IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,649

MAX ELKINS, et al.,

Petitioners,

vs.

ELISA SYKEN, et al.,

Respondents.

_____/

ON CERTIFICATION FROM THE
THIRD DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONERS MAX AND MARION ELKINS

BARBARA GREEN, ESQ.
999 Ponce de Leon Blvd.
Suite 1000
Coral Gables, Florida 33134
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800 / Fax (305) 358-2382

By: Joel S. Perwin

TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

AUTHORITIES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

AUTHORITIES

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

I
STATEMENT OF THE CASE AND FACTS

The en banc opinion of the Third District Court of Appeal omits several facts of relevance in the *Elkins* case. We therefore supplement the district court's recitation as follows.

A. Proceedings in the Trial Court. The scope of the subpoena duces tecum issued by plaintiffs Max and Marion Elkins is described at page 3 of the district court's en banc opinion. At a hearing on defendant Syken's motion for a protective order, directed to the scheduled deposition of Dr. Glatzer's records custodian, the trial court (Korvick, J.) followed prior Third District precedent in holding that the requested materials were discoverable, and inquired as to the cost of production (Elkins' App. at 44).[1/] About a week later, Dr. Glatzer submitted an affidavit asserting that the files in his office are kept in alphabetical order, and therefore would have to be examined manually in order to identify the IME cases; that it would take 45 days over a period of three months to complete the work; and that the cost of doing so would be $50,000.00 to $100,000.00, depending on whether Dr. Glatzer had to close his office in order to complete the work (Syken's App. at 8-9). Dr. Glatzer subsequently submitted a supplemental affidavit asserting that his accountant does not have the 1099 federal tax forms for Dr. Glatzer's office; that his present records involve 15,400 patients; and that it would take 1283 hours, or 160 days, or 32 weeks to review those records (Syken's App. at 31-33).

At a subsequent hearing on the motion for protective order, the court instructed that Dr. Glatzer appear in person "to explain to this Court why such an unreasonable bill" (Elkins App. at 60). The trial court found Dr. Glatzer's cost estimate inherently incredible (*id.* at 60-62), and stressed that "[i]f people want to make money by being an expert witness they are going to abide by the rules of the Court and by the laws of Florida, period, end of story" (*id.* at 62). Before

---

[1/] Defendant Syken (petitioner in the district court, respondent in this Court) filed an appendix in the district court numbered pages 1-40. Plaintiffs Elkins (respondents in the district court, petitioners in this Court) filed an additional appendix numbered pages 41-70. We will cite the two appendices by the name of the party which filed it, and the relevant page number.

the evidentiary hearing, Dr. Glatzer submitted a third affidavit, stating that in the previous two weeks he had seen 92 patients in six days, of which only 9 were for IME's (Syken's App. at 28). He then extrapolated from those two weeks that he sees an average of 15.33 patients a day, of which 1.5 are IME patients--or 2944 patients a year, of which 288 are IME patients (Syken's App. at 28-29). He estimated $144,000 in yearly income from such examinations, plus 10-12 court appearances at $500 per hour, and 5-10 depositions at $450 per hour (Syken's App. at 29). No supporting material was provided for these representations.

Two days later, Dr. Glatzer testified that his office does not separately record income from IME's (Syken App. at 40, Tr. 12)[2/]; that bills issued for IME's are marked with a number "3" (Tr. 45), but are filed only under the patient's name (Tr. 33) in the patient's chart (Tr. 41); that Dr. Glatzer does not keep any separate records of his IME files (Tr. 6, 56); that he makes no computer entry which would enable him to retrieve information on his IME files (Tr. 32); that he does not retain any past appointment calendars or schedules, but instead throws away his appointment calendar at the end of each week (Tr. 16, 20), notwithstanding that his calendars have been requested in numerous prior cases (Tr. 13); that he cannot specify how far into the future his present calendar records his appointments, and that he declines to produce his calendar for future appointments (Tr. 39-40); that he does not retain his federal 1099 forms, which record income from IME examinations, "because they're not needed," and that he does not furnish such forms to his accountant (Tr. 24-25); and that he has no way to extrapolate any IME information without doing a physical search of his files (Tr. 56). When asked why he could not easily record for separate retrieval the extent of his IME practice, Dr. Glatzer answered that he "is busy seeing patients," "does not have time to start writing things," and "might forget to put

---

[2/] The transcript of the May 6, 1993 hearing is found after page 40 of Syken's appendix in the district court, and is separately paginated 1-74. Accordingly, we will cite the transcript as Syken App. at 40, and then to the page number of the separately-paginated transcript.

LAW OFFICES. PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

somebody down" (Tr. 31, 32, 34). Dr. Glatzer could not state from memory the average number of IME examinations which he performs in a week (Tr. 36-37); he could not make such a determination from his calendar (Tr. 17); he has no idea how many average hours he spends a week reviewing medical records for IME's (Tr. 38); and he cannot approximate how much of his income is derived from being an expert witness (Tr. 10).

Dr. Glatzer also acknowledged that the quality of his recordkeeping has been a persistent concern of the circuit court. He has testified as an IME doctor on numerous occasions (Syken's App. at 40, Tr. 9); he is regularly listed as an expert witness (Tr. 9-10); and he routinely has been asked for the type of information which was requested in the instant case (Tr. 14). Not surprisingly, as the trial court noted in one of its orders compelling discovery, the extent of Dr. Glatzer's IME work has been the subject of judicial proceedings in the past (Syken's App. at 17-18). Before the instant case, Dr. Glatzer has been ordered to provide all or part of the information requested here by at least three other circuit court judges—Judge Klein (Syken's App. at 34-36), Judge Goldman (Elkins' App. at 67) and Judge Shapiro (Syken's App. at 37-38). Three prior discovery questions involving Dr. Glatzer have reached the appellate courts of this state—*State Farm Automobile Ins. Co. v. Gray,* 546 So. 2d 36 (Fla. 3d DCA 1989); *Dollar General, Inc. v. Glatzer,* 590 So. 2d 555 (Fla. 3d DCA 1991); *Trend South, Inc. v. Niurys Automarchy,* Case No. 93-00944, Third District Court of Appeal.

At the hearing (Syken's App. at 40, Tr. 66), the trial court took note of Judge Edward Klein's 1992 order in *Cabin v. State Farm and Casualty Co.,* Case No. 91-48437-CA-24 (copy at Syken's App. at 34-36), in which Judge Klein noted:

> [F]or some time Dr. Glatzer has been on notice of requests of this nature. . . . Notwithstanding this, the doctor, apparently, has in the past made no effort to keep accurate records of billings as a defense expert examiner and/or records of 1099s. It would seem that the doctor could implement a system which would not be

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> unduly burdensome or costly in order that such billings and 1099s would be available for production in the future.

Judge Klein therefore ordered Dr. Glatzer to begin keeping "complete and accurate records of billings for services as a defense expert examiner" (Syken's App. at 36). At the time of the hearing in the instant case before Judge Korvick—about a year and a half after Judge Klein's order—the *Cabin* case was still open and pending in the circuit court (*see* Elkins' App. at 68-70). Thus, at the time he testified in the instant case, Dr. Glatzer remained subject to Judge Klein's order; and yet Dr. Glatzer's testimony in the instant case revealed that he had made no attempt to comply with Judge Klein's instructions. Indeed, Dr. Glatzer testified that he did not recall the details of Judge Klein's order, and could not recall whether he had attempted to comply with it (Syken's App. at 40, Tr. 22-23).

Consistent with the unanimous Florida decisions to date, the trial court found that a clear showing of the necessity of the requested information had been made (Syken's App. at 40, Tr. 19), and that the necessity for such information was not outweighed by any burden upon Dr. Glatzer (Tr. 66-69). The trial court entered three orders—one addressed to Dr. Glatzer's records keeper (A. 16), one ordering Dr. Glatzer to produce relevant information concerning his IME services (Syken's App. 17-20), and one instructing Dr. Glatzer in the future to keep adequate records of his IME practice (Syken's App. at 21-23).

B. The District Court's En Banc Decision. The district court reviewed en banc the issue in *Elkins* and the related issue in *Roth*. On the assumption that experts are perceived by Florida juries as "hired guns" (opinion at 20 n.3), the district court opined that appellate decisions have gone too far in permitting intrusive discovery to establish a bias which would be "apparent to the jury on the simplest cross-examination" (opinion at 10-11). Accordingly, the district court prescribed eight "guidelines" governing the exploration of bias by an adverse expert witness, under which the expert may be deposed orally or in writing; may be required

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

to reveal his compensation in the pending case; may be asked for a general approximation of the percentage of his work as an expert which is devoted to plaintiffs or to defendants; may be asked for the approximate percentage of his time devoted to expert testimony, measured by the number or percentages of hours devoted, or the percentage of income, but not by the amount of income earned from providing expert testimony; may be required to identify the cases in which he has actually testified over a period of three years, and over a greater period only if good cause is shown; may not be required to produce business records, files or 1099 tax forms except under compelling circumstances; may protect from disclosure any information implicating the privacy of his patients; and may not be required to create documents which do not otherwise exist (opinion at 13-14).

The district court opined that the prescribed guidelines normally will be sufficient to disclose any bias in the witness (assuming of course that the witness answers truthfully), and that "minimal" cross-examination of the witness will make such bias "perfectly clear" (opinion at 15-16). In *Elkins v. Syken,* for example, the court suggested that the third affidavit submitted by Dr. Glatzer (projecting yearly numbers from his unverified summary of the previous two weeks, *see* Syken's App. at 28-29) itself showed his bias, and thus fully satisfied the plaintiffs' requirements for impeaching Dr. Glatzer (opinion at 16). Therefore, the court held, litigants in the Third District will be limited to the materials prescribed by the court's guidelines, except in cases in which the opposing party is able to demonstrate the falsity of the information provided, in which case the witness' testimony may be excluded by the trial court. The district court did not explain how the opposing party can demonstrate the falsity of such information, in the absence of additional discovery. The district court certified conflict with a number of other district-court decisions, and the instant proceeding ensued.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

II
ISSUE ON REVIEW

WHETHER THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY INSTRUCTING DR. GLATZER TO PRODUCE THE REQUESTED INFORMATION CONCERNING HIS IME PRACTICE, AND TO KEEP ADEQUATE RECORDS OF THAT PRACTICE IN THE FUTURE OR SUFFER DISQUALIFICATION.

III
SUMMARY OF THE ARGUMENT

Until the district court's en banc decision, the Florida circuit and district courts were unanimous in recognizing the vital importance of wide latitude in cross-examining medical experts for bias, and the necessity of adequate discovery for that purpose. The right to cross-examine for bias is codified in § 90.608(2), Fla. Stat. (1993), and the statute in turn reflects every litigant's constitutionally-protected right of cross-examination. The exercise of that right is especially important in cross-examining experts, who are permitted by the Florida Statutes to provide conclusory opinions on ultimate issues, the details of which may be left for cross-examination. For this reason, the Florida decisions consistently have recognized a litigant's right to broad-based cross-examination of experts in general, and medical experts in particular, on all matters relevant to their "motives, interest, or animus . . . ." *Eldridge v. State,* 27 Fla. 162, 9 So. 448, 450 (1891). And of course, an inherent corollary of that right is the opportunity for broad discovery of the expert's prior experience in the Florida courts, to probe the question of whether he has "consistently and repeatedly testified to the same effect in prior cases." *Secada v. Weinstein,* 563 So. 2d 172, 173 (Fla. 3d DCA 1990). The parameters of such inquiry of course are committed to the trial courts' broad discretion on a case-by-case basis. The scope of discovery appropriate in one case may be entirely inappropriate in another, in light of a myriad of factors which can only be balanced on a case-by-case basis. One of those factors is

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

the trial court's personal knowledge of the expert in question, and the likelihood that the expert's responses are forthright and complete.

The district court's en banc decision has radically undermined the constitutional right of litigants to cross-examine experts, by constricting litigants to the unverified and self-serving subjective approximations of opposing experts, foreclosing all access to the primary documentation. The only primary evidence now accessible is a list of cases in which the expert actually has testified over the previous three years, which excludes from discovery all cases in which the expert has offered opinions, or has even been deposed but did not testify, and excludes even those cases in which the witness did testify but no transcript was prepared. As to all of these matters, the opposing party is required to rely upon the expert's subjective recollections, and is deprived of all means by which to test their veracity. Thus, the trial courts are deprived of their discretion to tailor discovery to the peculiarities of each case, and the litigants are deprived of their right to an independent examination of an opposing expert's background and bias. The district court's guidelines are an inappropriate usurpation of the trial courts' management of the discovery process, and an inappropriate usurpation of the rights of all litigants in that process. Those guidelines should summarily be disapproved by this Court.

IV
ARGUMENT ON REVIEW

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY INSTRUCTING DR. GLATZER TO PRODUCE THE REQUESTED INFORMATION CONCERNING HIS IME PRACTICE, AND TO KEEP ADEQUATE RECORDS OF THAT PRACTICE IN THE FUTURE OR SUFFER DISQUALIFICATION.

A. The Importance of Investigating and Cross-Examining Medical Experts for Bias.

Three centuries ago in England, the trial of a woman for witchcraft depended upon the question of whether her alleged victims were actually bewitched, or instead had imagined their

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

experiences. Several lay witnesses testified that the alleged victims' behavior seemed genuine, but the tribunal was unimpressed, until it heard from a traveling witchcraft expert:

> Dr. Brown of Norwich, a person of great knowledge; who after this [lay] evidence [was] given, and upon view of the three persons in Court, was desired to give his opinion, what he did conceive of them; and he was clearly of opinion, that the persons were bewitched; and said, That in Denmark there had been lately a great discovery of witches, who used the very same way of afflicting persons, by conveying pins into them, and crooked as these pins were, with needles and nails.

A Trial of Witches at Bury St. Edmond's, 6 Howell's State Trials 687, 698 (1665). Needless to say, the accused was convicted. *Id.* at 702.

Any Florida trial lawyer can relate to this ancient evidence of the persuasive power of an expert witness. Jurors tend to assume that an expert's testimony is "more accurate and objective than lay testimony. . . . In the mind of the typical lay juror, a scientific witness has a special aura of credibility." E. Imwinkelried, *Scientific and Expert Evidence* 37 (1981). Expert witnesses therefore can be "both powerful and quite misleading." *Daubert v. Merrell Dow Pharmaceuticals,* _____ U.S. _____, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469 (1993). Juries especially see an expert physician as a "busy, important intelligent person." *State ex rel. Lichtor v. Clark,* 845 S.W. 2d 55, 61 (Mo. Ct. App. 1992). That impression may be exacerbated by the provision of § 90.703, Fla. Stat. (1993), which allows the expert to address "an ultimate issue to be decided by the trier of fact"; and by § 90.705(1), which allows the expert to give an opinion "without prior disclosure of the underlying facts or data." Both provisions inadvertently give the expert special status and implicitly reenforce his credibility.

In the light of those provisions, Florida's courts have recognized that cross-examination of experts "is extremely important . . . . [I]f cross-examination is limited . . . an expert's views and the soundness thereof may go largely untested." *Dempsey v. Shell Oil Co.,* 589 So. 2d 373, 378 (Fla. 4th DCA 1991). As a distinguished jurist has put it: "Challenging an expert and

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

questioning his expertise is the lifeblood of our legal system--whether it is a psychiatrist discussing mental disturbances, a physicist testifying on the environmental impact of a nuclear power plant, or a General Motors executive insisting on the impossibility of meeting federal anti-pollution standards . . . . It is the only way a judge or jury can decide whom to trust."[3/] Given the conclusory testimony permissible on direct examination, cross-examination of an expert necessarily must be permitted to "go into any phase and may not be restricted to mere parts . . . or to specific facts developed by the direct examination." *Dempsey v. Shell Oil Co.,* 589 So. 2d at 378, *quoted in Young-Chin v. City of Homestead,* 597 So. 2d 879, 881 (Fla. 1992). Cross-examination is "not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . . ." *Dempsey,* 589 So. 2d at 378.

Without question, such latitude necessarily must include an unbridled opportunity to challenge an expert's impartiality, in part by showing bias. The right to do so is codified in § 90.608(2), Fla. Stat. (1993), which permits impeachment by "[s]howing that the witness is biased." Indeed, the right to show bias is an inherent aspect of a litigant's constitutionally-protected right of cross-examination. *See Davis v. Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Eldridge v. State,* 27 Fla. 162, 9 So. 448, 450 (1891) ("Not only can a witness be questioned on cross-examination as to matters showing his motives, interest, or animus, but he can be contradicted as to such matters"); *Holt v. State,* 378 So. 2d 106, 108 (Fla. 5th DCA 1980). *See, e.g., Hunt v. Seaboard Coast Line R. Co.,* 327 So. 2d 193, 195 (Fla. 1976) (prospect of future employment "a powerful source of bias"); *Pandula v. Fonseca,* 145 Fla. 395, 199 So. 358, 360-61 (1940) (fact that treating physician was paid a small retainer by

---

[3/] David L. Bazelon, former Chief Judge, United States Court of Appeals for the D.C. Circuit, *Dallas Times Herald*, May 13, 1973, *reprinted in* D. Shrager & E. Frost, *The Quotable Lawyer* 74-75 (1986).

plaintiff); *Del Monte Banana Co. v. Chacon,* 466 So. 2d 1167, 1173 (Fla. 3d DCA 1985) (witness may be cross-examined about his employment by the defendant, and the prospect of promotions in the future). *See also Collins v. Wayne Corp.,* 621 F. 2d 777, 784 (5th Cir. 1980) (incentive to curry favor). *See generally State v. Glosson,* 462 So. 2d 1082 (Fla. 1985) (prohibiting contingency fees for informant testimony in criminal proceedings, in light of the "enormous financial incentive" for the witness to color his testimony); C. Ehrardt, *Florida Evidence* § 608.5, at 402-11 (1994); Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest,* 55 Ind. L. J. 35, 39-40 (1977). Clearly, such a challenge must embrace the opportunity to demonstrate that the expert has "consistently and repeatedly testified to the same effect in previous cases." *Secada v. Weinstein,* 563 So. 2d 172, 173 (Fla. 3d DCA 1990). As the above-cited cases make clear, such a pattern of prior testimony unquestionably suggests an incentive in the witness, consciously or unconsciously, to tailor his testimony in favor of the party which hired him, in the hope and expectation that the witness will be hired to provide similar testimony in the future.

These considerations are no less applicable to an expert medical witness. The plaintiff must certainly be permitted to show that a "significant part of the doctor's income is derived from insurance company business." *McAdoo v. Ogden,* 573 So. 2d 1084, 1085 (Fla. 4th DCA 1991). Thus, evidence of the Doctor Glatzer's billings and payments for examinations performed at the request of a defendant or an insurance company is "extremely relevant on the issue of Dr. Glatzer's credibility." *Dollar General, Inc. v. Glatzer,* 590 So. 2d 555, 556 (Fla. 3d DCA 1991) (overruled by the en banc decision at issue). *Accord, Trend South, Inc. v. Antomarchy,* 623 So. 2d 815 (Fla. 3d DCA), *review denied,* 630 So. 2d 1103 (Fla. 1993) (overruled by the en banc decision at issue); *Abdel-Fattah v. Taub,* 617 So. 2d 429, 430 (Fla. 4th DCA 1993) (information regarding defense requested examinations); *Bissell Brothers, Inc. v. Fares,* 611 So. 2d 620, 621 (Fla. 2d DCA 1993) (1099's "clearly subject to discovery");

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Young v. Santos, 611 So. 2d 586, 587 (Fla. 4th DCA 1993) (copies of bills, checks, and payment records; but not tax returns, absent refusal of doctor to provide bills, etc.); *Crandall v. Michaud,* 603 So. 2d 637 (Fla. 4th DCA 1992) (1099's discoverable, but not patient files or reports); *Wood v. Tallahassee Memorial Regional Medical Center, Inc.,* 593 So. 2d 1140, 1142-43 (Fla. 1st DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992) (relevant portions of tax returns, or a list of cases in which the expert was deposed or testified, or records revealing such information). As all of the above-cited cases make clear, the undeniable relevancy of such information necessarily requires adequate discovery in order to obtain it. *See also Hawkins v. South Plains International Trucks, Inc.,* 139 F.R.D. 679 (D. Colo. 1991).[4/]

Although the district court suggested that in almost all cases, the litigants' discovery requirements will be satisfied by questioning the expert witness or by the information voluntarily provided in his affidavit (opinion at 10, 15-16), this Court has held otherwise. Even if we

---

[4/] The expert physician has no standing to oppose such discovery on grounds of his own privacy or confidentiality, because the expert's decision to testify is a voluntary one, made for profit. *See Winn-Dixie Stores, Inc. v. Miles,* 616 So. 2d 1108, 1110-1111 (Fla. 5th DCA 1993); *Wood v. Tallahassee Memorial Regional Medical Center, Inc.,* 593 So. 2d 1140, 1142 (Fla. 1st DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992). By analogy, the plaintiff himself relinquishes similar privacy rights by filing the lawsuit, thereby voluntarily submitting himself to a physical examination by a doctor on the payroll of the opposition. In contrast, the plaintiff's treating physician has not voluntarily injected himself into the lawsuit, and thus may retain greater rights of privacy. *Winn-Dixie Stores, Inc. v. Miles,* 616 So. 2d at 1111. In the instant case, in any event, neither Dr. Glatzer nor the defendants raised any claim of privilege or confidentiality, and thus waived any such contention. Of course, the trial court also is concerned with the privacy of the doctor's patients, *see* § 455.241(2), Fla. Stat. (1993); in that context, the trial courts of course are authorized to order redaction of patients' names and confidential information. *See Abdel-Fattah v. Taub,* 617 So. 2d 429, 430 (Fla. 4th DCA 1993); *McAdoo v. Ogden,* 573 So. 2d 1084, 1085 (Fla. 4th DCA 1991); *Amisub (North Ridge Hospital), Inc. v. Kemper,* 543 So. 2d 470 (Fla. 4th DCA 1989); *Ventimiglia v. Moffitt,* 502 So. 2d 14 (Fla. 4th DCA 1986). *Compare Crandall v. Michaud,* 603 So. 2d 637, 639 (Fla. 4th DCA 1992) (cited by the district court, opinion at 14, 20 n.6) (patient has right to protect against disclosure of documents even if his name is redacted; medical records of slight relevance if plaintiff can get the information elsewhere, such as from the 1099's).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

indulge the district court's (dubious) assumption that the expert's approximations will be truthful, and thus that the opposing party has no need for the primary data in order to check the expert's veracity, this Court has recognized that even the most sincere expert is capable of shading his answers in a manner which may present a false picture. Thus in *Tennant v. Charlton,* 377 So. 2d 1169, 1170 (Fla. 1979), the Court held that "discovery of defendant's financial resources in punitive damages cases should not be limited to a sworn statement of defendant's current assets and liabilities," and quoted with approval the following passage from *Donahue v. Hebert,* 355 So. 2d 1264, 1265 (Fla. 4th DCA 1978) on that issue:

> Some authorities seem to suggest that a party can simply furnish a sworn statement of his current assets and liabilities to his opponent and thereby cut off any further aggressive inquiry into his true financial capacity to respond. We know from experience that one party frequently minimizes his financial ability to respond when it is an issue in a law suit, while the other party often has a tendency to inflate that same financial ability. Even under oath a party often seems to view another party's financial resources as great or small in direct proportion to the benefit which will accrue to that party. Thus, it is the height of naiveté to suggest that a sworn statement of one's net worth must be accepted as the final word on that important subject. The search for forgotten or hidden assets is of the essence of the discovery process. The whereabouts of assets disclosed by a recent income tax return, or shown on a recent financial statement furnished in another situation when the current litigation was not envisioned is very definitely appropriate inquiry as is the bona fides of the recent disposition of assets. These are routine inquiries for every knowledgeable trial lawyer in cases in which the financial resources of a party is a relevant issue. One must be afforded reasonable latitude in double and cross checking a party's statements about his current net worth. This, of course, can be done by reviewing income tax returns, recent financial statements, and the myriad of other sources of financial information.

Accord, Lay v. Kremer, 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982). Only a few weeks ago, this Court reached the same conclusion in *Rojas v. Ryder Truck Rental, Inc.,* 19 *Florida Law Weekly* S413 (Fla. Sept. 1, 1994), in upholding the production of out-of-state medical records

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

under Rule 1.351, Fla. R. Civ. P.--if necessary by compelling the opposing party's authorization--because requiring a Rule 1.350 request for the records from the opposing party "would place [the moving party] in the position of depending on the veracity of its adversary in furnishing the records."

Of course, the same reasonable possibility of inaccurate or incomplete responses applies to an expert medical witness; and the expert should be no less subject to reasonable inquiry than should a party to the lawsuit, having voluntarily injected himself into the action for profit. Simply put, reliance upon the expert's memory, veracity and completeness is no substitute for reasonable discovery of the primary documentation.

B. The Trial Courts Must Have Discretion to Regulate Discovery and Cross-Examination on a Case-By-Case Basis. Although the above-stated principles generally counsel broad latitude in discovery concerning an expert's potential bias, and broad latitude in the cross-examination of experts at trial, the trial courts at bottom must be the ultimate arbiters of the scope of discovery and cross-examination in a given case. The nature of the issues and their complexity, the number and the identities of the various experts, the intrusiveness of the discovery requested, the trial court's prior experience with the expert in question, the expert's credibility in responding to the request, and a variety of other factors will affect the trial court's exercise of discretion in a given case. As a general proposition, the trial courts of Florida have inherent discretion to protect the integrity and fairness of the proceedings which they administer. As this Court put it in *Anderson v. State,* 267 So. 2d 8, 10 (Fla. 1972): "Every court has inherent powers to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to, or not in conflict with, valid existing laws and

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

constitutional provisions."[5/] Such discretion has always extended to the demonstration of bias at trial: "Because in the nature of the case, no definite rule can be laid down as to what circumstances may be inquired about to show a witness' bias, the matter rests largely in the discretion of the trial court, and its rulings will not be disturbed in the absence of a showing of a clear abuse of discretion." *Pandula v. Fonseca,* 145 Fla. 395, 199 So. 358, 60 (1940). *Accord, Torres-Arboledo v. State,* 524 So. 2d 403 (Fla.), *cert. denied,* 488 U.S. 901, 109 S. Ct. 250, 102 L. Ed. 2d 239 (1988).

In the area of discovery, such discretion is conferred upon the trial courts by Rule 1.280(c), Fla. R. Civ. P., which allows the court upon motion to "make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires," including several enumerated restrictions upon the form and scope of discovery. As this Court put it in *Rasmussen v. South Florida Blood Service, Inc.,* 500 So. 2d 533, 535 (Fla. 1987): "The discovery rules . . . confer broad discretion on the trial court to limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Accord, Rojas v. Ryder Truck Rental, Inc.,* 19 *Florida Law Weekly* S413 (Fla. Sept. 1, 1994).

Until the district court's decision, such discretion necessarily has extended to the discovery of potential bias in expert witnesses, and also to the prevention of vexatious demands. *See Lay v. Kremer,* 411 So. 2d 1347, 1349 (Fla. 1st DCA 1982). Indeed, contrary to the district court's attempt at generalization, it would appear that the exercise of such discretion is

---

[5/] *See generally Ryan v. Ryan,* 277 So. 2d 266, 273 (Fla. 1973) (inherent power to prevent misuse of judicial machinery in dissolution-of-marriage proceeding); *Sanchez v. Sanchez,* 435 So. 2d 347 (Fla. 3d DCA 1983) (power to sanction intransigence of counsel); *Select Builders of Florida v. Wong,* 367 So. 2d 1089, 1091 (Fla. 3d DCA 1979) (inherent power to reverse orders fraudulently obtained); *State ex rel. Gebhardt v. Buchanan,* 175 So. 2d 803, 805 (Fla. 3d DCA 1965) (inherent power to sequester a material witness in a criminal case).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

inherent in the process of adjudicating a motion for protective order. As a general proposition, as the Court noted in *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d at 535, "the court must balance the competing interests that would be served by granting discovery or by denying it."[6/] On the precise point at issue, the district courts have been unanimous in holding that the trial court must conduct a "balancing analysis," *Abdel-Fattah v. Taub,* 617 So. 2d 429, 430 (Fla. 4th DCA 1993), of the "relevance of information against the burdensomeness of its production." *Young v. Santos,* 611 So. 2d 586, 587 (Fla. 4th DCA 1993). *Accord, Crandall v. Michaud,* 603 So. 2d 637, 638 (Fla. 4th DCA 1992); *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, 593 So. 2d 1140, 1143 (Fla. 1st DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992); *McAdoo v. Ogden,* 573 So. 2d 1084, 1085 (Fla. 4th DCA 1991).

Virtually by definition, the necessity of a balancing test reflects the recognition that "each case is different . . . ." *Crandall v. Michaud,* 603 So. 2d 637, 639 (Fla. 4th DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992). In some cases it may be appropriate to require deposition of the doctor before allowing broad-based production, in order to narrow the scope of subsequent production. *See Trend South, Inc. v. Antomarchy,* 623 So. 2d 815, 817 (Fla. 3d DCA) (Jorgenson, J., dissenting), *review denied,* 630 So. 2d 1103 (Fla. 1993); *Young v. Santos,* 611 So. 2d 586, 588 (Fla. 4th DCA 1993) (Warner, J., concurring). In some cases, the material available may obviate the necessity of examining tax returns, *see Young v. Santos,* 611 So. 2d at 587; in others, the court may approve "production of complete tax returns because the trial court first ordered that only the portions reflecting such income be produced, and was ignored . . . ." *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, 593 So. 2d 1140, 1143 n.* (Fla. 1st DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992). *See Rojas v. Ryder Truck*

[6/] *See generally North Miami General Hospital v. Royal Palm Beach Colony, Inc.*, 397 So. 2d 1033, 1035 (Fla. 3d DCA 1981); *Dade County Medical Association v. Hlis,* 372 So. 2d 117, 121 (Fla. 3d DCA 1979).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Rental, Inc., 19 *Florida Law Weekly* S413, S414 (Fla. Sept. 1, 1994) ("[W]hen previous record requests through Rule 1.351 have been ignored, judges may use their discretionary authority to order the execution of such a release [by the opposing party] to allow a party to obtain the same information available by subpoena under Rule 1.351").

In some cases the trial court may find the witness' affidavit or deposition testimony sufficiently credible to warrant limitation of discovery—in others not. *See Young v. Santos,* 611 So. 2d at 588 (Warner, J., concurring). The trial court may have prior experience with the expert in question, and good reason either to trust or to distrust his responses. In the instant case, for example, the trial court found Dr. Glatzer's protestations incredible in the light of Dr. Glatzer's disobedience of various trial courts' orders in previous cases; and the district court itself has expressed skepticism about Dr. Glatzer's credibility in the past. *See Dollar General, Inc. v. Glatzer,* 590 So. 2d 555, 556 (Fla. 3d DCA 1991). Moreover, even if the district court were correct in holding that an expert witness cannot be required to "create" evidence by keeping records in a certain way (opinion at 14, 20-21 n.7),[7/] at the least the trial court should have discretion to forbid the expert's testimony in the absence of such information, on the ground that the opposing party's cross-examination is impermissibly constricted without it. *See Wilkins v. Palumbo,* 617 So. 2d 850 (Fla. 2d DCA 1993) (defense medical expert stricken if

---

[7/] *But see Abdel-Fattah v. Taub,* 617 So. 2d 429, 430 (Fla. 4th DCA 1993) (expert ordered to compile information regarding defense-requested examinations); *Wood v. Tallahassee Memorial Regional Medical Center, Inc.,* 593 So. 2d 1141, 1142 (Fla. 1st DCA), *review denied,* 599 So. 2d 1281 (Fla. 1992) (if necessary, expert must compile list of relevant cases); *Brown v. Bridges,* 327 So. 2d 874 (Fla. 2d DCA 1976) (expert may be required to perform certain tasks for videotaped deposition). *See generally Rojas v. Ryder Truck Rental, Inc.,* 19 *Florida Law Weekly* S413, S414 (Fla. Sept. 1, 1994) (party can be required to execute release of medical information); *Tootle v. Seaboard Coast Line R. Co.,* 468 So. 2d 237 (Fla. 5th DCA 1985) (party can be required to execute consent form to allow deposition of psychologist).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

unwilling to perform an IME in the presence of a court reporter).[8/] Every case is different, and there is simply no substitute for the discretion which the trial courts must exercise case by case.

C. The District Court's Guidelines Impermissibly Deprive the Trial Courts of Discretion, and the Litigants of Their Right to Challenge Experts for Bias. In light of the foregoing, Respondents Elkins respectfully submit that the district court's decision is erroneous because it impermissibly deprives the trial courts of the discretion which they need to tailor the scope of discovery to the facts of a particular case. The district court's "guidelines" are applicable in all cases, in the absence of an extraordinary showing of necessity—a burden which necessarily constricts the ability of trial courts to tailor discovery to the facts at issue. In this light, even if the district court were correct that the Florida courts have been too lenient in allowing discovery of experts (opinion at 10), such perceived abuses should be corrected on a case-by-case basis, in order to prevent the pendulum from swinging too far to the other side.

In addition, even if this Court were to approve the district court's decision to prescribe universal guidelines for the discovery of expert witnesses, the guidelines adopted by the district court are far too draconian in their constriction of a litigant's ability to probe the biases of the other side's expert. At bottom, the district court ruled that the opposing party must rely upon the accuracy of the expert's subjective recollections. He must accept the witness' veracity in providing an "approximate estimate" (opinion at 10) of the witness' IME examinations during the course of a year, including his estimate of the percentage of IME examinations performed for defendants or insurance companies, as opposed to plaintiffs (opinion at 13). The opposing party also must rely upon the expert's estimation of the amount of his practice devoted to such testimony, as a percentage of his total time, or of the number of weekly hours devoted, or of the percentage of his income—but not the amount of such income (opinion at 13-14). The

---

[8/] A party does not have an absolute right to a particular expert. *See State ex rel. Lichtor v. Clark,* 845 S.W. 2d 55, 66-67 (Mo. Ct. App. 1992).

opposing party is not permitted to test the veracity of the expert's responses, for example by securing production of business records or 1099's, except under the most compelling circumstances—circumstances which the court did not define (opinion at 14). Thus, the opposing party is required to accept the witness' recitation, unless the opposing party can discover his own means of ascertaining the falsity of an expert's statement, in which case the expert's testimony may be excluded (opinion at 14-15). How the opposing party can acquire such contradictory information, in the absence of discovery, is a quandary which the district court did not resolve. On the assumption that the witness will answer truthfully, the district court concluded that the primary documentation requested would be duplicative of his statements by affidavit or by oral or written deposition (opinion at 11), and that the witness' bias can be disclosed in cross-examination on the basis of the information which the witness does disclose (opinion at 10, 15-16). We can think of no other area of the law in which a litigant is literally forced to rely upon the accuracy of his opponent's representations.[9/]

There can be little question that the district court's guidelines are not faithful to the broad parameters of discovery and cross-examination of experts prescribed by the Florida decisions. To begin with, the district court has foreclosed entire areas of discovery, such as the amount of income which a physician yearly makes from IME's and testimony--a matter which clearly is relevant to the expert's bias regardless of the percentage of his time devoted to such testimony. Moreover, although the witness can be asked to approximate the percentage of his time which is devoted to IME examinations, and the percentage of his IME examinations performed for

---

[9/] The only exception to this requirement of reliance upon the expert's veracity is the district court's declaration that the witness must identify the cases in which he has testified during the past three years. That leaves it to the opposing party to acquire and investigate the files in those cases (assuming that the trial in question in fact was transcribed), and to extrapolate the expert's bias on the basis of only those cases in which the expert actually testified (and his testimony was transcribed). There can be no discovery in the vast majority of cases--cases in which the expert provided an opinion, or was deposed but did not testify at trial.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

defendants as opposed to plaintiffs, the opposing party is given no practical means of testing the veracity of that information, or of obtaining the facts if the physician is unable to provide them. Dr. Glatzer, for example, purposefully avoids the creation of records which would permit him to answer the questions prescribed by the district court. Not surprisingly therefore, he was unable to provide even the approximate number of IME's which he performs in a given period of time, the average number of hours which he spends reviewing medical records for IME's, or even the approximate percentage of his income derived from that task (Syken's App. at 40, Tr. 10, 17, 36-38).

At most, Dr. Glatzer was able to put together an affidavit in which he extrapolated, from his unverified records of the prior two weeks alone, that he sees only 288 IME patients out of 2944 patients per year (Syken's App. at 28-29)--an extrapolation which has virtually zero statistical validity. Nevertheless, the district court concluded that Dr. Glatzer's extrapolation from his unverified summary of a two-week experience rendered the plaintiffs' discovery request "cumulative and duplicative of information easily available upon rudimentary written or oral deposition" (opinion at 16), even though Dr. Glatzer has stated directly that he is unable to provide any generalized information about his IME practice. Unless the plaintiff through some other means is able to acquire the generalized information which Dr. Glatzer has refused to retain or provide, the plaintiffs are stuck with answers which amount to nothing more than self-serving guesswork. And the trial court is deprived of the discretion which it would otherwise exercise to strike Dr. Glatzer's testimony on the ground of his intransigence, and the inherent incredibility of his assertions.

In light of the authorities cited, there can be little question that the district court's blanket restrictions impermissibly deprive both plaintiffs and defendants of their right to investigate and cross-examine experts, and deprive the trial courts of their appropriate discretion to administer

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

the discovery process. If guidelines are appropriate at all, they should better reflect the necessity of broad latitude in scrutinizing and cross-examining experts.

V
CONCLUSION

It is respectfully submitted that this Court should disapprove the guidelines enacted by the Third District Court of Appeal, and affirm the orders of the trial court in the *Elkins* case.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of November, 1994, to: ROBERT A. ROBBINS, ESQ., Robbins & Reynolds, P.A., Suite 400 Dadeland Towers, 9200 S. Dadeland Blvd., Miami, Florida 33156; RICHARD A. FRIEND, ESQ. and RICHARD A. WARREN, ESQ., Attorneys for Roth, 5975 Sunset Drive, Penthouse 802, South Miami, Florida 33143; RAOUL G. CANTERO, III, ESQ., Adorno & Zeder, P.A., Attorneys for Plaza of the Americas and Gregory, 2601 S. Bayshore Drive, Suite 1600, Miami, Florida 33133; JAMES T. SPARKMAN, ESQ., Clark, Sparkman, Robb & Nelson, Attorneys for Syken, 110 S.E. 6th Street, Suite 1800, Ft. Lauderdale, Florida 33301; PAUL R. REGENSDORF, ESQ., Fleming, O'Bryan & Fleming, P.A., Attorneys for Amicus Curiae Florida Defense Lawyers Association, P.O. Drawer 7028, Ft. Lauderdale, Flroida 33338-7028; and to ROY D. WASSON, ESQ., Attorney for Amicus Curiae Academy of Florida Trial Lawyers, 44 W. Flagler Street, Suite 402, Miami, Florida 33130.

Respectfully submitted,

BARBARA GREEN, ESQ.
2964 Aviation Avenue
Third Floor
Miami, Florida 33133

-and-

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: _____
JOEL S. PERWIN

41294\br\pet

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

ELISA SYKEN,	**	
Petitioner,	**	
vs.	**	CASE NO. 93-1299
MAX ELKINS, et al.,	**	
Respondents.	**	
PLAZA OF THE AMERICAS PART IV CONDOMINIUM ASSOCIATION, INC., and LEDFORD GREGORY, M.D.,	**	
Petitioners,	**	
vs.	**	CASE NO. 92-2317
MICHAEL ROTH,	**	
Respondent.	**	

Opinion filed October 5, 1994.

Writs of Certiorari to the Circuit Court for Dade County, Maria M. Korvick, Judge, and Harold Solomon, Judge.

Clark, Sparkman, Robb & Nelson, and James T. Sparkman, for petitioner Syken.

Robbins & Reynolds and Robert A. Robbins, and Barbara Green, for respondents Elkins, et al.

Fleming, O'Bryan & Fleming, and Paul R. Regensdorf, for Florida Defense Lawyers Association, as amicus curiae.

Roy D. Wasson, for the Academy of Florida Trial Lawyers, as amicus curiae.

Adorno & Zeder and Raoul G. Cantero III and David Lawrence III, for petitioners Plaza of the Americas Part IV Condominium Association, Inc. and Ledford Gregory, M.D.

Friend & Fleck and Richard A. Friend, for respondent Roth.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, JORGENSON, COPE, LEVY, GERSTEN, GODERICH, and GREEN,* JJ.

EN BANC

NESBITT, J.

We entertain these petitions for common law certiorari, en banc, in order to harmonize the divergent opinions of this court involving the scope of discovery reasonably necessary to impeach the testimony of an opponent's expert medical witness. We have jurisdiction. Fla. R. App. P. 9.331.

In Syken v. Elkins, case 93-1299, petitioner, defendant below, seeks, through rehearing en banc, this court's review (by common law certiorari) of three trial court orders which require that defendant's expert witness physician: 1) produce material ordered in earlier cases by other trial judges; 2) begin keeping certain new records to be made available to plaintiff's counsel; and 3) produce certain financial data, including federal income tax 1099

---

* Judge Green did not participate in oral argument.

forms. In Plaza v. Roth, case 93-2317, the petitioner, defendant below, and its expert witness physician, seek review of an order that the expert produce certain 1099's and P.A. federal income tax returns. For the reasons stated below, we grant the petitions and quash the orders under review.

The Facts in Syken v. Elkins

In February 1993, by subpoena duces tecum, counsel for Max Elkins, plaintiff in an automobile personal injury action, scheduled the deposition of the records custodian/bookkeeper of defendant Elisa Syken's orthopedic expert, Dr. Richard Glatzer. The information sought required documentation of income earned by the expert from independent medical examinations (IMEs) since January 1, 1990; the percentage of IME income relative to private patient income since January 1, 1990; the numbers of IME exams performed for insurance carriers and for defense attorneys since January 1, 1990; disclosure of the amount charged for IMEs, and review of the expert's medical records for the past twelve months; the number of impairment ratings given since January 1, 1990; and the number of court appearances and attorney conferences and relative charges since January 1990.

Defendant's counsel filed an objection and motion for protective order. The trial judge denied the motion and required the expert to set forth the cost of producing the above

information. The initial affidavit of Dr. Glatzer was filed February 12, 1993. Thereafter, Elkins filed a motion to require Dr. Glatzer's bookkeeper to comply with the subpoena, and filed a response to the affidavit. In response to Elkins' motion, the trial court ordered Dr. Glatzer to appear for an evidentiary hearing. Prior to that hearing, on May 6, 1993, the record reveals that the doctor submitted a notarized affidavit stating, in part:

> 5. Finally, at the request of defense counsel, I have examined my calendar for last week and this week in order to come to a reasonable approximation of the number of IME's I do in a year. Last week, I worked 4 days and saw 56 patients, of which only 3 were for the purpose of performing IME's. This week I am working only 2 days, but I am seeing 36 patients, of which 6 are for the purpose of performing IME's. Presently, I work 4 days per week. Extrapolating this information, I believe it is reasonable to conclude that I see, on average 15.33 patients per day, of which 1.5 patients are seen for performing IME's. I work approximately 48 weeks per year. As such, I believe it is reasonable to estimate that I see 2944 patients per year, of which 288 are seen for IME's. My average charge for an IME, including performing and reviewing x-rays is $500. As such a reasonable estimate of my P.A.'s income from IME's is $144,000 per year. Additionally, I attend court approximately 10-12 times per year at a rate of $500 per hour and I give approximately 5-10 depositions per year at a rate of $450 per hour.

Dr. Glatzer was questioned by the trial judge and Elkins' attorney. Two interested attorneys, involved in similar discovery pursuits on separate personal injury cases, were allowed to assist.

Dr. Glatzer was asked about the contents of his affidavit in the present case as well as a second similar affidavit.

Dr. Glatzer explained that his patient files are kept alphabetically and not chronologically, and that the estimated 15,000 patient files covered 25 years of practice in Dade County. The doctor expressed concern that compliance with the subpoena would require him to close his medical practice, due to the fact that his office personnel could not perform the task of gathering the requested materials during regular working hours in light of their duties in running his medical practice. Further, the doctor claimed that 1099 forms are not probative of medical legal charges because they do not differentiate between such charges and private patient charges. At the conclusion of the hearing, the trial judge issued the three orders appealed herein, in sum requiring the compilation of reports from the doctor's files, the implementation of new procedures for recording IME's and creation of new documents evidencing time spent on IME's, and production of 1099 tax forms for the last three years.[1]

The Facts in Plaza v. Roth

Michael Roth, plaintiff below, alleged he was injured when the ceiling in his apartment fell on him. Roth sued Plaza of the Americas Part IV Condominium Association, Inc. (Plaza), the association which owns the building's common areas. Plaza hired

Ledford Gregory, M.D. to conduct an IME of Roth. Thereafter, through interrogatories, Roth requested the identity of every person Dr. Gregory had examined at the request of Plaza's counsel. Plaza objected, and Roth moved to compel a response. The trial judge ordered Plaza to procure from Dr. Gregory an affidavit identifying every person examined by Dr. Gregory, or about whom Dr. Gregory had testified, pursuant to an authorization from Plaza's law firm. Subsequently, Roth issued a subpoena duces tecum to Dr. Gregory requesting, among other things, copies of

> all bills issued by [Dr. Gregory] as a defense expert examiner to any insurance company or law firm during a certain period; and
>
> all journals, ledgers, and 1099 forms pertaining to payments received by [Dr. Gregory] during a certain period, for examinations performed at the request of any insurance company or law firm.

Plaza objected to the request. The trial judge denied the objection.

In response to the subpoena, Dr. Gregory filed his affidavit, which stated that his office did not segregate files according to whether the patient was seen for an IME, and that his office maintains no central file or computer program from which the requested information could readily be retrieved. According to the affidavit, all the doctor's office files would have to be reviewed in order to determine which patients were given IMEs, and which patients were referred by Plaza's law firm, requiring "great amounts of money and time." He also stated in the affidavit that

he did not keep his Internal Revenue Service 1099 forms. Roth filed a motion for contempt or sanctions.

After a hearing, the trial judge issued the order, reproduced in part below, from which Dr. Gregory seeks review.

> A. Dr. Ledford Gregory is to sign a release for 1099 forms which is to be furnished by the Plaintiff and that will be sent to the IRS. Further, Ledford Gregory, M.D., P.A., shall produce its federal income tax returns for the years 1990, 1991 and 1992, to counsel for the plaintiff. Dr. Gregory is to produce the documents within ten (10) days from the date of this hearing.

Analysis

The issue in these cases is whether the trial courts' orders depart from the essential requirements of law, and will cause material injury to petitioners for which they have no adequate remedy by appeal. Abdel-Fattah v. Taub, 617 So. 2d 429, 430 (Fla. 4th DCA 1993).

Litigants attempting to demonstrate the bias of an expert witness physician have commonly asserted that they are entitled to discovery of basically two types. First, as in Syken, litigants have sought direct access to the doctor's office files in order to conduct some sort of "audit" so as to obtain an exact count of the number of IMEs the doctor performs each year, and then to compare that number with the total number of patients seen. Second, as in both Syken and Plaza, litigants have attempted to obtain access to the doctor's financial information so as to come up with exact

income figures which can be presented to the jury.

Florida Rule of Civil Procedure 1.280 allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action. The scope of this rule, while recognized as being broad, Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (Fla. 3d DCA), cert. denied, 364 So. 2d 889 (Fla. 1978), is not without limitation. First, as the rule indicates, irrelevant and privileged matter is not subject to discovery. Fla. R. Civ. P. 1.280(b)(1). Second, the discovery of relevant, non-privileged information may be limited or prohibited in order to prevent annoyance, embarrassment, oppression or undue burden or expense. Fla. R. Civ. P. 1.280(c); 1.410(b)(d)(1); South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798 (Fla. 3d DCA 1985), approved, 500 So. 2d 533 (Fla. 1987); Dade County Medical Ass'n v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979). The cases before us deal with this second limitation on discovery. As observed in Rasmussen, the discovery rules are enunciated pursuant to the supreme court's rule making authority under article V, section 2(a) of the Florida Constitution, granting courts the authority to control discovery in all aspects. Springer v. Greer, 341 So. 2d 212, 214 (Fla. 4th DCA 1976), appeal dismissed, 351 So. 2d 406 (Fla. 1977).

If a person seeking to prevent discovery establishes good cause, a court may make those orders necessary to protect the

interests set out in the rules. Included in the enumerated methods at the court's disposal under Rule 1.280(c) are the following:

> (1) that the discovery not be had;
>
> (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
>
> (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . . .

In deciding whether good cause has been shown, it is necessary to balance the opposing interests that would be served by the granting or denying of discovery. Rasmussen, 467 So. 2d at 801; Hlis, 372 So. 2d at 121; see also Lukaszewicz v. Ortho Pharmaceutical Corp., 90 F.R.D. 708 (E.D. Wis. 1981); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976). In the context of medical expert witnesses, courts in Florida have long held that the trial judge must balance the competing interests of the relevancy of the discovery information sought as impeachment information as against the burdensomeness of its production. Abdel-Fattah, 617 So. 2d at 430; Wood v. Tallahassee Mem'l Regional Med. Ctr., Inc., 593 So. 2d 1140 (Fla. 1st DCA), review denied, 599 So. 2d 1281 (Fla. 1992); McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991); North Miami General

Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033 (Fla. 3d DCA 1981).

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.

We are aware that our analysis conflicts with certain pronouncements of this court and that of other districts on this issue.[2] Nonetheless, we adopt the reasoning of Chief Judge Schwartz in LeJeune v. Aikin, 624 So. 2d 788, 789 (Schwartz, C.J., specially concurring) (Fla. 3d DCA 1993) and Judge Jorgenson in Trend South, Inc. v. Antomarchy, 623 So. 2d 815, 186 (Fla. 3d DCA) (Jorgenson, J., dissenting), review denied, 630 So. 2d 1103 (Fla. 1993), and conclude that decisions in this field 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."[3] LeJeune, 624 So. 2d at 790 (Schwartz, C.J., specially concurring; see Young v. Santos, 611 So. 2d 586, 587-88 (Fla. 4th DCA 1993) (Warner, J., concurring).

The production of the information ordered in the cases before us causes annoyance and embarrassment, while providing little useful information. In Syken, the court ordered additional discovery which, in light of the doctor's affidavit, is only duplicative, annoying and oppressive. In Plaza, 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 burdensome route of discovery, through oral or written deposition, was simply not followed.

A review of decisions of other jurisdictions supports our conclusion. In Ex Parte Morris, 530 So. 2d 785, 787 (Ala. 1988), the Alabama Supreme Court reviewed an order compelling certain expert witnesses to produce their income tax records and other information regarding their sources of income. There, reversing the trial court's order, the court concluded that while the old cry of "fishing expedition" does not preclude inquiry into the facts underlying an opponent's case, there comes a point where "[I]nstead of using rod and reel, or even a reasonably sized net, [the

requesting party] would drain the pond and collect the fish from the bottom." Id. (citation omitted), citing In Re: IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 42 (N.D. Cal. 1977).

In Jones v. Bordman, 759 P.2d 953 (Kan. 1988), the court considered a request for, among other items, all medical reports made by the witness for the past six years and the witness' income tax returns. The Kansas court held that where the sole purpose of the discovery request was to obtain evidence which could impeach the witness' veracity, the information fell outside the scope of permissible discovery, particularly as plaintiffs could have obtained needed evidence sought through other less obtrusive means. Likewise, in Mohn v. Hahnemann Medical College & Hosp., 515 A. 2d 920, 924 (Pa. Super. 1986), appeal discontinued, 527 A. 2d 542 (Pa. 1987), the court held that requiring an expert to "lift his visor so that the jury could see who he was, what he represented, and what interest, if any, he had in the results of the trial so that the jury could appraise his credibility" 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." Id. (citation omitted).

Also, in Russell v. Young, 452 S.W.2d 434 (Tex. 1970), the Texas court held that no discovery would be had, for the purposes of impeachment only, of financial and accounting records of a physician who was not a party to suit but who had treated claimant, and was scheduled to testify during trial as a medical expert for

claimant, where insurer sought discovery of such records solely for the purpose of showing the physician's alleged bias. Additionally, supporting our conclusion are statements made in Allen v. Superior Court, 151 Cal. App. 3d 447, 198 Cal. Rptr. 737 (1984) where a California court held that a trial court abused its discretion in requiring a defense medical expert witness to produce documents showing the extent of his practice for the defense and for insurance companies over the past five years without a showing that plaintiff's object could not be accomplished through less intrusive means. We conclude these cases support the guidelines outlined below.

Guidelines

For the foregoing reasons, discovery of an opposing medical expert for impeachment is limited by the following criteria:

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]

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.[5]

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.[6]

8. An expert may not be compelled to compile or produce non-existent documents.[7]

The Antidote

We have adopted the foregoing criteria based upon the rules of discovery and circumstances portrayed. We have done so in an effort to prevent the annoyance, embarrassment, oppression, undue burden, or expense, claimed on behalf of medical experts. Within the limits of permitted discovery, medical experts are obligated to testify on a reasonable basis, truthfully, fully and freely. When it is disclosed or made apparent to the trial court that such a witness

has falsified, misrepresented, or obfuscated the required data, the aggrieved party may move to exclude the witness from testifying or move to strike that witness's testimony and, or further, move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant expert.

These remedies, available at the trial judge's discretion, place trial counsel on notice to only engage reputable physicians. The exclusion or striking of an expert's testimony may result in the offending party being left with no expert testimony at trial. This is particularly so when the exclusion or striking occurs past the cut-off period for exchange of witnesses under a pretrial order. Of course, trial judges have discretion to vary the guidelines where appropriate and to impose less severe sanctions where warranted.

Conclusion

The data suggested by our guidelines will normally be sufficient to show the jury the expert's background and orientation. With this information, the opponent may, even with minimal cross-examination, make perfectly clear to a jury that a defense doctor testifies as a defense doctor, and plaintiff's doctor testifies as a plaintiff's doctor, and that each may spend considerable time doing just that.

These two cases, at different ends of the spectrum, demonstrate the problem we have addressed herein, 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.

In Plaza, the trial judge's order of burdensome and intrusive production of documentary evidence was made before the expert was ever deposed. In Syken, with an affidavit clearly evidencing the probability of bias,[8] and with the doctor, at deposition, affirming the information produced in his affidavit, the trial judge nonetheless ordered massive documentary production, including the creation of new documents. Not only is the information sought and the manner it which it has been requested cumulative and duplicative of information easily available upon rudimentary written or oral deposition, but also so burdensome as to create the possibility of a chilling effect on litigants' ability to find experts to testify as witnesses.

By this opinion, we recede from all conflicting pronouncements or statements in the earlier decisions of this court. Also, while in the instant case the discovery orders that we conclude were overburdensome were made in response to requests by plaintiffs' counsel, the statements made herein clearly apply equally to requests by defense counsel of plaintiffs' medical experts.

Accordingly, for the foregoing reasons, the petitions for a writ of common law certiorari are granted and the orders under review are quashed.

FOOTNOTES:

[1] The orders are reproduced below to demonstrate their burdensome nature. In the first order, the trial judge took judicial notice of two earlier orders, one by Judge Klein, in Cabin v. State Farm, et al., one by Judge Goldman, in Niurys Antomarchy v. Trend South, Inc., and two previous cases in which Dr. Glatzer has been the subject, State Farm Mutual Auto. Ins. Co. v. Gray, 546 So. 2d 36 (Fla. 3d DCA 1989) and Dollar General, Inc. v. Deangelis, 590 So. 2d 555 (Fla. 3d DCA 1991). The trial judge then announced that she found it "inconceivable that Dr. Glatzer has no idea of the approximate amount of money he makes performing IME's, or alternatively, that there is no reasonable means for him to provide such information without undue expense or hardship." The judge thereafter ordered:

> 1. That Dr. Richard Glatzer shall procure a copy of a complete and accurate list of his billings for his IME services performed since November 23, 1992, the date of Judge Edward Klein's aforementioned Order which required him to keep such records, including the number of IME's, the amount he has been paid for same, the amount he has been paid for courtroom and deposition testimony pertaining to said IME's, and by whom such payments were made. Dr. Glatzer shall produce these records within (7) working days from the date of this hearing. Plaintiffs shall send to Dr. Glatzer the sum of $5.00 for the cost of copying such list.
>
> 2. That in view of Judge Murray Goldman's recent Order requiring Dr. Glatzer to produce his 1099's, Dr. Glatzer shall have 10 days from the date of this hearing to produce his 1099's for the last three years that reflect in whole or in part income derived from IME work or, alternatively, to provide Plaintiffs' counsel with an authorization to obtain said 1099's directly from the Internal Revenue Service or from the payor insurance carriers.
>
> 3. That should Dr. Glatzer fail to comply with this Order, he shall be stricken as an expert witness in this case.

Also on that date, the trial court issued an omnibus order incorporating the findings of the order reproduced in part above and additionally ordering:

> 2. If Dr. Glatzer chooses to offer his services as an IME physician and intends to testify and appear as a defense expert witness regarding any IME performed by him on any case whatsoever before this Court, then he shall be required to maintain complete and accurate records, commencing from November 23, 1992, the date of Judge Edward Klein's Order in the case of Cabin v. State Farm Fire And Casualty Company, et al., Dade County Circuit Court Case No. 91-48437 (24), of the following information:
>
> > a. A complete and accurate listing of each and every IME performed, giving the date of each service performed in connection with the IME.
> >
> > b. A complete and accurate account of every dollar billed for IME work, giving a breakdown of all charges, including the charge per hour, the number of hours spent and billed in each case. This record shall include the charge for each IME examination, reports, x-rays, medical records review and all testimony arising out of the IME, as well as any transportation charges.
> >
> > c. A complete and accurate list of every party billed for such IME services and testimony, specifying in each case whether the money was paid by the defendant, the defense lawyer, the defendant's insurer, or by some other person or entity.
> >
> > d. Each and every 1099 which reflects, in whole or in part, payment for any IME work or testimony arising therefrom.
>
> 3. As long as Dr. Glatzer continues to offer his services as an IME physician and serve as a defense expert witness on IME's, he shall

> continue to maintain the aforesaid information in his office and to have it available for inspection and copying by any interested party or entity. This Order extends into the future, beyond the duration of this particular case.
>
> 4. Should Dr. Glatzer fail to comply with this Order, he shall be precluded from serving as a defense IME expert in any cause before this Court.

Five days later, the trial court noted its two earlier orders and then concluded that "in an abundance of caution" it was further ordered:

> 1. That within 20 days from the date of this Order, the Defendant's attorneys, Clark, Sparkman, Robb & Nelson f/k/a/ Barnett, Clark & Barnard, shall produce any and all 1099's which said law firm issued to Dr. Richard Glatzer for the past thee years reflecting income, in whole or in part, derived from services performed as an IME physician and for any testimony arising therefrom.
>
> 2. That within 20 days from the date of this Order, the Defendant's attorneys, Clark, Sparkman, Robb & Nelson f/k/a Barnett, Clark & Barnard, shall obtain and produce from the Defendant's insurer, State Farm, any and all 1099's which said insurance company issued to Dr. Richard Glatzer for the past three years reflecting income, in whole or in part, derived from services performed as an IME physician and for any testimony arising therefrom.

[2] See LeJeune v. Aikin, 623 So. 2d 815, 816 (Fla. 3d DCA), review denied, 630 So. 2d 1103 (Fla. 1993) (Jorgenson dissenting), citing Abdel-Fattah v. Taub, 617 So.2d 429 (Fla. 4th DCA 1993); (trial court ordered to determine reasonable cost for nonparty medical expert to compile information regarding defense-requested examinations done by him during past year); Bissell Bros., Inc. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993) (Internal Revenue Service 1099 forms of independent medical examiners subject to discovery as reasonably calculated to lead to relevant evidence concerning bias); Young v. Santos, 611 So. 2d 586 (Fla. 4th DCA 1993) (doctor ordered by trial court to produce copies of bills, checks, and

payment records regarding medical exams done at request of insurance companies and law firms, as well as tax returns, for three-year period; doctor's overall income not discoverable and that other less intrusive means of discovering information should be explored first); Crandall v. Michaud, 603 So. 2d 637 (Fla. 4th DCA 1992) (independent medical examiner not required to provide patient reports prepared for defense law firms or insurance agencies over past two years; 1099 tax forms or records of payments from insurers or defense law firms would be easier to locate and more relevant to issue of bias); Wood v. Tallahassee Memorial Regional Medical Ctr., Inc., 593 So. 2d 1140 (Fla. 1st DCA 1992) (trial court properly ordered independent medical examiners to produce for in camera inspection tax returns for previous five years to extent they reflected income from involvement in medical malpractice cases), rev. denied, 594 So. 2d 1281 (Fla. 1992); Dollar General, Inc. v. Deangelis, 590 So. 2d 555 (Fla. 3d DCA 1991) (1099 tax forms of defense medical expert discoverable if not unduly burdensome); McAdoo v. Ogden, 573 So. 2d 1084 (Fla. 4th DCA 1991) (same); State Farm Mutual Auto. Ins. Co. v. Gray, 546 So. 2d 36 (Fla. 3d DCA 1989) (same).

[3] A study conducted by the ABA section on Litigation's Jury Comprehension Committee noted that jurors easily identified "hired guns" and discounted their testimony accordingly. Mayne, Jury Comprehension on Study Completed, LITIGATION NEWS 1(Feb. 1990); See also R.J. Gerber, Victory vs. Truth: The Adversary System and Its Ethics, 19 Ariz. St. L.J. 3, 11 (1987) ("Because people perceive the expert witness . . . as capable of being bought and sold, these experts testify with an aura of disrepute.").

[4] A case giving an example of impeachment of an expert along these lines is Henry v. State, 574 So. 2d 66, 71 (Fla. 1991).

[5] The reason for allowing the particularized identification of cases where the doctor testifies is so that the plaintiff can see how the doctor has testified in past cases and see whether he is taking inconsistent positions. See Richmond v. American Honda Motor Co. Inc., 571 So. 2d 491 (Fla. 2d DCA 1990) (Motorcycle manufacturer, as defendant in products liability action brought by injured passenger was entitled to discover through requests for admissions, substantive testimony that passenger's experts had given testimony in previous cases.)

[6] An audit of an IME physician's patient files without notice to or consent of the patients involved violates the statutory confidentiality of said files. § 455.241(2), Fla. Stat. (1993); see Crandall v. Michaud, 603 So. 2d 637 (Fla. 4th DCA 1992).

[7] Clearly, a trial court has no authority to order the discovery

of nonexistent records. Bissell Bros. v. Fares, 611 So. 2d 620 (Fla. 2d DCA 1993); Balzebre v. Anderson, 294 So. 2d 701 (Fla. 3d DCA 1974).

[8] Here, the disclosures made by Dr. Glatzer, in fact, exceed that which we have outlined. Dr. Glatzer gave an estimate for the total number of IME's performed each year, compared with the total patient load, and also provided an estimate for the number of times he testifies each year at deposition and at trial. Not required under our analysis but also provided, was an estimate of the amount of money that he makes each year from IME's. (If asked by the plaintiff, of course, Dr. Glatzer may be required to identify specifically the cases in which he has testified, going back a reasonable period of time.)