

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]

**PLAINTIFFS' MEMORANDUM OF
LAW IN OPPOSITION TO 3M
COMPANY'S MOTION TO COMPEL
COMPLIANCE WITH THE COURT'S
ORDER OF SEPTEMBER 16, 2005**

[Class Action]

INTRODUCTION

Plaintiffs have complied with the letter and the spirit of the Court's September 16, 2005 Order Denying Motion for Protective Order ("Order"). The Order was the Court's decision with respect to *plaintiffs'* motion for a protective order allowing them not to include the names of five non-plaintiff clients (the "five clients"¹) in its responses to Defendant's First Set of Interrogatories. 3M seeks to transform the Court's Order from a denial of plaintiffs' motion to an affirmative direction to plaintiffs not only to disclose those clients' identities, but also to single them out as the persons who wanted to keep their identities secret. Defendant bases its argument primarily on a skewed reading of one phrase from the Court's opinion.

Defendant seeks to prop up its distorted linguistic argument with an argument that the order it seeks is necessary to "insure that Plaintiffs actually disclosed the identities" of these clients. Plaintiffs' counsel have represented to 3M, both orally and in writing, that the clients in issue are included in a supplemental interrogatory response served shortly after the Court of

¹ Plaintiff's motion for a protective order referenced the group of five non-plaintiff clients as the "anonymous clients." No longer anonymous, they are referenced in this memorandum as the "five clients."

Appeals denied plaintiffs' petition for discretionary review of the Order. Defendant's argument amounts to a thinly veiled and unwarranted attack on the honesty of plaintiffs' counsel. Plaintiffs' disclosure of the five clients in their supplemental interrogatory response should be the end of this matter.

BACKGROUND

Defendant's First Set of Interrogatories, served on plaintiffs on April 13, 2005, contained the following requests:

INTERROGATORY NO. 1: Identify each person with knowledge or who claims to have knowledge which relates to any of the issues in this case (including without limitation the claims asserted in your Complaint or the damages sought in your Complaint), and with respect to each such person, describe what knowledge he or she has or claims to have.

INTERROGATORY NO. 2: Identify each person with whom you have had any communication, written or oral, or from whom you have received any communication which referred, related, or pertained to any of the allegations in your Complaint . . . and, for each such person, describe the date of the communication and the substance of each communication.

Affidavit of Susan M. Coler in Opposition to 3M Company's Motion to Compel Compliance with the Court's Order of September 16, 2005, Ex. 1 at 3-5.² Plaintiffs response to these interrogatories, served on May 20, 2005 included a series of Appendixes. Appendixes A, B, D and E contained responses specific to each plaintiff. Coler Aff., ¶ 2; Ex. 1 at 4-5. Appendix C provided the remaining responses to Interrogatories 1 and 2 on behalf of the plaintiffs and was answered from the perspective of plaintiffs' agents, that is, their counsel. Coler Aff., ¶ 2, Ex. 1 at 4-6. In addition plaintiffs' response included the following statement in the "General Objections and Responses":

² Numbered exhibits cited in this memorandum are attached to the Coler affidavit and are referenced simply as Ex. ___.

3. Pursuant to Minn. R. Prof. [Conduct] 1.6, plaintiffs object to these interrogatories to the extent they require plaintiffs to disclose "secrets" of seven former and prospective clients, including their identity and information that would reveal their identity. Plaintiffs will be filing a motion for a protective order under Minn. R. Civ. P. 26.03 asking that discovery of this information "not be had."

Ex. 1 at 3.

Plaintiffs filed their Motion for a Protective Order Preserving Anonymity of Certain Clients on June 28, 2005. In that motion, they sought to preserve the anonymity of only five non-plaintiff clients. In footnote four on page four of their memorandum, plaintiffs explained why they reduced from seven to five the number of persons for whom protection was sought:

⁴ Plaintiffs initially indicated their intent to preserve the anonymity of seven persons but now seek that status for five. Since filing their answers, plaintiffs have since determined that the identity of one these persons is not responsive to defendant's interrogatories and that another should be disclosed in our next supplement to these interrogatory answers.

Ex. 2 at 4. Consistent with this footnote, plaintiffs included only five clients in their motion, did not include the person whose identity was non-responsive in its supplemental discovery responses, and disclosed the other. Coler Aff., ¶ 3. Therefore, although defendant seeks their identities, there never was an Anonymous Client F or G for purposes of plaintiffs' motion for a protective order. The Order at issue here denied protections only to the five clients. Accordingly, plaintiffs' references to the "five clients" in this memorandum pertain to the five for whom protections were sought.

On September 16, 2005 this Court denied plaintiffs' motion for a protective order. Ex. 3. After the Minnesota Court of Appeals denied their petition for discretionary review, plaintiffs served their Answers to Defendant's First Set of Interrogatories (Supplement 2) on November 10, 2005. Coler Aff., ¶ 4. In Appendix C – supplemented 11/10/05 ("App. C-supp."), plaintiffs disclosed the identities of 63 persons responsive to Interrogatories 1 and 2. *Id.*; see Affidavit of

Holly S.A. Eng in Support of 3M Company's Motion to Compel Compliance ~~With~~ the Court's Order of September 16, 2005 ("Eng Aff."), Ex. D. Plaintiffs included the identities of the five clients in the disclosures in App. C-supp. *Id.* Plaintiffs marked the names of many of the 63 persons, including each of the five clients, with an asterisk, meaning that the communications involving them are privileged because, when they occurred, the clients were seeking advice concerning their legal rights. *Id.*

Plaintiffs' service letter for their Answers to Defendant's First Set of Interrogatories (Supplement 2) perhaps was not a model of clarity, but plaintiffs have since cleared up any ambiguity. In her telephone call with defense counsel Holly Eng, plaintiffs' counsel Susan Coler explained that plaintiffs deemed the identity of one of the persons originally identified in the group of seven as non-responsive, but that the others had been included in the supplemental response. Coler Aff., ¶ 5. And, Coler's November 28, 2005 letter to Eng made clear that plaintiffs had disclosed the five clients in the supplement and further made clear plaintiffs' position that they had complied with the Court's Order:

With regard to the anonymous [five] clients, we have met our discovery obligation by supplementing our discovery response and including the identities of anonymous [five] clients responsive to those requests. Neither the discovery itself nor the Court's denial of our motion for a protective order requires us to do anything more.

Eng Aff., Ex. C.

ARGUMENT

Plaintiffs included the identities of the five clients in their Answers to Defendant's First Set of Interrogatories (Supplement 2) and therefore have complied with the Court's September 16, 2005 Order. In its brief, defendant ignores the fact that the Order for which it seeks compliance is a motion for a protective order filed by the plaintiffs. Consistent with Minn. R.

Civ. P. 26.03, plaintiffs asked the Court that certain discovery – the identities of the anonymous clients – included in Defendant’s First Set of Interrogatories “not be had.” The Court denied plaintiffs’ motion and did not issue the requested protective order. The sole effect of the Order was that plaintiffs retained their obligation to include the five clients in their responses to Defendant’s First Set of Interrogatories. Plaintiffs have fulfilled that obligation because the discovery for which protection was sought now has been “had.”

Defendant wrongly argues that the Order requires plaintiffs to single out the five clients and identify who is Anonymous Client A, B, C, D, and E. Neither the Order itself nor the accompanying Memorandum contains such a directive. The Court’s sole action was to deny the requested protective order. To reach the result it seeks, defendant relies on a claim that “this Court ruled that Defendant 3M had an ‘entitlement to discovery of the identities of’ seven individuals” Memorandum of Law in Support of Motion to Compel Compliance with the Court’s Order of September 16, 2005 (“Def’s Mem.”) at 2. This argument mischaracterizes a phrase excised from the Court’s statement of its reason for denying plaintiffs’ motion for a protective order:

Plaintiffs have not demonstrated that there is good cause for the issuance of a protective order sufficient to overcome Defendant’s entitlement to discovery of the identities of these individuals. For these reasons, no protective order will issue.

Ex. 3 at 4. Properly read, this statement indicates the Court’s decision that the discovery for which plaintiffs sought a protective order stands, and defendant is entitled to that discovery, including the identities of the individuals for whom the protective order was sought. Nothing in the Order or in the explanation cited above requires the plaintiffs to take any additional affirmative action of singling out or specially identifying the five clients in any way. Plaintiffs

have responded to the discovery and have included the five clients in their response. This is all that is required.

Nor does defendant need to worry about “the possibility of engaging in improper communications with or disclosing protected, confidential, and privileged information to current or former clients of Sprenger & Lang” Def’s Mem. at 7. App. C-supp. clearly marks with asterisks the names of all the persons, including the five clients, who engaged in privileged communications with plaintiffs’ counsel. Plaintiffs do not need to single out the five clients for defendant to avoid improper communications. Defendant needs only to use the identifying information provided in App. C-supp.

Finally, defendant claims that the order it seeks is necessary to “insure that Plaintiffs actually disclosed the identities” of the five clients. This is false. Plaintiffs’ counsel already has represented to defendant that plaintiffs have included the five clients in their interrogatory responses. Plaintiffs’ counsel has made the same representation to the Court in an affidavit submitted with this memorandum. Defendant needs nothing more to “insure” that plaintiffs included the identities of the five clients in their Answers to Defendant’s First Set of Interrogatories (Supplement 2).

Defendant’s argument suggests that plaintiffs’ counsel may be dishonest or deliberately disobeying a Court order. In doing so, defendant violates the Professionalism Aspirations approved by the Minnesota Supreme Court in January 2001, in particular the commentary in Section III (“Lawyer to Lawyer”) stating:

5. We will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations or acrimony toward opposing counsel, parties, and witnesses.

Plaintiffs' counsel's conduct provides no basis for such suggestions. If plaintiffs intended to disrespect the Court and proper judicial process, or engage in a cover-up of evidence favorable to the defendants, they would not have gone to the lengths they did to disclose the existence of the protected clients, and then advocate to maintain these clients' anonymity under Rule 1.6. Plaintiffs simply would have omitted the five clients altogether from discovery. This is not the course plaintiffs chose, and the Court should dismiss out of hand any imputation of bad motives based on plaintiffs' efforts to zealously represent their clients.


Plaintiffs' counsel merely have tried to honor their obligations under Minn. R. Prof. Conduct 1.6. Defendant would turn Rule 1.6 completely on its head. Not only would an attorney have to reveal the identity of clients who request anonymity, they would have to single out those clients. Nothing in the Order or Minnesota law suggests that persons requesting anonymity should be so branded.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request the Court to find that plaintiffs have complied with the Court's Order Denying Motion for Protective Order and to deny defendant's motion.

DATED: January 30, 2006

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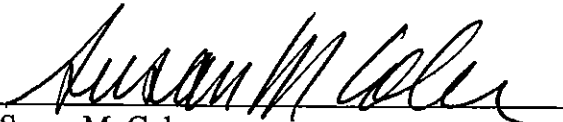
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ACKNOWLEDGMENT

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: January 30, 2006


Susan M. Coler