



## PALM BEACH COUNTY BAR ASSOCIATION

# BULLE<sup>T</sup>IN

[www.palmbeachbar.org](http://www.palmbeachbar.org)

November 2014



### Holiday Party set for December 4

Please join us for our annual Holiday Party and Silent Auction on Thursday, December 4 from 5:30 p.m. to 8:00 p.m. at Frenchman's Reserve Country Club in Palm Beach Gardens. The evening includes drinks, heavy hors d'oeuvres, plenty of shopping and unlimited networking with more than 350 members. This event sold out last year. Space is available as long as you RSVP no later than 5:00 p.m. on December 1 at [www.palmbeachbar.org](http://www.palmbeachbar.org). Don't be left out!

RSVP today! REGISTRATION CLOSES on DECEMBER 1 at 5:00 p.m.

Sponsors include Alpine Jaguar, Brooks Brothers, Bob Greenberg, Grand Bank and Trust, Ricoh Legal, Sabadell United Bank, U.S. Legal Support and Visual Evidence.

### Mark your calendar for upcoming Membership Events

#### December 4:

Annual Holiday Party at Frenchman's Reserve

#### January 9:

"Screen on the Green" Family Event Downtown West Palm Beach

#### February 2:

Joint Luncheon with Forum Club with guest speaker U.S. Supreme Court Justice Sonia Sotomayor

#### March 27:

Bench Bar Conference

#### April 28:

Judicial Reception

#### May 1:

Law Day Luncheon with guest speaker Mark Curriden, attorney and award-winning legal journalist. Senior writer for the ABA Journal

### Top Bar Leaders Speak During Annual Diversity & Inclusion Program



This year's diversity event was held in September in Jupiter. We were honored to have FL Supreme Court Chief Justice Jorge Labarga and FL Bar President Greg Coleman as the keynote speakers. Both Chief Justice Labarga and President Coleman are from Palm Beach County and we couldn't be more proud to have them both serving as Florida's top legal leaders. Pictured above are moderator David Prather, Greg Coleman, PBCBA President Theo Kypreos and Chief Justice Labarga. After the program members enjoyed a reception with justices from the Supreme Court as well as appellate judges from all over the state. Thank you to our sponsor Lylal, Reiter, Smith, Ivey & Fronrath. For more photos from this event, please see page 5.

### Dinner and Family Movie Night Set for January 9

Join us for dinner and a family-friendly movie on Friday, January 9 beginning at 6:30 p.m. at The Lake Pavilion on South Flagler Drive in downtown West Palm Beach. After a busy week of work, this new event promises to be a stress-free evening for all. After dinner, we'll open the sliding glass doors and watch the movie from the comfort of our private area. Kids can bring a blanket or a chair and watch the show from the pavilion's terrace. At the time of this printing January's movie had not been selected, but previous ones include The Wizard of Oz, Merry Madagascar and Home Alone. The cost is \$15.00 for adults; \$5.00 for children; and Judges are complimentary. Please register to attend online at [www.palmbeachbar.org](http://www.palmbeachbar.org) Sponsors include Deutsche Bank, Palm Beach Motorcars, Northwestern Mutual, Pressly & Pressly, Complete Legal Investigations and Sabadell Bank.

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## Rule 1.280(b)(5): Financial Discovery Concerning Treating Physicians

by Matt Triggs and Jonathan Galler

Responding to discovery... is there anything in the practice of law less enjoyable? It should therefore come as no surprise that a frequently litigated issue concerns the extent to which discovery is permissible regarding the relationship between a treating physician and a referring law firm. That subject was once again front and center in *Brown v. Mittelman*, 39 Fla. L. Weekly D1806 (Fla. 4th DCA Aug. 27, 2014) (per curiam).

*Mittelman* was a personal injury action in which the defendant sought documents from a treating physician regarding (i) other patients previously represented by the plaintiff's law firms, (ii) cases in which the treating physician treated patients under a letter of protection,<sup>1</sup> and (iii) referrals from the plaintiff's attorneys. The physician objected to the production, arguing, inter alia, that Rule 1.280(b)(5) prohibits such discovery. Rule 1.280(b)(5) limits the extent to which a testifying expert can be required to disclose financial information to the following:

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

<sup>1</sup> "A letter of protection is a document sent by an attorney on a client's behalf to a health-care provider when the client needs medical treatment[ ] but does not have insurance. Generally, the letter states that the client is involved in a court case and seeks an agreement from the medical provider to treat the client in exchange for deferred payment of the provider's bill from the proceeds of [a] settlement or award[,] and typically if the client does not obtain a favorable recovery, the client is still liable to pay the providers' bills." *Smith v. Geico Casualty Co.*, 127 So. 3d 808, 812 n.2 (Fla. 2d DCA 2013) (citations omitted).

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents.

Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(5)(C) of this rule concerning fees and expenses as the court may deem appropriate.

### Fla. R. Civ. P. 1.280(b)(5)(iii).

In deciding whether the discovery sought was permissible, the *Mittelman* Court noted that the existence of a financial relationship between a treating doctor and a plaintiff's attorney (in both present and past cases) creates the potential for bias – a well-accepted subject of inquiry at trial. See 90.608(2), Florida Statutes. *Mittelman*, 39 Fla. L. Weekly D1807. The Court further noted that, because a physician can derive substantial income from treating patients, a jury should be entitled to learn about the extent of the relationship between the doctor and referring lawyer. *Id.*

With respect to the question of whether Rule 1.280(b)(5) could otherwise serve to restrict discovery regarding such matters, the Court concluded that the rule simply does not address, much less limit, discovery of such a financial relationship. Although the Court concluded that the particular discovery sought in *Mittelman* was both reasonable in time frame and not overly-intrusive, it recognized that treating physicians should be protected from overly-intrusive financial discovery. Indeed, it went so far as to note that trial courts "generally should



not permit extensive discovery of a treating physician's finances." Any holding to the contrary, *Mittelman* held, might have a "chilling effect" on the willingness of physicians to treat patients involved in litigation. *Id.*

Assuming at least some financial discovery of a treating physician is permissible under the circumstances described in *Mittelman*, a closely related question is who should be required to gather and produce discovery relating to the existence of a referral relationship between the treating physician and referring law firm. Just this past year, the Fourth District shed light on that issue in *Steinger, Iscoe & Greene, P.A. v. Geico General Ins. Co.*, 103 So. 3d 200, 206 (Fla. 4th DCA 2013). There, the defendant sought discovery not from the treating physician, but from the law firm representing the plaintiff as to the nature of the relationship between the law firm and the treating physician. *Geico* held that where there is a preliminary showing that the plaintiff was referred to the doctor by the plaintiff's lawyer, the defendant is entitled to discover the extent of the relationship between the law firm and the doctor, because it is relevant to the potential bias of the witness. *Id.* at 205. But the normal procedure, according to *Geico*, was to first seek discovery from the party, the treating physician, or other witnesses, regarding the existence of a referral relationship "not the party's legal counsel." *Id.* at 206. Once such a relationship has been shown, discovery from the law firm may be permissible, provided the trial court balances privacy rights and implements appropriate safeguards. *Id.*

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