

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; et al.

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

**REPLY IN SUPPORT OF THE 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") respectfully submit this Reply in support of their Motion to Strike Expert Testimony Involving Legal Opinion ("Motion"), filed October 31, 2008. This Reply responds to arguments offered by Plaintiff in its Response, filed November 10, 2008.

A. Requested Relief

1. In their Motion, the Defendant and Counterclaimants requested two forms of relief: first, that Lindsay Fischer not be allowed to testify at all, and second, that the Court bar testimony about the civil law, whether given by Mr. Fischer or anyone else.

2. Defendant and Counterclaimants noted (at ¶ 17 of the Motion) that these requests for relief overlap as to Mr. Fischer.

B. A Lawyer-Advocate May Not Become An Expert Witness

3. As to the first request for relief, the Defendant and Counterclaimants submit that allowing a lawyer-advocate to switch roles to become an expert witness is unfairly prejudicial to the opposing parties and counter-productive for the Court, who must maintain the basic boundary between testimony (about facts) and argument (about law).

4. In this case, Mr. Fischer had been interacting with counsel for the Defendant and Counterclaimants like any other lawyer-advocate, including discussing the parties' theories of the case and working through discovery and privilege issues. *See* Motion at ¶¶ 7-13 (describing Mr. Fischer's legal work). Had counsel for Defendant and Counterclaimants known he was going to *testify, offering evidence rather than just argument*, they would have treated him entirely differently.

5. Further, the value of his testimony diminishes to zero when one recognizes the conflict of interest inherent in a lawyer-advocate taking the witness stand to testify as a witness – even an expert witness.

6. Certainly, the Court would not permit Bruce Wright, Dennis Hartley, Courtney Tawresey, or any other lawyer-advocate in this case to simply disclaim their prior work as advocate in order to take the witness stand.

7. Plaintiff's two responses on this issue lack merit. First, Plaintiff asserts "Mr. Fischer is not acting as an attorney for Grace Church in this case." Response at ¶ 3 (emphasis in original). Notably, Plaintiff neither offers any admissible factual evidence to support this assertion

nor rebuts the evidence submitted by Defendants and Counterclaimants with their Motion. Moreover, Plaintiff's disclaimers in the Response (about how Mr. Fischer is not *really* working as an advocate-attorney) ring as hollow as Mr. Fischer's disclaimers in his September 21 letter that he was merely Mr. Walta's "legal assistant" or "personal assistant." In truth, the evidence demonstrates conclusively that Mr. Fischer was acting in every way as one of Plaintiff's lawyer-advocates. *See* Motion at ¶¶ 7-13.

8. Second, Plaintiff claims, mistakenly, that "the rule is a prohibition only against acting as an advocate at trial." Response at ¶ 3 (emphasis in original). As recognized in the Motion, while the *usual* application of the rule is to prohibit an attorney from acting as an advocate at trial, the broader principle at stake is to ensure fairness so that cases are properly and justly resolved. *See* Motion at ¶¶ 15-16 (citing cases).

9. The typical situation involves an attorney who becomes an actor in the underlying factual situation, which necessitates his/her testimony at trial. In applying the usual rule to allow such an attorney to testify but to prohibit him/her from being an advocate at trial, courts vindicate both the interest in gathering the facts at trial (because the attorney-witness is uniquely situated to testify about facts that only he/she knows) and the interest in good advocacy (because the heretofore neutral attorney-advocate who takes over the litigation from the attorney-witness is better able to present the case to the Court).

10. Mr. Fischer's situation, however, is far from typical. Rather, he had been acting for months as a lawyer-advocate and only after Plaintiff filed its principal summary judgment brief in September 2007, with a copy of Mr. Fischer's forty-page, single-spaced "affidavit" attached, did he transform into a witness "to render expert legal opinions." *See* Fischer Affidavit at ¶ 2 (attached to Motion as Exhibit 7).

11. Mr. Fischer's proffered "expert" testimony vindicates neither the interest to gather facts (because he is offering legal opinions – a dubious prospect from the outset [*see below*]) or the interest in good advocacy (because, Plaintiff now states [Response at ¶ 3], he is not going to serve as an advocate at trial).¹

12. Rather, the only interest Mr. Fischer serves is permitting the Plaintiff to have one of its lawyer-advocates sit in the witness box to make legal arguments to the Court under the guise of serving as an "expert witness." Fundamental fairness prohibits such a result.

¹Although apparently Plaintiff is going to continue to employ Mr. Fischer behind the scenes to "make suggestions . . . based on [his] specialized knowledge," *id.* at ¶ 3, which just happens to be the civil law.

13. In this case, Rule of Professional Conduct 3.7 happens to be the specific rule that applies to prevent this unusual type of unfairness.

C. Expert Opinion Testimony About the Civil Law Should Not Be Permitted

14. Defendants and Counterclaimants object to Plaintiff offering experts to testify about the civil law. Defendants and Counterclaimants acknowledge that both sides are properly offering expert testimony to assist the Court to understand the implications of Episcopal Canon Law, with which the Court is not familiar.

15. There are plenty of good lawyers in this case providing abundant written briefs and oral argument on the civil law. There is no need to have civil lawyers (acting as advocates) asking civil lawyers (acting as "expert witnesses") to explain the civil law to the Court.

16. Mr. Fischer's proffered testimony is about the civil law *only*. Thus, this is a second reason his testimony should be excluded in its entirety.

17. To the extent the testimony of Plaintiff's other proposed expert witnesses is about subjects other than the civil law, the Motion does not challenge it.

In conclusion, Defendants and Counterclaimants request the Court (1) prohibit Mr. Fischer from testifying and (2) prohibit the testimony of any expert witness about the civil law.

DATED November 14, 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 November 14, 2008, I served, via LexisNexis File & Serve, a copy of the foregoing to:

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On November 14, 2008, I mailed a copy of the foregoing to:

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