

Discoverable Evidence and Appropriate Use of Email

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What is Discovery Anyway?

Discovery is the formal process attorneys use to gather – or discover – facts and evidence for a contested case at the Office of Administrative Hearings or in civil superior court

Interrogatories

- * Written questions formally put to one party in a case by another party and that must be answered.
 - * Ex. - Identify each person or entity having knowledge of the allegations made by you in your Petition for Contested Case

Requests for Production of Documents

- * Written requests for documents formally put to one party in a case by another party. The requesting party is entitled to documents in response.
 - * Ex. - Produce copies of each and every document which you contend serves as a basis or ground for each factual or legal assertion made by you in this contested case.

What is Discovery Anyway?

Cont.'d

Requests for Admission

- * A set of statements from one party to the other party, for the purpose of having the party admit or deny the statements made.
 - * Ex. – Admit that on January 1, 2016, Jane Doe was your employee.

Depositions

- * Out-of-Court testimony given under oath and recorded by an authorized officer, for later use in court.
 - * A typical deposition consists of an attorney asking a witness a series of questions, which the witness must answer under oath.

A Real Interrogatory

Identify all persons representing LME/MCO who communicated orally, in writing, or otherwise with Provider concerning the circumstances leading up to LME/MCO's decision to terminate Provider's Medicaid contract to provide MCM services, the MCM Termination Notice and the factual and legal basis thereof, LME/MCO's reconsideration of its termination of Provider's Medicaid contract to provide MCM services, and the MCM Reconsideration Decision.

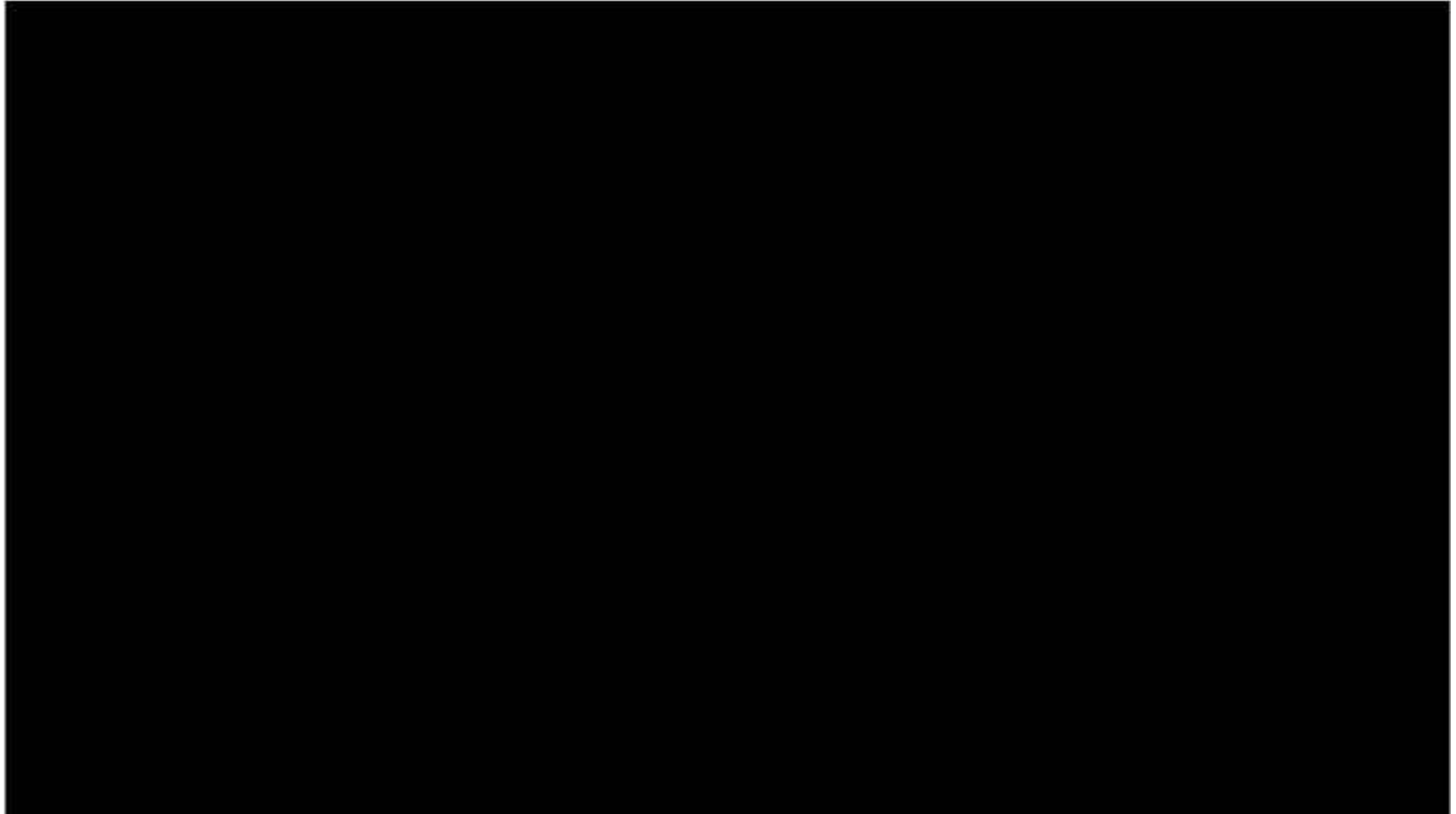
Please include in your response the date and substance of each such communication, the identity of the other persons participating in the communication, and the identity of any documents concerning any such communication(s).

And This Is Why We Hate Attorneys

RESPONSE:

LME/MCO reasserts its general objections. LME/MCO further objects that this Interrogatory is overly broad, unduly burdensome, and harassing, amounts to a fishing expedition, is not a proper Interrogatory, and is not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, it does not seek information with reasonable particularity. This Interrogatory is also objectionable because it in effect asks LME/MCO's counsel to divulge trial strategy and list all the evidence in support of LME/MCO's case. Such Interrogatories violate the work-product doctrine. This Interrogatory is tantamount to asking LME/MCO to tell Provider everything that LME/MCO can think of that might relate to the issue. Similar Interrogatories have been struck down as violating the discovery rules in many cases, including, *Hilt v. SFC, Inc.*, 170 F.R.D. 182 (D.C. Kan. 1997); *Stoval v. Gulf & South American S.S. Co.*, 30 F.R.D. 152 (S.D. Tex. 1961); *Sheffield Corp. v. George F. Alger Co.*, 16 F.R.D. 27 (S.D. Ohio 1954); *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641 (10th Cir. 2008); *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193 (N.D.W. Va. 2000); *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408 (M.D.N.C. 1992); *Lawrence v. First Kansas Bank & Trust*, 72 F.E.P. Cases 1496, D.C. Kan., No. 95-2555-EEO, Dec. 12, 1996). See *Central Hide & Rendering Co. v. B-M-K Corp.*, 19 F.R.D. 294 (D. Del. 1956). Rules 26 and 33 do not permit such broad-stroke Interrogatories. LME/MCO objects to the instruction to produce ESI as an image file with single-page TIFF with an accompanying load file in OPT format, metadata overlay in DAT format, and extracted text in a multi-page text file. Without waiving these objections, LME/MCO will produce the files and records reviewed by LME/MCO during the MCM and IIH reviews which are the subject of this contested case, including email correspondence.

What is a Photocopier?



Don't Ignore Discovery or Subpoenas!

- * Discovery must be answered within timeframes dictated by law, typically the North Carolina Rules of Civil Procedure or Administrative Code.
- * Properly noticed depositions must be attended.
- * Failure to respond to discovery or attend a deposition will almost always have a negative impact on your side's case.
- * You should always consult with your attorney before attending a deposition or answering discovery.

What is the Purpose of Discovery?

Discovery Is:

- * An opportunity to learn all the facts of a matter
- * A tool to identify and evaluate witnesses
- * The vehicle to obtain the “smoking gun” or other evidence that will make or break your case
- * Expensive, time consuming and frustrating

Discovery is not:

- * A tool to intimidate, harass or elicit embarrassing facts not pertinent to the matter
- * The opportunity for your attorney to unnecessarily drive up the costs of litigation
- * Something you should take lightly

Discoverable Evidence

Rule 26 of the North Carolina Rules of Civil Procedure provides that unless limited by court order, parties may obtain discovery of any unprivileged information that is relevant to the subject matter of the lawsuit, whether it relates to the claim or defense of any party.

This includes information that may be inadmissible at trial if the information “appears reasonably calculated to lead to the discovery of admissible evidence.”

Discoverable Evidence

Cont'd

The words "subject matter" have been broadly interpreted to include discovery of facts far beyond the simple merits of the case. Inquiry into collateral matters for impeachment purposes and procedural issues addressed to threshold legal questions should be permitted. Even discovery into matters which might promote settlement of the case has been held proper. Discovery designed to fully develop the scope of a claim or defense is of course appropriate, and is the very aim of this rule, extending not only to issues of liability but also damages.

Discoverable Evidence

Cont'd

Generally, discovery will be limited by the Court if:

- * the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- * the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- * the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

So What Can Providers Get From Me?

- * Internal and external correspondence about an investigation which they've appealed.
- * Internal and external general correspondence about/with the Provider, the provider's owners, and the provider's employees.
- * Investigative records pertaining to the investigation/audit that resulted in the action being appealed.
- * This includes emails!

So What Can Providers Get From Me?

Cont'd

- * List of people within the organization that have knowledge about the investigation, including those people that participated in the reconsideration process
- * Notes taken during an investigation
- * Internal Procedures
- * The documents/records reviewed in the course other investigations of the provider

Documentation is Your Friend ... Until It Isn't

Friendly Documentation Is:

- * Accurate
- * Professional
- * Complete and accessible; tells the full story
- * Consistent with the other documents in the file
- * Supported by other evidence (eyewitnesses, for instance)
- * Helpful to you

Unfriendly Documentation Is:

- * Inaccurate
- * Forged/Manipulated
- * Incomplete/inaccessible; leaves gaps and holes in narrative
- * Professionally Embarrassing
- * Inconsistent with the other documents in the file
- * Unsupported by other evidence
- * Helpful to the other side

Use Documentation to Build Your Record

- * Documents obtained and generated during audits and investigations are potential evidence at a trial or administrative hearing and they should be treated as such.
- * Get copies of records you review!
 - * You don't want missing records to "show up" later, without a way to prove they weren't there the first time.
- * Purposefully craft and organize written records and correspondence during your investigations to establish facts for future use.
- * As you develop your investigation, think about the impact your choices will have in proving/defending your position.

Brief Examples

You request records from Provider and don't receive them.

You could:

- (a) sanction the Provider for failing to cooperate with an investigation
- (b) conclude the records don't exist and refer them to DMA for fraud
- (c) confirm via certified mail whether they received the request for records and give them a deadline to respond before moving the investigation forward.

Which do you think will play better with a judge?

Cont'd

You review 5 enrollee files and discover evidence of “canned notes”. You look at paid claims data and know the Provider is serving 50 enrollees per month.

You could

- (a) extrapolate the findings and estimate an overpayment based on the presence of canned notes
- (b) contact the five enrollees to determine if services were rendered on the dates of the canned notes
- (c) expand the investigation to determine the extent of the canned notes and whether it's systemic, contact the enrollee families (in writing) about the services, and then evaluate the evidence to determine the appropriate overpayment and other sanctions based on a robust set of findings supported with ample documentation.

Which do you think will play better with a judge?

Cont'd

Provider Director calls the network liaison and reports that a staff member has been billing for services not rendered and identifies the clinician and enrollee it involved.

You can:

- (a) thank him for the call, tell your supervisor of the allegations and hope you recall the details when you are eventually called to testify because the Director later recants;
- (b) take notes of the conversation and share those notes with your supervisor;
- (c) confirm the details of the conversation in a letter to the Provider, initiate an investigation via email to your supervisor, request a copy of the notes, contact the enrollee's family to confirm the story, and put your findings/conclusions into a written report to use if the provider appeals any sanctions later.

Which do you think will play better with a judge?

Email Can Supplement Your File

Email is wonderful.

- * It's fast
- * It's convenient
- * It allows us to avoid face-to-face interactions with unpleasant human beings.

Email Can Wreck Your File

Email is of the devil

- * It is used too informally
- * It is used too much
- * We are way too candid way too often.

The Breakup – A Cautionary Tale

- * Boy Meets Girl (at work)
- * Boy Dates Girl
- * Girl Breaks Boy's Heart
- * Boy Goes Through Stages of Grief Via Email (at work)
- * In Discovery, Emails Happen To Get Flagged In Key Word Search
- * Room Full of Attorneys and Staff Read Emails - Aloud. Laughter Ensues.
- * One Person in the Room Isn't Laughing - The Boy With the Broken Heart.

More Practical Examples

To: Program Integrity Director
From: Program Integrity Investigator
Subject: Provider X

Well Jane did it again and ruined another investigation. She's so incompetent! I mean, I don't want to get into details over email, but I wouldn't be surprised if she lost documents on the way back to the office. You remember the last time that happened, right? Guess I'll have to clean up her mess later.

To: Compliance Manager
From: Compliance Investigator
Subject: Big News!!

I think I just found that excuse we needed to get Provider Y out of our network forever! We've been waiting for this for so long and now it's over for them. Woot Woot! Who run the world, girls run the world. Suck it Provider Y, you're going down! I can't wait to see the looks on their stupid faces when they see this stuff.



To: Care Coordinator

From: Care Coordinator

Subject: Deposition

Hey, did you get a subpoena for a deposition in the AB case? I did too. Can we talk later – we need to get our stories straight so we both say the same thing in our depositions.



To: Investigator

From: Investigator

Re: Sanction Decision

I can't believe they terminated Provider X. What a horrible decision. I know those clinicians and they are top notch. I've never known them to make serious mistakes. Plus, I've seen providers do way worse and get punished way less. Wonder who had an axe to grind?



To: Investigator
From: Investigator
Subject: Provider X

Hey, great job on the presentation today on provider X. I think the case is air-tight. I really like how you traced the problem between services and clinicians. They're problems are systemic indeed.

We're going out tonight if you want to come with. Last time Sally was there. I know she's married but from what I hear she still gets around. Tim claims he hooked up with her a couple months back, but they were both black out drunk and he's a serial liar, so who knows, right?

In Summary...

- * Your Investigation File, including internal correspondence, is subject to production to the other side in the course of litigation.
- * Be mindful of what to document (follow ups with the provider) and what not to document (concerns about an investigator).
- * Emails, if done professionally, can prove that you did a thorough job, can establish due process, and can supplement your recollection.
- * Email, if done unprofessionally, can shoot your case in the foot and can embarrass you and your colleagues.



Questions?