

DISCOVERY OF FINANCIAL INFORMATION REGARDING  
EXPERTS REVISITED

Elkins v Syken, 672 So.2d 517 (Fla. 1996) was a landmark case which severely limited a party's right to obtain discovery information concerning expert witnesses. That case approved the Third District's opinion setting forth strict guidelines concerning the kind of information that an expert was required to provide concerning the expert's income from litigation or frequency of testifying. While that case was based on a physician's obligation to provide information, the holding was extended when Florida Rule of Civil Procedure 1.280(b)(4)(A)(iii) was amended to cover all experts. Both the Third District and the Supreme Court reasoned that a balance had to be struck between a party's need to obtain information concerning the possible bias of an expert and the intrusive nature of the discovery request to the expert. The Court simply felt, as a public policy matter, that requiring an expert to produce tax returns and information concerning patients the expert had examined for litigation purposes was invasive to such an extent that it overrode the relevant information that could be obtained.

Elkins was criticized, by among others this writer, as an naïve attempt to protect experts who involve themselves in litigation on a regular basis and that

the resulting rule disguised the financial interest of these experts.

The Fourth District found a chink in the armor provided to experts by Elkins when it decided the case of Allstate Insurance Co. v Boecher, 705 So.2d 106 (Fla. 4th DCA 1998). In that case, the plaintiff in an uninsured motorist action directed discovery concerning an expert to the defendant rather than the expert. The trial court as well as the Fourth District found Elkins inapplicable in that situation. Under virtually identical facts, the Third District in Carrera v Casas, 695 So.2d 763 (Fla. 3d DCA 1997), quashed discovery to the party. The Third District, unlike the Fourth, concluded that the request exceeded the permissible bounds set by Elkins and the amended Rule of Civil Procedure which followed Elkins. This conflict in decisions resulted in a Supreme Court opinion in Allstate Insurance Co. v Boecher, 24 F.L.W. S187 (Fla. April 22, 1999) upholding the Fourth District's opinion and permitting the discovery.

The opinion of the Supreme Court, written by Justice Pariente, tracks the history of discovery in Florida, citing such seminal cases as Surf Drugs, Inc. v Vermette, 236 So.2d 108 (Fla. 1970) and Hickman v Taylor, 329 U.S. 495 (1947) for the proposition that the discovery of relevant information which

does not invade the lawyer/client privilege or work product exception and which is not conducted to harass a party or litigant is fair game.

Our broad rules of discovery are designed to bring all relevant information before the trier of fact. It is hard to imagine anything more relevant to a jury's determination than the financial interest a witness has in testifying. As Judge Farmer stated in the underlying Fourth District opinion, such information is "indisputably relevant and meaningful." Allstate Insurance Co., supra, 705 So.2d 107.

The Court concluded that the balance sought to be preserved in Elkins did not apply when the party has relevant information concerning an expert's finances:

To the extent that we strove in *Eklins* to achieve a balance between the need for information concerning potential bias and the right of the expert to be free from intrusive requests, the analysis of the competing interests in this case is qualitatively different. We conclude that where the discovery sought is directed to a party about the extent of that party's relationship with a particular expert, the balance of the interests shifts in favor of allowing the pretrial discovery. 24 F.L.W. at S188.

The arguments made by Justice Pariente in upholding the Fourth District's opinion and allowing the discovery are excellent arguments not only for permitting this discovery from a party but for overturning *Elkins* in its entirety.

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. *Id.*, at S189.

The reality of discovery is that expert's depositions are almost always taken. It would be extremely unusual for a lawyer to rely upon interrogatories to a party to discover the extent of an expert's opinion. Asking an expert during a deposition how much money the expert has made by testifying and the relationship of that expert with a particular defendant or law firm can hardly be considered "invasive." This is particularly true when one considers that if the expert has not made a habit of testifying, the question can

easily be answered as to the few times the expert has been involved previously. If, on the other hand, the expert's involvement is extensive, why shouldn't this information be provided to the jury? Rather than shielding the expert's litigation involvement, it would seem to make better sense to require experts to keep records concerning their involvement and provide 1099 forms concerning their financial interests.

In any case, the law as it stands now is that an expert cannot be required to divulge financial litigation or litigation experience beyond that required by

the Elkins decision and the relevant rule but a party can be compelled to provide all relevant discovery information concerning the involvement of that party with a particular expert.