

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
REGARDING *EX PARTE*
COMMUNICATIONS WITH PUTATIVE
CLASS MEMBERS AND CURRENT
AND FORMER EMPLOYEES**

[Class Action]

INTRODUCTION

Notwithstanding 3M's extensive and, in some instances, unfortunate response,¹ 3M agrees with plaintiffs' Proposed Order on many important issues. The issues that remain, however, are of profound importance to the rights and interests of putative class members in having access to and communicating with plaintiffs' counsel and in being fairly and fully informed of and able to participate in the litigation free from misleading or intrusive communications by 3M, to plaintiffs' counsel's need to communicate with putative class members to effectively represent their interests, and to proper respect for the attorney-client relationship and privilege.

¹ 3M's response is inadmissible or improper in several respects. The Eng Affidavit is rife with inadmissible hearsay, *State v. Pennebaker*, 215 Minn. 75, 77, 9 N.W.2d 257, 259 (1943), scurrilous invective that should be stricken, *see* Minn. R. Civ. P. 12.06, and statements concerning settlement negotiations, *see* Minn. R. Evid. 408. The Wernz Affidavit gives the appearance of an expert report on a legal question; *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 402-403 (Minn. 1981), but the author is a partner in the firm representing 3M and is anything but impartial.

ARGUMENT

I. THIS COURT SHOULD ORDER ONLY THOSE RESTRICTIONS ON PLAINTIFFS' COMMUNICATIONS WITH PUTATIVE CLASS MEMBERS CONTAINED IN THEIR PROPOSED ORDER

3M agrees with nearly all of plaintiffs' Proposed Order regarding plaintiffs' communications with putative class members and others. Accordingly, there is no dispute as to the Court entering the provisions of plaintiffs' proposed order on the following subjects:

- 3M agrees that plaintiffs' "*ex parte* contact is permissible" with all former 3M employees, so long as privileged information is protected, Def's Mem. at 16-17;
- 3M finds "acceptable" the provisions of plaintiffs' proposed order that guard against disclosure of privileged information, Def's Mem. at 17, which apply to all communications where there is reason to believe a person may be aware of privileged information; and
- 3M agrees that plaintiffs "may, of course, have *ex parte* contact with ... current employees – whether or not they are potential members of the proposed class – if these employees are not" employees "with supervisory or managerial authority," Def's Mem. at 16; *see id* p. 13.

3M also agrees that plaintiffs may have *ex parte* communications with those putative class members who have supervisory or managerial responsibilities (collectively "mid-level employees"). However, it would impose three restrictions on such communications: (1) communications would be limited to mid-level employees who initiate contact with plaintiffs' counsel to assert their own claims against 3M; (2) any communications should be limited to the facts of the mid-level employees' own claims; and (3) plaintiffs should immediately report to 3M the identity of such mid-level employees. Def's Mem. at 15-16. Each of these proposed restrictions would significantly hamper plaintiffs' efforts to gather facts through informal discovery. 3M has failed to meet its burden of establishing that any of them is justified.

A. Each of 3M's Proposed Restrictions Would Significantly Hamper Plaintiffs' Fact-Gathering

3M's proposed restriction of *ex parte* communications would severely limit counsel's ability to follow up on leads. For example, plaintiffs have been informed of two meetings in which high-level 3M employees supposedly said that Black Belt training should be limited, or largely limited, to employees aged 40 and younger. Neither of the communications comes from persons in a position to give admissible testimony concerning these statements. If plaintiffs can obtain identification of persons who participated in those meetings, they would be permitted to call class member participants who are current employees under their version of the proposed order, but not under 3M's.

Forcing counsel to limit their conversations with mid-level employees to the facts of their own claims is totally unworkable. An employees' own claims cannot be separated from the class-wide discriminatory practices and policies that are the subject of the claims. Moreover, these employees are the very persons among class members in the best position to shed the most light on those policies and practices.

Finally, a requirement that plaintiffs promptly notify 3M of any conversations they had with mid-level employees would stifle the willingness of those class members to contact plaintiffs. Very few mid-level employees would call plaintiffs' counsel if they knew that counsel immediately had to notify 3M, and that they could expect a call from 3M's counsel within a few days. Plaintiffs have the duty seasonably to supplement their interrogatory answers that require them to identify persons with knowledge and persons with whom they have been in contact concerning the case. That gives 3M more than sufficient chance to follow up.

B. 3M's Further Restrictions on Plaintiffs' Communications Are Not Warranted By *Abdallah*

3M's primary justification for these onerous restrictions is the decision in *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672 (N.D. Ga. 1999). See Def's Mem. at 15 & n. 11. But *Abdallah* presented the court with different problems than does the proposed class here, and the holding does not express the specific limitations 3M proposes.

The proposed class in *Abdallah* included all African American employees of Coca-Cola, including at the highest levels of company leadership. See *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 702 (N.D.Ga. 2001) (certifying class of "[a]ll African-American persons employed by Defendant Coca-Cola in salaried exempt and non-exempt positions"). Further, the court refused Coca-Cola's request to bar plaintiffs from *ex parte* communications with putative class member "employees involved in defending the action." *Abdallah*, 186 F.R.D. at 677. Accordingly, the court's restrictions on plaintiffs' communications were fashioned to accommodate *ex parte* communications with "upper level employees" who were class members, but who also unquestionably would be included within the scope of Rule 4.2 as members of the leadership of the company and others in possession of highly sensitive information regarding its prosecution of the litigation. *Id.*

Unlike the class in *Abdallah*, the proposed class in this case was defined to exclude employees in upper level managerial and leadership positions – those in Job Grades 18 ("Director") and above. Further, plaintiffs' Proposed Order prohibits their communication with any employees, including putative class members, who "have carried out any responsibilities for any 3M attorneys in connection with this litigation or any litigation against 3M alleging

employment-related claims.” See Proposed Order at ¶¶ 2.b., 2.d. and 3.² Because plaintiffs have structured the class and the Proposed Order to preclude their communication with such “upper level” and sensitive employees, this Court need not fashion restrictions like those in *Abdallah* to accommodate such communications.

Similarly, while it is true that *Abdallah* restricted plaintiffs’ communications with putative class members to those who contacted them, that was not a court-initiated limitation. Rather, that limitation simply responded to the plaintiffs’ request *only* for authorization to communicate with *any* putative class members who contacted them, see *Abdallah*, 186 F.R.D. at 677 (“Plaintiffs request a court order that permits them and their counsel to ... discuss the merits of the suit with potential class members *who contact them ...*”) (emphasis added) – a self-imposed limitation that 3M agrees is not appropriate in this case. See Def’s Mem. at 16.

Abdallah contained one limitation that applied only to “upper level” putative class member employees:

But it is also true that upper level employees of Coca-Cola have a right to bring a discrimination claim against their employer. Therefore, to the extent that these employees wish to pursue employment claims against Coca-Cola, they may communicate freely with Plaintiffs and their counsel. However, communications concerning any other matters relevant to this lawsuit – including but not limited to privileged information – are not permitted.

Abdallah, 186 F.R.D. at 677. 3M’s brief takes substantial license with this passage, attempting to convert it into a rule that “*ex parte* communications with that [mid-level] employee must be limited to the facts surrounding the employee’s own claim against 3M.” Def’s Mem. at 15. The passage does not state such a rule. Indeed, the court’s instruction that these employees “may

² Although plaintiffs’ counsel will not communicate with these putative class member employees, the Proposed Order protects their right to assert their own claims against 3M by providing for referral to separate counsel not associated with plaintiffs’ counsel. See Proposed Order at ¶ 2.d.

communicate freely with plaintiffs” contradicts such a narrow reading. Certainly, *Abdallah*’s next sentence prohibits communications on any other matter relevant to the lawsuit, including privileged information. But given that the court was authorizing *ex parte* communications with employees at the highest levels of the company and “involved in defending the action,” *Abdallah*, 186 F.R.D. at 677, this limitation was designed to protect the variety of highly sensitive information to which these upper level employees had access, rather than to divorce the employee’s facts from those of the class claims they were joining. Because plaintiffs do not seek to communicate with upper level and sensitive employees and propose measures that 3M agrees protect its privilege, such limitations are not required here.

C. 3M’s Proposed Restrictions Overreach

The purposes of Rule 4.2 would be best served by prohibiting plaintiffs’ communication with the 180 executive and Human Resources employees 3M previously identified in connection with discovery issues. Pl’s Mem. at 10-11; *see also* Affidavit of Barbara D. Valitchka in Opposition to Plaintiffs’ Motion to Compel Production of 3M’s Document Destruction and Retention Policies and For A Document Preservation Order (“Valitchka Aff.”) at ¶ 7. 3M instead argues that its interpretation of the *Abdallah* restrictions should apply to approximately 3,000 employees “with supervisory and managerial authority.” Def’s Mem. at 13. This overreaching proposal would severely limit plaintiffs’ communications with a substantial portion of the putative class.

3M indicates that there are 180 executive-level employees (L-1 and L-2) and Human Resources Operations Directors and Managers who support them. Valitchka Aff. at ¶ 7. The next level of management, the Director (L-3 and Grade 18) level, includes an additional 300 persons. See 3M’s Memorandum in Opposition to Motion to Compel (June 3, 2005) at 7. Thus,

480 executive and management employees of 3M are, by definition, outside of the putative class and plaintiffs' counsel will not communicate with them. But 3M is not content with application of Rule 4.2 to the top two or three layers of management. Instead, 3M would have this Court restrict plaintiffs' communications with any class members within a group of about 2,500 managers below the level of Director or Grade 18 (3,000 – 480 = 2,520). It is unreasonable to assert that 3M's counsel "represents" 2,500 low- and mid-level management employees in this case, in addition to 480 upper level Executives and Directors. Indeed, plaintiffs' best estimate is that this would place significant restrictions on counsels' ability to communicate with about one fifth of the class plaintiffs seek to represent.

D. 3M's Proposed Restrictions Are Based On the Abandoned "Managerial Responsibility" Criterion

Although acknowledging that the comments to the recently-adopted amendments to Minnesota's Rule 4.2 "provide appropriate guidance," Def's Mem. at 12, 3M's brief ignores the import of that guidance. As noted in plaintiffs' opening brief, among the dramatic changes in the comments is the complete abandonment of the "managerial responsibility" criterion. Pl's Mem. at 9-10. Yet 3M proposes to restrict plaintiffs' communications to 2,500 potential class members simply because they have "supervisory and managerial authority." Thus, 3M clings to a criterion that has been abandoned.

As attempted justification, 3M quotes the comments' criterion that Rule 4.2 applies to those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Def's Mem. at 12. 3M's brief cites no authority for the application of this criterion to all persons with "managerial responsibility." Instead, it argues:

These 3,000 individuals are Company employees who *likely* made employment decisions which are the subject of this litigation. The acts and omissions of these individuals *in connection with their supervision and management* of putative class members are imputed to 3M for purposes of liability in this litigation, and consequently, these individuals are appropriately considered "represented" by 3M under Rule 4.2.

Def's Mem. at 13 (emphasis added). This argument is a transparent attempt to resurrect the abandoned "managerial responsibility" criterion by stating *a priori* that every manager's acts or omissions may be imputed to 3M for purposes of liability. If that were the case, revision of the comments would be rendered meaningless, at least in employment cases.³

In sum, plaintiffs' Proposed Order would expressly preclude their communication with the 480 employees in the top three layers of 3M's management, ¶ 2, as well as putative class members with close working relationships with 3M's lawyers in this or any other employment litigation, ¶¶ 2.b., 2.d. and 3. It also provides protections against disclosure of privileged matter, ¶ 2.c., that 3M finds satisfactory. 3M has failed to establish that any further restrictions on plaintiffs' communications with putative class members are required to serve the interests of Rule 4.2.

II. THIS COURT SHOULD ORDER THE PROPOSED LIMITATIONS ON DEFENDANT'S COMMUNICATIONS WITH PUTATIVE CLASS MEMBERS AND OTHERS

A. The Court Should Order Prospective Notice To Accompany Releases To Which 3M Has Agreed, With Additional Information

The parties agree that 3M should provide notice of the litigation and its claims in connection with the communication of releases to putative class members, prospectively. See Def's Mem. at 10. They disagree only as to whether the notice should inform putative class

³ The comments provide no guidance on the meaning or application of the "imputed" criterion, and fail to identify any limits on the concept.

members that they can receive further information regarding the claims by contacting plaintiffs' counsel (plaintiffs' Proposed Order at ¶ 4. c. (ii)), and on the time they should be given to consider the release. (3M's proposed order provides for 21 days, see ¶ 10 a. (iii), other employees are given 45 days, Peplinski Aff., Ex. A., Release Section A).⁴

3M fails to acknowledge the purpose of providing notice of the identity of plaintiffs' counsel: to provide putative class members a source of information and the opportunity, if they wish, to understand more about the claims than a brief description in a notice can convey; to discuss their claims in light of the class claims; and to be informed of what may be involved in participating in or benefiting from the litigation. 3M's snide characterization of this notice as "a referral source for Named Plaintiffs' counsel" ignores the interests of the putative class members in obtaining substantial information regarding the claims they are being asked to release. Def's Mem. at 10. The Supreme Court specifically recognized the particular importance of putative class members having the opportunity to consult with class counsel regarding the choice of accepting a settlement or participating in litigation in *Gulf Oil v. Bernard*, 452 U.S. 89, 101 (1981).⁵

⁴ At one point, it appeared that counsel for 3M suggested that the 21 days was in addition to the 45 days provided to all employees, although plaintiffs do not read 3M's proposed language to say that. Plaintiffs seek only to have putative class members treated no less favorably than other employees with respect to the time afforded to consider the release.

⁵ 3M's proposal that the notice advise putative class members only to "seek independent legal advice," 3M's Proposed Order at ¶ 10 a. (iv), thus unfairly denies putative class members access to plaintiffs' counsel as a source of in-depth information regarding the litigation that other attorneys could not be expected to have. Of course, putative class members should have the opportunity to consult counsel of their choice. The release already recites that the employee was advised to "consult an attorney" (Release ¶ 7), and plaintiffs have no objection to the notice advising that the employee may obtain further information from putative class counsel "or any other attorney of your choice."

B. Curative Notice Is Required to Address the Harm of Misleading Communication of Releases

The parties disagree as to whether 3M should provide curative notice. 3M argues that curative notice is not necessary as there has been no harm. Def's Mem. at 10. But 3M fails to acknowledge the harm, recognized by the Manual for Complex Litigation and case law, in communicating a release without informing the recipients that they will be excluded from the class and their pending claims will be extinguished if the release is signed. See Pl's Mem. at 15-17. Persons denied proper notice who have signed releases have excluded themselves from the class and the litigation without the information needed to make an informed choice.⁶

Refusing to provide a curative notice perpetuates that harm. 3M's citation to *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630, 635 (N.D. Tex. 1994), Def's Mem. at 10, on the issue of harm illustrates this point: there the abuse was only letters that may have discouraged putative class members from participating in the case; here the communication was an instrument that, when signed, excludes persons from the class.⁷ Curative notice also is necessary to prevent 3M from unfairly benefiting from its refusal to adopt the practice it now concedes is appropriate when first put on notice, and to remedy the harm to those putative class members occasioned by the time taken for the parties to litigate and the Court to decide the matter.

⁶3M's assertion that publicity about this case is a substitute for notice, Def's Mem. at 9, cannot be taken seriously. Media reports do not and cannot provide the specific information putative class members need to make an informed judgment regarding whether to sign the release and forego their claims or participate in or benefit from the litigation.

⁷ The First Amended Complaint, to which the parties have stipulated, excludes release-signers from the putative class. Prior to the amendment, the effect was the same as far as 3M was concerned: 3M claimed that all release-signers were precluded from participating in the class by virtue of the signed release.

C. The Record Establishes Far More Than A Potential For Serious Abuse Justifying Limits On 3M's Communications With Putative Class Members

3M argues that the record presents no basis for an order limiting 3M's communications with putative class members. Def's Mem. at 5. However, 3M's consent to Court-imposed prospective limits on its communication of releases to putative class members, Def's Mem. at 9, is an acknowledgment that the Court has a proper basis on which to limit its communications. And the undisputed facts of 3M's communication of releases to putative class members and of Ms. Eng's unauthorized contact in a self-appointed mission to investigate the attorney-client relationship between plaintiffs' counsel and one former employee provides more than a sufficient basis for ruling that there is the potential for serious abuse justifying an order limiting 3M's communications under *Gulf Oil*, 452 U.S. at 101-02, and its progeny. See Pl's Mem. at 13-14.

The Manual and numerous cases have concluded that an employer's failure to provide information necessary for putative class members to understand and make an informed choice in considering whether to sign a release constitutes an "abuse" justifying limitations on communications. Pl's Mem. At 16, 18-19. The conduct in this case was not inadvertent, as 3M persisted in these communications despite notice of its obligations at an early point. Nor does 3M's current position evidence a recognition of the harm caused by the abuse: it comes only at the insistence of plaintiffs and, even now, 3M is unwilling to act voluntarily to address the past harm its conduct has caused.

3M's brief studiously avoids discussion or even citation of the many decisions ordering limitations on defendants' communications with putative class members because of the defendant's use of misleading communications concerning releases or settlements. 3M attempts to distinguish only those cases relating to post-certification communications with class members, by apparently suggesting that misleading communications to putative class members are

permissible because they are not "represented" by putative class counsel, but impermissible as to members of a certified class because they are represented by class counsel. *See* Def's Mem. at 6 n. 7. The Court's authority and obligation to enter orders "for the protection of the members of the class or otherwise for the fair conduct of the action" is found in Minn. R. Civ. P. 23.04, and is not constrained by the limits of Minn. R. Prof. Conduct 4.2. Courts consistently have held that "[t]he effect of a defendant attempting to influence potential plaintiffs not to join a potential class action is just as damaging to the purposes of Rule 23 as a defendant that influences members of an already certified class to opt out." *Jenifer v. Delaware Solid Waste Auth.*, 1999 U.S. Dist. LEXIS 2542, at *9-10 (D. Del. Feb. 25, 1999); *Abdallah*, 186 F.R.D. at 678 (same).

3M's *ex parte* contact with a person whom plaintiffs' counsel indicated they represented provides additional evidence of abuse. Despite the affidavits, opinions, characterizations and groundless accusations, the essential facts are undisputed: 1) Ms. Eng was informed that plaintiffs' counsel had an attorney-client relationship with an individual, Eng Aff. ¶ 3; 2), Ms. Eng initiated an unauthorized *ex parte* contact directly with that person on the subject of the representation, Eng Aff. ¶ 5; and, 3) Ms. Eng asked the person to provide her with a copy of correspondence from plaintiffs' counsel, Eng Aff. ¶ 13. These facts establish a violation of Rule 4.2, plain and simple.

The fact that she was responding to a call from the person to 3M, or that he agreed to speak with her, does not exempt or excuse the contact from the Rule's prohibition. *See* Minn. R. Prof. Conduct 4.2 Comment 3 ("The rule applies even though the represented person initiates or consents to the communication"); *State v. Miller*, 600 N.W.2d 457,464 (Minn. 1999) ("The right belongs to the party's attorney, not the party, and the party cannot waive the application of the no-contact rule - only the party's attorney can approve the direct contact and only the party's

attorney can waive the attorney's right to be present during a communication between the attorney's client and opposing counsel."').⁸

Moreover, even if he expressed uncertainty or ignorance of the attorney-client relationship, or repudiated that relationship, the communication is not exempt from the Rule. *See Monceret v. Board of Prof'l Responsibility*, 29 S.W.3d 455, 461 n. 5 (Tenn. 2000) ("Similarly, [ABA Comm. on Ethics and Professional Responsibility, Formal Op.95-396 (1995)] indicates that if a party informs the attorney that he or she is no longer represented by counsel, the attorney must establish "reasonable assurance" that the information is accurate. The most effective way of doing so is to contact the party's lawyer."); *In re News Am. Publ'g*, 974 S.W.2d 97, 103 (Tex. App. 1998) (communication with person who stated in a letter that there was no longer an attorney-client relationship violated Rule 4.2); *see also* ABA Formal Op. 95-396 (lawyer should "confirm whether in fact the representing lawyer has been effectively discharged" by asking for "evidence that the lawyer has been dismissed," "contact[ing] the representing lawyer directly" or "inform[ing] the person that she does not wish to communicate further until he gets another lawyer"); Minn. R. Prof. Conduct 4.2 Comment 6 ("A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.").

For purposes of this motion, however, it is immaterial whether Ms. Eng's contact constituted a violation of Rule 4.2. For purposes of this motion, Ms. Eng's intent to investigate the bone fides of opposing counsels' attorney-client relationships and her conduct in seeking correspondence from plaintiffs' counsel are critical. These facts show the need for an order

⁸ *See also United States v. Smallwood*, 365 F. Supp. 2d 689, 695 (E.D. Va. 2005) ("[Uncounseled] consent in no way mitigates whether a violation of Rule 4.2 has occurred") (citation omitted); Restatement (Third) of the Law Governing Lawyers, § 99 comment f ("The anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication.")

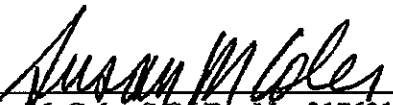
limiting 3M's communications with putative class members in order to protect their interests and the integrity of the class action proceedings. 3M demonstrated through its counsel's behavior, just as it has in its communications concerning releases, a disrespect for the interests of putative class members and the role of counsel for the proposed class that, if not checked, is likely to lead to further abuses. The Court should enter an order limiting 3M's communications with putative class members and others with whom plaintiffs' counsel have an attorney-client relationship.

CONCLUSION

This Court should enter the Proposed Order attached to Plaintiffs' Motion regulating both plaintiffs' and 3M's communications with putative class members and others.

DATED: July 8, 2005

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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


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