UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	CRIMINAL NO. 16-10343-ADB
(1) MICHAEL L. BABICH)	
(2) ALEC BURLAKOFF)	
(3) MICHAEL J. GURRY)	
(4) RICHARD M. SIMON)	
(5) SUNRISE LEE)	
(6) JOSEPH A. ROWAN)	
(7) JOHN N. KAPOOR)	
Defendants.)	

GOVERNMENT'S OPPOSITION TO
DEFENDANTS' MOTION TO DISQUALIFY DR. CHRISTOPHER GILLIGAN

I. INTRODUCTION

Defendants John Kapoor, Michael Babich, Michael Gurry, Richard Simon, Sunrise Lee, and Joseph Rowan (collectively, the "Defendants") have moved for an order (1) disqualifying Dr. Christopher Gilligan from testifying as an expert in this case; (2) precluding the government from any substantive communications with Dr. Gilligan about the case;[1] and (3) precluding the government from replacing Dr. Gilligan with a new expert. *See* Defendant's Motion To Disqualify Dr. Christopher Gilligan ("Defendants' Motion," Docket No. 387) and Memorandum of Law In Support of Defendant's Motion To Disqualify Dr. Christopher Gilligan ("Def. Mem.," Docket No. 388). The Defendants' Motion should be denied because, as discussed below, disqualification is not required by law or fact. In the alternative, should the Court find it

[1] The government will not discuss the case with Dr. Gilligan until the pending Motion is resolved.

necessary to preclude the testimony of Dr. Gilligan, the government should be permitted to retain a new expert.

II. BACKGROUND

The government has alleged that the Defendants sought to cause practitioners to prescribe Subsys outside the usual course of professional practice and not for a legitimate medical purpose, by bribing practitioners to write new prescriptions, and to increase dosages and units of existing Subsys prescriptions, without consideration of the medical condition affecting individual patients. The First Superseding Indictment includes allegations relating to interaction between the Defendants and several different practitioners between 2012 and 2015, most of whom have since lost their ability to prescribe schedule II controlled substances like Subsys.[2]

Accordingly, over the course of the spring and summer, the United States planned to give notice of three types of expert testimony related to the field of pain management.[3] First, notice of the testimony of four pain experts that have reviewed the medical records of several of the practitioners bribed by the Defendants. This category of expert witnesses was previously hired, and compensated, by state boards charged with governing the licenses of practitioners in their respective states. They are witnesses, who because of their occupation and employment prior to First Superseding Indictment, would discuss their expert opinion regarding their review of medical files.

Second, in an abundance of caution, the government planned to give notice of the testimony of two practitioners, who, after pleading guilty to federal crimes, are cooperating in the government's case. Although these practitioners are expected to testify based on firsthand

[2] In fact, three of the ten practitioners described in the First Superseding Indictment have been convicted of Illegal Distribution of Subsys.

[3] It should be noted that although the government planned to give broad expert notice, and did so, the government is not likely to call each of the listed expert witnesses.

involvement in the conduct at hand, the government planned to provide expert notice to avoid any later argument of surprise.

Third, over the course of the spring and summer, the United States endeavored to identify a pain expert that (a) did not work on the case previously, either with the state medical boards or otherwise, and (b) who is not a cooperating defendant practitioner. In doing so, the government sought the expertise of a number of different pain clinicians. During the first week of July, the government emailed Dr. Christopher Gilligan, Chief of the Division of Pain Management for the Department of Anesthesiology, Perioperative and Pain Medicine at Brigham & Women's Hospital. Dr. Gilligan, a Yale and Harvard trained physician, was previously retained by the government in this District in the case of *United States v. Zolot*. See e.g. Zolot, 1:11-cr-10070-PBS, Docket Nos. 380, 434-437, 609, 612, 660, 662, and 664 (Transcripts of Dr. Gilligan). Dr. Gilligan, who was on an extended break, did not response to the government's email until July 27, less than one week before the government's deadline for notice of expert testimony.

On July 27, 2018, Dr. Gilligan contacted the United States Attorney's Office in this District. The interaction between Dr. Gilligan and this Office is described in a letter sent to counsel for the Defendants. *See* Attachment A.

At the very beginning of his first conversation with the government regarding this case, Dr. Gilligan stated that he had previously spoken with counsel for the Defendants, but denied any warning from defense counsel or any agreement regarding confidentiality. Accordingly, the government continued to evaluate his retention as an expert. After researching case law and vetting the matter with both this District's professional responsibility officer, as well as the Justice Department's Professional Responsibility Advisory Office (PRAO), the United States again contacted Dr. Gilligan. Thereafter, Dr. Gilligan agreed to testify, consistent with his previous opinion in *United States v. Zolot*, regarding the duty of physicians to consider the needs

of individual patients before deciding to prescribe a drug. On August 1, 2018, pursuant to the Amended Scheduling Order (Docket No. 279) in this case, the United States provided notice to the Defendants of the expert testimony of each of the above-described witnesses, including Dr. Gilligan.

The Defendants have asserted that during a four-week period they met with Dr. Gilligan on several occasions, during which they shared confidential information with the witness.[4]

III. LAW

To disqualify an expert, the moving party must prove that, (1) it is objectively reasonable to believe that the moving party had a confidential relationship with the expert; and (2) that the moving party disclosed confidential information to the expert that was relevant to the current litigation. Palomar Med. Techs., Inc. v. TRIA Beauty, Inc., No. 09–11081, 2012 WL 517532, at *2-3 (J. Zobel, D.Mass. Feb. 15, 2012). With regard to the first two elements, "[d]isqualification ordinarily should not occur where a confidential relationship existed but no privileged information was communicated, or, alternatively, where no confidential relationship existed but privileged information was nonetheless disclosed." Mayer v. Dell, 139 F.R.D. 1, 3 (D.D.C. 1991).

Some Courts have also considered as a third element, whether preventing conflicts of interest and maintaining judicial integrity requires disqualification. Trustees of Boston University v. Everlight Electronics, Co., Ltd., et al, No. 12–11935, 2014 WL 345241, at *2 (J. Saris, D.Mass., Jan. 17, 2014) (quoting Koch Ref. Co. v. Jennifer L. Boudreaux MV, 85 F.3d 1178, 1181 (5th Cir.1996)).

[4] The Defendants assert four meeting dates, but also assert meeting with him on "five separate occasions." Cf. Def. Mem. at 1, with Def. Mem. at 5.

A. Objective Reasonableness

A number of factors have been considered when weighing the first element, whether or not it is objectively reasonable to believe the movant had a confidential relationship with the expert, including,

a. whether the relationship was one of long standing and involved frequent contacts instead of a single interaction with the expert;

b. whether the expert is to be called as a witness in the underlying case;

c. whether alleged confidential communications were from expert to party or vice-versa;

d. whether the moving party funded or directed the formation of the opinion to be offered at trial;

e. whether the parties entered into a formal confidentiality agreement;

f. whether the expert was retained to assist in the litigation;

g. the number of meetings between the expert and the attorneys;

h. whether work product was discussed or documents were provided to the expert;

i. whether the expert was paid a fee;

j. whether the expert was asked to agree not to discuss the case with the opposing parties or counsel; and

k. whether the expert derived any of his specific ideas from work done under the direction of the retaining party.

See Lacroix v. BIC Corp., 339 F.Supp.2d 196, 200 (J. Swartwood, D. Mass. Oct. 12, 2004)(quoting Stencel v. Fairchild Corp., 174 F.Supp.2d 1080, 1083 (D.Ca.2001); Hewlett–Packard Co. v. EMC Corp., 330 F.Supp.2d 1087, 1093 (N.D.Cal.2004).

It is not objectively reasonable to believe the Defendants and Dr. Gilligan had an actual confidential relationship. A review of the factors, a-k above, cut in favor of the government. Although the Defendants had five contacts with Dr. Gilligan, such is not a longstanding prior relationship. In addition, the government is not aware that the Defendants funded or directed the

formation of Dr. Gilligan's anticipated opinion, paid him any fee, or that Dr. Gilligan derived any of his specific ideas from work he completed for the Defendants.

In addition, the lack of any confidentiality agreement is a telling factor, which weighs heavily against the Defendants claims. The Defendants do not assert that they advised, or even requested, that Dr. Gilligan keep his interactions with counsel confidential. Despite that omission, defense counsel claim that they "repeatedly" held "privileged calls and meetings" with the witness during which they shared confidential information. Def. Mem. at 1. That experienced counsel failed to contemplate the need to simply request confidentially from a possible expert strongly suggests confidentiality was simply unnecessary.

It is true that a confidential relationship may exist despite the absence of a formal agreement with a prospective expert. See Hewlett–Packard Co. v. EMC Corp., 330 F.Supp.2d 1087, 1093 (N.D.Cal.2004). It is, however, also true that this Court can reject any assertion that it is objectively reasonable to believe that a confidential relationship existed where experienced counsel, from respected law firms, failed even to mention confidentiality in five different meetings with the witness. See Palomar, 2012 WL 517532, at *3 (citing Mayer v. Dell, 139 F.R.D. 1, 3 (D.D.C.1991) (no expectation of confidentiality where plaintiff's counsel never proffered a confidentiality agreement, followed up with expert to confirm an understanding regarding confidentiality, or made any request of confidentiality in contemporaneous notes").

It is the Defendants burden to establish the existence of a confidential relationship with Dr. Gilligan. Lacroix, 339 F. Supp. at 200. Rather than explaining its failure to seek confidentiality over the course of five meetings, counsel for the Defendants seek to flip that burden, by derogating the assertions of Dr. Gilligan, as well as the conduct of the government.

Regardless of whether the defense actually shared confidential information with Dr. Gilligan, the record of interaction between the government and Dr. Gilligan during the last week

of July 2018, squarely demonstrates a sincere respect for avoiding the possibility of a confidential disclosure. Dr. Gilligan immediately advised this office that he had previously met with counsel for the Defendants. Dr. Gilligan agreed that he would not discuss strategy; but also agreed that he would not discuss questions posed to him by the defense. Thereafter, the government confirmed its professional obligations and proceeded accordingly. *See* attachment A. As such, Dr. Gilligan has never discussed strategy, or any other confidential information with the government.

The Defendants also assert that, in one phone call with the government, they would have managed to express the need for confidentiality that they failed to express in five separate meetings with Dr. Gilligan. Clearly, any assertion of confidentiality during a phone call with the government, following five conversations with Dr. Gilligan devoid of such advice, would not adequately resolve the government's right to call the expert of its choice. Nevertheless, the parties are in the exact same position today, as they would have been following a call from the government. Put simply, because of the approach taken by both Dr. Gilligan and the government in this case, confidential information shared with Dr. Gilligan by the defense, if any, remains with Dr. Gilligan.

B. Actual Confidentiality About Relevant Facts

In considering proof of the second element, that the movant actually disclosed relevant confidential information, Courts have recognized that, "[c]onfidential information essentially is information 'of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the attorney-client privilege.'" Lacroix, 174 F.Supp.2d at 200-01 (quoting Hewlett–Packard Co., 330 F.Supp.2d at 1094).

The government is not privy to the Defendants' *ex parte* filings in support of their motion and, assumingly, this factor. Furthermore, as is their right, the Defendants declined to provide

the government any details of their contacts with Dr. Gilligan. To the extent the Court finds any of the *ex parte* pleadings appropriate for unsealing, the United States respectfully requests an opportunity to review and respond to the full breadth of the Defendants' Motion.

In the public pleading, Defendants assert that despite an agreement not to discuss strategy or questions, "the government admits that on at least two occasions to date Dr. Gilligan disclosed to prosecutors some substance from his prior conversations with defense counsel." Def. Mem. at 6. The government has disclosed *all* information provided by Dr. Gilligan, not information provided on "at least" two occasions. More importantly, the issue before the Court is confidentiality. Dr. Gilligan informed this office of exactly two aspects of counsel's questions to him, neither of which revealed anything confidential. First, Dr. Gilligan explained that he was asked a question about off-label marketing. Knowledge that the defense asked such a question simply does not convey any confidential information. Rather, the doctor was asked a general question about a matter alleged in the First Superseding Indictment. An issue so obvious, that defense counsel has publicly commented at length regarding the Defendants strategy on the very question. *See* Transcript of Motion Hearing before the Honorable Allison Burroughs, July 17, 2018, at 24-25. Second, Dr. Gilligan was asked if he had ever prescribed the drug. On its face, such a question has nothing to do with defense strategy or attorney work product and weigh against a finding that the second factor requires disqualification.

C. Disqualification Required By Judicial Integrity

Judges may "consider the court's interest in preventing conflicts of interest and maintaining judicial integrity," as well as "the public interest in permitting experts to pursue their trade and parties to select their own experts." Trustees of Boston University, 2014 WL 345241, at *2 (quoting Palomar, 2012 WL 517532 at *11). This discretion – and the public's interest in avoiding gamesmanship - weigh heavily in the government's favor.

This Court should not reward the Defendants' failure to protect whatever confidential information they believed they needed to protect, particularly from a Doctor whom the government has previously called upon. Such a ruling would be contrary to the interests of justice.

Although the government does not contend the Defendants intentionally engaged in such conduct; the Defendants repeated interaction with Dr. Gilligan, *a doctor who has previously set forth an opinion consistent with the government's theory in this case*, without expressing a need for confidentiality, is similar to litigation strategies frequently condemned by Courts whereby counsel force the disqualification of prospective experts beneficial to their opponents. See Wang Labs, Inc. v. Toshiba Corp., 762 F. Supp. 1246, 1248 (E.D. Va. 1991)(holding courts should not countenance strategies that disable potentially troublesome experts); Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 582 (D.N.J. 1994)(and cases cited); Paul By & Through Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 281–82 (S.D. Ohio 1988). Even though not done intentionally, an Order of Disqualification here would give the public the appearance that the Court condones such behavior. Allowing the Defendants' Motion to disqualify, either entirely or without permitting the government to replace Dr. Gilligan, would accomplish the same result.

If the Court believes disqualification is necessary, the government requests a 60-day extension to find an independent expert that has not worked on the case prior to the First Superseding Indictment.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion, or in the alternative permit the government to retain an expert to replace Dr. Gilligan.

Date: September 3, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, K. Nathaniel Yeager, I hereby certify that the foregoing document filed through the ECF system will be sent electronically to counsel for the Defendants.

By: /s/ K. Nathaniel Yeager
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