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) (holding that a physician could testify for the defense, in spite of plaintiff's objection, because the probative value of the treating physican's testimony exceeded the prejudicial effect, further noting the utmost importance of a treating physician's testimony when searching for the truth)

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, 390 N.J. Super. at 135*, the plaintiff sued his treating physician and attorney for failing to communicate properly regarding the physician's availability to testify. The physician had

agreed to testify on September 21 and was scheduled to leave for vacation the next day. *Id.* at 144. On September 20, the plaintiff's attorney confirmed the trial date with the physician's office. However, later on in the day, the secretary called the attorney to inform him that the doctor was unavailable and to adjourn the case. *Id.* at 142. After receiving the message, the attorney again spoke with the physician's secretary and was told that the physician was away and that she was unsure if she would hear from him again. *Id.* at 143. After discussing the situation, the plaintiff agreed to settle the case based on the recommendation by plaintiff's attorney that he should settle for what he could since the physician was not available to testify. Shortly thereafter, a message came in from the physician's office that he was unavailable to talk because of the holiday, but to call back tomorrow after 10:00 AM. The next day, the plaintiff called the physician's office, with his attorney listening, and was incorrectly told that the physician was on vacation. As such, the settlement was subsequently entered on the record. *Id.* at 144. However, the physician was in fact available to testify. Ultimately, the court held that a reasonable jury could have found that the physician acted negligently towards his patient. The court explained that the physician's failure to cooperate and to clearly advise his secretary that he would be available to testify could be seen as a breach of his duty to the patient to provide litigation assistance. *Id.* at 148.

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.

Moreover, 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 one 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). Furthermore, New Jersey courts have, on numerous occasions, sought fit to set reasonable fees for a physician's deposition testimony at $300.00 per hour. *See* Exhibit A.

The duty to charge a reasonable fee is inextricably derived from the physician's duty to cooperate in litigation. Essentially, an unreasonably excessive fee schedule for depositions and testimony is constructively the equivalent of refusing to provide litigation assistance, thereby breaching the duty to cooperate with the patient. An exorbitant fee will compromise the plaintiff's case and put him at a great disadvantage because he will be unable to use the physician's services

fully and effectively without unduly affecting the potential amount awarded to the plaintiff. Furthermore, absent testimony by a treating a physician, the plaintiff's case would be completely undermined. A physician has a duty to assist in litigation and to not exploit the plaintiff's vulnerable position by unfairly profiting off of the plaintiff's injuries. Therefore, an unreasonable fee is a clear breach of the duty to cooperate in litigation matters.

Here, the situation is further exasperated by the fact that 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. Similar to the situation in *Johnston*, an excessive amount would effectively eliminate plaintiff's case by denying the plaintiff valuable testimony. Therefore, a physician's fee must not stand as a barrier to plaintiff's case and such exorbitant fees are not only highly prejudicial, but clearly against the weight of New Jersey law.

Physicians-Duty-to-Cooperate-in-Litigation3.wpd