A19-0414

State of Minnesota

In Supreme Court

In re K.M.,

Petitioner,

vs.

Burnsville Police Department,

Respondent.

Minnesota State Bar Association's Brief as *Amicus Curiae*

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Statement of Issues[1]

Assuming K.M. and Intervenors have an injury without adequate remedy in appeal, did the Washington County and Dakota Count District Courts err in approving warrants for the search and seizure of all client files held in the office of an attorney suspected of criminal activity without safeguards to protect material within the scope of the attorney-client privilege and work-product doctrine?

Interest of *Amicus Curiae*

The Minnesota State Bar Association ("MSBA") is the largest statewide organization representing the legal profession. The MSBA is a voluntary organization of more than 14,000 attorneys that is committed to the administration of justice and the professional development of attorneys practicing in Minnesota. More than half of Minnesota's licensed attorneys are members of the MSBA.

The MSBA's public interest in this case derives from the fact that the search of the office of a criminal-defense attorney suspected of criminal activity and the seizure of client files beyond the scope of the investigation

[1]In accordance with Minn. R. Civ. App. P. 129.03, the Minnesota State Bar Association states that no counsel for any party has authored any part of this brief, and that no person other than the Minnesota State Bar Association, its members, and its counsel have made any monetary contribution to the preparation or submission of this brief.

raises important questions regarding the statutory and constitutional safeguards for protecting client secrets and material within the scope of the attorney-client privilege and the work-product doctrine. More specifically, the MSBA has an interest in the safeguards that should be in place in circumstances like these to protect the rights and confidentiality of an attorney's clients. These issues affect all Minnesota clients and attorneys, and have profound implications for public trust and confidence in the legal system and the attorney-client relationship.

Given its diverse constituency, the MSBA does not support either party in this case. Its interest is in having the correct rule announced and applied, rather than having the rule applied in a way that benefits any particular party. The MSBA also has an interest in the legal principles in this area being clearly set out because such clarity benefits the administration of justice and lawyer-client relations in general.

Summary of *Amicus*'s Views

The MSBA respectfully submits that a court reviewing a warrant for the search of an attorney's office must take steps to protect the confidentiality of the attorney's clients who are not complainants against the attorney or who are otherwise outside the scope of the criminal investigation of the attorney. The precise steps that are appropriate will vary depending on the facts of each case, and the MSBA does not advocate for any particular

methodology here. The MSBA advocates instead for a ruling that district courts should carefully review applications to search a criminal-defense lawyer's files to ensure that they include adequate procedures to ensure that privileged client confidences are not revealed to law-enforcement and prosecuting authorities beyond what is necessary to satisfy legitimate law-enforcement aims, and the courts should impose such procedures if the warrant applications do not contain them.

Facts

The MSBA incorporates the factual recitations in the parties' briefs.

Argument

It is not hard to spot the difficulty that this case presents. Police investigating two clients' allegations of criminal wrongdoing against their criminal-defense attorney apply for and obtain a warrant to seize all the attorney's files, not just the ones that pertain to the complaining clients. Those files not pertaining to the complaining clients would potentially include not only privileged information about clients who had been charged in other matters and were already known to the prosecuting authorities, but also privileged information pertaining to clients who sought the lawyer's advice before they came to the authorities' attention. After seizing all of the files, the police apply for a second warrant that limits the proposed search to information relating to the complaining clients. But to isolate the information

relating to the complainants, someone will have to search all the files in some manner. The police ask the court to assign that task to the Dakota County Electronic Crimes Task Force ("Task Force"), which promises to shield information about other clients from the gaze of the prosecuting authorities. But the Task Force is composed of other law-enforcement officials. To other clients of the attorney, that may instead sound much like the proposal: "Give all the information to my friend. He'll decide what information I can have, and promises not to tell me what I'm not supposed to know."

The MSBA wishes to be clear: it assumes that the police and prosecuting authorities acted properly and in good faith at all times, that there was probable cause to support both search warrants, and that those warrants were validly issued (*e.g.*, the MSBA does not take a position on whether the particularity requirement was met). It assumes that a search of all of K.M.'s files was necessary to isolate information that was necessary to a valid investigation of criminal wrongdoing. The MSBA does not assert that the police and prosecuting authorities cannot be trusted to respect the confidentiality of privileged communications between a criminal-defense lawyer and her clients. The issue is instead one of avoiding even the appearance of impropriety. *Cf.* Rule 1.2 of the Code of Judicial Conduct (judges "shall avoid . . . the appearance of impropriety"). A criminal-defense lawyer's clients, more than perhaps any other clients, need to have complete

confidence that they may be candid with a criminal-defense lawyer from whom they seek counsel. And if criminal-defense lawyers are to fulfill their crucial role in our justice system, they need to be able to give their clients the assurance that anything they say will be held in the strictest of confidence and not revealed to anyone else.

This Court recognized these principles four decades ago in *O'Connor v. Johnson*, 287 N.W.2d 400, 403, 405 (Minn. 1979):

> The indispensable relationship of trust between client and attorney and the adequate functioning of our adversary system of justice can only be ensured when the client can completely disclose all the facts—favorable and unfavorable—without the fear that the attorney's files will be seized by police officers pursuant to a search warrant. * * * Once [confidential] information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police.

It is this issue that the MSBA addresses in this brief. The MSBA includes both prosecutors and criminal-defense lawyers, and it does not side with either party in this dispute. But it is concerned about the implications of this case for the profession and (especially) the clients that it serves.

The rule of law the MSBA is asking the Court to establish is that when a district court asked to issue a search warrant relating to an attorney's legal files that: 1) is supported by probable cause to believe an attorney has committed a crime, 2) meets the particularity requirement, and 3) seeks authorization to search the attorney's legal files (whether paper or electronic), the court must impose safeguards to protect the attorney-client

privilege and work-product doctrine during the execution of the search and the later review of the files. In doing so, the court must balance the investigatory and public-safety interests of law enforcement, the sanctity of the attorney-client privilege and work-product doctrine, and the rights of the attorney's clients to effective assistance of counsel and confidence that information they provide to a lawyer in confidence will remain strictly confidential. *See Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984) (describing the interests that must be balanced when an attorney's documents are subject to a search warrant).

* * * * *

The search of a lawyer's office is *per se* unreasonable "when the attorney is not suspected of criminal wrongdoing and there is no threat that the documents sought will be destroyed." *O'Connor*, 287 N.W.2d at 405. Conversely, when an attorney is suspected of criminal activity, he or she is subject to a lawful search or seizure every bit as much as a non-attorney, and courts have upheld searches of law offices in those circumstances. *See, e.g.*, *Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

But the fact that an attorney suspected of criminal activity enjoys no special immunity from lawful searches and seizures does not mean that such searches or seizures can be treated just like searches and seizures of non-attorneys. The State certainly has a valid interest in obtaining, by legal

means, evidence of criminal wrongdoing by attorneys. But that interest conflicts with the rights of the attorney's clients who have not waived the attorney-client privilege to have their communications with the attorney held in strictest confidence, especially from the State. And the State also has "a genuine, if conflicting, interest in preventing investigators from accessing privileged materials." *In re Grand Jury Subpoenas*, 454 F.3d 511, 517 (6th Cir. 2006).

Obviously, the government's search of a lawyer's files—even when the lawyer is the target of an investigation—involves a lot of competing interests. As the Third Circuit has commented, when lawyers are suspected of criminal wrongdoing "the correct approach to th[e] issue … is not to immunize law offices from searches, but to scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure." *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 959 (3d Cir. 1984).

It is in the spirit of that careful scrutiny of searches of attorneys' offices and files—with a special emphasis on protecting the attorney-client privilege—that the MSBA approaches this issue. And the MSBA's goal is not to advocate for any particular solution, but to inform the Court of how other courts facing similar circumstances have handled the situation, and offer some thoughts on the pros and cons of each approach.

Several courts across the country have faced the same or similar issues that this case presents and have used a variety of measures to protect against the disclosure of client confidences to law-enforcement officials and prosecutors. All of them involve engaging a third party to review the material and determine what portions of it contain information that is subject to the attorney-client or work-product privileges regarding clients who have not waived the privilege; the difference between the approaches is the identity of that third-party reviewer.

1. A "taint team" or officials not involved in the investigation

This is the method that the State proposed to use in connection with its second warrant application in this case. In general, it involves engaging one or more law-enforcement officials or (more commonly) prosecuting attorneys who are not involved with the investigation to review the information collected from the attorney, determine whether or not the material is privileged, and retain any privileged or work-product materials in a confidential manner. As the Sixth Circuit has described it:

> [A] "taint team" [is] composed of government attorneys who are not involved in the … investigation [and is] established to segregate privileged documents from the residue of non-privileged material. * * * [T]he proposed taint team would return to [the attorney] any documents that it determined to be privileged … and would submit the materials it determined to be potentially protected by privilege to … the district court for final adjudication.

Grand Jury Subpoenas, 454 F.3d at 515; *see also Black v. United States*, 172 F.R.D. 511, 513 n.2 (S.D. Fla. 1997) (describing the "taint-team" procedure proposed by the Department of Justice); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 56 (S.D.N.Y. 1994) (describing "taint team" in case involving attorney who was target of criminal investigation). A variation of this approach involves having a prosecuting attorney with no connection to the investigation attend the search to answer any questions regarding privilege that might arise during the course of the search. *See In re Search Warrant*, 153 F.R.D. at 57.

The advantage of the "taint-team" approach is that the State can arrange to have the review done relatively speedily in cases where time is of the essence. A special master or other judge may have other obligations that do not allow him or her to provide a full-time effort to the review, but the State can presumably assign as many prosecutors as possible to perform the review to ensure that it happens quickly. *See Black*, 172 F.R.D. at 516 (discussing Government's concerns that other procedures would take too long).

There are three main disadvantages of using a "taint team." One is that governmental officials—either law-enforcement officers or prosecutors—will inevitably look at information that is privileged. Even though they are not involved in the immediate investigation, they are still "the State" from the

perspective of a client who entrusted confidential information to the attorney, and the promise that they will keep the information confidential from their fellow prosecutors or law-enforcement colleagues is not very reassuring to the attorney's other clients. "[T]aint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors." *Grand Jury Subpoenas*, 454 F.3d at 523. As another court dealing with similar circumstances observed:

> [R]eliance on the implementation of a [w]all [between prosecution team and attorney reviewing for privilege], especially in the context of a criminal prosecution, is highly questionable and should be discouraged. The appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe any such [wall] would be impenetrable; this notwithstanding our own trust in the honor of an [attorney representing the government].

In re Search Warrant, 153 F.R.D. at 59. Worse yet, while the reviewing prosecutor may not be involved in the current investigation, he or she might review confidential information that suggests criminal wrongdoing by one of the lawyer's clients in the prosecutor's jurisdiction. "Once that information is revealed to the police [or prosecutors], the privileges are lost, and the information cannot be erased from the minds of the police [or prosecutors]." *O'Connor*, 287 N.W.2d at 405. The MSBA's concern is that the loss of privilege may occur without the client's knowledge and without any chance to assert the privilege and protect it. The client is completely disempowered in

this situation. Yet the privilege belongs to the client and all the risk of the privilege being breached is borne by the client.

A second disadvantage is that law-enforcement officials or prosecutors will have a bias (at least a perceived bias) against putting information off limits to their colleagues. Both of these disadvantages would chill clients' willingness to be completely frank and forthcoming with their attorneys, thus reducing attorneys' ability to fulfill their proper role in the judicial system. *Id.* at 403.

A third disadvantage is that the reviewing attorney may not have sufficient information to evaluate the scope of the privilege and work-product doctrine. In civil matters, for example, the parties are able to explain to the judge their views of what constitutes work-product and privileged material and the factual bases for those assertions. Without that information, the reviewing attorney is just guessing about whether something is protected and may be biased in the discretion of disclosure.

The fourth disadvantage (but a curable one) is that there may be no opportunity for adversarial presentation to a neutral party before the information is released to the prosecution. If the "screening attorney" decides that a document is not privileged and can thereby hand it directly over to the prosecuting attorneys, the attorney and client have no opportunity to challenge the privilege determination. *See Grand Jury Subpoenas*, 454 F.3d

at 515, 523 (describing this as a potential problem). This problem can be cured by requiring the screening attorney to disclose to the attorney which documents he or she proposes to turn over to the prosecuting attorneys and allowing the attorney to go to a judge with any objections to the information being turned over, but that process would add more time to the endeavor.

2. A special master

The concept of a special master to review seized information *in camera* and screen out privileged material is a familiar one. *See, e.g.,* Minn. R. Civ. P. 53.01; *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 682-83 (Minn. App. 2000) (discussing district court's appointment of a special master to review documents to determine whether they were privileged); *St. John's Episcopal Church v. Brewmatic Co.*, 2000 WL 1220726, at *4-6 (Minn. App. Aug. 29, 2000) (same). As the Third Circuit described it, "[t]he master could be considered a special officer of the court with full judicial immunities to preserve all confidences encountered and could make a ruling, which either party could then appeal to the district court." *Klitzman*, 744 F.2d at 962. *See also Grand Jury Subpoenas*, 454 F.3d at 524 (laying out more detailed special-master protocol).

California law requires use of a special master in such circumstances by statute, and it prescribes a specific procedure that involves the special master actually attending the execution of the search warrant:

> At the time of the issuance of the warrant, the court shall appoint a special master … to accompany the person who will serve the warrant. Upon service of the warrant, the special master shall inform the party served of the specific items being sought and that the party shall have the opportunity to provide the items requested. If the party, in the judgment of the special master, fails to provide the items requested, the special master shall conduct a search for the items in the areas indicated in the search warrant.

Cal. Penal Code § 1524(c)(1). If the attorney served with the warrant asserts that certain items are privileged or otherwise should not be disclosed to the government, the special master seals them on the spot and they are "taken to court for a hearing" within three days of the service of the warrant and a judge makes the call. Cal. Penal Code § 1524(c)(2). This just illustrates the variations that are possible with the special-master procedure.

The advantage of the special-master procedure is that someone who is not "the State" reviews the material and determines what information is privileged, thus giving the attorney's clients greater (albeit not complete) confidence that their confidences have not been revealed to a governmental official. *See Klitzman*, 744 F.2d at 962 ("Such a procedure would vindicate both the interests of the government in investigating and prosecuting crimes and the confidentiality interests of the law office.").

The main disadvantage is cost: a special master will have to be compensated for his or her work. *See Klitzman*, 744 F.2d at 962 (hypothesizing that special master would be expense of government); *Black*,

172 F.R.D. at 516 (mentioning cost concern). Another potential disadvantage is one alluded to above: when time is of the essence in a criminal investigation (for example, the target of the investigation is a flight risk), a special master may not be able to conduct the review quickly enough, although it is certainly possible to find a special master who can make the review his or her full-time endeavor. *See Black*, 172 F.R.D. at 516 (discussing Government's concerns that other procedures would take too long). A special-master approach also "would effectively [temporarily] deprive the Government of any access to any of the seized information" in cases where "all parties agree that at least a part of the information … should be given to the Government." *Id.*

3. Another judge who is not presiding over the criminal proceedings

This is self-explanatory. It is the approach used by the federal district court in *Black* (*see* 172 F.R.D. at 516-17). In several ways, this approach is "between" the taint-team and special-master approaches. A government official, rather than a non-governmental party, is reviewing the information, but at least it is not a prosecutor or law-enforcement official. And other judges, unlike a special master, can presumably do the work "for free," but it is even more certain that a judge (as opposed to a special master) will have other duties to attend to and will not be able to devote all of his or time to the effort. (To say the least, adding a potentially large document-screening

project to a district Judge's already massive docket will not be well-received by all.)

As much as the MSBA would like to assist the Court by supporting a single safeguard, it is unable to do so because the discussion above demonstrates that the most appropriate safeguard often depends on the particular facts of the case. A safeguard that is appropriate in cases where the attorney suspected of criminal wrongdoing is not a flight risk and there is no danger of imminent destruction of evidence might not be appropriate when those factors are present. District courts must have discretion to decide on the appropriate safeguard based on the specific facts of the case. *See Grand Jury Subpoenas*, 454 F.3d at 524 ("we leave it to the district court's sound discretion to determine and enforce proper procedures for implementing our remedy" and "to issue reasonable deadlines" for the review process). But the MSBA does submit without reservation that the Court should require district courts to put at least some safeguard in place to protect the confidentiality of privileged information to the greatest extent possible when an attorney's offices are searched and materials seized under a valid warrant.

Conclusion

The U.S. Supreme Court has recognized that the purpose of the attorney-client privilege "is to encourage full and frank communication

between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citations omitted). The execution of a search warrant in an attorney's office, and the resulting search and seizure of files that may contain privileged communications by clients who have no involvement in the attorney's alleged misdeeds, presents a delicate situation. Legitimate law-enforcement aims must be recognized, but the sanctity of the attorney-client privilege must be upheld as well to promote "public interests in the observance of law and administration of justice." *Id.*

Thus, the Minnesota State Bar Association respectfully asks the Court to rule that when a district court asked to issue a search warrant relating to an attorney's legal files that: 1) is supported by probable cause to believe an attorney has committed a crime, and 2) seeks authorization to search the attorney's legal files (whether paper or electronic), the court must impose safeguards to protect the attorney-client privilege and work-product doctrine during the execution of the search and the later review of the files. In doing so, the trial court must balance the investigatory and public-safety interests of law enforcement, the sanctity of the attorney-client privilege and work-

product doctrine, and the rights of the attorney's clients to effective assistance of counsel and confidence that information they provide to a lawyer in confidence will remain strictly confidential.

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Certificate of Brief Length

I hereby certify that the foregoing **Minnesota State Bar Association's Brief as *Amicus Curiae*** complies with Minn. R. Civ. App. P. 132.01, subd. 3(c) because it contains 3,814 words, exclusive of the caption and signature block.

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