

Horton, Bill

From:
To:
Subject:

Horton, Bill
Tuesday, December 03, 2002 10:11 PM
Scrushy, Richard
FW: Privileged and Confidential

I think you got the attached e-mail from Lanny this afternoon. I don't think I knew they were working on this. In any event, please let me know whether this strategy is something you want to pursue. I'm happy to look at the drafts, but didn't want to spend time on it unless it was an approach you were interested in.

-----Original Message-----

From: Davis, Lanny [mailto:LDavis@PattonBoggs.com]
Sent: Tuesday, December 03, 2002 5:28 PM
To: Hansen, Amy; Scrushy, Richard; Horton, Bill
Cc: Rasmussen, Garret; Goldberg, Adam; Davis, Lanny
Subject: Privileged and Confidential

As previously discussed, I am attaching a draft complaint challenging Transmittal 1753 as a "rule change" not a "clarification" and, thus, a violation of the Administrative Procedure Act. Our APA litigator experts here have read this complaint and have offered me a better than 90% estimate of chances of success of obtaining an injunction. Also, a draft Motion for Summary Judgment.

Eric and I discussed the following strategy: We would send Tom Scully a draft copy on a personal, "off the record basis" (Tom Scully, as you know, was an associate here at Patton Boggs and continued to work closely with us after he left and I know that Eric is very close to Tom -- so it is safe for us to do back-channel this way. We would then call him, invite him to dinner, and talk about a better alternative than litigation (which he must realistically see as an embarrassment to him and the agency). There are may be a compromise, for example, that would permit concurrent therapy/individual coding, but fine better when group coding must be used (i.e., depending on the complexity of the procedure and the actual individual supervision by a PT of a particular patient, or other such definitions.)

I suspect his General Counsel will be a hardliner on this, and we still may have to file a suit. If the plaintiff is a physical therapist and/or a patient, we believe there would be standing to sue and that would be best of all. I can't remember the name, but another alternative would be the national physical therapy association based in the minority community. The fact that HealthSouth is funding the case will likely come out, and if it does, we should not fear that; but we should try to get others, including physicians, PTs, etc., to make even a nominal contribution to fund the case along with us.

Reid Smith can and should still be the counsel on the complaint if you decide to file this.

So the first action item: Can Eric and I meet with Scully on the basis outlined in this email.

Bill Horton -- we would appreciate your legal and substantive review of the complaint and the memorandum in support of Summary Judgment. Please call my partner, who did the first drafts of both, and who has considerable APA litigation experience, to offer comments and suggestions. His name is Garret Rasmussen, and his number is 202-457-6343. Adam Goldberg has also assisted, and you can reach him at 202-457-6457.

Best,

Lanny Davis

This e-mail message contains confidential, privileged information intended solely for the addressee. Please do not read, copy, or disseminate it unless you are the addressee. If you have received it in error, please call us (collect) at (202) 457-6000 and ask to speak with the message sender. Also, we would appreciate your forwarding the message back to us and deleting it from your system. Thank you.

This e-mail and all other electronic (including voice) communications from the sender's firm are for informational purposes

HHEC 371-0022
Confidential Treatment
Sponsored by HealthSouth

