the claimant." Tex. Civ. Prac. & Rem. Code Ann. §41.0105 (Vernon 2009). Medical expenses are not "actually paid or incurred" within the meaning of §41.0105 when the expenses have been written down by a medical service provider. *See* §I.C., *infra*.

2. Future Medical Expenses

Future medical expenses may be recovered for an original injury or for increased susceptibility to future injury because of the original injury. *Rivera v. White,* 234 S.W.3d 802, 807 (Tex. App.—Texarkana 2007, no pet.). Recovery of future medical expenses requires evidence of reasonable probability the medical care will be necessary in the future. *Ibrahim*, 253 S.W.3d at 808 (citing *Whole Foods Mkt. Sw., L.P. v. Tijerina*, 979 S.W.2d 768, 781 (Tex. App.—Houston [14th Dist.] 1998, pet. denied.)); *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 905 (Tex. App.—Texarkana 2004, pet. denied) (there is a "reasonable probability" that medical care will be necessary when the incurrence of future medical care is more likely than not). Additionally, a plaintiff is required to prove the reasonable costs of future care. *Ibrahim*, 253 S.W.3d at 808.

---

[544] A minor recovers future medical expenses that will be incurred after reaching majority. *Roth v. Law*, 579 S.W.2d 949, 956 (Tex. App.—Corpus Christi 1979, writ ref'd n.r.e.).

[545] Under Texas' comparative responsibility rules, a parent plaintiff found more than 50% responsible is barred from recovery, including recovery of a minor's past and future medical expenses. *See* Texas Civil Practice & Remedies Code §§33.001 (*Vernon 2009*). Any assigned percentage of 50% or less would reduce the recovery according to the assigned percentage. Tex. Civ. Prac. & Rem. Code §33.0013 (*Vernon 2009*).

There is no requirement a claimant establish reasonable probability of future care and costs through expert testimony. *Id.* at 809. A jury can make its own determination of the amount of future medical expenses and care based on the type of injury suffered, the medical care already received and the progress toward recovery under the treatment received. *Ibrahim*, 253 S.W.3d at 809; *Antonov v. Walters*, 168 S.W.3d. 901, 908 (Tex. App.—Fort Worth 2005, pet. denied); *Pilgrim's Pride*, 134 S.W.3d at 905; *Volkswagen of Am. v. Ramirez*, 79 S.W.3d 113, 127 (Tex. App.—Corpus Christi 2002), rev'd on other grounds, 159 S.W.3d 897 (Tex. 2005). Thus, a plaintiff's own testimony may provide sufficiently probative evidence of reasonable probability for future medical care and costs. *Blankenship v. Mirick*, 984 S.W.2d 771, 778 (Tex.App.—Waco 1999, pet. denied).

B. Collateral Source Rule and Exceptions

The collateral source rule precludes a tortfeasor from obtaining the benefit of payments to the injured party from sources other than the tortfeasor. *National Freight, Inc.*, 191 S.W.3d 416, 423 (Tex. App.—Eastland 2006, no pet.) (citing *Taylor v. Am. Fabritech, Inc.*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)). Evidence of coverage provided or collateral payments made to the plaintiff by any other source, including Medicare, insurance, pension/retirement funds, employee benefit accounts, or Social Security, are generally not admissible. *Traders & General Ins. Co. v. Reed*, 376 S.W.2d 591 (Tex. Civ. App. Corpus Christi 1964, writ ref'd n.r.e.); *see also Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 n. 48 (Tex. 1999) (citing *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 934-36 (Tex. 1980) (the collateral source rule "bars a wrongdoer from offsetting his liability by insurance benefits independently procured by the injured party")).

Evidence of a collateral source, however, may be admissible for impeachment purposes if the evidence is offered in response to testimony by the witness that is inconsistent with the receipt of collateral source benefits. *Guerra v. Wal-Mart Stores, Inc.*, 943 S.W.2d 56, 61 (Tex. App.—San Antonio 1997, no writ); *J.R. Beadel & Co. v. De La Garza*, 690 S.W.2d 71, 74 (Tex.App.—Dallas 1985, writ ref'd n.r.e.). If a witness claims financial hardship, for example, evidence of a collateral source may be offered to impeach the witness' credibility. *National Freight*, 191 S.W.3d at 423 (citing *Macias v. Ramos*, 917

S.W.2d 371, 374 (Tex. App.—San Antonio 1996, no writ)). Additionally, although evidence related to whether or not a plaintiff is insured is inadmissible to prove fault, the collateral source rule does not exclude evidence of insurance when offered for another issue such as proof of agency, ownership, or control, if disputed. Tex. R. Evid. 411; *see also Conner v. Angelina County Lumber Co.,* 146 S.W.2d 1093, 1095 (Tex. Civ. App.—Beaumont 1940, no writ) (agency); *Meuth v. Hartgrove,* 811 S.W.2d 626, 628 (Tex. App.—Austin 1990, writ denied) (ownership); *St. Joseph Hosp. v. Wolff,* 999 S.W.2d 579, 595 (Tex. App.—Austin 1999), rev'd on other grounds, 94 S.W.3d 513 (Tex. 2002) (control).[546]

C. Treatment of Write-downs and Write-offs

As indicated above, recoverable medical expenses in Texas are limited to those "paid or incurred" within the meaning of Tex. Civ. Prac. & Rem. Code §41.0105, which excludes expenses written off by a medical service provider. *See, e.g., Mills v. Fletcher,* 229 S.W. 3d 765, 769 (Tex. App.—San Antonio 2007, no pet.) (§41.0105 prevents a plaintiff from recovering medical or health care expenses that have been adjusted or "written off" by medical providers pursuant to an agreement with medical insurers); *Matabon v Gries,* 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.) ("[a]mounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred"). There is no distinction between a plaintiff's ability to recover medical expenses written off by a medical provider whether for the benefit of a private insurance company, or Medicare/Medicaid. Medical expenses written off or adjusted pursuant to an agreement between a health care provider and a plaintiff's private insurance company are not recoverable. *Mills,* 229 S.W. 3d at 769; *Matabon,* 288 S.W.3d at 480. Similarly, medical expenses written off pursuant to adjustments required by Medicare/Medicaid are not recoverable. *Garza v. Haygood,* 283 S.W.3d 3, 4 (Tex. App.—Tyler 2009, pet. filed). Moreover, medical bills previously discharged in bankruptcy proceedings cannot be recovered. *Tate v. Hernandez,* 280 S.W.3d 534, 541 (Tex. App.—Amarillo, 2009, no pet.).

[546] Note the viability of the collateral source rule in Texas has been questioned since the enactment of Texas Civil Practice & Remedies Code §41.0105. For a discussion of the interplay between these evidentiary rules, *See* I.C., *infra.*

Since the enactment of §41.0105 there has been debate over the procedural manner in which it should be applied. Specifically, the statute is unclear as to whether courts are required to implement it through the presentation of evidence at trial, thereby preventing plaintiffs from introducing the full amount of medical bills if subsequent write-offs have occurred, or whether it should be implemented post verdict. The majority of Texas courts addressing this issue have applied §41.0105 post verdict. *Gore v. Faye*, 253 S.W.3d 785, 790 (Tex. App.—Amarillo 2008, no pet.); *Tate v. Hernandez*, 280 S.W.3d at 540 n. 7 (citing *Matabon v Gries*, 288 S.W.3d 471 (Tex. App.—Eastland 2009, no pet.)). Under this approach, the full amount of undiscounted medical bills are admitted during trial and any verdict for the plaintiff is subsequently reduced to reflect recovery of only the amount of medical expenses actually paid or incurred. *Id; but see Garza*, 283 S.W.3d at 7 (because medical bill write-offs are not recoverable by a claimant, unreduced bills are irrelevant and should be excluded at trial). If a post-verdict reduction is followed by the Court, the jury should be asked to make separate findings for past and future medical expenses to allow appropriate reductions of only the past expenses awarded, if any.

The viability of the collateral source rule under §41.0105 has been questioned. Since §41.0105 may be applied pre-verdict, potentially allowing evidence of write offs during trial. One appellate court recently found that the legislature intended to abrogate the longstanding rule pursuant to the enactment of §41.0105. *Mills*, 229 S.W.3d at 769 n. 3. However, a majority of Texas courts hold that the collateral source remains in effect. *See, e.g., Matbon*, 288 S.W.3d at 481 ("However, the statute does not eviscerate the collateral source rule because it continues to permit the claimant to recover amounts actually paid on his behalf by an insurer. Furthermore, the statute does not require the admission of evidence of the nature and amount of collateral source payments made on behalf of the claimant so as to prejudice the amount of the claimant's recovery in the eyes of the fact finder").

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

A. Scope of the Physician Patient Privilege and Waiver

Physician-patient privilege exists for confidential communications between a physician and a patient, as well as for the patient's records including the identity, diagnosis, evaluation or treatment. Tex.

R. Evid. 509 (c) (1); *Mutter v. Wood*, 744 S.W.2d 600 (Tex. 1988). The records are privileged in their entirety and redaction of the parts relating to the patient's confidential information does not alleviate the privilege concern. *In re Tenet Healthcare, Ltd.*, No. 12-05-00310-cv, 2006 Tex. App. LEXIS 2640 (Tex.App.—Tyler Mar. 31, 2006). *In re Columbia Valley Regional Medical Center*, 41 S.W.3d 797, 800 (Tex. App. —Corpus Christi 2001, orig. proceeding).

Texas Rule of Evidence 509 lists seven exceptions or "waivers" to the physician-patient privilege: (1) in claims brought by the patient against a physician (2) if the patient gives written consent (3) in a suit to substantiate or collect on a claim for medical services (4) if the communication is relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense, even when the patient is not a party to the litigation (5) in the disciplinary investigation of a physician (6) in an involuntary commitment proceeding, or a probable cause hearing under various statutes and (7) in a suit for abuse or neglect of a resident in an institution. Tex. R. Evid. 509.

Privacy for a patient's mental health is governed by a separate rule in Texas. *See* Tex. R. Evid. 510. There are six similar exceptions which make mental health information discoverable, including when it is "relevant to the condition at issue" and the "condition is relied upon as a part of a party's claim or defense." *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex. 1994) (orig. proceeding). Significantly, a claim for mental anguish or emotion distress as a part of a typical personal injury claim will not, standing alone, entitle the defense to discovery of mental health records. *In re Williams*, 2009 Tex. App. LEXIS 1561 (Tex. App. Waco Mar. 4, 2009); *see also In re Toyota Motor Corp.*, 191 S.W.3d 498, 502 (Tex. App.—Waco 2006, orig. proceeding). A claim of severe emotional distress, however, does waive a patient's privilege relating to mental health information. *Groves v. Gabriel*, 874 S.W. 2d 660, 661 (Tex. 1994).

B. Interaction of Waiver of Physician-Patient Privilege and HIPPA

HIPPA's Privacy Rule, whose long title is *Standards for Privacy of Individually Identifiable Health Information*, establishes a federal floor for health privacy, but not a ceiling. Therefore, Texas may

provide for more stringent protections than HIPPA. 45 C.F.R. §160.203(b) (2009). Texas' waiver provisions are generally more stringent but a few conflict with HIPPA's provisions and are preempted.

The Texas Attorney General's office created a report detailing Texas laws subject to preemption by HIPPA. The Attorney General's office concluded very few Texas requirements contradict HIPPA.[547] Accordingly, HIPPA has not significantly altered waiver of physician-patient privilege in Texas. The Texas Attorney General highlighted two contrary Texas provisions which relate to personal injury claims and deserve specific mention here. The first is privacy after death. Under Texas common law the right to privacy terminates upon death, and disclosure regarding a deceased person is not an invasion of privacy. *Cox Texas Newspapers v. Wooten*, 59 S.W. 3d 717 (Tex. App.—Austin 2001, pet. Denied). Conversely, deceased persons are entitled to continued privacy protections under HIPPA. *See* 45 C.F.R. §164.502. The second conflict relates to fees for record requests. The Texas Health & Safety Code authorizes an entity to withhold access for records for nonpayment of any fee. Tex. Health & Safety Code §§241.154, 611.08 (Vernon 2009). In contrast, HIPPA only allows charges and nonpayment withholding for (a) copying (b) postage, or (c) preparing a summary of information.[548]

C. Authorization of *Ex Parte* Physician Communication By Plaintiffs

Ex parte physician communications are clearly allowed when plaintiff's authorization is given. *See Perkins v. United States, 877 F. Supp. 330, 333 (E.D. Tex. 1995).* Texas law until recently had been unsettled regarding whether *ex parte* communications between defense counsel and plaintiff's physician are allowed without a plaintiff's consent or authorization by court order. Recent Texas Supreme Court guidance indicates unauthorized *ex parte* communications are <u>not</u> prohibited and will be allowed at times.

[547] Several "contrary" provisions exists which do not directly relate to personal injury claims. These provisions can be found on the Texas Attorney General's website at www.oag.state.tx.us. *See* also Tex. Health & Safety Code §§595.004, 611.002, 611.0045(a), (b), 611.008; *Report: Preemption Analysis of Texas Laws Relating to the Privacy of Health Information and the Health Insurance Portability and Accountability Act & Privacy Rules (HIPPA)*, 301, 305, 308, 310 (Nov. 1, 2004) (Tex. Att'y Gen.)

[548] These sections also mandate record request be answered within 15 days. HIPPA allows 30 days to respond. Texas law is more stringent, and therefore not preempted.

In the 1994 *Houge v. Kroger* case, Kroger named one of the plaintiff's treating physicians as an expert witness and conducted *ex parte* meetings with the physician. *Hogue v. Kroger Store,* 875 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1994, no writ). On appeal, Plaintiff argued the *ex parte* contacts between defense counsel and her physician constituted a violation of her physician-patient privilege. The appellate court held the physician had been properly designated as an expert witness and *ex parte* contacts were permitted regarding communications relevant to an injury at issue in the case. *Id*.

A federal Court applying Texas law subsequently rejected the rationale in *Houge*. *Perkins v. United States*, 877 F. Supp. at 333. Specifically, the *Perkins* Court criticized the *Houge* Court for setting no limits on the allowed *ex parte* communications. *Id.* at 333. *Hogue* was further criticized for "noting that the physician there met with his patient only once, [but] leaving no indication how much contact triggers a privilege worth protecting." *Id*. The court cited several policy reasons for preventing unauthorized contact with a treating physician and concluded the *Hogue* decision was erroneous. *Id.*

Finally, in June of 2009 (after HIPPA's creation), the Texas Supreme Court weighed in on the debate. *See In re Collins*, 286 S.W.3d 911, 2009 (Tex. 2009) (orig. proceeding). The Court concluded "Texas law did not clearly prohibit *ex parte* communications with non-party health care providers." *Id*. at 918. The Court explained it is error to assume its prior decision in *Mutter*, 744 S.W.2d 600, prohibits unauthorized *ex parte* communications. Rather, the Court differentiated its prior decision as requiring the privileged information be relevant to the underlying suit before waiver of the physician-patient privilege could be considered appropriate. *Id*. The *Collins* Court did not decide if *ex parte* communications are authorized in all situations because the Plaintiffs failed to carry their burden in obtaining a protective order. *Id*. Therefore, we still have no clear picture of the precise circumstances when unauthorized *ex parte* communications will be allowed. Still, it appears that Texas courts should permit *ex parte* physician communications in some situations, even after the implementation of HIPPA.

D. Authorization of *Ex Parte* Physician Communication by Court Order

Ex parte physician communication may be compelled by court order, but the order must meet the *Mutter* standard. A trial court's order compelling release of privileged information should be restrictively

drawn so as to maintain the privilege with respect to records or communications not relevant to the underlying suit. *See Mutter v. Wood*, 744 S.W.2d at 601. An authorization waiving entirely the physician-patient privilege is inappropriate. *Id.* The discovery order must be tailored to gather only relevant medical facts. *Id.* The Court recognized that "even in the interest of broad discovery directed at seeking the truth, no privilege should be totally ignored." *Id*.

E. Local Practice Pointers

Since the Texas Supreme Court declined to outline specific occasions when unauthorized *ex parte* communications were appropriate, continued disapproval of such communications, particularly by federal courts and medical providers, should be expected. One method for obtaining medical providers' (including emergency scene responders') participation in *ex parte* communications is service of discovery subpoenas. Many medical providers are willing to engage in communications prior to the taking of their deposition once they are served with the subpoena, regardless of whether the deposition ultimately occurs.

III. OBTAINING TESTIMONY OF NON-PARTY PHYSICIAN

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

Texas Rules of Civil Procedure govern the requirements for obtaining testimony from witnesses, include non-party treating physicians in Texas. *See* Tex. R. Civ. P. 176, 199, 202, 204, 205 (2009). A discovery subpoena or trial subpoena is the device used to obtain a non-party treating physician's testimony in Texas. *See* Tex. R. Civ. P. 176.2, 199.3; *see St. Luke's Episcopal Hosp. v. Garcia*, 928 S.W.2d 307, 311 (Tex. App.—Houston [14th Dist.] 1996, orig. proceeding) (a subpoena is the instrument that compels nonparties to respond to a deposition). A discovery subpoena is issued to compel a nonparty to attend a deposition. *See* Tex. R. Civ. P. 176. A trial subpoena is used to command a witness to give testimony at trial. *Id*. The Rules require the subpoena be issued in the name of "the State of Texas and must: (a) state the style of the suit and its cause number; (b) state the court in which the suit is pending; (c) state the date on which the subpoena is issued; (d) identify the person to whom the subpoena is directed;(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2; (f) identify the party at whose instance the subpoena is issued, and

the party's attorney of record, if any; (g) state the text of Rule 176.8(a); and (h) be signed by the person issuing the subpoena. *Id*. Additionally, the subpoena must command the physician to do either or both of the following: (a) attend and give testimony at a deposition, hearing or trial; (b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person. *Id*. Proof of service may be made by filing the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena. Alternatively, a statement by the person who made the service of the date, time, and manner of service, and the name of the person served, may be filed as proof of service. *Id*.

B. Witness Fee Requirements and Limits

When a physician is subpoenaed he is entitled to the same witness fee as fact witness. The witness fee is $10 dollars for each day the witness is required to attend trial or discovery. *Id*. The fee includes the entitlement for travel, so the witness is not entitled to any reimbursement for mileage traveled or for any other costs. *Armes v. Campbell*, 603 S.W.2d 249, 254 (Tex. App.—El Paso 1980, writ ref'd n.re.) (The court had no authority to direct Plaintiff to pay $350.00 in fees to a doctor after Plaintiff subpoenaed the doctor to testify during a hearing). Any witness is entitled to receive payment of one day's witness fee at the time the subpoena is served, Tex. Civ. Prac. & Rem. Code §22.001(a) (2009); Op. Tex. Att'y Gen. No. DM-342 (1995). As Plaintiffs often designate treating physicians as experts, this entitles the physician to charge her standard hourly rate for testimony given. However, in Texas, each party pays all costs associated with its own experts; there is no requirement for an opposing party to pay testimony fees for the other's designated expert.

C. Local Custom and Practice

A party is not required to give other parties notice of its trial subpoenas but it must give other parties notice of its discovery subpoenas. Tex.R.Civ.P. 194.5**.** It is customary to give 10 days notice when serving a discovery subpoena though Texas law no longer requires a 10-day minimum. The notice of deposition and the subpoena must only be served a "reasonable time" before the deposition. Tex. R. Civ. P. 199.2(a) and 191.5; *see also Shenandoah Assocs. v. J & K Properties, Inc.*, 741 S.W.2d 470, 478

(Tex. App.—Dallas 1987, den.). The statute does not define "reasonable time", but six to eight days may be reasonable in Texas depending on case circumstances. *Gutierrez v. Walsh*, 748 S.W.2d 27, 28 (Tex. App. —Corpus Christi 1988, no writ).