

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL NO. 05-0602

ROMAN CATHOLIC BISHOP OF SPRINGFIELD,
A CORPORATION SOLE

v

TRAVELERS CASUALTY AND SURETY COMPANY & others¹

HAMPDEN COUNTY
SUPERIOR COURT
FILED
FEB 22 2007
Brian P. Lees
CLERK-MAGISTRATE

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION TO PERMIT PRODUCTION OF DISCOVERY UNDER
A PROTECTIVE ORDER**

The plaintiff, the Roman Catholic Bishop of Springfield, a Corporation Sole, brought this action against its insurers and the Massachusetts Insurers Insolvency Fund seeking a declaration of the defendants' obligation to provide coverage for claims relating to demands for damages as a result of sexual abuse by clergy or others said to be employed, appointed, controlled or selected by the plaintiff. The plaintiff now seeks an order of the court, presumably under Mass.R.Civ.P. 26(c), that would (1) impose conditions on the disclosure by any party of material produced by the plaintiff during the

¹Massachusetts Insurers Insolvency Fund, North Star Reinsurance Corporation, Underwriters at Lloyd's, London, Centennial Insurance Company, Interstate Fire & Casualty Company, and Colonial Penn Insurance Company

pretrial stage, and (2) limit the extent to which the parties, their agents, and court personnel may disclose such material to others, including to members of the public both during the life of this case and into the future. The defendants and claimants oppose the motion.

Specifically, the Protective Order, if allowed, will permit the Diocese to identify any document as a 'Protected Response'. By identifying a document as a Protected Response, the document would only be disclosed to the attorneys representing the insurance carriers and the claimants in the underlying cases, as well as the clients and experts. The documents would not be available to anyone other than the authorized individuals. When this action has concluded, all documents must be returned to the plaintiff within 30 days.

With respect to the specific use of any Protected Response in court, the proposed Protective Order states as follows:

“The use of any Protected Material in the course of this litigation or in the handling of the underlying claims, and/or the filing of any Protected Material in court shall be accomplished in a manner designed to protect and preserve the confidentiality of the information. If any Protected Material is to be filed with the Court, the parties shall first adhere to the procedures set forth in Trial Court Rules VIII, Uniform Rules on Impoundment Procedure.”²

DISCUSSION

Under Mass. R. Civ. P. 26(c), a party or witness from whom discovery is sought, for good cause, may move for a protective order to bar or limit discovery. The Court may make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense....” Mass. R. Civ. P. 26(c). The

² I am not completely sure as to the intended meaning of this paragraph, however, it seems that the Diocese is seeking that all materials filed in court be impounded in accordance with the Uniform Rules on Impoundment Procedure.

Diocese does not seek a protective order to limit the scope of the discovery furnished to the insurance companies. Rather, it seeks only to protect this discovery from being revealed to persons who, it believes, have no need to know this information.

The insurers and claimants are willing to agree to protective orders with respect to some of the documents (i.e. names of victims of sexual abuse), however, they oppose a global order that seeks protection of all documents. They assert that such a vague order would create significant practical problems (undoubtedly requiring constant court intervention), including the use of such documents during depositions, motions and trial. Not surprisingly, the claimants decry the withholding of such information from the public and assert that the Diocese “can advance no greater reason in support of impoundment than the right to continue to enjoy a bargained-for anonymity or the need to protect them from embarrassment.” *Globe Newspaper v. Clerk of Middlesex County Superior Court*, 2002 WL 562658 *2 (Mass.Super. 2002).

If the motion is allowed, it would essentially allow the Diocese to prevent court personnel and the parties, including claimants, from disclosing any material to third parties and also prevent the public from having any access to documents submitted in court. This is an impoundment order dressed as a protective order. More importantly, it is accomplished without an affidavit, hearing and showing of ‘good cause.’³ As noted

³ “An order of impoundment may be entered by the court, after hearing, for good cause shown and in accordance with applicable law.” Uniform Rules on Impoundment, Rule 7. The proper procedure involves a request for impoundment by a motion written with particularity and accompanied by an affidavit. Rule 2. There must be a hearing in which the court must determine ‘good cause’ for the impoundment. Rule 7. To determine good cause, “the court shall consider all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reasons” for the impoundment. Rule 7. A finding of good cause may be based solely on a “legitimate expectation of privacy,” especially when the information sought to be protected is “intensely personal.” *H.S. Gere & Sons, Inc. v. Frey*, 400 Mass. 326, 330 (1987); see also *George W. Prescott Publ'g Co. v. Register of Probate for Norfolk County*, 395 Mass. 274, 279 (1985).

by Judge Agnes, “[t]he motion before the court would replace judicial discretion with the discretion of the parties in making the determination of whether, when and to what extent material filed with the court is available to others. This cannot be squared with the general principle of publicity or the requirements of Rule 7 of the Uniform Rules on Impoundment, See *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 217, 227 (6th Cir.1996)(‘Rejecting validity of a stipulated protective order and noting that the district court cannot abdicate its responsibility to oversee the discovery process and determine what filings should be available to the public’).” *Converge, LLC v. Hickox*, 2001 WL 1692072 *2 (Mass.Super.). In addition, such an order would make the trial of this case most unwieldy, and may force the court to close the courtroom from time to time; an unacceptable proposition.

The parties are free to enter into a confidentiality agreement, among themselves, that limits disclosure of document or information during discovery.⁴ However, in attempting to limit or control the documents that are filed in court, it is imperative that the public interests be protected. A document filed in court is generally available to the public under the “rigorous presumption of openness.” *The Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 608 (2000). The public has the right to know what goes on in court. “It is desirable that [judicial proceedings] should take place under the public eye ... because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). *Ottaway Newspapers, Inc. v. Appeals Court*, 372

⁴ I am not unmindful of the issue of public access to pre-trial discovery, see *Harris-Lewis v. Mudge*, 1999 WL 140169 (Mass.Super.), however, that issue is not before the court.

Mass. 539, 546 (1977). In view of the legitimate public interest in the issue of sexual abuse of minors by priests, it is difficult to “conjure up an argument that would persuade a reasonable person that many of the issued raised in these cases and their underlying discovery documents do not lend themselves to public scrutiny.” *Leary v. Geoghan*, 2001 WL 1902393 *5(Mass.Super.).

.The court is not adverse to a limited impoundment order that would protect the identity of victims of sexual abuse or third parties not directly involved in the litigation. There is a compelling interest to protect victims of sexual abuse from public disclosure of their identities. However, this protection only requires removal of the respective names and any information that may reasonably be used to identify them.

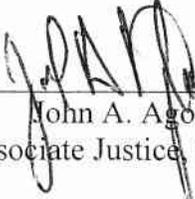
Other than this information, it is difficult to predetermine what document or information should be protected from disclosure. Unfortunately, it may require a document-by-document evaluation and, if necessary, an in camera inspection. Given the strong presumption of openness, the parties have an uphill battle if they seek to impound documents that are relevant to this litigation.⁵ “Failure to execute administrative responsibilities properly is not the kind of allegation that typically warrant impoundment . . .” *Demo v. Geoghan*, 2001 WL 1902397 *2 (Mass.Super.); See also *Globe Newspaper v. Clerk of Middlesex County Superior Court*, 2002 WL 562658 (Mass.Super.); *Petrell v. Rakoczy*, 2001 WL1631575 (Mass.Super.); *Globe Newspaper v. Clerk of Suffolk County Superior Court*, 2002 WL 202464 (Mass.Super.); *Leary v. Geoghan*, 2001 WL 1902393 (Mass.Super.).

⁵I have done an in camera review of a number of documents submitted by the plaintiff and have found very few documents that would warrant impoundment.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiff's motion to permit discovery under a protective order is **DENIED**.

2/13/07
Date



John A. Agostini
Associate Justice, Superior Court