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## Attorney Directed Medical Care...How to Find it and What to Do About It

By Jonathan L. Lee of Robinson & Wood, Inc.\*

Most civil litigation defense attorneys have seen a direct referral from a lawyer to a physician in a personal injury case, a.k.a. "Attorney Inspired Care." That same physician seems unusually prone to running up treatment bills, often on a lien basis, or initiating unusual and/or questionable treatment with limited success, only to prognosticate the worst future medical course imaginable for the patient/plaintiff. On other occasions, the referral seems likely, but there is no clear evidence to prove it.



Many questions arise about this situation or suspected situation: How does one find out about a referral by the lawyer to the doctor? Is such a referral protected by the attorney client privilege? Is the fact of the attorney referral to a physician relevant and admissible as evidence? Is a referral by an attorney to a physician legal and ethical? When you do find the presence of such a referral, how is it useful? This article is an attempt to briefly, but not exhaustively, examine these questions.

### Finding or Confirming the Attorney-Physician Referral

Assuming you have at your disposal the medical records of the plaintiff, examine the intake forms for the referral source. If the attorney is listed as the referral, the relationship is thereby established. Oftentimes, though, the complete records do not come into your hands in the pre-litigation phase, or there is scant evidence, even in the subpoenaed records, of the fact that an attorney-physician referral exists.

What other clues may suggest an attorney-physician referral took place? You can examine the location of the doctor and lawyer. Are the respective offices geographically close, or exceptionally far away? Obviously, if they are next door to one another, a strong suspicion of a referral is present. Also, the presence of an extreme distance between the patient's residence, the plaintiff attorney's office and the physician's office may indicate this doctor was the only doctor willing to treat the patient on a lien basis, thus creating the referral. Geography, therefore, can be one piece of the puzzle. The absence of a connection between an initial doctor and a subsequent doctor can also be a clue. The timing of legal representation, followed shortly thereafter by the start of treatment with a new doctor, is another tip-off.

How would an attorney locate a doctor willing to treat patients on a

lien basis? Aside from plaintiff counsel organizations with possible sources, you could check the internet. There are now companies that have been "connecting" lawyers and doctors for years. See <http://www.doctorsonliens.com> or <http://injurydoctorsnetwork.com> for examples.

If you suspect a relationship, but there is no documented proof, the case should be litigated to obtain the answer through discovery. You may receive the entire records, which may contain the referral information. The physician may admit the relationship during a deposition. The doctor might also admit he refers some patients to the plaintiff lawyer for legal representation.

In deposition (but not in written discovery), the plaintiff should be asked "Who referred you to Dr. Smith?" or the more innocuous "How did you happen to go see Dr. Smith?" Oftentimes, the plaintiff will say without hesitation (and without objection) "My lawyer." In some plaintiff attorney circles, there seems to be a feeling of pride surrounding such referrals, especially when attorney websites proclaim that that the attorney can refer you to the "right doctor." Many plaintiff attorneys think nothing of making such a referral and make no attempt to hide the referral during discovery. Others may claim the question violates the attorney client privilege.

### Is the Attorney-Physician Referral Protected by the Attorney Client Privilege?

There are arguments for and against this claim of privilege. First of all, the question "Who referred you to Dr. Smith?" seeks knowledge of a fact, not a communication. Had the question been phrased "Did your lawyer tell you to treat with Dr. Smith?" such a question would appear to be asking for a communication between client and attorney. Different courts are likely to view the issue of whether this referral is protected by the attorney client privilege differently, sometimes even in the same state (see below). However, you can make the distinction of fact vs. communication based upon *Upjohn Co v. U.S.* 449 U.S. 383 (1981), at 395 "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. '[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within



his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.” citing *Philadelphia v. Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (ED Pa. 1962).

### Is the Attorney-Physician Referral Relevant?

The issue of attorney referral to a particular physician is relevant, because it relates to the issue of bias. It is well settled by statute in California that a witness’ credibility is to be determined in part by the existence of “a bias, interest or other motive” Evidence Code § 780 (f).

In *Nager v. Allstate Ins. Co.* 83 Cal.App.4th 284 (2000) the court stated, at 291:

“Personal injury litigation places a central focus upon medical specials, litigation-oriented medical reports, and depositions and testimony by treating physicians and medical experts. Simple economics preclude such costs from being incurred on a pay-as-you-go basis; rather attorneys, litigants and medical providers rely upon such devices as liens against anticipated judgments or settlements to secure payment, and medical liens are frequently reduced during the process. As the court stated in *Lovett v. Carrasco* 63 Cal.App.4th 48 (1998) at 57, ‘some medical providers with liens may overtreat patients to run up medical special costs, thereby increasing their chances of getting paid.’”

### What do other states say?

Florida cases have spoken more directly on this issue of attorney-physician referral, a state where some written discovery is permitted on the use and payment to a particular expert, based upon a case called *Elkins*. There are currently Florida cases going both ways, saying that the information is both discoverable and not discoverable, based upon the attorney client privilege.

The discussion in Florida begins with *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060 (Fla. 4th DCA 2011), at 1064, “We agree that *Elkins* discovery should generally provide sufficient discovery into such financial bias. The discovery here is relevant to a discrete issue, whether the expert has recommended an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether the expert, as a treating physician, allegedly overcharged for the medical services at issue in the lawsuit.” In *Syken v. Elkins*, 644 So. 2d 539, 546 (Fla. 3d DCA 1994), the Third District Court of Appeal set forth eight criteria to be followed in seeking financial information from opposing medical experts. In *Elkins v. Syken*, 672 So. 2d 517, 522 (Fla. 1996), the Florida Supreme Court found that the criteria set forth by the district court was “proper.” *Crawford v. McColister’s Transp. Sys., Inc.*, No. 13-60402-CIV, 2013 U.S. Dist. LEXIS 152996, 2013 WL 5687861, at \*2 (S.D. Fla. Oct. 2, 2013) stated that “the existence of an attorney client relationship is not usually itself privileged, and **whether a Plaintiff was referred to a physician by her attorney is discoverable**” (footnote omitted, citing *Norfolk v. Comparato*, No. 11-81120-CIV, 2012 WL 3055675 (S.D. Fla. July 12, 2012)).

Ultimately, the Florida Court of Appeal, Fifth District, in *Worley v. Central Florida Young Men’s Christian Association Inc. et al.*, case number 5D14-3895, a very recent and not yet final 2015 case, stated “Having exhausted all other avenues without success, we find-contrary to the trial court’s preliminary ruling and to *Burt v. Government Employees Insurance Company* 603 So. 2d 125 (Fla. 2d DCA 1992),-that it was appropriate for YMCA to ask *Worley* if she was referred to the relevant treating physicians by her counsel or her counsel’s firm. However, the court certified a conflict with the

decision in *Burt v. Government Employees Insurance Co.*, to the extent that it holds that the disclosure of a referral of a client by an attorney to a healthcare provider is always protected by attorney client privilege.

A clever way of eliminating other sources of referral is to ask alternative questions, ruling out other potential sources of referral, as was done by the attorneys in *Worley*. There, defense counsel asked if the plaintiff had been referred to the physician via friends, associates, advertisements, etc. all producing a “No” answer. By inference, the only referral source left was the plaintiff counsel.

### Is an Attorney-Physician Referral Legal? Ethical?

This writer has not located an opinion which prohibits or ethically challenges this activity in California. Moreover, the activity is easily justified for clients with no financial means to treat for an injury other than a doctor or health care provider that will accept the case on a lien basis. If the referral is known, however, one seasoned plaintiff counsel has remarked “Jurors tend to distrust an attorney-referred doctor.”

### Assuming you can prove the Attorney-Physician Referral occurred, how can you best exploit this fact?

First of all, even if the referral is noted in the records, use the deposition of the doctor to confirm that fact (or if he denies it, his own record can be used as impeachment). Ask about the number of patients that have been referred between this same doctor and the same plaintiff firm over the years. Next, look to the place where plaintiff usually sought medical care and question why plaintiff did not avail himself or herself of his or her trusted family physician? After that, examine the charges of this attorney referred doctor, by using a qualified billing expert to demonstrate that the claimed charges are unreasonable. Finally, argue the jury instruction dealing with witnesses in your jurisdiction which parallels California’s CACI 107, which, in part, tells jurors to ask:

“Did the witness have any reason to say something that is not true? For example, did the witness show any bias or prejudice or have a personal relationship with any of the parties involved in the case or have a personal stake in how the case is decided?”

Argue that physicians who have a relationship with the plaintiff attorney, including physicians who have a stake in the outcome (by running up bills and accepting payment from the lawsuit proceeds), are not to be believed. As CACI 107 tells jurors, “You may believe all, part, or none of a witness’s testimony.”

### Conclusion

The presence of an attorney physician referral can be powerful evidence to damage or destroy plaintiff’s case. You should, of course, update these cases and consult counsel in your jurisdiction for particular rules or holdings.



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