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.

ON CERTIFICATION FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

INITIAL BRIEF OF PETITIONER, MICHAEL ROTH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND ORDINANCES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

The Third District concluded that production of 1099 forms and P.A. tax returns of the defendant's examining physician was overly intrusive and that a less burdensome route of discovery should be followed. *Syken v. Elkins*, 644 So. 2d 539 (Fla. 3d DCA 1994). This decision is incongruous in light of the facts of this case. The trial court in fact tried various less burdensome alternatives to the production of these documents, only to be thwarted by Dr. Gregory's professed inability to comply.

Roth initially requested production of medical examination reports and bills for examinations conducted by Dr. Gregory at the request of defendant's law firm, Adorno & Zeder, P.A., or defendant's insurer.[1] Record ("R.") at 29. The defendant, Plaza of the Americas, objected to this request on the grounds that it was "vague, over broad, and unduly burdensome." R. 74. In its order on Roth's motion to compel, the trial court fashioned an alternative which did not require the production of documents which would disclose the doctor's income. The court ordered Plaza of the Americas to obtain from Dr. Gregory "an affidavit identifying every person examined by or about whom Dr. Gregory has testified, at the request of or pursuant to an authorization of the lawfirm of Adorno & Zeder, P.A." R. 29.

This less intrusive alternative failed, however, because Dr. Gregory claimed that he was unable to identify such examinations. In response to the court's order, Dr.

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[1] The Third District's statement that Roth requested this information by interrogatory is incorrect.

Gregory filed an affidavit in which he swore that he could not even estimate the number of times he had seen patients or had testified at the request of the law firm.

> 1. I maintain my patient files in alphabetical order by patient name. I have thousands of them for the last calendar year alone. I maintain no retrieval system which would allow me to determine the number of times I have seen a patient at the request of Adorno & Zeder, P.A., nor any system by which [I] could estimate the number of times I have testified for Adorno & Zeder, P.A. I can therefore make no estimate as to the number of times I have testified or seen patients for Adorno & Zeder, P.A.

R. 76.

Roth then subpoenaed Dr. Gregory to produce his bills, journals, ledgers and 1099 forms pertaining to examinations performed at the request of any insurance company or law firm since 1991. R. 25, paras. 3 & 4. Dr. Gregory objected to this subpoena as unduly burdensome, irrelevant, and in breach of his "confidentiality interests." R. 27. The trial court overruled his objections in its order dated July 29, 1993. *Id.* at 33.

Instead of then complying with the subpoena and the order or appealing, Dr. Gregory filed another affidavit stating that his filing system did not permit the ready retrieval of the requested information, which could be obtained only by a time-consuming review of each file. R. 36-37. He also asserted that neither he nor his accountant had the 1099 forms "as they are discarded as they come in." *Id.* at 37, para. 7. Dr. Gregory made no mention of his privacy concerns in this affidavit. Roth

moved to hold Dr. Gregory in contempt, to preclude him from testifying as a witness, and for sanctions. *Id.* at 38-39.

The trial court did not grant Roth's motion. Instead, in its order of September 17, 1994, the court required Dr. Gregory to sign a release for the IRS to provide copies of his "discarded" 1099 forms to Roth. R. 46. In addition, the court ordered Dr. Gregory to produce his P.A. tax returns for 1990, 1991, and 1992. *Ibid.*

Plaza of the Americas and Dr. Gregory filed a petition for writ of certiorari with the Third District Court of Appeal to quash the September 17 order. The Third District consolidated the petition with a similar petition in the case of Elisa Syken vs. Max Elkins and Marion Elkins. The Third District granted the writ and quashed the order in *Syken v. Elkins*, 644 So. 2d 539 (Fla. 3d DCA 1994). On October 26, 1994, the Third District certified its *en banc* decision as in conflict with several decisions of other district courts of appeal. Elkins and Roth filed a joint Notice of Invoking Discretionary Jurisdiction of Supreme Court on October 27, 1994.

THE STANDARD OF REVIEW

The trial court possesses broad discretion in protecting parties against possible abuses of discovery procedures, "and only an abuse of this discretion will constitute fatal error." *Eyster v. Eyster*, 503 So. 2d 340, 343 (Fla. 1st DCA 1987), *rev. denied*, 513 So. 2d 1061 (Fla. 1987). Furthermore, before review by certiorari will be granted, the petitioner must demonstrate that the order complained of does not conform to the essential requirements of law. *Id.* at 342.

> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Jones v. State, 477 So. 2d 566, 569 (Fla. 1985) (Boyd, J. concurring).

SUMMARY OF THE ARGUMENT

This case requires the court to balance the interests of a professional expert witness in keeping his income private against the need of the party confronted by the expert to impeach the witness by showing the bias created by his or her financial interest.

Because a professional witness injects himself or herself into litigation for a fee, Florida cases hold that such a witness waives any right to object to discovery designed to reveal bias. This principle is even more appropriately applied to "venal" expert witnesses, who earn a substantial portion of their income routinely testifying for a particular side. Privacy concerns of such professional witnesses do not outweigh the need to discover and inform the jury of income derived from their decision to pursue such employment.

The party opposing an expert witness faces many difficulties in cross-examining the professional witness caused by the liberal rules of evidence, the specialized knowledge of the expert, and the well-trained witness' facility at handling cross-examination. Such a party needs to inquire fully into the income derived by a professional witness to effectively impeach for bias. A professional expert's pecuniary interest extends not only to the fee earned in a particular case, but to the increased likelihood of lucrative future employment which effective testimony in a particular case procures. The amount of income earned by the venal expert from all of his or her testimony as an expert, and the percentage of his or her livelihood which such

payments represent, are essential to show the full extent of the expert's financial interest in providing effective testimony for his or her employer.

The Third District failed to defer to the trial court's discretion in discovery matters. It was not for the district court of appeal to decide whether discovery was or was not overly intrusive in this case. In this case, Dr. Gregory had failed to comply with previous less intrusive discovery, leading the trial court to order production of his business tax returns and execution of authorizations for his 1099 forms.

The guidelines established by the Third District are unfair and unworkable. This Court has repeatedly held that the approximations of an interested party as to his or her income is not sufficient. Such secondary non-verifiable conclusions cannot suffice in lieu of primary detailed facts, particularly when the witness making the assertion is exempted from further meaningful scrutiny. Without primary materials, an expert's testimony cannot be effectively refuted, nor the witness cross-examined, and the expert witnesses will have free rein to obfuscate their actual interest. In this case, Dr. Gregory has already claimed by affidavit that he simply cannot even estimate the time he has spent or the number of cases he has handled for defendant's counsel. The guidelines would require Roth to accept such testimony at face value and desist from further inquiry, thus denying him his right to cross-examine adverse witnesses for bias.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW BY ORDERING A "PROFESSIONAL" EXPERT WITNESS TO PRODUCE AUTHORIZATIONS FOR DISCARDED 1099 FORMS AND P.A. TAX RETURNS IN ORDER TO REVEAL THE ACTUAL INCOME DERIVED BY THE WITNESS FROM EXPERT TESTIMONY AND THE ATTENDANT BIAS.

Rule 1.280(c), Florida Rules of Civil Procedure, gives the trial court discretion, upon a showing of good cause, to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." "Under this authority, a court may act to protect the privacy of the affected person." *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533, 535 (Fla. 1987). In determining whether good cause exists, 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." *Ibid.* Good cause exists only where the potential for significant harm far outweighs the probative value of and the propounding party's need for the discovery. *See id.* at 538; *North Miami General Hospital v. Royal Palm Beach Colony, Inc.*, 397 So. 2d 117 (Fla. 3d DCA 1981).

The potential harm to Dr. Gregory arises only from the annoyance and embarrassment which the disclosure of financial information might cause. There is no claim that Dr. Gregory is unduly burdened by signing a release and producing three of his P.A.'s tax returns. On the other side of the scales, Roth needs to discover information

which he can use to impeach Dr. Gregory by showing that he earns a significant portion of his livelihood by testifying for defense law firms and insurance companies, and can thus be expected to fashion his testimony to ensure his future employment.

The Third District's balancing of these interests shows an undue concern for the privacy interests of these professional testifier/consultants, an indifference to the corrupting influence of such witnesses on the litigation process and the concomitant need to show their bias, and a lack of appreciation for the genuine difficulties involved in impeaching such witnesses.

A. The interests of the professional expert witness in protection from annoyance and embarrassment in the disclosure of financial information.

This case does not involve the occasional or coincidental expert witness, who receives a fee for testifying but chiefly earns his livelihood from his professional practice or from teaching. This case rather involves a noxious byproduct of modern litigation -- the "professional" expert witness. "The use of the expert witness has become so prevalent that certain expert witnesses now derive a significant portion of their income from litigated matters." Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 Ind. L. J. 35 (1977-78) (hereafter "Graham"). These experts have been called "venal" in the sense that their testimony may be bought for money and are open to corrupt influence; "[i]n other words, a paid whore." Graham, *supra*, at 36. *See also, State ex rel. Lichtor v. Clark*, 845 S.W.2d 55, 61 (Mo. App. 1992) ("A 'venal' expert is an expert whose opinions are available to

the highest bidder -- a mercenary."); Gerber, *Victory vs. Truth: The Adversary System and its Ethics*, 19 Ariz. St. L. J. 3, 11 (1987) ("Some experts become professional testifiers, advertising their availability and pliability in legal journals. Lawyers on both sides commonly call them 'whores.'").[2]

The dangers presented by professional experts to the search for truth have been widely recognized.

> The practice of shopping for experts, *the venality of some experts*, and the reluctance of many experts to involve themselves in litigation, have been matters of deep concern.

Advisory Committee's Note to Fed. R. Evi. 706 (emphasis added). *See also* Graham, *supra*, at 36. Indeed, some courts have considered disqualifying such expert witnesses for lack of objectivity. *See State ex rel. Lichtor v. Clark*, *supra.*

> [T]he professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."

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[2] The Third District has recognized that Dr. Gregory "consistently and repeatedly" testifies for the defense in personal injury trials. *Secada v. Weinstein*, 563 So. 2d 172, 173 (Fla. 3d DCA 1990).

In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1233-34 (5th Cir. 1986). Since physicians are generally perceived to be objective and impartial, doctors who become professional witnesses deserve special inquiry into their objectivity.

> When it is shown that a physician, particularly a physician who makes a living primarily as a consultant and testifier, derives a substantial percentage of professional income from one law firm, that fact alone may justify further inquiry into factors reflecting upon the professionalism and objectivity of the witness.

State ex rel. Lichtor v. Clark, *supra*, at 63.

Because of these concerns, Florida courts have given little or no weight to the privacy interests of venal experts on the scales of the Rule 1.280(c) balance. In *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, 593 So. 2d 1140 (Fla. 1st DCA 1992), *rev. denied*, 599 So. 2d 1281 (Fla. 1992), for instance, the court held that the trial court properly required the production of the tax returns of non-treating medical experts over an objection that such production would constitute an unjustified invasion of the witnesses' right to privacy. The court reasoned that the expert witnesses had no right to privacy because, "[i]n the vast majority of cases, any claim of privacy as to such clearly relevant information should be found to have been relinquished by the expert's agreement to testify for remuneration." *Id.* at 1142. *Accord*, *B & L Service, Inc. v. Airport Rent-A-Car, Inc.*, 19 Fla. L. Weekly D2559 (Fla. 4th DCA Dec. 7, 1994).

> This reasoning makes sense when one considers that expert witnesses inject themselves into litigation and, by

> so doing, impliedly waive any right to invasive discovery requests designed to reveal bias.

Winn-Dixie Stores, Inc. v. Miles, 616 So. 2d 1108, 1111 (Fla. 5th DCA 1993).

Professional expert witnesses inject themselves into litigation purely for their own profit. They are not like those witnesses, such as the treating physician in *Miles, supra*, who do not choose to participate in litigation but are involuntarily drawn into it as fact witnesses. The Third District, in conflict with the foregoing cases, failed to make this distinction. The voluntary and self-serving participation of Dr. Gregory as a non-treating professional medical expert waived his right to object to the discovery of financial information designed to reveal his bias.

B. The need to impeach the professional expert witness by showing his income from testifying or consulting.

Experts are vital to the persuasion of jurors. Empirical studies prove that jurors are strongly influenced by expert testimony. *See* Raitz, Greene, Goodman and Loftus, *Determining Damages, The Influence of Expert Testimony on Jurors' Decision Making*, 14 Law and Human Behavior No. 4 at 385 (1990). The power of persuasion of an expert has elsewhere been acknowledged by the Third District. *See Key v. Angrand*, 630 So. 2d 646, 650 (Fla. 3d DCA 1994) (expert testimony as to matters of common understanding "was unfairly prejudicial because of the possibility that the jury would give such testimony, coming as it did from an expert, undue weight.").

1. Difficulties in cross-examining professional experts.

The rules of evidence deal all the cards to the party proffering the expert. *See* Graham, *supra* at 38-39. Under section 90.702, Florida Statutes, anyone with specialized knowledge that will assist the trier of fact can qualify as an expert. Section 90.703 permits the expert to give an opinion on an ultimate issue to be decided by the jury, and section 90.705 permits the expert to do so without disclosing the underlying facts or data on which the opinion is based. Section 90.704 permits the expert to rely on facts and data which are not admissible as evidence.

Furthermore, the credibility of the expert witness is unjustly enhanced when the jury hears the trial court qualify the witness as an "expert." *See* Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537 (July, 1994); Nielsen and Franco, *Purchased Testimony: The Problem of Professional Expert Witnesses*, Defense Counsel Journal, Oct. 1990, at 525 ("A large part of the problem [of the corrupting influence of expert testimony] is that experts are "clothed with the sanctity of judicial authority.").

These rules make effective cross-examination of experts, especially unscrupulous professional experts, difficult. *See* Graham at 40-41.

> Cross-examination has been made more difficult in part by the increased latitude given experts when rendering opinions. . . . Although we view this expansion as prudent, we do recognize the added burden which these changes place upon a party during cross-examination in

> attempting to discredit his opponent's expert, and we also recognize that these changes heighten the importance of such cross-examination.

Trower v. Jones, 121 Ill.2d 211, 520 N.E.2d 297, 299 (1988).

Even further compounding this difficulty is the commanding presence of professional expert witnesses who have mastered the art form of testifying. Such witnesses may appear in court more often than trial counsel. "Such experts with their vast amount of litigation experience become exceptionally proficient in the art of expert witness advocacy." Graham at 40.

> As this case helps illustrate, many experts today spend so much of their time testifying throughout the country that they might be deemed not only experts in their field but also experts in the art of being a persuasive witness and in the art of handling cross-examination. As was stated in *Kemeny v. Skorch* (1959), 22 Ill.App.2d 160, 159 N.E. 2d 489, little has the nonlitigating public (including the jury) realized "the true rhetorical masterpieces that come from the lips of medical experts."

Trower v. Jones, supra at 299. The danger presented by such skilled expert testimony is that "experts may set the standard of care, imbue the jury with their view of the facts and assume an advocate's role, all in the guise of an impartial arbiter." Nielsen and Franco, *Purchased Testimony, supra,* at 529-30.

2. The need to show the expert's financial interest.

Faced with the arduous task of cross-examining a professional expert possessing technical expertise in matters often foreign to lawyers and who are veterans of innumerable cross-examinations at the hands of seasoned trial counsel, "the availability of impeachment of the expert witness through a showing of bias due to financial interest takes on additional importance." Graham at 41. "Effective cross-examination of a professional expert witness requires a broad construction of counsel's right to inquire into the financial interest of the expert witness." *Id.* at 35-36. *See Trower v. Jones, supra* at 300 ("the principal safeguard against errant expert testimony is the opportunity of opposing counsel to cross-examine, which includes the opportunity to probe bias, partisanship or financial interest."); *Contini v. Hyundai Motor Co.*, 149 F.R.D. 41, 42 (S.D. N.Y. 1993) ("Requiring the fullest disclosure of potential sources of partiality of expert witnesses represents an important if incomplete response to this problem."). The discovery and disclosure of the expert's financial interest exposes the expert's bias and propensities and shows the jury that he is not an impartial arbiter but a paid advocate -- another actor on the litigation stage. *See* Nielsen and Franco, *Purchased Testimony, supra,* at 530.

Contrary to the Third District's opinion, the fee which a *professional* expert witness earns in a particular case is only the tip of the iceberg of his financial interest. A professional witness depends for his or her livelihood upon continued employment, in this instance by the defense bar and insurance companies. Rendering effective

testimony in a particular case will increase the likelihood or the volume or the price of the wtiness' future employment. The court in *Trower v. Jones, supra,* allowed cross-examination of a professional expert witness concerning his annual income from serving as an expert witness, refusing to limit the evidence to the fee earned in a particular case or for a particular party or for a particular attorney, because "the financial advantage which accrues to an expert witness in a particular case can extend beyond the remuneration he receives for testifying in that case." 520 N.E.2d at 300.

> A favorable verdict may well help him establish a "track record" which, to a professional witness, can be all-important in determining not only the frequency with which he is asked to testify but also the price which he can demand for such testimony. We find pertinent the following commentary from a recent annotation:
>
> "That an expert in a particular field may be in effect a 'professional witness' in lawsuits, rather than being more or less exclusively a practitioner whose employment in a lawsuit as a witness is merely incidental to his or her profession, is a matter which is likely to bear on the credibility of that expert, since a significant portion of the expert's livelihood may thus depend on his or her desirability as a favorable and convincing witness, thus possibly leading to a temptation for the witness to color findings and testimony to suit the needs of the proponent party, rather than to evaluate and present the subject matter of the testimony with complete impartiality." (39 A.L.R.4th 742, 746 (1985).)

Ibid. See also Graham at 46.

The amount of the income earned by the venal expert from all of his or her testimony as an expert, and the percentage of his or her livelihood which this income

represents, illuminate the true nature of the financial interest which such experts have in their testimony. *See* Graham at 50. The discovery propounded by Roth was directly and narrowly focused on these issues. The 1099's would show the income earned from insurance companies or defense counsel or would lead to the discovery of that evidence. The P.A. tax returns (although not requested by Roth) would show the doctor's total professional income, and thus the percentage of his livelihood attributable to his service as an expert.

3. The perception of jurors.

The Third District, however, opined that Roth did not need to discover or present to the jury Dr. Gregory's income as an expert because jurors easily identify "hired guns" and discount their testimony accordingly. 19 Fla. L. Weekly at D2112 n.3. This unsupported conjecture[3] is directly debunked by the empirical studies on this subject, which conclusively show that jurors, in fact, attach an aura of credibility to experts which is not easily detached. *See* Richey, *supra*, at 154 F.R.D. 544-45. In a survey of jurors serving in 40 jury trials over a three-month period, only 35 percent stated that payment of the expert meant that the expert could not be trusted to be unbiased; the remaining 65 percent stated that the expert testimony was crucial to the outcome of the case. Champagne, Shuman and Whitaker, *Expert Witnesses in the*

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[3] The articles relied upon by the Third District are not authoritative. The "Litigation News" article merely synopsizes a report conducted on a mere four jury trials. No data is presented. The Gerber article is merely a rambling editorial on lawyer ethics advocating tort reform with no pretension to any factual basis.

Courtroom: an Empirical Examination, 76 Judicature 5,8 (June-July 1992). The concept that the jury can detect the fraud perpetrated by a careful and well-trained expert is absurd. Graham at 41.

Indeed, the issue of bias is especially important in personal injury cases since "medical experts are believed by many to be the most scrupulous group of expert witnesses regularly testifying." Graham at 38.

> A mercenary with professional qualifications is likely to be a greater hindrance to a fair trial than a biased lay witness. . . . The physician is a person who, it is understood, has been specially trained in clinical objectivity and scientific precision. The physician has been schooled in the ethics of the hippocratic oath and its commitment to the highest principles of idealism and virtue. The physician is seen, by virtue of calling, as impartial. A physician is also perceived as a busy, important, intelligent person. The physician is referred to by all parties as an "expert."

State ex rel. Lichtor v. Clark, 845 S.W. 2d 55, 61 (Mo. App. 1992) (allowing discovery of physician's annual income derived from employment as expert witness to show lack of objectivity).

4. Conflict with other districts.

In light of the above concerns, other Florida district courts give great weight to the need of a party opposing a professional witness for disclosure of the expert's income from all expert testimony to show bias. This weight is shown by the courts' statement that such discovery is "extremely relevant." *See Wood v. Tallahassee Memorial Regional Medical Center, Inc., supra,* at 593 So. 2d 1142. In all of these

cases, the need of the opposing party for 1099 forms, tax returns, or other documents evidencing or leading to evidence indicating the actual income earned by the witness as an expert and the percentage that income bears to his or her overall income has been held to outweigh the privacy interests of venal experts. *See Wood, supra* (tax returns and other records "contain information which is extremely relevant to the credibility of petitioner's experts . . . ."); *Bissell Bros., Inc. v. Fares*, 611 So. 2d 620, 621 (Fla. 2d DCA 1993) (1099 forms "clearly subject to discovery as reasonably calculated to lead to the discovery of relevant, admissible evidence concerning the physician's bias."); *McAdoo v. Ogden*, 573 So. 2d 1084, 1085 (Fla. 4th DCA 1991) (bills for services rendered as defense expert examiner "relevant in that it might serve to demonstrate the witness's [sic] potential bias, if, as respondents suggest, a significant part of the doctor's income is derived from insurance company business."). *See also, Crandall v. Michaud*, 603 So. 2d 637, 639 (Fla. 4th DCA 1992) (payment records for IME's "relevant to the credibility of the physician as an expert witness; if a great amount of a defense medical expert's income comes from performance as a defense expert, the impartiality of his reports may be suspect.").

The Third District's contrary position ignores the dangers presented by professional expert witnesses to the search for truth, the difficulties of cross-examining those witnesses, and the significance which the revelation of their core financial interest will have on their credibility with the jury. The Third District's decision unduly favors the already potent professional expert. Because the trial court's decision did

not cause an inherent illegality or gross miscarriage of justice, the district court erred in granting certiorari and its decision should be quashed.

C. Effective impeachment requires discovery of primary information concerning actual income as an expert witness

The Third District decided that "less intrusive" means are available to reveal the bias of expert witnesses without disclosing their income. The guidelines set by the Third District prohibit a party from discovering the actual income earned by the expert from services rendered as an expert or the total professional income of the expert. The party opposing the paid witness must rely exclusively upon the self-serving approximations of the witness as to the percentage of his or her time devoted to or income derived from service as an expert. A party may obtain this information only through a deposition. *Elkins v. Syken,* 19 Fla. L. Weekly at D2111.

The issue of what constitutes overly intrusive discovery in a particular instance is one for the trial court, not a district court of appeal. In *Lambe v. Dewalt*, 600 So. 2d 1201 (Fla. 4th DCA 1992), for instance, the court denied a petition for writ of certiorari to quash an order requiring a medical expert to produce documents pertaining to his employment as a defense expert even after the doctor had testified on this matter.

> The trial court certainly does not depart from the essential requirements of law simply because it orders the production of material which may be cumulative of testimony. While the court in its discretion might limit the production of documents where testimony gives the plaintiff enough

> "ammunition" to impeach the witness at trial, I think that is a discretionary call by the trial court.

Id. (Warner, J. concurring). The "guidelines" established by the court clearly violate the scope of a trial court's discretion to deal with discovery matters. "[T]he trial court has a wide discretion in its treatment of discovery problems which we will not ordinarily disturb." *Charles Sale Corp. v. Rovenger*, 88 So. 2d 551, 553 (Fla. 1956). *See also, Orlowitz v. Orlowitz*, 199 So. 2d 97, 98 (Fla. 1967). Since such matters vary with each different case, the Third District should have deferred to the trial court's discretion.

The Third District's specification of a deposition as the only appropriate means of discovery directly affronts Rule 1.280(a), Florida Rules of Civil Procedure, which provides that discovery may be had "by one or more of the following methods: . . ."

The Third District incongruously called for less intrusive discovery in this case -- less intrusive means had previously been tried but were obstructed by Dr. Gregory. *See* Statement of Facts, *supra*. This case is similar to *Wood v. Tallahassee Memorial Regional Medical Center, Inc., supra*, where the court held that the inability of the opposing party to obtain the information in a less intrusive fashion (the experts were unable or unwilling to answer questions at deposition) justified the production of tax returns and other financial records. As the trial court in this case obviously and correctly believed, the obstruction of discovery by the expert compounds the need for independent sources to verify his or her income.[4]

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[4] Had the trial judge sanctioned Dr. Gregory's disobedience of its order overruling his objection to producing evidence of the extent of his work as a paid witness, by precluding his participation at trial, as urged by Roth, such would have comported

The concept that a party must accept the naked approximations of an interested witness as to his or her income when that income is relevant has been frequently rejected by this Court. In the context of determining a spouse's income, this Court quoted with approval the following passage from *Parker v. Parker*, 182 So. 2d 498 (Fla. 4th DCA 1966):

> "We must say, based upon our understanding of the Rules and the philosophy behind them, that we do not look with favor upon the husband's position in not wishing to reveal any of the details of his financial position and his effort to bridle the dependents' discovery rights by substituting his secondary non-verifiable conclusion in lieu of primary detailed facts. The adversary and the court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had."

Orlowitz v. Orlowitz, 199 So. 2d 97, 98 (Fla. 1967). In *Tennant v. Charlton*, 377 So. 2d 1169 (Fla. 1979), this Court refused to accept a sworn statement of the defendant's current assets in lieu of the production of tax returns where a claim for punitive damages put the assets of the defendant in issue. Because of a witness' tendency to minimize or exaggerate his finances when expedient, "'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.'" *Id.* at 1170, quoting *Donahue v. Hebert*, 355 So. 2d 1264

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with precedent. *See Brinkerhoff v. Linkous*, 528 So. 2d 1318 (Fla. 5th DCA 1988); *Mercer v. Raine*, 443 So. 2d 944 (Fla. 1983); and *Fla. Power & Light Co. v. Kennedy*, 549 So. 2d 247 (Fla. 5th DCA 1989).

(Fla. 4th DCA 1978). *See also*, *Lay v. Kremer*, 411 So. 2d 1347 (Fla. 1st DCA 1982); and *Medel v. Republic Nat'l Bank of Miami*, 388 So. 2d 327 (Fla. 3d DCA 1980).

Adequate discovery of primary information is essential to effective cross-examination. Under the Third District's guidelines, a party must accept the subjective approximations of the expert. Without primary materials, the expert's testimony cannot be cross-examined. Without the threat of verification, the expert can lie or profess ignorance with impunity. "It must also be recognized, however, that a venal expert could not be expected to fully answer inquiries as to which the witness is not required to produce documentation." *State ex rel. Lichtor v. Clark, supra*, at 65.

The Third District's guidelines are practically unworkable and highly detrimental to the party attempting to impeach the venal expert. As demonstrated by the experts in *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, *supra*, deposition questions seeking information concerning their participation as experts in other cases will be "met uniformly by inability to recall, or by vague and evasive answers." 593 So. 2d at 1142. That problem is fully illustrated in this case. Dr. Gregory has already stated in his affidavits that he cannot estimate the number of IME's he has performed nor the income he has received. Under the Third District's guidelines, Roth must accept such testimony and cannot seek the production of documents which would reveal Dr. Gregory's income. Such a result is manifestly unfair and denies Roth his right to impeach witnesses granted by Section 90.608, Florida Statutes.

Under the Third District's decision, the experts will thus escape effective cross-examination into their bias, without which the jury will be unable to see that they are

in fact paid advocates posing as impartial arbiters. Invigorated by this exemption from discovery and certain that the attorneys cross-examining them are saddled with empty briefcases with which to challenge their "estimations" of bias, these witnesses-for-hire will inevitably admit minimal or nonexistent enrichment from their trade, or worse assert that their expertise is essentially donated as a form of truth-finding civil service. It is odd that the very same witnesses whom the Third District asserts juries are loath to accept as credible are empowered by that court to serve as the sole filter of the evidence concerning their bias. The result will be a charade and a fraud upon the jury which misrepresents the true relationship between the defense and the expert witness not unlike that condemned by this Court, in the context of Mary Carter agreements, in *Dosdourian v. Carsten*, 624 So. 2d 241, 244 (Fla. 1993).

D. Cases from other states.

Several cases from other states allow discovery of the income earned by venal experts from their expert services. *See State ex rel. Creighton v. Jackson*, 879 S.W. 2d 639 (Mo. App. 1994) (production of Schedule C's and 1099 forms at deposition within discretion of trial court); *State ex rel. Lichtor v. Clark*, *supra* (production of tax returns and billing statements within discretion of trial court); *Plitt v. Griggs*, 585 So. 2d 1317 (Ala. 1991) (ordering plaintiff's expert witness to reveal the name of his accountant allowed where accountant could divulge information concerning percentage of income received from testifying as an expert). *See also*, *Trower v.*

Jones, supra (annual income received from working as an expert witness proper subject of cross-examination).

Of the cases cited by the Third District, the Alabama supreme court effectively receded from the broad language of *Ex Parte Morris*, 530 So. 2d 785 (Ala. 1988), relied upon by the Third District, in *Plitt v. Griggs, supra*. In *Jones v. Bordman*, 759 P.2d 953 (Kan. 1988), the court in fact held that a party may properly seek discovery of what percentage of a physician's practice involves examining and testifying for defendants "and what he is paid for such work . . ." *Id.* at 962. The court merely held that the details of medical reports prepared by the expert should not be disclosed. In *Mohn v. Hahnemann Medical College and Hospital of Philadelphia*, 515 A.2d 920 (Pa. Super. 1986), *appeal discontinued*, 527 A.2d 542 (Pa. 1987), the issue was not one of discovery but whether an expert's total income, including that from his patients, was admissible. The court limited admissibility only to those payments received from defense counsel's law firm. *Id.* at 925. In *Allen v. Superior Court of Contra Costa County*, 151 Cal. App. 3d 447, 198 Cal. Rptr. 737 (1984), the court held that discovery of an expert's compensation from defense work was permissible, but only by deposition without production of documents which would reveal exact information. That this procedure is contrary to Florida law has previously been demonstrated.

CONCLUSION

Petitioner, Michael Roth, requests this Court to quash the decision of the Third District Court of Appeal and affirm the order entered by the trial court.

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CERTIFICATE OF SERVICE

WE CERTIFY that a copy hereof has been furnished to all counsel on the attached service list by mail this 5 day of January, 1995.

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