

Discovery
FRCP 26(b)(1)
subsequent actions
First Amendment
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OEC 503
attorney-client privilege
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FRCP 43(c)(3)(A)(iv)

Roman Catholic Archbishop of Portland, Case No. 04-37154

12/23/2005 ELP

Unpublished

Memorandum Opinion ruling on the scope of depositions of pattern and practice witnesses, including Archbishop Levada. The opinion holds that the deposition questions about clergy sexual misconduct are limited to sexual misconduct with minors, and to misconduct by Archdiocesan clergy or non-Archdiocesan clergy working in an Archdiocesan ministry.

Applying Oregon law, the opinion concludes that the tort claimants are not precluded from asking questions relating to debtor's patterns and practices after the last alleged abuse occurred. Evidence of subsequent conduct may lead to discoverable evidence.

Discusses briefly whether the tort claimants may ask whether a deponent's answers are affected by the exercise of the concept of mental reservation.

The Opinion rejects debtor's argument that questions about internal church governance infringe on the First Amendment. It explains that, although the church autonomy doctrine may preclude a court from deciding essentially religious matters, it does not preclude discovery of church policy that affects the church's response to allegations of sexual misconduct by clergy.

The Opinion goes through each of the proposed topics and addresses any objections to them. It discusses Oregon attorney-client privilege, including OEC 503(4), which provides that there

is no privilege for communications relevant to an issue of breach of duty by the lawyer to the client. Because the Archdiocese filed a bar complaint against its attorney Robert McMenamin in the 1980s, there is no privilege prohibiting questions about advice given to the Archdiocese by the lawyer.

The Opinion also addresses the clergy-penitent privilege under Oregon law and concludes that the privilege is limited to situations where the communication was made in furtherance of spiritual advice.

With regard to the deposition of Archbishop Levada, the court ruled that the tort claimants could ask him limited questions about his knowledge or activities that post-dated his tenure as Archbishop of Portland. It also ruled that the tort claimants could not ask questions about internal communications and acts at the Congregation for the Doctrine of the Faith, because requiring responses to such questions would impose an undue burden on Archbishop Levada. The tort claimants may ask questions about actions Archbishop Levada may have taken while working at the Congregation for the Doctrine of the Faith with regard to issuance of general policies or directives to the church in the United States that related to sexual abuse of minors by priests. The court rejects other assertions of privilege, including self-critical analysis, deliberative process, confidential report, and judicial privilege, because the assertions of privilege either related to questions about work at the Congregation for the Doctrine of the Faith or because there are no proposed topics that would appear to implicate such privileges, if they exist.

Below is an Opinion of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 04-37154-elp11
ROMAN CATHOLIC ARCHBISHOP OF)
PORTLAND IN OREGON, AND SUCCESSORS,)
A CORPORATION SOLE, dba the) MEMORANDUM OPINION
ARCHDIOCESE OF PORTLAND IN OREGON,)
Debtor.)

In this chapter 11¹ case filed by the Archbishop of Portland in Oregon, and Successors, a Corporation Sole, dba the Archdiocese of Portland in Oregon, the tort claimants have submitted a list of topics for depositions of four witnesses regarding debtor's patterns, practices, and policies with regard to allegations of sexual misconduct with a minor by any priest while working in an Archdiocesan ministry assignment. The witnesses designated by the tort claimants, including Archbishop William J. Levada, object to some of the topics. This matter came before the

¹ 11 U.S.C. § 1101 et seq.

1 court for resolution of the objections in advance of the depositions.

2 Debtor and Archbishop Levada have raised numerous objections to the
3 lists of topics for pattern and practice depositions provided by the tort
4 claimants.² Some of the objections apply to all witnesses; some apply
5 only to the questions proposed to be put to Archbishop Levada. I will
6 address the common objections together, and those specific to Archbishop
7 Levada separately.

8 In federal court, a party is entitled to discovery of

9 any matter, not privileged, that is relevant to the claim or defense
10 of any party For good cause, the court may order discovery
11 of any matter relevant to the subject matter involved in the action.
12 Relevant information need not be admissible at the trial if the
13 discovery appears reasonably calculated to lead to the discovery of
14 admissible evidence.

15 Fed. R. Civ. P. 26(b)(1), made applicable to the adversary proceedings by
16 Fed. R. Bankr. P. 7026. "The burden is on the party objecting to
17 discovery to show that discovery should not be allowed." Meller v.
18 Walker, 124 F.R.D. 654, 656 (D. Or. 1989).

19 These depositions are being taken pursuant to the January 14, 2005
20 Order Regarding Premediation Discovery by Tort Claimants, in which the
21 court concluded that evidence regarding debtor's "patterns, practices,

22 ² Archbishop Levada filed a Motion to Modify Subpoena, pursuant
23 to Fed. R. Civ. P. 45(c), made applicable to bankruptcy cases by Fed. R.
24 Bankr. P. 9016. That rule allows the court that issued a subpoena to
25 quash or modify the subpoena if, among other things, it "requires
26 disclosure of privileged or other protected matter and no exception or
waiver applies," Fed. R. Civ. P. 45(c)(3)(A)(iii), or if it "subjects a
person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iv). Debtor filed
objections to the list of topics for the three other pattern and practice
witnesses. The procedure chosen is not critical; the point is to present
the dispute to the court before the depositions so the parties know what
matters are properly the subject of questioning at the depositions.

1 and policies' in regards to allegations of sexual misconduct with a minor
2 by any priest while working in an Archdiocesan ministry assignment is
3 relevant for discovery purposes to the negligence claims of various tort
4 claimants." Order Regarding Premediation Discovery by Tort Claimants at
5 p. 1, ¶ 1. That is because the defendant's knowledge of sexual
6 misconduct of priests with minors, and knowledge about whether priests
7 who engage in such behavior may safely be returned to ministry involving
8 children, bears upon whether debtor was negligent in how it handled
9 allegations of abuse, and because the extended statute of limitations for
10 child abuse cases set out in ORS 12.117(1) provides that the statute is
11 extended with regard to "an action based on conduct that constitutes
12 child abuse or conduct knowingly allowing, permitting or encouraging
13 child abuse[.]" The order provided that "Tort claimants may depose up to
14 four witnesses, to be chosen jointly by the tort claimants, for purposes
15 of discovering Debtor's 'patterns, practices, and policies' in regard to
16 the abuse or molestation of minors by priests." Order Regarding
17 Premediation Discovery by Tort Claimants at p. 3, ¶ 2.

18 COMMON OBJECTIONS

19 1. Evidence of clergy sexual misconduct

20 In a number of the topics included on the tort claimants' list, they
21 seek various types of information about clergy "sexual misconduct."
22 Debtor objects, arguing that questions should be limited to sexual
23 misconduct with minors by a priest working in an Archdiocesan ministry
24 assignment, because the claims at issue involve minors, and the court's
25 order holds that evidence of debtor's patterns and practices with regard
26 to "allegations of sexual misconduct with a minor by any priest while

1 working in an Archdiocesan ministry assignment" is relevant to these
2 claims. The tort claimants respond that they do not intend to ask
3 questions about clergy sexual contact with adults, "unless it is in a
4 context in which there is clear relevance." Tort Claimants' Reply to
5 Debtor's Responses and Objections to Topic Listing for Pattern and
6 Practice Witnesses (Non-Levada) at 11. As an example, the tort claimants
7 indicate they might want to question witnesses "about a prison chaplain's
8 sexual contact with inmates, be they adolescent boys at MacLaren or young
9 men at Oregon State Correctional Institution." Id.

10 The order allowing these pattern and practice depositions was
11 limited to debtor's patterns and practices with regard to sexual abuse of
12 minors. The tort claimants may inquire into debtor's practices and
13 policies with regard to priest sexual misconduct with minors, not with
14 adults. If debtor had patterns, practices, or policies with regard to
15 sexual abuse by priests in general, which applied to abuse of both minors
16 and adults, that information would be discoverable. Information about
17 patterns, practices, or policies relating to sexual abuse of adults is
18 not discoverable, unless the patterns, practices, or policies applied to
19 minors as well.

20 Debtor also argues that questions should be limited to debtor's
21 patterns and practices regarding misconduct of clergy working within the
22 Portland Archdiocese. The claims against debtor are based on alleged
23 misconduct by Archdiocesan clergy or non-Archdiocesan clergy who were
24 working in an Archdiocesan ministry, and debtor's response to that
25 conduct. Evidence of debtor's response to allegations of sexual
26 misconduct with minors by clergy who were either Archdiocesan clergy or

1 were working in the ministry of the Archdiocese is discoverable. Inquiry
2 is not limited to clergy who were directly employed by the Archdiocese.
3 That means that debtor's patterns and practices with regard to
4 Archdiocesan clergy and clergy who were part of a non-diocesan order but
5 who were working in the Archdiocese's ministry are discoverable.
6 Evidence of debtor's response to allegations of sexual misconduct by
7 clergy outside the Portland Archdiocese (unless the clergy remained
8 priests of the Archdiocese of Portland when working outside the
9 Archdiocese) is not relevant, nor is it likely to lead to relevant
10 evidence, of patterns and practice with regard to allegations of abuse by
11 Archdiocesan priests or other priests working with an Archdiocesan
12 ministry.

13 2. Evidence of debtor's patterns, practices, and policies after the
14 last alleged date of abuse

15 Debtor seeks a time limitation on questions, arguing that debtor's
16 patterns, practices, and policies after the last date of alleged abuse
17 are irrelevant to its liability for the alleged abuse. The tort
18 claimants respond that evidence of continued concealment after the
19 alleged abuse shows that the concealment was not an accident.

20 The tort claimants rely on Rader v. Gibbons & Reed Co., 261 Or. 354,
21 359 (1972), which holds that "[e]vidence of prior similar occurrences is
22 admissible under some circumstances in a negligence action." The Oregon
23 Supreme Court held that, although evidence of prior acts of negligence
24 are generally not admissible to prove a specific act of negligence,
25 "[s]uch evidence is, however, admissible to prove the existence of . . .
26 a continuing course of negligent conduct, and that the . . . course of

1 conduct is in fact dangerous, or that the defendant had notice of its
2 dangerous character." Id.

3 They further argue that conduct that occurs after the alleged
4 misconduct can also be relevant to show state of mind, because
5 concealment of misconduct can indicate knowledge that the conduct was
6 negligent. They cite two Oregon cases that upheld the admission of
7 evidence of the defendant's conduct after the alleged negligent conduct.
8 In Joachim v. Crater Lake Lodge, Inc., 48 Or. App. 379 (1980), the Oregon
9 Court of Appeals concluded that evidence that, after the plaintiff became
10 sick from drinking the water at Crater Lake Lodge, the manager of the
11 lodge removed notices that water at the lodge was contaminated provided
12 some evidence that the manager's conduct in failing to warn the public
13 about the contamination was in deliberate disregard of the rights of
14 others. The Court of Appeals held in Stephens v. Bohlman, 138 Or. App.
15 381 (1996), that evidence that a tortfeasor participated in covering up
16 the true cause of the injury was circumstantial evidence that he believed
17 he had acted negligently.

18 I will not limit the time frame for questions about debtor's
19 patterns, practices, and policies with regard to dealing with allegations
20 of clergy sexual misconduct with minors. This is discovery. The test is
21 whether the information obtained would be admissible at trial; it is
22 whether the information sought "appears reasonably calculated to lead to
23 the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).
24 Although the relevant time frame for these claims is the time of the
25 alleged misconduct, evidence of debtor's later policies could possibly
26 lead to evidence that would be relevant to the claims of negligence or to

1 establishing debtor's knowledge for purposes of extending the statute of
2 limitations under ORS 12.117(1). If, for example, evidence shows that
3 debtor continued to reassign known pedophile priests to new parishes even
4 after it knew that child molesters are likely to re-offend, that fact
5 would provide some evidence that debtor's earlier reassignment was not
6 merely a mistake or accident. Further, changes in policies after alleged
7 abuse occurred could shed light on what the policies were at the time of
8 the abuse.

9 Debtor argues that evidence of subsequent actions is relevant only
10 to the issue of punitive damages, which is not currently at issue. I
11 disagree that the relevance is only to punitive damages. As I explained
12 above, evidence that debtor continued a particular practice in light of
13 information about the harmful effects of sexual abuse on children, or
14 changed its policies may lead to relevant evidence about the practices it
15 followed when the abuse occurred.³

16
17 ³ Debtor points out that, at the August 4, 2005 hearing, I denied
18 Mr. Barton's request to inquire into what had happened between 1986 and
19 1995, saying that it was relevant to punitive damages, which was not yet
20 at issue. From that, debtor argues that I have already ruled that
21 information about what happened during Archbishop Levada's tenure in
22 Portland is relevant only to punitive damages. That is not what I said
23 at the August 4 hearing. According to the portion of the transcript
24 provided by debtor, Mr. Barton argued only that the information was
25 relevant to his punitive damages claim. I denied his request to depose
26 Levada based on his argument that the information would relate only to
the punitive damages claim. I did not rule that it could not be relevant
to liability; Mr. Barton did not argue that to the court. Transcript of
August 4, 2005 deposition of Archbishop Levada at 18-19 (Exhibit A to
Declaration of Thomas Dulcich in Support of Debtor's Responses and
Objections to Topic Listing of Pattern and Practice Witnesses (Non-
Levada)).

(continued...)

1 3. Mental reservation

2 At the hearing on the objections to the topics for these
3 depositions, the tort claimants argued that they should not be precluded
4 from asking questions about the role of mental reservation in a witness's
5 answer to questions posed. In simple terms, a person asserting mental
6 reservation may, for moral or ethical reasons, give less than a true
7 answer to a question.

8 Counsel for Archbishop Levada argued at the hearing that the tort
9 claimants waived any right to ask about mental reservation by not
10 including that topic in their topic lists. In my view, the question of
11 mental reservation is more of a follow-up question than a particular
12 topic. The tort claimants may not explore the concept of mental
13 reservation generally or the circumstances under which it may be used,
14 but they may ask whether a particular witness's answer to a question is
15 affected by the exercise of mental reservation. This is appropriate in
16 order to determine a witness's compliance with the civil oath to tell the
17 truth.

18 Counsel for Archbishop Levada argues that the tort claimants need
19 not ask about mental reservation, but may simply ask whether the witness
20 has given truthful answers. Because it would seem that the answer to
21 that question could itself be affected by the exercise of mental
22

23 ³(...continued)

24 I note that the tort claimants have a limited amount of time to
25 question these witnesses. It seems unlikely that they will spend much
26 time exploring matters relating to debtor's conduct that post-dates the
last alleged date of abuse, because of the minimal use that type of
evidence might be to them.

1 reservation, I conclude that limiting the tort claimants to that type of
2 general truthfulness question is not sufficient under the circumstances
3 of this case.

4 4. Internal church governance

5 Debtor argues that I should limit deposition questions "that seek to
6 delve into internal church decision-making." Debtor's Objections to
7 Proposed Topics for the Deposition of Archbishop Levada at 12. It
8 asserts that questions inquiring into matters of church governance are
9 protected by the First Amendment's Establishment and Free Exercise
10 clauses, and so should be avoided. The tort claimants argue that there
11 is no such thing as an internal church governance privilege.

12 In state law claims litigated in federal court, the federal court
13 applies state privilege law. Fed. R. Evid. 501. Debtor does not point
14 to any Oregon privilege for internal church governance, and there is
15 none.

16 However, state privilege law applies "[e]xcept as otherwise required
17 by the Constitution of the United States" Fed. R. Evid. 501.
18 Debtor argues that questions about church internal governance are
19 prohibited by the First Amendment.

20 The First Amendment Establishment and Free Exercise clauses
21 "[prevent] courts from resolving internal church disputes that would
22 require adjudication of questions of religious doctrine." Malicki v.
23 Doe, 814 So.2d 347, 355 (Fla. 2002). See also Serbian E. Orthodox
24 Diocese v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. St. Nicholas
25 Cathedral, 344 U.S. 94 (1952). Justice Rehnquist explained, in a one-
26 judge order granting a temporary stay:

1 There are constitutional limitations on the extent to which a civil
2 court may inquire into and determine matters of ecclesiastical
3 cognizance and polity in adjudicating intrachurch disputes. But
4 this Court never has suggested that those constraints similarly
5 apply outside the context of such intraorganization disputes. Thus,
6 Serbian Eastern Orthodox Diocese and the other cases cited . . . are
7 premised on a perceived danger that in resolving intrachurch
8 disputes the State will become entangled in essentially religious
9 controversies or intervene on behalf of groups espousing particular
10 doctrinal beliefs. Such considerations are not applicable to purely
11 secular disputes between third parties and a particular defendant,
12 albeit a religious affiliated organization, in which fraud, breach
13 of contract, and statutory violations are alleged.

8 Gen. Council on Fin. and Admin., United Methodist Church v. California
9 Superior Court, 439 U.S. 1369, 1372-73 (1978)(citations omitted). Thus,
10 while "[t]he church autonomy doctrine might insulate the church from the
11 dictates of a secular court regarding liturgy and leadership, . . . it
12 does not permit a church, as a general matter, to cloak its decisions and
13 actions in secrecy when the law requires compliance with the requirements
14 of civil law." Newport Church of the Nazarene v. Hensley, 335 Or. 1, 15
15 (2002).

16 The Oregon District Court explained:

17
18 Courts may not, without justification, force religious bodies
19 to abandon their religious beliefs or doctrines in favor of purely
20 secular rules or rule on the appropriateness or correctness of those
21 beliefs or doctrines. However, the mere consideration of religious
22 authorities in an action involving the church and third parties does
23 not necessarily amount to an infringement of the [churches']
24 religious freedom. A court may look to such evidence to establish
25 the basic purposes or policies of the religion as merely a guide to
26 determining whether a plaintiff has a viable action against the
church.

23 M.K. v. Archdiocese of Portland in Oregon, 228 F.Supp.2d 1168, 1170-71
24 (D. Or. 2002)(discussing vicarious liability claims against church for
25 sexual abuse by priest).
26

1 In these tort claims, the dispute is not over church doctrine or
2 beliefs, but over liability for misconduct by those in the church's
3 employ. The court is not called upon to resolve any matters of
4 ecclesiastical or theological doctrine. Instead, evidence of internal
5 church policy may be relevant to the question of what the church did at
6 what time in dealing with allegations of sexual abuse of minors by its
7 priests. Thus, the internal church governance doctrine, even if it gave
8 rise to some sort of discovery privilege under some circumstances, is not
9 implicated in these tort claims.

10 The cases debtor cites do not demonstrate that the First Amendment
11 protects the witness from questions about internal church governance, to
12 the extent the internal workings of the church are pertinent to debtor's
13 patterns, practices, and policies in addressing sexual misconduct with
14 minors by priests. As the court acknowledged in United Methodist Church
15 v. White, 571 A.2d 790 (D.C. App. 1990), cited by debtor, any immunity
16 from discovery or trial exists only under certain circumstances "in order
17 to avoid subjecting religious institutions to defending their religious
18 beliefs and practices in a court of law." 571 A.2d at 792. That case,
19 which involved a minister suing the church for wrongful discharge, does
20 not suggest that internal governance immunity exists in the context of a
21 tort claim for sexual abuse against a church.

22 Similarly, the court in Word of Faith World Outreach Center Church,
23 Inc. v. Morales, 787 F. Supp. 689, 699 (W.D. Tex. 1992), rev'd on other
24 grounds, 986 F.2d 962 (5th Cir. 1993), recognized that there are limits
25 to the First Amendment's protection of information about the internal
26 operations of a church. The court said that the state's authority to

1 inquire into internal church operations is not "without limitation or
2 compelling purpose." Id. It recognized that "[f]ull and complete
3 documentation of the Church's internal affairs" may be permissible, if
4 narrowly drawn to accomplish the purpose of the investigation, which was
5 to determine if the church was obtaining donations fraudulently. Id. at
6 700. The case does not say that tort claimants may not inquire into
7 internal church practices and policies in furtherance of their claims for
8 sexual abuse.

9 To the extent the First Amendment protects internal church
10 governance information, that protection does not apply in these claims
11 for sexual misconduct with minors by priests working in debtor's ministry
12 assignments. The tort claimants will not be precluded from questioning
13 deponents about internal church organization and practices that could
14 bear on debtor's patterns, practices, and policies with regard to
15 allegations of sexual misconduct with minors by Archdiocesan clergy.

16 **SPECIFIC OBJECTIONS TO NON-LEVADA DEPOSITION TOPICS**

17 The scope of each of the topics for the depositions is limited by my
18 ruling, set out above, regarding the general objections to the topics.
19 The term "sexual misconduct" will mean sexual misconduct with minors.
20 "Clergy" means Archdiocesan clergy, including those working outside the
21 Archdiocese, or non-Archdiocesan clergy in an Archdiocesan ministry. I
22 will address below only those objections that are specific to the
23 individual topics.

- 24 1. The sources, scope, and form of Debtor's policies, practices, and
25 procedures regarding the manner of responding to allegations of, or
26 to any information suggesting, that a member of the clergy has or
may have engaged in sexual misconduct.

1 Subject to the limitations discussed above in the general objections
2 to the topics, the tort claimants may inquire about this topic.

3 2. Knowledge of accusations involving sexual misconduct against the
4 clergy listed in the unredacted letter containing the subjects for
5 William J. Levada's deposition, together with knowledge of Debtor's
6 responses to those allegations, knowledge of decisions concerning
7 the assignment or reassignment of the clergy, and knowledge of
8 additions or modifications to their personnel file as a result
9 thereof.

10 Debtor does not raise additional objections, except that some of the
11 names on the list were not in a ministry assignment of the Archdiocese of
12 Portland. The tort claimants may inquire; the answer may be that the
13 witness does not know anything about that individual or allegations
14 relating to that individual because the individual did not serve in an
15 Archdiocesan ministry.

16 3. Knowledge of the storage and disposition of records concerning those
17 referenced in No. 2.

18 No objection.

19 4. Whether personal practices of the listed witnesses in responding to
20 reports of sexual misconduct by clergy have been consistent with the
21 stated policy of the Roman Catholic Church, U.S. Conference of
22 Catholic Bishops, and/or the Archdiocese.

23 Debtor originally objected to the term "personal practices," but has
24 since been satisfied as to the meaning of the term.

25 Subject to the general limitations set out above, the questions
26 should be limited to personal practices of the witnesses in responding to
27 reports of sexual misconduct by Archdiocesan clergy or clergy serving in
28 an Archdiocesan ministry. This is not seeking an expert opinion.

29 Debtor objects to the topic as an inquiry into the religious rules
30 of the Roman Catholic Church or other religious entities. This is an
31 internal church governance objection, which I have overruled.

1 5. Discussions with other officials in the Archdiocese (other than
2 attorneys representing you or the Archdiocese), the USCCB, other
3 dioceses or archdioceses, concerning the destruction of records
concerning allegations of sexual misconduct by members of the
clergy.

4 To the extent the objection is that the topic requires inquiry into
5 internal church governance, it is overruled. As to debtor's objection to
6 the assumption that records have been destroyed, the tort claimants may
7 inquire as to whether there were discussions about destruction of records
8 of debtor, or involving records of an Archdiocesan priest or other priest
9 in an Archdiocesan ministry and who was the subject of a complaint that
10 the priest had engaged in sexual misconduct with minors, whether or not
11 records were actually destroyed.

12 6. Information passed along to the listed witnesses by other clergy or
13 other Archdiocesan officials concerning Archdiocesan clergy accused
of sexual misconduct.

14 Debtor seeks to limit this topic to exclude discussions covered by
15 the attorney-client privilege and information received from in-house or
16 outside counsel. The tort claimants respond that information is not
17 protected by the attorney-client privilege simply because counsel is the
18 conduit for the information.

19 State privilege law applies to the tort claims, because they are
20 civil proceedings in which state law provides the rule of decision. Fed.
21 R. Evid. 501. Oregon's attorney-client privilege is set out in Oregon
22 Rule of Evidence 503. It protects "confidential communications made for
23 the purpose of facilitating the rendition of professional legal services
24 to the client[.]" OEC 503(2). "Confidential communication" is defined
25 as "a communication not intended to be disclosed to third persons other
26 than those to whom disclosure is in furtherance of the rendition of

1 professional legal services to the client or those reasonably necessary
2 for the transmission of the communication." OEC 503(1)(b). To the
3 extent the tort claimants seek information about reports made by a victim
4 of sexual abuse of minors by Archdiocesan clergy or communications
5 between debtor's representatives and the victims, there is no
6 confidential communication made for the purpose of facilitating the
7 giving of legal advice. If that information was routed through counsel,
8 the fact that counsel received the information does not make it
9 privileged. Thus, the tort claimants are entitled to inquire into that
10 topic area.

11 To the extent the tort claimants seek information relating to legal
12 advice with regard to reports of such sexual abuse, that information is
13 privileged, unless the tort claimants can make some showing that the
14 crime-fraud exception applies. Until they make such a showing, they may
15 not inquire into inquiries to counsel seeking advice or any advice given
16 by counsel.

17 7. Discussions of the Clergy Personnel Board, Cabinet, or other
18 official Archdiocesan groups about or concerning clergy accused of
19 misconduct, policies concerning the handling of complaints of sexual
misconduct by clergy, and reassignment of clergy accused of sexual
misconduct.

20 The scope of this topic, as for all topics, is subject to the
21 general limitations set out above in my discussion of the general
22 objections. Subject to those limitations, the parties agree that
23 information obtained in answer to questions about this topic will be
24 confidential in accordance with the court's protective order entered
25 January 11, 2005 although the information may, in accordance with that
26 order, be shared among counsel for the tort claimants.

1 8. Responsibilities of Archdiocesan personnel to investigate reports of
2 sexual misconduct by clergy.

3 There are no additional objections to this topic.

4 9. Communication with, and training of, Archdiocesan clergy concerning
5 responses to reports or observations of sexual misconduct by clergy.

6 There are no additional objections to this topic.

7 10. Former general counsel Robert McMenemy's advice concerning #9,
8 supra. (Attorney-client privilege has been waived - see In re
9 McMenamin, 319 Or 609, 615 (1994)(Graber, J., dissenting)).

10 Debtor objects to this topic, arguing that it seeks information
11 covered by the attorney-client privilege. There is no doubt that
12 questions about advice given to debtor by its former counsel seek
13 information that ordinarily would be covered by the attorney-client
14 privilege. The tort claimants argue that the privilege does not apply
15 when, as in this case, the client brings a disciplinary complaint against
16 the lawyer, and that the privilege was waived by its disclosure in the
17 Supreme Court's opinion on the complaint and the dissemination of the bar
18 disciplinary file to members of the public.

19 OEC 503(4)(c) provides that the privilege does not apply to "a
20 communication relevant to an issue of breach of duty by the lawyer to the
21 client or by the client to the lawyer[.]" "This exception should be
22 construed narrowly to avoid disclosing any more of the client's
23 confidences than are necessary for the lawyer to defend against the
24 client's claim or obtain redress for breach of duty by the client."
25 Laird C. Kirkpatrick, OREGON EVIDENCE § 503.12[3] (4th ed. 2002).

26 There are no Oregon cases addressing whether the exception to the
attorney-client privilege for communications that are relevant to the
breach of a duty by the lawyer to the client extends to matters other

1 than the dispute between the attorney and the client. The language of
2 OEC 503(4)(c) is quite plain, however, and appears to remove the
3 privilege for those communications within its scope. There is no rule or
4 principle that would re-impose the privilege for such communications,
5 once they are excepted from the privilege because of a breach of duty
6 claim.

7 The Oregon rule, which excepts such communications from the
8 privilege, is different from the implied waiver of privilege that the
9 Ninth Circuit has discussed under the federal common law privilege. In
10 Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003), a defendant in a
11 federal habeas corpus case raised the issue of ineffective assistance of
12 counsel. The district court entered a protective order that precluded
13 use of privileged attorney-client communications for any purpose other
14 than the habeas corpus petition. The state appealed, asserting that,
15 once the client waived the attorney-client privilege by claiming
16 ineffective assistance of counsel, the privilege was waived for all
17 purposes, including use in a subsequent re-trial of the murder charges.
18 The circuit held that a client's waiver of the privilege by putting the
19 attorney's performance at issue was an implied, not an express, waiver.
20 Although a privilege no longer exists when it is expressly waived,
21 implied waiver is different, and must be limited to its purpose.
22 Therefore, the court held that the district court did not err in imposing
23 the protective order.

24 Under Oregon law, there is no waiver; the privilege simply does not
25 apply to communications that are "relevant to an issue of breach of duty
26 by the lawyer to the client" OEC 503(4)(c). That language is

1 unambiguous, and says that there is no privilege that applies to the
2 communications that relate to debtor's complaint about McMEnamin to the
3 Oregon State Bar.

4 The attorney-client privilege continues to apply to advice McMEnamin
5 gave debtor on matters other than those relating to the bar complaint.
6 The topic as the tort claimants set it out adequately limits the subject
7 matters about which they may inquire.

8 11. Knowledge of communications in any form between representatives of
9 the Debtor and the Holy See (including the Congregation of the
10 Doctrine of the Faith and the Congregation for the Clergy), the
11 Papal Nuncio, the USCCB and predecessor entities, and other dioceses
12 or archdioceses concerning allegations of sexual misconduct against
individual clergy, as well as concerning the policies, practices,
and procedures regarding the manner of responding to allegations of,
or to any information suggesting, that a member of the clergy has or
may have engaged in sexual misconduct.

13 Debtor raises three objections to this topic. First, it argues that
14 the topic would violate the privilege for confidential communications to
15 clergy under OEC 506. OEC 506(2) provides:

16 (2) A member of the clergy may not be examined as to any
17 confidential communication made to the member of the clergy in the
18 member's professional character unless consent to the disclosure of
the confidential communication is given by the person who made the
communication.

19 A confidential communication is "a communication made privately and not
20 intended for further disclosure except to other persons present in
21 furtherance of the purpose of the communication." OEC 506(1)(a). A
22 member of the clergy for purposes of the privilege is "a minister of any
23 church, religious denomination or organization . . . who in the course of
24 the discipline or practice of that church, denomination or organization
25 is authorized or accustomed to hearing confidential communications and,
26 under the discipline or tenets of that church, denomination or

1 organization, has a duty to keep such communications secret." OEC
2 506(1)(b).

3 Thus, the privilege extends to communications with clergy, not with
4 other employees, agents, or officials of the church who are not clergy.

5 Even with regard to clergy, not all communications, even those made
6 privately and in confidence, are subject to the privilege; only those
7 confidential communications that are made to a clergy member "in the
8 member's professional character" are protected. The language is
9 ambiguous; the question is what "in the member's professional character"
10 means.

11 OEC 506 was enacted in 1981, and was "intended to restate existing
12 Oregon law." Legislative Commentary to Rule 506, reprinted in Laird C.
13 Kirkpatrick, OREGON EVIDENCE § 506.02 (4th ed. 2002). "The privilege
14 allows and encourages individuals to fulfill their religious, emotional
15 or other needs by protecting confidential disclosures to religious
16 practitioners." Id.

17 Before 1981, the privilege was set out in ORS 44.040(1)(c), and
18 applied only to confessions made to a clergyman "in his professional
19 character." Former ORS 44.040(1)(c), set out in State v. Forsyth, 20 Or.
20 App. 624, 636 (1975).

21 In light of the purpose of the privilege, and the fact that it was
22 originally directed at confession, I conclude that it should be applied
23 only to communications that are made to a clergy person acting in the
24 capacity of a spiritual advisor.

25 This is consistent with cases from other states that have similar
26 privilege statutes. Although the language of those privilege statutes

1 may vary, on this point they seem to be interpreted relatively
2 consistently. See, e.g., Masquat v. Maguire, 638 P.2d 1105 (Okla.
3 1981)(communication with Catholic nun in her capacity as hospital
4 administrator not within the privilege); Bonds v. State of Arkansas, 837
5 S.W.2d 881 (Ark. 1992)(communication with minister who was also
6 defendant's employer not privileged, because the communication was in
7 minister's capacity as employer, not spiritual advisor); State of New
8 Jersey v. Cary, 751 A.2d 620 (N.J. App. 2000)(communication with church
9 deacon who was also police officer not privileged, as the deacon was
10 performing at least partially secular function as law enforcement officer
11 at time of communication). See also State of Washington v. Martin, 975
12 P.2d 1020, 1026 n.65 (Wash. 1999)(listing cases where communication with
13 clergy was in other than professional capacity as clergy).

14 In Commonwealth of Pennsylvania v. Stewart, 690 A.2d 195, 198 (Pa.
15 1997), the court noted that "the mere fact that a communication is made
16 to a member of the clergy, or that documentation is transmitted to a
17 member of the clergy, is not sufficient alone to invoke the privilege."
18 The court pointed out that nearly every jurisdiction in the United States
19 has a clergy-penitent privilege, "which requires the communication to
20 have been motivated by penitential or spiritual considerations." Id.
21 Because the statutes require that the communication be made to clergy
22 members in the course of the discipline enjoined by the clergy's
23 denomination, the privilege has been applied only to clergy when they are
24 "acting in a spiritual capacity." Id. at 198-99. The court said: "Our
25 review of the relevant case law reveals no jurisdiction extending the
26 privilege to communications that are not penitential or spiritual in

1 nature." Id. at 200.

2 Oregon's statute includes the restriction regarding the discipline
3 of the denomination; "member of the clergy" is defined as "a minister of
4 any church . . . who in the course of the discipline or practice of that
5 church . . . is authorized or accustomed to hearing confidential
6 communications and, under the discipline or tenets of that church, . . .
7 has a duty to keep such communications secret." OEC 506(1)(b). Thus,
8 the requirement that the communication relate to the seeking of spiritual
9 advice should apply equally under the Oregon privilege statute.

10 Thus, communications, even those the person intends to be
11 confidential, are not protected by the privilege unless they are made to
12 the clergy person in the furtherance of obtaining spiritual advice.
13 Under this view, communications to persons, even members of the clergy,
14 who at the time of the communication were acting as employers or
15 administrators or in other, non-spiritual capacities, are not privileged.

16 The tort claimant should be able to inquire into the witnesses'
17 knowledge of communications between representatives of the debtor and
18 other religious organizations or personnel on the subject matter set out
19 in the topic (as limited by my ruling on the general objections), unless
20 that communication was made to a clergy person in furtherance of
21 spiritual advice.

22 Debtor also objects on the basis of internal church governance. I
23 have already rejected that objection.

24 Finally, debtor objects on the basis of attorney-client privilege.
25 Debtor does not explain how answering questions related to this topic
26 would invade the attorney-client privilege. The tort claimants may

1 inquire into the topic.

2 12. Understanding of what Canons and religious doctrine governed
3 Debtor's responses to allegations of sexual misconduct by clergy.

4 Debtor objects to this topic, arguing that it impermissibly inquires
5 into the reasonableness of religious rules and what is adequate
6 compliance with those rules. I agree with the tort claimants that there
7 is no basis for precluding them from asking questions about the subject.
8 The questions could lead to evidence shedding light on the reasons why
9 debtor responded to allegations of clergy sexual abuse of minors in the
10 way it did. That is clearly relevant to the issues in these claims.
11 Further, simply asking the questions cannot infringe on any First
12 Amendment rights. There is no privilege to keep religious doctrine
13 secret.

14 13. The hierarchy of the Archdiocese, including officials and other
15 persons responsible for assigning and reassigning clergy,
16 disciplining clergy, transferring clergy, and responding to reports
17 of sexual misconduct by clergy. Also, those officials and other
18 persons responsible for recommending same to the Archbishop.

19 Debtor does not object to this topic of inquiry, assuming that the
20 tort claimants mean to ask about debtor's internal structure with respect
21 to dealing with complaints of sexual misconduct with minors. By the tort
22 claimants' failure to respond to debtor's assumption, it appears they
23 agree that the questions will relate to debtor's internal structure with
24 respect to dealing with complaints of sexual misconduct with minors.

25 14. The Archdiocese's policies and practices regarding reporting child
26 abuse to civil authorities.

Debtor has no objections to this topic, other than limiting it to
knowledge of the witnesses while within the Archdiocese of Portland. The
tort claimants may inquire about any information the witnesses have

1 regarding Archdiocesan policies and practices, regardless of the time
2 frame to which that information relates.

3 15. Knowledge of the 1962 "Instruction About the Manner of Proceeding in
4 Cases of the Crime of Solicitation."

5 Debtor objects to this topic, arguing that it raises constitutional
6 concerns. I disagree. First, as I have already explained, the tort
7 claimants are not precluded from asking questions about internal church
8 governance or laws. Second, the document about which the tort claimants
9 seek to inquire could lead to discovery of relevant evidence, if it was a
10 document that was transmitted to the Archdiocese or provided some basis
11 for the Archdiocese's practices or policies with regard to the types of
12 sexual abuse claims at issue here.

13 Debtor also argues that Archbishop Levada testified that he had not
14 seen the document and, therefore, the other witnesses would also not have
15 seen the document. There is no reason to believe that, simply because
16 one witness has not seen a document, other witnesses also have not seen
17 it. The tort claimants can ask about this topic.

18 16. Assistance provided, and responses in general, to persons who
19 reported sexual misconduct by clergy.

20 Debtor has no additional objections to this topic.

21 17. Policies, practices, and procedures regarding the maintenance,
22 control, and purging of priest personnel and *sub secreto* files and
23 whether those policies, practices, and procedures were consistent
24 with those of the Roman Catholic Church and/or the USCCB (or its
25 predecessor entities); and adherence to such policies and
26 procedures.

27 Debtor objects to this topic to the extent it could relate to
28 policies, practices, and procedures of religious organizations other than
29 the Archdiocese of Portland. I agree that inquiry into organizations

1 other than the Archdiocese of Portland would not likely lead to
2 discoverable evidence. The topic should be so limited.

3 Debtor also claims that the topic involves church law or church
4 rules and so is outside the scope of discovery. I have already rejected
5 that argument.

6 Finally, debtor objects to the "pejorative assumption" arising from
7 the use of the word "purging." This is discovery; I will not prohibit
8 inquiry into this topic simply because debtor does not like the tone set
9 by the language used in the topic listed.

10 18. The nature and scope of any oath of secrecy taken in investigating
11 or prosecuting accusations of sexual misconduct by clergy, and the
role of "mental reservation" in adhering to that oath.

12 Debtor objects to this topic on the basis that it relates to an
13 attempt to impose civil liability for damages measured by a religious
14 organization's compliance with its religious rules. This is simply
15 another iteration of the internal church governance argument, which I
16 have rejected.

17 The tort claimants may inquire whether the witnesses have taken any
18 oath of secrecy relating to investigating or prosecuting accusations of
19 sexual misconduct by clergy, because that could bear on the quality of
20 the answers they give to questions about what they did or knew at a
21 particular time with regard to sexual abuse allegations. The tort
22 claimants may also ask about whether answers given in the deposition are
23 affected by the exercise of mental reservation. As I explained above,
24 however, they may not inquire into mental reservation generally, but only
25 as relates to questions posed in these depositions.

26 19. Communications, or knowledge of communications, with parish priests

1 and/or other parish employees or representatives of parishes or
2 schools when returning a priest who had been previously accused of
sexual misconduct to a parish or school ministry or position.

3 Debtor does not have any additional objections to this topic, so
4 long as it is limited to communications involving priests in an
5 Archdiocesan ministry. The tort claimants argue that there should be no
6 geographical limitation, because the tort claimants are entitled to know
7 whether the witness responded differently under these circumstances
8 depending on whether the witness was in the Portland Archdiocese or
9 elsewhere. I fail to see how information about how witnesses responded
10 when they were outside the Portland Archdiocese is likely to lead to
11 relevant information. The topic will be limited to the witnesses'
12 communications or knowledge of communications while the witness was at
13 the Portland Archdiocese.

14 20. The witnesses' personal philosophies regarding clergy sexual
15 misconduct, i.e. whether it is a spiritual or a criminal problem,
and how it is best addressed.

16 Debtor objects to this topic on the basis that this line of inquiry
17 has no relevance to the pending claims. I agree. The question in these
18 tort claims is what debtor knew and did with regard to sexual misconduct
19 with minors by priests in an Archdiocesan ministry. The witnesses'
20 personal beliefs are not relevant, nor are they likely to lead to
21 relevant evidence of what they, as representatives of debtor, knew or
22 did. The tort claimants may inquire about what the witnesses knew or
23 did. They may ask why the witnesses did what they did. They may not,
24 however, inquire generally into the witnesses' personal philosophies
25 about clergy sexual misconduct. What is relevant is what the witnesses
26 knew or did, not what their personal philosophies are.

1 As Archbishop of Portland, Archbishop Levada effectively controlled
2 the corporation that is the defendant in these tort claims. Thus, his
3 knowledge and activities while in Portland are relevant to proof of
4 debtor's knowledge, patterns, practices, and policies with regard to
5 child sexual abuse by clergy.

6 After Archbishop Levada left Portland, he may have communicated with
7 the new archbishop or other representatives of the Archdiocese of
8 Portland on matters pertaining to what had occurred during his tenure in
9 Portland or what was occurring in Portland after he left. The tort
10 claimants may seek information from Archbishop Levada that relates to the
11 time post-dating his tenure in Portland, provided it is related to the
12 Portland Archdiocese. They may not inquire about his activities or
13 obtain other information that is unrelated to what was happening in
14 Portland after he left.

15 As for Archbishop Levada's activities that pre-date his tenure in
16 Portland, the question is more difficult. Because Archbishop Levada
17 controlled the debtor once he came to Portland, whether he knew that
18 child sexual abuse was damaging and the practices or policies that he
19 followed or implemented while in Portland are certainly relevant.
20 However, Archbishop Levada engaged in activities before he came to
21 Portland that may have affected his knowledge of the issue of sexual
22 abuse by clergy in general, and his actions with regard to such issues,
23 when he arrived here. Because debtor's knowledge of the existence of
24 claims of sexual abuse among clergy and the reasonableness of its
25 response to such claims is relevant to the extension of the statute of
26 limitations for child abuse claims in Oregon and the negligence claims,

1 questioning Archbishop Levada about his knowledge of the subject could
2 lead to admissible evidence in this litigation.

3 Subject to the limitations imposed in my discussion in the next
4 section, the tort claimants may ask Archbishop Levada what he knew at the
5 time he arrived at his Portland post of the problem of sexual abuse of
6 minors by clergy, and whether he had policies or practices that he
7 planned to or did implement when he got here. The tort claimants are
8 entitled to inquire about how he obtained any such information, and
9 whether his pre-Portland activities influenced his views during his
10 tenure in Portland on how to handle claims of sexual abuse of minors by
11 clergy.⁵

12 2. Questions relating to Archbishop Levada's tenure at the Congregation
13 for the Doctrine of the Faith

14 Archbishop Levada raises numerous objections to any questions that
15 seek to elicit information about his activities and communications while
16 serving at the Congregation for the Doctrine of the Faith at the Holy
17 See. He is currently serving as Prefect of that body. My understanding
18 is that he also served in some capacity with that body in the late 1970s
19 and early 1980s. The tort claimants have stipulated that they will not
20 ask questions about Archbishop Levada's current work, or decisions made
21 during his current tenure at the Congregation for the Doctrine of the
22 Faith. Therefore, it is unnecessary for me to decide whether certain

23
24 ⁵ The time frame that is appropriate for questioning Archbishop
25 Levada is broader than it is for the other witnesses, because Archbishop
26 Levada effectively controlled the debtor while he was Archbishop of
Portland, so what he knew and did before he came to Portland could bear
on what he knew and did when he arrived here.

1 immunities would apply to protect him from being compelled to answer such
2 questions.

3 The tort claimants do seek to ask questions about Archbishop
4 Levada's work and information he obtained during his earlier tenure at
5 the Congregation for the Doctrine of the Faith, which occurred before he
6 became the Archbishop of Portland. They argue that his work there is
7 relevant to these tort claims against the Archdiocese of Portland,
8 because he later became the Archbishop of Portland, whose knowledge and
9 attitudes are relevant.

10 Archbishop Levada argues that he should be protected from questions
11 about this information for numerous reasons, including application of the
12 Federal Sovereign Immunity Act, comity with the law of the Holy See, and
13 various governmental privileges.

14 I conclude that he is entitled to protection from questions
15 regarding his internal communications and acts at the Congregation for
16 the Doctrine of the Faith, because it would cause an undue burden on him
17 to compel him to answer such questions.

18 There does not seem to be any dispute that the Holy See's rules
19 require persons serving at the Congregation for the Doctrine of the Faith
20 to observe confidentiality and not disclose any information about what
21 the person has done during or learned through that service. This
22 includes protecting from disclosure any information about acts and
23 proceedings related to matters treated by the Congregation. The
24 consequence of disclosure in violation of this rule can be
25 excommunication, house arrest for up to five years, and deprivation of
26 any ecclesiastical office.

1 The Federal Rules of Civil Procedure allow a court to issue a
2 protective order or modify a subpoena if the discovery sought in an
3 action would be an undue burden on the person from whom discovery is
4 sought. Fed. R. Civ. P. 26(c)(4); 45(c)(3)(A)(iv) (made applicable to
5 adversary proceedings by Fed. R. Bankr. P. 7026 and 9016). Whether or
6 not the information sought might be relevant or lead to discovery of
7 admissible evidence, and whether or not it is protected by some immunity
8 or privilege, I will not require Archbishop Levada to answer questions
9 that could potentially cause him to be excommunicated, arrested, or
10 stripped of his authority in the church. That is an undue burden.

11 Archbishop Levada is not a party to this action. His tenure as
12 Archbishop of Portland began after the last alleged abuse in the pending
13 claims occurred. There is no indication that his internal communications
14 and acts at the Congregation for the Doctrine of the Faith had any direct
15 relationship to the patterns, practices, and policies of the Archdiocese
16 of Portland during the time the alleged abuse was occurring.

17 The tort claimants will be precluded from asking any questions
18 relating to internal communications and acts at the Congregation for the
19 Doctrine of the Faith during Archbishop Levada's tenure, whenever that
20 tenure occurred. This restriction applies only to what he learned and
21 did at the Congregation for the Doctrine of the Faith. It does not mean
22 that the tort claimants are precluded from asking questions about a
23 particular subject merely because it was discussed while Archbishop
24 Levada was at the Congregation for the Doctrine of the Faith, if the
25 subject later arose in a different context, such as while he was
26 Archbishop of Portland. He also may be asked why he did what he did

1 while he was in Portland. He need not disclose in his answers any
2 reasons based on what he learned at the Congregation for the Doctrine of
3 the Faith.

4 The tort claimants may ask questions about any actions Archbishop
5 Levada may have taken while he was working at the Congregation for the
6 Doctrine of the Faith with regard to issuance of any general policies or
7 directives from that Congregation to the church in the United States that
8 related to sexual abuse of minors by priests. There is no indication
9 that the oath of secrecy for work at the Congregation for the Doctrine of
10 the Faith includes work in communicating general directives to the wider
11 church body. If Archbishop Levada was involved in disseminating general
12 directives that were issued from the Congregation for the Doctrine of the
13 Faith to the Catholic Church in the United States, not related to
14 specific allegations or instances of misconduct, the tort claimants are
15 entitled to learn about it.

16 Archbishop Levada argues that the tort claimants should also be
17 precluded from asking questions about the pattern and practice of the
18 Roman Catholic Church. Because the argument is included with the
19 arguments about questions relating to work at the Congregation for the
20 Doctrine of the Faith, it is not clear what precisely the objection is.
21 It apparently relates to topics #4 and 20, which refer to whether the
22 personal practices of Archbishop Levada in responding to reports of
23 sexual misconduct with clergy were consistent with the stated policy of
24 the Roman Catholic Church (Topic #4), and whether the policies,
25 practices, and procedures of debtor with regard to priest personnel and
26 *sub secreto* files were consistent with those of the Roman Catholic Church

1 (Topic #20).

2 I assume that Archbishop Levada's argument against these questions
3 rests in his concern that he will be questioned about policies of the
4 Roman Catholic Church that he learned while working at the Congregation
5 for the Doctrine of the Faith. Except for general policies of the church
6 regarding sexual abuse of minors by priests that were communicated to the
7 wider church body, those questions are precluded under my ruling that
8 such questions would cause undue burden to the witness. I will not
9 preclude the questions to the extent they simply ask about whether his or
10 debtor's practices or policies were consistent with those of the Roman
11 Catholic Church. The questions about consistency of debtor's practices
12 or policies with practices or policies of the Roman Catholic Church are
13 limited to debtor's practices or policies during his tenure as Archbishop
14 of Portland. His opinion about whether debtor's practices or policies
15 were consistent with the policies of the Roman Catholic Church at other
16 times is seeking an expert opinion. He has not been retained as an
17 expert.

18 3. Privileges

19 Archbishop Levada also seeks a ruling that he is entitled to raise
20 numerous privilege objections, including objections based on Oregon's
21 clerical privilege, as well as the deliberative process privilege, the
22 confidential report privilege, the judicial privilege, the self-critical
23 analysis privilege, and the attorney-client privilege and work product
24 doctrine.

25 A. Clergy privilege

26 As I explained above in ruling on the objections to the topics for

1 the other witnesses, Oregon privilege law applies in this matter. See
2 Fed. R. Evid. 501.⁶ I have rejected the argument that Oregon's privilege
3 for communications with clergy, set forth in OEC 506(2), applies to all
4 confidential communications with clergy. The rule requires that the
5 communications with clergy be "in the [clergy] member's professional
6 character," which I interpret to mean in his role as spiritual advisor.
7 Therefore, the tort claimants will not be precluded from seeking
8 information set out in Topic # 11 (which is the topic to which I assume
9 this objection relates) about communications Archbishop Levada had on the
10 subject, so long as those communications were not made for the purpose of
11 obtaining or providing spiritual advice, including confession.

12 B. Deliberative process privilege, confidential report privilege,
13 judicial privilege

14 I understand these objections to relate solely to Archbishop
15 Levada's work at the Holy See and the Congregation for the Doctrine of
16 the Faith.⁷ They relate to the exercise of governmental functions, and
17 do not exist under Oregon law. Because the tort claimants will be
18 precluded from asking questions about Archbishop Levada's communications

19
20 ⁶ Archbishop Levada argues that other privilege law applies with
21 regard to questions about his work at the Congregation for the Doctrine
22 of the Faith. Because he will not be asked any questions about that
work, I need not consider whether other privilege law might protect
against such inquiries.

23 ⁷ The topic heading in Archbishop Levada's memorandum is
24 "Questions Regarding the Inner Workings of the Holy See are Barred by the
25 Deliberative Process Privilege and the Confidential Report Privilege."
26 The Holy See's Memorandum of Points and Authorities in Support of Motion
to Modify Subpoena at 30. He argues that the judicial privilege applies
because the Congregation for the Doctrine of the Faith "has a judicial
function." Id. at 34.

1 and activities at the Congregation for the Doctrine of the Faith, there
2 will be no basis for him to assert these privileges.

3 C. Self-critical analysis privilege

4 Archbishop Levada argues that, "[t]o the extent that Tort Claimants'
5 questions attempt to elicit [information covered by the self-critical
6 analysis privilege], Archbishop Levada is entitled to invoke the
7 privilege." The Holy See's Memorandum of Points and Authorities in
8 Support of Motion to Modify Subpoena at 36. However, he does not point
9 to any Oregon privilege for questions about self-critical analysis. Nor
10 does he point to any topics that would raise the self-critical analysis
11 issue. The tort claimants are limited to asking questions relating to
12 the topics that they have submitted and any reasonable follow-up
13 questions. Because Archbishop Levada does not point to any questions
14 that would seek to elicit information covered by the privilege, and
15 because he has not shown that the privilege exists in Oregon, he is not
16 entitled to object based on the self-critical analysis privilege.

17 D. Attorney-client privilege and work product doctrine

18 I have discussed the attorney-client privilege issue above in
19 relation to the other pattern and practice witnesses. The same analysis
20 and ruling applies to questions posed to Archbishop Levada. The only
21 topic that would cover questions relating to matters that might be
22 privileged is Topic # 10, which involves advice given to Archbishop
23 Levada by Robert McMenamin concerning communication with and training of
24 Archdiocesan clergy concerning responses to reports or observations of
25 sexual misconduct by clergy.

26 As for work product, Archbishop Levada does not point to any topic

1 that arguably raises the work product issue. Because the tort claimants
2 are limited to the topics included in the list and any reasonable follow-
3 up questions, there should be no work product issue.

4 **SPECIFIC OBJECTIONS TO TOPICS FOR ARCHBISHOP LEVADA**

5 As with the topics for the other pattern and practice witnesses, the
6 scope of the topics for Archbishop Levada is limited by my ruling, set
7 out above, that any reference to "sexual misconduct" shall mean sexual
8 misconduct with minors. References to "clergy" means Archdiocesan
9 clergy, including those working outside the Archdiocese, or other clergy
10 working in a ministry of the Archdiocese of Portland, and not to conduct
11 or practices in other dioceses or geographic locations. The time and
12 geographic limits are as set out above in my discussion of the general
13 objections to topics for Archbishop Levada's deposition.

14 These rulings address most of the specific objections raised to the
15 particular topics. I will discuss below only those additional objections
16 to particular topics.

17 1. The sources, scope, and form of Debtor's policies, practices, and
18 procedures regarding the manner of responding to allegations of, or
19 to any information suggesting, that a member of the clergy has or
20 may have engaged in sexual misconduct.

21 No additional objections.

22 2. Knowledge of accusations involving sexual misconduct against [a
23 redacted list of] clergy working in the Archdiocese, together with
24 knowledge of Debtor's responses to these allegations, knowledge of
25 decisions concerning the assignment or reassignment of the clergy,
26 and knowledge of additions or modifications to their personnel file
as a result thereof.

Debtor objects to questions about names on the list that he says
were not part of an Archdiocesan ministry. If the witness is not
familiar with the name on the list, he may so testify. The fact that he

1 may not know who the person is does not preclude the tort claimants from
2 asking the question.

3 3. Knowledge of the storage and disposition of records concerning those
4 listed in No. 2.

5 No additional objections.

6 4. Whether personal practices in responding to reports of sexual
7 misconduct by clergy have been consistent with the stated policy of
8 the Roman Catholic Church, U.S. Conference of Catholic Bishops,
9 and/or the assigned dioceses or Archdioceses.

10 Debtor is apparently satisfied with the tort claimant's explanation
11 of what is meant by "personal practices."

12 The tort claimants may ask whether Archbishop Levada's personal
13 practices in responding to reports of sexual misconduct by clergy,
14 whether before or during his tenure as Archbishop of Portland, was
15 consistent with the policies stated in the topic. They may not ask about
16 Archbishop Levada's personal practices after he left the Archdiocese of
17 Portland.

18 5. Discussions with other officials in the Archdiocese (other than
19 attorneys representing you or the Archdiocese), the USCCB, other
20 dioceses or archdioceses, the Congregation of the Doctrine of Faith,
21 and/or the Congregation for the Clergy concerning the destruction of
22 records concerning allegations of sexual misconduct by members of
23 the clergy.

24 The tort claimants are precluded from asking Archbishop Levada about
25 internal discussions he had while serving at the Congregation for the
26 Doctrine of the Faith. They are not precluded from asking Archbishop
Levada about discussions he may have had with representatives of the
Congregation for the Doctrine of the Faith before or after his tenure
with that Congregation that relate to the subject matter set out in the
topic, as limited by my ruling on the general objections.

1 6. Information passed along to you by Archbishop Power or other
2 officials of the Archdiocese upon your appointment as Archbishop of
Portland concerning clergy accused of sexual misconduct.

3 Archbishop Levada objects to this topic of inquiry, arguing that the
4 question was already asked and answered at his earlier deposition. That
5 a question has been asked and answered in a separate deposition is not a
6 basis for limiting the scope of this deposition.

7 7. Discussions of the Clergy Personnel Board, Cabinet, and other
8 official Archdiocesan groups about or concerning clergy accused of
9 misconduct, policies concerning the handling of complaints of sexual
misconduct by clergy, and reassignment of clergy accused of sexual
misconduct.

10 No additional objections.

11 8. Responsibilities of Archdiocesan personnel to investigate reports of
12 sexual misconduct by clergy.

13 No additional objections.

14 9. Communication with, and training of, Archdiocesan clergy concerning
15 responses to reports or observations of sexual misconduct by clergy.

16 No additional objections.

17 10. Former general counsel Robert McMenemy's advice concerning #9,
18 *supra*. (Attorney-client privilege has been waived -- see In re
19 McMenamin, 319 Or 609, 615 (1994)(Graber, J., dissenting)).

20 This topic was discussed above with regard to the topics for the
21 other witnesses. The tort claimants may inquire about McMenemy's legal
22 advice with regard to communication with, and training of, Archdiocesan
23 clergy concerning responses to reports or observations of sexual
24 misconduct by clergy, because there is no privilege for matters pertinent
25 to the bar complaint.

26 11. Knowledge of communications in any form between representatives of
the Debtor and the Holy See (including the Congregation of the
Doctrine of the Faith and the Congregation for the Clergy), the
Papal Nuncio, the USCCB and predecessor entities, and other dioceses
or archdioceses concerning allegations of sexual misconduct against

1 individual clergy, as well as concerning the policies, practices,
2 and procedures regarding the manner of responding to allegations of,
3 or to any information suggesting, that a member of the clergy has or
4 may have engaged in sexual misconduct.

5 This topic is not limited by the clergy privilege in Oregon. It is,
6 however, limited to knowledge obtained or communications made during
7 times other than when Archbishop Levada was at the Congregation for the
8 Doctrine of the Faith, unless those communications related to general
9 policies communicated to the wider church body, or relate to subjects
10 that came up in contexts outside the Congregation for the Doctrine of the
11 Faith.

12 12. Understanding of what Canons and religious doctrine governed
13 Debtor's response to allegations of sexual misconduct by clergy.

14 Archbishop Levada argues that this topic seeks his expert opinion
15 about canon law and religious doctrine. I agree, to the extent the topic
16 relates to any time period other than when Archbishop Levada was
17 Archbishop of Portland. His understanding of what canons and religious
18 doctrine governed debtor's response when he was not the Archbishop of
19 Portland would require him to give an expert opinion. He has not been
20 retained as an expert, and need not answer questions seeking his expert
21 opinion.

22 Questions about what canons and doctrine governed debtor's response
23 to allegations of sexual misconduct by clergy while Archbishop Levada was
24 Archbishop of Portland do not seek expert opinion. They are not seeking
25 to determine what canon law or religious doctrine is, other than as it
26 formed a basis for debtor's responses. The tort claimants may inquire
27 into this topic, but limited to Archbishop Levada's tenure in Portland.

28 13. The hierarchy of the Archdiocese, including officials and other

1 persons responsible for assigning and reassigning clergy,
2 disciplining clergy, transferring clergy, and responding to reports
3 of sexual misconduct by clergy. Also, those officials and other
4 persons responsible for recommending same to the Archbishop.

5 No additional objections.

- 6 14. Role in the presentation of the 1985 report prepared by Fr. Thomas
7 Doyle, Fr. Michael Peterson, and attorney Ray Mouton to the
8 Conference of Catholic Bishops, and the responses received by
9 officials of that organization.
- 10 15. The discussions, preparations, and approval that went into the
11 "Restoring Trust" publication of 1994 and the canonical procedures
12 set forth therein.
- 13 16. The discussions, preparations, and approval that went into the
14 "Essential Norms for Diocesan/Eparchial Policies Dealing with
15 Allegations of Sexual Abuse of Minors by Priests or Deacons" in 2002
16 and the canonical procedures set forth therein.

17 Archbishop Levada objects to Topics # 14, 15, and 16 on the grounds
18 that they raise constitutional questions. I have rejected that argument
19 in my discussion above.

20 He also objects because the topics are unrelated to the claims at
21 issue in this case, which occurred at the latest in 1985. I have also
22 rejected that argument, because information about debtor's policies and
23 actions after the last alleged abuse could lead to discoverable evidence
24 of what debtor's policies and knowledge were during the time the abuse
25 was alleged to have occurred.

26 However, the topics do not simply relate to the existence of the
referenced documents; they seek information about Archbishop Levada's
involvement in creating or approving them. Because Archbishop Levada's
pre-Portland conduct is relevant, I will allow the tort claimants to ask
about the 1985 report. Because the 1994 "Restoring Trust" publication
appears to have been produced while Archbishop Levada was in Portland,

1 they may also ask about that topic.

2 For the 2002 document, however, I have already said that Archbishop
3 Levada's activities that post-dated his Portland tenure are not
4 discoverable, unless they relate specifically to practices or policies
5 that were communicated to or from the Archdiocese of Portland. The
6 process that went into the approval of the 2002 document is unlikely to
7 lead to admissible evidence on these tort claims. The tort claimants may
8 not ask about the 2002 document, other than to ask if Archbishop Levada
9 had any communications with the Portland Archdiocese about it and, if so,
10 what that communication was.

11 17. The Archdiocese's policies and practices regarding reporting child
12 abuse to civil authorities.

13 No additional objections.

14 18. The 1962 "Instruction About the Manner of Proceeding in Cases of the
15 Crime of Solicitation," marked as Exhibit 2 (Latin) and Exhibit 3
(English translation) during the April 7, 2004 deposition.

16 Archbishop Levada objects to this topic, because he testified at his
17 earlier deposition that he had never seen the document. That is not the
18 basis for precluding the topic. If he has not seen the document and has
19 no information about or knowledge of it, he can so testify.

20 He also objects because the document has no connection to these
21 claims or to Archbishop Levada's tenure in Portland. I have already held
22 that Archbishop Levada may be asked about information or knowledge that
23 pre-dated his tenure in Portland. According to debtor, the claims at
24 issue in this litigation are based on conduct that occurred in the 1950s
25 through the 1980s. Thus, a 1962 document relates to the time frame of
26 the claims at issue here.

1 19. Assistance provided, and responses in general, to persons who
2 reported sexual misconduct by clergy during your tenure as
3 Archbishop of Portland.

4 No additional objections.

5 20. Policies, practices, and procedures regarding the maintenance,
6 control, and purging of priest personnel and *sub secreto* files;
7 whether those policies, practices, and procedures were consistent
8 with those of the Roman Catholic Church, the USCCB (or its
9 predecessor entities), and/or other dioceses and archdioceses; and
10 adherence to such policies and procedures.

11 This topic is limited to information about Archbishop Levada's
12 policies, practices, and procedures other than when he was at the
13 Congregation for the Doctrine of the Faith. The tort claimants may ask
14 whether the policies, practices, and procedures of debtor during the time
15 Archbishop Levada was Archbishop of Portland were consistent with those
16 of the Roman Catholic Church. They may not inquire about consistency for
17 periods when he was not in Portland, as that would constitute an expert
18 opinion.

19 21. The nature and scope of the oath of secrecy you took while working
20 at the Congregation of the Doctrine of the Faith, and the role of
21 "mental reservation" in adhering to that oath.

22 Because I have concluded that the tort claimants may not question
23 Archbishop Levada about his activities at the Congregation for the
24 Doctrine of the Faith, the nature and scope of any oath of secrecy he
25 took for his work at the Congregation for the Doctrine of the Faith is
26 not relevant to this litigation, and is not likely to lead to
discoverable evidence.

As I held with regard to the other deposition witnesses, this does
not preclude the tort claimants from asking whether answers to particular
questions are influenced by Archbishop Levada's exercise of mental

1 reservation.

2 22. Your communication, or communication at your direction, with parish
3 priests and/or other parish employees or representatives of parishes
4 or schools when returning a priest who had been previously accused
5 of sexual misconduct to a parish or school ministry or position.

6 No additional objections.

7 23. Your personal philosophy regarding clergy sexual misconduct, i.e.
8 whether it is a spiritual or a criminal problem, and how it is best
9 addressed.

10 Archbishop Levada argues that inquiry into his personal philosophy
11 has no relevance to the pending claims. I agree. As I explained in
12 ruling on the topics for the other witnesses, the question in these tort
13 claims is what debtor knew and did with regard to sexual misconduct with
14 minors by priests in an Archdiocesan ministry. Archbishop Levada's
15 personal beliefs are not relevant, nor are they likely to lead to
16 relevant evidence of what he, when he controlled debtor, knew or did.
17 The tort claimants may ask what he did and why; they may not ask about
18 his personal philosophy generally.

19 CONCLUSION

20 These depositions are for discovery purposes. The scope of
21 discovery is much broader than the admissibility of evidence; a party is
22 entitled to seek any information that might lead to admissible evidence.
23 These particular depositions are for a limited purpose, however, which is
24 to determine liability for the claims of sexual abuse of minors by
25 Archdiocesan priests or other priests in the ministry of the Archdiocese
26 of Portland. They are not for the purpose of gathering evidence for
possible punitive damages for these claims, or for the purpose of
gathering information unrelated to these claims that might be useful in

1 later claims against other church entities. The tort claimants have only
2 a limited amount of time in which to question these pattern and practices
3 witnesses. They should focus on the questions that would be most likely
4 to lead to admissible evidence on the liability of the Archdiocese of
5 Portland for these claims. The witnesses should provide answers to those
6 questions, so long as the questions are limited as set out in this
7 ruling.

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10 cc: Erin Olson
11 Kelly Clark
12 Jeffrey Lena
13 Tom Dulcich
14 Jim Westwood
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