

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
CIVIL NO. 05-0602

ROMAN CATHOLIC BISHOP OF SPRINGFIELD,  
A CORPORATION SOLE

v.

TRAVELERS CASUALTY AND SURETY COMPANY & others<sup>1</sup>

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED  
JAN - 5 2007  
*William P. Pless*  
CLERK-MAGISTRATE

**MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANTS' MOTION TO COMPEL**

This is an action by the Roman Catholic Bishop of Springfield, a Corporation Sole (the Diocese), seeking a declaration of the defendant insurers' obligations to provide coverage for claims relating to demands for damages as a result of sexual abuse by clergy or others allegedly under the supervision or control of the Diocese. The defendants now move to compel the Diocese to produce several categories of documents listed in the Diocese's privilege logs, amounting to some 7,686 pages and to provide further answers to interrogatories. The Court considers, in turn, each of the Diocese's bases for not complying with discovery requests, and the defendants' arguments in support of its motion to compel.

---

<sup>1</sup>Massachusetts Insurers Insolvency Fund, North Star Reinsurance Corporation, Underwriters at Lloyd's, London, Centennial Insurance Company, Interstate Fire & Casualty Company, and Colonial Penn Insurance Company

## 1. Attorney-Client Privilege and Work Product Doctrine

The defendants seek the production of privileged and/or protected materials relating to the handling of the underlying claims, and argue that the Diocese, as an insured, owes them a duty to cooperate which trumps the attorney-client privilege and the work product doctrine. There are two problems with the defendants' argument. First, they advance bare assertions but point to no specific insurance policy provision imposing upon the Diocese a contractual duty to cooperate with the defendants. Contrast *Dedham-Westwood Water District v. National Union Fire Ins. Co. of Pittsburgh*, 2000 WL 33593142, \* 5 (Mass. Superior Ct., Feb. 4, 2000) (Connolly, J.) (analyzing whether an insurance policy's cooperation clause negated the attorney-client privilege or work product doctrine). Second, and even assuming arguendo that such a duty to cooperate is applicable to the policies at issue,<sup>2</sup> the defendants cite to no case law showing that the duty eviscerates the attorney-client privilege or work product immunity. See, e.g., *id.* ("a broadly worded cooperation clause is insufficient to override the attorney-client privilege or work product immunity since such a clause does not provide a clear intent to override these privileges"), citing *Pittston Co. v. Allianz Ins. Co.*, 143 F.R.D. 66, 72 (D.N.J. 1992); *Bituminous Casualty v. Tonka Corp.*, 140 F.R.D. 381, 386 (D. Minn. 1992) (cooperation clause did not waive attorney-client privilege where no showing that parties intended such waiver); *Remington Arms Co. v. Liberty Mutual Ins. Co.*, 142 F.R.D. 408, 417 (D. Del. 1992) ("the cooperation clause does not imply a duty to produce documents protected by attorney-client privilege in a coverage dispute").

Nonetheless, the Diocese has not met its burden of proving the applicability of the attorney-client privilege or work product doctrine with respect to some of the documents listed in

---

<sup>2</sup>As noted by the Massachusetts Appeals Court, the duty to cooperate is found in "virtually every liability policy." *MetLife Auto and Home v. Cunningham*, 59 Mass. App. Ct. 583, 587 (2003).

Exhibit B to the Defendants' Memorandum in Support of Their Motion to Compel Discovery (hereinafter, defendants' memorandum). See *In the Matter of the Reorganization of Electric Mut. Liability Ins. Co., Ltd. (Bermuda)*, 425 Mass. 419, 421 (1997) (attorney-client privilege is ordinarily strictly construed, and the party asserting the privilege bears the burden of proving the existence of the privilege, that the communications were made in confidence during the course of the client's search for legal advice from the attorney in his or her legal capacity, and that the privilege as to these communications has not been waived). The document stamped G12276, an undated newspaper article, must be produced, as it is plainly not a confidential communication designed to facilitate legal services. See *Purcell v. District Attorney for Suffolk District*, 424 Mass. 109, 115 (1997) ("[t]he attorney-client privilege applies only when the client's communication was for the purpose of facilitating the rendition of legal services"). The documents stamped as G 08076 - G 08078, described as a file of notes regarding the contents of two computer discs, must either be produced to the defendants or to the Court for an *in camera* review to determine whether the claimed work product doctrine applies. See Mass. R. Civ. P. 26(b)(3) (a document is immune from discovery in most circumstances under the work product doctrine if it was prepared in anticipation of litigation by or for another party or by or for that other party's representative); *Colonial Gas Co. v. Aetna Cas. & Surety Co.*, 144 F.R.D. 600, 605 (D. Mass. 1992) (the pertinent issue is whether, in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation). The rest of the documents listed in Exhibit B are protected by the attorney-client privilege and work-product doctrine and the defendants' motion to compel their production is therefore denied.

## 2. Priest-Penitent and Related Privileges

To justify its non-production of 107 documents, the Diocese relies upon G.L. c. 233, § 20A, which provides in pertinent part:

"A priest, rabbi or ordained or licensed minister of any church . . . shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church . . . testify as to any communication made to him by any person in seeking religious or spiritual advice or comfort, or as to his advice given thereon in the course of his professional duties or in his professional character, without the consent of such person."

Whether the withheld communications are privileged under this statute is a factual question for the Court to resolve. See *Commonwealth v. Zezima*, 365 Mass. 238, 242 n.4 (1974).

There is no support in the statute or the case law for the Diocese's sweeping assertion that any statements or acts transmitted from one individual to another (presumably, where at least one of the individuals involved in the communication is a priest or similar professional) are covered by the privilege. Exhibit C to the defendants' memorandum minimally describes the documents withheld by the Diocese on account of this privilege. The description of one document obviates its protection under G.L. c. 233, § 20A, and compels its production: the draft letter from Bishop Marshall to Richard Lavigne dated September 19, 1992, regarding unpaid bills (stamped as G 11072).

The remaining descriptions of the withheld documents are insufficient to permit the Court to determine whether they are privileged under G.L. c. 233, § 20A. Therefore, as to those remaining documents, the Diocese must, within seven days of entry of this order, either produce them to the defendants or deliver them to the Court for *in camera* review for a determination as to whether they are privileged.

### 3. First Amendment, Ecclesiastical Privilege, and Religious Autonomy

The Diocese refuses to produce certain documents and to provide further answers to interrogatories numbered 7, 8 and 11 on the grounds that these materials and information are protected from discovery by the church autonomy doctrine and the religious freedoms established by the First Amendment to the United States Constitution and the Massachusetts Declaration of Rights. In its arguments opposing the motion to compel, the Diocese focuses on withheld materials which include information and communications relating to laicization procedures, the Diocese's handling of sex abuse claims, and the role played by ecclesiastical law. However, the Diocese raises the "religious autonomy/First Amendment privilege" with respect to many documents which are, on their face, not confidential (such as the many newspaper articles) or which are devoid of substance (such as a FedEx airbill). (See exhibit D to the defendants' motion). There is no basis for the Diocese's refusal to produce these.

The Diocese, which says it has already produced the accused priests' personnel files, maintains that the withheld documents are confidential pursuant to norms promulgated by the last pope in 2001 in the document entitled *Sacramentorum Sanctatis Tutela* (SST), and that their production is precluded by the First Amendment and the church autonomy doctrine because they "pertain to matters of church doctrine, discipline, faith, and internal organization" and would "pose[] a substantial danger of a chilling effort [*sic*] upon religious decision-making."

This is not a case in which the Court is asked to interpret canon law, apply church policies, or adjudicate church decisions or internal church disputes. Contrast *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. 505, 506 (2002). Nor would production of these documents call for the Court to control, direct, or second-guess the assignments, supervision, or

selection of clergy. Compare *Williams v. Episcopal Diocese of Massachusetts*, 436 Mass. 574, 578 (2002) (court lacked jurisdiction over trial involving assessment of church's priorities over its ministries). Rather, the defendants seek to review these documents to find out when and what the Diocese knew about the sexual abuse claims in order to bolster their defense that the losses were "expected and intended" and therefore not covered under the policies. See *The Society of Jesus of New England v. Commonwealth*, 441 Mass. 662, 668 (2004) ("[t]he mere examination of the Jesuits' documents concerning [the accused priest], which is all that the subpoena entails, does not infringe on the Jesuits' autonomous decision-making with respect to [the priest's] fitness, discipline, assignments, or any other aspect of his relationship with the Jesuits"), citing *Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 862 n10 (1981) ("Examination of [ecclesiastical] documents is not, in and of itself, an impermissible intrusion into the religious realm. . . ."). Therefore, the discovery of these documents would not violate the church autonomy doctrine. See *Hiles v. Episcopal Diocese of Massachusetts*, 437 Mass. at 506; *Williams v. Episcopal Diocese of Massachusetts*, 436 Mass. at 578.

Separate analysis is required to determine whether production of these documents would burden the Diocese's free exercise of religion by breaching their confidentiality. The test as to whether State action improperly burdens the free exercise of religion is assessed with a balancing test. See *The Society of Jesus of New England v. Commonwealth*, 441 Mass. at 669.

"We must determine whether the State action complained of (here, enforcement of the subpoena) substantially burdens [the] free exercise of religion, and, if it does, whether the Commonwealth has shown that it has an interest sufficiently compelling to justify that burden. . . . The party claiming an unconstitutional burden on the free exercise of religion must show (1) a sincerely held religious belief, which, (2) conflicts with, and thus is burdened by, the state requirement. Once the claimant has made that showing, the burden shifts to the state. The state can prevail only by demonstrating both that (3) the requirement pursues an unusually important governmental goal, and that (4) an exemption would substantially hinder the fulfillment of the goal."

*Id.* at 669-670 (internal quotations and citations omitted).

The Diocese's arguments appear to conflate the church autonomy doctrine with the constitutional free exercise of religion rights. Moreover, its citations to free exercise of religion case law, *The Society of Jesus of New England v. Commonwealth*, appears to be designed to distinguish this case from that, and largely to advance its argument regarding the psychotherapist-patient privilege. Nowhere does the Diocese meet its burden of making a showing under the two elements required of it. Contrast *id.* at 670 (accused priest and the Jesuits met their burden by showing that confidentiality helps ensure that a priest will make honest disclosures to his superiors, as required by the tenets of their religious beliefs, that confidentiality assists that process, and that depriving them of confidentiality would burden the methods chosen to foster and preserve their relationship within the religious order).

Nonetheless, the Diocese would fare no better even if the Court were to accept as obvious that church doctrine (and thus belief) in the confidentiality of such documents is required by the SST, and that disclosure squarely contravenes such secrecy. The Diocese has already produced the accused priests' personnel files (which were at issue in *The Society of Jesus of New England* case). The Diocese does not offer any reasons why the withheld documents, if not kept confidential, would burden their exercise of religion any more than the prior disclosure of the accused priests' personnel files. Absent any argument on this point, it appears that the difference is that the withheld documents are subject to the confidentiality imposed by the SST, rather than to motivate priests to make honest disclosures to others in the church. Privacy mandates by ecclesiastical authorities are not, standing alone, binding on this Court. Cf. *Roman Catholic*

*Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1247 (Miss. 2005) ("No statute, regulation, or case recognizes a privacy right under Canon Law in the Mississippi civil courts").

Moreover, information in the withheld documents which might support the defendants' claim that there is no coverage because the losses were expected or intended could significantly motivate the parties to settle, thereby shielding the victims from the ordeal of testifying at trial. See *The Society of Jesus of New England v. Commonwealth*, 441 Mass. at 672-673. In sum, the defendants' motion to compel further answers to interrogatories and production of documents withheld on the grounds of the church autonomy doctrine or the constitutional freedom of religion guarantees is allowed.

#### **4. Psychotherapist-Patient Privilege**

The Diocese argues that where, as here, the documents from and relating to the accused priests' treatment were placed in a confidential file accessible only to the bishop and his designees, the psychotherapist privilege applies and precludes their disclosure. This assertion is at odds with the statute and the case law.

Pursuant to G.L. c. 233, § 20B, a patient has the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between the patient and his or her psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. The purpose of this statute is to "protect justifiable expectations of confidentiality that people who seek psychotherapeutic help have a right to expect."

*Commonwealth v. Clancy*, 402 Mass. 664, 667 (1988). The privilege does not apply to communications made for the purpose of being conveyed to a third party. *Ford v. Law*, 2002 WL 32139028, \*7 (Mass. Super. Ct. Nov. 25, 2002) (Sweeney, J.), citing *C.J.C. v. Corp. of*



*Catholic Bishop of Yakima*, 985 P.2d 262, 272 (Wash. 1999), and *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 522 n.21 (1984) ("[w]hen an employer retains a physician to examine employees, generally no physician-patient relationship exists between the employee and the doctor").

The Diocese is not and was not the patient of a psychotherapist and therefore lacks standing to assert this privilege. The Court is unaware of any of the patients (accused priests or others) involved in this case asserting the privilege under G.L. c. 233, § 20B, despite having an ample opportunity to do so. Contrast *Society of Jesus of New England v. Commonwealth*, 441 Mass. at 663 (religious order and one of its priests brought civil action challenging an order issued in a criminal action denying their rights to quash a subpoena duces tecum requiring the religious order to produce documents relating to the accused priest). Moreover, the communications at issue were not kept confidential between the psychotherapists and their patients, but rather disclosed to the Diocese, through its bishop and "his designees," whoever those persons may be. In all these circumstances, the psychotherapist-patient privilege does not apply.<sup>3</sup> Accordingly, the defendants' motion to compel these documents is allowed.

## **5. Relevancy and Materiality**

Many of the documents withheld on grounds of irrelevancy have been addressed above. The SST and other laicization-related documents meet the relevancy standard to justify compelling production, as they may shed light on what and when the Diocese knew about sex

---

<sup>3</sup>Additionally, some documents withheld on this basis and listed in Exhibit F to the defendants' memorandum appear to be entirely unrelated to psychotherapy, such as a communication from a patient accounts employee at a treatment center regarding a priest's personal phone call bills, and a priest's authorization to release his personnel records.

abuse allegedly perpetrated by persons under its control or supervision. The same is true for documents concerning abuse claims for which the Diocese does not seek coverage in this action.

A closer question is presented regarding the relevancy of the Diocese's applications for, purchase of, and claims asserted under policies of insurance issued by insurers other than the defendants. Many of these documents could lead to admissible evidence relating to the Diocese's credibility as to what it knew and when. However, not all claims ever submitted under those policies would be relevant. Consequently, the Diocese must only produce claim-related documents relating to damages for sexual abuse. In all other respects, the motion to compel documents withheld due to objections of irrelevance and immateriality is allowed.

### **ORDER**

For all the foregoing reasons, it is hereby ORDERED that the defendants' motion to compel is:

(1) **DENIED** insofar as the defendants seek documents protected from discovery by the attorney-client privilege and work-product privilege, except as discussed above with respect to documents stamped G 12276 and G 08076 - G 08078;

(2) **ALLOWED** insofar as the Diocese's basis for withholding documents and providing further answers to interrogatories 7, 8, and 11 is based upon the constitutional free exercise of religion clauses and/or the doctrine of religious autonomy;

(3) **ALLOWED** insofar as the Diocese has withheld documents in reliance upon the psychotherapist-patient privilege;

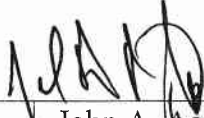
(4) **ALLOWED** insofar as the Diocese has withheld production of documents on grounds of irrelevance or immateriality, except that the Diocese shall not be compelled to

produce documents relating to insurance claims for losses not arising out of or relating to sexual abuse; and

(5) **ALLOWED** as to all of the documents identified in Exhibit A to the defendants' memorandum (listing documents withheld without specification of objections).

It is further **ORDERED** that, with one exception noted below, the documents which the Diocese asserts are protected from discovery by G.L. c. 233, § 20A, must, within seven days of entry of this order, either be produced to the defendants or to this Court for an *in camera* review to determine which, if any, are privileged. The sole exception to this aspect of this order is that the defendants' motion to compel is **ALLOWED** with respect to the draft letter from Bishop Marshall to Richard Lavigne dated September 19, 1992, regarding unpaid bills (stamped as G 11072).

It is further **ORDERED** that the Diocese shall, within seven days of entry of this order, provide a log listing and describing to the extent possible any documents it has destroyed within the past thirty years and which relate to or arise out of allegations of sexual abuse by persons under the Diocese's supervision or control.

  
\_\_\_\_\_  
John A. Agostini  
Associate Justice, Superior Court

**Dated:** January 3<sup>rd</sup>, 2007