

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Civil Docket No.: 06 CA 11370 MLW

Christine Varad,  
Plaintiff,  
v.

Reed Elsevier Incorporated,  
d.b.a. LexisNexis, LexisNexis Risk &  
Information Analytics Group, Inc.,  
Defendant.

**PLAINTIFF'S OPPOSITION TO MOTION TO QUASH SUBPOENA and REQUEST  
FOR LEAVE TO FILE AND SERVE AMENDED SUBPOENA**

The decision whether to quash a subpoena is within the discretion of the district court.

See: *In re Application of Hill*, D.C.N.Y. 2005 WL 1330769 (Ultimately, motions to quash a subpoena are entrusted to the sound discretion of the trial court."); *Insulate America v. Masco Corp.* D.C.N.C. 2005, 227 F.R.D. 427; *In re Corso*, D.C.N.Y. 2005, 328 B.R. 375 (affirming bankruptcy court's denial to quash subpoena based on lack of evidence showing undue burden.)

Plaintiff is a pro-se litigant bearing individually and alone all of the expense and responsibilities concerning asserting her rights pursuant to the instant litigation. In stark contrast, defendant, Reed Elsevier, Inc. d.b.a. LexisNexis, LexisNexis Risk & Information Analytics Group, Inc., represents multiple large corporate interests and the Attorney General's Office of the State of Maine represents a large state funded and maintained department of the judicial branch of state government, the Maine Board of Bar Examiners. It would seem "heavy handed" and fundamentally inequitable to severely penalize the discovery rights and interests of a pro-se litigant for inadvertently omitting a word, or specifically the word, "Maine," when filling in the standard subpoena form to complete the phrase, "District Court of, " in the form title. While it is true that Plaintiff unintentionally omitted the word, "Maine," to designate the local district court, that inadvertent omission should not be allowed to form the basis of an unfair advantage

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culminating in an ultimate denial of material and relevant discovery actively sought by both the Defendant and Plaintiff concerning the claims and issues of the instant litigation. (See: Second Amended Complaint, Cause of Action, ¶ 2). Quashing an otherwise valid subpoena would prohibit access to properly requested, material discovery, held in original form, solely in the possession and control of the Maine Board of Bar Examiners. Plaintiff requests permission to serve and file an amended subpoena on the Maine Board of Bar Examiners correcting the omission of the word, "Maine" in the title reading "District Court of \_\_\_".

Where the subpoena form title designation of the issuing district court was inadvertently left blank, the issuing court has for all general purposes been recognized by the Maine Board of Bar Examiners as the United States District Court for the District of Massachusetts pursuant to the properly designated title caption on the "Notice of Deposition" that accompanied the subpoena served on the Board on June 7, 2007 by a non-party employee of the United States Postal Service. This Court may properly address the issue of allowing the Plaintiff to serve and file an amended subpoena including the unintentionally omitted word, "Maine" to designate the local issuing District Court for the purposes of obtaining production of documents pursuant to F.R. Civ. P. 34, if found to be fair and equitable under the circumstances.

Alternatively, this Court may find it appropriate to deem the issue concerning the local district court moot where the Maine Board has voluntarily accepted Massachusetts's jurisdiction over the issue by motioning the Massachusetts District Court to judicially address the subject of quashing the subpoena. See: In re Sealed Case, C.A. 1998, 141 F.3<sup>rd</sup> 337, 329 U.S. App. D.C. 374; In re Application for Order Quashing Deposition Subpoenas, dated July 16, 2002. D.C.N.Y. 2002, 2002 WL 1870084 ("*A subpoena for attendance at a deposition shall issue from the court for the District in which the deposition is to be taken, but whether the deposition subpoena was issued out of an incorrect court was a moot issue when the deponent appeared to testify and remained willing to testify and answer questions.*"). The Maine Board of Bar Examiners were free to file a motion to quash the subpoena in the United States District Court for the District of

Maine but they voluntarily chose instead to request that Massachusetts District court address the issue.

On June 4, 2007, Plaintiff served an attached notice of deposition on the Maine Board of Bar Examiners concerning a F. R. Civ. P.31, Deposition upon Written Questions. The rules of civil procedure concerning party responsibilities pursuant to Rule 45 and a Rule 31 deposition upon written questions differ markedly from party responsibilities concerning Rule 45 and a Rule 30 deposition upon oral examination, particularly the requirements of an oral examination “Notice of Deposition” under Rule 30(b) in contrast with the notice required pursuant to a Rule 31(a)(3), deposition upon written questions. Either deposition noticed in connection with non-parties may be accompanied by a request for documents pursuant to Rule 34 and 45. The Maine Board has asserted in *Objection of Thomas Quinn and Maine Board of Bar Examiners to Plaintiff's Notice of Deposition (F.R.Civ.P. 31, 34*, that Varad’s notice was insufficient pursuant to the requirement of F.R.Civ.P. 31(a)(3). A careful review of Rule 31(a)(3) reveals that such section addresses solely the rights of parties and not non-parties to the litigation. Therefore any assertion of an insufficiency of that section by the Board is improper where the Board is non-party to the litigation and as such, has no standing to assert an insufficiency claim based that section of Rule 31.

The Board’s general, over inconclusive objections to producing the documents requested in “Schedule A, Documents To Be Produced,” as attached to the subpoena served on June 7, 2007 were improper for the reason the each request seeks access to relevant, material information concerning all the claims and issues contained in the Complaint, but particularly *Second Amended Complaint, Cause of Action, ¶ 2*. The Board’s repetitive objection, “This document Request seeks neither admissible evidence, nor information that is reasonably calculated to lead to the discovery of admissible evidence,” simply can not be justified without some kind of specificity that can genuinely form a basis to reasonably withhold relevant, material evidence concerning all the claims presented by *Second Amended Complaint, Cause of Action*, but in particular

concerning ¶ 2. Varad has a legitimate interest in gaining access to material discovery concerning her claims by subpoenaing the Board to produce documents and answer written questions concerning issues presented by the Second Amended Complaint.

Varad attached an "Exhibit A" and an "Exhibit B" to the subpoena issued and served on the Maine Board of Bar Examiners and returned to the Court for filing and docketing. Each attached exhibit contained documentary evidence showing that the Board made specific contracts to access the Defendant's databases to verify information provided by Bar admission applicants. It cannot sincerely be contested that the State of Maine pays substantial public monies under contract with the Defendant to purchase the service of accessing the Defendant's multiple investigative databases and that pursuant to such agreement access is routinely affected. Varad has a legitimate right to assume the Board routinely accesses those databases in the absence of documentary evidence to the contrary and to assume that the Board accessed her personal data on several occasions prior to submitting her February 2007 examination for a grade evaluation.

**Plaintiff's Specific Response to Maine Board of Bar Examiners's Objections**

1. Maine Board of Bar Examiners's "*Motion of Thomas J. Quinn to Quash Subpoena Issued to Plaintiff Varad (F.R.Civ.P. 45)*" makes a false claim that the subpoena served did not include the text of subdivisions (c) and (d) of F.R.Civ.P. 45. The subpoena form generally available through the clerk of court includes such texts on the reverse side of the form. Such text was included on the reverse side of the subpoena form served on the Board.
2. Maine Board of Bar Examiners demands tender of payment of a witness attendance fee and associated mileage fees. Such fees are not proper where the subpoena commanded the Board to make written response to questions posed pursuant to F.R.Civ.P 31, Deposition Upon Written Questions, at the Board's own offices in Augusta, Maine.

Imposition of a mileage fee is inappropriate where the Board was not commanded to go anywhere that it does not already routinely go each and every day. Imposition of a witness fee is also inappropriate where the Board is not commanded to perform any task that it does not already bear the responsibility in the regular course of business to perform concerning Bar application inquiries. Plaintiff is currently a Bar admission applicant in the State of Maine and has the right to ask questions concerning her application and request a associated written response. The Board has arguably never afforded Varad an effective accommodation in testing to fairly or fully accommodate her testing disability but it has repeatedly collected substantial testing related fees in connection with improperly administered disability accommodations it did agree to provide. It is unfair and inequitable to burden Varad by demanding even more fees the other Bar admission applicants are not expected to similarly pay.

In February 2007, the Board designated that Varad be tested utilizing a disability accommodation that afforded a court reporter to take down her oral responses to the essay portion of the Bar examination questions. In addition to the court reporter's computerized dictation version of Varad's oral responses, the court reporter made an audio recording of the proceeding. After Varad's dictated examination was completed by the court reporter, Cheryl Cutliffe, Executive Director of the Maine Board of Bar Examiners, personally edited by deletion portions of Varad's examination to produce what Cutliffe felt was a final, computerized format version of Varad's testing responses that masked Varad's identity as examinee and would then be appropriate to submitted for grading purposes. See: Exhibit A, Maine Board of Bar Examiners, Letter of Cheryl Cutliffe. When Varad reviewed copies of the final computerized version of her testing responses she found Ms. Cutliffe had deleted portions of her testing responses. Varad contested the grading results as evaluation pursuant to the Cutliffe version of her test responses. See: Exhibit B, Varad's letter to the Board. Varad requested that Ms. Cutliffe produce the audio

recording made of her testing responses by the court reporter. The Board has not produced the audio record of Varad's examination and refuses to specifically responded to that request.

The question is not whether the Board tampered with Varad's examination responses prior to submitting them for grading. The Board admits that it did delete portions of her examination at its discretion. The issue is how much was deleted and whether those deletions included portions of Varad's answers as originally submitted. The audio record exists but the Board refuses to produce it. That evidence is material to the issues and claims presented by the instant cause of action. Ms. Cutliffe tampered with Varad's test in response to false and defamatory information she received in Accurint data reports concerning Varad to insure a failing test grade result in order to thereby preclude any subsequent "character and fitness inquiry" related objections that Varad might have legitimately been able to raise concerning inquiry into the false, defamatory data utilized to evaluate her character and fitness for admission to the Bar.

All related data and information in any form held by the Board is relevant and material to the issues and claims presented by the Second Amended Complaint, Cause of Action, ¶ 2 and all other related paragraphs. While the Board may claim that it is reasonable to reformat a test to preserve anonymity as to identity of the examinee, it can never be fair or reasonable to delete any portion of that examinee's testing responses by editing or deleting portions of those responses at it's preference prior to submission for grading to effect any claimed purpose.

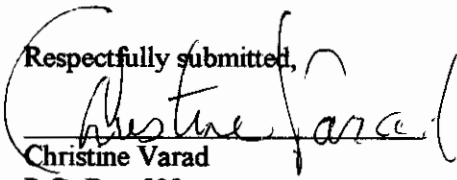
3. While acknowledging the governing rule, F.R.Civ.P. 45, does not require personal, "in hand" service on a deponent, (See: ¶ 3, *Motion of Thomas J. Quinn to Quash Subpoena Issued to Plaintiff Varad (F.R.Civ.P 45)*), the Maine Board of Bar Examiners makes another an improper claim that service by "delivering a copy to thereof" to Mr. Quinn pursuant to F.R.Civ.P. 45 was insufficient for the reason that the delivery was effected at the address of the Maine Board of Bar Examiners main offices and accepted by Executive Director of the Maine Board of Bar Examiners, Cheryl Cutliffe after signing a return for

receipt for the delivery of certified mail by a non-party agent/employee of the United States Postal Service. The Board improperly manufactures another counterfeit basis to try to invalidate the subpoena by claiming that the service made on Thomas J. Quinn, in his official capacity as Chairman of the Maine Board of Bar Examiners, was ineffective on Mr. Quinn in his individual capacity. Mr. Quinn was properly served pursuant to his official capacity as the Chairman of the Maine Board of Bar Examiners. See: Williams v. Gilles, D.C. Tenn. 2004, 2004 WL 792788 (“*Suits against persons in their official capacity are suits against an entity, not against the individual; therefore when a public officer is sued in his official capacity, and he leaves office, he must be subpoenaed as a non-party.*”). Quoted by: Wyoming v. U.S. Department of Agriculture, D.C., D.C. 2002, 208 F.R.D. 237; Innomed Labs, LLC. v. Alza Corp., D.C. N.Y. 2002, 211 F.R.D. 449; Stewart v. Mitchell Transportation, D.C. Kan. 2002, 2002 WL 1159699.

#### CONCLUSION

The only genuine objection that the Maine Board of Bar Examiners may rightfully assert to quash the subpoena served upon them on June 7, 2007 arises from an inadvertent mistake made by a pro-se litigant omitting the word, “Maine” from the subpoena form title area for “District Court of ---“ section. Otherwise, the subpoena is proper and effective. This Court has jurisdiction to allow Varad to correct the error by serving the Board with an amended subpoena document containing the full district court title designation. Alternatively, for all of the foregoing reasons, this Court should find that the inadvertent error concerning the subpoena form title is moot and act to enforce the otherwise valid subpoena.

June 25, 2007

Respectfully submitted,  
  
Christine Varad  
P.O. Box 583  
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781 534 8770

I certify that on the 25<sup>th</sup> day of June 2007, I caused a copy of "*PLAINTIFF'S OPPOSITION TO MOTION TO QUASH SUBPOENA and REQUEST FOR LEAVE TO FILE AND SERVE AMENDED SUBPOENA*" to be served by first class, postage prepaid mail on the attorney of record for (1) defendant Reed Elsevier, Incorporated, d.b.a. LexisNexis,, *LexisNexis Risk & Information Analytics Group, Inc.* and (2) Maine Board of Bar Examiners, at the following addresses of record:

(1) Kristin Cataldo  
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(2) Ronald W. Lupton, AAG  
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Christine Varad