MONTANA TWENTIETH JUDICIAL DISTRICT COURT
SANDERS COUNTY

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| ALEXIS NUŇEZ,<br><br>Plaintiff,<br><br>vs.<br><br>WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; *et. al.*,<br><br>Defendants/ Third-Party Plaintiffs. | ) | No. DV-16-84<br><br>**ORDER COMPELLING PRODUCTION** |

The Plaintiff, Alexis (Lexi) Nuňez (Nuňez) has filed Plaintiff's *Motion to Compel* (Doc. 207) in which she seeks discovery relating to, and production of, a ten page document from Defendant Watchtower Bible and Tract Society of New York, *et. al.*'s (Watchtower or Defendants) "CM Database" which Defendants refuse to produce on the basis of their claim of attorney-client and work product privileges. This case is before the Court for a second trial following an appeal. The Defendants oppose the Motion. (Doc. 208).

This case involves sexual abuse. In 2004, Max Reyes sexually abused Lexi Nuňez. During the time of the abuse, Defendants' elders, including elders in

Montana, allegedly learned that Reyes was an admitted pedophile. Plaintiff asserts that the elders and others, whom they assert are and were Defendants' agents, were negligent. Plaintiff asserts that Defendant Watchtower also knew about the abuse through a call from a local elder to Watchtower's Legal Department.

In its Rule 16 Scheduling Order, entered after conferring with the parties, the Court permitted discovery to be reopened "only concerning documents relating to the Child Molester (CM) database." (Doc. 190). The Plaintiff served written discovery on this narrow subject matter but the Defendants refused to answer. This Motion followed.

The discovery at issue is as follows:

**Request for Production No. 2**: Produce all pages from the CM database that include references to Alexis Nuñez.

**Request for Production No. 3**: Produce all pages from the CM database that include references to Max Reyes.

**Request for Production No. 4**: Produce the seven pages that you withheld from production as described in Exhibit B.

**Request for Production No. 5**: Produce all 10 pages of the document identified as item #1 on the privilege log attached as Exhibit C.

**Request for Production No. 7**: Produce all pages from the CM database that include references to Holly McGowan.

**Interrogatory 1**: Describe the CM database by providing the following information.

1. What is the name or designation the JW Defendants give to the database?
2. Generally describe the information contained in the database.

3. When was the database created?

During the first trial, Defendants produced three of ten pages of the document at issue. Ex.'s. A and C to Plaintiff's Motion. The three produced pages were publicly disclosed. Defendants have referred to the entire ten pages as a "running log," and they list it as a single document in their privilege log. Ex. A to Plaintiff's Motion. Plaintiff asserts, and Defendants do not dispute, that all pages concern the sexual abuse involving four people, but that the withheld pages only concern three of those people. Defendants assert that these three pages, and the remaining pages, are protected by attorney-client and/or work product privilege. Exs. D and E to Plaintiff's Motion.

Joel Taylor represents all Defendants. Mr. Taylor is also in-house lawyer for Watchtower. He produced the three pages to the Plaintiff. Ex. C to Plaintiff's brief. Plaintiff alleges in her Third Amended Complaint, ¶¶15, 26, 27, 28, 41, 56 (and filed evidence in support with a brief on summary judgment) that "elders" are agents of the Defendants, and that Peter McGowan notified "elders, agents of Defendants" that Reyes was a pedophile. The privilege is asserted by the principal(s), the Defendants, and there are no separate privilege claims by the elders.

Defendants assert that the Plaintiff has not made a cognizable argument that Defendants waived the work product privilege, and that, therefore, even if

attorney-client privilege does not apply, the work product privilege protects them from having to produce the documents. However, Plaintiff explicitly argued in her Motion that the Defendants have waived both privileges.

A party is entitled to discovery if the matter sought is not privileged and is relevant to the subject matter of the action. Rule 26(b)(1), Mont. R. Civ. P., provides that

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. The information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Discovery rules are liberally construed to make *all relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage. *Perdue v. Gagnon Farms, Inc.,* 2003 MT 47, ¶15, 314 Mont. 303, 65 P. 3d 570 (citation omitted). Rule 401, M. R. Evid., defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit ..... Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are

essential to proper litigation." *Richardson v. State of Montana*, 2006 MT 43, ¶ 22, 331 Mont. 231, ¶ 22, 130 P.3d 634 ¶ 22.

The Montana Supreme Court has emphasized it expects courts not to deal leniently with dilatory discovery conduct. *Morris v. Big Sky Thoroughbred Farms,* 1998 MT 229, ¶13, 291 Mont. 32, 965 P.2d 890 (citation omitted). Rather, trial courts must intently punish transgressors rather than patiently encouraging their cooperation. *Morris,* ¶13. Sanctions for failure to comply with discovery rules is favored. "It is, after all, a maxim of our rules of discovery that the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires." *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶71, 303 Mont. 274, 16 P.3d 1002.

Trial courts are not to give second chances where a party violates discovery rules. See, *Spotted Horse v. BNSF Railway Co.*, 379 Mont. 314, 321 (2006); *Peterman v. Herbalife Int'l, Inc.*, 2010 MT 142, ¶ 17, 356 Mont. 542, 234 P.3d 898. Violations of discovery rules risk sanctions. District courts "should punish those who engage in dilatory discovery actions rather than patiently encourage their cooperation." *Bulen v. Navajo Refining Co.*, 2000 MT 222, ¶19, 301 Mont. 195, 9 P.3d 607. "[F]ailure to comply with discovery procedures, in itself, is prejudicial to the other party," and sanctions promote "fair and efficient judicial administration of pending cases." *Xu v. McLaughlin Research Inst. for Biomedical*

*Science, Inc.*, 2005 MT 209, ¶25, 328 Mont. 232, 119 P.3d 100. "[I]t is the attitude of unresponsiveness to the judicial process, regardless of the intent behind that attitude, which warrants sanctions." *McKenzie v. Scheeler*, 285 Mont. 500, 508, 949 P.2d 1168, 1172 (1997).

In *Simonsen v. Allstate Insur. Co.*, 31 Mont. Fed. Repts. 154, 157 (D. Mont. 2003), Judge Anderson instructed: "Answers to discovery requests must be complete, clear, and responsive. An evasive or incomplete response is treated as a failure to respond." Accordingly, objections to discovery must be stated with specificity. "[B]oilerplate, shotgun-style objections" are improper. *Lurensky v. Wellinghoff*, 258 FRD 27, 30 (D.D.C. 2009). Boilerplate objections waive grounds not timely stated. *Mancia v. Mayflower Textile Servs. Co.*, 253 FRD 354, 464 (D.Md.2008).

Boilerplate objections or blanket refusals are not a basis for assertion of a privilege. *Burlington Northern & Santa Fe Ry Co. v. U.S. Dist. Court*, 408 F. 3d 1142, 1149 (9th Cir. 2005). Answers must be "true, explicit, responsive, complete, and candid." *Covad Communications Co. v. Revonet, Inc.*, 258 FRD 17, 19 (D.D.C. 2009).

The Court analyzes the Motion in the context of the above principles.

## I. Any claim of Privilege Was Waived.

The attorney-client is meant to "enable the attorney to provide the best

possible legal advice and encourage clients to act within the law." *Am. Zurich Ins. Co. v. Mont. Thirteenth Judicial Dist. Court*, 2012 MT 61, ¶¶ 9-10, 364 Mont. 299, 280 P.3d 240. The privilege allows attorneys to give accurate and candid advice to their clients without the fear the advice will be used against the client. *Inter-Fluve v. Mont. Eighteenth Jud. Dist. Ct.,* 2005 MT 103, ¶ 22, 327 Mont. 14, 112 P.3d 258 (citation omitted).

Attorney-client privilege must be construed narrowly to avoid obstructing the finding of the truth. *Am. Zurich*, ¶ 10 (citation omitted). Thus, it "protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." Id. The policy reason for the privilege is to, "encourage full and frank communication, not as an end in itself, but … to promote 'broader public interests in the observance of law and administration of justice.'" Id.

The work-product privilege "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Diacon ex rel. Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 116, 861 P.2d 895, 910 (1993) (citation omitted).

Privileges may be waived by voluntary disclosure. Rule 503, M. R. Evid.; *State v. Tadewaldt*, 2010 MT 177, ¶ 17, 357 Mont. 208, 237 P.3d 1273. "Voluntary disclosure to a third party of purportedly privileged

communications has long been considered inconsistent with an assertion of the privilege." Id., ¶ 20 (citation omitted).

In this case, the evidence reflects that the Defendants voluntarily waived any claimed privilege by disclosing selected excerpts of the document in question during the first trial for apparently strategic reasons. While Defendants argue that their disclosure during the first trial was the result of an "off the record" order made by Judge Manley, they offer no evidence of such an order, and no evidence of such an order appears in the record or in the Defendants' briefing.

Further, there is no evidence in the record that the Defendants objected to any such "order." Thus, even had an order been issued, the "law of the case" doctrine militates against reconsideration. Where rulings are not appealed when there is an opportunity they become "the law of the case for the future course of that litigation and the party that does not appeal is deemed to have waived the right to attack that decision at future points in the same litigation." *McCormick v. Brevig*, 2007 MT 195, ¶ 38, 338 Mont. 370, 169 P.3d 352 (citations omitted). The doctrine promotes finality and efficiency of the judicial process and protects against disturbing resolved issues. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988).

Defendants' attempt, now, to obstruct disclosure of the entire document, which on the face of the previously disclosed three pages constitutes attorney-

client communications and legal advice, by cloaking it as "privileged," is, at best, disingenuous. Defendants may not cherry pick portions of documents for which they waive privilege because it works to their strategic advantage, while withholding other parts because it does not. Defendants have clearly waived any claim of privilege.

**II. The Discovery Requests Seek Discoverable Information.**

Defendants objected to producing the balance of the document because it concerns acts committed by one or more third parties. This objection, likewise, is disingenuous. The person described as a third party is the Defendants' key witness, Peter McGowan (the document also relates to Max Reyes, who Defendants made a party). Discovery of information and evidence about a primary witness is, at the very least, likely to lead to probative evidence about the claims or defenses, and/or the bias of witness McGowan. It may also lead to impeachment evidence. The Court finds this objection to be specious.

Defendants argue that one page of the document involves a different "Max Reyes." The first page of the document, however, contains substantial and detailed identifying information about this person. Apparently, the argument is that a person named Anthony Montoya appears on this erroneously included document, thus showing that the document is erroneous. The Court is dubious because the name "Montoya" appears in other documents in Exhibit E. Out of an abundance of

caution, the Court will review this page *in camera* before determining whether it should be produced.

## III. The Discovery Requests Are Neither Vague nor Ambiguous.

Defendants object that the discovery request is "vague and ambiguous," representing that they do not know what the words "CM Database" mean. The Court finds this objection to be frivolous and interposed for an improper purpose. It is clear to the Court that the Defendants understand what the Plaintiff is seeking, regardless of whether they choose to call the information sought something different. The Defendants' counsel discussed the "CM Database" with the Court during the Rule 16 conference, which led to the Court's scheduling order, and never objected that they did not understand the term.

## IV. The Discovery Request is Not Overly Broad.

The Defendants finally object that the discovery sought is "overly broad." This objection is, at best, a shotgun, blanket objection expressly disapproved in the litany of Montana Supreme Court and federal courts. The time frame of the request encompasses the period of abuse until trial, and it is focused on the parties and subject matter at issue. This objection is spurious and interposed for an improper purpose.

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## ORDER

For the foregoing reasons, Plaintiff's Motion is GRANTED. The Plaintiff did not request sanctions, moving instead that the Court order production of the evidence and responses requested. The Court grants the relief requested and admonishes counsel that it will not tolerate further obstruction and will consider sanctions for similar conduct in the future. Defendants shall immediately fully respond to the following discovery requests: Requests for Production 2-8 and Interrogatory No. 1, except for the "erroneous" page containing the name of Anthony Montoya. That page shall be produced to the Court, in chambers, for in camera review, by emailing it to the Judge's clerk at jmckinney@mt.gov.

DATED this 26th day of May, 2021

ELIZABETH A. BEST

Elizabeth A. Best
District Court Judge

cc: James P. Molloy
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