

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

JANE DOE, <i>on her own behalf and on</i>)	
<i>behalf of a class of those similarly</i>)	
<i>situated,</i>)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO: 1:09-CV-842 WTL-TAB
)	
THE INDIVIDUAL MEMBERS OF)	
THE INDIANA STATE BOARD OF)	
LAW EXAMINERS, <i>in their official</i>)	
<i>capacities,</i>)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND
IN RESPONSE TO PLAINTIFF’S MOTION TO COMPEL**

Plaintiff in this action, Jane Doe, has filed a Motion to Compel responses to interrogatories it propounded to Defendants, the Members of the Indiana State Board of Law Examiners. Defendants now file a Motion for Protective Order concerning the same disputed discovery requests. The disputed interrogatories request data on Indiana bar applicants responding affirmatively to bar application questions relating to mental health. The interrogatories also request information concerning any actions taken with respect to those affirmative responses. Defendants objected to the interrogatories for two reasons. First, the interrogatories request information which is deemed confidential by Rule 19 adopted by the Indiana Supreme Court. In addition, the interrogatories are unduly burdensome in terms of the time it would take to respond to them. These objections are discussed in more detail below.

Rule 19, Section 1 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys provides as follows:

All information and all records obtained and maintained by the Board of Law Examiners in the performance of its duty under these rules and as delegated by the Supreme Court of Indiana shall be confidential, except as otherwise provided by these rules, or by order of (or as otherwise authorized by) the Supreme Court of Indiana.

The Rule designates the Board of Law Examiners as custodian of all Indiana bar applications and related files, reports and all other pertinent information. The Rule provides that those records are the property of the Indiana Supreme Court. Rule 19, Section 2.

The Board of Law Examiners is authorized to disclose certain very limited information concerning applicants such as the name of applicants successfully passing the bar, the names of applicants admitted to the bar, certain types of information to the National Conference of Bar Examiners and certain information to law schools. Rule 19, Section 3. There is no provision for release of information concerning those answering mental health questions affirmatively except by written authorization and release by the person about whom the information is sought. Rule 19, Section 3(e). Based upon these confidentiality rules, applicants are assured that confidential private information disclosed by them in their bar applications will be maintained in confidentiality. That confidentiality is key to the Board of Law Examiners receiving accurate and truthful information necessary for it to perform its duties as prescribed by the Indiana Supreme Court.

The Federal Rules of Evidence, Rule 501 addresses the question of privileges recognized under federal law. This Rule provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id. The United States Supreme Court has recognized that the federal courts may take notice of privileges recognized by state law in civil proceedings. *See, United States v. Gillock*, 445 U.S. 360, 368, 100 S. Ct. 1185, 1191, 63 L. Ed.2d 454 (1980), n. 8 (“This is not to suggest that the privilege law as developed in the states is irrelevant. This Court has taken note of state privilege laws in determining whether to retain them in the federal system.”). Confidentiality of bar applications received by the Indiana Board of Law Examiners is established by rule of the Indiana Supreme Court. This provision should, in light of the important considerations inherent in the bar application process, be applied in the present action and discovery of the information requested should be denied.

There is a second problem with Plaintiff’s discovery requests. Preparing a response to Plaintiff’s discovery requests poses an extremely burdensome demand on the time and resources of Defendants. This is true for several reasons. The method by which bar applicant’s files are stored and maintained by the Board of Law Examiners is not conducive to a quick review of the files. Responding to the discovery requests is further complicated because the Defendants do not currently keep any type of data reflecting the information Plaintiff is requesting.

Applicants for admission to the Indiana bar are assigned a number when they first apply for the bar and the records are stored according to these numbers. The assigned number remains with applicants throughout the application process. This is true even if a

given applicant fails to pass the bar examination or withdraws his or her application. Such applicants will have the same assigned number for any future applications for admission to the bar. Thus, identifying applicants who have applied for the bar at any given time will not be a matter of, for example, pulling applications 4,396 through 5,856.

While the bulk of applicants could be identified or at least roughly approximated through the numbering process, not all could be. So, the process of actually identifying applicants who sat for the bar in any particular year, including 2009, would involve a very time consuming task. Limiting the review process to only first-time bar applicants would reduce the burden somewhat but the task would still be overwhelming.

The process of identifying applicants for a given time period is further complicated by the fact that some applications are stored differently than others. Specifically, those applicants who are not admitted to the bar are stored separately by number. Those who receive conditional admissions are also stored separately as are those who are deferred for any number of reasons, including, but not limited to, failure to submit required paperwork, failure to meet a requirement in the Rules, requesting to have the application held in abeyance, simply not showing up for the examination or because a final decision on character and fitness has not been made by the Board of Law Examiners.

In addition, even if the Board of Law Examiners were to roughly approximate the numbers assigned to the applicant pool for a given time period, the process to respond to Plaintiff's discovery requests would still be daunting. Applicants for any given year total approximately 1,000. The Board of Law Examiners does not maintain any type of data concerning those who respond "yes" to any given question on the bar application.

Accordingly, identifying those who respond “yes” to any of the mental health questions on the bar examination would require physically looking through each application file. This initial review of each file will take an estimated three to five minutes per file. Thus, this review process alone could take as much as 5,000 minutes which would equal approximately 83 hours of time for just one year of applications. Plaintiff has asked for information from 2006 through 2009. Accordingly, the amount of time initially required would likely exceed 300 hours. This challenge is made even more difficult because the Board of Law Examiners has only five full-time employees and one part-employee. Only one of those employees has legal training.

Further, once an applicant is identified as responding “yes” to one or more of the mental health questions on the application, an additional review of the entire file and board meeting records by the one employee with legal training (the Executive Director) would be required to determine what action, if any, was taken with respect to the affirmative response(s). Although the majority of the files consist of the application and a small amount of additional information, a large number of files are quite voluminous. On average, an additional five to ten minutes will be required to determine whether and what additional action may have been taken concerning the affirmative response(s).

Because the information sought is confidential and because the discovery sought by Plaintiff would cause an undue burden on Defendants, Defendants request that Plaintiff’s Motion to Compel be denied and that their Motion for Protective Order be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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