

DISTRICT COURT, EL PASO COUNTY, COLORADO  
Court Address: 270 S. Tejon (80903), P.O. Box 2980  
Colorado Springs, CO 80901  
Phone Number: (719) 448-7577

**Plaintiff and Counterclaim Defendant:**

GRACE CHURCH & ST. STEPHEN'S, a Colorado  
nonprofit corporation,  
v.

**Defendants and Counterclaimants:**

THE BISHOP AND DIOCESE OF COLORADO, a  
Colorado nonprofit corporation; and THE EPISCOPAL  
CHURCH,

and

**Third Party Counterclaimants:**

THE DIOCESE OF COLORADO IN THE EPISCOPAL  
CHURCH; GRACE AND ST. STEPHEN'S  
EPISCOPAL CHURCH; and GRACE CHURCH AND  
ST. STEPHEN'S, a Colorado religious society and  
corporation,  
v.

**Counterclaim Defendants:**

REV. DONALD ARMSTRONG III; CHARLES C.  
BROWN; DARELEEN SCHAFFER; JON  
WROBLEWSKI; MARGE GOSS; CRAIG WHITNEY;  
ROBERT C. BALINK; CHAD FRIESE; MICHAEL  
BARBER; KEITH STAMPHER; JASON HUNTLEY;  
EMILY KLINE; RIP HOLLISTER; JACK GLORIOD;  
EDWIN J. MONTGOMERY, JR.; KEVIN DIBBLE;  
SUSAN SPENCER; ALAN CRIPPEN II; ST.  
STEPHEN'S CLASSICAL ACADEMY, a Colorado  
nonprofit corporation; and GRACE CHURCH & ST.  
STEPHEN'S, a Colorado unincorporated nonprofit  
association.

**Additional Counterclaim Defendant:**

RT. REV. ROBERT J. O'NEILL.

L. Martin Nussbaum #15370

• COURT USE ONLY •

Case No. 2007CV1971

Div.: COM5

Rothgerber Johnson & Lyons LLP 90 S. Cascade Avenue #1100 Colorado Springs, CO 80903 o: 386-3000; f:386-3070; <a href="mailto:mnussbaum@rothgerber.com">mnussbaum@rothgerber.com</a>	
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<p style="text-align:center"><b>BRIEF OF THE EPISCOPAL CHURCH SIDE REGARDING TWO PHASE TRIAL, ROLE OF JURY, AND BIFURCATION OF DISCOVERY (Commercial Docket)</b></p>
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The Episcopal Church Side<sup>1</sup> through Rothgerber Johnson & Lyons LLP, Goodwin Procter LLP, and Holme Roberts & Owen LLP, submit this brief in support of their request that the Court conduct trial, without bifurcation; that the trial have two phases; that a jury render a special verdict as trier of fact on all factual issues; and that discovery proceed without bifurcation. In support of this request, the Episcopal Church Side states:

1. During a case management conference in the summer of 2007, the Court noted that if the facts were to be decided by a jury, the jury would be required to answer special interrogatories. No party has ever objected to this until today.

2. The Court's May 13, 2008 order states, *inter alia*:

It appears that there will have to be a bifurcation of the issues. Unless I am convinced otherwise by counsel, the trial of issues relating to the status of the parties and property ownership will be to the Court. The result of that trial and the declaration of rights will give rise to whether one party or the other is entitled to damages. Since the parties have requested a jury, the issues of liability to one another and damages will be submitted to a subsequent jury.

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<sup>1</sup>"The Episcopal Church Side" includes the defendant and counterclaimant: The Bishop and Diocese of Colorado; the third party counterclaimants: The Diocese of Colorado in the Episcopal Church, Grace and St. Stephen's Episcopal Church, and Grace Church and St. Stephen's, a Colorado religious society and corporation; and the additional counterclaim defendant: Rt. Rev. Robert J. O'Neill, all of whom are represented by Rothgerber Johnson & Lyons LLP. It also includes the defendant and counterclaimant: The Episcopal Church, which is represented by Goodwin and Procter LLP and Holme Roberts & Owen LLP.

3. During the July 22, 2008 case management conference, counsel for the CANA parties<sup>2</sup> stated that they opposed a bifurcated trial and wanted a jury to serve as trier of fact on all issues. At that time, the undersigned stated that, while the Episcopal Church Side was sympathetic to this position, it was unable yet to take a position.

4. The Court responded by stating that it was open to reconsidering its May 13 order and would appreciate the parties' suggestions regarding the best way to proceed.

5. During the subsequent discussions between counsel regarding the case management order, it became clear that determining deadlines, conducting discovery, and preparing for trial will become far more complicated unless the Court revise its May 13 order and provides direction regarding bifurcation, the phasing of the trial, and the role of a jury.

6. Mr. Walta subsequently took the position that discovery itself should be bifurcated --with discovery regarding damages not commencing until after the first trial. Because it is unclear today whether the CANA parties still hold to this position, the Court should provide guidance as to whether there will be one or two periods of discovery.

7. In order to put such issues before the Court, the parties agreed that they would file simultaneous briefs on August 8, 2008 stating their respective positions regarding bifurcation of trial, phasing of trial, the role of a jury, and bifurcation of discovery. They agreed that they would, in their discretion, file simultaneous response briefs one week later so the Court can hear argument and decide these issues during the August 19 case management conference.

8. **Rule 121 Consultation.** On August 6, the undersigned provided counsel for the CANA parties with the Episcopal Church Side's recommendations regarding these issues in accordance with the duty to consult under Rule 121 § 8 and requested that the CANA side counsel state its position on such issues. Messrs. Hartley and Wright did not respond. On August 8, Mr. Walta stated, for the first time, that his clients wanted a jury to decide the entire case through a general verdict.

9. **Right to Trial By Jury.** While there may be other legal bases establishing the right to trial by jury, the clearest legal basis for a jury to decide the factual issues in this case is by consent of the parties. Colo. R. Civ. P. 39(c); *see also id.* 59(m) (making a jury available in declaratory relief actions).

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<sup>2</sup>The "CANA parties" include those parties that have left the Episcopal Church and attached to the Convocation of Anglicans in North America. These parties include the plaintiff, the individual counterclaim defendants, and the CANA parish in its capacity as an unincorporated association.

10. **Trial with Two Phases Preferable Over Bifurcation.** In order to avoid delay and duplication and to accommodate the desire that a jury rule on all factual issues, the Episcopal Church Side requests that the Court should conduct not a bifurcated trial, but a single trial with two phases commencing on the date previously set, February 10, 2009.

a. When the Court ordered the parties on May 13 to set a date for the second portion of the bifurcated trial, it became evident that the Court anticipated that there would be a significant gap between the first and second trials. During the undersigned's subsequent conversation with Mr. Walta, he took the position that if the first trial concluded in March, discovery regarding damages could commence only after that date and that the logical time for the second trial would be September 2009--two years and six months after the events triggering this lawsuit.

b. The Episcopal Church Side opposes bifurcation of the trial and supports, instead, a two-phase trial. In the first phase, it proposes that the Court and the jury will consider evidence relevant to the equitable and declaratory relief as to the substantive legal issues including without limitation: (i) the legal, equitable, and possessory interests in the disputed real, personal, trust, and intellectual property; (ii) the identity of ecclesiastical office holders; and (iii) other substantive issues. After this evidence is received and argued, the jury will answer special interrogatories, and the Court will apply the law to the the jury's factual findings and enter declaratory and equitable orders.

c. For a two-phased trial to work, the Court will need to enter its orders promptly after the special verdict interrogatories are answered. The Court could perhaps prepare its order over a weekend or a recess similar to that required each week according to the Court's 3.5-day-per-week trial schedule.

d. As part of its first phase ruling, the Court will dismiss the damages claims of the non-prevailing side so that only the damages claims of the prevailing side will be heard during the second phase. This will eliminate the presentation of unnecessary evidence as would also be accomplished through a bifurcated trial.

e. Within a day or two of entry of the first phase rulings, the second phase focused on damages claimed by the prevailing party will begin. This second phase beginning after a brief recess is analogous to the sentencing phase in a criminal proceeding. During this second phase, the Court and the jury will consider evidence on the damages claims and the jury would award damages as appropriate.

11. **Jury Determinations Made on Special Interrogatories.** The Episcopal Church Side proposes that one jury should serve as the trier of fact for all factual issues and that it should perform its role by returning a special verdict in the form of answers to special interrogatories. As

the Court surmised over a year ago, special interrogatories are the ideal way for the jury to perform a role while permitting the Court to apply the jury's factual findings to the many laws involved in this case.

a. "Special verdicts' are verdicts through which the jury makes finding on particular facts or on elements of claims, after which the court applies the findings to the law and enters judgment for one party or the other." 4 Sheila K. Hyatt and Stephen A. Hess, Colorado Civil Rules Annotated 670 (2005).

b. The Court has discretion to order the use of special interrogatories. Colo. R. Civ. P. 49(a); Furnary v. Merritt, 837 P.2d 192, 196 (Colo. App. 1992).

c. The use of special interrogatories for the jury in this case is ideal both because of the complex legal issues and because of the intense emotions and biases swirling around this case.

(1) The Court has had a sampling of the legal issues through prior briefing in this case. The laws at issue are not a mere assessment of a standard of care but issues that are arcane and complex for the attorneys and the Court including, *inter alia*, constitutional law regarding the identity of ecclesiastical office holders, constitutional law regarding property in secessionist church disputes, corporate law dating to the territorial days, corporate law regarding revival of an allegedly dissolved corporation, property law regarding title, beneficial interests, conveyancing, law regarding trusts, and more. It is unthinkable that a jury could be instructed and understand such law just as Judge Learned Hand understood when he penned the leading judicial critique of general verdicts:

[T]he least desirable feature of the general verdict, a feature which the fact verdict wipes out is this: The theory of the general verdict involves the assumption that the jury fully comprehends the judge's instructions concerning the applicable substantive legal rules. Yet, often the judge must state those rules to the jury with such niceties that many lawyers do not comprehend them, and it is impossible that the jury can. [J]uries have the disadvantage . . . of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law student blanch.

Skidmore v. Baltimore & O.R. Co., 167 F.2d 54, 64 (2d Cir. 1948).

(2) The Court is aware that this case is surrounded by intense personal and emotional issues, differing interpretations of Scripture, differing views on morality, tradition, and church law. These though cannot provide the basis for decision. Special interrogatories are a recognized antidote for appeals to personal bias because they require jurors to focus on specific factual findings with limited knowledge of how such findings fit into the law or affect the ultimate result. Ruddy v. New York Central Railroad Co., 124 F.Supp 470, 472 (N.D. N.Y. 1954).

d. A special verdict is also ideal in this case because it appears likely that, however it is decided, the case will be appealed and special verdicts aid appellate courts by distillation of issues. Ware v. Reed, 709 F.3d 345, 355 (5th Cir. 1983). "The Rule 49(a) special verdict was designed to avoid confusion, appellate uncertainty, and the need for additional proceedings by identifying the bases upon which the jury rendered its verdict." 9 James William Moore, Moore's Federal Practice § 49.11[1][a] (2008).

e. A special verdict is well-suited to this case because "of its ability to focus the jury's attention by identifying the issues in complex cases." Id. § 49.11[1][b].

f. Finally, special interrogatories also "benefit the jury's deliberations and reduce confusion by organizing the issues and evidence in complex cases [and] simplify the court's jury instructions." Id.

12. **No Bifurcated Discovery.** The Episcopal Church Side's position in opposition to a bifurcated trial, of course, means that there should only be one period of discovery and that discovery regarding all issues including damages should proceed forthwith. The parties acquired the present trial setting only after much discussion and after many months of effort. When the parties agreed to the trial setting, they did so understanding that damages evidence discovered before that trial and offered into evidence at that trial.

WHEREFORE, the Episcopal Church Side respectfully requests that the Court order that the trial in this case will be conduct in two phases as described above with a jury serving as trier of fact by answering special interrogators and, further, that they be only one period of discovery.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

/s L. Martin Nussbaum

L. Martin Nussbaum, Atty. Reg. # 15370

*/s Adam M. Chud*

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Adam M. Chud  
GOODWIN PROCTER LLP  
and  
Brent E. Rychener, Atty. Reg. #15372  
HOLME ROBERTS & OWEN LLP

Attorneys for Episcopal Side

**CERTIFICATE OF SERVICE**

On August 8, 2008, I served, via LexisNexis File & Serve, a copy of the foregoing to:

J. Gregory Walta  
J. Gregory Walta, P.C.  
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Bruce M. Wright  
Flynn, Wright & Fredman LLC  
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Colorado Springs, CO 80903-2246

On August 8, 2008, I mailed a copy of the foregoing to:

Chad Friese, Junior Warden  
Grace Church & St. Stephen's,  
a Colorado unincorporated nonprofit association  
c/o Argent Company  
511 N. Tejon, Suite 100  
Colorado Springs, CO 80903

*/s/ Karen Lutterschmidt*

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Karen Lutterschmidt