

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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UNITED STATES OF AMERICA,                    )  
  )  
                  Plaintiff,                    )  
  )  
vs.    )                    No. 04-20017-DV  
  )  
RANDE LAZAR, M.D., d/b/a                    )  
OTOLARYNGOLOGY                            )  
CONSULTANTS OF MEMPHIS,                 )  
                  Defendant.                 )

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ORDER GRANTING DEFENDANT'S MOTION TO COMPEL THE GOVERNMENT'S  
COMPLIANCE WITH RULE 16(a)(1)(G) (Doc. No. 43)  
AND  
ORDER DENYING DEFENDANT'S MOTION FOR ADDITIONAL TIME TO MAKE  
EXPERT DISCLOSURES AS MOOT (Doc. No. 54)  
AND  
ORDER CLARIFYING THE PROCESS FOR WHICH THE DEFENDANT'S EXPERTS  
MAY VIEW CT SCANS IN POSSESSION OF THE GOVERNMENT

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Before the court is the May 17, 2004, motion of the defendant, Rande Lazar, to compel the government to produce expert summaries that conform to Fed. R. Crim. Proc. 16(a)(1)(G) and to disclose all exculpatory information concerning the government's experts, as well as the government's promises, payments, threats, or other benefits given to each of its experts, and each expert's criminal, regulatory, and malpractice history. Also before the court is the motion of Lazar filed June 18, 2004 for additional time to make expert disclosures. Both motions were referred to the United States Magistrate Judge for determination.

A. Defendant's Motion to Compel the Government's Compliance with Rule 16(a)(1)(G)

Upon review of the entire record in this case, the court is unable to locate the government's specific response to Lazar's motion to compel compliance with Rule 16(a)(1)(G) although there are a number of motions and responses dealing with expert disclosures. Despite the fact that the government did not respond to the motion, which under Local Criminal Rule 12.1 would normally require the court to grant defendant's motion, the court has decided that it is necessary to rule on the merits of the motion. The motion was referred to the United States Magistrate Judge for a determination. For the following reasons, the motion is granted.

By order dated April 21, 2004 the undersigned magistrate judge ordered the government to serve upon defendant's counsel written expert summaries, pursuant to Fed. R. Crim. P. 16(a)(1)(G), within ten (10) days of the entry of the order. On April 27, 2004, the government complied with the order producing a written list of fourteen experts while advising defense counsel that it expected to later amend its disclosure to add additional experts.

In response to the government's written expert disclosures, Lazar filed this renewed motion on May 14, 2004, to compel the government to comply with Fed. R. Crim. P. 16(a)(1)(G). Lazar contends that the government failed to specify in its report each

expert's own specific opinions, the particular patient or count in the indictment to which that expert's opinion applies, and each expert's bases, reasons, and methodology for his or her opinions. Lazar also contends that the government should have disclosed each expert's employment history, publications, presentations, or prior testimony about the issues on the which the expert purports to testify.

Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure governs discovery of the government's expert witnesses. It requires the government, upon request by the defendant, to provide the defendant with "a written summary of any testimony that the government intends to use under Rule 702, 703 or 705 of the Federal Rules of Evidence during its case-in-chief at trial." FED. R. CRIM. P. 16(a)(1)(G). The summary must "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Id.* The objective of the drafters of Rule 16(a)(1)(G) was to "minimize surprise that often results from unexpected expert testimony, . . . and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *Id.* at Advisory Committee Notes, 1993 Amendment. Moreover, the summary should inform the requesting party "whether the expert will be providing only background information on a particular issue or whether the witness

will actually offer an opinion." *Id.*

In this case, a 115 count indictment was returned by the grand jury charging Lazar with devising and executing a scheme to defraud and obtain money from health care benefit programs. The indictment charges that Lazar falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all. In order to defend himself on each of the 115 counts, it is only fair that Lazar be prepared for whatever expert testimony the government decides to use against him in each count of the indictment. The government however has not sufficiently produced this required information in their initial expert summaries. (Def. Mot. to Comp. Gov.'s Compliance with Rule 16(a)(1)(G), Ex. A.) Instead, the government has combined the opinions of all the experts into one summary without identifying which expert is saying what concerning which particular patient or what particular count. Without the benefit of knowing which of the government's experts will testify as to what count in the indictment, Lazar will not be able to effectively defend himself or rebut the expert's opinions.

Accordingly, pursuant to Fed. R. Crim. P. 16(a)(1)(G), the government shall produce and serve upon the defendant within ten (10) days of the entry of this order a separate written expert report for each expert. Each report shall contain each expert's

own specific opinions. Each expert shall identify the particular patient or count in the indictment to which he/she will be testifying. In addition, the report shall identify each expert's own individual bases for his or her opinions, including but not limited to 1) a list of specific patient records relied on by such expert; 2) all information provided by the government, through any agent or attorney, to such expert other than patient records; 3) the substances of all communications between such expert and any other physician along with the name of such physician; 4) the substance of all communications between such expert and any patient along with the name of such patient; and 5) the expert's own reasons for his or her specific opinions including an explanation of the expert's methodology used in reaching his or her opinions.

Lazar also asks the court to compel the government to disclose each expert's employment history, publications, presentations, prior testimony on the issues on which the expert purports to testify and the expert's personal or economic motivations for testifying. While the government has provided a brief educational and training background for each of its experts, it has failed to list the items requested by Lazar. Rule 16(a)(1)(G) requires that the expert summary include "the witness's qualifications." The rule does not suggest what information is sufficient to satisfy the

required "witness qualification" disclosure, but Federal Rule of Civil Procedure Rule 26(a)(2)(B) provides some guidance. Rule 26(a)(2)(B) states that the disclosure of expert testimony report should contain "the qualifications of a witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Accordingly, to satisfy the mandates of Rule 16(a)(1)(G) which requires the government to include the qualifications of an expert witness, the government is ordered to produce a report containing a list of the expert's employment history, publications, presentations, prior testimony on the issues on which the expert purports to testify and the expert's personal or economic motivations for testifying within ten (10) days from the entry of this order.

Lazar's motion to compel is denied as to each expert's criminal, regulatory, and malpractice history.

B. DEFENDANT'S MOTION FOR ADDITIONAL TIME TO MAKE EXPERT DISCLOSURES

The court now turns its attention to an issue that arises as a result of this order. On October 18, 2004, this court ordered Lazar to file and serve on the government his expert witness list

within twenty (20) days of the date of service of the order. This time is now extended until twenty (20) days after Lazar receives the government's revised written expert reports. This order also effectively causes Lazar's Motion for Additional Time to Make Expert Disclosures and for Use of Critical Evidence, and His Expert Notice Pursuant to Fed. R. Crim. P. 16(b)(1)(C), (Doc. No. 54) to be moot as the court has now specified a time for when defendant's disclosures are due.

C. ACCESS TO THE CT SCANS

Another issue raised by Lazar in his Motion for Additional Time to Make Expert Disclosures (Doc. No. 54) involves access to 160 CT scans in the possession of the government. In his June 18, 2004 motion for additional time, Lazar requested the court to order the government to release the CT scans relied on by its experts directly into the custody of his experts once such experts were obtained. Lazar contended that the government's refusal and/or failure to do so places an unfair and unreasonable financial burden on him. In his motion he asked the court to impose reasonable conditions on the release of the CT scans in order to safeguard the evidentiary integrity of the scans. From the correspondence between the parties cited in the government's response motion, it appears as if the government has given Lazar ample opportunity to allow his experts to view the CT scans. In Lazar's subsequent

reply to the government's response, he withdrew his motion regarding the discovery of the CT scans because, as stated by Lazar, "it appears the parties are on their way to resolving the CT scan discovery issue without the court's intervention." What is problematic about this statement is that Lazar continues to complain about the problem in a surreply to the same motion filed ten (10) days later.

The court is unaware of the present situation regarding the CT scans. If the CT scans have not been produced by agreement, in order to facilitate the process of allowing Lazar's experts to view the CT scans, the court orders that the parties follow the government's proposal outlined in the United States Response to Defendant's Motion for Additional Time to Make Expert Disclosure (Doc. No. 63). According to this proposal, the government will release batches the CT scans to the defense in batches of ten at a time. The following safeguards are imposed: 1) Each expert will sign certifications that the signatory understands the CT scans must be returned to the government in the same condition as received; 2) The CT scans must be stored in a manner consistent with best practices; 3) Each expert will sign a statement which states the following: "Any intentional alteration or tampering with the CT scan could subject the signatory to criminal penalties including obstruction of justice; 4) The defendant is not to have

any access to the CT scans unless the expert or an attorney is present; 5) Each expert will execute a certification that the CT scans are being returned to the government in the same diagnostic condition that the CT scans were received; 6) The CT scans will be delivered in batches of ten; and (7) A new batch will be sent as soon as the previous batch is returned and in good condition.

For the above reasons, the defendant's motion to compel the government's compliance with Rule 16(a)(1)(G) is granted. The government shall produce and serve upon the defendant within ten (10) days of the entry of this order a separate written expert report for each expert containing the information specified herein. Lazar shall file and serve on the government his expert witness list within twenty (20) days after Lazar receives the government's revised written expert reports. The CT scans will be produced in accordance with the procedures outlined in this order.

IT IS SO ORDERED this 28th day of October, 2004.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE