

Gay v. Roman Catholic Diocese of Burlington, Vermont, No. S0784-04 Cncv (Joseph, J., Jan. 31, 2006)

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STATE OF VERMONT  
CHITTENDEN COUNTY

SUPERIOR COURT  
No. S0748-04 CnC

MICHAEL GAY,  
Plaintiff

v.

ROMAN CATHOLIC DIOCESE  
OF BURLINGTON, VERMONT,  
and EDWARD PAQUETTE,  
Defendants

ENTRY ORDER  
DEFENDANT DIOCESE'S MOTION FOR CLARIFICATION AND/OR  
RECONSIDERATION OF ORDER REGARDING PRODUCTION OF DOCUMENTS  
BY DEFENDANT DIOCESE

The Defendant Diocese (also referred to as the "RCD") seeks clarification and/or reconsideration of the Court's order compelling production of documents pursuant to V.R.C.P. 30(b)(5). Claiming various evidentiary and statutory privileges, the Diocese raises objections relating to the production of employee records, preordination or seminary documents and documents that concern the mental health of non-party priests. The term "non-party priest" refers a priest who has not been sued in this case. The only priest who is a party to this action is the defendant, Edward Paquette. In its Motion, the Diocese claims that every non-party priest has objected to the disclosure of his employee records by the RCD. For the reasons stated below, the court finds that there is no basis for the Diocese's Motion to withhold most of the documents that are the subject of

its Motion to Reconsider. However, employee records of non-party priests who have filed objections with the court will not be disclosed pending further order of this court.

### *1) Employee Records*

Vermont law provides special protection for employee records during the discovery phase of a civil action. The law provides that there can be no discovery of employee records from an employer unless there has been notice to the employee and an opportunity for that employee to object. 12 V.S.A. § 1691a. The statutory procedure for production of employee records does not confer any additional discovery protections or privileges on the employer. See 12 V.S.A. § 1691a(a) (stating underlying policy of the law). The statute extends existing discovery protections to employees who would otherwise not have standing to seek a protective order under the Vermont Rules of Civil Procedure. The Rules provide that “a party or person from whom discovery is sought” can obtain a judicial protective order to prevent “annoyance, embarrassment, oppression, or undue burden or expense.” V.R.C.P. 26(c) (emphasis added). The employee records statute gives an employee standing to seek such an order to prevent production of his/her employee records by a current or former employer. The employee can seek such an order to prevent annoyance, embarrassment, oppression, or undue burden or expense — plus “other grounds provided by law.” 12 V.S.A. § 1691a(f).

In its Motion, the RCD has informed the court that all non-party priests have objected to the production of their employee records with the RCD. The court has found only one such notice in this court file - the one that was filed by Edward Paquette. However, the court must be certain that any priest who wants to file such an objection has been given an opportunity to state the reasons for his objection in court. The court will ascertain if notice has been given and any objection filed. In all such cases, a hearing will be scheduled to consider objections.

### *2) Seminary and Preordination Records*

The Defendant RCD raises the argument that several of the employee files for priests sought by the Plaintiff contain seminary and pre-ordination materials that are constitutionally protected from discovery. The RCD submits that these document requests are really an inquiry into the selection and ordination process for priests by the RCD. The RCD contends that the plaintiff cannot use the discovery process to inquire about such matters without violating the United States Constitution’s First Amendment guarantee of freedom of religion.

It is true that the First Amendment stands as a limitation on civil court jurisdiction over disputes which are essentially religious in nature or are so intertwined with religious doctrine as to constitute a threat of state entanglement with religion. State v. Blaeuer, 81 S.W.3d 186, 192 (Mo. Ct. App. 2002). The First Amendment does not preclude court intervention in disputes when the issue is one of whether a religiously neutral civil law has been violated. Id. The United States Court of Appeals for the Second Circuit is in accord with this principle. See Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 196 F.3d 409 (2d. Cir. 1999) (The First Amendment does not prevent courts from deciding matters of civil law within religious institutions.)

Though First Amendment considerations may limit the power of the court if a case involves controversies over religious doctrine; this is not such a case. The pending discovery motion does not ask the court to make any decision for or against any religious doctrine or practice. There is no merit in the RCD's claim that allowing discovery of seminary and preordination records would violate the First Amendment. This is not a dispute within the church over matters of faith. This is a claim that the RCD sent known pedophiles to work with young boys in a Vermont parish. The Plaintiff's claim is brought under Vermont law, not church law. The issue before the court does not concern the standards for employing clergy as was the issue in Eherns v. Lutheran Church-Missouri Synod, 269 F. Supp. 2d (S.D.N.Y. 2003), a case heavily relied upon by Defendants.<sup>1</sup> Plaintiff is seeking these records to ascertain whether they contain evidence of, or may lead to admissible evidence of, sexual misconduct by priests with minors while they were in the seminary or during their pre-ordination period. These priests were subsequently employed and supervised by the RCD. This information falls squarely within the scope of Rule 26. Discovery of these records is granted.

### *3) Mental Health Records*

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<sup>1</sup> It is important to note that the RCD has failed to mention in its Motion that the United States Second Circuit Court of Appeals upheld the district court decision in the Ehlers case because the plaintiff there failed to state a claim for negligent supervision under New York law. The Appeals Court noted that it because it affirmed on this ground it would not address whether the district court erred in ruling that the First Amendment precluded a finding that the church was negligent in its supervision or hiring of clergy. The Appeals Court noted that the district court in Ehlers had not mentioned the holding in Martinelli that the Free Exercise Clause "does not prevent courts from deciding secular issues involving religious institutions when and for the reason that they require reference to religious matters."

Defendant objects to disclosure of documents concerning the mental health of non-party priests that are in the possession of the RCD. This objection is based on both the doctor/patient privilege and the priest/penitent privilege. Each one is discussed in turn.

### Doctor/patient privilege

Vermont Rule of Evidence 503(b), establishing the doctor/patient privilege provides:

A patient has a privilege to refuse to disclose and to prevent any other person . . . from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, dental, or emotional condition . . . among himself, his physician, dentist, nurse, or mental health professional, and persons who are participating in diagnosis or treatment under the direction of a physician, dentist, nurse, or mental health professional, including members of the patient's family.

The alleged patients in this case are priests who are not parties to this litigation. The doctor/patient privilege belongs exclusively to the patient except in limited circumstances. V.R.E. 503 (c) Any privilege recognized must be claimed by, or on behalf of, these individuals. Recognizing that these individuals are not represented, the court will analyze the arguments made by the Diocese on their behalf.

In order to be protected, the communications must be confidential. First, these communications are not "confidential" for purposes of the Rule. See V.R.E. 503(a)(6) ("A communication is 'confidential' if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview; persons reasonably necessary for the transmission of the communication; or persons who are participating in diagnosis and treatment under the direction of a physician, dentist, nurse or mental health professional, including members of the patient's family or other participants in joint or group counseling sessions."). These documents are either to or from church officials; they are not from doctor to patient or vice versa. These church officials are not among the "third persons" who are included in any of the Rule 503(a)(6) exceptions. The communications are, therefore, not confidential.

Second, the communications were not made “for the purpose of diagnosis or treatment.” V.R.E. 503(b). The documents at issue are correspondence between treating psychiatrists and counselors on the one hand and church personnel on the other. There is no suggestion that church officials were involved in the treatment of the priests in question.

Defendants have not met their burden of proving that the patient-physician privilege applies to communications between the Diocese and other church officials and treatment providers regarding non-party priests. See State v. Tatro, 161 Vt. 182, 184 (1993).

### The Priest/penitent privilege

Vermont Rule of Evidence 505(b), establishing the priest/penitent privilege, provides:

A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of the clergy in his or her professional character as spiritual adviser.

To come within the protection of the priest/penitent privilege, the communication must be confidential and the privilege may be claimed only by, or on behalf of, the communicant. V.R.E. 505(c). Because the priests involved in this instance are not parties to the law suit, the court will consider arguments made by Defendant that advance argument that nonparty priests could make to oppose disclosure of their employee records. Defendant has the burden of demonstrating that such communications are privileged. State v. Nunez, 162 Vt. 615, 616 (1994) (mem.).

In order for the privilege to apply, the communication must be made to a member of the clergy “acting in a capacity as defendant’s spiritual adviser.” Nunez, 162 Vt. at 616 (declining to find a statement by defendant to his minister was privileged without evidence that statement was made while the minister was acting in his capacity as spiritual adviser). The fact that communications could be construed as penitent is not alone sufficient to invoke the privilege. Id. For the privilege to apply, the documents must contain a request for spiritual guidance or other indication that the church officials were acting as spiritual advisors to the non-party priests. Defendant has not demonstrated that the documents involve church officials acting in their spiritual capacity, therefore the

court finds that the Rule 505 priest/penitent privilege cannot be invoked.

Accordingly, the Defendant Diocese's Motion for Clarification and/or Reconsideration of the Order Compelling Production of Documents is DENIED with the exception of the employee records of non-party priests who have filed objections to the production of their employee records in this case. The Defendant Diocese is ordered to produce proof of notice to all such employees within five (5) days. If notices have been given and objections have been received, the clerk of this court will schedule a hearing so that all such objections can be heard by the court.

With the exception noted above, the Defendant Diocese shall produce the requested documents within two (2) days of this order.

Dated at Burlington, Vermont, .

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Ben W. Joseph, Presiding Judge  
Chittenden Superior Court

31 January 2006