

STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Plaintiffs,

vs.

3M Company,

Defendant.

Court File No. 62-C4-04-012239

[T. Warner]

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

[Class Action]

INTRODUCTION

The Court should grant plaintiffs' Motion for a Protective Order Preserving Anonymity of Certain Clients because Minnesota Rule of Professional Conduct 1.6 ("Minn. Rule 1.6") requires plaintiffs' counsel to hold the identities of clients inviolate when those clients indicate a desire to have their identities kept secret. 3M relies on inapposite case law in support of its flawed argument that identities may not be held secret under Minn. Rule 1.6 and fails to demonstrate that discovery of the anonymous client's identities is warranted. Granting plaintiffs' motion will not prejudice 3M and may avert harm to the anonymous clients.

I. MINN. RULE 1.6 ENCOMPASSES CLIENT IDENTITIES

3M wrongly argues that Minn. Rule 1.6 does not encompass the identities of the anonymous clients. Its argument claims to interpret Minn. Rule 1.6 by relying on attorney-client privilege case law and on materials construing ABA Model Rule 1.6. None of this supposed authority is apposite.

When Minnesota replaced the Code of Professional Responsibility with the Rules of Professional Conduct in 1985, it was one of a small number of states that chose to base Rule 1.6

on the ABA's former model Code rather than its new model Rule. See <http://www.law.cornell.edu/ethics/comparative/> (listing 15 states with a version of Rule 1.6 based on the model Rules compared to three with a version of Rule 1.6 based on the model Code). Minnesota, like the former model Code, explains in a comment to Minn. Rule 1.6, "[t]he attorney-client privilege is more limited than the lawyer's ethical obligation to guard the client's confidences and secrets." Stated conversely, plaintiffs' counsel's obligations under Minn. Rule 1.6 are broader than the attorney-client privilege. Thus, plaintiffs' counsel are not relieved of their burden to hold their client's identities inviolate when the attorney-client privilege does not apply.

Even the ABA's model Rule version of 1.6 provides greater protection to client identities than does attorney-client privilege. 3M relies on the fourth edition of the Annotated Model Rules of Professional Conduct, which states, "The scope of the Rule is broad enough to support the contention that a client's identity under some circumstances must not be disclosed." Reply Affidavit of Susan M. Coler in Support of Plaintiffs' Motion for a Protective Order Preserving Anonymity of Certain Clients, Ex. 1. 3M does not tell the Court that the current version of the Annotated Model Rules of Professional Conduct, the fifth edition, is far broader: "Rule 1.6 generally prohibits the disclosure of a client's identity ... unless the client consents or the disclosure is impliedly authorized to effectuate the representation." Coler Reply Aff., Ex. 2.¹

All but two of the cases 3M cites in support of its argument do not analyze or evaluate even the ABA's recommended version of Rule 1.6, let alone Minnesota's version. Instead, these cases' holdings are premised on the attorney-client privilege. See, e.g., *Alexiou v. United States*,

¹ The protections given to client identity by courts and the ABA interpreting model Rule 1.6 would certainly apply under the greater protections afforded client secrets by Minn. Rule 1.6.

39 F.3d 973, 975 (9th Cir. 1994) (ruling on attorney's motion to quash a subpoena seeking client's identity based on the attorney-client privilege only).²

One of the two cases on which 3M relies that does discuss a version of Rule 1.6 – Missouri's version, which is modeled on the ABA's model Rule – supports plaintiffs' position that their counsel should not be forced to reveal the identities of clients who request anonymity. In *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995), the IRS summoned an attorney to provide the names of two clients who had engaged in cash transactions in excess of \$10,000, as required by statute. The Eighth Circuit first held that the lawyer could withhold the name of one of the two clients based on attorney-client privilege. *Id.* at 876. Referring to Missouri Rule 1.6, it went on, "The Missouri Rules of Professional Conduct appear on their face to extend somewhat broader protection to client identi[t]y ... than does the federal common law of attorney-client privilege." *Id.* at 876-77. However, it held that federal law preempted this broader protection in the context of the tax statute: "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of 26 U.S.C. § 6050L." *Id.* at 877. No federal law applies in this case. The protections afforded by Minn. Rule 1.6 to client identity govern.

The only other decision cited by 3M that addresses Rule 1.6, *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1488 (10th Cir. 1999), is readily distinguishable. The court held that counsel was not required to maintain the secrecy of his client's identity because an exception under the ABA's as well as Minnesota's version of Rule 1.6 – an attorney may disclose his

² See also *Lefcourt v. United States*, 125 F.3d 79, 88 (2d Cir. 1997) (analyzing ability to maintain secrecy of client's identity under the attorney-client privilege); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992) (same); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 505 (2d Cir. 1991) (same); *In re Grand Jury Proceedings* (791 F.2d 663, 665 (8th Cir. 1986) (holding that the information sought was neither confidential nor protected by the attorney-client privilege).

client's secrets when compelled by law – governed. In this case, plaintiffs' counsel have not been compelled by law to reveal their clients' identities and as discussed in plaintiffs' opening memorandum and below, no reason exists for this Court to compel plaintiffs' counsel to do so.³

In sum, plaintiffs' counsel's obligations under Minn. Rule 1.6 are broader than the attorney-client privilege. As argued in the next section, these obligations extend to preservation of the anonymity of the clients whose identities are the subject of the motion.

II. PLAINTIFFS' COUNSEL IS OBLIGATED TO COMPLY WITH MINN. RULE 1.6 WHENEVER A CLIENT REQUESTS THAT SECRETS BE HELD INVIOLATE.

3M's argument that plaintiffs' counsel have an "awareness that Rule 1.6 does not protect client identities" is puzzling. If counsel had added to their website's confidentiality warning the advice that callers only needed to ask for secrecy and it would be provided, a great number of persons undoubtedly would have asked and the Court would have had no reason to take the many requests seriously. Nothing on the website prevented persons from asking that counsel attempt to keep their identities secret, and presumably only persons who were seriously concerned made such a request.

³ 3M's reference to the *Cargill* case at page 3 of its memorandum requires special treatment. The *Cargill* opinions that 3M cites have nothing to do with maintaining the anonymity of a client who has requested that his identity be kept secret and who has no active involvement in a case. Plaintiffs already had disclosed client identities in *Cargill* prior to the issuance of the two opinions cited to the Court. 3M references a "spurious assertion of attorney-client privilege" in *Cargill*. To the contrary, the opinion found at Ex. B of the Iwan Affidavit is an order *overcoming* attorney-client privilege for purposes of the deposition of a former client. If the assertion of privilege were spurious, there would have been nothing to overcome. 3M cites nothing from the opinion found at Ex. A of the Iwan Affidavit, which disqualifies Sprenger & Lang from the *Cargill* case. Indeed neither opinion sheds any light on the issues in this motion. Given that the opinions 3M attached have no bearing on the issues and are not cited as any authority, plaintiffs can only assume that 3M fabricated a "spurious" connection between the *Cargill* case and the issues here and provided the two opinions to the Court in a distasteful attempt to influence negatively the Court's view of plaintiffs' counsel.

Regardless what language plaintiffs' counsel may have used on the website, the language actually used regarding the discoverability of contacts' identities cannot override counsel's obligations under Minn. Rule 1.6, which defines a "secret" as information that the client "has requested be held inviolate." (emphasis added). It is the fact that the five anonymous clients indicated to counsel their desire for anonymity that brings the rule into play.⁴ Plaintiffs' counsel could produce the identities of other prospective clients consistently with their obligations under Minn. Rule 1.6 because those clients, even if they do fear retaliation by 3M, did not indicate a desire to remain anonymous.⁵

3M's argument that plaintiffs' counsel could not have promised its clients anonymity also is unavailing. Minn. Rule 1.6 does not require a promise of anonymity. Absent any of the circumstances described in Minn. Rule 1.6(b), plaintiffs' counsel must respect the obligations imposed by the rule and have brought this motion pursuant to those obligations.

Finally, 3M inappropriately accuses plaintiffs' counsel of selecting clients for anonymity because they have information that is detrimental to the plaintiffs' case. Def. Mem. at 9. This accusation flies in the face of plaintiffs' counsel's statements that the clients for whom this motion is brought are those who requested or indicated their desire for anonymity, and that each of them stated that their reason for withdrawing from active involvement in the lawsuit was a fear of adverse consequences or retaliation by 3M. *See Coler Aff.*, ¶¶ 5-11. Nothing in the record warrants 3M's unsupported and unsupportable suggestion that plaintiffs' counsel are lying

⁴ Plaintiffs do not argue that the mere exchange of information between prospective clients implicates Minn. Rule 1.6, as 3M suggests plaintiffs argue.

⁵Not every individual who contacts plaintiffs' counsel with regard to this case becomes a client or prospective client. Several individuals have contacted plaintiffs' counsel for the sole purpose of offering information as opposed to obtaining legal advice. The warnings about confidentiality are useful to them as well. As 3M has aptly noted, the ethical rules also require plaintiffs' counsel to deal fairly with unrepresented parties. Minn. R. Pro. Conduct 4.3.

to the Court about their interactions with these individuals. Nothing in the record remotely suggests that plaintiffs hand-picked these individuals for anonymity in violation of counsel's duties during the discovery process and in furtherance of some sort of conspiracy to keep them from talking to 3M.

III. 3M HAS FAILED TO OFFER COMPELLING ARGUMENTS AGAINST PROTECTING THE IDENTITIES OF THE ANONYMOUS CLIENTS UNDER MINN. R. CIV. P. 26.03

3M would have the Court believe that only conduct that rises to the level of death threats, harassment and defamation justifies an order that discovery not be had. Def.'s Mem. at 10. This is not so. While the facts in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) are particularly egregious, other courts have limited discovery to protect individuals from oppression, embarrassment, and annoyance and to protect privacy and avoid the "chilling effect" that discovery may have. See, e.g., *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987) (protecting identity of witnesses); *Caver v. City of Trenton*, 192 F.R.D. 154, 162-63 (D.N.J. 2000) (ordering that discovery of police officer psychological records not be had because of the chilling affect on candor between officers and psychologists); *Blum v. Schlegel*, 150 F.R.D. 38, 41-42 (W.D.N.Y. 1993) (granting motion for protective order where production of tenure records would be an annoyance and needlessly embarrassing). As plaintiffs previously argued, revealing the identities of clients whose fear of retaliation was so great they requested or indicated a desire to remain anonymous would have a chilling effect on other potential class members who share the same fears, thereby preventing them from gaining access to information about this lawsuit and their status.

3M's second tack to persuade the Court not to issue the requested protective order is to reprise its "conspiracy" accusation. 3M again claims that this motion is an elaborate scheme to

screen putative class members and identify only those who would help plaintiffs' case. Def's Mem. at 11. If anything, the unfounded accusatory nature of this argument underscores the legitimacy of the anonymous clients' fears that the company will go to any length to achieve its goals.

In the face of such conduct, 3M's rote assertions that 3M does not retaliate provide little solace to employees and no basis for the Court to deny plaintiffs' motion. As recognized by the courts in *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299, 302 (8th Cir. 1974) and *Donovan v. First Federal Sav. & Loan Ass.*, 1982 U.S. Dist. LEXIS 12789 (S.D. Iowa 1982), retaliation is an ever present risk faced by employees who challenge their employer's illegal conduct. If anything, the employees in *Brennan* and *Duncan* had less to fear than 3M's employees: they were presenting their grievances against their private employer to the government, and presumably could count on the resources of the government in the event of retaliation, while the anonymous clients here face a private employer without governmental support. The rationale of *Brennan* and *Donovan* – that employees who wish to come forward with grievances against their employer but fear retaliation must be protected – is at least equally applicable to this case.

3M does not address the harsh reality that its discovery requests provide no protection for current or former employees who wish to seek advice about this case but fear being identified to 3M. Contacting plaintiffs' counsel puts an employee's name on the disclosure list and deprives the employee of the ability to decide to maintain anonymity. It further deprives the employee of the ability to withdraw anonymously from involvement in the case to avoid disclosure.

Through this motion, plaintiffs seek to protect the identities of a very small group of persons who sought anonymity *and* who either had little active involvement in the case or withdrew from involvement before the lawsuit was filed. Plaintiffs have provided compelling

reasons for the Court to order that this discovery not be had based on the client's anonymity request and fear of oppression and harassment. 3M has provided no reason for the Court to deny the requested protection. If anything, 3M's tactics in responding to this motion have supported plaintiffs' argument that their clients' privacy wishes should be preserved as protected by Minn. Rule 1.6 and allowed by Minn. R. Civ. P. 26.03.

CONCLUSION

For the above reasons and those stated in plaintiffs' opening memorandum in support of their Motion for a Protective Order Preserving Anonymity of Certain Clients, this Court should grant plaintiffs' motion and issue the requested order protecting the identities of the anonymous clients.

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ACKNOWLEDGMENT

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. §549.211.

Dated: July 8, 2005



Susan M. Coler