

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No. 08-00026-04-CR-W-FJG
)
 CHRISTOPHER L. ELDER,)
)
 Defendant.)

ORDER

This matter is currently before the Court on Non-Party Texas Medical Board's Motion to Quash Rule 17(c) Subpoena and in the Alternative, Motion for Protection (doc #183).

Defendant Elder served a subpoena upon the Custodian of Records for the Texas Medical Board requesting that the following documents be produced:

That portion of the non-public investigative filed [sic] maintained in the custody and care of the Texas Medical Board dealing with Doctor Peter Okose, Texas License Number J2714, concerning an investigation of Doctor Okose which resulted in disciplinary actions against him by the TMB in July and August of 2006. Documents requested are any and all written submissions by Okose to the Board by him or on his behalf by any representative dealing with the aforesaid investigation; any recorded statements or transcripts of statements of Okose in the Board's possession dealing with the aforesaid investigation; any summaries or reports prepared by any investigator or board member that reflects admissions, statements, or explanations offered by Okose to the Board in response to the aforesaid investigation; and, any other items or information in whatever medium, that reflect or are considered by the TMB as admissions or statements of Doctor Okose dealing with the aforesaid investigation.

In its Motion to Quash, the Texas Medical Board states that it will provide all non-confidential documents to counsel for defendant Elder,¹ but argues that portions of the investigative and disciplinary files maintained by the Board are confidential by state statute.

Oral argument was held on March 4, 2009. In defendant Elder's response to the motion to quash and again at oral argument, counsel for defendant Elder clarified that he is only requesting

¹These documents include: Agreed Order of Temporary Suspension dated July 13, 2006; Agreed Order dated August 25, 2006; Modification of Agreed Order dated August 24, 2007; Agreed Order Modifying Prior Order dated June 27, 2008; and Dr. Okose's public profile.

statements made by Okose (or someone acting on his behalf) to the Texas Medical Board which would constitute admissions. At oral argument counsel for defendant Elder stated: "... I want to know what he told the Board about sending prescriptions up here and whether or not he wrote them and authorized them." (Tr. at 8) The parties agreed that the Board would submit the subject documents to the Court for in camera review at which time the Court would review the documents and determine whether or not they contain exculpatory evidence as to defendant Elder. If the documents were found to contain exculpatory evidence, the documents would be produced to defendant Elder after the entry of an appropriate confidentiality order. If the Court found that the documents did not contain exculpatory evidence, the Texas Medical Board requested that they not be produced to defendant Elder, even as impeachment material, as the public policy interest in keeping the documents privileged and confidential under the Texas statutes outweighs defendant Elder's interest in using them as impeachment material.

The Court has reviewed the subject documents and finds that they do not contain exculpatory evidence as to defendant Elder. In fact, the Court has identified only one statement in the subject documents which is attributed to Okose and it does not deal with prescriptions sent to Missouri. Therefore, no documents will be ordered produced as exculpatory material.

The one statement in the subject documents which is attributed to Okose deals with one of the violations with which Okose was sanctioned by the Board. The violations are noted in the agreed orders of temporary suspension that have already been provided to defendant Elder. Courts have held that "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." United States v. Hardy, 224 F.3d 752, 756 (8th Cir. 2000)(quoting United States v. Nixon, 418 U.S. 683, 701 (1974)). See also United States v. Fields, 663 F.2d 880, 881 (9th Cir. 1981); United States v. Jackson, 155 F.R.D. 664, 668 (D. Kan. 1994). Given this case law and that fact that the one statement attributable to Okose appears to be cumulative of other evidence already in defendant Elder's possession (that is Okose's apparent acknowledgment of violations in the agreed orders of temporary suspension), there does not appear to be any reason to

