

1994 WL 262779

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United States District Court, D. New Hampshire.

Jaan LAAMAN, et al

v.

Ronald POWELL, Comm'r, et al
Raymond GUAY, et al

v.

Ronald POWELL, Comm'r, et al
John J. SULLIVAN, et al

v.

Michael J. CUNNINGHAM, Warden, et al

Nos. CIV. 75-258-SD, CIV. 77-256-SD, CIV.
87-301-SD. | Jan. 10, 1994.

Opinion

DEVINE.

ORDER

*1 At issue are the plaintiffs' "Renewed Motion to Compel" filed November 24, 1993, document 428; and the defendants' "Renewed Objection" to such motion, filed December 14, 1993, document 430. The relief sought is the admission of plaintiffs' psychiatric and corrections consultants, who are to be expert witnesses at trial, to conduct certain site visits at New Hampshire State Prison (NHSP).

1. Background

On May 16, 1990, the parties filed a "Consent Decree". Document 383. Inter alia, this document provided that the court should retain jurisdiction over this prison litigation until July 1, 1993, subject to further extension upon a showing that "substantial compliance" with its terms had not been achieved. *Id.*, ¶ 8, at 3-4.¹ Additionally, a mutually agreed-upon "Health Care Services Evaluator" was to prepare three annual surveys concerning the progress of NHSP toward the goals of improving medical care and mental health care as set forth in the Consent Decree. *Id.* ¶¶ 64-70, at 32-35.

Following hearing, at which the court heard from representative members of the plaintiff class, the Consent Decree was approved.² Dr. Albert J. Raymond was selected as the Health Care Services Evaluator, and he conducted the annual surveys and made the written

reports to counsel required by the Consent Decree.

On June 15, 1993, plaintiffs filed a "Motion for Contempt". Document 408. Despite certain indications in the Raymond surveys to the contrary, this motion claimed that the defendants had failed to comply with the Consent Decree. In the instant motion, plaintiffs claim that Dr. Raymond also lacked the expertise to properly evaluate mental health, as opposed to medical, services.

Defendants contend that the contemplated site surveys would be duplicative and/or cumulative, that they are unnecessary because of the availability of other documents and records, and that plaintiff's counsel have had ample opportunity in the three years since the filing of the Consent Decree to obtain the information here sought. Additionally, the defendants suggest that to permit the plaintiffs' experts to interview prison personnel without the presence of defendants' counsel would violate the Code of Professional Conduct. *See* Rule 4.2, New Hampshire Rules of Professional Conduct.³ PH0H2. *Discussion*

The "bottom line" of the defendants' objection is that plaintiffs seek to conduct a "fishing expedition" without clear articulation of the need for the discovery sought.

As amended effective December 1, 1993, and as here relevant, Rule 26, Fed.R.Civ.P., provides that "[p]arties may obtain discovery regarding any matter, not privileged; which is relevant to the subject matter involved in the pending action..." Rule 26(b)(1).⁴ However, such discovery is not unlimited, and the court shall limit discovery which (i) is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the projected discovery in resolving the issues.

*2 Discovery is not a "fishing expedition", and parties must disclose some relevant factual basis for their claim before requested discovery will be allowed. *Hoffman v. Reali*, 973 F.2d 980, 987 (1st Cir.1992); *Milazzo v. Century Ins.*, 856 F.2d 321, 322 (1st Cir.1988). Here, the court finds, plaintiffs have made such showing by virtue of their "Supplemental Response to Defendants' Motion for a More Specific Statement," filed August 25, 1993. Document 421.

This being so, Rule 26(b)(1) entitles the plaintiffs to

Laaman v. Powell, Not Reported in F.Supp. (1994)

discovery of any matter that bears on any issue in the case in the absence of privilege. *Santiago v. Fenton*, 891 F.2d 373, 379 (1st Cir.1989) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

The court finds, however, that there is merit to the defendants' contention that plaintiffs' experts should not be allowed to contact prison personnel without the presence of defendants' counsel. Accordingly, the court will grant the plaintiffs' motion to compel conditioned upon reasonable advance notice to defendants' counsel of the date of the site visits at NHSP.

3. Conclusion

The plaintiffs' "Renewed Motion to Compel", document 428, is granted to the extent that (1) plaintiffs' experts may make site visits, not to exceed three each, to NHSP and (2) defendants' counsel shall be given ten days' advance notice of each such visit in order that it might have its counsel present at any contacts as between the plaintiffs' experts and prison personnel.⁵

SO ORDERED.

Footnotes

- 1 This court, in the persons of (now Senior Circuit) Judge Bownes and the author, has been engaged in litigation concerning the conditions at NHSP since 1975.
- 2 See Order and Opinion of July 20, 1990. Document 401.
- 3 Rule 4.2, New Hampshire Rules of Professional Conduct, provides:
In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- 4 As regards the mandatory voluntary disclosure provisions of Rule 26(a), Fed.R.Civ.P., this district is exercising its prerogative to "opt out" of the application of such provision.
- 5 The ruling herein made moots further consideration of the original "Motion to Compel", filed June 23, 1993, document 410, and the defendants' objection thereto, filed July 7, 1993, document 423.