

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

DOCKET NO. 9374

In the Matter of)
)
Louisiana Real Estate Appraisers Board,)
)
Respondent.)

ORDER ON MOTION TO QUASH OR
LIMIT DEPOSITION SUBPOENA

I.

On March 6, 2018, pursuant to Rule 3.34(c) of the Federal Trade Commission's ("FTC") Rules of Practice, non-parties Adams and Reese LLP and Robert L. Rieger, Jr. ("the non-parties") filed a motion to quash or limit a subpoena *ad testificandum* (the "deposition subpoena") served on the non-parties by Respondent Louisiana Real Estate Appraisers Board ("Respondent" or "Board") ("Motion"). Respondent filed its opposition on March 14, 2018. For the reasons set forth below, the non-parties' Motion is GRANTED in part and DENIED in part.

II.

The Complaint in this matter alleges that the Board's promulgation and implementation of the Board's Rule 31101, requiring the payment of "customary and reasonable fees" to appraisers by, primarily, appraisal management companies ("AMCs"), constituted an unreasonable restraint on price competition. Complaint ¶¶ 1, 4. Respondent states that it issued a deposition subpoena to several individuals associated with the Real Estate Valuation Advocacy Association ("REVAA"), a trade association and lobbying organization that advocates on behalf of AMCs. Respondent further states that Mr. Rieger is a lobbyist who actively represented REVAA from 2011 through November 2017 with respect to legislation and regulations pertinent to issues in this case, and that Mr. Rieger represented before the Board the two specific AMCs named in the Complaint, Coester VMS and iMortgage Services.

The non-parties state that Mr. Rieger is an attorney and partner of Adams and Reese LLP who has represented clients before the Board. They further state that it appears that the Board intends to depose Mr. Rieger about information, actions, and activities undertaken by him on behalf of clients of Adams and Reese LLP and about interactions with the Board on behalf of those clients.

The non-parties argue that Mr. Rieger cannot disclose any information protected by Louisiana Rule of Professional Conduct 1.6, which states: “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” The non-parties state that the firm’s clients have not given such informed consent. In addition, the non-parties argue that the subpoena to Mr. Rieger implicates the attorney-client privilege as embodied by Federal Rule of Evidence 501, into which federal courts have incorporated by reference Louisiana Code of Evidence Article 508.¹

In response to the Motion, Respondent states that it does not seek discovery of any privileged matters or communications, and that its discovery seeks non-privileged interactions that Mr. Rieger has had with the Board, Louisiana government officials, and other persons who Mr. Rieger does not represent.

III.

A.

Proceedings before the Federal Trade Commission are governed by the FTC’s Rules of Practice. 16 C.F.R. § 3.1; *In re American Med. Ass’n*, 94 F.T.C. 701, 965 (1979). The Federal Rules of Civil Procedure, which govern discovery disputes in federal district court cases, can be applied in Commission cases where not in conflict with the Commission’s Rules of Practice, and can provide an analytical framework for the disposition of related issues. *In re LabMD, Inc.*, 2014 FTC LEXIS 20, *12 (F.T.C. January 10, 2014) (citing *In re Crush Int’l*, 1972 FTC LEXIS 255, *5-6 (March 23, 1972)). However, the Federal Rules of Evidence, which govern admissibility of evidence in federal trials, do not govern discovery disputes. *Id.* Therefore, the evidentiary restriction of Fed. R. Evid. 501 does not govern this discovery dispute.

Pursuant to Rule 3.31(c)(2)(4) of the Commission’s Rules of Practice, “[d]iscovery shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.” 16 C.F.R. § 3.31(c)(2)(4). “[T]he attorney-client privilege may be invoked . . . with respect to: (1) a communication; (2) between privileged persons; (3) in confidence; [and] (4) for the purpose of obtaining or providing legal assistance for the client.” Restatement (Third) of Law Governing Lawyers § 68. “The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is to facilitate full and frank disclosure between attorneys and clients. *Id.* Because of the sacrosanct nature of the attorney-client privilege, the privilege is “worthy of maximum legal protection.” *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992). Therefore, Respondent may not inquire into any privileged matters or communications between the non-parties and its clients.²

¹ Louisiana Code of Evidence Article 508 prohibits issuance of subpoenas of lawyers in civil cases except under narrow circumstances.

² In addition, the Protective Order issued in this case provides that any material that was provided by any third party during the course of this proceeding that is entitled to confidentiality shall be treated as “confidential” material and may be disclosed only to Respondent’s outside counsel. Protective Order ¶¶ 1, 2, 7. Outside counsel may only use

Although Respondent represents that it does not seek discovery of any privileged matters or communications, some of the information Respondent seeks would encompass privileged information. For example, in support of its requested discovery, Respondent's Motion states that Mr. Rieger presented the Board with proposals to resolve the Coester and iMortgage enforcement actions. To the extent Respondent seeks any communications between Mr. Rieger and his clients, including Coester and iMortgage, related to these proposals, such communications would be protected by attorney-client privilege and therefore protected from discovery by Respondent.

B.

The non-parties also seek an order compelling the Board to pay Mr. Rieger's hourly rate to attend the deposition. Pursuant to 15 U.S.C. § 49, in Commission proceedings, witnesses whose depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States. 15 U.S.C. § 49. The scope of permissible witness fees is set forth in 28 U.S.C. § 1821. This statute does not provide for payment of an hourly rate to witnesses. See *In re Natural Organics, Inc.*, 2001 FTC LEXIS 50 (March 26, 2001). Accordingly, this request is DENIED.

IV.

In accordance with the above stated reasons, the Motion is GRANTED in part and DENIED in part.³

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: March 16, 2018

confidential material "for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever." *Id.* ¶ 8. Thus, under the Protective Order, Respondents' outside counsel is barred from supplying confidential material to the Board.

³ The Board's Opposition states that the parties agreed to reschedule the date for the deposition from March 2, 2018, as originally noticed, to the week of March 19, 2018. Under the Second Revised Scheduling Order, issued January 24, 2018, the deadline for completion of fact discovery is March 16, 2018. The implicit request to extend the discovery deadline for the purpose of taking the rescheduled deposition GRANTED.

Notice of Electronic Service

I hereby certify that on March 16, 2018, I filed an electronic copy of the foregoing Order on Motion to Ouash or Limit Deposition Subpoena, with:

D. Michael Chappell
Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on March 16, 2018, I served via E-Service an electronic copy of the foregoing Order on Motion to Ouash or Limit Deposition Subpoena, upon:

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I hereby certify that on March 16, 2018, I served via other means, as provided in 4.4(b) of the foregoing Order on Motion to Ouash or Limit Deposition Subpoena, upon:

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