U.S. EX REL. STEWART v. LOUISIANA CLINIC, (E.D.La. 2002)

United States of America ex rel. Mary> <Jane> <Stewart> et al., v.

The Louisiana Clinic, et al.,

Civil Action No. 99-1767, Section "N" (2)

United States District Court, E.D. Louisiana

December 11, 2002

ORDER AND REASONS

JOSEPH C. WILKINSON, JR., United States Magistrate Judge

This is a qui tam action in which relators, <Mary> <Jane> <Stewart, Jr. and Margaret Catherine McGinity, seek to recover damages on behalf of themselves and the United States under the False Claims Act. 31 U.S.C. § 3729. Relators allege that defendants defrauded the federal government by presenting false claims for reimbursement for medical services provided to Medicare and Medicaid participants.

Defendant, Dr. Stephen Flood, filed a motion for protective order, which addresses the confidentiality of nonparty patients' medical records that relators have asked defendants to produce. Dr. Flood's motion also requests that the United States, which has previously declined to intervene in this action, be prohibited from receiving copies of any nonparty patient records produced by the parties. Record Doc. No. 94. Dr. Flood received leave to file a supplemental memorandum. Record Doc. Nos. 95, 96. The remaining defendants, Dr. Stuart I. Phillips, Dr. Bernard L. Manale, Dr. Ida Fattel and Dr. John Watermeier, and a former defendant, The Louisiana Clinic,[fn1] also moved for a protective order on the same legal grounds but requested a slightly different protective order. Record Doc. No. 99.

Relators filed a timely opposition memorandum. Record Doc. No. 103. The United States filed a memorandum in response to the two motions for protective order. Record Doc. No. 104. Dr. Flood received leave to file another supplemental memorandum. Record Doc. Nos. 105, 106.

Having considered the complaint, as amended; the record; the submissions of the parties; and the applicable law, and for the following reasons, IT IS ORDERED that defendants' motions for a protective order are GRANTED IN PART AND DENIED IN PART, as discussed below.

ANALYSIS

Defendants seek a protective order concerning disclosure of nonparty patient billing and medical records in response to relators' requests for production of documents. Defendants argue that if they are compelled to produce such records without concealing individual identifying information, they may incur civil liability to the nonparty patients under Louisiana law for unauthorized disclosure of confidential medical information. They seek an order allowing them to produce the documents only after all patient identifying information has been redacted. Dr. Flood suggests that the redacted information be replaced with a system that identifies each patient only by a number. Defendants rely on the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936 (1996), and its implementing regulations to argue that the Louisiana health care provider/patient privilege is not preempted by HIPAA and that the court must therefore follow Louisiana privilege law in deciding how the documents should be produced.

Defendants also argue that the United States, which has elected not to intervene in this action and is therefore technically a nonparty, is not entitled to receive copies of nonparty patient records. They argue alternatively that if the government is entitled to receive copies, it must be prohibited from using those records for any purpose other than this litigation.

A. There Is No Doctor/Patient Privilege in Federal Question Cases

Defendants acknowledge that, under Fed.R.Evid. 501, privilege questions are generally governed by federal common law unless otherwise required by federal law. Thus, privilege questions are governed by the federal courts' interpretation of federal common law, except when state law supplies the rule of decision, in which case state law on privilege governs. Fed.R.Evid. 501; Hancock v. Hobbs, 967 F.2d 462, 466 (11th Cir. 1992); Robertson v. Neuromed. Ctr., 169 F.R.D. 80, 81-82 (M.D.La. 1996) (Riedlinger, M.J.); Treasure Chest Casino, Inc., No. 95-3945, 1996 WL 736962, at *2 (E.D.La. Dec. 23, 1996) (Berrigan, J.).

The instant lawsuit is exclusively a federal question case. Relators assert claims solely under federal law. "Rule 501 makes it clear that state privilege law will apply in diversity cases, and that federal privilege law will apply in federal question cases." In re Combustion, Inc., 161 F.R.D. 51, 53 (W.D.La. 1995) (Tynes, M.J.), aff'd, 161 F.R.D. 54 (W.D.La. 1995) (Haik, J.).

Accordingly, Louisiana privilege law concerning production of nonparty patient records does not apply in this action brought solely under federal statutory law. See Marshall v. Spectrum Medical Group, 198 F.R.D. 1, 2000 WL 1824428, at *4-5 (D.Me. Dec. 8, 2000) (Maine hospital peer review records privilege does not apply in Americans with Disabilities Act case); Burrows v. Redbud Community Hosp. Dist., 187 F.R.D. 606, 608-09 (N.D.Cal. 1998) (California peer review records privilege does not apply in Emergency Medical Treatment and Active Labor Act case); Syposs v. United States, 179 F.R.D. 406, 409 (W.D.N.Y. 1998) (New York medical peer review privilege does not apply in action under Federal Tort Claims Act), adhered to on reconsideration, 63 F. Supp.2d 301 (W.D.N.Y. 1999); Robertson, 169 F.R.D. at 82 (Louisiana hospital peer review records privilege does not apply in Americans with Disabilities Act case with pendent state law claims); King v. Conde, 121 F.R.D. 180, 187 (E.D.N.Y. 1988) (New York law protecting personnel records of police officers from disclosure not applicable in federal civil rights action); Lewis v. RadcliffMat'ls, Inc., 74 F.R.D. 102, 103-04 (E.D.La. 1977) (Louisiana privilege for state unemployment compensation records not applicable in Title VII case). The court therefore applies federal privilege law in this federal question case.

Defendants concede that there is no federal physician/patient privilege.[fn2] Whalen v. Roe, 429 U.S. 589, 602 n. 28 (1977); Gilbreath v. Guadalupe Hosp. Found, Inc., 5 F.3d 785, 791 (5th Cir. 1993); United States v. Moore, 970 F.2d 48, 50 (5th Cir. 1992); accord Hingle v. Board of Admins. of Tulane Educ. Fund, No. 95-0134, 1995 WL 731696, at*3 (E.D.La. Dec. 7, 1995) (Vance, J.)). Their arguments center on the provisions of HIPAA and its regulations, which they contend direct the court to apply Louisiana privilege law. The parties have cited no cases, and my own research has located none, that address what appears to me to be a question of first impression.

B. HIPAA Does Not Require the Court to Apply Louisiana Privilege Law

HIPAA delegates to the Secretary of Health and Human Services broad authority to promulgate Standards for Privacy of Individually Indentifiable Health Information ("Standards"), with which health care providers must comply. 42 U.S.C. § § 1320d-1(d), 1320d-3(a)(b), 1320d-4(b). The Standards generally permit a health care provider (called a "covered entity") to disclose nonparty patient records during a lawsuit, subject to an appropriate protective order, without giving notice to the nonparty patients.

HIPAA and the Standards promulgated by the Secretary expressly "supercede [sic] any contrary provision of State law," 42 U.S.C. § 1320d-7(a)(1) (implemented by 45 C.F.R. § 160.203 (2002)), except as provided in 42 U.S.C. § 1320d-7(a)(2) (implemented by 45 C.F.R. § 160.203(b)). Under that exception, HIPAA and its Standards expressly do not preempt contrary state law id § 1320d-7(a)(2), if the state law "relates to the privacy of individually identifiable health information," id. § 1320d-7(a)(2)(B) (implemented

at 45 C.F.R. § 160.203 (b)), and is "more stringent" than HIPAA's requirements. Pub. L. 104-191, § 264(c)(2), 110 Stat. 1936 (published in the Historical and Statutory Notes to 42 U.S.C. § 1320d-2; implemented at 45 C.F.R. § 160.203 (b)).

Defendants contend that HIPAA's disclosure provision is less stringent than Louisiana law. Louisiana law requires notice to the patient and a contradictory hearing that includes the patient before a health care provider can produce nonparty patient records without the patient's consent. Thus, defendants argue that Louisiana law is more stringent than HIPAA in this area, that HIPAA does not preempt Louisiana law and that Louisiana privilege law must be applied.

The Secretary has promulgated final Standards under HIPAA. United States v. Sutherland, 143 F. Supp.2d 609, 612 (W.D.Va. 2001) (citing 65 Fed. Reg. 82, 462 (Dec. 28, 2000)). Although those regulations were effective on April 14, 2001, full compliance by health care providers is not required until April 14, 2003. Id. (citing 66 Fed. Reg. 12,434 (Feb. 26, 2001)); 45 C.F.R. § 164.534.

In the instant case, relators and the United States argue that the HIPAA Standards do not apply because the final compliance date for health care providers is April 14, 2003. In this regard, I agree with District Judge Jones of the Northern District of Virginia, who stated:

> Nevertheless, the Standards indicate a strong federal policy to protect the privacy of patient medical records, and they provide guidance to the present case. In [45 C.F.R.] § 164.512(e), the regulations define when and how disclosures are permitted for judicial and administrative proceedings. Although not presently binding on the Hospital or this court, I find these regulations to be persuasive in that they demonstrate a strong federal policy of protection for patient medical records.

Sutherland, 143 F. Supp.2d at 612. Moreover, the Standards will require full compliance in a mere four months, at a time when this lawsuit will still be ongoing (trial is set for October 2003) and the patient records at issue will be in full use by the parties.

Thus, the court will analyze the HIPAA regulatory scheme. 45 C.F.R. § 164.512 allows a health care provider to disclose protected health information during judicial proceedings under certain circumstances without the written authorization of the patient or an opportunity for the patient to agree or object to the disclosure.

Section 164.512(e) provides in relevant part:

> (I) Permitted disclosures. A covered entity may disclose protected health information in the course of

any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request;[fn3] or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.[fn4]

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order[fn5] sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other

> provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

45 C.F.R. § 164.512(e)(1), (2) (emphasis added).

Defendants argue that HIPAA does not preempt Louisiana law concerning disclosure of nonparty patient records without patient consent. As previously noted, HIPAA and its Standards expressly "supercede [sic] any contrary provision of State law," 42 U.S.C. § 1320d-7(a)(1); 45 C.F.R. § 160.203, unless the contrary state law "relates to the privacy of individually identifiable health information" and is "more stringent" than HIPAA's requirements. Id. § 160.203(b). Thus, to fall under this exception, Louisiana law must (1) be "contrary" to HIPAA or its Standards, (2) relate to the privacy of individually identifiable health information and (3) be "more stringent" than federal law.

Defendants focus solely on the "more stringent" element of this regulatory test and on paragraph (4) of the definition of "more stringent." "More stringent" means

> a State law that meets one or more of the following criteria: . . . .
>
> (4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the express legal permission, as applicable.

Id. § 160.202.

Defendants argue that the Louisiana health care provider/patient privilege law is more stringent than the federal regulations. They contend that the Louisiana statute increases the privacy protections afforded to individual patients by requiring either patient consent for the disclosure or, in the absence of consent, that a "court shall issue an order for the production and disclosure of a patient's records . . . only: after a contradictory hearing with the patient . . . and after a finding by the court that the release of the requested information is proper." La. Rev. Stat. § 13:3715.1(B)(5).

Defendants' argument fails because this provision of Louisiana law does not address "the form, substance, or the need for express legal permission from an individual," as required by 45 C.F.R. § 160.202 for the exception to apply. Rather, the Louisiana statute provides a way of

negating the need for such permission. In other words, although the individual patient may attend the contradictory hearing, the Louisiana provision states that the court shall issue an order for disclosure (despite the patient's lack of consent), if the court finds that release of the information is proper. Because the Louisiana statute does not fit within the exception from preemption cited by defendants, it is preempted by the HIPAA regulations. Therefore, Louisiana law does not apply in this pure federal question case.

I find that both relators and defendants have complied with the HIPAA regulations at issue by seeking an appropriate protective order and that the court has the authority to order disclosure of nonparty patient information, subject to such a protective order, without conducting a contradictory hearing or having the parties obtain the patients' consent. All parties agree (and I strongly agree) that there is good cause for entry of a protective order concerning the medical records of nonparty patients in this case, Fed.R.Civ.P. 26(c), and that the order should at the very least comply with 45 C.F.R. § 164.512(e)(v).

> (v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested;[fn6] and
>
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 C.F.R. § 164.512(e)(v).

However, defendants want all patient-identifying information redacted before they produce the documents to relators. Dr. Flood suggests that the redacted information be replaced with a system that identifies each patient by a number. Relators propose an alternative method to protect patient records by proposing a "twofold" production in which defendants would produce a set of unredacted documents to be marked "confidential, for counsel's eyes only." Relators propose that the unredacted documents be used only by counsel and their staff (which I find is too broad, as further discussed below), and a second set of redacted documents that may be used by any party for any pretrial purpose.

I find that relators' suggestion for a "twofold" production serves the

interests of all parties and of the nonparty patients whose records will be produced. The issue in this case is whether the defendants submitted false claims to the government for reimbursement for services rendered to Medicare and Medicaid patients. Relators must be allowed to see the patient names so that they can investigate the validity of the claims for services rendered to those patients. Restricting such information only to counsel of record, no more than two paralegals and one expert for each party, coupled with the other protections, will satisfactorily protect this confidential information from being disseminated by the non-government parties, outside this litigation.

Accordingly, I find that a form of the "twofold" production proposed by relators, but with disclosure somewhat more restricted than they suggest, should be incorporated in the protective order to be entered herein. To enhance the protection of these sensitive materials while also making them available for the legitimate adjudicative and government oversight functions discussed below, the protective order to be submitted by the parties in accordance with this order must also include the following language:

> All information produced in accordance with this order must be kept confidential and used only for purposes of this litigation and must not be disclosed to any one except parties to this litigation, the parties' counsel of record, no more than two paralegals employed by counsel of record and one expert per party retained in connection with this litigation. All persons to whom such information is disclosed must sign an affidavit that must be filed into the record, agreeing to the terms of the protective order and submitting to the jurisdiction of this Court for enforcement of those terms.

C. The United States Is a Real Party in Interest Entitled to Receive Discovery

The final issues are whether the United States is entitled to receive copies of the documents produced and, if so, whether those documents should be in unredacted form and whether the United States should be prohibited from using the documents for purposes other than this litigation. Defendants argue that because the United States declined to intervene, it is a nonparty with no rights to participate in this type of discovery and that it must be ordered to use the documents, if it receives them, solely for purposes of this litigation. Defendants cite no authority for these propositions. Again, these questions appear to be matters of first impression.

For the following reasons, I find that the government may receive unredacted copies of the documents.

"When a False Claims Act suit is initiated by a private person -

a qui tam plaintiff or relator - the action is brought `for the person and for the Government' and is `brought in the name of the Government.' . . . . If the government decides not to intervene, the citizen may conduct the action." United States ex rel. Russell v. Epic Healthcare Mgmt. Group, 193 F.3d 304, 306 (5th Cir. 1999) (quoting 31 U.S.C. § 3730(b)(1); citing 31 U.S.C. § 3730(b)(2)-(4), (b)(4)(B)) (emphasis added).

While the decision of the government not to intervene in the instant case means that the relators are free to "conduct the action," the United States "is a real party in interest even if it does not control the False Claims Act suit." Searcy v. Philips Elec. N. Am. Corp., 117 F.3d 154, 156 (5th Cir. 1997). However, "[t]he peculiar nature of the government's relation to a qui tam suit," Russell, 193 F.3d at 306, means that although the United States is a real party in interest, it "may be a relevant party m the suit for some purposes of the litigation." Id. (citing United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 289, 291 (5th Cir. 1999)) (emphasis added). The question in this case is whether unfettered access to documents produced in discovery falls within those relevant purposes.

The United States retains control over several aspects of the litigation.

> [E]ven in cases where the government does not intervene, there are a number of control mechanisms present in the qui tam provisions of the FCA [False Claims Act] so that the [United States] nonetheless retains a significant amount of control over the litigation. . . . [T]he FCA clearly permits the government to veto settlements by a qui tam plaintiff even when it remains passive in the litigation. . . . [N]ot only may the government take over a case within 60 days of notification, but it may also intervene at a date beyond the 60-day period upon a showing of good cause. . . . [T]he government retains the unilateral power to dismiss an action notwithstanding the objections of the person.
>
> In United States ex rel. Russell v. Epic Healthcare Mgmt. Group, we held that parties, in a qui tam suit filed under the FCA in which the United States does not intervene, have 60 days to file a notice of appeal under Rule 4(a)(1) of the Federal Rules of Civil Procedure. We similarly stated in Russell that although the government does not intervene, its involvement in the litigation nonetheless continues. We noted, for example, that, in addition to the control mechanisms already stated in Searcy, the government may request that it be served with copies of pleadings and be sent deposition transcripts . . . [and it] may pursue alternative remedies, such as

> administrative proceedings. We also noted that despite the government's non-intervention, it receives the larger share of any recovery, amounting to up to 70% of the proceeds of a lawsuit.
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> Furthermore, the FCA itself describes several additional ways in which the United States retains control over a lawsuit filed by a qui tam plaintiff. In the area of settlement, for example, the government may settle a case over a relator's objections if the relator receives notice and hearing of the settlement. Additionally, in the area of discovery, if the government shows that discovery initiated by a qui tam plaintiff would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for sixty days or more, whether or not the government intervenes.

Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753-54 (5th Cir. 2001) (quotations omitted) (citing 31 U.S.C. § 3730(b), (c), (d); *Russell,* 193 F.3d at 306, 307; Searcy, 117 F.3d at 159-60)); see also id. at 756 n. 10 (citing cases from other circuits concerning same control mechanisms). In addition, a qui tam action may not be dismissed without the government's consent. 31 U.S.C. § 3730(b)(1).

> However, the government's decision not to intervene is not meaningless. The structure [of the False Claims Act] distinguishes between cases in which the United States is an active participant and cases in which the United States is a passive beneficiary of the relator's efforts. When the government chooses to remain passive, as it has here, we see no reason to treat it as a party with standing to challenge the district court's action as of right.

Searcy, 117 F.3d at 156. Thus, the Searcy court rejected the government's argument that it was automatically a party when it sought to appeal a settlement that the district court had approved over the government's objection, without intervening in the district or appellate court. Id. Nonetheless, the Fifth Circuit granted the United States the right to appeal the settlement without intervening for three reasons. First, the United States participated in the proceedings below "by investigating and monitoring the case and by arguing against the settlement at a hearing." Id. at 157. Second, the equities favored the government because it had a good faith argument that it relied on the congressional instruction to the courts in the False Claims Act not to approve settlements without the government's consent. Id. Finally, the government had a stake in the outcome because it might be subject to claim preclusion by language in the settlement agreement binding "the parties to this action." *Id.* "In sum, the unique structure of the False Claims Act gives the government an

adequate level of participation in the district court proceedings, a good-faith reliance on a statutory right, and a concrete stake in the outcome. Thus, the government's appeal is properly before us even though the government is not a party that ordinarily could challenge as of right the district court's final order." Id. at 158.

Some district courts have also recognized the existence of a joint prosecutorial or common interest privilege, as to documents protected by the attorney-client privilege and work product doctrine, between the qui tam relators and the government with respect to documents that are shared between them. United States ex rel. Purcell v. MWI Corp., 209 F.R.D. 21, 26-27 (D.D.C. 2002) (recognizing joint privilege when the government intervened); United States ex rel. Burroughs v. DeNardi Corp., 167 F.R.D. 680, 686 (S.D.Cal. 1996) (recognizing joint privilege when the government did not intervene).

Based on these authorities, I find that the government's real party in interest status, coupled with the elements of control maintained by the United States in this qui tam action, entitle it to receive documents produced in discovery. The peculiar nature of the non-intervening government's role in qui tam actions, especially the rights to intervene with good cause, to prevent dismissal of the action, to dismiss the action despite relators' objections and to settle or approve any settlement, cannot be prudently exercised without access to all relevant discovery. I find that the United States may have access to the "twofold" redacted and unredacted nonparty patient records, subject to the same protective order as the parties, except that the government may also use the documents produced for purposes of its health care oversight function, as discussed below.

D. The United States May Use Information Gained Through Discovery for Purposes of Its Health Oversight Function

The final question that the court must address is whether the United States should be limited to using the nonparty patient records only in the context of this litigation, as defendants argue, again without citation to any authority. The government asserts that the HIPAA Standards specifically permit disclosure of such documents to the Department of Justice pursuant to its function as a "health oversight agency."

In this regard, the Standards permit disclosure of

> protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

(i) The health care system;

(ii) Government benefit programs for which health information is relevant to beneficiary eligibility;

(iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or

(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance.

45 C.F.R. § 164.5 12(d)(1) (emphasis added). The final rule implementing the Standards specifically names the Department of Justice as a health oversight agency with respect to its conduct of oversight activities relating to the health care system and its civil rights enforcement activities. 65 Fed. Reg. 82462, 82492 (Dec. 28, 2000).

These regulations are clear and unambiguous, and they wholly undermine defendants' arguments to the contrary. Accordingly, I find that the United States may use any information it obtains through discovery in this action in connection with its legitimate governmental health oversight activities, and not solely for purposes of this litigation. I further find that paragraphs (13) and (14) of the government's proposed protective order (Record Doc. No. 104, Government Exh. A to its memorandum in response to defendants' motions), should be included in the protective order to be entered herein.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that defendants' motions for protective orders are GRANTED IN PART AND DENIED IN PART. The motions are granted to the extent that they request that a protective order as outlined above be entered. The motions are denied in all other respects.

IT IS FURTHER ORDERED that the parties must submit to the court within ten (10) days of entry of this order a motion for a "qualified protective order" that incorporates (1) the provisions of 45 C.F.R. § 164.512(e)(v), (2) the "twofold" production procedure proposed by relators, but with access limited only to counsel of record in this action, no more than two paralegals employed by them and one expert for each party, and (3) the paragraphs currently numbered (13) and (14) in the government's proposed protective order.

In addition, the redrafted protective order must include the language cited on page 14 of this opinion concerning the execution of and filing with the court an affidavit by all those with access to the documents, in a form of affidavit to be annexed as an exhibit to the protective order.

The protective order must also provide that, although the burden is on

the party who challenges the validity or necessity of any redactions to bring that challenge to the court through a motion, the burden is on the party who resists discovery, i.e., the party making the redactions, to demonstrate that the redaction is proper.

Finally, the protective order shall provide that all parties must seek leave of court before filing any pleading or document under seal. This court's record is presumptively a public record, and the Clerk of Court has limited storage space for maintaining documents under seal. Only truly confidential, proprietary, trade secret or other similar materials should be sealed in a public record. Thus, the court will not permit the wholesale filing under seal of pleadings, motion papers, depositions and exhibits that contain only limited amounts of truly confidential information. Counsel are instructed to try to "write around" confidential information in their memoranda and to request sealing only of those parts of memoranda and exhibits that are truly confidential.

[fn1] Although the Louisiana Clinic was dismissed from this action, it joins in the motion because it asserts that it, not the physicians, controls the patient records at issue. It also asserts that it has never been served with any discovery requests for the records. The instant motions are not motions to compel and the court makes no order respecting any outstanding discovery requests.

[fn2] The Supreme Court recognized a limited psychotherapist/patient privilege in Jaffee v. Redmond, 518 U.S. 1, 9 (1996), but none of the parties to the instant lawsuit argue that this privilege applies.

[fn3] No such notice or assurances have been given in the instant case.

[fn4] Relators have attached a proposed protective order to their opposition memorandum. The definition of "qualified protective order" is discussed below.

[fn5] The health care providers seek a protective order in this case.

[fn6] The United States does not agree that it should be prohibited from using the information disclosed for purposes outside this litigation. This issue is discussed in the following section.