MCCARTHY et al v. FULLER et al Doc. 385 Att. 1

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Hand Delivered

The Honorable Debra McVicker Lynch
United States District Court
Birch Bayh Federal Building and U. S. Courthouse
46 E. Ohio Street, Room 277
Indianapolis, IN 46204

Dear Judge Lynch:

Re: Kevin B. McCarthy, et al. v. Patricia Ann Fuller, et al.
Case No. 1:08-cv-994-WTL-DML

Pursuant to the instructions contained in your "Entry of Motion to Compel and for *In Camera* Inspection of Documents (Dkt. 331)" ("April Entry"; Dkt. 258), enclosed herewith are the documents listed on the privilege log previously tendered to the Court ("Original Privilege Log"; Dkt. 320-2) as well as two additional documents that will be addressed below. As requested, the documents are organized, to the extent possible, in chronological order. An updated privilege log ("Updated Privilege Log"), in chronological order and with the referenced documents numbered, is attached to assist the Court in reviewing the documents.

Counsel is mindful of the Court's "Entry on Discovery Issues" (Dkt. 264) in which the Court addressed clergy privilege issues and of the Court's recognition in its April Entry that resolution of the privilege issue will be aided by the Court's review of the subject documents. Because the Court expresses some "surprise" at the content of the Original Privilege Log, counsel provides the following perspective on behalf of Kevin B. McCarthy ("McCarthy").

Bishop Ricken served as McCarthy's spiritual advisor prior to McCarthy's involvement with the Our Lady of America Devotion ("Devotion") and continued in that role with regard to McCarthy's efforts with the Devotion. McCarthy took a solemn vow with Bishop Garcia to assist in promoting the Devotion. Moreover, Bishop Ricken has acted as McCarthy's advisor/counselor with regard to McCarthy's calling to become a Deacon within the Catholic Church and with regard to other unrelated religious matters.

Exhibit 1

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McCarthy was and is entitled to confidential communications with Bishop Ricken, including confidential communications to Bishop Ricken and receipt of confidential advice from Bishop Ricken.

Efforts with regard to the Devotion are distinctly and unavoidably religious in nature. McCarthy's communications with Bishop Ricken (and certain other clergy) on how to pursue that Devotion, how to meet his solemn vow to do so, and his challenges in doing so, are protected by clergy privilege. McCarthy asserts and does not waive that privilege.

In addition to Bishop Ricken, McCarthy utilizes Father Cole, Bishop Paprocki, and Bishop Garcia (Diocese of Monterey) as his spiritual advisors. McCarthy respectfully submits that communications shared with any of these individuals does not waive his clergy privilege as they each serve in the role of his spiritual advisor.

Likewise, the fact that communication by McCarthy to or from his spiritual advisors was shared with his attorneys (such communications themselves being subject to an attorney/client privilege) does not defeat either of the privileges.

We would further note that the enclosed documents 24 through 29 are transmittal sheets. The documents attached to the transmittal sheets have been provided through discovery to counsel for Patricia Fuller (and have not been reprinted in the enclosed binder). McCarthy is asserting clergy privilege only as to the transmittal sheets.

As the Court was previously informed, we understand the bulk of the pages in the attached binder (documents 1 through 15) were produced directly to counsel for Fuller by Bishop Ricken in or about September, 2011. Only 25 pages of the binder have not been produced to counsel for Fuller. In addition to those 25 pages, document 34 was provided in a redacted form to counsel for Fuller. We have provided the document as it was produced (BR000143-BR000148), with redactions, and a copy of the document without redactions. McCarthy claims a clergy privilege and/or attorney/client privilege with regard to these documents and requests that the Court order them returned to counsel for McCarthy.

Undersigned counsel understands that Bishop Ricken does not believe any of the documents previously produced (1 through 15) contained confessional or spiritual material. Indeed, we understand all of these documents were produced by Bishop Ricken directly to counsel for Fuller in or about September, 2011. Fuller correctly notes that Bishop Ricken did not claim a privilege in such documents. McCarthy respectfully disagrees with Bishop Ricken's conclusion and notes that the privilege is for McCarthy to raise. He has done so.

Finally, we want to make the Court aware there are two documents – November 17, 2011 communication by attorney Lewinski to Paul Umentum and a February 17, 2012 communication by Mike Swift to Paul Umentum – that were provided to McCarthy's counsel through Bishop Ricken's current counsel, John Thompson. McCarthy does not assert clergy privilege with regard to these documents, but we are asserting the work product privilege.

When we received these documents, we questioned whether they were even responsive to the request and asked Mr. Thompson to look into the situation. He recently confirmed that, according to his follow-up, the documents went to Paul Umentum (Bishop Ricken's former counsel) who held them in his file. Bishop Ricken apparently never saw or reviewed the documents. Therefore, we do not believe the documents are responsive to the discovery request. In any case, they would be privileged and not discoverable as work product.

In order to avoid confusion or misunderstanding, we informed Ms. Cramer of the existence of these two documents. She requested that we add them to the Original Privilege Log and submit them for *in camera* review. If the Court wishes to review these documents, we are willing to provide them for *in camera* review but request the opportunity to brief the Court on the applicable privilege. Since McCarthy is not asserting clergy privilege with regard to these two documents, we have not included them in the enclosed binder.

Very truly yours,

Michael J. Lewinski

MJL:dat
cc: Marilyn A. Cramer (via e-mail, with a copy of the Updated Privilege Log but without a copy of the binder) (we note, however, that Ms. Cramer previously received a copy of documents 1 through 15, and a copy of document 34 with redactions)