

its Application for Review. A copy of Respondent's Application for Review to the ALJ is attached hereto as Exhibit C.

WHEREFORE, Respondent requests that the Commission GRANT its Application for Review and certify the denial of Respondent's Motion for Disclosure for an interlocutory appeal.

This the 2nd day of March, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2011, I electronically filed the foregoing with the Federal Trade Commission using the FTC E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-113
Washington, D.C. 20580
dclark@ftc.gov

I hereby certify that the undersigned has this date served copies of the foregoing upon the Secretary and all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-110
Washington, D.C. 20580
oalj@ftc.gov

This the 2nd day of March, 2011.

/s/ Alfred P. Carlton, Jr.

Alfred P. Carlton, Jr.

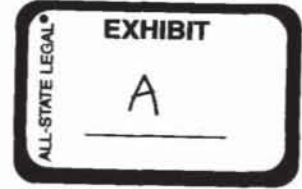
CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.

Alfred P. Carlton, Jr.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)

The North Carolina Board of)
Dental Examiners,)
Respondent.)
_____)

DOCKET NO. 9343

ORDER DENYING RESPONDENT'S MOTION FOR DISCLOSURE

I.

On January 25, 2011, Respondent filed a motion entitled "Motion for Disclosure of Non-Privileged and Non-Restricted Agency Information" ("Motion"). Complaint Counsel filed an opposition to the Motion on January 28, 2011 ("Opposition").

Upon full consideration of the Motion and Opposition, and as further set forth below, Respondent's Motion is DENIED.

II.

Respondent seeks an order requiring Complaint Counsel to provide Respondent with the following information (the "Information Requested"):

- 1) Clarification of the duties, responsibilities and authority of Complaint Counsel William Lanning;
- 2) Clarification of the duties, responsibilities and authority of Complaint Counsel Richard Dagen;
- 3) The jurisdiction of licensure of each of the individual attorneys designated as Complaint Counsel in this case, and identification of which jurisdiction's ethics rules apply to each such attorney;
- 4) Clarification of the authority of Complaint Counsel Michael J. Bloom, in his capacity as Complaint Counsel and as Assistant Director, Office of Policy Coordination, and the jurisdiction where he is licensed to practice law; and
- 5) Clarification of the authority of Erika Meyers "in the capacity of either Complaint Counsel or as an official of the Commission" and the jurisdiction where she is licensed to practice law.

Proposed Order; Motion ¶ 11, Motion Exhibit 2.

In support of the Motion, Respondent cites the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a). Respondent also states that Interrogatory 8 of Respondent's First Set of Interrogatories requested "[w]hich jurisdiction's bar rules are binding upon the Commission's legal staff including Complaint Counsel" but that Complaint Counsel's answer, which listed the states of licensure of Complaint Counsel's attorneys in the matter, collectively, without connecting those states to any particular attorney on the matter, was insufficient. Motion ¶¶ 3-8. Respondent further contends that it has not been informed of the various Complaint Counsel's "duties, obligations, and authority," Motion ¶¶ 1-2, and the fact that multiple attorneys are acting on the same matter for Complaint Counsel has created communication difficulties. Motion ¶ 9. The Information Requested, Respondent asserts, is "relevant to Counsel for Respondent's ability to undertake prosecution of this case and to effectively represent" Respondent. Motion ¶ 10.

Complaint Counsel opposes the Motion on the grounds that the fact-discovery deadline in this matter passed two months ago; a "motion for disclosure" of agency information is not a discovery method recognized by the Commission's Rules of Practice; and the only alternative rule for obtaining agency information is a Freedom of Information Act request under Commission Rule 4.11.¹

III.

Respondent's Motion is without merit. First, other than the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), Respondent, although having the burden of persuasion as movant, cites no legal authority permitting one party in litigation to obtain information from the opposing party by way of a "Motion for Disclosure." In contrast, Rule 3.31 clearly contemplates particular methods for a party in litigation to obtain information, i.e., discovery, from the opposing party, including depositions; interrogatories, document requests, and requests for admission. 16 C.F.R. § 3.31(a). Except for information purportedly encompassed by Respondent's Interrogatory 8, it does not appear, and Respondent does not contend, that Respondent attempted to use any discovery method to obtain the Information Requested.

In addition, even with respect to information allegedly lacking in Complaint Counsel's answer to Interrogatory 8, a self-styled "Motion for Disclosure" is not an appropriate vehicle for obtaining relief. Rather, Respondent was required to file a motion to compel under Rule 3.38. However, neither Respondent's previously filed Motion to Compel, submitted January 11, 2011, nor Respondent's Supplemental Statement regarding the January 11, 2011 Motion to Compel, submitted January 18, 2011, made any reference to any deficiency in Complaint Counsel's answer to Interrogatory 8.

Furthermore, Respondent does not offer any factual, legal, or equitable basis for treating its "Motion for Disclosure" as a Motion to Compel an answer to Interrogatory 8. In fact, the timeliness and practicality of such a motion at this stage of the proceedings

¹ The applicability of the Freedom of Information Act to the Information Requested, as alluded to by Complaint Counsel, is beyond the scope of this Order.

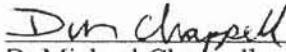
would be questionable, given that Complaint Counsel's answers to interrogatories were served on Respondent on November 18, 2010, the fact-discovery deadline passed November 23, 2010, and the hearing in this matter is scheduled to begin on February 17, 2011. In addition, other procedural requirements of a Motion to Compel are lacking. *See* 16 C.F.R. § 3.38.

Because there is no pending discovery request or Motion to Compel regarding the Information Requested, the issue of whether the Information Requested is subject to discovery by Respondent under the Commission's Rules is not presented, and thus need not, and will not, be addressed.

IV.

For all the foregoing reasons, and after full consideration of the arguments in the Motion and Opposition, Respondent's Motion for Disclosure of Non-Privileged and Non-Restricted Agency Information is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 14, 2011

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
In the Matter of _____)
_____)
The North Carolina Board of _____)
Dental Examiners, _____)
Respondent. _____)
_____)

DOCKET NO. 9343

**ORDER DENYING RESPONDENT'S APPLICATION
FOR REVIEW OF ORDER DENYING
RESPONDENT'S MOTION FOR DISCLOSURE**

I.

On February 18, 2011, Respondent filed an Application for Review of a Ruling Denying Respondent's Motion for Disclosure ("Application"). Complaint Counsel filed an Opposition to the Application on February 24, 2011 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, because Respondent has failed to meet the requirements of Commission Rule 3.23(b), the Application is DENIED.

II.

A. Standards for allowing application for review under Rule 3.23(b)

Pursuant to Commission Rule 3.23(b), Respondent filed an application seeking interlocutory appeal of an Order dated February 14, 2011. Commission Rule 3.23(b) states:

A party may request the Administrative Law Judge ["ALJ"] to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

16 C.F.R. § 3.23(b). Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *In re Daniel Chapter One*, 2009 FTC LEXIS 111, *1 (May 5, 2009); *In re Schering-Plough Corp.*, 2002 WL 31433937 (Feb. 12, 2002). Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2)

there is substantial ground for difference of opinion as to that controlling issue; and (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *In re Daniel Chapter One*, 2009 FTC LEXIS 111, *1-2; *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, at *1 (Nov. 5, 1996); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, at *1 (Nov. 20, 1979).

B. The ruling for which interlocutory review is sought

By Order dated February 14, 2011, Respondent's Motion for Disclosure was denied ("February 14, 2011 Order"). Respondent's Motion for Disclosure sought an order requiring Complaint Counsel to provide Respondent the following information (the "Information Requested"):

- 1) Clarification of the duties, responsibilities and authority of Complaint Counsel William Lanning;
- 2) Clarification of the duties, responsibilities and authority of Complaint Counsel Richard Dagen;
- 3) The jurisdiction of licensure of each of the individual attorneys designated as Complaint Counsel in this case, and identification of which jurisdiction's ethics rules apply to each such attorney;
- 4) Clarification of the authority of Complaint Counsel Michael J. Bloom, in his capacity as Complaint Counsel and as Assistant Director, Office of Policy Coordination, and the jurisdiction where he is licensed to practice law; and
- 5) Clarification of the authority of Erika Meyers "in the capacity of either Complaint Counsel or as an official of the Commission" and the jurisdiction where she is licensed to practice law.

The February 14, 2011 Order denied Respondent's Motion for Disclosure on the grounds that the motion was not authorized or appropriate under the Commission's Rules of Practice and held:

Respondent's Motion is without merit. First, other than the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), Respondent, although having the burden of persuasion as movant, cites no legal authority permitting one party in litigation to obtain information from the opposing party by way of a "Motion for Disclosure." In contrast, Rule 3.31 clearly contemplates particular methods for a party in litigation to obtain information, i.e., discovery, from the opposing party, including depositions; interrogatories, document requests, and requests for admission. 16 C.F.R. § 3.31(a). Except for information purportedly encompassed by Respondent's Interrogatory 8, it does not appear, and Respondent does not contend, that Respondent attempted to use any discovery method to obtain the Information Requested.

In addition, even with respect to information allegedly lacking in

Complaint Counsel's answer to Interrogatory 8, a self-styled "Motion for Disclosure" is not an appropriate vehicle for obtaining relief. Rather, Respondent was required to file a motion to compel under Rule 3.38. However, neither Respondent's previously filed Motion to Compel, submitted January 11, 2011, nor Respondent's Supplemental Statement regarding the January 11, 2011 Motion to Compel, submitted January 18, 2011, made any reference to any deficiency in Complaint Counsel's answer to Interrogatory 8.

Furthermore, Respondent does not offer any factual, legal, or equitable basis for treating its "Motion for Disclosure" as a Motion to Compel an answer to Interrogatory 8. In fact, the timeliness and practicality of such a motion at this stage of the proceedings would be questionable, given that Complaint Counsel's answers to interrogatories were served on Respondent on November 18, 2010, the fact-discovery deadline passed November 23, 2010, and the hearing in this matter is scheduled to begin on February 17, 2011. In addition, other procedural requirements of a Motion to Compel are lacking. *See* 16 C.F.R. § 3.38.

Because there is no pending discovery request or Motion to Compel regarding the Information Requested, the issue of whether the Information Requested is subject to discovery by Respondent under the Commission's Rules is not presented, and thus need not, and will not, be addressed.

February 14, 2011 Order at 2-3.

III.

A. The February 14, 2011 Order does not involve a controlling question of law or policy

The first prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that the ruling for which review is sought involves a controlling question of law or policy. Respondent argues that the February 14, 2011 Order involves the controlling question of law of whether or not Respondent is entitled to file a Motion for Disclosure under the FTC's Rules. Application at 2.

A "controlling" question of law or policy has been defined as "not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.""; *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000) (quoting *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996)). Procedural disputes and discovery disputes do not amount to controlling questions of law. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000) ("discovery ruling does not involve a controlling question of law or policy"); *In re Exxon Corp.*, 1981 FTC LEXIS 112, *1-2 (Feb. 13, 1981) (finding a refusal of discovery did not control the case).

Not only has Respondent failed to show that allowing an appeal from the February 14, 2011 Order would contribute to the determination of a wide spectrum of cases, Respondent has not even demonstrated that allowing such appeal would be determinative of the instant case. The February 14, 2011 Order was a procedural ruling, relating to whether or not Respondent was entitled to the Information Requested under the methods of discovery and motions authorized by the Commission's Rules of Practice. As a procedural ruling on a motion seeking information that is clearly not determinative of the case, the February 14, 2011 Order does not present a controlling question of law or policy.

B. The February 14, 2011 Order does not involve an issue as to which there is substantial ground for difference of opinion

The second prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that the ruling for which review is sought involves a question as to which there is substantial ground for difference of opinion. Respondent asserts that “[t]here is substantial ground for difference of opinion as to the [February 14, 2011 Order] because the Ruling assumes that the lack of a specific provision for a motion for disclosure indicates that the Rules do not allow such a motion.” Application at 2. Respondent states that the FTC Rules do not anywhere state that a motion for disclosure is not allowed; that while Rule 3.31 lists a number of discovery methods, it does not state that these are the only appropriate methods; and that the Rules do not limit Respondent to a motion to compel. *Id.*

To establish substantial ground for difference of opinion, a party seeking certification must show that a controlling legal question involves novel or unsettled authority. *In re Daniel Chapter One*, 2009 FTC LEXIS 111, *2; *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, at *5. *See also Fed'l Election Comm'n v. Club for Growth, Inc.*, No.: 5-851 (RMU), 2006 U.S. Dist. LEXIS 73933 (D.D.C. Oct. 10, 2006) (stating that “one method for demonstrating a substantial ground for difference of opinion is ‘by adducing conflicting and contradictory opinions of courts which have ruled on the issue’”). In addition, to establish a “substantial ground” for difference of opinion under Rule 3.23(b), “a party seeking certification must make a showing of a likelihood of success on the merits.” *In re Daniel Chapter One*, 2009 FTC LEXIS 111, *6 (citing *Int'l Assoc. of Conf. Interp.*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979) (stating that the substantial ground for difference of opinion test “has been held to mean that appellant must show a probability of success on appeal of the issue.”)). Respondent has not shown that the decision to deny Respondent the Information Requested involved a novel question or unsettled authority and has not demonstrated a likelihood of success on the merits.

Respondent acknowledges that “the ALJ has the authority to allow any discovery he sees fit to grant.” Application at 2. This exercise of discretion does not provide grounds for interlocutory appeal. Indeed, the Commission, in reviewing issues which “concern[ed] the hearing examiner’s prehearing rulings relating to discovery and discovery procedures,” held: “[t]he Commission’s policy . . . , frequently stated in

Commission opinions, is that the hearing examiner¹ has a broad discretion therein and the Commission will not interfere with his rulings short of a showing of an abuse of such discretion.” *In re Suburban Propane Gas Corp.*, 74 F.T.C. 1602; 1968 FTC LEXIS 277, *3 (Sept. 20, 1968) (denying request for interlocutory review concerning prehearing discovery on grounds that appeals concerning “issues relating to procedural details . . . concern prehearing discovery or procedure and thus are subject to the wide discretion of the hearing examiner”). “The resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ.” *In re Gillette Co.*, 98 F.T.C. 875, 875; 1981 FTC LEXIS 2, *1 (Dec. 1, 1981); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *19 (Oct. 17, 2000).

The February 14, 2011 Order was a procedural ruling that related to whether or not Respondent was entitled to the Information Requested under the methods of discovery and motions authorized by the Commission’s Rules of Practice. A ruling on a motion seeking information is within the discretion of the ALJ and does not qualify as an issue as to which there is substantial ground for difference of opinion.

C. An immediate appeal from the February 14, 2011 Order would not materially advance the ultimate termination of the litigation and subsequent review would not be an inadequate remedy

The third prong of the three-prong test set forth in Rule 3.23(b) requires a movant to show that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Respondent argues that it has been prejudiced by the denial of the information requested and that if Respondent’s Application is not heard immediately on appeal, then the hearing, which commenced on February 17, 2011, will proceed with those prejudices intact. Application at 4.

Respondent has not shown that an immediate appeal of the ruling, which according to Respondent, deprived Respondent of information, would materially advance the ultimate termination of the litigation or that subsequent review would not be an adequate remedy. An appeal of a discovery ruling or a procedural ruling relating to the Requested Information would not materially advance the ultimate termination of the litigation. *See In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *20. “Such a construction would make every ruling in every case appealable as to the relevance and propriety of any areas of discovery allowed by an administrative law judge. ‘This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission.’” *Id.*; *see also In re Exxon Corp.*, 1978 FTC LEXIS 89, *12 (Nov. 24, 1978). Indeed, for that reason, the Commission “generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ’s discovery rulings.” *In re Gillette Co.*, 98 F.T.C. 875, 875; 1981 FTC LEXIS 2, * 1 (Dec. 1, 1981); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *18-19.

¹ The title of the presiding officer was changed from “Hearing Examiner,” to “Administrative Law Judge,” in 1970. *In re Adolph Coors Co.*, 83 F.T.C. 32; 1973 FTC LEXIS 226 (July 24, 1973) (citations omitted).

Respondent's argument, that being deprived of the Requested Information has prejudiced it in this proceeding, does not provide a basis for interlocutory appeal. *See In re Exxon Corp.*, 1981 FTC LEXIS 112, *4-5 (Feb. 13, 1981) (finding respondents failed to show how an immediate appeal of an order denying discovery withheld on privilege grounds would "materially advance termination of th[c] case or render inadequate subsequent review"); *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) ("In sum, we conclude that the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege. Effective appellate review can be had by other means.").

For the above stated reasons, Respondent has not demonstrated that an immediate appeal from the February 14, 2011 Order would materially advance the ultimate termination of the litigation or that subsequent review would be an inadequate remedy.

IV.

Commission Rule 3.23(b) requires a movant to demonstrate that all three of the requirements set forth in that rule have been met. Respondent has failed to do so. Accordingly, after full consideration of Respondent's Application and Complaint Counsel's Opposition, and having fully considered all arguments and contentions therein, Respondent's Application is DENIED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: March 1, 2011

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)	PUBLIC
)	
THE NORTH CAROLINA [STATE] BOARD)	DOCKET NO. 9343
OF DENTAL EXAMINERS,)	
)	
Respondent.)	

RESPONDENT'S APPLICATION FOR REVIEW OF A RULING
DENYING RESPONDENT'S MOTION FOR DISCLOSURE

Respondent, the North Carolina State Board of Dental Examiners (the "State Board"), hereby files this Application for Review pursuant to FTC Rule 3.23(b) and in connection with the Order of the Administrative Law Judge ("ALJ") (such Order, the "Ruling", copy attached hereto as Exhibit 1) denying Respondent's Motion for Disclosure (the "Motion"). Respondent files this Application because the Ruling involves (1) a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) a subsequent review of the Ruling will be an inadequate remedy.

On January 25, 2011, Respondent filed its Motion seeking certain basic information regarding the duties and responsibilities of Richard Dagen and William Lanning in this case, the jurisdiction and licensure of individual attorneys identified as Complaint Counsel, and the status and/or involvement of the Federal Trade Commission's Office of Policy and Coordination in the matter, specifically with respect to the authority and involvement of Michael Bloom and Erika Meyers. On February 14, 2011, the ALJ denied this motion stating that Respondent's Motion "is not an appropriate

vehicle for obtaining relief” and noting that Respondent cited no legal authority for its Motion “other than the general motions authority under Commission Rule 3.22(a).” The Order further states that Respondent should have filed a motion to compel under Rule 3.38 to obtain such relief.

The ALJ’s Ruling denying Respondent’s Motion involves the controlling question of law of whether or not Respondent is entitled to file a Motion for Disclosure under the FTC’s Rules. There is a substantial ground for difference of opinion as to the Ruling because the Ruling assumes that the lack of a specific provision for a motion for disclosure indicates that the Rules do not allow such a motion.

First, the FTC Rules do not anywhere state that a motion for disclosure is not allowed. Rule 3.22 provides general authority allowing for motions to be filed in Federal Trade Commission (“Commission” or “FTC”) hearings, and does not state which motions are and are not allowed. Rule 3.31 lists a number of discovery methods but nowhere states that these are the only appropriate methods for obtaining discovery. Thus while the ALJ correctly notes that under the FTC Rules Respondent could have sought such information through filing a motion to compel, the Rules do not limit Respondent to such a motion.¹ Under the Federal Rules of Civil Procedure, however, a motion to compel disclosure is specifically contemplated. *See* Fed. R. Civ. P. 37(a)(3)(A) (describing “Motion to Compel Disclosure”).²

Second, the ALJ has the authority to allow any discovery he sees fit to grant. For instance, Rule 3.31 says with regard to discovery methods, “[e]xcept as provided in the

¹ In fact, the ALJ stated that the timeliness and practicality of such a motion was questionable at this stage in the proceedings.

² Where the Federal Rules of Civil Procedure are similar to the Commission’s Rule of Practice, those rules and case law interpreting them may be useful in adjudicating a dispute. *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (F.T.C. Apr. 27, 2010).

rules, or unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited.” Thus the ALJ is vested with the authority to grant Respondent’s Motion, regardless of where it stands with respect to the discovery deadline or whether it is listed as a specific discovery method in Rule 3.31.

Here, there is a compelling need for such discovery. Complaint Counsel, for unknown reasons, has refused to disclose to Respondent basic information regarding the states of licensure of its individual attorneys and the capacity in which various attorneys holding themselves out to be Complaint Counsel are involved in this matter. Attorneys, including Complaint Counsel, have a professional obligation to provide such information. For instance, the Preamble to the New York Rules of Professional Conduct³ provides that “[e]very lawyer is responsible for observance of the Rules of Professional Conduct and also should aid in securing their observance by other lawyers.” It is not possible to uphold such an obligation when a professional such as an attorney refuses to disclose to other members of the profession what jurisdiction they are licensed to practice in. Further, Rule 3.3(e) provides: “In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.”

Respondent has requested the information described in its Motion from Complaint Counsel through informal requests by telephone and email, Interrogatories issued in the

³ Although Complaint Counsel has not been fully forthcoming regarding the information requested in the Motion, Counsel for Respondent did finally learn the states of Complaint Counsel Michael Bloom’s licensure at the recent deposition of Dr. Van Haywood taken on February 4, 2011. At the outset of the deposition, Counsel for Respondent A.P. Carlton entered a notice of appearance, announcing his role in the case representing the State Board and his states of licensure. When Mr. Bloom was asked to enter his own notice of appearance, he still did not disclose his state of licensure. It was not until Mr. Carlton asked him to state his licensure for the record that Mr. Bloom revealed that he was licensed in New York and Pennsylvania. See Deposition of Dr. Van B. Haywood at 3:22-23 (excerpted copy attached hereto as Exhibit 2).

matter,⁴ Respondent's Motion for Disclosure, and a Freedom of Information Act Request.⁵ Complaint Counsel has refused to provide this information in numerous telephone calls and email correspondence, in response to Respondent's Interrogatories, and further has opposed Respondent's Motion seeking such information.⁶

Because of Complaint Counsel's contumacious behavior in continually attempting to shirk its professional duty to provide such information, Respondent filed its Motion in the hope that the ALJ could see fit to compel its disclosure. Although the ALJ has not exercised that discretion, Respondent respectfully submits, based on the foregoing, that there is substantial ground for difference of opinion as to the ALJ's Ruling.

Respondent has been prejudiced by the denial of this information. Complaint Counsel's obfuscation of their roles in the case has prevented Counsel for Respondent from knowing whom among Complaint Counsel they should properly be dealing with in their capacity as lead counsel, co-lead counsel, policy staff, counsel generally supporting the complaint, and so on. This has created a great deal of confusion for Counsel for Respondent in understanding whom they should be interacting with during the course of the investigation and present administrative proceeding, and has prejudiced their ability to represent their client.

Finally, if the matters bearing upon this Application are not decided here, they will not be decided at all. The hearing in this matter has just begun. If Respondent's Motion is not heard immediately on appeal, then the hearing will proceed with the above-described prejudices intact. An immediate appeal is necessary to avoid this result.

⁴ The Interrogatories only requested the state of licensure of Complaint Counsel.

⁵ Respondent's FOIA request to the FTC was sent on February 3, 2011.

⁶ An example of communications between Respondent's Counsel and Complaint Counsel regarding this subject is attached as Exhibit 3.

WHEREFORE, Respondent requests that the Administrative Law Judge GRANT its Application for Review and certify the denial of Respondent's Motion for Disclosure for an interlocutory appeal.

This the 18th day of February, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February, 2011, I electronically filed the foregoing with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-172
Washington, D.C. 20580
dclark@ftc.gov

I hereby certify that the undersigned has this date served a copy of the foregoing upon all parties to this cause by electronic mail as follows:

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sosnowitz@ftc.gov

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Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
rdagen@ftc.gov

I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580
ojl@ftc.gov

This the 18th day of February, 2011.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.

CERTIFICATION FOR ELECTRONIC FILING

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of _____

The North Carolina Board of _____
Dental Examiners. _____
Respondent. _____

DOCKET NO. 9343

ORDER DENYING RESPONDENT’S MOTION FOR DISCLOSURE

I.

On January 25, 2011, Respondent filed a motion entitled “Motion for Disclosure of Non-Privileged and Non-Restricted Agency Information” (“Motion”). Complaint Counsel filed an opposition to the Motion on January 28, 2011 (“Opposition”).

Upon full consideration of the Motion and Opposition, and as further set forth below, Respondent’s Motion is DENIED.

II.

Respondent seeks an order requiring Complaint Counsel to provide Respondent with the following information (the “Information Requested”):

- 1) Clarification of the duties, responsibilities and authority of Complaint Counsel William Lanning;
- 2) Clarification of the duties, responsibilities and authority of Complaint Counsel Richard Dagen;
- 3) The jurisdiction of licensure of each of the individual attorneys designated as Complaint Counsel in this case, and identification of which jurisdiction’s ethics rules apply to each such attorney;
- 4) Clarification of the authority of Complaint Counsel Michael J. Bloom, in his capacity as Complaint Counsel and as Assistant Director, Office of Policy Coordination, and the jurisdiction where he is licensed to practice law; and
- 5) Clarification of the authority of Erika Meyers “in the capacity of either Complaint Counsel or as an official of the Commission” and the jurisdiction where she is licensed to practice law.

Proposed Order; Motion ¶ 11, Motion Exhibit 2.

In support of the Motion, Respondent cites the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a). Respondent also states that Interrogatory 8 of Respondent's First Set of Interrogatories requested "[w]hich jurisdiction's bar rules are binding upon the Commission's legal staff including Complaint Counsel" but that Complaint Counsel's answer, which listed the states of licensure of Complaint Counsel's attorneys in the matter, collectively, without connecting those states to any particular attorney on the matter, was insufficient. Motion ¶¶ 3-8. Respondent further contends that it has not been informed of the various Complaint Counsel's "duties, obligations, and authority," Motion ¶¶ 1-2, and the fact that multiple attorneys are acting on the same matter for Complaint Counsel has created communication difficulties. Motion ¶ 9. The Information Requested, Respondent asserts, is "relevant to Counsel for Respondent's ability to undertake prosecution of this case and to effectively represent" Respondent. Motion ¶ 10.

Complaint Counsel opposes the Motion on the grounds that the fact-discovery deadline in this matter passed two months ago; a "motion for disclosure" of agency information is not a discovery method recognized by the Commission's Rules of Practice; and the only alternative rule for obtaining agency information is a Freedom of Information Act request under Commission Rule 4.11.¹

III.

Respondent's Motion is without merit. First, other than the general motions authority under Commission Rule 3.22(a), 16 C.F.R. § 3.22(a), Respondent, although having the burden of persuasion as movant, cites no legal authority permitting one party in litigation to obtain information from the opposing party by way of a "Motion for Disclosure." In contrast, Rule 3.31 clearly contemplates particular methods for a party in litigation to obtain information, i.e., discovery, from the opposing party, including depositions; interrogatories, document requests, and requests for admission. 16 C.F.R. § 3.31(a). Except for information purportedly encompassed by Respondent's Interrogatory 8, it does not appear, and Respondent does not contend, that Respondent attempted to use any discovery method to obtain the Information Requested.

In addition, even with respect to information allegedly lacking in Complaint Counsel's answer to Interrogatory 8, a self-styled "Motion for Disclosure" is not an appropriate vehicle for obtaining relief. Rather, Respondent was required to file a motion to compel under Rule 3.38. However, neither Respondent's previously filed Motion to Compel, submitted January 11, 2011, nor Respondent's Supplemental Statement regarding the January 11, 2011 Motion to Compel, submitted January 18, 2011, made any reference to any deficiency in Complaint Counsel's answer to Interrogatory 8.

Furthermore, Respondent does not offer any factual, legal, or equitable basis for treating its "Motion for Disclosure" as a Motion to Compel an answer to Interrogatory 8. In fact, the timeliness and practicality of such a motion at this stage of the proceedings

¹ The applicability of the Freedom of Information Act to the Information Requested, as alluded to by Complaint Counsel, is beyond the scope of this Order.

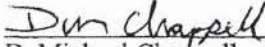
would be questionable, given that Complaint Counsel's answers to interrogatories were served on Respondent on November 18, 2010, the fact-discovery deadline passed November 23, 2010, and the hearing in this matter is scheduled to begin on February 17, 2011. In addition, other procedural requirements of a Motion to Compel are lacking. *See* 16 C.F.R. § 3.38.

Because there is no pending discovery request or Motion to Compel regarding the Information Requested, the issue of whether the Information Requested is subject to discovery by Respondent under the Commission's Rules is not presented, and thus need not, and will not, be addressed.

IV.

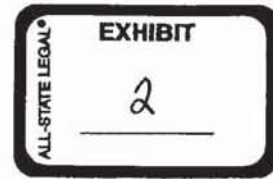
For all the foregoing reasons, and after full consideration of the arguments in the Motion and Opposition, Respondent's Motion for Disclosure of Non-Privileged and Non-Restricted Agency Information is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 14, 2011



In the Matter of:

North Carolina Board of Dental Examiners

February 4, 2011
Van B. Haywood, DMD

Condensed Transcript with Word Index



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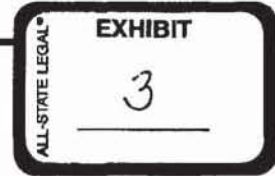
1 UNITED STATES OF AMERICA
 2 BEFORE THE FEDERAL TRADE COMMISSION
 3
 4 In the Matter of:
 THE NORTH CAROLINA BOARD
 OF DENTAL EXAMINERS Docket No. 9343
 5
 6
 7 D E P O S I T I O N
 8
 9 WITNESS: VAN B. HAYWOOD, DMD
 10 DATE: February 4, 2011
 11 TIME: 9:00 a.m.
 12 LOCATION: Augusta Marriott Hotel & Suites
 Two Tenth Street
 Augusta, Georgia
 13 TAKEN BY: Attorneys for the Federal Trade
 Commission
 14
 15 REPORTED BY: YVONNE R. BOHANNON
 Registered Merit Reporter,
 Certified Realtime Reporter
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 APPEARANCES:
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 10
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 16
 17 (INDEX AT REAR OF TRANSCRIPT)
 18
 19
 20
 21
 22
 23
 24
 25

1 STIPULATION: The deponent does not
 2 waive the right to read and sign the deposition
 3 transcript.
 4 * * * * *
 5 (Witness sworn.)
 6 MR. CARLTON: If I may go on the record
 7 for a moment. I'd like to enter an appearance, and
 8 I'd like to note the capacity I'm here in and the
 9 state in which I'm licensed.
 10 My name is Alfred P. Carlton, Jr. I'm
 11 a member of the law firm Allen and Pinnix. We
 12 represent the North Carolina State Board of Dental
 13 Examiners. I'm licensed in the state of North
 14 Carolina.
 15 I would like to invite Mr. Bloom to
 16 enter an appearance in the same manner. Thank you.
 17 MR. BLOOM: I represent the complaint
 18 in this matter and my appearance has been entered.
 19 Thank you.
 20 MR. CARLTON: State of licensure,
 21 please.
 22 MR. BLOOM: My state of licensure is
 23 New York and Pennsylvania.
 24 MR. CARLTON: Thank you.
 25 MR. BLOOM: You're welcome.

1 THE WITNESS: Can I make a request? I
 2 have hearing aids, so I may have to ask you to
 3 repeat the question because they -- they come loud
 4 and soft, and some of the meds I take and the diet
 5 I have may call for a break at a different time
 6 from we might schedule. So appreciate that.
 7 VAN B. HAYWOOD, DMD, being
 8 previously duly sworn, testified as follows:
 9 EXAMINATION
 10 BY MR. BLOOM:
 11 Q. Okay. I too have hearing aids. We're
 12 probably wearing the same ones, so I may have the
 13 same request of you, Dr. Haywood.
 14 A. That's fine.
 15 Q. You mentioned meds. Are any of the
 16 meds that you're taking of a kind that would affect
 17 your recall or your ability to testify fully and
 18 truthfully today?
 19 A. No, sir.
 20 Q. Dr. Haywood, have you been deposed
 21 before?
 22 A. Yes, sir.
 23 Q. The most important rule of deposition,
 24 if you will -- every lawyer begins these things
 25 similar -- different -- for me is to make sure that

AP Carlton



From: AP Carlton
Sent: Thursday, February 10, 2011 7:56 AM
To: 'Lanning, William'; Noel Allen
Cc: Dagen, Richard B.; Jack Nichols; Kathy Gloden
Subject: RE: Call This AM: FTC DOCKET #9343-----Professional Information

Mr. Lanning:

It matters not that we are receiving this information in partial form, or that it is available from other sources. Lecturing me or scolding me about it does not help anything. Asking me to provide you with "authority" is either an insult or blind arrogance---or maybe both.

I will forward to you my email of January 13, which detailed the information we requested. To date, the information requested, by and large, has not been provided. The request is now the subject of a Motion for Disclosure and a FOIA request. How simple it would be if you would just supply us with the information we have requested.

It is Complaint Counsel's professional obligation to respond to our request. Plain and simple. Why you refuse to provide it is beyond comprehension and defies very basic and fundamental principles of the profession.

I will forward to you and others my January 13 email, to which I have never received a response or an acknowledgement.

AP Carlton

From: Lanning, William [<mailto:WLANNING@ftc.gov>]
Sent: Monday, February 07, 2011 6:46 PM
To: AP Carlton; Noel Allen
Cc: Dagen, Richard B.; Lanning, William
Subject: RE: Call This AM: FTC DOCKET #9343-----Professional Information

Mr. Carlton and Mr. Allen,

Your request for information below is the subject of a pending motion and a FOIA request as well; could you please advise us as to what you mean by "formal demand" and "further steps"? I note that you refused to answer this question in our phone conversation earlier today. In addition, we believe we should have an answer shortly with respect to your prior "formal" demands and will take any requisite action upon learning of that decision.

In the meantime, as we are sure you aware, much of the information you seek is available through public sources. For example, a simple internet search has probably revealed to you that Mr. Dagen is a member of the D.C. Bar and that I am a member of the New York Bar. No doubt, other such searches would provide you with information that you apparently cannot locate. I further note that Mr. Bloom, prior to your email of today, advised you that he is a member of the New York Bar. Further, like many of your emails, the one below continues to request information that has already been provided orally (e.g., the lead attorneys, Mr. Dagen and Mr. Lanning are responsible for the litigation).

Sincerely,

Bill Lanning

From: AP Carlton [<mailto:acarlton@allenpinnix.com>]
Sent: Monday, February 07, 2011 7:12 AM
To: Lanning, William

Cc: Noel Allen; Jack Nichols; jackson.nichols@gmail.com; Kathy Gloden; Dagen, Richard B.
Subject: Call This AM: FTC DOCKET #9343-----Professional Information

Mr. Lanning:

As indicated in my earlier email, I wish to speak to you this morning regarding several matters.

I am available until 1pm. I am traveling and can be reached at (304) 345-6500, Room 1615. Please let me know what time is convenient for you.

There is an additional matter I wish to discuss with you this morning. It concerns the professional information regarding Complaint Counsel we have requested on numerous occasions by phone, by Interrogatory, and by email on January 13 (to which I have not received a response), and which is also the subject of our currently outstanding Motion For Disclosure of Non-Privileged and Non-Restricted Information and, more recently, our FOIA Request.

Counsel for Respondent takes the position that Complaint Counsel has a professional obligation to disclose the information requested. Before making a formal demand and taking any further steps to secure the information, we wish to discuss the request with you one more time.

Please advise.

AP Carlton
