

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ACLU of Indiana – Indiana University School)
of Law – Indianapolis Chapter, *et al.*,)
)
Plaintiffs,)
) No. 1:09-cv-842 WTL-JMS
)
The Individual Members of the Indiana State)
Board of Law Examiners,)
)
Defendant.)

Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Protective Order¹

This case challenges certain questions asked on the application for the Indiana bar and the procedures imposed on those who answer the questions affirmatively as violative of the Americans with Disabilities Act, 42 U.S.C. § 12132 (“ADA”). There are two plaintiffs in this case. The first is the ACLU student chapter at the Indiana University School of Law which has members who will be applying for the Indiana bar and who will, absent judicial intervention, have to answer a number of the objected to questions in the affirmative and therefore will be subject to violations of their rights under the ADA. The second plaintiff is a prospective bar applicant who wishes to apply for the bar examination but would have to answer a number of the questions affirmatively and does not wish to subject herself to an ADA violation.

The plaintiffs bring this action on their own behalf and on behalf of a class of similarly situated which is defined to include future bar applicants who will have to

¹ The defendants have entitled their motion as one for a protective order and opposing plaintiffs’ motion to compel. Plaintiffs’ have not filed a motion to compel. It was determined in the attorneys’ conference with the Magistrate Judge on November 19, 2009, that the burden was on defendants to file a motion to compel.

answer affirmatively to the objected to questions.² In order to establish that the class meets the numerosity requirements of Rule 23(a)(1), the plaintiffs have sought information as to the number of bar applicants who have answered affirmatively to the challenged questions since applications for the 2006 bar application. In order to determine if the unlawfully burdensome questions are even useful in the screening of bar applicants, the plaintiffs have also sought information as to the number of applicants who answered the questions affirmatively and were then not allowed to sit for the bar because of character and fitness concerns about their mental health and the number of applicants who answered the questions affirmatively who were referred to the Judges and Lawyers Assistance Program for evaluation concerning their mental status. This information was sought in interrogatories which sought only the numbers of applicants. No information was sought as to the specific names of bar applicants. Nevertheless, the defendants (“Members”) objected to answering any of the interrogatories, claiming that the information sought is privileged under Rule 19 of the Indiana Rules for Admission to the

² The proposed class is specifically defined as:

all persons who will file an application to take the Indiana bar examination for which any of the following are true:

-they have been diagnosed with or treated for bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder

-they have been diagnosed, since the age of 16 until the present, with or treated for any mental, emotional or nervous disorder

-they have a mental, emotional or nervous condition or impairment which if untreated could affect their ability to practice law in a competent and professional manner

Bar. The Members also claimed that the request is unduly burdensome. (The Members' discovery response is attached to this memorandum as Attachment 1).

The Members have now sought a protective order. The Members' arguments are not well-taken and the protective order should be denied. However, as counsel indicated in the parties' recent telephone conference with the Magistrate Judge, plaintiffs are willing to modify the request to seek only information for persons applying for the February 2009 and July 2009 bar examinations.

A. The information being sought is not confidential

Section 1 of Rule 19 of the Indiana Rules for Admission to the Bar states that all information and all records obtained and maintained by the Board of Law Examiners are to be "confidential" except as provided in the rules or as authorized by the Indiana Supreme Court. The only authorized disclosure of the confidential information contained in the rules is in Section 3 of the rule which provides:

The Board is authorized to disclose information relating to applicants or members of the bar only as follows:

- (a) The names of applicants successfully passing the law examination.
- (b) The name of any applicant admitted to the practice of law at any admission ceremony.
- (c) The name, date of birth, Social Security number and date of application, for placement in a national data bank operated by or on behalf of the National Conference of Bar Examiners.
- (d) Upon request of any law school, the names of each of its graduating students that took the law examination and whether each passed or failed the exam.
- (e) Information requests by the National Conference of Bar Examiners or from a foreign bar admitting agency, when accompanied by a written authorization and release duly executed by the person about whom such information is sought, providing, however, that no information received by the Board under an agreement of confidentiality or designation of confidentiality or otherwise restricted by law or these rules shall be disclosed.
- (f) Information relating to a violation of the Indiana Rules of Professional Conduct or to the unauthorized practice of law may be supplied to the Indiana Disciplinary Commission either at the request of the Disciplinary Commission or

on the Board's own motion, except that information received by the Board under an agreement of confidentiality or otherwise restricted by law shall not be disclosed.

(g) Copies of documents previously filed by an applicant may be provided upon the applicant's written request. Copies of documents submitted by other parties regarding an applicant may be supplied to the applicant only upon written consent by the party submitting such documents. The complete record of any hearing, including any and all documents or exhibits formally introduced into the record, and any transcript of such hearings may be made available to the applicant who was a party to the hearing pursuant to other provisions of these rules.

It would appear that Section 3 recognizes that what is confidential is specific identifying information for the applicant or bar member. This would appear to be the common understanding of "confidential." After all, data provided for the United States Census is confidential, 13 U.S.C. § 9, but it is clear that the statistical information generated by the census is not.

This is the precise understanding of the meaning of "confidential" that the Members appear to have, or at least have outside of this litigation. For the Members routinely publish information aggregating statistical information about those taking the bar in a portion of its website entitled "The Bar Exam: Indiana Bar Exam Statistics" at ww.in.gov/judiciary/ble/exam/stats.html. (Attachment 2 to this Memorandum). Thus, the Members publish information about the total number of persons taking the exam, the number of persons taking the exam for the first time, the number of repeat takers, the over-all pass rate for all takers, the over-all pass rate for first time takers, and the over-all pass rate for repeat takers. None of this information is authorized for disclosure by Section 3 of Rule 19. The only conclusion that can be drawn from this is that anonymous statistical information is not deemed to be confidential by the Board of Law Examiners.

Not surprisingly the Members have not cited one case to support its argument that the anonymous statistical information sought by the plaintiffs is confidential. The

information is not and its disclosure is not barred by Rule 19.

B. Even if the information is deemed confidential under Indiana law that does not bar the discovery in this federal proceeding

Given that this is a federal action the existence of a state privilege, even if one was present here, does not bar discovery of the information requested.

The Federal Rules of Civil Procedure authorizes parties to “obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...” Fed.R.Civ.P. 26(b)(1). Federal Rule of Evidence 501 provides that “[t]he privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” Fed.R.Evid. 501. “[T]he federal law of privilege provides the rule of decision in a civil proceeding where the court's jurisdiction is premised upon a federal question, even if the witness-testimony is relevant to a pendent state law count which may be controlled by a contrary state law of privilege.” *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir.1992).

Jenkins v. DeKalb County, Georgia 242 F.R.D. 652, 655 (N.D. Ga. 2007) (allowing discovery of morbidity and mortality report over objection that it was barred by state law peer review privilege). Of course, in this case there is only a federal claim. And, it is therefore “clear that despite the existence of the state statutory privilege, in cases arising under federal law there is no constitutional inhibition to abrogation of state created privileges either in connection with the admission of evidence or in connection with pretrial discovery. See generally Moore's Federal Practice P 26.69(7) at n. 6a.” *Dorsten v. Lapeer County General Hospital*, 88 F.R.D. 583, 586 (E.D. Mich. 1980) (refusing to bar production of peer review reports despite state law making them privileged.)

Even though any state law privilege need not be recognized, “federal courts should, in the spirit of comity, take into consideration the policy interests embodied in state privileges and related state laws limiting disclosure of confidential materials, at least

to the extent that they can be reconciled with federal policy interests and the discovery needs of federal civil rights litigants.” *Haus v. City of New York*, 2006 WL 3375395, *2 (S.D.N.Y. 2006). The policy interest that is apparent in Rule 19 is to keep personal information concerning bar applicants confidential. The plaintiffs are not seeking this confidential information. The broad interpretation of “confidential” urged by the Members cannot be reconciled with the broad discovery allowed under the Federal Rules of Civil Procedure and the clear needs of the plaintiffs. Therefore, even if the claim of confidentiality was legitimate under Indiana law, it could not be recognized in this case.

C. The Members’ claim of undue burden should be disregarded both because it is not supported and because this information is essential for the plaintiffs

The Members spend much of their memorandum arguing that it would be an undue burden to answer this discovery. Plaintiffs have already indicated that they would be willing to limit their discovery request to information concerning those applying for the February and July, 2009, bar examinations. Nevertheless, the Members assert that even that is too burdensome. This assertion should be disregarded.

Discovery may be limited if “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issue at stake in the action, and the importance of the discovery in resolving the issues.” Rule 26(b)(2)(C)(iii), Fed.R.Civ.P. “The objecting party bears the burden of demonstrating ‘specifically how, despite the broad and liberal construction afforded the federal discovery rules, each [request] is not relevant or how each question is overly broad, [unduly] burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.’”

Lamoureux v. Genesis Pharmacy Services, Inc., 226 F.R.D. 154, 159 (D. Conn. 2004) (internal citations and quotation marks omitted). In this case, the Members have not submitted any evidence at all concerning the burden imposed by the discovery request.

Moreover, the Members' argument essentially is that the records of the Board of Law Examiners are in such a state that it is impossible, or at least extremely difficult, to retrieve even one years worth of applications. Attachment 2 to this memorandum indicates that there are less than 800 persons a year who take the bar examination for the first time. Admittedly, there are some persons who apply for the bar and do not take the examination. However, it does not appear, if the inquiry is restricted to just the February and July, 2009, bar applications, that there are an overwhelming number of applicants. Further, the argument appears to be that although the questions challenged in this case are considered essential by the Members and will, if answered affirmatively, lead to the burden of more reporting by the applicant and perhaps an evaluation by the Judges and Lawyers Assistance Program, no record is kept of those answering the questions affirmatively, who is evaluated, and whether the persons are allowed to sit for the bar or not. This is curious.

Moreover, any burden must be balanced against the need for the information, Rule 26(b)(2)(C)(iii), Fed.R.Civ.P., and it is essential that the plaintiffs have this information. The Members are resisting the request for class certification and there is no way for the plaintiffs to establish numerosity without obtaining information about the number of persons who, in the past, have answered the objected to questions in the affirmative. And, it is essential for the plaintiffs' case in chief to determine if, in fact, the questions have any utility in the bar admission process. If, for example, it turns out that

no, or very few, applicants are found to be unfit after answering the questions affirmatively, but many more persons must suffer the intrusion of being forced to answer the questions, then this burden would appear to be unjustified, thus strengthening the plaintiffs' argument that the ADA is being violated.

D. Conclusion

For the foregoing reasons the motion for a protective order should be denied and defendants should be ordered to answer the Interrogatories, although the plaintiffs have no objection if the answers are limited to applicants for the February, 2009 and July, 2009, bar examinations.

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Certificate of Service

I hereby certify that on this 1st of December, 2009, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

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/s/ Kenneth J. Falk

Kenneth J. Falk

Attorney at Law

Attachment 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANE DOE, *et al.*,)
)
Plaintiffs,)
)
v.)
)
THE INDIVIDUAL MEMBERS OF THE)
INDIANA STATE BOARD OF LAW)
EXAMINERS, in their official capacities,)
)
Defendants.)

CAUSE NO. 1:09-CV-842 WTL-JMS

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES TO DEFENDANTS**

Defendants the Individual Members of the Indiana State Board of Law Examiners (hereinafter "Defendants"), by counsel, Laura L. Bowker, Deputy Attorney General, responds to Plaintiff's First Set of Interrogatories to Defendants, as follows:

1. Please state all persons who have participated in responding to these Interrogatories. In addition to names, please list business address and job title.

Answer: Linda L. Loepker, Executive Director, Indiana State Board of Law Examiners, and Laura L. Bowker, Deputy Attorney General.

2. How many bar applicants responded affirmatively to Question 22 on the bar application in applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.

- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.

Answer: Defendants object to this request because the information sought is confidential pursuant to Rule 19, of Indiana Rules for Admission to the Bar and the Discipline of Attorneys. In addition, this request is objectionable because it is overbroad and unduly burdensome because the information sought is not collected or compiled in any fashion and would require review of several thousand bar applications.

3. How many bar applicants responded affirmatively to Question 23 on the bar application in applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.

Answer: Please refer to the response to Request No. 2.

4. How many bar applicants responded affirmatively to Question 24 on the bar application in applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.

Answer: Please refer to the response to Request No. 2.

5. How many bar applicants responded affirmatively to Question 25 on the bar application in applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.

Answer: Please refer to the response to Request No. 2.

6. How many bar applicants responded affirmatively to Question 26 on the bar application in applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.

Answer: Please refer to the response to Request No. 2.

7. Of the persons noted in your responses to Interrogatories 2-6, how many were not allowed to sit for bar examination because they were found by the Board of Law Examiners to lack the requisite character and fitness because of issues concerning their psychiatric, mental, emotional or nervous disorders. State the number of applicants for each bar examination noted below.

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.

h. the July 2009, bar examination.

Answer: Please refer to the response to Request No. 2.

8. How many of bar applicants noted in Interrogatories 22-26 were referred to the Judges and Lawyers Assistance Program for evaluation concerning their character and fitness after submitting applications for:

- a. the February 2006, bar examination.
- b. the July 2006, bar examination.
- c. the February 2007, bar examination.
- d. the July 2007, bar examination.
- e. the February 2008, bar examination.
- f. the July 2008, bar examination.
- g. the February 2009, bar examination.
- h. the July 2009, bar examination.


Answer: Please refer to the response to Request No. 2.

AS TO OBJECTIONS:

Respectfully submitted,

GREGORY F. ZOELLER
Indiana Attorney General
Attorney No. 1958-98

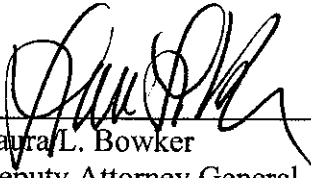
By: _____


Laura L. Bowker
Attorney No. 11147-79
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been served on the following counsel of record by first-class, United States mail, postage pre-paid, on this 22nd day of October, 2009:

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[663167]

Attachment 2

Indiana Board of Law Examiners

The Bar Exam: Indiana Bar Exam Statistics

Some failing applicants will be eligible for review. Any changes made following review would affect these percentages. A final result cannot be given until the review process is completed. Those final figures may not be available for some time.

February 2009 Bar Exam Statistics

Total Number of Exam Takers	260
Total Number of First Time Takers	175
Total Number of Repeat Takers	85
Over-all Pass Rate for All Takers	67%
Over-all Pass Rate for 1st Time Takers	78%
Over-all Pass Rate for Repeat Takers	45%

Archived Statistics

July 2008 Bar Exam Statistics

Total Number of Exam Takers	519
Total Number of First Time Takers	464
Total Number of Repeat Takers	55
Over-all Pass Rate for All Takers	82%
Over-all Pass Rate for 1st Time Takers	86%
Over-all Pass Rate for Repeat Takers	47%

February 2008 Bar Exam Statistics

Total Number of Exam Takers	226
Total Number of First Time Takers	151
Total Number of Repeat Takers	75
Over-all Pass Rate for All Takers	69%
Over-all Pass Rate for 1st Time Takers	79%
Over-all Pass Rate for Repeat Takers	41%

July 2007 Bar Exam Statistics

Total Number of Exam Takers	535
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Total Number of First Time Takers	463
Total Number of Repeat Takers	72
Over-all Pass Rate for All Takers	79%
Over-all Pass Rate for 1st Time Takers	87%
Over-all Pass Rate for Repeat Takers	31%

February 2007 Bar Exam Statistics

Total Number of Exam Takers	281
Total Number of First Time Takers	193
Total Number of Repeat Takers	88
Over-all Pass Rate for All Takers	70%
Over-all Pass Rate for 1st Time Takers	76%
Over-all Pass Rate for Repeat Takers	56%

July 2006 Bar Exam Statistics

Total Number of Exam Takers	544
Total Number of First Time Takers	484
Total Number of Repeat Takers	60
Over-all Pass Rate for All Takers	79%
Over-all Pass Rate for 1st Time Takers	86%
Over-all Pass Rate for Repeat Takers	28%

February 2006 Bar Exam Statistics

Total Number of Exam Takers	251
Total Number of First Time Takers	151
Total Number of Repeat Takers	100
Over-all Pass Rate for All Takers	68%
Over-all Pass Rate for 1st Time Takers	77%
Over-all Pass Rate for Repeat Takers	54%

July 2005 Bar Exam Statistics

Total Number of Exam Takers	576
Total Number of First Time Takers	508

Total Number of Repeat Takers	68
Over-all Pass Rate for All Takers	76%
Over-all Pass Rate for 1st Time Takers	83%
Over-all Pass Rate for Repeat Takers	21%

February 2005 Bar Exam Statistics

Total Number of Exam Takers	243
Total Number of First Time Takers	155
Total Number of Repeat Takers	88
Over-all Pass Rate for All Takers	72%
Over-all Pass Rate for 1st Time Takers	85%
Over-all Pass Rate for Repeat Takers	51%

July 2004 Bar Exam Statistics

Total Number of Exam Takers	552
Total Number of First Time Takers	467
Total Number of Repeat Takers	85
Over-all Pass Rate for All Takers	78%
Over-all Pass Rate for 1st Time Takers	84%
Over-all Pass Rate for Repeat Takers	41%

February 2004 Bar Exam Statistics

Total Number of Exam Takers	261
Total Number of First Time Takers	161
Total Number of Repeat Takers	100
Over-all Pass Rate for All Takers	65%
Over-all Pass Rate for 1st Time Takers	76%
Over-all Pass Rate for Repeat Takers	46%

July 2003 Bar Exam Statistics

Total Number of Exam Takers	535
Total Number of First Time Takers	459
Total Number of Repeat Takers	76
Over-all Pass Rate for All Takers	74%

Over-all Pass Rate for 1st Time Takers	79%
Over-all Pass Rate for Repeat Takers	41%

February 2003 Bar Exam Statistics

Total Number of Exam Takers	244
Total Number of First Time Takers	147
Total Number of Repeat Takers	97
Over-all Pass Rate for All Takers	63%
Over-all Pass Rate for 1st Time Takers	73%
Over-all Pass Rate for Repeat Takers	48%

July 2002 Bar Exam Statistics

Total Number of Exam Takers	515
Total Number of First Time Takers	434
Total Number of Repeat Takers	81
Over-all Pass Rate for All Takers	77%
Over-all Pass Rate for 1st Time Takers	83%
Over-all Pass Rate for Repeat Takers	43%

February 2002 Bar Exam Statistics

Total Number of Exam Takers	246
Total Number of First Time Takers	162
Total Number of Repeat Takers	84
Over-all Pass Rate for All Takers	57%
Over-all Pass Rate for 1st Time Takers	68%
Over-all Pass Rate for Repeat Takers	35%

Last modified on Tuesday, November, 10, 2009

Indiana Supreme Court.