The nature of the relationship between a patient and physician imposes fiduciary obligations on the physician. This fiduciary duty includes the duty of treating doctors to cooperate in litigation to their patients. Members of the medical profession "owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation." *Piller by Piller v. Kovarsky*, 194 N.J. Super. 392, 296 (Law. Div. 1984) (*citing Alexander v. Knight*, 197 Pa. Super. 79 (Super. Ct. 1962)

The New Jersey Courts have recognized, on contract principles, the enforceability of a treating physician's affirmative undertaking to cooperate with their patients in litigation. *See Battista v. Bellino*, 113 N.J.Super. 545 (App.Div.1971); *Stanton v. Rushmore*, 11 N.J.Misc. 544 (Sup.Ct.1933), aff'd. 112 N.J.L. 115, (E. & A.1933). Pursuant to this contractual relationship, a treating physician has a duty to render reasonably required litigation assistance to his patient. *Spaulding v. Hussain*, 229 N.J. Super. 430, 440 (App. Div. 1988). Furthermore, courts have specifically identified a physician's duty to testify as being within the scope of litigation assistance. *Kranz v. Tiger*, 390 N.J. Super. 135, 146 (App. Div. 2007); *see also Stigliano by Stigliano v. Connaught Laboratories, Inc.*, 140 N.J. 305, 316 (1995) (finding that there exists a special relationship between physician and patient, which may, at times, require a physician to testify regarding the patient's treatment).

In *Spaulding*, the plaintiff, seriously injured in a slip and fall accident, sued his treating physician after the physician "improperly refused to testify" for the plaintiff in his negligence action

against a commercial property owner. The complaint alleged that, as the key witness, the physician's failure to appear forced the plaintiff to settle his negligence claim for a "grossly inadequate sum." Id. at 432. Therefore, the physician was obligated to make the plaintiff financially whole. *Id*. at 435. In defense, the physician asserted that the plaintiff was comparatively negligent for accepting the inadequate settlement offer instead of moving for a mistrial or seeking other alternative relief. *Id*. at 442-44.

The Appellate Division in *Spaulding* rejected the physician's argument, finding that the physician's nonappearance threatened a litigation catastrophe to plaintiff and his attorney. *Id*. at 444. Therefore, they "were obviously entitled to deal with the impending catastrophe in any reasonable manner," which included settling the case for a lesser amount and suing the physician for the difference. *Ibid*.

As such, the Court's holding in *Spaulding* reaffirmed the nature of the relationship between a patient and physician that treating doctors have a fiduciary duty to cooperate in litigation with their patients. A treating physician is not at liberty to ignore with impunity the basic obligation of rendering a reasonable modicum of litigation assistance. Nor is he free, without compelling professional justification, to renege on a promise, reasonably and detrimentally relied upon by his patient, to render specific litigation assistance. *Id*. at 441; *see also Serrano v. Levitsky*, 215 N.J. Super. 454 (Law. Div. 1986)(holding that it would be unfair to permit plaintiff's own physician to undermine plaintiff's case since the doctor's professional fealty must not be allowed to harm his patient to whom he owes the greater duty).

In *Kranz, supra*, the plaintiff sued his treating physician and attorney for failing to communicate properly regarding the physician's availability to testify. The physician did not testify

and the plaintiff was forced to settle because the physician's testimony was crucial to the case. Ultimately, the court held that a reasonable jury could have found that the physician acted negligently towards his patient where the physician did not testify because he did not properly communicate his availability to the attorney, thereby breaching his duty to the patient. *Id. at 148*.

Similar to the situation presented in *Kranz*, absent your testimony, my client's case would be greatly prejudiced. Your testimony is crucial and my client's case would be completely undermined without your important contribution.

Moreover, the fiduciary duty of a treating physician to a patient includes the physician charging a reasonable fee for his or her services. *R*. 4:10-2(d)(2) states, "[u]nless otherwise ordered by the court, the party taking the deposition shall pay the expert or treating physician a reasonable fee for the appearance, to be determined by the court if the parties and the expert or treating physician cannot agree on the amount therefore." New Jersey Courts have ruled on what constitutes a reasonable expert fee. In *Johnston v. Connaught Laboratories, Inc*., 207 N.J.Super. 360 (L.Div.1985), plaintiff took the deposition of Dr. Pleasure, defendants' expert, a neurologist, and was billed $750 for the one hour deposition . Plaintiff offered Dr. Pleasure $200. At a case management conference, plaintiff raised the issue to the presiding Judge that the fee was excessive. The Trial Judge ruled that $200 was a fair and reasonable amount for the deposition. *Id*. at 362. The court explained that when a party chooses to depose the other party's expert witness "[t]he expert witness unilaterally cannot require payment of more than a reasonable amount. To allow otherwise would permit a situation to occur where the proposed fee is so dear that it would prohibit the taking of a deposition and frustrate the policies underlying pretrial discovery." *Ibid. See also* Perez v. Papandrikos, 2006 WL 3720307 (N.J.Super. Law 2006)(court finds it equitable to set Dr. Fineman's

deposition testimony rate at $650 per hour for a neurosurgeon that has been recognized as on of the Best Doctors in the New York Metropolitan area nine times.); *Schroeder v. Boeing Commercial Airplane Co., a div. of Boeing Corp.*, 123 F.R.D. 166 (D.N.J.,1988)(finding that the Magistrate appropriately limited amount aircraft manufacturer could be charged for deposing former flight attendant's medical and economic experts, in view of number of experts claimed by attendant and excessive fees that they wished to charge).

Here, the duty to charge a reasonable amount is even greater than in *Johnston* because the testimony being requested is of plaintiff's own physician. It is axiomatic to state that a physician has a greater duty of care to his own patient than to those opposed to him in litigation. Moreover, similar to the situation in *Johnston*, an excessive amount would effectively undermine, if not eliminate, plaintiff's case and thus, would be highly prejudicial.

In the present matter, it is clear that you have engaged in unlawful actions by failing to cooperate in the litigation which is your fiduciary obligation to the plaintiff Amarildo DeAssis. As shown in the *Spaulding* case, your failure to cooperate in this litigation will result in a future claim against you should this case be jeopardized. As such, you are under an obligation to cooperate and participate in all future treatment of Mr. DeAssis, including any deposition testimony, and a trial.

Accordingly, it is requested that you reconsider your position and permit Mr. DeAssis to have a lien placed on his case for the proceeds of your medical bills to come out of any future settlement in this matter in accordance with the conditions of our January 17, 2007 letter. Otherwise, I will

have no other option but to file a lawsuit against you to compel same.

Thank you for your attention to this matter.

Very truly yours,

RICHARD C. SCIRIA

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For the Firm