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United States District Court, S.D. New York.

Carolyn LANGLEY, Alberta Succaw, Shirley Furtick, and Celeste Cleckley, on behalf of themselves and others similarly situated, Plaintiffs,
v.
Thomas COUGHLIN, Commissioner of the New York State Department of Correctional Services, et al., Defendants.

No. 84 Civ. 5431 (LBS). | June 19, 1989.

Opinion

DOLINGER, United States Magistrate Judge:

***1** Defendants have moved to compel additional production of documents by the class plaintiffs. They also appear to seek additional documents from intervenor-plaintiff Michelle Burris. The parties have resolved several of their disputes since the filing of the motion. (*See* Reply Affidavit of Assistant Attorney General William K. Sanders, sworn to June 9, 1989 at ¶¶ 2–3.) As for the balance, defendants' motion is granted in part and denied in part.

1. ***The Attorney–Client Privilege***
The class plaintiffs are withholding approximately 350 pages of correspondence with their attorneys. According to the declaration of class counsel, the letters were written in connection with counsel's representation of the class in this litigation and are kept by counsel in a separate file labelled "correspondence with the Class." (*See* Declaration of Joan Magoolaghan, Esq., executed June 7, 1989, at ¶ 14.) That declaration in general terms meets the burden of a proponent of the attorney-client privilege under the applicable federal standard. *See, e.g.,* In re *Grand Jury Subpoena Duces Tecum,* 731 F.2d 1032, 1036 (2d Cir.1984) (quoting 8 C. Wigmore, *Evidence* § 2292 at 554 (McNaughton Rev.1961)).

The only specific questions raised by defendants concern whether the letters may have been disclosed to others and whether they might contain enclosures that are not privileged. To meet the first point, plaintiffs are to serve within seven days an affidavit, which may be by counsel, stating whether any of the letters reflect circulation to persons not covered by the privilege, and if so, they shall identify the author and all recipients of such correspondence. As for the question of unprivileged enclosures with the correspondence, plaintiffs shall serve an affidavit within seven days stating whether any enclosures sent with the correspondence have been withheld from production, and, if so, they shall identify the enclosures and the basis for withholding them. This affidavit may also be made by class counsel.

2. ***The Psychiatric Records of Plaintiffs***
Defendants seek either production of all pre-incarceration records of psychiatric treatment of plaintiffs or releases executed by those plaintiffs. Plaintiffs' counsel represents that all records in plaintiffs' possession have been produced and that counsel are now attempting to identify those plaintiffs who have had such psychiatric treatment in order to subpoena the pertinent records for trial.

Defendants are justified in seeking, at the least, releases by plaintiffs to pursue independent efforts to obtain relevant psychiatric records. Accordingly plaintiffs are to provide such releases to defendants. In view of the obviously substantial logistical difficulties facing plaintiffs' counsel in connection with this and other discovery matters, they will be given sixty days to complete this task.

3. ***Prior Testimony of Dr. Grassian***
Defendants seek copies of the transcript of any prior testimony by class plaintiffs' expert Dr. Stuart Grassian. To the extent that such testimony concerns the psychological effects of placement of a prisoner in isolation or other matters concerning which Dr. Grassian will testify at trial, the prior testimony is plainly relevant to the issues in this case. Moreover, under Fed.R.Civ.P. 26(b)(4)(A)(ii) the Court has discretion to permit discovery of expert witnesses beyond the limited scope provided in Fed.R.Civ.P. 26(b)(4)(A)(i), *see, e.g., Delcastor, Inc. v. Vail Associates, Inc.,* 108 F.R.D. 405, 409–10 (D.Colo.1985); *Dennis v. BASF Wyandotte Corp.,* 101 F.R.D. 301, 303 (E.D.Pa.1983); *cf.* In re *IBM Peripheral EDP Devices Antitrust Litigation,* 77 F.R.D. 39, 41–42 (N.D.Cal.1977), and in this case the defendants' request is quite reasonable. Accordingly, as a condition for Dr. Grassian testifying on behalf of the plaintiff class at trial, plaintiffs are directed to obtain from him and provide to defendants copies of any transcripts in his custody or control that contain testimony by him concerning any matters about which he is to testify in this case. Production is to be accomplished within ten days.

4. ***The Patient Treatment Records of Class Plaintiffs'***

and Intervenor Plaintiff's Psychiatric Experts

***2** Defendants seek document production from each of plaintiffs' psychiatric expert witnesses in the form of five randomly chosen patient files, which may be redacted to eliminate patient names. Defendants urge that such discovery is appropriate because these experts will testify about the adequacy of psychiatric records at Bedford Hills, and the experts' own patient records will reflect whether they themselves have conformed to the professional standards to which they are testifying.

Although the sought-after records would have some limited bearing on the question of professional standards for psychiatric record-keeping, defendants' request is inappropriate. First, it appears that production of such records would significantly trench upon the psychotherapist-patient privilege, which in one form or another is given general recognition both by the federal courts, *see, e.g., Robinson v. Magovern,* 83 F.R.D. 79, 91 (W.D.Pa.1979); *United States ex rel. Edney v. Smith,* 425 F.Supp. 1038, 1045–46 (E.D.N.Y.1976), *aff'd mem.,* 556 F.2d 556 (2d Cir.), *cert. denied,* 431 U.S. 958 (1977); *see also* In re *Zuniga,* 714 F.2d 632, 636 (6th Cir.), *cert. denied,* 464 U.S. 983 (1983); *Lora v. Board of Education,* 74 F.R.D. 565, 569–85 (E.D.N.Y.1977); *see generally* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 504[03]–[06] (1988), and by the states. *See, e.g.,* N.Y.C.P.L.R. § 4507 (McKinney Supp.1989); 2 *Weinstein's Evidence, supra,* ¶ 504[08] at 504–33 to –44. Although redaction of patient names and other possible protective devices would address to some extent the privacy concerns embodied in the privilege, *cf. Lora, supra,* 77 F.R.D. at 580–82, it is not at all clear that they could provide the degree of anonymity that is generally recognized as appropriate by the psychiatric profession. *See generally id.* at 582.

Second, the patients whose records would be exposed presumably have no interest in this litigation. Accordingly any invasion of their reasonable expectation of privacy in dealing with a psychotherapist should be avoided unless shown to be crucial to the fair adjudication of this case. *Compare Lora, supra,* 77 F.R.D. at 586 (surmising that the individuals whose records were being sought would not choose to invoke privilege since suit was seeking to protect their interests).

Third, the discovery is not being sought from a litigant but rather from non-parties, and even though the psychiatrists may have voluntarily chosen to serve as expert witnesses, it is the interests of their patients—who had no choice in the matter—that are at risk. Moreover, the federal rules limit to a degree the extent of discovery that may be taken of an expert witness, *see* Fed.R.Civ.P. 26(b)(4), and the assumption with regard to document production is that it will usually involve disclosure only of documents on which the expert has relied in forming his opinion or reports that he has prepared in connection with his preparation for trial testimony. *See generally County of Suffolk v. LILCO,* 122 F.R.D. 120, 122 (E.D.N.Y.1988); 4 J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 26.66[3] at 26–417 & n. 19 (2d ed. 1987) (citing cases). In this regard it bears noting that Rule 26(b)(4), on its face, permits discovery only of "facts known and opinions held by experts ... acquired or developed in anticipation of litigation or for trial...." Even broadly construed, this extends only to "all the documents the expert generated or examined in the process of forming those opinions" or "drafts of reports or memoranda experts have generated as they develop the opinions they will present at trial." *County of Suffolk v. LILCO,* 122 F.R.D. 120, 122 (E.D.N.Y.1988) (quoting *Hewlett–Packard Co. v. Bausch & Lomb, Inc.,* 116 F.R.D. 533, 536 (N.D.Cal.1987)). Since the psychiatrists' records on their own patients were not acquired or developed in connection with the litigation, they fall outside the permissible range of Rule 26(b)(4), even liberally construed.

***3** Fourth, defendants have not shown that the discovery they seek is necessary to a fair adjudication of the issues in this case. The professional standards at issue can be gleaned from the testimony of expert witnesses—including those retained by the defendants—as well as from an examination of the standards taught in medical schools or promulgated by professional societies. Such evidence seems, in fact, far more probative and reliable than the use of a small sampling of records taken from the files of the expert witnesses hired by the plaintiff class. Indeed, any evaluation of the significance of these isolated records almost certainly would require extended inquiry concerning both the psychiatric condition of those patients whose files are selected and the particular issues faced in treating them. In short, this form of proof would invite the Court into a swamp of tangential or irrelevant factfinding.

In sum, the requested patient files need not be produced.

CONCLUSION

Defendants' motion to compel is granted to the extent indicated, and is otherwise denied. The parties shall bear their own expenses of this motion.

SO ORDERED.