



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	PUBLIC
)	
NORTH CAROLINA STATE BOARD OF)	Docket No. 9343
DENTAL EXAMINERS,)	
)	
Respondent.)	
)	

**COMPLAINT COUNSEL'S ANSWER TO RESPONDENT'S APPLICATION
FOR REVIEW OF A RULING DENYING RESPONDENT'S
MOTION FOR DISCLOSURE**

Respondent's Motion for Disclosure was denied by the Court's order of February 14, 2011 ("Feb. 14th Order"). The Board's application for interlocutory review of the denial of its Disclosure Motion, filed on February 18, 2011, is equally devoid of merit and should be denied.¹

I. Respondent Seeks Irrelevant Information.

By its Motion, Respondent seeks details regarding the internal divisions of labor between, and work assignments of, the various attorneys appearing in this matter as Counsel Supporting the Complaint ("Complaint Counsel" or "CC"), as well as the bar admissions for each of them. The internal organization and management of the attorneys appearing as Complaint Counsel in this matter is the epitome of hearing preparation materials within the meaning of Rule 3.31(c)(5), and Respondent's unsupportable, and unsupported, claim of

¹ "Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception because they are particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay." *Schering-Plough Corp.*, 2002 WL 31433937, at *8 (F.T.C. Feb. 12, 2002) (quoting the Commission's interlocutory order in *Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977)).

prejudice² is not substantiated by even a suggestion of a supporting fact or circumstance. The unsupported claim of prejudice certainly does not amount to the showing of “substantial need” required by the Rule to set aside the work product doctrine.

Perhaps more importantly, the Board has provided no showing of relevance, not even a token one, to any claim or defense in this matter that warrants the disclosure of the professional licenses held by each of the attorneys appearing as Complaint Counsel. Instead of a relevance showing, Respondent’s counsel purport to be enforcing a general “ethical” duty that CC owes to adverse counsel “to provide such information.” Respondent’s Appl. at 3. Even if there were such a duty, Respondent has failed to cite any authority that such duties are enforceable by motions to compel discovery under the Commission’s Rules of Practice.³

Finally, if Respondent had a truly legitimate need for such licensing information, the Internet possesses a treasure trove of publicly available information about virtually everyone, including lawyers and their professional licensing information. A few well-designed keystrokes could have satisfied Respondent’s curiosity long ago regarding such matters.⁴ The alternative ease with which counsel could have obtained Complaint Counsel’s professional licensing information suggests a less savory intent to interfere with CC’s trial preparation and

² Respondent purports to be greatly confused “in understanding whom they should be interacting with” during this proceeding. Respondent’s Appl. at 4.

³ Independent of discovery, Complaint Counsel has advised Respondent’s counsel that, if it has even a suspicion that any counsel for the Commission has or is engaging in any questionable ethical conduct, any such conduct (including specific facts relating thereto) should immediately be brought to the attention of co-lead counsel for the Commission, Messrs. Dagen and Lanning, and/or the Commission’s Inspector General for prompt investigation and remedial action.

⁴ Complaint Counsel has previously informed Respondent’s counsel of the results that even a quick internet search would yield.

presentation: the dwindling inventory of dilatory motions could be supplanted in turn by questionable ethics complaints, sprinkled around the country, for example.

This application is nothing more than a specious distraction from the ongoing trial of the merits of this matter, and should be denied.

II. The Issues Raised Satisfy None of Tests for Appeal Under Rule 3.23(b).

An appeal under Rule 3.23(b) must meet a stringent test. It must involve (1) a controlling question of law or policy for which (2) there is substantial ground for difference of opinion, *and* for which (3) an immediate appeal may materially advance the ultimate termination of the litigation or subsequent review will be inadequate. Order Denying Respondent's Application for Review of Order Denying Respondent's Motion to Compel Discovery, Docket No. 9343 (Feb. 1, 2011) ("Feb. 1st Order") (*citing* 16 C.F.R. § 3.23(b); *In re Daniel Chapter One*, 2009 FTC LEXIS 111, *1-2 [May 5, 2009]; *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)).

Respondent has not shown that this application involves a question about which there is a substantial ground for difference of opinion, or a novel and unsettled question of law or policy.

See Feb. 1st Order at 4. Neither is the "controlling question" able to contribute to the "determination, at an early stage, of a wide spectrum of cases." *Id.* at 4-5 (internal quotations and citations omitted). Rather, the Board argues that the Court had discretion to grant its discovery request, but ruled to the contrary. Respondent's Appl. at 2-3 ("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."). However, "[this] exercise of discretion does not provide grounds for interlocutory appeal." Feb.

1st Order at 5 (citations and quotations omitted). Finally discovery issues, such as those raised here are incapable of materially advancing the termination of this litigation. *See Id.* at 5-6 (*citing In re Hoechst Marion Roussel, Inc.* 2000 FTC LEXIS 155, *20 [Oct. 17, 2000] (“It is clear that an appeal of the discovery ruling at issue would not materially advance the ultimate termination of the litigation. 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.”) (internal quotations and citations omitted)). Respondent’s application fails to meet any of the criteria for interlocutory appeal under Rule 3.23(b), and it must, therefore, be denied.

III. Conclusion.

In consideration of the foregoing reasons, Respondent's application for interlocutory review by the Commission of the denial of its Motion for Disclosure should be denied.

Respectfully submitted,

/s/Richard B. Dagen

Richard B. Dagen
William L. Lanning
Michael J. Bloom
Melissa Westman-Cherry
Counsel Supporting Complaint
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW
Washington, DC 20580

Dated: February 24, 2011

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
)
NORTH CAROLINA STATE BOARD OF) Docket No. 9343
DENTAL EXAMINERS,)
)
Respondent.)
)

**[PROPOSED] ORDER DENYING RESPONDENT'S APPLICATION
FOR REVIEW OF A RULING DENYING RESPONDENT'S
MOTION FOR DISCLOSURE**

On February 18, 2011, Respondent, North Carolina State Board of Dental Examiners, filed its Application for Review of a Ruling Denying Respondent's Motion for Disclosure. On February 24, 2011, Complaint Counsel filed their Answer to Respondent's Application, disputing Respondent's entitlement to the requested order because the discovery issues raised by Respondent seek irrelevant information and otherwise do not qualify for interlocutory appeal within the meaning of Rule 3.23(b).

Respondent's Application does not qualify for interlocutory review under Rule 3.23(b), and it is DENIED.

ORDERED:

D. Michael Chappell
Chief, Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Noel Allen
Allen & Pinnix, P.A.
333 Fayetteville Street
Suite 1200
Raleigh, NC 27602
nla@Allen-Pinnix.com

*Counsel for Respondent
North Carolina State Board of Dental Examiners*

CERTIFICATE FOR ELECTRONIC FILING

I 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 the adjudicator.

February 24, 2011

By: s/ Richard B. Dagen
Richard B. Dagen