

ORIGINAL



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: _____

Noel L. Allen
Alfred P. Carlton, Jr.
M. Jackson Nichols
Attorneys for Respondent
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: acarlton@allen-pinnix.com

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:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
westman@ftc.gov

Michael J. Bloom
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-7122
Washington, D.C. 20580
mjbloom@ftc.gov

Steven L. Osnowitz
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
sosnowitz@ftc.gov

Michael D. Bergman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-582
Washington, D.C. 20580
mbergman@ftc.gov

Tejasvi Srimushnam
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
tsrimushnam@ftc.gov

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
oyalj@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)	DOCKET NO. 9343
Dental Examiners,)	
Respondent.)	

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.

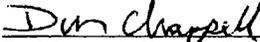
would be questionable, given that Complaint Counsel's answers to interrogatories were served on Respondent on November 18, 2010, the fact-discovery deadline passed November 23, 2010, and the hearing in this matter is scheduled to begin on February 17, 2011. In addition, other procedural requirements 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.

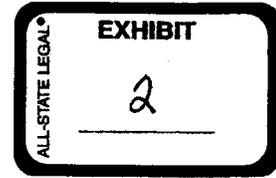
For all the foregoing reasons, and after full consideration of the arguments in the Motion and Opposition, Respondent's Motion for Disclosure of Non-Privileged and Non-Restricted Agency Information is DENIED.

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



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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
