

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

Attorneys for Defendant and Counterclaimants:

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• COURT USE ONLY •

Case No. 2007CV1971

Div.: COM5

**MOTION TO STRIKE EXPERT TESTIMONY INVOLVING LEGAL OPINION
(Commercial Docket)**

The Bishop and Diocese of Colorado, Defendant, 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 (collectively referred to herein as "Defendant and Counterclaimants") move the Court to strike expert testimony involving legal opinion, including legal opinion by a working attorney on the Plaintiff Side of the case. In support of this Motion, the Defendant and Counterclaimants state:

A. Procedural Posture

1. At the Status Conference on October 21, 2008, the Court permitted the parties to file motions related to the endorsement of experts, which had occurred the day before, October 20. The Court ordered that such motions be filed by October 31, 2008.

2. The Court further ordered that the responding parties will then have ten days to file responses to any such motions.

3. Finally, the Court ordered that should the challenged experts be permitted to testify, *i.e.*, if the Court denies these motions to strike, then the challenging party will have thirty days (from the date of the Court's order denying the motion) to endorse rebuttal experts.

4. Plaintiff filed a pleading on October 20, 2008, entitled Plaintiff's "Supplemental Expert Disclosures" in which Plaintiff stated it "ha[s] not determined all experts who may be used in this case, but pursuant to Rule 26(a)(2)(B)(I) and (a)(2)(B)(II), the Plaintiff discloses the following areas of expert testimony" In that pleading Plaintiff listed ten people as potential experts.

B. One of Plaintiff's Potential Expert Witnesses is An Attorney Working for the Plaintiff Side of the Case

5. Lindsay Fischer is one of the people Plaintiff endorsed as a potential expert.

6. Since at least the beginning of July 2007, Mr. Fischer has been working as an attorney for the Plaintiff Side. It is improper for an attorney working as an advocate for one side of a case to also testify as an expert witness. *See* Rule of Prof. Conduct 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . .").

7. In this case, Mr. Fischer has assisted the Plaintiff Side as an advocate by (a)

drafting an affidavit for Plaintiff's assistant treasurer on or about August 10, 2007, *see* Exhibit 1, pg. 2 (last paragraph) (attached); (b) conducting discovery for the Plaintiff Side, *see* Exhibit 2 (affidavit of Courtney Tawresey) and 3 (correspondence from Martin Nussbaum); (c) on behalf of Plaintiff, supervising discovery by the Defendant Side, *see id.*; and (d) writing legal memoranda that spans the period from August 2007 to October 2008 in which Mr. Fischer applies facts to legal research he has completed, *see* Exhibits 1, 4, and 5.

8. Specifically, Mr. Fischer acted as co-counsel for the Plaintiff throughout the summer of 2007 as the parties were conducting discovery for the summary judgment briefing. The undersigned and Courtney Tawresey, counsel for Defendant and Counterclaimants, both worked with Mr. Fischer on numerous occasions throughout the summer as the parties exchanged discovery, reviewed each other's files, and worked through discovery issues. During these interactions with Mr. Fischer, he and counsel for Defendants and Counterclaimants would discuss privileges, discovery issues, and the parties' respective theories of the case. In short, Mr. Fischer was acting like a lawyer-advocate for Plaintiff. *See* Exhibits 2 and 3.

9. In mid-August 2007, Mr. Fischer informed the undersigned that he would be the "point person for providing documents to us [the Defendant and Counterclaimants] and for reviewing documents requested by [Plaintiff]." The undersigned related this fact in a letter to Mr. Fischer's co-counsel, Greg Walta, and that representation was not disputed at the time by either Mr. Walta or Mr. Fischer. *See* Exhibit 3 (8-20-07 letter, ¶ 2). From July 10 to September 21, the undersigned wrote nine letters related to discovery either (i) directly to Mr. Fischer or (ii) to Mr. Walta in which Mr. Fischer and his work on the case is discussed. *See* Exhibit 3. Never during that three-month period did Plaintiff or any of its counsel state that Mr. Fischer was not working as a lawyer-advocate for Plaintiff.

10. As described below, on September 11, 2007, Plaintiff filed a pleading related to summary judgment. Plaintiff attached a forty-page, single-spaced affidavit from Mr. Fischer to that summary judgment pleading. Plaintiff now names this affidavit Mr. Fischer's expert report for purposes of C.R.C.P. 26(a)(2)(B).

11. Only after Mr. Fischer submitted this affidavit on September 11, 2007, did Plaintiff then assert, for the first time, that Mr. Fischer was not serving as a lawyer-advocate. In a letter dated September 21, 2007, Mr. Fischer disclaimed "being involved in the lawsuit as a licensed professional except to provide an expert's opinion on some corporation, property, and trust issues." *See* Exhibit 6.

12. However, in that same September 21 letter, Mr. Fischer admitted, "In the discovery area, because Greg Walta was not available, I did represent him in connection with your discovery at the church offices and I did review the files of the diocese which came from Denver or from George Wing." *Id.* He attempted to minimize his involvement by stating, "My role in

this [discovery] review was as a legal assistant.” Similarly, in the same letter, Mr. Fischer attempted to explain away his legal advocate role by stating, “I have . . . also helped Greg Walta as a personal assistant, and my legal background has been of importance in that connection” He admitted in that same letter that he had been reviewing certain documents and that he asked Ms. Tawresey “to hold [them] for a future date.” *Id.* at 1-2. He further admitted that he “review[ed] [documents] on the two days when I was in your office” *Id.* at 2 (fourth paragraph).

13. Mr. Fischer’s work was not limited to the summer of 2007, either. Recent discovery confirms that he has been working as an advocate for Plaintiff through October 14, 2008. *See Exhibit 5* (legal memorandum for his co-counsel). This legal memorandum to his co-counsel analyzes the arguments related to the 1923 and 1973 corporations – one of the central issues to the entire case – and offers strategy on how to best position the Plaintiff’s Side of the case.

14. It is improper for Mr. Fischer to work as a lawyer-advocate and then attempt to simply dismiss all that work by calling himself a “legal assistant” or “personal assistant” to Mr. Walta. Because the evidence demonstrates conclusively that Mr. Fischer has been acting on behalf of the Plaintiff Side as a lawyer-advocate, he may not also serve as an expert witness. He can no more do this than could Mr. Walta for the Plaintiff or the undersigned for the Defendant and Counterclaimants disclaim their legal-advocate work and offer to testify as an expert witness.

15. The Colorado Supreme Court has explained that “the rule, stated broadly, is that counsel cannot maintain dual roles as advocate and witness in the same matter before the same tribunal. Among the multitude of rationales for the rule, we have emphasized that a lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both cases.” *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005) (discussing Rule of Prof. Conduct 3.7) (citation and quotation marks omitted). The *Fognani* court continued, “[C]ombining the roles of advocate and witness can prejudice the opposing party as well as involve a conflict of interest between the lawyer and client.” *Id.*

16. While the typical sanction for a violation of Rule 3.7 is disqualification of the attorney from acting as advocate, *id.*, Colorado law grants courts “general supervisory authority to ensure fairness to all who bring their cause to the judiciary for resolution.” *Greenebaum-Mountain Mortg. Co. v. Pioneer Nat. Title Ins. Co.*, 421 F.Supp. 1348, 1351 (D.Colo. 1976). The “critical question” in this area “is not whether a lawyer who has some relationship to the prosecution of a trial may appear as a witness in that trial, but whether the litigation can be conducted in fairness to all, with all parties properly represented, if the attorney testifies.” *Id.* at 1353.

17. Here, the proper sanction for Mr. Fischer’s conduct is to prohibit him from offering testimony at trial. This sanction also overlaps with the general rule that legal opinion

testimony should not be admitted, described immediately below.

C. Legal Opinion Testimony Should Not Be Admitted

18. In addition to the foregoing, Plaintiff offers expert legal opinion testimony by Mr. Fischer and others. There is a difference between fact and law, and it is the Court's role to determine the law. The parties have already presented to the Court ample legal briefings and it is anticipated that both sides will provide additional legal briefing prior to trial. The Court does not need to lengthen an already long trial with legal opinion testimony.

19. Attorneys are not permitted to testify regarding ultimate issues of law. *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988). Expert witnesses may not usurp the court's function by expressing an opinion of the applicable legal standards. *Quintana v. City of Westminster*, 8 P.3d 527 (Colo. App. 2000). Similarly, Colorado law provides that a legal expert may not tell a court what result to reach. *People v. Lesslie*, 939 P.2d 443, 451 (Colo. App. 1996). See also e.g., *Grogan v. Taylor*, 877 P.2d 1374 (Colo. App. 1993), *rev'd on other grounds*, 900 P.2d 60 (Colo. 1995) (attorney may not explain purpose of the statute of limitation and outline when a cause of action accrues). This is precisely what Plaintiff's experts are being asked to do.

20. For instance, Mr. Fischer unequivocally states in his affidavit, "I have been retained by the Plaintiff . . . to render expert legal opinions in this case." See Exhibit 7 ¶ 2 (affidavit of Lindsay Fischer). The remainder of Mr. Fischer's single-spaced, forty page affidavit was simply another legal brief for the Plaintiff's Side. It was filed in support of Plaintiff's Brief regarding summary judgment, on September 11, 2007. In this affidavit, Mr. Fischer cites Colorado statutes sixty-four times, discusses five published case precedents, and analyzes the RESTATEMENT and articles from THE COLORADO LAWYER.

21. Equally objectionable legal opinions are offered by the Plaintiff through three other potential expert witnesses:

- a. *Mary McReynolds* (in her First Affidavit ¶¶ 8(I)(c)(i)-(iv), 8(I)(d), 8(II)(a)-(b); 37-41; 78-79; and her Second Affidavit ¶¶ 24-32) (both of which are endorsed by Plaintiff as her "expert report"). See Exhibit 8. In her affidavits, Ms. McReynolds offers legal conclusions about the effect under American civil law of various Episcopal Church Canons, most notably the Dennis Canon, and about the structure of the Episcopal Church. While testimony about the Canons and structure of the Episcopal Church *themselves* may be proper, her further conclusions about the *legal effect* of these are not. Again, the Court already has ample legal briefing by the parties about these legal conclusions. It should not allow testimony on the same.

- b. *Dr. Peter Toon* (in his Affidavit ¶¶ 9, 11, 14, 17, 25). *See* Exhibit 9. Dr. Toon likewise expresses his opinions about the legal effect of Episcopal Canon Law and relevant documents, like the Instrument of Donation. Again, while factual testimony about these items is appropriate, the additional step of offering legal conclusions about the evidence is not.
- c. *Rev. Alan Crippen II* (in his Affidavit ¶¶ 25, 33, 35-36, 51). *See* Exhibit 10. Rev. Crippen offers legal conclusions about Episcopal Church structure through time as well as documents like the Instrument of Donation and canons like the Dennis Canon.

22. Accordingly, this Court should prohibit Plaintiff from endorsing these experts to offer legal opinions in this case.

23. Further, this Court must also prohibit Plaintiff from endorsing Mr. Fischer as an expert witness at all.

DATED October 31, 2008.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

/s L. Martin Nussbaum

L. Martin Nussbaum Atty. Reg. # 15370
Attorneys for Episcopal Church Entities

CERTIFICATE OF SERVICE

On October 31, 2008, I served, via LexisNexis File & Serve, a copy of the foregoing to:

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On October 31, 2008, I mailed a copy of the foregoing to:

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/s/ Karen Lutterschmidt
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