ITEM 11.05 | SIGNIFICANT CASES INVOLVING THE BREADTH AND SCOPE OF EXPERT WITNESS DISCOVERY

Syken v. Elkins, 644 So. 2d 539 (Fla. 3d DCA 1994).

En banc, the appellate court reviewed trial court orders requiring defendant's trial experts to produce, among many other things, certain 1099s and P.A. federal income tax returns, as well as information regarding patients who were examined for purposes of litigation in unrelated matters. In quashing the orders, the court concluded that decisions in the field have gone too far in permitting burdensome inquiry into the financial affairs of physicians and established eight criteria limiting discovery of an opposing medical expert for impeachment. One of the limiting criteria was that production of the experts business records, files, and 1099s may be ordered produced only upon the most unusual or compelling circumstances. The court commented that the problem the criteria addresses is the attempt by litigators to demonstrate the possibility of a medical expert's bias through "overkill discovery," to prove a point easily demonstrable by less burdensome and invasive means, and that production of the information ordered in the cases before them caused annoyance and embarrassment while providing little information.

Elkins v. Syken, 672 So. 2d 517 (Fla. 1996).

On conflict certiorari review , the supreme court acknowledged that the issues presented in the case were an expanding problem, approved what the court called a well-reasoned decision, adopted in full the criteria governing the discovery of financial information from expert witnesses in an effort to prevent the annoyance, embarrassment, oppression, undue burden or expense, claimed on behalf of medical experts, and directed that the criteria be made part of the commentary to Fla. R. Civ. P. 1.280. The court stated that discovery was never intended to be used as a tactical tool to harass an adversary in a manner that actually chills the availability of information by non-party witnesses.

Allstate v. Boecher, 733 So. 2d 993 (Fla. 1999).

Conflict certiorari review of appellate decisions, one sustaining a trial court's order overruling Allstate's objections to interrogatories directed to it seeking the identity of cases in which its expert had performed analyses and rendered opinions for Allstate nationally in the preceding three years, and the amount of fees paid to that expert nationally during that same period. In approving that order, the court held that neither its decision in Elkins nor Fla. R. Civ. P. 1.280(b)(4)(A)(iii) prevents this type of discovery. The court pointed out that, unlike the information requested in Elkins, which related to the extent of the expert's relationships with others, the specific information sought from Allstate in this case pertained to the expert's ongoing relationship with Allstate. The court further stated that the information requested was directly relevant to the party's efforts to demonstrate to the jury the witness's bias.

Katzman v. Rediron, 76 So. 3d 1060 (Fla. 4th DCA 2011).

Defendant sought discovery form Dr. Katzman, plaintiff's treating physician, regarding how often he had ordered discectomies over the past four years (the procedure performed on both plaintiffs after an auto accident, on referral from plaintiffs' attorney, and under letters of protection), and what he had charged to perform it in litigation and non-litigation cases. Dr. Katzman objected and argued that the discovery was overbroad and exceeded the financial discovery permitted from retained experts under the discovery rules and Elkins v. Syken, 672 So. 2d 517 (Fla. 1996). The circuit court ruled that Dr. Katzman must respond and provide information as to the number of patients and what amount of money he collected from health insurance companies and under letters of protection, over the preceding four years. The appellate court held that since a lawyer referred the patient to the physician in anticipation of litigation the physician had injected himself into the litigation, and the circumstance would allow the defendant to explore possible bias on the part of the doctor. It agreed that Elkins discovery should generally provide sufficient discovery into such financial bias. The appellate court further held that the discovery sought is not relevant merely to show that the witness may be biased based on an ongoing financial relationship with a party or lawyer, but was relevant to a discrete issue, whether the expert had performed an allegedly unnecessary and costly procedure with greater frequency in litigation cases, and whether he allegedly overcharged for the medical services at issue, a substantive issue being the reasonableness of the cost and necessity of the procedure. In the Court's view, it meets the requirements of "unusual and compelling circumstances," and denied the petition to quash the discovery order.

Katzman v. Ranjana Corp., 90 So. 3d 873 (Fla. 4th DCA 2012).

Certiorari review of trial court order allowing discovery by subpoena duces tecum to Dr. Katzman, plaintiff's treating physician on referral from another physician, that included voluminous information covering four years concerning the number of times he performed four different surgeries, the amounts he had collected from health insurance coverage on an annual basis over four years regarding the type of surgeries (four) performed on plaintiff, and the number of patients and amounts received each year under letters of protection from attorneys. Dr. Katzman provided medical services pursuant to a letter of protection from her attorney. Dr. Katzman objected to the subpoena on the basis that it sought unrelated information, and confidential private business and financial records which exceeded the scope of permissible discovery under Fla. R. Civ. P. 1.280 as well as Elkins v. Sykens, 672 So. 2d 517 (Fla. 1996). He also asserted that the requests were extremely burdensome and would require thousands of man hours and dollars to comply. In denying the motion for protective order the trial court held, among other things, that the doctor potentially has a stake in the outcome of the litigation and had injected himself in the litigation by virtue of the letter of protection from plaintiff's attorney. In quashing the order, the appellate court said that the trial court did not have the benefit of the appellate court's revised opinion in Rediron when it entered its order, and thus had not seen that part of the revised opinion stating that it was the referral, not the letter of protection, that injects a doctor into litigation. On remand, the trial court was instructed to reconsider all of the objections raised by the doctor against the back drop of the clarified Rediron opinion, and that the trial court should consider petitioner's argument of undue burden, since requiring information on four surgical procedures is far more extensive and potentially burdensome than the "limited intrusions" found in Rediron.

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

Trial court overruled defendant's objection to plaintiff's Notice of Intent to Serve a Subpoena and Notice of Service of Expert Witness Request for Production directed to defendant's liability expert. Defendant asserted that Fla. R. Civ. P. 1.280(b)(4) does not allow a party to serve a subpoena or a request for production, and that a party may request the court to seek discovery of financial or business records by other means, but only when unusual or compelling circumstances exist. The appellate court agreed, quashed the order, and stated that Rule 1.280(b)(4) means what it says and says what it means, that the rule confines both the discovery methods that can be employed when directed to expert witnesses and the subject matter of that discovery, and that a request for productions is simply NOT a method condoned by the rule except upon motion.

Steinger v. Geico, 103 So. 3d 200 (Fla. 4th DCA 2012).

The trial court ordered plaintiff's law firm to produce discovery pertaining to the law firm's relationship with four of plaintiff's treating physicians who would render expert opinions on matters such as causation, permanency, and future damages. The production requests included all records of payments by the firm to these doctors, as well as all letters of protection to them. Client names could be redacted in cases that settled or where no lawsuit was filed. The appellate court stated that where there is a preliminary showing that the plaintiff was referred to the doctor by the lawyer (whether directly or through a third party) or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor with the trial court balancing the privacy rights of the former patients and clients, and implementing appropriate safeguards. "Normally, discovery seeking to establish that a referral has occurred should first be sought from the party, the treating doctor or other witnesses, not the party's legal counsel. We do not suggest, however, that the law firm may never be a primary source for such discovery where, as here, the doctor has no records or provides nebulous testimony about the doctor's past dealings with the referring law firm." The appellate court further stated: "We do not suggest that all financial discovery from a physician who also serves as an expert in litigation must always be limited to those matter listed in Rule 1.280(b)(5)(A). We stress that the limitations of financial bias discovery from expert witnesses cannot be used as a shield to prevent discovery of relevant information from a material witness – such as a treating physician. The rule limits discovery of the general financial information of the witness where it is sought solely to establish bias. However, trial courts have discretion to order additional discovery where relevant to a discrete issue in a case. See Rediron, 76 So. 3d at 1064-65.” Since from the record the Court was unable to determine whether defendant had established the existence of a referral relationship between the doctors and the law firm, it granted the petition, stating that it was premature to order more extensive financial bias discovery, and remanded the case for proceedings consistent with the opinion.

Pack v. Geico, 119 So. 3d 1284 (Fla. 4th DCA 2013).

Plaintiff sought a new trial after a defense verdict alleging error when the trial court denied her motion in limine and permitted the defendant to introduce into evidence a letter of protection between her and her physician, who testified as her expert witness on her claim of more serious injuries to her neck. Plaintiff argued that evidence of a letter of protection, absent a referral relationship from the lawyer to the doctor, was not relevant according to the Court’s prior ruling in Katzman v. Rediron, 76 So. 3d 1060 (Fla. 4th DCA 2011). The appellate court acknowledged that in Katzman it held that a letter of protection was not sufficient in itself to allow discovery of an expert beyond that permissible under Fla. R. Civ. P. 1.280(b)(4)(A). However, the Court stated that in Katzman it did not hold that a letter of protection is not relevant to show potential bias, and affirmed the trial court’s ruling denying plaintiff’s motion for new trial.

Lytal v. Malay, 133 So. 3d 1178 (Fla. 4th DCA 2014).

The trial court ordered plaintiff’s law firm to provide a list of all payments made to plaintiff’s treating expert, who was expected to provide expert opinions at trial, with all client and patient information redacted. At his deposition, the doctor denied having any records and provided “nebulous testimony” in connection with the number of patients who were represented by the law firm. The court held that under these circumstances the law firm was an appropriate source of this information, citing the Steinger case, and denied the petition to quash the discovery order.

Brown v. Mittelman, 152 So. 3d 602 (Fla. 4th DCA 2014).

Defense counsel, in a case arising from an automobile accident, subpoenaed the person in one of plaintiff's treating physician's office with the most billing knowledge, to produce documents regarding patients previously represented by both of plaintiff's law firms, LOP cases, and referrals from both law firms. One of plaintiff's attorneys had referred her to that doctor, who treated her under a LOP agreement. The trial court overruled the doctor's objections to the subpoena. The appellate court stated that because Rule 1.280(b)(5) did not apply to the requested discovery, and because "a law firm's financial relationship with a doctor is discoverable on the issue of bias" the petition for certiorari was denied. The court pointed out that a party may attack the credibility of a witness by exposing a potential bias. § 90.608(2), Fla. Stat. (2009). The court noted that the financial relationship between the treating doctor and plaintiff's attorneys in present and past cases creates the potential for bias and discovery of such relationship is permissible. The discovery available under Rule 1.280(b)(5) does not compel full disclosure of a treating physician's potential bias, but limits financial discovery to an approximation of the portion of the expert's involvement as an expert witness based on data such as the percentage of earned income derived from serving as an expert witness. A physician's continued financial interest in treating other patients referred by a particular law firm could conceivably be a source of bias "not immediately apparent to a jury," Morgan, Colling & Gilbert, P.A. v. Pope, 798 So. 2d 1 (Fla. DCA 2001), at 3. Rule 1.280(b)(5) neither addresses or circumscribes discovery of this financial relationship. Also, the court stated that whether the law firm directly referred the patient to the treating doctor does not determine whether discovery of the doctor/law firm relationship is allowed, and pointed out that a potential bias arising from a letter of protection exists independent of any referral relationship, as does a doctor's referral arrangements with a law firm in other cases.

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

Dr. Grabel, a medical expert retained by State Farm to conduct a CME in an uninsured motorist claim, petitioned the court to grant certiorari and quash an order of the circuit court that overruled his objections to a subpoena duces tecum. The order required the expert to produce copies of all billing invoices submitted to State Farm and its attorneys for the past three years; to produce any existing document and/or statement that included the total amount of money paid by or on behalf of State Farm or its attorneys for work the expert had performed as an expert witness on their behalf for the past three years; and to produce all documents evidencing the amount or percentage of worked performed by Dr. Grabel on behalf of any defendant or their defense attorneys, during the last three years, including time records, invoices, 1099s or other income reporting documents. In granting certiorari and quashing the order, the appellate court held that without making any finding of "the most unusual or compelling circumstances" that might justify the production of financial and business records, the trial court ordered the doctor to produce financial and business records beyond that allowed by the rule and Elkins. V. Syken, 672 So. 2d 517 (Fla. 1996). The court pointed out that plaintiff had obtained, or could obtain, records regarding payments from the insurer to the doctor pursuant to Allstate v. Boecher, and that this is more than sufficient information to reveal any potential bias.

Worley v. Central Florida YMCA, 163 So. 3d 1240 (Fla. 5th DCA 2015).

During the discovery process in a slip and fall case, Morgan & Morgan tenaciously opposed all attempts by defendant to learn how plaintiff became a patient of certain medical care providers. After hearings on various discovery requests by defendant, the trial court entered an order that required plaintiff to produce "the names of any and all cases (including plaintiff, defense, court and case number) where a client was referred directly or indirectly by any Morgan & Morgan attorney" to the relevant treating physicians in the present case, which necessarily included information on whether plaintiff in the pending case was referred by Morgan & Morgan to her treating physicians. The appellate court concluded that the order did not depart from the essential requirements of law, especially considering that YMCA had sufficiently demonstrated a good faith basis for suspecting that a referral relationship existed. "The limited type of discovery presently at issue concerns only the existence of a referral relationship between Morgan & Morgan and the treating physicians in this case," which is directly relevant to the potential bias of the physicians. The appellate court further held that: "Having exhausted all other avenues without success we find – contrary to the trial court's preliminary ruling and to Burt v. Geico, 603 So. 2d 125 (Fla. 2d DCA 1992) – that it was appropriate for YMCA to ask Worley if she was referred to the relevant physicians by her counselor or her counselor's firm."

Grabel v. Roura, 4D15-194, (Fla 4th DCA 2015).

The trial court, finding that the deposition responses of the defense expert witness were inconsistent with the interrogatory answers provided by defense counsel regarding the percentage of income the doctor derived from working as an expert and the number of times he has testified for plaintiffs and defendants in personal injury litigation, concluded that these inconsistencies constituted "the most unusual or compelling circumstances" that allowed production of the expert's financial and business records. The trial court allowed plaintiff to issue subpoenas to twenty non-party insurance carriers, not shown to have any involvement in the litigation, requiring production of financial records (including tax records) showing the total amount of fees paid to the doctor for expert litigation services since 2009. The appellate court quashed the order, stating that this extensive financial discovery as to a retained expert exceeded that allowed by the rule and was unnecessary, pointing out that the rule expressly provides that "the expert shall not be required to disclose his or her earnings as an expert witness." The appellate court further held that the alleged inconsistencies do not constitute "unusual or compelling circumstance" to warrant such broad financial disclosure, as there was no showing that the inconsistencies were the result of falsification, misrepresentation, or obfuscation.

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges