GEICO Case Opens Door to Depose Plaintiff's Physician

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A state appeals court has endorsed the possibility that a defendant in a personal injury case could engage in discovery directed to a plaintiff's treating physician as well as to the plaintiff's counsel and that counsel's law office.

In *Steinger, Iscoe & Greene, P.A. v. GEICO General Insurance Company*, GEICO was defending an under-insured motorist claim brought by its insured, Tiffany Washington, who was represented by Steinger Iscoe. Washington had a number of treating physicians her counsel admitted in open court would be rendering expert opinions in the case as to causation, permanency and future damages.

GEICO sought to depose the law firm's office manager to obtain information and documentation concerning the relationship between the firm and treating physicians, including:

- Records of payments by the firm to the medical providers
- Letters of protection to those providers
- Phone records between the firm and the providers
- Depositions and trial transcripts of those individuals or entities in the firm's possession.

The firm had filed a motion for protective order and asserted arguments regarding invasion of privacy of their other clients, violation of the attorney-client privilege of the firm's former clients, and undue burden as a result of having to manually review thousands of confidential files.

The trial court had denied the motion for protective order, although it did allow the names of the firm's clients whose claims had not become involved in litigation or had settled to be redacted from the discovery responses and any documents responsive to the request that were allegedly privileged could be produced under seal for review by the trial court.

The Fourth District Court of Appeal, in a unanimous decision by a three-judge panel in November 2012, went through an extensive analysis of the current law surrounding GEICO's discovery requests and discovery from experts and made several significant findings. The judges recognized that a plaintiff's treating physician who testifies on behalf of the plaintiff regarding his medical opinions is legally a "hybrid expert." The concept of a hybrid expert had previously been recognized in cases such as *Scott Katzman, M.D. v. Rediron Fabrication Inc.* However, the court also recognized that regardless of whether a witness was an expert or not, evidence of potential bias of that witness is always a legitimate area of discovery inquiries. This had previously only been recognized in part by a concurring opinion from the Fifth District Court of Appeal.

One of the arguments advanced by Steinger Iscoe was that the Florida Rules of Civil Procedure essentially limited financial bias

discovery from retained experts absent unusual and compelling circumstances. While the Fourth District acknowledged this argument, the judges found (1) that the Florida Rules of Civil Procedure were not intended to limit discovery from a treating physician, but that (2) a treating physician is "entitled to similar protection from overly intrusive general financial bias discovery."

While recognizing this protection, the court seemed to hold that the treating physician was more than an expert because he was also a material witness, and as such, additional discovery could be obtained regarding financial bias that exceeded the Florida Rules of Civil Procedure.

The most significant holding of the court was that if it was established in discovery that the plaintiff's treating physician had been referred to the plaintiff by his law firm, then the type of discovery sought by GEICO was permissible. That included the discovery from the plaintiff's law firm, provided there are safeguards for the privacy of the law firm's former clients.

Previously, this type of discovery had never been approved by an appellate court. At most (at least in reported case law), treating physicians who testified were required to produce discovery relating how often they had testified in the past and how much of their income and work was derived from expert testimony.

It is now possible to obtain discovery regarding how much work a treating physician performs on personal injury plaintiffs, how much of that work comes from the plaintiff's law firm, and the details of the letters of protection the treating physician has executed with the plaintiff's law firm in the past.

In a situation where a treating physician's practice is devoted substantially to treating personal injury plaintiffs with claims and the physician performs most of these medical services under letters of protection, the discovery and presentation at trial of a multi-claim financial relationship history between a treating physician and plaintiff law firm has the potential of severely undermining the credibility of that treating physician for the jury.

In the *Steinger* case, the trial court had not indicated whether or not a referral relationship had been established between the plaintiff's treating physician and the plaintiff's law firm. Therefore, the case was remanded to the trial court for the preliminary finding.

In the future, we can expect intense scrutiny of referral relationships. If such a relationship is discovered, defendants will likely come up with inventive and significant discovery requests to probe further this relationship. There is also likely to be significant push back by the treating physicians and plaintiff law firms that are subject to such discovery.

This may also discourage further medical treatment under letters of protection and referral relationships between law firms and doctors due to the negative repercussions of these relationships the *Steinger* case now creates.

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