



No. _____

Court of Appeal
of the
State of California
First Appellate District, Division _____

**WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK and NORTH
CONGREGATION OF JEHOVAH'S WITNESSES, RED BLUFF, CALIFORNIA,**

Petitioner,

vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF NAPA**
Respondent.

TIM W., JULIANNE WIMBERLEY GUTIERREZ AND JOSHUA WIMBERLEY
Real Parties In Interest

Judicial Council Coordination Proceeding No. 4374
Coordinated With Napa County Superior Court Case No. 26-22191 (Lead Case)

**PETITION FOR WRIT OF MANDATE; VERIFICATION OF ROBERT J.
SCHNACK AND MEMORANDUM OF
POINTS AND AUTHORITIES**

From the Order of the Napa Superior Court Granting Real Parties in Interest's Motion to
Compel Production of Documents (September 29, 2005)
The Honorable Raymond A. Guadagni, Judge

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**PETITION FOR WRIT OF MANDATE AND/OR
PROHIBITION OR OTHER APPROPRIATE RELIEF**

AUTHENTICITY OF EXHIBITS

1. All exhibits accompanying this petition are true copies of original documents on file with respondent court, except for the following: Exhibit E, which are true copies of the privilege logs furnished by the Church Defendants to plaintiffs. Exhibit J, which is a true copy of the original reporter's transcript of the hearing on August 31, 2005 on plaintiffs' Motion to Compel. Exhibit L which are true copies of the non-binding case law cited in the Memorandum of Points and Authorities, filed concurrently herewith. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page 1 through page 458 and page references in this petition are to the consecutive pagination.

**BENEFICIAL INTEREST OF PETITIONERS; CAPACITIES
OF RESPONDENT AND REAL PARTIES IN INTEREST**

2. Petitioners Watchtower Bible & Tract Society of New York, Inc. and North Congregation of Jehovah's Witnesses, Red Bluff, California, Inc. (collectively "Church Defendants") are defendants in two actions now pending in Tehama County Superior Court and entitled *Tim W. v. Watchtower New York, et al.*, Case No. 52594, and *Wimberley-Gutierrez v. Watchtower New York, et al.*, Case No. 52598, which are collectively referred to herein as "Track I Cases." The Track I Cases were earlier coordinated with other cases in Judicial Council Coordination Proceeding No. 4374, including the so-called lead case pending in respondent Napa County Superior Court entitled *Charissa W. v. Watchtower New York, et al.*, Case No.

26-22191. (Exh. K, pp. 407-08.) Plaintiffs in the Track I Cases are named herein as the real parties in interest.

CHRONOLOGY OF PERTINENT EVENTS

3. These Track I Cases arise from the alleged sexual abuse by co-defendant James Henderson in *Tim W.* that occurred more than 10 years ago and co-defendant Alvin Heard in *Wimberley* that occurred more than 24 years ago.

4. On July 24, 2003, Plaintiffs filed separate civil complaints against the Church Defendants asserting claims arising from allegations that the Church Defendants failed to report and/or disclose their knowledge of child abuse allegedly committed by James Henderson and Alvin Heard. (Exh. A, p. 5.)

5. On January 13, 2005, Plaintiffs propounded document requests to the Church Defendants seeking, *inter alia*, documents and information related to confidential spiritual communications that penitents Henderson and Heard had separately with clergy within a Jehovah's Witness congregation. (Exh. A, p. 5.)

6. On April 5, 2005, the Church Defendants objected to certain of Plaintiffs' document requests on the grounds that the responsive documents are protected from disclosure by the penitent-clergy privilege and the attorney-client privilege. (Exh. A, p. 5.)

7. On July 29, 2005, Plaintiffs filed a motion to compel responses to their requests for production of documents, arguing that the documents sought are not protected by either the penitent-clergy or attorney-client privileges. (Exh. A, pp. 1-246.)

8. On August 19, 2005, the Church Defendants filed their opposition to the motion to compel, asserting the requested documents

were protected from disclosure based on privilege and constitutional grounds. (Exh. B, pp. 247-300.)

9. The documents at issue in the underlying motion to compel relate to spiritual communications between penitent James Henderson and ordained elders of the Jehovah's Witnesses, and spiritual communications between penitent Alvin heard and ordained elders of the Jehovah's Witnesses. (See, Exh. E, pp. 331-40.)

10 On September 29, 2005, the trial court granted, in part, Plaintiffs' motion to compel and ordered the Church Defendants to produce all documents for which they previously asserted the penitent-clergy privilege. The trial court also ordered the Church Defendants to produce a privilege log with respect to all documents for which they asserted the attorney-client privilege, reserving Plaintiffs' right to challenge the log. (Exh. F.)

11 On October 24, 2005, the trial court granted the Church Defendant's motion to stay execution of order to produce documents until such time that a writ can be filed and ruled upon by the Court of Appeal. (Exh. G.)

12. On November 22, 2005, the trial court entered its stipulated order extending the time for the filing of the instant writ to April 28, 2006. (Exh. H.) On May 1, 2006, the trial court entered a further stipulated order extending the time for the filing of the instant writ up to and including June 30, 2006. (Exh. I.)

BASIS FOR RELIEF

13. The issue presented in this writ petition is whether the trial court erred in granting the motion to compel. In granting the motion, the trial court abused its discretion because disclosure of the

requested documents is prohibited by (1) the penitent-clergy privilege, (2) the First Amendment of the United States Constitution, and (3) the free exercise clause in both the federal and the California constitution.

ABSENCE OF OTHER REMEDIES

14. Interlocutory review is the only adequate remedy for the trial court's order compelling the Church Defendants to produce potentially privileged documents since "once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure." (*Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)

PRAYER

Petitioners/Church Defendants pray that this Court:

1. Issue an alternative writ directing respondent superior court set aside and vacate its order of September 29, 2005, granting Plaintiffs' motion to compel, or show cause why it should not be ordered to do so, and upon return of the alternative writ, issue a peremptory writ of mandate and/or probation or such other extraordinary relief as is warranted, directing respondent superior court to set aside and vacate its order of September 29, 2005, granting

Plaintiffs' motion to compel, and to enter a new and different order denying the motion;

2. Award Petitioners/Church Defendants their costs pursuant to Rule 56.4 of the California Rules of Court; and
3. Grant such other relief as may be just and proper.

Dated: 06-28-06

Respectfully submitted,

BULLVANT HOUSER BAILEY PC

By: 

Robert J. Schnack

Attorneys for the Church Defendants

VERIFICATION

I, Robert J. Schnack, declare as follows:

1. I am one of the attorneys for the petitioners herein. I have read the foregoing Petition For Writ Of Mandate/Prohibition Or Other Extraordinary Relief and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioners, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on June 28, 2006, at Sacramento, California.



Robert J. Schnack

MEMORANDUM OF POINTS & AUTHORITIES

I. WRIT OF MANDATE IS NECESSARY

A. The issue is whether confidential spiritual communications by a penitent to a “judicial committee” of ordained Jehovah’s Witness elders are protected by the penitent-clergy privilege.

1. Overview of penitent-clergy privilege

A penitent has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication. (Evid. Code § 1033.) Similarly, a member of the clergy has an independent privilege to refuse to disclose a penitential communication if he or she claims the privilege. (Evid. Code § 1034.) A penitent is defined simply as “a person who has made a penitential communication to a clergyman.” (Evid. Code § 1031.) A “penitential communication” is defined as a communication made (1) in confidence, (2) in the presence of no third persons so far as the penitent is aware, (3) to a member of the clergy who, incident to the tenets of his or her religious denomination, is authorized or accustomed to hear such communications and (4) has a duty to keep such communications secret. (Evid. Code § 1032.)

There is no requirement that the communication “have as its purpose the confession of a ‘flawed act’ to ‘receive religious consolation and guidance in return’ in order to be privileged.” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518.) Rather, the privilege applies to any communication that fits the statutory description. (See Cal. Law Revision Com. com., West’s Ann. Cal.Evid. Code (2006) foll. §§1032.) (statute extends protection of privilege beyond just “confessions”.)

2. Overview of clergy for the Jehovah's Witnesses

Congregations of Jehovah's Witnesses are not led by a priest or pastor but instead by appointed lay clergy called elders.

Congregations of Jehovah's Witnesses are provided spiritual oversight on a local level by a small group of elders recognized as ordained ministers and ordained elders. (See Exh B, pp. 285-86, 292, 297.) Elders are not automatically appointed to serve in a congregation. Rather, they must first meet strict Scriptural qualifications as outlined in the Bible and must also be recommended and approved by current congregation elders, an elder serving as circuit overseer, and the Service Department at the U.S. Branch Office Jehovah's. (See Exh. B, pp. 285-86.) Once an individual is approved and appointed to serve as a congregation elder, a letter from the Branch Office is read to the congregation and the individual is officially vested with ministerial authority and is ordained as an elder. (See Breaux Affidavit ¶ 6.) All elders of the Red Bluff congregation are and were at all times relevant to these cases ordained ministers and spiritual leaders of those congregations. (See Exh. B, p. 287.)

The congregation elders are responsible for the spiritual development and spiritual teaching of the members of the congregation, as well as for pastoral care. (See Exh. B, pp. 273-74, 286, 292, 297.) Elders frequently provide spiritual counsel and advice to members of the congregation concerning highly confidential personal and spiritual matters. (See Exh. B, p. 287.) According to the religious beliefs and practices of Jehovah's Witnesses, congregation

elders are expected to keep confessions and other spiritual communications confidential. (*See* Exh. B, pp. 274, 280-81, 287-88, 293-94, 298-99.)

From time to time, congregation elders, including those in Red Bluff, communicated with elders serving in the Branch Office's Service Department, as well as with elders serving as circuit overseers and district overseers, in order to receive spiritual guidance and advice as to how to apply the religious doctrine and procedures of Jehovah's Witnesses to issues concerning the congregation and its members. (*See* Exh. B, p. 287.) All such spiritual communications between congregation elders and the Branch Office Service Department, circuit overseer or district overseer must be kept strictly confidential under the religious tenets and teachings of Jehovah's Witnesses. (*See* Exh. B, p. 287.)

Congregation elders are also responsible for conducting "judicial investigations" where a member of the congregation is accused of a serious wrongdoing or sin. (*See* Exh. B, pp. 274-87.) The goal of a judicial investigation, which is conducted by two elders, is to ensure that the congregation remains spiritually and morally clean, and the elders endeavor to provide spiritual counseling and assistance to those who may have erred, with the hope of helping them to regain their spirituality and relationship with God. (*See* Exh. B, pp. 274, 287.) At times after a judicial investigation, a "judicial committee" consisting of three or more elders will be formed and will determine whether a person accused of sin should be ecclesiastically disciplined, based on Jehovah's Witnesses' understanding of the Bible. (*See* Exh. B, pp. 275, 287.) The "judicial committee" consists

of three or more elders because Jehovah's Witnesses believe that men are imperfect and, therefore, three elders can provide more full and complete spiritual counseling and guidance based on a broader range of experience and knowledge than can a single elder alone. (See Exh. B, p. 275.) Pursuant to the beliefs, tenets and teachings of Jehovah's Witnesses, all spiritual communications taking place during a "judicial investigation" and during a "judicial committee" are extremely private and strictly confidential. (See Exh B., pp. 275, 288.)

Where a serious sin is involved, the "judicial committee", in line with teachings of the Bible, may recommend religious discipline, called reproof (which can be private or public) or disfellowshipping. (See Exh. B, pp. 274-75.) When a member is subject to public reproof or disfellowshipping, an announcement is made during a congregation meeting simply to the effect that "[name] has been reproofed" or "[name] is no longer one of Jehovah's Witnesses." (See *Id.*) If a member suffers disfellowshipping, the "judicial committee" forwards a document to the Service Department in New York with only the name of the disfellowshipped person, the date of disfellowshipping, and a brief description of the Scriptural reason for disfellowshipping. However, the information on the card does not reveal the contents of the penitent's communications to the "judicial committee." (See *Id.*)

The confidentiality of spiritual communications between members of the congregation and elders is a foundational element of the religious beliefs and teachings of Jehovah's Witnesses. (See Exh. B, pp. 274, 281, 287-88, 292-94, 297-99.) Jehovah's Witnesses recognize the Bible's admonition to confess one's sins to God and

believe that there is a great benefit from speaking to congregation elders regarding such confidential spiritual matters. (*See* Exh. B, pp. 287-88.) As such, Jehovah's Witnesses encourage those who need spiritual assistance to approach the congregation elders and convey to them whatever information may be necessary to provide such spiritual assistance. (*See* Exh. B, pp. 288, 292, 297.)

Because open and free communication between congregation members and elders is required to provide spiritual guidance under the religious beliefs and practices of Jehovah's Witnesses, emphasis is placed on privacy and strict confidentiality. (*See* Exh B, pp.75, 281, 288, 293-94, 298-99.) The confidentiality requirements with respect to such church communications are explained in official church literature and publications. (*See* Exh B., pp. 288, 293-94, 298-99) Congregants expect that all spiritual communications with congregation elders will remain strictly confidential. (*See* Exh B., pp. 288, 293-94, 298-99.) Further, revealing confidential spiritual communications would call into question an elder's qualifications and could result in his removal as an elder in the congregation. (*See* Exh. B, pp. 286, 293, 298.) Moreover, if an elder was compelled to disclose confidential information, his credibility and effectiveness as an elder, as well as the credibility and effectiveness of other elders in the congregation, would be adversely affected and compromised, since congregants would not trust and rely that personal problems and information they disclose would not be revealed and used against them in a court action. (*See* Exh. B, p. 288.) In fact, defendant James Henderson has specifically stated that he would not have sought

church guidance had he believed that his communications with elders were not confidential. (*See* Exh. B, p. 276.)

Jehovah's Witnesses do not believe that the confidentiality of spiritual communications they may have with congregation elders is limited to confessions. (*See* Exh. B, p. 288.) Such confidentiality extends to all communication of a spiritual nature in a variety of life situations including those that take place in the course of "judicial investigations" and "judicial committee" meetings. (*See* Exh. B, pp. 275, 281, 288.) Additionally, based upon Scripture and church tradition, such confidentiality requirements also extend to congregation files, notes, papers, reports, minutes or other documents prepared in conjunction with, or as a result of, confidential church communications. (*See* Exh. B, pp. 274, 294, 299.)

3. Issues presented for review

This petition presents three issues, which are fundamental, not only to the underlying case, but also potentially to numerous other cases pending throughout the state and based on similar claims. First, did the trial court err when it granted Plaintiffs' motion to compel based on its ruling that the investigatory purpose of the judicial committee negated the penitent-clergy privilege? Second, did the trial court err in ruling that the judicial committee was under no duty to keep communications confidential, and therefore, the privilege is inapplicable? Finally, does the trial court's order compelling disclosure of confidential church documents violate the establishment clause of the First Amendment to the federal constitution, the free exercise clauses of the federal or California constitutions, or both?

B. Writ of mandate is essential and necessary.

1. A writ of mandate is the only adequate remedy available.

A writ of mandate must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc. § 1086.) Generally, writ review of discovery rulings is allowed when (1) the issues presented are of first impression and of general importance, (2) an order denying discovery denies a fair opportunity to a party to litigate its case, or (3) an order compelling discovery would violate a privilege. (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 886-87, quoting *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1061.) “Interlocutory review by writ is the only adequate remedy where a court orders production of documents which may be subject to a privilege, ‘since once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure.’” (*Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516.)

The trial court’s order compels the production of documents that the Church Defendants have asserted are protected from disclosure by the penitent-clergy privilege. Thus, a writ of mandate is appropriate and necessary, and interlocutory review is the only adequate remedy.

¹ [citations omitted.]

2. The issue will not go away.

Counsel for plaintiffs have filed a number of lawsuits in multiple venues against the various congregations of Jehovah's Witnesses and other religious entities that support their work. If the court compels the disclosure of confidential, privileged, and sensitive materials in these Track I Cases, the impact potentially will be felt not only in this proceeding but in other venues as well. As with other Jehovah's Witnesses congregations, the Church Defendants desire to keep confidential and privileged the materials regarding internal ecclesiastical affairs.

II. THE PENITENT-CLERGY PRIVILEGE BARS COMPELLED DISCLOSURE OF DOCUMENTS RELATED TO SPIRITUAL COMMUNICATIONS BETWEEN PENITENTS AND JUDICIAL COMMITTEE

Under California law, three requirements must be met for the penitent-clergy privilege to apply to a communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his/her religious discipline or practice is authorized or accustomed to hear such communications; and, (3) such clergy must have a duty under the tenets or discipline of his/her church to keep such communications secret. (Evid. Code § 1032; see *People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-63.) Communications between penitent and clergy are presumed to have been made in confidence. (Evid. Code § 917.) Thus, Plaintiffs bear the burden of establishing that the subject communications were not intended to remain confidential.

