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Discovery of Church Records

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DISCOVERY OF CHURCH RECORDS

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INTRODUCTION

This article will address the protection of Canon 489 and 490 archival documents[1] from discovery and production in civil litigations. I have been involved in the protection of archival documents in trial litigation situations in the past, one of which has resulted in an appeal.[2] I would like to address that litigation because as of today, with the exception of Pennsylvania, I know of no federal or state appellate decision that has addressed the specific question of the propriety of discovering archival documents. There are, however, several isolated and unpublished trial court opinions which do concern this issue—one in the state of Montana[3] and one in the state of Minnesota.[4]

I. HUTCHINSON V. LUDDY

The Superior Court of Pennsylvania is typically the final court of appellate review in Pennsylvania. In isolated situations, however, a case may be brought to the supreme court. Otherwise one must obtain a writ of appeal or writ of allocator. We argued *Hutchinson v. Luddy*[5] before the superior court and are now attempting to obtain a writ of allocator before the supreme court. Accordingly, I hope that my experience and involvement in these trials and appeals will elucidate our strategy and assist you and your diocese in resisting or responding to requests for production of documents that are contained in the archives.

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1 1983 Code c. 489; 1983 Code c. 490.

2 Hutchinson v. Luddy, 606 A.2d 905 (Pa. Super. Ct. 1992).

3 K.B. v. Roman Catholic Bishop and Diocese of Great Falls, Adv. No. 88-1174 (Mont. Dist. Ct. 9th Dist. filed Feb. 2, 1990).

4 State v. Carriere, (Minn. Dist. Ct. 9th Dist. filed Dec. 11, 1991).

5 606 A.2d 905 (Pa. Super. Ct. 1992).

A. Nature of the Hutchinson Action

The *Hutchinson* action was filed in October of 1988 in Somerset County, Pennsylvania, in a trial court of unlimited jurisdiction. The original complaint alleged pedophilic activities on the part of a diocesan priest with a male minor.[6] Shortly after the original complaint was filed, an amended complaint was served against the Diocese, naming the bishop and four different monsignors who had held various positions in the Diocese for a period of about ten years.[7] The allegations against the Diocese, the bishop and monsignors were not the typical ones of negligent hiring, negligent retention or agency. Rather a new, unique and very difficult claim to defend against was asserted. The plaintiff alleged that in the course of operating the Diocese, the Diocese had permitted or adopted a policy of condoning sexual activity by failing to actively investigate complaints of sexual activity and by allegedly encouraging the priest within the Diocese to engage in sexual activities.[8] The plaintiff essentially argued that although the Diocese did not approve of such activity, it did not necessarily disapprove of it either. Moreover, the plaintiff asserted that the Diocese's failure to investigate the allegations was the equivalent of looking the other way and encouraging priests to involve themselves in that kind of activity.

The court dismissed the claim of respondeat superior on our preliminary objections and we were left defending the Diocese on the main count of condoning or establishing a pattern that encouraged sexual activity.

B. Plaintiff's Discovery Requests

In order to substantiate its claim, the plaintiff engaged in a series of discovery procedures aimed primarily at developing information concerning the named defendant priest and all other priests in the Diocese.

1. Plaintiff's Service of Interrogatories

The first pleading we received from the plaintiff was a series of interrogatories designed to illicit the identity of priests about whom the bishop had received complaints within the past ten to fifteen years.[9] The interrogatories were posed in such a way that we attempted to limit the responses. As an aside, if you find yourself in this type of litigation, you will find that the plaintiff most likely has a lot more knowledge about the priests in the Diocese than you do until you finally talk to the bishop and start working closely with your client. In the interrogatories, the plaintiff specifically named priests who the plaintiff knew had been ques-

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6 *Hutchinson*, 606 A.2d at 906.
7 *Id.*
8 *Id.*
9 *Id.*

tioned by the bishop regarding some sexual activity complaints. The interrogatories were designed to develop what activity or inactivity the Diocese had engaged in upon receiving complaints regarding a priest.

The plaintiff sought to discover the following six items: (1) what actions had the Diocese taken; (2) what investigation had the Diocese undertaken after receiving the complaint; (3) what reporting or lack of reporting to state or public officials had the Diocese done; (4) whether the Diocese had reassigned the priest or those priests who had moved from one parish or diocese to another; (5) whether the priest or priests underwent psychological evaluation; and (6) whether or not the priests were removed from the parish and how long it took the bishop to remove the priest.

After raising numerous objections to the plaintiff's interrogatories, we were nevertheless forced to respond to many of the interrogatories. However, we attempted to and were partially successful in limiting the time period for which we were accountable.[10]

2. Plaintiff's Motion for Production of Documents

The plaintiff next filed a motion for production of documents. We produced the personnel file of the named defendant priest yet refused to disclose any information concerning the other priests who were not named as defendants. In addition, we refused to provide any further information on the named defendant or other priests on the ground that documentation or information was contained in the archives set up by Canons 489 and 490.[11] As expected, the plaintiff did not accept our objections and filed a motion to compel production of the documents.[12] We opposed the plaintiff's motion to compel on the following grounds: (1) according to the priest-penitent privilege, the documentation could not be discovered,[13] and (2) the bishop, pursuant to Canon Law, was not permitted to remove documentation for the purpose of inspection or copying.[14] We further argued that ordering the bishop to produce such documents would require him to violate the Canon Law and his religious

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[10] *Id.* at 907.

[11] *Id.* at 906.

[12] *Id.* at 907.

[13] PA. R. CIV. P. 4011.255. Section 4011.255 provides for the priest-penitent privilege stating

> [n]o clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization . . . who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any grand jury, traverse or petit jury . . . .

Id.

[14] 1983 Code c. 490, sec. 3

obligations which would, in effect, be violative of his First Amendment rights under the United States and Pennsylvania Constitutions.[15]

We also argued that a Pennsylvania statute barred production of these documents. That statute prohibits the discovery or production of information which is conveyed to a clergyman if it is conveyed in confidence and in the course of performing a function as a clergyman or minister.[16] In addition, to support our position, we created and filed two separate sets of affidavits signed by our bishops. This particular case involved a bishop who retired immediately after the suit was filed and his successor. We filed extensive affidavits, indicating the reason for the Canon Laws' existence and the bishop's own interpretation of his obligations under the Canon Law. We detailed how the bishop came to possess the documents placed in the archive but did not describe the documents. To do so would have, in effect, given the plaintiff what he was attempting to obtain and which we felt he was not entitled to obtain.

a. Procedural History in the Trial Court

Somerset County, is located in a rural section of Western Pennsylvania and has two high calibre judges. One particular judge who handled this case put a tremendous amount of consideration and study into the issue. He permitted argument and extensive briefing by both sides. Initially, he decided the issue against us but later permitted us to file a petition for reargument and reconsideration which he granted. We once again argued the issue but again the judge decided the issue against us. Thereafter, the judge ordered us to produce the documents within twenty days.[17] After he entered this order, we filed a motion for appeal.

The plaintiff countered our motion by asserting that the trial court's decision on the discovery matter was interlocutory in nature and, therefore, was not appealable. However, we were successful in convincing the judge that the matter was appealable since the issue was of such great importance, even though it was not the dispositive issue of the case.[18] If the court had not permitted us to appeal and had ordered us to produce the documents, the harm would have already been done even if we were able to sustain our position on appeal. In addition, the judge agreed that we could have the appeal act as a supersedeas, thereby not requiring us to comply with the twenty-day production order.[19] As of this date, we

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[15] PA. CONST. art. I, sec. 3 provides that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; . . . no human authority can, in any case whatever, control or interfere with the rights of conscience . . . ."

[16] 42 PA. CONS. STAT. § 5943 (1993).

[17] Hutchinson v. Luddy, No. 445 (Pa. C.P. Somerset County, Civ. Div. 1988).

[18] *Hutchinson*, 606 A.2d at 907.

[19] *Id.*

have not produced any documents and we are continuing to try not to produce them, even through the course of the appeal.

b. Procedural History in the Appellate Court

Thereafter, on August 21, 1991, we argued the appeal issues before the superior court. After a considerable amount of time, the superior court rendered an opinion upholding the trial court's opinion and directing that the documents be produced.[20]

We then filed a petition for free argument before the superior court. After sixty days, the superior court denied the petition for free argument and ordered the documents to be produced.[21] We are currently in the process of filing a writ of appeal to the Supreme Court of Pennsylvania.

As you can see, we are dealing in a very timely fashion with a very timely issue. We have the opportunity to participate in or at least witness the making of some law which may eventually become good law.

II. APPLICABLE PRINCIPLES OF LAW

Let us review some of the applicable principles of law in light of these facts. First, disclosure through discovery of documents kept in the secret archives presents a new and very sharp conflict between the Catholic Church and civil litigants. Canon 489 directs, orders, and compels each diocese to establish a secret archives file.[22] Remember, the word "secret" should not be used in relation to this subject because it has a negative connotation even though the Canon Law refers to it as a "secret archive."[23] The Canon Law states that in this completely locked and secure area, documents will be kept under secrecy and will be carefully guarded.[24] The Canon also refers to the storage of documents dealing with criminal matters—"criminal" under the Canon Law, not under the secular law.[25] Canon 489 says it is to be placed in a most secure place.[26]

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[20] *Hutchinson*, 606 A.2d at 905.

[21] *Id.*

[22] 1983 Code c. 489, sec. 1. Canon 489 sec. 1 states

> [I]n the diocesan curia there is also to be a secret archive, or at least in the ordinary archive there is to be a safe or cabinet, which is securely closed and bolted and which cannot be removed. In this archive documents which are to be kept under secrecy are to be most carefully guarded.

CODE OF CANON LAW, LATIN ENGLISH EDITION c. 489 sec. 1, at 185 [hereinafter CODE].

[23] CODE cc. 489, 490, at 185.

[24] CODE c. 489 sec. 1., at 185.

[25] CODE c. 489 sec. 2, at 185. Canon 489 sec. 2 states that "[e]ach year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement." *Id.*

[26] CODE c. 489 sec. 1, at 185.

Canon 490 indicates that only the bishop of the diocese can have the key[27] and that documents are "not to be removed."[28]

A. Conflict Between Church Law and Civil Law—Generally

The conflict obviously arises because on one hand the Catholic Church has the right to practice its constitutional freedom of religion by establishing and following rules for the appropriate practice of its faith and to allow its members to act in accordance with that faith. Yet, on the other hand, a civil litigant has the right to discover the documentation which he or she believes may be of assistance in prosecuting a claim for damages. The Canon Law directs each dioceses to set up files[29] and there are rules and regulations which the bishop must comply with in regard to such files.[30] These particular Canons, as all other Canons, regulate the internal functioning of the Catholic Church. The basis for the dispute or the conflict is that the Church claims that these documents are protected by the very words of the Canon from disclosure and inspection.[31] Therefore, the Church claims that these documents are privileged and not discoverable. Furthermore, the Church maintains that the diocese or the bishop *cannot*, of his own, elect to remove the documents because he is directed by Canon Law not to remove the documents.[32] Therefore, even if the bishop would like to make the documents available, he is not allowed to because the right exists not only in the bishop but the diocese to have the documents protected. However, the litigants will claim that these documents are relevant, material to the case, and are similar to any other document or subject being discovered.

Tedious research was required to find any decisive or substantive law that would be precisely on point or at least assist us in analyzing our position to the rights of a civil litigant versus the rights of the Church. When dealing with pre-trial discovery efforts, we did find that both state and federal courts are much more likely to listen to an argument that would in some way limit pre-trial discovery as opposed to trial evidence during the course of an actual trial. Starting with that in mind, we felt that we had at least some basis upon which to attempt to limit and prevent discovery. The litigants in this case, the Church and the private civil litigant, had to follow the same rules and had to work from the same set of case citations. We had to follow the same procedural citations that we had in any other type of litigation. We based our argument for re-

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27 CODE c. 490 sec. 1, at 185.

28 CODE c. 490 sec. 3, at 185. Canon 490 sec. 3 states: "Documents are not to be removed from the secret archive or safe." *Id.*

29 CODE c. 486, at 183.

30 CODE cc. 486-490, at 183-85.

31 CODE c. 489 sec. 1, at 185.

32 CODE c. 490 sec. 3, at 185.

stricting discovery on Canon Law, arguing that the holder of the documents (the bishop or the diocese) had no discretion or right to disclose the documents. We argued that this right existed under the Church law and to the diocese and then to the bishop upon whom the notice to produce was served. If these documents were not protected and the bishop was ordered to produce them, Church law would be violated. We also argued that to compel the bishop to produce the documents would require him to act contrary to the Canon Law and would require him to violate his own faith which is a substantial interference with his right of freedom of religion.

B. Theory of Hierarchal Structure and Dominations

The first prong of our argument was based on the jurisprudence of hierarchal structure and dominations. Said another way, whenever they can and whenever possible, the courts will attempt to avoid making or approaching a decision that has constitutional implications.[33] Courts, particularly those in Pennsylvania, have held in the past that the Catholic Church, as an organization, is an entity subject to the jurisdiction of the Pope, and all Catholic dioceses are subject to that jurisdiction. As such, the Catholic Church and every diocese has to be subservient to the rules of the Roman Catholic Church.[34] Many of our state courts have upheld Canon Law in other situations, for example, as it related to divorce,[35] remarriage,[36] premarital sex,[37] homosexuality,[38] and Days of Holy Obligation.[39] With that in mind, it was felt that the court might recognize that a legal entity such as a church or a religion, of necessity, needs internal rules in order to exist, govern itself, and to maintain its hierarchal structure.

An effort was made to convince the court that most courts should, in the exercise of judicial wisdom, attempt to avoid involvement in ecclesi-

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[33] *See, e.g.*, Blair v. United States, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function . . . ."); Ballou v. State Ethics Comm'n, 436 A.2d 186, 187 (Pa. 1981) ("It is well settled that when a case raises both constitutional and non-constitutional issues, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds.").

[34] *See, e.g.*, Bohachevsky v. Sembrot, 81 A.2d 554, 556-57 (1951).

[35] *See, e.g.*, Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

[36] *Id.*

[37] *See, e.g.*, Donahue v. Fair Employment and Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 2d Dist. 1991), *review granted*, 825 P.2d 766 (Cal. 1992).

[38] *See, e.g.*, Dignity Twin Cities v. The Newman Ctr. and Chapel, 472 N.W.2d 355 (Minn. Ct. App. 1991).

[39] *See, e.g.*, Barran v. Nayyar, 572 N.Y.S.2d 821 (N.Y. App. Div. 1991).

astical affairs and not be required to interpret church law.[40] We argued that the Court should treat involvement in the Church as it treats involvement in a corporation. For instance, courts are generally reluctant to interfere with the internal structure of a corporation unless the corporation has done something absolutely contrary to public policy or has subordinated the rights of stockholders.[41] We also argued that the courts should afford churches and religions even more traditional protection from court interference, particularly where the law of that particular church has not been disturbed and has been in existence for a considerable period of time, as our Canon Law has been. We found that courts generally are willing to afford a higher realm of protection from interference in church affairs than business affairs.

C. *Assertion of a Privilege*

The second prong of our argument was that for the court to take a position with respect to the internal operation of the church, there had to be a substantial compelling reason that could not be served in any way other than the court granting an inferior constitutional position to the church position. This raised the issue of privilege. In most state and federal courts, not all matters are discoverable. The doctrine of privilege allows a litigant to file a motion for a protective order if he or she believes that the matter at issue in discovery is truly a privileged matter.[42] Pennsylvania probably has the most broad or liberal right of discovery of any state.[43] Documents prepared in anticipation of a trial are discoverable and any document that is claimed relevant is discoverable.[44] However, Pennsylvania law, despite its liberal nature, does allow for claim of privilege.[45] Therefore, when the plaintiff served a notice of production in *Hutchinson* we claimed that the documents were privileged in addition to being protected under Canon Law.[46]

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40 In *Atterbury v. Smith*, the Commonwealth Court of Pennsylvania stated that where "the resolution of the issue involves questions of discipline, faith, ecclesiastical rule, custom, or law, a civil court must defer to the highest church judicatory to which the question has been carried." Atterbury v. Smith, 522 A.2d 683, 685-86 (Pa. Commw. Ct. 1987) (citing *Presbytery of Beaver-butler of the United Presbyterian Church v. Middlesex Presbyterian Church*, 489 A.2d 1317, 1319 (Pa. 1985), *cert. denied*, 474 U.S. 887 (1985) (citing *Watson v. Jones*, 80 U.S. 679, 727 (1871))).

41 *See* Kroese v. General Steel Castings Corp., 179 F.2d 760, 763 (3d Cir. 1950), *cert. denied*, 339 U.S. 983 (1950).

42 *See* FED. R. EVID. 501.

43 42 PA. CONS. STAT. § 5943 (1993).

44 PA. R. CIV. P. 4001-4025.

45 42 PA. CONS. STAT. § 5943; PA. R. CIV. P. 4011.255.

46 *Hutchinson*, 606 A.2d at 908-910.

Pennsylvania has a statute known as the "Clergyman Statute,"[47] which is separate and distinct from the priest-penitent privilege. This statute mirrors Canons 489 and 490. It states that a clergyman, including ministers of any recognized religion, cannot be compelled to disclose secret or confidential information which were received in the course of his duties.[48] If you compare the Pennsylvania statute with Canons 489 and 490, you will see a great deal of similarity. Both pertain to documents received by clergy in the course of the performance of that clergyman's duty, either as bishop or minister. Moreover, both indicate that if the material is received during the course of those duties and is given in confidence, the documents are not discoverable.[49] Canon 489 says you cannot take them out of the archive.[50] The Pennsylvania statute says that they are not discoverable.[51] This was a major point in our favor after having the other arguments on the business of the courts not interfering with constitutional rights and the courts not interfering with the internal operation of the church. We argued that by enacting this particular statute Pennsylvania had recognized a greater interest in precluding discovery than allowing it.

Several Pennsylvania cases have interpreted the statute—some favorably, some unfavorably.[52] We argued to the court that if one looked at the affidavits that were filed, we complied with the Canon Law requirements, but just as importantly, we complied with the Clergyman Statute.[53] The affidavits of the two bishops indicated that they were bishops (clergymen), they had received the documents in confidence and then placed them in the secret archives file in the course of their duties, and they could not remove them without violating their own religious tenets. In addition, we argued that the priest penitent-privilege would also apply since the bishops may have received the information by virtue of a confessional; not a closed confessional as we all know it, but a confessional in which the accused priest was summoned and asked to confess what he had done.[54]

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47 42 PA. CONS. STAT. § 5943.

48 *Id.*

49 *See* 42 PA. CONS. STAT. § 5943.

50 CODE c. 489 sec. 3, at 185.

51 42 PA. CONST. STAT. § 5943.

52 *See, e.g.*, Commonwealth of Pa. v. Paterson, 572 A.2d 1258 (Pa. Super. Ct. 1990) (statute did not apply, statements not made in confidence); Fahlfelder v. Commonwealth, Pa. Bd. of Probation, 470 A.2d 1130 (Pa. Commw. Ct. 1984).

53 *Hutchinson*, 606 A.2d at 906-907.

54 *See Fahlfelder*, 470 A.2d at 1131-32 (court disallowed privilege because no confidential relationship).

D. First Amendment—The Free Exercise Argument

We also spent a great deal of time on the constitutional approach because, as we all know, the First Amendment grants all of us the right to practice our religion freely.[55] The party which claims certain documents are not discoverable due to a free exercise of religion argument does not have the burden of proof.[56] The other party must demonstrate that he needs the documents or that there is a substantial state interest that is entitled to greater accord and respect by the court than the claim of the right of practicing one's religion without interference.[57] In fact, some of the cases we examined regard only those interests of the highest order which are not otherwise served to outweigh a legitimate claim for free exercise of religion.[58] We stressed that argument and maintained that to require the bishop to produce documents from the secret archive was, in effect, state action interfering with the practice of the faith.[59] We also maintained that, a civil litigant does not have an interest in pretrial discovery that would equate to a significant magnitude of state interest.[60] All things being equal, the court should not allow pretrial discovery of the secret archives because the plaintiff had not met the burden of a compelling state interest.

E. Availability of the Information Elsewhere

More importantly, the information that the plaintiff wanted from the secret archives could be secured in less obstructive constitutionally charged ways. For example, the plaintiff could depose the bishop, the priest, and the victim. There are still other ways by which the plaintiff could get the same information without violating the secret archives. The plaintiff argued that a civil litigant's rights to discovery in Pennsylvania extends to anything that may be relevant, and the applicable test is not whether it is admissible at trial but whether the material sought could lead to relevant information.[61] Based on the current status of the discovery procedures in Pennsylvania, the court ruled that where the Canon Law conflicts with the right of discovery as it did here, the right of discovery must prevail.[62] The court did not distinguish, as we argued, between pretrial discovery and trial evidence. The court failed

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55 U.S. CONST. amend. I.

56 *See* Surinach v. Pesquera de Busquets, 604 F.2d 73, 75-76 (1st Cir. 1979).

57 *See* In re Estate of Laning, 339 A.2d 520 (Pa. Commw. Ct. 1975).

58 *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

59 *See* Atterbury v. Smith, 522 A.2d 683 (Pa. Commw. Ct. 1987); *see also* Canovaro v. Brothers of the Order of Hermits, Etc., 191 A. 140, 144 (Pa. Sup. Ct. 1937).

60 *See* Seattle Times v. Rhinehart, 467 U.S. 20, 32-33 (1984); *In Re* Estate of Laning, 339 A.2d 520 (Pa. Commw. Ct. 1975).

61 *Hutchinson*, 606 A.2d at 912.

62 *Id.*

to distinguish between the rights of a civil litigant versus the rights of the bishop based upon the content of the bishop's affidavit to maintain the documents which he had received in confidence either under the Canon Law or the Pennsylvania Clergyman Statute.

III. POTENTIAL FUTURE ANALOGY

If this issue is reargued there are several, favorable points to be raised. Recently, the Pennsylvania Supreme Court ruled in *Commonwealth v. Wilson*[63] that any information a rape victim gives to a rape counselor will be considered nondiscoverable.[64] The Court extended the statutory sexual assault counselor privilege to protect a counselor's records, although the statute on its face appeared only to protect compelled testimony from a counselor.[65] The Court stated that the privilege would be meaningless if the protected information were protected only in testimonial form.[66] Additionally the Court ruled that a statutory privilege is an indication that the legislature acknowledges the significance of a particular interest and has chosen to protect that interest.[67]

The situation regarding rape counselors can be analogized to the Clergyman Statute which is also a legislatively enacted privilege intended to ensure that what is told to a clergyman in confidence should not be discoverable.[68] By enacting the statute, the legislature has determined that this is a greater right to protect than the right of a civil litigant to get that information. In *Wilson*, the party attempting to discover the information was a criminal defendant—the defendant charged with rape.[69] Generally, a defendant's right in a criminal case is accorded more protection than the civil litigant's right to discovery. Therefore it would seem that a court would also prevent discovery of priest-penitent documents. This is encouraging; hopefully, the supreme court will give us another day in court to argue that position.

IV. RISKS INVOLVED

One of the reasons we have gone to such length in protecting and refusing to produce the archival documents is that if we lose that argument there are some tremendous problems that will face bishops. A bishop, for reasons of his own conviction, may elect not to produce the documents. What are the risks attendant in losing the argument and

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63 602 A.2d 1290 (Pa. 1992).
64 Commonwealth v. Wilson, 602 A.2d 1290, 1295 (Pa. 1992).
65 *Wilson*, 602 A.2d at 1295; *see* 42 PA. CONS. STAT. § 5945.1 (1993).
66 *Wilson*, 602 A.2d at 1295.
67 *Id.*
68 42 PA. CONS. STAT. § 5943 (1993).
69 *Wilson*, 602 A.2d at 1292.

having your client, the bishop, saying that he is constrained and cannot reveal the documents?

Obviously, there are several risks. From a trial standpoint, one risk is that the court can make judicial admissions of disputed facts. There are available sanctions that can be applied to the noncomplying party who has lost a discovery conflict.[70] In addition to having the court admit disputed facts, as a matter of court order, the court can strike pleadings. It can, in effect, preclude the presentation of evidences in defenses.[71] The court may also enter a default judgment and decide the case of liability against you and your client.[72] And last, but not least, the court could hold your bishop in civil contempt.[73]

CONCLUSION

I have some general comments that I would like to make and some suggestions that might help you. First of all, when one claims privilege, the burden is on that party to prove the privilege. When the plaintiff attempts to overcome the defendant's constitutional right, the burden is on the plaintiff to show a compelling state interest. When you claim privilege, one cannot simply claim, "Well, protection under Canons 489 and 490 or the clergyman privilege and throw them in front of the court. It is incumbent upon the party asserting the privilege to demonstrate *why* they are entitled to that privilege. It also must be shown that there is no compelling reason for the plaintiff to have the documentation and that the information can be obtained by less obstructive means. If the forum state has a Clergyman Statute, or something parallel to that, one can argue from a state interest as well as Canon Law. Affidavits must be prepared and filed with the court. The affidavits should be as specific as possible without revealing what is in the archives. It is a "damned if you do and damned if you don't" situation in many cases. However, the effort must be made to convince the trial court that the words "secret archive" are not synonymous with incriminating evidence. Other means of pretrial discovery could be suggested. The court must be convinced that the proverbial "smoking gun" is not in the secret archives. That takes a lot of tightrope walking from a pleading standpoint but it can be done with appropriate time and effort.

In addition, it is important that when one gets into a discovery battle on the secret archives documents, he somehow gets permission from the court to establish evidentiary hearings to determine what evidence the plaintiff needs to present his case and what other means exists for

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70 *See* FED. R. CIV. P. 37; PA. R. CIV. P. 4019.

71 *See* FED. R. CIV. P. 37(d); PA. R. CIV. P. 4019.31.

72 *Id.*

73 *Id.*

him to get the information. The court must be convinced that you are not trying to defeat discovery. You are trying to protect the secret archives establishment as a canon of the Church. As a right, the Church had to establish internal rules and regulations and these Canons were set up long before anybody thought of pedophilic lawsuit or sexual molestation cases. If you do not succeed, the plaintiff will try his case in discovery. Also the bishop and diocese may be very reluctant to try the case on its merits. It really requires a great deal of advocacy to present and protect the documents and it is getting tougher and tougher, but there is no alternative. The alternative is to give up the documents or not to give them up and be saddled with a default judgment.

RELEVANT COMMENTS

Ward Shanahan, Helena, Mt.: I came here pursuant to Carl's request that "misery loves company." I wanted to inform you that there has been a ruling in Montana by the Supreme Court in a case known as the "*Burns*"[74] case. I will not give you any further citation on that. This was a criminal case involving sexual assault. In Montana, we have, after an enlightened constitution of 1972, a two-tier right of privacy. That right of privacy is divided into Article II, Section 9, which, of course, was urged by the press. It says that when you have some private information in the state record, the person who is claiming the right of privacy must show that the right of privacy clearly exceeds the merits of public disclosure. We have Article II, Section 10, which says that, in the ordinary right of privacy, if the state is trying to invade privacy, it must show a compelling state interest. To this point, we do not know exactly how those two fit together. In the *Burns* case, the district court denied discovery of the personnel file of a priest involved and that went to the supreme court. The supreme court sustained, in a 6 - 1 decision, the district court's exercise of discretion in that discovery ruling.[75] The only female member of the court wrote a dissent in which she said some very unflattering things about the Catholic Church.[76] My partner was there with the Chancellor at the time the judge made the ruling but the Catholic Church made no request that the personnel file remain private. This is a criminal case and it was up to the defendant to assert the right of privacy. As far as the dissent is concerned, we are not guilty. But the judge took us to task because the judge assumed from statements in the record that we had requested that the file remain private, which we did

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74 State of Montana v. Burns, 830 P.2d 1318 (Mont. 1992).

75 *Id.* at 1318.

76 *Id.* at 1322-26 ("The Catholic Church has been placed both above and outside the reach of the law with regard to the investigation and prosecution of the very animal offenses which people of value and morality find so disturbing.").

not. Following that, an editorial in the "Montana Standard" in Butte, Montana, reiterated the statements of the dissenting judge at some length, making a public attack upon the bishop and the Church and facing us with the problem of what we should do about that.

Secondly, we have another case pending. Three days ago, we had a discovery issued against us which said that we *had* to disclose the personnel file. We reargued on the *Burns* case decision. The court three days ago, reaffirmed that decision. We are now faced with a decision—should we disclose the file or should we apply for supervisory control. It is a personnel file. There has been no secret archives claimed. I do not think that I am in the position, and I guess you would agree with me.

Eck: We produced without question the personnel file of the named priest. We do not produce the personnel file of any other priest, as a matter of course. You have the case, *KB v. Roman Catholic Church*, that in a civil case said the file was not discoverable. That was a trial court opinion. Now, you have a state court opinion in a criminal case. I think in a criminal case, you have a little better argument because in a criminal case you cannot compel the defendant to incriminate himself. I think you can argue that is another privilege in addition to the others that you do not have a civil litigant case.