Succeeding Under Florida Tort Reform Part 8
Subsection (3)(e) Boecher Discovery

In the Second Article in this series, which addressed the new statutory definition of Letters of Protection (LOP), we discussed that: (1) an LOP includes "a promise of payment . . . from any judgment or settlement;" (2) this definition will have an impact on three different areas – subsection (2)(b)(2), subsection (2)(b)(4), and Section 3; and (3) with particular regard to Section 3, the defense will not be entitled to obtain the subsection (3)(e) Boecher impeachment information because Section 3 globally has no field of operation if there is no LOP in the case. To date, there appears to be no court orders applying the statutory definition of LOP.

The focus of this current article is on what to do if a judge rules that an LOP does exist. There are four additional arguments to be made by medical providers and plaintiffs against the discovery and admissibility of subsection (3)(e) Boecher discovery. While not specifically named, subsection (3)(e) does cover Boecher discovery, which on the defense side refers to the financial relationship between insurance companies and retained experts, and on the plaintiff side, to the financial relationship between plaintiff law firms and medical providers. Subsection (3)(e) states:

> In a personal injury or wrongful death action, as a condition precedent to asserting any claim for medical expenses for treatment rendered under a letter of protection, the claimant must disclose:
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> . . . .
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> (e) Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

Fla. Stat. § 768.0427(3)(e) (emphasis added). This plain language establishes the following:

First, the entirety of Section 3 refers to discovery from the "claimant," rather than medical providers. Thus, no medical provider should ever have to provide Boecher discovery.

Second, aside from the fact of the referral, Boecher discovery requires the defense to establish that an attorney (as opposed to a medical provider) made the referral. Thus, when a medical provider receives a referral from another medical provider, the defense is not entitled to Boecher discovery.

Third, despite that the opening salvo of Section 3 states that "claimants must disclose" subsection (3)(e) itself states only that the Boecher discovery is "relevant to the issue of the bias of a testifying medical provider," and not that it is inherently discoverable. Thus, all arguments against discovery of Boecher information are available to plaintiffs and medical providers – most notably confidentiality of financial and trade secret information.

Finally, Section 3 relates to discovery and not admissibility (other than the one express reference to admissibility of the referral itself). The legislature did not say Boecher discovery is admissible. This is critical given that in other sections of the statute, the legislature did expressly state that certain information is admissible. The legislature took the time to distinguish discovery from admissibility in Section 768.0427 and even within subsection (3)(e), itself. In short, all arguments for the inadmissibility of Boecher discovery at trial are available to plaintiffs even when the defense already obtained the Boecher discovery.