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IN CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

2007 AUG 15 06 CA 11370 MLW
Civil Docket No. 06 CA 11370 MLW

U.S. DISTRICT COURT
DISTRICT OF MASS.

Christine. Varad,
Plaintiff,

v.

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

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO QUASH SUBPOENA ISSUED TO "THOMAS J. QUINN, CHAIRPERSON,
MAINE BOARD OF BAR EXAMINERS."**

FACTUAL BACKGROUND

On June 7, 2007, the Maine Board of Bar Examiners', Thomas Quinn, Chairperson, were served by registered mail with a copy of a subpoena and related documents at P.O. Box 140, Augusta, Maine, 04332. The Board does not make publicly available, any physical street address to facilitate in hand service of process. That subpoena was quashed specifically for procedural reasons and not substantive reasons.

On July 5, 2007 Varad received a signed subpoena form from the United States District Court, District of Maine. She completed the form and on July 11, 2007, contacted Harry McKenney, Civil Process Division; Kennebec County Sheriff's Office to request that he serve the Maine Board of Bar Examiners in hand with the second subpoena that had been properly executed and was free of procedural errors. Mr. McKenney served the subpoena and also a check to for the witness fee and mileage fee in hand on Cheryl Cutliffe, Executive Director of the Maine Board of Bar Examiners, on July 31, 2007. See: Exhibit A, Subpoena, page 1.

Mr. McKenney had a great deal of difficulty locating an address for the Board to allow for his personal, in hand service even after conducting a diligent search. He reported to Varad that

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Cheryl Cutliffe, Executive Director of the Board had been extremely uncooperative in accepting service of the subpoena. McKenney claimed she intentionally impeded and delayed the process as long as possible by refusing to provide him with a current address to allow for the in hand service to take place. And even when McKenney had the new address, Ms. Cutliffe remained purposely unavailable or out of the office to avoid being served. See: Exhibit A, Credit Memo, Kennebec Sheriff's Office, page 2. The original subpoena document, with the in hand service of process section filled in and signed by Mr. McKenney, has been returned for filing to the United State District Court, District of Maine, clerk's office, addressed to the attention of Linda L. Jacobson, Clerk of Court.

ARGUMENT

Part I

On February 22, 2007, Reed served Varad with "Defendant's First Request For Production of Documents." See: Exhibit B, Copy of Defendant's First Request For Production of Documents, page 3-4.

In the "Documents Requested" section Reed made the following discovery requests of Varad:

- "9. All documents concerning Varad's application for admission to the Massachusetts Board of Bar Examiners, including but not limited to any application(s) for admission, bar exam results, and any correspondence concerning acceptance and/or denial to the Massachusetts bar."
- "10. All documents concerning Varad's application for admission to the Maine Board of Bar Examiners, including but not limited to any application(s) for admission, bar exam results, and any correspondence concerning acceptance and/or denial to the Maine bar."

Clearly, Reed concluded as of that date, February 22, 2007, that the discovery requests it was making of Varad would lead to material and relevant documents in her possession and control concerning the Maine Board of Bar Examiners and the Massachusetts Board of Bar Examiners.

On May 15, 2007, Christine Varad and Kristin Cataldo, counsel for defendant Reed, Elsevier, Inc. held a discovery conference by telephone at approximately 11:00 A.M. Ms. Cataldo requested that Varad research the issue of whether or not state bar applications and related files and documents were publicly available, and if not, that Varad would supplement her response by as necessary with any responsive documents in her possession and control concerning the Massachusetts and Maine Boards of Bar Examiners. Varad agreed to the request. Ms. Cataldo told Varad that she had personally contacted the Maine Board of Bar Examiner's to access Varad's bar application and related material and that the Board flatly denied her any access to any materials in its possession. Clearly, as of May 15, 2007, Reed continued to consider that its requests for any and all information concerning Varad and the Maine Board of Bar Examiners would lead to material, relevant and even important discovery.

Varad, like Reed, Elsevier, Inc., also wanted to access the materials in the possession and control of the Maine Board of Bar Examiners. Having taken Ms. Cataldo at her word, that the Maine Board of Bar Examiners was being uncooperative about providing public access to applications filed with the Superior Court of the State of Maine, Varad decided the best course was to subpoena the information, as such was sought, as least as of May 15, 2007, by both parties with equal intensity and attention.

Suddenly Reed changed position as to accessing the requested discovery in the possession and control of the Maine Board of Bar Examiners. It seems Reed had planned to defend against Varad's defamation claim by attempting to limit that claim to information disseminated by the Reed's system of investigative databases to Gall and Gall Company only. While in fact, Varad's complaint contained no such limitation. Varad named Gall and Gall Company, F & W Publishing, the Massachusetts Board of Bar Examiners, the Maine Board of Bar Examiners and others as recipients of false and defamatory data concerning her as provided by Reed's databases.

All of a sudden Reed is no longer interested in accessing Varad bar applications and related correspondence materials. Those materials tend to prove that defamation occurred on a professional licensing level culminating in a denial of professional employment opportunities for a considerable period of time. Reed's handy opportunity to humiliate and discredit Varad with disappointing bar exam results had turned risky and dangerous. Reed did not want to take the chance that those disappointing test results were caused as a result of the false and defamatory data provided to the Board by Reed under contract with the State of Maine to access investigative database systems to "verify bar applicants."

Varad may reasonably assume that the Maine Board of Bar Examiners routinely accesses Reed's investigative databases in the absence of admissible evidence to the contrary. A statement by the Board months after the incident complained of took place claiming that it did not access Reed's databases to verify Varad's bar application is inadmissible hearsay and nothing more. That unsupported and inadmissible statement cannot provide a justifiable basis to quash a subpoena seeking material and relevant information.

It is reasonably assume that the Maine Board of Bar Examiners accessed Varad's personal data as held and provide under contract by Reed Elsevier, Inc.'s databases on several occasions prior to the submission her February 2007 bar examination for grading and evaluation. Subpoena access to that material and relevant information proper and absolutely necessary to afford Varad a fair opportunity to access material that will aid her in satisfying the burden of proof that defamation occurred and that Reed provided that defamatory data within a professional licensing setting. In stark contrast, Reed improperly invites this court to limit the basis of Varad's defamation claim to "incorrect information" provided Reed's investigative databases solely and specifically to Gall and Gall Company. See: Exhibit C, Defendant's Opposition to Plaintiff's Motion to Compel Production of Documents, at page 5, ¶ 1, Argument, as to Request No. 2.

Part II

The Maine Board of Bar Examiners claim that they have not and did not access any information or data from databases that belong to the Defendant. However, apart from their own hearsay testimony on the subject, no other evidence has been provided to support the truth of that out of court statement. In fact, where the State Maine paid out tax dollars to be able to access the Defendant's databases under contract with Accurint for the express purpose of "verifying bar applicants," it would seem that the burden has shifted to the Maine Board of Bar Examiners to provide admissible evidence that they did not access the Defendant's databases under that contact to "verify" Varad's application data and information.

On May 15, 2006, Varad wrote to Cheryl Cutliffe, Executive Director of the Board of Bar Examiners to put her on notice that LexisNexis Accurint was disseminating false background check information in connection with her name. Varad requested that the Board provide her with an opportunity to review any information received by the Board from Accurint databases for accuracy. Ms. Cutliffe simply refused to respond to Varad's request in any way although Cutliffe had in truth an active account to access Accurint databases for information to "verify bar applicants." Cutliffe only response was to demand complete information concerning any and all civil proceeding to which Varad was a party. On June 15, 2006, Varad again wrote to Cutliffe to request that the Board provide her with access to a copy of any data and/or information received for Accurint database access by the Board in order to verify the truthfulness of the content of such data. And again, Cutliffe simply refused to respond to Varad's request for information. Cutliffe did not deny that the Board was accessing Accurint databases at any time; she simply refused to make any response at all to Varad's inquiry concerning the Board's access to Accurint database. Varad was entitled to a timely and truthful response as she had paid a considerable amount of money and time to participate in the Maine Bar admission testing program. See: Exhibit D, (1) Letter of Varad to Cutliffe dated May 15, 2006 and (2) Letter of Varad to Cutliffe dated June 16, 2006. Information and data received by the Board through access to the Accurint database, or

any other of the databases owned and operated by the Defendant, is material and relevant to this action. And that material and relevant information is by right discoverable pursuant to Fed. Rule Civ. P. 26(b), 31 and 45.

Part III

Reed Elsevier, Inc. and the Maine Board of Bar Examiners both raise an objection to base the quashing of the second subpoena citing that this court's scheduling order requiring that the parties complete fact discovery by July 13, 2007. [Docket Entry No. 43.] That being said, it seems only fair in view of their objection to scrutinize whether or not Reed, Elsevier, Inc. and the Maine Board of Bar Examiners have "clean hands" sufficient to validly raise that kind of objection. Both Reed and the Maine Board of Bar Examiners have used every possible method available to them to obstruct and/or simply fail to respond to valid discovery requests timely filed and served by Varad within the allotted discovery period designated by the court. This court overruled Reed's objection of untimely discovery requests and ordered on August 1, 2007, Reed Elsevier, Inc. to file responses to Varad's interrogatory requests by August 14, 2007.

The subpoena is a similar situation of discovery timely filed and timely acted upon as far as seeking the discovery. Cheryl Cutliffe was able to delay and obstruct the in hand service of the subpoena and the related witness fee and mileage fee by failing to provide McKenney with her street address, claiming that she was out of the office, claiming that she had gone to Portland on business, such that she was able to effectively use up enough time to allow the Board to raise an objection of untimeliness of the discovery request. It is inequitable to allow the Board to deliberately and improperly manufacture situations that would prevent it being from being served with discovery documents only to then raise the objection that it was not served on a timely basis.

Part IV

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

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 its preference prior to submission for grading to effect any claimed purpose as Cutliffe did with Varad's test responses. Ms. Cutliffe tampered with Varad's test in response to false and defamatory information she received in Accurint data reports concerning Varad. Cutliffe intended to insure a failing test grade in order to preclude any subsequent "character and fitness inquiry" that Varad might have legitimately been able to raise concerning an inquiry into the false, defamatory Accurint data that may have been utilized to evaluate her character and fitness for admission to the Bar.

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.

When Varad reviewed copies of the final computerized version of her testing responses she found Ms. Cutliffe had deleted multiple portions of her testing responses. Varad contested the grading results as evaluation pursuant to the Cutliffe version of her test responses and she requested that Ms. Cutliffe produce the audio recording made of her testing responses by the court reporter. Cutliffe again, simply refused to make any response to Varad's legitimate request to be provided with the audio record of her examination responses. Like Varad's letters of 2006 requesting information concerning the Board's access to Accurint databases, Cutliffe again simply

refused to answer. Cutliffe knew the truth concerning the Board's contract with Accurint and she deliberately withheld material and relevant information. Cutliffe knows the truth about how much of Varad's oral test response she deleted prior to entering the test for grading. Cutliffe has intentionally withheld material and relevant evidence to concerning the audiotape documenting the complete testing response made by Varad. The Board does not have clean hands to raise a claim to quash a subpoena requesting access to evidentiary documents and data solely within its custody and control.

Part V

In order to more graphically illustrate to this court the continuing improper behavior and intentional withholding of material and relevant evidence concerning Varad by Cheryl Cutliffe, Executor Director of the Maine Board of Bar Examiners the following facts and supporting evidentiary documents are hereby provided to this court.

Prior to becoming aware that Cutliffe had intentionally deleted portions of Varad's February 2007 Bar examination, Varad sought to reapply to take the July 2007 test. She timely submitted an application to take day one essay test and the \$450.00 fee. On June 18, 2007, Cutliffe informed Varad that she was no longer qualified to sit for the one day essay test and that she would have to submit a completed application to take both day one and day two of testing.

Varad responded by letter dated July 2, 2007, that she was not interested in submitting another application to take day one and day two testing and that no additional application would be forthcoming. Varad then requested that Cutliffe return her testing fee.

Cutliffe responded by refusing to return Varad's money and simply taking Varad's application for day one testing, deeming it to be an application for day one and day two testing Varad's request for disability accommodations before the "Board" and told Varad that the Board had specifically ruled on her disability requests.

The truth was that Varad had not submitted an application for day one and day two testing in Maine. And Varad had surely submitted no written application or request for a related

disability accommodation. See: Exhibit E, Varad letter to Board dated July 14, 2007. Cutliffe had been completely untruthful when she told the Board that Varad made any such accommodation requests. See: Exhibit F, Cutliffe's Letter to Varad, dated July 5, 2007, at ¶ 2. Varad only requested that Cutliffe return her testing fee of \$450.00. Based on Cutliffe's false assertions, the Maine Board of Bar Examiners is said to have considered and ruled on disability accommodation requests for which Varad never made written, signed application or request of any kind. The truth is that Varad never asked the Board for disability accommodations.

Cutliffe had been untruthful to Varad concerning deleting her February 2007 testing responses, untruthful to the Board concerning Varad making application for disability accommodations in the July 2007 examination and untruthful concerning Varad submitting a second application to sit for day one and day two of the July 2007 Bar examination in Maine. Yet, the Maine Board of Bar Examiners would have this court believe, without more and based upon Cutliffe's word alone, that the Maine Board of Bar Examiners never accessed the Accurint databases to access services provided to the State of Maine under contract with the Defendant to "verify" bar applicants as she stated on her Accurint application.

CONCLUSION

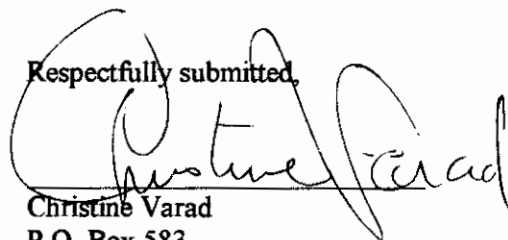
The whole truth, the real material and relevant facts, are never going to be known if the Reed Elsevier, Inc. and the Maine Board of Bar Examiners are allowed to quash a valid subpoena seeking material, relevant, case related discovery. A fair assessment of the facts and issues before this court will never be made if that subpoena is quashed. The playing field is not equal in this litigation. Varad is not truly able to defend herself against unfair acts of the Maine Board of Bar Examiners; no potential examinee is ever really in a position to defend against unreasonable acts of a state bar examination board. But this court can and should review those kinds of actions in equity. The truthfulness,

fairness and reasonableness of all of the elements should be considered before deciding whether or not to allow any motion to quash a valid subpoena requesting material discovery.

For all of the above stated reasons, Varad respectfully requests that this court deny all motions to quash the subpoena served on the Maine Board of Bar Examiners on July 31, 2007.

August 15, 2007

Respectfully submitted,



Christine Varad
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Milton, Massachusetts 02186
781 534 8770

I certify that on the 15th day of August 2007, I caused a copy of, "*PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO QUASH SUBPOENA ISSUED TO "THOMAS J. QUINN, CHAIRPERSON, MAINE BOARD OF BAR EXAMINERS,"*" 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:

Kristin Cataldo
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617 720 2880



Christine Varad