

CONSUMED BY LITIGATION: TEC IN SOUTH CAROLINA

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It is becoming increasingly apparent as we witness developments unfolding in The Episcopal Church that secular litigation objectives are paramount, trumping other principles such as the fundamental norms of Christian conduct, the canonical integrity of the church, ancient standards of catholic ecclesiology and even the pastoral care of TEC's own people. Proof of this startling proposition abounds, including the inexplicable disciplinary charges brought against nine bishops for joining ACI in filing an *amicus* brief asking the Texas courts to refrain from deciding complex questions of TEC polity and in submitting truthful affidavit testimony in Illinois. But nowhere is the ascendancy of litigation imperatives more apparent than in the actions TEC has taken concerning the Diocese of South Carolina.

This is the first of two articles in which we will address issues arising in South Carolina. We consider below issues of good faith and canonical integrity. In particular:

- TEC's actions in South Carolina raise troubling questions about the good faith of many church leaders in their dealing with Bishop Lawrence, including the Presiding Bishop, the Disciplinary Board, other TEC bishops and some diocesan clergy.
- TEC's position is canonically incoherent; either its actions in South Carolina are in open contempt of its own canons or it has undermined the basis on which it has spent millions of dollars on lawsuits.

In a second post later this week we will consider issues of ecclesiology and pastoral care. We are concerned that: TEC is acting contrary to basic principles of Anglican ecclesiology and ancient norms of the universal church; and it is subordinating the genuine pastoral needs of its members to further doubtful litigation goals.

But we begin with a detailed summary of facts that are not widely known outside South Carolina. It is important that these be placed in the record for the maintenance of public trust. This is neither light nor pleasant reading. Please bear with us.

Christian Conduct

It is an elementary principle of the civil law that every party to a commercial transaction is entitled to expect good faith and fair dealing from all others engaging in commerce. Those who fail to meet this standard are held legally accountable. Is it too much to expect the same from Christians even when they are wrestling with disputes that go to the essence of Christian belief and practice?

A review of the developments in South Carolina over the last two months makes for depressing reading. The starting point is the agreement reached on September 6 among Bishop Lawrence, the Presiding Bishop and Bishop Waldo of Upper South Carolina to meet in New York on October 3 to discuss “creative solutions” to the longstanding tensions between the Diocese and others in the church. It was two weeks after this meeting was set, on September 18, that the Disciplinary Board for Bishops decided to reverse a decision it had made only last year and to certify Bishop Mark Lawrence for abandonment of the church. And still another two weeks passed before the meeting in New York occurred as planned on October 3. Yet Bishop Lawrence did not learn of the abandonment certification until October 15.

This raises troubling questions at the very outset of this process. **How could the Board certify Bishop Lawrence for abandonment while he was trying to resolve these issues in good faith as Matthew’s Gospel commands through direct communication with the Presiding Bishop? How could the Presiding Bishop meet in good faith with Bishop Lawrence on October 3 without disclosing that the Board had certified abandonment two weeks earlier? Were there no communications between the Presiding Bishop’s office, including counsel, and the Board?** In previous cases of abandonment, the documentary record has shown that there were frequent communications between the Presiding Bishop’s counsel and the Board’s predecessor—the Title IV Review Committee.

When the abandonment certification finally came to light, TEC described this sequence in selective detail:

[The Board] issued a letter dated September 18. Following the assembly of numerous documents, the Presiding Bishop received the letter in her Church Center office on October 10; the letter was received via U.S. Mail.

We are told when the letter was dated, but not when it was signed; we know when (and how) the letter arrived at the office, but not what the Presiding Bishop knew and when she knew it.

When Bishop Lawrence first learned of the abandonment certification on October 15, his chancellor was given an unsigned certification dated September 18 and the “numerous documents”—the “evidence”—in computer files dated September 19. It is customary in legal systems that provide due process to assemble the evidence before the verdict, not after. In any

event, the three weeks between September 19 (“the assembly of numerous documents”) and October 10 (package received at the Church Center) is a long time, even for the U.S. Mail.

This sequence inevitably causes those without knowledge of the facts, including us, to suspect that the certification was not in fact signed on September 18 or mailed when the evidence was assembled on September 19, but only mailed, perhaps by mutual agreement, after the October 3 meeting. **The Presiding Bishop should state categorically whether she was aware of the Board’s decision when she met with Bishop Lawrence on October 3; stating that she did not have the executed hard copy to hand is not enough.**

At the October 3 meeting there was agreement to meet again, which was subsequently set for October 22. The Presiding Bishop requested that the fact of the meetings be kept confidential; Bishop Lawrence agreed for the time being, but noted that he would not be able to keep the meetings confidential for long. Bishop Lawrence presided over an anxious diocese. Shortly before the first meeting with the Presiding Bishop, he had asked the Diocese on September 22 for patience:

We announced last month on August 20th that the Standing Committee and I were in agreement on a course of action regarding the future of the Diocese of South Carolina and the challenges many of us face because of decisions by the recent General Convention of the Episcopal Church. However, for many reasons it was then and is now, imprudent to reveal that course of action. Things are progressing—we have not stopped or dropped the ball. Please know that I understand the level of anxiety and concern of many in the diocese. Nevertheless I must ask you all for your continued patience and prayers as we seek to deal wisely and carefully with a fluid situation that requires great discernment and sensitivity on a regular basis. I will communicate to you the details at the very earliest moment such a communication is prudent.

The “course of action” that he could not disclose was his agreement to meet with the Presiding Bishop in an effort to work out these “challenges” in a Scriptural manner. He had no inkling when he wrote this that the Board had already—and secretly—decided to try to expel him from the church.

When the Presiding Bishop advised Bishop Lawrence two weeks after their meeting that the Board had certified abandonment, she also advised him that she was restricting his ministry as the canon requires. She asked, however, that they proceed as planned with their scheduled second meeting the following week and that he keep the certification and restriction confidential in the meantime. **Did the Presiding Bishop expect Bishop Lawrence to continue to perform his episcopal duties in TEC notwithstanding her restriction? Or did she expect him to give the Diocese a false explanation for why he could not do so?**

On October 17 Bishop Lawrence advised the Presiding Bishop that he could no longer keep any of this confidential due to pre-existing resolutions of the Diocese. He then made all these developments and documents public. Less than 24 hours later the website of one of the pro-TEC parishes in the diocese disclosed that well-advanced plans were already laid to replace the diocesan leadership even down to the selection of the laity who would participate in the new structures:

However, soon **an Interim Bishop will be appointed by the Presiding Bishop** to carry on the liturgical work of Bishop Lawrence. **Together with the National Church and diocesan "Transitional Committee" being formed** (of which vestry person Erin Bailey will be a part), along with the avalanche of emotion that will erupt, we will continue as we have. (Emphasis added.)

Another website also posted the following almost immediately:

We all have questions but understand that **a transition team has been put in place by the Presiding Bishop and that information will be shared, perhaps next week.** It will serve everyone well to wait and hear from the Presiding Bishop. (Emphasis added.)

Within 48 hours, the apparent "Interim Bishop" Charles vonRosenberg was reported to be meeting with members of the Diocese. All this before the second meeting between the Presiding Bishop and Bishop Lawrence still scheduled at that time for October 22.

After learning of these developments, Bishop Lawrence declined to meet with the Presiding Bishop on October 22 as scheduled. Also, as telegraphed immediately on the parish websites, the prior plans of the "Interim Bishop" and "Transitional Committee" became public. On November 3, two of the TEC parishes placed an ad in a local paper using the diocesan seal and claiming that the "Episcopal Diocese of South Carolina" "will continue" as part of TEC with "new leadership and a new Bishop." Four days later an email was sent to diocesan clergy by an entity claiming to be "the Episcopal Diocese of South Carolina," using the diocesan seal and inviting them to a "Clergy Day" with Bishop vonRosenberg as preacher at which they would receive a report from "the Steering Committee." The rector of the parish at which this was to be held was unaware of the nature of this meeting, which subsequently had to be moved to a different venue when he objected.

On November 11 a public statement was released using the Diocese's name and seal to announce the formation of a "Steering Committee" to "reorganize" the Diocese and act as the body "that communicates with the Presiding Bishop during this period." One of the officers is the laywoman whose selection had apparently been made even before the abandonment certification was announced. Two "Episcopal Advisors" to the Steering Committee were announced, Bishops

vonRosenberg and Buchanan, who currently serves as the “Provisional Bishop” of the TEC diocese in Quincy.

One need not speculate as to the purpose of the actions to confiscate the Diocese’s name and seal. TEC has already followed the same path in Fort Worth. Their objective is to assume the legal identity of the departed diocese and then attempt to register that identity with the federal trademark office in Washington. This requires as a prerequisite a demonstrated use of the trademarks by the party seeking to register them. But all of this is mere groundwork for a subsequent trademark infringement action in federal court in which TEC attempts to litigate highly disputed issues of church polity in the unrelated context of trademark law. TEC tried exactly this litigation tactic in Fort Worth to circumvent the state court where TEC itself had initially filed suit, but the tactic failed when Bishop Iker successfully moved the federal court to stay the litigation pending the adjudication of the controlling state law issues.

This tactic is certainly doomed to failure in South Carolina. The diocesan name and corporate seal have long been the property of the South Carolina corporation that constitutes the Diocese, and they are registered in its name. Under South Carolina law, these misuses of the diocesan name and seal subject those responsible for the deception to serious civil liability, including treble damages. Indeed, if the seal were used in connection with the sale of goods and services such as church calendars, coffee mugs or posters or the rental of church facilities, the misuse of the corporate identity and seal could be a felony under South Carolina law.

All of this premeditated effort and deception has been unleashed, moreover, in a state where the Supreme Court has already ruled that issues of corporate control in South Carolina corporations, like the Diocese, are determined by neutral principles of law and that TEC’s Dennis Canon has no effect in the state. Is it too much to ask that TEC exhibit the same standard of good faith and fair dealing the law requires of all parties to ordinary commercial transactions?

To summarize: these facts raise important questions. When did the Presiding Bishop learn of the Disciplinary Board’s decision regarding Bishop Lawrence? Did she act deceitfully by feigning a desire for conciliation when she in fact had already made plans to replace him as bishop? These questions go to the heart of Christian integrity and episcopal credibility.

Canonical Integrity

There are two opposing canonical theories about what has happened in South Carolina. The Diocese’s understanding is simple: it has disassociated from TEC and now continues its legal existence as before as a South Carolina corporation only now as one that has changed its ecclesiastical affiliation from that of a TEC diocese to that of an extra-provincial Anglican

diocese. The canonical basis for the Diocese's action is summarized in the formal canonical interpretation issued by Bishop Lawrence in his role as Ecclesiastical Authority of the Diocese.

South Carolina's actions are entirely consistent with this understanding. The Diocese is no longer subject to TEC's canons in any way; it recognizes Bishop Lawrence as its bishop; he is acting as its bishop in accordance with the Diocese's canons; although not yet released from TEC and under restriction, he is not acting within TEC and would not do so if asked.

TEC's position has been less coherent. The Presiding Bishop seemed to acknowledge that the Diocese had withdrawn: speaking to the press during a meeting of the Executive Council she stated that she is "still hopeful that we can find a way for South Carolina to remain part of the Episcopal Church." TEC's spokeswoman, however, summarized the view TEC has often expressed in litigation: "dioceses may not leave the Episcopal Church....Even if leaders and individual members of congregations choose to leave, those who remain continue as members of the Episcopal Church and leader of their dioceses." The latter line is taken by the pro-TEC parishes in the Diocese: "We are the Diocese of South Carolina....Nothing is changing here." "The Episcopal Diocese of South Carolina is not an independent entity. It is one of many dioceses within TEC, and it will continue as such, albeit with new leadership and a new Bishop."

This view that TEC dioceses are inseparable parts of an indivisible, unitary whole fails both as a matter of fact and a matter of law. It is a historical fact that the Diocese of South Carolina existed as a distinct legal entity *prior* to the formation of TEC in 1789. Importantly, when TEC was formed as an association in 1789 the Diocese of South Carolina was not dissolved as a separate entity and merged into TEC; *it continued to operate under the same constitution that it had before joining TEC*. In 1973, the Diocese voted to change its legal structure from that of an association to become a South Carolina corporation, a status that it maintains to this day. Legal metaphysics are not that complicated: inseparable parts of an indivisible, unitary whole cannot become South Carolina corporations. To be a corporation is to be a distinct legal entity.

Those are facts. The law is equally clear. It is settled law that members can withdraw from associations such as TEC. Because this has First Amendment foundations in the freedom to associate, an association like TEC could not legally prevent withdrawal by member dioceses even if it tried to do so explicitly, which TEC has never done. That is the (civil) law.

What is not so obvious is that TEC's canon law points to the same conclusion. TEC has no canonical basis for the actions that the Presiding Bishop and pro-TEC local parishes appear to be taking. There is no canonical authority for an "Interim Bishop" to be "appointed by the Presiding Bishop" in an existing diocese. Nor is there any canonical basis for a self-appointed "Steering Committee" to attempt to "reorganize" an existing diocese, to "communicate with the Presiding Bishop" or be advised by other bishops of the church. Indeed, the constitution and

canons of TEC are clear: no bishop can act within the territory of an existing diocese without the consent of its Ecclesiastical Authority. If TEC's theory that the Diocese has not left is correct, then any notion of appointed Interim Bishops, Episcopal Advisors and transitional committees is strictly prohibited by TEC's own canons. Those appointments are the prerogatives of the diocese and its Ecclesiastical Authority acting pursuant to their governing instruments, not the Presiding Bishop or the "national church." The absence of any canons authorizing what the Presiding Bishop and others are doing is proof that TEC is operating under a profoundly flawed understanding of the church's polity.

The lacuna in TEC's canons concerning a situation like South Carolina stands in stark contrast to the canon law of churches with central hierarchies. For example, Roman Catholic canon law has explicit provisions for administering vacant sees. The Pope may appoint a new bishop or an interim apostolic administrator. If he does not act, there are multiple layers of authority including auxiliary bishops, metropolitans and a college of presbyters, specified in the canon law.

There is, however, one provision in TEC's canons that authorizes the Presiding Bishop to act as she is contemplating doing in South Carolina. Article II.3 permits the House of Bishops or the Presiding Bishop "by its direction" to authorize a bishop to "act temporarily in case of need within any territory not yet organized into Dioceses of this Church." Thus, TEC is manifesting by its conduct its acknowledgement that South Carolina is now unorganized territory—in other words, that the Diocese has in fact legally withdrawn from TEC.

To summarize: there are two possible bases for the Presiding Bishop's actions in South Carolina. Either:

a. TEC is correct to insist that a diocese "cannot leave" TEC, in which case the actions aimed at replacing Bishop Lawrence and the diocesan leadership before a resolution to his disciplinary investigation—and perhaps even before he was even informed of the Board's certification—is flagrantly in violation of TEC's canons; or

b. The Presiding Bishop believes that the Diocese has in fact left TEC and that South Carolina as a geographical unit is an unorganized area canonically receptive to a new organization. If so, TEC has admitted the very principle it has so expensively contested in other cases and thus subverted previous claims and financial interests.

The Presiding Bishop owes the church an explanation and justification for which one of these alternatives represents her position and why in either case such a position has any credibility. The first would seem to demand disciplinary action against the Presiding Bishop and others according to current canons; the second would seem to admit that millions of dollars of the church's resources have been wasted pursuing a sham strategy.