

STATE OF MINNESOTA
IN COURT OF APPEALS

Clifford L. Whitaker, and Michael V. Mucci, on behalf of themselves and all others similarly situated,)	
)	PETITION FOR DISCRETIONARY REVIEW UNDER MINN. R. CIV. APP. P. 105.01
Petitioners,)	
)	
vs.)	TRIAL COURT CASE NUMBER 62-C4-04-012239 [T. Warner]
)	
3M Company,)	
)	
Respondent.)	DATE OF FILING ORDER: 09/16/05

TO: The Court of Appeals of the State of Minnesota:

The petitioners, Clifford L. Whitaker and Michael V. Mucci, on behalf of themselves and all others similarly situated, request discretionary review under Minn. R. Civ. App. P. 105.01 of an Order Denying Motion for Protective Order of the Ramsey County District Court, entered on September 16, 2005 (attached as Exhibit 1). This Order denied petitioners' Motion for a Protective Order Preserving Anonymity of Certain Clients.

1. Statement of facts necessary to an understanding of the issues presented.

Petitioners Whitaker and Mucci filed this class action lawsuit against respondent 3M Company on December 21, 2004, alleging that 3M has engaged in a pattern and practice of age discrimination. In the First Amended Complaint, petitioners defined the class as:

All persons who were 46 or older when employed by 3M in Minnesota in a salaried position below the level of director, or salary grade 18, at any time during the liability period as determined by the Court and who did not sign a document on or about their last day of employment purporting to release claims arising out of their employment with 3M.

Petitioners estimate the number of class members to be approximately 7,000 current and former employees.

Before and since the filing of this lawsuit, more than 170 people have contacted putative class counsel. Among other things, they have sought information about the scope and claims of the lawsuit and the nature of a class action, as well as legal advice regarding the meaning and effect of class membership and any potential claims they may have against 3M.

Because the law is not clear and they could not guarantee anonymity to persons who contact petitioners, class counsel has taken measures to inform individuals of the potential consequences of contacting class counsel even before contact is made. Through a website at www.minnesotaclassaction.com, class counsel has attempted to alert individuals that contacting the firm could result in the disclosure of their identities to 3M, but advised that class counsel would keep such communications confidential to the extent allowed by law. Some persons who likely read the website *before* making initial contact have sent messages to class counsel only through anonymous letters and electronic mail explaining that they feared retaliation if their identity were known to 3M. Others communicated with class counsel without knowledge that, by doing so, their identity might be disclosed to 3M in the litigation.

3M's First Set of Interrogatories asked petitioners to identify each person with knowledge of the issues in the case, and with whom petitioners or their counsel had communicated regarding the case:

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.

(Emphasis added.)¹

In answer, petitioners disclosed to 3M the identity of several hundred persons with whom petitioners and class counsel had communicated. This included all such persons except those few who sought legal advice from class counsel about potential participation in the case but, fearing retaliation if their identities were disclosed, sought anonymity and decided not to have any active involvement in the case (together “Anonymous Clients”).

In withholding the identities of these Anonymous Clients, petitioners stated the following “General Objections and Responses” to the interrogatories:

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 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.”²

Without disclosing their identities, the individuals who seek to preserve their anonymity are putative class members who can be described as follows:³

Anonymous Client B is a current employee who contacted counsel several years ago seeking representation to assert age discrimination claims against 3M. Counsel engaged in numerous discussions where legal advice was sought and provided. Anonymous Client B ultimately decided not to participate

¹ 3M defined “you” to include the named plaintiffs and their lawyers.

² Although Petitioners originally believed seven persons had requested anonymity, they needed to seek relief only for five in their motion to the District Court.

³ Class counsel informed all Anonymous Clients of the District Court Order and the prospect of this Petition for Discretionary Review. After having been so informed, three of these Anonymous Clients continue to seek to have their identities remain secret. Two of these persons (identified as Anonymous Clients A and E in the filing before the District Court) have informed counsel that their names now may be disclosed to 3M. Accordingly, this petition is not submitted on behalf of Anonymous Clients A and E, and class counsel will disclose their identities in supplemental interrogatory answers.

as a plaintiff in this class action lawsuit against 3M. Anonymous Client B has had no involvement in this lawsuit since before it was filed. Plaintiffs seek anonymity for Anonymous Client B based on specific directions to maintain the secrecy of Anonymous Client B's identity and to hold all communications inviolate. In communications with class counsel since the District Court's Order, Anonymous Client B has communicated ongoing direction to preserve the secrecy of his identity.

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 employment experiences with 3M and seeking to obtain information about potential claims against 3M. When counsel responded to the email, Anonymous Client C withdrew from communications on March 1, 2005. Counsel has had no further communications from Anonymous Client C, except a confirmation, subsequent to the District Court's Order and in contemplation of this Petition, that he did not wish his identity to be disclosed.

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

As indicated in the "General Objections and Responses," petitioners filed a Motion for a Protective Order Preserving Anonymity of Certain Clients. Among other things, petitioners argued that the circumstances warranted issuance of a protective order because Rule 1.6 of the

Minnesota Rules of Professional Conduct obligates counsel to maintain the confidences and secrets of their clients, *including their identities*, when that is the wish of the client, to the extent possible, and Rule 26.03 of the Minnesota Rules of Civil Procedure gives the Court broad discretion to issue a protective order, including that certain discovery “not be had.”

Following submission of briefs and oral argument, on July 12, 2005, the District Court issued its Order Denying Motion for Protective Order.

2. Statement of the issues.

A. Whether the identity of a client or former client is "information relating to the representation of a client" that an attorney “shall not knowingly reveal” within the meaning of Minn. R. Prof. Conduct 1.6, and that is to be honored in the context of discovery in a matter in which the client is not a litigant or active participant.

B. Whether, in light of Minn. R. Prof. Conduct 1.6 and Minn. R. Civ. Pro. 23.04, a person's identity and the fact that they sought legal advice regarding possible involvement in a class action is discoverable information, pursuant to Minn. R. Civ. P. 26.02, where the person requests anonymity and, after seeking that advice, decides not actively to participate in the action.

3. Statement why immediate review of interlocutory or otherwise nonappealable order is necessary.

This petition raises important questions of general application not previously answered by Minnesota appellate courts regarding the protections afforded the attorney-client relationship. The issues involve the scope of lawyers’ obligations to preserve confidential information and the right of putative class members and other non-litigant clients to contact a lawyer to seek legal advice without fear of that fact being disclosed to the opposing party.⁴ Resolution of these

⁴ As used here, “putative class members” refers to absent members of the proposed class who are not the named plaintiffs or actively involved in the prosecution of the case, and “non-litigant clients” refers to a lawyer’s prospective, current or former clients who may have claims but are not parties and are not actively participating in a case in which the lawyer represents another client. In either instance, the person may have sought legal advice regarding their rights from counsel in the case and, therefore, be one “with whom counsel has communicated about the case” for purposes of discovery.

complex issues requires interpretation of newly-adopted Minn. R. Prof. Conduct 1.6,⁵ and a determination of the interplay of that ethical Rule with Minn. R. Civ. P. 23.04, regarding class actions, and 26.02 and 26.03, regarding the scope and limits of discovery and grounds for protective orders. *See Clark v. Monnens*, 436 N.W.2d 830, 831 (Minn. Ct. App. 1989) (suggesting that discretionary review under Rule 105.01 is appropriate where the discovery issues are not “limited to this case, and appellate review would ... settle difficult questions of general application”); *In re Rice Lake Auto, Inc.*, 430 N.W.2d 881, 882 (Minn. Ct. App. 1988) (recognizing that a petition under Rule 105.01 is an “appropriate form of relief” from discovery orders because they are interlocutory in nature).

In addition, there are “compelling reasons for immediate review” of the District Court’s Order, *Rice Lake Auto*, 430 N.W.2d at 883, because disclosure of the Anonymous Clients’ claimed secrets will occur, and their interests in confidentiality irrevocably will be lost, prior to any opportunity for appeal as of right.⁶ Comment 11 to Rule 1.6 contemplates that appellate review, presumably interlocutory, of adverse rulings will be available. Indeed, unless interlocutory review of orders requiring disclosure of the identities of clients is granted, such orders will continue to evade appellate review because disclosure will render them moot before an appealable final judgment.

⁵ By Order of the Minnesota Supreme Court dated June 17, 2005, amendments to the Minnesota Rules of Professional Conduct, including amendments to Rule 1.6, were adopted, effective October 1, 2005. For purposes of disposition of the motion for a protective order, the parties agreed that the amended rules should apply to this litigation. The amended rules now apply by virtue of their effective date.

⁶Petitioners have moved the District Court for a stay of the disclosure of the Anonymous Clients’ identities.

A. Rule 1.6 and Client Confidentiality

This Court's discretionary review is necessary, first, to answer the question whether the identity of a client is within the scope of Minn. R. Prof. Conduct 1.6. As the District Court below observed, "no Minnesota court ... has ruled on the question of whether a client's identity falls within the confidences and secrets under Rule 1.6" (Order at 3.) The text of the previous version of Rule 1.6 did not expressly indicate whether or when a client's identity was a "confidence or secret," although the Comment to that version advised lawyers to protect a "client's identity," at least when seeking counsel from other lawyers. The recent amendments to Rule 1.6 abandoned the concept of "confidence or secret" in favor of the more encompassing "information relating to the representation of a client," and Comment 3 to the amended Rule confirms that "[t]he confidentiality rule ... applies not only to matters communicated in confidence by the client but also to *all information* relating to the representation, whatever its source." (Emphasis added.) As in the Comment to the prior version, Comment 4 to amended Rule 1.6 instructs that a lawyer should use care in discussing matters related to the representation to avoid a "reasonable likelihood that the listener will be able to ascertain the identity of the client"

The District Court below had no guidance from Minnesota appellate courts on the interpretation of Rule 1.6. It acknowledged "decisions from other jurisdictions where the disclosure of a client's identity was held to be within the scope of Rule 1.6 protections" (Order at 3), but did not itself directly answer this question. It is not clear that the court afforded client identity any right to protection under Rule 1.6. To the extent it did, the court gave that right little importance, holding under Minn. R. Civ. P. 26.03 that, in the absence of proof of retaliatory conduct, "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.*" (Order at 4 (emphasis added).)

Minnesota lawyers, clients, persons interested in seeking legal advice, and courts all need appellate guidance in understanding whether and under what circumstances Rule 1.6 protects from disclosure the identity of a client or the fact that the client has sought legal advice. Client confidentiality is a "fundamental principle" of the client-lawyer relationship. Rule 1.6, Comment 2. Lawyers cannot properly fulfill their obligations to clients and the system of justice without a clear understanding of their obligations to preserve confidentiality. Persons who wish to obtain legal advice should have the right to know whether a consequence may be disclosure of that fact and their identity. And courts, in addressing discovery and other issues, need clear guidance on the protections from disclosure arising from the client-lawyer relationship. This Court should grant discretionary review to provide this needed guidance.

B. Client Confidentiality, the Rights of Putative Class Members and Discovery

To the extent that Rule 1.6 affords some protection to client identity, this Court's discretionary review also is necessary to answer the question whether Rule 1.6 alone, or in conjunction with protections accorded by Minn. R. Civ. P. 23.04 to communications between putative class members and putative class counsel, makes the identity of putative class members who have sought legal advice beyond the scope of discoverable information under Minn. R. Civ. P. 26.02. The District Court not only concluded that the defendant was "entitle[d] to discovery of the identities of these individuals" notwithstanding Rule 1.6 (Order at 4), but rejected petitioners' contention that "revealing the identity of these five individuals will have a 'chilling effect' on the ability of potential class members to get information." (Order at 3-4.) Thus, this petition presents broad issues central to the rights of putative class members to seek legal advice

from putative class counsel or other potential clients to seek advice from a lawyer representing another, including advice concerning possible claims and available avenues to pursue those claims, without their identity being disclosed to an adverse party.

Finding that “[c]lass actions serve an important function in our system of civil justice” by vindicating the rights of absent class members, the United States Supreme Court has recognized that the federal analog to Minn. R. Civ. P. 23.04 established rights of putative class members to obtain information regarding a class action to decide for themselves whether to participate, and duties of putative class counsel to inform putative class members of the class action. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 & n.11, 101 & n.14 (1981). Without deciding the issue, the Supreme Court has suggested that these rights may be of constitutional dimension, and that burdens on these rights are “serious restraints on expression.” *Id.* at 99, 103-04. The disclosure to the adverse party of the identity of putative class members who have sought legal advice regarding their rights and interests in connection with such an action represents a heavy burden on these rights. Thus, the interests protected by Rule 1.6 are complemented and strengthened by the interests protected by Rule 23.04.

Even if the interests in client confidentiality protected by Rule 1.6 and Rule 23.04 are not absolute,⁷ this Court should answer the question whether the identity of a client or prospective client who sought legal advice is subject to disclosure in discovery. Minn. R. Civ. P. 26.02(a) permits discovery as to “any matter, not privileged, which is relevant to the subject matter involved in the pending action” or “appears reasonably calculated to lead to the discovery of admissible evidence.” Because the subject of the communication with counsel will be protected

⁷ Comment 10 to the current version of Rule 1.6 provides that: “Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules.”

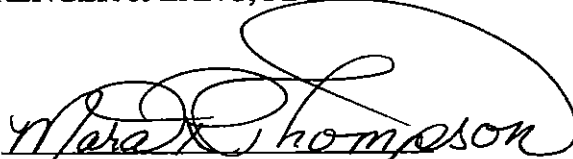
by privilege, disclosure of the identity of a class member or other non-litigant and the fact that he or she sought legal advice alone does not indicate the likelihood of discovering admissible evidence and should not be a permissible basis on which to distinguish among a number of persons who may have potential claims.

Rule 26.03, which authorizes courts, “for good cause shown,” to order “(a) that the discovery not be had; [or] (d) that certain matters not be inquired into,” provides courts with the tools properly to protect the interest of putative class members and non-litigant clients. Again without guidance from Minnesota appellate courts, the District Court did not make use of these available measures to foreclose or limit discovery on these matters and, instead, suggested that a protective order would be available, if at all, only on an affirmative showing of “retaliatory conduct” by the defendant. (Order at 4.) This Court should provide guidance on the rights of punitive class members and other non-litigant clients freely to seek legal advice and the extent, if at all, that those rights can be burdened by disclosure to an adverse party in discovery.

WHEREFORE, the petitioners request an order of the Court granting the petition for discretionary review.

DATED: October 17, 2005

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
CIVIL DIVISION
Court File No. C4-04-12239

Clifford L. Whitaker and Michael V. Mucci,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

**ORDER DENYING MOTION
FOR PROTECTIVE ORDER**

3M Company,

Defendant.

The above-entitled matter came on for a hearing before the Honorable Teresa R. Warner, District Court Judge, 1070 Ramsey County Courthouse, 15 W. Kellogg Blvd., St. Paul, Minnesota, 55102, on July 12, 2005, on Plaintiffs' Notice of Motion and Motion for a protective order preserving the anonymity of five individuals.

Susan M. Coler, Esq., Sprenger & Lang, P.L.L.C., 310 Fourth Avenue South, Suite 600, Minneapolis, Minnesota, 55415, and Thomas J. Henderson, Esq., Sprenger & Lang, P.L.L.C., 1614 Twentieth Street N.W., Washington, D.C., 20009, appeared representing the Plaintiffs.

Thomas W. Tinkham, Esq., Douglas R. Christensen, Esq., and Holly S. A. Eng, Esq., Dorsey & Whitney, L.L.P., 50 South Sixth Street, Suite 1500, Minneapolis, Minnesota, 55402-1498, appeared representing the Defendant.

Based upon the entire file, record and proceedings herein, the arguments of counsel and the written memoranda submitted on this issue, the Court makes the following:

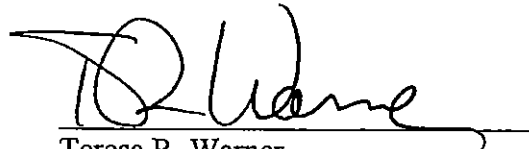
EXHIBIT 1

ORDER

1. That Plaintiffs' motion for a protective order preserving the anonymity of certain clients is **DENIED**;
2. That the attached Memorandum is incorporated herein and constitutes the Court's findings of fact, as required by Minnesota Rule of Civil Procedure 52.01;
3. There being no just reason for delay, let judgment be entered accordingly.

Date: September 16, 2005

By the Court:

A handwritten signature in black ink, appearing to read "T. Warner", written over a horizontal line.

Teresa R. Warner
District Court Judge

MEMORANDUM

In this motion, Plaintiffs seek a protective order preserving the anonymity of five persons 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 may make them a target for retaliation. In seeking a protective order for these five individuals, Plaintiffs rely on Minnesota Rule of Professional Conduct 1.6 (a)(1), which provides that, except when certain specific exceptions apply, a lawyer “shall not knowingly reveal a confidence or secret of a client...” The Plaintiffs also rely on Minnesota Rule of Civil Procedure 26.03, which provides that:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the discovery not be had;...

Plaintiffs state that the five individuals for whom the protective order is sought withdrew from communications with class counsel and declined any active involvement in this lawsuit based on a stated fear of adverse consequences or retaliation by 3M.

There is no Minnesota court that has ruled on the question of whether a client’s identity falls within the confidences and secrets under Rule 1.6 of the Minnesota Rules of Professional Conduct. Plaintiffs cite a number of decisions from other jurisdictions where the disclosure of a client’s identity was held to be within the scope of Rule 1.6 protections. Plaintiffs also argue that under Minnesota Rule of Civil Procedure 26.03, good cause has been shown that this discovery “not be had.” Plaintiffs argue that there are three primary reasons for anonymity outweighing 3M’s interest in seeking this discovery. 1) Plaintiffs argue that revealing the names of these individuals would impinge on their privacy interests; 2) that these five individuals withdrew from any involvement in this lawsuit because of fear of retaliation from 3M; and 3) revealing the

identity of these five individuals will have a “chilling effect” on the ability of potential class members to get information.

This Court is satisfied that the Plaintiffs have failed to show good cause for the issuance of the protective order. 3M’s argument is that the disclosure of these five individuals will lead to the discovery of admissible evidence and will also help 3M to not engage in improper communications and violate protected, confidential and privileged communications.

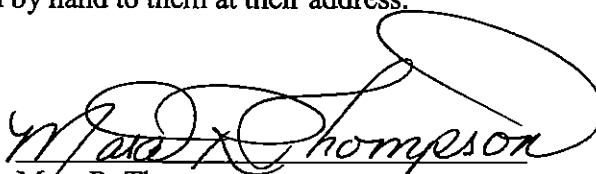
On its web site, counsel for Plaintiffs and prospective plaintiffs disclosed that identities likely will not remain confidential. There is also a disclaimer on the web site indicating that Sprenger & Lang will keep the substance of the information provided confidential, but does not provide confidentiality regarding the individual’s identity. The Plaintiffs have disclosed over 450 names and have not sufficiently explained why these five individuals’ identity should be withheld.

The Plaintiffs have cited a number of cases to support their proposition that they should be protected from divulging the identity of these “secret clients” in response to 3M’s discovery request. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299 (8th Cir. 1974) and *Donovan v. First Federal Sav. & Loan Ass’n*, 1982 U.S. Dist. LEXIS 12789, *3 (S.D. Iowa Mar. 31, 1982). Those cases are different from the scenario presented in this present litigation. There is nothing in the record to support the concern for retaliatory conduct by 3M. 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.

TRW

AFFIDAVIT OF SERVICE

I hereby certify that I caused to be served on, October 17, 2005 a copy of the Petition for Discretionary Review Under Minn. R. Civ. App. P. 105.01, on Holly S.A. Eng, Esq., Dorsey & Whitney, LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402-1498, attorneys for Respondent, by placing copies in an envelope, addressed to said attorneys at their last-known address above, and causing it to be delivered by hand to them at their address.


Mara R. Thompson

Subscribed and sworn to before me

this 17th day of October 2005.



Notary

