

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

RICHARD NADEAU, IN HIS CAPACITY :
AS THE ADMINISTRATOR OF THE :
ESTATE OF ELEANOR ANN NADEAU :
v. : C.A. No. 10-272ML
SUN HEALTHCARE GROUP, INC., :
et al. :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) are Plaintiff's Motions to Strike Objections and Compel. (Document Nos. 34 and 35). Defendant opposes both Motions. (Document Nos. 36 and 37). A hearing was held on July 25, 2011. At the hearing, Defendant was ordered to submit the documents identified in its privilege log to me for in camera review which was done on that same day. After reviewing the parties' arguments and conducting an in camera review of the documents identified as privileged by Defendant, Plaintiff's Motions are resolved as follows:

A. Document Requests

5. Defendant's Objections were withdrawn at the hearing. However, its response is sufficient since it represents that it has produced the only applicable liability policy of which it is presently aware.

8. & 9. Defendant's Objections are overruled and stricken. As to the Motion to Compel, Defendant represents that it has produced all such policies in effect on May 28, 2007 that it has been able to locate but that it "was under no legal obligation to preserve [such policies], and it has not done so." (Document No. 37-1 at p. 8). Although subsequent policies may be of marginal relevance, Defendant's relevance Objection is overruled, and it shall produce subsequent responsive

policies. Also, Defendant is reminded of its duty to supplement under Fed. R. Civ. P. 26(e) if it uncovers additional responsive policies in effect on or about May 28, 2007.

B. Interrogatories

2. & 6. Defendant's Objections are overruled and stricken. However, its responses are sufficient since it represents that it has identified all potential witnesses to the May 28, 2007 fall in issue and all others with discoverable information of which it is presently aware.

3. Plaintiff's Motion is DENIED as premature since the expert witness disclosure dates which were agreed to by the parties and subsequently ordered by the Court have not passed.

(See Document Nos. 26 and 33 and Text Orders GRANTING.)

4. Defendant's Objection was withdrawn at the hearing.

5. Defendant's Objection is overruled and stricken. Defendant shall fully respond to the Interrogatory.

8. Plaintiff's Motion is DENIED as Defendant represents that it has been unable to locate the nurse who wrote the Progress Note and it would be improperly speculating as to the identity of the staff members generically identified and not specifically named in the Note.

9. Defendant's Objections are overruled and stricken. However, its response is sufficient since it represents that it has produced a "staffing roster setting forth all clinical staff who were scheduled to be on duty on May 28, 2007." (Document No. 36-1 at p. 11).

11. Defendant's Objections are overruled and stricken. Defendant's response is that "at this time, the Defendant has not asserted that Eleanor Ann Nadeau made any oral statements which constitute an admission." (Document No. 36-1 at p. 12).

12. & 13. Defendant's Objections are overruled and stricken. Defendant's response is that it is not currently aware of facts supporting such contentions.

14. Plaintiff's Motion to Compel is DENIED as Defendant represents that it is not presently aware of the substance of any such conversations.

15. Defendant's Objections are overruled and stricken as to the signer of the Interrogatories and otherwise sustained. Although the information may be of marginal relevance given the signer's lack of direct personal knowledge since she was not employed at the time of the fall in issue, she did sign the responses under oath as required by Fed. R. Civ. P. 33(b)(3, 5).

16. & 17. Defendant's Objections are overruled and stricken. Defendant shall fully respond to the Interrogatory.

19. & 20. Defendant's Objections are overruled and stricken. However, its response is sufficient under Fed. R. Civ. P. 33(d) since it represents that it has produced all such policies currently in its possession, custody or control.

21. Defendant's Objections are overruled and stricken. Defendant shall fully respond to the Interrogatory.

22. Defendant's Objections are overruled and stricken. Defendant's response is that "at this time, the Defendant has not asserted that it advised Ms. Nadeau or any member of her family that Ms. Nadeau was not an appropriate resident of the Defendant's facility." (Document No. 36-1 at p. 27).

C. Privilege Log

In response to Document Requests 1, 6 and 11 and Interrogatory 18, Defendant produced a privilege log and asserted various privileges as to several responsive documents.

The first four items on the privilege log are unsworn, handwritten witness statements of Debra Holmander, LPN; Sharon Bray, CNA; and Suzette McCaffrey, CNA;¹ which were prepared by them on the day of the incident (May 28, 2007), as well as a fax sent on May 29, 2007 by the Assistant Director of Nursing at Pawtuxet Village, Susan Welch, to the Rhode Island Department of Health, Office of Facilities Regulation and the Rhode Island Long-term Care Ombudsman. Defendant offers several arguments as to why these four documents are privileged. Defendant contends the documents are work product pursuant to Fed. R. Civ. P. 26(b)(3)(A), and/or protected by the Rhode Island peer review privilege under R.I. Gen. Laws § 23-17-25(a), as well as the Federal Nursing Home Reform Act, 42 U.S.C. § 1396(b)(1)(B), and corresponding state law, R.I. Gen. Laws § 23-17-12.11.

The Federal Nursing Home Reform Act protects from disclosure any records that are created by or generated for “quality assurance” purposes at a nursing home. In re: Matter of Subpoena Duces Tecum to Jane Doe, 99 N.Y.2d 434, 440 (N.Y. 2005). There are only a handful of cases that have interpreted the relevant portion of the Federal Nursing Home Reform Act, but those decisions set forth several guideposts for this Court. First, the purpose of establishing quality assurance committees is to “develop[] and implement appropriate plans of action to correct identified quality deficiencies.” Spakosi v. Amsterdam Mem. Hosp. Skilled Nursing Fac., 789 N.Y.S.2d 408, 410 (N.Y. Sup. Ct. 2005). Documents that are created by or for quality assurance are accorded a statutory privilege in order to “encourage thorough and candid peer review.” Evans v. Quabog on the Common, Inc., No. 200601287D, 2009 WL 5698096 at *3 (Mass. Super. Ct. Dec. 7, 2009). Courts examining whether disputed documents are privileged have noted that the privilege does not

¹ The statements are written on “Interdisciplinary Progress Note” sheets which resemble the pages normally used in a medical chart.

attach when the documents at issue are merely examined or considered by a quality assurance committee, instead the documents must be “created or generated for quality assurance purposes.”

In re: Subpoena Duces Tecum to Jane Doe, 99 N.Y.2d at 440. Additionally, “[w]here facilities are compelled by a statutory or regulatory dictate to maintain a particular record or report that is not expressly related to quality assurance, the fact that a quality assurance committee reviews such information for quality assurance purposes does not change the essential purpose of the document.”

Id.

In the present case, Defendant was required by Rhode Island law (Rhode Island Administrative Code § 31-4-8:16.2) to report any resident accidents resulting in hospitalization, death in the nursing facility or death following hospitalization to the state licensing agency by the end of the next working day following the accident. The fourth item on the privileged log is identified as the “Report of May 28, 2007 incident drafted pursuant to Quality Assurance Procedures....” However, contrary to the representation on the privilege log, it is in fact a form that Defendant was legally required to submit to the Rhode Island Department of Health, which is wholly independent of Defendant’s internal quality assurance measures. As noted by the Court in Spakosi, the state law requirement to report certain incidents is “imposed on nursing homes generally and has no express relationship to quality assurance procedures.” Spakosi, 789 N.Y.S.2d at 410. For this reason, the fourth item on the privilege log is not entitled to protection. Additionally, after reviewing the witness statements, the Court is unconvinced by Defendant’s claim in the privilege log that the statements were taken for quality assurance purposes. Given the statutory mandate to disclose certain incidents which occur, the handwritten narratives outlining each witnesses’ direct observations of the incident do not appear to be created expressly for quality assurance purposes.

Although Defendant has stated that the documents were created for that purpose, Defendant has not otherwise presented any evidence to convince the Court of that, and thus has not met its burden of demonstrating that the documents are privileged. Moreover, there does not appear to be any basis for Defendant's assertion that the contemporaneous witness statements were made in anticipation of litigation, or that the mandatory accident report to the Department of Health was created for peer review purposes. Accordingly, the first four documents contained in the privilege log shall be disclosed to Plaintiff by the close of business on August 1, 2011 since they may be relevant to conducting the depositions of nursing personnel currently scheduled for August 3, 2011. As to the other documents on the privilege log, Defendant's claims of privilege are substantiated and sustained.

Conclusion

Plaintiff's Motions to Strike Objections and Compel (Document Nos. 34 and 35) are GRANTED in part and DENIED in part as specified herein. Defendant shall produce the first four documents listed on its privilege log by close of business on August 1, 2011, and otherwise supplement its responses as ordered within twenty-one (21) days pursuant to Local Rule Cv 37(b).

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 29, 2011