IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: CASE NO. 502012CP004391XXXXNBIH

ESTATE OF SIMON L. BERNSTEIN,
_____/

AMENDED MOTION FOR SANCTIONS PURSUANT TO FLORIDA STATUTE §57.105 AGAINST WILLIAM STANSBURY AND PETER FEAMAN, ESQ. FOR FILING MOTION TO VACATE IN PART ORDER PERMITTING RETENTION OF MRACHEK FIRM [DE 497] AND MOTION TO DISQUALiFY [filed 11-28-16]; AND FOR STANSBURY'S FILING RESPONSE IN OPPOSITION TO MOTIONS TO APPOINT ADMINISTRATOR AS LITEM [DE 471] AND TO RATIFY AND CONFIRM APPOINTMENT OF TED S. BERNSTEIN AS SUCCESSOR TRUSTEE OF THE SIMON BERNSTEIN AMENDED AND RESTATED TRUST [DE 495]

Ted S. Bernstein, as Successor Trustee of the Simon L. Bernstein Amended and Restated Trust ("Trustee"), moves for sanctions against Claimant, William Stansbury and his counsel, Peter Feaman, Esq. of the law firm Peter M. Feaman, P.A., for violating sections 57.105(1) and/or (2). In addition to the argument set forth herein, Trustee incorporates his Omnibus Response and Reply Memorandum filed November 28, 2016. In support of sanctions, Trustee states:

INTRODUCTION

William Stansbury and his counsel, Peter Feaman, Esq. (collectively "Stansbury"), have been the thorn in the side of this modest estate[1] for more than four years. Stansbury filed a multi-million dollar claim against the decedent, and is continuing that claim against the Estate, but has refused to settle or try the case. Instead, Stansbury has simply opposed (or ignored) everything that the Trustee has tried to accomplish to lower the expenses of the case and conclude the administration.

[1] The Inventory filed by the current Personal Representative, Brian O'Connell, lists the total assets of the Estate of Simon L. Bernstein at $1,121,325.51. Removing the illiquid assets, the Estate now has only a few hundred thousand dollars in cash. The remaining assets, including a second mortgage on Eliot Bernstein's home and certain claims, are of dubious value. By the time Stansbury's claim is tried, and given the high costs of administering this Estate, there likely will be very little remaining in the Estate (other than the Estate's fee claims against Stansbury).

Now, despite raising no argument at the hearing on the Trustee's Motion seeking, in part, approval for the Estate to retain Alan B. Rose, Esq. and the Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. law firm ("Mrachek Firm") to defend it against Stansbury's claim, Stansbury now seeks to have this Court vacate and reconsider that Order.[2] In addition, Stansbury opposes the Trustee's Motion to ratify his appointment or to have the Court appoint Trustee based upon the unanimous agreement of the beneficiaries, despite a prior unappealed order finding he has no standing to seek the removal of a trustee.[3] As a result of the both of these frivolous positions, the court should award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney because these claims or defenses are not supported by the material facts necessary to establish the claim or defense, nor are they supported by the application of then-existing law to those material facts.

Through the Motion to Vacate the retention order and disqualify the Mrachek Firm from representing the Estate, Stansbury now is trying to choose who can represent his adversary (the Estate) in the independent action in which Stansbury seeks more than $2.5 million – far more in damages than the total assets of the Estate.

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[2] The full title is *Motion To Vacate In Part The Court's Ruling On September 7, 2016, and/or Any Subsequent Order, Permitting The Estate Of Simon Bernstein To Retain Alan Rose And Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss P.A. As Legal Counsel And Motion for Evidentiary Hearing To Determine Whether Rose And Page, Mrachek Are Disqualified From Representing The Estate Due To An Inherent Conflict Of Interest*, filed October 7, 2010. [DE 497] On November 28, 2016, Stansbury also filed a similar *Motion to Disqualify etc.* [DE 508] raising the same issues. Both Motions are the subject of this sanctions motion.

[3] See *Motion to Ratify and Confirm Appointment of Ted S. Bernstein as Successor Trustee of Trust Which Is Sole Beneficiary of the Estate*, filed August 10, 2016 [DE 473] and Stansbury's *Response in Opposition to Motion to Ratify and Confirm Appointment of Ted S. Bernstein as Successor Trustee of the Simon Bernstein Amended and Restated Trust*, filed September 23, 2016. [DE 495]

The Motion is untimely, improper, and sanctionable, and evidences a further attempt by Stansbury to hijack the Estate for his own benefit. Stansbury also seeks to hinder, delay and obstruct the orderly administration of the Trust, which is the sole residuary beneficiary of the Estate. The Trust beneficiaries all agree the Trustee should continue to serve, and are trying to eliminate the unnecessary expense of continuing to litigate that issue. Because no funds can flow from the Estate to the Trust unless and until Stansbury's claim has been resolved, any claims by Stansbury that he has standing or may be prejudiced by Ted Bernstein serving as Trustee are nonsensical.

By way of background, preying on Simon's erratic child, Eliot Ivan Bernstein ("Eliot"), Stansbury has been manipulating these proceedings and attempting to exert influence over the selection of personal representatives; the selection of counsel; the accountings; the search for assets (except when inconsistent with Eliot's wishes); etc. Indeed, despite his opposition and objections to many things, even small dollar items, which has drastically increased the expense of the Estate's administration, Stansbury has never expressed concern over one of the largest assets in this Estate, a mortgage on Eliot's home. Nor has Stansbury ever questioned any of the substantial fee petitions filed by the Personal Representative to administer the Estate. Now that Eliot had been ruled to lack standing, Stansbury continues filing papers pushing Eliot's agenda.

Against the backdrop of increased expense and delay, the beneficiaries agreed in a Mediation Settlement Agreement to ratify the appointment of Ted S. Bernstein ("Ted" or "Trustee"), as Trustee of Simon's Trust, and to have the Trustee and the Mrachek Firm (which has been directly involved in Stansbury's litigation for several years) assume representation of the Estate in the independent action. Before the mediation, Stansbury had been complaining that the underlying action was moving too slowly. He requested a status conference on July 11, 2016, complaining that Mr. O'Connell was not available and the case was taking too long. In light of those concerns, the beneficiaries agreed

at the mediation to speed things up. Now, Stansbury says things are moving too quickly and should be slowed down or stayed altogether, for months.

After mediation, the Trustee filed the Motion to Retain [DE 471], seeking to appoint the Trustee as administrator ad litem and to retain the Mrachek Firm as counsel. Stansbury opposed the appointment of Ted Bernstein as administrator ad litem. This opposition may have been fueled by a desire to please Eliot. It may also have been fueled by anger and hostility toward Ted. Regardless, the most relevant consideration is that Stansbury seeks to prevent the most knowledgeable person (Ted) and the most knowledgeable and "up-to-speed" lawyers (Mrachek Firm) from defending against Stansbury's claims. Indeed, Ted is the only person still alive and still involved in these proceedings with any knowledge about Stansbury claims. After all, Ted was an officer, director and largest shareholder of the company which employed Stansbury, Simon and Ted and which is at the heart of Stansbury's $2.5 million claim. Ted also is the only person willing to stand up and defend the Estate against Stansbury's claim.

Stansbury's objection certainly cannot be based on the fact that Ted would serve for free, saving the Estate tens of thousands to be incurred by Mr. O'Connell defending the claim. Nor could it be based upon Ted's general availability, as contrasted with the very limited availability of Mr. O'Connell, a very busy probate lawyer. Regardless, Stansbury opposed Ted's appointment. But Stansbury filed nothing challenging the Estate's retention of the Mrachek Firm.

Judge Phillips conducted a hearing and entered an order approving the Estate's retention of the Mrachek Firm, and deferring on whether to appoint Ted. Then, there was a status conference before the trial court in the underlying action, at which the undersigned was granted leave to amend the affirmative defenses, and the parties discussed setting the case for trial immediately thereafter. Stansbury made no mention of any issue at the status conference. But as the train was about to get

moving, after the trial court status conference, Stansbury moved this Court to vacate the retention of the Mrachek Firm. He then sought to stay the underlying case ***for months*** until the Motion to Vacate (essentially disqualify the Mrachek firm) can be heard.

There is no basis for the Motion to Vacate. Purely tactical motions to disqualify opposing counsel are highly disfavored. In this case, the motion to disqualify counsel was brought by a party who was *never* a client of the law firm; shared no confidences or secrets with the law firm; and unreasonably delayed bringing the issue up the forefront. Trustee and his counsel move for sanctions because such strategic gambits are not only disfavored, but prohibited. Stansbury and his counsel should be sanctioned for this maneuver. The Motion to Vacate should be summarily denied; and Stansbury (both client and lawyer) should be sanctioned for pursuing this Motion which is meritless and filed for an improper purpose, and for pursuing other unsupportable defenses and positions.

The Mrachek Firm has never represented Stansbury. But the Mrachek Firm did serve as lead counsel for the primary defendant in the underlying Stansbury lawsuit, LIC Holdings, Inc. and other principal defendants in the underlying case:

PLAINTIFF	COUNSEL
William E. Stansbury,	Feaman
vs.	
DEFENDANTS	
Ted S. Bernstein	Mrachek
Estate of Simon L. Bernstein	Manceri/ **??**
Ted S. Bernstein, as Trustees of the Shirley Bernstein Trust Agreement	Mrachek
Lic Holdings, Inc.	Mrachek
Arbitrage International Management, LLC	Mrachek
Bernstein Family Realty, Llc	Manceri/Lessne

Since the Mrachek Firm's representation of defendants in the Stansbury case began, its lawyers handled all aspects of the litigation, including but not limited to: interviewing witnesses; document production; motion practice, including winning a key issue resulting in the dismissal of any derivative claims; began the deposition of Stansbury; prepared for trial; conducted mediation, at which most of the case settled except for the claim against Simon individually.[4] ***Again, Mrachek Firm has never represented Stansbury in anything***.

Two additional points bear on this analysis. First, the Curator appointed by this Court, Ben Brown, confirmed in a Motion for Stay that the Mrachek Firm's legal services to the other defendants enabled him to not retain separate counsel for the Estate, thereby saving the Estate from incurring fees. [Case 502012CA0013933 DE 215]

Second, the Personal Representative, Brian O'Connell, has acknowledged in writing that (a) he sees no conflict and (b) he would waive any waivable conflict to allow the Estate to retain the Mrachek Firm, thereby reducing expenses and complying with the wishes of the beneficiaries. Mr. O'Connell's statement is attached as Exhibit "1".

The Motion for Stay and the written waiver were provided to Stansbury and his counsel to in an effort to persuade them to thoughtfully reconsider their position and withdraw the motion to disqualify. However, within three minutes (certainly not sufficient time to even read, let alone carefully consider this information), they responded their position remains unchanged.

Thus, the Motion to Vacate violates section 57.105 and warrants sanctions against Stansbury and his counsel.

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[4] The Curator appointed by this Court, Ben Brown, confirmed in a Motion for Stay that the Mrachek Firm's legal services to the other defendants enable him to not retain separate counsel for the Estate, thereby saving the Estate from incurring fees. [Case 502012CA0013933 DE 215] This filing has been provided to Stansbury and his counsel to enable them to thoughtfully reconsider their position, but within three minutes they responded their position remains unchanged.

GROUNDS FOR SANCTIONS

As grounds for sanctions, Trustee states:

1. On July 30, 2012, Stanbury filed suit against Simon Bernstein, his companies (LIC and AIM), his son (Ted S. Bernstein), a trust under his control (Shirley Trust), and others. Initially, all defendants including Simon retained the same counsel.

2. Simon died on September 13, 2012. Under the terms of his Will, Donald Tescher and Robert Spallina were nominated as Co-Personal Representatives. They hired counsel, Mark Manceri, to represent the Estate and Trustees, the Shirley Bernstein Trust, a related trust for which they served as Co-Successor.

3. On April 1, 2013, Mrachek Firm became involved in the Stansbury case, representing LIC, AIM and Ted. The Estate, through Tescher and Spallina, continued to be represented by Manceri, a sole practioner; however, Mrachek Firm took the laboring oar on all matters, and worked with Manceri to streamline the Estate's expense.

4. In January, 2014, Tescher and Spallina resigned. A Curator (Benjamin Brown, Esq.) was appointed because Stansbury and Eliot objected to the appointment of Ted S. Bernstein as Personal Representative. Thereafter, while Brown served as Curator, the Estate was essentially unrepresented by trial counsel, with Mr. Brown acting as counsel, but with Mrachek Firm doing all of the work.

5. At a mediation held on June 9, 2014, Stansbury settled with LIC, AIM, Ted and the Shirley Trust. Because no one was truly representing the Estate, and its only representative was Mr. Brown as the then-Curator, the Estate was unable to settle its claims. The Trustee, as sole beneficiary of the Estate, did everything he could to attempt to achieve a settlement for the Estate, but to no avail.

6. After the Curator was replaced with Mr. O'Connell as Personal Representative, and despite good faith efforts, it appears that there can be no settlement with Stansbury. Regardless, virtually nothing happened in the underlying litigation for more than two years, with Stansbury showing no interest in moving the case forward. From his standpoint and to his credit, Mr. O'Connell took no action and incurred virtually no expense in defending the Stansbury claim, likely operating under the hope and belief that the claim would be resolved. Toward that end, a mediation was held on July 25, 2016, at which the parties were hopeful that the case would settle. It did not.

7. Sometime in 2016, all of the sudden, Stansbury decided the case had to begin moving. Mr. O'Connell, the Personal Representative, was not available for depositions fast enough for Stansbury. So, on July 8, 2016, Stansbury filed a motion for case management conference, complaining that the Estate's counsel was not available and deposition could not be taken until November, 2016, which was unacceptable to Stansbury.

8. Mediation occurred on July 25, 2016. The parties mediated all open issues, including the claim by Stansbury against the Estate. That case did not settle and an impasse was declared. However, the beneficiaries of the Estate (including the Guardian) and the Trustee all agreed to a global settlement of all disputes between and among the beneficiaries. The Trustee and beneficiaries included in their Mediation Settlement Agreement a provision confirming their agreement as to how to move the Stansbury claim to a prompt resolution:

> In light of their prior and extensive involvement in the case, the Mrachek Law firm shall represent the Estate in the case Stansbury v. the Estate, and if necessary and appropriate (subject to court approval), Ted Bernstein shall be appointed as administrator ad litem to defend the Estate's position in that case. They are directed to have the issues resolved by the court in an expeditious manner.

9. On August 5, 2016, the Trustee served the Motion to Retain, and emailed a copy to Stansbury's counsel. The email provided:

> We have filed the attached Motion to retain our firm and appoint Ted to defend against Stansbury's claim.
>
> If you object, advise us by 5 pm next Thursday, August 11, 2016. If no objections, we will submit an agreed order.
>
> If any objections, we will coordinate a hearing only with the objecting parties.
>
> ***As the PR, Mr. O'Connell, has agreed to this, I urge everyone to agree to this motion reduce expenses and save money for the Estate by avoiding a hearing.***
>
> Thanks

10. On Friday August 12, 2016, the Trustee's counsel emailed all counsel stating that he had received no objection to the Motion to Retain. Stansbury's counsel responded that day, stating "Mr. Stansbury OBJECTS to the Order. . . . We believe you have a non-waivable conflict of interest in representing the Estate."

11. On August 22, 2016, Stansbury filed an objection, but the objection was limited to opposing Ted serving as administrator ad litem. Stansbury's counsel did not object to the Personal Representative's retention of Mrachek Firm to defend the Estate against the Stansbury claim.

12. On September 1, 2016, Judge Phillips heard the Motion to Retain. Stansbury's counsel advised the Court that there was no objection to the retention of the Mrachek Firm; only to the administrator ad litem. Judge Phillips granted the Motion with regard to retaining Mrachek Firm, and deferred to a later evidentiary hearing the administrator ad litem issue. A proposed order was circulated by email on September 1. Mrachek Firm continued working on the matter defending the Estate.

13. On September 26, 2016, Judge Phillips entered the Order. [DE 496]

14. On October 5, 2016, the trial court held a Status Conference in the underlying case. The trial court, The Hon. Cheryl Caracuzzo, wanted to set the case for trial. There was an agreement

that the Estate was leave to amend its affirmative defenses, which has been completed. Now, the Stansbury litigation is at issue and ready to be set for trial.

15. On October 10, 2016, Stansbury filed the Motion to Vacate [DE 497], claiming there was a conflict of interest because Mrachek Firm represents Ted S. Bernstein as Trustee of the Simon Estate, and Ted S. Bernstein also is the trustee of a separate trust which, on a matter unrelated to Stansbury's claim against the Estate, is adverse to the Estate.[5]

16. On December 22, 2016, Mr. O'Connell signed a *Statement of Its Position There Is No Conflict and His Waiver of Any Potential Conflict* (Exhibit "1"), confirming there is no conflict in his view; supporting the retention and appointment of counsel and the administrator to handle the Stansbury litigation; and waiving any potential waivable conflict.

17. In an email entitled "57.105 Motion – follow up," the undersigned provided Stansbury and his counsel with a copy of the PR's *Statement* and an earlier filing by the Curator, confirming the Mrachek Firm's work saved the Estate from incurring fees. Within three minutes, Stansbury's counsel responded they would not reconsider the Motion to Disqualify.

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[5] Merely because Ted S. Bernstein is the Trustee of the Simon Trust, the sole beneficiary of the Estate, does not preclude Ted from serving in any other trustee capacity, including as the Trustee of a 1995 Insurance Trust. In his Trust, Simon provided:

> J. Interested Trustee. The Trustee may act under this Agreement even if interested . . . as a fiduciary of another trust. . . .

Regardless of the positions taken by Ted in the Illinois litigation, the Estate is represented through Mr. O'Connell and counsel, and nothing that happens in Illinois will impact or in any way materially limit the Mrachek Firm's ability and desire to the Estate against Stansbury's ill-founded claim.

LAW OF DISQUALIFICATION

Rule 4-1.7 of the Rules Regulating the Florida Bar, which addresses conflicts between two existing clients, states:

> Representing Adverse Interests . . . . a lawyer must not represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Stansbury alleges that, because Mrachek Firm represented Ted S. Bernstein at his deposition in a matter in which the Estate is adverse to a different trust, a 1995 insurance trust, that somehow disqualifies Mrachek Firm. This is wrong for a number of reasons.

First, Mrachek Firm represents Ted S. Bernstein solely in his role as Trustee of the Simon Bernstein Trust, whose interests are fully aligned with the Estate – both want to defeat Stansbury's claims and recover the Estate's legal fees from Stansbury. Second, the deposition was being taken not only by Estate's Illinois counsel, but also Eliot Bernstein. Ted was entitled to have his counsel attend to protect his privileges and to protect against harassment by Eliot. During that deposition, Ted Bernstein had the right to be represented by counsel.[6] At that time, on May 6, 2015, there were pending numerous motions to remove Ted Bernstein as Trustee, objecting to Ted's actions as Trustee

[6] The plaintiff in the Illinois case, a 1995 Insurance Trust, was represented by its own counsel at the deposition and throughout the Illinois litigation. Mrachek Firm is not counsel for the adverse party. Mrachek Firm is solely counsel to the Trustee/PR of these Florida trusts and estate, and in those capacities Ted had every right to have counsel attend his deposition in the Illinois case. (The 1995 Insurance Trust's counsel knew little of these proceedings and was in no position to protect Ted *vis-a-vis* the issues in the Florida estate and trust matters.) Thus, Ted requested that counsel appear to represent his interests as Trustee of the Florida Trusts and as Personal Representative of the Estate of Shirley Bernstein.

and accountings, a complaint to determine the validity of testamentary documents and proper beneficiaries of the various estates and trusts. Counsel had to be at this deposition. Moreover, all counsel did was object several times to address privilege issues. Stansbury was at the deposition, the whole time, and observed everything of which he now complains. Third, there is no risk that the representation of the Estate will be materially limited by the lawyer's responsibilities to Ted S. Bernstein as Trustee

Moreover, even there were a conflict, which there is not, the Estate's court-appointed Personal Representative is the only person with standing to assert it. Stansbury has no standing to raise a challenge as he is the adverse party. Indeed, the Rules of Professional Conduct are not intended to be a weapon to be used by an opposing party:

> Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. ***Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.*** The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, ***does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.***

Preamble [emphasis added].[7]

In addition, Mr, O'Connell has consented to the Mrachek Firm assuming the Estate's representation in the Stansbury case. (See Exhibit "1")

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[7] Stansbury claims to have standing because he has an interest in ensuring the proper marshaling of assets of the Estate. Whether that is true or false, that is not what is at issue here. The Motion to Vacate seeks to hamstring the Estate in its preservation of assets, for distribution to beneficiaries. Stansbury seeks to take everything in the Estate and more if he is successful. He has no legal standing or moral right to preclude the Estate from defending itself against his claims.

The second part of Rule 1.7 states:

> (b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Each of those requirements is met. In particular, Mr. O'Connell as Personal Representative agreed with beneficiaries' direction to have the Mrachek Firm defend the Estate, and to waive any "waivable" conflict.

There are numerous cases in which conflict waivers were found to be appropriate and enforceable:

• *AlliedSignal Recovery Trust v. AlliedSignal, Inc.*, 934 So. 2d 675, 679 (Fla. 2d DCA 2006) (attorney for the creditor's trust, which was assigned the bankrupt corporation's rights to sue the seller of the business to the corporation for fraud, could not be disqualified even though he had previously represented the founders of the bankrupt corporation – the trust waived any conflict of interest, the trust did not have a claim against the corporations founders, and the trust and the corporation's founders shared interest in securing meaningful recovery from seller);

• *Yang Enterprises, Inc. v. Georgalis*, 988 So. 2d 1180, 1184 (Fla. 1st DCA 2008) (attorney hired for estate planning services by a corporation and its principals could not be disqualified in litigation – petitioners were *former* clients law firm and had waived any claim regarding the conflict

because the litigation was extensive and ongoing and petitioners knew of the purported conflict of interest years before they moved to disqualify the firm);

• *Steinberg v. Winn-Dixie Stores, Inc.*, 121 So. 3d 622, 625 (Fla. 4th DCA 2013) (disqualification of an attorney in a premises-liability action was not warranted where attorney had spoken with the store manager a few days after his injured client's trip and fall, and could have become a witness against his own client on issue whether store had primary responsibility for any negligence – disqualification was not appropriate because the client waived any conflict and the attorney was not a necessary witness.).

The class of conflicts which would be non-waivable – those conflicts so extreme and direct the law does not permit the client to knowingly waive – is very limited. For example, in *Fla. Bar v. Feige*, 596 So.2d 433, 434 (Fla. 1992), the court held that a client (former wife) could not waive a conflict, even with full disclosure, when her former husband sued her *and her lawyer* for fraud. Because the lawsuit claimed that the former wife colluded with her attorney to defraud the husband, the lawyer could not adequately or ethically represent both her and himself in the fraud action brought by the former husband.

In *Fla. Bar v. Scott*, 39 So.3d 309, 315 (Fla. 2010), the court ruled there was an unwaivable conflict of interest where the attorney was representing multiple clients with claims to the same pool of money, such that one winning would directly result in the other losing. With regard to the Illinois case, that means the attorney could not represent the Estate and the Insurance Trust ***in that litigation***. But here Mrachek is not representing *either* the Estate or the Insurance Trust in that litigation. And, the results of the Illinois case and the Stansbury case are not mutually exclusive. Regardless of the outcome in Illinois, the Stansbury case must be defended and tried, and ***doing so in the manner to achieve the best result in absolutely in the best interests of everyone other than the complaining***

parties, Stansbury and his lawyers. There simply is no conflict here and, without doubt, there is not any unwaivable conflict.

The issue comes up more regularly in criminal cases. *E.g.*, *U.S. v. Culp*, 934 F. Supp. 394, 397 (M.D. Fla. 1996)(Conflict of interest was unwaivable where attorney had formerly represented a criminal defendant who was now cooperating with prosecution of a second co-conspirator). In such a case, the defense of the second defendant obviously would require the lawyer to attack veracity of his first client and also compromise the lawyer's integrity, and the result of the second case could impact potentially the "plea bargain" agreed to by the first. For example, if the lawyer proved his earlier client was lying, it would harm the first client. But if that were true, the lawyer would owe the second client a duty to expose. Such no-win situations are non-waivable.

Florida commentators address nonwaivable conflicts as follows:

> When a disinterested lawyer would conclude that the client should not agree to the representation under the particular circumstances of the case, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

4 Fla. Jur. 2d Attorneys at Law § 349.

Likewise, the relevant Comments to Rule 4-1.7 provide:

> In simultaneous representation of parties in litigation, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question . . . .
>
> Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

None of those issues is present here. The Mrachek Firm is representing the Trustee, who is the sole beneficiary of this Estate, in related trust and estate matters. The interest of the Trustee is

to minimize the expenses and the exposure to Stansbury's claim, to maximize the ultimate distribution from the Estate to the Trust. All of the direct and indirect beneficiaries of the Trust favor this representation. The lawyer serving as PR of the Estate believes there is no conflict and has waived any potential conflict, because the Mrachek Firm's involvement will reduce expenses and because the beneficiaries favor it. The only persons complaining, Bill Stansbury and his lawyer, are far from disinterested. Their goals are to raise win their lawsuit and take as much money as possible from the Estate and Trust, or to drive up the expenses to the Estate to pressure an unfavorable settlement. Either way, they truly are in no position to raise a conflict and their actions in doing so are sanctionable.

Stansbury also cannot rely on Rule 4-1.9 of the Rules Regulating the Florida Bar, which governs conflicts with former clients:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person *in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

Neither of those prohibitions is implicated here. Mrachek Firm's representation of Ted as Trustee at his deposition in the Illinois case is not the same or substantially related to Stansbury's claim against the Estate. Likewise, Mrachek Firm's prior representation of Ted and the other defendants who were co-defendants in the Stansbury case was not adverse to the Estate. To the contrary, all of the defendants' interests were fully aligned to defeat Stansbury's claim, and Mrachek Firm's work assisted in lowering the Estate's burden. (Neither the Personal Representative of the

Estate nor the parties which could raise any potential "conflict"– LIC, AIM, Ted Bernstein, Shirley's Trust – have not complained and will not be complaining.) Finally, Mrachek Firm is not using any information to the disadvantage of the Estate.

If a prior attorney-client relationship had been shown, the party seeking disqualification must show that the current case involves the same subject matter or a substantially related matter in which the lawyer previously represented the moving party. *Waldrep v. Waldrep,* 985 So. 2d 700, 702 (Fla. 4th DCA 2008) (quoting *Key Largo Rest., Inc. v. T.H. Old Town Assocs., Ltd.*, 759 So. 2d 690, 693 (Fla. 5th DCA 2000)).

As the Fourth District Court of Appeal has stated,

> Before a client's former attorney can be disqualified from representing adverse interests, it must be shown that **the matters presently involved are substantially related to the matters in which prior counsel represented the former client.**

Campbell v. Am. Pioneer Sav. Bank, 565 So. 2d 417, 417 (Fla. 4th DCA 1990)(emphasis added).

In determining which matters are "substantially related," a comment to the rule which the supreme court adopted in 2006 provides as follows:

> ***Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client***. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

In re Amendments to the Rules Regulating the Florida Bar, 933 So. 2d 417, 445 (Fla. 2006) (emphasis supplied).

Disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly. *Singer Island, Ltd. v. Budget Constr. Co.*, 714 So. 2d 651, 652 (Fla. 4th DCA 1998). Moreover, a Motion for Disqualification must be made with reasonable promptness. The Fourth District Court of Appeal has held:

> "A motion to disqualify should be made with reasonable promptness after the party discovers the facts which lead to the motion. " *Transmark, USA, Inc. v. State, Dep't of Ins.*, 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994)(citations omitted). "The rationale behind this rule is to prevent a litigant from using the motion as a tool to deprive his opponent of counsel of his choice after completing substantial preparation of the case." *Id.* at 1116 (citing *Cox v. Am. Cast Iron Pipe Co.*, 847 F. 2d 724, 729 (11th Cir. 1988)).

Information Systems Assoc., Inc. v. Phuture World, Inc.., 106 So. 3d 982, 985 (Fla. 4th DCA 2013).

It is important for this Court to be aware of certain timing issues. The Motion to Retain was filed on August 5, 2016, and a copy of it was served on Stansbury's counsel. The undersigned had several discussions with Mr. Feaman from the filing through the hearing, and Mr. Feaman never expressed any concern about a conflict of interest in Mrachek Firm's involvement. On behalf of Stansbury, Feaman did file an objection on August 22, 2016, to that portion of the motion that sought to appoint Ted Bernstein as administrator *ad litem* to defend the claim, but only that part. The written objection has no reference to any concern about the Mrachek Firm's involvement.

A hearing was held on September 1, 2016, and Mr. Feaman, on behalf of Mr. Stansbury, raised no objection to the Mrachek Firm being retained as counsel. A proposed order was circulated, and Mr. Feaman never raised any objection to the order. The order was entered on September 26, 2016 [DE 496], and thereafter the parties appeared at a status conference before the circuit court judge handling the independent action, which occurred on Wednesday, October 5, 2016. Only now, after an initial hearing before the trial court and when the case is ready to be set for trial, does Stansbury assert there is some conflict of interest that he only recently discovered.

A party can waive his right to seek disqualification of the opposing party's counsel by failing to promptly move for disqualification upon learning of the facts leading to the alleged conflict. *See Zayas-Bazan v. Marcelin*, 40 So. 3d 870, 872–73 (Fla. 3d DCA 2010); *Rahman v. Jackson*, 992 So.2d 390, 390-91 (Fla. 1st DCA 2008); *Balda v. Sorchych*, 616 So.2d 1114, 1116 (Fla. 5th DCA 1993); *Cox v. American Cast Iron Pipe Co*., 847 F.2d 725 (11th Cir.1988); *Glover v. Libman*, 578 F.Supp. 748 (N.D.Ga.1983). "The rationale behind this rule is to prevent a litigant from using the motion as a tool to deprive his opponent of counsel of his choice after completing substantial preparation of the case." *Cox v. Am. Cast Iron Pipe Co*., 847 F.2d 725, 729 (11th Cir. 1988) (*quoting Jackson v. J. C. Penney Co., Inc.*, 521 F. Supp. 1032, 1034 (N.D. Ga. 1981)).

There is no exact timing for when a motion to disqualify is deemed untimely, instead it is a reasonableness standard. *See Transmark, U.S.A., Inc. v. State, Dept. of Ins*., 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994) ("A motion to disqualify should be made with reasonable promptness after the party discovers the facts which lead to the motion."). In *Transmark*, the petitioners argued that they did not learn of the conflict until eight weeks before filing their motion to disqualify. *Id*. However, in determining that the petitioners had waived any right to seek disqualification, the First District reasoned that the petitioners knew the attorneys in question (Poppell and Cullen) were engaged in legal matters and were on notice as to what legal matter they had been and were continuing to engage in by the time the law suit was filed. *Id*. Even if they did not, the petitioners engaged in substantial discovery from the day the suit was filed, and thus knew long before they filed the motion to disqualify that Poppell and Cullen were assisting the respondent in pretrial matters. *Id*. The petitioners did not raise the question of conflict until more than 10 months had elapsed and the respondent had already paid $2 million in legal fees. *Id*.

Because Stansbury waited months before first raising any objection to the Mrachek Firm's involvement, having failed to object despite having been given several chances to do so, the Motion to Disqualify was unreasonably delayed and sanctions should be awarded for that reason alone.

STANSBURY'S OTHER FRIVOLOUS OBJECTIONS

Stansbury's other objections to the Trustee serving as administrator ad litem for no fee and the Trustee's motion to ratify his appointment are patently frivolous.

First, Stansbury lacks standing to address either issue. See Order of August 22, 2014. [DE 240] That order was never appealed. As noted above, Stansbury has no right to choose how the Estate defends itself against Stansbury's claim, and no right to dictate anything to the beneficiaries of the Trust.

Second, there is no conflict. As explained in footnote 4, Simon Bernstein provided that a Trustee of his Trust could serve even if interested as a trustee of another trust. The Trustee's interest here is directly aligned with the Estates – to crush Stansbury's claim and to incur the least amount of cost and expense (including legal fees) in doing so, and thereafter to seek to recover all of the fees and expenses incurred in defeating Stansbury under section 768.79 and Rule 1.442. Everyone but Stansbury is aligned in that pursuit and share that common goal.

Regardless of what Stansbury says, his only motivation to file these motions is to advance his own interests as the expense of the Estate.

LAW OF SANCTIONS PURSUANT TO SECTION 57.105

Sanctions under section 57.105 are awarded "to discourage baseless claims, by placing a price tag through attorney's fees on losing parties who engage in these activities." *Albritton v. Ferrera*, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005); *accord Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982).

A party is required to drop or dismiss a claim once it is evident that the claim is not supported by material facts sufficient to establish the claim or not supported by existing law. If a party fails to drop a known frivolous claim, the court "shall" sanction the party. §57.105(a), Fla.Stat.; *see also Morrone v. State Farm Fire & Cas. Ins. Co.*, 664 So. 2d 972, 973 (Fla. 4th DCA 1995)("Section 57.105, Florida Statutes provides that a court 'shall' award attorney's fees to the prevailing party where there is 'a complete absence of a justiciable issue of either law or fact'.").

A frivolous claim is one that "presents no justiciable question and is so devoid of merit on the face of the record that there is little prospect it will ever succeed." *Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482, 490-91 (Fla. 4th DCA 2000). Pursuit of a claim that is completely without merit in law and undertaken primarily to harass or maliciously injure another establishes that the claim is frivolous. *See id.* at 491. Moreover, Rule 4-3.1 of the Rules Regulating The Florida Bar, imposes an ethical duty on attorneys to not file or pursue frivolous actions. *See De Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 683 (Fla. 1st DCA 2007)(imposing sanctions on an attorney and his client for making "objectively groundless arguments on appeal"). That rule provides, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."

When a party files a motion to disqualify counsel that is unsupported by material facts or by the law applicable to the material facts, a court shall award attorney's fees under section 57.105(1), Florida Statutes. *See Yang Enterprises*, 988 So. 2d at 1184 . In *Yang,* the First District upheld the trial court's award of attorney's fees under section 57.105(1), after finding the petitioner's motion to disqualify counsel was "uncorroborated, subjective, highly dubious," and incredible because petitioners "knew or could have known" that the attorneys they were seeking to disqualify were representing the respondent in both this and other litigation. *Id*.

In *Freedom Commerce Ctr. Venture v. Ranson*, 823 So. 2d 817, 820 (Fla. 1st DCA 2002), the trial court denied the appellees' post judgment motion to disqualify appellants' counsel and initially awarded the appellants attorney's fees under section 57.105 because the motion to disqualify was not based in fact, appellees had expressly consented to the attorneys' representation of the appellants, and the appellees were aware of appellants' counsel's prior representations yet failed to raise the issue until the last possible moment. The trial court then issued a subsequent order finding that the amended version of section 57.105 governed but did not apply post judgment motions and therefore section 57.105 attorney's fees could not be awarded for the motion to disqualify. However the First District reversed the subsequent order, holding that the amended version of section 57.105 applied and, based on the trial court's findings, an award of fees was appropriate.

Here, Stansbury and his counsel should be sanctioned for continuing to pursue the Motion to Disqualify the Law Firm. There was no prior representation of Stansbury, so the Motion is frivolous. Likewise, if the former client was Ted S. Bernstein or the company LIC/AIM, that substantially related representation is precisely why the Personal Representative, Trustee, and the beneficiaries (specifically including the Guardian) want Mrachek Firm to undertake this role. Also, Stansbury waived any right to object and did not make a timely Motion to Disqualify the Law Firm, which alone should also be grounds for sanctions.

Prior to filing this Motion, the Estate and Mrachek Firm served (but did not file at this time) this Motion upon counsel for Stansbury in accordance with the "Safe Harbor" provisions of section 57.105, Florida Statutes. The Motion will be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

WHEREFORE, because the above described Motions and Responses are not supported by material facts sufficient to establish a basis for the relief sought, are not supported by existing law, and/or are filed for an improper purpose, the Court must grant the Motion for Sanctions and enter an award of attorneys' fees and costs against Stansbury and his counsel for the reasons set forth herein.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Amended Motion has been served on all parties on the attached Service List, specifically including counsel for William Stansbury, by E-mail Electronic Transmission, this 28th day of December, 2016, but the Motion is not being filed at this time in accordance with the safe harbor provisions of section 57.105(4) of the Florida Statutes.

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Attorneys for Ted S. Bernstein

By: /s/ Alan B. Rose
Alan B. Rose (Fla. Bar No. 961825)

CERTIFICATE OF FILING AND SERVICE

I CERTIFY that, given the expiration of the safe harbor provisions of section 57.105(4), the foregoing Amended Motion has been filed with the Clerk and has been served on all parties on the attached service list, by E-Mail Electronic Transmission, this 2nd day of February, 2017.

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: CASE NO. 502012CP004391XXXXNBIH

ESTATE OF SIMON L. BERNSTEIN,
_____/

PR'S STATEMENT OF ITS POSITION THAT THERE IS NO CONFLICT AND HIS WAIVER OF ANY POTENTIAL CONFLICT

I, Brian O'Connell, am the court-appointed Personal Representative ("PR") of The Estate of Simon L. Bernstein ("Estate"). Based upon the Will upheld during a probate trial conducted last December, resulting in a Final Judgment dated December 16, 2015, Simon Bernstein's children are the named devisees of certain personal property, but the sole residuary beneficiary of the Estate is the current trustee of the Simon L. Bernstein Amended and Restated Trust dated July 25, 2012 ("Trust"). That role is currently being fulfilled by Ted S. Bernstein, as Successor Trustee ("Trustee").

There are certain persons who have asserted potential claims against the Estate. The largest such claim is an independent action styled *William E. Stansbury, Plaintiff, v. Estate of Simon L. Bernstein and Bernstein Family Realty, LLC, Defendants*, in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida, Case No.: 50 2012 CA 013933 MB AN (the "Stansbury Lawsuit"). In that action, Stansbury is suing the Estate for more than $2.5 million, asserting claims for breach of oral contract; fraud in the inducement; civil conspiracy; unjust enrichment; equitable lien; and constructive trust. Each of these claims arises from Stansbury's employment with and involvement in an insurance business in which the principal shareholders were Ted Bernstein and Simon Bernstein.

The Stansbury Lawsuit was filed in July 2012, while Simon was alive. After Simon died, the Estate was substituted as the party defendant, and the former personal representatives hired counsel to defend the Estate. The primary defendant in that action was LIC Holdings, Inc. ("LIC"), along with its wholly-owned company, Arbitrage International Management, LLC, f/k/a Arbitrage International Holdings, LLC ("AIM"). Stansbury also maintained claims against the Shirley Bernstein Trust Agreement Dated May 20, 2008 ("Shirley Trust"), and Ted S. Bernstein, Individually ("Ted").

The law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. ("Mrachek") served as counsel for LIC, AIM, Shirley Trust and Ted Mrachek beginning in April 2013, formally appearing on April 15, 2013. As I was not appointed PR until sometime in July of 2014, I had no involvement or knowledge of this matter at that time.

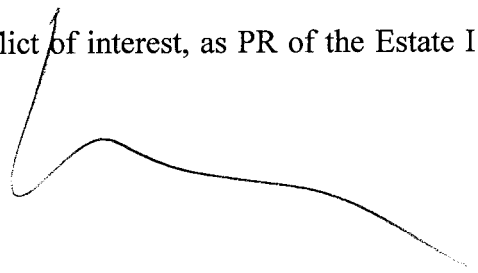
I have been advised that Mrachek represented those defendants and the position taken is not in conflict or adverse to the Estate's position. After mediation in June 2014, LIC, AIM, Shirley Trust and Ted settled with Stansbury. The Estate, then under the control of a Curator, did not settle with Stansbury. After my appointment, to avoid unnecessary expense, settlement efforts were made. Those efforts, including through a mediation held on July 25, 2016, were unsuccessful.

Some of the direct and indirect beneficiaries of the Estate I am administering advised me, in light of the Mrachek firm's prior and extensive involvement in the Stansbury Lawsuit, the beneficiaries wanted Mrachek to represent the Estate in the Stansbury Lawsuit. I agreed to that request, and agreed that Mrachek was retained to represent the Estate.

Additionally, I agreed to Trustee, Ted, being appointed to serve as administrator ad litem with regard to overseeing the defense of the Estate in the Stansbury Lawsuit for at least three two reasons: (i) Ted agreed to serve in that role for no additional compensation, whereas any time I spend will cost the Estate a reasonable fee for my services; (ii) Ted has direct knowledge of the facts and circumstances surrounding the Stansbury lawsuit, because he was part of LIC and AIM at the relevant time, he was Simon's son, and he was extensively involved in the Stansbury Lawsuit already as a defendant and as a corporate representative of LIC and AIM; (iii) I have no personal knowledge or involvement in this matter; and (iv) there is no reason to believe Mrachek and Ted will not adequately and vigorously defend the Estate's interests.

It is also in the best interest of the Estate (not only the beneficiaries but any creditors and claimants with the possible exception of Stansbury) to have the Stansbury Lawsuit resolved as quickly and efficiently as possible, because this Estate administration must remain open and ongoing until the Stansbury Lawsuit is resolved, and the expenses of defending the claim will cost the Estate money and time until the case is finally determined.

To the extent there is a waivable conflict of interest, as PR of the Estate I would waive any such conflict.



BRIAN O'CONNELL, Personal Representative