UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:01CR00050
	)	
v.	)	**OPINION AND ORDER**
	)	
VINODCHANDRA MODI, ETC., ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Rick A. Mountcastle and Ruth E. Plagenhoef, Assistant United States Attorneys, Abingdon, Virginia, for United States of America; Wyatt B. Durrette, Jr., Durrette, Irvin & Bradshaw, PLC, Richmond, Virginia, for Defendant Vinod Modi; *and John B. Russell, Jr., John B. Russell, Jr. & Associates, PLC, Midlothian, Virginia, for Defendant Kailas Modi.*

The defendants have filed motions for subpoenas duces tecum ordering pre-trial production of requested documents from the government's expert medical witnesses. I find that the subpoenas constitute impermissible discovery in a criminal case and therefore I will deny the defendants' motions.

I

The defendants, Vinodchandra and Kailas Modi, are physicians charged in a 140-count indictment with racketeering and racketeering conspiracy, mail fraud and mail fraud conspiracy, money laundering conspiracy, federal health care program kickbacks, and illegal drug distribution.[1] On January 22, 2002, the defendants filed joint motions pursuant to Federal Rule of Criminal Procedure 17(c), requesting that the court authorize subpoenas directed to two physicians who have been designated by the government as expert witnesses. These physicians, who both have their own medical practices, are expected to testify that the defendants improperly prescribed certain medications and procedures.[2]

The proposed subpoenas request the pre-trial production of various documents, including the witnesses' own patient records relating to the treatment of chronic obstructive pulmonary disease and the use of prescription drugs to alleviate pain. The government has objected to the issuance of these subpoenas, arguing that discovery of

[1] *See* 18 U.S.C.A. § 1962(c) (West 2000); 18 U.S.C.A. § 1962(d) (West 2000); 18 U.S.C.A. § 1341 (West 2000); 18 U.S.C.A. § 371 (West 2000); 18 U.S.C.A. § 1956(h) (West 2000); 42 U.S.C.A. § 1320a-7b(b)(1)(B) (West Supp. 2001); 21 U.S.C.A. § 841 (West 1999 & Supp. 2001).

[2] It appears that a primary issue in the case is the defendants' treatment of patients with pulmonary disorders and one of the expert witnesses is a specialist in that field; the other expert is apparently expected to testify concerning the defendants' prescribing of pain medication.

government expert witness materials is governed by Rule 16(a)(1)(E),[3] rather than Rule 17, and that the defendants' requests fail to meet the relevancy, admissibility, and specificity requirements set forth in *United States v. Nixon*.[4] The parties argued the motions at a hearing on January 30, 2002, and the issue is now ripe for decision.

II

Rule 17(c) provides for the production of documentary evidence by subpoena in a criminal case. At the court's direction, the subpoenaed party may be required to produce the identified materials prior to trial for inspection by the parties. The party requesting issuance of the subpoena must obtain the court's permission where such pre-trial production is requested, and the court is obligated to ensure that the procedure is not abused through use of overbroad or impermissive subpoenas.[5]

The first issue addressed by the defendants is whether the government has standing to object to the issuance of the proposed subpoena. They argue that only the subpoenaed third party, and not the government, has a proprietary interest in the requested materials, and only the third party can assert that compliance with the

[3] *See* Fed. R. Crim. P. 16(a)(1)(E) (regarding disclosure of the opinions of the government's expert witnesses, the bases and reasons for those opinions, and the experts' qualifications).

[4] 418 U.S. 683, 699-700 (1974).

[5] *See United States v. Beckford*, 964 F. Supp. 1010, 1020-25 (E.D. Va. 1997).

subpoena would be unreasonable or oppressive. The cases cited by the defendants in support of their argument are persuasive only in cases where a third-party subpoena is issued and the government thereafter files a motion to quash the subpoena.[6] This case has not proceeded that far. Here, the subpoenas have not yet been served, and the government merely objects to their issuance. The government, as opposing party, has a right to be heard on a motion presented for the court's consideration.

Furthermore, the issue of standing is a red herring in this case because the court "'has an interest in preserving the proper procedure prescribed by the Rules of Criminal Procedure, irrespective of the desires of the parties.'"[7] The court must supervise the process so that Rule 17(c) does not become a means of conducting general discovery, which is not permitted in criminal cases.[8] Regardless of whether the government objects, the court is required to examine the subpoenas for compliance with the test set forth in *Nixon*. The government's standing to object has no effect on the court's obligations under Rule 17.[9]

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[6] *See United States v. Daniels*, 95 F. Supp.2d 1160, 1164 (D. Kan. 2000); *United States v. Nachamie*, 91 F. Supp.2d 552, 558-61 (S.D.N.Y. 2000); *United States v. Tomison*, 969 F. Supp. 587, 595-96 (E.D. Cal. 1997).

[7] *Beckford*, 964 F. Supp. at 1025 (quoting *United States v. Ferguson*, 37 F.R.D. 6, 8 (D.D.C. 1965)).

[8] *See id*. at 1022.

[9] *See Tomison*, 969 F. Supp. at 594 ("Even assuming the full vigor of the [government's] objection . . . there is no reason to suppose that the government's participation is required to ensure

The defendants also argue that a lower evidentiary standard should apply when a subpoena duces tecum is directed to a third party, rather than to the government. They acknowledge that no court has so held, although quite a few, including the *Nixon* Court, have hinted that a lesser standard might apply.[10] However, I find that the requested subpoenas duces tecum requiring pre-trial production must meet the test set forth in the *Nixon* case. There might be a case where the witness' independence from the government would suggest a more relaxed test; however, where the object of the subpoena is a compensated government expert witness, as here, it is fully appropriate to apply *Nixon*. Under the test of that case, the moving party must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the

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that the court performs its duty in determining that the requisites for issuing the subpoena have been demonstrated, and that the party seeking the subpoena is not simply on a fishing expedition.").

[10] *See Nixon*, 418 U.S. at 699 n.12. In the *Nixon* case, the special prosecutor suggested that the evidentiary requirement "does not apply in its full vigor when the subpoena duces tecum is issued to third parties rather than to government prosecutors." *Id*. The Supreme Court passed on the question, finding that the relevance and evidentiary nature of the subpoenaed materials had been adequately shown. *See id*.; *see also United States v. Nachamie*, 91 F. Supp.2d 552, 563 (S.D.N.Y. 2000) ("Because the Rule states only that a court may quash a subpoena 'if compliance would be unreasonable or oppressive,' the judicial gloss that the material sought must be evidentiary—defined as relevant, admissible and specific—may be inappropriate in the context of a defense subpoena of documents from third parties.").

> application is made in good faith and is not intended as a general "fishing expedition."[11]

There are, therefore, three obstacles to issuance of a Rule 17(c) pre-trial subpoena: relevancy, admissibility and specificity.[12] I find that the defendants have failed to satisfy this test.

The purpose of Rule 17(c) is to expedite trial by establishing a time and place for the inspection of subpoenaed documents prior to trial; it was in no way intended to provide a means of discovery.[13] In fact, the court has a "responsibility to prevent Rule 17(c) from being improperly used as a discovery alternative to Rule 16."[14] It is clear that the defendants in this case are engaging in the type of fishing expedition that is prohibited in criminal cases. They are not seeking a particular document or a specific set of materials that they know exists. Rather, they request "any and all documents, records, correspondence, emails and data" relating to a series of broad subjects, with the hope of uncovering something useful to their defense—in particular, documents that might show either that the government's doctors have treated their own patients in a

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[11] *Nixon*, 418 U.S. at 699-700.

[12] *See id*. at 700.

[13] *See Nixon*, 418 U.S. at 698-99; *Beckford*, 964 F. Supp. at 1021 (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

[14] *Beckford*, 964 F. Supp. at 1022.

manner similar to the defendants, or that the witnesses' patients are dissimilar in severity of disease and thus the witnesses' experiences are irrelevant. However, the "'mere hope' of discovering favorable evidence is insufficient to support issuance of a subpoena duces tecum."[15] Although they could articulate the reasons for the proposed search, defense counsel could not pinpoint with any precision the object of that search.

I find that this case does not meet the test of *Nixon* and therefore I cannot permit issuance of the subpoenas duces tecum.

For the reasons stated, it is **ORDERED** that the motions (Doc. Nos. 64, 65) are denied.

ENTER: February 4, 2002

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United States District Judge

[15] *United States v. Clark*, No. 1:00CR00094, 2001 WL 759895, at *2 (W.D. Va. June 27, 2001) (citing *United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996)).