

United States District Court
Western District of New York

United States of America,
Plaintiff

vs

Indictment № 06-Cr-00236-RJA-
HBS

Ezzat Soliman,
Defendant

The accused, by the undersigned, hereby demands production of the following, as particularized in the annexed schedules:

1. Discovery
2. Bill of Particulars

November 26, 2006



Mark J. Mahoney
HARRINGTON & MAHONEY
1620 Statler Towers
Buffalo, NY 14202-3093
Tel: 716-853-3700
Facs: 716-853-3710
Attorneys for Ezzat Soliman

To:
Robert G. Trusiak, AUSA

Schedule 1: Discovery

The defendant demands discovery pursuant to Rule 16 FRCrP and the Due Process clause of the U.S. Constitution of the following items and under the following conditions:

Introduction: Definition of Terms

Document. As used herein, the term "Document" includes reports, correspondence, lab notes, memoranda, sketches, lists, charts, computations, electro magnetic recordings, video tapes, film, photographs, "electronically stored information" as understood under FRCP 34(a)(1)[*effective December 1, 2006*], accounting data and statements and reports, and the like, which are within the government's possession, custody or control or "reasonably accessible" to the government, or which with the exercise of diligence on the part of the government could be brought within the government's possession, custody or control. Discovery is requested in "electronic format" wherever applicable. See ¶[63](#), *et seq.* below.

Report As used herein, the term "Report" includes both written and oral communications.

Conversation The term "Conversation" as used herein refers to any electronically intercepted oral or telephonic communication or any videographic recording of a conversation or meeting.

Statements

3. Any written, recorded, oral or observed statement of the defendant or attributed to the defendant including notes, summaries or memoranda concerning such statements;

4. Any transcript of testimony relating to the criminal action given by any agent or employee of any defendant (or by any uncharged co-defendant or co-conspirator) before any grand jury.

Examinations or Tests

5. Any documents concerning any physical or mental examination, or scientific test or experiment relating to this case, including any evaluation of the services performed by Dr. Soliman compared to billing codes..

[As used herein, "concerning. . . examination, . . . test or experiment" includes preparation for, conducting of, immediate results of, and evaluation of such procedures, for example "lab notes" or checklists or graphic or otherwise recorded output of analytic instrumentation].

6. Transcripts of any testimony given relative to any physical or mental examination, or scientific test or experiment relating to this case, specifically including any testimony reporting on any clinical observations or review of medical records of any type relative to the investigation of this case, or other expert opinions relevant to the charges.

7. A summary of the testimony of any proposed expert witness, describing the witness' testimony, the data upon which the witness will testify and the bases for the opinions or factual evidence to be offered.

8. A *curriculum vitae* for any proposed expert witness.

Grand Jury

9. A statement as to the extent of use of "summarized" testimony, in lieu of direct testimony by those with direct knowledge, by government agents, or investigators, accountants, experts, and any other person, indicating the specific counts of the indictment for which the evidence was supplied by summaries of "evidence" and the nature of the evidence summarized.

10. The legal instructions provided to the grand jury.

11. Any orders or directives, whether written or oral, compelling any person to submit to medical procedures or examinations, including the basis on which such orders or directives were made.

Identification

12. Any visual or audio identification procedures utilized in this case, specifying the procedure, the participants and the circumstances; any visual or audible representation of a person or voice used for identification purposes.

Documents - Rule 16(A)(1)(E)

13. All documents obtained from the defendant or belonging to the defendant. To reiterate, discovery of this information is requested in “electronic format” wherever applicable. See ¶63, *et seq.* below. The discovery provided voluntarily to this point fails to meet the minimal requirements for disclosure, and in fact imposes a huge burden on the defense.¹

14. All documents obtained from the Genesee County Sheriff’s Department which

¹ The government has provided us with various CD-ROM or DVD discs containing graphic images of documents seized from the office of the accused. However these single-page TIF images are not grouped according to the files, file folders, and individual documents (and attachments) labeled to correspond to any patient, vendor, supplier, payor, time period, etc. Therefore, as produced the documents are not “as they are kept in the usual course of business.” FRCP 34(b)(i) Nor is any index or other means provided to locate files or load these files into any software designed to help examine such discovery items in their proper file, folder or document association. Nor is there any means to associate any particular file with any particular count of the indictment. As the comment to FRCP 34(b) states: “The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Such materials should be produced at least in “reasonably useable form” FRCP 34(a) and (a)(ii). And the Comments to Rule 34 state: “But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.” While here we are specifically referring to material that was originally in *document* form, the principle remains the same. See, 2003 Report and Recommendations of the Joint Administrative Office/Department of Justice Working Group on Electronic Technology in the Criminal Justice System at p.6:

(ii) For example, the government may have spent time and money converting discoverable paper documents into an electronic format and creating a basic index of the documents by entering them into an electronic data base. In this circumstance, requiring a defendant to independently convert the same paper documents into an electronic format and then enter those documents into a comparable electronic data base might not only be wasteful and inefficient, but also could lead to difficulties at a trial or hearing if the parties have used different electronic formats for the documents they seek to exchange or present to a judge or jury electronically.

From the information provided so far, it would cost the defendant at least \$10,000 to identify and rearrange the material provided to us to reflect the actual probable file, folder, and document locations of the original documents in this case. This could have been avoided by early discussions about the parameters for scanning the documents.

Moreover, contrary to all convention, there are no “Bates” numbers on any of the documents provided to us so far to allow them to be uniquely identified.

were taken from Dr. Soliman.

15. All documents which the government intends to use at trial.

16. All documents “material to preparing the defense” including documents sought in the following requests in paragraphs.

Health Care Benefit Programs

17. Any documents obtained from any Health Care Benefit Programs in connection with the investigation of the accused. As used in this section, “Health Care Benefit Programs” refers to those programs referred to in counts 1-64 of the indictment, and any predecessors or successors thereto.

18. Any documents obtained from any **“Independent Practice Association” (“IPA”)** involved in the billing or contractual arrangement between Dr. Soliman and the Health Care Benefit Programs.

19. Any contracts between Dr. Soliman and any such Health Care Benefit Program or between any either Dr. Soliman or any such Health Care Benefit Program and any IPA.

20. All claims submitted by the accused or on his behalf or with his Provider Number on them to any such Health Care Benefit Program during the period of January 1, 2001 through August 2005. “Claims” include any documents made or submitted in connection with a claim for reimbursement.

21. All documents related to the processing and payment of any such claims, including any offsets, deductions or “withholds” by such Health Care Benefit Programs during the same time period.

22. All documents reflecting communications of any sort between the accused, or anyone acting on his behalf, and any such Health Care Benefit Program relating to the same time period.

23. All documents reflecting communications of any sort between the accused, or anyone acting on his behalf, and any IPA relating to the same time period.

24. Documents reflecting or relating to the pattern or practices of Dr. Soliman in

submitting claims, to such Health Care Benefit Programs relating to the same time period.

25. Documents reflecting or relating to the patterns and practices of such Health Care Benefit Programs, and relevant to the same time period, in the processing and payment of such claims. This includes manuals, training materials, guidelines and directives for employees reviewing claims at any stage of the process.

26. Documents reflecting or relating to any policies, procedures, or guidelines on the part of such Health Care Benefit Programs concerning monitoring of the billing practices of physicians during the same period including all versions and revisions thereof, and for each such Health Care Benefit Program identify which set of Centers for Medicare and Medicaid Services (CMS) E/M guidelines were being used over any time period encompassed by the indictment.

27. Documents reflecting actual practices of such Health Care Benefit Programs concerning monitoring of the billing practices of physicians during the same period including all versions and revisions thereof, e.g. sampling and audit protocols, checklists

28. Any documents relating to any specific or routine examination or investigation by any such Health Care Benefit Programs concerning Dr. Soliman's billing practices ("Report Cards" etc).

29. Any documents relating to any specific or routine examination or investigation or audit by any IPA concerning Dr. Soliman's billing practices ("Report Cards" etc).

30. Documents reflecting or relating to any efforts on behalf of such Health Care Benefit Programs, during the same time period, to communicate with Dr. Soliman in any way concerning such patterns and practices, or their failure to so communicate.

31. Any documents within or among such Health Care Benefit Programs relating to Dr. Soliman, relating to his billing practices, to any investigation by any state or governmental agency into his billing practices.

32. Any documents within or among such Health Care Benefit Programs relating to "re-credentialing" Dr. Soliman or reviewing or renewing his contractual arrangement with such Health Care Benefit Programs.

33. For each Health Care Benefit Program provide a list of each relevant electronic system that has been in place at all relevant times for the collection of data and the payment for services and the storage of documents , including a general description of each system, including the nature, scope, character, organization, and formats employed in each system and any archive or backup systems.

34. While it is believed that all the documents sought are withing the possession or control of the government, and could be obtained with the exercise of due diligence, for any documents claimed to be beyond the reach of the government, provide the name, address, title, phone number of the person likely to have the information.

Other Health Care Benefit Programs

35. Any documents such as described above relating to Health Care Benefit Programs not referred to in the indictment relating to Dr. Soliman and his billing practices.

Third Party Documents

36. Any documents obtained from any third parties including banks, financial institutions, credit reporting agencies, or the like relating in any way to the indictment or the investigation or the accused which lead up to the indictment or since the indictment.

37. Any documents obtained from any **utility companies, services providers** or the like relating in any way to the indictment or the investigation or the accused which lead up to the indictment or since the indictment.

38. Any documents obtained from any **common carriers** whether for packages, information, data, or persons, including telephone records, or the like relating in any way to the indictment or the accused or the investigation which lead up to the indictment or since the indictment.

Tapes, Photographs

39. Copies of all video or audio tapes made in connection with the investigation by any agency.

40. A precise description of the form and location of the original recordings, and

the process by which the current copy was created.

41. Any photographs made in connection with the case.

42. Any charts, graphs, maps or drawings related to the investigation and prosecution of this case.

Physical evidence

43. All physical evidence collected or seized in connection with the case, including copies of all property capable of being photocopied or reproduced. The source and date and time of recovery, as well as the authority under which the property was obtained must also be disclosed.

Favorable Information

44. All material evidence or information, whether admissible at trial or not, whether regarding facts or occurrences or the absence of facts or occurrences, known to the prosecutor or which could become known upon diligent inquiry to those under the prosecutor's direction or control, which is in any way favorable to any defendant, whether by detracting from the prosecution's case or the credibility of the prosecution's witnesses, or supportive of the positions urged, or likely to be urged, by any defendant at any stage of the proceedings.

45. Any statements known to be false or erroneous or conflicting made by persons intended to be called as witnesses.

46. Any statements, records or information indicating that any prospective witness has given contradictory or deceitful information in the course of the investigation of this case.

47. Any information indicating that any prospective witness has given information inconsistent or materially different from information received from other more reliable sources.

48. Names and addresses and statements of any persons interviewed by or on behalf of the Government or who are known to have been witnesses to the events underlying

the charge whom the Government do not intend to call as witnesses.

49. The existence of any government agents or information or cooperating individuals in this case and any representation, offer, agreement or understanding regarding any past, present, or future benefit to such persons as a result of or in relation to their cooperation with the prosecutor.

50. Any information to the effect that the instant prosecution is based on or derived from evidence acquired as a result of Governmental action violative of Constitutional standards. This request expressly encompasses any information which might affect the Court's decision on a suppression issue in a fashion favorable to the Defendant.

51. Any other records or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the prosecution's evidence or which arguably could lead to such records or information.

Impeaching information

52. The defense also requests information which could be utilized for the impeachment of prosecution witnesses, including specifically the disclosure of any of the following within the possession, custody or control of the prosecution or which, with due diligence could become known to the prosecution:

53. Any records or information revealing prior convictions or juvenile adjudications attributed to each witness to be called by the government, including but not limited to relevant "rap sheets." Any records, including police personnel records, or information revealing prior misconduct or bad, vicious or immoral acts on the part of any witness.

54. Any consideration or promise of consideration or expectation of consideration which obtains with respect to any witness intended to be called by the prosecution, including, but not limited to leniency, favorable treatment, assistance with respect to any pending legal proceeding, claim for reward or fees, including witness fees or special provisions for protection, food, clothing, shelter, transportation, or other benefits, or anything else which arguably could reveal an interest, motive, or bias of the witness in favor of the prosecution or against the defense or act as an inducement to testify or to color testimony.

55. Any threats, express or implied, direct or indirect or other coercive measures directed against any witness such as threats of criminal prosecution or investigation or potential prosecution, any probationary, parole, deferred prosecution or custodial status of the witness or any civil, tax court, court of claims, administrative, or other pending or potential legal disputes or transactions with the prosecution or over which the prosecution has a real, apparent, or perceived influence.

56. Any information as to any prospective prosecution witness having a history of mental or emotional disturbance.

57. The existence and identification of each occasion on which any witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to the defendant, the investigation, or the facts of this case.

58. The existence and identification of each occasion on which each witness who was or is an informer, accomplice, co-conspirator, has testified before any court, grand jury, or other tribunal or body.

59. Whether any witness has commenced or contemplates commencement of a civil action against the accused.

60. The same records and information requested in the paragraphs above is also requested with respect to each non-witness declarant whose statements may be offered in evidence.

Alleged prior misconduct

61. Any alleged criminal or immoral conduct on the part of the defendant intended to be used against any defendant on the governments direct or rebuttal case.

62. Any alleged criminal or immoral conduct on the part of the defendant intended to be used in the examination of the defendant should he testify at trial.

Electronic Format

63. For those documents which exist or existed as electronically stored information, we request production in the format in which they were obtained, or some other

agreed to reasonably useable format. A sample of any such files should be produced in order to permit mutual agreement as to the format for disclosure.

64. For this purpose, and for the purpose of regulating disclosure by third parties to conform to these guidelines, it is requested that the government and the affected third parties shall engage in discussions regarding the production of electronic documents in this case. The discussions should be attended by a representative of each Health Care Benefit Program or IPA with sufficient knowledge of that party's electronic documents to enable a good faith effort to resolve all issues regarding the production of electronic documents without court action.

65. Scanned images should be from an original rather than a copy and in standard image format (TIFF or PDF).

66. For documents obtained in a format other than electronic, if produced as scanned images of documents, in an electronic format or arrangement that preserves the original file, file folder, and document structure of the documents or which contains an index or "load file" permitting the import of the image files into software available to the defendant in a manner which allows replication of the original file, file folder, and document boundaries of the documents.

67. Images should be uniquely numbered with "Bates" numbers with an appropriate prefix to indicate the source, such as MED, EXC, UNI, SOL for this case.

68. Fielded data relating to individual documents (box number, exhibits, etc.) should be provided in a database format or in an ASCII format in a delimited structure (i.e. tab, CSV, etc.)

69. Every document described above which is required to be supplied in "hard copy" shall also be provided in electronic format if it exists in that format without regard to whether, such as a transcript, it was originally created in electronic format or it was converted to an electronic format from original hand written notes. In the event that the original format is unreadable on the defendants' equipment, then the government shall endeavor to provide the information in ASCII or other readable format. This would include all Title III pleadings, search warrant applications, transcripts, and the like originally prepared in a word processing

format, as well as any logs, summaries, or other documents which have subsequently, by scanning and optical character recognition, or keyboard operation, been converted to electronic format.

70. This also includes any database or accounting records or other records provided to the government by insurance companies, administrators of group insurance programs, or vendors.

Tapes

71. If any tapes made in connection with the case were originally created in digital format, we move that the digital master shall be made available to the defense for copying in digital format. If tapes are supplied in digital format, they should be supplied with the same markings and indexing information referred to in the next paragraph.

72. Otherwise, we move that analog tapes shall be provided to the defense by supplying a complete sets of all the tapes created in connection with the investigation with reproduced sound quality equivalent to the tapes intended to be used by the government at trial. Such tapes shall be clearly marked with information sufficient to identify the conversations contained on each using a log or table supplied to assist defendants to locate conversations separately identified in any transcripts, logs, or summaries.

Timing of disclosure

Favorable Information

73. In order to effectuate the Right to Present a Defense which is embodied in the compulsory process clause of the Sixth Amendment, and to the right to a fair trial, all favorable information, *including favorable information useful to impeach government witnesses*, must be disclosed to the accused immediately or as soon as its existence comes to the attention of the government or its agents. See October 19, 2006 Memorandum from the Deputy Attorney General, relating to the addition of §9-5.001 to the United States Attorney's Manual. ("Exculpatory information must be disclosed reasonably promptly after it is

discovered.”)²

² Of course the Manual is incorrect in describing the material required to be disclosed as “exculpatory.” The Supreme Court in *Brady v. Maryland*, the subject of the memo, never used the word “exculpatory.” It referred to “favorable information.”

Schedule 1: Bill of Particulars

The defendant requests particularization of the indictment as follows:

74. State the manner and place and time on which it is alleged that the accused ever “instructed the billing clerks that he employed to bill the highest office-based E&M code” as stated in ¶25 of the indictment.

Counts 1-64

75. For each count of the indictment, specify (by every unique combination of “Bates” number and range, computer file and path name, claim number, date, patient, date of service) any documents submitted as part of the claim for reimbursement at issue.

76. For each count, state “the actual services provided to patients by the defendant” (see ¶23) which is alleged to have called for a lower and less costly level of services than that billed by the defendant, specifying, for each, what is claimed to be the proper code for the service.

77. For each count, state the precise “false statements” or “misrepresentations of fact” (see ¶24) alleged to have been made.

78. For each count state what, if anything, was done by the defendant which “caused false statements and misrepresentations of fact to be made.” ¶24

79. For each count, state the precise “non-rendered clinical services,” if any, referred to. (see ¶26)

80. For each count, state the precise additional amount of money, if any, alleged to have been received as a result of any “upcoding” or billing for “non-rendered clinical services.” (See ¶26)

81. Specify each count where the liability of the accused is claimed to derive from application of § 2 of Title 18, specify the actions of the accused which render him liable for the conduct of the principal actor.

82. For each such count, identify the principal actor.

Forfeiture

83. For each count specify the “gross proceeds traceable to the offenses described in such violations.”

84. Specify the basis for the claim that any individual item of real property or any motor vehicle is subject to forfeiture.

Respectfully submitted,

Mark J. Mahoney, Esq.
HARRINGTON & MAHONEY
1620 Statler Towers
Buffalo, NY 14202-3093
Ph: 716-853-3700
Facs: 716-853-3710
mmahoney@harringtonmahoney.com
(Attorneys for Ezzat Soliman)