IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, MARION ELKINS, and MICHAEL ROTH,

Petitioners,

vs.

ELISA SYKEN, PLAZA OF THE AMERICAS PART IV CONDOMINIUM ASSOCIATION, INC, and LEDFORD GREGORY, M.D.,

Respondents.

PETITION FOR DISCRETIONARY REVIEW
ON CERTIFICATION OF CONFLICT FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

ANSWER BRIEF OF RESPONDENTS PLAZA OF THE AMERICAS PART IV CONDOMINIUM ASSOCIATION, INC. and LEDFORD GREGORY, M.D.

February 28, 1995

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INTRODUCTION

These cases present the problem, as the district court described it, of "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." *Syken v. Elkins*, 644 So. 2d 539, 547 (Fla. 3d DCA 1994). The issue is what limits should be placed on a party seeking to uncover evidence of an opposing expert's bias.

This petition for discretionary review arises from two petitions for writs of certiorari presenting similar, but not identical, facts: *Syken v. Elkins*, 3d DCA Case No. 93-1299, and *Plaza of the Americas Part IV Condominium Association v. Roth*, 3d DCA Case No. 93-2317. The Third District Court of Appeal decided these cases together in *Syken v. Elkins*, 644 So. 2d at 539. Plaza of the Americas Part IV Condominium Association, Inc. ("Plaza"), and Ledford Gregory, M.D. sought review of an order requiring Dr. Gregory to produce his income tax returns and IRS 1099 forms. The district court reversed.

Because Petitioner's Statement of the Case and Facts omits certain facts and fails to discuss the district court's opinion, Respondents present their own concise statement.

STATEMENT OF THE CASE AND FACTS

Petitioner Michael Roth was allegedly hurt when his apartment's ceiling collapsed (R. 14). He sued Plaza, which owns the building's common areas (R. 14). Plaza hired Dr. Gregory to

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conduct an independent medical examination ("IME") (R. 17).

A. Proceedings in the circuit court

Roth served interrogatories requesting the identity of every person Dr. Gregory had examined at the request of Plaza's counsel. Plaza objected, and Roth moved to compel (R. 19). The judge denied the objection (R. 21). Roth then served a subpoena on Dr. Gregory demanding copies of all bills he issued as a defense expert to any insurance company or law firm during a certain period; and all journals, ledgers, and IRS 1099 forms regarding IMEs performed at the request of any insurance company or law firm (R. 23). The subpoena did not request income tax returns (R. 23). Again, the judge denied Plaza's objections (R. 25, 31). Roth never deposed Dr. Gregory.

Dr. Gregory filed an affidavit stating that his office does not segregate IME files from others, and that his office maintains no central file or computer program from which such information can be retrieved (R. 34). All office files would have to be reviewed to determine which patients were given IMEs, and which were referred by Plaza's law firm (R. 35). Compliance would take "great amounts of money and time" (R. 34). Dr. Gregory also does not keep his 1099 forms (R. 35).

Roth moved for contempt (R. 36). After a hearing, Judge Solomon issued the order under review, which required Dr. Gregory to sign a release allowing Roth to obtain the 1099 forms from the IRS, and to produce tax returns for three years (R. 44). The

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Respondents then filed their petition for writ of certiorari in the Third District Court of Appeal.

B. The district court's opinion

The district court, sitting *en banc*, issued a unanimous opinion reversing the orders in both *Roth* and *Syken*. 644 So. 2d at 539. It did not, however, ban all discovery from medical experts. Rather, in a thorough nine-page opinion, the court balanced the competing interests involved, and articulated a reasonable approach permitting limited discovery. *Id.* at 544.

In reviewing Florida law in this area, the district court believed that decisions "have gone too far in permitting burdensome inquiry into the financial affairs of physicians, providing information which 'serves only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross-examination: that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf.'" *Id.* at 545 (quoting *LeJeune v. Aikin*, 624 So. 2d 788, 790 (Fla. 3d DCA 1993) (Schwartz, C.J., specially concurring)).

The district court adopted a moderate approach to such collateral discovery:

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> Upon *en banc* consideration, we decide that in order to demonstrate the probability of bias, it is sufficient for a doctor to be asked to give an approximate estimate for IMEs and total patients seen in a year. The figures given need only be an honest estimate, and do not have to be an exact number. We find no sound reason to require disclosure of exact income figures. The doctor should not be required to disclose the amounts of money he or she earns from expert witness work, or disclose their total income. Similarly, the ordered production of income tax returns or Form 1099's do no more than create the danger of exactly those pitfalls outlined in Rule 1.280(c), and have limited probative value.

Id. at 544. The district court established the following Guidelines, which apply to *either* side seeking discovery from an opposing medical expert:

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.

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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.

Id. at 546 (footnotes omitted).

The district court also warned that if an expert falsifies, misrepresents, or obfuscates the required information, the aggrieved party may move to exclude the expert from testifying or to strike the expert's testimony, and can recover the attorney's fees and costs incurred. *Id.* at 547. The district court also recognized that "trial judges have discretion to vary the guidelines where appropriate and to impose less severe sanctions where warranted." *Id.*

The district court concluded that the information ordered produced "causes annoyance and embarrassment, while providing little useful information." *Id.* at 545. Addressing the production ordered in *Plaza vs. Roth*, the district court held that "the information necessary to demonstrate the basis for a claim of bias is most likely readily available through oral or written deposition without intrusive and improper examination of the doctor's 1099 forms and federal income tax returns. The least

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burdensome route of discovery, through oral or written deposition, was simply not followed." *Id.*

The district court granted both petitions and quashed the orders under review. *Id.* at 547.

SUMMARY OF ARGUMENT

This case is not about a party's right to cross-examine experts about their potential bias; no trial has yet occurred. Nor is this case about a party's right to inquire about the expert's potential bias during discovery; Respondents recognize its relevance. Rather, this case is about whether discovery on such a collateral issue should have limits. The district court correctly quashed the order in this case requiring the expert to produce financial records, and correctly placed reasonable limits on discovery of an expert's potential bias.

The district court correctly reversed the trial court's order requiring Dr. Gregory to produce all IRS 1099 forms, including those unrelated to his performance of IMEs, and in requiring him to produce his tax returns. Such documents are irrelevant because they show only Dr. Gregory's total income. Only the income derived from IMEs is relevant, but tax returns and 1099 forms do not segregate such income from other income.

Moreover, even if these financial records were relevant to bias, production would violate Dr. Gregory's constitutional right to privacy. As this Court has stated, Article V, section 23 of the Florida Constitution "was intended to protect the right to

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determine whether or not sensitive information about oneself will be disclosed." *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 536 (Fla. 1987). The discovery rules also allow a court to protect a person's privacy. *See* Fla.R.Civ.P. 1.280(c) (court may make any order protecting from annoyance, embarrassment, oppression, or undue burden or expense). Recognizing this right to privacy, several Florida courts have refused to require non-parties to produce their tax returns. Moreover, Florida law in this regard is consistent with the law across the country, which almost uniformly protects an expert's tax returns from production.

The Guidelines the district court established for discovering an expert's potential bias represent a reasonable accomodation of the competing interests involved, one which other states have adopted. The Guidelines respond to the recent wave of satellite litigation on this issue. Trial courts have ordered production of everything from tax returns to a sample of the expert's files, to requiring that experts adopt certain recordkeeping systems. Such discovery is reaching stratospheric heights, and the Guidelines represent an attempt to bring it closer to earth.

The Guidelines do not ban discovery of an expert's potential bias. Rather, they establish boundaries, which can be crossed in the trial court's discretion. They allow a party to depose an expert, and to ask a whole array of questions designed to discover whether the expert regularly works for certain insurance companies or law firms, regularly testifies on behalf of plaintiffs

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or defendants, and receives a substantial amount of income from IMEs. The Guidelines correctly assume that an expert's bias is sufficiently established with approximate percentages and amounts, rendering exact figures unnecessary.

ARGUMENT

THE DISTRICT COURT'S DECISION STRIKES A REASONABLE BALANCE BETWEEN A PARTY'S NEED FOR INFORMATION CONCERNING AN EXPERT'S POTENTIAL BIAS AND THE EXPERT'S RIGHTS TO PRIVACY AND FREEDOM FROM BURDENSOME PRODUCTION REQUESTS

This case is not about a party's right to cross-examine experts, or about that party's right to inquire into an expert's bias. Respondents recognize these rights. The issue here is only whether such discovery should have boundaries. Respondents submit, and the district court found, that a party should first be required to depose the expert. Only where an expert stonewalls such inquiries should more burdensome discovery be allowed, and then in a manner designed to obtain only relevant information.

As Roth admits (brief at 7), a court "must assess all of the interests that would be served by the granting or denying of discovery -- the importance of each and the extent to which the action serves each interest." *Rasmussen*, 500 So. 2d 533, 535 (Fla. 1987). In other words, the court must balance the competing interests. Here, Roth seeks to uncover evidence of Dr. Gregory's bias in favor of defendants so he can impeach Dr. Gregory at trial. In contrast, Dr. Gregory seeks to protect his privacy from invasion and his medical practice from disruption.

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As explained below, the district court correctly quashed the trial court's order because Dr. Gregory's IRS 1099 forms and tax returns are irrelevant to his bias and invade his privacy. Moreover, the Guidelines constitute a reasonable balancing of the competing interests involved when parties seek to uncover an expert's potential bias.

A. The order requiring production of all 1099 forms and income tax returns departed from the essential requirements of law because these materials are irrelevant to bias and invade Dr. Gregory's privacy

The trial court required Dr. Gregory to produce *all* 1099 forms, regardless of whether they related to IMEs, as well as his tax returns. As explained below, (1) Florida law protects such financial records from production; and (2) other state and federal courts almost uniformly protect an expert's tax returns.

1) Current Florida law protects most financial records of a non-party from production in litigation

In ordering production of Dr. Gregory's tax returns and 1099 forms unrelated to IMEs, the trial court's order contradicts current Florida law. Therefore, regardless of whether this Court adopts the district court's Guidelines, it should affirm the decision.

These financial records are irrelevant to Dr. Gregory's bias. In assessing an expert's bias, the relevant information is not total income, but only the income received from work as consultant or witness. *Young v. Santos*, 611 So. 2d 586, 587 (Fla. 4th

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DCA 1993). Dr. Gregory's tax returns will merely reflect his total income, without distinguishing between IMEs and patients. Similarly, 1099 forms reflect the total income received from a particular source, without segregating the income according to type of work performed. Even if they did, however, the trial court lumped the irrelevant with the germane by ordering all 1099 forms produced, not merely those reflecting payments for IMEs. *See Bissell Bros. v. Fares*, 611 So. 2d 620, 621 (Fla. 2d DCA 1993) (allowing discovery only of 1099 forms reflecting payments for IMEs).

Production of these documents also would invade Dr. Gregory's privacy. "It can scarcely be denied that the public exposure of one's wallet or purse is, in the abstract, an invasion of privacy. Nor can it be denied that private individuals have legitimate expectations of privacy regarding the precise amount of their income." *DeMasi v. Weiss*, 669 F.2d 114, 119 (3d Cir. 1982). The Florida Constitution protects a citizen's right to privacy. Art. V, § 23, Fla. Const. (1980). "The Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed." *Rasmussen*, 500 So. 2d at 536. The discovery rules also allow a court to protect a person's privacy. *Id.* at 535 (citations omitted). *See* Fla.R.Civ.P. 1.280(c) (court may make any order protecting from annoyance, embarrassment, oppression, or undue burden or expense).

Several Florida cases have refused to require non-parties to produce tax returns. *See Young*, 611 So. 2d at 587; *Frank Medina*

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Trading Co. v. Blanco, 553 So. 2d 285, 286 (Fla. 3d DCA 1989); *McCarty v. Estate of Schultz*, 372 So. 2d 210, 212 (Fla. 3d DCA 1979). In *Young*, the Fourth District held that an expert does not "relinquish[] his right of privacy by becoming a potential witness in . . . litigation. Tax returns contain a multitude of sensitive information regarding the filer, most of which has no relevance to the information which may form the basis of impeachment material."

Although Roth cites several Florida cases requiring production of tax returns (brief at 21-22), all but one concern parties in litigation, where one party's income was a crucial issue in the case. *See Parker v. Parker*, 182 So. 2d 498 (Fla. 4th DCA 1966) (husband's income needed to determine alimony and child support); *Orlowitz v. Orlowitz*, 199 So. 2d 97, 98 (Fla. 1967) (husband's income needed to determine alimony); *Tennant v. Charlton*, 377 So. 2d 1169, 1170 (Fla. 1979) (defendant's income relevant to punitive damages claim); *Lay v. Kremer*, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982) (same); *Medel v. Republic Nat'l Bank of Miami*, 388 So. 2d 327 (Fla. 3d DCA 1980) (same); *Donahue v. Hebert*, 355 So. 2d 1264 (Fla. 4th DCA 1978) (same).[1] Thus, Roth overlooks the crucial distinction in Florida law between parties and non-parties.

Respondents have found only one Florida case requiring an

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[1] The cases concerning punitive damages were effectively overruled by adoption of section 768.72, Florida Statutes. *State of Wisconsin Investment Bd. v. Plantation Square Assoc., Ltd.*, 761 F.Supp. 1569, 1579 (S.D. Fla. 1991). That statute grants Florida citizens "a limited right of privacy" in their financial records when faced with punitive damage claims. *Id.* at 1578.

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a non-party to produce tax returns: *Wood v. Tallahassee Memorial Regional Medical Center*, 593 So. 2d 1140, 1141 (Fla. 1st DCA), *review denied*, 599 So. 2d 1281 (Fla. 1992). In *Wood*, the expert gave evasive answers at his deposition, *Id.* at 1142, and ignored a court order to produce the portions of his tax returns reflecting income received in other medical malpractice cases. *Id.* at 1141, 1143 n.*. The trial court then ordered him to produce all his returns for *in camera* inspection, to the extent they reflected income from any medical malpractice case. *Id.* at 1141. The First District affirmed because the respondents had been unable to obtain the information by less intrusive means. *Id.* at 1142. It emphasized that it did not "mean to suggest by this opinion that complete personal income tax returns of such expert witnesses should routinely be required to be produced." *Id.* at 1143 n.*.

Several crucial differences exist between this case and *Wood*. Here, Roth never even requested Dr. Gregory's tax returns, yet the court ordered them produced. Moreover, as the district court emphasized, Roth has never attempted to depose Dr. Gregory, so his protests that Dr. Gregory would give evasive answers are pure conjecture. Finally, in *Wood* the court at least ordered an *in camera* inspection to assure that only relevant information would be disclosed. Here, the judge ordered no *in camera* inspection, and even ordered Dr. Gregory to produce *all* 1099 forms, not just those concerning IMEs.

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2) Like Florida, federal courts and other states also protect the financial records of non-parties

Florida law is consistent with state and federal cases across the country, which almost uniformly protect the financial documents, especially tax returns, of non-parties.

Federal courts recognize the right to privacy inherent in tax returns, and have fashioned a qualified privilege regarding their discovery, even from parties to the litigation. *Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc.*, 96 F.R.D. 147 (E.D. Va. 1982); *Mitsui & Co. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72, 80 (D. P.R. 1978). Judge Sirica explained the public policy behind the privilege as encouraging taxpayers to report all their taxable income and take all lawful deductions. *Payne v. Howard*, 75 F.R.D. 465, 469 (D. D.C. 1977).

The privilege requires that "in order to compel the disclosure of tax returns, the court must be shown that the information sought from the returns bears some relevance to the subject matter of the litigation; and that the information sought from the returns is not readily obtainable from other sources." *Eastern Auto*, 96 F.R.D. at 148-49. *See also Federal Sav. & Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512, 514 (N.D. Ill. 1972) ("Unless a litigant himself makes an issue of his income, his income tax returns are not subject to discovery"); *Shaver v. Yacht Outward Bound*, 71 F.R.D. 561, 564 (N.D. Ill. 1976) ("In most instances, it has been held that production of a tax return should not be ordered unless

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there appears to be a compelling need for the information it contains, such as it is not otherwise readily obtainable"). Federal courts have applied the privilege to non-party experts. *See Hawkins v. South Plains Intern. Trucks, Inc.*, 139 F.R.D. 679, 682 (D. Colo. 1991).

Applying the privilege here, Roth failed to show a compelling need for the tax returns. They will not help Roth uncover any bias because they contain only total income, without distinguishing between IMEs and patients. Roth also failed to show that the information is not "otherwise readily obtainable" because he never even attempted to depose Dr. Gregory.

Other states also protect an expert's financial records. *See, e.g., Ex parte Morris*, 530 So. 2d 785 (Ala. 1988); *Jones v. Bordman*, 243 Kan. 444, 759 P.2d 953 (1988); *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796 (Mo. App. 1985); *Allen v. Superior Court*, 151 Cal.App.3d 447, 198 Cal. Rptr. 737 (1984); *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970). In *Morris*, the Alabama Supreme Court, recognizing the "emerging qualified privilege disfavoring disclosure of one's income tax records," denied such production, holding that "[t]he incremental value that such information would provide respondent for purposes of showing bias is substantially outweighed by the prejudice that would be imposed on a person not a party to the proceedings, and involving an issue that is not controlling."

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530 So. 2d at 789.[2]

Roth identifies only one other case in the country that allowed a party to obtain an expert's tax returns. *See State ex rel. Lichtor v. Clark*, 845 S.W.2d 55 (Mo. App. 1992) (brief at 23-24). That case involved the infamous Dr. Joseph Lichtor. The evidence showed that during the previous four years, 44% of Dr. Lichtor's trial testimony was on behalf of one law firm; that six courts had refused Dr. Lichtor permission to testify; and that at least once he agreed to change his testimony in return for more business. *Id.* at 62.[3] The court was careful to note that it did "not decide this case as though it involved the usual expert witness" and that "[t]he procedure here approved will be the very rare exception and not the rule." *Id.* at 64. The court thus created the "Lichtor exception" to the general rule prohibiting discovery of tax returns from non-parties. The other cases Roth cites (brief at 23-24) did not allow discovery of tax returns.

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[2] Roth argues that the Alabama Supreme Court receded from *Morris* in *Plitt v. Griggs*, 585 So. 2d 1317 (Ala. 1991) (brief at 24). That case merely required the expert to identify his accountant, noting that identifying the name caused no prejudice. *Id.* at 1321. The court authorized the trial court to protect any financial information not necessary to show bias. It did not order production of tax returns, and specifically reaffirmed *Morris*.

[3] Dr. Lichtor's notoriety is also discussed in *Bordman*, 759 P.2d at 955-58, which nevertheless refused to allow the plaintiff wholesale discovery regarding bias without first deposing him.

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B. The Guidelines strike a reasonable balance between the competing interests involved, while allowing trial courts discretion to vary from the Guidelines when appropriate

Roth argues that the Guidelines violate a trial court's discretion in discovery matters (brief at 20). As explained below, however, the Guidelines constitute a reasonable accomodation of the competing interests involved when parties seek to investigate an expert's bias. The Guidelines reflect the determination that it will usually constitute an abuse of discretion to order production of sensitive financial records and other burdensome discovery on a collateral issue such as bias when the information, even if not exact, can be obtained by much less intrusive means.

1) *The problem*: overkill discovery on the collateral issue of bias threatens to frighten physicians from conducting IMEs

Discovery concerning a medical expert's potential bias has become much broader than necessary, and has spawned a wave of satellite litigation concerning the limits of such discovery. *See Young*, 611 So. 2d at 587 (Warner, J., concurring). Trial courts have allowed discovery of everything from tax returns, *Wood*, 593 So. 2d at 1141, to a random sample of the expert's files, *LeJeune v. Aikin*, 624 So. 2d 788 (Fla. 3d DCA 1993), to *in futuro* compilation of records, *Abdel-Fattah v. Taub*, 617 So. 2d 429, 430 (Fla. 4th DCA 1993). Courts also have allowed discovery of 1099 forms reflecting referrals for IMEs. *See Bissell Bros.*, 611 So. 2d at 621. Such discovery has become more expansive even than the

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proverbial fishing expedition.[4]

The district court's decision reflects recent criticism of this trend. *See Trend South, Inc. v. Niurys Antomarchy*, 623 So. 2d 815, 816 (Fla. 3d DCA), *review denied*, 630 So. 2d 1103 (Fla. 1993) (Jorgenson, J., dissenting); *Young*, 611 So. 2d at 587 (Warner, J, concurring): *LeJeune*, 624 So. 2d at 789 (Schwartz, C.J., specially concurring). In *LeJeune*, Chief Judge Schwartz suggested that courts have "gone much too far in permitting inquiry into the private financial affairs of the physicians in question." He further stated that

> [i]n my view, the intrusiveness of this type of discovery greatly outweighs its alleged value. The information serves only to emphasize in wholly unnecessary detail what everyone knows to be the case and what would be apparent to the jury on the simplest cross-examination: that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf. I tend to believe therefore that our courts have misbalanced "the competing interests that would be served by granting discovery or by denying it," . . . .

Id. at 789-90 (citations omitted). Chief Judge Schwartz feared that "the discovery process is being used improperly as a tool to force particular doctors from becoming involved in the judicial process at all or to extract settlements in individual cases." *Id.*

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[4] "Instead of using a rod and reel, or even a reasonably sized net, [the requesting party] would drain the pond and collect the fish from the bottom. This exercise goes beyond the bounds set by the discovery rules." *In re: IBM Peripheral EDP Devices Antitrust Litigation*, 77 F.R.D. 39, 42 (N.D. Cal. 1977).

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Other states, while recognizing the right to discover an expert's bias, have rejected unlimited discovery on the issue. *See Bordman*, 759 P.2d at 962 ("It does not follow that the wholesale discovery of these medical records is permissible because evidence may be discovered which might show bias and prejudice of the witness"); *Allen*, 198 Cal. Rptr. at 741 ("Exact information as to number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing bias"); *Whitacre*, 701 S.W.2d at 799 ("In balancing the need of the plaintiffs to obtain the information against the burden of furnishing the documents requested, this court concludes that the burden on [the expert] clearly outweighs the need of the plaintiffs below"); *Mohn v. Hahnemann Medical College & Hosp.*, 357 Pa. Super. 173, 515 A.2d 920, 924 (1986) (requiring an expert to "lift his visor" so that the jury could see who he was and what interest, if any, he had in the trial did not encompass "the emptying of one's pockets and turning them inside out so that one's financial worth can be open to scrutiny"), *appeal discontinued*, 515 Pa. 582, 527 A.2d 542 (1987).

2) *The solution*: limit discovery on the issue of bias to depositions, absent compelling circumstances

To inject some balance into this process, Florida judges have suggested a requirement that the expert first be deposed. In *Young*, 611 So. 2d at 587, Judge Warner, concurring, suggested that the expert be deposed before more burdensome discovery is attempted. In *Trend South*, 623 So. 2d 816, Judge Jorgenson argued in

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dissent that the party seeking production of financial records such as 1099 forms must prove that the expert is "venal," which can only be done by deposing the expert. Judge Jorgenson "would not permit detailed discovery of personal financial data of a non-party witness unless and until that witness has been deposed and appears to be less than forthcoming with respect to the character of his practice and the approximate amount of money he derives from rendering expert opinions in cases of this nature." *Id.* at 817.

Courts in other states require exactly that. In *Allen*, 198 Cal. Rptr. at 741, the court held that the trial court erred in requiring production without a showing that plaintiff's object could not be accomplished through less intrusive means. The court noted that the expert may be asked questions regarding what percentage of his practice involves examining patients for the defense and how much compensation he derives from such work. The opposing party need not learn the details of his billing and accounting or the specifics of his prior testimony and depositions. Similarly, exact information on the number of cases and amounts of compensation paid was deemed unnecessary. *Id.* at 741.

In *Bordman*, 759 P.2d at 955, the court reversed an order requiring production of medical reports, tax returns, and a list of all cases in which the expert served as expert for the defendant's attorneys. The court reached the same conclusion as did the court in *Allen* that the necessary information can be obtained at a deposition, and "a showing of bias or prejudice does not require that

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the details of those medical reports be disclosed." *Id.* at 962.

As these cases demonstrate, the issue of an expert's bias need not be burdened with the broad discovery attendant to substantive issues. In most cases, any bias can be discovered in a deposition. A simple question about how many cases an insurance company has referred to the expert can accomplish as much as detailed document requests. The marginal benefit of a detailed accounting is minimal compared to its inconvenience and intrusiveness. Financial records provide much irrelevant and personal information, and in many cases physicians or their staff must search through thousands of files to obtain it. Depositions can efficiently secure the desired information.

This, of course, is exactly what the district court did. It did not ban the discovery of experts. Consistent with cases in other states, it required parties to depose the expert before attempting more onerous discovery. The Guidelines allow a broad array of questions at a deposition designed to reveal bias. They include: what the expert has been hired to do and how the expert will be compensated; what expert work the expert generally does, and whether the work is performed for plaintiffs, defendants, or some percentage of each; an approximation of the portion of the expert's professional time or work devoted to service as an expert; and identification of each case in which the expert has testified, whether by deposition or trial, during a reasonable period. *Syken*, 644 So. 2d at 546.

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In most cases, such questioning will sufficiently establish any bias. The district court also, however, allowed for exceptions to the Guidelines in those rare cases when an expert either cannot honestly recall, or obviously misrepresents, the facts. Trial judges have "discretion to vary the guidelines where appropriate." *Id.* at 547. The district court also warned that if an expert misrepresents the facts, the aggrieved party can exclude the expert from testifying or strike the expert's testimony, and can recover the attorney's fees and costs incurred. *Id.* Thus, the opposing party need not, as Roth argues (brief at 22-23), accept an expert's evasive or misleading testimony.

The bottom line of the district court's decision is that before seeking an expert's personal financial records or other documents, a party should depose the expert. Only thereafter, and only after showing compelling circumstances, such as the expert's stonewalling, should further discovery be allowed; and financial records should rarely be produced. The Guidelines reasonably balance a party's right to inquire into bias with the expert's right to privacy.

Roth essentially argues for unlimited discovery of an expert's financial resources. Although he would apparently apply such discovery only to "professional" or "venal" experts, his argument begs the question of which experts are such. Roth assumes that experts are venal to argue that parties should be allowed unlimited discovery to prove they are venal. If only some experts

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are venal, however, then all experts should not be subject to unlimited discovery. As Judge Jorgenson suggested in *Trend South*, 623 So. 2d at 817, and as many states have held, parties should undertake a less drastic inquiry, such as a deposition, to prove venality before resorting to more burdensome discovery.

Roth's argument for unlimited discovery of experts also would expand the collateral discovery of experts far beyond anything Florida has known. Expert discovery would become a case-within-a-case. Such broad disclosure would have substantial chilling effects on both sides. Experts would become reluctant to conduct IMEs, knowing they are thereby relinquishing their privacy, opening their files to public scrutiny, and revealing their financial portfolio. Conversely, a rule narrowing such discovery will reduce litigation costs and protect experts from intrusive discovery, while conserving a party's right to discover an expert's bias.

3) The Guidelines should apply to all experts, whether plaintiffs' or defendants', including treating physicians

The district court held that the Guidelines apply to all experts, whether for plaintiffs or defendants. *Id.* at 547. Petitioners Elkins concede that whatever the standards, they should apply to both plaintiffs' and defendantss' experts (Elkins reply brief at 2). Certainly Roth's diatribe against the credibility of experts (brief at 8-10) applies to experts for either side. In fact, *Trower v. Jones*, 121 Ill.2d 211, 520 N.E.2d 297 (1988), which Roth extensively quotes to demonstrate the venality of experts and

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the need for effective cross-examination (brief at 12-13, 14, 15, 23-24), involved a defense counsel's cross-examination of a plaintiff's expert.

Respondents submit that whatever standards this Court adopts should also apply to treating physicians. Although Roth characterizes treating physicians as mere innocent fact witnesses (brief at 11), such doctors are often guilty of the same "venality" Roth so fervently ascribes to other experts (brief at 8-10, 17). Many physicians receive referrals from the same plaintiffs' lawyers, often after other physicians treated the plaintiff and diagnosed no permanent injury. Although designated "treating physicians," they choose to participate in litigation in the same way as other experts, and tailor their diagnosis and treatment with a view toward pending or imminent litigation. They sometimes have a direct stake in the outcome, because payment of their fees depends on the plaintiff's victory. Moreover, many times these physicians testify to more than their treatment of the plaintiff; they opine on the causes of the injury and prognosis for permanent injury.

The bias of some treating physicians is well-documented. As Justice Douglas once said, "a doctor for a fee can easily discover something wrong with any patient -- a condition that in prejudiced medical eyes might have caused the accident." *Schlagenhauf v. Holden*, 379 U.S. 104 (1964) (Douglas, J., dissenting). Therefore, courts in other states have equated treating physicians with other medical experts. *See Sears v. Rutishauser*, 102 Ill.2d

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402, 466 N.E.2d 210 (1984) (holding that a "medical expert" such as that treating physician "can be questioned about fee arrangements, prior testimony for the same party, and financial interest in the outcome of the case"). *See also Yale University School of Medicine v. McCarthy*, 26 Conn.App. 497, 500, 602 A.2d 1040, 1042 (1991) (treating physicians are "experts" for purpose of discovery rule requiring identification of any experts who will testify at trial).

In *Winn-Dixie Stores, Inc. v. Miles*, 616 So. 2d 1108, 1110 (Fla. 5th DCA 1993), which Roth cites as distinguishing between treating physicians and experts (brief at 11), the court rested its holding on much narrower grounds. The defense sought the same kinds of records from a treating physician that the Petitioners in these two cases seek. The court held that the defense cannot engage in "an extensive fishing expedition" about bias absent a basis for suspecting it. *Id.* at 1110. The court recognized, however, that in a particular case the treating physician could be biased, which would make such inquiries relevant.

To the extent that a plaintiff can currently demand substantial discovery regarding bias from a defense expert but not a treating physician, *Miles* creates a double standard;[5] but on

[5] The Academy of Florida Trial Lawyers would exacerbate this double standard by applying this unlimited discovery only to defense medical experts (brief at 4-5). This not only would constitute a giant leap beyond current practice; it would create an unjustified incongruity. If, as Plaintiff suggests, experts of all kinds are subject to potential bias because of their relationships with the parties they represent, then whatever discovery rules apply to defense medical experts should apply to all others.

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close examination the case is consistent with the Guidelines adopted here. The Guidelines prohibit intrusive discovery regarding the bias of any expert absent compelling circumstances, but permit extensive deposition questions and trial cross-examination on that issue. Similarly, *Miles* prohibits "an extensive fishing expedition" regarding a treating physician's bias, but presumably would allow deposition questions designed to elicit such information. Otherwise, the case creates a Catch-22: a party must prove the physician's bias before it can ask him about bias.

Many treating physicians are as venal as Roth believes all defense experts to be. Defendants should be allowed to inquire into such bias. Therefore, whatever remedy this Court ultimately adopts, it should apply to all experts, whether for plaintiffs or for defendants, including treating physicians.

CONCLUSION

This Court should affirm the decision of the district court in *Roth v. Plaza* and approve the Guidelines as a reasonable balancing of the competing interests involved whenever a party seeks to investigate an expert's potential bias.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this brief was mailed on February 28, 1995 to all counsel on the attached service list.

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