

STATE OF MINNESOTA
COUNTY OF RAMSEY

Judge Joanne Smith
DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Contract

DR. BA LAM,)
)
) Plaintiff,) **PLAINTIFF’S REPLY MEMORANDUM**
) **OF LAW IN SUPPORT OF MOTION FOR**
v.) **AN ORDER TO SHOW CAUSE, TO**
) **COMPEL DISCOVERY, TO MODIFY**
) **SCHEDULING ORDER, AND FOR**
) **SANCTIONS**
COUNTY OF RAMSEY, MINNESOTA,)
DANIEL SCHACHT, OFFICE OF THE)
RAMSEY COUNTY ATTORNEY, and)
DAVID MACMILLAN,) Case No. 62-C8-05-012545
)
)
) Defendants.)

TO: HON. JOANNE SMITH, RAMSEY COUNTY DISTRICT COURT, 1530
COURTHOUSE, 15 W. KELLOGG BOULEVARD, ST. PAUL, MN 55102.

Plaintiff Dr. Ba Lam, through the undersigned attorney, submits this reply memorandum of law in support of his motion for an order to show cause, to compel discovery, to modify the scheduling order, and for sanctions.

Nota Bene

The service of defendants’ memorandum of law in opposition was untimely in that it was personally served on plaintiff’s attorney on April 18th instead of on April 17th as required by Minn. Gen. R. Prac. 115.04(a). Exhibit 1 to Affidavit of Alfred Stanbury dated April 23, 2007 (hereinafter “Stanbury Aff. ¶ __ and/or Ex. __”). Accordingly, this reply memorandum of law is being served and filed on Monday, April 23d, instead of on Friday, April 20th, as would ordinarily be required by Minn. Gen. R. Prac. 115.04(c) (“The moving party may submit a reply . . . at least 3 days before the hearing.”). Additionally, defendants served and filed a proposed protective order eight days late on April 18th and only after plaintiff brought their failure to the court’s attention in his Memorandum of Law in Opposition to Defendants’ Motion for a Protective Order and

to Quash Subpoenas at 5-6. Defendants' failure to serve and file the proposed protective order is said to have been inadvertent. Even so, it should cause the court to refuse to hear defendants' motion for a protective order and to quash subpoenas which should not have been slotted ahead of plaintiff's anyway. Defendants' miscues range from that inadvertence to an inadvertent failure to respond on time to written discovery to failures to communicate clearly among themselves to failures to serve and file a motion in a timely way to blaming plaintiff's attorney for their own misconduct to thinking the court will believe that internal professional commitments constitute legitimate reasons to disobey duly served subpoenas. All of that is why it is beyond laughable for defendants to seek an order which would vest control over plaintiff's remaining discovery in defendants' attorney Dietz.

REPLY ARGUMENT

Defendants' entire argument in opposition is a canard. Crucially absent from their argument is any justification for their failure to serve a written objection to the Engh, Noonan, and Auge subpoenas or a timely motion to quash them. Asserting that the subpoenas were deficient in certain ways does not excuse in retrospect attorney Dietz' disobedience of the subpoenas on behalf of non-party County employees Engh, Noonan, and Auge. Such asserted deficiencies (improper service, undue burden, unreasonable time for compliance) are grounds on which to base a timely, written objection or a timely motion to quash, but, clearly, the scrambling defendants are saying that, *looking back*, they had grounds to object in writing or to serve a timely motion to quash if only they had thought to do so. In other words, their argument is pretextual, made up after the fact, just as attorney Dietz' decision to serve a motion to quash after the time for compliance was a crude attempt to cover what he came to realize was his inexcusable and indefensible disobedience of the subpoenas.

Defendants argue that the service of the Grundtner, Engh, Noonan, and Auge subpoenas was improper both because they were served by fax and because they were

faxed on a Friday at 4:32 P.M. so as to assure that attorney Dietz would not see them until the following Monday and thus would not have sufficient time to prepare the deponents. That is just a continuation of attorney Dietz' insinuation that there is something sinister about faxing to the Office of the Ramsey County Attorney at or around 4:30 P.M., *to wit*: He says, with emphasis, "[t]he transmission started at **4:25 pm**" and then, again with emphasis:

Stanbury's notices, in all too familiar pattern, were sent by fax at **4:32 pm on Friday March 30, 2007**. The Ramsey County Attorney's Office has one fax machine on the 5th floor where it has a staff of about 36 people. Stanbury's actions appear to be deliberately calculated to make sure that Dietz will not have notice until the following Monday.

Defs.' Mem. at 3.

An attorney's or law firm's quitting time does not define the close of a normal business day, just as the close of normal business hours is not defined by an attorney's desire, *e.g.*, to make a tee time. The close of a normal business day is defined in Rules. To appreciate the propriety of faxing at about 4:30 P.M., one need only look at Minn. R. Civ. P. 5.02 and, in particular, its Advisory Committee Comments--1996 Amendments, wherein it is said in pertinent part:

Most of Rule 5.02 is new and for the first time provides for service by facsimile. Service by this method has become widespread, generally handled either by express agreement of counsel or acquiescence in a service method no explicitly authorized by rule.

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The committee believes an express authorization for service by facsimile is appropriate and preferable to the existing silence on the subject.

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In addition to providing for service by facsimile, Rule 6.05 is amended to create a specific deadline for timely service. This rule adds an additional day for response to any paper served by any means other than mail . . . and where service is not effected until

after **5:00 p.m.** local time. This rule is intended to discourage, or at least make unrewarding, the inappropriate practice of serving papers **after the close of a normal business day**. Service **after 5:00 p.m.** is still *timely* as of the day of service if the deadline for service is that day, but if a response is permitted, the party served has an additional day to respond. (Emphasis added.)

The was nothing improper, let alone sinister or calculating, about the faxing of the Meyer and Clepper subpoenas and the Grundtner, Engh, Noonan, and Auge subpoenas at about 4:30 P.M., and, because their service was effective, the subpoenas provided an ample eleven days notice.

In support of their motion to quash subpoenas, defendants have argued that the Grundtner, Engh, Noonan, and Auge subpoenas provided less than eleven days notice. That was refuted in plaintiff's memorandum of law in opposition. Now, with an awareness of that, defendants have moved on to arguing that 14 days notice was required by Minn. R. Civ. P. 45(b)(2), which provides in pertinent part:

[A] person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises.

That sounds dispositive until one realizes what defendants have omitted to say, namely that Rule 45.03(b) is titled "Subpoena for Document Production **Without** Deposition." (Emphasis added.) Rule 45.03(b) is irrelevant where, as herein, the subpoenaed persons were to be deposed. Defendants oblivious reliance on the irrelevant Rule 45(b)(2) is repeated in their reply memorandum in support of protective order which was served in the afternoon of April 20th.

Moreover, defendants say nothing meaningful when they paraphrase only the first sentence of the Advisory Committee Comment--2006 to Rule 45 ("Rule 45 is replaced, virtually in its entirety, by its federal counterpart."). The Advisory Committee went on to say in pertinent part:

Provisions of the federal rule that do not apply to state court practice are deleted or replaced with comparable provisions consistent with current Minnesota practice. . . . Portions of the federal rule not relevant to state practice have been deleted.

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The most significant ‘new’ provisions of the rule are authorizations of issuance of subpoenas by attorneys as officers of the court (Rule 45.01(c)) and the adoption of the mechanism for requiring production of documents without requiring a deposition to be conducted (Rule 45.01(a)(3)).

In short, current Minnesota subpoena practice is the same as it was when Rule 45 was amended on January 1, 2006. For a motion to quash a subpoena to be timely, Minnesota practice still requires the motion to be made promptly but in any event at or before the time for compliance, as expressed in Minn. R. Civ. P. 45.02 until January 1, 2006. Defendants argue, absurdly, that the “time” for compliance is the “date” for compliance. Defendants cite some federal cases as standing for the proposition that a motion to quash can be timely even if brought after the time for compliance, but those cases are irrelevant since Minnesota practice, as expressed in the former Rule 45(b)(2), is unambiguous.

Defendants have worded their statement of facts so as to mask the untimeliness of their motion for a protective order and to quash subpoenas. *E.g.*, defendants want the court to think that right after attorney Dietz arrived for the depositions on April 10th, he told plaintiff’s attorney that he wanted to take depositions on the 10th he would have to get a court order. Attorney Dietz did not say that *right after* he arrived. He said it *two hours* after he arrived and only *after* the Meyer and Clepper depositions had been taken and he was halfway out the door, figuratively speaking. *See* ¶ 15 of Affidavit of Alfred Stanbury dated April 10, 2007. Defendants go on to say that “[f]inally, on April 10th, 2007, defendants brought a motion to quash all of the subpoenas and a motion for a protective order”, which disingenuously omits any mention of the fact that the motion was made in the afternoon of April 10th and thus after the time for compliance.

In an ostensible attempt to excuse their failure to serve and file their motion for a protective order and to quash subpoenas at or before the time for compliance, defendants cite three cases, only one of which is a reported case (*Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44 (S.D.N.Y. 1996)). The two unreported cases need not be considered here since copies thereof were not enclosed with defendants' responsive papers as well-settled practice required. *Concord*, meanwhile, is easily distinguishable on its facts. After obtaining several one-month extensions of time to produce a wide-ranging list of documents as well as at least one agreement to limit the scope of the subpoena, non-party Merrill Lynch obtained outside counsel who, after trying unsuccessfully to obtain another extension, moved to quash the subpoena after the time for compliance had passed. The facts of *Concord*, a case which, *inter alia*, did not involve a deposition, are not comparable in the least to the facts of the instant case.


CONCLUSION

For the foregoing reasons, the court should issue an order requiring defendants' attorney David Dietz to appear before the court to show cause as to why he should not be held in civil contempt for his willful disobedience of duly served subpoenas, and the court should modify the First Amended Scheduling Order along the lines proposed by plaintiff, set the date on which Ramsey County employees Engh, Noonan, and Auge must attend their depositions, and award to plaintiff his costs and reasonable attorney's fees in the amount of \$4,780.

Respectfully submitted,

STANBURY LAW FIRM P.A.

Dated: April 23, 2007.



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