

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL.)
REBECCA E. POOKER, BY AND)
THROUGH HER NEXT FRIEND,)
NORMAN POOKER,)

RELATOR,)

vs.)

APPEAL NO: SC 87878

THE HONORABLE GARY P.)
KRAMER CIRCUIT JUDGE,)
DIVISION 2)
MISSOURI CIRCUIT COURT,)
23rd JUDICIAL CIRCUIT,)
COUNTY OF JEFFERSON,)

RESPONDENT.)

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Procedural Status

Russell Macke suffered painful and permanent injury to his left knee in a motor vehicle collision attributable to the carelessness and negligence of Rebecca E. Pooker. Mr. Macke and his wife filed a personal injury action against Ms. Pooker (A1)¹. In the course of the litigation, Defendant Pooker arranged a medical examination of Mr. Macke by orthopedist Marvin Mishkin, M.D., which occurred on April 24, 2006 (A15, A16). On May 11, 2006, Defendant served notice that a video deposition of Dr. Mishkin was to take place on June 14, 2006, at 11:00 a.m. (A17). On May 30, 2006, Plaintiffs served notice of deposition on Metropolitan Orthopedics, Ltd., the corporation employing Dr. Mishkin, scheduled two hours earlier on the same day as the previously scheduled deposition (A6). The corporation was to designate a person to testify, relating to four areas of inquiry.

Attached to the Subpoena For Taking Deposition was a listing of documents to be produced (A12). These documents corresponded to the four areas of inquiry (A8). On June 2, 2006, Defendant filed a

¹ Exhibit references are to Defendant/Relator's Exhibits included in the Appendix to Brief of Relator.

Motion to Quash (A20). The corporation made no separate effort to quash the subpoena. On June 9, 2006, the matter came on for oral argument on the Motion (A34). Following oral argument, the trial court took the matter under advisement. Subsequently, the trial court denied the Motion in a Memorandum (A14).

Defendant obtained a stay of both the court's order and the depositions of Metropolitan Orthopedics, Ltd., and Dr. Mishkin, in order to file a Petition for Writ of Prohibition (A46). Defendant filed the Petition and the Missouri Court of Appeals, Eastern District issued a Preliminary Order in Prohibition, directing that answer to the Petition in Prohibition be filed on or before July 11, 2006 (A47). Following the parties' submission of memoranda to the Court of Appeals for the Eastern District of Missouri, the Court of Appeals denied Defendant/Relator's Petition for Writ of Prohibition (A48), whereupon Defendant/Relator filed a Petition in this Court.

The Circumstances and The Actual Request

The context in which the subpoena duces tecum was issued is essential to understanding the function to be served by the requested materials. Defendant had scheduled a videotape deposition of Dr. Mishkin, the physician engaged by the law firm representing the

Defendant to examine Plaintiff.² Presumably, the video deposition would be played at trial in lieu of Dr. Mishkin's appearance as a live witness. Consequently, the deposition setting would be the only opportunity afforded Plaintiffs' counsel to inquire of Dr. Mishkin. Jurors are instructed before trial commences that "In considering the weight and value of the testimony of any witness, you may take into consideration ... the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully, and the probability or improbability of the witness' statements. You may give any evidence of the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive." MAI 2.01 [2002 Revision]. The video deposition of Dr. Mishkin, with the information requested in the subpoena duces tecum directed to Metropolitan Orthopedics, Ltd. for reference, would serve as Plaintiffs' only effective means for cross-examination of Defendant's key witness.

² While the lawsuit was filed by both Russell Macke and his wife, Janice Lee Macke, it is only Plaintiff Russell Macke who was examined by Dr. Mishkin.

It is important to also note the actual listings under Documents To Be Produced. Critical to the decision as to whether the Preliminary Writ is dissolved or made permanent, is what the Plaintiffs' subpoena actually calls for and even more significantly, what is not requested.

The document requests each cover the calendar years 2002 through 2006. The requests relate to **medical services** rendered by Dr. Mishkin. The definitions in the Notice of Deposition apply to the subpoena duces tecum and read as follows:

“Medical services shall include treatment, examination, diagnosis, testing, reporting, evaluation, rating, consultation, record review and testimony of any nature including deposition testimony and trial testimony related to any person having a legal claim or potential claim for injuries or damages.”

This definition covers individuals who consult with or are seen by Dr. Mishkin for the purpose of a medical evaluation related to a legal claim or potential legal claim. The documents to be produced do not call for a comprehensive list of patients seen in the practice for all treatment modalities. *No name of any patient* was requested nor

was any form of information ever sought that could conceivably identify a patient. Rather, the inquiries and documents relate to the number of persons who received **medical services** from Dr. Mishkin; the amount of fees received by Metropolitan Orthopedics, Ltd., and/or Dr. Mishkin as a result of **medical services**; documents memorializing communications between Metropolitan Orthopedics, Ltd./Dr. Mishkin and Brown & James, P.C. (the firm representing Defendant in the personal injury lawsuit); and documents related to the names of other lawyers or law firms requesting **medical services of Dr. Mishkin**.

These requests are in stark contrast to those concerning personal and spousal finances, pensions, accounts, assets and patient names and private information – at times found defectively burdensome and intrusive. See, e.g., *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325 (Mo. App. 1985).

POINTS RELIED ON

The Court's preliminary Writ of Prohibition should be dissolved and the Defendant/Relator's Petition for Writ of Prohibition denied, as Respondent acted within the trial court's jurisdiction and appropriately exercised discretion in ordering the production of materials identified in Plaintiff's Subpoena duces tecum.

- I. Missouri law recognizes that facts showing interest or bias of an opposing party's witness, are not irrelevant or immaterial.
- II. Missouri law supports Respondent's exercise of discretion in ordering the production of materials requested by Plaintiff.
- III. Respondent Judge Kramer adequately explained his order of June 9, 2006.
- IV. Production of the requested materials would not invade any statutory physician- patient privilege nor compromise privacy interests of Dr. Mishkin and non-party patients.

V. Production of the requested materials would not infringe on any work product privilege of counsel for Defendant/Relator or other non-party attorneys, as referenced in the Supreme Court Rules.

ARGUMENT

The Court's preliminary Writ of Prohibition should be dissolved and the Defendant/Relator's Petition for Writ of Prohibition denied, as Respondent acted within the trial court's jurisdiction and appropriately exercised discretion in ordering the production of materials identified in Plaintiffs' Subpoena duces tecum.

(Relator's Point Relied On: Relator is entitled to an order prohibiting Respondent from taking any action other than granting Relator's Motion to Quash, because Respondent exceeded the trial court's jurisdiction and abused his discretion in ordering Dr. Mishkin and his custodian of records to produce the material identified in Plaintiff's Subpoena duces tecum)

INTRODUCTION

This case is about the kind of information to which a party plaintiff in a personal injury case, is entitled when a medical expert is designated by the defendant, and plaintiffs' only opportunity to inquire of the expert, akin to cross examining a witness at trial, will be by video deposition. Determining the appropriate boundaries and scope of discovery requests involves "the pragmatic task of weighing the conflicting interests of interrogator and the respondent... The trial

court must not only consider questions of privilege, work product, relevance, and the tendency of the request to lead to discovery of admissible evidence, it must also balance the need of the interrogator to obtain the information against the responding party's burden in furnishing it, including the extent to which the request will be an invasion of privacy." *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. App. 1985)(internal citation omitted). This need for discovery to be balanced against the burden and intrusiveness involved in furnishing requested information, defines the limitation on discovery rules. Moreover, a trial court is vested with wide discretion to administer the rules of discovery. The court's exercise of discretion will not be disturbed unless exercised unjustly. See, *Great Western Trading Co. v. Mercantile Trust Co. Nat. Ass'n.*, 661 S.W.2d 40 (Mo. App. 1983).

"The interest or bias of a witness and his relation to or feelings towards the parties are never irrelevant matters." *Housburg v. Kansas City Stock Yards Co. of Maine*, 283 S.W.2d 539, 549 (Mo. 1955). The *Kansas City Stock Yards* Court referred to the "universal rule that the pecuniary interest of a witness, or his bias or prejudice, can always be shown, subject only to such limitation upon the extent

of the inquiry as may be imposed by the trial judge in his sound discretion.” *Id.*

In the underlying personal injury case in this matter, Defendant designated Dr. Mishkin as his medical expert and scheduled a video deposition. It was then essential in the interest of responsible representation and effective advocacy, for Plaintiffs’ counsel to document information about the nature of Dr. Mishkin’s consultation services and the proportion of his income derived therefrom. The Missouri Rules and case law recognize that a party is expected to seek information dealing with other lawsuits in which opposing counsel and his or her medical expert were involved.

Under Rule 56.01(b)(4)(a) only the name and the ‘general nature of the subject matter on which the expert is expected to testify’ can be obtained from a party through interrogatories. ... Under Rule 56.01 (b)(4)(b) the facts and opinions held by the expert, and, by implication, relevant information to impeach the expert’s testimony

regarding the facts and opinions held,
are only discoverable by deposition,
coupled perhaps with a motion to
produce the expert's records.

Willis v. Brot, 652 S.W.2d 738, 739-40 (Mo. App. 1983).

Were the portion of the video deposition scheduled by Plaintiff's counsel to have transpired, Dr. Mishkin would have been asked a series of questions, the answers to which would not require any names of patients or any information protected by attorney-client privilege. Dr. Mishkin would have been asked, for example:

- how many individuals he examines on a weekly basis, referred to him by lawyers;
- how many individuals he sees per week in conjunction with worker's compensation claims, with third party claims;
- how long on average does he spend on each type of examination;
- what does he charge for each kind of examination;
- what insurance companies send him business;
- what does he charge for each report he prepares;

- what lawyers send him consultation business and for which side do they do their work.

Surely, these types of questions are permissible to show that an expert is biased or interested. And, as this would be Plaintiff's counsel's sole opportunity for inquiry, documentation would eliminate a situation whereby the deponent's recollection may not be explicit as to these details.

Plaintiffs' requests were not overbroad or unduly invasive. And, if Defendant truly had a question about what was required by the subpoena duces tecum or was legitimately concerned about whether information requested fell under a privilege exception, he could have utilized the Instructions for stating a basis for withholding documents from production (A12).

Plaintiffs' request for Documents To Be Produced and the stated Areas of Inquiry fit well within the logic of the circumstances of the personal injury case. Therefore, this Court should dissolve its preliminary Writ in Prohibition and allow the underlying case, and the appropriate discovery which is part of the litigation, to go forward.

I. Missouri law recognizes that facts showing interest or bias of an opposing party's witness, are not irrelevant or immaterial.

(Relator's Point Relied On: Respondent's order is contrary to Missouri law because there was no basis for compelling production of the requested material because Plaintiffs have wholly failed to support or make any allegations that Dr. Mishkin is a "venal" expert.)

Beginning in the Jurisdictional Statement of Defendant/Relator's Brief and continuing throughout the points relied on in his Brief, Defendant/Relator characterizes the production sought by Plaintiffs of Defendant's medical expert as "extensive" and "non-case related" and "collateral." Defendant/Relator further suggests that Plaintiffs wished to engage in a "paper war." And, switching metaphors, Defendant/Relator insinuates that Plaintiff was on a "fishing expedition" as to the credibility of Defendant's expert witness. Meant as a damning accusation, the Defendant/Relator declares, "Plaintiffs merely feel they are entitled to the discovery at issue." Defendant/Relator claims that it is incumbent upon Plaintiffs to demonstrate both exceptional circumstances and the venality of

Defendant's expert, Dr. Mishkin, before a trial court could allow elicitation of information that could be used to establish bias.

Plaintiffs' actual request (A12) with its reference to the definitions including that of "Medical services" (A7-A8), belies that they are seeking "burdensome and extensive discovery." But there is a matter of arguably greater criticality. In the Statement of Facts in his Brief, Defendant/Relator indicates that he requested that Mr. Macke undergo "an independent medical examination by orthopedic surgeon, Dr. Marvin Mishkin." Brief at pp. 9, 40. Dr. Mishkin was not acting in the capacity of an "independent" medical examiner; rather, he was a witness of Defendant, the party procuring the examination. Mo. Rev. Stat. § 510.040; Rule 60.01³. Missouri courts have inherent

³It is apparent that Metropolitan Orthopedics, Ltd., Dr. Mishkin's practice, is in the business of providing "medical services" as defined in Plaintiffs' listing of Documents To Be Produced. See A16 (Metropolitan Orthopedics, Ltd. form titled,

RETURN TO WORK EVALUATION/THIRD PARTY
WORKERS' COMPENSATION
APPOINTMENT CONFIRMATION LETTER,

power to require the physical or mental examination of a party to a personal injury suit. The “physician or physicians so appointed act as officers of the court, and not as agents of either party.” *State ex rel. St. Louis Public Service Co. v. McMullan*, 297 S.W.2d 431, 435 (Mo. Banc 1957). But, where the physician is the agent or witness of one party, here the Defendant, it is axiomatic that the opposing party has the right – and the duty – to acquire the means for vigorous cross-examination.

Relator makes various references to the information sought by Plaintiffs as “collateral discovery,” at one place citing to *State ex rel. Williams v. Lohmar*, 162 S.W.3d 131,134 (Mo. App. 2005). *Williams*, however, did not involve the possible interest or bias of a witness, but rather the standard of care with respect to the type of surgery at issue. The general rule is that an opposing party is bound by a witness’ answers elicited upon cross-examination with respect to collateral matters inquired into for the purpose of impeachment and is not permitted to refute the witness’ answers. See, *Overfield v. Sharp*,

notification to Brown & James of Russell Macke’s appointment and “IME Policy” requiring “\$200 IME Deposit”).

668 S.W.2d 220, 223 (Mo. App. 1984). The rule regarding the limits of testimonial impeachment makes good sense to exclude irrelevant facts. The data about Dr. Mishkin and his practice, requested by Plaintiffs, is routinely asked of doctors and other experts in the course of discovery and at trial. Information intended to ferret out the possible bias, prejudice, or general bent of one party's expert is hardly an "excursion into collateral matters" that the rule is meant to forestall. Cf. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 877 (Mo. App. 1986) (recognized exception to general rule is for use of extrinsic evidence to show bias or prejudice on the part of a witness, in favor of one party or the other, as bias or prejudice of a witness is not deemed a collateral matter; respondent hospital failed to demonstrate how extrinsic evidence in question (circumstances under which nurse left hospital where she had been previously employed) served purpose independently of contradiction nor did hospital claim it tended to prove nurse expert was biased or prejudiced).

Impeachment evidence may not be automatically labeled "collateral." In *State v. Day*, 95 S.W.2d 1183 (Mo. 1936), it was held reversible error where defendant on trial for having knowingly

received stolen property, offered testimony to show that a prosecution witness had made statements that would show bias and prejudice towards defendant, and testimony was excluded on the ground that it was collateral. The Court held that because the testimony was material to discredit the witness or lessen the value of his testimony, it was not “collateral.” Moreover, a party who interrogates a witness on cross examination as to bias and prejudice is not bound by his answer, but may contradict the witness by other evidence. *Id* at 1184-85.

In an automobile collision case in which the jury found for the defendant, the plaintiff appealed claiming trial court error in its admitting into evidence a letter written by plaintiff’s treating chiropractor and sent to 2,081 attorneys.⁴ See, *Weatherly v. Miskle*, 655 S.W.2d 842 (Mo. App. 1983). The court acknowledged that the proffered evidence, the letter, was to impeach the chiropractor for interest and bias. The court stated that the pecuniary interest of a witness, or his bias or prejudice can always be shown. The court

⁴ A records custodian for a mailing house testified for defendant by deposition. He appeared in response to a subpoena duces tecum for records of mail advertising done by the chiropractor.

also stated that it may be inferred from the chiropractor's letter that he is willing to testify as an expert witness in personal injury cases. The court then reflected on an earlier case that held "it was not improper to make general inquiries of the physician testifying as a witness to the frequency with which he had appeared in personal injury cases as a witness for the defendant. We find it equally permissible to make inquiries of [the chiropractor's] willingness to testify for any client. This fact is relevant to show possible bias on his part and is not a collateral matter." *Id* at 844.

The case of *Miller v. SSM Health Care Corporation*, 193 S.W.3d 416 (Mo. App. 2006), is also instructive. Plaintiff Miller appealed from a judgment on a jury verdict in favor of defendant hospital, a doctor and his practice, following trial on Miller's medical negligence action. On appeal, Miller contended that the trial court abused its discretion in allowing evidence of Miller's expert's censure by a professional organization. The court rejected Miller's argument that the evidence of the expert's censure was not legally relevant and inadmissible. The court stated that a factfinder is entitled to know information that might affect the credibility of the witness, and the

weight to be given his testimony. *Id* at 421. The *Miller* court cited language from this Court:

[i]t has long been the rule in Missouri that on cross-examination a witness may be asked any questions which tend to test his accuracy, veracity or credibility or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except where the answer might expose him to a criminal charge. *Sandy Ford Ranch, Inc. v. Dill*, 449 S.W.2d 1, 6 (Mo. 1970).

Id.

The court found Miller's characterization of the censure as a "collateral matter" did not affect the outcome because a trial court has discretion to allow cross-examination on collateral matters affecting witness credibility. *Id* at 422. Cf. *Lineberry v. Shull*, 695 S.W.2d 132 (Mo. App. 1985) (extent of cross-examination allowed on "collateral matters" is largely within discretion of trial court; court did not abuse its discretion in not allowing counsel to ask witness if he always

concluded in reports for defendants that he found no evidence of the complained of condition⁵).

Bias and prejudice are not collateral if they tend to lessen the value of a witness's testimony. "The facts or circumstances showing the interest or bias of a witness and his relation to or feeling toward a party are not irrelevant or immaterial matters, even though they have no evidentiary bearing on the issues tendered by the pleadings."

Thornton v. Vonallmon, 456 S.W.2d 795, 798 (Mo. App. 1970).

When interest or bias is denied by the witness, it may be shown by the testimony of others; even when admitted, the extent of witness bias and prejudice may be shown, but the trial court has considerable discretion as to the degree of detail that may be pursued by the inquiry. *Id.*

Defendant/Relator relies primarily on three cases, (*Lichter, Creighton and Soete*) in his effort to convince the Court that the kind of documents requested by Plaintiffs need be produced only in a rare

⁵ *Lineberry* is cited in Relator's Brief at pg. 20 where Relator also cites to *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo. Banc 1991), but does not indicate that the case was overruled in *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

and exceptional case involving a venal expert. Yet, in *State ex rel. Lichtor v. Clark*, 845 S.W.2d 55 (Mo. App. 1992)⁶, the court affirmed discovery that might lead to evidence which would be admissible to show a financial interest of the witness in consulting relationships and the trial judge would then have discretion to allow testimony as to the amount of annual income derived from employment as an expert witness. *Id* at 64-65. The appellate court found one item requested of Dr. Lichtor (all financial records for the past five years) that seemed vague and highly invasive of Dr. Lichtor's privacy as it would arguably

⁶ In *Lichtor*, the defendant's insurance company named Dr. Lichtor as its proposed medical expert and requested that plaintiff submit to an examination by him. Plaintiff refused to be examined by Dr. Lichtor; defendant insurance company then sought an order under Rule 60.01. Defendant's motion was opposed by plaintiff, who concurrently issued a notice of deposition and served on Dr. Lichtor and his office's records custodian, a subpoena duces tecum pursuant to Rule 57.09, seeking production of various documents. The trial court required the proposed "professional" expert, Dr. Lichtor, to submit to thorough interrogation concerning his objectivity as a *precondition* to being allowed to serve as expert.

require production of documents such as bank statements, documents reflecting securities transactions, and other financial matters completely unrelated to his professional income and professional relationships. The appellate court went on to approve the other items requested, i.e., tax returns, records related to billings for services provided the insurance company's law firm, and records of income for services in providing treatment. The emphasis on "venality" in the *Lichtor* case stems from the court's discussion of how commonplace "professional experts" had become. The court observed that, "A venal' expert is an expert whose opinions are available to the highest bidder-a mercenary. A mercenary with professional qualifications is likely to be a greater hindrance to a fair trial than a biased lay witness." *Id* at 61.

Likewise, in *State ex rel Creighton v. Jackson*, 879 S.W.2d 639 (Mo. App. 1994), a products liability case, the appellate court found that documents requested, including portions of income tax returns for the five past years, reflecting income received as an expert consultant or witness, were within the scope of discovery as impeachment information. It is fair to deduce from *Creighton* the court's recognition that a deponent when asked about earnings as an

expert witness, could easily evade such inquiries in the absence of any documentation to which reference may be made. The appellate court observed that the trial court's action in limiting the subpoena simply to Schedule C's and 1099's showed that the trial court was attempting to balance Dr. Creighton's privacy interest against defendant's interest in discovering the information in question. *Id* at 643-644.

The case of *State ex rel. Soete v. Weinstock*, 916 S.W.2d 861 (Mo. App. 1996) involved a subpoena duces tecum served on a physician and asking for expansive documentation consisting of the following:

- 1) all corporate and personal income tax records and "any other tax documentation you have from 1992 through the present reflecting income received for expert consultant or witness services and any and all forensic examinations";
- 2) all appointment calendars and office logs from 1992 through the present;
- 3) all records of any work with fourteen law firms;
- 4) any requests for payment to defendant's law firm for the medical examination; and
- 5) any

copies of payments made by defendant's law firm to Dr. Lemann for services rendered in plaintiff's case.

Soete, supra at 862.

The trial court did deny both the motion to quash the subpoena and the motion for protective order filed by the doctor, presumably without any case law citation in explanation. In the present case, Plaintiffs did not make requests for the wholesale disclosure of documents containing highly personal information, e.g., corporate and personal income tax records, nor did Plaintiffs request documents that might constitute an invasion of others' privacy as well, e.g., all the doctor's appointment calendars and office logs. Moreover, in the case at bar, the trial court's reasoning was discernible from the case law citation in its Memorandum (A14).

Defendant/Relator cites to *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. 1988), to support denial of the requested documents to Plaintiffs because Plaintiffs did not demonstrate factual evidence to support their request. However, in the cited personal injury action case, the trial court was found to have properly excluded further cross examination on the subject of the expert's previous employment in other specific lawsuits concerning chronic systemic chemical

intoxication *only after* it became evident that the line of inquiry was ineffective as impeachment and unproductive as to any relevant end. The appellate court held that the trial court properly permitted cross examination to continue to probe whether in other litigations the witness had found some manifestation of the intoxication in other plaintiffs. *Elam supra*.

Case law has not required a finding of venality or bias as a condition precedent to a trial court allowing the type of discovery at issue here⁷. As a matter of fact, the *Creighton* court notes that it must be recognized that “a venal expert witness could not be expected to fully answer inquiries as to which the witness is not required to produce documentation.” *Creighton, supra* at pg. 643. Rather, the cases have emphasized the necessity of trial courts balancing privacy interests against the need for accountability. See, e.g., *id*, citing *Lichter* at pg. 65.

The information requested of Dr. Mishkin and his practice corporation related to Dr. Mishkin’s possible bias as a witness. Solicitation of such facts is sanctioned by Missouri courts and tempered by trial court discretion. Missouri courts have the authority

⁷ See footnote 3.

to allow a party to serve a subpoena duces tecum on an opposing party's "expert" for the purposes of obtaining documents to impeach the expert. The documents requested must be within the scope of discovery as impeachment information, as determined by the discretion of the court.

A trial court does not abuse its discretion by allowing documentary evidence and cross examination as to amounts a defendant's expert witness earned from giving testimony in other cases. Evidence that a witness earns substantial income from testifying illuminates the financial interest the expert has in giving such testimony. See, *State v. Love*, 963 S.W.2d 236, 243-44 (Mo. App. 1997). In another case, homeowners brought an action against the seller of a dishwasher that caused a home fire. The court stated that the expert witness for the homeowners' insurer could be cross examined to show the pecuniary bias of the witness. The expert admitted he had testified for the same insurer over 150 times and that he testified in this case so that the insurer might receive \$154,000 of its money back. See, *Brantley v. Sears Roebuck and Co.*, 959 S.W.2d 927 (Mo. App. 1998). The fees earned by an expert witness

for testifying in cases bear materially on the witness' credibility and are appropriate for impeachment evidence.

This Court affirmed the relevance of the monetary relationship of an attorney and the expert in *State v. Anderson*, 79 S.W.3d 420, 437 (Mo. Banc 2002). The Court noted that it was "beyond dispute" that substantive evidence concerning what the defense's expert was paid in the current case and other cases involving the Public Defender's Office "would be discoverable under normal methods and that such information was clearly relevant and admissible to show bias." (In *Anderson*, the expert's testimony was by way of video deposition based on billing records.)

In cross examination of expert witnesses, general questions as to the frequency of referrals of the particular kind of case to the witness, or the witness' testimony in such cases as distinct from specific questions as to particular past instances, are necessarily admissible. See, e.g., an inquiry as to the frequency with which the witness had appeared in personal injury cases for the defendant, *Zarisky v. Kansas City Public Service Co.*, 186 S.W.2d 854 (Mo. App. 1945). Moreover, it has been held as necessarily allowable, or to have been properly allowed in the discretion of the trial court, for

counsel upon cross examination of an expert witness to inquire in a general way, as distinct from reference to specific individual instances, as to the extent and nature of the expert's previous association with particular counsel or a particular attorney in matters relating to referrals or testimony in the course of that attorney's practice. In cases involving testimony tending to show the relation existing between the expert witness and the attorney for one party, it is appropriate for the consideration of the jury as tending to show bias and interest on the part of the witness, thereby affecting his credibility. See, *Lammert v. Wells*, 13 S.W.2d 547 (Mo. App. 1928). Wide latitude is to be allowed any pertinent inquiry with some reasonable bearing on the issues in the case, or tending to impeach or discredit the witness and generally seen by the courts as proper on cross examination. See, *Board of Public Building v. GMT Corp.*, 580 S.W.2d 519 (Mo. App. 1979).

II. Missouri law supports Respondent's exercise of discretion in ordering the production of materials requested by Plaintiff.

(Relator's Point Relied On: The production of the collateral materials requested is unduly burdensome, oppressive and serves to discourage reputable experts from participating in litigation.)

A trial court is allowed broad discretion in control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that appellate courts will interfere. See, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66 (Mo. App. 1997) (blanket assertions of privilege pursuant to medical peer review statute were insufficient to invoke its protection; rather, party opposing request for discovery on basis of statute must make showing as to how requested discovery violates statute's provision). In a prohibition proceeding, the burden is on the petitioning party to show that the trial court exceeded its jurisdiction and that burden includes overcoming the presumption of right action in favor of a trial court's ruling. See, *Id* at 796-97. Here, the Defendant/Relator did not meet that burden.

Defendant/Relator argues that Prohibition is warranted.

Defendant/Relator claims that the trial court's order forces Defendant/Relator's "medical expert"⁸ to produce "burdensome and extensive discovery." Yet, Plaintiffs' requests in this case stand in marked contrast to a case extensively cited by Defendant/Relator, namely *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796 (Mo. App. 1985). In the *Whitacre* case, the subpoena at issue commanded the custodian to:

... bring 'all calendars, appointment books, ledgers, notebooks or the like' which recorded Dr. Frederick's court testimony, deposition schedules, office examinations and charges for his services concerning patients not seen for purposes of treatment but only for the rendition of medical opinions about the nature and extent of their injuries...

The subpoena also commanded a compilation of statistical information for the same time

⁸ The subpoena and subpoena duces tecum that is the subject of the Writ Petition, was served on Metropolitan Orthopedics, Ltd. (A6).

period concerning: “1) the total number of patients seen by Dr. Frederick; 2) the total number of patients not seen for purposes of treatment; 3) the total number of patients seen for whom a medical report was sent outside the office concerning patients examined by Dr. Frederick; 4) the total number of patients seen at the request of an insurance company; 5) the total number of depositions given and the total amount charged for them; 6) the total number of times Dr. Frederick gave live (in court) testimony and the total amount charged for all of the testimony; and 7) the total number of examinations performed by Dr. Frederick, when a medical report was made, along with the total charges for the examinations and reports and for any x-rays taken during the examinations.

Id at pp.796-97.

The appellate court did find the subpoena request to be “unreasonable, oppressive and intrusive.” That request, however, is instantly distinguishable from the request at issue here.

Plaintiffs are not indulging in a “fishing expedition”; rather, Plaintiffs have observed boundaries in an effort to obtain the information required in order that Defendant’s medical expert may be properly evaluated in terms of objectivity, and impeached, tailoring the information request so that it is not burdensome or unduly intrusive. The requests hone in on the type of information appropriate for the fact finder’s consideration.

The remedy afforded by the Writ of Prohibition shall be granted only to prevent usurpation of judicial power. See, Mo. Rev. Stat. §530.010 (2000). Prohibition is an extraordinary remedy that should lie only in cases of extreme necessity. The intention is not for a writ to serve as a remedy for all legal difficulties nor as a substitute for appeal. While challenges to discovery decisions have been held to be reviewable upon a petition for writ of prohibition, such issues have also been reviewed on direct appeal. See, *Edwards v. Missouri State Board of Chiropractic Examiners*, 85 S.W.3d 10, 22 (Mo. App. 2002). Appellate courts issue such writs in their discretion and only when the trial court has acted arbitrarily or unjustly. See, *State ex rel. Phillips v. LePage*, 67 S.W.3d 690, 692 (Mo. App. 2002).

It is hard to imagine how these circumstances and Judge Kramer's ruling could give rise to a holding that it was an abuse of discretion. Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstance then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion. See, *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848 (Mo. App. 2000). The broad discretion allowed the trial court in the control and management of discovery was judiciously exercised in this case.

In *Edwards v. Missouri State Board of Chiropractic Examiners*, *supra*, Dr. Edwards, a Chiropractor, sought review of an order of the State Board of Chiropractic Examiners which, based on findings of an Administrative Hearing Commission, revoked his license to practice Chiropractic as a result of his treatment of an HIV-positive hemophiliac patient. Dr. Edwards sought entries from private journals, that referred to him or his treatment of the patient. Dr. Edwards also sought discovery of potentially inconsistent statements

made by the patient's wife in Settlement of previous litigation. (The statements were presumably under seal.)

The Commission had conducted an *in camera* review of the journals to determine the relevant entries under Dr. Edwards' request and restricted Dr. Edwards' discovery of the wife's journal to those entries that referred to Dr. Edwards or his treatment of the patient and protected the remaining entries in the wife's private journals from discovery. The court held that the Commission did not abuse its discretion in denying Dr. Edwards' discovery requests to the extent that the remaining entries were irrelevant under Rule 56.01 (b)(1) or in entering an order under Rule 56.01 (c) protecting the wife from potential embarrassment resulting from the discovery of journal entries containing her deeply personal thoughts. The court held however, that the Commission did abuse its discretion in precluding Dr. Edwards from discovery of statements made in related litigation, based on relevancy. The court held that the information sought by Dr. Edwards for impeachment purposes was within the scope of discovery as defined in Rule 56.01(b)(1) (citing to both *Creighton* and *Willis v. Brot*). The court stated, "Inconsistent statements, criminal convictions, proof of bias, and similar material, being themselves

admissible evidence, cannot be excluded from the scope of discovery.” *Edwards, supra* at 25 (internal citation omitted).

Curiously enough, the Subpoena For Taking Deposition outlined an alternative remedy by including instructions should Metropolitan Orthopedics, Ltd. contend that it was entitled to withhold any documents from production on any grounds. In addition, Dr. Mishkin or Metropolitan Orthopedics could have requested *in camera* review of any allegedly “privileged” documents. A “privilege log” could have also been created. Defendant did not comply with the procedure outlined in the Subpoena instructions, nor did he suggest other alternatives; rather Defendant filed a Motion to Quash and then pursued a Writ of Prohibition.

III. Respondent Judge Kramer adequately explained his Order of June 9, 2006.

(Relator’s Point Relied On: Respondent failed to make specific findings in his Order of June 9, 2006, and the order is not based on evidence or sound logic and is arbitrary and capricious, indicates a lack of careful consideration, and is unreasonable.)

Respondent Judge Kramer explained his order overruling Defendant’s Motion to Quash, by citation to *State ex rel. Creighton v.*

Jackson, supra. In fact, the *Creighton* case is the appropriate predicate and precedent for the instant matter.

As is the situation with Dr. Mishkin, Dr. Creighton (a professional engineer) was designated an expert. In connection with a scheduled deposition of Dr. Creighton, the opposing party served him with a subpoena duces tecum specifying various documents which Dr. Creighton was requested to produce at his deposition. The document request included those portions of Dr. Creighton's income tax over five years, reflecting income received as an expert consultant or witness. Dr. Creighton followed the same procedural steps as Dr. Mishkin has followed to bring him to this juncture. Essentially, Dr. Creighton argued the items sought by subpoena were not within the scope of discovery and that "the production of the documents violates the expert's interest in reasonable privacy, constitutes harassment, and is burdensome." *Id* at 641.

In response, the opposing party argued that "in view of the critical importance of expert testimony in certain types of litigation, it is imperative that the cross-examiner be entitled to show any factors which may influence the objectivity of the expert witness." *Id*. There was no motion in *Creighton*, nor was there a motion in the case at

bar, to disqualify the doctor as an expert. Rather, the issue was – as it is here – whether an order to produce the documents in question at the doctor’s deposition, exceeded the trial court’s authority with regard to discovery.

The *Creighton* court briefly reviewed the scope of discovery. As to whether inquiry is permitted as to matters that affect the credibility of a deponent or which might be used in impeaching a witness at trial, the Court acknowledged that in Missouri the answer was not entirely clear. The Court went on to explore the purposes of discovery and determined, “There is no apparent reason that credibility issues must be off limits to discovery.” *Id* at pg. 643. The Court concluded that in “the spirit of discovery rules,” the impeachment information sought in *Creighton* was within the scope of discovery. In the face of a reasonable discovery effort under the particulars of the case, and not abusive, disclosure of such information may be ordered within the discretion of the trial court.

The *Creighton* court recognized the antecedents in Missouri case law and found certain language from *Lichter* generally applicable. The referenced language from *Lichter* elaborated on the trial court’s responsibility to balance respect for the proposed witness

as an individual and his or her privacy interests, against the need for accountability. The Court held that the trial court had not abused its discretion in refusing to quash the subpoena duces tecum. The Court reflected on what “the trial court could reasonably have concluded” in light of the snippets of information from previous depositions of Dr. Creighton.

It is apparent that Judge Kramer considered the reasoning and result in *Creighton*, to fully address the equivalent situation that arose in the *Macke* case. Neither Defendant nor Plaintiffs requested findings of fact in conjunction with the trial court’s consideration of Defendant’s Motion to Quash. When neither party requests findings of fact, an appellate court must assume all factual findings were in accordance with the result reached by the trial court. See, *Ruzicka v. Hart Printing Co.*, 21 S.W.3d 67, 70-71 (Mo. App. 2000).

Defendant/Relator contends that the instant case is more analogous to *State ex rel. Soete v. Weinstock, supra* or *State ex rel. Metropolitan Transportation Services, Inc. v. Meyers*, 800 S.W.2d 474 (Mo. App. 1990), than to *Creighton*. In *Metropolitan Transportation Services*, the trial judge, presiding over a personal injury action, determined that an examination of plaintiff by a physician was

appropriate under Rule 60.01(a). The defendant proposed an examining physician who was rejected by the plaintiff. Defendant filed a motion to compel plaintiff's examination by defendant's chosen doctor. The court overruled the motion, adding that the Court would sustain defendant's motion and compel plaintiff to submit to a physical examination by "any other physician." *Id* at 475. Defendant initiated a proceeding in mandamus. The appellate court found that the trial court had abused its discretion as absent a stated legal reason, the trial court's decision appeared arbitrary, capricious, and unreasonable.⁹

Soete is addressed *infra* at page 33. It is interesting to note that in *Soete*, it was the doctor himself who attempted to quash the request or limit the records ordered by the subpoena. In the present case, it has been only Defendant/Relator who has voiced the objection to production.

A trial court is vested with broad discretion regarding discovery matters (see, *Norber v. Marcotte*, 124 S.W.2d 651,659 (Mo. App.

⁹ Though not part of the record, both parties agreed that the trial judge had stated in chambers, "I see red every time [defendant's chosen doctor] enters the courtroom." *Id* at 475.

2004) (default judgment as sanction; partial remand for recalculation of attorney fees)). Cf. *Boatmen's Bank of Pulaski County v. Brooks*, 869 S.W.2d 781 (Mo. App. 1994) (judgment of trial court is affirmed on appeal unless there is no evidence to support it, it is against weight of evidence, or it erroneously declares or applies the law; judgments that reach correct results will not be set aside even if the trial court gives an insufficient or wrong reason for judgment.).3-

If the ruling of the trial court is correct, it will not be disturbed on appeal because the court may have given a wrong or insufficient reason for it. See, *Heisterman v. Heisterman*, 941 S.W.2d 768 (Mo. App. 1997). Judge Kramer viewed the requests made of Metropolitan Orthopedics, Ltd. comparable to those in *Creighton* – reasonable in the particulars of the case and not abusive. This Court is primarily concerned with the correctness of the result reached by the trial court – not the route taken by the trial court to reach that result. See, *Mortenson v. Leather Wood Construction, Inc.*, 137 S.W.3d 529, 537 (Mo. App. 2004). A result whereby a plaintiff is permitted to exercise the least intrusive means to garner information for evaluation of the expert's objectivity or bias, is the correct result; the documents to be produced by Metropolitan Orthopedics, Ltd. effect that end.

In accord with the court's discussion in *Lichtor supra*, Plaintiffs fashioned their inquiries and requests for production to be no more intrusive than necessary to discover evidence to show Dr. Mishkin's financial interest in consulting relationships. The *Lichtor* court acknowledged that *Willis v. Brot* had held that impeachment information was within the scope of discovery, but by way of deposition, not interrogatories. The *Lichtor* court also referenced *State ex rel. Whitacre v. Ladd*, noting that it was decided two years after *Willis* and pointed out the trend was to allow discovery of such documents. The *Lichtor* opinion stated, "...[A]s we have seen, the court's authority may not be limited by Rule 56.01(b) where the requirements of a fair trial validate the reasonable exercise of the court's power to enable the court to determine whether expert testimony would be helpful to the jury." *Lichtor, supra* at pg. 66.

Plaintiffs have restricted their inquiries to one class of patients who need not be individually identified.

A trial court's discretion is involved where an inquiry within the scope of discovery runs against an interest in privacy or against an assertion that proposed discovery is burdensome. See, *Creighton supra* at 639. And even where it is shown that particular items

requested to be produced are overly broad or not relevant, the preferred response is for the trial court to enter an order limiting the scope of discovery to certain matters rather than quashing a request in its entirety. See, *State ex rel. Wilson v. Davis*, 979 S.W.2d 253, 257 (Mo. App. 1998).

Metropolitan Orthopedics, Ltd. has not been asked for “unreasonable, oppressive, and intrusive discovery” as Defendant/Relator contends. Nor has the trial court acted arbitrarily or unjustly; consequently, its ruling should be affirmed (role of reviewing court limited to ensuring trial court’s ruling is not clearly against logic of circumstances or arbitrary and unreasonable; see, *Matthews v. Chrysler Realty Corp.*, 627 S.W.2d 314, 318 (Mo. App. 1982) (admissibility of expert testimony)).

IV. Production of the requested materials would not invade any statutory physician – patient privilege nor compromise privacy interests of Dr. Mishkin and non-party patients.

(Relator's Point Relied On: The production of the collateral materials requested would improperly invade the physician-patient privilege as codified in Section 491.060(5), R.S. Mo. 2000, thereby compromising the privacy interests of Dr. Mishkin and non-party patients alike.)

The party asserting that material is not discoverable must supply the court with sufficient information to determine that each element of the privilege is satisfied. Blanket statements of privilege do not invoke its protection. *State ex rel. Dixon v. Darnold, supra* at 70. The *Dixon* court found an abuse of discretion where the trial court had denied a patient's request for disclosure of records of the hospital against which she had brought a medical malpractice action, on the basis that the records were protected by a peer review statute. The finding of abuse of discretion was based on arguments of counsel at hearing and their briefs. The appellate court stated that a showing was required by the hospital as to how the requested discovery violated the statute. See also, *State ex rel. Health Midwest*

Development Group, Inc. v. Daugherty, 965 S.W.2d 841 (Mo. Banc 1998) (physician-patient privilege did not preclude discovery of hospital's peer review committee documents in physician's action against hospital for actions taken by hospital's peer review committee that restricted his staff privileges, even though documents contained confidential medical information; however, identifying characteristics of records should be redacted to protect patients against humiliation, embarrassment, and disgrace).

Defendant/Relator pointed out that Plaintiffs' definition of "medical services" includes the word "treatment." Brief at 34. Plaintiffs did not mean "treatment" in the sense of the steps taken to effect a cure of an injury or disease. The definition of "medical services" does not encompass "treatment of any nature provided by Dr. Mishkin" (Brief at 35). Rather, Plaintiffs' requests are limited to numerical information relating to the extent that Dr. Mishkin's medical practice is related to medical-legal matters.¹⁰

¹⁰ In the spirit of the purpose of discovery, Defendant's counsel could have attempted to discuss the matter with Plaintiff's counsel, to seek clarification of the nature of any request in a good faith effort to resolve any disputed issues. Also available to Defendant was

Defendant/Relator relies, in the main, on *Hammack v. White*, 464 S.W.2d 520 (Mo. App. 1971) and *State ex rel. Whitacre* to argue that the documents requested by the subpoena would violate Dr. Mishkin's privacy rights and the rights of non-party patients. Brief at pp. 31-38. Plaintiffs submit that this argument illustrates either Defendant/Relator's fundamental misunderstanding of what materials are being sought by the subpoena duces tecum, or an attempt by Defendant/Relator to obfuscate the request at issue before this Court.

The context of the court's rulings in *Hammack* is in stark contrast to that in the instant case. In *Hammack*, a subpoena duces tecum was served by defendant on plaintiff's physician witness the same day on which the jury trial commenced. The documents requested included "[y]our complete file, including but not limited to all records, reports, written notes, p[re]scriptions and other written memoranda pertaining to the examination and treatment of all patients" who have been represented by a particular attorney, *id* at _____ creation of a privilege log (A12) or request for a Protective Order. See, *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 369 (Mo. Banc 2004) ("discovery process was not designed to be scorched earth battlefield").

523, and financial books and records covering a three year period.

Out of the hearing of the jury, the doctor testified as to how burdensome collection of the information would be and would delay the trial for some days. The trial judge quashed the requests.

Defendant contended the trial court erred because the motion to quash was filed by the attorney for plaintiff whereas the grounds for quashing the subpoena were personal to the witness and must ordinarily be raised by him. The court's response was that the doctor in his own testimony at the hearing, protested enforcement of the relevant sections of the subpoena duces tecum, especially considering he would have had only a few hours to obtain the information. As to defendant's assertion that the files on the other patients should be revealed based on a plaintiff's physical condition being put at issue and the privilege waived, the *Hammack* court responded, "[Waiving the privilege as to issues concerning plaintiff's physical condition] does not waive the privilege with respect to the doctor opening his files on all patients who may have been represented by the attorney for plaintiff." *Id* at 524. Plaintiffs in the case at bar did not ask for wholesale production of patient files or the

specific identities of any category of patients, including those who received “medical services.”

The *Whitacre* court acknowledged both that the trend in modern times had been to broaden the scope of discovery and that federal practice endorsed discovery of evidence to be used solely for impeachment by means of subpoena duces tecum. The court determined, however, that it need not decide whether earlier Missouri cases still applied to the facts under consideration in *Whitacre* as it would make the writ absolute because the requests under consideration were “so broad as to be defectively oppressive, burdensome, and intrusive.” *Id* at 798-99. (The requests are quoted *infra* at pp. 40-41).

The subpoena at issue listed as an area of inquiry, “all medical services performed by Dr. Marvin Mishkin for the calendar years 2002 to 2006.” The nature of the questions Plaintiffs’ counsel would have directed to Dr. Mishkin would have focused in the main on the amount of time Dr. Mishkin spends on matters relating to “medical services” and the income he derives therefrom.

It should also be noted that Missouri courts have rejected the

argument that medical records of non-parties are absolutely protected from discovery by virtue of the physician-patient privilege statute, Mo. Rev. Stat. § 419.060(2000). Facts, circumstances, and interests of justice determine applicability of the physician-patient privilege to a particular situation. See, *State ex rel. Lester E. Cox Med. Ctr. v. Keet*, 678 S.W.2d 813 (Mo. Banc 1985) (the court approved an *in camera* review of patient records in redacted form).

Defendant/Relator alludes to the Health Insurance Portability and Accountability Act (HIPAA) providing for civil and criminal penalties for disclosure of private health information without patient authorization. Again, no patient's identity is required by Plaintiffs for any response in terms of documentation or inquiry. Every court to have considered the question agrees that HIPAA does not create a private cause of action. See, *Bradford v. Semar*, 2005 WL 1806344 (E.D. Mo. 2005) (Not Reported in F. Supp.2d) (citing to reported cases from other jurisdictions at *3).

Defendant/Relator cites to a case from a foreign jurisdiction to argue against district court discovery orders that would compel a surgeon hired by defendants in personal injury actions to allow plaintiff's counsel to conduct audits of the surgeon's patient files or to

create detailed records to determine both the doctor's and his practice's fees for professional services and the amounts of same for acting as an "IME and/or expert witness" in records to be provided to plaintiff's counsel every 30 days until trial. Brief at 34, citing *LeJeune v. Aikin*, 624 So.2d 788 (Fla. App. 3 Dist. 1993).¹¹ Unlike the circumstances in the Florida case, in the instant case, Plaintiffs neither requested to audit Dr. Mishkin's files nor that he "create" records.

¹¹ Defendant/Relator did not refer to the *LeJeune* opinion's "Special Concurrence" with the author opining his concern that decisions had gone too far in permitting inquiry into the private financial affairs of the physicians in question. The controversy and conflicts among the districts caused by the Special Concurrence was noted in *Syken v. Elkins*, 644 S.2d 539, 544 (Fla. App. 3 Dist. 1994) (following *LeJeune* analysis, no sound reason to require disclosure of exact income figures of expert witness physicians; approximations are adequate; simplest cross examination should reveal that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf and jurors easily identify "hired guns" and discount their testimony accordingly).

Defendant/Relator also cites to *State ex rel. Boswell v. Curtis*, 344 S.W.2d 757 (Mo. App. 1960). The case recognizes that notwithstanding the fact that a document may not be strictly privileged, its production may sometimes constitute an unreasonable invasion of a right to privacy. *Id* at 763. Seemingly, the more relevant proposition for the case at bar is the *Boswell* court's observation that a court might in its discretion "hedge the examination of the document with such reasonable restrictions as are possible and practicable in order to protect the privacy in respect to matters not material to the case." *Id* at 763-64. The court noted that none had been asked in that case. In the case at bar, Plaintiffs had put forth a methodology by which Dr. Mishkin/Metropolitan Orthopedics, Ltd. could claim privilege (A12). Moreover, were it necessary to provide documents that contained either patients' names or the names of other individuals where privacy was an issue, certainly redaction of names would be an option, as would *in camera* review.

V. Production of the requested materials would not infringe on any work product privilege of counsel for Defendant/Relator or non party attorneys, as referenced in the Supreme Court Rules.

(Relator's Point Relied On: Respondent's order to produce the collateral materials requested would improperly infringe on the work product privilege of counsel for Relator as well as other non-party attorneys under Supreme Court Rule 56.01(b)(3) and 56.01(b)(4).)

While Missouri does provide strong protection for attorney-client communications, the privilege cannot be used as a shield against provision of information otherwise required. See, *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. Banc 2000) (explanation of "bright line" rule that all material given to a testifying expert must, if requested, be disclosed; it is appropriate at deposition or trial to cross-examine an expert witness as to information provided to expert that may contradict or weaken bases for his or her opinion regardless of whether expert relied upon or considered the information; removing privilege from documents provided to expert does not necessarily make the documents admissible at trial).

See also, *State ex rel. Slattery v. Burditt*, 909 S.W.2d 762 (Mo. App. 1995) (in criminal defendant's search for exculpatory evidence, statutory privilege must give way to fair adjudication as function of the courts; trial court directed to make *in camera* review of information in undisclosed files under assumption information came within attorney-client or work product).

Of course, a document which is not privileged does not become privileged by the mere act of sending it to an attorney. See, *St. Louis Little Rock Hospital, Inc. v. Gaertner*, 682 S.W.2d 146 (Mo. App. 1984).

Even if information in certain documents is privileged, defendant could have proposed numerous alternatives, including conditioning disclosure upon execution of a confidentiality agreement, redaction of client names and *in camera* inspection of the allegedly privileged documents. Similar procedures have been used both regarding information of a physician's patients and an attorney's clients. See, *Lester E. Cox Medical Center v. Keet*, *supra*.

In *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76 (Mo. Banc 1984), a lawyer under grand jury investigation for overbilling a school district sought to quash a subpoena requesting billing

statements of the lawyer relative to all clients. The prosecutor intended to compare these statements to those of the school district. Declaring that the public's interest in a thorough grand jury investigation merited the limited disclosure of potentially privileged material, this Court approved *in camera* inspection of the subpoenaed materials for the purpose of determining the extent to which they reflected privileged communication. The Court also made it clear that protection of work product as well as attorney-client privilege does not extend to materials prepared in anticipation of prior unrelated litigation. Thus, the Court concluded the identities of clients in unrelated cases appeared to be outside the scope of the work product privilege. *Id* at 80. See also, *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573 (Mo. Banc 1994) (under work product doctrine, notes of interviews with administrative law judges could not be excluded from discovery simply because the witnesses were administrative law judges; to the extent work product doctrine may operate to exclude some requested information, statements requested could be redacted *in camera* to the extent they reveal the opinions, theories, or conclusions of the special assistant attorney

general; whether to allow the discovery remained within respondent trial court's discretion).

Blanket assertions of work product are insufficient to invoke work product protection. The party challenging the privilege must have enough information to assess the applicability of the claimed privilege. Competent evidence may include a privilege log and affidavits from counsel. See, *State ex rel. Ford Motor Co.*, *supra* at 367-68 (Court suggested *in camera* review of disputed documents would be appropriate as would order of reference to a special master).

Plaintiffs continue to maintain that they are not seeking the identity of patients or clients. (The names of other attorneys and law firms with whom, and with which, Dr. Mishkin has consultation relationships would not seemingly be entitled to any privilege.) Defendant never sought to withhold documents from production by stating the basis for the refusal, e.g., privilege, protection, immunity (A12), nor did he seek a protective order suggesting that the discovery be accomplished in an alternative manner as provided for by Rule 56.01(c), Protective Orders. The same opportunities would

be available to Defendant if the Writ were dissolved and the litigation ordered to proceed.

CONCLUSION

Plaintiffs pursued a narrow basis of inquiry as to impeachment information. The matters inquired about were well within the letter and spirit of the discovery rules. And, the trial court acted well within its discretion in overruling Defendant's Motion to Quash. For the reasons discussed above, Plaintiffs respectfully request that this Court dissolve the Preliminary Writ In Prohibition and remand the case so that the trial court may reset a trial date and discovery may proceed in the underlying action.

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AFFIDAVIT OF SERVICE

The undersigned hereby certifies that Respondent's Brief and disk containing same were mailed via first class postage paid U.S. mail this _____ of November 2006, to: Michael B. Maguire, Esq. and Troy A. Brinson, Esq., Brown & James, P.C. 1010 Market Street 20th Floor, St. Louis, MO 63101, Attorneys for Relator's.

Gary Sarachan #25683

Subscribed and sworn to before me this ___ of November, 2006.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondent's Brief includes the information required by Rule 55.03.
2. The Respondent's Brief complies with the limitations contained in Rule 84.06.
3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, affidavit of service, and authorities contains 10,900 words, as determined by the word-count tool contained in the Microsoft Word 2003 Software with which this Respondent's Brief was prepared;
and
4. The computer disk accompanying the Respondent's Brief has been scanned for viruses and, to the undersigned's best knowledge, information and belief, is virus free.

Gary Sarachan #25683