Not Reported in F.Supp., 1993 WL 12811 (E.D.Pa.), Med & Med GD (CCH) P 41,054
(Cite as: 1993 WL 12811 (E.D.Pa.))

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United States District Court, E.D. Pennsylvania.
UNITED STATES of America
v.
URBAN HEALTH NETWORK, INC., et al.
Civ. No. 91-5976.

Jan. 19, 1993.

MEMORANDUM

LOUIS H. POLLAK, District Judge.

***1** Before me are (1) defendants' motion to compel discovery responses (doc. # 17), (2) plaintiff's response to defendants' motion to compel, and (3) defendants' reply memorandum in support of their motion to compel. For the reasons that follow, defendants' motion will be denied in part and granted in part.

I

The Tortuous History of Discovery

In 1989, two doctors who were providing medical services on a contractual basis to patients at the Philadelphia Nursing Home were advised that a federal investigation of their Medicare billing practices was underway. On September 23, 1991, the government filed a civil complaint against the two doctors and three related corporations alleging that, between 1986 and 1989, defendants had submitted false claims to the Medicare Trust Fund for services provided at the Philadelphia Nursing Home. The complaint described two types of allegedly false billing practices: (1) billing routine physical checkups, which are noncompensable, as reimbursable "comprehensive consultations," and (2) billing for physical therapy, which is reimbursable only when provided by a licensed physical therapist, although it had been administered by an unlicensed therapist. 3,646 comprehensive consultation claims were alleged to have been submitted during the relevant years, some of which were claimed to be false, and 10,614 physical therapy claims were said to have been submitted, all of which were allegedly unreimbursable.

On November 15, 1991, the government served its first request for production of documents upon defendants. A number of documents were turned over to the government on February 9, 1992, but defendants' document production continued through the fall of 1992.[FN1]

In February, 1992, defendants requested a broad range of documents-including all documents reviewed by the government during its investigation of defendants and all documents containing statements made to the government during its investigation. The government refused to provide much of the requested material. On September 18, 1992, defendants served a set of interrogatories, seeking, among other things, the identification of each and every Medicare claim that the government contends is improper and an explanation of why each claim was said to be improper. The government refused to comply with this request, and defendants filed the instant motion to compel addressed to its unrequited requests for documents and interrogatories.

Because the government had issued subpoenas for the depositions of various current and former employees of defendants, and because defendants felt it necessary to obtain the requested discovery before those depositions occurred, defendants also sought a protective order that no depositions would take place until the resolution of its motion to compel. Defendants' motion for a protective order was granted in a November 16, 1992 order, which also extended the discovery deadline to March 1, 1993.

In light of progress made by the parties toward resolving the discovery dispute since the filing of

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defendants' motion to compel, there is not much distance separating the parties even on some of the discovery issues remaining for judicial resolution.

II

The Remaining Discovery Issues

A. *Identification of False Claims and the Government's Good Faith Basis for Asserted Falsity of Those Claims*

***2** Defendants request that the government immediately identify each of the physical therapy and comprehensive consultation claims alleged to be fraudulent and-as requested in its first set of interrogatories-detail the grounds on which the government contends that each claim was fraudulent and the factual basis for its allegations of fraud.[FN2] Since the filing of the instant motion to compel, the government has provided defendants with a list of all comprehensive consultation and physical therapy claims submitted by defendants during the years 1986-89, listed by patient identification number. The government contends that each of the more than 10,000 physical therapy claims was false due to the therapist's lack of license, and that some of these claims may have been fraudulent for other reasons. As for the 3,624 comprehensive consultation claims mentioned in the pleadings, the government has already identified 600 of those claims as false, and contends that, in the course of discovery, more false comprehensive claims may be identified. Importantly, the government has agreed, by the close of discovery (March 1, 1993), to inform defendants of (1) any physical therapy claims believed to be false for reasons other than the status of the therapist's license, *together with the reason each is believed to be false*, and (2) any additional comprehensive consultation claims believed to be false, *together with the reason that each of these claims, and each of the original 600, is believed to be false.*

Therefore, the disagreement between the parties is solely one of timing: whether the government should have to identify all claims believed to be false and why each claim is believed to be false immediately, or whether the government should be allowed until the close of discovery to make the requested identification and explanation. The government contends that it is not now able fully to comply with defendants' request for false claim identification because it has not yet been able to depose defendants' former and current employees and hence learn relevant details of defendants' billing practices and specifics about what defendants knew when they submitted the claims in question to Medicare.[FN3] I am satisfied that the government needs the additional months to comply with defendants' request for false claim identification and explanation of asserted false grounds, and that defendants are not unduly prejudiced by allowing depositions to take place without defendants' first having received all false claim information.

Therefore, based on the government's representation that it will identify each claim believed to be false and the good-faith basis for such beliefs no later than March 1, 1993, I decline to compel immediate compliance with defendants' request.

2. *Document Requests*

Defendants seek production of documents reflecting any reviews by Medicare or Pennsylvania Blue Shield ("PBS") of defendants' claim submissions for work performed at the Philadelphia Nursing Home.[FN4] The parties apparently reached an agreement that defendants would subpoena prelitigation claim reviews and other documents directly from PBS, and that the government would facilitate this process. To that end, the government has provided defendants with the name of a PBS employee, Linda Hicks, whom the government indicates is the proper person to receive a subpoena. Defendants were initially concerned, in light of information they received from Ms. Hicks, that she was not the appropriate subpoena recipient, *see* De-

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fendants' Reply Brief, Exhibit G; however, the government has continued to maintain that she is the appropriate recipient, and defendants apparently have served a subpoena on PBS (although they have not yet received the requested documents). Therefore, it seems to me that judicial intervention is not necessary at this stage.[FN5]

C. *Investigatory Statements of Interviewees*

***3** Defendants seek all notes of witness interviews taken during the investigation of defendants' claim submissions, or, alternatively, the names and dates of all persons interviewed by the government.[FN6] Defendants are particularly interested in such information so that they can determine when the government knew or should have known that defendants had submitted erroneous claim submissions, which is relevant to a possible statute of limitations defense. Recognizing this concern as valid, the government has agreed to provide defendants with the name and date of any individual interviewed by the government in connection with this case prior to September 23, 1988 (which, on the government's calculus, marks the first date on which the government could have learned of the alleged fraud and still have timely filed all counts of the complaint). *See* Plaintiff's Letter of December 28, 1992, to my law clerk, Timothy Macht.

There can be no doubt that notes prepared by an attorney or his agent[FN7] of oral interviews with witnesses are core work product requiring a very strong showing of necessity and unavailability by other means.[FN8] *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981). Defendants argue that they have substantial need for the interview notes and an inability to obtain the information by other means because "the memories of the witnesses interviewed years ago when events were fresh in their minds about specific practices and procedures of defendants regarding billing during the relevant 1986-89 time period, have obviously faded."[FN9] Defendants' Mem. in Sup. at 29. However, as the government points out, assertions of possibly faded memories-as distinct from a witness's statement during the course of a deposition that she does not remember relevant facts-cannot suffice to overcome the work product privilege.[FN10] *See, e.g.*, *Lewandowski v. National R.R. Passenger Corp.*, Civ.A. No. 85-2036, 1985 WL 106 (Nov. 22, 1985 E.D.Pa.1985).

The names and dates of persons interviewed by the government during its investigation are also covered by the work product rule. *See, e.g.*, *Massachusetts v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152-53 (D.Mass.1986). Defendants might have substantial need of some of this information in order to assert a statute of limitations defense;[FN11] however, the government has already agreed to provide defendants with a list of names and dates of all persons interviewed during the critical period before September 23, 1988.[FN12]

Therefore, the government will not now be ordered to turn over any interview notes or provide a list of any persons interviewed after September 23, 1988.

D. *Claim for Costs*

Defendants' claim for costs associated with filing this motion will be denied.

ORDER

For the reasons given in the accompanying memorandum, it is hereby ORDERED and DIRECTED that defendants' motion to compel (doc. # 17) is GRANTED in part and DENIED in part as follows:

***4** 1. Plaintiff shall be required to identify every physical therapy and comprehensive consultation claim believed to be fraudulent, and the reason(s) that each claim is believed to be false, by the close of discovery on March 1, 1993;

2. Plaintiff shall verify that the list of persons already provided to defendants contains all those reasonably likely to have information concerning

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the claims or defenses at issue, or provide an additional list including government representatives with such relevant information; and

3. Defendants' motion is DENIED in all other respects, including their claim for costs.

FN1. Based on this discovery, the government moved for, and was given, leave to file an amended complaint alleging that the individual defendants used the corporate defendants as their alter egos.

FN2. For instance, in defendants' first set of interrogatories, defendants requested that the government identify all facts and information upon which it based its charge that defendants acted with "reckless disregard" in billing for physical therapy, and, similarly, that the government identify the bases for its charge that defendants knowingly misrepresented or recklessly disregarded the truth of both physical therapy and comprehensive consultation claims. *See* Plaintiff's Mem. in Opp., Exhibit 6, Interrogs. 25-27.

FN3. Defendants may have contributed to this state of affairs when, in response to plaintiff's interrogatories about defendants' billing practices, defendants stated that the information requested called for "a narrative response more properly the subject of deposition testimony." *See* Plaintiff's Mem. in Opp., Exhibit 8, Defendants' Resp. to Plaintiff's Interrogs. 29-30.

FN4. Defendants also seek documents reflecting communications and correspondence between the parties concerning those claim submissions (including notes of meetings and records of phone conversations). Such a request seems to me overly burdensome-especially because much of this information should be, or should have been, available to defendants from their own records.

FN5. If, however, Ms. Hicks indicates again that she is not the appropriate recipient, the government may be required to provide defendants with the name of another subpoena recipient at PBS.

FN6. Defendants also request a list of former or current Medicare, PBS, or Department of Health and Human Services representatives with knowledge of the claims contained in the amended complaint. Pursuant to § 4:01(a)(1)(A) of the Civil Justice Expense and Delay Reduction Plan, the government has already provided names and addresses of persons with relevant information concerning the claims or defenses at issue. Defendants object that the government has failed to list any PBS or other government representatives as having knowledge of the claims against defendants. Therefore, the prudent course, it seems to me, is that the government should verify that the list already provided to defendants contains all persons reasonably likely to have information concerning the claims and defenses at issue, or provide an additional list including government representatives with such information.

FN7. Fed.R.Civ.P. 26(b)(3) protects against disclosure of work product of an attorney or any other "representative" of a party. Therefore, defendants' attempt to distinguish those interview notes that may have been produced by a "non-attorney," *see* Defendants' Reply Brief at 15, falls flat. *See generally* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2026, at 231 (1970).

FN8. Defendants suggest that I review the interview notes *in camera* with an eye toward identifying and/or redacting attorney opinion work product contained in the

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notes. *See* Defendants' Mem. in Sup. at 30; Defendants' Reply Brief at 16. However, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes" by the simple fact of " 'what he saw fit to write down regarding witnesses' remarks.' " *Upjohn,* 449 U.S. at 399 (citation omitted); *see also Hickman v. Taylor,* 329 U.S. 495, 512 (1947) (where the Court-noting the dangers of inaccuracy and untrustworthiness in forcing an attorney to turn over his notes of oral statements-"[did] not believe that any showing of necessity can be made under the circumstances of this case so as to justify production [of oral statements made by witnesses to lawyers])." Therefore, it may be impossible to excise offending instances of attorney mental impression from notes of oral statements. Besides, even if the interview notes could be found to contain no mental impressions of an attorney or other party representative, the notes would still be discoverable only upon a showing of substantial need and undue hardship, which I do not believe defendants have made. *See infra.*

FN9. Defendants also note that at least two witnesses have left the jurisdiction since the interviews occurred; however, mere absence from the state typically does not itself make a substantial showing of substantial need. *See* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2025, at 217 (1970).

FN10. In their reply brief, defendants state that several witnesses have indicated to defense counsel that they do not recall the events listed in the complaint. *See* Defendants' Reply Brief at 16. If, at their depositions, these witnesses continue to insist that they cannot recollect important events, and it appears from the list provided by the government or by the witnesses' own deposition testimony that they were indeed interviewed by the government, defendants will have the opportunity at that time to file a new motion to compel, directed to production of the interview notes of those specific witnesses.

FN11. Additionally, defendants might claim a need to interview those with knowledge of relevant facts about the claims and defenses at issue; however, the government has already provided a list of all such persons-which it must now verify. *See supra* note 6.

FN12. Defendants claim that the government's calculus is incorrect because the two-year *state* statute of limitations should apply rather than the three-year *federal* statute of limitations used by the government and gleaned from 28 U.S.C. § 2415 ("Time for commencing actions brought by the United States"). *See* Defendants' Letter of December 31, 1992 to my law clerk, Timothy Macht. However, it is a well settled rule that "the United States is not subject to local statutes of limitations." *United States v. John Hancock Mut. Life Ins. Co.,* 364 U.S. 301, 308 (1960).

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