COMMENTS TO LEGAL COMMITTEE
of the Assembly of Canonical Orthodox Bishops

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"Being an Orthodox Christian Attorney: Integrating Faith & the Practice of Law" at 10:15-11:45am, Oct. 28th

INTRODUCTION

I am happy to be here and I appreciate the invitation to briefly advance a few thoughts to this audience.
I have to admit that it took a little bit of gentle persuasion to draw me off from the East Coast in order to be with you here for this wonderful event. I wanted to be with you, of course, but we are in a particularly hectic point in time in the cycle of matters in Syosset: I have to leave Newport Beach sooner than I would like in order to participate in an annual Diocesan Assembly of our Diocese of New York and New Jersey, under the omophorion of our Archbishop Michael, which will take place in Endicott immediately after the meeting here, followed soon by the Fall Session of our Holy Synod out on Long Island. I probably will not be able to make landfall back home in Georgia until sometime after the first week in November.

I am delighted to be with you.

RESERVATIONS ABOUT BASIC THEME OF CONFERENCE

The basic theme of this session *is"Being an Orthodox Christian Attorney: Integrating Faith & the Practice of Law,*" and I have to confess up front that I have a little bit of discomfort with implications of that heading. It seems to suggest, I believe, a crypto-Nestorian inference of an abiding division between the secular and the sacred, that somehow there is an impassable gulf between the secular order and its courts (and its lawyers) on the one hand, and the sacred precincts of the Church and our Faith, on the other. At least in its hyperbolic form, I find myself rejecting that notion embedded in the theme's, this for a couple of sound reasons, I think.

First: We often overlook the fact that our fundamental legal order in the English common law tradition is infused with an unusually high degree of moral sensitivity and consciousness, a fact owing in large measure to the powerful influence of the English ecclesiastical courts prior to the time of the 8th Henry and, after that, with the pervasive influence of the English Chancery Courts especially during and after the time of the great chancellors in the equity courts of England, roughly, say in the 16th and 17th centuries. For the jurists of those two great judicial bodies, the Christian faith (as they understood it to be) and Christian morality was law and conversely, law encompassed the faith and its moral systems. Those days are long gone, of course, but the

influence of this formative period in the evolution of the common law has by no means wholly dissipated, even in our time.

Look, for instance, at the traditional Maxims of Equity:

1. Equity will not suffer a wrong without a remedy.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Delay defeats equities.
9. Equity looks to the intent rather than the form.
10. Equity looks on that as done which ought to be done.
11. Equity imputes an intention to fulfil an obligation.

And second: It is undeniable that we live in a constitutional republic which since its inception has been sensitive to and protective of the role of religious faith in our body politic. The First Amendment and its state analogs are powerful bulwarks against the advent of the sort of catastrophic secularism which devastated European life at the end of the 18th and the beginning of the 19 centuries. As beaten and battered – and controversial – as the two religion clauses of the First Amendment may be in our times, the constitutional guarantees of freedom in the practice of religion and the prohibition of the establishment of religion remain strong and robust and enjoy, I believe, the emphatic support of our people, whether churchgoers or not.

I am not oblivious, however, to the essential theme of our conference theme today: I know full well – as do you. – That there are times when divisions (perhaps the better word would be, "inconsistencies" or, better yet, tensions) do arise. Hence, the need for a conscious and deliberate integration of Faith and of Practice.

STRUCTURAL PRINCIPLES IN INTEGRATION FAITH AND THE PRACTICE OF LAW

Metropolitan Panteleimon, in his classic "*Overview of Orthodox Canon Law*," stated the problem in these terms:

> "There is an initial problem of the essence of relations between the Church and law. The problem is how to reconcile the notion and theory of the Church as an organized communion of the faithful, which is conditioned by Canon Law and other laws, with the fundamental teaching of the Church, according to which Christ became incarnate in order to free mankind from the "curse of the law," from the bonds of legal polity, and so on,… and to bring people to the freedom of

> the spirit, to the communion of love, to the Church, in which it is not the law but "grace which has worked everything."

And he said further, with perhaps a little more charity toward the law:

> "Every law and every human judicial institution must be formulated in accordance with divine justice (jus divinum), that is, with unwritten divine justice or natural justice (jus naturale), or the natural law (Lex naturale) and with the written divine law. In any instance where a law is in conflict with divine justice, then it is wanting in ethical character. We are, then, no longer dealing with true justice, but rather with legalized injustice, which is not able to obligate or bind the human conscience."(An Overview of Orthodox Canon Law, Metropolitan Panteleimon Rodopoulos – Orthodox Research Institute, Rollins Ford, New Hampshire, 2007, pages 10-11).

What Metropolitan Panteleimon expressed as a dogmatic norm was, I think it can be said, translated into a living reality by the lawyers who represented Rosa Parks and who represented Dr. Martin Luther King.

Father **Vasile Mihai of the GOA** (and Rector of the historic St. Paul's Greek Orthodox church in Savannah, Georgia) expressed the same thoughts as Metropolitan Panteleimon but only in more concrete and canonical form when he wrote of the fundamentally irregular and extra-canonical nature of civil litigation in his *Orthodox Canon Law: Reference Book, published by Holy Cross Orthodox Press in 2014:*

> "Normally, lawsuits occur when there is a tension between canon law and secular law. Canon law prescribes the sins and offenses (sometimes crimes) that fall under its jurisdiction, and by default all other crimes are dealt with by secular law. Moreover, communicants are required to solve their litigious problems within the Church on the basis of the ecclesiastical law and then, only by exception, to make use of secular law. Those laypeople and clergymen who disregard this injunction may be excommunicated or deposed (Canon 11 of Antioch), lose the grace of the Church (without chance of pardon), lose the right of appeal, and remain with no hope of future restoration (Canon 12 of Antioch).

CANONS 75 and 97 of CARTHAGE

Any scruples which we might reserve about resort to the civil courts for the resolution of disputes among Christians is modulated to some extent at least by the peremptory directive of **Canon 75 and 97, of Carthage:**

"**A diocese should have lawyers in order to defend the interests of the Church**."

PROFESSOR LEWIS J. PATSAVOS

And, perhaps most perceptive of all, Professor Lewis J. Patsavos has this to say relevant to the relationship of Law and faith:

> "An overview of the theology of law in the Old and New Testaments reveals the following conclusions:
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> 1. The law of the Old Testament is not in substance detrimental, even though it is incomplete and temporary. The law has a pastoral and soteriological character. Even the incomplete law of the Old Testament is necessary as a "pedagogue in Christ." …
>
> 2. The law is not some beneficial human invention, but an expression of God's revealed will for humankind. "Exodus 24. 12; Leviticus 24. 22).
>
> 3. The law is a means and not an end. By applying the law in humility, a person can be elevated to a relationship of love towards God and fellow human beings. In such a relationship, one receives divine grace, the life of God, and salvation (1 Timothy. 8-11).
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> 4. Misuse of the law by transforming it from a means to an end becomes spiritually fatal for a person. However, the law is not responsible for its misinterpretation. (Romans 7. 6-16, 9. 30-32).
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> 5. The Lord reveals the true content of the misinterpreted law of the Old Testament and indicates that its true character is to be found in love. Love and decrees of law are in a relationship of substance and form. (Matthew 22. 36-40; Romans 13. 8-10).
>
> 6. True freedom for the believer is not to be found in discarding the law, which is lawlessness, but in preserving it by living in love as responsible freedom towards God and fellow human beings. (Romans 6. 15-18; James 1. 25).
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> According to the patristic interpretation of Scripture, there is no contradiction between law and grace; rather, law constitutes an expression of grace.

The Integration of Faith and Law: My Practice

All of us have to address questions regarding the integration of faith and the practice of law with reference to our own peculiar and individual circumstances and with regard to the questions which may arise in the context of our own peculiar and individual practices. As I approach the half-century mark since my admission to the Bar in the spring of 1968, I find myself a "one client lawyer." That client is, of course, the Orthodox Church in America where, for at least the last 20 years, I have been pretty heavily committed to the representation of my parish, my diocese, and my Church in a wide variety of matters. I recently made the remark at a Deanery meeting in New Jersey that representing the OCA is much akin to playing the role of Sheriff Andy in Mayberry – you basically deal with whatever Aunt Bea puts on your plate on any given day. The tasks range from the sublime to the ridiculous.

One day you were dealing with the legal intricacies of the adoption on a churchwide basis of the Neutral Principles constitutional test of Jones v. Wolf into the constitutional order of the church as a means of resolving internal property disputes and schism cases; the next day you are working out problems with a local municipal noise ordinance in proceedings brought by neighbors of a local parish who object to all that singing and bell ringing in the middle of the night at Pascha. The next day you are emmeshed with local defense counsel in the details of civil actions brought as a result of sexual misconduct by clergyman out in a parish in California. Next up is the always heartbreaking task of monitoring litigation in a case where a parish which has decided to jump the wall and affiliate with a noncanonical group of schismatics who are less than rigorous in their application of canonical practices and standards. The list goes on. And on.

Models: Past General Counsel of the Orthodox Church in America

As General Counsel of the Orthodox Church in America – which is now approaching two centuries of experience on this continent – I have the astounding benefit of being able to look back across those 200 years in North America and take some guidance from my predecessors in this office and the standards which they set in their representation of the Church within the context of those challenges which faced them during their tenures as retain counsel of the OCA. I am in a unique position to look at our litigation files involving the Orthodox Church in America and to learn from my predecessors in my office (if not, in my title) valuable lessons from the past.

Edward J. Martin/Thomas Mahoney/George Zabriskie/M. B. GLUCK (1910-1920)

Ralph M. Arkush (1940-1950)

Jonathan Russin (1980-1990)

Gregory Nescott

Thaddeus Wojcik

These were great advocates for the Church and I have learned mightily from each of them.

A Special Danger: Risk to Faith in litigation

All of us have, I would imagine, have encountered those moments in the practice – I would think that they are very, very rare – when a relatively clear conflict between our Faith and our role as attorneys has come into play.

In the wake of Obergefehl (June 2015), for instance, I was faced by the conundrum invite judicial role of being required to perform marriage ceremonies between same-sex couples. Fortunately for me, our Council of Judges down in Georgia addressed this problem head on in a definitive position adopted by that Council which basically – and these are not the exact terms of that policy – permitted judges to decline the performance of same-sex marriages conditioned on the individual judges agreement to perform no weddings at all, whether traditional unions between husband and wife, or otherwise (man/man, woman/woman). I was spared having to face this conflict.

There have been instances where I was discomfited by request to preside at weddings and the more traditional context (man/woman). In one case, a Roman Catholic man was to marry an Armenian Orthodox woman. I was troubled with this. Taking advantage of my peculiar access to spiritual counsel in Syosset, was ultimately permitted to perform the wedding on the basis that the canons did not specifically disapprove of my performing the judicial role in these circumstances.

In another case, an Orthodox man asked that I perform his wedding to his Jewish bride. In that case, I kicked the can down the road and appointed my Judge Pro Tem to marry the happy couple.

But of all the branches and divisions of the practice of law, it seems to me that there is one particular area which represents a special danger to the attorney in active and contested litigation; this is especially true given the adversarial nature of the common law, which posits that truth will emerge out of conflict.

A litigation practice has the capability of summoning up the darker instincts of the attorney and

to some extent I think it's true that this is an almost integral feature of a trial practice. The sort of confrontational passion which always lurks in litigation can be soul destroying.

The analogy is not wholly perfect, of course, but I cannot help but draw comparisons between trial practice and war. There is some hyperbole in this, but when I recently read a passage in S. C. Gwinne's biography of Thomas Jonathan Jackson, his description of the battle in the Cornfield at Sharpsburg in September 1862, resonated in me as suggesting the demons that the trial lawyer has to sometimes confront:

> The battle was as intimate as it was violent, fought at close range by men who could see each other clearly, a free-for-all in the choking fog and smoke and heat, with attacks and counterattacks coming from seemingly every direction. There was something fearless and primitive and elemental in the combat that morning, a kind of madness or possession, *as soldiers left their humanity behind and became mere feral killing machines.*

Nothing like that has ever happened in any court room where I participated in a trial. Still, the trial lawyer has to deal with the terrible prospect of treating a brother (or sister) attorney as "The Other," something alien and apart, as an enemy, as something to be prostrated and defeated. There is no way that this is Christian.

This experience has recurred intermittently for me over the past 50 years, although – thanks be to God – not on a consistent basis. I cannot give any really solid advice on how to resolve this situation which I regard as a clear conflict between faith and the practice. For me personally and individually, I have always sought the Counsel of my confessor, a man who has been my spiritual father for almost 30 years. I would advise you – if you ever find yourself in this trying circumstance – to seek help and guidance from your priest.

I thank you for your attention.