

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]

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

[Class Action]

INTRODUCTION¹

Defendant 3M Company has served an interrogatory request on plaintiffs seeking the identities of *every person* who communicated with plaintiffs' counsel about this case. The interrogatory asks plaintiffs to identify these individuals, regardless of the purpose of the communication, regardless of whether these current and former employees who initiated contacts with the firm wanted their identities disclosed to 3M, and regardless of whether they intend to have any active involvement in the case.

For the most part, plaintiffs have made the requested disclosures. As to five persons, however, plaintiffs have not. Plaintiffs move the Court to preserve the anonymity of these non-plaintiff clients ("Anonymous Clients") who sought legal advice from class counsel about participation in the case but then declined further active involvement and sought anonymity based on fear that disclosure of their identities would make them a target for retaliation.

¹ Plaintiffs provided an extensive statement of facts at pages 2 through 8 of the section titled "Background" in its Memorandum of Law in Support of Plaintiffs' Motion to Compel, submitted for filing on May 23, 2005. That statement provides an appropriate overall factual background for this motion as well. Rather than repeat the statement, plaintiffs incorporate it by reference.

Rule 1.6 of the Minnesota Rules of Professional Conduct obligates counsel to try to maintain the confidences and secrets of their clients, *including their identities*, when that is the wish of the client. Rule 26.03 of the Minnesota Rules of Civil Procedure gives the Court broad discretion to issue a protective order preserving the anonymity of persons contacting class counsel, including that certain discovery “not be had.” The circumstances here warrant issuance of such an order.

RELEVANT FACTS

Before and since the filing of this lawsuit, more than 170 people have contacted class counsel, most of them to seek information about the lawsuit, to seek legal advice regarding their potential claims against 3M and their status as putative class members, and/or to provide information about their employment experiences with 3M and 3M’s employment policies and practices. Affidavit of Susan M. Coler in Support of Motion for a Protective Order Preserving Anonymity of Certain Clients (“Coler Aff.”), ¶ 2.

In the course of communications with any persons who make such contacts, class counsel informs the individual that they cannot assure that the identities of the current or former employees will remain confidential. *Id.*, ¶ 3. Through a case website at www.minnesotaclassaction.com, plaintiffs’ counsel also has alerted individuals that contacting the firm could result in disclosure of their identities to 3M.² Several persons who most likely

² The website contains the following text in the section “Should I Call?”

Confidentiality

If you provide us with information relevant to the claims in the case, it is likely that we will have to reveal your name and contact information if 3M asks us for the identity of all persons of whom we are aware who have knowledge concerning the allegations in the complaint. To the extent allowed by law, however, we will keep the substance of the information that you provide to us confidential. By submitting this information to us, you intend, as do we, that all the information

knew this information *before* making their initial contact with counsel have communicated with counsel only through anonymous letters and emails. *Id.*, ¶ 4; Ex. 1.³ A general subject included in the communications from four of those individuals was fear of retaliation. *Id.* As discussed below, others likely learned this information only *after* making their initial contact with the firm, but then withdrew from any further communications on the grounds that they wanted to remain anonymous.

On April 13, 2005, 3M served plaintiffs with its First Set of Interrogatories containing 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.

Ex. 2. In response to these requests, plaintiffs and their counsel produced over 450 names and other identifying information to 3M and its counsel. *Coler Aff.*, ¶ 5 and Ex. 2.

Plaintiffs withheld the identities of certain individuals, stating in their "General Objections and Responses":

3. Pursuant to Minn. R. Prof. Resp. 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

you provide will be privileged from disclosure to 3M Company as a communication between a potential client and an attorney.

³ All exhibits are attached to the *Coler Affidavit* and shall be referenced simply as "Ex. ___."

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. 2.⁴ The circumstances of the five individuals for whom plaintiffs seek to preserve anonymity are as follows:

Anonymous Client A is a former employee and release signer who contacted counsel through electronic mail on January 8, 2005 – after the lawsuit was filed. A subject of one communication was whether his name could be kept confidential. Counsel contacted Anonymous Client A by telephone on January 27, 2005 to answer questions posed by the individual and to provide legal advice. Anonymous Client A ended the communication upon learning that plaintiffs might not be able to keep his name confidential. Counsel have had no further communications with Anonymous Client A. *Coler Aff.*, ¶ 6.

Anonymous Client B is a current employee who contacted counsel several years ago seeking representation in an age discrimination lawsuit against 3M. Counsel engaged in numerous discussions where legal advice was sought and provided. Anonymous Client B ultimately decided not to participate as a plaintiff in this class action lawsuit against 3M. Plaintiffs seek anonymity for Anonymous Client B based on specific directions to hold all communications inviolate and to maintain the secrecy of Anonymous Client B's identity. Anonymous Client B has had no involvement in this lawsuit since before it was filed. *Id.*, ¶ 7.

Anonymous Client C is a current 3M employee who contacted counsel by electronic mail on February 25, 2005 – after the lawsuit was filed – providing information about his 3M employment experiences and seeking to obtain information about possible claims against 3M.

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.

When counsel responded to his email, Anonymous Client C withdrew from communications with the firm on March 1, 2005. No further communications have occurred with Anonymous Client C. *Id.*, ¶ 8.

Anonymous Client D is a current 3M employee who contacted counsel in May 2005 – after the lawsuit was filed – inquiring about his legal options. After an interview on May 9, 2005 about his individual work circumstances, Anonymous Client D withdrew from further communications with the firm. No further communications have occurred with Anonymous Client D. *Id.*, ¶ 9 .

Anonymous Client E is a former 3M employee and release signer who contacted counsel by electronic mail on December 28, 2004 – after the lawsuit was filed. Counsel communicated with Anonymous Client E and provided legal advice. Anonymous Client E then withdrew from any further involvement and indicated a desire to remain anonymous. No communications with Anonymous Client E have occurred since February 24, 2005. *Id.*, ¶ 10.

In all instances, the Anonymous Clients withdrew from communications with class counsel and any active involvement in this lawsuit based on a stated fear of adverse consequences or retaliation by 3M. *Id.*, ¶ 11.

Pursuant to their obligations under Minn. Rule 115.10, the parties have conferred about this motion and have not resolved the matter. *Id.*, ¶ 12. Should any resolution occur in the course of the briefing of the motion, plaintiffs will so inform the Court.

ARGUMENT

I. THE IDENTITIES OF THE PERSONS FOR WHOM ANONYMITY IS SOUGHT ARE “SECRETS” UNDER MINN. R. PROF. CONDUCT 1.6

Except under certain limited circumstances, “a lawyer shall not knowingly ... reveal a confidence or secret of a client.” Minn. R. Prof. Conduct 1.6(a)(1). This prohibition is broader

than the attorney-client privilege, and extends to persons who have "employed or sought to employ the lawyer." Minn. R. Prof. Conduct 1.6 (Comment—1991); *see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 358, text following n.4 (1990), Ex. 3 ("A duty to maintain the confidentiality of information relating to the prospective representation may arise under Rule 1.6 even though the lawyer performs no legal services for the would-be client and declines the representation."). "The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the employment." Minn. R. Prof. Conduct 1.6 (Comment—1991).

According to Minn. R. Prof. Conduct 1.6(d), a "secret" is "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which . . . would be likely to be detrimental to the client." Minnesota courts have not ruled on the question whether a client's identity falls within the ambit of Rule 1.6. However, several courts in other jurisdictions have determined that Rule 1.6 requires attorneys to maintain the secrecy of information relating to the representation of a client, including but not limited to the client's identity. For example, the District of Columbia Court of Appeals has determined that disclosure of a client's identity falls within the scope of Rule 1.6 whenever a client requests nondisclosure. *In re Hager*, 812 A.2d 904, 920 (D.C. App. 2002). *See also In re Goebel*, 703 N.E.2d 1045, 1047 (Ind. 1998) (explaining that Rule 1.6(a) is broad and may include the identity of a client); *In re Advisory Opinion No. 544 of New Jersey Supreme Court Advisory Committee on Professional Ethics*, 511 A.2d 609, 613-15 (N.J. 1986) (same). As one authority summarizes:

[T]he client's identity may be entitled to protection under Rule 1.6 if the fact of the representation itself should be confidential. For instance, a client may not want it revealed that bankruptcy advice has been sought . . .

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411, at n.6 (1998), Ex. 4; *accord* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 358, text accompanying n.9 (1990)

("[u]nder some circumstances, the provisions of these rules prohibit the lawyer from revealing the identity of the would-be client").

The persons for whom anonymity is sought here are clients because each of them sought legal advice from plaintiffs' counsel. Each of them further indicated a desire that plaintiffs' counsel preserve their anonymity – that is, maintain their identities as secrets. Plaintiffs' counsel has the obligation to respect that request unless disclosure is "required by law or court order." Minn. R. Prof. Conduct 1.6(b)(2). Accordingly, plaintiffs have brought this motion seeking to preserve the anonymity of the listed Anonymous Clients.

II. THE FACTS HERE WARRANT EXERCISE OF THE COURT'S DISCRETION UNDER MINN. R. CIV. P. 26.03 TO ORDER THAT THIS DISCOVERY "NOT BE HAD"

For good cause shown, the Court has discretion under Minn. R. Civ. P. 26.03 to issue "any order which justice requires to protect a . . . person from . . . embarrassment [or] oppression . . . including . . . that the discovery not be had." Minn. R. Civ. P. 26.03 and 26.03(a). "The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery," and accordingly has "substantial latitude to fashion protective orders." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984); *see also Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987) (Rule 26.03 gives trial court "broad discretion to fashion protective orders").

In this case, forced disclosure of the identities of the five Anonymous Clients would or might be harmful to the interests of those clients or the judicial process in three ways. Those harms far outweigh the detriment, if any, that 3M would suffer from not having access to the names.

First, revelation of the names would impinge on the privacy interests of the Anonymous Clients. Discovery issues may implicate privacy interests of non-parties and protection of such interests “are implicit in the broad purpose and language of [Rule 26].” *Seattle Times*, 467 U.S. at 35 n.21; *see also Erickson*, 414 N.W.2d at 409 (recognizing privacy concerns of eye witnesses as a factor to be weighed in discovery); *State by Johnson v. Colonna*, 371 N.W.2d 629, 634 (Minn. Ct. App. 1985) (ordering use of Rule 26.03 protective order to protect private personnel data); *Jones v. Clinton*, 12 F. Supp. 2d 931, 934-35 (E.D. Ark. 1998) (preserving “Jane Doe” characterization for third-party witnesses). 3M probably will investigate many if not all of the persons identified in response to the interrogatories. Identification of the Anonymous Clients also may expose them to a subpoena for the production of documents or deposition or both pursuant to Minn. R. Civ. P. 45.

Second, the Anonymous Clients have withdrawn from active involvement in this lawsuit based on a fear of adverse consequences or retaliation if 3M learns their identities. No doubt 3M will argue that such fear is not reasonable. However, the fear is not limited to one or two individuals. The five Anonymous Clients have indicated a desire to keep their identities secret. Another seven persons have communicated with class counsel without disclosing their names. In the words of one of them, “it is clear that the only way to guarantee my confidentiality from 3M (and certain retribution) is to send this message anonymously.” Ex. 1; *see also* Ex. 5 (“When things start getting exposed, I strongly suspect there will be some serious retribution.”). A general subject included in four of those communications was a fear of retaliation.

It cannot be disputed that 3M has power over current and former employees that it could wield to their detriment. Courts have acknowledged that employers often have such power and have made efforts to protect employees who could be victimized by their employer. In the

context of FLSA enforcement actions, courts have recognized a qualified privilege allowing the Secretary of Labor to withhold, at least in initial discovery, the names of people who have given statements. *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 302 (8th Cir. 1974). The rationale for allowing this preservation of anonymity is an acknowledgement of the risk of retaliation faced by employees who challenge illegal employer conduct:

“The average employee involved in this type of action is keenly aware of his dependence upon his employer’s good will, not only to hold his job but also for the necessary job references essential to employment elsewhere. Only by preserving their anonymity can the government obtain the information necessary to implement the law properly.”

Id. (quoting *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962)). See also *Donovan v. First Federal Sav. & Loan Ass’n*, 1982 U.S. Dist. LEXIS 12789, at *3 (S.D. Iowa 1982) (purpose of privilege is to promote enforcement and “protect both present and former employee informants from retaliation by the employer”).

Third, 3M’s demand for disclosure of the identities of everyone “from whom [plaintiffs or their agents] have received any communication which referred, related, or pertained to any of the allegations in your Complaint” may have a chilling effect on the ability of potential class members to obtain information about this case designed to represent their interests. Ex. 2, Interrogatory No. 2. The request, if enforced fully by the Court, would deprive non-plaintiffs in this case of any opportunity to obtain information directly from plaintiffs’ counsel about this lawsuit or to request legal advice about their options with regard to the lawsuit without having their identities disclosed to 3M. Because it seeks identification based on the very act of initiating contact, the interrogatory leaves an individual with no means of contacting plaintiffs’ counsel and preserving anonymity. One purpose of Rule 26.03 is to mitigate this type of chilling effect.

See Seattle Times, 467 U.S. at 37 n.24 (noting lower court's recognition that intrusion on privacy may chill right of person to resort to the courts for redress).

Thus, three substantial reasons exist to protect the names of the five Anonymous Clients. These bases for anonymity far outweigh 3M's interest in discovering their names.

None of the five is a plaintiff. None has any active ongoing involvement in the lawsuit. One of them considered participating in a lawsuit before this case was even filed and has had no involvement in this action since then. The other four had limited contact with plaintiffs' counsel for purposes of seeking legal advice since the lawsuit was filed. For each of them the requested anonymity falls within the purview of the type of "secret" warranting protection under the Rules of Professional Conduct and Minn. R. Civ. P. 26.03. As a condition of the protective order, plaintiffs will agree not to solicit information from these clients nor to call them as witnesses unless they have been timely identified in a supplement to plaintiffs' answers to defendant's interrogatories, and this provision is included in plaintiffs' Proposed Order.


3M has substantial access to information about all current and former 3M employees. Plaintiffs have identified and will continue to identify persons who are potential witnesses and who have any type of active involvement in this lawsuit. 3M can claim no prejudice and should not be allowed to put every current or former 3M employee in the situation of being identified to their employer upon the sole act of contacting plaintiffs' counsel. Good cause warrants this limited protective order, the issuance of which is well within the Court's authority under Rule 26.03.

CONCLUSION

For the foregoing reasons, plaintiffs' counsel respectfully requests that this Court enter a Protective Order permitting plaintiffs' counsel to preserve the anonymity of the five Anonymous Clients.

DATED: June 28, 2005

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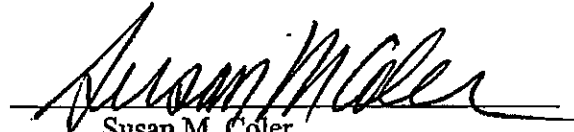
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ACKNOWLEDGMENT

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: June 28, 2005


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