

**MINUTE ENTRY**  
**ROBY, M.J.**  
**January 26, 2022**

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF LOUISIANA**

**UNITED STATES OF AMERICA**

**CRIMINAL ACTION**

**VERSUS**

**NO: 21-CR-98**

**SHIVA AKULA**

**SECTION: "I" (4)**

**JUDGE KAREN WELLS ROBY, PRESIDING**

LAW CLERK: Jayde Encalade  
COURT REPORTER/RECORDER: Alexis Vice

Appearances: **Kathryn McHugh** for the United States of America  
**Rachel Conner** for Defendant.

**Minute Entry and Amended Order**

Before the Court is a **Motion for Protective Order Governing the Use of Protected Material (R. Doc. #51)** filed by the Government seeking an order prohibiting the release of confidential and sensitive information contained in the documents produced during discovery. The motion is opposed. R. Doc. #60. The United States also provided a reply to Defendant's opposition. R. Doc. #61. The motion was heard by oral argument via video teleconference on January 19, 2022. Counsel participated in a status conference via video teleconference with the Court on January 26, 2022.

**I. Background**

On August 5, 2021, Defendant, Dr. Shiva Akula ("Dr. Akula") was charged by indictment with twenty-three (23) counts of health care fraud in connection with his ownership and operation of Canon Healthcare ("Canon"). Dr. Akula is an infectious disease specialist in

the New Orleans area. R. Doc. 60, p. 1. In addition to his private practice, Dr. Akula owned and operated Canon, a nonprofit hospice care facility with three locations in Louisiana. *Id.*

During Canon's operations, claims were submitted to Medicare for reimbursement. To receive Medicare funds, providers, their authorized agents, employees, and contractors are required to abide by the provisions and regulations promulgated under the Social Security Act as well as the policies, procedures, rules, and regulations issued by the Centers for Medicare and Medicaid Services. R. Doc. 1, p. at 4. It is alleged that from January 2013 to December 2019, Dr. Akula, through Canon, violated these policies and regulations by improperly billing Medicare \$62,833,346.28, resulting in Cannon being paid approximately \$47,106,838.94 in reimbursements.

It is first alleged that Dr. Akula improperly treated and billed patients in hospice care. Medicare beneficiaries are eligible for hospice care when they are certified as being terminally ill. *Id.* p. 3 at 9. Under Medicare there are three levels of care: continuous home care, general inpatient ("GIP"), and respite care. *Id.* p. 3 at 7. GIP is available for a hospice beneficiary who is in need of pain management or symptom management that cannot be provided in any other setting. *Id.* p. 3 at 8. When a Medicare beneficiary receives hospice care the medical provider is paid a per diem rate based on the number of days and level care. *Id.* p. 6 at 22. The per diem includes payment for all services directly provided or arranged by the hospice care provider. *Id.*

In the indictment, it is alleged that Akula instructed his employees to improperly admit patients and automatically billed for GIP services. *Id.* at p. 8. It is further alleged that he instructed Canon employees to improperly bill for GIP services to maximize reimbursements, while knowing that the services being billed for were not medically necessary. *Id.*

Each year the American Medical Association (“AMA”) publishes Common Procedural Terminology (CPT) codes that are used for reporting medical services and procedures performed by medical providers. *Id.* p. 2 at 5. These codes were used by the employees at Canon when submitting reimbursements to Medicare. It is alleged that Dr. Akula violated CPT code 99233, CPT code 99236, and CPT code 99350. *Id.* at p. 8. Regarding CPT code 99233 and CPT code 99236, it alleged that Dr. Akula engaged in double billing.

CPT 99233 is a code designated for subsequent hospital care for an unstable patient with significant or new complication or problems. It requires at least two of the following components to be completed: (1) detailed interval history; (2) detailed examination; and/or (3) medical decision making of a high complexity. *Id.* p. 7 at 25. The indictment alleges that Canon routinely billed for physician services using this code when the beneficiary was receiving GIP services. *Id.* at p. 8. Since the patient was receiving GIP services, the Government alleges that it was improper for Canon to also bill separately for individual services using CPT code 99233. The Government alleges that from approximately January 1, 2013 to August 25, 2017 Canon submitted 23,000 claims using this code and was paid approximately \$2,281,251 in reimbursements. *Id.* at p. 8.

CPT code 99236 is billed when a patient is admitted to in-patient care for a minimum of 8 hours but less than 24 hours. *Id.* p. 7 at 26. When billing using the code, it is required that a physician be present and perform the initial hospice care service. *Id.* The physician is also required to personally document admission and discharges notes and include the number of hours the patient was in inpatient status. *Id.* The indictment alleges that Cannon routinely billed for physician services using CPT code 99236 while patients were admitted for GIP hospice services. *Id.* at p. 8. Again, the Government alleges that Canon should not have billed separately

using this code while also billing for the GIP services. As a result, the Government alleges that Cannon submitted approximately 1,053 claims using this code and was paid approximately \$223,601 by Medicare. *Id.*

CPT Code 99350 is used to bill for home visits for the evaluation and management of established beneficiaries who present problems of moderate to high severity which require immediate physician assistance. *Id.* p. 7 at 27. The code requires a physician to be present at the home visit in order to seek reimbursement using this code. *Id.* It is alleged in the indictment that Cannon purported that home visits were performed by a doctor when a doctor did not perform the visits. *Id.* at p. 8. As a result of these home visits, it is alleged that Medicare reimbursed Canon approximately \$316,384. *Id.*

## **II. Non-Lawyer Advocacy Group -Physicians Against Abuse**

Dr. Akula hired Physicians Against Abuse (“PAA”), a physician’s advocacy group, to assist him with defending the case. However, this fact was not disclosed to the Court at the original discovery hearing in this case in January 29, 2022. According to its website, PAA is a non-lawyer advocacy group that serves as conduit for the retention of lawyers and experts, they also “dive into the evidence and follow every lead to prove beyond a shadow of doubt the lack of merit in the case filed”. *See* PAA website<sup>1</sup>.

PAA retained Rachel Conner (“Ms. Conner”), an attorney licensed to practice in this Court, to represent Dr. Akula in this case. By virtue of their relationship with Ms. Conner and Dr. Akula, Dr. Christina Black (“Dr. Black”) and Sebastian Ohanian (“Mr. Ohanian”) believe they are entitled to access the evidence in the case. Ms. Conner, counsel for Dr. Akula, acknowledged that she represents him, while still advocating to permit Dr. Black and Mr.

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<sup>1</sup> Physicians Against Abuse Webpage, <http://physiciansagainstabuse.com/> (last visited January 26, 2022)

Ohanian, the ascribed consultants, to gain access to the case evidence for the purpose of aiding in defending Dr. Akula. Ms. Conner also requested an allowance for the evidence in this case to be used in administrative proceeding for Dr. Akula. But, when requested by the Court, Ms. Conner failed to present information regarding the nature of those administrative matters. Ms. Conner also originally failed to disclose that she was hired by PAA to serve as counsel for Dr. Akula.

### **III. The Motion**

The Government opposes the release of the discovery produced in this case to PAA. The government, represented by AUSA Kathryn McHugh (“AUSA McHugh”), generally argued that the information should not be produced specifically to Dr. Black, a PAA board member. AUSA McHugh argued that as a consultant hired by the defendant, Dr. Akula, and not his counsel Ms. Conner, Dr. Black and Mr. Ohanian should not have access to the discovery. AUSA McHugh further represented that Dr. Black was previously involved in the issuance of an incendiary press release and that members of Dr. Akula’s trial team were using information related to the investigation to intimidate current and potential witnesses. R. Doc 61-2, p. 2.

Given the lack of transparency by both counsels, and evaluating the evidence provided at the hearing of January 19, 2022, the Court concluded that Dr. Black and Mr. Sebastian Ohanian, who was represented to be a consultant and Dr. Black’s attorney, were granted permission to sign the protective order and have access to the discovery. AUSA McHugh and Ms. Conner were ordered to submit an updated draft of the protective order consistent with the Court’s ruling. The government requested seven days to conduct research to challenge the appropriateness of allowing Dr. Black and Mr. Ohanian access to the information in this Medicaid fraud case. The government was given until Wednesday, January 26, 2022 to file a

supplemental memorandum, but the Court maintained its position regarding the submission of a draft protective order by Friday, January 21, 2022.

Counsel complied with one portion of the order and submitted a draft protective order noting their dispute. A dispute remained about the language in the protective order, specifically regarding the appropriateness of allowing Dr. Black and Mr. Ohanian access to discovery. The Court had advised counsel during the original hearing that if a dispute remained upon submission of the protective order, they should contact chambers and request a status conference. As a result of the ongoing dispute and upon request of counsel, a status conference was noticed to the parties on Wednesday, January 26, 2022.

Interestingly the government, despite its request to conduct research and submit a memorandum supporting its position that Dr. Black and Mr. Ohanian should not be granted authority to access the documents via the protective order, failed to do so. Oddly, and without response by the Court, on Tuesday, January 24, 2022, AUSA McHugh telephoned chambers and suggested that the undersigned speak to another district judge in the Court regarding information about Dr. Black which the undersigned remains unaware of. Finding the behavior inappropriate, and a possible attempt to have an *ex parte* communication with the Court, or to influence the Court's decision, the undersigned ignored the call, took no action, and prepared for the status conference.

In preparation for the status conference the Court attempted to research the third-party consultants and discovered during this research that they were affiliated with PAA, a fact which was not disclosed by the defense or prosecution counsel. Prior to the conference, the Court received a phone call from Kelly with Ms. Conner's office about a scheduling conflict. The Court also received an email from Dr. Akula's counsel, Ms. Conner, regarding whether Dr.

Akula, Dr. Black, and Mr. Ohanian would be granted permission to attend the status conference. Upon responding to the scheduling conflict, a request was once again made for Dr. Black and Mr. Ohanian to attend the status conference. Finding the request, peculiar, the Court questioned why such a request was being made at this point given that Dr. Black and Mr. Ohanian appeared on at the zoom hearing the week prior. The Court then declined to respond to the request and left it to the discretion of counsel. During the call, Ms. Conner's office even inquired if her client was granted permission to attend and was advised by the Court's staff that the client is always permitted to attend.

The status conference occurred as scheduled but Dr. Akula did not participate. During the conference the Court proceeded to admonish both counsel about their lack of candor and reminded them that they both had a duty of candor to the Court. It was only at this point that Dr. Akula's counsel, Ms. Conner, disclosed that she was retained by PAA to represent Dr. Akula. She also continued to advocate for Dr. Black and Mr. Ohanian to have access to the documents because they were "consultants" in this Medicaid fraud case. Understanding the ethical implications regarding the presentation, and concerned about a non-lawyer, non-expert gaining access to evidence in the case, the Court rescinded its prior decision, and denied PAA, including Dr. Christina Black and Mr. Sebastian Ohanian, (lawyer not licensed to practice in the Eastern District of Louisiana) access to the evidence in this case.

After the status conference, Dr. Black, a PAA Board Member, forwarded a rather incendiary letter to this Court containing a threat of pursuing disciplinary action against the undersigned. The Court interprets Dr. Black's communication as an attempt at intimidation in an effort to influence this Court's decision. Dr. Black's actions not only demonstrate her lack of

legal acumen, but further supports the Court's decision to preclude a non-expert consultant from accessing discovery information in this case.

Having detailed the events to the present, the Court will proceed with its analysis denying the non-lawyer advocacy group, their board member, and non-admitted attorney access to discovery in this case.

#### **IV. Standard of Review**

Federal Rule of Criminal Procedure 16 “requires the Government to produce, upon the defendant's request, any documents and data that are material to preparing the defense.” Fed. R. Crim. P. 16(a)(1)(A)–(G)). Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part, that “[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” Entering a protective order falls under this provision. The entry of a protective order under Rule 16(d)(1) is within the trial court's discretion.

[T]he trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.” *Alderman v. United States*, 394 U.S. 165, 185, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) (citing prior version of Fed. R. Crim. Pr. 16(d)); see also *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir.2003) (“The power of courts ... to delimit how parties may use information obtained through the court's power of compulsion is of long standing and well-accepted.”). In doing so, the court should seek to ensure that disclosure of discovery materials to a defendant “involve[s] a minimum hazard to others.” *Alderman*, 394 U.S. at 185, 89 S. Ct. 961 (1969). Additionally, a court must consider whether the imposition of the protective order would prejudice the defendant. See, e.g., *United States v. Davis*, 809 F.2d 1194, 1210 (6th



Cir.1987) (requiring the defendant to “demonstrate substantial prejudice” from “imposition of a Rule 16 protective order”). Finally, “[t]he good cause determination must also balance the public's interest in the information against the injuries that disclosure would cause.” *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir.2007) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–91 (3d Cir.1994)).

**V. Analysis**

This order in addition to addressing the Court’s reasons for reversing its decision of last week will also address the ethical implications of counsel conduct.

First, the order regarding who gets access to discovery produced in this case is modified. Dr. Black is not a Medicaid expert retained to examine the evidence to assist Dr. Akula, instead she and Mr. Sebastian Ohanian (counsel for PAA, not Akula) are consultants that only serve as intermediaries between the client, counsel, and experts as such, there is no reason for either of them to have direct access to the discovery. The actual experts retained to evaluate the coding in this case and who are retained to provide an opinion as to whether the entries were appropriate and why they are appropriate, are certainly granted access to the discovery in this case. Further, they are required to sign the attachment to the protective order agreeing to be bound by the terms of this Court’s order.

While the Court was willing to consider a modification of the order if presented with tangible evidence as to why the evidence provided in this case would assist Dr. Akula in administrative proceedings regarding his license or his relationship with health insurance providers, his counsel has failed to present any evidence of a need for such modification. Regarding the appropriateness of any limited modification, counsel may, upon motion, request consideration of the issue by this Court.

Regarding the behavior of both counsel in this case, first both counsels failed to inform the Court about the type of consultant Dr. Black and Sebastian Ohanian were. While Dr. Akula has the right to hire whoever he chooses in this case, consultants typically work in the background have no right to interfere with the Court's proceedings or to be involved in the evaluation of the discovery.

Regarding PAA's retention of Ms. Conner, Louisiana Rules of Ethics 1.8f ("Rule 1.8f") provides that a lawyer shall not accept compensation for representing a client from one other than the client unless:

1. The client gives informed consent, or the compensation is provided by contract with a third person such as an insurance contract or a prepaid legal services plan;
2. There is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
3. Information relating to representation of a client is protected as required by Rule 1.6 which deals with confidentiality of client information.

Presumably, Dr. Akula gave informed consent and authorized PAA to compensate Ms. Conner. However, Ms. Conner disclosed that she was not only compensated by PAA, but she also was retained by PAA to represent Dr. Akula. Ms. Conner then proceeded to advocate for PAA by seeking to permission for PAA through Dr. Black and Mr. Ohanian to have access to the discovery which implicates the second prong Rue 1.8f. The second prong of Rule 1.8f requires that the person or entity who pays for the representation shall not interfere with the lawyer's independence.

It is this Court's opinion that Ms. Conner's independence may have been interfered with, as a trained lawyer Ms. Conner should know that a consultant does not review evidence, this is

only done by retained experts for the purpose of either consultation or testimony that will aid the defendant. PAA, Dr Black, and Mr. Sebastian only marshal the people with the expertise to conduct the review, and do not serve in the expert role themselves. Moreover, the Court received two requests from Ms. Conner's office specifically requesting permission for Dr. Black and Mr. Ohanian to be present at a status conference. This was an unusual request and illustrates possible interference with Ms. Conner's independence because as she is likely aware of status conferences are generally conducted between counsel, the client, and the Court.

The third provision of Rule 1.8f is also implicated because communicating evidence to PAA, Dr. Black, and Mr. Sebastian could result in a compromise of the attorney client privilege. For example, assuming that Dr. Black would review the discovery and give advice to Ms. Conner and Dr. Akula, her advice and communications are not privileged. Furthermore, communication between Ms. Conner and Dr. Akula which he shares with Dr. Black may result in a waiver of privilege. To guard and to protect Dr. Akula's sacrosanct right of attorney client privilege it is important to limit the disclosure of discovery to counsel and the actual experts, and not allow access to a "consultant" whose job it is to marshal the actual players who will provide the service to the defendant.

The Court also admonished both counsels, AUSA Kathryn McHugh, and counsel for Dr. Akula, Rachel Conner, regarding their duty of candor to the Court which was clearly lacking in this case.

Under Rule 3.3 of the Louisiana Rules of Professional Conduct, which governs a lawyer's duty of candor toward the court, lawyers may not knowingly make a false statement of fact or law to the court or fail to correct a false statement of material fact or law that the lawyer previously made to the court. La. St. Bar Art. 16 RPC Rule 3.3(a)(1). This duty continues to the

conclusion of the proceeding. La. St. Bar Art. 16 RPC Rule 3.3(c). In addition, under Rule 3.4, lawyers may not “knowingly disobey an obligation under the rules of [the court], except for an open refusal based on an assertion that no valid obligation exists.” La. St. Bar Art. 16 RPC Rule 3.4(c).

As the Fifth Circuit has stated, a federal court may hold attorneys accountable to the state code of professional conduct. *In re: Deepwater Horizon*, 824 F.3d 571, 577 (5th Cir. 2016). Pursuant to its inherent authority, the Court may sanction an attorney for engaging in bad-faith conduct, which may include violations of the attorney's duty of candor to the Court. *See Deepwater Horizon*, 824 F.3d at 583, 586–87; *Sandifer v. Gusman*, 637 F. Appx 117, 121 (5th Cir. 2015); *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. Appx 373, 378–79 (5th Cir. 2016) (applying the American Bar Association's Model Rules of Professional Conduct).

Neither counsel upon questioning by the Court stated that Dr. Black and Mr. Ohanian were associated with Physician Against Abuse Organization. Conner generally represented that they were “consultants” but failed to specify the type of consultant. She also craftily alluded to PAA assisting Dr. Akula in administrative hearings, something that is consistent with their website.

Further, AUSA McHugh fails no better than counsel for the defendant. McHugh also lacked candor by only disclosing that Dr. Black was involved in a press release leak and suggesting that there was an attempted to intimidate witnesses. AUSA McHugh clearly knew that the Court was being misled and failed to correct the falsity.

Finally, and most concerning is AUSA McHugh's call to chambers suggesting the undersigned contact another judicial officer to obtain information regarding Dr. Black. ABA Model Rule 2.9 regarding *ex parte* communications provides: (A) that A judge shall not initiate,

permit, **or consider *ex parte* communications** or consider other communications made to the judge outside of the presence of the parties or their lawyers concerning a pending or impending matter except as follows:

(1) When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and gives the parties an opportunity to respond.

It is this Court's opinion that AUSA McHugh's call was an improper attempt to influence the judgment of this Court. While the court did not contact the judicial officer, the behavior of counsel was unprofessional. This order shall serve as a warning to both counsel to perform in a manner consistent with the Rules of Professional Conduct and the Louisiana Rules of Ethics. Any further misconduct may result in discipline and a referral to the Court's ethics committee.

#### **IV. Conclusion**

Accordingly,

**IT IS HEREBY ORDERED** that the Court Amends' its previous order as follows:

Neither Physicians Against Abuse, Dr. Christina Black, nor Sebastian Ohanian shall be allowed to receive discovery in this case. This order however does not prohibit experts retained to assist Dr. Akula with his defense and who are retained for the purpose of providing

substantive assistance to be subject to the protective order and receive discovery as determined by Dr. Akula's trial attorney

**IT IS FURTHER ORDERED** that counsel comply with Rules of Professional Conduct and the Louisiana Rules of Ethics in all further proceedings in this matter.

New Orleans, Louisiana, this 28<sup>th</sup> day of January 2022.

  
KAREN WELLS ROBY  
UNITED STATES MAGISTRATE JUDGE

**MJSTAR 00:32**

**CLERK TO NOTIFY:**  
Mr. Duane Evans  
Interim United States Attorney  
Eastern District of Louisiana