

BATON ROUGE BAR ASSOCIATION

**DEPOSE THE LAWYERS? HOW ABOUT THE
COMMISSIONER? WHY NOT THE GOVERNOR?
UNIQUE DISCOVERY ISSUES FROM CLIENT
NETWORK SERVICES, INC. VERSUS STATE, *ET AL***

Presented by:

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I. Introduction

If you're fortunate, a case comes along that has it all: factual intrigue, big money "bet the business" consequences, a committed client, press coverage, political interest, related criminal prosecutions and a "briar patch" of legal issues. CNSI v. State of Louisiana, et al, involving the State's "for cause" termination of a \$200+ million Medicaid Management and Information System contract, was such a case.

Representing the terminated contractor, Client Network Services, Inc. ("CNSI"), we were immediately faced with a number of issues, both legal and non-legal. Jurisdictional issues, negative press, related criminal investigations and political motivations were some of these issues. This presentation will deal with another issue – discovery. Specifically, we will focus on three distinct areas of discovery which arose from the factual context of this dispute:

- 1) Public records litigation;
- 2) Depositions of the State's officers; and
- 3) Depositions of the State's lawyers.

In order to understand how these issues arose and developed, it is necessary to understand the factual context of the suit.

II. Factual Background of the CNSI Case

The CNSI case arose out of a state procurement process for a company to build and operate a new Medicaid management information system, or "MMIS," for Louisiana. The MMIS is the computer system each U.S. state or territory uses to process and pay Medicaid claims. In

Louisiana, the Department of Health ("LDH")¹ , formerly known as DHH, the Louisiana Department of Health and Hospitals, the agency that owns the MMIS.

MMIS contracts are to be awarded based on a competitive selection process using criteria outlined in a "solicitation for proposal."² On November 1, 2010, the state's central purchasing agency, the Division of Administration's Office of State Purchasing ("OSP"),³ issued a "Solicitation for Proposal for Medicaid Management Information System Replacement and Fiscal Intermediary Services" (the "SFP").

Meanwhile, just before the SFP was released, Bruce Greenstein was appointed by Governor Bobby Jindal to serve as Secretary of LDH. Greenstein was a well-respected healthcare expert with experience in state and federal government programs, as well as private industry – most recently as Managing Director of Worldwide Health for Microsoft. He had also worked prior to that at CNSI for less than one year in 2006. Although Greenstein had extensive background in healthcare-related information technology, his appointment came after the SFP's drafting was nearly complete and he had little input in the SFP's contents.

Four bidders ultimately submitted proposals in response to the SFP: Molina, CNSI, ACS State Health Care ("ACS"), and HP Enterprise Services. The proposals then were evaluated through a detailed procedure involving eleven teams comprised of over sixty individuals. Greenstein had no involvement in the evaluation process.

¹ Until June 2016, LDH was known as the Louisiana Department of Health and Hospitals, or LDH.

² See La. R.S. 39:198(I). The statute uses the term "fiscal intermediary services" because Louisiana uses a "fiscal intermediary" arrangement, where the MMIS contractor processes claims and issues payments to providers on behalf of the state Medicaid office. Thus, the contractor is a fiscal intermediary between the state and healthcare providers.

³ The name of the state central purchasing agency changed to "Office of State Procurement" effective January 1, 2015. See La. R.S. 39:1556(4); Acts 2014, No. 864, § 2.

In summer 2011, the State announced that CNSI was the winning proposer. The award generated controversy even before it was announced. Greenstein was peppered with questions about the MMIS procurement during his confirmation hearing before the Senate Governmental Affairs Committee. It seemed clear from the questioning that the Senators knew "something." In fact, competing lobbyists at the hearing were congratulating CNSI's lobbyist before CNSI knew about the award. The pressure on Greenstein became so intense that he was forced to announce that CNSI had won the award, even though the statutory prerequisites for a public announcement arguably had not been completed.⁴

Greenstein's announcement, and the subsequent official notification by OSP of the award to CNSI, attracted more controversy and significant press coverage. Two of the disappointed proposers — ACS and the incumbent, Molina — protested the award to the Director of State Purchasing. The protests were denied and CNSI and LDH entered into the "Agreement for the Operation and Enhancement of the Louisiana Medicaid Management Information System (LMMIS) through a Fiscal Intermediary Type Arrangement" (the "LMMIS Agreement") effective February 15, 2012. The initial total price for the work under the LMMIS Agreement was \$197.4 million.

CNSI performed under the LMMIS Agreement for over a year. On the morning of March 21, 2013, the Baton Rouge Advocate reported that the DOA had received a federal grand jury subpoena seeking documents related to the MMIS procurement. That afternoon, CNSI employees began seeing media reports to the effect that the State was terminating the LMMIS

⁴ Discovery in the CNSI case revealed that lawyers within LDH and the DOA had advised Greenstein and others that La. R.S. 39:198(I)(6) required that the House and Senate Committees on Health and Welfare conduct a hearing concerning an award of an MMIS contract before there could be any public announcement of the award.

Agreement for cause. After calling an attorney within DOA to verify reports, CNSI's General Counsel received a letter signed by the Director of State Purchasing that announced the termination for cause but did not provide any reasons.

Unbeknownst to CNSI at this time, but revealed through later discovery, the Attorney General's office had been investigating the bid process and award of the MMIS contract to CNSI since December, 2011. The investigation was initiated as a result of an anonymous email (since totally discredited)⁵, alleging wrongdoing and collusion on the part of CNSI, the Governor and Secretary Greenstein, among others. Upon learning that the State was planning to expand the MMIS contract, the Attorney General's office arranged for a meeting with Kristy Nichols, the Commissioner of Administration, and Paul Rainwater, the Governor's Chief of Staff, to advise them of the investigation, although they would not provide factual details or support due to the ongoing nature of the investigation. As a result of this meeting, and without any further investigation – including consultation with LDH, the party to the contract with CNSI – the contract was terminated for cause.

Commissioner of Administration Kristy Nichols issued a statement in connection with the termination in which she took responsibility for the decision after consultation with the Attorney General's Office.⁶ She also publicly accused CNSI of "wrongdoing," stating that: "We have zero tolerance for wrongdoing, and we will continue to cooperate fully with any

⁵ The anonymous emailer was a disgruntled CNSI employee, who admitted in his deposition that he did not have personal knowledge of the facts supporting his allegations and that he sent the email to "save his ass" after being frightened by threats from CNSI's competitors. CNSI successfully sued this person in federal court in Maryland, obtaining a judgment against him for breach of various duties.

⁶ *See* Ex. 2, Marsha Shuler, The Advocate, "Jindal Cancels Contract: Action Follows Grand Jury Probe of CNSI Medicaid Award," Mar. 21, 2013 ("Based on consultation with the Attorney General's Office, today I am terminating the state's contract with CNSI, effective immediately.").

investigation."⁷ Within days after the termination, LDH's General Counsel wrote a letter asserting a claim against the \$6 million bond that CNSI had obtained to secure the LMMIS Agreement. Greenstein resigned as Secretary under pressure due to the controversy generated by the contract termination; and, he was later indicted by a grand jury run by the State Attorney General's Office in East Baton Rouge Parish, essentially for perjury involving the CNSI contract during his Senate confirmation hearing.⁸

CNSI immediately attempted to set up a meeting to discuss the decision. Finally, over a month later, the State agreed to set a Monday, April 29, 2013 meeting with LDH to discuss the termination of the LMMIS Agreement. At 5:36 p.m. on April 26, 2013, the last Friday before the scheduled meeting, the Director of State Purchasing emailed a letter to CNSI's attorneys that purported to set out the reasons why the LMMIS Agreement was terminated. The letter gave six alleged bases for the termination, some of which involved alleged wrongdoing during the proposal process itself and others of which involved alleged wrongdoing in the course of contract performance. None of these bases were known to the Commissioner of Administration or the Director of State Purchasing at the time of the decision to terminate. They resulted from an investigation conducted by outside counsel for the DOA after the termination decision was made and announced.⁹ Notably, the letter was released to the press before it was transmitted to CNSI's counsel.¹⁰

⁷ *See id.*

⁸ Greenstein's indictment was later dismissed by newly-elected Attorney General Jeff Landry's office, partially as a result of information uncovered by CNSI discovery.

⁹ CNSI believed that this termination letter was actually written by outside counsel based upon information developed during the course of the case.

¹⁰ The letter arrived in CNSI's counsel's email inbox at 5:36 p.m. on April 26. By that time, the first media reports about the letter had been posted on the World Wide Web.

The six alleged bases for termination followed four basic categories:

- 1) CNSI personnel made numerous phone calls and sent text messages to LDH Secretary Bruce Greenstein, allegedly obtaining the bidding and award process;
- 2) CNSI unfairly under bid the contract;
- 3) CNSI misrepresented its financial information; and
- 4) CNSI failed to perform on several contractual obligations.

CNSI remained perplexed as to the termination, because the bases were either grounded on incorrect information; had already been addressed during the bid proposal, award and protest process; or were issues that had not been previously raised during the existence of the contract by LDH, the State entity that was a party to the contract with CNSI.

When CNSI arrived at LDH's offices for April 29, 2013, representatives of the DOA were present and in fact took the lead in the meeting. The LDH officials present were largely silent. One of the matters discussed at the meeting was a settlement proposal by CNSI. At the request of the State's representatives, CNSI put its proposal in writing after the meeting.

On May 2, 2013, CNSI received a letter from outside counsel for DOA (not LDH) rejecting the settlement proposal. The letter also included a demand that CNSI return the approximately \$17 million it had been paid under the LMMIS Agreement up to the termination date. It started to become clear to CNSI that the decision to terminate the LMMIS had come entirely from DOA, and that CNSI's actual contract partner — LDH — had virtually no involvement in the decision. (Discovery in CNSI's civil lawsuit confirmed that fact.)

CNSI responded by filing a "Petition for Bad Faith Breach of Contract, Declaratory Judgment, and Damages" on May 6, 2013. Named defendants included LDH, DOA, OSP, and various state officials (including Commissioner of Administration Nichols and Governor Bobby

Jindal) in their official capacities. The crux of CNSI's claim was that the State had breached the LMMIS Agreement by asserting a termination for cause without any justifiable basis.

III. Public Records Litigation

Given CNSI's initial shock and the total lack of response from the State during the period from the March 21, 2013 termination to the April 26, 2013 letter as to reasons for termination of the contract other than a broad accusation of wrongdoing, CNSI utilized one of the unique aspects of litigation with the State – the Public Records Request under LSA-R.S. 44:1, *et seq.*, and particularly LSA-R.S. 44:3. The records request was sent on April 5, 2013 to the DOA and LDH. The letter requested documents regarding all sorts of communications between the various parties and witnesses to this matter. *See* Attachment 1, April 5, 2013 letter to Secretary Bruce Greenstein. The State agencies initially objected to the requests, claiming that were overly broad. CNSI narrowed the scope of the requests in response.

After initially agreeing and actually beginning to respond to a portion of the request on a rolling basis, the State changed its position on May 10, 2013, stating that the Attorney General asserted a "law enforcement privilege" over these records under LSA-R.S. 44:3A(1) as they pertained to reasonably anticipated criminal proceedings.

CNSI then filed a mandamus petition on May 4, 2013. The Attorney General's office intervened in the matter, which was heard on May 23, 2013. The Attorney General produced testimony that it had made a rolling request for documents from the DOA and LDH regarding this matter beginning on April 2, 2013 (even though it had been working on the case since December, 2011). The court, after hearing the testimony, granted judgment making the mandamus peremptory in part. The Order specifically excluded "documents that you contend support any of the allegations" in the April 26, 2013 letter, as well as any records or communications with the Attorney General's office that might reflect the thought or investigative processes of the Attorney

General's office. The court felt that the "documents that you contend support any of the allegations" would require discretionary action on the part of the custodian and went beyond its ministerial duty. Further, the court felt that any records or communications reflecting the investigative processes by the Attorney General's office were privileged.

The Attorney General appealed to the First Circuit Court of Appeal. The appellate court affirmed the trial court's ruling. *McKay v. State*, 143 So.3d 510 (La. App. 1 3/21/14). The court reasoned that the Attorney General's request for records was not exempt from disclosure in the hands of the original custodian does not serve to exempt those records from the Public Records Doctrine. *Supra*, at 517-518. Practically speaking, CNSI had no way of knowing what documents the Attorney General saw or whether any of the documents CNSI obtained were also obtained by the Attorney General.

The Public Records Request is a uniquely valuable tool when available. It does not require an existing lawsuit and can be made immediately. It is a matter of statutory right, and the burden of claiming exemption is upon the custodian of the records. While it may well take the place of a request for production of documents under the Louisiana Code of Civil Procedure, it is not governed by the Code. So, the cost of the production is borne by the custodian and the scope of the production is not limited by the Code either. As there is no lawsuit involved, the "not designed to lead to relevant evidence" standard does not apply. So, the request can be more broad. The vast majority of facts discovered by CNSI during discovery actually came through the Public Records Requests response in this case.

IV. Depositions of the State's Officers

This suit was brought against the State, the Department of Health and Hospitals and its Secretary, Kathy Kliebert, the DOA and its Commissioner, Kristy Nichols, the Office of State Purchasing and its head, Sandra Gillen, and Governor Bobby Jindal, in his official capacity. There

are separate but related statutes involved in compelling the appearance of the Governor and appointed heads of State departments. For reasons set forth below, we did not actually depose the Governor, but we did depose the Commissioner of Administration and the Secretary of LDH. We did, however, research deposing all of the above.

A. The Governor's Deposition

LSA-R.S. 13:3667.2 specifically provides the procedure for compelling the Governor's appearance as a witness. LSA-R.S. 13:3667.2A provides that the Governor cannot be compelled to attend court as a witness in a civil case unless he is personally a defendant or an alleged eyewitness to the incident giving rise to the case. LSA-R.S. 13:3667.2B requires a civil party litigant seeking to compel the Governor's attendance as a witness to file a written motion in the 19th Judicial District Court setting forth:

1. The facts sought to be proved by the testimony and its relevance to the case;
2. The basis for mover's belief of the Governor's knowledge of such facts; and
3. A request for a hearing.

If the judge determines the motion to be "well founded" and denial of the motion could prejudice mover's case; the court shall set a hearing and notify the Governor. If after the hearing the court determines that the Governor is necessary to the case, the court will issue the subpoena.

Interestingly, Section A addresses the compelling of appearance "to attend court as a witness"; while Section B addresses the compelling of "attendance of the Governor as a witness." It does not restrict the language to court, although the title of the statute is "Governor's Compelled

Attendance in Court." So, whether or not Section B deals with attendance at depositions remains to be seen.

In this case, the Governor was a party, although in his official capacity. It is unclear whether that means he is "personally a defendant" or not.

We did not get to either questions in this case. Discovery revealed that the Governor was not involved in the decision to cancel the CNSI contract. If he had been, we believed that we had solid arguments to compel his deposition as a party and as an "eyewitness."

B. State Heads of Department Depositions

LSA-R.S. 13:3667.3 is similar to LSA-R.S. 13:3667.2, but covers compulsion of attendance of statewide elected officials, members of the legislation, legislative personnel and appointed heads of State departments. A party litigant in civil case seeking to compel the attendance of the head of any department of the State appointed to the position by the Governor as a witness in a suit that arises out of, or in connection with, that person's exercise of his duties, must file a motion to do so in district court. That motion must also set forth:

- 1) The facts sought to be proved by the person's testimony;
- 2) The relevance of those facts to the case; and
- 3) The basis for mover's belief that such person has knowledge of those facts.

The court shall order a hearing if it finds the motion to be "well-founded" and the denial of the motion could be prejudicial to mover's case. After a hearing, the court shall issue the subpoena sought if mover establishes that the witness is necessary to the case.

The subsection of the statute on compelling legislators or legislative personnel specifically provides for compulsion "as a witness or deponent in any civil or criminal case." The subsection of the statute on statewide elected officials and appointed heads of State departments merely provides for compulsion "as a witness in a suit arising out of, or connected with, the

person's exercise of duties." The title of the section addresses "compelled attendance as witness in court or in administrative hearing." It is unclear whether these differences of language are meaningful.

In the CNSI case, we deposed Kristy Nichols, the Commissioner of Administration; Paul Rainwater, the Governor's Chief of Staff; and Kathy Kliebert, the Secretary of LDH. As Nichols and Rainwater were personally involved in the discussions and decision to terminate the contract, there was little question as to the relevance of their testimony. Also, because the grounds for the termination included breaches of the contract with LDH, even though LDH wasn't even consulted prior to the termination decision being made, Secretary Kliebert's testimony was obviously relevant as well. The prejudice from the denial of compelling this testimony was evident. As a result, there was really no significant pushback from lawyers for the State and the departments, and the depositions were taken voluntarily without the necessity of a motion and hearing.

C. Depositions of the Lawyers

Numerous lawyers were involved in the decision-making process which resulted in the termination for cause of CNSI's MMIS contract and the preparation of the April 26, 2013 letter providing a rationale for that decision. Included were two attorneys from the Attorney General's office, the Governor's Executive Counsel, the Execution Counsel for the DOA and the General Counsel for the DOA. CNSI successfully sought to depose these lawyers.

La. C.E. Article 508 provides the guidelines for deposing a lawyer. Basically, such a deposition is not allowed unless, after a contradictory hearing, mover is able to show:

- 1) The information is not privileged;
- 2) The information is essential to mover's case and not merely peripheral, cumulative or speculative;

- 3) The purpose for seeking the information is not to harass the lawyer or the client;
- 4) The information sought is listed with particularity, is reasonably limited as to scope of matter and time; and
- 5) There is no practicable alternative means for obtaining the information.

La. C.E. Article 508.

Here, CNSI specifically moved to depose these lawyers on the following subjects:

- a) The events and discussion at any meeting or other conversation leading up to the termination of the LMMIS Agreement, including advice provided to Commission of Administration, Kristy Nichols, and/or Governor Jindal's Chief of Staff, Paul Rainwater;
- b) The alleged reasons or bases for the termination of the LMMIS Agreement on March 21, 2013, including any evidence allegedly supporting the termination; and
- c) The alleged reasons or bases for termination cited in the April 26, 2013 letter from the DOA to CNSI, including any evidence allegedly supporting the assertions in that letter, whether known at that time or later acquired.

CNSI also moved to overrule any privilege objections both for the Attorney General's lawyers and the lawyers for the Governor and the DOA. *See* Attachment 2, CNSI's Motion to Depose Attorneys and Second Motion to Overrule Privilege Objections.

At the hearing of the matter, CNSI argued that its request was essential, not sought for harassment, reasonably limited in scope and that it had no practicable alternative source. Essentially, these lawyers were actively involved in the discussions leading up to the meeting where the decision to terminate was made, in the meeting itself and in the execution and justification of the decision. In this case, CNSI had sued for "bad faith" termination, to which the

State responded that it had just and reasonable cause for termination. Thus, the State had put its own behavior at issue.

The trial court granted CNSI's Motion to Depose Attorneys and Second Motion to Overrule Privilege Objections in each of the three categories mentioned in the motion. However, the court, in each instance, added the proviso that the deposition "inquiry shall be limited to factual information known and/or conveyed by said attorneys and not any legal advice or recommendation by the attorneys." *See* Attachment 3, Judgment on Motion to Depose Attorneys and Second Motion to Overrule Privilege Objections." The court also advised counsel that it expected that there would be objections and disagreements on the scope of the Order at the depositions and offered to be available, if given adequate notice, to rule on objections during the course of the depositions to avoid delay. The court's foresight was well founded. Objections were made and ruled upon during the course of several of these depositions. However, CNSI was able to obtain the necessary information it sought.

In none of these depositions was CNSI seeking to depose an "attorney of record." It was discussed, however, as CNSI believed that counsel of record for the DOA had actually written the April 26, 2015 letter of justification for the termination "for cause" based on an investigation overseen by said counsel.

Had it desired to take such a deposition, CNSI would face the requirements of Louisiana Code of Civil Procedure Article 1452B:

No attorney of record representing the plaintiff or the defendant shall be deposed except under extraordinary circumstances and then only by order of the district court after contradictory hearing.

Under CCP Article 1452B, movant must show that:

- a) No other practical means are available to obtain the desired information such as depositions of other persons or other discovery methods such as interrogatories or requests for admissions;
- b) The desired information is relevant; and
- c) The needed for the information substantially outweighs the harm the deposition might cause.

Board of Commissioners of New Orleans Exhibition Authority v. Missouri Pacific Railway Co., 647 So.2d 340 (La. 12/15/94).

In this case, it is quite likely that the State and its outside counsel would have been sufficiently motivated to provide the information to CNSI through means of identifying the sources of the information which lead to the letter. Failure to do so could bring into play Rule 3.7 of the Louisiana Rules of Professional Conduct, which prohibit a lawyer from advocating at a trial in which he or she is likely to be a necessary witness. At any rate, this issue was fortunately not reached in this matter.

V. Conclusion

The discovery issues in this *CNSI v. State* case were only one area of significant procedural interest. The case had any number of such issue areas. It truly was a lawyer's dream case. Ultimately, the matter was settled prior to trial, but with the parties agreeing as part of the settlement to arbitrate the damages. At the end of the day, CNSI obtained over \$20 million, representing primarily its costs in winding down the contract and its administration.