

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



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

**MOTION TO STRIKE AFFIDAVITS OF MICHAEL J. BLOOM AND
TEJASVI SRIMUSHNAM FROM THE RECORD**

Pursuant to FTC Rule 3.22(a), Respondent, the North Carolina State Board of Dental Examiners (the “State Board” or “Respondent”), hereby moves the Administrative Law Judge (“ALJ”) to strike from the record the Affidavits of Michael J. Bloom and Tejasvi Srimushnam (the “Affidavits”) and all references in Complaint Counsel’s Reply to Respondent’s Post-Trial Proposed Findings of Fact and Conclusions of Law (“Reply to Respondent’s Proposed Findings”) to the Affidavits. These Affidavits were filed with Complaint Counsel’s Reply Findings on May 5, 2011. Respondent moves to strike these Affidavits because they improperly seek to introduce evidence into the record to contradict the testimony of one of Respondent’s witnesses following the closure of the record ordered by the ALJ.

In support of this motion, Respondent states as follows:

1. The ALJ ordered the record closed on March 30, 2011.
2. On May 5, 2011, Complaint Counsel filed its Reply to Respondent’s Proposed Findings. Complaint Counsel submitted with its Reply the Affidavits, which

purport to contradict the testimony of Mr. Runsick that was given at the hearing before the ALJ. These Affidavits were made “based upon [the] personal knowledge” of Mr. Bloom and Mr. Srimushnam in their capacity as attorneys participating in this matter on behalf of Counsel in Support of the Complaint.

3. Complaint Counsel’s submission of these Affidavits is improper because they were submitted after the close of the record on March 30, 2011. Complaint Counsel had an opportunity to rebut Mr. Runsick’s testimony at trial and, indeed, conducted a thorough cross-examination of him. Complaint Counsel waived its right to present any further rebuttal evidence on the record.

4. The submission of these Affidavits is also improper because Complaint Counsel provides these Affidavits based on the personal knowledge of attorneys participating in this matter and signed “under penalty of perjury” in order to contradict the testimony of a witness in this proceeding. This conduct violates the advocate-witness rule, “which articulates the professional impropriety of assuming the dual role of advocate and witness in a single proceeding, [and] has deep roots in American law.” *United States v. Johnston*, 690 F.2d 638, 642 (7th Cir. 1982) (noting the inconsistency of the roles of advocate and witness). “[T]radition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.” *Kalina v. Fletcher*, 522 U.S. 118 (1997) (holding that attorney who signed document “under penalty of perjury” improperly performed function of giving sworn testimony as a witness).

WHEREFORE, Respondent requests that the Affidavits of Michael J. Bloom and Tejasvi Srimushnam and all references to them in Complaint Counsel’s Reply to

Respondent's Post-Trial Proposed Findings of Fact and Conclusions of Law be stricken from the record in this Matter.

This the 19th day of May, 2011.

ALLEN AND PINNIX, P.A.

/s/ M. Jackson Nichols

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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

I hereby certify that the undersigned has this date served copies of the foregoing upon 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
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This the 19th day of May, 2011.

/s/ M. Jackson Nichols

M. Jackson Nichols

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/ M. Jackson Nichols

M. Jackson Nichols.

**UNITED STATES OF AMERICA
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THE NORTH CAROLINA [STATE] BOARD)	
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**PROPOSED ORDER ON MOTION TO STRIKE AFFIDAVITS OF
MICHAEL J. BLOOM AND TEJASVI SRIMUSHNAM
FROM THE RECORD**

Upon the motion of the Respondent to strike the Affidavits of Michael J. Bloom and Tejasvi Srimushnam and all references to them in Complaint Counsel's Reply to Respondent's Post-Trial Proposed Findings of Fact and Conclusions of Law in this matter, the undersigned hereby orders that the Affidavits and all references to the Affidavits in Complaint Counsel's Reply to Respondent's Post-Trial Proposed Findings of Fact and Conclusions of Law be stricken.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: