

1 Irwin M. Zalkin, Esq., (#89957)  
2 Devin M. Storey, Esq. (#234271)  
3 Michael J. Kinslow, Esq. (#238310)  
4 THE ZALKIN LAW FIRM, P.C.  
5 12555 High Bluff Drive, Suite 260  
6 San Diego, CA 92130  
7 Tel: 858-259-3011  
8 Fax: 858/259-3015

9 Attorney for Plaintiffs

2011 APR 28 PM 2:25  
SAN DIEGO COUNTY, CA

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SAN DIEGO**

11 John Dorman, Individually, and Joel  
12 Gamboa, Individually,  
13  
14 Plaintiffs,  
15  
16 vs.  
17 Defendant Doe 1, La Jolla Church;  
18 Defendant Doe 2, Linda Vista Church;  
19 Defendant Doe 3, Supervisory Organization;  
20 Defendant Doe 4, Perpetrator; and Does 5  
21 through 100,  
22  
23 Defendants.

Case No: 37-2010-00092450-CU-PO-CTL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
NOTICE OF MOTION AND MOTION  
TO COMPEL FURTHER  
DOCUMENTS FROM DEFENDANT**

**Date: 5-20-11**  
**Time: 9:00 a.m.**  
**Judge: Steven R. Denton**  
**Dept: C-73**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS NOTICE  
OF MOTION AND MOTION TO COMPEL FURTHER DOCUMENTS FROM DEFENDANTS**

TABLE OF CONTENTS

1

2

3 I. INTRODUCTION.....1

4 A. The Jehovah’s Witness Response to Accusations of  
Childhood Sexual Abuse.....1

5 B. The Documents.....4

6 II. THE CLERGY-PENITENT PRIVILEGE.....6

7 A. Defendants Cannot Establish the Essential Pre-requisites  
for Application of the Clergy-Penitent Privilege.....7

8 B. The Withheld Documents are not “Penitential  
Communications”.....7

9 1. A “Penitential Communication” Cannot be Spoken  
in the Presence of a Third Party or Disclosed to  
Persons not Privy to the Original Communication.....8

10 2. The Withheld Documents are not “Penitential  
Communications” Because the Statements Were  
Made With Knowledge that the Statements  
Would be Disclosed to Third Parties.....9

11

12

13

14 C. None of the Withheld Documents was Addressed to a  
“Member of the Clergy”.....9

15

16 D. None of the Withheld Documents was Drafted by a “Penitent” .....10

17 E. Any Privilege has been Waived.....10

18 III. DOCUMENTS GENERATED AFTER THE LAST DATE OF  
ABUSE ARE RELEVANT.....11

19

20 A. Documents Generated After the Plaintiffs’ Last Date of  
Abuse may Show the Existence and Identities of Other  
Victims Abused Before and During the Plaintiffs’ Abuse.....11

21

22 B. Documents Generated After The Plaintiffs’ Last Date of  
Abuse May Have Information of Other Victims Abused  
After the Last Date of Plaintiffs’ Abuse.....12

23

24 C. Documents Generated After Plaintiffs’ Last Date of Abuse  
are Relevant in Assessing Punitive Damages.....12

25

26 D. Documents Generated After Plaintiffs’ Last Date of Abuse  
are Relevant for Purposes of Showing that Defendants  
Ratified the Perpetrator’s Molestation of Children.....13

27 IV. THE PRIVACY RIGHTS OF THIRD PARTIES DO NOT SUPPORT  
WITHHOLDING OR REDACTING THE WITHHELD DOCUMENTS.....13

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

V. THE FIRST AMENDMENT.....14  
VI. CONCLUSION.....15

**TABLE OF AUTHORITIES**

**Cases**

1

2

3

4 *Baptist v. Robinson*  
    (2006) 143 Cal.App.4th 151.....13

5

6 *C.R. v. Tenet Healthcare Corp.*  
    (2009) 169 Cal.App.4th 1094.....13

7 *Colonial Life & Acc. Ins. Co. v. Sup. Ct.*  
    (1982) 31 Cal.3d 785.....11

8

9 *Davies v. Sup. Ct.*  
    (1984) 36 Cal. 3d 291.....11

10 *Doe 2 v. Superior Court*  
    (2005) 132 Cal.App.4th 1504.....8,14

11

12 *Emerson Elec. Co. v. Grayson*  
    (1997) 16 Cal.4th 1101.....11

13 *Greyhound Corp. v. Clay*  
    (1961) 56 Cal.2d 355.....11

14

15 *Johnson v. Ford Motor Co.*  
    (2005) 35 Cal.4th 1191.....13

16 *McChristian v. Popkin*  
    (1946) 75 Cal.App.2d 249.....13

17

18 *Murillo v. Rite Stuff Foods*  
    (1998) 65 Cal.App.4th 833.....13

19 *Pacific Tel. & Tel. Co. v. Sup. Ct.*  
    (1970) 2 Cal.3d 161.....11

20

21 *People v. Johnson*  
    (1969) 270 Cal.App.2d 204.....7

22 *People v. Sinohui*  
    (2002) 28 Cal.4th 205.....6-7

23

24 *People v. Thompson*  
    (1982) 133 Cal.App.3d 419.....7

25 *Roman Catholic Archbishop of Los Angeles*  
    (2005) 131 Cal.App.4th 417.....7,8

26

27 *Serbian Eastern Orthodox Diocese v. Milivojevich*  
    (1976) 426 U.S. 696.....15

28 *Stevens v. Roman Catholic Bishop of Fresno*  
    (1975) 49 Cal.App.3d 877.....15

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

*Valley Bank of Nevada v. Superior Court*  
(1975) 15 Cal.3d 652.....14

**Statutes**

California Code of Civil Procedure § 2017.010.....11  
California Evidence Code § 911.....14  
California Evidence Code § 912(a).....10  
California Evidence Code § 1030.....7,9  
California Evidence Code § 1031.....7,10  
California Evidence Code § 1032.....7,8  
California Evidence Code § 1033.....7,10  
California Evidence Code § 1034.....7,10

1 **I. INTRODUCTION**

2 This case results from the sexual molestation of Plaintiffs John Dorman and Joel Gamboa by Doe  
3 4 Perpetrator. Perpetrator held several different positions, over several years, with The La Jolla Spanish  
4 Congregation of Jehovah's Witnesses (the La Jolla Congregation), The Linda Vista Spanish Congregation  
5 of Jehovah's Witnesses (the Linda Vista Congregation), The Playa Pacifica Spanish Congregation of  
6 Jehovah's Witnesses, and The Watchtower Bible and Tract Society of New York, Inc (the Watchtower).  
7 The La Jolla Congregation and the Linda Vista Congregation are local congregations of the Jehovah's  
8 Witness Church. The Watchtower is the national headquarters of the Jehovah's Witness Church and  
9 exercises governance over the local congregations. Through the association of Plaintiffs and Perpetrator  
10 with the Church Defendants, Plaintiffs were repeatedly molested.

11 This motion involves eighteen documents in the possession of the Watchtower and the La Jolla  
12 Congregation (Defendants). Defendants object to the production of these documents primarily on the  
13 basis of the clergy-penitent privilege. The first of these documents was a written complaint by John and  
14 Manuela Dorman regarding the molestation of their son by the Perpetrator. Each of the remaining  
15 documents regards the investigation of the allegations, findings by the local church and punishment or  
16 reinstatement of the Perpetrator. In short, there is nothing remotely penitential, scriptural or confidential  
17 about any of the subject documents.

18 **A. The Jehovah's Witness Response to Accusations of Childhood Sexual Abuse**

19 "Since July 1989, if elders learn of an allegation of childhood sexual abuse they call the Legal  
20 Department and receive advice with respect to reporting laws for clergy members." (Plaintiffs' Exhibit 1,  
21 Doe 1, La Jolla Church's Response to Special Interrogatories, Response Number 7.) If local elders learn  
22 of allegations of sexual abuse, "two elders would be assigned to investigate the matter." (Plaintiffs'  
23 Exhibit 1, Doe 1, La Jolla Church's Response to Special Interrogatories, Response Number 6.) Such an  
24 investigation would be made "by elders for the congregation where the accused was associated or  
25 possibly where the victim was associated, if different." (Plaintiffs' Exhibit 2, Doe 3, Supervisory  
26 Organization's Response to Special Interrogatories, Response Number 7.)

27 If the two investigating elders "determined that there was a basis for the allegations, a judicial  
28 committee would have been formed (which could usually consist of the original two elders and at least

1 one more elder) to handle the matter according to Biblical principles.” (Plaintiffs’ Exhibit 1, Doe 1, La  
2 Jolla Church’s Response to Special Interrogatories, Response Number 6.) Local elders typically speak  
3 with the perpetrator and the victims. (Plaintiffs’ Exhibit 3, Doe 2, Linda Vista Church’s Response to  
4 Special Interrogatories, Response Number 9.)

5 A judicial committee has the authority to issue punishment or set restrictions on congregants who  
6 have committed a serious sin. (Plaintiffs’ Exhibit 4, Deposition of Juan Guardado at 30:7-9.) At its  
7 conclusion, the judicial committee generates a report summarizing the accusations and outcome of the  
8 judicial committee investigation and stating what punishment has been imposed on the accused.  
9 (Plaintiffs’ Exhibit 4, Deposition of Juan Guardado at 30:7-19.) A person is reprovved when the judicial  
10 committee determines that the person was guilty of the sin, but is repentant and stopped committing the  
11 sin prior to the commencement of the judicial committee. (Plaintiffs’ Exhibit 4, Deposition of Juan  
12 Guardado at 30:20 - 31:4.) A person who is reprovved remains an active member of the congregation, but  
13 may be subjected to some restrictions. (Plaintiffs’ Exhibit 4, Deposition of Juan Guardado at 32:8 -  
14 32:19.) A person who is disfellowshipped is subjected to a period of expulsion from the congregation. A  
15 person who is disfellowshipped cannot do field service, and no member of the congregation will speak to  
16 him or her. (Plaintiffs’ Exhibit 4, Deposition of Juan Guardado at 31:6 - 32:7.)

17 If the wrongdoer is disfellowshipped, he has the right to appeal the decision of the judicial  
18 committee. (Plaintiffs’ Exhibit 4, Deposition of Juan Guardado at 33:4 - 4.) This appeal is not heard by  
19 the same members who comprised the original judicial committee, but is instead heard by a different  
20 group of three elders, sometimes from a different congregation altogether. (Plaintiffs’ Exhibit 5,  
21 Deposition of Jesus Montijo at 32:13-25.)

22 The written report of the judicial committee must be sent to the Service Department of the  
23 Watchtower if the wrongdoer was disfellowshipped, or if the wrongdoer was reprovved while serving in  
24 the appointed positions of pioneer, ministerial servant, or elder. (Plaintiffs’ Exhibit 4, Deposition of Juan  
25 Guardado at 51:3 - 52:1.)

26 When a judicial committee was formed as a result of child abuse by the accused, the written  
27 report of the judicial committee must be kept forever. (Plaintiffs’ Exhibit 4, Deposition of Juan  
28 Guardado at 34:25 - 35:15.) This is true whether the accused was reprovved or disfellowshipped.

1 (Plaintiffs' Exhibit 4, Deposition of Juan Guardado at 34:25 - 35:15.) If the perpetrator moves to another  
2 congregation, that new congregation would be given a letter about the results of the judicial committee.

3 (Plaintiffs' Exhibit 5, Deposition of Jesus Montijo at 34:1-9.)

4 The file of the judicial committee is kept in the congregation's confidential files. (Plaintiffs'  
5 Exhibit 6, Deposition of Dennis Palmer at 50:6 - 50:20.) One of the congregation's elders serves as the  
6 congregation's secretary. The secretary has access to the congregation's confidential files and judicial  
7 committee records. (Plaintiffs' Exhibit 6, Deposition of Dennis Palmer at 50:6 - 50:20.) It is the  
8 obligation of a new secretary upon rising to that position to review the congregation's archives and  
9 confidential files, including the judicial committee reports. (Plaintiffs' Exhibit 6, Deposition of Dennis  
10 Palmer at 50:6 - 50:20.; Plaintiffs' Exhibit 7, Deposition of Ramon Preciado at 61:19 - 62:12.) This  
11 would be true even if the secretary was not an elder at the time that a past judicial committee was  
12 convened. Additionally, when new elders are appointed, they must be informed of what members of the  
13 congregation are under restriction, and the basis of the restrictions. (Plaintiffs' Exhibit 6, Deposition of  
14 Dennis Palmer at 34:5-17.)

15 After a congregation member has been disfellowshipped, he or she can apply for reinstatement by  
16 submitting a written request to the body of elders of the congregation. (Plaintiff's Exhibit 4, Deposition  
17 of Juan Guardado at 42:10 - 43:12.) A group of elders will consider the reinstatement request.  
18 (Plaintiff's Exhibit 4, Deposition of Juan Guardado at 44:7 - 44:17.) This group of elders may be  
19 comprised of the original judicial committee who imposed disfellowship, or of different elders if the  
20 original judicial committee members are no longer associated with the congregation. (Plaintiff's Exhibit  
21 4, Deposition of Juan Guardado at 44:7 - 44:17.) The elders will open the judicial committee file and  
22 review its contents. (Plaintiff's Exhibit 4, Deposition of Juan Guardado at 49:19-21.) They will  
23 consider whether the perpetrator can be reinstated, and if so, what restrictions should be placed on him.

24 Thus, in light of the foregoing, any report of childhood sexual abuse made to a local congregation  
25 is made with the understanding that individuals associated with the Watchtower's Legal Department, the  
26 perpetrator, the victim, and at least two elders of the local congregation where the perpetrator was  
27 affiliated will be made aware of the communication. Any statement made to a judicial committee is made  
28 with the understanding that the perpetrator, individuals associated with the Watchtower, the currently



1 constituted body of elders of the local congregation conducting the judicial committee, innumerable  
2 subsequent elders who hold the position of secretary, a judicial committee formed from elders at another  
3 congregation for the purpose of appeal, the elders of any subsequent congregation that the perpetrator  
4 attends, and subsequent elders not associated with the original judicial committee in considering a request  
5 for reinstatement of the accused may be given access to the statement. In short, potentially dozens of  
6 individuals not present for the original communication, may ultimately be able to review any statement or  
7 information provided to a judicial committee or body of elders.

8 **B. The Documents**

9 Eleven documents were withheld by the Watchtower on the basis of the "minister-communicant"  
10 privilege, the privacy rights of third parties, and / or on the basis of relevance. Those documents are:

11 Withheld Document 1. April 11, 1994, letter from John and Manuela Dorman to the elders  
12 of the English Congregation, Monmouth, Oregon.

13  
14 Withheld Document 2. April 13, 1994, letter from the presiding elder (overseer) in the  
15 English Congregation, Monmouth, Oregon to the elders in the U.S.  
16 Service Department, regarding [John Dorman] and [Doe 4  
17 Perpetrator].

18  
19 Withheld Document 3. June 9, 1994, letter from elders in U.S. Service Department to body  
20 of elders for the English Congregation, Monmouth, Oregon, with a  
21 P.S. to the body of elders for the Playa Pacifica Spanish  
22 Congregation, regarding [Doe 4 Perpetrator].

23  
24 Withheld Document 4. March 29, 1995, letter from elders on Service Committee for Playa  
25 Pacifica Spanish Congregation to elders in the U.S. Service  
26 Department, regarding [Doe 4 Perpetrator].

27  
28 Withheld Document 5. April 27, 1995, letter from elders in the U.S. Service Department to

1 the body of elders for Playa Pacifica Spanish regarding [Doe 4  
2 Perpetrator].

3 Withheld Document 6. August 18, 1995, letter from the elders on the Playa Pacifica  
4 Spanish Congregation Judicial Committee for [Doe 4 Perpetrator] to  
5 elders in the U.S. Service Department, regarding [Doe 4  
6 Perpetrator].

7 Withheld Document 7. November 13, 1996, letter from elders in the Playa Pacifica Spanish  
8 Congregation to elders in the U.S. Service Department, regarding  
9 [Doe 4 Perpetrator].

10 Withheld Document 8. January 7, 1997, letter from elders in the U.S. Service Department  
11 to the body of elders for Playa Pacifica Spanish Congregation,  
12 regarding [Doe 4 Perpetrator].

13 Withheld Document 9. July 24, 1999, letter from elders in the Playa Pacifica Spanish  
14 Congregation to elders in the U.S. Service Department, regarding  
15 [Doe 4 Perpetrator].

16 Withheld Document 10. August 12, 1999, letter from elders in the U.S. Service Department  
17 to the body of elders for Playa Pacifica Spanish Congregation,  
18 regarding [Doe 4 Perpetrator].

19 Withheld Document 11. June 5, 2000, letter from elders in the U.S. Service Department to  
20 the body of elders for Playa Pacifica Spanish, regarding [Doe 4  
21 Perpetrator].

22  
23 Seven documents were withheld by the La Jolla Congregation on the basis of relevance, the  
24 clergy-penitent privilege, and the privacy rights of third parties. Those documents are:

25 Withheld Document 12. June 9, 1995, Notification of Expulsion or Disassociation sent by  
26 Playa Pacifica Congregation Judicial Committee to elders in U.S.  
27  
28

1 Service Department regarding [Doe 4 Perpetrator].<sup>1</sup>

2  
3 Withheld Document 13. October 13, 1995, letter from [Doe 4 Perpetrator] to the body of  
4 elders for the Playa Pacifica Spanish Congregation, requesting  
5 reinstatement into the congregation.  
6

7 Withheld Document 14. September 14, 1998, letter from [Doe 4 Perpetrator] to the body of  
8 elders for the Playa Pacifica Spanish Congregation, requesting  
9 reinstatement into the congregation.  
10

11 Withheld Document 15. January 27, 1999, letter from [Doe 4 Perpetrator] to the body of  
12 elders for the Playa Pacifica Spanish Congregation, requesting  
13 reinstatement into the congregation  
14

15 Withheld Document 16. July 4, 1999, draft of a letter from elders in the Playa Pacifica  
16 Spanish Congregation to elders in the U.S. Service Department,  
17 regarding [Doe 4 Perpetrator].  
18

19 Withheld Document 17. July 20, 1999, draft of a letter from elders in the Playa Pacifica  
20 Spanish Congregation to elders in the U.S. Service Department,  
21 regarding [Doe 4 Perpetrator].

22 Withheld Document 18. October 28, 2006, notes of an elders meeting of elders in the Playa  
23 Pacifica Spanish Congregation, regarding [Doe 4 Perpetrator].

24 **II. THE CLERGY-PENITENT PRIVILEGE**

25 The general rule is that evidentiary privileges should be narrowly construed because privileges  
26 prevent the admission of relevant and otherwise admissible evidence. *People v. Sinohui* (2002) 28  
27

---

28 <sup>1</sup> This document was produced in redacted form by the Watchtower. If this Court finds this document is discoverable, it should be produced by both the Watchtower and the La Jolla Spanish Congregation.

1 Cal.4th 205, 212. With this rule in mind, it bears discussing that the Defendants are seeking the broadest  
2 possible interpretation of the clergy-penitent privilege, which would effectively immunize all church  
3 communications from discovery. This privilege does not exist to allow church organizations to shroud all  
4 communications by or to a member of the church with an impenetrable cloak of immunity.

5 Instead, “the clergyman-penitent privilege is rooted in the imperative need for confidence and  
6 trust between the relator and the recipient. The priest-penitent privilege recognizes the human need to  
7 disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or  
8 thoughts and to receive priestly consolation and guidance in return.” *People v. Thompson* (1982) 133  
9 Cal.App.3d 419, 427. As a result, not every communication to a clergyman is privileged. *Id.* at 426  
10 citing *People v. Johnson* (1969) 270 Cal.App.2d 204, 207.

11 None of the purposes underlying the clergy-penitent privilege is advanced by applying the  
12 privilege to the withheld documents.

13 **A. Defendants Cannot Establish the Essential Pre-requisites for Application of the**  
14 **Clergy-Penitent Privilege**

15 The clergy-penitent privilege is defined in Evidence Code section 1030-1034. When those  
16 provisions are examined, it is clear that the clergy-penitent privilege does not apply to any of the withheld  
17 documents. In the context of the clergy-penitent privilege, the privilege claimant has the initial burden of  
18 proving the preliminary facts to show the privilege applies. *Roman Catholic Archbishop of Los Angeles*  
19 (2005) 131 Cal.App.4th 417, 442. Once the preliminary facts have been proven, the burden shifts to the  
20 opponent of the privilege. *Id.* To meet its initial burden Defendant must establish the following:

- 21 1. There was a “penitential communication” (Cal. Evid. Code § 1032);
- 22 2. The penitential communication was made to a “member of the clergy” (Cal. Evid. Code §  
23 1030); and
- 24 3. The penitential communication was made by a “penitent” (Cal. Evid. Code § 1031.)

25 Defendant has not met, and cannot meet, its burden with regard to any of these requirements.

26 **B. The Withheld Documents are not “Penitential Communications”**

27 A “penitential communication means a communication made in confidence, in the presence of no  
28 third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline  
or practice of the clergy member’s church, denomination, or organization is authorized or accustomed to

1 hear those communications and, under the discipline or tenets of his or her church, denomination, or  
2 organization, has a duty to keep those communications secret.” Cal. Evid. Code § 1032.

3 **1. A “Penitential Communication” Cannot be Spoken in the Presence of a Third**  
4 **Party or Disclosed to Persons not Privy to the Original Communication**

5 *Roman Catholic Archbishop* involved grand jury subpoenas to compel production of certain  
6 priests’ personnel files in the possession of the Archbishop. The Archbishop claimed that many  
7 documents were protected from disclosure by the clergy-penitent privilege because they contained  
8 information divulged to the Archbishop, or his subordinate, the Vicar for Clergy. The court disagreed,  
9 finding that the communications at issue were made with the understanding that the communications  
10 would be shared with more than one person. 131 Cal.App.4th at 444-445. “This sharing of information  
11 violates Evidence Code section 1032’s requirement that the penitent’s communication be ‘made in  
12 confidence, in the presence of no third person so far as the penitent is aware.’” *Id.* at 445. Moreover, “the  
13 fact that both parties to the original communication knew it likely would be transmitted to a third person  
14 vitiated ab initio any privilege under Evidence Code section 1032, or, alternatively, constituted a waiver  
15 of the privilege.” *Id.*

16 In addition, in *Roman Catholic Archbishop*, the Archdiocese argued that the communications had  
17 not been transmitted to any third party because the Vicar for Clergy was the Archbishop’s alter ego. *Id.*  
18 The court disagreed finding that even though both individuals worked for the Archdiocese, sharing a  
19 confidential communication between them destroyed any privilege. *Id.* Sharing a communication among  
20 multiple individuals associated with Defendants likewise breaks any privilege that would have been  
21 applicable. This includes statements that are shared among officials of the same church, and for the  
22 purpose of determining what actions should be taken regarding sexual abusers.

23 In *Doe 2 v. Superior Court*, the court found that any statement made in the presence of a third  
24 person, even in a therapeutic environment, was not a penitential communication. The court stated:

25 “Pastor Fernandez noted in her declaration that she held a weekend retreat to provide religious and  
26 spiritual healing to persons affected by Gary Carson-Hull. To the extent any participant in that  
27 retreat made statements to Pastor Fernandez in the presence of other participants, such statements  
28 would not be protected from disclosure by virtue of the clergy-penitent privilege because of the  
presence of other persons.” (2005) 132 Cal.App.4th 1504, 1518.

The hallmark of a “penitential communication” is the unfettered knowledge on the part of the  
speaker that the statement will not be divulged to any third party. As a result, any communication either

1 made in the presence of a third party, or with knowledge that the communication could be shared with a  
2 third party, is not a “penitential communication” and therefore is not protected by the clergy-penitent  
3 privilege.

4                   **2. The Withheld Documents are not “Penitential Communications” Because the**  
5                   **Statements Were Made With Knowledge that the Statements Would be**  
6                   **Disclosed to Third Parties**

7                   No complaint for childhood sexual abuse, or statement to a judicial committee or body of elders  
8 could possibly be considered a penitential communication. Each such statement would have been made  
9 with the knowledge that individuals not present for the initial communication could nonetheless be given  
10 access to the statement at a later date. A person making such a statement, could not form the requisite  
11 intent to make a “penitential communication.”

12                   For this reason, this case is extremely analogous to *Roman Catholic Archbishop*, where the  
13 privilege did not apply to statements by troubled priests who disclosed their sexual problems to the vicar  
14 for clergy, or the Archbishop, with the knowledge that one or more persons not party to the original  
15 communication was likely to gain knowledge of the communication, even though it was known the  
16 communication would not be disseminated outside of the church. Here, any statement made to the body  
17 of elders of a local congregation regarding childhood sexual abuse was made with the knowledge that  
18 other individuals, who were not present for the original communication, could have access to the  
19 statement at a later time. Under *Roman Catholic Archbishop*, such statements cannot be “penitential  
20 communications.”

21                   **C. None of the Withheld Documents was Addressed to a “Member of the Clergy”**

22                   “A member of the clergy means a priest, minister, religious practitioner, or similar functionary of  
23 a church or of a religious denomination or religious organization.” Cal. Evid. Code § 1030. Notably, the  
24 definition of “member of the clergy” only includes natural persons associated with religious  
25 organizations, churches and religious denominations. Neither the religious organizations themselves, nor  
26 any subdivision thereof are included within the definition. Thus, Defendants, the “U.S. Service  
27 Department” of the Watchtower, and the “body of elders” of the La Jolla Congregation are not “members  
28 of the clergy” as defined by the Evidence Code.

                  Defendants’ exclusion from the definition of “member of the clergy” is significant for two

1 reasons. First, any communication made directly to Defendants would fail to be privileged since the  
2 communication would not have been made to a member of the clergy. Second, if the communication was  
3 made to a member of the clergy, and then found its way into the files of the La Jolla Congregation or the  
4 Watchtower, any putative privilege would be waived by disclosure of the potentially privileged  
5 communication to a third party.

6 None of the recipients of the subject communications meets the definition of a “member of the  
7 clergy.” Consequently, none of the withheld documents are privileged.

8 **D. None of the Withheld Documents was Drafted by a “Penitent”**

9 A penitent is “a person who has made a penitential communication to a member of the clergy.”  
10 Cal. Evid. Code § 1031. A penitent is a person. While that word is subject to multiple meanings, and can  
11 include corporations, to read the word to mean anything other than a natural person would be ridiculous  
12 in this context. As discussed above, the purpose of the clergy-penitent privilege is to provide an  
13 individual the ability “to disclose to a spiritual counselor, in total and absolute confidence, what are  
14 believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.” A  
15 religious organization does not have the same need.

16 Since only a “penitent” or a “member of the clergy” has a right to assert the clergy-penitent  
17 privilege (Cal. Evid. Code §§ 1033, 1034), and since Defendants are neither, Defendants have no  
18 standing to assert this privilege, and have made no showing that any of the natural persons who were  
19 recipients of the subject communications qualify to assert the privilege. Because Defendants are not  
20 natural persons, and since religious organizations are not included within the definition of a “member of  
21 the clergy,” no holder of a privilege has objected to the production of the withheld documents.

22  
23 **E. Any Privilege has been Waived**

24 “Except as otherwise provided in this action, the right of any person to claim . . . [the clergy-  
25 penitent privilege] . . . is waived with respect to a communication protected by the privilege if any holder  
26 of the privilege, without coercion, has disclosed a significant part of the communication or has consented  
27 to disclosure made by anyone.” Cal. Evid. Code § 912(a). In the event that any of the withheld  
28 documents were at some time privileged, the privilege was waived when the documents were given to

1 Defendant who was not a holder of the privilege.

2 **III. DOCUMENTS GENERATED AFTER THE LAST DATE OF ABUSE ARE RELEVANT**

3 Defendants refused to produce any documents generated after the last date of abuse of Plaintiff  
4 Gamboa in 1995. The stated basis is that the documents are irrelevant since they were generated after the  
5 last date of abuse. Such documents are properly within the scope of discovery and should be produced.

6 Code of Civil Procedure section 2017.010 provides as follows:

7 Unless otherwise limited by order of the court in accordance with this title, any party may  
8 obtain discovery regarding any matter, not privileged, that is relevant to the subject matter  
9 involved in the pending action or to the determination of any motion made in that action, if  
the matter either is itself admissible in evidence or appears reasonably calculated to lead to  
the discovery of admissible evidence.

10 The “relevance to the subject matter” and “reasonably calculated to lead to discovery of  
11 admissible evidence” standards are applied liberally. Any doubt is generally resolved in favor of  
12 permitting discovery, particularly where the precise issues in the case are not yet clearly established.  
13 *Colonial Life & Acc. Ins. Co. v. Sup. Ct.* (1982) 31 Cal.3d 785, 790. To avoid the prejudicial effects of  
14 denying discovery based on relevance alone, courts have construed the discovery statutes broadly and  
15 upheld the right to discovery wherever possible. *Greyhound Corp. v. Clay* (1961) 56 Cal.2d 355, 377-78;  
16 *Emerson Elec. Co. v. Grayson* (1997) 16 Cal.4th 1101, 1108; *Pacific Tel. & Tel. Co. v. Sup. Ct.* (1970) 2  
17 Cal.3d 161, 172-73 (stating that “the relevance of the subject matter standard must be reasonably applied;  
18 in accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should  
19 generally be resolved in favor of permitting discovery”). Further, the test for discovery is not whether it  
20 will ultimately be admissible, but rather will it lead to other evidence that will be admissible. *Davies v.*  
21 *Sup. Ct.* (1984) 36 Cal. 3d 291, 301. Moreover, “[d]iscovery may relate to the claim or defense of the  
22 party seeking discovery, or of any other party to the action.” Code Civ. Proc. § 2017.010. Thus, the  
23 Plaintiffs are entitled to any discovery both to establish their own case, as well as to attack the  
24 Defendants’ defenses.

25 **A. Documents Generated After the Plaintiffs’ Last Date of Abuse may Show the**  
26 **Existence and Identities of Other Victims Abused Before and During the Plaintiffs’**  
**Abuse**

27 Plaintiffs’ are aware of additional victims of molestation by the Perpetrator, but there may be  
28 additional victims that are unknown to Plaintiffs. Such unknown victims may have been abused prior to



1 the abuse of Plaintiffs. Even if these, or other victims of abuse by the Perpetrator reported their  
2 victimization to Defendants after the abuse of Plaintiffs' ceased, the reports may lead to the discovery of  
3 admissible evidence: (1) they may have information that they reported their abuse to the church years ago  
4 during their abuse, and therefore before or during the time of the Plaintiffs' abuse; (2) they may have  
5 information about other victims (which is often the case), and those victims may have information of  
6 notice to the Defendants; (3) they may have corroborating evidence of the Plaintiffs' abuse, such as  
7 providing eye witness testimony to their abuse; (4) they may have information about the Plaintiffs'  
8 damages, such as witnessing unexplained changes in the Plaintiffs' character; and (5) they may provide  
9 testimony as to the pattern of the Perpetrator's grooming of minors or sexual acts.

10 **B. Documents Generated After The Plaintiffs' Last Date of Abuse May Have**  
11 **Information of Other Victims Abused After the Last Date of Plaintiffs' Abuse**

12 Reports or allegations made by victims abused after Plaintiffs' last date of abuse are also  
13 reasonably calculated to lead to the discovery of admissible evidence. Such allegations or reports may:  
14 (1) have information about other victims, and those victims may have information of notice to the  
15 Defendants; (2) have corroborating evidence of the Plaintiffs' abuse, such as providing eye witness  
16 testimony to their abuse; (3) have information about the Plaintiffs' damages, such as witnessing  
17 unexplained changes in the Plaintiffs' character; and (4) provide testimony as to the pattern of the  
18 Perpetrator's grooming of minors.

19 **C. Documents Generated After Plaintiffs' Last Date of Abuse are Relevant in Assessing**  
20 **Punitive Damages**

21 From the number of victims, and the information uncovered by Plaintiffs', it appears that  
22 Defendants received complaints about the Perpetrator's sexual abuse of children prior to the report by  
23 Manuela and John Dorman in 1994 (*See* Withheld Document 1). The Perpetrator continued to retain a  
24 position of authority after those reports were made. Evidence of the Defendants' subsequent acts of  
25 protecting and covering for the Perpetrator is relevant to assess whether there is a basis to seek leave to  
26 amend the complaint to allege punitive damages against the Defendants. The California Supreme Court  
27 recently held as follows:

28 While both *BMW* and *State Farm* were cases in which the evidence state courts had considered of conduct toward others was impermissibly broad, the United States Supreme Court's analysis in both cases makes clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or

1 wrongful conduct toward others that was similar to the tortious conduct that injured the  
2 plaintiff or plaintiffs. We therefore join the numerous courts holding that a civil  
3 defendant's recidivism remains pertinent to an assessment of culpability.

4 *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1204 (emphasis added).

5 In this case, abuse and notice information after the Plaintiffs' abuse is relevant in proving the  
6 Defendants' continuing pattern of coverup in protecting the Perpetrator, and the Defendants' continuing  
7 conscious disregard for the rights and safety of minor Jehovah's Witness children. Pursuant to the  
8 Court's holding in *Johnson*, this type of evidence is clearly relevant to an assessment of the Defendants'  
9 culpability and, therefore, to an assessment of punitive damages.

10 **D. Documents Generated After Plaintiffs' Last Date of Abuse are Relevant for Purposes**  
11 **of Showing that Defendants Ratified the Perpetrator's Molestation of Children**

12 Documents generated after Plaintiffs' last date of abuse are also necessary to establish that  
13 Defendants ratified the Perpetrator's sexual abuse of children, including John Dorman. The failure to  
14 discharge an agent or employee despite knowledge of his unfitness is evidence tending to show  
15 ratification. *See McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256. "The theory of ratification is  
16 generally applied where an employer fails to investigate or respond to charges that an employee  
17 committed an intentional tort, such as assault or battery."<sup>2</sup> *Baptist v. Robinson* (2006) 143 Cal.App.4th  
18 151, 170; *see also Murillo v. Rite Stuff Foods* (1998) 65 Cal.App.4th 833, 852 (finding that defendant  
19 ratified assault and battery in a sexual harassment context); *see also C.R. v. Tenet Healthcare Corp.*  
20 (2009) 169 Cal.App.4th 1094, 1111. Documents generated after the last date of Plaintiffs' abuse can  
21 nonetheless show that Defendants ratified the sexual abuse of Plaintiffs by retaining the Perpetrator as  
22 their agent after gaining knowledge of his abuse of children.

23 Documents generated after the last date of abuse are plainly discoverable as they can lead to the  
24 discovery of admissible information in several different ways.

25 **IV. THE PRIVACY RIGHTS OF THIRD PARTIES DO NOT SUPPORT WITHHOLDING**  
26 **OR REDACTING THE WITHHELD DOCUMENTS**

27 Defendants' objection on third party privacy grounds should not stop Defendants from producing  
28 the withheld documents. As an initial matter, third party names and identifying information can be easily

---

<sup>2</sup> An additional consequence of ratification is that the ratifying defendants are subject to joint and several liability for Plaintiffs' non-economic damages.

1 redacted and produced to Plaintiffs without damage to any third party's rights.

2 In *Doe 2 v. Superior Court*, the court noted:

3 "A party to an action may assert privacy rights of third parties. In such event, the third party has a  
4 right to notice and an opportunity to be heard . . . [¶] . . . In this case, it is true that the privacy  
5 rights of third parties may be implicated. Indeed, the plaintiffs do not claim otherwise, though  
6 they argue (correctly) that the constitutional right to privacy is not absolute. It may be outweighed  
7 by supervening concerns. The state has enough of an interest in discovering the truth in legal  
8 proceedings, that it may compel disclosure of confidential material. However, before a court can  
9 make such a determination, it must afford the parties whose privacy rights are at issue an  
10 opportunity to present their views . . . [¶] . . . Thus, . . . these third parties must be formally  
11 notified of the proceedings and afforded a fair opportunity to assert their privacy interests by  
12 objecting to the disclosure - in whole or in part - or asserting possible alternative ways to protect  
13 their privacy rights." 132 Cal.App.4th at 1520-21.

14 The holding in *Doe 2* requires that notice be given to all third parties, including victims or  
15 witnesses whose privacy rights may be implicated. Under *Valley Bank of Nevada v. Superior Court*,  
16 Defendant must give notice to third parties. (1975) 15 Cal.3d 652, 658.

17 Defendants should produce redacted versions of the withheld documents forthwith. Defendants  
18 must also endeavor to give notice to each of the third parties whose privacy rights may be implicated by  
19 producing the withheld documents. If those third parties do not make a timely objection to the production  
20 of the documents, then the documents should be produced to Plaintiffs in un-redacted form. If an  
21 objection is received, this Court can balance the interests of the parties and the State and determine  
22 whether the right to privacy precludes production of un-redacted records.

## 23 V. THE FIRST AMENDMENT

24 Defendants also objected to each of Plaintiffs' requests for production on the basis of the First  
25 Amendment because the requests "seek information related to religious faith, custom or law, or to  
26 internal church organization." In meet and confer efforts, Defendants did not indicate a continued  
27 intention to rely on the his objection, but nonetheless, this is not a legitimate basis to withhold any  
28 documents. Allowing such documents to be discovered does not endorse one religion over another, or  
otherwise burden religious practice. Moreover, general laws of neutral applicability raise no  
constitutional issues. *Roman Catholic Archbishop*, 131 Cal.App.4th at 434. This objection has no merit.

Under Evidence Code section 911: "[e]xcept as otherwise provided by statute [¶] . . . [¶] (b) No  
person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object or other  
thing." "This section declares the California Legislature's determination that evidentiary privileges shall

1 be available only as defined by statute.” *Roman Catholic Archbishop of Los Angeles*, 131 Cal.App.4th at  
2 441. No statute creates a privilege for religious organizations to refuse to produce any documents in  
3 discovery simply because they may relate to the internal workings of the church. The existence of such a  
4 privilege would be perplexing in light of the fact that such evidence is admissible in court actions. *See*  
5 *Stevens v. Roman Catholic Bishop of Fresno* (1975) 49 Cal.App.3d 877, 883 (“by-laws and internal rules  
6 and regulations of religious organizations” admissible.)

7 While there is nothing to rightly preclude the admission of the withheld documents at trial, that is  
8 not the issue raised by Defendants. What is discoverable is the not the same as what is admissible. The  
9 scope of discovery is broad and there is no legitimate reason for precluding discovery of the documents  
10 withheld by Defendants. Even if the documents themselves ultimately proved to be inadmissible (a  
11 dubious proposition), they may nonetheless lead to the discovery of admissible evidence, as discussed  
12 above, and are therefore discoverable.<sup>3</sup> They are not subject to an evidentiary privilege. The documents  
13 must be produced.


#### 14 VI. CONCLUSION

15 The documents Defendants withheld on the basis of privilege should be produced. The clergy-  
16 penitent privilege was not designed or intended to apply with regard to internal church communications  
17 relating to procedures employed to respond to complaints of child sex abuse, and has been waived in any  
18 event. The First Amendment provides no protection against the discovery of materials from a religious  
19 organization. Moreover, Plaintiffs’ requests for production are narrowly-tailored and seek information that  
20 is well within the scope of discovery.

21 Respectfully Submitted,

22 THE ZALKIN LAW FIRM, P.C.

23 Dated: 4/27/11

24   
25 Devin M. Storey  
26 Attorney for Plaintiffs

27 <sup>3</sup> The case cited by Defendant in its objection, *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976)  
28 426 U.S. 696, involved an Illinois Court’s determination that the Diocese had not followed church  
procedure in removing Milivojevich. The case did not involve the discoverability of documents relating  
to church governance and structure, and is therefore inapplicable to the question before the Court.