

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]

**PLAINTIFFS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO
STAY DISCLOSURE OF ANONYMOUS
CLIENTS AND, IF DISCRETIONARY
REVIEW IS GRANTED, TO ORDER
THE STAY ON OTHER TERMS THAN
A SUPERSEDEAS BOND**

[Class Action]

BACKGROUND

This Court issued its Order Denying Motion for Protective Order ("Order") on September 16, 2005. The result of that Order is that plaintiffs are required to disclose the identities of five Anonymous Clients in response to defendant 3M Company's Interrogatories 1 and 2. Consistent with their obligations under Minn. R. Prof. Conduct 1.4 and 1.6,¹ plaintiffs have consulted with the Anonymous Clients about the Order. Affidavit of Susan M. Coler, ¶ 2. Anonymous Clients A and E have informed class counsel that they may now disclose their names and plaintiffs will do so in a supplement to their discovery responses. *Id.* at ¶ 3.

On behalf of Anonymous Clients B, C, and D (together "Anonymous Clients"), plaintiffs filed a petition for discretionary review of the Order pursuant to Minn. R. Civ. App. P. 105.01. The filing occurred on October 17, 2005 and plaintiffs have provided this Court with notice and a copy of the petition.

¹ "In the event of an adverse ruling [by a court or other tribunal], the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4." Minn. R. Prof. Conduct 1.6, Comment 11.

On October 10, 2005, plaintiffs' counsel contacted 3M counsel and requested that 3M stipulate to a stay of the disclosure requirement pending the appeal. 3M refused to so stipulate, thereby giving plaintiffs no choice but to file this motion. *Id.* at ¶ 4.

ARGUMENT

Plaintiffs respectfully ask the Court to stay the disclosure of the Anonymous Clients' identities until resolution of their appeal. The requested stay has two components – the period during which the Court of Appeals considers plaintiffs' petition for discretionary review and, if review is granted, the period until the appeal is resolved. Plaintiffs are petitioners and not yet appellants during the discretionary review period, putting their motion for a stay during this period within the purview of Minn. R. Civ. P. 16.03(f) and 26.03. If review is granted, plaintiffs are automatically entitled to a stay under Minn. R. Civ. P. 62.03 and Minn. R. Civ. App. P. 108.01 if they comply with the requirements of Minn. R. Civ. App. P. 108.01, subd. 2. Besides seeking a stay during the discretionary appeal period, plaintiffs seek the Court's determination of appropriate terms for a stay under Minn. R. Civ. App. P. 108.01, subd. 2.

I. GOOD CAUSE AND THE INTEREST OF JUSTICE SUPPORT A STAY OF DISCLOSURES DURING THE DISCRETIONARY REVIEW PERIOD

Plaintiffs have found Minnesota rules and caselaw bereft of specific standards to apply to a motion for a stay during a discretionary review period. However, the rules provide general guidance. Under Minn. R. Civ. P. 16, a court may exercise its discretion to “take *appropriate* action, with respect to: . . . (f) the control and scheduling of discovery, including orders affecting discovery” Minn. R. Civ. P. 16.03(f) (emphasis added). To the extent that a motion for a stay of particular discovery while on appeal is akin to a temporary protective order, Minn. R. Civ. P. 26.03 requires “good cause shown” and allows the Court to order any party or person to provide or permit discovery “on such terms and conditions as are just.”

There are at least four reasons why the Court should grant plaintiffs' motion for a stay during the discretionary review period. First, denial of the stay effectively would defeat plaintiffs' right to petition for discretionary review. If plaintiffs are required to make the disclosures before the petition is decided, the protection of the Anonymous Clients' identities will become a moot issue for purposes of any appeal – plaintiffs cannot unring that bell. By itself, this reason establishes good cause for granting the stay, which certainly is a just means of assuring that plaintiffs can exercise their right to petition for review as established by the Minnesota legislature.

Second, 3M is hard pressed to show that the stay will result in unfair prejudice outweighing the de facto defeat of plaintiffs' ability to petition for discretionary review. The Anonymous Clients are not plaintiffs and are not persons who are playing an active role in the litigation. They are three out of approximately 7,000 or more putative class members and three out of over 170 to have had contact with class counsel. The communications these individuals had with class counsel are privileged, making the contents of the communications not discoverable. 3M has access to all of its own employee information about all of the class members, making weak any claim that learning the identities of these three individuals before the appeal process is complete is essential to its defense or that denial of the disclosures during the discretionary review period will be unfairly prejudicial.

Third, the now-issued Order Regarding *Ex Parte* Communications with Putative Class Members and Current and Former Employees will address the concern expressed by the Court on page 4 of its Order that disclosure will “help 3M to not engage in improper communications and violate protected, confidential and privileged communications.” The Anonymous Clients all are putative class members. The *Ex Parte* Communications Order at paragraph 8 obligates 3M and

its attorneys, when initiating contact with any putative class member about this lawsuit, to advise the employee of their identity, and to inform the employee that he or she may choose not to engage in any communications with them. Further, paragraph 8 directs 3M and its attorneys, when making a contact, to

instruct the putative class member that if the putative class member is represented by counsel or has contacted counsel, is relying on the representation of counsel, or wishes to be represented by Plaintiffs' counsel, that Defendant or the 3M attorney making the contact is prohibited from further communications with the putative class member regarding 3M's investigation of the allegations made in this litigation . . . and that the putative class member may simply state that they do not wish to communicate regarding 3M's investigation of the allegations made in this litigation

Moreover, to assure that the Anonymous Clients themselves are aware of these protections, plaintiffs intend to send a copy of the *Ex Parte* Communications Order to each of them, thereby informing them of their rights under the Order and the means provided in the Order to assure that protected, confidential and privileged communications remain inviolate. Should 3M happen to select one of the Anonymous Clients for communications out of the more than 7,000 putative class members, its compliance with the *Ex Parte* Communications Order will prevent it from engaging in improper communications.²

Finally, Minnesota's appellate rules allow for a virtually automatic stay if the appellant meets certain requirements. This indicates a public policy supporting a party's ability to seek review of decisions of the district court before execution of those decisions – that is, before the bell is rung. To deny a stay during the discretionary review period would thwart this policy.

In sum, compelling and multiple reasons establish good cause, making a stay of disclosures appropriate during the discretionary review period.

² 3M can be guilty of improper communications only if it reasonably knows an employee is represented by counsel and approaches the employee anyway. Obviously, that scenario cannot happen with the Anonymous Clients.

II. IF THE COURT OF APPEALS GRANTS THE PETITION FOR DISCRETIONARY REVIEW, A STAY “ON OTHER TERMS” IS APPROPRIATE UNDER MINN. R. CIV. APP. P. 108.01

Titled “Stay Upon Appeal,” Minn. R. Civ. P. 62.03 provides that “the appellant may obtain a stay only when authorized and in the manner provided in Rules 107 and 108, Rules of Civil Appellate Procedure.” Those rules provide clear guidelines for achieving a stay of discovery once an issue is accepted for appeal. Minn. R. Civ. App. P. 108.01, subd. 1 states that

the appellant may obtain a stay by providing a supersedeas bond or other security in the amount and form which the trial court shall order and approve, in the cases provided in this rule

An application to approve a supersedeas bond, or for a stay on other terms, shall be made in the first instance to the trial court.

Therefore, if review is granted, a stay is virtually automatic once the plaintiffs/appellants provide appropriate security through a supersedeas bond or a “stay on other terms.”

For appeals “from an order,” Minn. R. Civ. App. P. 108.01, subd. 2 provides that

the condition of the bond shall be the payment of the costs of the appeal, the damages sustained by the respondent in consequence of the appeal, and the obedience to and satisfaction of the order or judgment which the appellate court may give if the order or any part of it is affirmed or if the appeal is dismissed.

The delay of disclosures caused by the appeal will not cause monetary damages, nor will obedience to or satisfaction of the Order involve the payment of money. If plaintiffs are unsuccessful in their appeal, obedience to the Order solely will involve making discovery disclosures. Accordingly, the circumstances of this appeal result in the need for security under Minn. R. Civ. App. P. 108.01, subd. 2 only for the “costs of the appeal.”

If review is granted, Minn. R. Civ. App. P. 107 will require the plaintiffs/appellants, to provide either a bond or a deposit of \$500 with the trial court administrator as security for payment should costs and disbursements be awarded against them in the appeal. This bond or

deposit also satisfies the “costs of the appeal” requirement in Minn. R. Civ. App. P. 108.01, subd. 2. Since that is the only monetary component of Rule 108.01, subd. 2 relevant to this case, plaintiffs move the Court for a stay “on other terms” than a supersedeas bond. As set forth in the order submitted with this filing, plaintiffs propose the following as appropriate conditions for a stay “on other terms”:

1. Within five working days from the filing of this Order, plaintiffs shall provide Anonymous Clients B, C, and D with copies of this Court’s Order Regarding *Ex Parte* Communications with Putative Class Members and Current and Former Employees.
2. Plaintiffs shall not solicit information for use in this lawsuit from any of the Anonymous Clients nor call any of them as witnesses unless the Anonymous Client has been timely identified in a supplement to Plaintiffs’ Answers to Defendant’s First Set of Interrogatories.
3. If the Court of Appeals grants discretionary review of the Order Denying Motion for a Protective Order, the “costs of the appeal” requirement shall be met upon fulfilling the bond requirements of Minn. R. Civ. App. P. 107.01.


These conditions are appropriate because they address the Court’s concern about 3M engaging in improper communications, prevent plaintiffs from gaining any improper advantage through seeking information from the Anonymous Clients, and meet the requirements of the appellate rules.

CONCLUSION

Compelling reasons exist for granting plaintiffs’ motion for a stay of disclosures, and if the court of appeals grants plaintiffs’ petition for discretionary review, the proposed “stay on other terms” provides 3M with security appropriate to the issue on appeal. For these and all of the above reasons, plaintiffs respectfully request the Court to grant their motion.

DATED: October 17, 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: October 17, 2005


Mara R. Thompson