EXHIBIT 1

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,

COUNTY OF NAPA

CHARISSA W., et al.,

Plaintiffs,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, et al.

Defendants.

Case No.: 26-22191
JCCP No. 4374

RULING ON SUBMITTED MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiffs' Motion To Compel Production Of Documents came on for hearing on August 31, 2005. The court, having read and considered the papers and heard oral argument, took the matter under submission and now rules as follows:

Plaintiff's motion to compel production of documents is GRANTED in part and continued in part to allow for the production of an attorney-client privilege log.

Although defendants raised a number of objections when responding to plaintiffs' request for production of documents, they address only two of those objections in opposing plaintiffs' motion to compel: the penitential communication privilege and the attorney-client privilege, which the court will discuss in more detail below. As to the other objections not discussed by defendants, the court finds the objections are not well taken. The requested discovery requests

are not overbroad, are relevant, and are not barred by *Serbian East Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696.

1. Penitential Privilege

Evidence Code section 1032 provides:

> As used in this article, "penitential communication" means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.

Defendants object to the production of a number of documents requested by plaintiffs on the ground that they are protected by the penitential communication privilege contained in Evidence Code section 1032. This court finds that the privilege does not apply to communications between the alleged abusers and the Judicial Committee. The evidence presented by both sides establishes that communications with the Judicial Committee do not fall within the scope of the privilege. First, it is clear that the Judicial Committee's purpose is to investigate sins for which disfellowship is a potential penalty. This is established not only by the deposition excerpts provided by plaintiffs, but by the Watchtower publication provided by defendants in connection with the objections to plaintiffs' evidence ("Judicial action is necessary only if a gross sin has been committed that could lead to disfellowshipping" p. 18.) Second, the privilege does not apply because the Judicial Committee was under no duty to keep the communications private. In fact, the evidence establishes that the Judicial Committee was required to communicate information it obtained regarding potential cases of child molestation to the Watchtower Society Headquarters.

Because the penitential communication privilege does not apply, within 20 days defendants shall produce all documents for which it previously asserted this privilege.

2. Attorney-client privilege

Defendants have not produced a privilege log for those few documents they apparently claim are protected by the attorney client privilege. Neither the plaintiffs nor the court can adequately address the objection without a privilege log. Defendants shall serve a privilege log

on plaintiffs within 10 days. Plaintiffs may thereafter file and a supplemental brief addressing the log within 10 days. The court will then issue a written ruling on the matter.

Dated: 9/27/05

Raymond A. Guadagni, Judge

EXHIBIT 2

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK ET AL.,

Petitioners,

v.

THE SUPERIOR COURT OF NAPA COUNTY,

Respondents;

TIM W., ET AL.,

Real Parties in Interest.

A114329

(Judicial Council Coordination Proceeding No. 4374; Coordinated with Napa County Super. Ct. No. 26-22191)

BY THE COURT:*

The petition for a writ of mandate is denied.

Dated: JUL - 6 2006

McGUINESS, P.J.

* McGuiness, P.J., Parrilli, J., and Siggins, J.

EXHIBIT 3

SUPERIOR COURT OF CALIFORNI
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/01/2011 TIME: 10:30:00 AM DEPT: C-73

JUDICIAL OFFICER PRESIDING: Steven R. Denton
CLERK: Yvette Terronez
REPORTER/ERM: Paula Rahn CSR# 11510
BAILIFF/COURT ATTENDANT: M. Micone

CASE NO: **37-2010-00092450-CU-PO-CTL** CASE INIT.DATE: 05/20/2010
CASE TITLE: **Dorman vs. La Jolla Church**
CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Discovery Hearing
MOVING PARTY: John Dorman, Joel Gamboa
CAUSAL DOCUMENT/DATE FILED: Motion to Compel Discovery, 04/28/2011

APPEARANCES
Devin M Storey, counsel, present for Plaintiff(s).
James M McCabe, counsel, present for Defendant(s).
George L De la Flor, counsel, present for Defendant(s).
The Watchtower Bible and Tract Society of New York Inc, self represented Defendant, present telephonically.
Irwin Zalkin is present for plaintiff

The Court hears oral argument and confirms the tentative ruling as follows:
Plaintiffs JOHN DORMAN and JOEL GAMBOA'S motion to compel further responses to Requests for Production of Documents (Set One) is GRANTED IN PART. C.C.P. § 2031.310. As set forth in detail below, defendant DOE SUPERVISORY ORGANIZATION is ordered to produce all of the withheld documents except the following: 4/27/95 letter from the national church to the local church; 10/13/95 letter from defendant perpetrator to the local church; 9/14/98 letter from defendant perpetrator to the local church; and 1/27/99 letter from defendant perpetrator to the local church. Defendant must serve its supplemental responses, including the production of documents, within two weeks of this hearing. The Court will return to defendant the documents submitted for the *in camera* review.

Both a penitent and a member of the clergy have "a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege." Evidence Code §§ 1033 and 1034. A "penitential communication" is one "made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret." Evidence Code § 1032. In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed

to hear such communications; and (3) such member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret. Doe 2 v. Superior Court (2005) 132 Cal.App.4th 1504, 1516 (quoting People v. Edwards (1988) 203 Cal.App.3d 1358, 1362–1363). In order for a statement to be privileged, it must be intended to be in confidence. Id. at 1518. Even if third parties are not physically present at the time of the communication, the privilege may still be inapplicable if the penitent does not intend for the contents of the communication to be kept in confidence. Id. See also Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal.App.4th 417, 444-445 (privilege not available when third party present).

The Court has now carefully reviewed the disputed documents. The majority of the documents consist of (a) an ongoing investigation into the perpetrator's conduct, and/or (b) an ongoing discussion as to whether and what extent the perpetrator should be reinstated. Several people at both the local and national levels were privy to the documents, and generally were cognizant of the facts surrounding the instances of alleged sexual abuse. Not all of these individuals have the status of clergy. Though many of the letters make spiritual references, fundamentally they discuss the secular business of investigating the claims of sexual abuse and the extent to which the perpetrator may repeat this abuse. The April 13, 1994 letter from an elder of a local church to the national church notes that John Dorman is not a member of the church (his wife is a member). As a result, the April 11, 1994 letter from John and Manuela Dorman to the local church is not privileged. Also, the October 28, 2006 meeting notes appear to be signed by individuals who are not clergy in the church. Given all of these reasons, the majority of the documents must be produced.

On the other hand, the April 27, 1995 letter from the national church to the local church will not be compelled. This letter consists of the local church elders receiving spiritual guidance from elders at the national level and is privileged on this basis. The three letters drafted by defendant perpetrator are also privileged. In essence, these letters consist of a penitent seeking spiritual guidance from members of his clergy.

Regarding relevancy, "[a]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence...." CCP § 2017.010. For discovery purposes, information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. Gonzalez v. Superior Court (1995) 33 Cal. App. 4th 1539, 1546. Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. Id. These rules are applied liberally in favor of discovery. All of the disputed documents are relevant for purposes of discovery because they could demonstrate knowledge of the sexual abuse followed by reinstatement within the church.

Third party privacy rights are preserved because third party names have been redacted. Finally, there is no First Amendment issue because the court has applied the law surrounding the penitent-clergy privilege is neutral manner such that the court's decision to permit the discovery of certain documents need not be justified by a compelling governmental interest. Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal.App.4th 417, 431.

Steven R Denton

Judge Steven R. Denton

EXHIBIT 4

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

JOSE LOPEZ, Individually,

Plaintiff,

v.

DOE 1 LINDA VISTA SPANISH CONGREGATION OF JEHOVAH'S WITNESS SAN DIEGO CALIFORNIA; DOE 2 SUPERVISORY ORGANIZATION, WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK; DOE 3 PERPETRATOR; GONZALO CAMPOS, and DOES 4 through 100, inclusive,

Defendants.

Case No. 37-2012-0099849-CU-PO-CTL

ORDER ON PLAINTIFF'S MOTIONS TO COMPEL

Judge: Hon. Joan M. Lewis
Dept.: 65

Plaintiff Jose Lopez's motions to compel came on regularly for hearing March 1, 2013, at 8:30 a.m., in Department 65 of the above-entitled Court, the Hon. Joan M. Lewis, judge presiding. Devin M. Storey, Esq., appeared on behalf of the moving party. Rocky K. Copley, Esq., Calvin A. Rouse, Esq., and James M. McCabe, Esq., appeared on behalf of the opposing parties. At the time of the hearing the Court ordered that the documents the subject of the motions be provided to the Court for its *in camera* review. Having now received and reviewed the documents, the Court rules as follows.

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Plaintiff's motions seek documents from Defendant Watchtower Bible and Tract Society of New York, Inc. and third party Playa Pacifica Spanish Congregations of Jehovah's Witnesses (collectively, "responding parties").

In opposing the motion, the responding parties' principal argument was that the documents are subject to the clergy-penitent privilege. A "'penitential communication' means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenants of his or her church, denomination, or organization, has a duty to keep those communications secret." [Evid. Code Sec. 1032]

The responding parties argued that the withheld documents are communications involving elders and congregation members concerning spiritual counsel, advice or comfort, which are confidential pursuant to the religious practices and beliefs of Jehovah's Witnesses based upon Scripture.

The Court disagrees. Having reviewed the documents, the Court observes that almost all documents concern communications regarding Gonzalo Campos' alleged misconduct, investigation into that conduct as well as Campos' requests for reinstatement. The Court agrees with Plaintiff that the documents appear to have been made with knowledge the statements would be disclosed to third parties. The Court does not believe these documents generally reflect penitential communications as contemplated by the Evidence Code. *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417.

There are, however, four documents the Court concludes should not be produced because they are protected by the clergy-penitent privilege. Specifically, Mr. Campos' letters to the Playa Pacifica Spanish Congregation dated October 13, 1995, September 14, 1998 and January 27, 1999 [Playa Pacifica's Disputed Documents 2, 3 and 4] and correspondence of April 27, 1995 to the Body of Elders of Playa Pacifica [Watchtower's Disputed Document 5]. The remaining documents are ordered to be produced to Plaintiff.

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In ruling on this motion, the Court finds the documents are reasonably calculated to lead to the discovery of admissible evidence.

The Court also rejects the responding parties' privacy arguments in light of the fact that the names of the third parties have been redacted.

Finally, the Court disagrees that the disclosure of these records would violate the responding parties' First Amendment rights. *See Roman Catholic Archbishop of Los Angeles v. Superior Court, supra,* 131 Cal.App.4th at 431.

In ruling on these motions the Court declined to take judicial notice of pleadings and orders filed in other Superior Court cases.

The documents produced to the Court by Watchtower and Playa Pacifica will be returned to their respective counsel.

IT IS SO ORDERED.

Dated: 4-29-13

Joan M. Lewis

JOAN M. LEWIS
Judge of the Superior Court

EXHIBIT 5

Declined to Extend by Padron v. Watchtower Bible and Tract Society of New York, Inc., Cal.App. 4 Dist., November 9, 2017

Lopez v. Watchtower Bible and Tract Society of New York, Inc.
Court of Appeal, Fourth District, Division 1, California. April 14, 2016 246 Cal.App.4th 566 201 Cal.Rptr.3d 156 329 Ed. Law Rep. 465

Fourth District, Division 1, California.

Jose LOPEZ, Plaintiff and Respondent,
v.
WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.,
Defendant and Appellant.

D066388
Filed April 14, 2016
Review Denied July 27, 2016

Synopsis

Background: Member of religious organization's congregation sued organization, asserting legal theories including failure to warn, negligent supervision, and negligent hiring and retention, stemming from alleged incident in which Bible instructor sexually abused member when he was a child. After organization failed to comply with discovery orders compelling deposition of purported managing agent of organization and ordering production of documents in organization's files pertaining to other perpetrators of child sexual abuse, the Superior Court, San Diego County, No. 37–2012–00099849–CU–PO–CTL, Joan M. Lewis, J., granted member's motion for monetary and terminating sanctions, struck organization's answer, and entered organization's default. Organization appealed.

Holdings: The Court of Appeal, Haller, Acting P.J., held that:
1 trial court complied with statutory obligation to independently consider organization's objections to discovery referee's recommendation;
2 trial court did not abuse its discretion by determining that requests for documents regarding perpetrators of child sexual abuse were relevant and not overbroad;
3 burden of responding to requests for documents regarding perpetrators was not oppressive;
4 organization failed to meet its burden to show preliminary facts supporting application of attorney-client or penitential-communication privilege;
5 order compelling production of documents regarding perpetrators did not violate property rights of others;
6 order compelling production of documents regarding perpetrators did not violate organization's First Amendment religious freedom rights; but
7 evidence was insufficient to support determination that member of organization's governing body was managing agent of organization; and
8 imposition of terminating sanction was improper without first attempting to compel compliance with discovery order by using lesser sanctions.

Affirmed in part, reversed in part, and remanded with instructions.

West Headnotes (40)

Change View

1 **Appeal and Error** Grounds and reasons for ruling
Court of Appeal was not required to disregard trial court's written statement of decision on appeal from order imposing monetary and terminating sanctions for religious organization's failure to comply with discovery orders in action filed by congregation member, stemming from alleged incident in which Bible instructor

SELECTED TOPICS

Pretrial Procedure

Depositions and Discovery
Mere Fact of Trial Attorney Non-Membership
Timely Claim of Work Product Privilege
Court of Appeals Review of Trial Court Imposition of Discovery Sanctions

Secondary Sources

s 5484. "Confidential Communication"

24 Fed. Prac. & Proc. Evid. § 5484 (1st ed.)

...Rejected Rule 503(a)(4) defines "confidential communication", one of the key concepts in the application of the attorney-client privilege. Once it has been determined that a "lawyer" and a "client" hav...

APPENDIX B: FEDERAL REGULATIONS

Employer's Guide to the Health Insurance Portability and Accountability Act Appendix B

...Editor's Note: Many of HIPAA's portability rules, as finalized Dec. 30, 2004 (69 Fed. Reg. 78763), were superseded or rendered moot by the Affordable Care Act (ACA), which required the outright elimina...

APPENDIX II: FAIR LABOR STANDARDS ACT REGULATIONS TITLE 29 CODE OF FEDERAL REGULATIONS

Fair Labor Stds. Hdbk. for States, Local Govs. and Schools Appendix II

...The U.S. Department of Labor published rule changes in October 2013 that will modify the companionship and live-in domestic services exemptions (but not the babysitting exemption) effective on Jan. 1, ...

See More Secondary Sources

Briefs

Government's Consolidated Answering Brief

2013 WL 2391924
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Terry CHRISTENSEN et al., Defendants-Appellants.
United States Court of Appeals, Ninth Circuit.
May 22, 2013

...FN1. Pellicano, Turner, Kachikian, and Nicherie were charged in the initial and first superseding indictments. (JER 535-39, GER 1-8). Arneson was added in the second (GER 9-68), and Christensen was add...

Government's Consolidated Answering Brief

2013 WL 2391921
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Terry CHRISTENSEN et al., Defendants-Appellants.
United States Court of Appeals, Ninth Circuit.
May 22, 2013

...FN1. Pellicano, Turner, Kachikian, and Nicherie were charged in the initial and first superseding indictments. (JER 535-39, GER 1-8). Arneson was added in the second (GER 9-68), and Christensen was add...

Government's Consolidated Answering Brief

sexually abused member when he was a child; rule governing statement of decision did not apply to law and motion matters at issue in the case, and court was permitted to explain its ruling in writing. Cal. R. Ct. 3.1590.

2 **Appeal and Error** Against weight of evidence
In its review of discovery referee's factual findings, court should give referee's findings great weight and focus on the parties' objections to those findings. Cal. Civ. Proc. Code §§ 639, 644(b).

3 **Appeal and Error** Depositions, affidavits, or discovery
Court of Appeal examines trial court's decision to accept discovery referee's recommendation for an abuse of discretion. Cal. Civ. Proc. Code §§ 639, 644(b).

4 **Reference** Hearing and determination
Trial court complied with its statutory obligation to independently consider religious organization's objections to discovery referee's recommendation to compel deposition of alleged managing agent of organization and to order production of documents in organization's files pertaining to other perpetrators of child sexual abuse in action filed by member of organization, stemming from alleged incident in which member's Bible instructor sexually abused him when he was a child; although trial court did not read recommendation or organization's opposition memorandum prior to hearing on recommendation, court reviewed those documents during hearing, considered newly submitted declarations, and carefully listened to oral explanations of objections, and court was not required to consider referee hearing transcript or initial discovery objections. Cal. Civ. Proc. Code §§ 639, 644(b).

1 Case that cites this headnote

5 **Appeal and Error** Nature and extent in general
Absent a contrary indication on the record, Court of Appeal is required to accept trial court's statements and presume the court complied with its statutory duties.

6 **Pretrial Procedure** Relevancy and materiality
Statutory phrase "subject matter," as used in discovery statute providing that any party may obtain discovery regarding any matter, not privileged, that is relevant to subject matter involved in pending action, is broader than the issues and is not limited to admissible evidence. Cal. Civ. Proc. Code § 2017.010.

1 Case that cites this headnote

7 **Pretrial Procedure** Relevancy and materiality
For discovery purposes, information is "relevant" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement. Cal. Civ. Proc. Code § 2017.010.

1 Case that cites this headnote

8 **Pretrial Procedure** Probable admissibility at trial
Admissibility is not the test for information to be discoverable, and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. Cal. Civ. Proc. Code § 2017.010.

1 Case that cites this headnote

9 **Pretrial Procedure** Construction of discovery provisions
Pretrial Procedure Grounds of claim or defense; 'fishing expedition'
Discovery rules are applied liberally in favor of discovery, and, contrary to popular belief, fishing expeditions are permissible in some cases. Cal. Civ. Proc. Code § 2017.010.

10 **Pretrial Procedure** Determination

2013 WL 2391920
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Terry CHRISTENSEN et al., Defendants-Appellants.
United States Court of Appeals, Ninth Circuit.
May 22, 2013

...FN1. Pellicano, Turner, Kachikian, and Nicherie were charged in the initial and first superseding indictments. (JER 535-39, GER 1-8). Arneson was added in the second (GER 9-68), and Christensen was add...

See More Briefs

Trial Court Documents

Medical Laboratory Management Consultants v. American Broadcasting Cos, Inc.

1998 WL 35174273
MEDICAL LABORATORY MANAGEMENT CONSULTANTS d/b/a Consultants Medical Lab, et al., Plaintiffs, v. AMERICAN BROADCASTING COMPANIES, INC., et al., Defendants.
United States District Court, D. Arizona.
Dec. 23, 1998

...FN1. A cytotechnologist is a medical laboratory technologist who examines cells under a pathologist's supervision in order to diagnose cancer or other diseases. FN2. John and Carolyn Devaraj are Medica...

In re Color Star Growers of Colorado, Inc.

2014 WL 657744
In re: COLOR STAR GROWERS OF COLORADO, INC., Vast, Inc., and Color Star, LLC, Debtors.
United States Bankruptcy Court, E.D. Texas, Sherman Division.
Jan. 14, 2014

...The matter having come before this Court on the Motion for Order(s) Approving/Authorizing (a) Sale(s) of Certain or Substantially All of the Estates' Assets Free and Clear of All Liens, Claims, Encumbr...

United States of America v. Thomas

2015 WL 10529234
UNITED STATES OF AMERICA, Plaintiff, v. David Savoy THOMAS, Defendant.
United States District Court, D. New Mexico.
Mar. 03, 2015

...THIS MATTER comes before the Court on Defendant's Motion to Suppress Tainted Identifications [Doc. 27], the Government's First and Second Motion[s] in Limine and Request for a Daubert Hearing [Docs. 34...

See More Trial Court Documents

Trial court did not abuse its discretion by determination that discovery requests for documents in religious organization's files pertaining to perpetrators of child sexual abuse were relevant and were not overbroad in action filed against organization by member of organization's congregation for negligent hiring, supervising, and retaining and seeking punitive damages, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; documents were potentially relevant to punitive damages claims and to liability issues, documents potentially were relevant to test validity of organization's defenses, and court had reasonable basis to conclude that sexual abuse reports prepared after incident potentially contained information helpful to member's case. Cal. Civ. Proc. Code §§ 2017.010, 3294.

11 **Damages** Nature of act or conduct
Degree of reprehensibility of defendant's conduct is the most important indicator of reasonableness of punitive damages award, and one relevant factor in this analysis is the extent to which defendant's alleged wrongful conduct involved repeated actions, including conduct occurring after the incident in question. Cal. Civ. Code § 3294.

1 Case that cites this headnote

12 **Damages** Nature of act or conduct
Damages Actual damage or compensatory damages; relationship and ratio
Although punitive damages may not be used to punish defendant for injury inflicted on third parties, jury may consider evidence of harm to others in determining the reprehensibility of defendant's conduct toward plaintiff when awarding punitive damages. Cal. Civ. Code § 3294.

1 Case that cites this headnote

13 **Damages** Nature of act or conduct
Damages Deterrence
By placing defendant's wrongful conduct into context of a continuing pattern and practice, individual plaintiff, in support of punitive damages claim, can demonstrate that conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature. Cal. Civ. Code § 3294.

14 **Pretrial Procedure** Probable admissibility at trial
Pretrial Procedure Relevancy and materiality
Document may be discoverable even if it is unlikely to be admitted at trial. Cal. Civ. Proc. Code § 2017.010.

15 **Pretrial Procedure** Burden of proof
Burden of responding to discovery requests made by member of religious organization for documents in organization's files pertaining to perpetrators of child sexual abuse was not oppressive and did not substantially outweigh any possible relevance or informational value of evidence, and thus trial court's order compelling production of documents was reasonable in member's action against organization for negligent hiring, supervising, and retaining, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; court had reasonable basis to conclude that requested documents had been segregated within congregational files, and organization had scanned all documents from congregation files into a computer program that had a search function. Cal. Civ. Proc. Code § 2017.010.

16 **Privileged Communications and Confidentiality** Privilege logs
Privileged Communications and Confidentiality Clergy and spiritual advisers
Religious organization failed to meet its burden to show preliminary facts supporting application of attorney-client or penitential-communication privilege to

trial court's discovery order compelling production of documents in organization's files pertaining to perpetrators of child sexual abuse in action filed by organization member, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; organization did not produce privilege log or identify any specific confidential communications, and there was no indication that documents necessarily arose from attorney-client or clergy-penitent communication or were prepared in the context of litigation. Cal. Evid. Code §§ 917, 1032; Cal. Civ. Proc. Code § 2017.010.

17 **Privileged Communications and Confidentiality** Presumptions and burden of proof
Generally, privilege claimant has initial burden of proving preliminary facts to show privilege applies. Cal. Evid. Code § 917.

18 **Privileged Communications and Confidentiality** Presumptions and burden of proof
Once privilege claimant establishes preliminary facts to show privilege applies, burden of proof shifts to party opposing privilege claim. Cal. Evid. Code § 917.

19 **Privileged Communications and Confidentiality** In camera review
Privileged communications are generally not subject to in camera review.

20 **Pretrial Procedure** Order
Discovery order compelling production of documents in religious organization's files pertaining to perpetrators of child sexual abuse did not violate privacy rights of others, and thus order was not invalid on such basis in action filed against organization by organization member, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; order specifically permitted organization to redact names, birth dates, and Social Security numbers from documents, and there were not facts before discovery referee or trial court showing that documents would have disclosed identities of individuals after deleting personal identifying information. Cal. Civ. Proc. Code §§ 639, 2017.010.

21 **Constitutional Law** Tort claims by members against organization or other members
Pretrial Procedure Order
Discovery order compelling production of documents in religious organization's files pertaining to perpetrators of child sexual abuse did not violate organization's First Amendment religious freedom rights in action filed by organization member for negligent hiring, supervising, and retaining, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; argument that issues of ratification and agency were inquiries that necessarily required court to entangle itself in interpretation, evaluation, and determination of religious beliefs and internal governance of a religion was not a basis for limiting discovery, and order did not reflect a ruling that ratification or agency theories were legally valid or that court or jury would be permitted to engage in factfinding that would interfere with religious doctrine. U.S. Const. Amend. 1; Cal. Civ. Proc. Code § 2017.010.

1 Case that cites this headnote

22 **Constitutional Law** Ministerial exception in general
Ministerial-privilege doctrine is based on notion that church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions, and termination of employment, is an inherently religious function because clergy are such an integral part of a church's functioning as a religious institution. U.S. Const. Amend. 1.

23 **Constitutional Law** Ministerial exception in general

Ministerial-privilege exception applies to bar an action by clergy member against religious institution. U.S. Const. Amend. 1.

24 **Pretrial Procedure** Parties' agents or employees
Requisite party-affiliated relationship must exist at the time deposition notice is served on opposing party in order for party-affiliated deponent to be deposed without deposition subpoena. Cal. Civ. Proc. Code §§ 2025.280(a), 2025.280(b), 2025.450(h).

25 **Courts** Decisions of United States Courts as Authority in State Courts
In analyzing issue of whether a particular deponent is managing agent of one of the parties, and thus is a party-affiliated deponent for which deposition subpoena is not required, state courts look to federal court decisions that apply a similar managing agent test. Cal. Civ. Proc. Code §§ 2025.280(a), 2025.280(b), 2025.450(h).

26 **Pretrial Procedure** Parties' agents or employees
Generally, it is the party seeking to compel deposition that has the initial burden to show foundational facts to support finding that particular deponent is a managing agent, and thus is a party-affiliated deponent for which deposition subpoena is not required. Cal. Civ. Proc. Code §§ 2025.280(a), 2025.280(b), 2025.450(h).

27 **Pretrial Procedure** Parties' agents or employees
Pretrial Procedure Corporate officers, agents, and employees
Managing agent, as used in statute providing that deposition subpoena is not required if the deponent is a officer, director, managing agent, or employee of a party, need not also be an employee, officer, or director, given that statute uses terms in the disjunctive. Cal. Civ. Proc. Code § 2025.280(a).

28 **Pretrial Procedure** Parties' agents or employees
Factors used to determine whether person is a managing agent of party, as used in statute providing that deposition subpoena is not required if deponent is managing agent of party, include: (1) whether person exercises judgment and discretion in dealing with party's matters; (2) whether person could be expected to comply with party's directive to appear; and (3) whether person could be anticipated to identify himself or herself with party's interests. Cal. Civ. Proc. Code § 2025.280(a).

29 **Pretrial Procedure** Corporate officers, agents, and employees
Evidence was insufficient to support determination that member of religious organization's governing body was a managing agent of organization, as required to compel member's deposition based on service of deposition notice on organization and to sanction organization for member's nonappearance, in congregation member's suit against organization, stemming from alleged incident in which Bible instructor sexually abused congregation member when he was a child; although there was evidence that member of governing body had authority to exercise supervisorial authority and discretionary judgment over organization's operations and that member would have likely identified with organization's interests, there was no evidence as to whether member could have been expected to comply with organization's directive to appear. Cal. Civ. Proc. Code §§ 2023.010, 2023.030, 2025.280(a), 2025.280(b), 2025.450(h), 2025.480(k).

30 **Pretrial Procedure** Parties' agents or employees
If deponent is party's employee, officer, or director, entity has substantial practical control to compel the attendance of these individuals, including the ability to terminate an employee who refuses to appear at a noticed deposition or to end the relationship with its officer or director. Cal. Civ. Proc. Code §§ 2025.280(a), 2025.450(h).

31 **Pretrial Procedure** Non-party witnesses in general; experts
If deponent has no formal or legal role within party's organization, there must be some additional factual basis to establish the party has the practical ability to require nonparty's compliance with deposition notice served on party. Cal. Civ. Proc. Code §§ 2025.280(a), 2025.280(b).

32 **Appeal and Error** Depositions, affidavits, or discovery
Pretrial Procedure Failure to Disclose; Sanctions
Trial court has broad discretion in selecting appropriate penalty for party's refusal to obey discovery order, and Court of Appeal must uphold trial court's determination absent abuse of discretion. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

1 Case that cites this headnote

33 **Appeal and Error** Interlocutory Orders and Proceedings
When reviewing penalty selected by trial court for party's refusal to obey discovery order, Court of Appeal defers to trial court's credibility decisions and draws all reasonable inferences in support of trial court's ruling. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

34 **Constitutional Law** Dismissal
Pretrial Procedure Failure to Disclose; Sanctions
Trial court must be cautious when imposing a terminating sanction for party's refusal to obey discovery order because sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. U.S. Const. Amend. 14; Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

2 Cases that cite this headnote

35 **Pretrial Procedure** Failure to Disclose; Sanctions
Trial court should select a sanction for party's refusal to obey discovery order that is tailored to the harm caused by the withheld discovery. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

36 **Pretrial Procedure** Failure to Disclose; Sanctions
Sanctions imposed for party's refusal to obey discovery order should be appropriate to the dereliction, and should not exceed that which is required to protect interests of party entitled to but denied discovery. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

1 Case that cites this headnote

37 **Pretrial Procedure** Failure to Disclose; Sanctions
Discovery statutes evince an incremental approach to discovery sanctions, starting with monetary sanctions and ending with the ultimate sanction of termination. Cal. Civ. Proc. Code §§ 2023.010, 2023.030.

4 Cases that cite this headnote

38 **Pretrial Procedure** Dismissal or default judgment
Although in extreme cases court has authority to order terminating sanction for party's refusal to obey discovery order as a first measure, terminating sanction should generally not be imposed until court has attempted less severe alternatives and found them to be unsuccessful or the record clearly shows lesser sanctions would be ineffective. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

6 Cases that cite this headnote

39 **Pretrial Procedure** Failure to Comply; Sanctions

Although trial court had authority to impose sanctions for religious organization's willful disobedience of court's discovery order compelling production of documents in religious organization's files pertaining to perpetrators of child sexual abuse, imposition of terminating sanction was improper without first attempting to compel compliance with order by using lesser sanctions in action filed by member of organization, stemming from alleged incident in which Bible instructor sexually abused member when he was a child; terminating sanction was first and only sanction imposed, and there was no indication that court was unable to obtain organization's compliance with lesser sanctions or that court made meaningful effort to determine whether alternatives would have been effective. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030, 2025.450, 2025.480(k).

4 Cases that cite this headnote

40 **Pretrial Procedure** Failure to Comply; Sanctions

When party does not produce ordered documents in discovery, court is entitled to infer documents would contain evidence damaging to that party's case and instruct jury accordingly. Cal. Civ. Proc. Code §§ 2017.010, 2023.010, 2023.030.

See 2 Witkin, Cal. Evidence (5th ed. 2012) Discovery, § 52.

***162** APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed. (Super. Ct. No. 37–2012–00099849–CU–PO–CTL)

Attorneys and Law Firms

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Opinion

HALLER, Acting P.J.

***572** Jose Lopez sued the national Jehovah's Witnesses organization, the Watchtower Bible and Tract Society of New York, Inc. (Watchtower), alleging his Bible instructor sexually abused him in 1986 when he was a child. Lopez asserted several legal theories, including failure to warn, negligent supervision, and negligent hiring/retention. After contentious discovery disputes, the court issued two discovery orders against Watchtower: (1) compelling the deposition of an individual (Gerrit Lösch) who the court found was a "managing agent" of Watchtower and (2) ordering the production of documents in Watchtower's files pertaining to other perpetrators of child sexual abuse. When Watchtower failed to comply with these orders, the court granted Lopez's motion for monetary and terminating sanctions, struck Watchtower's answer, and entered Watchtower's default.[1]

On appeal, Watchtower challenges the validity of the discovery orders and contends the court abused its discretion in failing to impose lesser sanctions. We reject Watchtower's challenges to the document production order, but conclude the court erred in ordering Watchtower to produce Lösch for his deposition. The factual record does not support the court's finding that Lösch was Watchtower's managing agent and therefore the court ***163** erred in sanctioning Watchtower for Lösch's nonattendance at the deposition. (See Code Civ. Proc., §§ 2025.280, 2025.450.)[2] We additionally conclude that under the particular circumstances of this case, the court erred in issuing terminating sanctions as the initial remedial measure without first attempting to compel ***573** compliance with its discovery orders by using lesser sanctions or by imposing evidentiary or issue sanctions.

Accordingly, we reverse the order compelling the Lösch deposition and the entry of default based on the terminating sanctions. We remand for the court to consider the appropriate sanctions for Watchtower's violation of the document production order. The initial measure should be a remedy that is less onerous than a terminating sanction.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Summary of Allegations*

The Jehovah's Witnesses is a religion with more than 1.2 million members in about 13,777 congregations in the United States. During the relevant times, Watchtower supervised the local congregations and was responsible for the religion's policies and administrative matters. Jehovah's Witnesses congregations are comprised of elders (spiritual leaders responsible for congregation governance), ministerial servants (performing administrative tasks), and various levels of baptized members, including publishers (rank-and-file members). As stipulated by the parties, congregation elders serve as agents for Watchtower.

In June 2012, 34–year–old Lopez filed a complaint against Watchtower and the Linda Vista Spanish Congregation of Jehovah's Witnesses (Linda Vista congregation), seeking damages for sexual abuse committed by Gonzalo Campos in 1986 when Lopez was about seven years old. In his amended complaint, Lopez alleged that in the mid–1980's, Lopez's mother was a baptized Jehovah's Witnesses member associated with the Linda Vista congregation, and received Bible study instruction from a congregation elder, Joel Munoz. Munoz recommended to Lopez's mother that Lopez should be receiving Bible study instruction and she "should approach [Campos] because he was very good with children." Following this direction, Lopez's mother spoke with Campos and Campos began giving lessons to Lopez. After Campos had given Lopez several Bible study lessons, and in the context of a Bible study lesson, Campos sexually molested Lopez.

Lopez reported the abuse to his mother, who reported it to Elder Munoz and his wife. The next day, several elders from the Linda Vista congregation came to Lopez's home and spoke to Lopez's mother about the abuse. One of the elders asked Lopez to show him, on a teddy bear or doll, where Campos had touched him. Soon after, Lopez's family left the congregation and Lopez had no additional contact with Campos.

574 At the time of the abuse, Campos was directed by Linda Vista congregation leaders to provide Bible instruction to Lopez and other minors. In giving the Bible study lessons to minors, Campos filled out a form for each study session, identifying the Bible study student, address, and date of the lesson, and submitted each form to a congregation elder.

About four years earlier, in approximately 1982, Campos had allegedly sexually molested another young boy from the Linda Vista congregation. Soon after the ***164*** abuse, this earlier victim reported the abuse to his mother, who reported the abuse to two church elders. When questioned by the elders, Campos confessed to acting inappropriately. The elders nonetheless continued to hold Campos out as safe to be around children, and affirmatively recommended him to serve as a Bible study instructor.

Campos had been a member of the Linda Vista congregation since about 1979. In 1987, Campos became associated with another Jehovah's Witnesses congregation (La Jolla Spanish Congregation of Jehovah's Witnesses, also known as Playa Pacifica Spanish Congregation of Jehovah's Witnesses (La Jolla congregation)). In about 1988, La Jolla congregation elders appointed Campos to a ministerial servant position, and Watchtower approved the appointment. While serving as a ministerial servant, Campos frequently preached at the Linda Vista and La Jolla congregations, and continued to teach Bible study to Jehovah's Witnesses children. In 1993, Watchtower approved Campos's appointment as elder of the La Jolla congregation, and he was later appointed secretary of the congregation, placing him on the congregation's governing "Service Committee."

Lopez alleged that Campos sexually abused at least eight other Jehovah's Witnesses children between 1982 and 1995, including when Campos served as an elder. Some of these abuse incidents were reported to congregation elders.

Based on these allegations, Lopez's amended complaint asserted six causes of action against Watchtower and the Linda Vista congregation: negligence; negligent supervision/failure to warn; negligent hiring/retention; negligent failure to warn, train or educate; sexual battery; and sexual harassment. Lopez alleged defendants were negligent because they knew or should have known of Campos's "dangerous and exploitive propensities and/or that [he] was an unfit agent"; they allowed Campos to come into contact with Lopez without supervision; they failed to tell or concealed from Lopez and his parents that Campos had previously sexually abused minors; they failed to tell law enforcement officials that Lopez had been sexually abused, making it less likely Lopez would receive medical and mental health care and treatment; and they held out Campos to Lopez and his parents as being in good standing and ***575*** trustworthy. Lopez claimed "[b]y retaining and promoting [Campos] after learning of his past sexual abuse of children, [Watchtower] ratified and authorized [Campos's] conduct." Lopez alleged "[d]efendants acted with willful and

conscious disregard of the rights and safety of others by repeatedly ignoring warnings and complaints that [Campos] had committed acts of sexual abuse upon minors and allowing [Campos] to attain and retain elevated positions within the Jehovah's Witness[es] religion ... [w]here he had access to unsuspecting minors."

Lopez alleged the lawsuit was timely under California law. (See § 340.1, subds. (a), (b)(1), (2).) Lopez claimed Campos's sexual abuse resulted in "various psychological coping mechanisms" that precluded him from "ascertaining the resulting damages from that conduct, or the wrongfulness of [Campos's] conduct" and that he did not discover the "causal relationship between the molestation and adulthood psychological injuries" until April 2012.

Lopez later amended the complaint to add a punitive damage claim.

B. *Discovery Disputes*

1. *Discovery Relating to Campos's Molestation of Others*

At some point before February 2013, Lopez propounded document requests on ***165** Watchtower. The requests sought documents pertaining to written complaints and investigations concerning Campos's sexual abuse of other victims. Watchtower identified responsive documents, but declined to produce them on the basis of the First Amendment, overbreadth, clergy-penitent privilege, and third party privacy rights. Watchtower also refused to produce any documents generated after the date Lopez was allegedly abused (1986), stating the documents were not relevant or admissible, and thus not discoverable.

Lopez moved to compel the production of the documents, and the court granted the motion in part. After briefing and a hearing, the court broadly rejected Watchtower's arguments regarding scope, overbreadth, privacy, and the First Amendment. On the penitential communications privilege, the court conducted an in camera hearing, and found all but four of the withheld documents were not protected. In reviewing the documents, the court applied ***576** the rule that documents created with the knowledge they would be read by third parties were not protected by the penitential communications privilege. (See Evid.Code, § 1032.)[3]

2. *Deposition Notices at Issue in This Appeal*

Several months later, in August 2013, Lopez's counsel notified defense counsel of his intent to notice several depositions, including (1) Watchtower's person most qualified (PMQ) and (2) Gerrit Lösch, a member of a Jehovah's Witnesses entity known as the "Governing Body."

On September 20, 2013, Lopez noticed the deposition of Watchtower's PMQ on 30 identified subject matters. The notice requested the deponent to produce 29 separate categories of documents similar to the identified subject matters. The topics and requested documents related to Watchtower's organizational structure, including its committees and the Governing Body; the formulation and implementation of organizational policies; reports of childhood sexual abuse within the organization from 1979 through the current date, including sexual abuse perpetrators other than Campos; and Watchtower's handling of sexual abuse notifications.

Two requests are of particular relevance here because Watchtower's failure to provide any documents responsive to these requests was one ground for the court's terminating sanctions order. Request No. 5 sought:

> "Any and all individual written accounts, reports, summaries, letters, emails, facsimiles, and records, whether or not compiled, concerning reports of sexual abuse of children by members of the Jehovah's Witnesses, including but not limited to, Governing Body members, district overseers, circuit overseers, elders, ministerial servants, pioneers, publishers, baptized publishers, and individuals from the time period of 1979 to the present."

Request No. 12 sought:

> "All letters, emails, facsimiles, or other documentary, tangible, or electronically stored information of any kind, Watchtower Bible and Tract Society New York, Inc. received in response to the ***166** Body of Elder Letter Dated March 14, 1997."[4]

***577** On October 9, Watchtower served objections to the requested documents. Those objections included (1) the documents seek information protected from discovery by the penitential communications privilege; (2) the documents are protected by the attorney-client privilege or work product doctrine; (3) the requests are "overly broad as to time" and not reasonably calculated to lead to admissible evidence; (4) the disclosure of the documents would violate third party privacy rights; (5) the requests violate Watchtower's First

Amendment rights to religious freedom; and (6) the requests are unduly burdensome with the intent to harass Watchtower and solicit other clients.

In late October 2013, the court held a hearing on defendants' summary judgment motion pertaining to the statute of limitations. After hearing argument, the court denied the motion. The court then noted the upcoming trial date (in Jan. 2014) and asked the parties whether they had resolved their discovery disputes regarding the PMQ deposition. The parties reminded the court it had ordered the parties to meet and confer on discovery referees and notified the court that they had agreed on three names. The court then randomly chose one of those names to serve as discovery referee: former San Diego County Superior Court Judge Vincent Di Figlia (Referee).

On November 7, 2013, Lopez served Watchtower with a notice of Lösch's deposition. Watchtower objected to the deposition on the ground it "violates the 'apex-deposition rule' " (a rule prohibiting the deposition of a high-ranking official unless the deponent has unique or superior personal knowledge of relevant information). Watchtower also challenged the proposed scope of the deposition.

3. *Summary of Parties' Assertions Before Referee*

The Referee scheduled a December 13 hearing to resolve the parties' disputes regarding (1) the PMQ deposition and document requests and (2) Lösch's deposition. Lopez and Watchtower each submitted briefs regarding their respective positions on these matters.

On the PMQ document requests, Lopez argued the preabuse, postabuse, and other perpetrator evidence was relevant to several issues in the case, including notice, ratification, and punitive damages. Lopez also argued the trial court had rejected many of Watchtower's objections in ruling on the prior discovery and summary judgment motions, and the same legal principles apply to the current document requests, including those seeking postabuse and other perpetrator information. On Watchtower's penitential communications privilege claim, Lopez argued that (as the trial court had ***578** previously found) this privilege did not apply to documents containing statements made with knowledge that the statements would be disclosed to third parties. Regarding Watchtower's privacy claim, Lopez proposed that the Referee ****167** allow redaction of third party names and identifying information.

On the Lösch deposition, Lopez asserted that Lösch is currently the longest serving member on the Governing Body, and has information relevant to the formulation and implementation of the organization's policy on childhood sexual abuse matters, as well as specific matters concerning sexual abuse by Campos. In support, Lopez submitted the deposition testimony (taken in another case) of Allen Shuster, a Jehovah's Witnesses elder who has served in the Watchtower organization since 1981. Shuster testified the Governing Body "is a committee that oversees the worldwide activity of Jehovah's Witnesses," and is responsible for approving policies and guidelines governing the religion and the religious organization, including those contained in Watchtower documents known as Body of Elder letters pertaining to child sexual abuse matters.

In opposing the PMQ requested documents, Watchtower argued the requests were overbroad and sought irrelevant information, and asked the Referee to limit the discovery to a reasonable time surrounding the date of the alleged abuse (1986) and to preclude all discovery involving perpetrators other than Campos. Watchtower also argued the requests seek information protected by attorney-client privileges, the First Amendment, and the penitential communication privilege. Although Watchtower challenged the broad scope of the requests, Watchtower did not specifically argue (or present any evidence showing) that responding to the requests would be administratively burdensome.

Regarding Lösch, Watchtower withdrew its apex-doctrine objection, but argued the deposition notice was void on its face because Lösch is not an " 'officer, director, managing agent or employee' " of Watchtower and thus a deposition subpoena was required under section 2025.280, subdivision (b). In support Watchtower proffered the declaration of its employee Danny Bland, who stated that based on his search of Watchtower records, "Losch [has] never ... been an officer, director, managing agent or employee of Watchtower." Watchtower also asserted that a California deposition subpoena would be ineffective to compel Lösch's deposition because he is a New York resident. Watchtower additionally argued that any information regarding the structure, composition, and activities of the Governing Body is irrelevant because the Governing Body is a separate entity from Watchtower.

***579** 4. *Referee Recommendation*

The Referee held a hearing on December 13, 2013, at which both counsel had an extensive opportunity to present their arguments. Several days after the hearing, Watchtower requested permission to submit additional information regarding the Jehovah's Witnesses' organizational structure, and the role of the Governing Body within this structure, including that Lösch's role is solely one of a spiritual leader ("akin to the Dalai Lama") and not "a corporate managing agent." The Referee denied the motion, concluding the issues had been fully briefed.

Shortly after, on December 20, the Referee issued a written order (Referee Recommendation) concluding that Lopez should be permitted to depose Lösch in New York as a "managing agent" and that Watchtower produce the documents requested in the PMQ deposition notice (including request Nos. 5 and 12).

Regarding Lösch, the Referee stated: "The deposition testimony of Mr. Shuster establishes that the Governing Body ... is the principal overseer of the church's activities. Mr. Losch is the longest serving member of the Governing Body and may ***168** well possess knowledge pertinent to this litigation." The Referee also noted: "According to deposition testimony given by Shuster ..., the Governing Body approves operational guidelines for the United States branch of the Jehovah's Witness[es] Organization, including directives for investigating and reporting of alleged childhood sexual abuse within the church." The Referee said that "[d]espite Mr. Bland's declaration, the referee believes that Mr. Losch's position as a member of the Governing Body and its functions as described by Mr. Shuster, make Mr. Losch a managing agent" under section 2025.280, subdivision (a).

On the document requests, the Referee rejected each of Watchtower's objections, including its blanket privilege and overbreadth claims. The Referee stated: "It is [my] recommendation that the deposition of the PMQ be allowed to go forward on the topics enumerated, and that the PMQ be required to produce the documents in question which I believe are relevant to the subject matter of the lawsuit in many areas, including subsequent ratification by the church, if any."

The Referee qualified its ruling in two ways. First, the Referee stated that to protect the "privacy rights of third parties, defendants may produce documents wherein the names, addresses, e-mail addresses, telephone numbers and social security numbers of third-parties have been redacted." Second, the Referee stated, "in that the court has previously reviewed in camera and withheld some documents pursuant to Evidence Code §§ 1033 and 1034, ***580** the referee recommends that defendant prepare a privilege log and provide for in camera review by me those documents which may fall within the minister-communicant and/or attorney/client or work produc[t] privileges."

5. *Parties' Responses to Referee Recommendation*

One week later, on December 26, Lopez filed an ex parte application requesting the court to compel Watchtower's compliance with the Referee's Recommendation.

The next day, Watchtower filed objections to the Referee's Recommendation under section 644, subdivision (b). With respect to Lösch, Watchtower argued the Referee misunderstood Shuster's testimony and that the Governing Body is purely a religious committee that provides guidance on religious practice. Watchtower also argued there was no evidence showing Lösch was an officer, director, or managing agent of Watchtower and thus the court lacked authority to compel Watchtower to produce Lösch for his deposition. In support of these arguments, Watchtower proffered Shuster's new declaration, stating: "[T]he Governing Body ... is not a committee that operates within the corporate structure of Watchtower ... and it does not make corporate policy or decisions for Watchtower.... Rather, the Governing Body is a religious body that provides spiritual guidance to Jehovah's Witnesses worldwide."

On the document production, Watchtower argued the Referee erred by failing to rule on each objection, and instead improperly "lump[ed]" the requests into a single category. Watchtower also urged the court to reject the Referee's findings because the requests were overbroad as to time and the order would impose an "enormous" administrative burden. In support of the burden argument, it produced three new declarations, none of which were before the Referee.

First, Watchtower produced the declaration and supplemental declaration of Richard Ashe, Jr., the person designated as Watchtower's PMQ, who has been an elder since 1982 and has worked in Watchtower ***169** departments (the United States branch offices and the service department) since 1999. Ashe stated in part:

"All of the confidential letters from bodies of elders written to Service Department elders at Watchtower in response to the March 14, 1997, letter are filed and maintained in the individual confidential congregation Service Department files for nearly 14,000 congregations of Jehovah's Witnesses in the United States."

**581* "Most of these 14,000 congregation Service Department files do not have any documents related to child sexual abuse...."

> "The typical congregation ... file has hundreds of pages, most of which are unrelated to the issue of child abuse or child molesters. [¶] ... [¶] In order to review the documents in these confidential files it would be necessary for a Service Department elder to physically go through each of the nearly 14,000 congregation Service Department files to determine if among the hundreds of pages of documents in each file there happened to be any correspondence related to the March 14, 1997, letter to all bodies of elders or the issue of child abuse."
>
> "Only a handful of elders at [Watchtower's national office] are qualified and capable of going through these confidential congregation files. At a minimum, it would take an average of three to four hours to go through each of the nearly 14,000 files. That would mean that it would take one ... elder approximately 56,000 hours which works out to be 7,000 days (19.17 years), assuming he searched for the requested documents for ... 8 hours per day. The number of days could be reduced to 2,334 days (6.39 years) if three ... elders were assigned this task. Assuming the ... elders who first reviewed the files were to be paid New York's current minimum wage of $8.00 per hour, the reasonable value of their time would be $448,000."

"Given the spiritual responsibilities and workloads of the elders in the U.S. Service Department it would not be possible to accomplish these file reviews without stopping all of their other current tasks and responsibilities. This would cripple or severely hamper the operation of [Watchtower's service department] and be a spiritual detriment to the congregations that its elders serve."

Watchtower also produced the declaration of its general counsel, Philip Brumley, who stated the Referee's order would require Watchtower attorneys to review 13,777 files and "to turn over files" containing privileged attorney-client communications and work product information, and would subject Watchtower attorneys to ethics violations and malpractice claims. Brumley stated the preparation of privilege logs would take "thousands of hours" and prevent the legal department from providing needed legal advice to elders.

Watchtower also asked the court to remand the matter back to the Referee because the "hearing ... addressed only the scope of the [permitted] testimony" and "did not include or address the objections that had been made to the *document production*." Watchtower claimed the Referee did not consider its numerous objections, based on "privilege, rights of privacy of **582* third persons, attorney work product doctrine, and the undue burden that the search, assembly and redacting of these documents would cause upon Watchtower."

In response to Watchtower's objections, Lopez argued Watchtower was not entitled to challenge the Referee's determinations because the parties had agreed to submit the issues to the Referee. (See § 644, subd. (a).) Lopez alternatively opposed ***170* Watchtower's arguments on their merits, and stated the Referee had expressly considered and rejected each of Watchtower's objections to the discovery. On Lösch's deposition, Lopez argued the Referee properly found Lösch was a party-affiliated witness (a managing agent) and thus Lösch's deposition notice served on Watchtower was sufficient to compel his attendance. Lopez maintained that the Referee was entitled to rely on Shuster's deposition testimony and to reject Watchtower's contrary evidence.

On the document requests, Lopez objected to Watchtower raising the new administrative-burden argument, but also urged the court to reject this new claim based on evidence showing Watchtower specifically directed congregation elders to send reports about any person in an appointed position "*known to have been guilty of child molestation,*" and instructed elders to place the reports in " 'Special Blue' envelopes" and that the reports "should be marked 'Do Not Destroy' and be kept indefinitely." Lopez argued that given these documentation requirements, it was not reasonable to conclude Watchtower would need to search through each individual congregation file to locate the responsive documents.

C. January 2 Hearing and Order Affirming Referee Recommendation

At the January 2 hearing, the court initially expressed concern with the scope of the issues before it at an ex parte hearing and indicated it had not yet reviewed the Referee Recommendation or Watchtower's objections. However, as explained in more detail below, the court then permitted the parties to argue their points at length (including the relevance of the evidence and administrative burden issue), asked questions, and reviewed the submitted paperwork.

At the conclusion of the arguments, the court requested Watchtower's counsel to give a reasonable time estimate to locate the responsive documents, stating defense counsel's claim it would take "nine and a half years ... seems ludicrous." Watchtower's counsel said the "calculations worked out to be 19.7 years with one person working seven days a week, eight hours a day, and flying all over the countryside. And then you use three people, and we can knock it down just shy of seven years."

***583** After additional discussion, the court stated it was adopting the Referee Recommendation, and would continue the trial date 120 days to June 27. The court said, "I don't want to have anybody coming back in to tell me they couldn't find the documents." In its written order (the January 2 order), the court stated it had reviewed the Referee Recommendation "and makes it an order of the Court."

D. *Motions After January 2 Order*

One month later, on February 4, Watchtower moved to stay the court's January 2 order, stating it intended to file a writ petition with the Court of Appeal. The court denied the motion, finding a stay was not warranted unless it was imposed by a higher court. At the end of the hearing, the court rejected Watchtower's suggestions it had not adequately reviewed Watchtower's prior objections, stating "[the court] looked at the objections on the date that you came in. You were here last [on the calendar]. And I went ahead and signed an order adopting [the Referee Recommendation]." The court also ordered counsel to "get that deposition on calendar forthwith." When Watchtower counsel responded that the document production was asking for the "Impossible," the court replied: "I understand that it's going to be quite an endeavor, but it also ***171** has been a very long time that this has been in the making. And one of the things I recall talking about the last time was that 90 days had already passed at the request of the documents, and we're looking at several more months, and it was represented to me that nothing had been done to even start the process. [¶] So I can't tell you how long it's going to take, *but it should have at least been attempted,* and it wasn't the last time I made the order." (Italics added.)

The next month, in March 2014, Lopez's counsel moved for an order scheduling the depositions and ordering the documents to be produced, noting that Watchtower was refusing to cooperate with the court orders. At the hearing, Watchtower's counsel said Lösch's own counsel was present and "we have no ability to compel Mr. Losch to attend [his deposition]. That's the reality of our situation." The court stated it had previously determined (at the Jan. 2 hearing) that Lösch was Watchtower's "managing agent" and declined to rule on a motion to quash the deposition filed by Lösch's personal counsel.

The court and counsel then engaged in a lengthy colloquy pertaining to the documents ordered to be produced. During this discussion, Watchtower's counsel restated his strong objections to the order, repeating his position that the order requires Watchtower to search through 14,000 congregation files and that Watchtower was unable to do so. The court said it had made clear Watchtower should begin locating responsive documents and asked whether this process had commenced, but Watchtower's counsel was unable to ***584** identify a single person working on the document production. Lopez's counsel responded that he had "grave concern[s]" about going ahead with the PMQ deposition without any assurance the documents would be produced. He argued, "this whole idea that they cannot produce these documents is disingenuous at best," noting that Watchtower requests sexual abuse information from local congregations and "keep[s] track" of these individuals, and therefore it is not credible to conclude "they just shove [these documents] away somewhere ... [and] don't have a database." Watchtower's counsel replied: "[T]here's just a certain unfairness about what the court has ordered my client to do. It is a religion with almost 14,000 congregations nationwide. This request asks them to produce documents that were transmitted and filed manually into these 14,000 files involving these congregations. We explained in detail the manual search that would have to take place."

At the conclusion of the hearing, the court asked whether Watchtower intended to appear at the New York deposition with documents, and Watchtower's counsel said he believed the court abused its discretion in compelling Watchtower to produce these documents. The court responded there was nothing it could do at this point, "[b]ut if you show up for a deposition

and documents aren't produced, and they were inappropriately not produced, I'll be looking at other motions."

After the hearing, the court issued an order setting the dates for the New York depositions of Watchtower's PMQ and stating "[t]he topics of the testimony are those previously noticed by Plaintiff" and "[a]t or before the commencement of the deposition, Watchtower must produce all documents requested by Plaintiff...." The court also ordered Lösch's deposition to be taken on specific dates at a New York location to be mutually agreed by the parties.

Two weeks later, Watchtower and Lösch each filed a petition for a writ of mandate challenging the court's January 2 order. Several days later, on March 27, 2014, this ***172** court summarily denied both petitions, and the California Supreme Court later denied similar petitions.

The next week, on March 31 and April 1, Watchtower's PMQ (Ashe and Watchtower Attorney Mario Moreno) appeared and testified at their New York depositions, but did not produce the documents at issue here. During his deposition, Ashe testified about Watchtower prior publications that discuss the problem of child abuse and the significant long-term emotional and psychological damage to victims, and the requirement that any known abuse be reported to Watchtower. Ashe also testified that all Jehovah's Witnesses congregation files have been fully scanned into a computer system, including ***585** child abuse reports that are "marked do not destroy" and "stay[ ] indefinitely in [the] congregation file." He said there are 36 elders in Watchtower's service department available to search the files, but their primary job is to give spiritual guidance to congregation members and elders. Ashe said compliance with the January 2 order "would effectively shut down their duties in the Service Department for a considerable length of the time." When asked why these documents could not be located by an electronic search method, Ashe testified in part:

> "[The electronic system] was never designed for the 3,000,000 documents that we scanned into it at its managing force. So to put in the words, technical terms used by computer support, sometimes it's loopy. It's not reliable all the time but to try and type in a search parameter, we examine this. How can we do this to be in compliance. There is no easy way to do that. You have to search every congregation file electronically to try and do that. And the search parameters, for example if you type in child abuse, you're going to get every document that has the word child in it and every document that has the word abuse in it."

Ashe also said that when the computer identifies a responsive document, there is usually a brief delay ("a second delay") as the document uploads, and the document then would have to be reviewed for attorney-client privilege and therefore "It gets very complicated." He opined that "technically" Watchtower could not comply with the January 2 order using the electronic search method, and that "It would take years to get that information put together." Ashe also said "there are no [remaining] physical file[s]. Once they were scanned[,] all those documents were destroyed." When asked why Jehovah's Witnesses could not devise a search for the phrase " 'do not destroy,' " Ashe responded that you "can try to do" this search, "but you'll come up with child abuse, you'll come up with adultery, you'll come up with bigamist marriage, you'll come up with slander, fraud, murder any abhorrent sin."

Lösch did not appear for his scheduled deposition.

E. *Motion for Monetary and Terminating Sanctions*

One week after the depositions, on April 8, Lopez moved for terminating and monetary sanctions for Watchtower's failure to comply with the court's orders to produce the documents at the PMQ deposition and to produce Lösch for deposition. Regarding the PMQ deposition, Lopez's counsel stated that the deponents (Ashe and Moreno) did not produce documents responsive to Lopez's document request Nos. 5 and 12.[5] Lopez's counsel also discussed ***173** the recent PMQ depositions, and noted that Ashe "testified that all of the historical records regarding child abuse that were [requested] by Plaintiff and ***586** ordered produced have been scanned into a computer system, and that the text of those scanned documents is searchable," but that Watchtower had made no efforts to "create[ ] a team to search for them." Lopez additionally discussed Watchtower's assertion of various meritless objections to earlier discovery. Lopez requested monetary sanctions of $37,799.21, primarily for his counsel's costs in attending Lösch's New York deposition and making a record of his nonappearance.

In opposition, Watchtower reasserted its challenges to the discovery orders and alternatively argued there were insufficient grounds for terminating sanctions. Watchtower argued terminating sanctions were not appropriate because there was no evidence it destroyed or concealed documents, and instead it "simply cannot identify all the documents requested and produce the unprivileged documents with a privilege log in the limited time set by this court...." Watchtower also argued it had no ability to compel Lösch's attendance and thus should not be sanctioned for his nonappearance. Watchtower additionally asserted that a terminating sanction would be an improperly drastic remedy because Lopez would be unable to prove his claims and therefore a terminating order would place him in a better position than if defendants had complied with the court's orders. Watchtower also challenged the monetary sanctions request related to Lösch's deposition notice.

In reply, Lopez produced a declaration of a computer expert (Rafiq Wayani), who was consulted after Lopez's counsel learned of the scanned files on Watchtower's computer system. Wayani opined there were methods to extract the relevant data, and that this extraction "could take as little as two days to as long as two months," depending on the particular system.

F. *Court's Sanctions Order*

1 After conducting a hearing and considering the papers, the court granted Lopez's sanctions motion, stating that at the January 2 hearing, it "considered the recommendations of the discovery referee, as well as Watchtower's objections thereto, and adopted the recommendations as the order of the court," and Watchtower had willfully and repeatedly refused to comply with the court's order. In its written statement of decision, the court summarized its reasoning as follows:

"The only facts prerequisite to imposition of a discovery sanction are the party's failure to comply with ordered discovery, and the failure was willful.... This Court finds that [Watchtower] failed to comply with this court's orders requiring [it] to produce Mr. Losch for deposition, and to produce the documents requested by Plaintiff in connection with the PMQ Notice. This Court further finds that Watchtower's refusal to comply with this Court's orders was willful....

***587** "In opposing the motion, Watchtower made various arguments including that Mr. Losch was not Watchtower's managing agent.... [T]his Court has found to the contrary and has ordered his deposition to proceed.

"[Watchtower] also contends that it was not required to comply with this Court's orders because it is exercising its appellate rights to challenge the validity of the underlying court orders.... The Court agrees that Watchtower is within ***174** its rights to seek appellate review. However, in the absence of a stay ..., compliance ... is required notwithstanding any pending writ petition or petition for review....

"At the hearing of this motion, Watchtower devoted substantial time expressing its disagreement with the underlying orders of this Court requiring the deposition of Mr. Losch, and the production of documents relating to childhood sexual abuse complaints. However, the validity of these orders is not at issue in the present motion. The issue raised by Plaintiff's motion involve Watchtower's non-compliance with this Court's orders. This Court's discovery orders are valid and remain in effect, and whether [Watchtower] agrees with the orders is inconsequential. Watchtower was ordered to provide discovery and did not do so.

"In its sur-reply, [Watchtower]—citing to [Ashe's] declaration—states that to produce the documents sought would be so time-consuming as to take years to search the relevant records. However, the Court was unable to locate any evidence that Watchtower had at anytime since the Court first ordered production months ago has even attempted to locate responsive documents. Even at the hearing of this motion, Watchtower did not provide any assurances that the documents were in the process of being gathered, or that any effort had been made to comply with this Court's orders. [¶] ... [¶]

"The Court considered ordering the imposition of either issue sanctions or evidence sanctions in lieu of the terminating sanctions requested by Plaintiff. However, Plaintiff has made a showing that the materials requested are relevant to nearly [every] aspect of Plaintiff's claim[s], including his negligence based causes of action, ratification based cause of action, and his prayer for punitive damages, as well as to Defendants' claimed statute of limitations defenses. Given Watchtower's willful refusal to comply with multiple orders of this Court, and the fact that Watchtower produced no evidence of any attempt to

comply with this Court's orders, this Court finds that only terminating sanctions can effectively respond to Watchtower's willful refusals.

"The Court additionally grants Plaintiff's request for monetary sanctions in the amount of $37,799.21 for the reasons argued in Plaintiff's papers, ***588** including the expenses associated with traveling to New York relative to the scheduled Losch deposition."[6] Based on the terminating sanction order, the court entered Watchtower's default and scheduled a default prove-up hearing.

DISCUSSION

I. *Validity of January 2 Discovery Order*

As its primary challenge to the terminating sanction and entry of default, Watchtower contends the January 2 order is invalid and therefore its violations of the order cannot be the basis for a discovery ***175** sanction. Watchtower contends the court erred in ordering the Lösch deposition and the PMQ document production. Watchtower also contends the January 2 order is void because the court did not independently consider Watchtower's objections to the Referee Recommendation.

As explained below, we conclude the court properly considered Watchtower's challenges to the Referee Recommendation and did not abuse its discretion in ordering the PMQ documents to be produced. But we determine the court order requiring Watchtower to produce Lösch for a deposition was invalid because the record does not contain sufficient evidence showing Lösch was Watchtower's "officer, director, managing agent, or employee." (§ 2025.280, subds. (a); see id., subd. (b).)

A. *Court Independently Reviewed Objections to Referee Recommendation*

Watchtower initially contends the January 2 order is invalid because the court did not comply with its statutory obligation to independently consider its objections to the Referee Recommendation. (§§ 643, 644.) The record does not support this argument.

A court may direct a special reference to a discovery referee to resolve the parties' discovery disputes. (§ 639.) If the trial court orders the reference without the parties' consent, "[t]he referee's factual findings are advisory recommendations only; they are not binding unless the trial court adopts them." (***589** *In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177, 110 Cal.Rptr.2d 111 (*Petropoulos*); see § 644, subd. (b).) In determining whether to adopt the findings, the court must "independently consider[ ] the referee's findings and any objections and responses thereto filed with the court." (§ 644, subd. (b); see *Marathon Nat. Bank v. Superior Court* (1993) 19 Cal.App.4th 1256, 1261, 24 Cal.Rptr.2d 40 (*Marathon*).)

2 3 The court has broad discretion to determine the best method for considering a party's challenges to the referee's findings, and the court is not required to hold a hearing or conduct a de novo analysis of the underlying arguments. (See § 644, subd. (b); *Marathon, supra*, 19 Cal.App.4th at p. 1261, 24 Cal.Rptr.2d 40.) In its review, the court should give the referee's findings " 'great weight' " and focus on the parties' objections to those findings. (*Petropoulos, supra*, 91 Cal.App.4th at p. 176, 110 Cal.Rptr.2d 111.) We examine the trial court's decision to accept the referee's recommendation for an abuse of discretion. (See *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 226, 240 Cal.Rptr. 489.)

4 The court held a hearing on the Referee Recommendation. At the outset, the court acknowledged its independent obligation to consider and rule on Watchtower's objections to the Referee's conclusions. The court initially expressed concern about the ex parte nature of the hearing, but after recognizing the approaching trial date and that the parties had fully briefed the issues, the court moved the hearing to the end of the calendar and then provided the parties a full opportunity to argue their respective positions. Although it appears the court did not read the Referee Recommendation or Watchtower's opposition memorandum before the hearing, the record affirmatively supports that during the hearing the court reviewed these documents, considered the newly submitted declarations, and carefully listened to Watchtower's counsel's oral explanation of the objections.

Watchtower contends it was not possible for the court to read "195 pages of written objections" during the hearing. The 195– ***176** page number is misleading. Watchtower's substantive objections to the Referee Recommendation were contained in less than eight pages. The remaining pages included Lopez's affirmative discovery requests, Watchtower's initial objections to the document requests (spanning about 55 pages of substantially identical, boilerplate objections), and the parties' briefs submitted to the Referee. At the time of the hearing, the court was highly familiar with the issues and the parties. It had presided over the case for almost two years, had ruled on similar objections to earlier discovery

requests, and had denied two summary judgment motions. We are satisfied the trial judge had the ability to, and did, review the objections and other relevant submissions during the hearing.

5 At the subsequent hearings in February, March and May 2014, the court stated it recalled reviewing and considering Watchtower's objections ***590** and that it had independently found them to be without merit. Absent a contrary indication on the record, we are required to accept the court's statements and presume the court complied with its statutory duties. (See *People v. Risenhoover* (1968) 70 Cal.2d 39, 56–57, 73 Cal.Rptr. 533, 447 P.2d 925 [presumption the trial court does what it is supposed to do and reversal is inappropriate unless the record affirmatively shows the trial court misconstrued its powers].)

Watchtower's reliance on *Rockwell International Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 32 Cal.Rptr.2d 153 is misplaced. The *Rockwell* court found "the trial court abdicated its judicial responsibility by simply entering an order on the referee's report as though it were a binding decision of the court itself." (*Id.* at p. 1270, 32 Cal.Rptr.2d 153.) Here, the court made clear that it understood the report was not binding, and that it was required to consider Watchtower's objections. Additionally, to the extent the *Rockwell* court suggested that in every case a trial court must consider the transcript of the referee hearing and the parties' initial objections to the discovery, we disagree with this blanket rule. The statute requires only that the trial court independently consider the referee's findings and any objections and responses to these findings. (§ 644, subd. (b).) Although a court's review of the referee hearing transcript or the initial discovery objections may be helpful under certain circumstances, the rules do not mandate this in every case.

Having concluded the court complied with its statutory duties, we now turn to Lopez's contentions that the court abused its discretion in adopting the Referee's conclusions regarding the PMQ document requests and Lösch's deposition.

B. *Document Production*

Watchtower contends the court erred in ordering the PMQ requested documents produced because (1) the document requests did not seek relevant information and were "overly broad"; (2) the requests imposed an undue burden; (3) the order required the production of documents protected by the attorney-client and penitential communication privileges; (4) the order violated third party privacy rights; and (5) the order violated Watchtower's First Amendment rights. For the reasons explained below, we find each of these arguments to be without merit.

1. *Relevance/Overbreadth Arguments*

6 7 8 9 California law provides parties with expansive discovery rights. Section 2017.010 states: "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the ***591** pending action or to the determination of any motion made in that action, if the matter either is itself admissible ****177** in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence.*" (Italics added; see *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712, fn. 8, 10 Cal.Rptr.3d 724.) The statutory phrase " 'subject matter' " is " 'broader than the issues' and is not limited to admissible evidence." (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 711, 3 Cal.Rptr.3d 877; accord, *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 172–173, 84 Cal.Rptr. 718, 465 P.2d 854.) " 'For discovery purposes, information is relevant if it "might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement...." [Citation.] Admissibility is not the test and information unless privileged, is discoverable if it might reasonably lead to admissible evidence. [Citation.] These rules are applied liberally in favor of discovery [citation], and (contrary to popular belief), fishing expeditions are permissible in some cases.' " (*Garamendi, supra*, 116 Cal.App.4th at p. 712, fn. 8, 10 Cal.Rptr.3d 724.)

10 Lopez brought several claims against Watchtower, including negligent hiring, supervising, and retaining Campos, and failure to warn. To prevail on his negligent hiring/retention claim, Lopez will be required to prove Campos was Watchtower's agent and Watchtower knew or had reason to believe Campos was likely to engage in sexual abuse. (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836, 842–843, 10 Cal.Rptr.2d 748 (*Evan F.*); see *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139–1140, 91 Cal.Rptr.3d 864; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395–397, 97 Cal.Rptr.2d 12.) On the negligent supervision and failure to warn claims, Lopez will be required to show Watchtower knew or should have known of Campos's alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as Lopez's Bible instructor. (See *Federico v. Superior Court*

(1997) 59 Cal.App.4th 1207, 1216, 69 Cal.Rptr.2d 370; *Juarez, supra*, at pp. 395–397, 97 Cal.Rptr.2d 12.) For each claim, Lopez will also be required to prove the alleged sexual abuse occurred, causation, and compensatory damages. (See *Evan F., supra*, at p. 834, 10 Cal.Rptr.2d 748.) Lopez sought punitive damages, which requires a showing of fraud, oppression, or malice. (Civ.Code, § 3294.)

Lopez's requests at issue on appeal identified documents concerning reports of child sexual abuse by members of the Jehovah's Witnesses from 1979 to the present, and documents prepared in response to a 1997 letter asking for information about known child abusers in Jehovah's Witnesses congregations. Watchtower argues the postabuse (post–1986) documents are not relevant to his claims because "they will *not* demonstrate what Watchtower knew *before* Lopez was abused (notice), what Watchtower did ***592** with information about Campos (negligence), or what an officer, director or managing agent of Watchtower did to express approval or censure Campos's conduct (ratification)."

Watchtower is viewing Lopez's discovery rights too narrowly. Although the documents may not contain information specific to Watchtower's pre-incident knowledge of Campos's dangerousness or its alleged ratification of Campos's conduct, the court had a valid basis to find the documents were relevant or potentially relevant to other matters at issue in the case.

11 12 13 First, the postincident documents were potentially relevant to Lopez's punitive damages claim, including the reprehensibility of Watchtower's actions. "The degree of reprehensibility of the defendant's ***178** conduct is the most important indicator of the reasonableness of a punitive damage award" (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 985, 180 Cal.Rptr.3d 382), and one relevant factor in this analysis is the extent to which the defendant's alleged wrongful conduct involved repeated actions, including conduct occurring after the incident in question (see *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed.2d 585; *Izell, supra,* at pp. 985–986, 180 Cal.Rptr.3d 382). Although punitive damages may not be used to punish a defendant for injury inflicted on third parties, a jury may consider evidence of harm to others in determining the reprehensibility of a defendant's conduct toward the plaintiff. (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 355, 127 S.Ct. 1057, 166 L.Ed.2d 940; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1202–1204, 29 Cal.Rptr.3d 401, 113 P.3d 82; *Izell, supra*, at p. 986, fn. 10, 180 Cal.Rptr.3d 382; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1691, 26 Cal.Rptr.3d 638; see CACI No. 3943.) By placing the defendant's wrongful conduct into the context of a continuing pattern and practice, "an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature." (*Johnson, supra,* 35 Cal.4th at p. 1206, fn. 6, 29 Cal.Rptr.3d 401, 113 P.3d 82; *Izell, supra,* 231 Cal.App.4th at p. 987, fn. 10, 180 Cal.Rptr.3d 382.) Accordingly, if the postabuse documents contain information that Watchtower continued to engage in similar conduct, this information could support Lopez's punitive damages claim (if the case reaches that stage).

The postabuse evidence may also be relevant on the issue whether Watchtower acted with the willful and conscious disregard for Lopez's rights. If the documents show Watchtower's agents continued to commit acts of child abuse and that Watchtower did not change its policies and/or took no meaningful protective actions, this evidence may be probative on the issue whether Watchtower was deliberately indifferent to Lopez's rights in 1986. Failure to prevent similar incidents may tend to prove the earlier acceptance ***593** of the abuse and thus willful and conscious disregard of Lopez's rights. (See *Henry v. County of Shasta* (9th Cir. 1997) 132 F.3d 512, 519–520; *Grandstaff v. Borger* (5th Cir. 1985) 767 F.2d 161, 170.)

A similar principle applies on liability issues. The postabuse documents may contain information showing the nature of Watchtower's actions towards others accused of child abuse and this evidence could potentially shed light on Watchtower's actions or inactions towards Campos and the intent underlying those actions. An entity's actions and the intent with which the party engaged in such actions "may be inferred from evidence of [its] subsequent conduct," including that the conduct was not merely a mistake or an accident. (*Tranchina v. Arcinas* (1947) 78 Cal.App.2d 522, 524, 178 P.2d 65; see *Foley v. Lowell* (1st Cir. 1991) 948 F.2d 10, 14; see also *In re Roman Catholic Archbishop of Portland* (Bankr.D.Or.2005) 335 B.R. 815, 823 ["Although the relevant time frame for these [clergy sexual abuse] claims is the time of the alleged misconduct, evidence of [the Roman Catholic Archbishop's] later policies could possibly lead to evidence that would be relevant to the claims of negligence...."].) The postincident evidence may also be relevant to test the validity of Watchtower's defenses regarding its knowledge of child sexual abuse at the time of the

incident and the effectiveness of its claimed steps to protect Jehovah's Witnesses children in the 1980's.

**179 In responding to these asserted relevancy grounds, Watchtower argues "Campos was not a cleric, agent, or employee of Watchtower" and therefore its postincident actions towards other clerics, agents, or employees had no connection to the claims at issue. This argument lacks merit at this stage of the litigation. The parties have stipulated the congregation elders were Watchtower's agents, and Lopez alleged that before the alleged molestation occurred, congregation elders knew Campos had molested another child, yet represented to members that Campos was a qualified Jehovah's Witnesses Bible instructor and was "very good with children." Lopez also alleged the elders knew Campos had molested multiple children and despite this knowledge later elevated Campos to the position of elder, an action Watchtower sanctioned. Given these allegations, Watchtower's assertions that Campos was merely a "rank-and-file congregation member" who perpetrated the alleged abuse unrelated to the Jehovah's Witnesses congregation may be a successful defense (if proven), but it is not a basis for precluding discovery.

14 Moreover, contrary to Watchtower's assertions, the fact that the other molestation incidents may have been different from the one that allegedly occurred here does not mean the other perpetrator evidence was not discoverable. While the trial court will have to assess whether the information revealed in the documents is admissible (taking into account similarity, *594 remoteness, prejudice, etc.), these issues are not dispositive at the discovery stage. A document may be discoverable even if it is unlikely to be admitted at trial. (See *Davies v. Superior Court* (1984) 36 Cal.3d 291, 301, 204 Cal.Rptr. 154, 682 P.2d 349; *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481, 1490–1491, 43 Cal.Rptr.3d 723; *Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1761, 30 Cal.Rptr.2d 217.)

Watchtower contends that even assuming the relevancy of the postabuse documents, the document requests were patently overbroad given that they seek documents prepared more than 25 years after the alleged abuse. But on the issues for which the sexual abuse reports may be relevant, the court had a reasonable basis to conclude reports prepared long after the incident could contain information helpful to Lopez's case, even if the document's remoteness to the incident may preclude their admission at trial. Moreover, Watchtower never proposed any time limits it considered reasonable. Viewing the totality of the circumstances (including the documents' conceivable significance on both liability and punitive damage issues, and the court's rejection of Watchtower's burdensome claims, discussed below), the court's determination was not an abuse of discretion.

In reaching this conclusion, we recognize that a 27–year postincident time period for requested documents is unusual. But the breadth of the request is partly a function of the permissive limitations statutes governing child sexual abuse, under which Lopez was seeking to recover for an alleged wrongful act committed almost three decades earlier.[7] Absent this tolling period or an equivalent circumstance, it is unlikely that a similarly time-expansive document production would be upheld.

2. *Claimed Burden of Document Production Request*

15 Watchtower additionally contends that even if the requested documents were **180 discoverable under the liberal discovery and relevancy standards, the court erred in ordering it to produce the documents because the burden of responding to the requests was oppressive and substantially outweighed any possible relevance or informational value of the evidence. In support, Watchtower argues the evidence was "*uncontroverted*" that "the labor involved in locating and producing the virtually unlimited records Lopez requested will require literally tens of thousands of man hours." (Italics added.)

Assuming Watchtower did not waive the argument by failing to raise it with the Referee, the court's rejection of this contention was fully supported *595 by the record. Contrary to Watchtower's assertions, the evidence regarding the administrative burden was not "uncontroverted." Lopez presented evidence countering Watchtower's claim that compliance with the Referee Recommendation would require years of "manually" looking through its files. This included evidence showing Watchtower directed the elders to send to Watchtower reports about all known child abuse perpetrators in their respective congregations and gave specific instructions on the manner in which this information should be reported, including to segregate the reports and place them in " 'Special Blue' envelopes" that were to be kept indefinitely. From this, the court had a reasonable basis to conclude the requested documents had been segregated within the congregational files and thus decline to credit Watchtower's claim it would take "years" to locate the responsive documents.

The court's rejection of the burden argument was also supported by Watchtower's conduct in refusing to take *any* steps—however minimal—to locate the responsive documents or to offer any suggestions on how to reasonably narrow the request. At every hearing from January through April 2014, the court repeated its concern that, although these documents had been first requested in October 2013, Watchtower had not made any effort to identify any responsive documents. Watchtower's PMQ later admitted it was possible to quickly locate responsive documents if Watchtower knew the identity of a sexual abuse perpetrator. Watchtower acknowledged it was aware of at least seven other child sexual abuse perpetrators, but it did nothing to locate documents pertaining to these individuals.

The court's finding was also supported by evidence showing Watchtower had scanned all documents from congregation files into a computer program that had a search function. Although one elder (Ashe) opined the search function would not accurately identify the other perpetrator child abuse reports, Lopez's expert reached a contrary conclusion and there is no suggestion Watchtower made any efforts to design a search or consult with an individual qualified to conduct a search.

Calcor Space Facility v. Superior Court (1997) 53 Cal.App.4th 216, 61 Cal.Rptr.2d 567, relied on by Watchtower, does not support its arguments. *Calcor* involved a document request against a *nonparty* that contained six pages of highly complex definitions and instructions and did not provide reasonable specification of the documents sought. (*Id.* at pp. 219–221, 61 Cal.Rptr.2d 567.) In reversing an order compelling the documents, *Calcor* found the documents would have no evidentiary value in the litigation and urged trial courts to use their authority to prevent discovery abuse. (*Id.* at pp. 218–221, 61 Cal.Rptr.2d 567.)

This case is different. It involves a request against *a party* for specifically described documents that have potential relevance to the subject matter of the ***596** lawsuit or may lead to the discovery of relevant ****181** evidence. Watchtower has superior knowledge regarding its files and documents, and the evidence showed the documents could be identified. We are satisfied the trial court recognized the broad scope of the document requests, but reasonably found Lopez's counsel sought the documents in good faith to obtain necessary and helpful information to prepare the case. Whether this court would have reached the same conclusion as the trial court is not the issue. Instead, it is whether the court acted in an arbitrary and capricious manner in ordering Watchtower to produce documents responsive to the requests. Under the trial court's expansive authority over discovery issues, we find the court's rulings were reasonable.

3. *Claimed Privileges*

16 Watchtower also contends the order was invalid because it violated attorney-client and penitential communication privileges.

This contention is unavailing because Watchtower misconstrues the scope of the order. We accept that certain requested documents could contain privileged material upon which the court would have to rule in due course. But contrary to Watchtower's assertions, neither the Referee nor the court ordered the production of privileged material. Instead, the Referee specifically ruled that Watchtower may prepare a privilege log for later review. This ruling was incorporated into the court's January 2 order, which adopted the Referee Recommendation in full. Because responsive documents had not yet been identified, neither the Referee, nor the trial court, was in a position to rule on any specific privilege claims.

17 18 Generally, "the privilege-claimant 'has the *initial burden* of proving the *preliminary facts* to show the privilege applies.' " (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442, 32 Cal.Rptr.3d 209 (*Roman Catholic Archbishop*).) Once the claimant establishes the preliminary facts, it is presumed that the matter sought to be disclosed was a communication made in confidence in the course of the lawyer-client or clergy-penitent relationship. (Evid.Code, § 917.) At that point, the burden of proof shifts to the party opposing the privilege claim. (*Roman Catholic Archbishop, supra,* at p. 442, 32 Cal.Rptr.3d 209.)

Because Watchtower had not yet produced a privilege log or identified any specific confidential communications, it had not met its burden to show the preliminary facts supporting the application of the privilege. Thus, its privilege claim was premature. For example, as the court ruled earlier in this case, to the extent that the reports were written and sent to Watchtower with the expectation they would be read by a third party, they do not come within the ***597** penitential communication privilege. (See *Roman Catholic Archbishop, supra,* 131 Cal.App.4th at pp. 444–445, 32 Cal.Rptr.3d 209; see also *Conti v. Watchtower*

Bible & Tract Society of New York, Inc. (2015) 235 Cal.App.4th 1214, 1229–1230, 186 Cal.Rptr.3d 26 (*Conti*).)

Watchtower argues "the very categories and broad descriptions of information and documents demanded by Lopez *necessarily* sought documents protected by the attorney-client and clergy-penitent privileges...." (Italics added.) The record does not support this argument. In the challenged document requests, Lopez primarily sought reports prepared by elders in response to Watchtower's requests for the information. There is no indication that these reports necessarily arose from an attorney-client or a clergy-penitent ***182** communication or were prepared in the context of litigation.

Watchtower's reliance on *Conti, supra*, 235 Cal.App.4th 1214, 186 Cal.Rptr.3d 26, is misplaced. Watchtower relies on the portion of *Conti* in which the Court of Appeal declined to impose a duty on a clergy member to notify congregation members of a penitential communication (e.g., a church member's private confession to a clergyperson) involving suspected child abuse. (*Id.* at p. 1230, 186 Cal.Rptr.3d 26.) We agree with this principle, but it does not help Watchtower on the issue of *whether* it met its preliminary burden to show an applicable privilege. The *Conti* court recognized the fundamental importance of the penitential communication privilege, but also found this privilege did not apply to communications if they were shared with others or made with the expectation they would be disclosed beyond the protected relationship. (*Id.* at pp. 1229–1230, 186 Cal.Rptr.3d 26.) This principle applies equally in this case and underscores the need for Watchtower to have provided a privilege log to support any privilege claim.

19 In asserting error on the privilege issue, Watchtower focuses on the Referee's statement that he would review the claimed privileged documents "*in camera.*" (Italics added.) Watchtower correctly argues that privileged communications are generally not subject to in camera review. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 736–737, 101 Cal.Rptr.3d 758, 219 P.3d 736.) But there are two fundamental flaws with Watchtower's contention for purposes of our appellate review. First, there is no showing on this record that Watchtower raised this in camera issue below. Thus, it is waived. (See *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 155, 87 Cal.Rptr.3d 5.) More important, this contention is unrelated to the court's sanctions order. The court did not sanction Watchtower because it refused to provide the privileged documents for an in camera review. Instead, the court imposed a sanction for Watchtower's willfully violating the court's order to search for, identify, and produce nonprivileged documents (or at least *start* this process), and prepare a ***598** privilege log for any responsive privileged documents. It is undisputed that Watchtower failed to do this. To the extent Watchtower is arguing that it did not make any effort to comply with the court's order because it was concerned with the Referee's summary reference to an in camera hearing, we find this argument unconvincing.

4. *Third Party Privacy Rights*

20 Watchtower contends the court's January 2 order was also invalid because it would violate the privacy rights of others, and the court "failed to adequately take the rights of those third parties into consideration." The Referee and the trial court rejected these arguments because the order specifically permitted Watchtower to redact names, birth dates, and Social Security numbers from the documents.

Watchtower argues the redaction would not prevent the violation of privacy rights "where the circumstances surrounding such reports would nonetheless make them readily identifiable to anyone with a modicum of familiarity with those individuals." This argument is unsupported by the record. There were no facts before the Referee or the trial court showing the documents would disclose the identities of the individuals after deleting personal identifying information. To the extent Watchtower believes that a particular document would fall within this category, it had the right to seek some form of protection. But the record does not support a blanket ***183** objection based on third party privacy rights given the order's express redaction provision.

We find unavailing Watchtower's additional argument that the documents relating to other child abuse perpetrators were sought solely to assist Lopez's counsel in soliciting additional clients. The Referee and the court rejected this argument, and they had a reasonable basis to do so. There is no basis in the appellate record showing the court abused its discretion in finding the discovery was sought for proper purposes.

5. *First Amendment Objection*

21

Watchtower next argues the January 2 order was improper because it violated its First Amendment religious freedom rights. In support, Watchtower contends that issues of ratification and agency are "inquiries which necessarily require the court to entangle itself in the interpretation, evaluation and determination of the religious beliefs and internal governance of Jehovah's Witnesses." This argument is not a basis for limiting discovery at this stage of the litigation. The court's January 2 order did not reflect the court's ruling that Lopez's ratification or agency theories are legally valid or that the court or jury will be permitted to engage in factfinding that would interfere with religious doctrine.

22 ***599** In a related argument, Watchtower relies on a line of cases applying the ministerial privilege doctrine, a constitutionally based rule that exempts religious organizations from liability arising from employment-related claims by a religious figure. (See *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC.* (2012) —— U.S. ——, 132 S.Ct. 694, 706–707, 181 L.Ed.2d 650; *Alcazar v. Corp. of Catholic Archbishop* (9th Cir. 2010) 598 F.3d 668, 672–673, affd. in part & vacated in part (9th Cir. 2010) 627 F.3d 1288; see also *Henry v. Red Hill Evangelical Lutheran Church of Tustin* (2011) 201 Cal.App.4th 1041, 1053, 134 Cal.Rptr.3d 15.) This doctrine " 'is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, is an inherently religious function because clergy are such an integral part of a church's functioning as a religious institution.' " (*Henry v. Red Hill, supra*, at p. 1053, 134 Cal.Rptr.3d 15; *Roman Catholic Archbishop, supra*, 131 Cal.App.4th at p. 433, 32 Cal.Rptr.3d 209.)

23 This rule is not applicable here. The ministerial exception applies to bar an action by a clergy member against a religious institution. (See *Roman Catholic Archbishop, supra*, 131 Cal.App.4th at p. 433, 32 Cal.Rptr.3d 209.) Watchtower has not cited, nor are we aware of, any decisions extending this rule to preclude a third party action against a religious organization for the tortious conduct of its agents. And the law appears to be to the contrary. (See *Evan F., supra,* 8 Cal.App.4th at pp. 841–843, 10 Cal.Rptr.2d 748 [Methodist pastor molesting minor]; *Stevens v. Roman Catholic Bishop of Fresno* (1975) 49 Cal.App.3d 877, 884–88, 123 Cal.Rptr. 171 [visiting French priest held agent of local diocese for purposes of holding the diocese liable for priest's negligence in vehicle accident].)

More than 10 years ago, the Court of Appeal rejected a similar First Amendment argument seeking to preclude the production of documents in a child sexual abuse case. (*Roman Catholic Archbishop, supra*, 131 Cal.App.4th at pp. 432–433, 32 Cal.Rptr.3d 209.) There, the grand jury subpoenaed documents from the archdiocese to determine whether to indict priests who allegedly sexually abused children while working for the archdiocese. (***184** *Id.* at p. 425, 32 Cal.Rptr.3d 209.) In affirming orders compelling the document production, the court rejected arguments that the disclosure order violated constitutional religious freedom rights, and found the asserted "ecclesiastical abstention doctrine" and the "ministerial exception" rule were inapplicable to the case. (*Id.* at pp. 430–440, 32 Cal.Rptr.3d 209.) The court also held "the disclosure of the subpoenaed documents ... will not result in excessive entanglement or any other violation of the establishment clause." (*Id.* at p. 436, 32 Cal.Rptr.3d 209.)

C. *Lösch's Deposition*

Watchtower contends the court erred in ordering it to produce Lösch for deposition. The court's order was based on the court's adoption of the ***600** Referee's finding that Lösch is a "managing agent" under section 2025.280, subdivision (a), and thus service of the notice on Watchtower was sufficient to require Lösch's appearance. On the factual record before us, we determine Lopez did not satisfy his minimal burden to present evidence showing Lösch fell within the statutory "managing agent" category. (§ 2025.280, subd. (a).) Accordingly, the order compelling Watchtower to produce Lösch was invalid and the court did not have the authority to sanction Watchtower for its noncompliance with this order.

1. *Statutory Framework*

24 Generally, a party may require the deposition of a nonparty only if the party serves the deponent with a deposition subpoena. (§ 2025.280, subd. (b).) Thus, a deposition notice served on the opposing party is inadequate to compel a third party's attendance. (*Ibid.*) However, a subpoena is not required if the deponent is "an officer, director, managing agent, or employee of a party." (§ 2025.280, subd. (a).) The discovery statutes refer to this deponent as a "party-affiliated deponent." (§ 2025.450, subd. (h).) The requisite "party-affiliated" relationship must exist at the time of the deposition notice. (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1398, 115 Cal.Rptr.2d 137 (*Maldonado*).)

If a party-affiliated deponent fails to obey a court order to attend a deposition, the court may impose monetary, evidentiary, issue, or terminating sanctions against the party. (§§ 2025.450, subd. (h), 2025.480, subd. (k); see § 2023.030.) However, if the deponent is not a party or a party-affiliated deponent, the court has no authority to impose sanctions on the party for the deponent's disobedience of the order. (See *ibid.*; § 2025.280, subd. (b); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 8:824, p. 8E–144.) By creating this distinction, the Legislature necessarily recognized a party should not be sanctioned if it had no legal or practical means to require the nonparty deponent to attend his or her deposition.

2. *Definition of Managing Agent*

Both parties acknowledge that Lösch was not a party, nor was he an officer, director, or employee of Watchtower. However, Lopez argued Lösch was a party-affiliated deponent because he was a "managing agent" based on his status as a member of a Jehovah's Witnesses organization known as the Governing Body. In support, Lopez presented evidence showing the Governing Body issues policy directives applicable to Watchtower and the local congregations. Although Watchtower argued below (and on appeal) that the ***601** Governing Body has a solely spiritual function within the Jehovah's Witnesses religion, Lopez's evidence showed that the Governing Body has broader administrative ****185** responsibilities, such as issuing policy guidelines regarding child abuse prevention and reporting in local congregations. The Referee, as a trier of fact, was entitled to find this evidence credible and reject Watchtower's contrary evidence. On its independent review, the court also had a reasonable basis to adopt this factual finding in its January 2 order.

25 26 But the fact the Governing Body had this policymaking function does not answer the question whether Lösch was Watchtower's "managing agent." The California Supreme Court has defined a "managing agent" for purposes of the discovery statutes as "a person who may exercise his judgment and discretion in dealing with corporate matters, who can be expected to comply with [the party's] directive to appear for [the requested examination], and who can be anticipated to identify himself with the interests of the corporation." (*Waters v. Superior Court* (1962) 58 Cal.2d 885, 896, 27 Cal.Rptr. 153, 377 P.2d 265 (*Waters*).) "The question whether a particular deponent is a 'managing agent' of one of the parties for purposes of pretrial discovery proceedings must of necessity be answered pragmatically" and is highly dependent on the particular factual circumstances before the court. (*Id.* at pp. 896–897, 27 Cal.Rptr. 153, 377 P.2d 265; see *Roehl v. Texas Co.* (1930) 107 Cal.App. 691, 704, 291 P. 255.) In analyzing the issue, California courts look to federal court decisions that apply a similar "managing agent" test. (*Waters*, at pp. 895 –896, 27 Cal.Rptr. 153, 377 P.2d 265; see *Reed Paper Co. v. Proctor & Gamble Distributing Co.* (D.Me. 1992) 144 F.R.D. 2, 4.) Generally, it is the party seeking to compel the deposition that has the initial burden to show the foundational facts to support a "managing agent" finding. (See *Sugarhill Records, Ltd. v. Motown Record Corp.* (S.D.N.Y. 1985) 105 F.R.D. 166, 170.)

27 Before applying the *Waters* test, we note our agreement with Lopez that a "managing agent" need not be an employee. Given that the terms "employee," "officer," "director," and "managing agent" are each used in the statutory description of a party-affiliated deponent, and the statute uses these terms in the disjunctive (§ 2025.280, subd. (a)), we agree that a "managing agent" need not also be an employee, officer, or director. Otherwise, the use of the phrase "managing agent" would be surplusage. (See *Reno v. Baird* (1998) 18 Cal.4th 640, 658, 76 Cal.Rptr.2d 499, 957 P.2d 1333 [" '[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word [or phrase] surplusage' "].) This conclusion is consistent with analysis by federal courts, which have recognized that a third party (such as an independent contractor or former officer) may be deemed a party's "managing agent" upon a factual showing that the deponent currently serves in that functional role. (*United States v. Afram Lines, Ltd.* (1994) 159 F.R.D. 408, 413 (*Afram*); see ***602** *Founding Church of Scientology, Inc. v. Webster* (C.A.D.C. 1986) 802 F.2d 1448, 1451–1453; *Dubai Islamic Bank v. Citibank, N.A.* (S.D.N.Y. 2002) 2002 WL 1159699, p. *3; *U.S. Fidelity & Guar. Co. v. Braspetro Oil Services Co.* (S.D.N.Y. 2001) 2001 WL 43607, p. *3 (*Braspetro*); *Calgene, Inc. v. Enzo Biochem, Inc.* (E.D.Cal. 1993) 1993 WL 645999, p. *8.) We also find Watchtower's reliance on decisions construing the "managing agent" phrase within the meaning of Civil Code section 3294, subdivision (b) not particularly helpful because the punitive damages and discovery statutes have different language, purposes, and objectives.

****186** 3. *Insufficient Evidence Showing Lösch Is a Managing Agent*

28

With these principles in mind, we turn to consider the three *Waters* factors: (1) does the person exercise judgment and discretion in dealing with the party's matters; (2) can the person be expected to comply with the party's directive to appear; and (3) can the person be anticipated to identify himself or herself with the party's interests. (*Waters, supra*, 58 Cal.2d at p. 896, 27 Cal.Rptr. 153, 377 P.2d 265.)

29 Lopez's evidence satisfies the first and third factors. Lopez presented Shuster's deposition testimony stating Lösch is a long-standing member of the Governing Body, which approves operational guidelines for the United States Branch of the Jehovah's Witnesses organization, including issuing directives for preventing and investigating child sexual abuse within the church. Shuster also testified that the Governing Body "oversees" the worldwide activity of Jehovah's Witnesses.

Based on this testimony, the court could reasonably infer Lösch (as a Governing Body member) had the authority to, and did, exercise supervisorial authority and discretionary judgment over Watchtower's operations, including those potentially relevant to the issues in this case. Based on this same evidence, the court could have also reasonably found Lösch would likely identify with Watchtower's interests.

However, Lopez failed to produce any evidence on the second *Waters* factor: whether the proposed deponent can be expected to comply with the party's directive to appear. Although there was evidence indicating the Governing Body (and its members) asserted authority over Watchtower and could influence its conduct, there was no evidence showing the reverse was true. For example, Lopez proffered no facts to indicate that Lösch receives compensation or other tangible benefits from Watchtower or that Governing Body members had previously complied with such deposition directives. (See *Aram, supra,* 159 F.R.D. at p. 415 [deponent's "history of cooperating with a party in discovery may be probative of the party's ability to rely on the agent ***603** to testify"].) Likewise, there was no evidence concerning the Governing Body's status as a separate legal entity or as an affiliate of Watchtower. (See *Braspetro, supra*, 2001 WL 43607, *5 [fact that deponent is "completely separate entity from [party], without any contractual obligation to act on [party's] behalf" means "there is no reason to assume that [party] can assure ... participation in a deposition for an action to which [deponent] is not a party"].) Without evidence from which a reasonable inference can be drawn that Watchtower had some legal or practical ability to influence Lösch's decision to attend the deposition, there is no basis to conclude Lösch could be expected to comply with Watchtower's directives to appear.

30 31 If the deponent is the party's employee, officer, or director, an entity has substantial practical control to compel the attendance of these individuals, including the ability to terminate an employee who refuses to appear at a noticed deposition or to end the relationship with its officer or director. (See *Twin Lock, Inc. v. Superior Court* (1959) 52 Cal.2d 754, 759, 344 P.2d 788 ["There can be no doubt that a witness ... will be under considerable coercion to attend whenever his corporate employer is placed upon the severe sanctions authorized by section 2034."].) But if the deponent has no formal or legal role within the party's organization, there must be some additional factual basis to establish the party has the practical ability to require the nonparty's compliance. (See ***187** *Maldonado, supra,* 94 Cal.App.4th at p. 1398, 115 Cal.Rptr.2d 137 [holding party was not required to produce a former employee even if "the former employees are far more knowledgeable about the litigation than anyone currently employed by the company"].)

Viewing the entire record and applying the required pragmatic analysis, there was insufficient evidence to support a determination that Lösch was Watchtower's "managing agent" for purposes of compelling his deposition and granting sanctions for his nonappearance. The discovery statutes must be construed to ensure fairness and that the ends of justice are served. Because a party may be subject to severe sanctions if a party affiliate does not attend a deposition, there must be at least some minimal showing that the party has the ability to induce the deponent to attend the scheduled deposition. A contrary conclusion would be unjust and inconsistent with the purposes of discovery procedures under California law—to avoid surprise, aid in ensuring all parties are in possession of relevant facts, and assure fairness to all parties.

II. *Terminating Sanctions*

Watchtower also contends the court erred in issuing terminating sanctions. Because the court ordered the sanctions issued based on both discovery orders, and we are reversing one of those orders, the matter must be ***604** remanded to the trial court. But given that the issues may arise again on remand and for purposes of judicial efficiency, we shall rule on Watchtower's contention.

32 33 California discovery law authorizes a range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. (§§ 2023.010, 2023.030; *Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390, 166 Cal.Rptr.3d 899; *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991, 94 Cal.Rptr.3d 802 (*Doppes*).) A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion. (*Los Defensores, supra,* at p. 390, 166 Cal.Rptr.3d 899.) We defer to the court's credibility decisions and draw all reasonable inferences in support of the court's ruling. (*Id.* at pp. 390–391, 166 Cal.Rptr.3d 899.)

34 35 36 Despite this broad discretion, the courts have long recognized that the terminating sanction is a drastic penalty and should be used sparingly. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613–616, 47 Cal.Rptr.2d 24.) A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. (See *Lyons v. Wickhorst* (1986) 42 Cal.3d 911, 916, 231 Cal.Rptr. 738, 727 P.2d 1019; *Newland, supra,* 40 Cal.App.4th at pp. 613–614, 47 Cal.Rptr.2d 24.) The trial court should select a sanction that is " ' "tailor[ed] ... to the harm caused by the withheld discovery." ' " (*Doppes, supra,* 174 Cal.App.4th at p. 992, 94 Cal.Rptr.3d 802.) " '[S]anctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." ' " (*Ibid.*)

37 38 The discovery statutes thus "evince an incremental approach to discovery sanctions, *starting* with monetary sanctions and *ending* with the ultimate sanction of termination." (*Doppes, supra,* 174 Cal.App.4th at p. 992, 94 Cal.Rptr.3d 802, italics added.) Although in extreme cases a court has the authority to order a terminating sanction as a first measure (see ***188** *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 928–929, 12 Cal.Rptr.3d 159; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 10, 207 Cal.Rptr. 233), a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective (see *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1516, 127 Cal.Rptr.3d 542; *Doppes, supra,* 174 Cal.App.4th at p. 992, 94 Cal.Rptr.3d 802; ***605** *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1399, 16 Cal.Rptr.3d 638; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496, 89 Cal.Rptr.2d 353).

39 There is no question that Watchtower willfully failed to comply with the document production order. In the January 2 written order, the court required Watchtower to produce the documents requested in Lopez's PMQ deposition notice, and the court repeated this order at several subsequent hearings, including with respect to the postabuse reports. Watchtower made no effort to comply with the order, and instead continued to repeat its previously unsuccessful objections. The court rejected the credibility of Watchtower's assertions that it would need to physically inspect each congregation file and that this inspection would take many years to complete. The court instead credited the Watchtower PMQ's deposition testimony that all potentially responsive documents have been scanned into a computer system and Lopez's expert's opinion that this computer system has a search function that could assist in identifying the requested documents. The court also repeatedly emphasized Watchtower's failure to take *any* steps—however minimal—toward complying with the court's order.

On this record, the court had the authority to impose sanctions for Watchtower's willful disobedience of its order. But, as Lopez admits, the terminating sanctions order was the *first and only* sanction imposed (along with a monetary sanction for the Lösch deposition costs). And the court imposed the sanction within four months of its initial document production order.

40 The fundamental flaw with the court's approach is that there is no basis in the record showing the court could not have obtained Watchtower's compliance with lesser sanctions or that another sanction could not effectively remedy the discovery violation. To the contrary, the record supports that the court had numerous tools at its disposal to compel compliance before imposing the ultimate sanction. For example, the court could have imposed a significant monetary penalty for every day Watchtower did not search for the documents or for each day the responsive documents were not produced. Alternatively, the court could have imposed evidentiary or issue sanctions to replace the information that would or could be included within those documents. When a party does not produce ordered documents, the court is entitled to infer the documents would contain evidence damaging to that party's

case and instruct the jury accordingly. (See *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 987–990, 10 Cal.Rptr.2d 773.) Thus, as Watchtower now proposes "the trial court could have ... ordered an issue ***606** sanction that would have precluded Watchtower from disputing certain aspects of liability at trial." Or—if the case proceeded to the punitive damage stage—the court could have considered instructing the jury that Watchtower refused to produce documents concerning subsequent child sexual abuse incidents, and from that the jury could infer Watchtower had engaged in a pattern and practice ****189** of ignoring and/or ratifying sexual abuse by its agents.

Although the court made a conclusory observation in its written order that it had considered imposing issue or evidentiary sanctions, the record does not contain any basis to find the court had made a meaningful effort to determine whether the alternatives would be effective. The court suggested only that a suitable alternate sanction could not be devised because the "materials requested are relevant to nearly [every] aspect of [Lopez's] claim[s]."

This finding is unsupported. Viewing the record at this stage of the litigation, it is unlikely the responsive information would relate to at least some of the core issues at trial, including whether Lopez was in fact a victim of the abuse, whether Castro was Watchtower's agent, whether Watchtower's statute of limitations defense applied in this case, and the existence and extent of Lopez's economic and/or emotional distress damages. Watchtower previously complied with the court's order to produce all unprivileged documents pertaining to Campos and Watchtower's knowledge of his prior or subsequent misconduct, and these documents would have contained information on several of these core issues. Given that there were disputed issues unaffected by the document production and the court and parties made no meaningful effort to at least consider and discuss possible alternative sanctions, the court's conclusion that there was no effective alternate sanction is premature and unsupported.

We conclude the court erred in ordering terminating sanctions because there was no evidence that lesser sanctions would have failed to obtain Watchtower's compliance with the document production order and because there were other possible sanctions that could have effectively remedied the discovery violation. On remand, the court has broad discretion to start with a different sanction that does not wholly eliminate Watchtower's right to a trial.

DISPOSITION

We order the court to vacate (1) the portion of the January 2 order requiring Watchtower to produce Lösch for his deposition; (2) the order granting ***607** terminating and monetary sanctions; and (3) the entry of default and the default judgment. Each party to bear its own costs.

McDonald, J., and O'Rourke, J., concurred.

All Citations

246 Cal.App.4th 566, 201 Cal.Rptr.3d 156, 329 Ed. Law Rep. 465, 16 Cal. Daily Op. Serv. 4015, 2016 Daily Journal D.A.R. 3619

Footnotes

1 The court later entered a default judgment in Lopez's favor for $13.5 million. This judgment is the subject of a separate appeal.

2 Statutory references are to the Code of Civil Procedure unless otherwise specified.

3 California law defines a " 'penitential communication' " as "a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret." (Evid.Code, § 1032.)

4 The March 14, 1997 letter instructed elders to send a written report to Watchtower about "anyone who is currently serving or who formerly served in a [Watchtower]-appointed position in your congregation who is known to have been guilty of child molestation in the past." Watchtower said this information should be kept confidential, and instructed elders to place the reports in a "

'Special Blue' " envelope. The March 14 letter also reminded elders of prior letters stating that when a known "*child molester*" moves to another congregation, a letter of introduction should be sent to the new congregation and copies of the letter should be sent to Watchtower in the " 'Special Blue' envelopes."

5 Although counsel's declaration identified "request for production numbers 4 and 12," based on other portions of Lopez's moving papers, it appears that counsel intended to identify request numbers 5 and 12.

6 We reject Watchtower's argument that we must disregard this written statement because it came after the court's oral ruling and/or because it did not comply with California Rules of Court, rule 3.1590. As Watchtower admits, rule 3.1590 "do[es] not apply to law and motion matters such as this one." Additionally, Watchtower does not cite, nor are we aware of, any authority prohibiting a court from explaining the grounds for an oral ruling after the ruling is made. A court may explain its ruling in writing, and the fact Lopez's counsel prepared a draft of the order is immaterial given the court's signature on the order.

7 Whether the lawsuit was timely and/or whether Lopez's claims are supported by the facts is not before us.

End of Document

EXHIBIT 6

RIVERSIDE SUPERIOR COURT
PUBLIC ACCESS

Minute Order

Case Name: JW VS MOUNTAIN VIEW CONGREGATION OF JEHOVAH'S		
Mid-County Civil		Negligence
Case Number: MCC1300850		**File Date:** 6/19/2013
Action Date: 2/11/2014	**Action Time:** 8:30 AM	**Department:** 11
Action Description: Hearing re: Motion to/for COMPEL FURTHER RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS, SET ONE by J W		

Honorable Judge Thomas Peterson, Presiding

Clerk: S. Portillo

Court Reporter: S. Layton

J W represented by THE ZALKIN LAW FIRM PC - DEVIN STOREY present.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW Y ORK INC represented by/in CALVIN ROUSE

FRENCH VALLEY CONGREGATION OF JEHOVAH'S WITNESSES, MURRIETA CALIFORNIA INC represented by/in JAMES MCCAB

Motion by PLAINTIFF Re MTN TO COMPEL FURTHER RESPONSES is called for hearing.

Counsel Argue.

MOTION IS GRANTED AND DENIED IN PART

RULING AS STATED ON THE RECORD

Notice waived.

Hearing held: Pre-disposition hearing.

FEBRUARY 11, 2014; RIVERSIDE, CALIFORNIA

BEFORE THE HONORABLE THOMAS A. PETERSON

THE COURT: JW versus Mountain View Congregation of Jehovah's Witnesses.

MR. STOREY: Good morning, Your Honor. My name is Devon Storey for the plaintiff.

THE COURT: Storey. Thank you.

MR. ROUSE: My name's Calvin Rouse. I'm here for two defendants, Watchtower and Christian Congregation of Jehovah's Witnesses.

THE COURT: Thank you. Spell your last name.

MS. ROUSE: R-o-u-s-e.

MR. McCABE: Morning, Your Honor. James McCabe on behalf of the French Valley Congregation. And my name is M-c-C-a-b-e.

THE COURT: Thank you, gentlemen.

I'd like to propose the following: The Court will inform counsel of a tentative decision, and then the Court will entertain further comments or arguments from any or all counsel.

All right. The matter's here on a motion to compel further responses as to the production of documents by the plaintiff. The defendants object on the following grounds: Number one, penitent clergy privilege, attorney-client privilege, attorney work product, privacy, and in several instances, the time period which would cover the documents sought to be received.

First of all, there's an objection to the declaration of Mr. William Bowen, B-o-w-e-n. The objection is overruled.

Mr. Bowen has a sufficient foundation to testify as to the procedures within the Church. Any statements as to religious purposes are not relevant.

Turning to the issue of privacy, the defendants cite no authority that there is a privacy right in this case. However, even if there is one, disclosure of information relating to sexual predators of children outweigh any privacy. That comes from the clergy cases.

Objection to the time period. The defendants want to stop discovery at the time of the slumber party, however the plaintiff's response overcomes this argument.

Now, there is one other objection to the time period wherein the plaintiff wants to go back to 1975, and so I'll need clarification on that when I entertain counsel's remarks.

As to the penitent clergy privilege, first of all, plaintiff argues collateral estoppel. The Court does not accept that argument based upon the following: That the issues are not the same, and there is no evidence of privity between the parties. A privilege requires that the communication be in confidence to a member of the clergy, and there's a duty upon the member of the clergy to keep it secret. In this case, the Church, Jehovah's Witnesses, have a procedure by which the communication is sent to a congregation of elders.

So in a typical situation, for instance, with the Catholic church, a parishioner visits the confessional, communicates to the priest, and the priest has a duty to keep that communication secret. The defendants herein argue that they should receive the same benefit, and just because the information

is shared by a congregation of elders should not take them out of the privilege. However, the *Roman Catholic Arch Bishop of Los Angeles* case clearly states and holds that when the communication is shared, the privilege is waived. The defendants argue that this is a violation of the establishment clause because it favors one religion. However, the *Arch Bishop* case overcomes this argument also.

The Court has also reviewed the attorney-client-client and attorney work product issues. And, now, gentlemen, the Court is going to state its findings as to the requested documents. So please have your pencils ready, and no one is allowed to cry "bingo" at any time during my recitation.

As to the plaintiff's motion against defendant Watchtower, as to documents 1 and 2, 52, 53, 55, and 66, the motion is granted. As to document number 15, the motion is denied.

As to the plaintiff's motion against defendant Christian Congregation, as to number 52, the motion is granted. The motion is denied as to the following documents: 34, 35 through 39, 42, 45, 55 and 56, 58 and 59, 73 through 77, number 80, 82 and 83, 90 and 91, 97, 98, 99. And the basis for the Court's ruling is that these are protected under the attorney-client privilege and the attorney work product doctrine.

The motion is granted as to the remaining requests pertaining to defendant Christian Congregation.

As to the plaintiff's motion against Mountain View, the Court denies the motion as to documents 11, 27, and 72. The motion is granted to all of the remaining requests.

The plaintiff's motion against French Valley, the Court grants the motion of the plaintiff as to documents 1 through 22 and number 25 because French Valley has failed to show that they are privileged. The motion is denied as to documents 23, 24, 26, because they are the product of the attorney-client privilege.

All right. Gentlemen, here's my suggestion. I've just given you all those numbers. I may have erred as to a particular number. This is really a challenge. So here's my suggestion: That I put this on second call, you gentlemen go out in the hallway, review all these numbers, and make sure I got 'em right. For instance, I may have mentioned a document and labeled it attorney-client, and I may have erred.

You want to do that now, or have the Court entertain argument and then go back to your office and then find out I've made a mistake? You know, I'm just throwing this out.

Any thoughts or suggestions? Anything at all? I know it will take you a while. It took me a while.

MR. McCABE: On behalf of French Valley, Your Honor, I think you got the numbers right.

MR. ROUSE: Yeah.

THE COURT: Oh, wow.

MR. ROUSE: In regard to Watchtower, there were only -- in our privilege log, there were only 15 items, but in your comments you said -- you mentioned 52, 53, 55 and 66.

THE COURT: Correct.

MR. ROUSE: And if those numbers are included in our brief, then we made the mistake.

THE COURT: Probably my error.

MR. ROUSE: So the --

THE COURT: If you're only concerned about number 15 and you can see --

MR. ROUSE: One through 15 is all that we have.

THE COURT: Sir?

MR. ROUSE: One through 15 is all that we have.

THE COURT: You know, I vaguely remember that now. Yeah, I do. Thank you, Mr. Rouse.

MR. ROUSE: So all I would say, that those last numbers there are really non-existent and would not be applicable to your ruling.

THE COURT: Glad to hear that.

MR. ROUSE: But with regard to CCJW, I think the numbers you called out are consistent with the principles that you stated there with regard to your ruling.

THE COURT: Thank you again.

Mr. Storey.

MR. STOREY: I had made the same notation mentally that Mr. Rouse did with respect to Watchtower.

THE COURT: Thank you.

MR. STOREY: But other than that, I think this looks correct, Your Honor, in terms of those are the ones dealing with attorney-client.

THE COURT: Before I forget, I've sort of forgotten which item it was that you wanted to be able to go back to 1975.

MR. STOREY: Yes.

THE COURT: Was that because Mr. -- was it Simental?

MR. McCABE: Yes, yes.

MR. ROUSE: Yes.

THE COURT: Was he de-worshipped in that year?

MR. STOREY: Basically, that would be Watchtower 1 and 2, documents Watchtower 1 and 2. They both deal with what appears to be a disfellowship that occurred in 1976. We don't know what that disfellowship is about, and that's why we'd like that document.

THE COURT: All right. Insofar as the objection because of the time period involved as to single issue, the Court will overrule the objection. I think the plaintiff has the right to find out why Mr. Simental was de-worshipped.

MR. McCABE: Disfellowshipped.

MR. ROUSE: Disfellowshipped.

THE COURT: Disfellowshipped.

MR. ROUSE: Yeah, he was a member. In other words, his membership was revoked.

THE COURT: Correct.

And, by the way, as an aside, in reading Mr. Bowen's declaration, that if a particular member has some kind of difficulty and that member is transferred to another location, it's the responsibility of the elders to send a communication to let the new -- or the people at the new location, fully inform them as to what occurred. And I think that was wonderful. I mean, if our school teachers were allowed to do that, we might have less problems, but they worry about lawsuits. So anyway.

MR. McCABE: And we get sued regardless.

THE COURT: All right. So, anyway, that's my tentative. Anything further on that, Mr. Storey?

MR. STOREY: Not from me, Your Honor. The tentative's acceptable.

THE COURT: Mr. Rouse?

MR. ROUSE: Well, you know, there's -- let me say that, Your Honor. They've brought a lawsuit against a church and a religion. And the role that our government back to the Constitution has assigned to religions, churches, is that when people sin and make mistakes, that the people, not just the victims, but the people that do wrong and the families, all of them, go to their ministers for consolation and to change their behavior, even child molesters.

If he wants to change his behavior, the Church, all these churches, have a much better record than throwing him in prison for 30 years. They really do. And they have to communicate with their ministers. They struggle, all these folks struggle.

All these records that that you're ordering produced here today, many of them are the relatives of these victims that went to the ministers, pouring their hearts out to them and their private thoughts. And the ministers themselves had to get counseling for minsters because this is something they're not familiar with. This is a rare occurrence.

And all of their private thoughts and private notes of people struggling after the fact, after it's all over, of trying to get some consolation, and that's what is being turned over, and the role of the Church in trying to fulfill that purpose assigned by the government is gutted when people know that their thoughts and what they struggle with is going to be distributed

in a court of law and read like this.

It's just -- somehow it goes against, whether you like religion or don't like religion or like churches or don't like churches, that's irrelevant. We've got a history in this country of separation of church and state, and the good that they do is sort of raped by this. And, I mean, I'm speaking for my client here, but it's an injury.

As soon as the word gets out about this, people are not going to do -- I mean, it cuts off a source of help that's available to them, that they feel psychologically they go to or need help. If it's in a court, their private, personal thoughts, what's inside them, is just laid out publically, they're not going to do -- they're not going to do that. They're not going to go to that source.

And the only difference between my client's model and, as you talked about, the Catholic church model, is that the model that we suggest and employ is the same as, for example, it just occurred to me, Alcoholics Anonymous. You sit in a group, and you talk to a group of people, and through that little group in that little room where you talk about your sins, or what you did wrong, or your drinking, it changes behavior. It's a successful thing. Not just to one person, but to the group.

And that's what I'm saying on behalf of my client, when they speak to that body of elders, it changes behavior. They're motivated to change. But the motivation is what I'm talking about. The point I'm trying to make to the Court is that the motivation is what's eroded here by this decision that you're handing down. It affects more than just these congregations that

he represents. It's going to have a bigger effect.

THE COURT: Since I've already ruled --

MR. ROUSE: Oh, I know, I know.

THE COURT: No. Since I've already ruled, I'm allowed to make this statement.

I agree with you 100 percent. However, you mentioned early on in your statement that this is a rare occurrence. And, with luck, these types of matters will continue to be very rare and will not dissuade persons from utilizing the benefits of visiting their church. And I'll cross my fingers to that, too.

All right. Notice waived?

MR. STOREY: Oh, Your Honor, there was one other thing that wasn't addressed in the tentative.

THE COURT: Oh, what?

MR. STOREY: There were a number of requests that were separate and apart from the identified documents that we were discussing. Essentially, all of those documents, the numbered documents, were responsive to plaintiff's request number two, for the file of the perpetrator. There were other documents that were requested but not provided, and there was no privilege log. For instance, plaintiff sought the production of various iterations of the Jehovah's Witnesses Handbook to be produced as well as several letters. The --

THE COURT: Will you slow down there, Mr. Storey? You're sort of running those words together.

MR. STOREY: Sure.

THE COURT: This book, is that the one that Bowen referred to?

MR. STOREY: It is.

THE COURT: I forgot the title.

MR. STOREY: "Pay Attention to Yourselves and To All The Flock."

So there's been no ruling with respect to those, and the ones that are significant would be the elder handbooks.

THE COURT: Well, excuse me, Mr. Storey. My ruling as to the objections and stating that all remaining items -- the request for all remaining items is granted, would that not include all those documents, the books?

MR. STOREY: So far as that's clear, Your Honor, it does.

THE COURT: I think it does.

MR. STOREY: So the ruling said that all the materials that were not specified as being privileged are to be produced.

THE COURT: Certainly. And I apologize if I wasn't clear.

Anything else, gentlemen?

MR. ROUSE: No, Your Honor.

MR. McCABE: No, Your Honor.

MR. STOREY: No, Your Honor. Thank you.

THE COURT: Thank you very much for your appearances.

(Proceedings Concluded)

REPORTER'S CERTIFICATE

JW, individually, by and through her Guardian Ad Litem, TW, Plaintiff, vs. Mountain View Congregation of Jehovah's Witnesses, et al., Defendants.	)	Case No. MCC1300850

I, Shari L. Layton, Certified Shorthand Reporter No. 6256, and Official Court Reporter for the Riverside County Superior Court, State of California, do hereby certify:

That on February 11, 2014, in the County of Riverside, State of California, I took in stenotype a true and accurate report of the testimony given and proceedings had in the above-entitled case, pages 1 - 10, and that the foregoing is a true and accurate transcription of my stenotype notes, taken as aforesaid, and is the whole thereof.

DATED: Riverside, California, February 24, 2014.

/s/ Shari L. Layton

SHARI L. LAYTON, CSR NO. 6256

EXHIBIT 7

People v. Simental, Unpublished/Non-Citable August 10, 2009
Court of Appeal, Fourth District, Division 2, California. August 10, 2009 Not Reported in Cal.Rptr.3d *(Approx. 6 pages)*

 Not Officially Published

(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)

2009 WL 2426334

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California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

Gilbert SIMENTAL, Defendant and Appellant.

No. E046303. (Super.Ct.No. SWF018805). Aug. 10, 2009.

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III, Judge. Affirmed.

Attorneys and Law Firms

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Opinion

OPINION

RICHLI, J.

*1 A jury found defendant **Gilbert Simental** guilty of three counts of lewd and lascivious acts upon a child under the age of 14. (Pen.Code, § 288, subd. (a).) The jury also found true that defendant committed the offense against multiple victims within the meaning of Penal Code section 667.61, subdivision (e)(5). Defendant was sentenced to three consecutive terms of 15 years to life. Defendant's sole contention on appeal is that the trial court's failure to exclude his admissions to his church elders violated the penitential communication privilege. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

The families of two of the victims (Jane Doe 1 and Jane Doe 2) and defendant were members of different congregations of Jehovah's Witnesses in the Murrieta area. The families began a close relationship in 2003. Defendant's daughter M.S. was a best friend of Doe 2, and the families spent much time together. All three girls attended school together, and Doe 2 and M.S. were inseparable, beginning in the first grade. Defendant's wife and the Does' mother were like "sisters."

Sometime in 2005, then eight-year-old Doe 2 spent the night with M.S. at defendant's residence. During the night, defendant entered the room where the two girls were sleeping. Doe 2 was awakened by defendant touching her all over her body. Doe 2 felt defendant rubbing her vagina and buttocks and touching her underwear. Doe 2 did not initially tell anyone about the incident, but her behavior at home changed noticeably. Doe 2 stopped hugging her father and grandfather, started sleeping with her mother at night, and did not want to be left alone. Doe 2 also told her mother that she no longer wanted to spend time at M.S.'s home.

Sometime after the above incident, Doe 2 spent the night at M.S.'s house again.[1] Defendant again came into M.S.'s bedroom where the girls were sleeping and touched Doe 2 all over her body.

On July 15, 2006, both Doe 1, who was one year older than Doe 2, and Doe 2 were invited to defendant's house for a sleepover with M.S. and two other girls, including Doe 3. While swimming in defendant's pool and playing a swimming game, defendant repeatedly rubbed Doe 1's upper thigh while the other girls were swimming on the other side of the pool. Doe 1 admitted that a certain kind of touching was inherent in the game but maintained that defendant touched her while both were hiding. Doe 1 also acknowledged that defendant's wife was outside at times during the game.

Doe 2 attended the pool party but refused to spend the night because she was afraid of defendant. Doe 2's mother picked her up but left Doe 1, who appeared happy, at defendant's house to spend the remainder of the night.

The four remaining girls slept on three air mattresses. During the night, Doe 1 was awakened by defendant massaging her all over her body. Defendant was touching her leg and thigh over her pajamas. Defendant also rubbed her stomach beneath her tank top and moved his hand under her bra and touched the top of her breast. Defendant also moved his hand under the top of her pajama waistband and under her underwear, touching her upper thigh, and then began rubbing her bare back and buttocks. Doe 1 pulled the bed covers over her body and rolled onto her stomach in an attempt to evade defendant. Defendant continued rubbing her back and buttocks. After Doe 1 said, "Hey," defendant said, "Shh." Defendant eventually left after Doe 1 said she had to go to the bathroom. When Doe 1 returned from the bathroom, she began packing her things to go home. Doe 1 then awakened M.S.'s mother and asked her if she would call her mother to pick her up. M.S.'s mother responded that it was too early to call Doe 1's mother, being around two or three in the morning. Doe 1 then reluctantly returned to bed and began crying.

*2 In late July 2006, Doe 1 and Doe 2 disclosed the touching to their mother. Both the girls were very emotional and cried throughout the conversation. Doe 2 expressed feelings of shame, anger, and sadness; she believed it was her fault that her sister was also victimized.

After the girls revealed the abuse, their mother called an elder in her congregation and explained to him the allegations made by her daughters. The elders in the congregation then called the elders in defendant's congregation, who convened a judicial committee of three elders, to investigate the allegations against defendant. Elders in defendant's congregation, Andrew Sinay and John Vaughn, spoke with the victims' parents first and then spoke with defendant. Mr. Sinay and Mr. Vaughn informed defendant of the allegations and asked if they were true. Defendant admitted to touching Doe 2 in a sexual manner on two separate occasions and went into detail about the incidents. When questioned about Doe 1, defendant admitted touching Doe 1 in a sexual manner once in the pool on July 15, 2006, and again later that evening.

The principal at the children's school was also notified of the abuse and contacted the Murrieta Police Department. Officer John Martin interviewed Doe 1 and Doe 2. The Riverside Child Assessment Team (RCAT), a group of experts in conducting child interviews, was also assigned to the case. Vera Diaz of RCAT conducted interviews of Doe 1 and Doe 2. Both girls described the abuse by defendant to Diaz.

Doe 3 later revealed that defendant had also touched her inappropriately during the pool party on July 15, 2006. Doe 3 explained that while helping her across the pool, defendant had placed his hand on her vagina. At one point, defendant had rested four fingers inside her bathing suit, directly touching her vagina while placing one finger inside her vagina.

Defendant admitted to touching Doe 2 in a sexually inappropriate manner on two occasions. When questioned about the allegations of Doe 1, defendant admitted that he may have unintentionally touched her in the pool on July 15, 2006, during a game of Marco Polo, but denied touching Doe 1 during the sleepover. Defendant also denied touching Doe 3 in a sexual manner and denied ever helping her across the pool.

II

DISCUSSION

Defendant contends the trial court's failure to exclude his admissions to his church elders violated the penitential communication privilege and, on this record, merits reversal.

The procedural background related to this issue is as follows: On February 15, 2008, defendant filed a motion to quash a subpoena issued to Mr. Sinay, claiming the communications about which Mr. Sinay would testify were privileged penitential communications. The court denied the motion. On February 22, 2008, defendant filed a motion to quash the subpoena of Mr. Vaughn, another elder to whom defendant had admitted the allegations against him, based on the same claim of privilege. That motion was also denied and the two witnesses were ordered to appear in court.

*3 A hearing was later held to determine whether defendant's admissions to the church elders qualified as a privileged penitential communication. Mr. Sinay testified to the practices and policies of the church regarding the confidentiality of communications made to church elders, as well as the role of the church's judicial committee charged with investigating allegations of wrongdoing. In pertinent part, Mr. Sinay testified that one of the primary purposes of confronting defendant was to investigate the allegations, allow him to admit or deny his wrongdoing, and determine his level of repentance in order to determine the appropriate sanction. The trial court also heard testimony from the parents of Doe 1 and Doe 2 regarding the church's policies, their meetings with the church elders from defendant's congregation, and their subsequent conversations with defendant's church elders in which Mr. Sinay told them that defendant had made a full confession to molesting their girls.

Following a two-day hearing, the trial court found the penitential privilege did not apply, as the communications were not intended to be confidential and the elders in this case felt they had no duty to keep the confession confidential. Specifically, the court stated: "In the opinion of the Court, the privilege does not apply because the conditions under Evidence Code Section 1032 have not been met. [¶] First, the Court cannot find that the defendant intended that his communications be kept confidential. The Court draws this conclusion based on the nature of the proceeding itself. Rather than approaching his pastor unilaterally, a fact-finding entity in the form of a judicial committee was formed because the elders received information from church members of another congregation that the defendant had molested their children. The evidence adduced at the hearing was that the victims told their parents about the molestation. In response, the parents approached their church elders and told them about what happened, who in turn contacted the elders of the defendant's church. These elders, Mr. Sinay and Mr. Vaughn, met with the parents and asked them about what happened. After being told what had occurred, they responded that they would look into the matter and get back to them. [¶] As Mr. Sinay stated, judicial matters involve serious wrongs, and the purpose of a judicial matter is to help determine repentance by

the wrongdoer and determine if the congregation needs protection by means of disfellowship or reproval. In sum, the defendant was approached by at least two elders of his church and confronted with accusations that he had molested children, then invited him to comment. He then confessed. [¶] ... [¶] At this point the defendant had to know that possible sanction included disfellowship. To avoid such an outcome, the defendant had to show a requisite level of repentance to the elders. We know this because Mr. Sinay stated that one of the purposes of a judicial proceeding was to help determine an individual's level of repentance in order to gauge the appropriate punishment. [¶] Here we can infer that the defendant's primary concern was not with whether his comments and response to the allegations would be kept confidential, but rather that he showed his elders the requisite remorse so as not to be disfellowed. [¶] ... [¶] The Court also finds that the last prong of Evidence Code [section] 1032 has not been satisfied. For one thing, Mr. Sinay stated that if an individual is disfellowed, notice is sent by form to New York [headquarters of the church] indicating the decision to disfellow, and the reasons for that decision. If the decision to disfellow has been made, an individual admitted to the allegation and no other evidence was taken. It can be reasonably inferred that New York contact the church for additional information which would, of course, be forthcoming, indeed, ... the reason the actual statements of the accused could be included in that statement. [¶] Also, Mr. Sinay stated that notes may be kept in the office if an appeal is requested. And the official guidebook states that those notes should be turned over to as yet another committee which is handling the appeal, and that those notes may include a confession to the allegations. [¶] Mr. Sinay also conceded that the guidebook states that all important materials must be turned over to the new committee, and that notes would be considered important."

*4 The Evidence Code provides a privilege for penitential communications: "Subject to [Evidence Code] [s]ection 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege." (Evid.Code, § 1033.) Evidence Code section 1031 defines a penitent as "a person who has made a penitential communication to a member of the clergy." And Evidence Code section 1032 defines a penitential communication as "a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret."

We apply the substantial evidence standard to review of the trial court's privilege determination. (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442 (*Roman Catholic Archbishop*).) " ' ' 'When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].' " [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision to reject that claim.' [Citation.]" (*Id.* at pp. 442-443.)

In *People v. Edwards* (1988) 203 Cal.App.3d 1358 (*Edwards*), the defendant, an employee of an Episcopal Church, confessed to one of the priests at the church that she had embezzled church funds. The priest told her to talk to another priest. The defendant told the second priest what she had done and asked for his assistance in stopping payment on some checks the church had issued that could not be honored because of her embezzlement. She asked that their conversation be kept confidential. The priest told her he could either keep their conversation confidential or he could talk to church officials about the situation to help her solve her problem. The defendant agreed to the priest's disclosure of their confidential communication. Thus, in *Edwards*, the defendant herself explicitly waived the privilege. However, in ruling that the conversation was not privileged, the trial court based its decision on testimony from church officials about the tenets of the church. The trial court found that those tenets did not require the priest to keep a "secular confidence" a secret. (*Id.* at pp. 1364-1365.) The trial court drew a distinction between "problem-solving" and a "confession" seeking absolution or forgiveness, and the appellate court affirmed. (*Id.* at p. 1364.)

*5 Additionally, the *Edwards* court determined: "Since the trial court fully considered and evaluated all of the conflicting evidence in reaching its factual determination that the questioned statement was not a penitential communication within legal contemplation, no privilege attached preventing [the priest] from otherwise consensually disclosing the content of the nonpenitential, though private, communication to the church officials and, ultimately, to the authorities. Where such determination is supported by substantial, credible evidence, as shown, we are duty bound to uphold it. [Citations.]" (*Edwards, supra,* 203 Cal.App.3d at p. 1365.)

Of particular importance in the present case is the requirement of confidentiality. "[T]he privilege may apply only if the statements were 'made in confidence, *in the presence of no third person* so far as the penitent is aware.' (§ 1032, italics added.)" (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518 (*Doe 2*).) Thus, in *Doe 2,* the appellate court ruled that the clergy-penitent privilege did not apply to statements made to a pastor by the participants in a weekend retreat held to provide "religious and spiritual healing" to the alleged victims of clergy sexual abuse, where the statements were made in the presence of other participants. (*Ibid.*) The court explained: "[T]here is no requirement that a communication 'have as its purpose the confession of a "flawed act" to "receive religious consolation and guidance in return" ' in order to be privileged.... [A]lthough the statutory definition of 'penitential communication' that was in effect until 1967 required a 'confession,' the statutory definition in effect since that time contains no such limitation. (See [Evid.Code,] § 1032.) The Law Revision Commission comments state that the current definition was meant to broaden the protection afforded penitent communications. (See Cal. Law Revision Com. com., 29B West's Ann. Evid.Code (1995 ed.) foll. § 1032, p. 359 ['Under existing law, the communication must be a "confession." [Citation.] [Evidence Code] [s]ection 1032 extends the protection that traditionally has been provided only to those persons whose religious practice involves "confessions" '].)" (*Ibid.*)

Similarly, in *Roman Catholic Archbishop,* the clergy-penitent privilege was held not to apply to documents reflecting communications that were made in "troubled-priest interventions" because the communications "were routinely shared by Cardinal Mahoney, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees as well." (*Roman Catholic Archbishop, supra,* 131 Cal.App.4th at pp. 444-445.) The court in *Roman Catholic Archbishop* observed that before the enactment of the current penitent-clergy privilege in Evidence Code sections 1030 through 1034, "the privilege was defined by Code of Civil Procedure section 1881, subdivision (3), which provided, 'A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the *confession* be examined as to any *confession* made to him in his professional character in the course of discipline enjoined by the church to which he belongs.' ... The current statute makes no reference to confessions, and instead provides an evidentiary privilege for ' "penitential communication." ' [Citation.]" (*Roman Catholic Archbishop,* at p. 443.)

*6 Thus, the definition of penitential communications in the current Evidence Code section 1032 expands the outside limit for privileged communications beyond the former statute. Nonetheless, within the current definition, the statute further requires that the member of the clergy to whom the disclosure is made has a duty "under the discipline or tenets of his or her church, denomination, or organization" to keep such communications secret. (Evid.Code, § 1032.)

The burden of proof for a claim of clergy-penitent privilege is described in Evidence Code section 917, subdivision (a): "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the ... clergy-penitent [or] husband-wife ... relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." However, "the privilege-claimant 'has the *initial burden* of proving the *preliminary facts* to show the privilege applies.' [Citation.] 'Once the claimant establishes the preliminary facts ..., *the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] ... Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912....' [Citation.]" (*Roman Catholic Archbishop, supra,* 131 Cal.App.4th at p. 442, fns. omitted.)

Having reviewed the statutory scheme for the clergy-penitent privilege, we turn to our analysis of the application of the privilege in the present case. Here, there was no evidence that the communication was in the form of a confession seeking absolution or that defendant intended that the communication be kept confidential. As the evidence shows, defendant did not seek out the elders to confess his sins and seek absolution, rather, the elders approached defendant as a fact-finding entity after they had received information that defendant had molested children. After being approached by at least two elders from his congregation, namely, Mr. Sinay and Mr. Vaughn, and questioned about the allegations made against him, defendant was invited to express his side of the story and ultimately confessed. Defendant's admissions were a result of the judicial council's formal inquiry into the allegations against him. In fact, Mr. Sinay testified that one of the main purposes of a judicial council proceeding is to help determine an individual's level of repentance and to protect the congregation. Therefore, as the trial court noted, defendant's primary concern was not whether the communication would be kept confidential, but rather that he displayed a sufficient level of remorse to avoid being disfellowed. The trial court's well-reasoned statements are aptly sound.

*7 Contrary to defendant's suggestion and consistent with *Doe 2,* there is nothing in the trial court's ruling suggesting it believed the privilege did not apply because defendant's statements were not confessional in nature. Rather, the lower court rejected the assertion of the privilege because the statements were not intended to be made in confidence, nor was there an expectation of confidence. In addition, as the trial court found, the evidence clearly shows that under the church's judicial discipline process, the elders were under no duty to keep the communications secret. Indeed, the evidence shows that the tenets of the Jehovah's Witness faith require that the statements made to the judicial committee be disclosed to the appellate committee, as well as to their New York headquarters, if an appeal is requested following a disfellowship. Mr. Sinay testified that it is the practice of the judicial committee, if a member is disfellowed, to send notice to the Jehovah's Witness headquarters in New York indicating both the decision to disfellow and the reasons behind that decision, including any admission made by a member. Mr. Sinay also asserted that the notes of the judicial council meetings are taken and kept in the office and are disclosed to an appellate committee should a disfellowship be appealed, and that those notes may include the contents of an admission. Mr. Sinay further stated that the results of a judicial proceeding are "public knowledge," indicating that the purpose of the judicial process of the church is to determine guilt or innocence and to take the appropriate action to protect the congregation; not to keep the results of the investigation strictly confidential. The fact that defendant was not disfellowed and the branch office in New York was not notified is of no consequence as the evidence showed that confidentially was neither required nor expected by the parties.

Furthermore, the victims' mother testified that the committee told her they were initiating an inquiry into her daughters' allegations and would get back to her with anything they discovered. The victims' parents testified that Mr. Sinay had contacted them and told them that defendant had made a full confession. Though the elders did not disclose the details of the confession, it was clear as to what the confession referred to. Similarly, the fact that an elder told the victims' parents that he had spoken to defendant suggests, as the trial court concluded, "that the duty the elders felt in this case was not to keep communications secret, but rather to assuage concerns the victims' parents had about what the defendant had done and to grant assurances to the extent possible, that the matter was being handled internally by the church." The evidence here clearly shows that the duty of the elders in this case was focused on investigating the allegations against a member of their congregation. The duty of the elders in convening the fact-finding committee was to discover the truth and

disclose it to the congregation, or to the victims if necessary, and was not to keep the communications confidential.

*8 We conclude, therefore, that the trial court did not err in finding the penitential communication privilege did not apply to statements defendant made to church elders, Mr. Sinay and Mr. Vaughn.

In any event, even if we assume, for the sake of argument, the privilege did apply, any error would be harmless. A defendant suffers prejudice from the erroneous admission of privileged communications when it is "reasonably possible that a reasonable jury would have rendered a different verdict had the evidence been excluded. [Citation.]" (*People v. Clark* (1990) 50 Cal.3d 583, 623.) Here, the evidence was brief. Moreover, contrary to defendant's contention, there was overwhelming evidence of defendant's guilt without the elders' testimony. Both the victims and their mother testified as to the specific incidents that formed the basis of the charges. The prosecution also presented the testimony of Doe 3 and her mother, who also described how she had been touched by defendant at the pool party. Defendant himself also testified about his admissions as to Doe 2. In light of this extensive testimony establishing defendant's guilt, the challenged evidence pales to insignificance. Even if the challenged evidence had been excluded, it is not reasonably likely the jury would have reached a more favorable determination.

III

DISPOSITION

The judgment is affirmed.

We concur: HOLLENHORST, Acting P.J., and McKINSTER, J.

Footnotes

1 The record is unclear as to the exact date of this second incident.

End of Document

EXHIBIT 8

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

BEVERLY BULLOCKS BEIDLEMAN, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 1/22/15 Case No. 13CV181057

ELIZABETH MCFARLAND
Plaintiff

DEVIN M STOREY
Plaintiff's Attorney (858)259-3011

VS

WEST CONGREGATION OF JEHOVAH'S WITNESSES, LORAIN, OH INC
Defendant

FRANCIS J MCNAMARA
Defendant's Attorney (845)306-1000

DECISION ON PLAINTIFF ELIZABETH McFARLAND'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This cause came to be heard upon Plaintiff Elizabeth McFarland's Motion to Compel Production of Documents. Defendants have filed a brief in opposition to Plaintiff's motion along with filing under seal numerous documents for the Court's review. Upon consideration thereof, the Court makes the following order.

With regard to the S-77 forms attached to Plaintiff's motion as Exhibits 1 and 2, the Court notes that while Defendants have produced unredacted copies of the forms themselves, they have not provided the Court with unredacted copies of the attachments thereto. The forms themselves refer to the attachments and without the unredacted attachments the Court is unable to determine whether or not the S-77 forms are discoverable. The Court hereby orders Defendants to produce, under seal, unredacted S-77 forms to include unredacted copies of the attachments to the S-77 forms. The Court will render a decision upon reviewing the unredacted forms and attachments.

With regard to the January, 2000 letter (Tab 3) and the December 10, 1999 letter (Tab 4) the Court cannot determine whether these letters concern an adult or a minor individual. If the individual referenced in these letters was a minor at the time of his association with Scott Silvasy (time frame appears to be 1993 or 1994), the Court

orders that unredacted copies of these letters be provided to Plaintiff. If this individual was *not* a minor at the time then the Court finds that they are not discoverable.

With regard to The November 24, 1993 notes (Tab 5) the Court finds that this document is privileged.

With regard to the Pay Attention Books requested by Plaintiff, the Court hereby orders the production of said books which may contain a "Confidential" watermark across the text. Admissibility of these documents at trial will be determined by the Court at a later date. Production of these documents shall be for use in this case only and may not be used for any purpose outside of this litigation.

Concerning the Body of Elders letters produced to the Court, upon review, the Court finds that the following documents are not subject to privilege and the Court orders that these documents be produced to Plaintiff:

Document No. 17 – BOE letter dated March 10, 1983
Document No. 21 – BOE letter dated September 20, 1984
Document No. 30 – BOE letter dated March 15, 1987
Document No. 48 – BOE letter dated July 1, 1989
Document No. 55 – BOE letter dated January 15, 1990
Document No. 77 – BOE letter dated March 23, 1992
Document No. 83 – BOE letter dated February 3, 1993
Document No. 97 – BOE letter dated August 1, 1995
Document No. 114 – BOE letter dated March 14, 1997
Document No. 130 – BOE letter dated July 20, 1998

Of the remaining documents produced under seal, Nos. 183 through 197, the Court hereby orders that these documents be produced to Plaintiff. Production of these documents shall be for use in this case only and may not be used for any purpose outside of this litigation. Admissibility to be determined prior to trial.

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

To: DEVIN M STOREY
ZALKIN LAW FIRM PL
12555 HIGH BLUFF DR #260
SAN DIEGO, CA 92130

Case No.: 13CV181057

Caption: ELIZABETH MCFARLAND V/S WEST CONGREGATION OF JEHOVAH'S WITNESSES, LORAIN, OH INC

Please find enclosed copy of journal entry in regard to the above matter. Thank you.

Jamie McCartney
Criminal Secretary
329-5560

Traci Orlando
Civil Secretary
329-5561

Stephen Vanek
Judicial Staff Attorney
329-5565

FAX 329-5562

EXHIBIT 9

Original Image of 60 N.E.3d 39 (PDF)

60 N.E.3d 39
Court of Appeals of Ohio,
Ninth District, Lorain County.

McFarland v. W. Congregation of Jehovah's Witnesses, Lorain, Ohio, Inc.

Court of Appeals of Ohio, Ninth District, Lorain County. August 22, 2016 60 N.E.3d 39 2016 -Ohio- 5462 *(Approx. 27 pages)*

Elizabeth McFARLAND, Appellee

v.

WEST CONGREGATION OF JEHOVAH'S WITNESSES, LORAIN, OH, INC., et al., Appellants.

No. 15CA010740.
Aug. 22, 2016.

Synopsis

Background: Former member of local congregation of religious society, who alleged that she was sexually abused by another member, brought suit against local and national organizations for negligence, ratification, and fraud. The Court of Common Pleas, Lorain County, No. 13CV181057, granted portion of former member's motion to compel production of certain documents. Defendants appealed.

Holdings: The Court of Appeals, Whitmore, J., held that:
1 correspondence of a secular nature between local congregation and service department of society's national headquarters was not protected by clergy-penitent privilege;
2 correspondence regarding spiritual guidance was protected by clergy-penitent privilege; and
3 documents were not protected by attorney-client privilege.

Affirmed in part, reversed in part, and remanded.

West Headnotes (37)

Change View

1 **Appeal and Error** Depositions, affidavits, or discovery
In general, discovery orders are reviewed under an abuse-of-discretion standard.

1 Case that cites this headnote

2 **Pretrial Procedure** Discretion of court
Courts have broad discretion over discovery matters.

3 **Records** Court records
Whether documents filed under seal were privileged and/or confidential was subject to de novo review.

4 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
The clergy-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive spiritual consolation and guidance in return. R.C. § 2317.02(C).

5 **Privileged Communications and Confidentiality** Construction in general

SELECTED TOPICS

Privileged Communications and Confidentiality

Clergy and Spiritual Advisers
Privilege of Confidentiality of Communications
Attorney-Client Privilege
Context of Strict Relation of Attorney and Client

Constitutional Law

Freedom of Religion and Conscience
Free Exercise Clause

Secondary Sources

What corporate communications are entitled to attorney-client privilege--modern cases

27 A.L.R.5th 76 (Originally published in 1995)

...This annotation collects and discusses the cases decided since 1964 that have considered the circumstances under which a communication from a corporate client is eligible for protection under the attor...

Interference With the Right to Free Exercise of Religion

63 Am. Jur. Proof of Facts 3d 195 (Originally published in 2001)

...The First Amendment right to free exercise of religion may conflict with other laws under some circumstances. Churches and individuals have claimed that a law or ordinance interferes with the free exer...

Proof of Waiver of Attorney-Client Privilege

32 Am. Jur. Proof of Facts 3d 189 (Originally published in 1995)

...The attorney-client privilege, protecting confidential communications between a lawyer and the lawyer's client, is fundamental to the legal systems of every jurisdiction in the United States. When prop...

See More Secondary Sources

Briefs

Brief of the American Bar Association as Amicus Curiae

1980 WL 339283
THE UPJOHN COMPANY, et al., Petitioners, v. UNITED STATES OF AMERICA, et al., Respondents.
Supreme Court of the United States
June 20, 1980

...The American Bar Association, with the consent of the parties, submits this brief amicus curiae in support of petitioners. This case presents two issues of peculiar significance to lawyers: (1) the sco...

Brief for the Respondents

2014 WL 546900
CONESTOGA WOOD SPECIALTIES CORPORATION, et al., petitioners, v. Kathleen SEBELIUS, Secretary of Health and Human Services, et al.
Supreme Court of the United States
Feb. 10, 2014

...2. Whether the requirement that non-exempted, non-grandfathered group health plans include coverage of contraceptives violates the Free Exercise Clause of the First Amendment. Pertinent statutory and r...

Being in derogation of the common law, any statutory privilege must be strictly construed against the party seeking to assert it and may be applied only to those circumstances specifically named in the statute.

6 **Privileged Communications and Confidentiality** Presumptions and burden of proof
The party claiming a privilege has the burden of proving that the privilege applies to the requested information.

7 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
Letters drafted by service department at national headquarters of religious society addressed to leaders of local congregations were not protected by clergy-penitent privilege; letters involved multiple individuals and were not an instance of any particular penitent confiding to cleric, nor were they responsive to any individual inquiry for religious counseling. R.C. § 2317.02(C)(1).

8 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
Not every word authored or spoken by a cleric is privileged under the clergy-penitent privilege. R.C. § 2317.02(C)(1).

9 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
The clergy-penitent privilege may be applied only to those circumstances specifically named in the statute; it does not protect communications made for secular purposes, even when those communications were intended to be confidential. R.C. § 2317.02(C)(1).

10 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
Letter sent from individual to service department of religious society's national headquarters was not protected by clergy-penitent privilege; author did not pose any questions or request advice of a spiritual nature, but appeared to have sent letter to draw attention to particular matter and to express author's frustration with handling of that matter. R.C. § 2317.02(C)(1).

11 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
Letter sent from service department of religious society's national headquarters to individual was not protected by clergy-penitent privilege, even if purpose of letter was to provide spiritual guidance to recipient; recipient did not confide in service department for purpose of receiving religious counseling. R.C. § 2317.02(C)(1).

12 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
The clergy-penitent privilege does not apply to unsolicited religious counseling. R.C. § 2317.02(C)(1).

13 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
Letter from leaders of local congregation to service department of religious society's national headquarters, which was an answer to an inquiry from department for certain background information, was not a request for spiritual guidance and was thus not protected by clergy-penitent privilege; letter was a response sent for purpose of aiding an investigation. R.C. § 2317.02(C)(1).

14

Privileged Communications and Confidentiality Clergy and spiritual advisers

Letter from leader of local congregation to service department of religious society's national headquarters was utterly divorced from any request for religious counseling and was thus not protected by clergy-penitent privilege; letter provided certain background information relevant to investigation. R.C. § 2317.02(C)(1).

15 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter from leader at service department of religious society's national headquarters to leaders of local congregation bore no relationship to any request for religious counseling and was thus not protected by clergy-penitent privilege; letter acknowledged receipt of different letter and requested additional, factual information from leaders at local congregation. R.C. § 2317.02(C)(1).

16 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter from group of leaders at one local congregation of religious society to leaders at different congregation did not amount to request for spiritual guidance and thus was not protected by clergy-penitent privilege; letter conveyed certain background and factual information and did not seek to elicit any response. R.C. § 2317.02(C)(1).

17 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter from leaders of local congregation to service department of religious society's national headquarters was not sent for purpose of requesting religious counseling or offering it to a penitent and was thus not protected by clergy-penitent privilege; letter only set forth certain factual information. R.C. § 2317.02 (C)(1).

18 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter sent from leader at service department of religious society's national headquarters to leaders of local congregation was not protected by clergy-penitent privilege; letter was an acknowledgement of receipt of earlier letter. R.C. § 2317.02(C)(1).

19 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter from individual to leader at service department at religious society's national religious society was protected by clergy-penitent privilege; letter was plea from individual who sought spiritual guidance on particular issue. R.C. § 2317.02(C)(1).

20 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter sent to individual from leader in service department of religious society's national headquarters was protected by clergy-penitent privilege; letter was in response to request for spiritual guidance, and letter offered spiritual counseling in response to confidential request. R.C. § 2317.02(C)(1).

21 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter sent from individual to leader in service department of religious society's national headquarters was protected by clergy-penitent privilege, even though portions of letter were secular in nature; letter represented continuation of ongoing, privileged communication between sender and service department. R.C. § 2317.02(C)(1).

22 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Memorandum documenting telephone call from individual to leader in service department of religious society's national headquarters was not protected by clergy-penitent privilege; there was no indication whether leader or someone else transcribed memorandum, memorandum contained information received from second individual, information contained within memorandum was shared with multiple individuals, and memorandum did not show that caller asked for religious counsel. R.C. § 2317.02(C)(1).

23 **Privileged Communications and Confidentiality** Clergy and spiritual advisers

Letter from two individuals to leader in service department of religious society's national headquarters was protected by clergy-penitent privilege; letter was a specific request for religious counseling. R.C. § 2317.02(C)(1).

24 **Constitutional Law** Establishment of Religion
Constitutional Law Free Exercise of Religion
Constitutional Law Religious Organizations in General

The Establishment Clause and Free Exercise Clause apply to the judiciary as well as the legislature and limit the power of the courts to hear suits whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by church judicatories. U.S.C.A. Const.Amend. 1.

25 **Constitutional Law** Matters of faith and doctrine
Constitutional Law Internal affairs, governance, or administration; autonomy or polity

Religious freedom under the Free Exercise Clause encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. U.S.C.A. Const.Amend. 1.

26 **Constitutional Law** Religious Organizations in General

The First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters. U.S.C.A. Const.Amend. 1.

27 **Constitutional Law** Internal affairs, governance, or administration; autonomy or polity

Whether a secular court may hear a tort suit despite the First Amendment's church autonomy doctrine turns on the availability of secular standards and the ability of a court to resolve the controversy without reference to religious doctrine. U.S.C.A. Const.Amend. 1.

28 **Constitutional Law** Tort claims by members against organization or other members
Religious Societies Actions by or Against Societies

First Amendment did not preclude local congregation and national headquarters of religious society from being required to produce unprivileged documents in response to request for discovery in tort action, where production of documents did not require court to interpret or evaluate parties' religious beliefs or internal governance. U.S.C.A. Const.Amend. 1.

29 **Privileged Communications and Confidentiality** Nature of privilege

The attorney-client privilege is governed both by statute and by common law. R.C. § 2317.02(A).

30 **Privileged Communications and Confidentiality** Communications from client to attorney and from attorney to client

Privileged Communications and Confidentiality Agents or employees of attorney or client in general

The statutory attorney-client privilege governs communications directly between an attorney and a client; it does not apply to communications beyond testimonial speech or between clients and agents of an attorney. R.C. § 2317.02(A).

31 **Privileged Communications and Confidentiality** Attorney-Client Privilege

The common law attorney-client privilege applies to communications beyond testimonial speech or between clients and agents of an attorney and protects against any dissemination of information obtained in the confidential relationship.

32 **Privileged Communications and Confidentiality** Purpose of privilege

The attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

33 **Privileged Communications and Confidentiality** Elements in general; definition

Under the common law attorney-client privilege, (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.

34 **Privileged Communications and Confidentiality** Professional Character of Employment or Transaction

The common-law attorney-client privilege does not require the communication to contain purely legal analysis or advice to be privileged; instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.

35 **Privileged Communications and Confidentiality** Purpose of privilege

The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

36 **Privileged Communications and Confidentiality** Presumptions and burden of proof

The party seeking protection under the attorney-client privilege carries the burden of establishing the existence of that privilege.

37 **Privileged Communications and Confidentiality** Particular cases

Letters and memorandum written by leaders in service department of religious society's national headquarters were not protected by common-law attorney-client privilege, even though documents referenced contact with legal department; documents did not constitute confidential communications between a client and an attorney made for purpose of securing legal advice, and there was no showing that communications would facilitate rendition of legal services or advice.

Attorneys and Law Firms

**43* Amanda Martinsek and Marquettes D. Robinson, Attorneys at Law, Francis J. McNamara, Attorney at Law, for Appellants.

Konrad Kircher, Attorney at Law, Irwin M. Zalkin and Devin M. Storey, Attorneys at Law, for Appellee.

Opinion

WHITMORE, Judge.

{¶ 1} Defendant–Appellants, West Congregation of Jehovah's Witnesses, Lorain, Ohio, Inc. ("West Congregation"), Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), and Christian Congregation of Jehovah's Witnesses ("Christian Congregation") (collectively, "Appellants"), appeal from the order of the Lorain County Court of Common Pleas, granting a portion of Plaintiff–Appellee, Elizabeth McFarland's, motion to compel ***44** the production of certain documents. This Court affirms in part and reverses in part.

I

{¶ 2} West Congregation is one of many local Jehovah's Witnesses congregations throughout the country. Each local congregation has members who have been elevated to serve as elders for their particular congregation. The Bodies of Elders at each congregation have many responsibilities, including disciplining any members who have engaged in wrongful behavior. Additionally, the Bodies of Elders receive instructions from and communicate directly with several national entities the Jehovah's Witnesses operate to provide leadership and maintain consistency among the local congregations.

{¶ 3} Prior to 2001, Watchtower was responsible for disseminating literature to the Bodies of Elders at each local congregation. Christian Congregation usurped that responsibility in 2001 and, since then, has regularly distributed to the Bodies of Elders letters instructing the elders as to the appropriate way to address various issues within their respective congregations. Additionally, Christian Congregation maintains a Service Department that is staffed with elders who serve at the national level. Both members and elders of local congregations may call or write to elders in the Service Department to seek their guidance on a particular issue. Service Department elders then may respond in kind, by providing guidance either over the phone or through a letter.

{¶ 4} From 1997 to 2001, when she was between ten and fourteen years of age, McFarland was a member of West Congregation. Scott Silvasy was another member of the congregation during a portion of that time period. Appellants concede that Silvasy was disfellowshipped twice from the congregation: once between June 1995 and April 1996 and once between October 1998 and February 2000.[1] They also concede that, at some point, "Silvasy informed an elder that, prior to his becoming one of Jehovah's Witnesses, he had a minor female touch him inappropriately." According to McFarland, Silvasy molested her over a period of several years before she finally disclosed the abuse to her parents in 2001. McFarland alleges that her parents told the elders at West Congregation about the abuse, but they neglected to discipline Silvasy or to report the matter and discouraged her parents from doing so. Silvasy died in February 2003.

{¶ 5} In 2013, McFarland brought suit against Appellants for negligence, ratification, and fraud by omission/concealment. McFarland alleged that Appellants were aware that Silvasy had previously molested a minor and was a danger to her, but failed to take measures to protect her from his abuse and ratified his conduct by responding inappropriately once she reported the abuse. McFarland sought both compensatory and punitive damages from Appellants, alleging that they acted with intentional, malicious, and/or reckless disregard for her welfare.

{¶ 6} After discovery commenced, McFarland served Watchtower with a request for the production of certain documents. Included within that filing was a request that Watchtower produce "ALL DOCUMENTS received by YOU in response to the Body of Elders letter dated March 14, 1997." There is no dispute that the letter in question was a letter from ***45** Watchtower to the Bodies of Elders at each local congregation, regarding child molestation, the identification of child molesters, and the steps local elders should take to protect children within the congregation from harm. The letter specifically asked the elders to supply Watchtower with reports "on anyone who is currently serving or who formerly served in a Society-appointed position in your congregation who is known to have been guilty of child molestation in the past." In her discovery request, McFarland sought the reports Watchtower received in response to its letter.

{¶ 7} Watchtower raised several objections to McFarland's request. After the two were unable to resolve the matter themselves, Watchtower filed a motion for a protective order. Watchtower argued, among other things, that the reports McFarland sought would not advance her case against Appellants because Silvasy never served in a "Society-appointed

position." McFarland responded to Watchtower's motion, and Watchtower filed a reply. The court ultimately determined that McFarland's request was overbroad. It also wrote, however, that any reports that actually pertained to Silvasy were relevant. Consequently, the court granted Watchtower's motion in part, but also ordered it to provide McFarland with "unredacted copies of any and all reports by the body of elders at West Congregation to Defendant Watchtower concerning Scott Silvasy * * *."

{¶ 8} Following the court's order, the parties once again found themselves in a discovery dispute. Of interest to this appeal, McFarland sought (1) all letters that Watchtower/Christian Congregation issued to the Bodies of Elders between January 1, 1980, and December 31, 2002, and (2) any documents Appellants had in their possession that related to Silvasy and/or herself. As to the latter, it was McFarland's position that the court, in ruling on Watchtower's motion for a protective order, had ordered Appellants to produce unredacted copies of any documents that related to Silvasy. Meanwhile, it was Appellants' position that the court had only ordered them to produce any reports that West Congregation had issued on Silvasy after receiving the March 14, 1997 letter from Watchtower. Because there were no such reports, Appellants argued that they had complied with the court's order. They opposed McFarland's discovery requests on the basis of clergy-penitent privilege, attorney-client privilege, and the First Amendment. Additionally, they challenged the scope of McFarland's requests, noting that they were not specifically tailored to the time period of her alleged abuse.

{¶ 9} McFarland ultimately filed a motion to compel the production of the documents she sought. Appellants opposed her motion, but also filed under seal all of the documents they identified as being at issue. McFarland then filed a reply brief. Following an in camera review of the sealed documents, the court issued its decision. The court granted McFarland's motion to compel in part and ordered Appellants to produce: (1) ten letters from the Service Department elders at Watchtower to the Bodies of Elders at the local congregations; and (2) fifteen other documents that Appellants described as either letters or memoranda sent, received, or transcribed by West Congregation elders, Service Department elders, and non-parties to the litigation. Appellants then immediately appealed from the trial court's order.

{¶ 10} Appellants have appealed from the court's order with respect to nineteen of the documents it ordered them to produce. Those nineteen documents are four of the ten letters from Service Department ***46*** elders to the Bodies of Elders ("the Bodies of Elders letters") and all fifteen of the remaining documents that Appellants described as either letters or memoranda. Appellants raise two assignments of error for our review.

II

Assignment of Error Number One

THE TRIAL COURT ERRED WHEN IT ORDERED PRODUCTION OF DOCUMENTS PROTECTED FROM DISCOVERY BY THE CLERGY–PENITENT PRIVILEGE AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶ 11} In their first assignment of error, Appellants argue that the trial court erred when it ordered them to produce nineteen documents for purposes of discovery. Specifically, they argue that the documents are protected from discovery by virtue of either the clergy-penitent privilege or the First Amendment.

1 2 3 {¶ 12} "In general, discovery orders are reviewed under an abuse-of-discretion standard." *Med. Mut. of Ohio v. Schlotterer,* 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. That is because "courts have broad discretion over discovery matters." *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register,* 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18. "However, the Supreme Court of Ohio has concluded that the issue of whether [ ] information sought is confidential and privileged from disclosure is a question of law that should be reviewed de novo." *Price v. Karatjas,* 9th Dist. Summit No. 25361, 2011-Ohio-1048, 2011 WL 806826, ¶ 8, citing *Schlotterer* at ¶ 13. Because the issue on appeal is whether the nineteen documents that Appellants filed under seal are privileged and/or confidential, we review this matter de novo. *See Price* at ¶ 8. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Consilio,* 9th Dist. Summit No. 22761, 2006-Ohio-649, 2006 WL 335646, ¶ 4.

Clergy–Penitent Privilege

4 5 6 {¶ 13} R.C. 2317.02(C) codifies the clergy-penitent privilege in Ohio. The statute provides, in relevant part, that

> [a] cleric, when the cleric remains accountable to the authority of that cleric's church, denomination, or sect, [shall not testify] concerning a confession made, or any information confidentially communicated, to the cleric for a religious counseling purpose in the cleric's professional character.

R.C. 2317.02(C)(1). The clergy-penitent privilege generally may be waived either by express consent of the penitent or by operation of law under R.C. 2151.421(A)(4)(c). *Id.* Neither form of waiver applies, however, if the cleric's disclosure would violate a sacred trust, as defined in R.C. 2317.02(C)(2)(b). *Id.* The privilege "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive [spiritual] consolation and guidance in return." *Trammel v. United States,* 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Nevertheless, "being in derogation of the common law, any statutory privilege must be strictly construed against the party seeking to assert it and may be applied only to those circumstances specifically named in the statute." *Ward v. Summa Health Sys.,* 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 15. "The party claiming the privilege has the burden of proving that the privilege applies to the requested information." ***47** *Giusti v. Akron Gen. Med. Ctr.,* 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, ¶ 17 (9th Dist.).

{¶ 14} As previously noted, Appellants seek to have nineteen separate documents protected from disclosure by virtue of the clergy-penitent privilege. Four of those documents are the Bodies of Elders letters. The remaining fifteen are letters/memoranda sent, received, or transcribed by West Congregation elders, Service Department elders, and non-parties to the litigation. We consider each set of documents in turn.

The Bodies of Elders Letters

7 {¶ 15} The Bodies of Elders letters were drafted by Service Department elders at Watchtower and addressed to all of the Bodies of Elders on March 10, 1983; September 20, 1984; March 15, 1987; and January 15, 1990, respectively. The four letters provide instructions to elders at local congregations on a variety of topics. Appellants argue that the letters are privileged because they were "used to convey scripturally based advice, guidance, and direction from the Elders in the Service Department to the Elders serving local congregations to assist the local Elders in shepherding their membership." In support of their argument, Appellants rely upon the affidavit of Thomas Jefferson, an elder in the Service Department. In his affidavit, Jefferson averred that all Bodies of Elders letters are "strictly confidential communications." He further averred that the purpose of the letters "is to make application of the Bible-based beliefs, practices, and procedures of Jehovah's Witnesses on a wide variety of topics."

{¶ 16} As previously noted, Ohio's clergy-penitent privilege only protects "information confidentially communicated" when it is communicated to a cleric "for a religious counseling purpose in the cleric's professional character." R.C. 2317.02(C)(1). "Although the scope of the [clergy-penitent] privilege varies from State to State, * * * all States at a minimum 'require that the communications be made in private, with an expectation of confidentiality, to a minister in his or her professional capacity as a member of the clergy.' " (Internal citation omitted.) *Varner v. Stovall,* 500 F.3d 491, 495 (6th Cir.2007), quoting Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy–Penitent Privilege?,* 44 Wm. & Mary L.Rev. 1627, 1645 (2003). Appellants concede that the Bodies of Elders letters are letters from one set of elders to another. Accordingly, the letters involve multiple individuals and are not an instance of any particular penitent confiding in a cleric. Nor are they responsive to any individual inquiry for religious counseling. For instance, they do not represent correspondence between an individual congregation and the Service Department, based on a specific, spiritual inquiry posed by that individual congregation. The nature of the letters causes us to question whether they are confidential communications within the meaning of R.C. 2317.02(C)(1). Even assuming that they are, however, we still cannot conclude that they were distributed for the purpose of religious counseling.

8 9 {¶ 17} Not every word authored or spoken by a cleric is privileged. *See People v. Bragg,* 296 Mich.App. 433, 455, 824 N.W.2d 170 (2012), quoting *Cox v. Miller,* 296 F.3d 89, 106 (2d Cir.2002) ("[A] conversation is not privileged if made 'with wholly secular purposes solely because one of the parties to the conversation happens to be a religious minister.' "). The clergy-penitent privilege "may be applied only to those circumstances specifically named in the statute." *Ward,* 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 15. It does not protect communications made for secular purposes, even when those ***48** communications were intended to be confidential. *See id.* See also *Niemann v. Cooley,* 93 Ohio App.3d 81, 88–89, 637 N.E.2d 943 (1st Dist.1994). Although Appellants

contend that the Bodies of Elders letters were issued for the purpose of conveying scripturally-based advice, the letters themselves are in the nature of administrative direction/instruction. They do not, by this Court's reading, seek to impart spiritual wisdom. Accordingly, even if the letters constitute confidential communications within the meaning of R.C. 2317.02(C)(1), Appellants have not shown that they were distributed for a religious counseling purpose. *See Giusti,* 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, at ¶ 17. Because Appellants have not shown that the letters satisfy the statutory requirements set forth in R.C. 2317.02(C)(1), the trial court did not err by ordering their production. *See Ward* at ¶ 15. We reject Appellants' argument to the contrary.

The Remaining Letters/Memoranda

{¶ 18} The remaining fifteen letters/memoranda that the trial court ordered Appellants to produce all post-date the four-year period of abuse that McFarland alleged in her complaint. Consistent with their filing in the court below, Appellants have described each letter/memoranda in broad terms and have given a numerical reference for each one. We have reviewed each letter/memoranda and, for ease of discussion, separately analyze each document. Although Appellants numbered the documents in reverse chronological order, we analyze them chronologically.

i. *Letter Dated May 1, 2002 (# 197)*

10 {¶ 19} Appellants describe the May 1, 2002 letter as a one-page letter sent from a non-party to Christian Congregation's Service Department. Appellants claim that the letter is privileged because the non-party's purpose in writing it was to seek religious guidance from an elder in the Service Department. Appellants further claim that the letter is privileged because it concerns scriptural discipline.

{¶ 20} As noted, the clergy-penitent privilege only protects confidential communications when they are made to a cleric "for a religious counseling purpose * * *." R.C. 2317.02(C)(1). Strictly construing the privilege as we must, *see Ward,* 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 15, we cannot conclude that the author of the May 1, 2002 letter sent the letter for the purpose of receiving religious counseling. The author did not pose any questions to the elders or request advice of a spiritual nature. Rather, the author appears to have sent the letter to draw attention to a particular matter and to express the author's frustration with the handling of that matter. Because the letter was sent for a secular purpose, it is not protected by the clergy-penitent privilege. *See Niemann,* 93 Ohio App.3d at 88, 637 N.E.2d 943. *See also Doe ex rel. Doe v. Catholic Diocese of Rockford,* 395 Ill.Dec. 483, 38 N.E.3d 1239 (2015), ¶ 56; *Commonwealth v. Vital,* 83 Mass.App.Ct. 669, 673, 988 N.E.2d 866 (2013); *Roman Catholic Diocese of Jackson v. Morrison,* 905 So.2d 1213 (2005), ¶ 116–117.

{¶ 21} Appellants also argue that the trial court erred when it ordered them to produce the May 1st letter because the letter implicates the privacy rights of third-parties to this litigation. They argue that McFarland does not have a right "to discover confidential records of non-parties in a private lawsuit." Yet, the cases upon which Appellants rely concern privileged documents. *See, e.g., ***49** Roe v. Planned Parenthood Southwest Ohio Reg.,* 122 Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶ 46–52 (privileged medical records); *Wozniak v. Kombrink,* 1st Dist. Hamilton No. C–89053, 1991 WL 17213 (Feb. 13, 1991) (privileged medical records); *Doe v. University of Cincinnati,* 42 Ohio App.3d 227, 538 N.E.2d 419 (10th Dist.1988) (privileged medical records). We have already determined that the May 1st letter is not privileged, and Appellants have not argued that third-parties have similar privacy interests in unprivileged documents. *See* App.R. 16(A)(7). This Court will not undertake such an analysis on their behalf. *See Cardone v. Cardone,* 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). As such, we reject Appellants' argument regarding third-party privacy.

ii. *Letter Dated May 23, 2002 (# 196)*

11 {¶ 22} Appellants describe the May 23, 2002 letter as a one-page letter from a Service Department elder to a non-party. In the court below, they further described the letter as a response to the letter the Service Department received from the non-party on May 1, 2002. Appellants claim that the letter is privileged because it is in the nature of scriptural assistance. According to Appellants, the letter was "provided in response to an express request for religious/spiritual guidance and counsel."

12 {¶ 23} The May 23rd letter is a response to the May 1st letter discussed above. It is not information confidentially communicated to a cleric because it is directed to a non-cleric. Further, it is not responsive to a request for religious counseling. *See* R.C. 2317.02(C)(1). We have already determined that the May 1st letter is not privileged because it was sent for

a secular purpose. Even if the purpose of the May 23rd letter was to provide the author of the May 1st letter with spiritual guidance, the clergy-penitent privilege does not apply to unsolicited religious counseling. Because the author of the May 1st letter did not confide in the Service Department for the purpose of receiving religious counseling, Appellants have not shown that the Service Department's response to the letter satisfies the statutory requirements set forth in R.C. 2317.02(C)(1). *See Ward,* 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 15. Thus, the trial court did not err when it found that the privilege did not apply to it.

{¶ 24} Appellants also argue that the trial court erred when it ordered them to produce the May 23rd letter because the letter implicates the privacy rights of third-parties to this litigation. Appellants have not shown, however, that third-parties have privacy rights in unprivileged documents. *See* discussion, *supra.* Because we have determined that the May 23rd letter is not privileged, we reject Appellants' argument regarding third-party privacy.

iii. *Letter Dated July 11, 2002 (# 195)*

13 {¶ 25} Appellants describe the July 11, 2002 letter as a two-page letter from the Body of Elders at West Congregation to an elder in the Service Department. In the court below, they further described it as a response to a request for information from the Service Department. Appellants argue that the letter is privileged because it concerns the "internal discipline of Jehovah's Witnesses," and "relays information of another party's spiritual confession to misconduct."

{¶ 26} As previously noted, statutory privileges must be strictly construed against the party asserting them. *Ward* at ¶ 15. The clergy-penitent privilege does not protect communications when they serve a secular purpose or are not kept confidential. *See* R.C. 2317.02(C)(1). The ***50** privilege is meant to guard "the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive [spiritual] consolation and guidance in return." *Trammel,* 445 U.S. at 51, 100 S.Ct. 906. Strictly construing the privilege against Appellants, we cannot conclude that it applies to the July 11th letter.

{¶ 27} The July 11th letter is an answer to an inquiry from the Service Department for certain background information. The letter is not a request for spiritual guidance, but a response sent for the purpose of aiding an investigation. Although it contains information that the Body of Elders at West Congregation learned from third-parties, it is not clear from the letter that the elders received that information by way of a request for religious counseling. Accordingly, even assuming that the letter satisfies the confidentiality component of R.C. 2317.02(C)(1), Appellants have not shown that it satisfies the statute's religious counseling component. *See Giusti,* 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, at ¶ 17. The letter was sent for a secular purpose, so the clergy-penitent privilege does not apply to it. *See Niemann,* 93 Ohio App.3d at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford,* 395 Ill.Dec. 483, 38 N.E.3d 1239, at ¶ 56; *Vital,* 83 Mass.App.Ct. at 673, 988 N.E.2d 866; *Morrison,* 905 So.2d 1213 at ¶ 116–117. Thus, the trial court did not err when it found the privilege inapplicable.

iv. *Letter Dated July 28, 2002 (# 194)*

14 {¶ 28} Appellants describe the July 28, 2002 letter as a one-page letter from a non-party elder to an elder in the Service Department. They argue that the letter is privileged because it is a confidential communication "addressing internal church disciplinary matters."

{¶ 29} By this Court's reading, the July 28th letter is entirely divorced from any request for religious counseling. Much like the July 11th letter, the July 28th letter provides certain background information relevant to an investigation. Appellants have not shown that the letter serves anything other than a secular purpose. *See Giusti* at ¶ 17. Accordingly, the trial court did not err when it found that the clergy-penitent privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

v. *Letter Dated August 15, 2002 (# 193)*

15 {¶ 30} Appellants describe the August 15, 2002 letter as a one-page letter from a Service Department elder to the Body of Elders at West Congregation. They argue that the letter is privileged because it was intended "to make sure that Scriptural practices were followed and that any violations of Bible-based beliefs were dealt with properly." They further argue that the letter is privileged because it relates to "the internal discipline of the Jehovah's Witnesses."

{¶ 31} As previously noted, not every word authored or spoken by a cleric is privileged. *See Bragg,* 296 Mich.App. at 455, 824 N.W.2d 170, quoting *Cox,* 296 F.3d at 106 (2d Cir.2002). Much like the July 28th letter, the August 15th letter bears no relationship to any request for religious counseling. The letter acknowledges the receipt of a different letter and requests additional, factual information from the Body of Elders at West Congregation. Appellants have not shown that the letter serves anything other than a secular purpose. *See Giusti* at ¶ 17. Accordingly, ***51** the trial court did not err when it found that the penitent-clergy privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

vi. *Letter Dated November 15, 2002 (# 192)*

16 {¶ 32} Appellants describe the November 15, 2002 letter as a one-page letter from the Body of Elders at West Congregation to elders at a different congregation who are non-parties to this suit. According to Appellants, the letter is privileged because it represents a "confidential communication from one Body of Elders to another requesting spiritual guidance for several non-parties."

{¶ 33} We do not agree with Appellants' assertion that the November 15th letter amounts to a request for spiritual guidance. Upon review, the letter conveys certain background and factual information. It does not seek to elicit any response, much less a response for spiritual counseling. Appellants have not shown that the letter serves anything other than a secular purpose. *See Giusti* at ¶ 17. Accordingly, the trial court did not err when it found that the clergy-penitent privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

{¶ 34} Appellants also argue that the trial court erred when it ordered them to produce the November 15th letter because the letter implicates the privacy rights of third-parties to this litigation. Appellants have not shown, however, that third-parties have privacy rights in unprivileged documents. *See* discussion, *supra.* Because we have determined that the November 15th letter is not privileged, we reject Appellants' argument regarding third-party privacy.

vii. *Letter Dated February 27, 2003 (# 191)*

{¶ 35} Appellants describe the February 27, 2003 letter as a one-page letter from a Service Department elder to the Body of Elders at West Congregation. In the court below, they further described it as a letter seeking a response to a previous request for information, dated August 15, 2002. Appellants argue that the February 27th letter is privileged, but do so strictly on the basis that it was meant to remain confidential.

{¶ 36} We have already determined that the August 15th letter is not privileged. The February 27th letter essentially duplicates the August 15th letter, as it requests a response of the same type posed by the August 15th letter. It is entirely secular in nature. Indeed, Appellants have made no attempt to explain how the letter relates to a religious counseling purpose. *See* App.R. 16(A)(7); R.C. 2317.02(C)(1). Because the February 27th letter is wholly secular in nature, the trial court did not err when it found that the clergy-penitent privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

viii. *Letter Dated June 9, 2003 (# 190)*

{¶ 37} Appellants describe the June 9, 2003 letter as a one-page letter from a Service Department elder to the Body of Elders at West Congregation. In the court below, they further described it as yet another request for the elders at West Congregation to respond to the Service Department's August 15th letter, requesting certain information. Appellants argue that the June 9th letter is privileged because it "pertains to internal communications ***52** regarding church disciplinary matters."

{¶ 38} For the reasons set forth in our discussion of the August 15th letter and the February 27th letter, the June 9th letter is also not privileged. The purpose of the letter is entirely secular. The clergy-penitent privilege does not apply to it because it is not a request or response to a request for religious counseling. *See* R.C. 2317.02(C)(1). Accordingly, the trial court did not err when it found that the privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

ix. *Letter Dated June 22, 2003 (# 189)*

17 {¶ 39} Appellants describe the June 22, 2003 letter as a one-page letter from the Body of Elders at West Congregation to the Service Department. They further describe the letter

as a response to an earlier request from the Service Department for certain information. According to Appellants, the letter is privileged because the Service Department "asked for [the] information in order to be able to provide religious guidance."

{¶ 40} Appellants have not argued that the June 22nd letter itself offers religious counseling. We understand their argument to be that the letter is privileged because it provides the reader with information that could, at some future point, be used to offer religious counseling. The clergy-penitent privilege, however, is not so broad in scope. It requires the communication directly at issue to have been made for the purpose of religious counseling. *See* R.C. 2317.02(C)(1). *See also See Ward,* 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, at ¶ 15 (statutory privileges must be strictly construed). The June 22nd letter only sets forth certain factual information and was not sent for the purpose of requesting religious counseling or offering it to a penitent. Accordingly, the trial court did not err when it found that the clergy-penitent privilege did not apply. *See Niemann* at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford* at ¶ 56; *Vital* at 673, 988 N.E.2d 866; *Morrison* at ¶ 116–117.

x. *Letter Dated July 7, 2003 (# 188)*

18 {¶ 41} Appellants describe the July 7, 2003 letter as a one-page letter from a Service Department elder to the Body of Elders at West Congregation. In the court below, they further described it as an acknowledgement of receipt of the letter that the Body of Elders sent to the Service Department on June 22, 2003.

{¶ 42} While Appellants refer to the July 7th letter as a confidential communication, they have not explained how it pertains to religious counseling. *See* R.C. 2317.02(C)(1). Appellants have conceded that the letter is an acknowledgement of the receipt of an earlier letter. They have not offered any argument as to how the letter serves a non-secular purpose, and we decline to create one on their behalf. *See* App.R. 16(A)(7); *Cardone,* 1998 WL 224934, at *8. As such, we reject their argument that the trial court erred when it found that the clergy-penitent privilege did not apply to the July 7th letter.

xi. *Letter Dated August 28, 2011 (# 187)*

19 {¶ 43} Appellants describe the August 28, 2011 letter as a one-page letter from a non-party to an elder in the Service Department. They argue that the letter is privileged because it "contains confession to a Service Department Elder and seeks religious guidance as to how to address confessed failings."

***53** {¶ 44} As previously noted, Appellants supported their argument in the court below with the affidavit of Thomas Jefferson, an elder for the Service Department. Jefferson averred that he has served as an elder in the faith since 1981 and is "thoroughly familiar with the religious beliefs and practices of Jehovah's Witnesses, and with the Scriptural precedents for those religious beliefs and practices." He averred that "[t]he confidentiality of spiritual/religious communications between members of the congregation and elders is a foundational element of the religious beliefs and practices of Jehovah's Witnesses." According to Jefferson, "if an elder * * * was compelled to disclose confidential information, his credibility and effectiveness as an elder, as well as the credibility and effectiveness of other elders * * *, would be adversely affected and compromised." Jefferson averred that the letters at issue here "were sent with the expectation that their content would remain private and highly confidential pursuant to the Holy Scriptures and the religious beliefs and practices of Jehovah's Witnesses."

{¶ 45} Having reviewed the August 28th letter, we must conclude that the trial court erred when it ordered Appellants to produce it. The letter is not secular in nature. It is a plea from an individual who seeks spiritual guidance on a particular issue from an elder in the Service Department. McFarland does not dispute that Service Department elders are clerics within the meaning of R.C. 2317.02(C)(1). Further, Appellants set forth evidence that the confidentiality of spiritual communications between congregation members and elders is of such importance that it is "a foundational element of the religious beliefs and practices of Jehovah's Witnesses." Because Appellants have shown that the August 28th letter satisfies the statutory elements of R.C. 2317.02(C)(1), we must conclude that the letter is privileged. Accordingly, Appellants need not produce it.

xii. *Letter Dated October 24, 2011 (# 186)*

20 {¶ 46} Appellants describe the October 24, 2011 letter as a one-page letter from a Service Department elder to a non-party. In the court below, they further described it as a response to a non-party's written plea for spiritual guidance, dated August 28, 2011.

Appellants argue that the October 24th letter is privileged because it "contains Scriptural assistance and religious counseling * * *."

{¶ 47} The October 24th letter is a response to the August 28th letter discussed above. We have already determined that the August 28th letter is privileged and we likewise conclude that the October 24th response to that letter is privileged. The October 24th letter is not secular in nature. It offers spiritual counseling in response to an individual's confidential request for the same. Further, Appellants set forth evidence that a cleric authored the letter and that elders, while serving as clerics, are bound by the tenets of their faith to uphold the confidentiality of such communications. Because Appellants have shown that the October 24th letter satisfies the statutory elements of R.C. 2317.02(C)(1), we must conclude that the letter is privileged and that the trial court erred by ordering its production. Accordingly, Appellants need not produce the October 24th letter.

xiii. *Letter Dated May 3, 2012 (# 185)*

21 {¶ 48} Appellants describe the May 3, 2012 letter as a one-page letter from a non-party to an elder in the Service Department. They further describe it as "a continuation of an on-going conversation" ***54*** instituted by the non-party. Appellants argue that the letter is privileged because it is in the nature of religious/spiritual counseling and reveals Scriptural discipline.

{¶ 49} This Court has reviewed the May 3rd letter and portions of it are undoubtedly secular in nature. Were we to view the letter in isolation, we might question its overarching purpose. As Appellants have noted, however, the letter is one in an ongoing conversation. Specifically, it is a reply to the October 24th letter that the Service Department issued in response to the same non-party's August 28th letter. Because the October 24th letter represents a continuation of the ongoing, privileged communication between the non-party and the Service Department, we must conclude that it too is privileged. Accordingly, the trial court erred by ordering its production. Appellants need not produce the May 3rd letter.

xiv. *Telephone Memorandum Dated August 1, 2013 (# 184)*

22 {¶ 50} Appellants describe the August 1, 2013 telephone memorandum as a one-page memorandum documenting a phone call from a non-party to an elder in the Service Department. Appellants argue that the telephone memorandum is privileged because the non-party called the Service Department for the purpose of seeking spiritual guidance and the memorandum includes the guidance given to the non-party.

{¶ 51} Having reviewed the August 1st memorandum, we must conclude that it is not privileged. First, it is not clear that the memorandum is a confidential communication. *See* R.C. 2317.02(C)(1). According to Appellants, the letter is a "record of a telephone call from a non-party to an Elder * * *." They have not indicated, however, whether the elder who accepted the call transcribed the memorandum or if someone else transcribed it on the elder's behalf. Further, the memorandum contains a section that records information received from a second individual. Appellants describe that section as recording a "discussion between an Elder in the Service Department and Watchtower's Legal Department." Thus, the memorandum is not a direct communication from a penitent to a cleric and it is apparent that the information contained within it was shared with multiple individuals who may or may not have been elders. Because the clergy-penitent privilege only protects confidentially communicated information, we question whether the memorandum satisfies that element of the privilege. *See id.* Even assuming that it does, however, Appellants still have not shown that the memorandum serves a religious counseling purpose. *Id. See also Giusti,* 178 Ohio App.3d 53, 2008-Ohio-4333, 896 N.E.2d 769, at ¶ 17.

{¶ 52} It is not clear from the August 1st memorandum that the non-party who initiated the telephone call at issue in the memorandum contacted the Service Department for the purpose of receiving religious counseling. The memorandum does include a very brief recitation of the spiritually-motivated response that the Service Department offered the caller. It does not, however, show that the caller asked for religious counsel. The fact that a cleric responds to an individual's lament on a particular point with spiritual advice does not mean that the individual sought to elicit religious counseling. The clergy-penitent privilege stems from a penitent's desire to receive spiritual counsel, not a cleric's desire to give it. *See Trammel v. United States,* 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). The August 1st memorandum relays information about a particular situation and documents the ***55*** actions taken in response to that information. Appellants have not satisfied their burden of demonstrating that the memorandum serves a religious counseling purpose rather than a secular one. *See* R.C. 2317.02(C)(1). *See also Niemann,* 93 Ohio App.3d at 88, 637 N.E.2d 943. *See also Catholic Diocese of Rockford,* 395 Ill.Dec. 483, 38 N.E.3d 1239, at ¶ 56; *Vital,*

83 Mass.App.Ct. at 673, 988 N.E.2d 866; *Morrison,* 905 So.2d 1213 at ¶ 116–117. Thus, the trial court did not err when it found the privilege inapplicable.

{¶ 53} Appellants also argue that the trial court erred when it ordered them to produce the August 1st memorandum because it implicates the privacy rights of third-parties to this litigation. Appellants have not shown, however, that third-parties have privacy rights in unprivileged documents. *See* discussion, *supra.* Because we have determined that the August 1st memorandum is not privileged, we reject Appellants' argument regarding third-party privacy.

xv. *Letter Dated September 15, 2014 (# 183)*

23 {¶ 54} Appellants describe the September 15, 2014 letter as a three-page letter from non-parties to an elder in the Service Department. Appellants argue that the letter is privileged because it "makes confessional disclosures" and "seeks Scriptural guidance and religious direction * * *."

{¶ 55} Having reviewed the September 15th letter, we must conclude that the trial court erred when it ordered Appellants to produce it. The letter is not secular in nature. It is a specific request for religious counseling from two individuals to an elder in the Service Department. As previously noted, McFarland does not dispute that Service Department elders are clerics within the meaning of R.C. 2317.02(C)(1). Further, Appellants set forth evidence that the confidentiality of spiritual communications between congregation members and elders is of such importance that it is "a foundational element of the religious beliefs and practices of Jehovah's Witnesses." Because Appellants have shown that the September 15th letter satisfies the statutory elements of R.C. 2317.02(C)(1), we must conclude that the letter is privileged. Accordingly, Appellants need not produce it.

First Amendment

{¶ 56} Appellants also argue that the trial court's ruling on McFarland's motion to compel violates the First Amendment because it "exposes [their] internal discipline procedures and beliefs regarding repentance, mercy, and redemption to external, secular scrutiny." Initially, we note that we need not consider Appellants' arguments in light of all nineteen documents at issue in this appeal. We have already determined that four of those documents, # 183, # 185, # 186, and # 187, are privileged. Because Appellants do not have to produce those documents, we need not consider whether their production would violate the First Amendment. Further, on appeal, Appellants have not raised a First Amendment argument with respect to two of the documents, # 189 and # 196. Because Appellants have not set forth a First Amendment argument with respect to those two documents, we need not include them in our discussion. *See* App.R. 16(A)(7). Finally, in the court below, Appellants failed to raise a First Amendment argument with respect to three of the documents, # 188, # 191, and # 192. Even assuming that Appellants could do so now via a claim of plain error, they have not attempted to do so. We, therefore, exclude the three foregoing documents from our discussion. *See* ***56** *Buckingham, Doolittle, Burroughs, L.L.P. v. Izaldine,* 9th Dist. Summit No. 27956, 2016-Ohio-2817, 2016 WL 2343355, ¶ 13. We need only consider Appellants' arguments in light of the Bodies of Elders letters and the six remaining documents, # 184, # 190, # 193, # 194, # 195, and # 197.

24 {¶ 57} The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." The Establishment Clause and Free Exercise Clause prohibit States from "enact[ing] [ ] laws that have the purpose or effect of advancing or inhibiting religion," or expressing a preference for any one religious denomination. (Internal quotations and citations omitted.) *Varner,* 500 F.3d at 495. The Clauses apply "to the judiciary as well as the legislature, *Kreshik v. St. Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960), and limit[ ] the power of the courts to hear suits 'whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by * * * church judicatories * * *.' " *Ogle v. Hocker,* 279 Fed.Appx. 391, 395 (6th Cir.2008), quoting *Watson v. Jones,* 13 Wall. 679, 80 U.S. 679, 727, 20 L.Ed. 666 (1871). "Courts have variously termed this restraint as the church autonomy doctrine or ecclesiastical abstention." *Ogle,* at 395.

25 26 27 {¶ 58} "[R]eligious freedom encompasses the 'power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' " *Serbian Eastern Orthodox Diocese for United States of America and Canada v. Milivojevich,* 426 U.S. 696, 721–722, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952). *Accord Harrison v. Bishop,*

2015-Ohio-5308, 44 N.E.3d 350, ¶ 19, quoting *Tibbs v. Kendrick,* 93 Ohio App.3d 35, 41, 637 N.E.2d 397 (8th Dist.1994) ("It is well established that civil courts lack jurisdiction to hear or determine purely ecclesiastical or spiritual disputes of a church or religious organization."); *Fisher v. Archdiocese of Cincinnati,* 2014-Ohio-944, 6 N.E.3d 1254, ¶ 35–38. Yet, "[t]he First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters." *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.,* 196 F.3d 409, 431 (2d Cir.1999). *Accord Bell v. Presbyterian Church (U.S.A.),* 126 F.3d 328, 331 (4th Cir.1997), quoting *General Council on Finance and Administration of the United Methodist Church v. California Superior Court,* 439 U.S. 1369, 1373, 99 S.Ct. 35, 58 L.Ed.2d 63 (1978) (Rehnquist, Circuit Justice) (religious organization may be held liable in civil court for "purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization."). "Whether a secular court may hear a tort suit despite the church autonomy doctrine turns on the availability of secular standards and the ability of a court to resolve the controversy without reference to religious doctrine." *Ogle,* at 395.

28 {¶ 59} The question presently before us on appeal is strictly whether the trial court erred in ordering Appellants to produce ten unprivileged documents in response to McFarland's request for discovery. "Courts in other jurisdictions have explicitly rejected the argument that the [F]irst [A]mendment protects religious institutions from disclosing relevant, non-privileged information." ***57** *Thopsey v. Bridgeport Roman Catholic Diocesan Corp.,* Sup.Ct. of Conn. New Haven No. NNHCV106009360S, 2012 WL 695624, *11 (Feb. 15, 2012). Once the trial court determined that the documents here were not privileged, it could order their discovery so long as it found them "relevant to the subject matter involved in the pending action * * *." *See* Civ.R. 26(B)(1). That decision did not require the court to interpret or evaluate Appellants' religious beliefs or internal governance. *See Thopsey* at *11. *See also* ***Lopez v. Watchtower Bible and Tract Society of New York, Inc.*, 246 Cal.App.4th 566, 598–599, 201 Cal.Rptr.3d 156 (2016)**; *Krystal G. v. Roman Catholic Diocese of Brooklyn,* 34 Misc.3d 531, 542–543, 933 N.Y.S.2d 515 (2011); *People v. Campobello,* 348 Ill.App.3d 619, 627–631, 284 Ill.Dec. 654, 810 N.E.2d 307 (2004). The question of relevance was purely secular and did not require the court to delve into religious law and polity. *Compare Serbian Eastern Orthodox Diocese for United States of America* at 708–710, 96 S.Ct. 2372; *Howard v. Covenant Apostolic Church, Inc.,* 124 Ohio App.3d 24, 28–29, 705 N.E.2d 385 (1st Dist.1997). Consequently, we reject Appellants' argument that the trial court violated the First Amendment when it ordered them to produce the ten documents at issue.

{¶ 60} Appellants also argue that the trial court's order violates Article 1, Section 7 of the Ohio Constitution. They rely upon *Humphrey v. Lane,* 89 Ohio St.3d 62, 728 N.E.2d 1039 (2000), to argue that the Ohio Constitution affords broader protection than the United States Constitution with respect to the protection of religious freedoms. Appellants, however, did not develop the foregoing argument in the court below. Indeed, they failed to even cite *Humphrey* in their memorandum in opposition to McFarland's motion to compel. Moreover, they have not assigned as error on appeal that the court's order violates the Ohio Constitution. This Court declines to address an additional argument that Appellants did not raise in their captioned assignment of error or develop in the court below. *See 22 Exchange, L.L.C. v. Exchange Street Assocs., L.L.C.,* 9th Dist. Summit No. 27472, 2015-Ohio-1719, 2015 WL 2091758, ¶ 21; *JPMorgan Chase Bank, Natl. Assn. v. Burden,* 9th Dist. Summit No. 27104, 2014-Ohio-2746, 2014 WL 2918455, ¶ 12.

Conclusion

{¶ 61} The trial court erred when it ordered Appellants to produce four documents: # 183, # 185, # 186, and # 187. Those four documents are protected from disclosure by virtue of the clergy-penitent privilege. To the extent Appellants' first assignment of error pertains to those four documents, it is sustained on that basis.

{¶ 62} The trial court did not err when it concluded that the remaining fifteen documents at issue here are not protected from disclosure by virtue of either the clergy-penitent privilege or the First Amendment. To the extent Appellants' first assignment of error pertains to those fifteen documents, it is overruled.

Assignment of Error Number Two

THE TRIAL COURT ERRED WHEN IT ORDERED PRODUCTION OF DOCUMENTS PROTECTED FROM DISCLOSURE BY THE ATTORNEY–CLIENT PRIVILEGE.

{¶ 63} In their second assignment of error, Appellants argue that the trial court erred when it ordered them to produce six documents because those six documents are protected from

disclosure by the attorney-client privilege. Specifically, they argue that the court should not have ordered them to disclose documents # 184, # 189, # 190, # 191, # 193, and # 195.

{¶ 64} Initially, we note that Appellants did not object to the production of documents # 190 and # 195 in the court below on the basis of attorney-client privilege. ***58** Appellants objected to the production of those two documents strictly on the basis of the clergy-penitent privilege and the First Amendment. "Arguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank, Natl. Assn.*, 2014-Ohio-2746, 2014 WL 2918455, at ¶ 12. Even assuming that Appellants could assert the privilege on appeal via a claim of plain error, they have not done so. Consequently, we will not address their attorney-client privilege argument with respect to documents # 190 and # 195. *See id.*

{¶ 65} We incorporate the standard of review set forth in Appellants' first assignment of error. Because this assignment of error likewise concerns the applicability of a privilege, the issue is a question of law that we review de novo. *Price,* 2011-Ohio-1048, 2011 WL 806826, at ¶ 8. Consequently, we undertake "an independent review of the trial court's decision without any deference to the trial court's determination." *Consilio,* 2006-Ohio-649, 2006 WL 335646, at ¶ 4.

29 30 31 {¶ 66} "In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law." *State ex rel. Leslie v. Ohio Hous. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18. "[T]he statutory privilege governs communications directly between an attorney and a client." *Jackson v. Greger,* 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 7. It does not apply to communications beyond testimonial speech or between clients and agents of an attorney. *See State ex rel. Dawson v. Bloom–Carroll Local Sch. Dist.,* 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 27; *State v. McDermott,* 72 Ohio St.3d 570, 574, 651 N.E.2d 985 (1995). Instead, the common law privilege applies in those instances and "protects against any dissemination of information obtained in the confidential relationship." *American Motors Corp. v. Huffstutler,* 61 Ohio St.3d 343, 348, 575 N.E.2d 116 (1991). Appellants only argue that the common law privilege applies here. Consequently, we need not analyze the statutory privilege.

32 33 34 35 {¶ 67} The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

> Under the [common law] attorney-client privilege, "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."

State ex rel. Leslie at ¶ 21, quoting *Reed v. Baxter,* 134 F.3d 351, 355–356 (6th Cir.1998). The "privilege 'does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.' " *State ex rel. Toledo Blade Co. v. Toledo–Lucas Cty. Port Auth.,* 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 27, quoting *Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir.1991). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Squire, Sanders & Dempsey, L.L.P. v. Givaudan **59** Flavors Corp.,* 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 16, quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

36 {¶ 68} "[T]he party seeking protection under the [attorney-client] privilege carries the burden of establishing the existence of that privilege." *Nageotte v. Boston Mills Brandywine Ski Resort,* 9th Dist. Summit No. 26563, 2012-Ohio-6102, 2012 WL 6697396, ¶ 8, quoting *Perfection Corp. v. Travelers Cas. & Sur.,* 153 Ohio App.3d 28, 2003-Ohio-2750, 790 N.E.2d 817, ¶ 12 (8th Dist.). Appellants argue that documents # 184, # 189, # 191, and # 193 are privileged because they reference "the activities or contain [ ] requests and communications between the Legal Department that gives legal advice to Watchtower and local elders such as [ ] West Congregation Elders after they received notice of McFarland's allegations of sexual abuse." According to Appellants, the attorneys in the Legal Department function as

in-house counsel for the religious organization, so the confidential communications that elders have with those attorneys are privileged.

37 {¶ 69} None of the four documents at issue here involve communications either directly from or to an attorney. Three of the documents are letters from one elder or set of elders to another elder or set of elders. The fourth is a memorandum from an elder in the Service Department. Appellants argue that the documents are privileged because the attorney-client privilege protects "communications between an organization and its in-house legal department." *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The documents, however, are not communications between members of an organization and its in-house counsel. They are strictly communications between members. Appellants have not addressed the issue of whether the attorney-client privilege protects communications between members of the same organization when those communications do not involve an attorney. *See Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 215, 744 N.E.2d 154 (2001) (attorney-client privilege did not apply to communications between two employees where organization's attorney was "not involved in these communications on the issue in question.").

{¶ 70} As the parties seeking to assert the privilege here, Appellants bore the burden of establishing its existence. *See Nageotte* at ¶ 8, quoting *Perfection Corp.* at ¶ 12. Appellants have not shown that the four documents at issue here constitute confidential communications between a client and attorney made for the purpose of securing legal advice. *See State ex rel. Leslie*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, at ¶ 21, quoting *Reed*, 134 F.3d at 355–356. Nor have they shown that the communications "would facilitate the rendition of legal services or advice * * *." *State ex rel. Toledo Blade Co.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, at ¶ 27, quoting *Dunn*, 927 F.2d at 875. The four documents here reference contact with the Legal Department either having been made or not made and outline certain facts. *See Upjohn Co.*, 449 U.S. at 395–396, 101 S.Ct. 677, quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (1962) ("[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing."). *See also State v. Mitchell*, 9th Dist. Summit No. 17029, 1995 WL 678624, *9 (Nov. 15, 1995) ("The mere fact that a meeting occurred, or did not occur, does not constitute a 'communication' for purposes of the attorney-client privilege."); ***60** *State v. Smith*, 9th Dist. Summit No. 13730, 1989 WL 28698, *3 (Mar. 29, 1989) (attorney permitted to testify regarding her "unsuccessful attempts to contact [the defendant] to remind him of his trial date"). The case law upon which Appellants rely does not resolve the issue on appeal. *See* App.R. 16(A)(7). Because Appellants have not shown that the attorney-client privilege applies to the four documents at issue here, we reject their argument that the trial court erred by granting McFarland's motion to compel. *See Nageotte* at ¶ 8, quoting *Perfection Corp.* at ¶ 12. Consequently, Appellants' second assignment of error is overruled.

III

{¶ 71} Appellants' first assignment of error is sustained with respect to documents # 183, # 185, # 186, and # 187. Appellants need not produce those four documents. Appellants' first assignment of error is overruled with respect to the remaining documents. Additionally, Appellants' second assignment of error is overruled. Appellants must produce the Bodies of Elders letters as well as documents # 184 and # 188 through # 197. The judgment of the Lorain County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

HENSAL, P.J., and SCHAFER, J. concur.

All Citations

60 N.E.3d 39, 2016 -Ohio- 5462

Footnotes

1 When a Jehovah's Witness is disfellowshipped, he or she is no longer considered a practicing member of the faith or his or her congregation. A person who has been disfellowshipped can later seek reinstatement.

End of Document

EXHIBIT 10

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

VELICIA ALSTON, an individual; and JOHN ROE, an individual proceeding under a pseudonym, Plaintiffs v. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a foreign corporation; NORTH HILLSBORO CONGREGATION OF JEHOVAH'S WITNESSES, an Oregon nonprofit corporation; and SOUTH CONGREGATION OF JEHOVAH'S WITNESSES, HILLSBORO, OREGON, an Oregon nonprofit corporation, Defendants. WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a foreign corporation, Defendant / Third Party Plaintiff, v. DANIEL CASTELLANOS, an individual, Third Party Defendant.	Case No: 14-cv-18423 **ORDER ON PLAINTIFFS' MOTION TO COMPEL**

THE ZALKIN LAW FIRM
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ORDER

Plaintiffs, through their attorneys, moved to compel certain documents as described below from Defendant Watchtower Bible and Tract Society ("Watchtower"). The Court heard argument on Tuesday, June 28, 2016. Appearing for Plaintiffs were Devin M. Storey, Esq. (attorney *pro hac vice*) and Kristian S. Roggendorf, Esq. Defendant Watchtower was represented by Joel M. Taylor, Esq. (attorney *pro hac vice*) Adam W. Holbrook, Esq., and Philip S. Van Der Weele, Esq. Also present was Anna M. Helton, Esq. on behalf of Defendant North Hillsboro Congregation of Jehovah's Witnesses.

This Court, after considering the briefing, exhibits, and oral argument hereby **ORDERS** as follows:

1. Plaintiffs' motion to compel the production of the 16 documents identified in Watchtower's privilege log is **GRANTED**. The documents are to be produced pursuant to the protective order in effect in this case.

2. Plaintiffs' motion to compel the production of the document referred to as "Branch Organization" is **GRANTED**. The document is to be produced pursuant to the protective order in effect in this case.

3. Plaintiffs' motion to compel the production of documents responsive to Plaintiffs' Request for Production No. 63 ("All documents evidencing childhood sexual abuse allegations or complaints against any Baptized Jehovah's Witnesses, when the abuse occurred prior to 1990") as later narrowed by Plaintiffs to include only complaints that were received by Watchtower prior to April 13, 1987 and that were received or possessed by Watchtower, is **DENIED** without prejudice to Plaintiffs renewing their request if they seek and are granted leave to add punitive

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damages. The Court expressly reserves its decision on, and does not express an opinion whether, a punitive damages amendment is warranted or whether it would be allowed.

Signed: 9/27/2016 02:12 PM

It is so **ORDERED**.

DATED this _____ day of _____, 2016.

Hon. Thomas Ryan, Circuit Court Judge
Multnomah County Circuit Court

Circuit Court Judge Tom Ryan

Prepared by:
ROGGENDORF LAW LLC

s/ *Kristian Roggendorf*

Kristian Roggendorf, OSB# 013990
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CERTIFICATE OF READINESS PURSUANT TO UTCR 5.100

Undersigned counsel certifies that the foregoing judgment or order is subject to service as follows: Service on opposing counsel not less than three days prior to submission to the court.

The foregoing service requirement was met as follows: Counsel emailed varous versions of the order among themselves in latter July, 2016, and the above form was agreed upon by respective counsel not later than August 4, 2016.

This proposed order or judgment is ready for judicial signature because: Each party affected by this order or judgment has approved the order or judgment, as shown by written confirmation of approval sent to me.

DATED this 23rd day of September, 2016.

ROGGENDORF LAW LLC

s/ *Kristian Roggendorf*

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ORDER ON PLAINTIFFS' MOTION TO COMPEL**, upon:

Philip S. Van Der Weele, Esq.
K&L GATES LLP
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Suite 1900
Portland, OR 97258

Of Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc.

Thomas V. Dulcich, Esq.
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Of Attorneys for Defendants North Hillsboro Congregation of Jehovah's Witnesses and South Congregation of Jehovah's Witnesses, Hillsboro, Oregon

Via the court's electronic filing system on September 23, 2016. The above counsel as well as the following additional counsel were served a courtesy copy of the above document:

Anthony P. La Rocco, Esq.
Margaret T. Korgul, Esq.
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Of Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc.

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Patterson, NY 12563

Of Attorneys for Defendant Watchtower Bible and Tract Society of New York, Inc.

Via electronic mail on September 23, 2016.

DATED this 23rd day of September, 2016.

ROGGENDORF LAW LLC

s/ *Kristian Roggendorf*

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EXHIBIT 11

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 12/02/2015 TIME: 03:34:00 PM DEPT: C13

JUDICIAL OFFICER PRESIDING: John C. Gastelum
CLERK: Debra A Cepeda
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: Gaylene D Show

CASE NO: **30-2014-00741722-CU-PO-CJC** CASE INIT.DATE: 08/25/2014
CASE TITLE: **Roe 1 vs. Defendant Doe 1, Congregation**
CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT ID/DOCUMENT ID: 72280931

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

Plaintiffs' two Motions to Compel and CMC hearing.

The Court, having taken the above-entitled matter under submission on 12/1/2015, now makes the following ruling as attached hereto and incorporated herein by reference.

The Case Management Conference is scheduled for 02/09/2016 at 08:45 AM in Department C13.

Clerk to give notice.

(1) Motion to Compel Production (2) Motion to Compel Production

(1) Motion by to Compel Directed to Doe 1, Congregation. The Court finds the subject discovery does not violate the partial discovery stay, because it relates to Defendant's knowledge, a relevant factor for determination of the statute of limitations under Code of Civil Procedure section 340.1.

The Motion is ***denied as moot*** **as to Document LH1** (Undated redacted handwritten document); Defendant agreed to produce.

The Motion is ***granted*** **as to Document LH2** (12-9-97 Record of Disfellowshipping or Disassociation).

The Motion is ***granted*** **as to Document LH3** (11-26-97 Judicial Committee Notes by The Body of Elders), with the following restriction. **Defendant may redact the names of any other alleged victims of the perpetrator (third-party victims), *only* and substitute the word "Third-Party" in place of the redacted name to protect the right to privacy of such third parties.**

The Motion is ***denied as moot*** **as to RFP Nos. 4, 5 and 15.** Defendant represented it served supplemental responses.

Defendant is ordered to produce unredacted copies of the documents in accordance with the terms of this Order within 10 days.

Rulings on Evidentiary Objections: Defendant's objections to Plaintiff's evidence are **sustained as to Nos. 5-16**, and otherwise are **overruled.** Plaintiff's objections to the Salmon declaration are **overruled.**

Grounds for Ruling: Document LH2 is a one-page document Defendant produced to Plaintiff, redacted to eliminate the one-word Scriptural reason for the alleged perpetrator's dissociation from the organization. The alleged perpetrator was a bible instructor for the organization at the time the alleged sexual molestation occurred. Defendant contends the reason for the perpetrator's disassociation is protected by the clergy-penitent privilege.

The burden of proof for a claim of clergy-penitent privilege is described in Evidence Code section 917, subdivision (a): "If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the ... clergy-penitent [or] husband-wife ... relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." However, "the privilege-claimant 'has the initial burden of proving the preliminary facts to show the privilege applies.' [Citation.] 'Once the claimant establishes the preliminary facts ..., the burden of proof shifts to the opponent of the privilege. To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] ... Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912....' [Citation.]" (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442.)

In *Roman Catholic Archbishop*, the court summarized the requirements for a statement to qualify as privileged pursuant to the penitent-clergy privilege:

" 'In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) it must be intended to be in confidence; 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret. [Citations.]' [Citation.]" (Id. at pp. 443–444, italics omitted.)

There is the over-arching axiom that privileges are to be strictly, and narrowly, construed to prevent suppression of otherwise admissible evidence. (*People v. Sinohui* (2002) 28 Cal.4th 205, 212.) Here, Defendant failed to meet its initial burden of showing that the Scriptural basis for the alleged perpetrator's disassociation is a "penitential communication" as defined in Evidence Code section 1032. (Salmon Decl., 6.)

Document LH3 are notes from the judicial committee's 1997 investigation into Plaintiff's allegations, which Defendant contends consist of statements made by the perpetrator to the elders of the organization. The judicial committee consists of usually three elders charged with investigating allegations of wrongdoing. (Sandoval Decl., 10.) The committee initiates the investigation, rather than the individual coming to the elders seeking confidential spiritual counseling. Information learned by the elders during the investigation may be used to disassociate a congregant, can be disclosed to other elders, and is recorded on a record of disfellowshipping. (Sandoval, 11.)

Here, Defendant failed to meet its initial burden of showing that the information the perpetrator provided to the judicial committee was intended to be confidential and that the committee had a duty to keep the communication confidential, such that the communication is a "penitential communication" as defined in Evidence Code Section 1032. (Salmon Decl., 7.)

With respect to the privacy rights of third parties, Defendant failed to introduce evidence that any of the information being withheld contains the name of other alleged third-party victims. In the event such information is contained in any of the documents, it is protectable, and may be redacted as indicated in this Order. (*Scull v. Superior Court* (1988) 206 Cal.App.3d 784.)

(2) Motion to Compel Directed to Doe 2, Supervisory Organization. ***Granted*** as to Document WT 1 (11-20-97 Event Form) and WT 2 (Record of Disfellowshipping or Disassociation). Defendant has not shown reason for disassociation, which was redacted from the form, reflects a "penitential communication" as defined in Evidence Code section 1032

Denied as Moot **as to RFP Nos. 4 and 5.** Defendant represents in Opposition that it served supplemental responses.

Defendant's argument as to the timeliness of the motion is not well taken. There is no deadline to compel *compliance* with a document request (as opposed to further written responses).

Defendant is ordered to produce unredacted copies of the documents within 10 days.

EXHIBIT 12

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Timothy Lopez, Individually Plaintiff, v. Defendant Doe 1, Congregation; Defendant Doe 2, Supervisory Organization; Defendant Doe 3, Perpetrator, Individually and Does 4 through 100, inclusive, Defendants.	Case No: 30-2013-00675535-CU-PO-CJC **NOTICE OF RULING REGARDING DISCOVERY MOTIONS HEARD ON OCTOBER 22, 2014** **Dept: C17** **Judge: Craig Griffin**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on October 22, 2014, the trial court heard argument on the motion for protective order filed jointly by Defendant Doe 1, Congregation and Defendant Doe 2, Supervisory Organization; the motion for protective order filed jointly by non-party Estancia Congregation of Jehovah's Witnesses, Costa Mesa, California and non-party Mile Square Congregation of Jehovah's Witnesses, Fountain Valley, California; Plaintiff's motion to compel further production of documents from Doe 1, Congregation; Plaintiff's motion to compel further production of documents from Doe 2, Supervisory Organization; Plaintiff's motion to compel further production of documents from non-party Estancia Congregation; and Plaintiff's motion to compel further production of documents from non-party Mile Square Congregation.

Plaintiff was represented by Devin M. Storey, Esq. Defendant Doe 1, Congregation, non-party Mile Square Congregation, and non-party Estancia Congregation were represented by James M. McCabe, Esq. Defendant Doe 2, Supervisory Organization was represented by Dean A. Olson, Esq. Prior to the October 22, 2014 hearing, and based on the written submissions of the parties, and non-parties Estancia Congregation and Mile Square Congregation, the court issued the following tentative ruling:

THE TENTATIVE RULING

A. Pertinent Background

In 1992, plaintiff Timothy Lopez was 16 years old. As alleged, he attended three sleepovers at the family home of defendant Brent Dalluge - a ministerial servant with defendant Park Congregation. Plaintiff alleges that Dalluge "drugged" him (along with other minors present) and performed sexual acts on him.

A report was made to congregation Elders, who invoked a judicial committee to investigate. The committee (made up of four church Elders) summoned victims, families, and Dalluge to a meeting at the church in one of the main halls. During that meeting (the date for which is not clear), each victim and his parent(s) was escorted into the adjacent library where Dalluge openly confessed his wrongdoing. After each separate atonement, the victim/family returned to the hall where everyone else either waiting their turn or was already grieving. There

were an estimated 30 persons present in Kingdom Hall for the meeting (12 victims, 1-2 parents each, 4 Elders, one perpetrator).

Following that meeting, the judicial committee - with input from the supervisory organization (U.S. Service Department and Watchtower) - decided to excommunicate (referred to as "disfellowship") Dalluge based on the severity of his wrongdoing and (apparently) a lack of sincere repentance. Although plaintiff's family made a police report, no criminal charges were ever filed.

In March or April of 2013, plaintiff was engaged in a conversation with his wife about matters of the past, which (according to plaintiff) triggered a "flashback" to the Dalluge incidents. Shortly thereafter plaintiff retained counsel and filed suit. The Complaint names three defendants: the perpetrator (Dalluge), the congregation where he served (Park Congregation) and the supervisory entity overseeing disciplinary issues within the Jehovah's Witness church (Watchtower).

Pending within are 6 discovery motions, all of which relate to the same common nucleus, to wit: plaintiff's right to access internal writings relating to the accused perpetrator Dalluge.

The documents sought generally fall into 7 of 4 categories:

1. Writings from Dalluge himself
2. Elder notes
3. Writings between congregations
4. Writings between congregations and supervisory bodies

Each of the four responding entities herein (Watchtower, Park Congregation, Estancia Congregation, and Mile Square Congregation) assert the clergy-penitent privilege as a primary basis for resisting production of documents. Other objections include relevance, violation of First Amendment, attorney-client privilege, and violation of third-party privacy rights.

B. Documents at Issue

From defendant Park Congregation, plaintiff seeks by way of ordinary RPD:

- No. 4: draft letter (09/22/92) from Elder to Body of Elders documenting advice from

attorney

- No. 13: letter (11/02/92) from U.S. Service Department to Park
- No. 15: notification (11/26/92) of dis-fellowshipping
- No. 16: letter (11/27/92) from U.S, Service Department to Park
- No. 17: letter (03/24/93) from Watchtower counsel providing legal advice to Body of Elders
- No. 18: letter (07/24/94) from Dalluge to Estancia
- No, 19: letter (08/12/94) from Estancia to Park
- No. 20: letter (08/24/94) from Park to Estancia
- No. 24: letter (04/25/95) to Park re: Judicial Committee meeting (*from* unknown)
- No. 25: letter (04/25/95) from Judicial Committee (presumably Park Congregation?) to Estancia
- No. 26: letter (03/27/95) from Dalluge to Estancia
- No. 27: letter (04/02/95) from Estancia to (presumably Park?) Judicial Committee
- Nos. 1-3, 5-6, 8-12, 14: handwritten notes by Park Elders (dtd 1992)
- Nos. 27-23,28-42: handwritten notes by Park Elders (dtd 1994-1995 and dates unknown)

From defendant Watchtower, plaintiff seeks by way of ordinary RPD:

- No. 1: letter (09/22/92) from Watchtower legal to Park
- No, 2: letter (I1/02/92) from U.S. Service Department to Park
- No. 3: letter (11/18/92) from Park to U'S. Service Department
- No. 4: letter (11/27/92) from U.S, Service Department to Park
- No, 5: letter (02/12/93) from Park to U.S' Service Department
- No. 6: letter (03/06/93) from U.S. Service Department to Watchtower legal
- No, 7: letter (03/24/93) from legal to Park elders
- No. 8: letter (03/24/12) from Estancia to Mile Square
- No. 9: telephone memo (07/18/13) by U'S' Service Department for call from elders (unknown congregation)

From non-party Estancia Congregation, plaintiff seeks by way of business records subpoena:

- No. 1: letter (07/24/94) from Dalluge to Estancia
- No. 2: letter (08/12/94) from Estancia to Park
- No. 3: letter (08/28/94) from Park to Estancia
- No. 4: letter (09/17/94) from Park to Estancia
- No. 5: letter (03/27/95) from Dalluge to Estancia
- No. 6: letter (04/02/95) from Estancia to Park
- No. 7: letter (04/25/95) from Park to Estancia
- No. 8: letter (11/14/06) between Estancia Elders
- No. 9: notes/research (11/20/06) by congregation Judicial Committee
- No. 10: letter (03/24/12) from Estancia to Mile Square
- No. 11: notes (undated) from Judicial Committee Elders

From non-party Mile Square Congregation, plaintiff seeks by way of business records subpoena:

- No. 1: letter (07/25/13) from Mile Square to U.S Service Department
- No. 2: letter (03/24/12) from Estancia to Mile Square
- No. 3: handwritten notes by Mile Square elders (dtd 01/16/14)
- No. 4: handwritten notes by Mile Square elders (dtd 01/16/14)
- No. 5: letter (01/29/14) announcing disfellowship
- No. 6: letter (01/29/14) announcing disfellowship
- No. 7: letter (undated) from U'S' Service Department to Mile Square

Several of the documents identified by plaintiff are sought from more than one entity. All entities have opposed the motions to compel and filed their own motion for protective order.

C. Objection 1: Relevance

In California, discovery is purposefully broad. With certain exceptions, parties have a right to inquire about any matter which - based on reason, logic and common sense – might (1) be admissible, (2) lead to admissible evidence, or (3) reasonably assist that party in evaluating

the case, preparing for trial and/or facilitating resolution. *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1276-1277; in accord , *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420. Although there is a "good cause" requirement for documents sought from a party, absent a valid claim of privilege, that threshold is met simply by a fact-specific showing of relevance, See CCP §2031.310(b), and *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92,98. For records sought from a nonparty, the "good cause" requirement – at least for purposes of discovery - is eliminated' See CCP §2020.410(c), and *Terry v. SLICO* (2009) 175 Cal.App.4th 352, 358. Here, although plaintiff has the burden to show good cause for records sought from Park and Watchtower, an objection based on "relevance" is disfavored. Defendants have provided so little information in their briefs and privilege logs regarding the content of the documents sought that it is nearly impossible to conclude that the documents are not at least reasonably likely to lead to the discovery of admissible evidence. Without more, objections based on relevance are overruled.

D. Objection 2: First Amendment

Article I to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." California's counterpart, Cal. Const. Art 1 §4, provides as follows: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed, This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State, The Legislature shall make no law respecting an establishment of religion." Both constitutional provisions provide for similar protection to religious organizations to conduct their internal affairs as they see fit, subject of course to neutral secular laws of general applicability, See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U,S. 520, 531-532 (1993); *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 559-560.

Here, defendants claim a First Amendment privilege against compelled disclosure of any internal documents shared between congregations (i.e., lateral communications), or documents shared between a congregation and Watchtower/Service Department (ie, vertical

communications). As objectors, defendants have the burden of showing how the First Amendment is implicated, and then offended, by a court-ordered disclosure of documents. Defendants do not explain how a court order to turn over internal (whether investigative or spiritual) records implications their freedom of religion. The principal case in California dealing with this issue is *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417 - a case relied on by plaintiff, and discredited by defendants, The Court of Appeal in that case provided an exhaustive analysis of religious rights under both the Federal and State Constitution, and concluded in pertinent part as follows (at 430-441):

> (1) There is nothing about California's discovery obligations which unduly impede the establishment or free exercise of religion; and
>
> (2) Even if impediment exists, discovery in matters involving child molestation serves such a compelling state interest that any balancing test is met.

The Court's analysis is equally applicable to the case at bar. The fact that Roman Catholic involved a criminal investigation rather than a civil lawsuit is a distinction without a clearly meaningful difference (the same Evidence Code section is at play, and the same secular evil is implicated). Responding to civil discovery is a neutral obligation of general applicability, and just as "freedom of association" does not provide government agencies, youth sports organizations, or social clubs cover of darkness to hide pedophiles in their midst, neither does freedom of religion. Defendants' objection to production of documents based on the First Amendment (whether that be federal or state) is overruled.

E. Objection 3: Third-Party Privacy Rights

Defendants object to disclosure of several documents based on an assertion that the writing contains information protected by third-party privacy rights. It is not clear from the objections just who the "third-party" is (witnesses, victims, families, investigating Elders, etc), which makes a difference since the requisite balancing cannot take place without some clarity, Nonetheless, a basic balancing is feasible.

The source for privacy rights here in California is Cal. Const., art. I, § 1, which provides:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Generally speaking, a heightened balancing test must be satisfied if private third-party information is to be turned over in discovery. See *Planned Parenthood Golden Gate v' Superior Court* (2000) 83 Cal.App.4th 347, 359-360; in accord, *Tien v. Superior Court* (2006) 139 Cal.App.4th 528,539-540:

"In determining whether disclosure is required, the court must indulge in a 'careful balancing' of the right of a civil litigant to discover relevant facts, on the one hand, and the right of the third parties to maintain reasonable privacy regarding their sensitive personal affairs, on the other. The court must consider the purpose of the information sought, the effect that disclosure will have on the affected persons and parties, the nature of the objections urged by the party resisting disclosure and availability of alternative, less intrusive means for obtaining the requested information. Based on an application of these factors, the more sensitive the nature of the personal information that is sought to be discovered, the more substantial the showing of the need for the discovery that will be required before disclosure will be permitted."

This heightened balancing test applies when the information sought pertains to individuals with unique issues or heightened sensitivities. See *Starbucks Corp. v. Superior Court* (2011) 194 Cal.App.4th 820, 828 [plaintiffs not entitled to discover identity of other job applicants with prior drug use]; *County of Los Angeles v. Superior Court* (2006) 139 Cal.App.4th 8, 18 [heirs of prisoner who committed suicide in jail not entitled to discover information regarding other incarcerated individuals]; *Pollock v. Superior Court* (2001) 93 Cal.App. 4th 817, 821 [plaintiff in insurance bad faith not entitled to discover identity of other insureds denied psychiatric disability benefitsl; *Denari v. Superior Court* (1989) 215 Cal.App.3d 1488, 1501 [plaintiff injured during booking process at county jail not entitled to discover identity of others in jail around the same time]; *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 Cal.App.3d 1-51-4, 1518 [defendant in IUD litigation not entitled to discover identity of potential plaintiffsl; *Smith v Superior Court* (1981) 118 Cal.App.3d 136, 141 [wife not entitled to discover identity of husband's psychiatric patients since fact of

treatment divulges existence of some condition].

In *Scull v. Superior Court* (1988) 206 Cal.App.3d 784, the district attorney prosecuting a psychiatrist for sexual molestation of a teenage patient could not discover names of other patients, despite the prosecutor's expressed desire to investigate potential other victims. In denying the requested discovery, the Court held (at 793): "It does not require the powers of a seer to envision the potential of harm in such contacts: a number of persons of fragile psyche could be traumatized ... Those who have been cured could have old wounds reopened. Indeed, the very fact of the authorities knowledge of the patient's having sought the assistance of a psychiatrist could prove to be embarrassing. Such embarrassment may well nigh be compounded by the caller's innuendo that the former patient was possibly the victim of sexual molestation."

If the information contained in the various documents pertains to other potential victims, plaintiff has not yet demonstrated a compelling need for this information. Of course, an "opt in" letter is certainly an available route – but plaintiff's proposed solution is to permit redaction of any identifying information of other victims - which solves that immediate concern. See *Snibe v. Superior Court* (2074) 244 Cal.App.4th 184, 196; *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1520.

As for information which might identify witnesses or other perpetrators, the test is different. Plaintiff has a right to discover the identity of individuals who might be percipient witnesses. See *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249-1250. As for other potential perpetrators, there is a compelling social interest in disclosure of information relating to sexual predators which clearly outweighs the right of a putative perpetrator to remain anonymous. See *In re Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1235.

Therefore, provided that identifying information for other victims is redacted, there are no other privacy interests at stake worthy of protection. The objection is, as clarified, overruled.

F. Objection 4: Attorney-Client Privilege

Defendants assert the attorney-client privilege for a small number of documents prepared by "legal" or recounting advice from "legal" regarding Dalluge. The attorney-client

privilege, which has been a hallmark of American jurisprudence for over 400 years, confers a privilege on the client to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725,732.

The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. *Costco, supra*, 47 Cal.4th at733. Thus, the two-part inquiry is as follows: (1) Burden on the party resisting disclosure to show that the documents (a) were made in furtherance of the attorney-client relationship and (b) contain some discussion of legal advice or strategy; (2) Burden on the party seeking disclosure to show that the communication was made to non-essential third parties, and thus waived. See *Insurance Co. of North America v.Superior Court* (1980) 108 Cal.App.3d 758, 769-771.

With regard to the non-essential third-party issue, Evidence Code §952 defines a confidential communication as one between a lawyer and the client, and includes within the scope of "client" those who are present to "further the interest of the client" and those "to whom disclosure is reasonably necessary" to accomplish the purpose behind acquiring legal advice. As the Court in *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, observed: "In order to implement the advice of lawyers, the advice must be communicated to others within the corporation. It is neither practical nor efficient to require that every corporate employee charged with implementing legal advice given by counsel for the corporation must directly meet with counsel or see verbatim excerpts of the legal advice given." *Id.* at 1498.

Here, although little detail is provided, it does appear that letters from counsel, and letters within the Congregation and Watchtower discussing counsel's advice, are protected. Since this Court is not permitted to order the documents produced for an in camera inspection to determine if the privilege applies (see *Costco, supra,* and Evidence Code §915), no more can be

gleaned and defendants have met their burden. The following documents need not be produced: Park Congregation Nos 4, 7, 17; Watchtower Nos. 1, 5, 6, 7.

G. Objection 5: Clergy-Penitent Privilege

Defendants assert this objection to virtually all documents sought, which have at their common core communications between Dalluge, Elders, U,S. Service Department and Watchtower. Defendants contend that the clergy-penitent privilege broadly extends to all internal communications; plaintiff contends that the privilege was never intended to reach beyond its original purpose of protecting a singular disclosure from an individual to a religious figure. The scope of the privilege is indeed confusing since it retains the moniker "clergy-penitent" but "penitence" is no longer part of the equation.

At its origin, the clergy-penitent privilege was premised on the presumed value to the human spirit of disclosing confidential concerns to a religious counselor for the purpose of cleansing one's guilty conscience (and to receive spiritual absolution). California's pre-1965 version of the privilege specifically applied to "confessions" - but the Legislature realized the term "confession" was sometimes difficult to define for religions using different ways of promoting spiritual dialogue between congregants and their religious leaders. Therefore, in 1965, the term "confession" was replaced with "communication" - and therein lies the rub. The old version focused on the purpose behind the communication (why the congregant was talking) whereas the modern version focuses on the role of the recipient (who the congregant is talking to).

Under the current codification of the clergy-penitent privilege (Evidence Code §1030 *et seq)*, the party claiming the privilege has the initial burden to show by a preponderance of the evidence:

> (1) the communication was made to a member of the clergy;
>
> (2) who, in the course of his or her religious discipline or practice, was authorized or accustomed to hear the communication; and
>
> (3) who has an affirmative duty under the discipline or tenants of the organization to keep the communication secret.

Assuming these three conditions are met, the burden then shifts to the party seeking production to rebut the statutory presumption (Evid. Code §917) of confidentiality. In other words, the party seeking production must show by a preponderance of the evidence that the communication was not made with the intent and expectation of remaining confidential as between speaker and hearor (no third person present). See *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518-1520; *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 4!7, 442-445.

Finally, there is the over-arching axiom that privileges are to be strictly, and narrowly, construed to prevent suppression of otherwise admissible evidence. *People v. Sinohui* (2002) 28 Cal.4th 205, 212; in accord, *People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362.

Dalluge Communications

Defendants have failed to meet their burden to show by a preponderance of the evidence that any recipient within the Church had an affirmative duty under the discipline or tenants of the Jehovah's Witnesses organization to keep Dalluge's communications secret.

First, within the discipline or tenants of the Jehovah's Witnesses organization Elders receiving a report of secular wrongdoing are permitted to disclose same to local law enforcement. Elders are instructed to first contact the Watchtower legal department, but thereafter Elders are free to follow their consciousness if they believe law enforcement should be informed. See Moreno Depo Tx 68:2I-71:20; Ashe Depo Tx 271:19-274:22; Watchtower 07/01/89 directive. Although there is an institutional "expectation" that spiritual communications will remain confidential (see Makarov Decl ¶I3, Santana Decl ¶3, Wilson Decl ¶3; Jefferson Decl ¶8), an "expectation" of confidentiality is not the same thing as a "duty" to keep communications confidential'

Second, defendants do not contend that the group meeting held in Kingdom Hall at Park Congregation in 1992 was outside of the discipline or tenants of the Jehovah's Witnesses organization, Thus, assuming the format of that meeting was authorized in the practice, it is clear Elders were under no affirmative duty to keep Dalluge's communications secret. Just the opposite: Elders encouraged (if not compelled) Dalluge to confess his sins directly to his

victims and their family members. Moreover, there is no evidence that the congregants at that meeting (the other victims and their families) had a duty under the discipline or tenants of the Jehovah's Witnesses organization to keep secret what they heard in the library. See Lopez Depo Tx 332:17-333:17, 337:8-338:3, 341:19-342:12

Third, if a congregant like Dalluge confesses his or her wrongdoing to two Elders, those Elders then repeat that to the entire Body of Elders, who then invoke a judicial committee to investigate. Since the goal of the judicial committee is to help the congregant understand the gravity of his or her wrongdoing, and to evaluate repentance for purposes of remaining in the Church, the congregant is well-aware that his or her confession is not staying with the original two Elders. See Ashe Depo Tx 74:12-80:15, 87:6-90:20.

In addition, since Dalluge voluntarily participated in the meeting at Kingdom Hall where he confessed his wrongdoing to victims and families, that means one of two things: (1) plaintiffs successfully rebutted any presumption that Dalluge's communication to Elders was intended and expected to be confidential; and (2) Dalluge - as the holder of the privilege - waived the privilege by voluntarily disclosing substantial portions thereof (see Evidence Code §912(a)). When Dalluge initially spoke to Elders (whether it was a single Elder or a panel is not pertinent here), he did so not with any expectation that the listener(s) would keep it a secret and take it "to the grave" so to speak. Quite the contrary, Dalluge spoke with the Elders knowing there was a chance his communications would be shared with other Elders, perhaps Elders in other congregations, with the victims and their families, and with the various entities up the "chain of command" that would be involved in handing down discipline. In common vernacular, congregants in the Jehovah's Witnesses organization know that communications to Elders would be broadcast to others as part of the overall repentance process. Republications are not themselves protected as reasonably necessary to fulfill church doctrine since the clergy-penitent privilege is not one of the California privileges anointed with the "reasonably necessary" extension in Evidence Code §912(d). This might be an issue for the Legislature, but the decision not to include the clergy-penitent privilege in the privileges enumerated in §912(d) means that the Legislature had no intention of extending the clergy-penitent privilege beyond

the speaker and *initial* hearor(s). {To be clear, this Court does not find that an initial communication to 2-3 Elders renders the communication non-confidential; it is what happened after that which matters.}

Therefore, any writing which reflects or recounts Dalluge's confession of wrongdoing is not protected by the clergy penitent privilege because the Elders were not under a duty to keep the communication(s) secret, Dalluge did not make the communication(s) intending or expecting confidentiality, and any privilege was waived by Dalluge's voluntary publication. The following documents must be produced: Park Nos. 18, 26; Estancia Nos. 1, 5.

Disfellowship Documents

With regard to the disfellowship documents, defendants have failed to establish the predicate facts to show any privilege. According to defendants, these letters contain only "the name of the disfellowshipped person, the date of disfellowshipping, and the Scriptural basis for disfellowshipping." Jefferson Decl ¶11. They are circulated to Branch Offices, the Service Department, and neighboring congregations if the individual seeks to join another congregation. An announcement is made to the congregation indicating the same. Although the letter itself may not be widely disseminated, the information contained therein is. Nothing about the letter suggests inclusion of any personal communication from a penitent to a religious figure. The following documents must be produced: Park No. 15; Mile Square Nos. 5, 6.

Internal Congregation Communications

There are three distinct categories of documents consumed within the general umbrella of internal congregation documents:

1. Notes prepared by Elders while dealing with the Dalluge incidents;
2. Writings exchanged between congregations regarding Dalluge;
3. Communications to/from the supervisory bodies (U.S. Service Department and Watchtower) regarding Dalluge.

Since this Court has concluded that the Dalluge communications themselves are not entitled to protection under the clergy-penitent privilege, to the extent internal congregation documents merely repeat the Dalluge confessions those too are not entitled to protection.

Defendants contend that internal documents are separately entitled to protection because an Elder can qualify as a penitent if he/she seeks guidance from other Elders regarding how to minister Dalluge. This is a creative extension to say the least.

The statute, as currently written, would indeed permit an Elder to qualify as a penitent, See Evid, Code §§ 1031-1032. However, in light of the requirement that the privilege be strictly construed, can it really be said that the Legislature intended to expand the privilege that way?

As noted, the clergy-penitent privilege came into existence solely as a way to give individuals laboring under some personal, spiritual or moral angst a limited opportunity to talk about it (ie, get it off their chest) without risk of societal penalty. See *People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362. Although some courts have described recent amendments as "expanding" the privilege, no court has ever held that the privilege now reaches communications between clergypersons discussing how to handle a disciplinary issue. The Legislative history suggests only that recent amendments were to account for different religious practices, not to rip the privilege from its historical moorings. An Elder asking other Elders how to deal with a sinner is far afield from the concept of a lay congregant speaking to a religious figure to clear a guilty conscience.

Neither side has identified authority directly on point. Plaintiff relies on Roman Catholic, which did address internal vertical communications but not with regard to who qualifies as a penitent, Defendants rely most notably on *Jane Doe v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints*, 90 P.3d 1147 (Wash.App.2004) – which held that internal communications qualified for protection but not because a Mormon clergyperson qualified as a penitent but rather because Washington allows republications to "reasonably necessary" individuals. *Id.* at 1153. As previously noted, California does not extend the "reasonably necessary" standard to the clergy-penitent privilege (per Evid. Code §912(d)),

In support of their position, the responding parties cite the following evidence:

- Handwritten Elder notes were taken during private confessional meetings and

"always kept in sealed envelopes under lock and key" - see Wilson Decl ¶6; Jefferson Decl ¶14.

- Communications between Elders were "kept strictly confidential under the religious beliefs and practices of Jehovah's Witnesses" - see Makarov Decl ¶4, Santana Decl ¶4; Wilson Decl ¶4; Jefferson Decl ¶9. However, "only pertinent details should be discussed and names should not be used." Watchtower 07/01/89 directive.
- Communications between congregations and a supervisory body (U.S. Service Department or Watchtower) "were sent with the expectation that the contents of the letters would remain private and highly confidential" - see Makarov Decl ¶5; Wilson Decl ¶5.
- Decisions by the local judicial council can be appealed, which requires disclosure to a new set of Elders of all prior communications. See Ashe Depo Tx 94:10-101:6.

Similar evidence was found to be inadequate to trigger the clergy-penitent privilege in *Elliott v. State*, 49 So.3d 795 (Fla.App.2010), and *In re Commitment of J.B.*, 766 N.E.2d 795 (Ind.App.2002) – both of which involved organization.

There is logic behind protecting an Elder's personal notes while he or she deliberates - similar to that of an attorney's work product or a mediator in civil litigation. Forcing production of personal notes could certainly have a chilling effect on how the church deliberates spiritual issues. There is also logic behind protecting an Elder's inquiry for guidance from another Elder or a Supervisory body in spiritual matters, if a lay congregant can make a penitent confession in secret, an elder should be treated the same.

Should there be any difference if the communications are oral versus written. There is the curious choice of verbiage that neither side has picked up on. Evid. Code §1032 provides that the subject communication must be made to a member of the clergy "authorized or accustomed to hear" the subject communication - not receive, but specifically "to hear." This is consistent with the historical underpinnings of the privilege (oral confession) and suggests that the Legislature may not have intended *written* communications to enjoy the same protection. Hard to tell.

On balance, this Court concludes as follows:

1. Notes prepared by Elders reflecting Dalluge's confession(s) are not privileged, whereas notes regarding the Elder's own deliberations are deserving of protection;
2. Writings exchanged between congregations reflecting Dalluge's confession(s) are not privileged, whereas communications seeking deliberative guidance toward disfellowshipping qualify for protection;
3. Communications to/from the supervisory bodies (U.S. Service Department and Watchtower) reflecting Dalluge's confession(s) are not privileged, whereas communications seeking deliberative guidance toward disfellowshipping qualify for protection.

Defendants have not specified in the privilege logs or briefs how the content of the internal communications might be parsed (again the descriptions are incredibly vague), but objectively speaking it appears that the gravamen of the writings is Dalluge's confession(s) and not spiritual guidance since Dalluge's sins were clear, confessed, and abhorrent at any level (in other words, serious reproval, if not disfellowship, was all but guaranteed). Production is required for: Park Nos. 1-3, 5-6, 8-14, 16, 19,20,21-25, 27-42; Watchtower Nos, 2-5, 8 {9 is presumably deliberative and, given the date, unlikely to reflect Dalluge's confession(s)}; Estancia Nos. 2-4, 6-11; Mile Square Nos. 1-7.

Caveat re : Clergy- Penitent Privilege

Defendants provided very little information in the privilege logs and briefs regarding what is actually in the various communications now ordered produced. That is their prerogative. Although this Court is not permitted to order production *in camera* for review, nothing prohibits defendants from offering to submit the documents to this Court for in camera review without waiving the privilege. See *Costco, supra,* and Evidence Code §915. Such a review could illuminate a gravamen of deliberative effort and spiritual guidance, which might alter this Court's conclusion regarding application of the privilege. Absent such a proffer, the documents ordered produced herein must be produced within 15 days.

Sanctions

In light of the difficult, and novel, issues presented herein, this Court concludes that there has been no misuse of the discovery process, and that there was substantial justification for the position taken by both sides. Sanctions are denied.

ADOPTION AND MODIFICATION OF THE TENTATIVE RULING

After hearing the argument of counsel, the Court adopted its tentative ruling in total, subject only to the following modifications and / or clarifications:

1. The document identified as Watchtower Number 5, is to be produced, however, Defendant may redact the portions of that document that contain legal opinions or advice.
2. The parties are to reach an agreement to provide notice to third party victims of childhood sexual abuse identified in the subject documents that Plaintiff is seeking the production of un-redacted copies of the documents, and that each witnesses has a legal right to assert his or her privacy interest in those documents.
3. Each document produced subject to this order, as identified in the attached tentative ruling, is subject to a protective order to be formalized by the parties, which will provide generally that a party, or non-party, producing documents pursuant to this order may designate documents as "confidential." If the party receiving said documents disputes the "confidential" designation, that party may bring a motion with the Court to challenge the designation. Such documents will be treated as "confidential" until such time as the Court orders otherwise. Documents labeled "confidential" may be used for any purpose relating to this litigation, or any appeal resulting therefrom, but may not be published or disseminated on the internet, or distributed to others for the purpose of publishing or disseminating the documents. Any party seeking to file any material stamped "confidential," must lodge the

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documents "conditionally under seal" pursuant to Rule 2.551 of the California Rules of Court.

THE ZALKIN LAW FIRM, P.C.

Dated: 11-5-14

Devin M. Storey, Esq.
Attorney for Plaintiff

APPROVED AS TO FORM:

MCCABE LAW FIRM

Dated: _____

James M. McCabe, Esq.
Attorney for Defendant Doe 1, Congregation; Non-Party Estancia Congregation of Jehovah's Witnesses, Costa Mesa, California; Non-Party Mile Square Congregation of Jehovah's Witnesses, Fountain Valley, California

MORRIS, POLICH & PURDY, LLP

Dated: _____

Dean A. Olson, Esq.
Beth A. Kahn, Esq.
Brendan Chan, Esq.
Attorney for Defendant Doe 2, Supervisory Organization

EXHIBIT 13

131 Cal.App.4th 417
Court of Appeal, Second District, Division 3, California.

The ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Petitioner,

SUPERIOR COURT of Los Angeles County, Respondent;
The People, Real Party in Interest.
Does 1 and 2, Petitioners,
v.
Superior Court of Los Angeles County, Respondent;
The People, Real Party in Interest.

Nos. B177852, B180696.
July 25, 2005.
As Modified on Denial of Rehearing Aug. 16, 2005.
Review Denied Nov. 16, 2005 and March 1, 2006.
Certiorari Denied (2 Petitions) April 17, 2006.
See 126 S.Ct. 1783; 126 S.Ct. 1786.

Synopsis

Background: Church and two priests moved to quash grand jury subpoenas duces tecum with regard to documents that were part of grand jury investigation into whether priests had sexually molested children. The Superior Court, Los Angeles County, No. BH001928, Dan Thomas Oki, J., and Thomas F. Nuss, (Retired) J., substantially rejected motions to quash. Church and priests petitioned for writ of mandate seeking to prevent disclosure of documents.

Holdings: The Court of Appeal, Klein, P.J., held that:
1 disclosure of subpoenaed documents did not violate free exercise clause or establishment clause of federal Constitution;
2 clergy-penitent privilege did not apply to subpoenaed documents;
3 psychotherapist-patient privilege did not apply to majority of subpoenaed documents;
4 attorney-client and attorney work product privileges did not apply to subpoenaed documents; and
5 subpoenas were not impermissibly vague.

Petitions granted in part, denied in part.

West Headnotes (29)

Change View

1 **Constitutional Law** Establishment of Religion
Constitutional Law Free Exercise of Religion
The first of the two Religion Clauses of the First Amendment, commonly called the Establishment Clause, commands a separation of church and state, while the second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of the people. U.S.C.A. Const.Amend. 1.

2 **Constitutional Law** Free Exercise of Religion
Constitutional Law Freedom to believe
The First Amendment safeguards the free exercise of the chosen form of religion, embracing the concepts of freedom to believe and freedom to act; the first is

absolute but, in the nature of things, the second cannot be, since conduct remains subject to regulation for the protection of society. U.S.C.A. Const.Amend. 1.

3 **Appeal and Error** Cases Triable in Appellate Court
Judicial decisions regarding the religion clauses of the First Amendment are subject to de novo review. U.S.C.A. Const.Amend. 1.

4 **Constitutional Law** Sexual misconduct by clergy
Grand Jury Compelling Testimony or Production; Subpoenas and Orders
Disclosure of subpoenaed documents by church, as part of grand jury investigation into allegations that two priests sexually molested children while priests worked for church, did not violate the free exercise clause of the federal Constitution; grand jury subpoenas were based on a valid and neutral law of general applicability that would have had, at most, an incidental effect on church's practice of keeping confidential the communications arising out of church's formation of clergy obligation of caring for priests. U.S.C.A. Const.Amend. 1.

See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 375 et seq.; Cal. Jur. 3d, Constitutional Law, §§ 228-230.

5 **Constitutional Law** Neutrality; general applicability
The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his or her religion prescribes or proscribes. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

6 **Constitutional Law** Strict scrutiny; compelling interest
In addressing the constitutional protection for free exercise of religion, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice; a law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

7 **Constitutional Law** Proceedings
Grand Jury Compelling Testimony or Production; Subpoenas and Orders
Ecclesiastical abstention doctrine, as an exception to the general rule that the right of free exercise does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability, did not apply to church that was required to disclose subpoenaed documents as part of grand jury investigation into allegations that church priests had sexually molested children, inasmuch as the case did not involve an internal church dispute, but rather, was a criminal investigation. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

8 **Constitutional Law** Labor and Employment in General
Constitutional Law Proceedings
Grand Jury Compelling Testimony or Production; Subpoenas and Orders
In the context of a church's claim that disclosure of church documents, which were subpoenaed as part of grand jury investigation into allegations that church priests had sexually molested children, would violate the free exercise clause of the federal Constitution, the ministerial exception doctrine did not apply; the ministerial exception, which provides that matters such as clerical salaries, assignments, working conditions, and termination of employment are an

Brief Amicus Curiae for the United States, Acting Through the Attorney General, Supporting Certiorari

1997 WL 33549617
OFFICE OF THE PRESIDENT, Petitioner, v. OFFICE OF INDEPENDENT COUNSEL, et al.
Supreme Court of the United States
Jun 1997

...Petitioner and respondent represent discrete interests of the United States in this specific litigation. The issues presented, however, implicate fundamental concerns of the United States that extend f...

See More Briefs

Trial Court Documents

In re Altegrity, Inc.

2015 WL 727225
In re: ALTEGRITY, INC., et al., Debtors.
United States Bankruptcy Court, D. Delaware.
Feb. 10, 2015

...Upon the motion (the "Motion") of the debtors (the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), pursuant to sections 105(a), 361, 362, 363 and 364 of the Bankruptcy Code...

U.S. v. Haskell

2010 WL 8230380
UNITED STATES OF AMERICA, v. Benjamin HASKELL.
United States District Court, D. Massachusetts.
Nov. 04, 2010

...X Additional documents attached XX/XX/ restitution payment info THE DEFENDANT: X pleaded guilty to count(s) 1s, 2s pleaded nolo contendere to count(s) which was accepted by the court. _ was found gu...

Medical Laboratory Management Consultants v. American Broadcasting Cos, Inc.

1998 WL 35174273
MEDICAL LABORATORY MANAGEMENT CONSULTANTS d/b/a Consultants Medical Lab, et al., Plaintiffs, v. AMERICAN BROADCASTING COMPANIES, INC., et al., Defendants.
United States District Court, D. Arizona.
Dec. 23, 1998

...FN1. A cytotechnologist is a medical laboratory technologist who examines cells under a pathologist's supervision in order to diagnose cancer or other diseases. FN2. John and Carolyn Devaraj are Medica...

See More Trial Court Documents

inherently religious function, did not apply since the case was a criminal investigation rather than an employment matter. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

9 **Constitutional Law** Sexual misconduct by clergy
Grand Jury Compelling Testimony or Production; Subpoenas and Orders
Disclosure by church of subpoenaed documents, as part of a grand jury investigation into whether church priests had sexually molested children, was not barred by the establishment clause of the federal Constitution; disclosure of the subpoenaed documents to the grand jury would not result in government's excessive entanglement with questions of religious doctrine, inasmuch as core issue was whether children were molested by priests, which had no religious doctrine aspect. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

10 **Constitutional Law** Establishment of Religion
A three-part test is used for determining whether a statute violates the Establishment Clause: first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

11 **Constitutional Law** Entanglement
Government's entanglement with religion must be excessive before it runs afoul of the Establishment Clause. U.S.C.A. Const.Amend. 1.

1 Case that cites this headnote

12 **Constitutional Law** Sexual misconduct by clergy
Grand Jury Compelling Testimony or Production; Subpoenas and Orders
Hybrid rights exception to rule requiring an individual to comply with valid and neutral laws, despite a conflict with the individual's religion, did not apply to case in which church refused to disclose subpoenaed documents as part of grand jury investigation into allegations that church priests had sexually molested children, where the church had merely combined its free exercise claim with a meritless establishment clause claim. U.S.C.A. Const.Amend. 1.

13 **Constitutional Law** Neutrality; general applicability
Constitutional Law Strict scrutiny; compelling interest
Under the hybrid rights theory, the First Amendment still bars application of a neutral, generally applicable law to religiously motivated action if the law implicates not only the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press; in such hybrid cases, the law or action must survive strict scrutiny. U.S.C.A. Const.Amend. 1.

14 **Grand Jury** Privilege
Clergy-penitent privilege did not apply to subpoenaed documents that were part of a grand jury investigation into whether church priests had sexually molested children; communications at issue, which consisted of disclosures by priests to a bishop as part of church's interventions to help troubled priests, failed to satisfy statutory privilege requirement that the communication be made to a cleric who was obligated to keep those communications secret, inasmuch as the priests were aware that their communications were likely to be transmitted to third persons, including the vicar for clergy. West's Ann.Cal.Evid.Code § 1032.

6 Cases that cite this headnote

15 **Constitutional Law** Privileges
Courts may not add to the statutory privileges except as required by state or federal constitutional law, nor may courts imply unwritten exceptions to existing statutory privileges.

2 Cases that cite this headnote

16 **Privileged Communications and Confidentiality** Presumptions and burden of proof
Ordinarily, the party claiming an evidentiary privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute.

2 Cases that cite this headnote

17 **Privileged Communications and Confidentiality** Presumptions and burden of proof
A privilege claimant has the initial burden of proving the preliminary facts to show the privilege applies; once the claimant establishes the preliminary facts, the burden of proof shifts to the opponent of the privilege, who must rebut the statutory presumption of confidentiality, or show that the privilege has been waived. West's Ann.Cal.Evid.Code §§ 912, 917(a).

7 Cases that cite this headnote

18 **Appeal and Error** Questions preliminary to admission of evidence
The appellate court reviews the trial court's privilege determination under the substantial evidence standard; when the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it.

9 Cases that cite this headnote

19 **Privileged Communications and Confidentiality** Clergy and spiritual advisers
In order for a statement to be privileged under the clergy-penitent privilege, it must satisfy all of the conceptual requirements of a penitential communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and (3) such member of the clergy must have a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret. West's Ann.Cal.Evid.Code § 1032.

8 Cases that cite this headnote

20 **Grand Jury** Privilege
Psychotherapist-patient privilege did not apply to majority of subpoenaed documents that were part of a grand jury investigation into whether church priests had sexually molested children; communications at issue consisted mostly of memoranda or letters from vicar or clergy pertaining to recommendations made by priests' psychotherapists, and they were not reasonably necessary to accomplish the purposes for which the psychotherapist was consulted. West's Ann.Cal.Evid.Code § 1012.

2 Cases that cite this headnote

21 **Grand Jury** Privilege
Psychotherapist-patient privilege applied to one subpoenaed document that was part of a grand jury investigation into whether church priests had sexually molested children; document consisted of a memorandum from member of vicar for clergy's staff to a priest's psychotherapists, which supplied therapeutic team with information about the troubled priest's personal history as an aid to diagnosis and treatment, and, as such, the disclosure was reasonably necessary to

accomplish the purpose for which the psychotherapist was consulted. West's Ann.Cal.Evid.Code § 1012.

1 Case that cites this headnote

22 **Grand Jury** Privilege
Attorney-client and attorney work product privileges did not apply to subpoenaed documents that were part of a grand jury investigation into whether church priests had sexually molested children, where there was no indication that any of the disputed documents constituted information transmitted between the church and its lawyer. West's Ann.Cal.C.C.P. § 2018(c)(Repealed); West's Ann.Cal.Evid.Code § 952.

23 **Grand Jury** Nature and functions in general
Grand Jury Offenses and accusations
Proper scope of grand jury investigation is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime; the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.

24 **Grand Jury** Indefiniteness or overbreadth; motive and purpose
Subpoenas that requested documents as part of a grand jury investigation into whether church priests had sexually molested children were not overbroad as to time; although the subpoenas effectively asked for every personnel document since the priests had been incardinated in the church, the admissibility of other crimes evidence could be discovered by such requests. West's Ann.Cal.Evid. Code §§ 1101, 1108.

1 Case that cites this headnote

25 **Searches and Seizures** Particularity or generality and overbreadth in general
Although the Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search, a search warrant need only be reasonably specific, rather than elaborately detailed, and the specificity required varies depending on the circumstances of the case and the type of items involved.

1 Case that cites this headnote

26 **Grand Jury** Indefiniteness or overbreadth; motive and purpose
Subpoenas that requested documents as part of a grand jury investigation into whether church priests had sexually molested children were not overbroad as to place, notwithstanding that subpoenas were not limited to crimes committed in particular county; provision of Penal Code allowed a sex crime committed outside that county to be joined with sex crimes committed in that county, and then for the entire case to be prosecuted in that county. West's Ann.Cal.Penal Code § 784.7 (a).

1 Case that cites this headnote

27 **Grand Jury** Indefiniteness or overbreadth; motive and purpose
Subpoenas that requested documents pertaining to "evidence of child molestation and sexual abuse" as part of a grand jury investigation into whether church priests had sexually molested children were not overbroad as to conduct; the term "sexual abuse" could be interpreted to modify "child," and there was no indication that the subpoenas were read in an overly broad manner.

28 **Appeal and Error** Necessity of Setting Forth Evidence Excluded
Appeal and Error Defects, objections, and amendments

Court of Appeal would decline to address claims that subpoenaed documents that were part of a grand jury investigation into whether church priests had sexually molested children could not be disclosed without violating the hearsay rule, the confidentiality of third persons named in the subpoenaed documents, the right of privacy, and privileges, where claimants failed entirely to specify which documents they were challenging, and failed to furnish appellate court with copies of any disputed documents.

2 Cases that cite this headnote

29 **Courts** In issuance of writs

A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the appellate court with a record sufficient to permit such review.

1 Case that cites this headnote

Attorneys and Law Firms

***214** Hennigan, Bennett & Dorman, J. Michael Hennigan, Donald F. Woods, Jr., and Jeffrey S. Koenig, Los Angeles, for Petitioner The Roman Catholic Archbishop of Los Angeles.

Law Offices of Guzin & Steier and Donald H. Steier, Los Angeles, for Petitioners Doe 1 and Doe 2.

O'Melveny & Myers and Charles C. Lifland, Los Angeles, for Monsignor Thomas J. Green as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Steve Cooley, District Attorney (Los Angeles), and Lael Rubin, William Hodgman, Brentford J. Ferreira and Patrick D. Moran, Deputy District Attorneys, for Real Party in Interest.

KLEIN, P.J.

***424 INTRODUCTION**

This proceeding arises out of a grand jury investigation into allegations that two Roman Catholic priests, petitioners Doe 1 and Doe 2 (sometimes hereafter referred to as the Priests), sexually assaulted children while they worked for petitioner Roman Catholic Archbishop of Los Angeles, a Corporation Sole (hereafter referred to as the Archdiocese). In seeking to quash grand jury subpoenas duces tecum, petitioners raise issues that require a balance of the rights of religious belief and practice with the rules of the criminal justice system.

As the California Supreme Court noted in connection with this state's evidentiary privilege for clergy-penitent communications (Evid.Code, §§ 1030–1034), "the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry." (*In re Lifschutz* (1970) 2 Cal.3d 415, 428, 85 Cal.Rptr. 829, 467 P.2d 557.) While it is true the right to religious freedom holds a special place in our history and culture, there also must be an accommodation by religious believers and institutions to the rules of civil society, particularly when the state's compelling interest in protecting children is in question. Although the religion clauses of the First Amendment to ***425** the United States Constitution "embrace[ ] two concepts,—freedom to believe and freedom to act," the first concept "is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303–304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

The Los Angeles County Grand Jury subpoenaed various documents from the Archdiocese which purportedly would allow the grand jury to determine whether to indict the Priests. Petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges. Some of petitioners' ***215** objections were sustained, but the great majority of them were overruled. Petitioners seek to reverse the adverse rulings. With the exception of a single document, we affirm the rulings ordering the subpoenaed materials to be turned over to the grand jury.

PROCEDURAL BACKGROUND

In June and July 2002, the Los Angeles County Grand Jury served subpoenas duces tecum on the Archdiocese's custodian of records, seeking documents relating to child sexual abuse allegedly committed by certain Roman Catholic priests. Except for routine attorney-client communications, the Archdiocese turned over the requested documents. However, several priests and the Archdiocese immediately filed motions to quash the subpoenas. As a result, none of the documents has been turned over to the grand jury.

The parties to this proceeding, the petitioners, the Priests and the Archdiocese, and the real party in interest, the District Attorney of Los Angeles County (District Attorney), stipulated to the appointment of Retired Judge Thomas Nuss as referee (hereinafter, referee) to resolve substantive issues raised by the motions to quash.

On July 15, 2002, the referee concluded the subpoenas were not defective for failing to meet the affidavit requirements set forth in Code of Civil Procedure sections 1985, subdivision (b) (affidavit shall be served with subpoena duces tecum showing good cause and materiality) and 1987.5 (service of subpoena duces tecum is invalid without affidavit).

On July 29, 2002, petitioners sought a writ of mandate from this court vacating the referee's order denying their motions to quash. We issued an order to show cause. After briefing and oral argument, we held a California grand jury has the power to issue a subpoena duces tecum and that such a ***426** subpoena does not require a good cause affidavit. (*M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454.)[1]

On June 25, 2004, the referee quashed all the grand jury subpoenas in response to the United States Supreme Court's decision in *Stogner v. California* (2003) 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, which held California's newly enacted statute of limitations for child molestation was unconstitutional when used to *revive* time-barred prosecutions. However, the referee granted the People leave to serve new subpoenas requesting the identical documents on the assurance and subsequent showing the People were investigating credible, prosecutable claims against named targets.

On June 30, 2004, the People served the two grand jury subpoenas, one for Doe 1 and one for Doe 2, at issue in this writ proceeding.

On July 9, 2004, Does 1 and 2 moved to quash the new subpoenas. The Archdiocese followed with its own motion to quash.

On September 7, 2004, the referee issued a decision which substantially rejected petitioners' motions to quash. Out of the approximately 285 subpoenaed documents challenged by petitioners below, the referee sustained 53 objections and ordered the remaining documents turned over to the grand jury. Of the 53 sustained objections, one was based on the attorney-client privilege (Evid.Code, § 954), two were based on the clergy-penitent privilege (Evid.Code, §§ 1033–1034), and 50 were based on the physician-patient privilege (Evid.Code, § 1014). The referee ****216** stayed disclosure of the documents to enable the parties to seek review.

Thereafter, the Archdiocese filed a petition for writ of mandate in this court seeking to prevent disclosure of 15 documents the referee had ruled could go to the grand jury. The Priests filed their own petition for writ of mandate asking this court to prevent the disclosure of *any* documents to the grand jury. The petitions were consolidated, an order to show cause was issued, production of documents was stayed, and briefing was obtained from the parties.

An amicus curiae brief from Monsignor Thomas Green, a professor of canon law, was filed in support of petitioners' claims.

FACTUAL BACKGROUND

1. *Petitioners' claim the subpoenaed documents cannot be disclosed to grand jury.*
Petitioners contend the referee erred in ruling the subpoenaed documents should be disclosed to the grand jury because compliance with the subpoenas ***427** would violate constitutional and statutory rules. Petitioners assert a Catholic bishop has a religious obligation to care for the physical, emotional and spiritual well-being of the priests within his diocese. Petitioners argue all the communications arising out of this obligation, including communications with the accused priests and the psychotherapists who treat them, are protected from disclosure by the constitutional right to freedom of religion and by California's psychotherapist-patient and clergy-penitent evidentiary privileges. In support of these claims,

petitioners submitted evidentiary declarations, which were opposed by declarations filed by the District Attorney.

2. *Petitioners' evidentiary declarations; their reliance on the church's "formation of clergy" doctrine.*
In declarations supporting its motion to quash, the Archdiocese asserted that according to Roman Catholic doctrine, bishops are the direct successors of the 12 apostles of Jesus Christ.[2] Under the church's "formation of clergy" doctrine, a bishop is charged with the responsibility of sanctifying his priests, and is obligated to "care for and treat any emotional, physical, or spiritual problem a priest may be experiencing."[3] In carrying out this obligation, a bishop "may establish detailed boundaries for his priests concerning chastity" and "pass judgment in particular cases concerning the observance of this obligation. The bishop is obliged to intervene and judge inappropriate conduct of any priest and to impose restrictions and penalties as appropriate in his moral judgment." The Archdiocese argued these tasks require "open communications between the bishop and his priests."

A bishop "is permitted to appoint Episcopal vicars. An Episcopal vicar has the same power as a Bishop in the specific type of activity for which he is appointed." The archbishop in Los Angeles, Cardinal Mahony, has appointed such a vicar, called the Vicar for Clergy, who is obligated to ***217** care for the "emotional, physical, psychological and spiritual lives" of the archdiocesan priests. Monsignor Craig Cox, who is both a canon lawyer and the Vicar for Clergy, declared Cardinal Mahony had established policies for the Archdiocese under which accusations of clerical sexual misconduct immediately are investigated. "The involved priest is confronted and is encouraged to ***428** discuss whatever problems he is experiencing regarding chastity." "Msgr. Cox states 'Based on the fundamental religious relationship between the bishop and his priest, the priest is encouraged to communicate his deepest psychological and sexual issue[s], to undergo psychiatric evaluation and treatment, and to share the results of this therapy with the Vicar and the Bishop. *All of this for the purpose of the ongoing formation and sanctification of the priest.*' " (Italics added.)

If "a canonical investigation of a boundary violation or accusation of sexual misconduct [is required], the process is conducted in accord with the requirements of Canons 1717–1719"[4] and pursuant to Archdiocesan practice. These Canons require the bishop to inquire carefully either personally or through some acceptable person, about the facts and circumstances and about the imputability of the offense. [¶] ... [T]o date, the bishops and priests have always understood that these records would be confidential, and files covering these materials would be kept separately from the priest's normal personnel file."

3. *The District Attorney's evidentiary declarations.*
In an attempt to rebut petitioners' evidentiary claims, the District Attorney submitted declarations from Thomas Doyle, a Roman Catholic priest who is also an expert in canon law.

Father Doyle stated it is expected the preliminary investigation, required by Canons 1717 –1719, will generate a written record. "The information contained in the record may be sensitive and is to be treated accordingly with due regard for the reputations of those involved. It may however, be licitly and properly disclosed to civil law enforcement agencies if it involves [a] matter as serious as sexual abuse." Father Doyle asserted "investigations of child abuse documented by the Archdiocese, through the Vicar for Clergy, which are kept in the 'secret archives' (confidential files) can be and have been supplied to law enforcement in other jurisdictions."

4. *Referee's final decision on petitioners' claims.*
In his final decision, the referee rejected petitioners' claims all the subpoenaed documents had arisen out of the archbishop's religious obligation to care for the physical, emotional and spiritual well-being of his priests, and, ***429** therefore, that disclosing them to the grand jury would violate a constitutional right to freedom of religion, California's evidentiary privileges for clergy-penitent and psychotherapist-patient communications, and various other rules of law.

The referee held the subpoenas violated neither the free exercise clause nor the establishment clause of the federal Constitution. Further, compliance with the subpoenas ***218** would not impermissibly burden petitioners' religious beliefs or practice under *Employment Div., Ore, Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (*Smith*), nor would it create an impermissible governmental entanglement with internal church affairs under *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. As for California's free exercise clause, even under the pre-*Smith* (*Smith*,

supra, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876), compelling state interest test, disclosure was required because the government has a compelling interest in prosecuting child molesters.

While the referee found evidence in the record to support the assertion Cardinal Mahony had a religious obligation to care for his priests, he also found the Archdiocese simultaneously had been engaged in the kind of routine investigation any employer would undertake upon learning a trusted employee had been accused of child molestation. In addition, the referee held the clergy-penitent privilege was inapplicable where the communication had been disclosed to a third person.

Regarding the principal remaining issues, the referee concluded the psychotherapist-patient privilege protected some of the subpoenaed documents, that the prosecution of Doe 1 and Doe 2 was not precluded by the United States Supreme Court's statute of limitations ruling in *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, that the prosecutor had not improperly manipulated the grand jury process, and that the subpoenas were not impermissibly vague or overbroad.

CONTENTIONS

Petitioners' chief contentions are that disclosure of the subpoenaed documents is barred by the First Amendment of the federal Constitution and by the free exercise clause of the California Constitution, as well as by Evidence Code provisions relating to the clergy-penitent and psychotherapist-patient privileges.

Additionally, petitioners contend disclosure of the subpoenaed documents is barred by California's attorney-client and work product privileges; under *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, disclosure of the subpoenaed ***430** documents is barred by the ex post facto clause; the District Attorney improperly usurped the grand jury's authority; the subpoenas duces tecum were impermissibly vague and were issued without proper authority and without the requisite good faith affidavit; and disclosure of the subpoenaed documents is barred by assorted statutory and constitutional rules.

DISCUSSION

1. *Constitutional right to freedom of religion does not bar disclosure of the subpoenaed documents.*

Petitioners contend the disputed documents[5] cannot be turned over to the grand jury without violating their right to freedom of religion. In particular, they claim disclosure of the subpoenaed documents will violate the free exercise and establishment clauses of the First Amendment to the federal Constitution, as well as the free exercise clause of the California Constitution. For the reasons explained below, petitioners' contention is without merit.

a. *General principles.*

1 2 "The Religion Clauses of the First Amendment provide: 'Congress shall ***219** make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." (*Cutter v. Wilkinson* (2005) 544 U.S. 709, 125 S.Ct. 2113, 2120, 161 L.Ed.2d 1020.) The First Amendment "safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut, supra,* 310 U.S. 296, 303–304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

3 Judicial decisions regarding the religion clauses of the First Amendment are subject to de novo review. (See *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1199, 124 Cal.Rptr.2d 867 [establishment clause challenge to religious invocation at municipal function reviewed de novo].)

***431** b. *No violation of the free exercise clause of the federal Constitution.*

4 Petitioners' contention that disclosure of the subpoenaed documents would violate the free exercise clause of the federal Constitution is defeated by *Smith.*

(1) Smith's *new rule for evaluating free exercise claims rests on "neutral laws of general applicability."*

5 In *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, a case involving peyote use by members of the Native American Church in a state (Oregon) which had not

granted an exemption for sacramental use of the drug, the United States Supreme Court adopted a new rule for evaluating free exercise claims. *Smith* rejected the former balancing test (see *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," reasoning "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." (*Smith, supra,* 494 U.S. at pp. 878–879, 883, 110 S.Ct. 1595.) Under the new rule, "the right of free exercise does not relieve an individual of the obligation to comply with a '*valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes*).' [Citation.]" (*Id.* at p. 879, 110 S.Ct. 1595, italics added.)

6 In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, the United States Supreme Court summed up its newly-announced rule "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that *a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.* ... A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (*Id.* at pp. 531–532, 113 S.Ct. 2217, italics added.)

Although *Smith* involved criminal conduct, the case is not limited to such situations. As *Smith* commented, "The ***220** government's ability to enforce generally applicable prohibitions of socially harmful conduct, *like its ability to carry out other aspects of public policy,* 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' [Citation.] To make an individual's obligation to obey such a law ***432** contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,' [citation]—contradicts both constitutional tradition and common sense." (*Smith, supra,* 494 U.S. at p. 885, 110 S.Ct. 1595, fn. omitted, italics added; see *Gary S. v. Manchester School Dist.* (1st Cir.2004) 374 F.3d 15, 18 [rejecting argument *Smith* was "limited to instances of socially harmful or criminal conduct," court applied *Smith* to claim the Individuals with Disabilities Education Act was unconstitutional as applied to disabled child attending Catholic elementary school].)

Smith is applicable here and defeats petitioners' contention the First Amendment's free exercise clause bars disclosure of the subpoenaed documents.

(2) *The "ecclesiastical abstention" doctrine does not apply.*

7 Petitioners, however, argue an exception to the *Smith* rule applies, namely, the ecclesiastical abstention doctrine. This doctrine grew out of the so-called church property cases. However, the church property cases, as exemplified by the ones cited by the Archdiocese, are inapposite because they involve internal church disputes whose resolution crucially depend on interpretations of religious doctrine. [6]

However, the case at bar is not, at its core, an *internal* church dispute. It is a criminal investigation into suspected child molestation allegedly committed by Catholic priests. *Smith* itself characterized the church property decisions as cases in which the government was impermissibly "lend [ing] its power to one or the other side in controversies over religious authority or dogma." (*Smith, supra,* 494 U.S. at p. 877, 110 S.Ct. 1595.) The case at bar does not involve an internal church dispute over religious authority or dogma.

(3) *The "ministerial exception" doctrine does not apply.*

8 Petitioners also argue the *Smith* rule does not defeat their free exercise claim because the so-called ministerial exception doctrine applies. Petitioners' reliance on this exception is misplaced.

***433** The ministerial exception doctrine is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, is an inherently religious function because clergy are such an integral ****221** part of a church's functioning as a religious institution. (See, e.g., *Werft v. Desert Southwest Annual Conference* (9th Cir.2004) 377 F.3d 1099, 1101.) This is not an employment case and the ministerial exception doctrine has no application here.

(4) Smith *applies to these grand jury subpoenas.*

The Archdiocese contends *Smith* is inapplicable because there is no legislative act at issue, and because subpoenas are not neutral laws of general application. This argument misconstrues the notion of generally applicable neutral laws. "A law is not neutral towards religion if its 'object ... is to infringe upon or restrict practices because of their religious motivation....' [Citation.] A law is not generally applicable if it 'in a selective manner impose[s] burdens only on conduct motivated by religious belief....' " (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 550, 10 Cal.Rptr.3d 283, 85 P.3d 67.) The neutral law of general applicability at issue here is the statutory and common law[7] basis of California's grand jury process. That this particular grand jury investigation and the subpoenas it generated are directed at a Catholic archdiocese is merely an incidental effect of the grand jury process.

In *Matter of Grand Jury Subpoena (Chinske)* (D.Mont.1991) 785 F.Supp. 130, the petitioner claimed that having to comply with a grand jury subpoena would violate his religious beliefs. At oral argument, the petitioner's attorney "attempted to distinguish *Smith* ... by claiming that the compulsion to testify before the grand jury is not a law of general application prohibiting certain conduct." (*Id.* at p. 133.) Commenting that "[c]ounsel clearly does not appreciate the scope of the Supreme Court's recent rulings concerning free exercise claims," the federal court held "*Smith* clearly does not apply only to cases where the law in question prohibits certain conduct, since the court considered tax collection cases in reaching its decision. [Citation.] The laws of this land compel all persons to pay taxes assessed by various governmental bodies, regardless of their religious convictions, ... In much the same way, the laws of this land compel all persons to testify before the grand jury when subpoenaed to do so...." (*Id.* at pp. 133–134.) Assuming for the purpose of ***434** decision that the petitioner's religious beliefs were sincere, the court held the free exercise claim was defeated by *Smith* because any burden on petitioner's religious beliefs was not the object of the grand jury subpoena, but " 'merely the incidental effect of a generally applicable and otherwise valid' governmental action." (*Id.* at p. 134.)

We similarly conclude the grand jury subpoenas here do not violate the free exercise clause of the federal Constitution because they are based on a valid and neutral law of general applicability that will have, at most, an incidental effect on the archdiocese's practice of keeping confidential the communications arising out of the Archbishop's formation of clergy obligation of caring for his priests.

c. *No violation of the establishment clause of the federal Constitution.*

9 Petitioners contend disclosure of the subpoenaed documents is barred by ****222** the establishment clause of the federal Constitution. This claim is without merit because the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines.

10 11 "The Establishment Clause provides that 'Congress shall make no law respecting an establishment of religion....' [Citation.] In *Lemon v. Kurtzman*, 403 U.S. 602[, 91 S.Ct. 2105, 29 L.Ed.2d 745] ... (1971), the Supreme Court established a three-part test for determining whether a statute violates the Establishment Clause: [¶] First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. [Citation.]" (*E.E.O.C. v. Catholic University of America* (D.C.Cir.1996) 83 F.3d 455, 465.) "Although it is difficult to attach a precise meaning to the word 'entanglement,' courts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pit[s] church and state as adversaries,' [citation], and where the Government is placed in a position of choosing among 'competing religious visions.' [Citation.]" (*Ibid.*) "Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, [citation], and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (*Agostini v. Felton* (1997) 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391.)

The Archdiocese asserts that, under *Lemon*, "[t]he constitutional question can be simply put: Does the state action (here it is a subpoena) interfere with ***435** a religious practice?" The Archdiocese answers this question as follows "The effect of these subpoenas is to interfere with the bishop's pastoral and episcopal relationship with his priests in need, to destroy any serious pastoral discussion of deeply personal and intimate concerns of the priests regarding their celibacy, sexuality and emotional and psychological needs, and to 'foster an "excessive government entanglement with religion." ' [Citation.] More specifically, these

subpoenas interfere directly with ecclesiastical policy by mandating the disclosure of information that, under Roman Catholic practice, is held in strict confidence."

The Archdiocese asserts the closest Supreme Court decision to the case at bar is *NLRB v. Catholic Bishop of Chicago* (1979) 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, which held the National Labor Relations Board's (NLRB) exercise of jurisdiction over lay teachers at Catholic high schools presented a significant First Amendment risk. However, the core issue in that case was whether there had been unfair labor practices, and it was this issue which was necessarily entangled with questions of religious doctrine. [8]

However, the core issue in the case at bar is whether children were molested by priests who worked for the Archdiocese, an issue having no comparable religious doctrine aspect.

****223** Also pertinent here is *Society of Jesus of New England v. Com.* (2004) 441 Mass. 662, 808 N.E.2d 272, in which the Massachusetts Supreme Judicial Court rejected a claim that disclosure of a priest's personnel file, in connection with a criminal prosecution for sexual assault, would violate the establishment clause. The court explained "With regard to the test of 'effect' on religion, we must look at the law's 'principal or primary effect,' *Lemon v. Kurtzman, supra,* not at its incidental effects. Here, the alleged inhibition on religion is not a 'principal or primary' effect of the subpoena, although it may, in a subtle way, provide some disincentive that would arguably discourage accused priests from being totally forthcoming with their superiors.... [¶] *Nor does the enforcement of this subpoena result in any excessive government entanglement with religion.* The court can decide issues of relevance, burdensomeness, and the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings of the Jesuits. Indeed, the only form of 'entanglement' with religion at issue in the motions to quash is a form that [the priest] and the Jesuits have ***436** themselves invited, namely, the court's consideration whether [the priest's] communications qualify for protection under the priest-penitent privilege.... Assessment of the applicability of that privilege does not lead to excessive government entanglement in religion." (*Id.* at p. 283, fn. omitted, italics added.)

This case is analogous to *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, rather than to *NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533. We conclude disclosure of the subpoenaed documents to the grand jury will not result in excessive entanglement or any other violation of the establishment clause.

d. "*Hybrid rights" exception to* Smith *not applicable.*

12 Petitioners contend disclosure of the subpoenaed documents would violate the First Amendment because the so-called hybrid rights exception to the *Smith* rule applies in this case. The Archdiocese argues "the neutrality rule of *Smith* does not apply" here because "the challenged state conduct interferes with the free exercise of religion *and* causes excessive entanglement." This claim is without merit.

13 As a doctrinal matter, the nature and scope of the so-called hybrid rights exception to *Smith* is rather nebulous. "The *Smith* court developed the hybrid claim exception in an effort to explain several past decisions which invalidated on free exercise grounds laws that appeared to be neutral and generally applicable. [Citation.]" (*Gary S. v. Manchester School Dist.* (D.N.H.2003) 241 F.Supp.2d 111, 121, fn. omitted, affd. (1st Cir.2004) 374 F.3d 15, 19.) "The most relevant of the so-called hybrid cases is *Wisconsin v. Yoder,* 406 U.S. 205, 232–33 ... [92 S.Ct. 1526, 32 L.Ed.2d 15] (1972), in which the Court invalidated a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to school." (*Brown v. Hot, Sexy and Safer Productions, Inc.* (1st Cir.1995) 68 F.3d 525, 539.) Under the hybrid rights theory, " 'the First Amendment [still] bars application of a neutral, generally applicable law to religiously motivated action' if the law implicates not only 'the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press [.]' [Citation.] In such 'hybrid' cases, the law or action must survive strict scrutiny." (*San Jose* ****224** *Christian College v. Morgan Hill* (9th Cir.2004) 360 F.3d 1024, 1031.)

However, even assuming a hybrid rights exception to *Smith,* it would not apply to this case because the Archdiocese merely has combined a free exercise claim with a meritless establishment clause claim. (See ***437** *Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. 15 ["Catholic Charities perfunctorily asserts that its claims under the establishment clause [citation] also justify treating this case as involving hybrid rights. We have, however, already determined that

those claims lack merit."].) Hence, *Smith's* "valid and neutral rule of law of general applicability" standard does apply to petitioners' federal free exercise claim.

e. *California free exercise claim is meritless.*
Petitioners contend the *Smith* rule does not apply to a free exercise claim under the California Constitution and that we should apply, instead, the pre-*Smith* compelling state interest test. However, we conclude that even pursuant to the former strict scrutiny test, under which governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, disclosure of the subpoenaed documents would not violate petitioners' rights. Therefore, we need not decide whether *Smith* applies to California's free exercise clause.

California's free exercise clause (Cal. Const., art. I, § 4.) provides "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."

The *Smith* case was decided in 1990. In 2004, the California Supreme Court was faced in *Catholic Charities of Sacramento, Inc.v. Superior Court, supra,* 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67 with a claim that the pre-*Smith* test applies to California's free exercise clause because its language differs from the federal free exercise clause.[9] "Catholic Charities' final argument for applying strict scrutiny invokes the free exercise clause of the California Constitution. [Citation.] That clause, Catholic Charities contends, forbids the state to burden the practice of religion, even incidentally, through a neutral, generally applicable law, unless the law in question serves a compelling governmental interest and is narrowly tailored to achieve that interest. Catholic Charities asserts, in other words, that we must interpret the California Constitution the same way the United States Supreme Court interpreted the federal Constitution's free exercise clause in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965." (*Catholic Charities,* at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. omitted.)

Saying that in the proper case it would not have hesitated "to declare the scope and proper interpretation of the California Constitution's free exercise clause," *Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at page 562, 10 Cal.Rptr.3d 283, 85 P.3d 67 concluded it did not need to do so because the pre-*Smith* ***438*** strict scrutiny test[10] had been ****225*** met. *Catholic Charities* involved the claim by a religiously-connected nonprofit public benefit corporation that it had been impermissibly burdened by the Women's Contraception Equity Act (WCEA), a law requiring certain health and disability contracts to cover prescription contraceptives. The Supreme Court held "Assuming for the sake of argument the WCEA substantially burdens a religious belief or practice, the law nevertheless serves a compelling state interest and is narrowly tailored to achieve that interest. [¶] The WCEA serves the compelling state interest of eliminating gender discrimination." (*Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at pp. 563–564, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

We reach a similar conclusion here. As the following case law demonstrates, the grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest.

In *Branzburg v. Hayes* (1972) 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, in the course of holding that reporters may be required to testify before grand juries about the criminal conduct of their confidential sources, the United States Supreme Court said "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that '*the public ... has a right to every man's evidence,*' except for those persons protected by a constitutional, common-law, or statutory privilege...." (*Id.* at p. 688, 92 S.Ct. 2646, italics added.) "The requirements of those cases, [citation], which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, *the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen,* and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' [Citation.]" (*Id.* at p. 700, 92 S.Ct. 2646, italics added.)

With a nod to *Branzburg,* many federal cases since have held that compelled testimony before a grand jury in violation of a witness's religion does not constitute a free exercise violation. We rely on federal cases in this context because (1) before *Smith* was decided,

both the federal and the California free exercise clauses were analyzed under the compelling state interest test (see ***439** *Walker v. Superior Court* (1988) 47 Cal.3d 112, 138–141, 253 Cal.Rptr. 1, 763 P.2d 852), and (2) we have found no California cases involving free exercise clause claims in a grand jury context.

These federal cases have assumed, for the purpose of decision, that the witness's objection to testifying was both sincerely held and religiously grounded. Each case concluded the ensuing burden on the witness's religious belief was outweighed by the compelling state interest in obtaining grand jury testimony. (See *In re Grand Jury Empaneling of Special Grand Jury* (3d Cir.1999) 171 F.3d 826, 832 [even if Orthodox Jewish law proscribed giving grand jury testimony against family member, "the government's interest in securing the evidence" in white collar crime case was "compelling" because "the duty to prosecute persons who commit serious crimes is part and parcel of the government's 'paramount responsibility for the general safety and welfare of all its citizens' ****226** "]; *Grand Jury Proceedings of John Doe v. U.S.* (10th Cir.1988) 842 F.2d 244, 247–248 [Mormon belief proscribing intra-family testimony before grand jury was outweighed by compelling state interest in investigating violation of federal criminal law]; *In re Three Children* (D.N.J.1998) 24 F.Supp.2d 389, 392 ["the government's interest in investigating and successfully prosecuting crimes, which invariably includes taking the grand jury testimony of witnesses, far outweighs the incidental burden on the professed free exercise of religion in this matter."]; see also *Congregation B'Nai Jonah v. Kuriansky* (1991) 576 N.Y.S.2d 934, 936 [172 A.D.2d 35, 39] [state's interest in enforcing subpoenas for Medicaid fraud investigation outweighed infringement on free exercise "Unquestionably, the State has a profound interest in fighting corruption in the Medicaid industry and in enforcing its tax laws [citations]."].)

The Priests also argue that because the "documents pertain to confidential communications of a most private nature between a Roman Catholic bishop and the priests he ordained," their disclosure "will chill the free exercise of their religion, and inevitably and impermissibly alter the relationship [between] Catholic bishops and priests and the way they practice their religion."

However, several jurisdictions have rejected similar arguments and we agree with their reasoning. (See *People v. Campobello* (2004) 348 Ill.App.3d 619, 284 Ill.Dec. 654 658–59, 810 N.E.2d 307, 311–312 [Catholic diocese must comply with government subpoena in sexual assault prosecution against priest, even if Canon 489 requires bishop to maintain secret archive for files relating to internal church discipline]; *Com. of Penn. v. Stewart* (1997) 547 Pa. 277 [690 A.2d 195, 201–202] [criminal defendant's compelling interest in fair trial outweighed Catholic diocese's claim to withhold documents deemed confidential under canon law because "the burden on the Diocese's religious freedom furthers a compelling governmental interest by the least restrictive means available"]; ***440** *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, 279 [state could subpoena personnel file of priest charged with sexual assault even if such disclosure would inhibit "communications that are necessary to maintain the Jesuits' relationship with one of its own priests"].)

Hence, we conclude that even if the pre-*Smith* compelling state interest test governs a California free exercise claim, that test is met here.

f. *Conclusions regarding federal and state constitutional contentions.*
We are not persuaded by any of petitioners' freedom of religion arguments. We conclude disclosure of the subpoenaed documents is not barred by the First Amendment to the federal Constitution, or by the free exercise clause of California's Constitution. Having so determined, we next examine the two principal statutory grounds petitioners rely on to prevent disclosure of the subpoenaed documents to the grand jury, the clergy-penitent privilege and the psychotherapist-patient privilege.

2. *Documents in question do not satisfy criteria for application of clergy-penitent privilege, irrespective of the formation of clergy theory.*
Evidence Code section 1032, within the article relating to the clergy-penitent privilege, defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, ****227** denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, *has a duty to keep those communications secret.*" (Italics added.)[11]

Petitioners argue the subpoenaed documents constitute privileged penitential communications within the meaning of Evidence Code section 1032 because they were generated in the course of the formation of clergy process during the Archdiocese's interventions to help troubled priests.

*441 Petitioners' contention fails. The penitential communications are not privileged because they were not "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." (Evid.Code, § 1032.)

a. *Statutory scheme is controlling.*

15 "Evidence Code section 911 provides, in relevant part: 'Except as otherwise provided by statute: [¶] ... [¶] (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.' This section declares the California Legislature's determination that 'evidentiary privileges shall be available *only as defined by statute.* [Citation.] Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], nor may courts imply unwritten exceptions to existing statutory privileges. [Citations.]' (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 20 Cal.Rptr.2d 330, 853 P.2d 496 ... see *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, 125 Cal.Rptr. 553, 542 P.2d 977) ... [privileges contained in Evidence Code are exclusive and courts are not free to create new privileges as matter of judicial policy unless constitutionally compelled]...." (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 887, 8 Cal.Rptr.3d 146, italics added.)

"In section 911 of the Evidence Code, the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy. [Citations.] Thus, unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal." (*Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769, 190 Cal.Rptr. 919, 661 P.2d 1073.)

b. *Parties' respective burdens of proof.*

16 Ordinarily, "[t]he party claiming [an evidentiary] privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute." (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729, 36 Cal.Rptr. 468, 388 P.2d 700; see, e.g., **228 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 370, 122 Cal.Rptr.2d 504 [per *Chadbourne,* Department of Motor Vehicles bore burden of establishing claim of privilege based on Evid.Code, § 1040 (public entity has privilege to resist disclosure of official information)].)

Here, however, it was ultimately the District Attorney's burden to overcome the presumption of confidentiality.

*442 Evidence Code section 917 provides at subdivision (a) "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, *psychotherapist-patient, clergy-penitent,* husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, *the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.*" (Italics added.)

17 Thus, in this context, the privilege-claimant "has the *initial burden* of proving the *preliminary facts* to show the privilege applies." (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014, 135 Cal.Rptr.2d 532, italics added.) [12] "Once the claimant establishes the preliminary facts ..., *the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] ... Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912 [[13]...." (*Story, supra,* at p. 1015, 135 Cal.Rptr.2d 532, italics added.)

c. *Standard of review.*

18 We review the trial court's privilege determination under the substantial evidence standard. " ' "When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations]." ' [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the

undisputed facts, an appellate court may not overturn the trial ***443*** court's decision to reject that claim." (*HLC Properties, Limited v. Superior Court* (2005) 35 Cal.4th 54, 60, 24 Cal.Rptr.3d 199, 105 P.3d 560, fn. omitted.)

****229*** d. *Development of California's clergy-penitent privilege.*
"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive clerical consolation in return." (*Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186.) "The present day clergy-penitent privilege has its origin in the early Christian Church sacramental confession which existed before the Reformation in England. It has evolved over the years into the contemporary 'minister's' privilege adopted in some form in virtually every state of this country. (Yellin, *The History and Current Status of the Clergy–Penitent Privilege* (1983) 23 Santa Clara L.Rev. 95.)" (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362–1363, 248 Cal.Rptr. 53.)

As noted, California's clergy-penitent privilege is contained in Evidence Code sections 1030 –1034. Before these sections were enacted in 1965, the privilege was defined by Code of Civil Procedure section 1881, subdivision (3), which provided "A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the *confession,* be examined as to any *confession* made to him in his professional character in the course of discipline enjoined by the church to which he belongs." (Italics added.) The current statute makes no reference to confessions, and instead provides an evidentiary privilege for " 'penitential communication.' " (Evid.Code, § 1032.)

e. *For clergy-penitent privilege to attach, requirements of Evidence Code section 1032 must be satisfied.*
The central provision of California's clergy-penitent privilege is Evidence Code section 1032, which defines a penitential communication as a confidential communication made to a clergy person who is authorized to hear and obligated to keep secret such communications.

19 However, even with the privilege centered on a "communication," rather than on a "confession," not every statement made to a member of the clergy is privileged. "In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) *it must be intended to be in confidence;* 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy ***444*** *has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.* (§ 1032; 2 Jefferson, Cal. Evidence Benchbook (2d ed.1982) § 39.1, pp. 1405–1407.)" (*People v. Edwards, supra,* 203 Cal.App.3d at pp. 1362 –1363, 248 Cal.Rptr. 53, italics added.)

f. *Petitioners' theory as to why clergy-penitent privilege is applicable.*
Mindful of the criteria of Evidence Code section 1032 requiring a communication to be made in confidence, in the presence of no third person, to a member of the clergy who is authorized to hear the communication and who, under the tenets of the church, has a duty to keep said communication secret, the petitioners invoke the Roman Catholic church's formation of clergy doctrine. They presented evidence below showing that pursuant to this religious doctrine, a bishop is charged with the obligation to care for the physical, spiritual, emotional and psychological well-being of the priests within his diocese. Further, the obligation imposed by this doctrine includes intervention with priests who are experiencing problems related to celibacy and sexuality, including an "intervention ****230*** interview" with the accused priest. The evidence also showed the Los Angeles Archdiocese encouraged priests to discuss such problems with Cardinal Mahony and the Vicar for Clergy.

The Archdiocese argues the challenged subpoenaed documents fall within California's clergy-penitent privilege because they were confidential communications made in the course of troubled-priest interventions, and under the tenets of the church, Cardinal Mahony and the Vicar for Clergy were authorized to hear the communications and obligated to keep them secret. The Archdiocese also presented evidence the interventions with troubled priests depend on the troubled priests' understanding the communications will be held in confidence *within the church.*

g. *Subject communications do not meet criteria of Evidence Code section 1032.*
Petitioners' theory conflicts with Evidence Code section 1032, which defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware," to a clergy person who must keep the communication secret. (Italics added.)

The record demonstrates the participants in the Archdiocese's troubled-priest interventions knew any communications likely were to be shared with **445* more than one person. According to the Archdiocese's declared policy, priests experiencing psychological and sexual problems were encouraged to discuss those problems with the archbishop and the Vicar for Clergy. Furthermore, the subpoenaed documents themselves amply demonstrate that communications to and from the individual priests were routinely shared by Cardinal Mahony, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees as well.

This sharing of information violates Evidence Code section 1032's requirement that the penitent's communication be "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." The fact both parties to the original communication knew it likely would be transmitted to a third person vitiated ab initio any privilege under Evidence Code section 1032, or, alternatively, constituted a waiver of the privilege under Evidence Code section 912, subdivision (a). [14]

Here, the record demonstrates the District Attorney met the burden of rebutting Evidence Code section 917's presumption of confidentiality by proving the Priests were aware the communications were likely to be transmitted to third persons.

The Archdiocese argues these communications were not transmitted "to any third party, that is, someone outside of the bishop ***231* (or his alter ego, the Vicar for Clergy)." The contention is unavailing. We reject the argument that just because Cardinal Mahony considers the Vicar for Clergy his surrogate for dealing with troubled priests, there was no violation of Evidence Code section 1032's requirement that the communication be "made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who ... has a duty to keep those communications secret."

**446* With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the clergy-penitent privilege. Guided by the principles set forth above, we uphold the referee's rulings in their entirety as follows.

Doe 1 No. 16–17: This is a letter from Cardinal Mahony to a priest. The referee reasonably could conclude the three numbered subparagraphs of this letter did not constitute penitential communications because they merely notified the priest of certain administrative decisions made by the Archdiocese. In any event, the entire letter is not covered by the clergy-penitent privilege because it was not sufficiently confidential. Not only did the priest know such communications were likely to be shared with the Vicar for Clergy, but the letter itself announced a copy was being sent to the Vicar.

Doe 1 No. 50–52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum from the Vicar transmitting the priest's letter to Cardinal Mahony. The referee reasonably could conclude the letter was not within the clergy-penitent privilege because it merely discussed administrative actions taken by the Archdiocese, asked for legal information and suggested future job assignments. Furthermore, the letter was not sufficiently confidential to constitute a penitential communication because the priest knew it was likely to be shared with a third person. Further, the cover memorandum does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 1 No. 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation with a priest. The referee reasonably could conclude this document did not constitute a penitential communication because it merely reported on the priest's cooperation with his therapists, strategized about possible legal problems and discussed church assignments. Moreover, the letter was not within the clergy-penitent privilege because it was not sufficiently confidential in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 1 No. 397–400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The December 24, 1986, entry is a summary of Doe 1 No. 16–17, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

*447 The June 22, 1987, entry is a summary of Doe 1 No. 80, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

Doe 2 No. 13: This is a letter to Cardinal Mahony's predecessor from an official of the Archdiocese then responsible for ministering to troubled priests. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 No. 23: This is a memorandum to the file, written by the Vicar for Clergy, **232 reporting on a third person's observation and evaluation of a priest's conduct in a particular situation. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 No. 31–32: This is a memorandum from the Vicar for Clergy to Cardinal Mahony. The Archdiocese is only objecting to two paragraphs of this document. The third paragraph merely repeats communications, contained in Doe 2 No. 13 and Doe 2 No. 23, which we have concluded do not fall within the clergy-penitent privilege. The same result applies to this summary of those documents. The referee reasonably could conclude the information contained in the seventh paragraph of the memorandum did not constitute a penitential communication because it merely related an incident in the priest's personal history. In any event, the entire memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 No. 34: This is a memorandum from a member of the Vicar for Clergy's staff to the Vicar for Clergy. A copy of the memorandum was transmitted to another member of the Vicar for Clergy's staff. The referee reasonably could conclude the document was not a penitential communication because it merely related incidents in the priest's personal history and offered an evaluation of the priest's situation. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest. In any event, the memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 No. 79: This is a letter from Cardinal Mahony to a priest, responding to a letter from the priest. A copy of Cardinal Mahony's letter was transmitted to the Vicar for Clergy. The letter was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

*448 Doe 2 No. 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. The referee reasonably could conclude this document did not constitute a penitential communication because it was merely a status report concerning the priest's progress in psychotherapy. In any event, the document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 No. 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing the establishment of an aftercare program for when a priest completes psychotherapy. The document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 2 No. 183: This is a letter from the Vicar for Clergy to a priest. The referee reasonably could conclude the document did not constitute a penitential communication because it was largely taken up with administrative matters and any penitential aspect was insignificant. Moreover, the document was not sufficiently confidential to constitute a penitential communication **233 in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 No. 278: This document consists of excerpts from three of the documents discussed above (Doe 2 No. 140, No. 172 & No. 183), which we have concluded do not fall within the clergy-penitent privilege. The same result applies to these excerpts of those documents.

In sum, we conclude that none of the particular subpoenaed documents challenged by the Archdiocese falls within California's clergy-penitent privilege, and we affirm *all* of the referee's rulings in this regard.

3. *Application of psychotherapist-patient privilege to Archdiocese's claims regarding particular documents; the communication must be "reasonably necessary" to accomplish the purpose for which the psychotherapist was consulted.*

a. *Controlling statute: Evidence Code section 1012.*
California's psychotherapist-patient privilege provides that a " 'confidential communication between patient and psychotherapist' means information, including information obtained by an examination of the patient, transmitted ***449** between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Evid.Code, § 1012, italics added.)[15]

b. *Petitioners' theory why the psychotherapist-patient privilege is applicable to the disputed documents.*
20 Similar to their arguments for the application of the clergy-penitent privilege, petitioners assert that certain communications made in the context of the formation of clergy process are privileged pursuant to the psychotherapist-patient privilege.

Petitioners acknowledge the statutory language requiring that information communicated in psychotherapy not be disclosed to third persons other than those necessary to further the interests of the patient in the consultation. They argue that disclosures to third parties were duly made as reasonably necessary to accomplish the purpose of the psychotherapy, namely, diagnosis and treatment of issues relating to celibacy and sexuality, and therefore remain confidential within the meaning of Evidence Code section 1012.

c. *Case law interpretation of Evidence Code section 1012; to remain privileged, disclosure to third persons must be in furtherance of the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient.*
To reiterate, Evidence Code section 1012 defines a confidential communication between patient and psychotherapist as information transmitted between a patient and his or her psychotherapist in the course of that relationship, which information is disclosed "to no third persons other than those who are present to further the ***234** interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary* for the transmission of the information or *the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Italics added.)

***450** The *purpose* for which a psychotherapist is consulted is set forth in Evidence Code section 1011, which defines "patient" as "a person who consults a psychotherapist or submits to an examination by a psychotherapist *for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition* or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." (Italics added.)

There is ample case law illustrating disclosures to third persons which are "reasonably necessary" for the accomplishment of the *purpose* for which the psychotherapist was consulted. (Evid.Code, § 1012.)

In *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, 140 Cal.Rptr. 278, the issue presented was whether the plaintiff in a personal injury action was entitled to discovery of a minor defendant's psychiatric hospital records, on the theory the records might contain statements made by the minor's parents to the hospital staff indicating the parents had knowledge of the minor's propensities for violence. (*Id.* at p. 504, 140 Cal.Rptr. 278.)

Grosslight held such communications between parent and hospital were shielded by the psychotherapist-patient privilege because they were made "for the purpose of furthering the child's interest in communicating with the psychotherapist and ... *to facilitate the diagnosis and treatment of the child.*" (*Id.* at p. 506, 140 Cal.Rptr. 278, italics added.) *Grosslight* reasoned "Although the [patient] at 16 or 17 is clearly old enough verbally to communicate with her doctors, the nature of her problem is psychiatric, and it is entirely possible that her

psychiatric illness precludes objective, accurate and complete communication by her with hospital personnel without the cooperation of her parents." (*Id.* at p. 507, 140 Cal.Rptr. 278.) Thus, any parental communication *to the hospital staff* in *Grosslight* would be privileged because it was made to assist in the diagnosis and treatment of the patient.

In *People v. Gomez* (1982) 134 Cal.App.3d 874, 185 Cal.Rptr. 155, the defendant contended that statements he made to students serving as interns with the family court services office were privileged. (*Id.* at p. 880, 185 Cal.Rptr. 155.) *Gomez* rejected that argument, noting the psychotherapist-patient privilege extended to virtually every licensed classification of "therapist" but did not apply to student interns. (*Id.* at pp. 880–881, 185 Cal.Rptr. 155; see Evid.Code, § 1010.)[16] *Gomez* went on to state, however, that under some circumstances, communications to student interns could be privileged if the students were working "*under the supervision of a licensee to whom the privilege does attach* [citation]." (*Id.* at p. 881, fn. 3, 185 Cal.Rptr. 155, italics added.)

***451** In *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485, 212 Cal.Rptr. 516, the prosecution sought access to written records relating to conversations between a defendant and a clinical social worker, one Gramajo. (*Id.* at p. 487, 212 Cal.Rptr. 516.) Gramajo was not a therapist to whom the privilege attached but "he worked under such a person generally, and [defendant's] case was ultimately *controlled and supervised by persons to whom the privilege attached.*" (*Id.* at p. 490, 212 Cal.Rptr. 516, italics added.) *Luhdorff* was guided by "[t]he language of ***235** [Evidence Code] section 1012 [which] plainly indicates that communications made by patients to persons *reasonably necessary to assist psychiatrists and psychologists in the treatment of the patient's mental disorder* come within the privilege." (*Id.* at p. 489, 212 Cal.Rptr. 516, italics added.) *Luhdorff* concluded "Gramajo clearly falls within the category of persons reasonably necessary for the transmission of information or the accomplishment of the purpose for which the psychotherapist is consulted." (*Id.* at p. 490, 212 Cal.Rptr. 516.)

In *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 250 Cal.Rptr. 25, the question presented was "whether communications made by a patient to other persons participating in a group therapy session [conducted by a counselor at a state hospital] come within the psychotherapist-patient privilege." (*Id.* at p. 527, 250 Cal.Rptr. 25.)

Farrell L. reasoned "the other participants in a group therapy session are those who are present *to further the interest of the patient in the consultation ... or the accomplishment of the purpose for which the psychotherapist is consulted* ...." (Evid.Code, § 1012.) The language of Evidence Code section 1012 plainly indicates that communications made by patients to persons who are present to further the interests of the patient come[ ] within the privilege. 'Group therapy' is designed to provide comfort and revelation to the patient who shares similar experiences and/or difficulties with other like persons within the group. The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment. Communications such as these, when made in confidence, should not operate to destroy the privilege." (*Farrell L., supra,* 203 Cal.App.3d at p. 527, 250 Cal.Rptr. 25, italics added.)

In *In re Pedro M.* (2000) 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, the juvenile court ordered a minor to "[c]ooperate in a plan for psychiatric, psychological testing or treatment." (*Id.* at p. 553, 96 Cal.Rptr.2d 839.) The minor subsequently contended the juvenile court erroneously admitted the testimony of his therapist after he invoked the psychotherapist-patient privilege. (*Id.* at p. 554, 96 Cal.Rptr.2d 839.) *Pedro M.* concluded said privilege did not preclude the therapist from testifying at the adjudication of the supplemental petition concerning the minor's participation and progress in the court-ordered treatment plan. (*Id.* at p. 555, 96 Cal.Rptr.2d 839.)

***452** *Pedro M.* explained "Evidence Code section 1012 itself permits disclosure of a confidential communication between patient and psychotherapist to '*those to whom disclosure is reasonably necessary for ... the accomplishment of the purpose for which the psychotherapist is consulted* ....' In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation." (*In re Pedro M., supra,* 81 Cal.App.4th at p. 554, 96 Cal.Rptr.2d 839, italics added.)

In re Mark L. (2001) 94 Cal.App.4th 573, 114 Cal.Rptr.2d 499 held "[t]he rationale of *In re Pedro M., supra,* 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, is applicable in the juvenile dependency context, in which therapy has a dual purpose—treatment of the child to

ameliorate the effects of abuse or neglect and the disclosure of information from which reasoned recommendations and decisions regarding the child's welfare can be made. As the Supreme Court has observed, '[w]ithout the testimony of psychologists, in many juvenile dependency ***236** and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court.' (*In re Jasmon O.* (1994) 8 Cal.4th 398, 430 [33 Cal.Rptr.2d 85, 878 P.2d 1297].)" (*Id.* at p. 584, 33 Cal.Rptr.2d 85, 878 P.2d 1297.)

Most recently, in *In re Christopher M.* (2005) 127 Cal.App.4th 684, 26 Cal.Rptr.3d 61, the juvenile court placed the defendant on probation subject to numerous conditions, including conditions requiring that all records related to his medical and psychological treatment be made available upon request to the court and to the probation department. (*Id.* at pp. 687, 690, 26 Cal.Rptr.3d 61.) Defendant contended said conditions of probation violated the psychotherapist-patient privilege. (*Id.* at p. 695, 26 Cal.Rptr.3d 61.)

Christopher M. rejected the argument, explaining the express language of Evidence Code section 1012 "permits disclosure of otherwise privileged communications between patient and psychotherapist to third persons to whom disclosure is *reasonably necessary to accomplish the purpose* for which the psychotherapist is consulted." (*In re Christopher M., supra,* 127 Cal.App.4th at p. 696, 26 Cal.Rptr.3d 61, italics added.) *Christopher M.* observed "Here, by reasonably limiting disclosure of otherwise privileged psychotherapist-patient communications to the probation officer and the court, the court acted under the authority of Evidence Code section 1012 and avoided unnecessary disclosure of those communications." (*Ibid.*)

***453** Additionally, we briefly look to case law relating to the physician-patient privilege, which is analogous to the psychotherapist-patient privilege. [17]

In *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 114 Cal.Rptr. 603, 523 P.2d 643, the plaintiff sued drug manufacturers for damages for injuries allegedly caused by a defective drug. (*Id.* at p. 927, 114 Cal.Rptr. 603, 523 P.2d 643.) Defendants refused to produce their records containing adverse drug reaction reports on the ground that such reports constituted confidential communications by various physicians and that their production would be violative of the physician-patient privilege. (*Ibid.*)

Rudnick explained "The 'disclosure in confidence [by the physician] of a communication that is protected by [the] (physician-patient privilege) ... *when such disclosure is reasonably necessary for the accomplishment of the purpose for which the* ... physician ... was consulted, is not a waiver of the privilege.' [Citation.] Thus, for example, if the physician reported to defendants the adverse effects of the drug on his patient so as to obtain assistance in the use of the drug in treating the patient, such disclosure even if consented to by the patient would not constitute a waiver of the privilege." (*Rudnick v. Superior Court, supra,* 11 Cal.3d at pp. 930–931, 114 Cal.Rptr. 603, 523 P.2d 643, italics added.)

***237** In *Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798, 132 Cal.Rptr. 635, the trial court entered a discovery order directing a prepaid health care plan to furnish plaintiff with information relating to other Blue Cross subscribers who had filed claims for psoriasis treatment. (*Id.* at pp. 799–800, 132 Cal.Rptr. 635.) The reviewing court ordered issuance of a peremptory writ of mandate directing the trial court to vacate its discovery order. It explained "All parties agree that the patients' names and ailments were disclosed to Blue Cross for the purpose of paying the doctor's fees. Disclosure, then, was '*reasonably necessary for ... the accomplishment of the purpose for which the physician* [*was*] *consulted;* confidentiality was not lost and the privilege not waived." (*Id.* at pp. 801–802, 132 Cal.Rptr. 635, italics added.)

Guided by these authorities, we review the trial court's determination as to the applicability of the psychotherapist-patient privilege to the challenged documents.

***454** d. *Application of Evidence Code section 1012 to Archdiocese's claims regarding particular documents.*
With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the psychotherapist-patient privilege. Pursuant to the principles set forth above, we uphold the referee's rulings, with one exception.

Doe 1 No. 50–52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum from the Vicar transmitting the letter to Cardinal Mahony. The Archdiocese only claims that the cover memorandum, which recites a psychotherapist's recommendation about the priest taking a trip abroad, is protected by the psychotherapist-

patient privilege. However, the referee reasonably could conclude the transmission of this information to the Archdiocese did not come within the "furtherance of the purpose" rule of Evidence Code section 1012, because any connection to furthering the priest's treatment was too attenuated. Moreover, neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 No. 74: This is a memorandum to the file, by the Vicar for Clergy, reporting on treatment recommendations transmitted by a priest's psychotherapists. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar was not involved in rendering psychotherapy to the priest, nor was he being supervised by a treating psychotherapist.

Doe 1 No. 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation the Vicar had with a priest regarding psychotherapy recommendations and future work assignments for the priest. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 No. 397–400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The January 9, 1987, entry is essentially a copy of a psychotherapeutic report prepared by a priest's therapists. The report contains a detailed psychosexual history and diagnosis. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because no person at the Archdiocese was involved in rendering psychotherapy to the priest, or was being supervised by a treating psychotherapist.

238 *455 The June 22, 1987, entry is a summary of Doe 1 No. 80, which we have concluded must be produced to the grand jury. The same result applies to this summary of that document.

The September 6, 1996, entry is essentially a copy of a psychotherapeutic evaluation sent by a priest's therapists to a member of the Vicar for Clergy's staff. This evaluation contains both a diagnosis and treatment recommendations. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar for Clergy's staff was not involved in rendering psychotherapy to the priest, nor was that staff being supervised by a treating psychotherapist.

The March 5, 1999, entry is essentially a copy of a file note prepared by a member of the Vicar for Clergy's staff, reporting on a discussion he had with a priest. The document describes the priest's self-report concerning his level of functioning, his progress in therapy and his desires concerning future work assignments. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because it does not convey any significant psychological information. Moreover, the Vicar for Clergy's staff was not involved in rendering psychotherapy to the priest, nor was it being supervised by a treating psychotherapist.

21 Doe 2 No. 46: This is the sole item as to which we overturn the referee's ruling because the "claimed privilege appears as a matter of law from the undisputed facts." (*HLC Properties, Limited v. Superior Court, supra,* 35 Cal.4th at p. 60, 24 Cal.Rptr.3d 199, 105 P.3d 560.) This document is a memorandum from a member of the Vicar for Clergy's staff to a priest's psychotherapists. Said memorandum supplied the therapeutic team with information about a troubled priest's personal history as an aid to diagnosis and treatment. The record reflects such background information was routinely provided to assist the psychotherapists in diagnosing and treating the Priests. Under the reasoning of *Grosslight v. Superior Court, supra,* 72 Cal.App.3d at pages 506–507, 140 Cal.Rptr. 278, we conclude this document is appropriately shielded by the psychotherapist-patient privilege because it was a disclosure reasonably necessary to accomplish the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient. (Evid.Code, § 1012.) The inclusion of such material within the purview of the privilege "encourages full disclosure of pertinent matters that otherwise might be withheld by [third persons] to the detriment of the patient." (*Grosslight, supra,* 72 Cal.App.3d at p. 507, 140 Cal.Rptr. 278.) Therefore, we overrule the referee's order that this particular document be produced.

456 Doe 2 No. 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. Although the document is ostensibly a status report on the priest's

progress in therapy, the referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" ***239*** rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 No. 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing possible aftercare programs for a priest when he completes psychotherapy. The referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 No. 278: This document consists of dated file notes containing excerpts from two of the documents discussed above. We have concluded that neither Doe 2 No. 140 nor Doe 2 No. 172 falls within the psychotherapist-patient privilege. The same result applies to these excerpts of those two documents.

In sum, we conclude that, *except for Doe 2 No. 46,* none of the particular subpoenaed documents challenged by the Archdiocese falls within California's psychotherapist-patient privilege, and we affirm all of the referee's rulings in this regard. We order that Doe 2 No. 46 not be turned over the grand jury.

4. *Attorney-client and attorney work product privileges are inapplicable.*

22 The Archdiocese contends some of the disputed documents should not be disclosed to the grand jury because they are protected either by the attorney-client privilege or by the attorney work product privilege. This claim is without merit.

457 Noting the referee concluded "the communications at issue [had] been made for multiple purposes," the Archdiocese argues that if any of the disputed documents were generated by "investigations of crime or communications to ascertain the validity of charges, as Respondent court asserts, then they should be protected by the Work Product Doctrine and/or the Lawyer–Client Privilege in addition to the First Amendment and Clergy Privilege."

However, the Archdiocese is confusing two different issues: (1) the referee's conclusion, in connection with his general ruling on the First Amendment and clergy-penitent privilege claims, that the Archdiocese had mixed motives for intervening with priests accused of sexual misconduct, and (2) the referee's rulings on the individual documents at issue in this writ proceeding. None of the remaining disputed documents falls within either the attorney-client or the attorney work product privileges.

Under Evidence Code section 952, the attorney-client privilege protects "information transmitted between a client and his or her lawyer in the course of that relationship ... and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." " ' In California the [attorney-client] privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of communicating information....' " (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 457, 107 Cal.Rptr.2d 456.) Under Code of Civil Procedure section 2018, subdivision (c), "[a] ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances."

240 The Archdiocese's attorney is referred to only twice in the 15 documents that remain in dispute. Doe 2 No. 31 refers to particular advice given by the attorney to the Vicar for Clergy, but this reference appears in one of the paragraphs of Doe 2 No. 31 that is *not* being disputed by the Archdiocese. In Doe 1 No. 50, the Vicar for Clergy refers to the attorney, but only to mention counsel's presence at a meeting during which Cardinal Mahony made a particular statement. There is no indication Cardinal Mahony's statement reflects any of the attorney's thought processes.

There is no indication any of the 15 disputed documents constitutes information transmitted between the Archdiocese and its lawyer.

Hence, none of the disputed documents falls within either the attorney-client or the attorney work product privilege.

458 5. *The* Stogner *decision does not invalidate the subpoenas.*

In 1993 the Legislature enacted Penal Code section 803, subdivision (g), in order to expand the statute of limitations in child molestation cases. *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, held this statute violated the ex post facto clause when used to revive prosecutions already time-barred before the statute was enacted. The Priests contend the grand jury subpoenas duces tecum violate the principles of *Stogner* because the subpoenas encompass documents that are irrelevant to crimes allegedly occurring after January 1988, and because, properly understood, *Stogner* prohibits prosecution of any child molestation crime committed before January 1, 1994.[18] These claims are without merit.

The first claim fails because admissible 'other crimes' evidence is not restricted by the statute of limitations. (See Evid.Code, §§ 1101, subd. (b), & 1108.)[19] As the Priests themselves acknowledge, "neither Evidence Code section 1101(b) nor 1108 is a chargeable offense. They are merely rules of admissibility for evidence at trial."

The second claim is unavailing because it misconstrues *Stogner,* which stated "[W]e agree that the State's interest in prosecuting child abuse cases is an important one. But there is also a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution. And *to hold that such a law is ex post facto does not prevent the State from extending time limits* for the prosecution of future offenses, or *for prosecutions not yet time barred.*" (*Stogner v. California, supra,* 539 U.S. 607 at p. 633, 123 S.Ct. 2446, 156 L.Ed.2d 544, italics added.)

Hence, the Priests' argument already has been firmly rejected by a number of courts which have recognized the difference ****241*** between extension statutes and revival statutes. (See *People v. Terry* (2005) 127 Cal.App.4th 750, 775, 26 Cal.Rptr.3d 71 ["As *Stogner* indicates, extensions of existing, ****459*** unexpired limitations periods are not ex post facto because such extensions do not resurrect otherwise time barred prosecutions."]; accord *People v. Vasquez* (2004) 118 Cal.App.4th 501, 13 Cal.Rptr.3d 162; *People v. Superior Court* (*German*) (2004) 116 Cal.App.4th 1192, 10 Cal.Rptr.3d 893; *People v. Renderos* (2003) 114 Cal.App.4th 961, 8 Cal.Rptr.3d 163; *People v. Robertson* (2003) 113 Cal.App.4th 389, 6 Cal.Rptr.3d 363.)

6. *No showing District Attorney impermissibly usurped grand jury authority.*
The Priests contend none of the subpoenaed documents may be disclosed because the District Attorney improperly usurped the grand jury's authority. This claim also is without merit.

The Priests assert the District Attorney openly declared he was using the grand jury to conduct "private" discovery for his own purposes that had nothing to do with any pending grand jury investigation, and that the referee improperly acquiesced in this manipulation of the grand jury process. We cannot agree.

23 This claim is based on a misreading of the District Attorney's oral argument to the referee and a misperception about the proper scope of a grand jury investigation, which " ' "is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." ' " (*M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1394–1395, 127 Cal.Rptr.2d 454.)

Contrary to the Priests' assertion the District Attorney was allowed to subvert the grand jury process, the record shows the referee rejected the District Attorney's argument he should be allowed to present, at the pre-indictment stage of a grand jury proceeding, evidence that would be inadmissible at trial.

The Priests complain that, although the District Attorney "may be present to advise the grand jury and conduct examination of witnesses for the grand jury, ... he may not take the evidence he is exposed to in that capacity to use for other purposes outside the grand jury." But the Priests point to no evidence indicating such a thing happened here. They merely argue it can be *inferred* from the District Attorney's oral argument to the referee that the District Attorney *believed* he could do this. We do not agree with the Priests' interpretation of the District Attorney's comments. In any event, something more than bad thoughts would have to be demonstrated to sustain this claim.

****460*** 7. *Subpoenas were not impermissibly vague.*
24

The Priests contend the subpoenas were defective because they were overbroad as to time, place and conduct, and imprecise in their description of the items to be produced. Again, these claims are without merit.

25 Although "[t]he Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search," in order to prevent police from rummaging through someone's belongings, a search warrant " 'need only be reasonably specific, rather than elaborately detailed, and the specificity ***242** required varies depending on the circumstances of the case and the type of items involved.' [Citation.]" (*U.S. v. Bridges* (9th Cir.2003) 344 F.3d 1010, 1017.)

The subpoenas here requested "[a]ll documents and other materials that are in the possession, custody, or control of the Archdiocese of Los Angeles that relate in any way to allegations of child molestation or sexual abuse committed by Father.... [¶] The subpoenaed documents and other materials *include, but are not limited to,* documents in the Archdiocese general archives, general files, secret archives, secret files,...." (Italics added.)

The Priests contend the subpoenas amounted to unconstitutional general warrants because their descriptions of the items to be produced were impermissibly vague. They argue that the "include, but are not limited to" language is precisely the kind of overbroad language found to have invalidated a search warrant in *U.S. v. Bridges, supra*, 344 F.3d 1010. But a crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated. "In light of the expansive and open-ended language used in the search warrant to describe its purpose and scope, *we hold that this warrant's failure to specify what criminal activity was being investigated,* or suspected of having been perpetrated, *renders its legitimacy constitutionally defective.*" (*U.S. v. Bridges, supra,* 344 F.3d at p. 1016.) There is no such problem in this case.

The Priests contend the subpoenas were impermissibly overbroad as to time because they effectively asked for every personnel document since the Priests had been incardinated in the Archdiocese. As we pointed out above, however, the admissibility of other crimes evidence under Evidence Code sections 1101 and 1108 means relevant evidence could be discovered by such requests.

26 ***461** As to place, the Priests complain the subpoenas are not limited to crimes committed in Los Angeles County in compliance with Penal Code section 917, which provides "[t]he grand jury may inquire into all public offenses committed or triable within the county...." However, as the District Attorney points out, Penal Code section 784.7, subdivision (a), allows a sex crime committed outside Los Angeles County to be joined with a Los Angeles County sex crime, and then for the entire case to be prosecuted in Los Angeles County.[20] (See *People v. Betts* (2005) 34 Cal.4th 1039, 1059, 23 Cal.Rptr.3d 138, 103 P.3d 883 [section 784.7 "expands venue for specified offenses to permit crimes ... that occurred in different counties to be tried in the same county"].)

27 As to conduct, the Priests contend "The term 'sexual abuse' is so vague and broad that a reasonable Custodian of Records might feel obliged to produce information pertaining to sexual conduct that is not criminal at all, such as verbal sexual harassment, [or] consensual sexual activity with an adult—one person's bawdy joke ***243** may be another person's 'sexual abuse.' Indeed, in the context of the Catholic clergy ... even masturbation and sexual thoughts may be deemed to be sinful and abusive." However, there is no indication whatsoever the subpoenas were read in such a broad manner. Had they been, objections could have been made.

Moreover, this claim is based on a reading of the phrase "evidence of child molestation and sexual abuse" in which the word "child" does not modify "sexual abuse." This is not the only, or even the most natural, interpretation.

8. *Several grand jury issues already have been decided in prior appellate proceeding.*
The Priests raise several grand jury issues that were decided in our earlier opinion in this matter. They claim the grand jury did not have the power to issue subpoenas duces tecum and, if it did, these subpoenas were defective because they were unaccompanied by a good faith affidavit. These issues were decided in *M.B. v. Superior Court, supra,* 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454, and it is unnecessary to revisit them here.

****462** 9. *Priests' claims regarding particular documents are insufficiently presented and will not be addressed.*
28 The Priests contend some of the subpoenaed documents cannot be disclosed without violating the hearsay rule, the confidentiality of third persons named in the subpoenaed

documents, the right of privacy, and the attorney-client, attorney work product, psychotherapist-patient, and clergy-penitent privileges. As to all of these claims, however, the Priests have failed entirely to specify which documents they are challenging. Their pleadings merely refer to "some of these records" and similarly vague characterizations.[21] This does not constitute adequate briefing. (Cf. *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99, 31 Cal.Rptr.2d 264 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

Nor have the Priests furnished this court with copies of any disputed documents. Hence, even assuming a privilege existed theoretically, we would be unable to determine that any particular subpoenaed document was in fact privileged. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296, 240 Cal.Rptr. 872, 743 P.2d 932 [failure to furnish adequate record on appeal mandates adverse ruling]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, 93 Cal.Rptr.2d 97 [failure to provide adequate record on appeal triggers adverse ruling because appealed judgments are presumed correct].)

29 "A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the appellate court with a record sufficient to permit such review. [Citations.]" (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186, 154 Cal.Rptr. 917, 593 P.2d 862.) Because the Priests have failed to do so in this case, we decline to address their separate claims.

*****244 *463* DISPOSITION**

The order to show cause is discharged. The Archdiocese's objection to Doe 2 # 46 is sustained; this document will not be turned over to the grand jury. In all other respects, the petitions for writ of mandate, prohibition, or other appropriate relief are denied. All parties to bear their own costs in this proceeding. (Cal. Rules of Court, rule 56(*l*)(2).) The stay order is vacated.

CROSKEY and KITCHING, JJ., concur.

All Citations

131 Cal.App.4th 417, 32 Cal.Rptr.3d 209, 05 Cal. Daily Op. Serv. 6544, 2005 Daily Journal D.A.R. 8947, 2005 Daily Journal D.A.R. 9926

Footnotes

1 We also decided a second writ petition in this matter. (See *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247, 7 Cal.Rptr.3d 524.)

2 We express no opinion regarding the validity of any interpretation of religious doctrine contained in these declarations.

3 This citation comes from the referee's final decision in this matter. Although this, and similar factual statements, originated in declarations filed by the parties in this court, most of those declarations have been filed under seal. Therefore, this opinion will refer to the facts alleged below either by citing the referee's decision, which is not under seal, or by referring generically and circumspectly to documents presently filed under seal. (See *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 105, 4 Cal.Rptr.3d 823; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 308, 116 Cal.Rptr.2d 833.)

4 Canon 1717, section 1, provides, in part: "Whenever an ordinary has knowledge, which at least seems true of a delict, he is carefully to inquire personally about the fact...." "Canon 1719 states in part: '[T]he acts of the investigation, the decrees of the ordinary *which initiated and concluded the investigation,* and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process."

5 While the Archdiocese is challenging only the disclosure of 15 documents, the Priests are disputing every single document the referee ordered turned over to the grand jury.

6 The Archdiocese relied on the following church property cases. *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666, 1871 WL 14848, arose out

of a schism in the Presbyterian Church during the Civil War about the morality of slavery, which led to legal disputes between rival congregations over entitlement to church property. *Watson* deferred to a ruling by the church's national governing body. In *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120, where the right to use church property depended on the validity of a religious official's ecclesiastical appointment, the court deferred to the church's own ruling. *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151, reversed a decision, reinstating a defrocked bishop, predicated on the lower court's theory the church's internal disciplinary process had been defective.

7 As this court pointed out in *M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1388–1389, 127 Cal.Rptr.2d 454 "our Supreme Court has emphatically 'rejected the contention that the California grand jury [is] a "purely" statutory body, wholly distinct from its common law predecessor.' (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 440, fn. 11, 119 Cal.Rptr. 193, 531 P.2d 761....)"

8 The case involved "charges of unfair labor practices filed against religious schools," to which "the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the [NLRB], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." (*NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. at p. 502, 99 S.Ct. 1313.)

9 Whereas the federal clause prevents Congress from passing any law prohibiting the free exercise of religion, California's free exercise clause guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference...." (Cal. Const., art. I, § 4.)

10 "Under [the strict scrutiny] standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." (*Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

11 The other clergy-penitent privilege statutes provide that: "a 'member of the clergy' means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization" (Evid.Code, § 1030); " 'penitent' means a person who has made a penitential communication to a member of the clergy" (Evid.Code, § 1031); "[s]ubject to [Evidence Code] Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege" (Evid.Code, § 1033); and, "[s]ubject to [Evidence Code] Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege" (Evid.Code, § 1034).

12 Thus, for example, where the psychotherapist-patient privilege is claimed, " '[p]reliminary facts' means the existence of a psychotherapist-patient relationship, 'that is, that the person [the claimant] consulted was a " 'psychotherapist' " within the meaning of ... section 1010, and [the claimant] was a " 'patient' " within the meaning of ... section 1011.' [Citation.]" (*Story v. Superior Court, supra,* 109 Cal.App.4th at p. 1014, 135 Cal.Rptr.2d 532.)

13 Evidence Code section 912, subdivision (a), provides: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any

statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

14 Under Evidence Code section 912, subdivision (a), the clergy-penitent privilege is waived if a holder of the privilege discloses a significant part of the communication or consents to such disclosure.

> Under Evidence Code section 912, subdivision (d), "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), *when disclosure is reasonably necessary for the accomplishment of the purpose* for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, *is not a waiver of the privilege.*" (Italics added.) *Notably, the clergy-penitent relationship is missing from the enumerated relationships that benefit from this "reasonably necessary disclosure" rule.*

15 With respect to the parties' respective burdens of proof and the standard of review, the discussion in the previous section, relating to the clergy-penitent privilege, is equally applicable here.

16 Evidence Code section 1010 defines persons who are psychotherapists for purposes of the psychotherapist-patient privilege.

17 Evidence Code section 992 provides: "As used in this article, confidential communication between patient and physician means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is *reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted,* and includes a diagnosis made and the advice given by the physician in the course of that relationship." (Italics added.)

18 Penal Code section 803, subdivision (g), came into effect on January 1, 1994. The statute of limitations for child molestation cases is six years (Pen.Code, §§ 800, 805, subd. (a)).

19 Under Evidence Code section 1101, subdivision (b), "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401–402, 27 Cal.Rptr.2d 646, 867 P.2d 757.) Evidence Code section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible [by the rule excluding propensity evidence]."

20 Penal Code section 784.7, subdivision (a), provides, in pertinent part: "When more than one violation of Section 220, except assault with intent to commit mayhem, 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to a hearing, pursuant to Section 954, within the jurisdiction of the proposed trial."

21 For instance, regarding the psychotherapist-patient privilege, the Priests contend that "[*w*]*ithin some of the files* the Archdiocese intends to produce ... are extremely private and intimate communications." (Italics added.) With regard to the clergy-penitent privilege, the Priests contend: "*Some of the items* within the command of the subpoenas include statements that are protected by this privilege...." (Italics added.)

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