SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KINGS

BRENTON R. SMITH, M.D. et. al
Plaintiff,
vs.
ADVENTIST HEALTH SYSTEMS/ WEST et. al.
Defendants.

CASE NO. 08C0069

ORDER GRANTING MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES AND REQUESTS FOR ADMISSION

ORDER GRANTING MOTION FOR SANCTIONS AGAINST DEFENDANTS AND THEIR COUNSEL

The hearing on plaintiff's motion to compel further responses to form interrogatories and requests for admission and for sanctions came on for hearing on May 9, 2011. The court heard argument from counsel and took the matter under submission. For the reasons discussed below, the motion to compel is granted and sanctions are ordered.

**Plaintiff's request for judicial notice**

The court denies the request for judicial notice of various documents that have been filed in this case in support of a waiver of the Evidence Code section 1157 objection made by the responding parties to some of the interrogatories and requests for admission. The court finds that a waiver finding is not needed in order to compel defendants to further respond to the requested discovery. The request did not attach a copy of the documents to review. Although (as required by California Rule of Court, rule 3.1306 ( c)) plaintiff did describe the documents, there are 17 court files in this case. Given the limited relevance of the "waiver" theory to support the motion, the court found that the burden to retrieve the relevant file and search for the document outweighed the relevance of the request. Accordingly, the request for judicial notice is denied.

**Ruling on defendants' objection to discovery based on Evidence Code section 1157**

Evidence Code section 1157 subdivision (c) provides that its discovery prohibition embracing proceedings and records of health care review committees does not apply to any person requesting hospital staff privileges. It has been held that the discussion concerning a peer's request for staff privileges is not protected from discovery and his or her colleague's criticisms can be discovered. (*Brown v Superior Court* (1985) 168 Cal.App.3d 489, 501.) The court in *Brown* also held that the burden is on the person resisting discovery to establish that the discovery request would violate Evidence Code section 1157. It is not permissible to object on the grounds that the request *may include* materials generated by hospital committees. Instead, the hospital resisting discovery must sufficiently establish that an answer cannot be given without divulging the proceedings or the records of the medical staff committees to which section 1157 refers. (*Id.* at 501.)

Here, Form Interrogatory 12.1 sought: 1) the identity of witnesses to the incident (defined as the refusal to accept the reapplication of Brenton R. Smith MD submitted in or around October 2007); 2) the identity of persons making statements at that time; 3) the identity of persons hearing statements made at that time; and 4) the identity of persons having knowledge of the incident (other than expert witnesses). Objection was made to the use of the word "reapplication." Responding parties also asserted an Evidence Code 1157 objection "to the extent the word "incident" relates to discussions of peer review committees to the Medical Staff."

In responding to an interrogatory, the responding party must answer the interrogatory to the extent possible. (CCP 2030.220 (b) [interrogatories are to be answered to the extent possible; CCP 2030.240 [answer is to be given to the unobjectionable portion of the interrogatory] .) Here, responding parties may object to plaintiff's characterization of the request for hospital privileges as a "reapplication" since this is an issue in dispute in this lawsuit. However, responding parties are required to proceed and answer the unobjectionable portion of the interrogatory. In the above example, that means respondents were to proceed and provide the information requested about the identity of the witnesses to the refusal to accept the "reapplication." In terms of the Evidence Code section 1157 objection, the court finds that responding parties have not met their burden that the information requested is protected from discovery. Identification of witnesses is not testimony or documents from the peer review committees. This same finding (that defendants failed to meet their burden to establishing an Evidence Code section 1157 objection) applies to the other interrogatories. (Interrogatory 12.2

[identity of persons interviewed about the incident]; 12.3 [identity of person from whom written or recorded statement was taken]; 12.6 [identity of person making a report of incident]; 13.1 [if surveillance been conducted]; 13.2 [if report of surveillance made and identity of author of report; 14.1 [if contention is made a violation of law was proximate cause of incident]; 14.2 [identification of any person charged with violation of law as a result of incident]; 17.1 [identity of witnesses of no response to request for admission, facts in support of denial, identification of documents].

As to the three requests for admission, an objection was made to each request "to the extent it seeks information immune from discovery pursuant to Evidence Code section 1157." No persuasive argument was presented by defendants that an "admit" or "deny" response would divulge the proceedings or the records of the medical staff committees to which section 1157 refers. And, as noted above, the information is being sought by a physician seeking hospital privileges. This is a situation that is specifically excluded from the discovery prohibition set forth in Evidence Code section 1157.

The discovery was propounded before the complaint was amended to also seek damages. The only case that the court found that discussed the impact of Evidence Code section 1157 in a suit for both hospital privileges and damages was *Teasdale v Marin General Hospital* (1991) 138 F.R.D. 691. The court therein noted that *California Eye Institute v Superior Court of Fresno County* (1989) 215 Cal.App.3d 1477 did not decide what should happen when the physician's hospital privileges had been denied, suspended or terminated. (*Id.* at 695 citing *Calif. Eye Institute* at 1481 n.3.) The *California Eye Institute* case also did not discuss if discovery should be prevented when the physician had successfully exhausted his administrative remedies and was suing for damages.) (*Id.* at 1486 n. 5.)

With respect to the discovery requested from the five responding defendants herein, the court is only ruling that defendants have not met their burden that the Evidence Code section 1157 discovery bar applies to this discovery. The court reserves for a later, and more thorough briefing by the parties at the appropriate time, if there is any need for or ability to distinguish between discovery permitted to plaintiff in his suit seeking redress for the failure/ refusal to consider his reapplication for appointment, as opposed to plaintiff's suit for damages, and if a "privilege log" should be established as to specified documents within the latter category.

**Background**

Form Interrogatories and Requests for Admission were propounded by plaintiff against 5 defendants in 2008. Before defendants responded, the case was stayed by the SLAPP motion and appeal of the denial of the SLAPP motion. Responses to the RFA and Form Interrogatories were served 2/3/11. Only objections were made to the RFA. The interrogatories were either objected to, there was no response, or unverified responses were received. One set of meet and confer letters was exchanged. One supplemental response from Rawson was given, but the supplemental response was not verified, the verification only referred to the original responses. Without an extension, the motion to compel was required to be filed by 3/18/11. An extension was granted to 4/1/11 by counsel for defendants. Plaintiff counsel sent a letter 3/22/11 and asked for supplemental responses by 4/1/11 if defendant would further extend the time to bring the motion to 4/8/11. There was no response. Another letter was sent by plaintiff 3/28/11 asking for a response. Another proposal from plaintiff was suggested to extend the deadline to 4/5/11. Defendant did not respond.

This is the motion to compel further responses to discovery propounded in 2008. Separate statements were filed in support of each motion against each defendant. The separate statements contain citation to case and statutory authority in support of each request for a further response. Sanctions are sought as follows ($3200 plus $5200 plus 40 filing fee for each motion (400) is sought for a total of $8800:

Declaration of Joseph Andrews was filed in support of a request for attorney fees of $3200 ($250 an hour times 12 hours; $640 for each of 5 motions relating to form interrogatories and Request for Admissions ) (Doc 257)

Declaration of attorney Hensliegh in support of attorney fees. (Doc 258) It relates to form interrogatories and requests for admission propounded in October of 2008 against 5 defendants (AHW (Adventist Health Systems West); HCMC, CVGH, SCH, Rawson). It sets forth the meet and confer efforts made as set forth above. Objections to discovery were received on 2/3/11 from all defendants except HCMC (Hanford Community Medical Center) a response was received from AHMC (a non-party called Adventist Health Medical Center) One of the objections was that a separate request for admissions was not served on each defendant (even though defendants served a set for RFA on all plaintiffs). Some responses were objected to, some were not responded to and others were responded to but not verified. The motions were

filed on the due date of 4/1/11. Attorney fees are sought in a total sum of $5200. ($250 an hour time times 17 or more hours. A break down per defendant is set forth in the declaration.

Form Interrogatories were the Judicial Council interrogatories.

The requests for admission (which related to the original complaint, that was not yet amended to seek damages and focused on the bylaw 36 month rule for rejecting the reapplication) included the following requests:

1. Admit that section 4.5-10 of the Consolidated Medical Staff bylaws of the consolidated Medical Staff of Central Valley General Hospital, HCMC and SCH did not permit you to refuse to accept the reapplication by Brenton Smith MD submitted in October 2007
2. Admit that Brenton Smith MD submitted a reapplication to the Consolidated Medical Staff of CVGH, Hanford
3. Admit that Brenton Smith MD did not submit an application to SCH from any time between January 1, 2007 to present.

**Responding Parties Position (Doc 285)**

Opposition explains who all the defendants are. HCH is the only "true" defendant. HCMC is a former dba. Adventist Medical Center-Hanford is a new dba following the building of the new hospital. They cited to the verified response sent after the deadline and argue that the motion as to Interrogatories 1-3 is "moot."

The opposition argues that it was plaintiff who was unreasonable for not sending a copy of the "reapplication" so defendant knew what document was being referred to in the definition of "incident." Opposition at pages 11-12 also take the position that Evidence Code section 1157 is not a privilege that can be waived, but it is "discovery immunity." Defendant relies on *University of Southern Calif v Sup Ct* (1996) 45 Cal.App.4th 1283, 1292. (Reply notes that this case actually supports plaintiff, who is a staff physician, not a medical resident in training as in the cited case. This distinction is noted at page 1290 [Physicians seeking staff privileges are entitled to discovery notwithstanding the general discovery exemption of section 1157. [7] However, there is no exception applicable to a resident such as Dr. Comeau who seeks reinstatement to a postgraduate training program.)

Declaration of attorney Shenfeld in opposition (Doc 284)

The attorney explains who the defendants are and why Hanford Community Hospital responded to discovery directed to Selma Community Hospital. (SCH is a dba of SCH Inc, which no longer exists; HCH is the successor interest to SCH Inc.) The attorney states that all of this is set forth in a response to a form interrogatory verified by Richard Rawson. (But this response was not served on plaintiff until 4/7/11 after the 45 day deadline for bringing the motion to compel, as extended by defendant to 4/1/11.) The declaration sets forth the meet and confer efforts made, with exhibits. The attorney accuses plaintiff of not having sent the letter with a fax cover sheet so it was delivered to the wrong attorney, a delay of "several days." As to the last offer (to receive verified responses by 4/1/11 on condition an extension is granted to 4/8/11) there was an email after 6:00 pm the day before the deadline essentially accusing plaintiff of not meeting and conferring in good faith. The Rawson replacement verification was also sent (after the deadline) on 4/7/11.

IT IS HEREBY ORDERED THAT:

Plaintiffs' motions to compel further responses to the form interrogatories and requests for admission from all 5 defendants are granted. The request for sanctions against all 5 defendants in the amounts as specified in the declarations of attorneys Heinsleigh and Andrews and Andrews supplemental declaration (which adds an additional $2500 in sanctions [Doc 289]) for a total sum of $11,300.

The court finds that defendants unreasonably filed objections to form interrogatories and requests for admission and made no attempt to object, but then without waiving the objection, proceed to answer the interrogatories/ RFA to the extend the defendants were able to do so. (CCP 2033.220 (a) and (b) [requests for admission]; CCP 2030.220 (b) [interrogatories are to be answered to the extent possible; CCP 2030.240 [answer is to be given to the unobjectionable portion of the interrogatory].) Sanctions are also supported by the declarations and exhibits of counsel and the fact that defendant's counsel unreasonably refused to cooperate in supplying supplemental responses and unreasonably refused to extend the deadline for filing the motion to compel in light of the numerous objections raised by defendants.

The rulings on the issues raised by the parties follow:

1. Requests for Admission were propounded to Hanford Community Medical Center (HCMC). No verified responses to discovery were received from this entity. Instead, a response (consisting solely of objections) was received from Adventist Medical Center-

Hanford (AHMC) Plaintiff asserts this is a "non-party and unknown entity." Plaintiff is entitled to a verified response to discovery from HCMC. If this entity no longer exists, is merely a dba of another legal entity, then a verified response that so states should be supplied.

2. There was no confusion in the discovery being addressed to all defendants. Each defendant may answer separately with a separate verification if they so desire. (*Tobin v Oris* (1992) 3 Cal.App.4th 814, 829, disapproved on other grounds in *Wilcox v Birdwhistle* (1999) 21 Cal.4th 973, 982.)

3. The form interrogatories are not ambiguous and plaintiff was not required to provide to defendant a copy of the "reapplication" submitted by Dr. Smith in 2007. It is inconceivable that defendants were uncertain what document was being referred to by the interrogatories given the long history of this case and the many appellate decisions discussing this reapplication. The objection to the interrogatory on that basis was frivolous. (*Clement v Alegre* (2009) 177 Cal.App.4th 1277, 1283-1284.)

4. The few verified responses that defendants did provide were after the motion to compel deadline and such delayed response does not support defendants' opposition to plaintiff's request for attorney fees as sanctions. For the sake of clarity, verified responses to each set of discovery that was the subject of this motion is to be supplied.

5. To the extent the responding parties refused to answer the discovery propounded based on Evidence Code section 1157, the court overrules the objection. As noted above, Evidence Code section 1157, subdivision ( c), excludes this privilege from litigation between the health care professional review committees and the person requesting hospital staff privileges. (*Schultz v Superior Court* (1977) 66 Cal.App.3d 440, 446; *University of Southern California v Superior Court* (1996) 45 Cal.App.4th 1283, 1290.) No limitation of this exception to administrative proceedings is set forth in Evidence Code 1157, subdivision ( c) and the posture of this case is not as existed in *California Eye Institute v Sup Ct* (1989) 215 Cal.App.3d 1477. The court in the forgoing case found that Evidence Code section 1157 did not apply to the plaintiff doctor because he had been reinstated to full hospital staff privileges three years before the damage action had commenced. (*Id.* at 1481 and fn 3.) By contrast here, plaintiff is exercising hospital privileges as a result of a preliminary injunction issued by this court and affirmed on appeal, and he is seeking hospital privileges at this time. Defendants failed to bear their burden of establishing that the information requested herein falls within the protection of

Evidence Code section 1157. (*Coy v Sup Ct (Wolcher)* (1962) 58 Cal.2d 210, 220-221 [burden is on responding party to justify objections]; Weil and Brown Civil Procedure Before trial section 8:1179.)

6. Defendants' objections based on attorney client and attorney work product privilege do not have merit as plaintiffs are not seeking disclosure of privileged communications between client and counsel and do not seek counsel's work product.

Further verified responses to requests for admission and form interrogatories from each defendant are due 20 days after service of notice of ruling. Sanctions from each defendant and defendant's law firm are due 30 days after service of notice of entry of ruling in the amounts set forth in the declarations filed by plaintiff's counsel.

Dated: 5-16-11

Thomas DeSantos

Thomas DeSantos, Judge
Kings County Superior Court

CONFORMED COPY
ORIGINAL FILED ON

MAY 17 2011

TODD H. BARTON, COURT EXECUTIVE OFFICER
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF KINGS

DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KINGS

* * * * *

**BRENTON R. SMITH, M.D. et al,**
**Plaintiff(s),**

**Vs.**

**ADVENTIST HEALTH SYSTEMS/WEST, et al.**
**Defendant(s)**

**PROOF OF SERVICE BY MAIL**

**No. 08 C 0069**

I hereby declare under penalty of perjury that I am employed by Kings County Superior Court, over the age of 18 years, and not a party to the within action.

That on **May 17, 2011**, I served the within **ORDER GRANTING MOTION TO COMPEL FURTHER RESPONSES TO FORM INTERROGATORIES AND REQUESTS FOR ADMISSION AND ORDER GRANTING MOTION FOR SANCTIONS AGAINST DEFENDANTS AND THEIR COUNSEL** by mailing a true copy thereof, from my place of business (Kings County Superior Court, 1426 South Drive, Hanford, CA 93230), following our ordinary business practices with which I am readily familiar, addressed as follows:

| | |
|---|---|
| **Barbara Hensleigh**<br>**ANDREWS & HENSLEIGH, LLP.**<br>**350 S. Figueroa Street, Suite 580**<br>**Los Angeles, CA 90071**<br>***(Attorney for Plaintiff's BRENTON SMITH, M.D., VALLEY FAMILY HEALTH CENTER MEDICAL GROUP, INC., AND CENTRAL VALLEY MATERIAL & CHILD CARE CENTERS MEDICAL GROUP, INC.)***<br>**(Mailing)** | **Carlo Coppo, Esq.**<br>**Michael R. Popcke, Esq.**<br>**DiCARO, COPPO & POPCKE**<br>**2780 Gateway Road**<br>**Carlsbad, CA 92009**<br>***(Attorneys for Defendants THE CONSOLIDATED MEDICAL STAFF OF CENTRAL VALLEY GENERAL HOSPITAL, HANFORD COMMUNITY MEDICAL CENTER, SELMA COMMUNITY HOSPITAL AND NICHOLAS REIBER, M.D.)*** |
| **MANATT, PHELPS & PHILLIPS, LLP.**<br>**Barry S. Landsberg**<br>**Doreen Wener Shenfeld**<br>**11355 West Olympic Boulevard**<br>**Los Angeles, CA 90064-1614**<br>***(Attorney for Defendants, ADVENTIST HEALTH SYSTEMS/WEST, HANFORD COMMUNITY MEDICAL CENTER (ALSO ERRONEOUSLY SUED AS SELMA COMMUNITY HOSPITAL); CENTRAL VALLEY GENERAL HOSPITAL; SELMA COMMUNITY HOSPITAL, INC. AND RICHARD RAWSON)***<br>**(Mailing)** | |

Executed on **May 17, 2011** at Hanford, California.

TODD H. BARTON, Court Executive Officer and Clerk of the Courts

by: Rachelle Serrano

Rachelle Serrano, Deputy Clerk