

STATE OF MINNESOTA  
COUNTY OF RAMSEY

DISTRICT COURT  
SECOND JUDICIAL DISTRICT

Case Type: Employment

Court File No. C4-04-12239

Clifford L. Whitaker and  
Michael V. Mucci,  
on behalf of themselves  
and all others similarly situated,

Plaintiffs,

v.

3M Company,

Defendant.

**MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR A PROTECTIVE ORDER  
PRESERVING ANONYMITY OF  
CERTAIN CLIENTS**

**INTRODUCTION**

In the course of normal discovery, Defendant 3M served the Named Plaintiffs with its First Set of Interrogatories, which included two standard requests seeking the identification of individuals with knowledge about the case and individuals with whom the Named Plaintiffs have communicated regarding the allegations made in their Complaint. The Named Plaintiffs interpreted the request broadly enough to list over 450 individuals, including individuals with whom Sprenger & Lang ("S&L") has had various degrees of contact. S&L, however, has determined, for reasons still not fully articulated, that it does not have to identify at least five individuals who indisputably provided S&L with relating to their age issues in employment at 3M. 3M has a right to the information because identities of clients have not been found to be the kinds of "secrets" and "confidences" protected from disclosure under the Minnesota Rules of Professional Conduct and because such information is discoverable. 3M has a need for such information because, by definition, information that S&L possesses and does not want to divulge is very likely to be the most helpful or important to the defense of this case. Further, not

knowing the identity of employees with connections to S&L puts 3M at risk of exposing confidential and privileged communications (including communications about this very litigation) and of engaging in what later could be claimed to be improper *ex parte* contacts with represented parties or putative class members. The Named Plaintiffs have not demonstrated good cause for a protective order precluding discovery of this relevant information, and their Motion should be denied.

### BACKGROUND

The discovery requests at issue in this Motion seek the identification of individuals with knowledge about the case and individuals with whom the Named Plaintiffs have communicated regarding this case and a description of knowledge each identified person has (or claims to have).<sup>1</sup> Although the Named Plaintiffs lodged various general objections to these requests, they responded by identifying over 450 purportedly responsive names and other identifying information. See Pls.' Mem. Supp. Mot. Prot. Order at 3.

The Named Plaintiffs selectively withheld, however, the names of various "former and prospective clients," objecting to 3M's discovery requests to the extent they require the disclosure of the identities of these clients. The Named Plaintiffs seek to shield the disclosure of this information by invoking the protection of Minnesota Rule of Professional Conduct 1.6. and of Minnesota Rule of Civil Procedure 26.03.

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<sup>1</sup> The relevant text of these interrogatories is set forth in Plaintiff's Memorandum at page 3. 3M also served related document requests, which the Named Plaintiffs do not mention. Thus, 3M seeks not only the identification of the five "secret clients," but also any documents the Named Plaintiffs may be withholding based on the same objection.

## ARGUMENT

### I. IDENTIFYING THESE CLIENTS WILL LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE, PROTECT 3M'S CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS, AND AVOID LATER CLAIMS OF IMPROPER, *EX PARTE* CONTACT.

There is no question that any individual who is responsive to the interrogatories at issue here is likely to have non-privileged information that is relevant to this matter or would likely lead to the discovery of admissible evidence. The Named Plaintiffs clearly acknowledge as much by identifying over 450 such individuals, over 170 of whom allegedly are people who contacted S&L to discuss this case. Some or all of these individuals very well may have information that is *detrimental* to the Named Plaintiffs and their case against 3M and, if so, 3M is entitled to explore that information. This information certainly is within Rule 26.

Indeed, the very same issue arose in Arnold v. Cargill, Inc., another class action case involving S&L. There, S&L's contact with the same type of prospective "secret" client eventually led to the firm's disqualification as class counsel, but only after the defendant employer overcame a spurious assertion of attorney-client privilege raised by S&L to protect the nature of its contacts with this secret client (a former, high-ranking human resources executive) from legitimate scrutiny. See 2004 WL 2203410 (D. Minn. Sept. 24, 2004); Arnold v. Cargill, Inc., Civil File No. 01-2086 (DWF/AJB), Order Overcoming Attorney-Client Privilege (D. Minn. June 3, 2003) (attached as Exs. A & B, respectively, to the accompanying Affidavit of Michael Iwan regarding Plaintiffs' Motion for a Protective Order Preserving Anonymity of Certain Clients ("Iwan Aff.")). There are clearly very legitimate reasons for 3M to seek this information.

**II. THE NAMED PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT CLIENT IDENTITIES CONSTITUTE “SECRETS” UNDER MINNESOTA RULE OF PROFESSIONAL CONDUCT 1.6.**

**A. The Identities Of The “Secret Clients” Are Not Protected Under Rule 1.6.**

The Named Plaintiffs seek to sweep the identities of the “former and prospective clients” under the protection of Rule 1.6 by claiming they are “secret.” The Named Plaintiffs concede that no Minnesota court has ruled on the question of whether a client’s mere identity falls under the protection of Rule 1.6. It is clear, however, that identity can only be protected from disclosure by 1.6 under limited circumstances such as where a client’s name is intertwined with confidential information or is the “last link” that ties a particular client to a crime. See Annotated Model Rules of Professional Conduct, 83 (4th ed. 1999), quoting Alexiou v. United States, 39 F.3d 973 (9th Cir. 1994). The Named Plaintiffs’ own case citations<sup>2</sup> reveal the limited nature of protection Rule 1.6 offers to the protection of mere identity: “Rule 1.6(a)...*may* include the identity of a client,” “[t]he client’s identity *may* be entitled to protection under Rule 1.6,” “*under some circumstances...these rules prohibit the lawyer from revealing the identity of the would-be client.*” Pls.’ Mem. at 6-7 (emphasis added).

While certainly there are circumstances where client identity may constitute privileged and confidential information under Rule 1.6, these circumstances are exceptions to the general rule that a client’s identity is not privileged and, regardless, those circumstances are not present here. In United States v. Sindel, the Eighth Circuit held that the attorney-client privilege “ordinarily *does not* apply to client identity.” See 53 F.3d 874, 876 (8th Cir. 1995) (emphasis added), citing In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986); In re Grand Jury Subpoenas, 906 F.2d 1485, 1488 (10th Cir. 1990). In Sindel, the Eighth Circuit identified only

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<sup>2</sup> The Named Plaintiffs fail to cite any Minnesota or Eighth Circuit authority in support of their argument.

three “special circumstance” exceptions to this rule: the legal advice exception, the last link exception, and the confidential communications exception.<sup>3</sup> See id.

None of the special circumstance exceptions laid out in Sindel applies in this case. The legal advice exception protects client identity only where “there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought.” See Sindel, 53 F.3d at 876. Similarly, the last link exception prevents disclosure of client identity “when it would incriminate the client by providing the last link in an existing chain of evidence.” See id. Obviously, this case does not involve criminal charges of any kind; thus, these “special circumstances” are not applicable. The confidential communications exception also is irrelevant, as disclosure of the “secret clients” mere identities would not reveal “the substance of a confidential communication.” See id. Thus, because the Named Plaintiffs fail to allege any facts that would constitute “special circumstances” sufficient to invoke the protection of Rule 1.6, their motion should be denied.

**B. The Actions Of The Named Plaintiffs’ Counsel Clearly Demonstrate Awareness That Rule 1.6 Does Not Protect Client Identities.**

Even if Rule 1.6 could shield the disclosure of identity in some circumstances, the Court should not allow the Named Plaintiffs to invoke that protection in this case. It is clear that the

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<sup>3</sup> See also Lefcourt P.C. v. United States, 125 F.3d 79, 88 (2d Cir. 1997), cert. denied, 857 U.S. 937 (1998) (holding the client’s identities were not privileged because no special circumstances laid out in Sindel were present); Alexiou, 39 F.3d at 976 (holding that client identity is only protected if the client’s identity is intertwined with confidential information or would provide the last link to tie the client to a crime); U.S. v. Goldberg & Dublin, P.C., 935 F.2d 501, 505 (2d Cir. 1991) (holding that absent special circumstances, a client’s identity is not privileged); U.S. v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992) (same); Splash Design, Inc. v. Lee, 14 P.3d 879, 883 (Wash. Ct. App. 2001) (“[o]rdinarily a client’s identity does not fall within the purview of the attorney-client privilege unless there is a strong probability that disclosure would convey the substance of confidential communications between the client and attorney”); In re Mendel, 897 P.2d 68 (Ala. 1995) (holding that contempt citation was inappropriate for an attorney who refused to reveal the identity of his client, a mother in hiding with her children, because the information requested was not relevant to the case at bar and did not involve a crime or fraud which would abrogate the attorney-client privilege).

Named Plaintiffs' counsel is well aware that Rule 1.6 would not protect the disclosure of identities of individuals who contacted them to discuss this case. Indeed, the Named Plaintiffs concede as much in their brief, noting that counsel makes at least two affirmative representations to prospective clients that their identities likely *will not* remain confidential. First, class counsels' case website specifically informs individuals who contact Sprenger & Lang ("S&L") that "*it is likely* that we will have to reveal your name and contact information if 3M asks us for the identity of all persons of whom we are aware who have knowledge concerning the allegations in the complaint." See Pls.' Mem. at 2 (emphasis added). Indeed, that is exactly the request 3M made in this case to which the Named Plaintiffs now object. The website disclaimer goes on to state that S&L "will keep the substance of the information that you provide to us confidential." See id. By this statement, counsel admits that Rule 1.6 distinguishes the *substance* of a client communication from the mere *identity* of the client.

If an individual still decides to contact S&L, counsel again informs the individual that their identities likely will be disclosed. See id. Thus, by the Named Plaintiffs' own admission, the "former and prospective clients" were well aware that their identities would be disclosed. Indeed, at least Clients A, B, D, and E are said to have had substantive discussions either in person or via telephone with S&L knowing their identity could be disclosed. See id. at 4-5. These individuals cannot now claim, after the fact, that their identities should be kept secret.

The Named Plaintiffs' argument that Rule 1.6 protects the identities of these "secret clients" is also at odds with the fact that they boast about having identified "over 450 names and other identifying information to 3M and its counsel." See id. at 3. The Named Plaintiffs argue that identification of the "secret clients" may expose them to a subpoena for a deposition or production of documents. Presumably many individuals who contacted S&L would rather not be

identified or be subject to a subpoena, but expressing a desire not to be identified to opposing counsel does not mean, *ipso facto*, that they can be immune from normal discovery and fact gathering. Moreover, *all* of the individuals identified, whether current employees or not, could be subject to a subpoena.<sup>4</sup>

The Named Plaintiffs also argue that the “secret clients” fear adverse consequences or retaliation. While 3M strongly disputes the inference that it would take any adverse action against an individual for making a claim in this lawsuit, presumably the same argument regarding fear of retaliation *could* be made for the hundreds of other 3M current employees the Named Plaintiffs already have identified. Essentially, the Named Plaintiffs seek to use Rule 1.6 as both a sword and a shield, identifying those individuals who it deems helpful while refusing to identify other individuals who may have information that does not support their case.

**C. There is no evidence that at least four of the five “secret clients” specifically directed the Named Plaintiffs’ counsel to withhold their identity.**

The Named Plaintiffs’ entire argument that the identities of the five “secret clients” should be protected from disclosure by Rule 1.6 relies on the unsupported assertion that “each of [the clients] further indicated a desire that plaintiffs’ counsel preserve their anonymity” See Pls.’ Mem. at 7. A close reading of the Affidavit of Susan M. Coler In Support of Plaintiffs’ Motion for a protective Order (“Coler Aff.”) reveals that, even by S&L’s own description of events, *only one* of the five individuals specifically requested that their identities not be revealed.

No mention is made in the Coler Aff. of a request by Client A to keep his/her identity secret. By contrast, Client B is said to have given “specific directions to . . . maintain the secrecy of [his/her] identity,” but those apparently were given well before this current lawsuit was even filed. See Coler Aff. at ¶ 7. It is unclear from the Coler Aff. whether S&L has had any

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<sup>4</sup> Indeed, one does not have to be identified in the Named Plaintiffs’ discovery to be subject to a subpoena.

communications with Client B since the filing of this lawsuit, but regardless the circumstances are substantially changed from whenever Client B expressed his/her desire not to be named. The Coler Aff. contains no statement that either Client C or D asked for their identities to remain secret. See id. ¶¶ 8, 9. Client E is said to have merely “*indicated* a desire to remain anonymous.” See id. ¶ 10 (emphasis added). The Named Plaintiffs’ unsupported statement that all five individuals indicated a desire to remain anonymous should be disregarded.

The Named Plaintiffs also broadly assert that the five clients withdrew from communications with S&L based on fears of adverse consequences or retaliation by 3M, but again there is no such assertion made in the specific descriptions given for each of the five “secret clients.”<sup>5</sup> Compare Pls.’ Mem. at 5 with Coler Aff. Indeed, the stated reason for why Client A withdrew from communication was that “plaintiffs might not be able to keep his name confidential.” See Pls.’ Mem. at 4, Coler Aff. at ¶ 6. Client A, moreover, is a former employee who cannot have any reasonable fear of employment retaliation by 3M, nor have the Named Plaintiffs’ explained what kind of retaliatory action 3M could take with respect to such former employees. See Coler Aff. ¶ 6.

Similarly, no statement is attributed to Client B in the Coler Aff. regarding a fear of retaliation. See id. ¶ 7. By the Named Plaintiffs’ own admission, Clients C and D both cut off communications with S&L without any explanation. S&L never even communicated in person or via telephone with Client C – indeed, his or her only communication with S&L apparently was a single e-mail requesting information. After S&L responded, Client C withdrew from

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<sup>5</sup> The Named Plaintiffs correctly predicted that 3M would question the reasonableness of any of these individual claims of fear of retaliation. See Pls.’ Mem. at 8. Despite foreseeing this challenge, the Named Plaintiffs failed to provide any facts to support the otherwise wholly subjective (and truly unreasonable) concerns allegedly expressed by at least some of the Clients A – E. The alleged fear of retaliation also is not reasonable given that S&L has identified 450 other individuals, including numerous current or former 3M employees, none of whom have been the subject of any retaliation following their identification.

communications. Pls.' Mem. at 5; Coler Aff. at ¶ 8. Similarly, Client D withdrew from communications with S&L after one interview with the firm. See Pls.' Mem. at 5; Coler Aff. at ¶ 9. Client E is both a former employee and a release-signer, negating any reasonable basis for fearing retaliation, in addition to the fact that no such concern is actually attributed to Client E in the Coler Aff. See Coler Aff. ¶ 10.

Even if it were relevant, the claims of a desire to remain anonymous or a fear of retaliation are largely unsupported in the record offered by the Named Plaintiffs' and their counsel, and should be viewed with a jaundiced eye. It could just as easily be the case that these "secret clients" discontinued contact with S&L because, after learning more about this lawsuit, they disagreed with and did not want to be associated with it – exactly the kinds of people that 3M would have an interest in learning about and S&L would have an interest in keeping secret. Regardless, if these individuals really have or had such a strong desire for anonymity, they should have been disabused of that result by Sprenger & Lang as early in the course of communications as possible. As part of their ethical obligations to deal fairly with unrepresented parties and/or provide all material information to clients, S&L could not have promised Clients A, B, C, D, & E the kind of anonymity S&L now seeks on their behalf. See, e.g., Minn. R. Prof. Conduct 1.4, 1.7, 4.1, & 4.3.

**III. THE NAMED PLAINTIFFS FAIL TO ESTABLISH FACTS THAT WARRANT AN ORDER THAT DISCOVERY NOT BE HAD UNDER MINN. R. CIV. P. 26.03.**

An order that discovery not be had under Minnesota Rule of Civil Procedure 26.03 would be unnecessary and unwarranted in this case. Rule 26.03 allows a court to modify, partially grant, or deny discovery requests that would be an "annoyance, embarrassment, oppression, or undue burden or expense" to the party. Here there is no evidence or authority supporting an order that discovery not be had.

The Named Plaintiffs cite Seattle Times Co. v. Rhinehart as authority for the proposition that they should be protected from divulging the identities of the "secret clients" in response to 3M's discovery requests. Pls.' Mem. at 8. In quoting Seattle Times, however, the Named Plaintiffs fail to include the court's limiting preamble that the purpose of Rule 26 is to protect a party or person "from annoyance, embarrassment, oppression or undue burden or expense." 467 U.S. 20, 35, n.21 (1984). The facts of Seattle Times are distinguishable. In that case, a newspaper printed "fictional and untrue" articles about plaintiffs and allegedly harassed plaintiffs by sending letters, death threats, and telephone calls defaming them. See id. at 26. Thus, the plaintiffs already had been victims of embarrassment and oppression by the defendant. Here, however, there is no assertion that 3M has threatened, embarrassed, or taken any adverse action against the "secret clients," and 3M certainly will not do so in the future. The Named Plaintiffs' concern that disclosure of their identities would lead to retaliation also is unfounded; they provide no authority supporting their conclusion that disclosure of identities would lead to retaliation and merely point to the unsupported fears of the individuals involved.

The Named Plaintiffs also cite Brennan v. Engineered Prods., Inc. and Donovan v. First Federal Savings & Loan Ass'n to support withholding the identities of the "secret clients." The Named Plaintiffs cherry pick a quotation seemingly helpful to their argument while failing to provide any context for that quotation. In fact, neither Brennan nor Donovan have any application to the case at bar. Both cases involved the Fair Labor Standards Act ("FLSA") "informer's privilege" that allows the Secretary for the Department of Labor to withhold the identities of individuals who have provided information to the Department in the context of FLSA enforcement actions. See id. 506 F.2d 299, 302 (8th Cir. 1974); 1982 U.S. Dist. LEXIS 12789, \*3 (S.D. Iowa Mar. 31, 1982). Indeed, the Named Plaintiffs fail to disclose to this Court

that the “informer’s privilege” discussed in Brennan and Donovan is limited to employees “exercising their constitutional and statutory right to present their grievances *to the government.*” 506 F.2d at 302 (emphasis added). No such facts exist here and, therefore, the Named Plaintiffs’ argument regarding these cases can be disregarded.

Lastly, the Named Plaintiffs also complain that allowing disclosure of the identities of these individuals may have a “chilling effect” on potential class members’ ability to obtain information about the case. This argument is entirely inconsistent with S&L’s personal warnings to individuals who call them and their own case website’s warning that individuals contacting putative class counsel will have their identities revealed to 3M. There is simply no evidence of any such “chilling effect” in this case.

The Named Plaintiffs’ proposal that they will identify only those persons “who are potential witnesses” and not to solicit information from clients whose identity is not disclosed or seek to call them as witnesses is not adequate. See Pls.’ Mem. at 10. The Named Plaintiffs seek to set up a system by which S&L can screen putative class members and only identify those individuals who would offer helpful information to the Named Plaintiffs’ case while placing other individuals who would not provide helpful testimony off limits simply by deeming them to be anonymous clients. This proposal again boils down to using Rule 1.6 as both a sword and a shield, and it should not be allowed. As explained more thoroughly above, 3M should be able to explore the knowledge of the “secret clients” and the reasons why they cut off communications with S&L. The Named Plaintiffs should not be able to limit their response to interrogatories seeking identification of all persons with knowledge of any issues in the case to only those individuals who they deems to be allied witnesses.

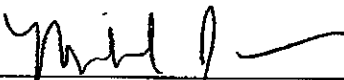
## CONCLUSION

The mere identities of the "secret clients" at issue simply are not confidential and privileged information protected under Rule 1.6, absent special circumstances which are indisputably not present here. Furthermore, the actions of the Named Plaintiffs' counsel clearly demonstrate their awareness that Rule 1.6 does not protect the identities of these individuals and there is no evidence that several of these individuals even asked the Named Plaintiffs' counsel to withhold their identity. The Named Plaintiffs' selective disclosure of individuals where it suits their needs is an attempt to utilize Rule 1.6 as both a sword and a shield, and it should not be allowed. The Named Plaintiffs also fail to establish facts that would warrant a protective order under Minnesota Rule of Civil Procedure 26.03, as disclosure of the identities of these "secret clients" would not result in "annoyance, embarrassment, oppression, or undue burden or expense." For all the foregoing reasons, the Named Plaintiffs' motion should be denied.

Dated: July 5, 2005

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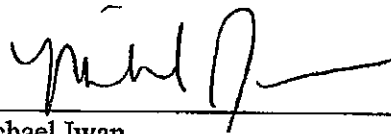
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**ACKNOWLEDGMENT**

The undersigned hereby acknowledges that sanctions may be imposed under  
Minn. Stat. § 549.211.

DORSEY & WHITNEY LLP

A handwritten signature in black ink, appearing to read "Michael Iwan", is written over a horizontal line.

Michael Iwan