

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
FILED
CLERK'S OFFICE

CHRISTINE VARAD)

Plaintiff,)

v.)

REED ELSEVIER INCORPORATED,)
d/b/a LexisNexis, Lexis Nexis Risk & Information)
Analytics Group, Inc.)

Defendant.)

2007 JUN 21 P 4:52
C.A. No. 06 CA 11370 MLW

U.S. DISTRICT COURT
DISTRICT OF MASS.

**MOTION OF THOMAS J. QUINN TO QUASH SUBPOENA ISSUED TO
PLAINTIFF VARAD (F.R.Civ.P. 45)**

Thomas J. Quinn (“deponent,” “Quinn”) moves the Court for an Order quashing the subpoena issued by this court, commanding that he appear for a deposition and produce certain documents at the time of the deposition.

Quinn is the Chairman of the Maine Board of Bar Examiners. Plaintiff obtained a subpoena from a clerk of this court and mailed it to the Maine Board of Bar Examiners addressed to Quinn, where it was received by the Executive Director on June 7, 2007. It commands Quinn to attend a deposition at those offices on June 25, 2007 and to produce at that time various documents set forth in eleven paragraphs in a Schedule A attached to a Notice of Deposition accompanying the subpoena. The Notice of Deposition, purporting to schedule a deposition on written questions pursuant to F.R.Civ.P. 31 also contained a list of questions to be posed at the deposition.

The subpoena must be quashed as it was not properly served on Quinn, was not accompanied by the required witness fees and mileage, and does not state the name of the court from which it was issued. Further, it lacks the power to command Quinn to attend as it was

issued by this court, and not the U. S. District Court for the District of Maine, the location where the deposition is to be taken.

INTRODUCTION

Since Quinn has not been a party to this action, counsel's understanding of Varad's case is gleaned from a review of the pleadings on the Court's Pacer system. It appears the suit commenced in August 2006, and claims that defendant has failed to provide Varad access to a file containing information she believes was provided by defendant Reed to Gall & Gall Company. That information is alleged to be false and defamatory, and as a result of its dissemination it is alleged that she lost employment opportunities. She also alleges that information was sent to the Massachusetts and Maine Bar Examiners resulting in her inability to practice law.

On June 7, 2007, the Executive Director of the Maine Board of Bar Examiners received in the mail, addressed to the Board's Chairman, Thomas J. Quinn at the address of the Board, a subpoena commanding the appearance of Quinn at a deposition to be taken on written questions. *See* attached Exhibit 1. He was also commanded to produce and permit inspection and copying of eleven categories of documents described in the Notice of Deposition Schedule A. *See* attached Exhibit 2. The deposition is set for Augusta, Maine on June 25, 2007.

The face of the subpoena does not contain the name of the court that issued it, though it is signed by Kathleen Boyce of the U.S. District Court of the District of Massachusetts. Deponent Quinn has not been served in hand with the subpoena, nor has it been delivered to him by a non party. No witness fees or mileage costs were included with the subpoena. Neither the subpoena nor any on the documents attached to it contain the text of subdivisions (c) and (d) of F.R.Civ.P. 45.

Deponent Quinn seeks to have the subpoena quashed.¹

ARGUMENT

1. The Subpoena is Defective on its Face as it Lacks the Name of the Court that Issued It, the Name of the Court in Which the Action is Pending, and Fails to Set Forth the Text of Subdivisions (c) and (d) of F.R.Civ.P. 45.

F.R.Civ.P. 45 governs the form and issuance of subpoenas for hearing, depositions, and for the production of documents. It mandates that every subpoena “shall state the name of the court from which it is issued...and the name of the court in which it is pending.” F.R.Civ.P. 45(a)(1)(A)(B). The subpoena is defective on its face as it fails to set forth either the court where the action is pending or the court which issued it.

The service of a subpoena on a nonparty will often represent the first notice of the witness's involvement in the action. Rule 45(a)(1) therefore requires that the action be identified to the subpoenaed witness by including the title, civil action number, and court in which the action is pending. The subpoena must also identify the issuing court, which is the court in whose jurisdiction performance under the subpoena will occur. The issuing court may therefore be the same as the court in which the action is pending, but may also be any other district court [citation omitted]. The failure to include, or the affirmative misstatement of, any of this identifying information makes the subpoena facially invalid and unenforceable.

9-45 Moore's Federal Practice - Civil § 45.10.

Exhibit 1 is the only portion of the subpoena sent to the Maine Board of Bar Examiners. Though Rule 45(a)(1)(D) requires that the subpoena “set forth the text of subdivisions (c) and (d)...” that language is nowhere to be found. It is not contained in the single page of the subpoena received by the Board, nor is it set out anywhere else in the papers that accompanied the subpoena itself. The purpose of the inclusion of these subdivisions in every subpoena is to ensure that the recipient of the subpoena is fully

¹ Deponent is also serving an Objection to the Notice of Deposition due to defects in the Notice and the subpoena, and is objecting to the document production request.

aware of both her own obligations in responding to the subpoena, of the duties of the attorney in properly executing the subpoena, and the options a recipient may exercise in contesting a subpoena. *Anderson v. V.I.*, 180 F.R.D. 284, 289-290 (D.V.I. 1998) *affirmed without opinion*, *Anderson v. Government of the Virgin Islands*, 215 F.3d 1314 (3d Cir. 2000). Failure to include the text may be a ground for quashing the subpoena. *See Anderson* at 290; *Productos Mistolin, S.A. v. Mosquera*, 141 F.R.D. 226, 228 (D.P.R. 1992) (refusing to enforce a subpoena for, *inter alia*, failing to include the mandatory text).

2. The Subpoena Has Not Been Issued by the Proper Court.

The deposition has been set to occur in Augusta, Maine. Rule 45(a)(2)(B) unambiguously requires that a subpoena for attendance at a deposition must “issue...from the court from the district where the deposition is to be taken, stating the method for recording the testimony.” Neither the subpoena itself, nor the accompanying Notice states the method of recording. More importantly, however, the process was not issued by the District Court for the District of Maine. The Advisory Committee Notes (1991 Amendment) reiterate that “a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled.”

The subpoena issued from the wrong court is invalid and must be quashed. *James v. Booz-Allen & Hamilton, Inc.*, 206 F.R.D. 15, 19 (D.D.C. 2002); *Echostar Communs. Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 397 (D. Colo. 1998).

3. The Subpoena Has Not Been Served on the Deponent and the Required Fees Have not Been Tendered.

Service of a subpoena may be made by any person who is not a party. Rule 45(b)(1). It appears that the mailing herein was performed by a party, Ms. Varad; it was she who certified in her deposition Notice that she served that document on opposing counsel, and the return address on the USPS Priority Mail envelope received by the Board's Executive Director shows the sender as "Varad, P.O. Box 583, Milton, MA." Even if the governing Rule does not require personal service on the deponent,² service must be made by "delivering a copy thereof" to him. F.R.Civ.P. 45(b)(1). Delivery to the Board of Bar Examiners' address, and receipt by its Executive Director is not sufficient service. The deponent is Quinn, not the organization. On June 18, 2007 a Return of Service of the subpoena (Document #51) was filed with the Court. It contains an unsigned return attesting to service on "C. Cutliff" in hand by the "United States Postal Service."

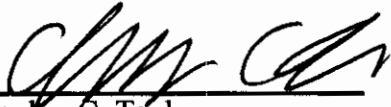
Here, Quinn's attendance is commanded at a deposition, and under the Rule he is entitled to receive the fee for one day's attendance and the mileage allowed by law at the time he is served. F.R.Civ.P. 45(b)(1). Nothing was provided and that alone is sufficient to mandate quashing the subpoena. In *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696 (5th Cir. 2003), the court was presented with a situation where the witness fee was paid, but the mileage amount was not. Even though the mileage due was only a few dollars, (the witness lived close to the deposition location), the Fifth Circuit held that the lower court was correct in quashing the subpoena.

² Moore's notes the majority rule is that personal service of a subpoena is required, service by mail or other substituted service is insufficient. 9-45 Moore's Federal Practice - Civil § 45.21

WHEREFORE deponent, Thomas J. Quinn requests that the Court quash the subpoena and Order that he not be required to attend the deposition scheduled for June 25, 2006 and that he not be required to produce any documents in response thereto.

Dated: June 19, 2007

G. STEVEN ROWE
Attorney General of Maine

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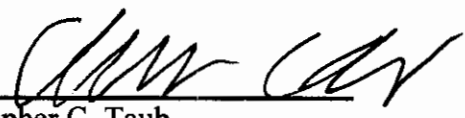
CERTIFICATE OF SERVICE

I hereby certify that a conforming copy of this document, **MOTION OF THOMAS J. QUINN TO QUASH SUBPOENA ISSUED TO PLAINTIFF VARAD (F.R.Civ.P. 45)**, was mailed by first-class mail today to the following in accordance with Rule 5 of the Federal Rules of Civil Procedure:

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Kristin M. Cataldo, Esq.
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Dated at Augusta, Maine this 19th day of June, 2007.

BY: 
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