

ITEM 11.02 | DISCUSSION

Pursuant to Fla. R. Civ. P. 1.280(b)(5)(A) discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Fla. R. Civ. P. 1.280(b)(1) (scope of discovery) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) By interrogatories a party may require a party (a) to identify each person whom the party expects to call as an expert witness at trial and (b) to state the subject matter on which the expert is expected to testify, and (c) to state the substance of the facts and opinions to which the expert is expected to testify and (d) to provide a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with Fla. R. Civ. P. 1.390 without motion or order of court.

(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; and (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.

Under the same rule, 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 the rule concerning fees and expenses as the court may deem appropriate. The referenced rules confine both the discovery methods that can be employed when directed to expert witnesses and the subject



matter of discovery. By its terms the rule allows a party to obtain information about another party's expert initially only through the vehicle of interrogatories.⁷

A party may attack the credibility of a witness by exposing a potential bias.⁸ A financial relationship between the expert and a party, an agent for a party, or counsel for a party is an area often explored to attempt to uncover possible bias. In the years up to the mid-1990's, trial courts permitted broad discovery into the private financial affairs of experts far beyond what was reasonably necessary to fairly litigate the potential for bias, and which was invasive and harassing and threatened to chill the willingness of experts to become involved in litigation. In *Syken v. Elkins*,⁹ experts retained to provide compulsory medical examinations (CME) were ordered by the trial court to produce expansive private financial information, including tax returns, and information regarding patients who were examined for purposes of litigation in unrelated actions. On certiorari appeal, the appellate court, en banc, quashed the trial court order, holding that the required information was overly burdensome, caused annoyance and embarrassment, and provided little useful information. The Court fashioned criteria for financial discovery and a methodology that balanced a party's need to obtain financial bias discovery from an expert with the need to protect their privacy rights. The criteria governing the discovery of financial information from expert witnesses adopted by *Elkins* are as follows:

1. The medical expert may be deposed either orally or by written deposition.
2. The expert may be asked as to the pending case, what he or she has been hired to do and what the compensation is to be.
3. The expert may be asked what expert work he or she generally does. Is the work performed for the plaintiffs, defendants, or some percentage of each.
4. The expert may be asked to give an approximation of the portion of their professional time or work devoted to service as an expert. This can be a fair estimate of some reasonable and truthful component of that work, such as hours expended, or percentage of income earned from that source, or the approximate number of IME's that he or she performs in one year. The expert need not answer how much money he or she earns as an expert or how much the expert's total annual income is.



5. The expert may be required to identify specifically each case in which he or she has actually testified, whether by deposition or at trial, going back a reasonable period of time, which is normally three years. A longer period of time may be inquired into under some circumstances.

6. The production of the expert's business records, files, and 1099's may be ordered produced only upon the most unusual or compelling circumstance.

7. The patient's privacy must be observed.

8. An expert may not be compelled to compile or produce nonexistent documents.

The Florida Supreme Court adopted in full the Third District's criteria in *Elkins*, and subsequently the methodology was codified in part in Fla. R. Civ. P. 1.280(b)(5)(A). The purpose of Fla. R. Civ. P. 1.280(b)(5)(A) is to protect experts from the annoyance, embarrassment, oppression, undue burden, or expense associated with discovery of financial information. In general, without making any finding of "the most unusual or compelling circumstances" that might justify the production of financial or business records, the trial court may not order an expert to produce financial and business records beyond that allowed by the rule.¹⁰ The purpose of financial discovery is to expose potential bias to the jury, and normally the information available from discovery had under Fla. R. Civ. P. 1.280(b)(5)(A) is sufficient to accomplish that purpose.¹¹

Several years following *Elkins*, the Supreme Court decided *Allstate Insurance Co. v. Boecher*.¹² In *Boecher*, an insured sought discovery from his insurance company of the identity of cases and amount of fees paid to its expert reconstruction and injury causation expert during the preceding three years. The Supreme Court held that the *Elkins* limitations could not be used to shield the discovery sought from a party regarding its financial relationship with the expert and stated:

The information sought here would reveal how often the expert testified on Allstate's behalf and how much money the expert made from its relationship with Allstate. The Information sought in this case does not just lead to the discovery of admissible information. The information requested is directly relevant to a party's efforts to demonstrate to the jury the witness's bias.



The more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship.

In this case Boecher attempted to discover facts known directly by Allstate concerning the extent of Allstate's relationship with its expert witness. We find no indication from either the language of Rule 1.280(b)(4) or our opinion in Elkins that the rule was intended to shield a party from revealing the extent of its relationship with an expert witness.

Because the discovery in Boecher sought information from the party regarding its relationship with a particular expert, the court found that the analysis changed and the balance of interests shifted in favor of allowing the discovery.

While Rule 1.280(b)(5)(A)(iii) was drafted to protect retained experts only, a treating physician expert is entitled to similar protection from overly intrusive general financial bias discovery.¹³ Cases in which there is evidence of a referral relationship between a physician and lawyer may result in the need for financial discovery beyond that provided by Fla. R. Civ. P. 1.280(b)(5)(A) from both the law firm and the doctor.¹⁴

The situation in which a physician treats a patient on referral from a lawyer has been addressed in a number of cases. In one respect, the physician is a "fact" witness, a treating physician. In another respect, the same physician often provides expert opinions at trial regarding the permanency of injuries, prognosis, and the need for future treatment. In such cases, the physician is not merely a witness retained to give an expert opinion about an issue at trial and is not a typical treating physician that a patient independently sought out.¹⁵ A lawyer referred the patient to the physician in anticipation of litigation and therefore the physician has injected himself into the litigation, and the witness potentially has a stake in the outcome of the litigation because of the referral by the lawyer, which provides the "compelling circumstances" to expand discovery beyond that provided by rule.¹⁶



A law firm's financial relationship with a doctor is discoverable on the issue of bias.¹⁷ Discovery seeking to establish that a financial relationship exists should first be sought from a party, a treating doctor, or other witnesses—not the party's legal counsel. Once there is evidence that a referral relationship exists, discovery from the law firm may be appropriate, with the trial court balancing the privacy rights of the former patients and clients, and implementing appropriate safeguards. Where a testifying expert doctor in deposition denied having any records and provided "nebulous testimony" in connection with the number of his patients who were represented by the law firm, the law firm became an appropriate source of the necessary information.¹⁸

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Footnotes

⁷ *Smith v. Eldred*, 96 So. 3d 1102 (Fla. 4th DCA 2012).

⁸ Fla. Stat. § 90.608(2) (2015).

⁹ 644 So. 2d 539 (Fla. 3d DCA 1994), approved, 672 So. 2d 517 (Fla. 1996)

¹⁰ *Grabel v. Sterrett*, 163 So. 3d 704 (Fla. 4th DCA 2015).

¹¹ *Id.*

¹² 733 So. 2d 993 (Fla. 1999).

¹³ *Steinger, Iscoe & Greene, P.A. v GEICO Gen. Ins. Co.*, 103 So. 3d 200, 203-04 (Fla. 4th DCA 2012).

¹⁴ *Id.* at 547

¹⁵ See *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1064 (Fla. 4th DCA 2011).

¹⁶ *Id.*

¹⁷ *Worley v. Cent. Fla. YMCA*, 163 So. 3d 1240 (Fla. 5th DCA 2015).

¹⁸ *Id.*; *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So. 3d 1178 (Fla. 4th DCA 2014).

