*2004 U.S. Dist. LEXIS 956, **

FRANK J. LAWRENCE, JR., Plaintiff, v. DIANE VAN AKEN, et al., Defendants.

Case No. 4:03-cv-20

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2004 U.S. Dist. LEXIS 956

January 14, 2004, Decided

SUBSEQUENT HISTORY: Affirmed by, Appeal dismissed by **Lawrence v. Van Aken, 2004 U.S. Dist. LEXIS 6878 (W.D. Mich., Apr. 6, 2004)**

PRIOR HISTORY: Lawrence v. Chabot, 2003 U.S. Dist. LEXIS 17895 (W.D. Mich., Sept. 29, 2003)

DISPOSITION: **[*1]** Motion of third party Michigan Judicial Tenure Commission to quash subpoena and for protective order granted in part and denied in part. Assertion by the Judicial Tenure Commission of a blanket privilege protective all subpoenaed documents overruled. Assertion by the Judicial Tenure Commission of the deliberative process privilege protecting documents reflecting the deliberative and decisional processes of the agency sustained. All documents, and information contained, produced to plaintiff pursuant to this order held by plaintiff in confidence and not divulged to any other person.

CASE SUMMARY:
PROCEDURAL POSTURE: Plaintiff bar applicant filed an action under 42 U.S.C.S. § 1983 against, inter alia, defendant state bar employees arising from their allegedly wrongful delay in processing his state bar membership application and their violation of his right to privacy. Movant judicial tenure commission filed a motion to quash a subpoena duces tecum that he served on it to discover certain information contained in its investigative files.

OVERVIEW: The bar applicant was charged with a misdemeanor ordinance violation in a township for interfering with a police officer. He sought to enjoin the prosecution by filing a lawsuit in federal trial court. The federal trial court decided it should abstain from interfering with the pending state-court prosecution. The bar applicant then alleged in a 42 U.S.C.S. § 1983 action that the state bar employees wrongfully delayed processing his state bar membership application. He added that the delay was a tactic to pressure him into dropping the federal lawsuit. He filed a subpoena duces tecum with the judicial tenure commission to investigate the trial court's conduct in communicating with the state bar employees regarding the delay in processing that membership. The judicial tenure commission filed a motion to quash. The federal trial court found that neither the state court rules governing judicial conduct nor the related cases warranted giving the judicial tenure commission a blanket privilege as to its investigative records, but state court rules and related cases did warrant granting a privilege for documents concerning the judicial tenure commission's deliberative process.

OUTCOME: The judicial tenure commission's motion for a protective order was denied to the extent it sought a blanket privilege protecting all subpoenaed documents. However, its request for recognition of a privilege protecting the deliberative and decisional processes was

granted. It was ordered to produce for inspection by the bar applicant certain factual materials related to specific people, and his disclosure of that material was limited.

CORE TERMS: confidentiality, deliberative process, evidentiary privilege, disclosure, discovery, administrator, common law, subpoenaed, disclose, catch line, state law, tenure, reflecting, staff, federal question, good cause, investigative, dissemination, deliberative, recommendation, fitness, claim of privilege, protective order, public interest, disciplinary, confidential, privileged, state-law, subpoena, duty

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction
Civil Procedure > Disclosure & Discovery > Privileged Matters

HN1 The recognition of privileges is governed by Fed. R. Evid. 501 in cases pending in the United States District Courts. With regard to diversity cases, where the rule of decision is provided by state law, Fed. R. Evid. 501 directs the trial court to apply state law to questions of privileges. In federal question cases, the courts are to be guided by the common law of privileges, interpreted "in the light of reason and experience." Fed. R. Evid. 501. That rule was not intended to freeze the common law governing privileges in federal trials at a particular point in history, but rather directed federal courts to continue the evolutionary development of testimony of privileges. To be recognized, the asserted privilege must serve some public interest transcending the normally predominant principle of utilizing all rational means for ascertaining the truth. Furthermore, the proposed privilege must promote a public interest sufficiently important to outweigh the need for probative evidence. When examining a claim of privilege, the "primary assumption" is that there is a general duty to give testimony and that any exemptions are distinctly exceptional, being so many derogations from a positive general rule.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Question Jurisdiction
Civil Procedure > Disclosure & Discovery > Privileged Matters

HN2 When faced with the assertion of a state-law privilege in a federal question case, the federal courts are required to determine: (1) whether state law recognizes the evidentiary privilege asserted and (2) if so, whether the privilege is weighty enough under the principles enunciated by the United States Supreme Court to merit recognition under federal common law.

Legal Ethics > Judicial Ethics
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations

HN3 See Mich. Ct. R. 9.221.

Legal Ethics > Judicial Ethics
Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations

HN4 All Judicial Tenure Commission (JTC) proceedings are available for public inspection if and when a complaint is filed. Mich. Ct. R. 9.221(B). Furthermore, the confidentiality of proceedings may be lifted altogether upon written consent of the respondent judge, Mich. Ct. R. 9.221(C), and, even in the absence of consent, the rule allows disclosure to other state administrative bodies. Mich. Ct. R. 9.221(D), (E). Consistent with the language of the rule, Michigan courts have stated that the purpose of the rule is to preserve confidentiality to protect both the integrity of the investigation, and the reputation of courts and judges involved until the JTC determines that formal proceedings are warranted.

Civil Procedure > Disclosure & Discovery > Privileged Matters
Legal Ethics > Judicial Ethics

Legal Ethics > Sanctions > Disciplinary Proceedings > Investigations

HN5 Statutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts. Merely asserting that a state statute declares that the records in question are "confidential" does not make out a sufficient claim that the records are "privileged" within the meaning of Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 501.

Civil Procedure > Disclosure & Discovery > Privileged Matters

HN6 Federal courts recognize that state statutes creating a duty of confidentiality, but lacking an express provision for an evidentiary privilege, can nevertheless be construed by the state courts as implying an evidentiary privilege.

Civil Procedure > Disclosure & Discovery > Privileged Matters
Governments > Legislation > Interpretation
Governments > Courts > Rule Application & Interpretation

HN7 Michigan law uniformly holds that a title or catch line cannot limit the plain meaning of a provision's text. The general provisions of the Michigan Court Rules of 1985 specifically provide that the catch lines of a rule are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates. Mich. Ct. R. 1.106.

Civil Procedure > Disclosure & Discovery > Privileged Matters

HN8 When deciding whether to recognize a federal privilege, it is significant that the privilege finds widespread recognition in state statutory or common law. By the same token, the lack of a broad national consensus on the existence of a privilege to be a factor weighing against recognition.

Civil Procedure > Disclosure & Discovery > Privileged Matters
Constitutional Law > Civil Rights Enforcement > Immunity

HN9 The doctrine of absolute immunity creates an immunity from suit, not discovery.

Civil Procedure > Disclosure & Discovery > Privileged Matters
Constitutional Law > Civil Rights Enforcement > Immunity > Public Officials

HN10 The deliberative process privilege covers documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated. The privilege rests on the realization that officials will not communicate candidly among themselves if their remarks are potential items of discovery. Its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government. Although the deliberative process privilege is most often invoked in Freedom of Information Act (FOIA) cases, its application is not limited to FOIA actions. Rather, the deliberative process privilege is a well-established common law privilege applicable in both civil and criminal cases.

Civil Procedure > Disclosure & Discovery > Privileged Matters

HN11 The deliberative process privilege generally protects only deliberative or policy-making documents, while leaving purely factual, investigative matters open for discovery.

Civil Procedure > Disclosure & Discovery > Privileged Matters
Governments > Courts

HN12 The courts are especially solicitous of claims of confidentiality made by third parties to litigation.

Civil Procedure > Disclosure & Discovery > Privileged Matters

Governments > Courts > Authority to Adjudicate
HN13 A trial court retains the power to modify or lift confidentiality orders that it has entered.

COUNSEL: Frank J. Lawrence, Jr., plaintiff, Pro se, Bloomfield Hills, MI.

For Diane Van Aken, Nicole Armbrustmacher, defendants: E. Thomas McCarthy, LEAD ATTORNEY, Smith, Haughey, Rice & Roegge, PC (Grand Rapids), John R. Oostema, LEAD ATTORNEY, Smith Haughey Rice & Roegge, Grand Rapids, MI.

For Diane Van Aken, Nicole Armbrustmacher, defendants: Thomas K. Byerley, LEAD ATTORNEY, Michigan, State Bar of, Lansing, MI.

For Michigan Judicial Tenure Commission, movant: Denise C. Barton, LEAD ATTORNEY, Public Employment, Elections and Torts Division, Lansing, MI.

JUDGES: Joseph G. Scoville, United **[*2]** States Magistrate Judge. Honorable David W. McKeague.

OPINIONBY: Joseph G. Scoville

OPINION: This is a civil rights action brought by a *pro se* plaintiff pursuant to 42 U.S.C. § 1983. Plaintiff's sole remaining claim is a damages action brought against defendants Diane VanAken and Nicole Armbrustmacher, employees of the State Bar of Michigan (SBM) arising from their allegedly wrongful delay in processing plaintiff's application for State Bar membership and their violation of plaintiff's right to privacy. Presently pending before the court is a motion by the Michigan Judicial Tenure Commission (JTC) to quash a subpoena duces tecum served by plaintiff on that agency, seeking to discover certain information contained in the agency's investigative files. (docket # 98). The Judicial Tenure Commission contends that its files are privileged under state law and that this privilege should be recognized by the federal courts in this federal question case. The JTC further asserts that the deliberative process privilege protects certain predecisional materials. The court conducted a hearing on the motion on January 12, 2004. For the reasons set forth below, the motion will be **[*3]** granted in part and denied in part. The court will require production of factual material subject to a confidentiality order, but will uphold the assertion of privilege regarding deliberative materials.

Findings of Fact

The facts relevant to the present motion are as follows. Plaintiff, Frank J. Lawrence, Jr., is a graduate from an accredited Michigan law school. He passed the bar examination administered in July 2001. In August of 2000, when plaintiff was still in law school, he was charged with a misdemeanor ordinance violation in Bloomfield Township for interfering with a police officer. Attorney Thomas Ryan, then an officer of the State Bar of Michigan, represented Bloomfield Township in the misdemeanor prosecution. Plaintiff sought to enjoin the prosecution by filing a lawsuit in the Eastern District of Michigan. *Lawrence v. Bloomfield Township,* No. 00-cv-74302 (E.D. Mich. 2000). Judge Avern Cohn decided that the federal court should abstain from interfering with the pending state-court prosecution, but allowed the action to remain pending. The United States Court of Appeals for the Sixth Circuit denied an emergency motion by Mr. Lawrence to stay the state-court **[*4]** prosecution. *In re Lawrence,* No. 01-2271 (6th Cir. Oct. 12, 2001). During the course of the state misdemeanor prosecution, plaintiff made public statements criticizing both attorney Ryan and Judge Edward Avadenka, before whom the criminal case was pending.

Although plaintiff passed the State Bar examination, his application was not immediately

processed by the State Bar, because of the pendency of the criminal prosecution. This is evidenced by a letter from defendant Diane K. VanAken, a member of the staff of the State Bar of Michigan, dated December 29, 2001. Ms. VanAken's letter invoked a rule of the standing committee on character and fitness, which did "not allow for a Character & Fitness determination while criminal charges are pending. Therefore, we will be unable to complete your Character and Fitness investigation until your pending charge has been resolved." n1 Plaintiff alleges that VanAken held his admission process in abeyance as a means of pressuring him to drop his Eastern District lawsuit challenging the Bloomfield Township prosecution. Plaintiff further alleges that Ryan used the delay in the admissions process as leverage to coerce plaintiff to withdraw his federal **[*5]** lawsuit and that Ryan recruited Judge Avadenka in this effort. (Complaint, P 33). Plaintiff also alleges that defendant Nicole Armbrustmacher, a character and fitness investigator for the State Bar of Michigan, participated in the unconstitutional delay of plaintiff's application and improperly contacted his employer and Judge Avadenka in this effort.

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n1 Rule 5 of the Rules of the Standing Committee on Character and Fitness provides:

> If an applicant has criminal charges pending, the district committee referral should be delayed until the pending proceeding is concluded. An applicant may request that a referral be made prior to the final adjudication of criminal charges, and the request should be granted provided that a district committee report and recommendation does not issue until the criminal matter is concluded.

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Although Judge Avadenka is not a defendant in this case, the communications alleged to have occurred among him, Attorney Ryan and defendant Armbrustmacher are at issue. Plaintiff alleges **[*6]** that Mr. Ryan solicited the judge's help in pressuring plaintiff to drop his federal lawsuit by asking the judge to recommend plaintiff's admission to the State Bar, provided that plaintiff dismiss his federal lawsuit. Plaintiff refused to compromise, and the ordinance violation prosecution went to trial. Plaintiff was found guilty, although the matter is now on appeal.

As evidence of communications between Judge Avadenka and representatives of the State Bar, plaintiff points to a statement made by the judge on the record at a hearing conducted on June 26, 2002, preparatory to sentencing:

> In this in-chambers conference, which was participated in by Thomas Ryan, the attorney for the Township and Mr. Bufalino, representing Mr. Lawrence, Mr. Ryan made an offer to Mr. Bufalino to take to Mr. Lawrence that he would still offer an advisement with the proviso that Mr. Lawrence dismiss all of his other lawsuits involving the Township. I understand there is one in Circuit court, there is one still in Federal court in front of Avern Cohn.
>
> At that offer, which Mr. Bufalino, a practicing attorney, would take to his client, I offered -- and this is what I offered and I want it to **[*7]** be very clear, because I don't know after what happened, how it was transmitted to Mr. Lawrence. I

> offered to call, if this resolved it, I offered to call the Character and Fitness Commission, which has been holding up Mr. Lawrence's approval as an attorney in the State of Michigan, and explain to them that this matter had been finished and that they should move on now to a final decision. That was an offer made strictly to Mr. Bufalino to impart to his client.

Although plaintiff disputes the judge's characterization of the facts as inaccurate and incomplete, he points to the judge's statement as evidence that State Bar officers were delaying his application in order to pressure him to drop his federal case. Plaintiff further asserts that at the same hearing, Judge Avadenka disclosed that he had been in contact with defendant Armbrustmacher concerning plaintiff and that Armbrustmacher had read to the judge correspondence that plaintiff had directed to the State Bar about the judge. Plaintiff claims that the judge became upset upon hearing Ms. Armbrustmacher's report, which prejudiced him at the time of sentencing.

After the June 26, 2002 hearing, plaintiff filed a request **[*8]** for investigation with the JTC with regard to Judge Avadenka's alleged conduct. The present record discloses little about that proceeding, except that the JTC did not issue a complaint against the judge. On November 5, 2003, plaintiff caused a subpoena to be issued by the Clerk of this Court to the Judicial Tenure Commission, seeking "any and all information" concerning the investigation of Judge Avadenka "including but not limited to any and all information concerning communications between the Hon. Edward Avadenka and Diane VanAken, Nicole Armbrustmacher, or Thomas Ryan concerning Frank J. Lawrence, Jr." The JTC has filed a motion to quash the subpoena, asserting that its files are privileged from discovery under Michigan Court Rule 9.221 and that certain analytical documents are further protected by the deliberative process privilege. Plaintiff argues that the state court rule does not create an evidentiary privilege and, in any event, that any state-law privilege should not be recognized by the federal courts. With respect to the deliberative process privilege, plaintiff has clarified his request to say that he is not interested in deliberative process materials, but only in witness **[*9]** statements and other factual materials. In support of his need for such information, plaintiff asserts that he has been given voluntary access to the State Bar's file on this matter, "which contains meticulous notations concerning conversations that defendant Armbrustmacher had with individuals about Plaintiff -- except any notes concerning Judge Avadenka." (Plf. Response, docket # 111, at 5-6). Plaintiff therefore asserts that the files of the JTC may contain the only roughly contemporaneous evidence of the content of the discussions between Ms. Armbrustmacher and Judge Avadenka.

Discussion

Rule 501 of the Federal Rules of Evidence governs *HN1* the recognition of privileges in cases pending in the United States District Courts. With regard to diversity cases, where the rule of decision is provided by state law, Rule 501 directs the district court to apply state law to questions of privileges. In federal question cases, the courts are to be guided by the common law of privileges, interpreted "in the light of reason and experience." FED. R. EVID. 501. Rule 501 was not intended to freeze the common law governing **[*10]** privileges in federal trials at a particular point in history, but rather directed federal courts to "continue the evolutionary development of testimony of privileges." *See Jaffee v. Redmond,* 518 U.S. 1, 8-9, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996). To be recognized, the asserted privilege must serve some public interest "transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel v. United States,* 445 U.S. 40, 50, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980). Furthermore, the proposed privilege must promote a public interest "sufficiently important ... to outweigh the need for probative evidence." *Id.* at 51; *see Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.,* 332 F.3d 976, 980 (6th

Cir. 2003). When examining a claim of privilege, the Supreme Court starts with the "primary assumption" that there is a general duty to give testimony and that any exemptions "are distinctly exceptional, being so many derogations from a positive general rule." *Jaffee,* 518 U.S. at 9 (quoting *United States v. Bryan,* 339 U.S. 323, 331, 94 L. Ed. 884, 70 S. Ct. 724 (1950)).

In the present case, **[*11]** the JTC claims two privileges: a general privilege created by Mich. Ct. R. 9.221 allegedly covering all contents of the Commission's files and the deliberative process privilege, covering only deliberative materials. Each alleged privilege will be examined in turn.

1.

As noted above, state-law privileges do not automatically apply in federal question cases. For example, the federal courts generally refuse to recognize an accountant-client privilege, although many states have created such a privilege either by statute or common law. *See generally United States v. Arthur Young & Co.,* 465 U.S. 805, 817, 79 L. Ed. 2d 826, 104 S. Ct. 1495 (1984). Consequently, *HN2*when faced with the assertion of a state-law privilege in a federal question case, the federal courts are required to determine (1) whether state law recognizes the evidentiary privilege asserted and (2) if so, whether the privilege is weighty enough under the principles enunciated by the Supreme Court to merit recognition under federal common law.

The JTC relies on the following court rule, promulgated by the Michigan Supreme Court, as the source of its claim of privilege:

*HN3***RULE 9.221 CONFIDENTIALITY; DISCLOSURE**

> **[*12]**
>
> **(A) Before Complaint.** Before a complaint is filed, a member of the commission or its staff may not disclose the existence or contents of the investigation, testimony taken, or papers filed in it, but the commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to the fact that
>
> (1) there is an investigation pending, or
>
> (2) the investigation is complete and there is insufficient evidence for the commission to file a complaint.
>
> **(B) After Filing of Complaint.** After the complaint is filed, the proceedings are available for public inspection and must be conducted in open public hearings.
>
> **(C) Consent of Judge.** On the written consent of a judge who is being investigated, the commission may disclose matters relating to the investigation, notwithstanding the prohibitions against disclosure set forth in this rule.
>
> **(D) Disclosure to State Court Administrator.**
>
> (1) The commission may refer to the state court administrator requests for investigation and other communications received by the commission concerning the conduct of a judge if, in the opinion of **[*13]** the commission, the communications are properly within the scope of the duties of the administrator. The commission may provide the administrator with files, records, investigations,

and reports of the commission relating to the matter. Such a referral does not preclude action by the commission if the judge's conduct is of such a nature as to constitute grounds for action by the commission, or cannot be adequately resolved or corrected by action of the administrator.

(2) The commission may disclose to the administrator, upon request, the substance of files and records of the commission concerning a former judge who has been or may be assigned judicial duties by the administrator; a copy of the information disclosed must be furnished to the judge.

(E) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const. 1963, art. 6, § 30, to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney **[*14]** Grievance Commission. In the event of a dispute concerning the release of information, the Attorney Grievance Commission may petition the Supreme Court for an order of disclosure, and the Judicial Tenure Commission may file a response.

MICH. CT. R. 9.221. n2

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n2 All citations to the Michigan Court Rules governing the JTC are to the rules as amended effective January 21, 2003. Before that date, the rule quoted above was numbered 9.222.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

On its face, Rule 9.221 creates a limited confidentiality interest in JTC proceedings. The rule forbids members of the Commission and its staff to disclose the existence or contents of an investigation and related information before a complaint is filed. This confidentiality is limited in time, because HN4 all proceedings are available for public inspection if and when a complaint is filed. MICH. CT. R. 9.221(B). Furthermore, the confidentiality of proceedings may be lifted altogether upon written consent of the respondent judge, MICH. CT. R. 9.221 (C), and, even in the absence **[*15]** of consent, the rule allows disclosure to other state administrative bodies. MICH. CT. R. 9.221(D), (E). Consistent with the language of the rule, the Michigan courts have stated that the purpose of the rule is to preserve confidentiality "to protect both the integrity of the investigation and the reputation of courts and judges involved until the Commission determines that formal proceedings are warranted." *In re Petition of Judicial Tenure Commission,* 649 N.W.2d 71 (Mich. 2002); *accord Czuprynski v. Bay Circuit Judge,* 166 Mich. App. 118, 420 N.W.2d 141, 143 (Mich. Ct. App. 1988) (under court rule, proceedings before the JTC are "confidential" prior to the issuance of a complaint); *see also In the Matter of Mikesell,* 396 Mich. 517, 243 N.W.2d 86, 94 (Mich. 1976) (confidentiality provisions of the rule designed to protect respondent judges, witnesses and citizen complainants).

Conspicuously absent from either the text of the rule or the Michigan cases decided thereunder is any indication that the rule creates an evidentiary privilege. The text of the rule does not mention the word "privilege," nor does it purport to make the files **[*16]** of the

JTC immune from discovery in a proper civil or criminal action. HN5"Statutory provisions providing for duties of confidentiality do not automatically imply the creation of evidentiary privileges binding on courts." *Pearson v. Miller,* 211 F.3d 57, 68 (3d Cir. 2000); *see Martin v. Lamb,* 122 F.R.D. 143, 146 (W.D.N.Y. 1988) ("Merely asserting that a state statute declares that the records in question are 'confidential' does not make out a sufficient claim that the records are 'privileged' within the meaning of Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 501.").

The HN6federal courts recognize, however, that state statutes creating a duty of confidentiality, but lacking an express provision for an evidentiary privilege, could nevertheless be construed by the state courts as implying an evidentiary privilege. *See Pearson,* 211 F.3d at 68. This does not appear to be the case with regard to Rule 9.221. The JTC has not cited, nor has independent research uncovered, any Michigan case in which the courts have found an evidentiary privilege protecting the files of the JTC **[*17]** arising from the confidentiality provisions of the rule.

When asked at oral argument to support the contention that the rule was intended to create an evidentiary privilege, the Assistant Attorney General pointed to the catch line of the rule. Even this assertion is unavailing, for two reasons. First, although the catch line of the rule formerly read "Confidentiality and Privilege of Proceedings," the amendments adopted in 2003 dropped all reference to any "privilege." The catch line of the rule now reads "Confidentiality; Disclosure." Consequently, to the extent that reliance on the rule's catch line had any persuasive effect, that effect disappeared one year ago. Second, HN7Michigan law uniformly holds that a title or catch line cannot limit the plain meaning of a provision's text. *See Schell v. Baker Furniture Co.,* 461 Mich. 502, 607 N.W.2d 358, 364 (Mich. 2000). The general provisions of the Michigan Court Rules of 1985 specifically provide that the catch lines of a rule "are not part of the rule and may not be used to construe the rule more broadly or more narrowly than the text indicates." MICH. CT. R. 1.106.

In summary, neither the text of the Michigan Court **[*18]** Rules nor cases decided thereunder support the existence of a state evidentiary privilege protecting the files of the JTC. Certainly, such investigation files are entitled to confidential treatment, but such confidentiality cannot impede the legitimate needs of the judicial truth-seeking process.

Even assuming that state law does (or would) accord some privilege to the JTC's records, the central question is whether the federal courts should recognize such a privilege in fashioning common law under Evidence Rule 501. Again, the JTC has not cited any federal decision recognizing such a privilege with regard to the judicial disciplinary proceedings under the law of any state, let alone Michigan. HN8When deciding whether to recognize a federal privilege, the Supreme Court finds it significant that the privilege finds widespread recognition in state statutory or common law. *See, e.g., Jaffee,* 518 U.S. at 12-13. By the same token, the Court considers the lack of a broad national consensus on the existence of a privilege to be a factor weighing against recognition. *See Arthur Young & Co.,* 465 U.S. at 817. In the present case, the JTC is, in essence, asking **[*19]** this court to fashion a new common-law privilege from whole cloth, in the absence of any appellate authority recognizing a federal privilege for judicial disciplinary proceedings in Michigan or any other state.

One searches in vain for an analogous situation in which the federal courts have recognized an evidentiary privilege. In Supreme Court jurisprudence, at least a rough analogy might be the claim of privilege asserted by universities against disclosure of peer review materials sought in discovery in connection with civil rights claims arising from tenure decisions. In that situation, the Supreme Court has soundly rejected the request to recognize such a privilege. *Univ. of Pa. v. EEOC,* 493 U.S. 182, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990). While recognizing the strong interest of the university in academic freedom and the desire to encourage candor in the tenure process, the court found that these considerations did not

meet the high standard for recognition of an evidentiary privilege. *Id.* at 193-95. Although it could be argued that the state's interest in regulating its judiciary is greater than its interest in regulating the tenured faculty **[*20]** of its universities, the Supreme Court's failure to give controlling weight to the need for candor in the tenure process in the *University of Pennsylvania* case is some indication that it would reject a similar argument in the judicial tenure arena. Professors Wright and Graham suggest that the rejection of a privilege for hospital and university tenure proceedings indicates that no such privilege should be recognized in the case of legal disciplinary matters. *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5431 at 825 (1980).

In an effort to fill this gaping hole in its argument, the JTC cites federal cases recognizing that certain state prosecutorial officers enjoy absolute, quasi-judicial immunity in federal civil rights cases. *See, e.g., Bush v. Rauch,* 38 F.3d 842 (6th Cir. 1994); *Sparks v. Character & Fitness Comm. of* Ky., 859 F.2d 428 (6th Cir. 1988). This proposition is unobjectionable, but irrelevant to the present dispute. ***HN9***The doctrine of absolute immunity creates an immunity from suit, not discovery. Plaintiff is not attempting to sue officers of the JTC, but merely seeks access to certain factual materials. **[*21]**

The JTC has failed in its burden to demonstrate the existence of an evidentiary privilege that has been, or should be, recognized by the federal courts under Rule 501. The court therefore rejects the JTC's claim of a blanket privilege protecting all its files.

2.

The JTC also invokes the deliberative process privilege, which stands upon much firmer ground. The federal courts have long recognized ***HN10***the deliberative process privilege, which covers "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975). The privilege rests on the realization that officials will not communicate candidly among themselves if their remarks are potential items of discovery. *Department of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8-9, 149 L. Ed. 2d 87, 121 S. Ct. 1060 (2001). Its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the government. *Id.; see EPA v. Mink,* 410 U.S. 73, 86-87, 35 L. Ed. 2d 119, 93 S. Ct. 827 (1973). **[*22]** Although the deliberative process privilege is most often invoked in FOIA cases, its application is not limited to FOIA actions. Rather, the deliberative process privilege is a well-established common law privilege applicable in both civil and criminal cases. *See, e.g., Hinckley v. United States,* 329 U.S. App. D.C. 315, 140 F.3d 277 (D.C. Cir. 1998).

HN11The deliberative process privilege generally protects only deliberative or policy-making documents, while leaving purely factual, investigative matters open for discovery. *See Mink,* 410 U.S. at 87-91. In the present case, the JTC has provided an affidavit from its Executive Director and General Counsel, Paul J. Fischer, disclosing that the agency's files normally consist of a copy of the grievance, investigative materials such as witness statements or notes, correspondence to or from the grievant, correspondence to or from the respondent judge, staff memoranda to the Commission, reports and recommendations prepared by the Commission or at its request, minutes of Commission meetings, and the votes of Commission members. (Aff., P 7). The deliberative process privilege would certainly protect from disclosure staff memoranda to the **[*23]** Commission, reports and recommendations prepared by or at the request of the Commission, and minutes or other documents reflecting the deliberations and votes of Commissioners. n3 By contrast, the privilege does not protect purely factual documents. Plaintiff has demonstrated a reasonable need, in the context of this case, for discovery of purely factual material in the JTC files reflecting statements, of witnesses concerning discussions between SBM employees and Judge Avadenka, the conduct

of Mr. Ryan, or concerning plaintiff himself.

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n3 At oral argument, plaintiff eschewed any attempt to seek discovery of these items.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The court therefore upholds the JTC's assertion of the deliberative process privilege, but will order the JTC to product to plaintiff all investigative and factual materials in the subpoenaed file. The confidentiality interest created by Mich. Ct. R. 9.221, as bolstered by Mr. Fischer's affidavit, establishes good cause for the entry of a confidentiality order protecting the use and dissemination **[*24]** of the subpoenaed material. In cases where privilege does not protect information from discovery, considerations of confidentiality and the potential for abuse of information will often provide good cause, FED. R. CIV. P. 26(c), for a confidentiality order limiting the dissemination and use of discovered material. *HN12* The courts are especially solicitous of claims of confidentiality made by third parties to litigation. *See Dart Indus. Co. v. Westwood Chem. Co.,* 649 F.2d 646, 649 (9th Cir. 1980).

The Third Circuit's decision in *Pearson v. Miller* is instructive. In that case, the court was faced with a request to recognize an evidentiary privilege arising from Pennsylvania statutes granting absolute confidentiality to documents related to the treatment of mental health problems and statutes granting protection to information regarding juveniles. After a thorough analysis of the issue under Rule 501, the court rejected the invitation to fashion a new common-law privilege. 211 F.3d at 65-72. The court went on to hold, however, that the state-created interest in confidentiality, while not rising to the dignity of a privilege, **[*25]** provided good cause supporting a protective order under Rule 26(c) preventing unlimited dissemination of the discovered material. 211 F.3d at 72-74. The same analysis applies to the present case, as the JTC and the State of Michigan have a clear confidentiality interest in JTC proceedings.

Finding good cause to limit the dissemination and use of the subpoenaed material, the court will order its production subject to a confidentiality order. The order will require plaintiff to hold all subpoenaed materials in confidence and not disclose them to any other person, without permission of the JTC or leave of court. The confidentiality order will further limit plaintiff's use of the subpoenaed material to the preparation, litigation, trial and appeal of this matter only. Of course, all parties remain free to petition the court for greater restrictions or, if a particular document does not appear sensitive, to relax the restrictions of the confidentiality order with regard to that document. "It is well-established that *HN13* a district court retains the power to modify or lift confidentiality orders that it has entered." *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 784 (3d Cir. 1994). **[*26]**

Conclusion

For the reasons set forth above, the motion of the Michigan Judicial Tenure Commission for a protective order will be granted in part and denied in part.

Dated: January 14, 2004

/s/ Joseph G. Scoville

United States Magistrate Judge

DISCOVERY ORDER

In accordance with the opinion issued this date:

IT IS ORDERED that the motion of third party Michigan Judicial Tenure Commission to quash subpoena and for protective order (docket # 98) be and hereby is GRANTED IN PART AND DENIED IN PART as follows:

A. The assertion by the Judicial Tenure Commission of a blanket privilege protective all subpoenaed documents is OVERRULED.

B. The assertion by the Judicial Tenure Commission of the deliberative process privilege protecting documents reflecting the deliberative and decisional processes of the agency is SUSTAINED.

C. The Judicial Tenure Commission shall produce for inspection and copying by plaintiff all memoranda of interview and other factual materials generated in investigation no. 02-14077 reflecting communications between the Honorable Edward Avadenka and Diane VanAken, Nicole Armbrustmacher, or Thomas Ryan concerning Frank J. Lawrence, Jr. **[*27]**

IT IS FURTHER ORDERED that all documents, and information contained therein, produced to plaintiff pursuant to this order shall be held by plaintiff in confidence and shall not be divulged to any other person. Plaintiff may use said documents and information for purposes of preparation, litigation, trial and appeal of this action, and for no other purpose. This confidentiality order may be modified by written stipulation between plaintiff and the Judicial Tenure Commission or by order of court, after notice to all parties.

DONE AND ORDERED this 14th day of January, 2004.

/s/ Joseph G. Scoville

United States Magistrate Judge

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