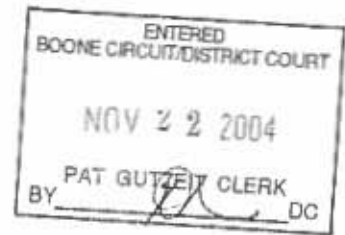


Commonwealth of Kentucky  
Boone Circuit Court  
Case No. 03-CI-181



John Doe, et. al.

Plaintiffs

v.

Roman Catholic Diocese of Covington, et. al.

Defendants

Date: November 15, 2004  
Proceeding: Motion on behalf of Louis Holtz, et. al  
for protective Order or in the Alternative to Limit Examination  
Present: Mr. Carran, Attorney for Movants  
Mr. Steinberg, Attorney for Plaintiffs  
Recorded: Tape No. 04-137; Time 11:02-11:18

**OPINION AND ORDER DENYING MOTION**

This is a class action brought against the Diocese by people who allege that as minors they were sexually abused by its priests.

The case is before the Court on a motion for a protective order.

The Plaintiffs have subpoenaed the Movants to give deposition testimony. Although the motion does not specifically so state, the court assumes that each Movant is a priest or former priest in the Diocese. So far four Movants have been specifically identified in the pleading as being people who abused minors. The motion asserts that the remaining three Movants have a good faith belief that the Plaintiffs will make similar allegation against them.

At the commencement of their motion the Movants "assert their 5<sup>th</sup> Amendment privilege, and under this Constitutional privilege, refuse to answer any questions posed to them concerning any matter related, whatsoever, to the allegations contained in, or relevant to, Plaintiffs' Complaint."

Having thus purportedly asserting the privilege, the Movants ask relief as follows:

"[T]he Court... order that discovery of these Movants not be had, based upon the assertion of their 5<sup>th</sup> Amendment privilege. In the alternative, The Court should order that said discovery deposition shall terminate upon a deponent's invocation

on the record of his 5<sup>th</sup> Amendment privilege, or that the discovery shall be done upon written interrogatory only, and that the discovery be sealed and only opened by order of the Court and after notice to Movants. Finally, the Movants alternatively pray that this Honorable court order production to Movants of all records of any kind whatsoever, that Plaintiffs' counsel possesses related to these Movants."

During oral argument it became clear that each Movant seeks to avoid publicly being on the record, and particularly a video record, as declining to answer whether he molested a child on the grounds that the answer might intend to incriminate him.

The Fifth Amendment to the Federal Constitution provides that "no person ... shall be compelled in any criminal case to be a witness against himself." It applies to the States by virtue of the Due Process clause of the Fourteenth Amendment.

Section Eleven of the Bill of Rights to the Kentucky Constitution provides that an accused "cannot be compelled to give evidence against himself." This provision has been interpreted to duplicate the protections provided by the Federal Constitution. *Commonwealth v. Cooper*, 899 S.W.2d 75 (Ky. 1995). Therefore, only the Federal provision need be discussed.

The Fifth Amendment protects the accused in a criminal proceeding as well as mere witnesses. However it operates differently depending on the status of the person asserting the privilege. An accused has an unfettered right to assert the privilege and refuse to testify. On the other hand a mere witness may assert the privilege only with respect to those particular questions, his truthful answers to which would create a real and appreciable danger of incrimination.

Since Movants are not defendants in a criminal proceeding, they may not decline to testify, and this court should not order that their depositions be cancelled.

Similarly since a witness can assert the privilege only as to a particular question and since some questions may incriminate the witness and others may not, Movants are not entitled to have questioning cease as soon as they first assert the privilege.

The Court can find, and has been cited to, no authority that would require the Plaintiffs to forego oral examination and proceed by written interrogatory. Therefore the Court will allow the Plaintiffs to choose the method of examination.

Similarly the Court has been referred to no basis for ordering the Plaintiffs to produce documents for the deponents. The Rules of Evidence provide for the production of documents in certain limited situations, KRE 613, and, by implication, do not require production in others.

At oral argument it was suggested that the Movants might invoke their Fifth Amendment right to the first question, regardless of the question.

Since such a refusal to testify would only bring the case back to the court, the Court feels it best emphasize that, as noted above, Movants, unlike those accused in criminal proceeding, do not have an unfettered right to decline to testify.

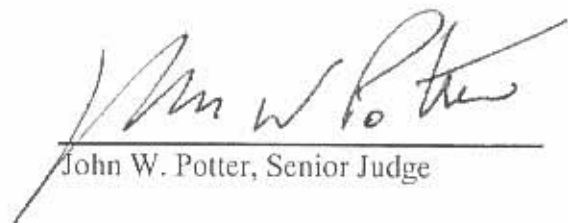
Also, because here the factual predicate underlying a refusal to testify is particularly within the knowledge of the witness Movants should themselves invoke the privilege.

For the parties information, should disagreements arise regarding whether the privilege has been properly invoked it is the Court's current intention to follow the procedure set out in *Hoffman v. United States*, 341 U.S. 479 (1951), as articulated in I Strong, McCormick on Evidence, Sec. 133 (5<sup>th</sup> Edition 1999).

"A witness invoking the privilege need not carry a burden of persuasion requiring the witness to persuade the judge that the answer sought would be incriminating. But where the question, considered in light of the evidence in the case and other information properly taken into account, is one which the trial judge could reasonably regard as presenting no more than an imaginary and unsubstantial risk of incrimination, the witness has the burden of putting into the record-by evidence, logical argument or persuasion-a basis for regarding that conclusion as insufficiently supported." Id. At 496.

For the reasons stated above IT IS HEREBY ORDERED:

1. The Motion is DENIED.



John W. Potter, Senior Judge

CC: Mr. Carran  
Mr. Steinberg  
Mr. O'Hara  
Ms. Oldfather  
Ms. Huff  
Mr. Guilfoyle  
Judge Potter