*2006 Conn. Super. LEXIS 3647, **

George Rosado v. Bridgeport Roman Catholic Diosesan Corporation et al.

X06CV930157085S

SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF WATERBURY, COMPLEX LITIGATION DOCKET AT WATERBURY

2006 Conn. Super. LEXIS 3647

December 5, 2006, Decided
December 6, 2006, Filed

NOTICE: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

PRIOR HISTORY: Rosado v. Bridgeport Roman Catholic Diocesan Corp., 2006 Conn. Super. LEXIS 2529 (Conn. Super. Ct., July 21, 2006)

CASE SUMMARY

PROCEDURAL POSTURE: Intervenor newspapers moved to vacate protective orders filed by the court in 23 actions alleging sexual abuse of minors by priests employed by defendant diocese. The diocese moved for a new protective order sealing the documents in the court file if the court were to find that the prior protective orders had expired or should be vacated.

OVERVIEW: In 23 actions, priests were accused of child sexual abuse. To protect the priests' right to a fair trial, 12,675 pages of documents were sealed. After the 23 cases were withdrawn, the newspapers moved for an order vacating the sealing orders and for access to the documents. The court granted the newspapers' motion except with respect to a few documents that it found subject to a healthcare privilege, those documents that had been filed for the sole purpose of an in camera review, and the names of two priests who were still involved in pending lawsuits. The court found that the protective order had not automatically expired upon withdrawal of the actions. A presumptive right of access applied to the documents pursuant to Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A. There was no longer a need to protect the priests' right to a fair trial. The public's right of access outweighed the priests' interest in the confidentiality of their personnel files. Certain documents were not subject to the healthcare privilege because child abuse was known or in good faith suspected. The public right of access did not, however, attach to documents reviewed by the court in camera.

OUTCOME: The court granted the newspapers' motion to vacate the sealing orders except with respect to certain documents subject to a healthcare privilege, certain documents filed with the court for the sole purpose of allowing the court to review the documents in camera, and the names of two priests. The court denied the diocese's motion to seal the documents filed with the court.

CORE TERMS: protective orders, disclosure, newspaper's, sealing, priest, right of access, documents filed, complex litigation, deposition, sealed, personnel file, seal, in camera, public access, confidentiality, modify, vacate, healthcare, modification, fair trial, sexual, confidential, privileged, discovery, jury selection, attorney-client, presumptive, protective, withdrawal, withdrawn

LEXISNEXIS® HEADNOTES - **Hide**

Civil Procedure > Discovery > Protective Orders

Civil Procedure > Dismissals > Voluntary Dismissals > General Overview

HN1 A trial court retains continuing jurisdiction to restore withdrawn cases to the docket, more than four months after withdrawal, for the limited purpose of determining whether protective orders should be vacated or modified. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Discovery > Protective Orders

Civil Procedure > Remedies > Injunctions > General Overview

HN2 While the Connecticut Supreme Court has stated that protective orders are materially similar to an injunction, and operate like injunctions, the court has not equated protective orders with injunctions for all purposes. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Discovery > Protective Orders

HN3 The Martindell test is only applicable where there has been reasonable reliance by ~~a party or~~ deponent upon the protective order. More Like This Headnote

Governments > Courts > Court Records

HN4 The rule of Martindell does not apply to documents which are presumptively accessible to the public. More Like This Headnote

Governments > Courts > Court Records

HN5 Connecticut has decreed that the public has a presumptive right of access to any document filed with the court. More Like This Headnote

Civil Procedure > Discovery > Protective Orders
Governments > Courts > Court Records
HN6 The party seeking to unseal a document previously sealed by the court should bear the burden of proving that appropriate grounds exist for the modification of the sealing order, which shall include that the initial basis for the sealing order no longer exists, that the sealing order was improvidently granted, or that the interests protected by nondisclosure do not outweigh the public's right of access to the document. The interests to be weighed by the court include any reasonable reliance by the parties upon the sealing order. Placing such a burden on the movant is consistent with the general rule that the moving party bears the burden of persuasion, and it gives appropriate deference to the fact that a court has previously determined that sealing is warranted. More Like This Headnote

Governments > Courts > Court Records
Labor & Employment Law > Posting & Recordkeeping
HN7 An employee's right to the confidentiality of his personnel file is not absolute. Conn. Gen. Stat. § 31-128f provides in part that no individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except where the disclosure is made pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena. Documents in a personnel file which are material and relevant to a legal dispute are subject to disclosure by court order, Conn. Gen. Stat. § 31-128f, and, once disclosed documents are filed with the court, the public has a right of access to them, Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A. More Like This Headnote

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > General Overview
HN8 Waiver is the intentional relinquishment or abandonment of a known right or privilege. Various statutory and contract rights may be waived. Walver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced. Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed. Waiver does not have to be express but may consist of acts or conduct from which waiver may be implied. In other words, waiver may be inferred from the circumstances if it is reasonable to do so. More Like This Headnote

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > General Overview
HN9 Generally, a privilege is waived by a party in a judicial proceeding where the party fails to properly assert the privilege or object to an attempt by another person to give or exact testimony or other evidence of a privileged communication. If the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed. More Like This Headnote

Evidence > Privileges > General Overview
HN10 Selective waiver permits a party who has disclosed privileged communications to continue asserting the privilege against other parties. More Like This Headnote

Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver
HN11 The statute governing the psychologist-patient privilege requires written consent for the disclosure of privileged communications. Conn. Gen. Stat. § 52-146c(a)(4). More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion
Constitutional Law > Substantive Due Process > Privacy > General Overview
Evidence > Privileges > Attorney-Client Privilege > Waiver
Evidence > Privileges > Clergy Communications > Waiver
HN12 There is no requirement of written consent for the disclosure of information protected by the attorney-client privilege, the clergyman privilege, or the constitutional rights of privacy and the free exercise of religion. More Like This Headnote

Evidence > Privileges > General Overview
HN13 A client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. More Like This Headnote

Civil Procedure > Discovery > Privileged Matters > General Overview
Evidence > Privileges > General Overview
HN14 The doctrine of selective waiver is not favored because privileges inhibit the truth seeking process and they should be strictly construed and judiciously applied. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Privileges > Doctor-Patient Privilege > Waiver
Evidence > Privileges > Psychotherapist-Patient Privilege > Waiver
HN15 An implied waiver is not appropriate with respect to the physician-patient privilege, Conn. Gen. Stat. § 52-146o; the psychologist-patient privilege, Conn. Gen. Stat. § 52-146c; the psychiatrist-patient privilege, Conn. Gen. Stat. § 52-146d et seq.; the clinical social worker-patient privilege, Conn. Gen. Stat. § 52-146q; and the professional

counselor-patient privilege, Conn. Gen. Stat. § 52-146s because the statutes require a patient's express consent for disclosure and they specifically delimit the exceptions to the general rule of nondisclosure. More Like This Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview

HN16 A healthcare privilege must generally be asserted by the patient or the physician. More Like This Headnote

Civil Procedure > Discovery > Disclosures > General Overview

Civil Procedure > Discovery > Privileged Matters > General Overview

Evidence > Privileges > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

HN17 Where the confidential status of a document is apparent, a claim of privilege may be disposed of without further inquiry. Otherwise, the burden of establishing immunity from disclosure rests with the party asserting the privilege. More Like This Headnote

Evidence > Privileges > Doctor-Patient Privilege > Exceptions

HN18 Conn. Gen. Stat. § 52-146o(b) provides that consent of a patient is not required for disclosure of records of a physician if child abuse is known or in good faith suspected. More Like This Headnote

Civil Procedure > Discovery > Protective Orders

Governments > Courts > Court Records

HN19 Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A governs the sealing of documents filed with the court. It provides that except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public. Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A(a). The official commentary to the 2005 amendments to the Connecticut General Practice Book reveals that the words "except as otherwise provided by law" contained in § 11-20A(a) are intended to exempt from the operation of the rule the in camera inspection of documents. More Like This Headnote

Civil Procedure > Discovery > Protective Orders

Governments > Courts > Court Records

HN20 A motion to seal documents filed with the court is governed by Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A which provides in part that the judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials. Conn. Gen. Prac. Book, R. Super. Ct. § 11-20A(c). More Like This Headnote

JUDGES: Jon M. Alander, Judge.

OPINION BY: Jon M. Alander

OPINION

MEMORANDUM OF DECISION

This case is back before this court upon remand from our Supreme Court See *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 884 A.2d 981 (2005). The New York Times Company, The Hartford Courant, Globe Newspaper Company and The Washington Post Company (hereinafter, the newspapers) which have intervened in the above captioned action and twenty-two related cases [1] have filed motions to vacate the protective orders entered by the court In those actions. [2] Each of the twenty-three cases involves lawsuits filed in the mid-1990s alleging sexual abuse of minors by clergymen employed by the Bridgeport Roman Catholic Diocesan Corporation. The lawsuits were withdrawn on March 12, 2001. Prior to the withdrawal of the actions, protective orders were issued by the court which, *inter alia*, authorized the filing of certain documents with the court under seal. The newspapers seek an order vacating that portion of the protective **[*2]** orders which sealed documents filed with the court. [3] The defendant Bridgeport Roman Catholic Diocesan Corporation and its former officials [4] (collectively, the Diocese) oppose the vacating of the protective orders and the unsealing of the documents. In addition, the Diocese has requested that, to the extent the court concludes that the prior protective orders have expired or should be vacated, the court enter a new protective order sealing the documents in the court file.

FOOTNOTES

1 The twenty-three lawsuits in which the newspapers have intervened and filed motions to vacate are: (1) *William Kramer v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157311 S; (2) *S.P. Carr v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0159118 S; (3) *M. McDonough v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-97-0157365 S; (4) *J. Knecht v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-96-0157367 S; (5) *William Slosser v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159073 S; (6) *Ronald Slosser v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159072 S; (7) *Sandra Forsberg v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159066 S; (8) *Alvin Koscelek v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159067 S;

(9) *Katherine Landro v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159068 S; (10) *J.L. Powers v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159069 S; (11) *Jenilee Rosado v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159070 S; (12) *James See v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159071 S; (13) *J. Harding v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157368 S; (14) *M. Didato v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157370 S; (15) *John Doe v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-99-0157369 S; (16) *James Krug v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-93-0157366 S; (17) *Jamie Belleville v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-93-0157371 S; (18) *Paul Doyle v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-94-0159065 S; (19) *Theresa Pace v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-95-0157086 S; (20) ***Richard Rosado v. Bridgeport Roman Catholic Diocesan Corporation, et al., 2006 Conn. Super. LEXIS 1517, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV95-0157364 S [41 Conn. L. Rptr. 413]***; (21) *George Rosado v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-93-0157085 S, 2006 Conn. Super. LEXIS 2529, [41 Conn. L. Rptr. 723]; (22) *Sharon See v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-93-0157363 S; and (23) *J. Fleetwood v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Docket No. X06-CV-95-0156274 S. **[*3]**

2 For a complete procedural history of the newspapers' efforts to intervene and vacate the protective orders in these cases, see *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 884 A.2d 981 (2005).

3 The newspapers have withdrawn their request that the court vacate that part of the protective orders which ordered the parties not to disclose to others unfiled discovery material and their request, that unfiled discovery be ordered filed with the court.

4 The following former officials of the Bridgeport Roman Catholic Diocesan Corporation have joined in Diocese's objection to the motion to vacate: The Reverend Monsignor Laurence Bronkiewicz, the Reverend Monsignor 'Thomas Driscoll, Bishop Edward Egan and the Reverend Monsignor Andrew Cusack.

I

The Protective Orders

The fountainhead of the current dispute is a protective order issued by the court (Levin, J.) on December 8, 1994, in the matter of *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation,* Superior Court, judicial district of Fairfield, Docket No. CV93-0300272S. **[*4]** 5 The defendant Raymond S. Pcolka had moved for a protective order pertaining to depositions of himself, Bishop Walter Curtis and Bishop Edward Egan scheduled by the plaintiffs in *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation* and fifteen related cases. Pcolka requested an order protecting certain documents from disclosure on the grounds that they were privileged and an order limiting the further disclosure of documents and information obtained at the depositions.

FOOTNOTES

5 The case of *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation*, Superior Court was affixed the docket number CV 93-0300272 S while it was pending in the judicial district of Fairfield. Its docket number was changed to its current docket number of X06 CV 93-0157085 S upon its transfer to the complex litigation docket in Waterbury.

After a contested hearing, Judge Levin issued a memorandum of decision together with an "addendum" granting in part and denying in part Pcolka's motion for a protective order. **[*5]** In the first section of his decision, Judge Levin, after conducting an *in camera* review, ordered the disclosure to the plaintiffs of some, but not all, of the documents contained in Pcolka's personnel file. In the decision's second section, Judge Levin issued a protective order denying the plaintiffs' request for documents in the possession of the Diocese concerning allegations of sexual misconduct by any priest who was at any time a member of the Diocese. In the third section of his decision, Judge Levin addressed the defendant's request prohibiting the disclosure to others of information and documents obtained at the depositions. It is this section and the addendum, which contains the court's orders implementing its decision, which lie at the heart of the current dispute. In his decision, Judge Levin stated that the defendants had advanced two principal grounds for the issuance of a protective order: protection of the reputation of the Diocese and its priests and protection of the defendants' right to a fair trial. Judge Levin first concluded that, after hearing the evidence, he was not persuaded that disclosure would so harm the defendants' reputation as to warrant the issuance **[*6]** of a protective order. He did find, based on the existence of widespread media coverage of the plaintiffs' allegations and the pending cases, that the issuance of a protective order limiting the disclosure of information gained in discovery was necessary to protect the defendants' right to receive a fair trial. Judge Levin issued an addendum to his memorandum of decision which set forth the specifics of the protective order. The addendum was entitled "Protective Order" and contained three provisions: (1) "Until further order of the court, which order shall be made not later than the completion of jury selection, all information, documents and transcripts which the parties may obtain through the depositions of the defendants, including persons designated pursuant to Practice Book §§ 244(g)(6), and Bishop Edward Egan shall not be disseminated, shown, disclosed, divulged or transmitted by anyone to any person or organization other than the parties to this lawsuit and their respective attorneys and to any investigators and potential expert witnesses retained by the parties to this lawsuit or their attorneys and stenographic personnel with a need and obligation to see and receive the same **[*7]** . . . (2) All such documents and transcripts which the attorneys representing any of the

parties believe in good faith may be entitled to protection from disclosure after the completion of jury selection, shall be marked "CONFIDENTIAL: SUBJECT TO COURT ORDER" and shall be submitted to the court for review and appropriate order before being released from the protection afforded by this order; and (3) Whenever any pleading, document or motion referencing, incorporating or attaching any documents described in paragraph one of this order is filed with the court or delivered to any judge thereof, it shall be filed or delivered under seal pending review by the court or judge and shall be marked by the party filing or delivering same "CONFIDENTIAL: SUBJECT TO COURT ORDER."

The newspapers and the Diocese agree that the same protective order or one similar thereto was entered in twenty-one of the twenty-three consolidated cases. While no party has been able to identify the entry of a protective order in two cases, [6] the Diocese asserts that the sealed documents contained in the files of those two cases are controlled by the protective order entered in *George L. Rosado v. Bridgeport Roman* **[*8]** *Catholic Diocesan Corporation* because the information contained in those documents or the documents themselves were procured pursuant to depositions governed by the Rosado protective order.

FOOTNOTES

6 *J. Knecht v. Bridgeport Roman Catholic Diocesan Corporation, et al.*, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV-96-0157367 S and ***Richard Rosado v. Bridgeport Roman Catholic Diocesan Corporation, et al., 2006 Conn. Super. LEXIS 1517, Superior Court, Complex Litigation Docket at Waterbury, Docket No. X06-CV95-0157364 S [41 Conn. L. Rptr. 413]***.

Subsequent to the entry of the protective orders, 924 documents [7] totaling 12,675 pages were filed with the court under seal in the 23 cases. Though each of the 23 cases was withdrawn on March 12, 2001, the sealed documents remain in the court's files. The newspapers have moved for an order vacating the sealing orders and for access to the documents.

FOOTNOTES

7 A review of the files reveals that many of the documents are duplicates.

[*9] *II*

Whether the Protective Orders Have Expired

The newspapers first assert that the documents filed with the court under seal should be unsealed because the protective order issued by Judge Levin [8] has expired by its terms or as a matter of law upon withdrawal of the underlying actions. I do not agree.

FOOTNOTES

8 Both the newspapers and the Diocese agree that the language of the protective order issued in *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation* is the operative language with respect to all of the protective orders issued in the 23 consolidated cases.

The newspapers argue that the protective order was by its terms temporary and only intended to extend to the completion of jury selection. In support of their position, they point to the language of the protective order which states that the ban on the disclosure of documents obtained through the deposition of the defendants and Bishop Egan would continue "[u]ntil further order of the court, which order shall be made not later **[*10]** than the completion of jury selection" and the language of the protective order that any documents which a party believes are entitled to protection from disclosure after the completion of jury selection shall be submitted to the court for review and appropriate order before being released from the protection afforded by the protective order. I agree with the newspapers that the cited language of the protective order indicates that Judge Levin intended the protective order to be a temporary order which would be revisited after the completion of jury selection. This intent is also consistent with the purpose of the protective order as expressed in Judge Levin's memorandum of decision which was to protect the defendants' right to a fair trial. I do not agree that the protective order expired by its own terms upon withdrawal of the actions. Rather, some affirmative step needed to be taken by Judge Levin before the protective order ended or before any documents were released from its protection. While Judge Levin intended to determine after the completion of jury selection which documents, if any, were entitled to continued sealing, that determination was never made because the underlying **[*11]** actions were withdrawn prior to jury selection.

The newspapers next assert that the protective order was an interlocutory order which expired by operation of law upon withdrawal of the underlying actions. I am not persuaded. The newspapers cite in support of the proposition that interlocutory orders automatically expire upon the entry of final judgment case law which holds that pendente lite orders in a marriage dissolution action, see, e.g., *Tobey v. Tobey*, 165 Conn. 742, 745, 345 A.2d 21 (1974), and *Papa v. Papa*, 55 Conn.App. 47, 54-55, 737 A.2d 953 (1999), and preliminary injunctions, *Nowell v. Nowell*, 157 Conn. 470, 482, 254 A.2d 889, cert. denied, 396 U.S. 844, 90 S. Ct. 68, 24 L. Ed. 2d 94 (1969) and *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 144 (2nd Cir. 1977), do not survive entry of final judgment. I do not find either situation to be analogous to the sealing order entered in these cases. Here, the trial court expressly ordered that any documents filed with the court which were obtained by the parties through designated depositions be filed under seal. The newspapers have cited no authority **[*12]** for the proposition that a sealing order automatically expires upon withdrawal of the action or the entry of final judgment. Moreover, their position conflicts with the ruling by the Connecticut Supreme Court in this case that HN1 a trial court retains continuing jurisdiction to restore withdrawn cases to the docket, more than four months after withdrawal, for the limited purpose of determining whether the protective orders should be vacated or modified. *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 213-14, 884 A.2d 981 (2005). See also *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427, (10th Cir. 1990) cert.

denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed. 2d 860 (1991) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed."), and *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 141 (2nd Cir. 2004) (Dismissal of the action does not terminate the court's supervisory power over sealed documents.) If protective orders automatically expire upon withdrawal of the action, there would be nothing to vacate or modify. The rule proposed **[*13]** by the newspapers would be also unworkable as it would subject to public disclosure upon the withdrawal or dismissal of an action a wealth of confidential information, such as trade secrets, General Statutes § 35-55, alcohol and drug treatment records, § 17a-688, and psychiatric records, § 52-146e, which is shielded by law from public view.

III

Whether the Protective Orders Should be Vacated

A

THE STANDARD TO BE USED

Our Practice Book and case law are silent on the precise standard that should be used in determining whether a sealing order [9] should be modified or vacated. The newspapers and the Diocese disagree on what the appropriate standard should be. The Diocese urges this court to adopt the precept first established by the Second Circuit Court of Appeals in *Martindell v. International Telephone and Telegraph Corporation*, 594 F.2d 291, 296 (2nd Cir. 1979) that a protective order may be modified only upon a showing of improvidence in the granting of the order or some extraordinary circumstance or compelling need for modification. The Diocese contends that the newspapers have failed to satisfy the *Martindell* standard. **[*14]** The newspapers argue that this court should follow the lead of those jurisdictions which have rejected the Second Circuit test in favor of a rule which balances the competing interests to determine whether to modify a protective order. The newspapers maintain that a balancing of the relevant interests support modification of the protective orders. They further contend that modification is appropriate even under the more stringent *Martindell* test.

FOOTNOTES

[9] The newspapers are in effect seeking to vacate a sealing order, inasmuch as the only portion of the protective order issued by Judge Levin which remains in dispute is that portion of the order which seals certain documents filed with the court.

A survey of the case law from other jurisdictions concerning the modification of sealing orders is necessary to address the parties' competing claims. In *Martindell v. International Telephone and Telegraph Corporation, supra*, the Second Circuit affirmed the trial court's refusal to provide the United **[*15]** States government, a non-party to the action, with access to pretrial depositions which the trial court had previously ordered to be kept confidential and made available only to the parties to the action. The appellate court held that a witness who has been deposed should be entitled to rely on a protective order and the order should not be modified "absent a showing of improvidence in the grant of [the] protective order or some extraordinary circumstance or compelling need." *Martindell v. International Telephone and Telegraph Corporation, supra*, 594 F.2d 296.

Subsequently, in *United States v. Amodeo*, 44 F.3d 141 (2nd Cir. 1995) ("Amodeo I"), and *United States v. Amodeo*, 71 F.3d 1044 (2nd Cir. 1995) ("Amodeo II") the Second Circuit addressed the contours of the common law right of public access to judicial documents. In *Amodeo I*, the court recognized that the public had a presumptive right of access to "judicial documents." *United States v. Amodeo, supra*, 44 F.3d 145. The court then defined a judicial document as those items "relevant to the performance of the judicial function and useful in the judicial process. **[*16]** " *Id.* It rejected the approach of the Third Circuit, see, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3rd Cir. 1994), which classified as a judicial document any document actually filed with the court. *Id.* In *Amodeo II, supra*, the court established the standard to be used in balancing the presumption of access to judicial documents against countervailing interests when there is an objection to public access to certain documents. The court held that the weight to be given the presumption of access will depend on the role of the material "in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *United States v. Amodeo, supra*, 71 F.3d 1049.

In *S.E.C. v. TheStreet.Com*, 273 F.3d 222 (2nd Cir. 2001), the Second Circuit clarified the relationship between the presumption against public access recognized in *Martindell* and the presumption in favor of pubic access endorsed in *Amodeo I* and *Amodeo II*. The issue in *TheStreet.Com* was the propriety of the modification of a protective order by the trial court which unsealed deposition **[*17]** testimony to allow disclosure of the testimony to the Intervenor. The court noted that "[w]hile *Martindell* established a general and strong presumption against access to documents sealed under protective order when there was reasonable reliance upon such an order, . . . we have held more recently in *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (*'Amodeo I'*) that a subspecies of sealed documents in civil cases--so-called 'judicial documents'--deserve a presumption in favor of access." *SEC v. TheStreet.com, supra*, 273 F.3d 231. The court resolved the issue of which presumption to apply by determining whether the sealed documents at issue constituted judicial documents. The court held that, in situations involving a request to modify a protective order, the presumption in favor of access applies to those documents which are judicial documents and the presumption against access applies to documents which are not judicial documents. *Id.*, 234.

A number of jurisdictions have considered and expressly rejected the Second Circuit's *Martindell* test. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3rd Cir. 1994), **[*18]** *Beckman Industries, Inc. v. International Insurance Company*, 966 F.2d 470, 475 (9th Cir. 1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988); *Ballard v. Herzke*, 924 S.W.2d 652, 659 (Tenn. 1996); *Holland v. Eads*, 614 So. 2d 1012, 1016 (Ala. 1993); *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 492-93, 758 N.E.2d 286 (Ohio Ct. App. 2001); and *State v. Philip Morris Inc.*, 606 N.W.2d 676, 687 (Minn.App. 2000). These courts have adopted a test for modification of protective orders which is based on a balancing of the competing interests. The standard set forth in *Pansy v. Borough of Stroudsberg, supra*, 23 F.3d 772, is typical. In *Pansy*, the Third Circuit ruled that once the party seeking modification of a protective order comes forward with a reason to modify the order, the court should balance the various interests involved, including the reliance of the original parties on the confidentiality order. *Id.*, 790. See also *The*

Republican Company v. Appeals Court, 442 Mass. 218, 225, 812 N.E.2d 887 (2004) ("A 'proper challenge' to the continued **[*19]** validity of [a sealing order] is raised whenever the party seeking to modify the order comes forward with a nonfrivolous reason to do so. Once such a reason is before the court, the obligation of the motion judge is to apply the same balancing test used in determining whether to grant [a sealing order] in the first instance." (Citations omitted.))

The Diocese asserts that the standard established by the Second Circuit in Martindell v. International Telephone and Telegraph Corporation, supra, 594 F.2d 296, that a protective order should not be modified absent a showing of improvidence in the grant of the protective order or some extraordinary circumstance or compelling need, should apply to the newspapers' request to vacate the protective order sealing the documents filed with the court in this case. [10] I do not agree that the *Martindell* rule applies to the circumstances surrounding the cases before me.

FOOTNOTES

10 The Diocese contends in the alternative that the standard used to determine whether to modify or vacate an injunction is the standard which should be used to modify or vacate a sealing order because our Supreme Court in Rosado v. Bridgeport Roman Catholic Diocesan Corp., 276 Conn. 168, 884 A.2d 981 (2005), determined that protective orders were injunctive in nature. I do not agree. HN2 While our Supreme Court stated that protective orders are "materially similar to an injunction," id., 213, and "operate like injunctions," id., 215, the court did not equate protective orders with injunctions for all purposes.

[*20] First, the Second Circuit has made it clear that HN3 the *Martindell* test is only applicable "where there has been reasonable reliance by a party or deponent" upon the protective order. SEC v. TheStreet.com, supra, 273 F.3d 229. See also *In Re Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2nd Cir. 1987), cert. denied sub nom. Dow Chem. Co. v. Ryan, 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987). In *TheStreet.com*, the court noted that the basis for the strict rule established in *Martindell* was the need to protect the legitimate expectations of the parties that the assurance of confidentiality upon which they reasonably relied would continue to be enforced. SEC v. TheStreet.com, supra, 273 F.3d 230. The court ruled that the presumption against disclosure contained in the *Martindell* rule did not apply to a protective order which was not reasonably relied upon by the parties. Id., 234-35.

The court in In Re Agent Orange Product Liability Litigation, supra, 821 F.2d 139, likewise held that the rule of *Martindell* was inapplicable where it was not reasonable for the **[*21]** parties to have relied on the protective order. The facts of *In Re Agent Orange Product Liability Litigation* closely correspond to the facts here. The trial judge had issued a protective order authorizing the filing of documents deemed confidential by a party with the court under seal. The case subsequently settled. Certain intervening parties sought access to the sealed documents filed with the court. The Second Circuit affirmed the trial court's modification of the protective order unsealing the documents. The court found that it was not reasonable for the parties to have relied on the protective order because it was not a permanent order. Id., 147. Similarly, it was clear from the express language of Judge Levin's order that it was intended to be temporary. See Part II, pp. 6-7, of this opinion. The protective order issued by Judge Levin contained the very attributes of the order in *In Re Agent Orange Product Liability Litigation* which the Second Circuit found undercut a finding of reasonable reliance: the order by its terms was applicable solely to the pretrial stages of the litigation and it was specifically indicated that the confidentiality issue would **[*22]** be reconsidered upon the commencement of trial. *Id.* It was plainly not reasonable for the Diocese to conclude that the order was a permanent order which would remain unalterable after settlement of the action. "Any reliance on such a sweeping, temporary protective order simply was misplaced." In Re Agent Orange Product Liability Litigation, supra, 821 F.2d 147. See also Lugosch v. Pyramid Company of Onondaga, 435 F.3d 110, 126 (2d Cir. 2006). (The court ruled that it was not reasonable to have expected that documents would always be kept secret based on a confidentiality order which specifically provided that relief from the order could be sought at any time.)

The second reason why the rule of *Martindell* is inapplicable to the case at bar is that HN4 it does not apply to documents which are presumptively accessible to the public. The Second Circuit held in SEC v. TheStreet.com, supra, 273 F.3d 234, that *Martindell's* presumption against access did not cover judicial documents for which a presumption in favor of access applied. See also Iridium India Telecom LTD. v. Motorola, Inc., 165 Fed. Appx. 878, 881 (2nd Cir. 2005) **[*23]** ("A second exception to *Martindell's* presumption exists for 'judicial documents.' ") While the Second Circuit in United States v. Amodeo, supra, 44 F.3d 141 (*"Amodeo I"*), determined that the common law right of public access was limited to "judicial documents," the presumptive right of public access in Connecticut has been established by court rule. [11] See Clerk of the Superior Court v. Freedom of Info. Comm'n, 278 Conn. 28, 54, 895 A.2d 743 (2006) (Palmer, J., concurring) ("[T]he public's presumptive right of access to court proceedings and documents is embodied in our rules of practice"). Practice Book § 11-20A, which governs the sealing of files and documents in civil cases, [12] provides that "[e]xcept as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Practice Book § 11-20A(a). In contrast to the Second Circuit, HN5 Connecticut has decreed that the public has a presumptive right of access to any document filed with the court. Cf. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 782 (3rd Cir. 1994) **[*24]** (whether or not a document is subject to common law right of public access turns on whether the document has been filed with the court) and SEC v. Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) (settlement agreement filed with the court is a judicial record to which the public's common-law right of presumptive access applies). Since the documents to which the newspapers seek access in this case have been filed with the court, a presumptive right of access applies to them pursuant to Practice Book § 11-20A(a), and the presumption against access laid down in *Martindell* does not apply. [13]

FOOTNOTES

11 The Diocese maintains that our Supreme Court has determined that the right of public access is limited to judicial documents as they have been defined by the Second Circuit. Rosado v. Bridgeport Roman Catholic Diocesan Corp., supra, 276 Conn. 217 n.54. The Diocese reads the Supreme Court's language in footnote 54 too broadly. The text in the body of the court's opinion indicates that the court was referring to the common law and constitutional rights of public access when it stated in its footnote that the right of public access was limited to judicial documents and did not apply to all documents filed with the court. *Id.* The court was not referring to the right of public access established by the provisions of the practice book which clearly provide the public with a presumptive right of access to documents filed with the court. See, e.g., Practice

Book § 11-20A(a) ("Except as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public.") **[*25]**

12 The current Practice Book rules governing the sealing of court records did not govern the entry by Judge Levin of the sealing order as they had not yet been enacted. They are, however, material to the newspapers' pending motion to modify the prior sealing order.

13 It is not necessary to determine whether the *Martindell* test should govern the modification of a protective order sealing or limiting the disclosure of discovery material not filed with the court as the newspapers have withdrawn their claim for access to such material. See fn.3, *supra*.

Although it is manifest that the newspapers are not required to establish that Judge Levin's sealing order was improvidently granted or that an extraordinary circumstance or compelling need mandates modification, the question remains as to the showing that is required to modify or vacate the sealing order. There is no consensus among other jurisdictions as to which party has the burden of proof or what that burden should be regarding a motion to modify an order sealing documents subject to a presumptive right of public access. [14] The **[*26]** Third Circuit Court of Appeals has ruled that "The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order," to determine whether to modify the order. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3rd Cir. 1994). The rule in Massachusetts is in accord. *The Republican Company v. Appeals Court*, 442 Mass. 218, 225, 812 N.E.2d 887 (2004). Other courts have placed on the party seeking to modify a protective order "the burden of producing evidence sufficient to convince the court that, on the facts of the particular case, the interests favoring continued secrecy do not outweigh the interests favoring disclosure." *Mokhiber v. Davis*, 537 A.2d 1100, 1117 (D.C. 1988). See also *Holland v. Eads*, 624 So. 2d 1012, 1016 (Ala. 1993) (Adopting the approach of *Mokhiber v. Davis, supra*). Still other courts have placed the burden of proof on the party seeking to maintain nondisclosure with the burden ranging from establishing that the current need for secrecy substantially **[*27]** outweighs the presumption of public access, *Hammock v. Hoffmann-LaRoche, Inc.*, 142 N.J. 356, 381-82, 662 A.2d 546 (1995); proving convincing reasons to rebut the presumption of openness, *Pulitzer Publ'g Co. v. Transit Casualty Co.*, 43 S.W.3d 293, 303-04 (Mo. 2001); and proving a sufficiently compelling interest, *In re Keene Sentinel*, 136 N.H. 121, 130-31, 612 A.2d 911 (1992), or compelling reasons, *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), which overcome the public's right of access. I am persuaded that [HN6] the party seeking to unseal a document previously sealed by the court should bear the burden of proving that appropriate grounds exist for the modification of the sealing order, which shall include that the initial basis for the sealing order no longer exists, *Mokhiber v. Davis, supra*, 537 A.2d 1117, that the sealing order was improvidently granted, *id.*, or that the interests protected by nondisclosure do not outweigh the public's right of access to the document. The interests to be weighed by the court include any reasonable reliance by the parties upon the sealing **[*28]** order. *Pansy v. Borough of Stroudsberg, supra*, 23 F.3d 790. Placing such a burden on the movant is consistent with the general rule that the moving party bears the burden of persuasion, *In re Final Grand Jury Rpt., Torrington Police Dept.*, 197 Conn. 698, 712, 501 A.2d 377 (1985), and it gives appropriate deference to the fact that a court has previously determined that sealing is warranted.

FOOTNOTES

14 The newspapers contend that our Supreme Court has determined that the Diocese has the burden of proof and its burden is to establish a compelling interest which overrides the public's right of access. In support of its position, they cite the following statement of *Rosado v. Bridgeport Roman Catholic Diocesan Corp., supra*, 276 Conn. 224: "[T]o the extent that the [newspapers'] motion to vacate the protective orders relates to judicial documents, the [newspapers] interest in such documents is especially great, and the defendants bear a heavy burden of establishing a compelling interest in preventing those documents from being disclosed to the public." I do not agree that the court was addressing the issue of which party had the burden of proof regarding the newspapers' motion to modify the sealing orders, as that issue was not before the court. Rather, the court was simply expressing its agreement with the general proposition that the public has a right of access to judicial documents which can only be overcome by a compelling countervailing interest.

[*29] *B*

Applying the aforementioned standard to these cases, the newspapers maintain that the sealing order should be vacated because the original basis for the order no longer exists. They assert that the reason for the issuance of the order was to protect the defendants' right to a fair trial. Since the twenty-three cases have now been settled and withdrawn, there is no longer a need to protect the defendants' right to a fair trial. The Diocese contends that its right to a fair trial remains an active concern because there are currently pending two lawsuits against it which assert claims of sexual abuse by priests similar to the twenty-three cases at issue here. The Diocese also asserts that additional claims of sexual abuse could be brought against it in the future. It argues that the documents should remain sealed in order to protect its right to a fair trial in those cases. I conclude that the newspapers have met their burden of establishing that the initial grounds for the issuance of the sealing order no longer justify the continuation of that order.

As previously noted, Judge Levin issued the sealing order to protect the defendants' right to a fair trial. Judge Levin was concerned **[*30]** that public dissemination prior to trial of documents obtained through discovery coupled with the widespread media coverage of the cases would compromise the defendants' ability to receive a fair trial. As all twenty-three cases have now been settled and withdrawn, the defendants' right to a fair trial in these cases is no longer an ongoing concern. I do not find that the pendency of two other sexual abuse cases or the potential for additional cases justifies the continuation of the sealing order in these twenty-three cases. It was the protection of the defendants' right to a fair trial in these twenty-three cases which motivated Judge Levin to issue his order. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (dismissal of the underlying action eliminated the need for a protective order which was entered to protect fair trial rights.) Moreover, the continued sealing of 924 documents totaling 12,675 pages is not the least restrictive means available to protect the Diocese's right to a fair trial in other cases. There exist reasonable alternatives which will adequately protect the Diocese's fair trial rights.

See Practice Book § 11-20A(c) **[*31]** (The court must first consider reasonable alternatives to the issuance of a sealing order and any sealing order must be no broader than necessary to protect the overridlng interest sought to be protected.) See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (U.S. 1986) (a preliminary hearing could constitutionally be closed to the public only if specific findings are made demonstrating that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.) Those alternatives include voir dire. See *State v. Reynolds*, 264 Conn. 1, 224, 836 A.2d 224 (2003) ("[t]here is no reason to believe that any influence of the pretrial publicity could not have been overcome by the voir dire process.") and *Press-Enterprise Co. v. Superior Court, supra*, 478 U.S. 15 ("[t]hrough voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.")

The Diocese also asserts that the sealing order should be preserved because it relled upon the order when it settled these cases. I do **[*32]** not agree that the Diocese's reliance upon the sealing order overrides the public's right of access to the sealed documents because that reliance was not reasonable. Judge Levin's order was not a permanent sealing order. It was intended to be a temporary order whlch was to govern the proceedings until the commencement of trial and which, by its terms, was subject to reconsideration and modlfication. It was not reasonable for the Diocese to assume that Judge Levin's order permanently sealed the documents from publlc view after settlement of the cases. See *In Re Agent Orange Product Liability Litigation, supra*, 821 F.2d 147, and *Lugosch v. Pyramid Company of Onondaga, supra*, 435 F.3d 126.

C

WHETHER VARIOUS PRIVILEGES OUTWEIGH THE PUBLIC RIGHT OF ACCESS

The Diocese further maintains that the public's right of access to the sealed documents is outwelghed by various constitutional, common law and statutory rights and privlleges which it asserts apply to Individual documents. The rights and privileges which the Diocese asserts prevent disclosure are (1) the privilege governing personnel files under General Statutes § 31-128f **[*33]** ; (2) the attorney-client privllege; (3) the clergyman privilege pursuant to General Statutes § 52-146b; (4) the rights provided under the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and Article First, Section 3, and Article Seventh of the Connecticut Constitution; (5) the right of privacy; and (6) the statutory privileges governing confidential medical records. The newspapers contend that each of these privileges was waived by the Diocese when it failed to assert the privileges prior to providing the documents to the plaintiffs in these actions.

1

The Privilege Governing Personnel Files

With respect to the Diocese's claim that certain documents are protected from disclosure by the statutory privilege for records contained in personnel files, I conclude that, under the circumstances presented by these cases, the public's right of access to documents flled with the court outweighs the employees' interest in the confidentiality of the personnel files.

The plaintiff in *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation* in connection with his notice of the depositions of the defendants **[*34]** and Bishop Egan subpoenaed the personnel file of Pcolka. Pcolka moved for a protective order, including an order barring production of his personnel file. The court, Levin, J., after an *in camera* review of the personnel file, ordered disclosure of the contents of the personnel file [15] to the plaintiff on the grounds that the documents contained in the file were relevant and material to the plaintiff's claims. *George L. Rosado v. Bridgeport Roman Catholic Diocesan Corporation,* Superior Court, judicial district of Fairfield, Docket No. CV93-0300272S (December 8, 1994). Those documents, and documents from personnel files of additional defendants, were subsequently filed under seal with the court by the parties in connection with a variety of motions.

FOOTNOTES

15 The court did not order disclosure of the report of the Institute of Living which was contained in the personnel file because the report appeared to be protected from disclosure by the statutory privilege governing psychiatric records.

HN7 An employee's right **[*35]** to the confidentiality of his personnel file is not absolute. General Statutes § 31-128f provides in relevant part that: "No individually identifiable information contained in the personnel file or medical records of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except . . . where the disclosure is made . . . pursuant to a lawfully issued administrative summons or judicial order, including a search warrant or subpoena . . ." Documents in a personnel file which are materlal and relevant to a legal dispute are subject to disclosure by court order, General Statutes § 31-128f and, once disclosed documents are filed with the court, the public has a right of access to them, Practice Book § 11-20A. The public's right of access to those documents is particularly strong in these cases due to the extraordinary public interest in knowing whether minors in Connecticut were sexually abused by priests employed by the Diocese and whether the Diocese was responsible for perpetuating that abuse. **[*36]** Just as the plaintiffs' right of access to relevant and material documents concerning sexual abuse by priests contained in the personnel files of the defendant priests trumps the privacy of personnel files, so too does the public's right of access to the same information when it is filed with the court. [16]

FOOTNOTES

16 To the extent that documents from the personnel files of individual priests were filed with the court for the sole purpose of allowing the court to conduct an *in camera* review of the documents in the personnel files, the documents remain entitled to sealing. See part IV of this opinion.

2

The Attorney-Client and Clergyman Privileges and the Rights of Privacy and the Free Exercise of Religion

The Diocese also asserts that certain documents are protected from disclosure by (1) the attorney-client privilege; (2) the clergyman privilege pursuant to General Statutes § 52-146b; (3) the Free Exercise and Establishment Clauses of the First Amendment to the United States **[*37]** Constitution and Article First, Section 3, and Article Seventh of the Connecticut Constitution; and (4) the right of privacy. The Diocese does not claim that these rights and privileges which it now contends override the public's right of access to documents filed with the court were asserted by the Diocese prior to the disclosure of the documents to the plaintiffs or the filing of the documents with the court. Rather, it asserts that it did not waive its rights and privileges vis-a-vis the press and the public by disclosure of the documents under a protective order to the plaintiffs and, in the alternative, any waiver attending the disclosure of information to the plaintiffs was limited to the plaintiffs. I do not agree.

HN8 "Waiver is the intentional relinquishment or abandonment of a known right or privilege . . . Various statutory and contract rights may be waived . . . Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel would be enforced. Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps **[*38]** have otherwise existed . . . Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Citation omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 704 v. Dept Of Public Health*, 272 Conn. 617, 623, 866 A.2d 582 (2005). See also *Schreck v. Stamford*, 72 Conn.App. 497, 500, 805 A.2d 776 (2002).

It is undisputed that all of the documents filed under seal with the court were obtained through the depositions of the defendants and Bishop Egan or are based on information received from those depositions. It is also undisputed that during the depositions, neither the Diocese, the individual defendants, nor Bishop Egan objected to disclosure of the documents or information based on the privileges and rights now being asserted by the Diocese. HN9 Generally, a privilege is waived by a party in a judicial proceeding where the party fails to properly assert the privilege or object to an attempt by another person to give or exact testimony or other evidence of a privileged communication. See, e.g., Restatement (Third), The Law Governing Lawyers, § 78 **[*39]** (2006) (attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client in a proceeding before a tribunal fails to object properly to an attempt by another person to give or exact testimony or other evidence of a privileged communication); *Gebbie v. Cadle Company*, 49 Conn.App. 265, 714 A.2d 678 (1998) (the attorney-client privilege was waived regarding a particular topic for purposes of testimony at trial when the party's attorney testified at a pretrial deposition, without objection, concerning the same issue); and *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999) (the failure to object to questions designed to elicit information about confidential communications waived the attorney-client privilege). "If the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed." (Citations and internal quotation marks omitted.) *Gebbie v. Cadle Company, supra*, 49 Conn.App. 274. The failure to assert the privileges now being asserted by the Diocese **[*40]** at the time that the documents and information were being sought by the plaintiffs and the disclosure of the documents and information to the plaintiffs constitute a waiver of those privileges.

The Diocese contends that it would not be reasonable to imply a waiver because the disclosure of information was made to the plaintiffs under the compulsion of a court order. The Diocese mischaracterizes the nature of the proceedings in these cases. Judge Levin did not order the disclosure of the documents and information obtained by the plaintiffs though the depositions of Pcolka, Curtis and Bishop. Those documents and that information were obtained through the normal discovery process. This is not a situation where the defendants sought to prevent disclosure by asserting privileges and the court overruled the privileges and ordered disclosure.

The Diocese contends that it would not be reasonable to imply a waiver because the disclosure of the information was made to the plaintiffs under an order of confidentiality. The Diocese fails to offer a rationale as to why that is so. Disclosure was made to the plaintiffs of allegedly privileged information without an assertion of the privilege. The **[*41]** fact that further disclosures would not be made does not alter the fact that the privileges have already been breached. See *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1430 (3rd Cir. 1991) (finding waiver of the confidentiality of work-product notwithstanding the existence of a confidentiality agreement). See also *Genentech, Inc. v. Intl. Trade Center*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) ("[g]enerally disclosure of confidential communications or attorney work product to a third party, such as an adversary in litigation, constitutes a waiver of privilege as to those items.") Moreover, the Diocese had no assurances that the information would remain sealed, as Judge Levin's protective order expressly stated that the need for confidentiality would be revisited after jury selection.

The Diocese further asserts that any waiver of its privileges is limited to the plaintiffs. In essence, the Diocese seeks to apply the rule of "selective waiver" to its disclosure of the documents to the plaintiffs. HN10 Selective waiver permits a party who has disclosed privileged communications to continue asserting the privilege against other parties. *Westinghouse v. Republic of the Philippines, supra*, 951 F.2d 1423 n.7. **[*42]** The Diocese contends that the privileged documents which it disclosed to the plaintiffs in these cases should not be disclosed to the newspapers as any waiver of its privileges was limited to the plaintiffs. In support of its position, it cites *Cabrera v. Cabrera*, 23 Conn.App. 330, 340, 580 A.2d 1227 (1990), in which the Appellate Court held that the execution of written releases limited to specific individuals did not constitute a general waiver of the psychologist-patient privilege provided by General Statutes § 52-146c. I do not agree that the rule of selective waiver should appropriately be applied to the disclosures here.

First, unlike the situation in *Cabrera*, the Diocese did not expressly limit its waiver of its privileges to a release of documents to the plaintiffs. Moreover, HN11 the statute governing the psychologist-patient privilege requires written consent for the disclosure of privileged communications. General Statutes § 52-146c(a)(4). Since the written releases in *Cabrera* were limited to specific individuals, no authorization was provided for the release of the information to anyone else. HN12 There **[*43]** is no requirement of written consent for the disclosure of information protected by the attorney-client privilege, the clergyman privilege, or the constitutional rights of privacy and the free exercise of religion.

Second, any confidentiality provided by the privileges asserted by the Diocese was compromised by the disclosure of the information by the Diocese to the plaintiffs. The Diocese cannot now pick and choose among those who seek access to the documents. See *Permian Corp. v. United States*, 214 U.S. App. D.C. 396, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (HN13 "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.") To rule otherwise, would allow a party to manipulate use of its privileges through selective assertion. *Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners L.P.)*, 9 F.3d 230, 235 (2d Cir. 1993).

Finally, the doctrine of selective waiver is not favored. See *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1186 (10th Cir. 2006) **[*44]** (In declining to adopt the selective waiver rule for the attorney-client privilege, the court, citing decisions from the D.C. Circuit and the First, Second, Third, Fourth and Sixth Circuits, found that "[t]here is almost unanimous rejection of selective waiver.") But cf. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (court applied the selective waiver rule to prevent the discovery in civil litigation of material protected by the attorney-client privilege and previously disclosed to the SEC during a formal investigation.) HN14 The doctrine is not favored because privileges inhibit the truth seeking process and they should be strictly construed and judiciously applied. *In re Qwest Communications International Inc., supra*, 450 F.3d 1185.

3

Healthcare Privileges

The Diocese also asserts that certain documents contained in the court's files are protected from disclosure by various healthcare privileges. The privileges claimed by the Diocese are the physician-patient privilege, General Statutes § 52-146o; the psychologist-patient privilege, General Statutes § 52-146c; **[*45]** the psychiatrist-patient privilege, General Statutes §§ 52-146d et seq.; the clinical social worker-patient privilege, General Statutes § 52-146q; and the professional counselor-patient privilege, General Statutes § 52-146s. The newspapers contend that these privileges have been waived because they were not asserted by the Diocese prior to disclosing the documents to the plaintiffs. I do not agree that a waiver of the healthcare privileges can be inferred from the Diocese's failure to previously assert the privileges. HN15 An implied waiver is not appropriate with respect to these statutory healthcare privileges because the statutes require a patient's express consent for disclosure and they specifically delimit the exceptions to the general rule of nondisclosure. See *State v. Jenkins*, 271 Conn. 165, 183, 856 A.2d 383 (2004) (court refused to recognize an implied waiver of the psychiatrist-patient privilege under § 52-146d). Moreover, a review of the depositions of the individual defendant priests whose healthcare records were filed with the court under seal indicates that they repeatedly objected **[*46]** to any inquiry concerning their medical records. [17]

FOOTNOTES

[17] HN16 A healthcare privilege must generally be asserted by the patient or the physician. Accordingly, the Diocese and its former officials lack standing to assert such a privilege on behalf of another. However, because the record before me indicates that individual priests registered their objection to disclosure of their medical records, it is necessary for me to determine whether the documents are protected from disclosure by a healthcare privilege.

HN17 Where the confidential status of a document is apparent, a claim of privilege may be disposed of without further inquiry. *Babcock v. Bridgeport Hospital*, 251 Conn. 790, 847, 742 A.2d 322 (1999). Otherwise, the burden of establishing immunity from disclosure rests with the party asserting the privilege. *Id.*, 849.

I have reviewed *in camera* each of the documents for which the Diocese asserts a healthcare privilege. [18] A privilege does not appropriately apply to a number of these **[*47]** documents for a variety of reasons, including the following: (1) the document did not involve communications relating to diagnosis and treatment by the patient to a healthcare provider; [19] (2) child abuse is known or in good faith suspected, see § 52-146c(c)(4) and § 52-146o(b)(4); [20] and (3) it was not established that the healthcare provider met the requirements of the statutory privilege, including that the individual practitioner was licensed to practice in Connecticut. In addition, with respect to two documents, it was not clear from the face of the documents, and the Diocese failed to establish, that the documents concerned communications between a psychiatrist and a patient which occurred after October 1, 1961, the effective date of § 52-146d. [21]

FOOTNOTES

[18] The court has been hampered in its review of the healthcare privilege claims of the Diocese because the Diocese has asserted a broad "healthcare privilege" in its privilege log without specifically identifying for each document which particular statutory privilege it was relying on.

[19] For example, a letter dated April 9, 1990 from Dr. Howard Iger to Rev. Laurence Bronkiewicz is not privileged because it concerns the administrative actions which the Diocese should take regarding an individual priest. **[*48]**

[20] For example, the documents filed with the court under seal include medical records of Pcolka which the Diocese claims are subject to the physician-patient privilege established by General Statutes § 52-146o. That privilege does not apply however because additional documents indicate that Pcolka has been accused of sexual abuse of a minor. See HN18 § 52-146o(b) which provides that consent of a patient is not required for disclosure of records of a physician "if child abuse . . . is known or in good faith suspected." A child abuse exception also applies to the psychological evaluation dated November 16, 1978 conducted by James Cassidy, PhD., of Rev. Martin Federici and the memorandum dated May 22, 1990 from Leslie Lothstein, PhD. See § 52-146c(c)(4).

[21] The two documents are a letter dated March 20, 1962 from Dr. Jacob Meshken to Monsignor Curtis and a letter dated

March 21, 1962 from Dr. William Sires to Rev. Matthew Stapleton. With respect to the former, the letter refers to psychiatric consultations from December 1960 through June 5, 1961. With respect to the latter, the letter gives no dates as to when the evaluation occurred.

[*49] I conclude that a statutory privilege applies to the following documents: (1) the report of Dr. Richard Brldburg dated June 26, 1989; (2) a letter dated April 20, 1994 from Dr. Louis Padovano to Monsignor Laurence Bronkiewicz; (3) a letter dated May 29, 1986 from Dr. Mohammed Kabir to Monsignor Andrew Cusack; (4) the affidavit of Santi Neuberger, M.D., dated September 13, 1994; and (5) the affidavit of Santi Neuberger, M.D., dated July 29, 1996. I further conclude that the statutory healthcare privileges which protect these documents from public disclosure outweigh the public's right of access to these documents. Accordingly, with respect to these flve documents, the newspaper's motion to vacate the sealing order is denied.

IV

Whether to Unseal Documents Reviewed by the Court In camera

The newspapers seek access to certain documents reviewed by the court *in camera*. They do not seek access to any documents reviewed *in camera* by the court but not ordered disclosed to the plaintiffs because the court found the documents to be privileged or otherwise nondiscoverable. The newspapers do seek access to those documents reviewed by the court *in camera* which the court **[*50]** ordered disclosed to the plaintiffs during discovery. The Diocese objects to the unsealing of any document reviewed by the court pursuant to an *in camera* proceeding on the grounds that the newspapers do not have a right of access to such documents. I agree with the Diocese that the public right of access does not attach to documents reviewed by the court *in camera*.

HN19 Practice Book § 11-20A governs the sealing of documents filed with the court. It provides that "[e]xcept as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Practice Book § 11-20A(a). The official commentary to the 2005 amendments to the practice book reveals that the words "except as otherwise provided by law" contained in Practice Book § 11-20A(a) are intended to exempt from the operation of the rule the *in camera* inspection of documents. [22] See also *U.S. v. Wolfson*, 55 F.3d 58, 60 (2nd Cir. 1995) (There is no constitutional or common law right of public access to documents reviewed by the court *in camera* **[*51]** which the court has ruled need not be disclosed to the opposing party.) The reason that documents reviewed by the court *in camera* are exempt from the presumptive right of public access is obvious--allowing public access to documents inspected *in camera* would eviscerate the raison d'etre of an *in camera* review which is to provide the court with a mechanism to address a claim that the document Is entitled to confidentiality without disclosing the contents of the document. [23] See *State v. Peeler*, 271 Conn. 338, 403, 857 A.2d 808 (2004) (*In camera* review is a means of examining allegedly privileged material without abrogating the privilege itself.) Accordingly, the newspapers' request for access to documents which were filed with the court for the sole purpose of allowing the court to review the documents *in camera* is hereby denied. [24]

FOOTNOTES

22 The 2005 commentary provides in relevant part that "[a]s used in subsection (a) above, the words 'except as otherwise provided by law' are intended to exempt from the operation of this rule all established procedures for the sealing or *ex parte* filing, *in camera* inspection and/or nondisclosure to the public of documents, records and other materials, as required or permitted by statute; e.g. Gen. Stat. §§ 12-242vv (pertaining to taxpayer information), 52-146c et seq. (pertaining to the disclosure of psychiatrlc records) and 54-56g (pertaining to the pretrial alcohol education program); other rules of practice; e.g. Practice Book Secs. 7-18, 13-5(6)-(8) and 40-13(c); and/or controlling state or federal case law; e.g. *Matza v. Matza*, 226 Conn. 166, 627 A.2d 414 (1993.) (establishing a procedure whereby an attorney seeking to withdraw from a case due to his client's anticipated perjury at trial may support his motion to withdraw by filing a sealed affidavit for the court's review)." **[*52]**

23 The fact that the newspapers are limiting their request to those documents which the court ordered disclosed to the plaintiffs as part of discovery does not alter the result. Pursuant to the provisions of our practice book, the public does not have a right of access to documents exchanged by the parties in discovery because ordinarily such documents are not filed with the court.

24 To the extent these same documents may have been subsequently filed with the court for another purpose, the newspapers may be entitled to access to the documents in accordance with other aspects of this decision.

V

Whether to Unseal Document Which Discloses the Identity of Seven Intervening Priests

Seven priests, who were not defendants in the underlying actions, were allowed by the court to intervene for the limited purpose of preventing disclosure of private, confidential material contained in their personnel records. See *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn.App. 134, 758 A.2d 916 (2000). The intervenors were granted permission to use the fictitious names **[*53]** of Reverend John Doe 1 through 7 and the parties and their counsel were ordered by the court not to disclose the identity of the intervenors. The names of the seven intervening priests were disclosed during the deposition of Bishop Edward Egan. The transcript of Bishop Egan's deposition was subsequently filed with the court under seal by the plaintiff as an exhibit to the plaintiff's objections to defendants' motion for protective order. It is undisputed that the names of five of the intervenors were subsequently publicly disclosed by the Diocese as priests who have been the subject of claims of sexual misconduct. The newspapers seek access to the deposition transcript, including the names of the five intervening priests whose names have now been publicly disclosed. The newspapers have agreed that the names of the two intervenors who have not been publicly identified by the Diocese may remain under seal. [25] The newspapers contend that they are entitled to access to the sealed

document which discloses the names of the five priests because the initial basis for the sealing order no longer exists. The intervening priests argue that the unsealing of the document is not warranted because **[*54]** they reasonably relied upon the protective order and disclosure would violate their right to privacy.

FOOTNOTES

25 Accordingly, the names of John Doe Priest No. 1 and John Doe Priest No. 2 shall remain sealed.

As noted previously, the newspapers bear the burden of proving that appropriate grounds exist for the modification of the sealing order. Such grounds include that the initial basis for the sealing order no longer exists. The newspapers argue that the sealing order is no longer necessary due to the public disclosure by the Diocese of the names of the five Intervenors as priests who have been the subject of claims of sexual misconduct. I agree. The priests intervened in this case to protect their rights to the confidentiality of their personnel files. They sought anonymity because disclosure of their names in connection with these lawsuits would have revealed that there existed "complaints, accusations, allegations, reports and rumors" concerning sexual misconduct by them. See *Rosado v. Bridgeport Roman Catholic Diocesan Corp., supra*, 60 Conn.App. 135. **[*55]** Since it has been publicly revealed that the five intervening priests have been the subject of complaints of sexual misconduct, no interest would be served in continuing to seal their names from public view and the right of public access to documents filed with the court should prevail.

VI

Whether to Grant the Diocese's Motion to Seal

The Diocese has asked the court to issue a new order sealing the documents filed with the court should the court grant the newspapers' motion to vacate the prior sealing orders. The newspapers object to any sealing order.

HN20 A motion to seal documents filed with the court is governed by Practice Book § 11-20A which provides in pertinent part that "[t]he judicial authority may order that files, affidavits, documents, or other materials on file or lodged with the court or in connection with a court proceeding be sealed or their disclosure limited only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials." Practice Book § 11-20A(c). For the reasons which I have cited **[*56]** in my determination that the prior sealing orders should be vacated, I conclude that the Diocese has not established that a sealing order is necessary to preserve an interest which overrides the public's right of access to the documents previously filed with the court.

VII

Conclusion

In light of the above, the newspapers' motion to vacate the sealing orders is granted except with respect to the following documents and information filed under seal in these consolidated cases, which shall remain sealed: (1) the documents which I have determined to be appropriately subject to a healthcare privilege; (2) documents filed with the court for the sole purpose of allowing the court to review the documents *in camera*; and (3) the names of John Doe Priest No. 1 and John Doe Priest No. 2. The Diocese's motion to seal the documents filed with the court is denied.

BY THE COURT

Jon M. Alander

Judge of the Superior Court