



CHAPTER XI
FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2016)
[ALL-IN-ONE DOCUMENT]

CHAPTER XI
EXPERT WITNESS DISCOVERY

E: TextBookDiscrimination@gmail.com
W: www.TextBookDiscrimination.com

visit TBD's [website](http://www.TextBookDiscrimination.com) for the most up-to-date information

TABLE OF CONTENTS | CHAPTER XI | EXPERT WITNESS DISCOVERY

ID	Item	Title	Page
1101	11.01	Introduction	4
1102	11.02	Discussion	6
1103	11.03	Discovery of Non-Party Medical Records	10
1104	11.04	Discovery from Expert Not Testifying at Trial	12
1105	11.05	Significant Cases Involving the Breadth and...	13
-	n/a	Appendix	21

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER XI EXPERT WITNESS DISCOVERY

ITEMS: 11.01 through 11.05

ITEM 11.01 | INTRODUCTION

If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

1. The testimony is based upon sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case.¹

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.²

The facts or data upon which an expert bases an opinion may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonable relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.³

Like any witness, an expert is subject to impeachment, as is the testimony the expert presents. Challenges to the expert's qualifications and the validity of an opinion may be made to the court in its gatekeeper role; and, if the opinion is allowed, challenges may be made before the trier of fact. Experts in general are qualified to render opinions based on their experience, background, and training. In medical malpractice actions, the law imposes additional requirements to ensure that the expert has the necessary expertise.⁴ General challenges to the qualifications of the expert include the knowledge, skill, experience, training, or education of the witness. As the gatekeepers, trial courts have considerable discretion in determining whether an expert is qualified to give an opinion in a given case, but in fact rarely will the expert be excluded on general challenges to qualification. The court should not exclude an expert's opinion based on matters that go to the weight of the opinion because it is the exclusive province of the jury to weigh the evidence.⁵

Challenges that go to the weight of the opinions of an expert include the reasons given by the witness for the opinion expressed, the reasonableness of the opinion in light of all surrounding facts

and circumstances, whether the opinion differs from that of other qualified experts or recognized authorities and treatises, and any relationship or circumstance that may give rise to bias on the part of the expert.⁶ These factors require discovery broad enough for the opposing party to challenge the expert and the expert testimony.

In 2013, the Florida Legislature amended Fla. Stat. § 90.702 and stated in the preamble to the amendment that it intended to adopt as standards for expert testimony to be used by the courts of this state to be those as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), and to no longer apply the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Florida Supreme Court is currently considering whether to adopt the amendment as a rule of evidence, to the extent that it is procedural.

As gatekeeper, the trial court, upon objection, must determine whether Daubert applies, and, if so, whether the testimony of the expert is admissible under Daubert standards. The details of the analysis required to challenge or support opinions is beyond the scope of this work.

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

Footnotes

¹ Fla. Stat. § 90.702 (2015).

² Fla. Stat. § 90.703 (2015).

³ Fla. Stat. § 90.704 (2015).

⁴ E.g., Fla. Stat. § 766.102(5).

⁵ See, e.g., *Univ. of Fla. Bd. of Trs. v. Stone*, 92 So. 3d 264, 272 (Fla. 1st DCA 2012).

⁶ For example, bias can be shown in the form of financial remuneration for testifying, financial or business interest in supporting the opinions expressed, a relationship between the witness and a party or counsel, etc.

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

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

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).

ITEM 11.03 | DISCOVERY OF NON-PARTY MEDICAL RECORDS

Privacy rights, statutory law,¹⁹ and common sense dictate that discovery of nonparty medical records and information is severely restricted.²⁰ The issue has arisen most often in association with experts who do a Compulsory Medical Examination and are asked to provide records or information from records of CME's for other patients. Simply redacting the names of patients does not necessarily resolve privacy and patient confidentiality issues, and the issues of undue burden and relevance are also associated with such requests. Section 456.057(7)(a)(3) Fla. Stat. (2015), as it has been interpreted and applied in Florida courts, creates "a broad and express privilege of confidentiality as to the medical records and the medical condition of a patient." The clear terms of the statute prohibit the production of a nonparty patient's medical records and they prohibit discussion about a nonparty patient's medical condition without prior notice to that nonparty.²¹ Likewise, an interrogatory to a party requesting that the party furnish a "general summary of the opinions and basis of the opinions" offered by his medical experts in other cases has been found to invade the privacy rights of non-parties, as protected by the referenced statute.²²

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

Footnotes

¹⁹ Fla. Stat. § 456.057(7)(a)(3)(prohibits the disclosure of nonparty CME reports without prior notice to all of the affected nonparties); *Graham v. Dacheikh*, 991 So. 2d 932 (Fla. 2d DCA 2008)(disclosure is disclosure whether it is production of records or through deposition testimony).

²⁰ *Crowley v. Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011)(trial court departed from the essential requirements of the law when it ordered CME doctor to bring the CME reports of nonparties to his deposition and to testify to some of the information contained in those reports); *USAA Casualty Insurance Co. v. Callery*, 66 So. 3d 315 (Fla. 2d DCA 2011)(it was departure from essential requirements of the law to enter an order compelling an insurance company party to produce CME results from CME doctor's last 20 exams for the party with all patient-identifying information redacted and only including the physician's conclusions/impressions, the physician's signature, the date of report, and the name and address of the receiving attorney). See also *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla. 4th DCA 2012)(similar denial of discovery where the nonparty CME patient information was requested from a party as opposed to the CME physician).

²¹ *Crowley*, supra at 358.

²² *Coopersmith v. Perrine*, 91 So. 3d 246 (Fla 4th DCA 2012).

ITEM 11.04 | DISCOVERY FROM EXPERT NOT TESTIFYING AT TRIAL

While a party is entitled to reasonable discovery from and about a testifying expert witness, such access changes when the expert is withdrawn from the witness list. A party is entitled to discover facts known or opinions held by an expert who has been retained by a party in anticipation of litigation or preparation for trial and who is not expected to testify at trial, only as provided in Rule 1.360(b). Alternatively, such discovery may be had upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. Thus, an expert witness that is not expected to testify in trial may not be deposed except upon such a showing of exceptional circumstances. Where a party, through answers to expert interrogatories, initially disclosed a particular doctor as an expert who would testify as a witness at trial, but later withdrew the doctor's name and he was no longer a witness who would be called at trial, it would be error for a judge to compel the doctor's deposition absent a showing of compelling circumstance.²³

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

Footnotes

²³ *Rocca v. Rones*, 125 So. 3d 370 (Fla. 3d DCA 2013).

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 from 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 work 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

APPENDIX

COPYRIGHT NOTICE

TextBookDiscrimination.com is not the author of this handbook. Instead, TextBookDiscrimination.com merely re-printed and reformatted them for easier use.

ORIGINAL SOURCE

<u>#</u>	<u>Item</u>	<u>Link</u>
1	Original Source	NinthCircuit.org

CONTACT INFORMATION

E: TextBookDiscrimination@gmail.com

W: www.TextBookDiscrimination.com

Congratulations! You're now ***booked up*** on Chapter XI from Florida's Handbook on Civil Discovery Practice (2016)!