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March 9, 2017

VIA EMAIL ONLY TO
CAD-DivisionIH@pbcgov.org

The Honorable Rosemarie Scher
NORTH COUNTY COURTHOUSE
3188 PGA Blvd., Room 2728
Palm Beach Gardens, FL 33410

Re: Estate of Simon Bernstein;
Palm Beach County Probate Court Case No. 502012CP004391XXXXSB (IH)
Written Final Argument of William Stansbury

Dear Judge Scher:

In accordance with Your Honor's Order of instructions at the conclusion of the hearing held on March 2, 2017, the following is submitted as Written Final Argument:

1. Written Final Argument in Support of William Stansbury's Motion to Disqualify Alan Rose and the Law Firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. from Representing the Estate of Simon Bernstein (The "Estate") and Motion to Vacate in Part the Court's Ruling on September 1, 2016;

2. Case law cited in Written Final Argument:

   A. *Florida Bar v. Scott*, 39 So.3d 309 (Fla. 2010)
   B. *United States v. Culp*, 934 F.Supp. 394 (U.S.D.C.M.D. Fla., 1996)
   C. *Anheuser Busch Companies v. Staples*, 125 So.3d 309 (Fla. 1st DCA, 2013)
   D. *Rule 4-1.7, Conflict of Interest; Current Clients,* FL ST Bar Rule
   E. *Rule 1.0: Terminology,* American Bar Association

3. Hearing Transcript of February 16, 2017 with pertinent parts highlighted; and,

4. Proposed Order in Word format.

Thank you for your consideration in this regard.

Respectfully submitted,

PETER M. FEAMAN, P.A.

By: _____
Peter M. Feaman

PMF/tr
Enclosures
cc: Alan Rose, Esq. (via email w/enclosures)
Brian O'Connell, Esq. (via email w/enclosures)
Gary R. Shendell, Esq. (via email w/enclosures)
Diana Lewis, Esq. (via email w/enclosures)
Eliot Bernstein (via email w/enclosures)
Jeffrey Friedstein and Lisa Friedstein (via email w/enclosures)
Pamela Beth Simon (via email w/enclosures)

IIN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,

Deceased.

_____/

WRITTEN FINAL ARGUMENT IN SUPPORT OF WILLIAM STANSBURY'S MOTION TO DISQUALIFY ALAN ROSE AND THE LAW FIRM OF MRACHEK FITZGERALD ROSE KONOPKA THOMAS WEISS FROM REPRESENTING THE ESTATE OF SIMON BERNSTEIN (THE "ESTATE") AND MOTION TO VACATE IN PART THE COURT'S RULING ON SEPTEMBER 1, 2016

In opening statement by Mr. Rose, the Court heard numerous misstatements of fact and unsubstantiated assertions which are contradicted by the evidence and not supported by the record.

Standing

The statement was made by Mr. Rose that Judge Colin ruled that William Stansbury "was not a creditor and denied his [Stansbury's] previous motion to remove and disqualify Ted Bernstein as trustee." [Trans. p. 24, ln. 22-24] Actually, there was no ruling on the merits of Stansbury's Motion to Remove and Disqualify Ted Bernstein as Trustee. The denial was based on Judge Colin's determination that, since William Stansbury was not a named beneficiary of Simon Bernstein's Pourover Trust (the "Trust"), he lacked standing to seek removal of Ted Bernstein as Trustee. This is completely distinguishable from whether Stansbury has standing in this Estate as an Interested Person to bring his Motion to Disqualify and to Vacate Judge Philips' previous Order allowing the appointment of Alan Rose and his law firm to represent the Estate.

William Stansbury has standing because he is an "interested person" which under §731.201(23) means "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved." As the Estate's largest claimant, Stansbury will be affected by the decision on Alan Rose's disqualification as it has ramifications on the potential size of the Estate's assets available to pay his claim. Additionally, and just as importantly, Stansbury has paid tens of thousands of dollars in legal fees to counsel in Chicago for representing the Estate of Simon Bernstein in connection with the Illinois insurance litigation where the Estate has intervened (at the behest and request of William Stansbury), and where Ted Bernstein and Alan Rose are adverse.

Mr. Rose then falsely stated that Mr. Stansbury "has been trying to remove me and Mr. Bernstein for like almost three or four years now." [Trans. P. 25, Ln. 7-9] This is another patently false statement. There have been no previous motions by William Stansbury attempting to "remove" Alan Rose and his law firm because Alan Rose and his law firm only became counsel for the Estate relatively recently (September, 2016).

Then, Mr. Rose stated "everybody that's a beneficiary of this Estate coming together and signing a written agreement ..." [Trans. P. 25, ln. 20-22] Mr. Rose also stated to this Court, "Every single person who is a beneficiary of this Estate wants my firm to handle this for the reasons I'm about to tell you. And I don't think there's any dispute about it." [Trans. p. 27, ln. 19-23] Both of these statements to the Court are false. As testified by Mr. Rose when he was on the stand, he knew that Eliot Bernstein (Mr. Eliot) was a beneficiary of the Estate of Simon Bernstein, yet he continues his false narrative that all beneficiaries are in agreement with his retention by the Estate of Simon Bernstein. They are not.

Also, in his opening statement, Mr. Rose asserts that the former Curator, Ben Brown, "filed papers" where "he states that he wanted to stay the litigation [Stansbury's] but he states that I (Alan Rose) have "been doing a great job representing him ..." [Trans. P. 27, ln. 9-12] Mr. Rose never represented Ben Brown and no such statement was ever made in Mr. Brown's Motion to Stay or in any other court filing by Mr. Brown.

At page 29, line 8, Mr. Rose also misrepresented to the Court, "So they said the beneficiaries with Mr. O'Connell's consent, want Mr. Rose to become the lawyer and we want Mr. Ted Bernstein to become the administrator ad litem." [Trans. p. 29, ln. 8-11] There is no unanimous consent among the beneficiaries for the retention of Mr. Rose and the appointment of Ted Bernstein as AAL.

Mr. Rose further misstated the historical record of this case when he stated that "Mr. Feaman and Mr. Stansbury filed a motion to require Mr. Brown to intervene in the (Chicago Litigation) case." This is not true. The record reflects that Mr. Stansbury, through counsel, filed a motion requesting the Court to appoint an Administrator ad Litem to intervene, and supplemented his motion by recommending that Mr. Stansbury serve as Administrator ad Litem. The Court instead appointed Mr. Brown. And it is worth noting that Alan Rose, on behalf of Ted Bernstein, opposed the Estate's intervention and now seeks to represent that same Estate which stands to benefit, in the amount of $1.7 million, as a result of the very intervention that Rose opposed.

As discussed further below, Mr. Rose cannot have it both ways. He cannot take a position adverse to the Estate in the pending Chicago action and, at the same time, represent the Estate in another action related to the administration of the Estate.

Rose's Appearance in the Chicago Litigation

When discussing Mr. Rose's appearance in the Chicago litigation, he, again incorrectly, states that all he did at the deposition was "on four occasions, I objected, on what grounds? Privilege." [Trans. p. 39, ln. 18-19] The record shows that Mr. Rose objected or interrupted seven times and also objected to the form of a question and instructed the witness not to answer questions, placing himself directly adverse to the Estate while representing his client, Ted Bernstein, who in the Chicago litigation is suing the Estate of Simon Bernstein. And now, Mr. Rose wants to represent the Estate he opposed. This is unquestionably a clear and obvious conflict of interest.

Duty of Loyalty

The most striking or telling portion of Mr. Rose's opening statement is when he candidly admitted to the Court: **"Now I am rooting like crazy that the Estate loses this case in one sense, because that is what everybody that is a beneficiary of my Trust wants. But I could care less how that turns out, you know, from a legal standpoint."** [Trans. p. 40, ln. 7-11] His statement to the Court is revealing on multiple levels. First, Rose is rooting against the client that he now seeks to represent, or at least could "care less" whether the client prevails or not. The Florida Bar rules for representation of clients clearly require a duty of loyalty to a client, and when an attorney is conflicted by his duty of loyalty to a client, he should not be permitted to represent that client, in this case, the Estate of Simon Bernstein.

Also note that he said, "that's what everybody that is a beneficiary of 'my' Trust wants." Would he be referring to the Trust that is the Plaintiff in the Chicago litigation? Or is he referring to the Trust that is the pourover beneficiary of the Estate of Simon Bernstein? That shows a definite conflict of interest right there because the beneficiaries of the Trust are the

grandchildren of Simon Bernstein. It is implausible that the grandchildren would not want $1.7 million dollars to come into the Estate of which they are the ultimate beneficiaries. The only person that does not want that to happen would be Ted Bernstein and the other adult children of Simon Bernstein, because if Ted and his siblings prevail in Chicago, that $1.7 million will go to Ted Bernstein and his siblings and not to the grandchildren. There is no greater example of a conflict that can be presented before this Court.

The Facts

1. The Chicago litigation. It is undisputed that Ted Bernstein, individually, is a plaintiff in the case of *Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95 v. Heritage Union Life Insurance Company, et al.*, Case No. 13 CV 3643, U.S. District Court for the Northern District of Illinois (see **Exhibit 1**).

2. It is undisputed that the Estate filed a Motion to Intervene and, in fact, was allowed to intervene and is now a party Defendant in the Chicago litigation and an Intervenor Plaintiff (see **Exhibits 2 through 4**).

3. It is undisputed that Ted Bernstein, individually, is adverse to the Estate of Simon Bernstein in the Chicago litigation because he is a Plaintiff there (**Exhibit 5**). O'Connell confirmed this in his testimony [Trans. p. 73, ln. 23-24; p. 74, ln. 7-12, 19-20, 23-25]

4. It is undisputed that Alan Rose appeared on behalf of Ted Bernstein in the Chicago litigation at Ted Bernstein's deposition (see **Exhibit 6**), and, in his representation of Ted Bernstein, made objections on the record that were adverse to the interests of the Estate of Simon Bernstein (**Exhibit 6**).

Therefore, the question here is not whether there is a conflict, which there clearly is, but whether the conflict can properly be waived by the Estate and still have the representation comply with the Rules of Professional Conduct regulating the members of the Florida bar.

Case Law and Rule Commentary

Florida Bar v. Scott, 39 So.3d 309 (Fla. 2010) is directly on point. There, the Florida Bar held that an attorney violated the Rules of Professional Conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds in a frozen account. **This was a violation even though the client signed a conflict waiver** because the conflicts were directly adverse to the client's interest and could not be waived (citing Florida Bar Rules 4-1.7(a), 4-1.9(a) and 4-1.16(a)(1)).

Here, Alan Rose represents Ted Bernstein in the Chicago litigation, a case in which the Estate of Simon Bernstein is an adverse party, and now seeks to represent the Estate of Simon Bernstein, both of whom have claims to the same limited funds being held in the registry of the court in the Northern District of Illinois. The fact that Mr. Rose seeks to represent the Estate in a separate but related matter does not make the conflict waivable because a lawyer cannot act as an advocate against a client that the lawyer represents in some other matter, even if it is totally unrelated. See, comment to Florida Bar Rule 4-1.7 under the heading "Loyalty to a Client" where it says: "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." As applied to this case, where Rose has acted as an advocate against the Estate (the Chicago Litigation), he cannot represent the Estate on some other matter (here, the Stansbury litigation) even if the Stansbury litigation were wholly unrelated, which it is not. Even if the conflict is waivable, this does not change the lawyer's duty of loyalty. In this case, Rose has a duty of loyalty to Ted Bernstein who is a

plaintiff in the Chicago litigation, but now also has a duty of loyalty to the Estate, a competing claimant against Ted Bernstein in the Chicago litigation. The same comment under 4-1.7 states:

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

That is why Stansbury's **Exhibits 7 and 8** are so important to display how and why there is a conflict. **Exhibits 7 and 8** are emails from Chicago Estate counsel to Brian O'Connell, Mr. Stansbury and Stansbury's counsel, Peter Feaman, soliciting comments about the court's ruling and soliciting discussions concerning settlement. With Mr. Rose representing Ted Bernstein in that same action where he is adverse to the Estate, and in numerous other capacities, and now with Mr. Rose representing the Estate, there is clearly the appearance of impropriety where Rose's duty of loyalty is compromised. Mr. O'Connell must tread a very tricky and thin line concerning what to communicate to Mr. Rose in Stansbury's case relating to litigation strategy, and what to communicate to Mr. Stamos in the Chicago litigation relating to strategy and potential settlement. These actions are not separate and distinct. Stansbury's willingness to settle his case for some lesser amount before trial is directly affected by how much money will ultimately be available in the Estate to pay claims. With Ted Bernstein and his "personal counsel" Alan Rose involved, directly or indirectly, in the settlement negotiations in the Chicago litigation, which will determine the amount of money that will eventually fund the Estate, and at the same time his attorney, Alan Rose, is simultaneously representing the Estate in a related matter, the conflict is blatant and mandates disqualification of Alan Rose and his firm.

In the case of *United States v. Culp*, 934 F.Supp. 394 (U.S.D.C.M.D. Fla., 1996), the court stated that:

> Successive representation of clients may give rise to an actual conflict although attorney's simultaneous representation of clients with adverse

> interests is the most egregious form of conflict of interest. (emphasis added)
>
> Citing *ABA Rule of Professional Conduct, Rule 1, comment.*

For Rose to argue that there is no conflict because "he does not appear on the docket sheet" or did not make a formal appearance in the Chicago Litigation, ignores the "elephant in the room." The "elephant in the room" is that Alan Rose represented Ted Bernstein in the Chicago litigation where Ted Bernstein is adverse to the Estate, fighting over $1.7 million dollars. Rose still represents Ted Bernstein in numerous other capacities.

In the case of *Anheuser Busch Companies v. Staples*, 125 So.3d 309 (Fla. 1st DCA, 2013) the plaintiff in a personal injury case sought to disqualify the attorney who represented both the defendant tortfeasor and the plaintiff's employer who had asserted a worker's compensation lien in the case. In upholding disqualification the court held that:

> Under Rule 4-1.7 of the Florida Rules of Professional Conduct...the conduct could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of petitioners involved the assertion of a position adverse to respondent's employer.

First, it is significant to note that, as in Staples, William Stansbury, the Plaintiff in his case, is seeking to disqualify Alan Rose, defense counsel for the Estate of Simon Bernstein. In *Staples*, Plaintiff was also seeking to disqualify defense counsel. Additionally, Alan Rose's representation of Ted Bernstein in the Chicago litigation has involved the assertion of a position adverse to the Estate of Simon Bernstein. It is unreasonable to believe that that same lawyer and law firm could provide competent and diligent representation to the Estate after giving advice to another client directly adverse to the Estate while both actions are pending.

The Purported Written Waiver by O'Connell is Legally Insufficient

The Personal Representative's statement of waiver by Brian O'Connell is legally insufficient. In the 2nd page in the 3rd paragraph, Mr. O'Connell states that he has "been advised ..." that there is no conflict. Yet, there is no statement that any independent investigation or review was conducted by him to evaluate the existence of a conflict of interest. In fact, there is not even a mention of the Chicago litigation, which is the very litigation that gives rise to the conflict. It is conspicuous by its absence and is completely ignored.

The witness presented no written consents of any of the Trust beneficiaries. Most importantly, the direct beneficiary who normally would give the consent, Ted Bernstein as Successor Trustee to the Simon Bernstein revocable trust, is hopelessly conflicted himself. There is no way that Ted Bernstein can give consent to anything pertaining to the Estate because he is the Plaintiff suing the very Estate which his attorney seeks to represent. Therefore, any consent from the primary beneficiary would be null and void.

It is therefore respectfully requested that the Motion of William Stansbury to Disqualify be granted and that this Court enter an Order disqualifying Alan Rose and the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss from representing the Estate of Simon Bernstein in the Stansbury action, or in any matter.

Peter M. Feaman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been forwarded via e-mail service through the Florida E-portal system to those listed on the attached service list, on this 7th day of March, 2017.

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A

39 So.3d 309
Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
William Sumner SCOTT, Respondent.

No. SC05-1145.
|
June 10, 2010.
|
Rehearing Denied July 6, 2010.

Synopsis

Background: Disciplinary action was brought against attorney. The referee recommended attorney be found guilty of professional misconduct and suspended from the practice of law for 18 months.

Holdings: The Supreme Court held that:

[1] attorney represented client's business partner in attempt to have frozen funds released;

[2] attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds;

[3] attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client; and

[4] three-year suspension was warranted.

Suspension ordered.

West Headnotes (11)

[1] **Attorney and Client**
Review

In an attorney discipline matter, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Supreme Court will not reweigh the evidence and substitute its judgment for that of the referee.

1 Cases that cite this headnote

[2] **Attorney and Client**
Grounds for Discipline

Attorney's action in telling individual who was entering into business transaction with client that client was an "honest man" triggered a duty on attorney's part to also reveal to individual the negative information he had concerning client that could have impacted individual's decision to go into business with client.

Cases that cite this headnote

[3] **Attorney and Client**
What constitutes a retainer

Attorney represented client's business partner in attempt to have frozen funds released; attorney sent partner a retainer agreement outlining representation and sent an addendum to the agreement stating that partner consented to the employment of attorney's law firm.

Cases that cite this headnote

[4] **Attorney and Client**
Disclosure, waiver, or consent

Attorney violated rules of professional conduct regarding conflicts of interest by representing multiple clients who all had claims to the same limited funds in frozen account regardless of whether client signed conflict waiver; the conflicts were directly adverse to clients' interests and could not be waived. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

3 Cases that cite this headnote

[5] **Attorney and Client**
Representing Adverse Interests

An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1).

1 Cases that cite this headnote

[6] **Attorney and Client**
Disclosure, waiver, or consent

Some kinds of conflicts of interest cannot be waived by a client.

1 Cases that cite this headnote

[7] **Attorney and Client**
Disclosure, waiver, or consent

Assuming that the conflicts of interest attorney had with various clients who had claims to frozen account funds had been waivable, client's waiver was at best void or voidable; at the time client signed the retainer agreements, he was unaware of the severity of the conflict, and he believed that his and everyone else's money was intact, just frozen, when he retained attorney, and did not discover that most of the money was gone until much later.

Cases that cite this headnote

[8] **Attorney and Client**
Character and conduct

Attorney violated rules of professional conduct prohibiting lawyer from making false statements or engaging in dishonesty by making misrepresentations to business partner of client about client's honesty and failing to tell partner about lawsuit against client, the court order prohibiting client from entering into certain business transactions, or client's criminal history, even though this information was public and nonconfidential. West's F.S.A. Bar Rules 4-4.1(a), 4-8.4(c).

Cases that cite this headnote

[9] **Attorney and Client**
Review

In reviewing a referee's recommended attorney discipline, Supreme Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction.

1 Cases that cite this headnote

[10] **Attorney and Client**
Review

Generally speaking, the Supreme Court will not second-guess the referee's recommended attorney discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions.

Cases that cite this headnote

[11] **Attorney and Client**
Definite Suspension

Three year suspension was warranted for attorney who engaged in misconduct by representing clients with unwaivable conflicts of interest and making misrepresentations to client. West's F.S.A. Bar Rules 4-1.7(a), 4-1.9(a), 4-1.16(a)(1), 4-4.1(a), 4-8.4(c).

1 Cases that cite this headnote

Attorneys and Law Firms

*310 John F. Harkness, Jr., Executive Director, and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, Tallahassee, FL, and Arlene Kalish Sankel, Bar Counsel, The Florida Bar, Miami, FL, for Complainant.

William Sumner Scott, pro se, Miami, FL, for Respondent.

Opinion

PER CURIAM.

We have for review a referee's report recommending that William Sumner Scott be found guilty of professional misconduct and suspended from the practice of law for eighteen months. We have jurisdiction. *See* art. V, § 15, Fla. Const. We approve the referee's findings of fact and recommendations regarding guilt. But we disapprove the sanction recommendation and instead impose a three-year suspension.

FACTS

The referee found that The Florida Bar proved the following facts by clear and convincing evidence.

***311** In 1995, Scott represented Richard Maseri's company, Private Research, Inc., in a suit for an injunction filed by the Commodity Futures Trading Commission (CFTC) in the United States District Court for the Southern District of Florida-*Commodity Futures Trading Commission v. Maseri,* No. 95-6970-CIV-DAVIS, 1995 WL 17144922 (S.D. Fla. complaint filed Oct. 16, 1995). The CFTC complaint alleged that Maseri and Private Research defrauded customers, converted customer funds, and violated the registration provisions of the Commodity Exchange Act (the Act), 7 U.S.C. §§ 1-27f (1994), and CFTC Regulations, 17 C.F.R. §§ 1-199 (1995). The court issued preliminary injunctive orders and, in 1997, made them permanent. The orders prohibited Maseri and Private Research from contracting for the sale of any commodity; acting directly or indirectly as a commodities trading advisor (CTA) or commodities pooling operator (CPO) without being registered as such; and engaging in any fraudulent activities while acting as a CTA or CPO.

In the summer of 1998, Maseri advertised for investors for a commodities brokerage venture. Steven Frankel, who was unaware of Maseri's previous history, responded to the advertisement. In July 1998, Maseri hired Scott to represent him in negotiations with Frankel aimed at establishing a forex brokerage company.[1] In August 1998, Maseri and Frankel created International Currency Exchange Corporation, a Nevada corporation, later renamed Intercontinental Currency Exchange Corporation (ICEC). They each owned a fifty-percent share of the company. They met, along with Scott, on August 4, 1998, to sign the stockholders' agreement. Before Maseri arrived for the meeting, Frankel questioned Scott about Maseri. Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. During the course of their conversation, Scott made statements to the effect that Maseri was "an honest man."

During the August 4 meeting, Scott agreed to represent ICEC. At a minimum, Scott agreed to prepare new account form documents for ICEC. Frankel put up $5000 in equity for the venture and loaned ICEC $180,000.

In November 1998, the federal court entered a final order of judgment against Maseri in the *Maseri* case. Prudential Securities, Inc. (Prudential), as a holder of ICEC assets, filed an interpleader action against CFTC in the United States District Court for the Southern District of Florida and notified ICEC that its assets would be frozen until released by the court. *Prudential Securities, Inc. v. Commodity Futures Trading Commission,* No. 98-8891-CIV-MIDDLEBROOKS (S.D.Fla.). Maseri, as ICEC's president and chief operating officer, hired Scott to attempt to unfreeze ICEC's assets.

Frankel was unaware of these events until December 15, 1998. On that date, because he was unable to contact Maseri by telephone, he drove to the office and discovered that law enforcement officers had raided ICEC. At that point, Maseri told Frankel about his problems with the CFTC and referred him to Scott.

Frankel contacted Scott, who told him that he had been retained to represent ICEC and, since Frankel had loaned ***312** ICEC money, he would be representing Frankel in getting his funds released to him. On December 18, 1998, Frankel entered into a retainer agreement with Scott in which Scott agreed "to attempt to have the accounts which hold your funds at Prudential released."[2] Three days later, Frankel signed an addendum to his retainer agreement with Scott in which "Frankel, not as a Director, but as a lender to ICEC," ratified, adopted, and approved his earlier hiring of Scott.

ICEC also maintained accounts at Donaldson, Luftkin & Jenrette (DLJ). These accounts were controlled by Dreyfus Service Corporation (Dreyfus). In 1999, Dreyfus, like Prudential, filed an interpleader action in the United States District Court for the Southern District of Florida.

Dreyfus Service Corp. v. Intercont'l Currency Exch. Corp., No. 99-6151-CIV-DAVIS (S.D.Fla.). Scott, on behalf of ICEC investor Moresea, Ltd., filed a counterclaim against Dreyfus and a third-party complaint against DLJ, alleging that ICEC had conducted business in an illegal manner.

On January 6, 1999, Scott filed a petition for emergency relief on behalf of ICEC in the *Prudential* interpleader action. The petition included a cross-claim against Prudential on behalf of ICEC investors.

On January 15, 1999, the federal district court supplemented the final judgment in the *Commodity Futures Trading Commission v. Maseri* case to make ICEC subject to receivership. As a result, ICEC's assets went into receivership. The receiver notified Prudential that ICEC's assets were to be turned over to satisfy the judgment.

On February 9, 1999, on behalf of ICEC investor Investcan, Ltd., Scott filed an answer and a counterclaim against Prudential, alleging that Maseri and ICEC had operated in violation of Florida law. Prudential wrote to Scott on February 12 and 19, 1999, to object to his dual representation of ICEC and its investors on the basis of conflicts of interest. Despite Prudential's objection, Scott filed a counterclaim on February 24, 1999, on behalf of ICEC investors Roger Lennon and The Lennon Trust.

The court in *Prudential* dismissed the ICEC investors' cross-claim on March 17, the Investcan cross-claim on April 13, and the Lennon counterclaim on April 19. Scott filed a first amended counterclaim against Prudential on behalf of ICEC investors on April 23; that counterclaim also asserted unlawful conduct by ICEC.

The court dismissed the *Dreyfus* case on June 14, 2000, and the *Prudential* case on January 4, 2001. Prudential released the ICEC funds to the receiver. Scott tried to reopen the *Prudential* case over a year later, on January 18, 2002, and to file a cross-claim against his former client Frankel on behalf of ICEC and its investors/depositors for breach of contract, legal malpractice, and fraud. The court denied his motion on February 4, 2002. That same day, Scott filed a motion on behalf of Investcan, seeking joinder to the cross-claim against Frankel. On February 13, Scott filed a motion to reconsider reopening the *Prudential* case on behalf of ICEC and all persons who opened an account with ICEC.

Meanwhile, on January 29, 2002, the federal district court in *Commodity Futures Trading Commission v. Maseri* issued an order discharging the receiver and granting ***313** the receiver's final report of distribution. On February 5, 2002, Scott filed a motion for reconsideration in that case on behalf of ICEC to contest the order of distribution. On February 19, Scott wrote to Frankel and Maseri, urging them to appeal the court's order of discharge and demanding a retainer for legal fees to represent ICEC in an appeal.

On February 20, 2002, Frankel demanded that Scott cease representing ICEC. Five days later, on February 25, 2002, Scott wrote to Frankel and Maseri, claiming that "no impasse of ICEC Nev[ada] management exists in regard to this case because both of you agreed for our firm to obtain recovery of the ICEC Nev [ada] deposits without regard to where they were located. We will keep you advised of developments."

On February 26, 2002, Frankel filed a motion to disqualify Scott on the basis of a conflict of interest. Scott wrote to Frankel on March 7, 2002, through Frankel's attorney, stating, "ICEC Nev[ada] depositors have a superior right to the proceeds taken from ICEC Nev[ada] to pay the fees and costs of the Receiver than does Mr. Frankel either as shareholder or lender to ICEC Nev[ada]," and affording Frankel the "opportunity to respond to the proposed appeal by ICEC Nev[ada] of the order that discharged the receiver."

On April 22, 2002, Scott filed suit against Frankel and Maseri, on behalf of ICEC investor Investcan, in the United States District Court for the Southern District of Florida, asserting Investcan's right to a return of its funds. *Investcan Int'l, Ltd. v. Frankel,* No. 02-60565-CIV-MIDDLEBROOKS (S.D. Fla. complaint filed Apr. 22, 2002).

The court denied Scott's motion for reconsideration in *Prudential* on May 24, 2002, noting

> a serious question as to ICEC's putative counsel's ability to represent ICEC in this matter.... This raises conflict issues.... The fact appears to be that *at this date,* Mr. Scott *has* represented Mr. Frankel in his individual capacity, in an attempt to get back monies

> Mr. Scott apparently now seeks on behalf of another client.

Scott appealed the order. The Eleventh Circuit Court of Appeals affirmed. *Moresea, Ltd. v. Prudential,* No. 02-13523-JJ (11th Cir.).

On July 3, 2002, Scott amended the Investcan complaint to allege that Frankel and Maseri failed to ensure that ICEC operated legally and thus defrauded plaintiffs of their money. The court disqualified Scott on October 4, 2002, on the basis of a conflict of interest in violation of Rule Regulating the Florida Bar 4-1.9. That decision was affirmed by the Eleventh Circuit Court of Appeals on March 28, 2003. *Investcan Int'l, Ltd. v. Frankel,* 65 Fed.Appx. 715 (11th Cir. 2003).

Based on the factual findings, the referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third party in course of representing client)-one count; 4-1.7(a) (1993) (prohibiting lawyer from representing client if representation will be directly adverse to interests of another client unless lawyer reasonably believes representation will not adversely affect lawyer's responsibilities to and relationship with other client and each client consents after consultation)-five counts; 4-1.9(a) (1993) (prohibiting lawyer who formerly represented client from representing another person in same or substantially related matter in which that person's interests are materially adverse to interests of former client unless former client consents after consultation)-six ***314** counts; 4-1.16(a)(1) (1993) (prohibiting lawyer from representing client or requiring lawyer to withdraw where representation will result in violation of Rules of Professional Conduct or law)-seven counts; and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation)-one count.

The referee recommends that Scott be suspended for eighteen months and taxed with the Bar's costs. In recommending the eighteen-month suspension, the referee considered two mitigating factors-the absence of a prior disciplinary record and Scott's age (seventy). The referee found no aggravating factors. In recommending an eighteen-month suspension, the referee did not identify the particular Florida Standards for Imposing Lawyer Sanctions on which he relied. Neither did he cite to any previous cases involving similar fact patterns in which this Court imposed eighteen-month suspensions.

Scott petitioned for review of the referee's report. He argues that the Bar's complaint should have been dismissed as barred by the statute of limitations for Bar disciplinary proceedings; Scott was not obligated to tell Frankel about Maseri's criminal history or legal problems with the CFTC; the referee's finding that he misled Frankel was unsupported; the referee's finding that he represented Frankel was unsupported and Frankel had waived any real or potential conflict of interest; and Scott's duty to protect the public took precedence over his duty to maintain client confidentiality or to decline the representation of a client where a conflict of interest exists or is likely to arise. The Bar filed a cross-petition, seeking review of the sanction recommendation. The Bar argues that a three-year suspension is the appropriate sanction for the proven misconduct.

ANALYSIS

Scott previously raised the statute-of-limitations issue in a motion to dismiss filed in this Court. The Court rejected Scott's statute-of-limitations argument and denied the motion to dismiss. We will not now revisit this issue, which we have previously determined adversely to Scott.

[1] Scott takes issue with the referee's finding that Scott misled Frankel by representing that Maseri was an honest man. Scott argues that he had no duty to advise Frankel of public, nonconfidential information about Maseri. The referee's finding in this regard is supported by competent, substantial evidence. Critically, if a referee's findings of fact are supported by competent, substantial evidence in the record, the Court will not reweigh the evidence and substitute its judgment for that of the referee. *Fla. Bar v. Frederick,* 756 So.2d 79, 86 (Fla.2000); *see also Fla. Bar v. Jordan,* 705 So.2d 1387, 1390 (Fla.1998).

[2] In this instance, the referee found that Scott's action in telling Frankel that Maseri was an "honest man" triggered a duty on his part to also reveal to Frankel the negative information he had concerning Maseri that could have impacted Frankel's decision to go into business with Maseri. This finding is also supported by the record. Frankel, testifying about his conversation with Scott at the August 4, 1998, meeting, stated: "I asked him

what he knew of him, and he indicated to me that Mr. Maseri had never lied to him, that he was an honest man, that he had never lost any money with him, and generally he left me feeling very good about him." He further testified that Scott did not tell him anything negative about Maseri during their conversation and that if Scott had told him anything negative, specifically about the public nonconfidential information ***315** Scott had about Maseri, Frankel would have gotten up and left.

More importantly, Scott admitted that his intent was to convince Frankel that Maseri was an honest man so as to ensure that Frankel proceeded with the proposed business deal. Concerning his motivation in telling Frankel that Maseri had never lied to him, Scott testified:

> Q Isn't it true that in response to Mr. Frankel's questions, you told him that Maseri had never lied or cheated you because you wanted Frankel to infer that Maseri was an honest man?
>
> A I gave a deposition and acknowledged that. When he started asking his questions, my goal was to preserve the deal. I already knew that in the agreement there was no representation of past litigation or regulation history. I already knew and had discussions with Maseri about what had he disclosed to Frankel and what he had not.
>
> I felt that at a closing that had been going on and negotiations back and forth for seven or eight days, for those questions to come up, I felt blindsided and as though the guy was trying to make me personally responsible for his problems instead of serving as his own lawyer, which I told him at the outset he had to do, and I told him-I thought I gave him plenty of notice that there was something there for him to worry about when I told him he ought to go get his own lawyer. You know, you can only take a cripple so far.
>
> Q Do I understand you correctly to have just said that yes, you wanted him to infer that Maseri was an honest man because you didn't want the deal to get blown?
>
> A That is true.

Scott also admitted that if the deal had been "blown," he would not have been able to look forward to earning any fees from the ICEC venture.

[3] The referee's finding that Scott represented Frankel is also supported by competent, substantial evidence in the record. The Bar introduced two retainer agreements, dated December 18 and 21, 1998, into evidence. The December 18 agreement states: "After my explanation to you of the existence of potential conflicts of interests among the depositors, you have requested *that our firm represent you* in the limited capacity to attempt to have the accounts which hold your funds at Prudential released." (Emphasis added.) In the December 21 "Addendum to Retainer Agreement," Frankel "consents, ratifies, and approves the employment of The Scott Law Firm, P.A. (the 'Firm') upon the terms outlined above."

In addition, both Scott and Frankel testified concerning Scott's representation. When discussing the December 18 and 21 retainer agreements, Scott stated: "I also believed that I needed to get [a] retainer from him, which I *now* prefer to characterize as a waiver." (Emphasis added.) The clear implication of this statement is that Scott himself viewed the documents as retainers at the time he sent them to Frankel.

We reject Scott's argument that it was permissible for him to represent the ICEC investors despite the conflicts presented by his representation under some kind of duty-to-the-public exception. No such exception exists. To the extent that ICEC investors wanted to pursue claims against Scott's past or present clients with interests adverse to theirs, Scott should have referred them to other counsel, someone without a disqualifying conflict.

[4] We next address the referee's guilt recommendations. The Court has repeatedly stated that the referee's factual findings must be sufficient under the applicable ***316** rules to support the recommendations as to guilt. *See Fla. Bar v. Shoureas,* 913 So.2d 554, 557-58 (Fla.2005). Scott argues that the referee's guilt recommendations on the conflict-of-interest issue are unsupported by the factual findings. His argument fails.

[5] An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation. *Fla. Bar v. Cosnow,* 797 So.2d 1255, 1257 (Fla.2001). The referee recommends that Scott be found guilty of violating Rules Regulating the Florida Bar 4-1.7(a), 4-1.9(a), and 4-1.16(a)(1) for his conflict-of-interest conduct in this case.

Rule 4-1.7(a) provides that an attorney "shall not represent a client if the representation of that client will be directly adverse to the interests of another client" unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation.

Rule 4-1.9(a) provides that a lawyer who formerly represented a client shall not "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 consents after consultation."

Rule 4-1.16(a)(1) provides that a lawyer shall not represent a client or shall withdraw where "the representation will result in violation of the Rules of Professional Conduct or law."

Scott represented, either seriatim or in conjunction: Maseri's company, Private Research, in the *Maseri* case; Maseri in business negotiations with Frankel; ICEC (owned in equal parts by Maseri and Frankel) in the preparation of certain forms and in attempts to have ICEC's assets unfrozen; Frankel, individually, as the maker of a loan to ICEC, for the recovery of the money Frankel loaned to ICEC; and individual ICEC investors, for recovery of the money they invested with ICEC and in a lawsuit for fraud against Maseri and Frankel. All of the representations undertaken by Scott after the creation of ICEC involved claims for ICEC's assets in one way or another. The interests of ICEC, Maseri, Frankel, and the individual ICEC investors were all directly adverse to one another because all had claims to the same pool of money.

[6] Furthermore, even if the documents Frankel signed on December 18 and 21, 1998, were waivers of conflict rather than retainer agreements, as Scott argues, Frankel's waiver would have been ineffective. Some kinds of conflicts of interest cannot be waived by a client. For example, in *Florida Bar v. Feige,* 596 So.2d 433, 434 (Fla.1992), Feige represented himself and his client in a suit by his client's ex-husband for the return of alimony payments made after Feige's client had remarried. Feige had not represented the client in the divorce proceedings, but was aware of the provision in the couple's marital settlement agreement requiring the ex-husband to pay alimony until the ex-wife, Feige's client, died or remarried. His client was aware of the conflict in Feige's representing himself and her and agreed to waive the conflict. This Court held that the conflict was the type that could not be waived and suspended him for two years.

[7] The conflicts of interest in this case were as directly adverse as those in *Feige* and equally unwaivable. Even if the conflicts had been waivable, Frankel's waiver would have been, at best, void or voidable. At the time Frankel signed the retainer agreements, he was unaware of the severity of the conflict. Frankel testified that he ***317** believed that his and everyone else's money was intact, just frozen, when he retained Scott. He did not discover that most of the money was gone until much later.

Thus, the referee's findings more than amply support the referee's recommendations of guilt as to the conflict-of-interest claims, and accordingly, we approve these guilt recommendations.

[8] Scott also argues that the recommendation that he be found guilty of a misrepresentation is unsupported by the factual findings. We reject this argument as well. The referee's findings adequately support his recommendation that Scott be found guilty of violating rules 4-4.1(a) (prohibiting lawyer from making false statement of material fact or law to third person in course of representing a client) and 4-8.4(c) (prohibiting lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee found that Scott made a misrepresentation to Frankel when he told Frankel that Maseri had never lied to him, indicating that Maseri was an honest man. The referee also found that Scott failed to tell Frankel about CFTC's suit against Maseri, the court order prohibiting Maseri from entering into certain business transactions, or Maseri's criminal history, even though this information was public and nonconfidential. The combination of the two circumstances constituted a misrepresentation. These factual findings are sufficient to support the referee's recommendations that Scott be found guilty of violating rules 4-4.1(a) and 4-8.4(c).

[9] **[10]** We next consider the appropriate sanction for Scott's misconduct. In reviewing a referee's recommended discipline, the Court's scope of review is broader than that afforded to the referee's findings of fact because ultimately it is the Court's responsibility to order the appropriate sanction. *See Fla. Bar v. Anderson,* 538 So.2d

852, 854 (Fla.1989); *see also* art. V, 15, Fla. Const. However, generally speaking, the Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *See Fla. Bar v. Temmer,* 753 So.2d 555, 558 (Fla.1999). The referee in this case did not cite to any cases or standards in support of the sanction recommendations.

[11] The Bar argues in its cross-petition that the referee's recommendation of an eighteen-month suspension is unsupported by the Florida Standards for Imposing Lawyer Sanctions and our caselaw and that the suspension should be for three years. We agree and instead impose a three-year suspension.

In support of its argument that a three-year suspension is the appropriate discipline, the Bar cites to standards 4.32 and 7.2, as well as *Florida Bar v. Dunagan,* 731 So.2d 1237 (Fla.1999) (suspending attorney for ninety-one days for representing husband in dissolution proceeding after he had represented both husband and wife in connection with various business matters and business was marital asset); *Florida Bar v. Wilson,* 714 So.2d 381 (Fla.1998) (suspending attorney for one year for agreeing to represent wife in dissolution proceeding after previously representing couple in unrelated declaratory judgment action and for other misconduct); *Florida Bar v. Hmielewski,* 702 So.2d 218 (Fla.1997) (suspending attorney for three years for making deliberate misrepresentations in medical malpractice action despite significant mitigating factors); *Florida Bar v. Calvo,* 630 So.2d 548, 549 (Fla.1993) (disbarring attorney for his reckless misconduct with regard to securities offering, including failing to disclose to potential ***318** investors that one of principals involved had been indicted for mail fraud); *Florida Bar v. Mastrilli,* 614 So.2d 1081 (Fla.1993) (suspending attorney for six months for filing suit against one client on behalf of another client in matter for which attorney had been retained by both of them); and *Feige,* 596 So.2d 433 (suspending attorney for two years for representing himself and client when their interests were adverse, despite client's consent to dual representation).

Standard 4.32 provides that suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Of course, the standards do not distinguish between suspensions of different lengths. These standards support the referee's recommendation to the same extent that they support the Bar's position.

However, if the egregiousness of the conduct is viewed as falling along a continuum, the closer the conduct falls on the continuum to the dividing line between suspension and disbarment, the longer the suspension that such conduct would warrant. In looking at the corresponding standards for disbarment in these same categories, it appears that Scott's conduct comes close to that dividing line in both cases. Standard 4.31 provides, in pertinent part, that disbarment is appropriate when a lawyer, without the informed consent of the client, simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client, or represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Standard 7.1 provides that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

In the case of both standards, it appears that Scott's conduct falls close to the dividing line on the continuum between disbarment and suspension. This supports the imposition of a suspension close to the dividing line between suspension and disbarment. The maximum length of a definite-term suspension under the Rules Regulating the Florida Bar is three years. R. Regulating Fla. Bar 3-5.1(e).

Feige is particularly helpful in gauging an appropriate sanction in this case. *Feige* involved a lawyer who engaged in an unwaivable conflict of interest and who failed to inform a third party of nonconfidential information

under circumstances that allowed his client to perpetrate a fraud on her ex-husband, the third party. Scott engaged in precisely the same kinds of misconduct in this case but to a more egregious extent. This Court suspended Feige for two years. Because Scott's misconduct was more egregious, it warrants a longer suspension than that imposed in *Feige.*

The more recent cases of *Florida Bar v. Head,* 27 So.3d 1 (Fla.2010), and *Florida Bar v. Herman,* 8 So.3d 1100 (Fla.2009), also involved similar but less egregious misconduct. In *Head* we suspended a lawyer ***319** for one year after he created a conflict of interest between himself and his clients by convincing them to pay him $10,000 from the proceeds of a mortgage refinancing when his clients' primary objective in arranging the mortgage refinancing had been to pay off their biggest creditor and paying the lawyer $10,000 frustrated that objective. *Head,* 27 So.3d at 9. In addition, the lawyer was not forthcoming in advising the bankruptcy court in his clients' case that he had received $10,000 in fees. He also filed a "Suggestion of Bankruptcy" for his firm in his clients' bankruptcy case when he had not filed a petition for bankruptcy for the firm. *Id.* at 5.

In *Herman* we suspended a lawyer for eighteen months for going into direct business competition with a client of his firm and representing both companies without advising the first client of the conflict or obtaining a waiver. *Herman,* 8 So.3d at 1103. We found his failure to inform his first client about his own company was "dishonest and deceitful" and motivated by "monetary concerns." *Id.*

CONCLUSION

Accordingly, William Sumner Scott is hereby suspended from the practice of law for three years and ordered to reimburse the Bar for its costs. The suspension will be effective thirty days from the filing of this opinion so that Scott can close out his practice and protect the interests of existing clients. If Scott notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Scott shall accept no new business from the date this opinion is filed until he is reinstated by this Court.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from William Sumner Scott in the amount of $5,637.71, for which sum let execution issue.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

39 So.3d 309, 35 Fla. L. Weekly S333

Footnotes

1 Frankel testified before the referee that a forex brokerage company is a currency exchange brokerage company.

2 The agreement reflects that Scott was retained by ICEC on November 30, 1998, but was terminated on December 12, 1998.

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934 F.Supp. 394
United States District Court,
M.D. Florida.

UNITED STATES of America
v.
Conan Curtis CULP.

No. 96–9–CR–FTM–23.
|
July 9, 1996.

Conspiracy to distribute cocaine prosecution was brought, and government moved to disqualify defendant's counsel for conflict of interest. The District Court, Gagliardi, Senior District Judge, held that: (1) defense counsel had actual conflict of interest; (2) government did not have to show existence of actual conflict before its motion could be granted; (3) defendant could not waive either rights of attorney's former clients or interest of court in integrity of its procedures and fair and efficient administration of justice; and (4) impending trial date did not preclude granting of motion.

Motion granted.

West Headnotes (15)

[1] **Criminal Law**
⇦ Choice of Counsel

Right of criminal defendant to be represented by counsel of his choice, although comprehended by Sixth Amendment, is not absolute. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
⇦ Choice of Counsel

Essential aim of Sixth Amendment is to guarantee effective advocate for each criminal defendant, rather to ensure that defendant will inexorably be represented by lawyer he prefers. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[3] **Criminal Law**
⇦ Objections and Waiver

Actual conflict of interest required disqualification of attorney from representation of defendant in prosecution for conspiracy to distribute cocaine, despite defendant's willingness to waive conflict, as vigorous representation of defendant would require attorney to act in manner adverse to interests of his former clients; attorney represented one former client in matter that led to his cooperation in defendant's prosecution, and attorney represented second former client in state cocaine proceeding for conduct which was "part-and-parcel" of conspiracy charge in defendant's prosecution. U.S.C.A. Const.Amend. 6; ABA Rules of Prof.Conduct, Rules 1.6, 1.6 comment, 1.7, 1.7 comment, 1.8(b), 1.9, 1.9 comment, 3.3.

1 Cases that cite this headnote

[4] **Attorney and Client**
⇦ Interests of Former Clients

Successive representation of clients may give rise to actual conflict, although attorney's simultaneous representation of clients with adverse interests is most egregious form of conflict of interest. ABA Rules of Prof.Conduct, Rule 1.6 comment.

3 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Client's Confidences, in General

Lawyer's duty to preserve client confidences survives termination of lawyer-client relationship. ABA Rules of Prof.Conduct, Rule 1.6.

2 Cases that cite this headnote

[6] **Criminal Law**
⇦ Joint Representation of Codefendants

Simultaneous or successive representation of more than one defendant charged in same criminal conspiracy inevitably presents conundrum for lawyer who is so engaged, because of lawyer's continuing duty of confidentiality. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

4 Cases that cite this headnote

[7] **Attorney and Client**

Government, Employment by or Representation Of

Attorney's representation when former client will testify against current client as witness for government is presumptively suspect, because conflicting ethical impairments under such circumstances place attorney in untenable position. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

3 Cases that cite this headnote

[8] **Attorney and Client**

Interests of Former Clients

Prohibition on representation of clients with interests adverse to those of former client without former client's consent applies without regard to whether prior representation entailed disclosure of confidential communications. ABA Rules of Prof.Conduct, Rules 1.6, 1.7, 1.9(a).

1 Cases that cite this headnote

[9] **Attorney and Client**

Interests of Former Clients

Blanket prohibition on representation of clients with interests adverse to those of former client without former client's consent promotes attorney's duty of loyalty to clients while furthering objectives of rules protecting confidential communications between attorney and client by obviating need for intrusive judicial fact finding that would require disclosure of confidential communications. ABA Rules of Prof.Conduct, Rules 1.6, 1.7, 1.9(a).

2 Cases that cite this headnote

[10] **Attorney and Client**

Interests of Former Clients

Proscription against successive representation is triggered when representation of former and present client involve same or substantially related matter. ABA Rules of Prof.Conduct, Rule 1.9(a).

Cases that cite this headnote

[11] **Criminal Law**

Pretrial Proceedings in General

Criminal Law

Presumptions and Burden of Proof

Government need not show existence of actual conflict before motion to disqualify defense counsel before trial in criminal prosecution may be granted.

1 Cases that cite this headnote

[12] **Criminal Law**

Pretrial Proceedings in General

Criminal Law

Presumptions and Burden of Proof

Showing of potential conflict alone will suffice to grant motion to disqualify defense counsel before trial in criminal prosecution.

Cases that cite this headnote

[13] **Criminal Law**

Stage of Proceedings as Affecting Right

Criminal Law

Presumptions and Burden of Proof

Defendant's presumptive right to counsel of his choice may be overcome before trial by showing of potential conflict of interest, although defendant who raises no objection at trial must demonstrate in collateral proceeding that actual conflict of interest existed, and that such conflict adversely affected lawyer's performance at trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[14] **Criminal Law**
⇨ Objections and Waiver

Defendant could not waive either rights of attorney's former clients or interest of court in integrity of its procedures and fair and efficient administration of justice for purposes of government's motion to disqualify attorney based on conflict of interest. ABA Rules of Prof.Conduct, Rules 1.7 comment, 1.9 comment.

1 Cases that cite this headnote

[15] **Criminal Law**
⇨ Advice, Inquiry, and Determination

Criminal Law
⇨ Objections and Waiver

Government's motion to disqualify defendant's counsel for conflict of interest did not have to be denied because of claims of prejudice based upon government's failure to bring motion more promptly and impending trial date; any prejudice to defendant would be addressed at such time as it was properly raised by defendant's substitute counsel.

Cases that cite this headnote

Attorneys and Law Firms

***396** Susan Daltuva, Asst. U.S. Atty., United States Attorney's Office, Ft. Myers, FL, for United States of America.

Stuart Pepper, Pepper Law Firm, Cape Coral, FL, for Defendant.

Order and Opinion

GAGLIARDI, Senior District Judge.

I. Facts

In this case the Government has moved the Court to disqualify counsel for Defendant Conan Curtis Culp, Stuart Pepper, based on its allegations that Mr. Pepper's representation of Defendant would be a conflict of interest. Defendant is charged with conspiring to distribute large quantities of cocaine. Two of the Government's prospective witnesses—Carlos Valdes, and his son Douglas Wayne Valdes—who are co-conspirators in the crimes charged against Defendant, have also been represented by Mr. Pepper in the past. [1] On April 23, 1996, this Court held a hearing to determine whether a conflict of interest exists.

The parties do not dispute that Mr. Pepper represented Douglas Valdes at a *Nebbia* hearing in connection with federal narcotics charges which ultimately led to his cooperation in the instant case. *Tr. of Proceedings: Mot. to Determine Conflict of Interest, Apr. 23, 1996,* at 11:6–11. As part of that representation, Mr. Pepper had several conversations with Douglas Valdes. *Aff. of Stuart Pepper, Apr. 24, 1996,* at 2. [2] In addition, the parties do not dispute that Mr. Pepper represented Carlos Valdes in a state cocaine proceeding which is part-and-parcel of the drug conspiracy charged in this action. *Id.* at ¶ 8. Although both of the Government's witnesses have pleaded guilty to federal drug charges, neither has been sentenced at this time.

***397** At the hearing, Defendant testified that he was willing to waive his right to conflict-free counsel. Douglas Valdes and Carlos Valdes each in turn declined to waive their rights.

Mr. Pepper then attempted to make a proffer in order to show (1) that his representation of Douglas and Carlos Valdes had terminated; and (2) that no confidential communications were exchanged during his prior representation of them. The Court sustained objections to Mr. Pepper's attempts to elicit from his former clients information relating to his representation of them. *Tr.* at 22:14–24:11.

The Government introduced a letter dated March 12, 1996 sent to Mr. Pepper by the Assistant United States Attorney ("AUSA") prosecuting the case, advising Mr. Pepper of the Government's position that his representation of Defendant posed a conflict of interest. *Tr.* at 30:24–31:7. The AUSA stated that she believed a conflict existed from the beginning of her involvement

in the matter, and repeatedly exhorted Mr. Pepper to withdraw from the representation. *Tr.* at 9:11–18. After he failed to heed the Government's importunings, the Government filed this motion.

II. Arguments Presented

Mr. Pepper challenges the Government's standing to move for his disqualification. In addition, Mr. Pepper argues that the Government has failed to show that a conflict of interest exists, and that if such a conflict does exist, Defendant has knowingly and voluntarily waived his right to conflict-free counsel. The Government responds that because its cooperating witnesses, who are former clients of Mr. Pepper, have refused to waive their rights to conflict-free representation, Mr. Pepper must be disqualified. The Court agrees.

III. Conclusions of Law

[1] [2] [3] This motion pits the defendant's constitutional interest in counsel of his choice against the competing interests of the defendant, the Court, the Government and two of its potential witnesses in a trial free from conflicts of interest. The right of a criminal defendant to be represented by counsel of his choice, although comprehended by the Sixth Amendment, is not absolute. *Wheat v. United States,* 486 U.S. 153, 154, 108 S.Ct. 1692, 1694, 100 L.Ed.2d 140 (1988). As the Supreme Court has interpreted the Sixth Amendment, its "essential aim ... is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat,* 486 U.S. at 159, 108 S.Ct. at 1697. In *Wheat,* the Court considered the extent to which a defendant's right to be represented by an attorney of his or her choice is qualified by the attorney's past representation of other defendants charged in the same criminal conspiracy. *Id.* After considering the countervailing interests, the Court concluded that when a motion to disqualify based on an alleged conflict is raised prior to trial, a defendant's presumptive entitlement to retain counsel of his or her choice "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id.* at 164, 108 S.Ct. at 1700. Because the facts adduced with respect to this motion show at least a potential conflict of interest, the Court declines the Defendant's request to have Mr. Pepper represent him in this case.

[4] [5] The Court finds on the basis of facts proven in the evidentiary hearing that Mr. Pepper labors under an intractable conflict of interest, since the vigorous representation of his present client will require him to act in a manner adverse to the interests of his former clients, Douglas and Carlos Valdes.[3] Although the simultaneous representation of clients with adverse interests is the most egregious form of a lawyer's conflict of interest, this Circuit has repeatedly held that successive representation may also give rise to an actual conflict. *Smith v. White,* 815 F.2d 1401, 1405 (11th Cir.1987); *United States v. Ross,* 33 F.3d 1507, 1523 (11th Cir.1994). Mr. Pepper's vehement protestations that he no longer represents any members ***398** of the Valdes family are therefore unavailing. Moreover, these assertions ignore the fact that a lawyer's duty to preserve client confidences survives the termination of the lawyer-client relationship. *Model Rules of Professional Conduct* (hereinafter "*Model Rules*"), Rule 1.6 cmt. at ¶ 22 ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). To the extent that Mr. Pepper argues that he never represented Douglas Valdes, the Court refers him to Model Rule 1.2, entitled "Scope of the Representation," and Model Rule 3.3, entitled "Candor Towards the Tribunal."

[6] [7] Because of the lawyer's continuing duty of confidentiality, the representation, be it simultaneous or successive, of more than one defendant charged in the same criminal conspiracy inevitably presents a conundrum for the lawyer who is so engaged. *Model Rules,* Rule 1.7 cmt. at ¶ 7 ("The potential for conflict of interest in representing several defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."); *see also* Rule 1.9 cmt. at ¶ 1 (incorporating Rule 1.7 test for "adverse interests" into context of successive representation). This conundrum is posed most starkly where, as here, the lawyer's former client will testify against his current client as a witness for the Government. To vigorously defend his current client, the lawyer must cross-examine his former client in an effort to impeach the former client's credibility. The ethical canons thus present the lawyer with a Hobson's choice: the lawyer must either seek to elicit confidential information from the former client,[4] or refrain from vigorous cross-examination. Because the

conflicting ethical imperatives under such circumstances place the defense lawyer in an untenable position, *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1699–1700; *Ross,* 33 F.3d at 1523; representation under such circumstances is presumptively suspect. *Lightbourne v. Dugger,* 829 F.2d 1012, 1023 (11th Cir.1987) ("An attorney who cross-examines a former client inherently encounters divided loyalties"). The Court will not abandon the legal presumption that Culp will be adversely affected by this conflict merely because of Mr. Pepper's apparent willingness to compromise his ethical obligations to his former clients.

[8] **[9]** Mr. Pepper states in his affidavit, however, that due to the limited nature of his representation of Douglas Valdes, he learned no information during the course of that representation which he could now use against Mr. Valdes. *Aff. of Stuart Pepper,* at 2–3.[5] This argument ignores the fact that under the ethical canons a duty of loyalty exists apart and distinct from the duty to maintain client confidences. *Compare Model Rules,* Rule 1.6 with Rules 1.7 & 1.9. One need only compare Model Rule 1.6, which outlines the lawyer's duty of confidentiality, with Model Rule 1.9(a), which imposes a blanket prohibition on the representation of clients with interests adverse to those of a former client without the former client's consent. The prohibition set forth in Rule 1.9 applies *without regard* to whether the prior representation entailed the disclosure of confidential communications. The rule thereby furthers two purposes simultaneously; it promotes the attorney's duty of loyalty to his clients while furthering the objectives of rules protecting confidential communications between attorney and client by obviating the need for intrusive judicial fact-finding that would require the disclosure of such communications. The policies underlying this rule are equally relevant here, for the Government's intended witnesses in this case, both of whom have not yet been sentenced for their own participation in the charged conspiracy, will be understandably loath to take the stand and refute Mr. Pepper's proffer by describing any of their own illegal activities which they may have disclosed to him.

*399 **[10]** Under Rule 1.9(a), the proscription against successive representation is triggered when the representation of the former and present client involve "the same or a substantially related matter." *Model Rules* Rule 1.9(a); *Ross,* 33 F.3d at 1523 (firm disqualified where former client represented in connection with same narcotics conspiracy); *Smith v. White,* 815 F.2d 1401, 1405 (11th Cir.1987). Here, Mr. Pepper represented Douglas Valdes in the matter that led to his cooperation in the instant case, including appearing on Valdes' behalf at a *Nebbia* hearing. Mr. Pepper represented Carlos Valdes in a state cocaine proceeding for conduct which is "part-and-parcel" of the conspiracy charged in this case. Accordingly, the Court finds that an actual conflict of interest exists on these facts.

[11] **[12]** **[13]** Notwithstanding its finding that an actual conflict exists in the case at bar, the Court unequivocally rejects Mr. Pepper's arguments that the Government must show the existence of an actual conflict before its motion may be granted. As the case law makes abundantly clear, a showing of a potential conflict alone will suffice at this stage. *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700; *Ross,* 33 F.3d at 1523. Mr. Pepper's reliance on *Smith* and *Lightbourne* for the proposition that the Government must demonstrate an actual conflict of interest ignores the procedural posture in which those challenges were presented, and demonstrates his failure to appreciate the important distinction between post-conviction challenges asserted in *habeas corpus* petitions and motions filed prior to trial. Thus, although a defendant who raises no objection at trial must demonstrate in a collateral proceeding that an *actual* conflict of interest existed and that such conflict adversely affected his lawyer's performance at trial, *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980), a defendant's presumptive right to counsel of his choice may be overcome before trial by a showing of a *potential* conflict. *Wheat,* 486 U.S. at 164, 108 S.Ct. at 1700.

The reasons for this difference are clear enough. As the Supreme Court observed in *Wheat,* a trial judge presented with the specter of a prospective conflict must resolve the issues "in the murk[y] pre-trial context when relationships between parties are seen through a glass, darkly." *Id.* at 162, 108 S.Ct. at 1699. At such time, "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials." *Id.* Different interests are implicated, however, and a different standard applies, when a defendant uses collateral proceedings to attack the finality of his or her conviction. *Smith,* 815 F.2d at 1406. *See generally McCleskey v. Zant,* 499 U.S.

467, 490–92, 111 S.Ct. 1454, 1468–69, 113 L.Ed.2d 517 (1980) (discussing systemic reasons to protect finality of convictions).

Mr. Pepper's argument that the Government lacks standing to raise the issue of a potential conflict gives short shrift to the respective interests of the Government and the Court in ensuring that judgments remain intact on appeal. *Model Rules,* Rule 1.7 cmt. at ¶ 15 (Government may raise question of conflict). Under such circumstances, a trial court's inquiry is necessarily informed by "the legitimate wish of district courts that their judgments remain intact on appeal." *Wheat,* 486 U.S. at 161, 108 S.Ct. at 1698. *See also id.* at 160, 108 S.Ct. at 1698 ("[N]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation."). The Eleventh Circuit has explicitly recognized the independent judicial interest at stake in cases involving the representation of multiple defendants. *Ross,* 33 F.3d at 1523–24; *see also Cuyler,* 446 U.S. at 351, 100 S.Ct. at 1719 (Brennan, J., concurring) ("[T]he Constitution also protects defendants whose attorneys fail to consider, or choose to ignore potential conflict problems."). Mr. Pepper's challenges to the Government's standing betray a conception of the interests at stake in this motion which is both unduly narrow and overly simplistic.

[14] Mr. Pepper's underinclusive conception of the interests at stake also leads him to place undue reliance on his client's waiver, which he argues should singularly determine the Court's disposition of the motion to disqualify ***400** him. The Supreme Court held in *Wheat* that, consistent with the independent judicial interest in conflict-free adjudication, courts are free to reject a client's waiver of conflict-free counsel. *Wheat,* 486 U.S. at 160, 108 S.Ct. at 1697–98; *Ross* at 1524. In *Wheat,* the Court upheld the district court's disqualification of the defendant's attorney despite the waiver by the defendant and by two of the attorney's former clients of their right to conflict-free counsel. *Id.* at 156, 108 S.Ct. at 1695. In contrast, both of the former clients in this case have refused to waive their rights. See *Model Rules,* Rule 1.9 cmt. at ¶ 12 ("Disqualification from subsequent representation is for the protection of former clients."); *see also* Rule 1.7 cmt. at ¶ 5 ("When more than one client is involved, the question of conflict must be resolved as to each client."). Because Defendant Culp is incapable of waiving either the rights of his attorney's former clients or the interests of the Court in the integrity of its procedures and the fair and efficient administration of justice, this waiver will not carry the day for Mr. Pepper. [6]

[15] As a last resort, Mr. Pepper objects that the Government's failure to bring its motion more promptly has prejudiced him because of the impending trial date. As the Court admonished him during the hearing, however, Mr. Pepper cannot in good conscience complain about a situation which is due in large part to his own professional derelictions. *Model Rules,* Rule 1.7, cmt. at ¶ 1 (representation should be declined where a conflict is apparent from inception); *id.* at ¶ 5 ("[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."); *Cuyler,* 446 U.S. at 346, 100 S.Ct. at 1717 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises...."). Any prejudice which has inured to the detriment of Defendant will be addressed at such time as it is properly raised before this Court by Defendant's substitute counsel.

For the reasons discussed above, the Government's motion to disqualify Mr. Pepper from the representation of Conan Curtis Culp in the instant case is granted.

So Ordered.

All Citations

934 F.Supp. 394

Footnotes

1 Mr. Pepper has also previously represented Douglas Valdes' other son, and another of the Government's prospective witnesses, Kenneth R. Valdes, in connection with an unrelated state charge. In addition, Mr. Pepper had several conversations with Kenneth Valdes which related to the *Nebbia* hearing held to obtain a bond for Douglas Valdes. However, the Government states in its motion that it does not know whether Mr. Pepper's prior representation of Kenneth

Valdes is related to Kenneth Valdes' role in the drug conspiracy. *Government's Mot. to Determine Conflict of Interest, Apr. 9, 1996,* at ¶ 7. Thus, the Court will consider the alleged conflict of interest solely as it relates to Carlos and Douglas Valdes.

2 Mr. Pepper has also previously represented Douglas Valdes in connection with unrelated state charges.

3 According to the Assistant United States Attorney prosecuting the case, Carlos Valdes may but will not necessarily be called as a rebuttal witness. *Tr.* at 33:18–23. The Government intends to call Douglas Valdes as part of its case-in-chief, however, and his testimony will be critical to its case. *Government's Mot. to Determine Conflict of Interest,* at ¶ 7.

4 The lawyer's duty of confidentiality prevents not only the disclosure of confidential communications, but also any use of such communications "to the disadvantage of the client." *Model Rules,* Rule 1.8(b); Rule 1.9 cmt. at ¶ 11.

5 Mr. Pepper's averrals are strikingly at odds with his stance during a related matter before this Court, the trial of Edna Simpson. During that trial Mr. Pepper, after being called as a hostile witness by the defense, invoked the attorney-client privilege on behalf of Douglas Valdes in response to insinuations by defense counsel that Pepper had suborned the perjury of Mrs. Simpson.

6 Moreover, the Court questions whether Defendant's waiver was validly obtained, given the following commentary in the Model Rules:

> [T]here 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.
>
> *Model Rules,* Rule 1.7, cmt. at ¶ 5.

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125 So.3d 309
District Court of Appeal of Florida,
First District.

ANHEUSER–BUSCH COMPANIES, INC. and Anheuser–Busch, Incorporated, Petitioners,
v.
Christopher STAPLES, Respondent.

No. 1D13–1038.
|
Oct. 9, 2013.
|
Rehearing Denied Nov. 26, 2013.

Synopsis

Background: Injured worker, who filed negligence/premises liability action against defendant corporations, seeking damages for the injuries he sustained in the accident occurring on their premises, brought motion to disqualify law firm representing defendants, which also represented worker's employer with respect to employer's workers' compensation lien claim against any judgment awarded to worker as a result of his lawsuit. The trial court granted motion, and disqualified the law firm. Defendants filed petition for writ of certiorari and challenged the order.

[Holding:] The District Court of Appeal, Lewis, C.J., held that defendants waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm.

Petition denied.

Benton, J., concurred with opinion.

Makar, J., filed dissenting opinion.

West Headnotes (5)

[1] **Appeal and Error**
⇦ Insufficient discussion of objections

Alleged tortfeasors waived or abandoned argument that trial court departed from essential requirements of law in determining that conflict of interest existed and in disqualifying law firm representing both alleged tortfeasors in injured workers' negligence suit, and worker's employer, with respect to its workers' compensation lien claim against any judgment awarded a result of workers' tort suit; only issues alleged tortfeasors raised on appeal were whether worker had standing to seek disqualification of the law firm and whether, if worker had requisite standing to do so, the existence of indemnity agreement that was not brought to trial court's attention until filing of alleged tortfeasors' motion for rehearing established that their interests were fundamentally antagonistic to worker's employer's interest. West's F.S.A. Bar Rule 4–1.7.

1 Cases that cite this headnote

[2] **Certiorari**
⇦ Particular proceedings in civil actions

Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel.

Cases that cite this headnote

[3] **Attorney and Client**
⇦ Disqualification in general

Disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly.

Cases that cite this headnote

[4] **Appeal and Error**
⇦ Necessity of presentation in general

An appellate court is not at liberty to address issues that were not raised by the parties.

4 Cases that cite this headnote

[5] **Attorney and Client**
⇦ Particular Cases and Problems

Trial court did not depart from the essential requirements of the law in determining that it was unreasonable for law firm to believe that it could provide competent and diligent representation to both alleged tortfeasors and injured worker's employer, as basis for disqualifying the law firm; alleged tortfeasors' interest lay in minimizing the damages awarded by a verdict or settlement in worker's tort action, while the employer's interest lie in helping worker recover the maximum possible damages against alleged tortfeasors so that it could maximize its recovery on its workers' compensation lien. West's F.S.A. Bar Rule 4–1.7(b).

Cases that cite this headnote

Attorneys and Law Firms

***310** E.T. Fernandez, III and Brian Sebaaly of Fernandez Trial Lawyers, P.A., Jacksonville, for Petitioners.

Philip S. Kinney of Kinney & Sasso, PL, Jacksonville and Brett Hastings of Brett A. Hastings, P.A., Jacksonville, for Respondent.

Opinion

LEWIS, C.J.

Petitioners, Anheuser–Busch Companies, Inc. and Anheuser–Busch, Incorporated, petition for a writ of certiorari and challenge an Order Disqualifying Law Firm. We conclude that the trial court, based upon the record before it, did not depart from the essential requirements of the law in determining that a conflict of interest existed and in disqualifying the law firm representing both Petitioners, the alleged tortfeasors in a negligence suit brought by Respondent, Christopher Staples, and Respondent's employer with respect to its workers' compensation lien claim against any judgment awarded to Respondent as a result of his lawsuit. We, therefore, deny the certiorari petition.

After he was injured while working for his employer, Respondent received workers' compensation benefits. He subsequently filed a negligence/premises liability action against Petitioners, seeking damages for the injuries he sustained in the accident occurring on their premises. The law firm at issue entered an appearance on behalf of Petitioners in the tort action. The firm also filed a Notice of Lien pursuant to section 440.39(3)(a), Florida Statutes, in the tort action on behalf of the employer. Prior to a scheduled mediation, Respondent moved to disqualify the law firm. Both Petitioners and Respondent's employer filed a Consent to Representation with respect to the ***311** law firm. The trial court entered an order disqualifying the firm, finding in part that the interests of the firm's clients were directly adverse to one another. After determining that Respondent had standing to raise the conflict of interest, the trial court noted that even if Respondent lacked the requisite standing, it would have raised the issue itself and reached the conclusion that disqualification was necessary. It also determined under Rule 4–1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer.

Petitioners filed a motion for rehearing and claimed for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous. The indemnity agreement was not attached to the motion or to an accompanying affidavit. The trial court denied the motion for rehearing, and this proceeding followed.

[1] [2] [3] Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel. *See Transmark, U.S.A., Inc. v. State, Dep't of Ins.*, 631 So.2d 1112, 1116 (Fla. 1st DCA 1994). While it is true, as Petitioners and the dissent point out, that disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly, *see Vick v. Bailey*, 777 So.2d 1005, 1007 (Fla. 2d DCA 2000), we find no departure from the essential requirements of the law in this case. The dissent acknowledges that the law firm's representation of Petitioners and Respondent's employer amounted to a conflict of interest under rule 4–1.7(a) of the Florida Rules of Professional Conduct. The dissent then characterizes the issue in this proceeding as being whether the trial court's legal ruling that Petitioners and Respondent's

employer could not waive the conflict departed from the essential requirements of the law. However, the only issues Petitioners have raised before us are whether Respondent had standing to seek disqualification of the law firm and whether, if Respondent had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of Petitioners' motion for rehearing established that Petitioners' interests were not fundamentally antagonistic to Respondent's employer's interest. [1]

Contrary to the dissent's characterization of the issue presented in this case, Petitioners have not argued in this proceeding that the trial court's analysis under rule 4–1.7(b) was erroneous, that the trial court departed from the essential requirements of the law in concluding that the law firm could not reasonably believe that it was capable of providing competent and diligent representation to each affected client under rule 4–1.7(b)(1), or that mediation does not constitute a "proceeding before a tribunal" for purposes of rule 4–1.7(b)(3). In fact, Petitioners did not cite to rule 4–1.7(b) in their certiorari petition or in their reply to Respondent's response. Nor was any mention of the rule or the trial court's analysis as to the rule ***312** made at oral argument. Although the dissent correctly notes that Petitioners cited to *State Farm Mutual Automobile Insurance Co. v. K.A.W.,* 575 So.2d 630 (Fla.1991), and *Anderson Trucking Service, Inc. v. Gibson,* 884 So.2d 1046 (Fla. 5th DCA 2004), in their certiorari petition, neither of those cases cited to rule 4–1.7(b). Moreover, Petitioners relied upon those two cases in support of their argument that Respondent lacked standing to seek disqualification of the law firm, not in support of any of the issues raised by the dissent. Furthermore, while Respondent's response to the certiorari petition contains one citation to rule 4–1.7(b), Petitioners made no mention of the rule or the issue of waiver or consent in their reply to the response.

[4] **[5]** The dissent obviously finds certain aspects of this case concerning. However, we are not at liberty to address issues that were not raised by the parties. *See* Philip J. Padovano, *Florida Appellate Practice* § 18.5, at 340–41 (2011 ed.) (noting that an issue on appeal must be one that was raised by a party to the proceeding and citing *Lightsee v. First National Bank of Melbourne,* 132 So.2d 776 (Fla. 2d DCA 1961), for the proposition that an appellate court is "not authorized to pass upon issues other than those properly presented on appeal"); *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.,* 972 So.2d 275, 281 (Fla. 2d DCA 2008) (deeming any potential issue pertaining to the final judgment for attorney's fees and costs waived or abandoned as no argument regarding the issue was made on appeal). [2]

Accordingly, because Petitioners have failed to establish that the trial court departed from the essential requirements of the law with respect to the specific issues actually raised in this proceeding, we DENY their certiorari petition on the merits.

BENTON, J., concurs with opinion; MAKAR, J., Dissenting.

BENTON, J., concurring.

By petition for writ of certiorari, the defendants in a premises liability case ask us to quash the order disqualifying their trial counsel on conflict-of-interest grounds. They argue here, as they did below, that they have given informed consent in writing to the representation, well aware that the same law firm represents the plaintiff's employer, and that the same law firm has filed a lien asserting the plaintiff's employer is entitled to reimbursement, from any recovery the plaintiff may receive from petitioners, for workers' compensation benefits that the employer paid the plaintiff.

After reciting the facts in its order disqualifying law firm, [3] the trial court ruled ***313** that a conflict existed (and that whether or not plaintiff had standing to raise the conflict was "likely moot," [4]) and then went on:

> The next question to be answered is therefore: Can this conflict be waived by the clients?
>
> An untitled subsection (b) of Rule 4–1.7 ("Conflict of Interest; Current Clients"), Florida Rules of Professional Conduct, states:
>
> (b) 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 these four criteria must be met for a lawyer to proceed with dual representation in the face of a conflict of interest. In the present case, neither criterion (1) nor criterion (3) is met. It is not reasonable for the challenged law ***314** firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Because fewer than all the requirements of the rule are met, client consent to continued dual representation by the law firm is insufficient to permit the firm to continue its representations in the face of a conflict. The conflict is thus not one capable of being waived by client consent.

As is clear from the trial court's order, the trial court had not been told of any indemnity agreement between the owner of the premises and the plaintiff's employer when its order was entered. Petitioners did advert to such an agreement in an affidavit attached to their motion for rehearing in the trial court. But they never favored the trial judge with a copy of the indemnity agreement. That did not surface until it appeared in the appendix to the amended petition for writ of certiorari.

Yet in this proceeding petitioners rely heavily on the indemnity agreement for the proposition that any conflict of interest was waived. (Disputing this contention at oral argument, respondent took the position that the agreement did not apply in any event because petitioners alone were alleged to have been negligent.) The belatedly disclosed indemnity agreement is plainly not something we should address now for the first time, or a proper basis for issuance of the writ. For this reason alone, the petition should be denied.

If the respondent had never filed suit, or if the employer had never filed the lien aligning itself against the defendant in the main action, the conflict might have been waivable. But by the time the trial court entered the order under challenge here, these parties were "adversaries in litigation." As a comment to the Third Restatement of the Law Governing Lawyers explains:

> *Conflicts between adversaries in litigation.* When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment *c,* & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment *d*), the joint representation may not continue if the parties become opposed to each other in litigation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2013). The employer's lien was filed, not with the mediator, but with the court. Thereafter, the conflict between the employer and the petitioners became, in the terminology of the restatement, "nonconsentable."

The filing of the lien in this case was "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." R. Regulating Fla. Bar 4–1.7(b)(3). The premises liability claim remained unresolved. *Cf. City of Hollywood v. Lombardi,* 770 So.2d 1196, 1198–1202 (Fla.2000). Counsel filed the employer's lien in the judicial proceeding, not in the mediation, which was, after all, court-ordered. The employer-by seeking to participate in any recovery with its employee, the plaintiff (respondent)-asserted a position (as a statutory indemnitee) adverse to ***315** petitioners, the defending owners of the premises "in the same proceeding before a tribunal," the Circuit Court for the Fourth Judicial Court. *Id.* See generally *The Club at Hokuli'a, Inc. v. Am. Motorists Ins. Co.,* No. 10–00241 JMS–LEK, 2010 WL 3465278, at *5 (D.Haw. Sept.3, 2010) *report and recommendation adopted sub nom,* 2010 WL 4386741 (D.Haw.2010) ("Oceanside notes that, as a general rule, indemnitors are aligned with their indemnitees in cases where the principal obligation is in dispute.").

MAKAR, J., dissenting.

I.

While at an Anheuser–Busch (A–B) brewing and shipping facility in Jacksonville, Florida, Christopher Staples was involved in an accident connected to his employment with Container Carrier Corporation (Container). Mr. Staples received workers' compensation benefits from Container, which is self-insured. Mr. Staples then filed suit against A–B, seeking to recover on negligence and premises liability theories.

Fernandez Trial Attorneys, P.A. (Fernandez), which had been A–B's legal counsel in the past, appeared on behalf of A–B in the lawsuit. Pertinent to this proceeding, Fernandez also filed a notice of lien on behalf of Staples's employer, Container, against any future judgment in Mr. Staples's favor to recoup its expenditures in the workers' compensation proceeding.

Mediation in the matter was scheduled, but cancelled after Mr. Staples's counsel made an issue of Fernandez representing both A–B and Container at the mediation. Fernandez indicated that it would attend on behalf of A–B and that a non-lawyer claims manager employed by Container would attend on behalf of that company. Upon cancellation of the mediation, Mr. Staples promptly filed a motion alleging that a conflict of interests existed between A–B and Container and that Fernandez should be disqualified from further representing A–B and Container in the case.

Fernandez responded with client waivers demonstrating that both A–B and Container understood and consented to Fernandez representing their interests jointly. Both companies waived "any conflict which may currently or in the future exist because of the law firm's representation" of them in the litigation. The trial court, after considering legal memoranda and argument of counsel, issued a lengthy order that, distilled to its core, found as a matter of law that a non-waivable conflict existed as to Fernandez's concurrent representation of A–B and Container. The trial court prohibited Fernandez from representing either A–B or Container, allowing both companies thirty days to get new lawyers to represent them individually. Fernandez seeks certiorari review, asserting the trial court departed from the essential requirements of law in denying A–B and Container their right to be represented by counsel of their choice. *See Yang Enterprises, Inc. v. Georgalis,* 988 So.2d 1180, 1183 (Fla. 1st DCA 2008) ("Certiorari is the appropriate remedy to review orders denying a motion to disqualify counsel."). As this Court recently noted, "because disqualification of counsel denies a party its counsel of choice, such disqualification constitutes a material injury not remediable on plenary appeal." *Walker v. River City Logistics Inc.,* 14 So.3d 1122, 1123 (Fla. 1st DCA 2009). Thus, the only question is whether the order below departed from the essential requirements of law. *Id.*

II.

Disqualification of a lawyer is a serious matter, so serious that it is highly disfavored ***316** because it operates to deprive a litigant of its chosen attorney, interfering with a relationship having constitutional implications. *In re BellSouth Corp.,* 334 F.3d 941, 955–56 (11th Cir.2003). It follows that disqualification of counsel is an extraordinary step, resorted to only sparingly. *Melton v. State,* 56 So.3d 868, 872–73 (Fla. 1st DCA 2011) (citing *Minakan v. Husted,* 27 So.3d 695 (Fla. 4th DCA 2010); *Walker,* 14 So.3d 1122 (Fla. 1st DCA 2009)). Motions for disqualification are "generally viewed with skepticism because ... [they] are often interposed for tactical purposes." *Yang Enterprises,* 988 So.2d at 1183 (citations omitted).

No dispute exists that Fernandez's representation of A–B and Container in this litigation amounts to a conflict as defined under the Rules of Professional Responsibility. *See* R. Regulating Fla. Bar 4–1.7(a). But that does not end the analysis. Both A–B and Container recognized this conflict, voluntarily agreed they both wanted Fernandez to represent them, and explicitly waived the conflict in writing. That was their informed choice to make. What constitutes a conflict under subsection (a) of Rule 4–1.7 is not necessarily a non-waivable conflict under subsection (b); if that were the case no conflicts could ever be waived. The question raised here is whether the trial court's legal ruling, that the conflict between A–B and Container was non-waivable under the circumstances presented, departs from the essential requirements of law.[5] It does for two reasons.

A.

First, the interests of A–B and Container in this routine tort case are not so fundamentally antagonistic that disqualification is compelled. It is not uncommon that clients choose to have one lawyer represent their interests jointly, even if a conflict exists. If clients are fully informed and make voluntary decisions to allow for joint representation (here through written waivers), the basic concerns of the Rules are ameliorated.

To demonstrate that a conflict is one to which a client may consent, four criteria must be met:

(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.

R. Regulating Fla. Bar 4–1.7(b). The trial court set out these criteria in its order, holding that criteria (1) and (3) were not shown. Though the trial court's order is lengthy, the totality of its reasoning as to ***317** these two criteria is contained in these two sentences:

> It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Addressing the first sentence, it is clear legal error to conclude that a lawyer cannot reasonably represent two sophisticated corporate businesses that have voluntarily and specifically averred that they desire the lawyer to jointly represent them and waive in writing "any conflict which may currently or in the future exist because of the law firm's representation" in the matter. To the contrary, it is presumptively reasonable for a lawyer representing A–B and Container under the circumstances of this case at the mediation stage to believe he will be able to "provide competent and diligent representation to each affected client." *Id.* Multi-party representation may not be the norm, but it has become commonplace due to its significant benefits (and risks)[6] that the parties may choose to bear. *See* William E. Wright, Jr., *Ethical Considerations In Representing Multiple Parties In Litigation,* 79 Tul. L.Rev. 1523, 1526 (2005) (discussing ethical considerations and practical issues arising in multiple-party representation) (noting that "applying economic realities and recognizing strategic alliances, it is often advantageous to limit the number of attorneys involved in litigation").

Nothing in the record establishes that joint representation was other than reasonable. Fernandez believed it could provide competent and diligent representation to A–B and Container, an assessment in which both companies concurred. Mr. Staples's counsel could identify no prejudice arising from the joint representation. As such, the trial court's ruling to the contrary simply disregards the voluntary, fully-informed decisions of A–B and Container, thereby depriving *two* clients of their chosen lawyer's services. Harm of this type and magnitude is irremediable once judgment is entered making certiorari appropriate. While trial courts should be wary, as the trial court here was, to potential conflicts that run afoul of the Rules, the joint representation of A–B and Container, supported by written waivers, with no countervailing harm to Mr. Staples, provides no legal basis to conclude that criterion (1) was unmet.

B.

Next, the second sentence—which is an almost verbatim statement of the language of criterion (3)—misapprehends the procedural context of the case. The third criterion only applies where "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.*" (Emphasis added). This criterion does

not apply in this case at this juncture because mediation is not a "proceeding before a tribunal." The Florida Bar Rules define "Tribunal" as

> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body ***318** acting in an adjudicative capacity. A ... body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

R. Regulating Fla. Bar 4 (preamble). Mediations do not meet this definition; no neutral official renders a binding legal judgment. Instead, in mediation the "decisionmaking authority rests with the parties." § 44.1011, Fla. Stat. The mediator lacks authority to adjudicate any aspect of a dispute. Fla. R. Med. 10.420(a)(2). Because mediation does not meet the definition of "tribunal," a mediation cannot be a "proceeding before a tribunal" as specified in Rule 4–1.7(b)(3).

Florida Rule 4–1.7 is an analogue of Model Rule of Professional Conduct 1.7, which likewise prohibits representation involving "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Model Rules of Prof'l Conduct R. 1.7. The definition of tribunal is also similar. *Id.* R. 1.0. Notably, the commentary to Model Rule 1.7, discussing paragraph (b)(3), states that "this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under [the terminology rule])." *Id.* R. 1.7 cmt. 17. Because mediation is not a proceeding before a tribunal, criterion (3) of Rule 4–1.7(b) is met, and the conflict presented in this case was one to which A–B and Container may consent at the mediation stage. [7]

That mediation is outside of the Rule's application is consistent with the goal that mediation be a cost-efficient way to resolve disputes. Here, the disqualification order did the opposite; it created a domino effect that multiplied the costs on two companies that did no more than try to reduce their legal expense by using one law firm. Such a result makes little sense in the mediation context.

Beyond that, counsel for Mr. Staples at oral argument was unable to identify any harm to Mr. Staples's interests that would result from the Fernandez firm's joint representation; none. Even if A–B and Container were to hire separate counsel, nothing would prevent the new attorneys from collaborating on behalf of their clients. Given the irremediable harm to A–B and Container it causes, and the absence of any harm to Mr. Staples from the joint representation by Fernandez, the disqualification of Fernandez has no utility other than as an impediment to mediation. If allowed to stand, the order may embolden the tactical use of threats of disqualification as a strategy to gain settlement leverage at the mediation stage by potentially raising litigation costs to opponents. [8]

***319** A side issue that has no bearing on the legal issue presented is the trial court's denial of A–B and Container's motion for rehearing. Perhaps because they believed their written waivers were sufficient to resolve the conflict issue, or even for their own strategic reasons, A–B and Container did not initially disclose a previously signed indemnity agreement between themselves. The agreement —identified in an affidavit submitted with their motion for rehearing-reflects that Container agreed to indemnify A–B for any liability in this case. The effect of the agreement aligned the interests of A–B and Container because any judgment against A–B would be a liability of Container. The trial court was not made aware of this agreement prior to its initial decision; had it been brought to the trial court's attention, it would have been helpful in solidifying that the joint representation met applicable legal standards. Even without the indemnity agreement, the record sufficiently shows that disqualification of Fernandez was unwarranted.

III.

Because the trial court's ruling departs from the essential requirements of law, depriving two clients of the services of their chosen counsel, the disqualification order should be reversed with instructions to allow Fernandez to represent both A–B and Container.

All Citations

125 So.3d 309, 38 Fla. L. Weekly D125

Footnotes

1 Petitioners do not argue that the trial court erred in denying their motion for rehearing. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So.3d 269, 278 (Fla. 1st DCA 2012) (noting that trial courts are not required to consider new issues presented for the first time on rehearing).

2 We note that even if Petitioners had raised the issues addressed by the dissent, we would still deny the certiorari petition. We disagree with the dissent's assertion that the trial court departed from the essential requirements of the law in determining, pursuant to rule 4–1.7(b)(1), that it was unreasonable for the law firm to believe that it could provide competent and diligent representation to both Petitioners and Respondent's employer. As the trial court reasoned based upon the facts before it, Petitioners' interest would lie in minimizing the damages awarded by a verdict or settlement while the employer's interest would lie in helping Respondent recover the maximum possible damages against Petitioners so that it could maximize its recovery on its workers' compensation lien. With respect to rule 4–1.7(b)(3), while the dissent focuses on whether mediation constitutes a "proceeding before a tribunal," the employer's Notice of Lien was filed in the underlying tort case. There is no question that the underlying case constitutes a "proceeding before a tribunal." As such, the dissent's focus on mediation is much too narrow.

3 The trial court set out its fact findings in numbered paragraphs as follows:

> This case arises from the following circumstances:
>
> 1. The Plaintiff, Christopher Staples ("Plaintiff"), was an employee of Container Carrier Corporation ("Employer").
>
> 2. On January 27, 2003, while working for the Employer, the Plaintiff was injured at the Jacksonville brewing and shipping facility of Anheuser–Busch, Inc. Plaintiff alleges that the accident occurred because of the negligence of two related Anheuser–Busch entities, Anheuser–Busch Companies, Inc., and Anheuser–Busch, Inc. ("Defendants").
>
> 3. The Employer is a corporation separate and distinct from the Defendant corporations.
>
> 4. The Plaintiff received worker's compensation benefits from the Employer as a result of this accident. Because the Employer is self-insured against worker's compensation claims, there is no Carrier in the worker's compensation case.
>
> 5. The Plaintiff filed a negligence/premises liability action against the Defendants, seeking damages for the injuries he sustained in the January 27, 2003, accident at the Defendants' brewery.
>
> 6. The law firm of Fernandez Trial Lawyers, P.A. ("the firm"), which has represented the Defendants in past actions, entered an appearance on behalf of both Defendants in this tort action.
>
> 7. The firm also filed a Notice of Lien in this tort action on behalf of the Employer. The lien was filed pursuant to section 440.39(3)(a), Fla. Stat.
>
> 8. When mediation was scheduled for November 1, 2012, in this case, Plaintiff's counsel discussed with the firm his concern about the fact that the firm was representing both the Defendants in the tort action and the Employer in the same action. On behalf of the firm, attorney E.T. Fernandez, III, responded in writing, indicating that the interest of the Employer with regard to the worker's compensation lien would be addressed at mediation by, and negotiated by, Mr. James Gourley, a non-lawyer claims manager employed by the Employer. Because Plaintiff's counsel still had continuing concerns, the mediation was cancelled.
>
> 9. After learning of the dual representation, Plaintiff's counsel moved promptly to file the pending disqualification motion.
>
> 10. Both the Defendants in the tort case and the Employer have filed waivers of any conflict which may currently or in the future exist because of the law firm's representation of all three in the tort case.
>
> (Footnotes omitted.)

4 The trial court ruled:

> [E]ven if Plaintiff here had no standing, the Court would "raise the question" of disqualification itself and reach the same result required by this order. Consequently, the issue of Plaintiff's standing to pursue disqualification is likely moot.

5 Fernandez's petition, though not citing Rule 4–1.7, asserts that its disqualification was improper because the trial court misapplied the legal standard, tracking language from the caselaw interpreting the rule. *See, e.g., State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So.2d 630 (Fla.1991) (citing Rule 4–1.7); *Anderson Trucking Serv., Inc. v. Gibson*, 884 So.2d 1046 (Fla. 5th DCA 2004) (citing *K.A.W.*). Mr. Staples's response, understanding the nature of Fernandez's legal challenge, contains citations to the caselaw applying Rule 4–1.7 as well as to both subsections of Rule 4–1.7. Identification of

the specific judicial act to be reviewed (the disqualification order) and the legal reasoning for its reversal (it applied the incorrect legal standard under the caselaw applying Rule 4–1.7) enables appellate review. *See* Philip J. Padovano, *Florida Appellate Practice* § 16:9 (2012 ed.) (citing cases).

6 That A–B and Container have agreed to joint representation by Fernandez does not end Fernandez's ethical responsibilities, which include continual reevaluation of the joint representation under ethical rules and full, ongoing communications with A–B and Container as circumstances evolve or change.

7 If the case goes beyond meditation and a "proceeding before a tribunal"—such as a trial—is scheduled, the question of whether a conflict then exists can be raised. At that point, the trial court can assess whether joint representation, if it still exists, will involve the "assertion of a position adverse to another client" that fails to meet 4–1.7(b)—along with the other criteria of the Rule. Whether a lienor would appear at trial in this type of case is doubtful, but it might occur.

8 Tempering this tactic is that litigants, absent a special relationship to the lawyers sought to be disqualified, ordinarily will lack standing to make formal motions to disqualify. *See Zarco Supply Co. v. Bonnell,* 658 So.2d 151, 154 (Fla. 1st DCA 1995) (finding standing only where movant could demonstrate prejudice). Here, the trial court erred in concluding that Mr. Staples had standing to seek to disqualify Fernandez because, as admitted at oral argument, Mr. Staples can point to no prejudice arising from the joint representation by Fernandez. The trial court, however, can sua sponte raise conflict issues, making Mr. Staples's standing a non-issue.

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D

West's Florida Statutes Annotated
Rules Regulating the Florida Bar (Refs & Annos)
Chapter 4. Rules of Professional Conduct (Refs & Annos)
4-1. Client-Lawyer Relationship

West's F.S.A. Bar Rule 4-1.7

Rule 4-1.7. Conflict of Interest; Current Clients

Currentness

(a) Representing Adverse Interests. Except as provided in subdivision (b), 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.

(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.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Credits

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Jan. 23, 2003, effective July 1, 2003 (838 So.2d 1140); March 23, 2006, effective May 22, 2006 (933 So.2d 417); May 29, 2014, effective June 1, 2014 (140 So.3d 541).

Editors' Notes

COMMENT

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses

alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. 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 1 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.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). 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. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory

judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Notes of Decisions (190)

West's F. S. A. Bar Rule 4-1.7, FL ST BAR Rule 4-1.7
Florida Supreme Court Rules of Civil Procedure, Judicial Administration, Criminal Procedure, Civil Procedure for Involuntary Commitment of Sexually Violent Predators, Worker's Compensation, Probate, Traffic Court, Small Claims, Juvenile Procedure, Appellate Procedure, Certified and Court-Appointed Mediators, Court Appointed Arbitrators, Family Law, Certification and Regulation of Court Reporters, Certification of Spoken Language Interpreters, and Qualified and Court-Appointing Parenting Coordinators are current with amendments received through 08/15/16. All other State Court Rules are current with amendments received through 08/15/16.

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E

Rule 1.0: Terminology

Client-Lawyer Relationship
Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT

IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 502012CP004391XXXXNBIH

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

/

Proceedings before the Honorable

ROSEMARIE SCHER

Thursday, February 16, 2017

3188 PGA Boulevard

North County Courthouse

Palm Beach Gardens, Florida 33410

2:38 p.m. - 4:46 p.m.

Reported by:
Lisa Mudrick, RPR, FPR
Notary Public, State of Florida

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BE IT REMEMBERED that the following proceedings were had in the above-styled and numbered cause in the Palm Beach County Courthouse north branch, City of Palm Beach Gardens, County of Palm Beach, in the State of Florida, by Lisa Mudrick, RPR, FPR, before the Honorable ROSEMARIE SCHER, Judge in the above-named Court, on February 16, 2017, to wit:

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THE COURT: The first thing we are going to do, and this is more for the Court, starting to the left in the first pew behind, we are going to make our appearances and go around, and ending with Judge Lewis.

MR. FEAMAN: Thank you, Your Honor. Peter Feaman on behalf of the movant William Stansbury. With me today is Jeff Royer from my office and also Nancy Guffey.

THE COURT: Okay.

MR. ROSE: Good afternoon, Your Honor. Alan Rose. I represent Ted S. Bernstein as successor trustee of Simon's trust and Shirley's trust.

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THE COURT: Okay.
MR. ROSE: I represent him as the movant seeking to be appointed as administrator ad litem to defend the estate in the independent action.
And Mr. O'Connell is here. And with me is Michael Kranz, my associate, at the end. And I will let Mr. O'Connell introduce himself.
MR. O'CONNELL: Good afternoon, Your Honor. Brian O'Connell, PR of the Simon Bernstein Estate.
JUDGE LEWIS: Diana Lewis, guardian ad litem for the Eliot Bernstein children.
THE COURT: Okay. A few ground rules. I have my order on this case management conference, and that's the order in which we will proceed, okay? Does everyone have a copy of that order? I also have an extra copy in case somebody needs it.
So we will begin with Stansbury's 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 I am just verifying the correct docket

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entry. And it is noted on the case management conference as docket entry 497. That is incorrect. That's why I was double checking. It's 496. And I knew that because I just looked it up.
All right. In the order one of the things I had said was to get all materials to me by February 9th. Thank you. You can see I am surrounded by notebooks. I received a ton of materials. The only thing I would request is from now on when I say February 9th, I mean February 9th. I received two more -- from everybody, from both sides, just so everybody knows, I received documents Monday. From now on if you don't meet the deadline you will have to come into court with them and provide them and tell me why you didn't meet the deadline.
I am going to put some firm rules on these parties, and I don't think I will have to explain why, just going through some of this case.
Number two, from this point forward, and I plan to include this in any order I issue, in preparing for this it was very difficult to get a grasp as to when the pleadings to the same

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thing ended. Because we've got the original motion or petition, then we've got the response, then we've got the reply, then we've got the supplement, then we've got the second supplement to the response. Then we have an answer to the second supplement. No more.
Petition or motion, response, reply, end. If you desperately feel that there must be something you must bring to the Court's attention prior to the hearing, come in and ask me for permission.
Because, quite frankly, the Court read as much as humanly possible given the fact that with all due respect it's not my only case. And I am very compulsive, so I read as much as I could. But some of it was -- if I thought every single new piece of paper had some gem of nuance that was different from all the other prior, I might not be putting this rule. But a lot of it was just repeating the same thing.
And I know a lot of it, which is why I completely understand, had to do with the fact that we need to get this judge up to speed, which I appreciate. Okay. From this point now I will be the original judge reading, all

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sides, petition or motion, response, reply. Okay.
Last and final housekeeping. I will make no -- how do I put this? You all know that the other half of my division is family and divorce, an area where people get truly bent out of shape as well and can be exceedingly nasty to each other because you are going through a horrible time.
You all are lawyers. I do not expect from this point forward to see any direct -- now, an appropriate motion is an appropriate motion. I am excluding in a motion something you feel justified to do. But in the pleadings, state the facts. I don't want the adjectives, okay? I can figure -- you know, state the facts, tell me what happened. And I don't want the adjectives that are following back and forth, which I won't deal with. Anyone who has practiced in front of me knows me. You can do anything on your position within the bounds of the law. I will not accept unprofessionalism even in pleadings, even though you are professional personally here.
Okay. That takes care of that. And

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that's kind of a general rule I set forth in all of my box cases in family too. So don't anyone take it personally. That's something I say at the get-go because as things proceed people get mad. Remember, you are the lawyers, not the clients, although I do know we have some clients here.

Okay. So since it is, let me pull up on Cap, Mr. Feaman's motion to vacate, he will begin to have the floor.

MR. FEAMAN: Thank you, Your Honor.

THE COURT: Sorry, I just hit something bad on my computer. I do take notes on my computer. The reason we must end at 4:30 is because I do not look at my e-mail or my emergency motions, and I am signing judge, which must be sent in before 5:00, okay? So I give you my full attention, but we end prompt at 4:30 because I am signing judge. Yesterday I think I had four by the time I got back there.

So let me -- here it is. Perfect. Thank you again for the notebooks with the tab indexes. Truly a time saver for the Court.

You may proceed, Mr. Feaman, thank you.

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MR. FEAMAN: Thank you, Your Honor. May it please the Court. Peter Feaman on behalf of William Stansbury. My remarks are by way of an opening statement at this time, Your Honor, in connection with Your Honor's order, case management conference and order specially setting hearings.

As Your Honor noted, we are dealing with Stansbury's motion, docket entry 496, and Stansbury's related motion to disqualify Alan Rose and his law firm, docket entry 508.

The story and premise, Your Honor, for this is that the personal representative of the Simon Bernstein estate, Brian O'Connell, has a fiduciary duty to all interested persons of the estate. And that's found in Florida Statute 733.602(1) where it states a personal representative is a fiduciary, and in the last sentence, a personal representative shall use the authority conferred by this code, the authority in the will, if any, and the authority of any order of the Court, quote, for the best interests of interested persons, including creditors, close quote.

Mr. Stansbury is an interesting --

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interested person to the Estate of Simon Bernstein as well as a claimant in this case.

Interesting -- interested persons -- yes, he is an interesting person. But interested persons is defined, Your Honor, in Florida Statute 731.201(23) which states that an interested person means, quote, any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.

The evidence will show that Mr. Stansbury clearly falls into that category.

The second part of our presentation, Your Honor, will then involve the presentation of evidence to show that in fact there is a conflict of interest. And then part three -- of conflict of interest of Mr. Rose and his law firm representing the estate in this case.

And thirdly, that the conflict of interest, the evidence will show, is not waivable.

The parties' chart, which we did and submitted to Your Honor with our package last week, is the color chart, I have an extra copy if Your Honor does not have it.

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THE COURT: I believe it is --

MR. FEAMAN: For the Court's convenience.

THE COURT: I believe it is in -- I know I have it. And I know I had it. Oh, got it. I knew it was in one of my notebooks. Thank you.

MR. FEAMAN: Thank you.

Now, the summation of the position of the parties in connection with what the evidence will show, Your Honor, shows that we are here obviously on the Estate of Simon Bernstein, and the proposed attorney is Alan Rose. That's the box at the top. The two proceedings that are engaged with regard to the estate right now is the Stansbury litigation against the estate which is wherein it is proposed that Mr. Rose and his law firm defend the estate in that case.

And more significantly, Your Honor, because it really wouldn't matter what the other litigation is that Mr. Rose is being asked to defend, because more significantly is the orange box on the right, which I will call for the purposes of this litigation the Chicago litigation. And in that action there are a number of plaintiffs, one of whom is Ted

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Bernstein individually. And the evidence will show in this case that Alan Rose represents Ted Bernstein individually, not only in other matters, but he actually appeared in a deposition on behalf of Mr. Bernstein individually in that Chicago litigation, made objections to questions. And the evidence will show that he actually on a number of occasions instructed Mr. Bernstein not to answer certain questions that were directed to Mr. Bernstein by counsel for the Estate of Simon Bernstein.

In that Chicago litigation we will present to Your Honor certified copies of pleadings from the Chicago litigation that shows the following: That Ted Bernstein, among others, sued an insurance company to recover approximately $1.7 million dollars of life insurance proceeds. Mr. Stansbury became aware that that litigation was going on, and moved to intervene in that lawsuit. Mr. Stansbury was denied.

So the evidence will show that he was able to prevail upon Ben Brown, and Ben Brown moved on behalf of the estate when he was curator to intervene. And in fact the Estate of Simon

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Bernstein --

MR. ROSE: May I object for a second?

THE COURT: Legal objection?

MR. ROSE: That he is completely misstating the record of this Court and the proceedings before Judge Colin.

THE COURT: You will have an opportunity to respond and explain it to me.

MR. FEAMAN: Thank you, Your Honor.

And the evidence will show that the Estate of Simon Bernstein is now an intervenor defendant, and they filed their own intervenor complaint seeking to recover that same $1.7 million dollars that Ted Bernstein is seeking to recover as a plaintiff in that same action.

So the evidence will show that Mr. Rose represents Ted Bernstein. Ted Bernstein is adverse to the estate. And now Mr. Rose seeks to represent the estate to which his present client, Ted Bernstein, is adverse in the Stansbury litigation, which is why we are there. Now --

THE COURT: Wait. Slow down one second.

MR. FEAMAN: Sure.

THE COURT: That is something you repeated

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several times in your motion, but I want you to state it one more time for me slowly.

MR. FEAMAN: Yes. The Chicago litigation one of the plaintiffs is Ted Bernstein individually. The Estate of Simon Bernstein has now intervened in that action. And Ted Bernstein as plaintiff is seeking to recover $1.7 million dollars.

Adversely, the Estate of Simon Bernstein seeks to recover that same $1.7 million dollars and is arguing up there that it should not go to the plaintiffs but should go to the estate.

So they are one hundred percent adverse, that would be Ted Bernstein and the Estate of Simon Bernstein.

And Mr. Rose represents Ted Bernstein, and now seeks to represent the estate in a similar -- in an action against the estate, and they are both going on at the same time. Thus, the conflict is an attorney cannot represent a plaintiff in an action, whether he is counsel of record in that action or not, that's adverse to the Estate of Simon Bernstein, and at the same time defend the Estate of Simon Bernstein when he has a client that is seeking to deprive

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the estate of $1.7 million dollars.

Now, if Ted Bernstein and the other plaintiffs in that case were monetary beneficiaries of the estate, I suppose it could be a waivable conflict. However, that's not the case.

That drops us to the third box on the -- the fourth box on the chart, which is the green one, which deals with the Simon Bernstein Trust. The Simon Bernstein Trust is the residual beneficiary of the Simon Bernstein estate. And once the estate captures that money as a result of the Chicago litigation, if it does, then the trust will eventually accede to that money after payment of creditors, one of which would be or could be my client.

And who are the beneficiaries of the trust? So we have the one beneficiary of the Simon Bernstein estate, the Simon Bernstein Trust, and who are the beneficiaries of the trust? Not the children of Simon Bernstein. Not Ted Bernstein. But the grandchildren of Simon Bernstein, some of whom are adults and some of whom are minors in this case. Such that if the estate prevails in the Chicago

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litigation, even assuming Mr. Stansbury wasn't around making his claim against the estate, if all of the distributions were finally made when the estate wins that Chicago litigation, none of it will ever end up in the hands of Ted Bernstein as plaintiff. The only way Mr. Bernstein can get that money is to prevail as a plaintiff in the Chicago litigation. Mr. Rose represents Mr. Bernstein, and therefore there's a conflict, and it's a non-waivable conflict.

And in my final argument when I discuss the law, I will suggest to the Court that the conflict that's presented before the Court is in fact completely non-waivable.

THE COURT: Before you sit down, I want you to address one thing that's been raised in their responses. And that is why did it take you so long to file it?

MR. FEAMAN: I filed it as soon as I became aware that there was a conflict. For example, when the order that we are seeking to set aside was entered, I was not aware that the Rose law firm represented Ted Bernstein in that Chicago action. My client then brought it to

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my attention. And as soon as we did that, I moved to set aside the order because it became apparent that there was a clear conflict.

Because initially, as I told Brian O'Connell, Mr. Stansbury can't dictate who the estate wishes to hire as its attorneys unless, as it turns out, that attorney represents interests that are adverse to the estate. And that's when we filed our motion to set aside.

I got possession of the deposition that will be offered today. The deposition revealed to me what I have summarized here today, this afternoon, and then we moved to set aside the order. And then we thought that wasn't enough, we should do a formal motion to disqualify, which we did.

The chronology of the filings, the motion to vacate, I am not sure exactly when that was filed, but it wasn't too long after the entry of the September 7th order, and then the motion to disqualify came after that. And --

THE COURT: It was filed October 7th.

MR. FEAMAN: Pardon me?

THE COURT: It was filed October 7th.

MR. FEAMAN: Okay. The motion to vacate?

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THE COURT: Yes.

MR. FEAMAN: Correct. We had to do our due diligence. We got the copy of the deposition, and moved. Because we don't get copies of things that go on up there on a routine basis.

THE COURT: Okay. I just wanted to ask what your position was. Okay. All right. Thank you.

Opening?

MR. ROSE: As a threshold matter, I think even though this is an evidentiary hearing, you are going to receive some documentary evidence, I don't think there's a real need for live testimony, in other words, from witnesses. No, no.

THE COURT: Okay.

MR. ROSE: I am advising you. I am not asking your opinion of it.

THE COURT: Thank you.

MR. ROSE: I am advising you. I have spoken to Mr. Feaman.

THE COURT: Okay.

MR. ROSE: So I don't know there's going to be live witnesses.

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THE COURT: Okay.

MR. ROSE: He has seven documents or eight documents he would like to put in evidence, and I would be happy if they just went into evidence right now.

THE COURT: He can decide how he wants to do his case.

MR. ROSE: Okay.

THE COURT: You can do your opening.

MR. ROSE: I think we are going to be making one long legal argument with documents, so.

THE COURT: Okay. Well, let's do an opening and then.

MR. ROSE: Let me start from the beginning then.

THE COURT: Okay.

MR. ROSE: So we are here today, and there are three motions that you said you would try to do today. And I don't have any doubt you will get to do all three today given how much time we have and progress we are making and the amount of time Mr. Feaman and I think this will take.

THE COURT: Okay.

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MR. ROSE: The three are completely related. They are all the same. They are three sides of the same coin.

Am I blocking you?

MR. O'CONNELL: Your Honor, could I step to the side?

THE COURT: Yes, absolutely.

MR. ROSE: You can have the chart.

MR. O'CONNELL: Okay.

THE COURT: Mr. Rose, I have to ask you. I received a, I think it was a flash drive, and it had proposed orders on matters that were not necessarily going to be heard today. I don't think I got a flash dive with a proposed order. I did receive Mr. Feaman's on these particular orders.

MR. ROSE: I don't think I sent you a flash drive that I recall.

THE COURT: Okay. But I did on the other ones. That's what seemed odd to me.

MR. ROSE: I am not aware, I am sorry.

THE COURT: Okay. That's okay. You may proceed.

MR. ROSE: There's three matters today and they are sort of related, and they involve how

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are we going to deal with the claim by Mr. Stansbury against the Estate of Simon Bernstein.

And there are currently three separate proceedings. There's a proceeding in Illinois. It's all taking place in Illinois. There's the probate proceeding which we are here on which is the Estate of Simon Bernstein. And there's the Stansbury litigation that is pending in circuit court. It's just been reassigned to Judge Marx, so we now have a judge, and that case is going to proceed forward. It's set for trial, I believe, in July to September timeframe.

So the first thing you are asked to do today is to reconsider a valid court order entered by Judge Phillips on September the 7th. We filed our motion in August, and they had 30 days, more than 30 days before the hearing to object or contest the motion to appoint us.

The genesis of the motion to appoint us was what happened at mediation. We had a mediation in the summer. The parties signed a written mediation settlement agreement. We have asked Your Honor at next week's hearing to

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approve the mediation settlement agreement. It is signed by every single one of the ten grandchildren or their court-appointed guardian ad litem, Diana Lewis, who has now been approved by this Court, upheld by the 4th District, and upheld by the Supreme Court this week. So I think it's safe to say that she's going to be here.

So the settlement agreement is signed by all of those people. It's signed by my client as the trustee. It's also signed by four of the five children, excluding Eliot Bernstein.

And as part of this, once we had a settlement, there was a discussion of how do we get this relatively modest estate to the finish line. And the biggest impediment getting to the finish line is this lawsuit. Until this lawsuit is resolved, his client is something. We can debate what he is. He claims to be an interested person. I think technically under law he is a claimant. Judge, I think even Judge Colin ruled he was not a creditor and denied his motion to remove and disqualify Ted Bernstein as trustee. That was pending and there's an order that does that a long time

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ago. If I could approach?

THE COURT: Sure.

MR. ROSE: I don't have the docket entry number. This is in the court file. This was Judge Colin on August 22nd of 2014.

THE COURT: I saw it.

MR. ROSE: He has been trying to remove me and Mr. Bernstein for like almost three or four years now. But that's only significant because he is not a creditor. He is a claimant. So what we want to do is we want to get his claim to the finish line.

So I am not talking about anything that happened at mediation. Mediation is now over. We have a signed settlement agreement. Mr. Stansbury participated in the mediation, but we did not make a settlement with him. Okay.

So as a result of the mediation, all the other people, everybody that's a beneficiary of this estate coming together and signing a written agreement, those same people as part of the written agreement said we want this case to finish, and how are we going to do that.

Well, let's see. Mr. Stansbury is the

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plaintiff represented by Mr. Feaman. The estate was represented by -- do you?

THE COURT: No.

MR. ROSE: I can give you one to have if you want to make notes on.

THE COURT: I would like that. I would like that very much.

MR. ROSE: That's fine. I have two if you want to have one clean and one with notes.

THE COURT: Thank you.

MR. ROSE: You will recall -- I don't want to talk out of school because we decided we weren't going to talk out of school. But I got Mr. Feaman's -- like I didn't have a chance to even get this to you because I hadn't seen his until after your deadline, but.

THE COURT: This is demonstrative.

MR. ROSE: Okay.

THE COURT: He can pull up something new demonstrative as well.

MR. ROSE: Mr. -- originally the defendant here originally was assigned when he was alive. When he died his estate was substituted in. He hired counsel. His counsel didn't do much in the case because I did all the work because I

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was representing the companies, Ted Bernstein and another trust. And in January of 2014 the PRs of the estate resigned totally unrelated to this.

So in the interim between the original PRs and the appointment of Mr. O'Connell, we had a curator. The curator filed papers, which I filed, it's in the file, but I have sent it to Your Honor, where he admits, he states that he wanted to stay the litigation but he states that I have been doing a great job representing him and he hasn't even had to hire a lawyer yet because he is just piggybacking on the work I am doing.

I represented in this lawsuit the very one that Mr. O'Connell wants to retain my firm to handle. And he wants it with the consent -- and one thing he said was that there's some people that aren't here. Every single person who is a beneficiary of this estate wants my firm to handle this for the reasons I am about to tell you. And I don't think there's any dispute about it.

I was the lawyer that represented the main company LIC and AIM. Those are the shorthands

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for the two companies. Mr. Stansbury was at one point a ten percent stockholder in these companies. He gave his stock back. Ted Bernstein who is my client, and the Shirley Bernstein trust, I represented all these people in the case for about 15 or 18 months before we settled. I could be off on the timing. But I did all the documents, the production, interviewed witnesses, interviewed everybody you could interview. Was pretty much ready to go to trial other than we had to take the deposition of Mr. Stansbury, and then he had some discovery to do.

We went and we settled our case. Because we had a gap, because we didn't have a PR at the time, we were in the curator period, Mr. Brown was unwilling to do anything, so we didn't settle the case.

So Mr. O'Connell was appointed, so he is now the personal representative. He doesn't know the first thing about the case. No offense. I mean, he couldn't. You know, it's not expected for him to know the first thing about it. I don't mean the first thing. But he doesn't know much about the case or the

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facts.

We had discussions about hiring someone from his law firm to do it. I met someone from his law firm and provided some basic information, but nothing really happened. We were hopeful we'd settle in July. We didn't settle.

So they said the beneficiaries with Mr. O'Connell's consent we want Mr. Rose to become the lawyer and we want Mr. Ted Bernstein to become the administrator ad litem.

Now, why is that important? That's the second motion you are going to hear, but it's kind of important.

THE COURT: That's the one Phillips deferred?

MR. ROSE: Well, what happened was Mr. Feaman filed an objection to it timely. And in an abundance of caution because it might require an evidentiary or more time than we had, Judge Phillips deferred. That was my order. And my main goal was I wanted to get into the case and so we could start going to the status conferences and get this case moving. And what happened was as soon as we

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had the first status conference and we started the case moving, until we got the motion to disqualify, and stopped and put the brakes on.

And this is a bench trial, so there's not -- this is like maybe argument, but it's a little bit related. I believe that Mr. -- this is the case they want to happen first and they're putting the brakes on this case because they want this case to move very slowly. Because the only way there's any money to pay --

MR. FEAMAN: Objection.

THE COURT: Legal objection?

MR. FEAMAN: What counsel believes is not appropriate for --

THE COURT: Sustained.

MR. ROSE: Okay. So this case -- so anyway. Mr. Bernstein, Ted Bernstein, Ted, Simon and Bill, that's Ted, the dead guy Simon and his client Bill, were the three main shareholders of a company.

THE COURT: I got it.

MR. ROSE: Ted and Simon started it. They brought Bill in and gave him some stock for a while. Bill is suing for two and a half

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million dollars. The only person alive on this planet who knows anything about this case is Ted. He has got to be the representative of the estate to defend the case. He has got to be sitting at counsel table. If he is not at counsel table, he is going to be excluded under the exclusionary rule and he will be out in the hallway the whole trial. And whoever is defending the estate won't be able to do it. This guy wants Ted out and me out because we are the only people that know anything about this case.

So why is that important? Well, it makes it more expensive. It makes him have a better chance of winning. That's what this is about. And at the same time the Illinois case is really critical here because unless the estate wins the money in Illinois, there's nothing in this estate to pay him.

THE COURT: I understand.

MR. ROSE: Mr. O'Connell, I proffer, he advised me today there's about $285,000 of liquid assets in the estate. And we are going to get some money from a settlement if you approve it.

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Now, Eliot and Mr. Stansbury will probably object to that. It's not for today. So we have a settlement with the lawyers, the ones that withdrew. So we got a little bit of money from that. But there's really not going to be enough money in the estate to defend his case, pay all, do all the other things you got to do. So this is critical for Mr. Stansbury.

So the original PR, the guys that withdrew, they refused to participate in this lawsuit because they knew the facts. They knew the truth. They met with Simon. They drafted his documents. So they were not participating in this lawsuit.

Mr. Feaman stated in his opening that his client tried to intervene. So Bill tried to intervene directly into Illinois, and the Illinois judge said, no thank you, leave.

So when these guys withdrew we got a curator. The curator I objected --

THE COURT: Mr. Brown?

MR. ROSE: Ben Brown. He was a lawyer in Palm Beach, a very nice man. He passed away in the middle of the lawsuit at a very young age. But he -- the important thing -- I interrupted,

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and I apologize for objecting. I didn't know what to do. But Mr. Brown didn't say, hey, I want to get in this lawsuit in Illinois; let me jump in here. Mr. Feaman and Mr. Stansbury filed a motion to require Mr. Brown to intervene in the case.

THE COURT: In the federal case?

MR. ROSE: In the federal case in Illinois. Because it's critical for Mr. Stansbury, it's critical for Mr. Stansbury to get this money into the estate.

THE COURT: Into the estate, I understand.

MR. ROSE: Okay. So we had a hearing before Judge Colin, a rather contested hearing in front of Judge Colin. Our position was very simple -- one of the things you will see, my client's goals on every one of these cases are exactly the same. Minimize time, minimize expense, maximize distribution. So we have the same goal in every case.

All the conflict cases you are going to see all deal with situations where the lawyers have antagonistic approaches and they want -- like in one case he has, it's one lawsuit the lawyer wants two opposite results inside the

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same lawsuit for two different clients. That's completely different. And even that case, which is the Staples case, it was two to one. There was a judge that dissented and said, look, I understand what you are saying, but there's still not really a conflict there.

But our goals are those goals.

So what we said to Judge Colin is we think the Illinois case is a loser for the estate. We believe the estate is going to lose. The lawyer who drafted the testamentary documents has given an affidavit in the Illinois case saying all his discussions were with Simon. The judge in Illinois who didn't have that when he first ruled had that recently, and he denied their summary judgment in Illinois. So it's going to trial. But that lawyer was the original PR, so he wasn't bringing the suit.

Mr. Brown says, I am not touching this. So we had a hearing, and they forced Mr. Brown to intervene with certain conditions. And one of the conditions was very logical. If our goal is to save money and Mr. Stansbury, Mr. Feaman's client, is going to pay the cost of this, he will get it back if he wins, then

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we got no objection anymore, as long as he is funding the litigation. He is the only guy who benefits from this litigation. None of the -- the children and the grandchildren they don't really care.

Judge Lewis represents Eliot's three kids versus Eliot. The money either goes to Eliot or his three kids. She's on board with, you know, we don't want to waste estate funds on this. Our goal is to keep the money in the family. He wants the money.

This is America. He can file the lawsuit. That's great. But these people should be able to defend themselves however they choose to see fit. But the critical thing about this is Mr. Brown didn't do anything in here. Judge Colin said, you can intervene as long as he is paying the bills. And that's an order. Well, that order was entered a long time ago. It was not appealed.

So one of the things, the third thing you are being asked to do today is vacate that order, you know. And I did put in my motion, and I don't know if it was ad hominem toward Mr. Feaman, it really was his client, his

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client is driving this pace. He is driving us to zero. I mean, we started this estate with over a million dollars. He has fought everything we do every day. It's not just Eliot. Eliot is a lot of this. Mr. Stansbury is driving us to zero as quickly as possible.

So in the Illinois case the estate is represented by Stamos and Trucco. They are hired by, I think, Ben Brown but was in consultation with Mr. Feaman. They communicated -- the documents will come into evidence. I am assuming he is going to put the documents on his list in evidence.

You will see e-mails from Mr. Stamos from the Stamos Trucco firm, they e-mailed to Mr. O'Connell, and they copied Bill Stansbury and Peter Feaman because they are driving the Illinois litigation. I don't care. They can drive it. I think it's a loser. They think it's a winner. We'll find out in a trial.

They are supposed to be paying the bills. I think the evidence would show his client's in violation of Judge Colin's orders because his client hasn't paid the lawyer all the money that's due. And Mr. O'Connell, I think, can

15:15:12-15:15:53 Page 37

testify to that. I don't think it's a disputed issue. But the lawyer's been paid 70 and he is owed 40, which means Mr. Feaman's client is right now technically in violation of a court order.

I have asked numerous times for them to give me the information. I just got it this morning. But I guess I can file a motion to hold him in contempt for violating a court order.

But in the Chicago case the plaintiff is really not Ted Bernstein, although he probably nominally at some point was listed as a plaintiff in the case. The plaintiff is the Simon Bernstein 1995 irrevocable life insurance trust. According to the records of the insurance company, the only person named as a beneficiary is a defunct pension plan that went away.

THE COURT: Net something net something, right?

MR. ROSE: Right. And then the residual beneficiary is this trust. And these are things Simon -- he filled out one designation form in '95 and he named the 95 trust.

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THE COURT: But there's no paperwork, right?

MR. ROSE: We can't find the paperwork. Not me. It was not me. I have nothing to do with it. I said we. I wanted to correct the record because it will be flown up to Illinois.

Whoever it is can't find the paperwork. So there's a proceeding, and it happens in every court, and there's Illinois proceedings to determine how do you prove a lost trust.

This lawsuit is going to get resolved one way or the other. But in this lawsuit the 95 trust Ted Bernstein is the trustee, so he allowed, though under the terms of the trust in this case, and we cited it to you twice or three times, under Section 4J of the trust on page 18 of the Simon Bernstein Trust, it says that you can be the trustee of my trust, Simon said you can be the trustee of my trust even if you have a different interest as a trustee of a different trust. So that's not really an issue. And up in Chicago Ted Bernstein is the trustee of the 95 trust. He is represented by the Simon law firm in Chicago.

I have never appeared in court. He is

15:17:02-15:17:50 Page 39

going to put in all kinds of records. My name never appears -- I have the docket which he said can come into evidence. I don't appear on the docket.

Now, I have to know about this case though because I represent the trustee of the beneficiary of this estate. I've got to be able to advise him. So I know all about his case. And he was going to be deposed.

Guess who was at his deposition? Bill Stansbury. Bill Stansbury was at his deposition, sat right across from me. Eliot, who is not here today, was at that deposition, and Eliot got to ask questions of him at that deposition. He wanted me at the deposition. He is putting the deposition in evidence. If you study the deposition, all you will see is on four occasions I objected on what grounds? Privilege. Be careful what you talk about; you are revealing attorney/client privilege. That's all I did. I didn't say, gee, don't give them this information or that information. And if I objected incorrectly, they should have gone to the judge in Illinois. And I guarantee you there's a federal judge in Illinois that if

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I had objected improperly would have overruled my objections. I instructed him to protect his attorney/client privilege. That's what I was there for, to advise him and to defend him at deposition and to protect him. That's all I did in the Illinois case. And that is over.

Now, I am rooting like crazy that the estate loses this case in one sense because that's what everybody that is a beneficiary of my trust wants. But I could care less how that turns out, you know, from a legal standpoint. I don't have an appearance in this case. And everyone up there is represented by lawyers.

So what we have now is we have this motion which seeks to disqualify my law firm. We still have the objection to Ted serving as the administrator ad litem. And I think those two kind of go hand in hand.

There's another component you should know about that motion. But as I told you, our goals are to reduce expense.

The reason that everybody wanted Ted to serve as the administrator ad litem, so he would sort of be the representative of the estate, because he said he would do that for

15:19:13-15:20:04 Page 41

free.

THE COURT: I remember.

MR. ROSE: Mr. O'Connell is a professional. He is not going to sit there for free for a one-week, two-week jury trial and prepare and sit for deposition. That's enough money -- just his fees alone sitting at trial are enough to justify everything -- you know, it's a significant amount of money.

So that's what's at issue today.

But their motion for opening statement, and I realize this is going to overlap, my other will be --

THE COURT: Which motion?

MR. ROSE: The disqualification.

THE COURT: I wasn't sure.

MR. ROSE: I got you. That was sort of first up. All right. So I am back. That's the background. You got the background for the disqualification motion. This is an adversary in litigation trying to disqualify me.

I think it is a mean-spirited motion by Mr. Stansbury designed to create chaos and disorder and raise the expense, maybe force the estate into a position where they have to

15:20:11-15:20:59 Page 42

settle, because now they don't have a representative or an attorney that knows anything about the case.

MR. FEAMAN: Objection.

THE COURT: Legal objection?

MR. FEAMAN: Comments on the motivation or intention of opposing counsel in opening statement is not proper.

THE COURT: I will allow it only -- mean spirited I will strike. The other comments I will allow because under Rule 4-1.7, and I may be misquoting, but it is one of the two rules we have been looking at under the Florida Bar, the commentary specifically talks about an adverse party moving to disqualify and the strategy may be employed. So I will allow that portion of his argument, striking mean spirited.

MR. ROSE: Okay. If you turn to tab 2 of the -- we, I think, sent you a very thin binder.

THE COURT: Yes, you did.

MR. ROSE: We had already sent you the massive book a long time ago.

THE COURT: Yes.

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MR. ROSE: And I think all I sent you was the very thin binder. If you turn to Tab 2.

THE COURT: In any other world this would have been a nice sized binder. In this particular case you are indeed correct, this is a very thin binder.

MR. ROSE: Okay. If you flip to page 2240 --

THE COURT: I am just teasing you, sorry.

MR. ROSE: -- which is about five or six pages in.

THE COURT: Yes.

MR. ROSE: This is where a conflict is charged by opposing party.

THE COURT: Yes.

MR. ROSE: It's part of Rule 4-1.7. These two rules have a lot of overlap.

And I would point for the record I did not say that Mr. Feaman was mean spirited. I specifically said mean spirited by his client.

THE COURT: Thank you.

MR. ROSE: So conflicts charged by the opponent, and this is just warning you that this can be used as a technique of harassment, and that's why I am tying that in.

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But the important things are I have never represented Mr. Stansbury in any matter. Generally in a conflict of interest situation you will see I represented him. I don't have any confidential information from Mr. Stansbury. I have only talked to him during his deposition. It wasn't very pleasant. And if you disqualify me to some degree my life will be fine, because this is not the most fun case to be involved in. I am doing it because I represent Ted and we are trying to do what's right for the beneficiaries.

THE COURT: Appearance for the record. Someone just came in.

MR. ELIOT BERNSTEIN: Hi. Eliot Ivan Bernstein.

THE COURT: Thank you.

MR. ELIOT BERNSTEIN: I am pro se, ma'am.

THE COURT: Thank you. You may proceed. I just wanted the court reporter to know.

MR. ELIOT BERNSTEIN: Thank you, Your Honor.

MR. ROSE: I don't have any confidential information of Mr. O'Connell. He is the PR of

15:22:39-15:23:31 Page 45

the estate. I don't know anything about Mr. O'Connell that would compromise my ability to handle this case. I am not sure he and I have ever spoken about this case. But in either case, I don't have any information.

So I can't even understand why they are saying this is a conflict of interest. But the evidence will show, if you look at the way these are set up, these are three separate cases, not one case. And nothing I am doing in this case criticizes what I am doing in this case. Nothing I am doing -- the outcome of this case is wholly independent of the outcome of this case. He could lose this case and win this case. He could lose this case and lose this case. I mean, the cases have nothing to do with the issues.

Who gets the insurance proceeds? Bill Stansbury is not even a witness in that case. It has nothing to do with the issue over here, how much money does Bill Stansbury get? So you've got wholly unrelated, and that's the other part of the Rule 4-1.9 and 4-1.7, it talks about whether the matters are unrelated. And I guess when I argue the statute I will

15:23:43-15:24:35 Page 46

argue the statute for you.
At best what the evidence is going to show you -- and I am not trying to win this on a technicality. I want to win this like up or down and move on. Because this estate can't -- this delay was torture to wait this long for this hearing.
But if I showed up at Ted's deposition, and I promise you I will never show up again, I am out of that case, this is a conflict of interest with a former client. I have ceased representing him at his deposition. He is never going to be deposed again. If it's a conflict of interest with a former client, all these things are the prerogative of the former client. They are not the prerogative of the new client. The new client it's not the issue. So if I represented Ted in his deposition, I cannot represent another person in the same or a substantially related matter.
So I can't represent the estate in this case because I sat at Ted's deposition, unless the former client gives informed consent. He could still say, hey, I don't care, you do the Illinois case for the estate. I wouldn't do

15:24:46-15:25:40 Page 47

that, but that's what the rule says. Use information. There's no information. I am not even going to waste your time. Reveal information. So there's no information. If this is the rule we are traveling under, you deny the motion and we go home and move on and get back to litigation. If we are traveling under this rule, I cannot under 4-1.7 --
MR. FEAMAN: Excuse me, Your Honor, this sounds more like final argument than it does opening statement what the evidence is going to show.
THE COURT: Overruled.
MR. ROSE: So under 4-1.7, except as in b, and I am talking about b because that's maybe the only piece of evidence we may need is the waiver. I have a written waiver. I think it has independent legal significance. Because if I obtained his writing in writing, I think it's admissible just because Mr. O'Connell signed it. But they object, they may object to the admission of the waiver, so I may have to put Mr. O'Connell on the stand for two seconds and have him confirm that he signed the waiver document.

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But except if it's waived, now let's put that aside. We never even get to the waiver. The representation of one client has to be directly adverse to another client. So representing Ted in his deposition is not -- has nothing to do -- first of all, Ted had counsel representing him directly adverse. I was there protecting him as trustee, protecting his privileges, getting ready for a trial that we had before Judge Phillips where he upheld the validity of the documents, determined that Ted didn't commit any egregious wrongdoing. That's the December 15th trial. It's on appeal to the 4th District. That's what led to having Eliot determined to have no standing, to Judge Lewis being appointed as guardian for his children. That was the key. That was the only thing we have accomplished to move the thing forward was that, but we had that.
But that's why I was at the deposition, but it was not directly adverse to the estate.
Number two, there's a substantial risk that the representation of one or more clients will be materially limited by my responsibilities to another. I have asked them

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to explain to me how might -- how what I want to do here, which is to defend these people that I have been doing -- I have asked Mr. Feaman to explain to me how what I am doing to defend the estate, like I defended all these people against his client, could possibly be limited by my responsibilities to Ted. My responsibilities to Ted is to win this lawsuit, save the money for his family, determine his father did not defraud Bill Stansbury. So I am not limited in any way.
So if you don't find one or two, you don't even get to waiver. But if you get to waiver, and this is evidence, it's one of the -- I only gave you three new things in the binder. One was the waiver. One was the 57.105 amended motion.
I think the significance of that is after I got the waiver, after I got a written waiver, I thought that changed the game a little bit. You know, if you are a lawyer and you file a motion to disqualify -- so when I got the written waiver --
MR. FEAMAN: Your Honor --
THE COURT: Legal objection.

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MR. FEAMAN: Not part of opening statement when you are commenting on a 57.105 motion --
THE COURT: Sustained.
MR. FEAMAN: -- that you haven't even seen yet.
THE COURT: Sustained.
MR. FEAMAN: Thank you.
THE COURT: Sustained.
MR. ROSE: I got a waiver signed by Mr. O'Connell. I had his permission, but I got a formal written waiver. And it was after our first hearing, and it was after -- so I sent it to Mr. Feaman.
But if you look under the rule, it's a clearly waivable conflict. Because I am not taking an antagonistic position saying like the work I did in the other case was wrong or this or that.
And if you look at the rules of professional conduct again, and we'll do it in closing, but I am the one who is supposed to decide if I have a material limitation in the first instance. That's what the rules direct. Your Honor reviews that. But in the first instance I do not have any material limitation

15:29:01-15:29:53 Page 51

on my ability to represent the estate vigorously, with all my heart, with everything my law firm's resources, and with Ted's knowledge of the case and the facts to defend his case, there is no limitation and there's no substantial risk that I am not going to do the best job possible to try to protect the estate from this claim.
And I think we would ask that you deny the motion to disqualify on the grounds that there's no conflict, and the waiver for Mr. O'Connell would resolve it.
And we also would like you to appoint Ted Bernstein. There's no conflict of interest in him defending the estate as its representative through trial to try to protect the estate's money from Mr. Stansbury. It's not like Ted or I are going to roll over and help Mr. Stansbury or sell out the estate for his benefit. That's what a conflict would be worried about. We are not taking a position in -- we are not in the case yet, obviously. If you allow us to continue in this case, we are not going to take a position in this case which is different from any position we have ever taken in any case

15:30:02-15:30:38 Page 52

because all --
THE COURT: Just for the record, for the record, I see you pointing. So you are not taking a position in the Palm Beach circuit court --
MR. ROSE: Case.
THE COURT: -- civil case --
MR. ROSE: Different than we've --
THE COURT: -- that's different than probate or even the insurance proceeds?
MR. ROSE: Correct. Different from what we did in the federal case in Illinois, different from we are taking in the probate case. Or more importantly, in fact most importantly, we are not taking a position differently than we took when I represented other people in the same lawsuit.
You have been involved in lawsuits where there are eight defendants and seven settled and the last guy says, well, gee, let me hire this guy's lawyer, either he is better or my lawyer just quit or I don't have a lawyer. So but I am not taking a position like here we were saying, yeah, he was a terrible guy, he defrauded you, and now we are saying, oh, no,

15:30:49-15:31:36 Page 53

it's not, he didn't defraud you. That would be a conflict. We have defended the case by saying that Mr. Stansbury's claim has no merit and we are going to defend it the same way.
And then that's what we'd like to do with the Florida litigation, and then time permitting we'd like to discuss the Illinois litigation, because we desperately need a ruling from Your Honor on the third issue you set for today which is are you going to vacate Judge Colin's order and free Mr. Stansbury of the duty to fund the Illinois litigation.
Judge Colin entered the order. The issue was raised multiple times before Judge Phillips. He wanted to give us his ruling one day, and we -- you know, he didn't. We were supposed to set it for hearing. We had numerous hearings set on that motion, the record will reflect, and those were all withdrawn. And now that they have a new judge, I think they are coming back with the same motion to be excused from that, and that's the third thing you need to decide today.
THE COURT: All right.
MR. ROSE: Unless you have any questions,

15:33:38-15:34:48 Page 54

I'll --
THE COURT: Give me one second to finish my notes. Just one second, please. I have to clean things up immediately or I go back and look and sometimes my typos kill me. Just one more second.
Mr. Feaman, back to you.
MR. FEAMAN: Thank you.
THE COURT: Feaman, forgive me.
MR. FEAMAN: No problem.
I would offer first, Your Honor, as Exhibit 1 --
THE COURT: I am going to do a separate list so I will keep track of all the exhibits. So Exhibit 1, go ahead.
MR. FEAMAN: It's a --
THE COURT: Stansbury Exhibit 1?
MR. FEAMAN: Yes.
THE COURT: Go ahead.
MR. FEAMAN: May I approach, Your Honor?
THE COURT: You may. Has everybody seen a copy?
MR. FEAMAN: Yes.
MR. ROSE: I have seen a copy. Do you have an extra copy?

15:35:03-15:35:43 Page 55

MR. FEAMAN: Sure. We have one for everybody.
THE COURT: It appears to be United States District Court Northern District of Illinois Eastern Division.
MR. FEAMAN: There's exhibit stickers on the back.
MR. ROSE: Just for the record, I have no objection to the eight exhibits he has given, and he can put them in one at a time.
THE COURT: Okay. Great.
MR. ROSE: But no objection.
THE COURT: Okay. This is the first one in the complaint.
MR. FEAMAN: And we offer Exhibit 1, Your Honor, for the purpose as shown on the first page of the body of the complaint where it lists the parties, that the plaintiffs are listed, and Ted Bernstein is shown individually as the plaintiff in that action.
THE COURT: Give me one second. I have to mark as Claimant Stansbury's into evidence Exhibit 1.
///
///

15:35:57-15:36:41 Page 56

(Claimant Stansbury's Exb. No. 1, Complaint, United States District Court Northern District of Illinois.)
THE COURT: And you are saying on page two?
MR. FEAMAN: Yes. After the style of the case, the first page of the body under the heading Claimant Stansbury's First Amended Complaint, the plaintiff parties are listed.
THE COURT: Yes.
MR. FEAMAN: And it shows Ted Bernstein individually as a plaintiff in that action.
THE COURT: Okay.
MR. FEAMAN: May I approach freely, Your Honor?
THE COURT: Yes, absolutely, as long as you are no way mad.
MR. FEAMAN: And, Your Honor, William Stansbury offers as Exhibit 2 a certified copy of the motion to intervene filed by the Estate of Simon Bernstein in the same case, the United States District Court for the Northern District of Illinois, the Eastern Division.
THE COURT: So received.
///

15:37:10-15:38:41 Page 57

(Claimant Stansbury's Exb. No. 2, Motion to Intervene, United States District Court Northern District of Illinois.)
MR. FEAMAN: Thank you.
And the purpose for Exhibit 2, among others, is shown on paragraph seven on page four where it is alleged that the Estate of Simon Bernstein is entitled to the policy proceeds as a matter of law asserting the estate's interest in the Chicago litigation.
THE COURT: Okay.
MR. FEAMAN: Next, Your Honor, I would offer Stansbury's Exhibit 4.
THE COURT: We have gone past Exhibit 3.
MR. FEAMAN: I am going to do that next.
THE COURT: Okay.
MR. FEAMAN: I think chronologically it makes more sense to offer 4 at this point.
THE COURT: Sure.
MR. FEAMAN: Exhibit 4, Your Honor, is a certified copy again in the same case, United States District Court for the Northern District of Illinois Eastern Division. It's a certified copy of the federal court's order granting the motion of the estate by and through Benjamin

15:39:09-15:40:29 Page 58

Brown as the curator granting the motion to intervene in that action.

And the purpose of this exhibit is found on page three under the analysis section where the court writes that why the estate should be allowed to intervene, showing that the setting up, I should say, a competing interest between the Estate of Simon Bernstein and the plaintiffs in that action, one of whom is Ted Bernstein individually.

THE COURT: All right.

(Claimant Stansbury's Exb. No. 4, Order Granting the Motion to Intervene, United States District Court Northern District of Illinois.)

THE COURT: You may proceed.

MR. FEAMAN: Thank you.

THE COURT: I generally do with everybody, I put all the evidence right here so if anybody wants to approach and look.

Okay. This is now 3?

MR. FEAMAN: Yes, Your Honor.

THE COURT: Okay.

MR. ELIOT BERNSTEIN: Excuse me, what did you say?

MR. FEAMAN: She puts them there so if you

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want to look at them you can see them.

THE COURT: The ones that have been entered into evidence.

MR. ELIOT BERNSTEIN: Okay. He just gave me a copy of everything.

THE COURT: Yes.

MR. FEAMAN: Exhibit 3, Your Honor, is offered at this time it is a certified copy of the, again in the same court United States District Court Northern District of Illinois, it is actual intervenor complaint for declaratory judgment filed by Ben Brown as curator and administrator ad litem of the Estate of Simon Bernstein seeking the insurance proceeds that are at issue in that case and setting up the estate as an adverse party to the plaintiffs.

THE COURT: So received.

(Claimant Stansbury's Exb. No. 3, Complaint for Declaratory Judgement by Intervenor, United States District Court Northern District of Illinois.)

THE COURT: Thank you very much.

MR. FEAMAN: You are welcome.

Mr. Stansbury now offers as Exhibit 5 a

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certified copy again for the United States District Court Northern District of Illinois, the answer to the intervenor complaint filed by the estate, which was Exhibit 3. Exhibit 5 is the answer filed by the plaintiffs.

And this is offered for the purpose as set forth at page three, the plaintiff Simon Bernstein -- excuse me -- the plaintiff's Simon Bernstein irrevocable trust which is different from the Simon Bernstein Trust that's the beneficiary of the Simon Bernstein estate down here, and Ted Bernstein individually and the other plaintiffs answering the complaint filed by the estate. And requesting on page seven in the wherefore clause that the plaintiffs respectfully request that the Court deny any of the relief sought by the intervenor in their complaint and enter judgment against the intervenor and award plaintiffs their costs and such other relief.

THE COURT: Just give me one second.

MR. FEAMAN: Thank you.

(Claimant Stansbury's Exb. No. 5, Answer to Intervenor Complaint, United States District Court Northern District of Illinois.)

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THE COURT: I am sorry, I am having a problem with my computer again. Give me just one minute.

MR. FEAMAN: Exhibit 6 is a certified copy of the -- I am sorry, are you ready?

THE COURT: Yes, I am.

MR. FEAMAN: Thank you.

THE COURT: Exhibit 6 is a certified copy?

MR. FEAMAN: Of the deposition taken by the Estate of Simon Bernstein in the same action, United States District Court for the Northern District of Illinois of Ted Bernstein taken on May 6, 2015.

THE COURT: Okay.

(Claimant Stansbury's Exb. No. 6, Deposition of Ted Bernstein 5-6-15, United States District Court Northern District of Illinois.)

MR. FEAMAN: And the highlights of that deposition, Your Honor, are shown on the first page showing the style of the case and noting the appearances of counsel on behalf of Ted Bernstein in that action, Adam Simon of the Simon Law Firm, Chicago, Illinois, and Alan B. Rose, Esquire of the Mrachek Fitzgerald law firm of West Palm Beach, and James Stamos, the

15:45:48-15:46:21 Page 62

attorney for the Estate of Simon Bernstein in Chicago, Illinois.
I will not read it into the record. I will just read three excerpts into the record in the interests of time, although I am offering the entire thing.
THE COURT: Okay.
MR. FEAMAN: So that we don't go back and forth with I will read this, you read that. So I am offering it entirely, but I would highlight three excerpts.
MR. ROSE: Just with respect to the documents coming into evidence, it has yellow highlighting. Can he represent that he has yellow highlighted everywhere where my name appears?
MR. FEAMAN: Yes.
MR. ROSE: And therefore we don't have to bother with places like searching the record.
MR. FEAMAN: That's correct. I highlighted everybody's copy.
MR. ROSE: I have no objection.
THE COURT: Okay.
MR. ROSE: I just wanted the record to be clear that the yellow highlighting reflects the

15:46:28-15:47:59 Page 63

places where I either spoke or my name came up.
MR. FEAMAN: That's correct.
THE COURT: Okay.
MR. ROSE: Thank you, Your Honor.
MR. FEAMAN: The first subpart I was reading into the record would be beginning at page 63, line 20, statement by Mr. Rose. "This is Alan Rose, just for the record. Since I am Mr. Bernstein's personal counsel, he is not asserting the privilege as to communications of this nature as responded in your e-mail. He is asserting privilege to private communications he had one on one with Robert Spallina who he considered to be his counsel. That's the position for the record and that's why the privilege is being asserted."
The second -- although the ones I am going to read into the record are not all of them, but just three different examples. The second one would be at page 87, line six, statement by Mr. Rose. "I am going to object, instruct him not to answer based on communications he had with Mr. Spallina. But you can ask the question with regard to information that Spallina disseminated to third parties or."

15:48:52-15:50:53 Page 64

The next item is found on page 93, line one, "Objection to form."
THE COURT: Okay.
MR. FEAMAN: Next I will offer Exhibits 7 and 8 at the same time because they are related, and I will describe them for the record.
THE COURT: Exhibit 7 is. Thank you. And 8.
MR. FEAMAN: You are welcome.
Exhibit 7 is an e-mail from TheodoreKuyper@StamosTrucco.com, attorneys for the estate in the Chicago action, to Brian O'Connell or BOConnell@CiklinLubitz.com, with a copy to Peter Feaman and William Stansbury, enclosing a court ruling, dated January 31st, 2017, enclosing a court ruling. And in the last line saying in the interim, quote, we appreciate your comments regarding the Court's ruling.
And then Exhibit 8 is an e-mail from James Stamos, attorney for the estate in the Chicago action, sent Tuesday, February 14th, 2017, to Brian O'Connell, Peter Feaman, William Stansbury, saying, quote, See below. What is

15:51:10-15:52:02 Page 65

our position on settlement?, close quote. I think he is right about the likely trial setting this summer.
The e-mail response to an e-mail from counsel for the plaintiffs in the Chicago action that solicits information concerning a demand for settlement.
And we'll save comment and argument on those exhibits for final argument, Your Honor.
THE COURT: Okay.
(Claimant Stansbury's Exb. No. 7, E-mail, 1-31-2017, Theodore Kuyper to Brian O'Connell, etc.)
(Claimant Stansbury's Exb. No. 8, E-mail, 2-14-2017, James Stamos to Brian O'Connell, etc.)
MR. ELIOT BERNSTEIN: Your Honor?
MR. FEAMAN: Next --
MR. ELIOT BERNSTEIN: Sorry, thought you were done.
MR. FEAMAN: Next I would call Brian O'Connell to the stand.
THE COURT: Okay.
- - -
Thereupon,
BRIAN O'CONNELL,

15:52:20-15:59:22 Page 66

a witness, being by the Court duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Have a seat. Thank you very much.

Before we start I need six minutes to use the restroom. I will be back in six minutes.

(A recess was taken.)

THE COURT: All right. Call Mr. O'Connell. I apologize. Let's proceed.

MR. FEAMAN: Thank you, Your Honor.

DIRECT (BRIAN O'CONNELL)

BY MR. FEAMAN:

Q. Please state your name.

A. Brian O'Connell.

Q. And your business address?

A. 515 North Flagler Drive, West Palm Beach, Florida.

Q. And you are the personal representative, the successor personal representative of the Estate of Simon Bernstein; is that correct?

A. Yes.

Q. And I handed you during the break Florida Statute 733.602. Do you have that in front of you?

A. I do.

15:59:34-16:00:21 Page 67

Q. Would you agree with me, Mr. O'Connell, that as personal representative of the estate that you have a fiduciary duty to all interested persons of the estate?

A. To interested persons, yes.

Q. Okay. Are you aware that Mr. Stansbury, obviously, has a lawsuit against the estate, correct?

A. Correct.

Q. And he is seeking damages as far as you know in excess of $2 million dollars; is that correct?

A. Yes.

Q. Okay. And the present asset value of the estate excluding a potential expectancy in Chicago I heard on opening statement was around somewhere a little bit over $200,000; is that correct?

A. Correct.

Q. And --

A. Little over that.

Q. Okay. And you are aware that in Chicago the amount at stake is in excess of $1.7 million dollars, correct?

A. Yes.

Q. And if the estate is successful in that

16:00:35-16:01:33 Page 68

lawsuit then that money would come to the Estate of Simon Bernstein, correct?

A. Correct.

Q. And then obviously that would quintuple, if my math is correct, the assets that are in the estate right now; is that correct?

A. They would greatly enhance the value of the estate, whatever the math is.

Q. Okay. So would you agree that Mr. Stansbury is reasonably affected by the outcome of the Chicago litigation if he has an action against the estate in excess of two million?

A. Depends how one defines a claimant versus a creditor. He certainly sits in a claimant position. He has an independent action.

Q. Right.

A. So on that level he would be affected with regard to what happens in that litigation if his claim matures into an allowed claim, reduced to a judgment in your civil litigation.

Q. So if he is successful in his litigation, it would -- the result of the Chicago action, if it's favorable to the estate, would significantly increase the assets that he would be able to look to if he was successful either in the amount of

16:01:48-16:02:40 Page 69

300,000 or in an amount of two million?

A. Right. If he is a creditor or there's a recovery then certainly he would benefit from that under the probate code because then he would be paid under a certain priority of payment before beneficiaries.

Q. All right. And so then Mr. Stansbury potentially could stand to benefit from the result of the outcome of the Chicago litigation depending upon the outcome of his litigation against the estate?

A. True.

Q. Correct?

A. Yes.

Q. So in that respect would you agree that Mr. Stansbury is an interested person in the outcome of the estate in Chicago?

A. I think in a very broad sense, yes. But if we are going to be debating claimants and creditors then that calls upon certain case law.

Q. Okay.

A. But I am answering it in sort of a general financial sense, yes.

Q. Okay. We entered into evidence Exhibits 7 and 8 which were e-mails that were sent to you

16:02:56-16:03:53 Page 70

first by an associate in Mr. Stamos's office and --
MR. FEAMAN: Could I approach, Your Honor?
THE COURT: Yes. Do you have an extra copy for him so I can follow along?
MR. FEAMAN: I think I do.
THE COURT: Okay. If you don't, no worries. Let me know.
Does anyone object to me maintaining the originals so that I can follow along? If you don't --
MR. FEAMAN: I know we do.
MR. ROSE: If you need my copy to speed things up, here.
BY MR. FEAMAN:
Q. There's our copies of 7 and 8.
A. Which one did you want me to look at first?
Q. Take a look at the one that came first on January 31st, 2007. Do you see that that was an e-mail directed to you from is it Mr. Kuyper, is that how you pronounce his name?
A. Yes.
Q. Okay. On January 31st. Do you recall receiving this?
A. Let me take a look at it.

16:04:19-16:05:04 Page 71

Q. Sure.
A. I do remember this.
Q. All right. And did you have any discussions with Mr. Kuyper or Mr. Stamos concerning your comments regarding the Court's ruling which was denying the estate's motion for summary judgment?
A. There might have been another e-mail communication, but no oral communication since January.
Q. Did you send an e-mail back in response to this?
A. That I don't recall, and I don't have my records here.
Q. Okay.
A. I am not sure.
Q. Why don't we take a look at Exhibit 8, if we could. That's the e-mail from Mr. Stamos dated February 14th to you and me and Mr. Stansbury. Do you see that?
A. Yes.
Q. And he says, "What's our position on settlement?," correct?
A. Correct.
Q. Okay. And that's because Mr. Stamos had

16:05:19-16:06:06 Page 72

received an e-mail from plaintiff's counsel in Chicago soliciting some input on a possible settlement, correct?
A. Yes.
Q. And when you received this did you respond to Mr. Stamos either orally or in writing?
A. Not yet. I was in a mediation that lasted until 2:30 in the morning yesterday, so I haven't had a chance to speak to him.
Q. So then you haven't had any discussions with Mr. Stamos concerning settlement --
A. No.
Q. -- since this?
A. Not -- let's correct that. Not in terms of these communications.
Q. Right.
A. I have spoken to him previously about settlement, but obviously those are privileged that he is my counsel.
Q. Okay. And you are aware that -- would you agree with me that Mr. Ted Bernstein, who is in the courtroom today, is a plaintiff in that action in Chicago?
A. Which action?
Q. The Chicago filed, the action filed by

16:06:14-16:06:41 Page 73

Mr. Bernstein?
A. Can you give me the complaint?
Q. Sure.
MR. FEAMAN: If I can take a look?
THE COURT: Go ahead.
BY MR. FEAMAN:
Q. This is the --
MR. ROSE: We'll stipulate. The documents are already in evidence.
THE COURT: Same objection?
MR. ROSE: I mean, we are trying to save time.
BY MR. FEAMAN:
Q. Take a look at the third page.
(Overspeaking.)
THE COURT: Hold on. Hold on. Hold on. I have got everybody talking at once. It's Feaman's case. We are going until 4:30. I have already got one emergency in the, we call it the Cad, that means nothing to you, but I am telling you all right now I said we are going to 4:30.
THE WITNESS: Yes, sir, Ted Bernstein is a plaintiff.
///

16:06:57-16:07:32 Page 74

BY MR. FEAMAN:
Q. Individually, correct?
A. Individually and as trustee.
Q. And Mr. Stamos is your attorney who represents the estate, correct?
A. Correct.
Q. And the estate is adverse to the plaintiffs, including Mr. Bernstein, correct?
A. In this action, call it the Illinois action, yes.
Q. Correct.
A. Okay.
THE COURT: Hold on. One more time. Go back and say that again. You are represented by Mr. Stamos?
THE WITNESS: Right, in the Illinois action, Your Honor.
THE COURT: Right.
THE WITNESS: And Ted Bernstein individually and as trustee is a plaintiff.
THE COURT: Right, individually and as trustee, got it.
THE WITNESS: And the estate is adverse to Ted Bernstein in those capacities in that litigation.

16:07:37-16:08:34 Page 75

BY MR. FEAMAN:
Q. All right. And are you aware --
THE COURT: Thank you.
BY MR. FEAMAN:
Q. And are you aware that Mr. Rose represents Mr. Ted Bernstein in various capacities?
A. Yes.
Q. Generally?
A. In various capacities generally, right.
Q. Including individually, correct?
A. That I am not -- I know as a fiduciary, for example, as trustee from our various and sundry actions, Shirley Bernstein, estate and trust and so forth. I am not sure individually.
Q. How long have you been involved with this Estate of Simon Bernstein?
A. A few years.
Q. Okay. And as far as you know Mr. Bernstein has been represented in whatever capacity in all of this since that time; is that correct?
A. He is definitely -- Mr. Rose has definitely represented Ted Bernstein since I have been involved. I just want to be totally correct about exactly what capacity. Definitely as a fiduciary no doubt.
Q. Okay. And did you ever see the deposition that was taken by your lawyer in the Chicago action that was introduced as Exhibit 6 in this action?
A. Could I take a look at it?
Q. Sure. Have you seen that deposition before, Mr. O'Connell?
A. I am not sure. I don't want to guess. Because I know it's May of 2015. It's possible. There were a number of documents in all this litigation, and I would be giving you a guess.
Q. On that first page is there an appearance by Mr. Rose on behalf of Ted Bernstein in that deposition?
A. Yes.
Q. So would you agree with me that Ted Bernstein is adverse to the estate in the Chicago litigation? You said that earlier, correct?
A. Yes.
Q. Okay. And would you agree with me upon reviewing that deposition that Mr. Rose is representing Ted Bernstein there?
MR. ROSE: Objection, calls for a legal conclusion.
THE WITNESS: There's an appearance by him.
THE COURT: Sustained.
BY MR. FEAMAN:
Q. There's an appearance by him? Where does it show that?
MR. ROSE: The objection is sustained.
THE COURT: I sustained the objection.
MR. FEAMAN: Oh, okay. Sorry.
BY MR. FEAMAN:
Q. Now, you have not gotten -- you said that you wanted to retain Mr. Rose to represent the estate here in Florida, correct?
A. Yes. But I want to state my position precisely, which is as now has been pled that Ted Bernstein should be the administrator ad litem to defend that litigation. And then if he chooses, which I expect he would, employ Mr. Rose, and Mr. Rose would operate as his counsel.
Q. Okay. So let me get this, if I understand your position correctly. You think that Ted Bernstein, who you have already told me is suing the estate as a plaintiff in Chicago, it would be okay for him to come in to the estate that he is suing in Chicago to represent the estate as administrator ad litem along with his attorney

16:08:53-16:09:55 Page 76

16:09:59-16:11:05 Page 77

16:11:18-16:12:00 Page 78

Mr. Rose? Is that your position?
A. Here's why, yes, because of events. You have an apple and an orange with respect to Illinois. Mr. Rose and Ted Bernstein is not going to have any -- doesn't have any involvement in the prosecution by the estate of its position to those insurance proceeds. That's not on the table.
THE COURT: Say it again, Ted has no involvement?
THE WITNESS: Ted Bernstein and Mr. Rose have no involvement in connection with the estate's position in the Illinois litigation, Your Honor. I am not seeking that. If someone asked me that, I would say absolutely no.
BY MR. FEAMAN:
Q. I am confused, though, Mr. O'Connell. Isn't Ted Bernstein a plaintiff in the insurance litigation?
A. Yes.
Q. Okay. And as plaintiff in that insurance litigation isn't he seeking to keep those insurance proceeds from going to the estate?
A. Right.
Q. Okay.
A. Which is why the estate has a contrary

16:12:11-16:12:52 Page 79

position --
Q. So if the estate --
(Overspeaking.)
THE COURT: Let him finish his answer.
THE WITNESS: It's my position as personal representative that those proceeds should come into the estate.
BY MR. FEAMAN:
Q. Correct.
A. Correct.
Q. And it's Mr. Bernstein's position both individually and as trustee in that same action that those proceeds should not come into the estate?
A. Right.
Q. Correct? And Mr. Bernstein is not a monetary beneficiary of the estate, is he?
A. As a trustee he is a beneficiary, residuary beneficiary of the estate. And then he would be a beneficiary as to tangible personal property.
Q. So on one hand you say it's okay for Mr. Bernstein to be suing the estate to keep the estate from getting $1.7 million dollars, and on the other hand it's okay for him and his attorney

16:13:07-16:13:56 Page 80

to defend the estate. So let me ask you this --
A. That's not what I am saying.
Q. Okay. Well, go back to Exhibit 8, if we could.
A. Which one is Exhibit 8?
Q. That's the e-mail from Mr. Stamos that you got last week asking about settlement.
A. The 31st?
Q. Right.
A. Well, actually the Stamos e-mail is February 14th.
Q. Sorry, February 14th. And Mr. Rose right now has entered an appearance on behalf of the estate, correct?
A. You have to state what case.
Q. Down here in Florida.
A. Which case?
Q. The Stansbury action.
A. The civil action?
Q. Yes.
A. Yes. You need to be precise because there's a number of actions and various jurisdictions and various courts.
Q. And Mr. Rose's client in Chicago doesn't want any money to go to the estate. So when you

16:14:16-16:15:02 Page 81

are discussing settlement with Mr. Stamos, are you going to talk to your other counsel, Mr. Rose, about that settlement when he is representing a client adverse to you?
A. No.
Q. How do we know that?
A. Because I don't do that and have not done that.
Q. So you --
A. Again, can I finish, Your Honor?
THE COURT: Yes, please.
THE WITNESS: Thanks. Because there's a differentiation you are not making between these pieces of litigation. You have an Illinois litigation pending in federal court that has discrete issues as to who gets the proceeds of a life insurance policy. Then you have what you will call the Stansbury litigation, you represent him, your civil action, pending in circuit civil, your client seeking to recover damages against the estate.
BY MR. FEAMAN:
Q. So Mr. Rose could advise you as to terms of settlement, assuming he is allowed to be counsel for the estate in the Stansbury action down here,

16:15:13-16:16:08 Page 82

correct?
A. About the Stansbury action?
Q. Right, about how much we should settle for, blah, blah, blah?
A. That's possible.
Q. Okay. And part of those settlement discussions would have to entail how much money is actually in the estate, correct?
A. Depends on what the facts and circumstances are. Right now, as everyone knows I think at this point, there isn't enough money to settle, unless Mr. Stansbury would take less than what is available. There have been attempts made to settle at mediations and through communications which haven't been successful. So certainly I am not as personal representative able or going to settle with someone in excess of what's available.
Q. Correct. But the outcome of the Chicago litigation could make more money available for settlement, correct?
A. It it's successful it could.
Q. Okay. May be a number that would be acceptable to Mr. Stansbury, I don't know, that's conjecture, right?
A. Total conjecture.

16:16:16-16:17:03 Page 83

Q. Okay.
A. Unless we are going to get into what settlement discussions have been.
Q. And at the same time Mr. Rose, who has entered an appearance at that deposition for Mr. Bernstein in the Chicago action, his client has an interest there not to let that money come into the estate, correct?
MR. ROSE: Objection again to the extent it calls for a legal conclusion as to what I did in Chicago. I mean, the records speak for themselves.
THE COURT: Could you read back the question for me?
(The following portion of the record was read back.)
"Q. And at the same time Mr. Rose, who has entered an appearance at that deposition for Mr. Bernstein in the Chicago action, his client has an interest there not to let that money come into the estate, correct?"
THE COURT: I am going to allow it as the personal representative his impressions of what's going on, not as a legal conclusion because he is also a lawyer.

16:17:17-16:17:55 Page 84

THE WITNESS: My impression based on stated positions is that Mr. Ted Bernstein does not want the life insurance proceeds to come into the probate estate of Simon Bernstein. That's what he has pled.
BY MR. FEAMAN:
Q. Right. And you disagree with Mr. Ted Bernstein on that, correct?
A. Yes.
MR. FEAMAN: Thank you.
CROSS (BRIAN O'CONNELL)
BY MR. ROSE:
Q. And notwithstanding that disagreement, you still believe that --
MR. ROSE: I thought he was done, I am sorry.
MR. ELIOT BERNSTEIN: Are you done, Peter?
MR. FEAMAN: No, I am not, Your Honor.
MR. ROSE: I am sorry, Your Honor.
THE COURT: That's okay. I didn't think that you were trying to.
MR. FEAMAN: Okay. We'll rest.
THE COURT: All right.
MR. FEAMAN: Not rest. No more questions.
MR. ELIOT BERNSTEIN: Excuse me, Your

16:18:02-16:18:48 Page 85

Honor.
BY MR. ROSE:
Q. And notwithstanding the fact that in Illinois Ted as the trustee of this insurance trust wants the money to go into this 1995 insurance trust, right?
A. Right.
Q. And he has got an affidavit from Spallina that says that's what Simon wanted, or he's got some affidavit he filed, whatever it is? And you have your own lawyer up there Stamos and Trucco, right?
A. Correct.
Q. And not withstanding that, you still believe that it's in the best interests of the estate as a whole to have Ted to be the administrator ad litem and me to represent the estate given our prior knowledge and involvement in the case, right?
A. It's based on maybe three things. It's the prior knowledge and involvement that you had, the amount of money, limited amount of funds that are available in the estate to defend the action, and then a number of the beneficiaries, or call them contingent beneficiaries because they are

16:19:03-16:19:46 Page 86

trust beneficiaries, have requested that we consent to what we have just outlined, ad litem and your representation, those items.

Q. And clearly you are adverse to Mr. Stansbury, right?

A. Yes.

Q. But in this settlement letter your lawyer in Chicago is copying Mr. Stansbury and Mr. Feaman about settlement position, right?

A. Correct.

Q. Because that's the deal we have, Mr. Stansbury is funding litigation in Illinois and he gets to sort of be involved in it and have a say in it, how it turns out? Because he stands to improve his chances of winning some money if the Illinois case goes the way he wants, right?

A. Well, he is paying, he is financing it.

Q. So he hasn't paid in full, right? You know he is $40,000 in arrears with the lawyer?

A. Approximately, yes.

Q. And there's an order that's already in evidence, and the judge can hear that later, but -- okay. So --

THE COURT: I don't have an order in evidence.

16:19:55-16:20:16 Page 87

MR. ROSE: You do. If you look at Exhibit Number 2, page --

THE COURT: Oh, in the Illinois?

MR. ROSE: Yes, they filed it in Illinois.

THE COURT: Oh, in the Illinois.

MR. ROSE: But it's in evidence now, Your Honor.

THE COURT: Yes, I am sorry, I didn't realize it was in --

MR. ROSE: I am sorry.

THE COURT: No, no, that's okay.

MR. ROSE: I was going to save it for closing.

THE COURT: In the Illinois is the Florida order?

MR. ROSE: Yes.

THE COURT: Okay. That's the only thing I missed.

MR. ROSE: Right.

BY MR. ROSE:

Q. The evidence it says for the reasons and subject to the conditions stated on the record during the hearing, all fees and costs incurred, including for the curator in connection with his work, and any counsel retained by the administrator ad litem will initially be borne by William Stansbury. You have seen that order before, right?

A. I have seen the order, yes.

Q. And the Court will consider a petition to pay back Mr. Stansbury. If the estate wins in Illinois, we certainly have to pay back Mr. Stansbury first because he has fronted all the costs, right?

A. Absolutely.

Q. Okay. So despite that order, you have personal knowledge that he is $40,000 in arrears with the Chicago counsel?

A. I have knowledge from my counsel.

Q. Okay. That you shared with me, though?

A. Yes. It's information everyone has.

Q. Okay.

A. Should have.

Q. Would you agree with me that you have spent almost no money defending the estate so far in the Stansbury litigation?

A. Well, there's been some money spent. I wouldn't say no money. I have to look at the billings to tell you.

Q. Very minimal. Minimal?

A. Not a significant amount.

16:21:26-16:22:05 Page 89

Q. Okay. Minimal in comparison to what it's going to cost to try the case?

A. Yes.

Q. Have you had the time to study all the documents, the depositions, the exhibits, the tax returns, and all the stuff that is going to need to be dealt with in this litigation?

A. I have reviewed some of them. I can't say reviewed all of them because I would have to obviously have the records here to give you a correct answer on that.

Q. And you bill for your time when you do that?

A. Sure.

Q. And if Ted is not the administrator ad litem, you are going to have to spend money to sit through a two-week trial maybe?

A. Yes.

Q. You are not willing to do that for free, are you?

A. No.

Q. Okay. Would you agree with me that you know nothing about the relationship, personal knowledge, between Ted, Simon and Bill Stansbury, personal knowledge? Were you in any of the

16:22:11-16:22:45 Page 90

meetings between them?
A. No, not personal knowledge.
Q. Were you involved in the business?
A. No.
Q. Do you have any idea who the accountant -- well, you know who the accountant was because they have a claim. Have you ever spoken to the accountant about the lawsuit?
A. No.
Q. Have you ever interviewed any witnesses about the lawsuit independent of maybe talking to Mr. Stansbury and saying hello and saying hello to Ted?
A. Or talking to different parties, different family members.
Q. Now, did you sign a waiver, written waiver form?
A. Yes.
Q. And did you read it before you signed it?
A. Yes.
Q. Did you edit it substantially and put it in your own words?
A. Yes.
Q. Much different than the draft I prepared?
A. Seven pages shorter.

16:22:54-16:23:39 Page 91

MR. ROSE: Okay. I move Exhibit 1 into evidence. This is the three-page PR statement of his position.
MR. FEAMAN: Objection, it's cumulative and it's hearsay.
THE COURT: This is his affidavit, his sworn consent?
MR. ROSE: Right. It's not cumulative. It's the only evidence of written consent.
THE COURT: How is it cumulative? That's what I was going to say.
MR. FEAMAN: He just testified as to why he thinks there's no conflict.
THE COURT: But a written consent is necessary under the rules, and that's been raised as an issue.
MR. FEAMAN: The rule says that --
THE COURT: I mean, whether you can waive is an issue, and I think that specifically under four point -- I am going to allow it. Overruled.
MR. ELIOT BERNSTEIN: Can I object?
THE COURT: Sure.
MR. ELIOT BERNSTEIN: That just came on February 9th to me.

16:23:43-16:24:39 Page 92

THE COURT: Okay.
MR. ELIOT BERNSTEIN: They didn't copy me on this thing. I just saw it.
THE COURT: Okay.
MR. ELIOT BERNSTEIN: Which kind of actually exposes a huge fraud going on here. But I will get to that when I get a moment. It shouldn't be in. I hardly had time to review it. And I will explain some of that in a moment, but.
THE COURT: I am overruling that objection. All documents were supposed to be provided by the Court pursuant to my order by February 9th. This is a waiver of any potential conflict that's three pages. And if you got it February 9th you had sufficient time. So overruled.
I am not sure what to call this, petitioner's or respondent's, in this case. I am going to mark these as respondent's.
MR. ROSE: You can call it Trustee's 1.
THE COURT: I could do that. Let me mark it.
(Trustee's Exb. No. 1, Personal Representative Position Statement.)

16:24:49-16:25:51 Page 93

BY MR. ROSE:
Q. I think you alluded to it. But after the mediation that was held in July, there were some discussions with the beneficiaries, including Judge Lewis who's a guardian ad litem for three of the children, correct?
A. Yes.
Q. And you were asked if you would consent to this procedure of having me come in as counsel because --
THE COURT: I know you are going fast, but you didn't pre-mark it, so you got to give me a second to mark it.
MR. ROSE: Oh, I am sorry.
THE COURT: That's okay.
I have to add it to my exhibit list.
You may proceed, thank you.
BY MR. ROSE:
Q. You agreed to this procedure that I would become counsel and Ted would become the administrator ad litem because you thought it was in the best interests of the estate as a whole, right?
A. For the reasons stated previously, yes.
Q. And other than having to go through this

16:26:02-16:26:39 Page 94

expensive procedure to not be disqualified, you still agree that it's in the best interests of the estate that our firm be counsel and that Ted Bernstein be administrator ad litem?
A. For the defense of the Stansbury civil action, yes.
Q. And that's the only thing we are asking to get involved in, correct?
A. Correct.
Q. Now, you were asked if you had a fiduciary duty to the interested persons including Mr. Stansbury, right?
A. I was asked that, yes.
Q. So if you have a fiduciary duty to him, why don't you just stipulate that he can have a two and a half million dollar judgment and give all the money in the estate to him? Because just because you have a duty, you have multiple duties to a lot of people, correct?
A. Correct.
Q. And you have to balance those duties and do what you believe in your professional judgment is in the best interests of the estate as a whole?
A. Correct.
Q. And you have been a lawyer for many years?

16:26:51-16:27:33 Page 95

A. Yes.
Q. Correct? And you have served as trustee as a fiduciary, serving as a fiduciary, representing a fiduciary, opposing fiduciary, that's been the bulk of your practice, correct?
A. Yes, yes and yes.
MR. ROSE: Nothing further.
THE COURT: Redirect?
MR. FEAMAN: Yes.
THE COURT: Wait a minute. Let me let Mr. Eliot Bernstein ask any questions.
MR. ELIOT BERNSTEIN: Can I ask him questions at one point?
THE COURT: You can.
MR. ELIOT BERNSTEIN: Your Honor, first, I just wanted to give you this and apologize for being late.
THE COURT: Don't worry about it. Okay.
MR. ELIOT BERNSTEIN: Well, no, it's important so you understand some things.
I have got ten steel nails in my mouth so I speak a little funny right now. It's been for a few weeks. I wasn't prepared because I am on a lot of medication, and that should explain that. But I still got some questions

16:27:43-16:28:19 Page 96

and I would like to have my....
MR. ROSE: I would just state for the record that he has been determined to have no standing in the estate proceeding as a beneficiary.
THE COURT: I thought that was in the Estate of Shirley Bernstein.
MR. ROSE: It's the same ruling -- (Overspeaking.)
THE COURT: Please, I will not entertain more than one person.
MR. ROSE: By virtue of Judge Phillips' final judgment upholding the documents, he is not a beneficiary of the residuary estate. He has a small interest as a one-fifth beneficiary of tangible personal property, which is --
THE COURT: I understand.
MR. ROSE: Yes, he has a very limited interest in this. And I don't know that he --
THE COURT: Wouldn't that give him standing, though?
MR. ROSE: Well, I don't think for the purposes of the disqualification by Mr. Feaman it wouldn't.
THE COURT: Well, that would be your

16:28:26-16:28:51 Page 97

argument, just like you are arguing that Mr. Stansbury doesn't have standing to disqualify you, correct?
MR. ROSE: Right.
THE COURT: So that's an argument you can raise.
You may proceed.
CROSS (BRIAN O'CONNELL)
BY MR. ELIOT BERNSTEIN:
Q. Mr. O'Connell, am I a devisee of the will of Simon?
MR. ROSE: Objection, outside the scope of direct.
THE COURT: That is true. Sustained. That was not discussed.
BY MR. ELIOT BERNSTEIN:
Q. Do I have standing in the Simon estate case --
MR. ROSE: Objection, calls for a legal conclusion.
BY MR. ELIOT BERNSTEIN:
Q. -- in your opinion?
MR. ELIOT BERNSTEIN: Well, he is a fiduciary.
THE COURT: He was asked regarding his

16:29:01-16:29:37 Page 98

thoughts regarding a claimant, so I will allow it. Overruled.

THE WITNESS: You have standing in certain actions by virtue of your being a beneficiary of the tangible personal property.

BY MR. ELIOT BERNSTEIN:

Q. Okay, so beneficiary?

A. Right.

Q. Okay. Thank you. Which will go to the bigger point of the fraud going on here, by the way.

Are you aware that Ted Bernstein is a defendant in the Stansbury action?

A. Which Stansbury action?

Q. The lawsuit that Mr. Rose wants Ted to represent the estate in?

A. I'd have to see the action, see the complaint.

Q. You have never seen the complaint?

A. I have seen the complaint, but I want to make sure it's the same documents.

Q. So Ted --

THE COURT: You must allow him to answer the questions.

MR. ELIOT BERNSTEIN: I am sorry, okay.

16:29:45-16:30:19 Page 99

THE WITNESS: I would like to see if you are referring to Ted Bernstein being a defendant, if someone has a copy of it.

MR. ROSE: Well, I object. Mr. Feaman knows that he has dismissed the claims against all these people, and this is a complete waste. We have a limited amount of time and these are very important issues.

MR. ELIOT BERNSTEIN: Excuse me.

THE COURT: Wait.

MR. ROSE: These defendants they are dismissed, they are settled. Mr. Feaman knows because he filed the paper in this court.

THE COURT: Mr. Rose.

MR. ROSE: It's public record.

THE COURT: Mr. Rose, you are going to have to let go of the -- it's going to finish by 4:30.

MR. ROSE: Okay.

THE COURT: Because I know that's why you are objecting, and you know I have to allow --

MR. ROSE: Okay.

THE COURT: All right? The legal objection is noted. Mr. O'Connell can respond. He asked to see a document.

16:30:28-16:31:01 Page 100

BY MR. ELIOT BERNSTEIN:

Q. I would like to show you --

THE DEPUTY: Ask to approach, please.

MR. ELIOT BERNSTEIN: Oh, ask to.

BY MR. ELIOT BERNSTEIN:

Q. Can I approach you?

THE COURT: What do you want to approach with?

MR. ELIOT BERNSTEIN: I just want to show him the complaint.

THE COURT: Complaint? As long as you show the other side what you are approaching with.

MR. ELIOT BERNSTEIN: It's your second amended complaint.

MR. ROSE: No objection.

BY MR. ELIOT BERNSTEIN:

Q. Is Ted Bernstein a defendant in that action?

A. I believe he was a defendant, past tense.

Q. Okay. Let me ask you a question. Has the estate that you are in charge of settled with Ted Bernstein?

A. In connection with this action?

MR. ROSE: Objection, relevance.

16:31:07-16:31:37 Page 101

BY MR. ELIOT BERNSTEIN:

Q. Yes, in connection with this action?

THE COURT: Which action?

MR. ELIOT BERNSTEIN: The Stansbury lawsuit that Ted wants to represent.

THE COURT: If he can answer.

MR. ELIOT BERNSTEIN: This is the conflict that's the elephant in the room.

THE COURT: No, no, no.

MR. ELIOT BERNSTEIN: Okay.

THE COURT: I didn't allow anyone else to have any kind of narrative.

MR. ELIOT BERNSTEIN: Sorry.

THE COURT: Ask a question and move on.

MR. ELIOT BERNSTEIN: Got it.

THE COURT: Mr. O'Connell, if you can answer the question, answer the question.

THE WITNESS: Sure. Thanks, Your Honor. I am going to give a correct answer. We have not had a settlement in connection with Ted Bernstein in connection with what I will call the Stansbury independent or civil action.

BY MR. ELIOT BERNSTEIN:

Q. Okay. So that lawsuit --

A. The estate has not entered into such a

16:31:52-16:32:41 Page 102

settlement.
Q. So Stansbury or Ted Bernstein is still a defendant because he sued the estate and the estate hasn't settled with him and let him out?
A. The estate prior to -- I thought you were talking about me, my involvement. Prior to my involvement there was a settlement.
Q. With Shirley's trust, correct?
A. No, I don't recall there being --
Q. Well, you just --
THE COURT: Wait. You have to let him answer.
MR. ELIOT BERNSTEIN: Sorry, okay.
THE WITNESS: I recall there being a settlement again prior to my involvement with Mr. Stansbury and Ted Bernstein.
BY MR. ELIOT BERNSTEIN:
Q. But not the estate? The estate as of today hasn't settled the case with Ted?
A. The estate, the estate, my estate, when I have been personal representative, we are not in litigation with Ted. We are in litigation with Mr. Stansbury. That's where the disconnect is.
Q. In the litigation Ted is a defendant, correct?

16:32:55-16:33:47 Page 103

A. I have to look at the pleadings. But as I recall the claims against Ted Bernstein were settled, resolved.
Q. Only with Mr. Stansbury in the Shirley trust and individually.
So let me ask you --
THE COURT: You can't testify.
MR. ELIOT BERNSTEIN: Okay.
BY MR. ELIOT BERNSTEIN:
Q. Ted Bernstein, if you are representing the estate, there's a thing called shared liability, meaning if Ted is a defendant in the Stansbury action, which he is, and he hasn't been let out by the estate, then Ted Bernstein coming into the estate can settle his liability with the estate. You following? He can settle his liability by making a settlement that says Ted Bernstein is out of the lawsuit, the estate is letting him out, we are not going to sue him. Because the estate should be saying that Ted Bernstein and Simon Bernstein were sued.
THE COURT: I am sorry, Mr. Bernstein, I am trying to give you all due respect.
MR. ELIOT BERNSTEIN: Okay.
THE COURT: But is that a question?

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MR. ELIOT BERNSTEIN: Yeah, okay.
THE COURT: I can't --
MR. ELIOT BERNSTEIN: I will break it down, because it is a little bit complex, and I want to go step by step.
THE COURT: Thank you. And we will be concluding in six minutes.
MR. ELIOT BERNSTEIN: Then I would ask for a continuance.
THE COURT: We will be concluding in six minutes.
MR. ELIOT BERNSTEIN: Okay.
THE COURT: Ask what you can.
MR. ELIOT BERNSTEIN: Okay.
BY MR. ELIOT BERNSTEIN:
Q. Ted Bernstein was sued by Mr. Stansbury with Simon Bernstein; are you aware of that?
A. I am aware of the parties to the second amended complaint that you have handed me.
Q. Okay.
A. At that point in time.
Q. So both those parties share liability if Stansbury wins, correct?
MR. ROSE: Objection.
THE WITNESS: No.

16:34:38-16:35:17 Page 105

THE COURT: Hold on.
MR. ROSE: Objection, calls for a legal conclusion, misstates the law and the facts.
MR. ELIOT BERNSTEIN: Well, if Mr. Stansbury won his suit and was suing Ted Bernstein --
THE COURT: Hold on one second. Hold on, please. You have got to let me rule. I don't mean to raise my voice at all.
But his question in theory is appropriate. He says they are both defendants, they share liability. Mr. O'Connell can answer that. The record speaks for itself.
THE WITNESS: And the problem, Your Honor, would be this, and I will answer the question, but I am answering it in the blind without all the pleadings. Because as I -- I will give you the best answer I can without looking at the pleadings.
THE COURT: You can only answer how you can.
THE WITNESS: As I recall the state of this matter, sir, this is the independent action, the Stansbury action, whatever you want to call it, Ted Bernstein is no longer a

16:35:29-16:36:07 Page 106

defendant due to a settlement.
BY MR. ELIOT BERNSTEIN:
Q. He only settled with Mr. Stansbury, correct? The estate, as you said a moment ago, has not settled with Ted Bernstein as a defendant. So the estate could be --
THE COURT: Mr. Bernstein, Mr. Bernstein.
MR. ELIOT BERNSTEIN: Uh-huh.
THE COURT: From the pleadings the Court understands there is not a claim from the estate against Ted Bernstein in the Stansbury litigation. Is the Court correct?
MR. ELIOT BERNSTEIN: The Court is correct.
THE COURT: Okay.
MR. ELIOT BERNSTEIN: But the estate, if Mr. O'Connell was representing the beneficiaries properly, should be suing Ted Bernstein because the complaint alleges that he did most of the fraud against Mr. Stansbury, and my dad was just a partner.
THE COURT: Okay. So that's your argument, I understand.
MR. ELIOT BERNSTEIN: Okay.
THE COURT: But please ask the questions

16:36:15-16:36:48 Page 107

pursuant to the pleadings as they stand.
MR. ELIOT BERNSTEIN: Okay.
BY MR. ELIOT BERNSTEIN:
Q. Could the estate sue Ted Bernstein since he is a defendant in the action who has shared liability with Simon Bernstein?
MR. ROSE: Objection, misstates -- there's no such thing as shared liability.
THE COURT: He can answer the question if he can.
MR. ROSE: Okay.
THE WITNESS: One of the disconnects here is that he is not a current beneficiary in the litigation as you just stated.
MR. ELIOT BERNSTEIN: There's no beneficiary in that litigation.
THE COURT: Okay. You can't answer again.
MR. ELIOT BERNSTEIN: Oh.
THE COURT: Remember, you have got to ask questions.
THE WITNESS: Defendant, Your Honor, wrong term. He is not a named defendant at this point due to a settlement.
BY MR. ELIOT BERNSTEIN:
Q. Could the estate sue back a

16:37:05-16:37:57 Page 108

counter-complaint to Ted Bernstein individually who is alleged to have committed most of the egregious acts against Mr. Stansbury? He is a defendant in the action. Nobody settled with him yet from the estate. Could you sue him and say that half of the liability, at least half, if not all, is on Ted Bernstein?
A. Anyone, of course, theoretically could sue anyone for anything. What that would involve would be someone presenting in this case me the facts, the circumstances, the evidence that would support a claim by the estate against Ted Bernstein. That I haven't seen or been told.
Q. Okay. Mr. Stansbury's complaint, you see Ted and Simon Bernstein were sued. So the estate could meet the argument, correct, that Ted Bernstein is a hundred percent liable for the damages to Mr. Stansbury, correct?
A. I can't say that without having all the facts, figures, documents --
Q. You haven't read this case?
A. -- in front of me. Not on that level. Not to the point that you are -- not to the point that you are --
Q. Let me ask you a question.

16:38:04-16:38:29 Page 109

A. -- trying to.
MR. ROSE: Your Honor?
BY MR. ELIOT BERNSTEIN:
Q. Let me ask you a question.
THE COURT: Hold on one second, sir.
MR. ROSE: He is not going to finish in two minutes and there are other things we need to address, if we have two minutes left. So can he continue his cross-examination at the continuance?
THE COURT: March we have another hearing.
MR. ELIOT BERNSTEIN: Can we continue this hearing?
THE COURT: Yes. But I am going to give you a limitation. You get as much time as everybody else has.
MR. ELIOT BERNSTEIN: That's fine.
THE COURT: You have about ten more minutes when we come back.
MR. ELIOT BERNSTEIN: Okay. Can I submit to you the binder that I filed late?
THE COURT: Sure.
MR. ELIOT BERNSTEIN: (Overspeaking).
THE COURT: As long as it has been -- has it been filed with the Court and has everybody

16:38:40-16:39:16 Page 110

gotten a copy?
MR. ELIOT BERNSTEIN: I sent them copies and I brought them copies today.
THE COURT: As long as everybody else gets a copy --
MR. ELIOT BERNSTEIN: Okay.
THE COURT: -- you can submit the binder. Just give it to my deputy.
MR. ROSE: Your Honor, we had a couple of other -- I mean, he can continue it but we have limited time. There is a summary judgment hearing set for next week in this case. So right now -- not this case, Your Honor, I mean the Stansbury case.
THE COURT: Oh, you did see the look in my face?
MR. ROSE: Right. No, I understand. So I am right now traveling under a court order that authorizes me to appear, but I would like to on the record I am not going to -- I think we need to cancel that hearing or advise Judge Marx, because I don't feel comfortable going forward in the light of this motion, no matter how frivolous I think it is, pending. That's why I would hope to get this concluded today.

16:39:23-16:40:00 Page 111

THE COURT: I understand.
MR. ROSE: But it's not anyone's fault. That's why I wanted to raise it in the minute we have. So I think we should either continue it or I would withdraw the motion without prejudice, whatever I need to do with Judge Marx. But I want Mr. Feaman's comment on the record.
MR. FEAMAN: I think it should be continued until there's a disposition of this.
MR. ELIOT BERNSTEIN: Yeah.
MR. ROSE: And then --
MR. FEAMAN: And in fact, that judge or that division, sorry, I didn't mean to interrupt, stayed all discovery in that case until this motion was heard, so.
THE COURT: I am trying.
MR. ROSE: No, I understand.
MR. FEAMAN: No, we are not.
MR. ROSE: The other thing is Mr. Feaman has represented this is the last witness. So I would think we would finish this hearing in a half an hour, and we have a couple hours set aside. And you were going to just state what other matters you were going to address.

16:40:11-16:41:00 Page 112

The one thing I wanted -- we had sent you in an order to -- at that same hearing if there's time to handle some just very mop-up motions in the Shirley Bernstein estate.
THE COURT: Let me see how long we have set for next time.
MR. ROSE: We have two hours on the 2nd.
THE COURT: All right. Here's what I want done. Within the first hour we are going to finish this motion. With all due respect, now I will have some time to review some of what you have given me, but I don't know if I will rule from the bench, so you are also going to have to give me time.
MR. ROSE: That's fine.
THE COURT: Thanks. I appreciate that.
MR. ROSE: I will tell Judge Marx that we need a continuance for let's say 45 days or something.
THE COURT: I need time to rule on that motion once I have everything. And we are just going to have to take things as they come. I mean, that's just how we'll have to do it. We have a lot of -- how can I put this -- positions being presented. And so, like I

16:41:08-16:41:36 Page 113

said, so, Mr. Eliot -- and I am only calling you that because there's a lot of Bernsteins in the room.
MR. ELIOT BERNSTEIN: That's okay.
THE COURT: It's not disrespectful, I am not trying to be, because I have two Bernsteins.
Mr. Eliot Bernstein.
MR. ELIOT BERNSTEIN: Yes.
THE COURT: So you will get ten more minutes.
MR. ELIOT BERNSTEIN: Okay.
THE COURT: Then Mr. Feaman will have his final say because it was his witness, on that witness.
MR. ELIOT BERNSTEIN: And then do I get to say something at some point?
THE COURT: You will get to say something at some point, yes.
MR. ELIOT BERNSTEIN: Thank you.
THE COURT: Okay. But we are going to wrap it all up within an hour.
MR. ELIOT BERNSTEIN: That one hearing?
THE COURT: Yes, the motion to disqualify and the motion to vacate.

16:41:45-16:42:37 Page 114

MR. ELIOT BERNSTEIN: Okay.
THE COURT: So the first hour -- and you can see I am pretty militant, because if not we are not going to get anything done here. So we are -- no, not yet. Then we are going to move on to the administrator ad litem motion which would be the next consecutive motion.
Yes?
MR. ELIOT BERNSTEIN: What day is that on?
THE COURT: March 2nd. I can give you an extra copy of the scheduling order if you would like.
MR. ELIOT BERNSTEIN: Okay. All I want to make the Court aware of here is I am dealing with a serious medical issue that I am telling you I am bleeding talking to you. It's very serious, and it has been for three weeks. And I just want to say I will let you know if I -- as soon as I can how long it's going to take. He has got to put in full. It's complicated. But I have had facial reconstruction and it takes time for the teeth to adjust once he puts. And I do not have teeth for three weeks, and these spikes are like nails in your mouth. So every talk tongue bite will hurt.

16:42:46-16:43:25 Page 115

THE COURT: You can --
MR. ELIOT BERNSTEIN: I will let you know if it's going to take any longer than that by say a week before that hearing, okay? And I will give you a doctor's note that it's still ongoing, et cetera. Because I can't -- I mean, the last three weeks they've bombarded me with all this stuff, not saying I wasn't prepared for it. But I have been severely stressed, as the letter indicates. I am on severe narcotics, heavy muscle relaxers that would make you a jellyfish. So just appreciate that.
THE COURT: I do.
MR. ELIOT BERNSTEIN: Okay. I appreciate that.
THE COURT: The Court appreciates what you have represented. We'll deal with it. Do you need an extra copy of the scheduling order?
MR. ELIOT BERNSTEIN: Me?
THE COURT: You.
MR. ELIOT BERNSTEIN: Oh, for March 2nd?
THE COURT: Yes.
MR. ELIOT BERNSTEIN: Can I get one, please?
THE COURT: I am trying to find it. I have so many papers.
MR. ELIOT BERNSTEIN: Did you serve it to me?
THE COURT: Me personally?
MR. ELIOT BERNSTEIN: Did somebody?
THE COURT: I have no idea. You should, actually yes.
MR. ELIOT BERNSTEIN: Is it today's order?
MR. FEAMAN: Yes, he is on the list.
THE COURT: He is on the service list. I double checked when you were late.
MR. ELIOT BERNSTEIN: I got it.
THE COURT: You did get it, okay. So you do have it. All right. Excellent.
Thank you everyone. I am taking -- you know what, Court's in recess. He has some of the exhibits in evidence. But I think he took Mr. Feaman's original e-mail.
MR. ROSE: We'll straighten it out, Your Honor.
THE COURT: Thank you. Court's in recess.
(Judge Scher exited the courtroom.)
MR. FEAMAN: Don't go off the record. Stay on the record. We have got to have custody of these original exhibits. We've got to know who's going to get them and all that.
MR. ROSE: Mr. Feaman, would you please check these and determine if they are your copies or the Court's copies? Thank you, sir.
MR. FEAMAN: This looks like a copy, copy, copy, original.
THE DEPUTY: This is for the Court.
MR. FEAMAN: I just want to go through it and make sure the Court has all the originals.
MR. ROSE: Those are the eight -- I handed Mr. Feaman the eight exhibits that he put in and the one exhibit that was trustee's exhibit.
MR. FEAMAN: The Court has all the exhibits.

(The proceedings adjourned at 4:46 p.m.)

C E R T I F I C A T E

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The State of Florida
County of Palm Beach

I, Lisa Mudrick, RPR, FPR, certify that I was authorized to and did stenographically report the foregoing proceedings, pages 1 through 117, and that the transcript is a true record.

Dated February 21, 2017.

LISA MUDRICK, RPR, FPR
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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PROBATE DIV. CASE NO. 502012CP004391XXXXNB (IH)

IN RE: ESTATE OF SIMON L. BERNSTEIN,
Deceased.
_____/

ORDER ON MOTION TO DISQUALIFY ATTORNEY ALAN ROSE AND LAW FIRM AND RELATED MOTIONS

THIS MATTER having come before this Honorable Court on February 16, 2017, upon Motion of Creditor, William E. Stansbury ("Stansbury"), to Disqualify Alan Rose ("Rose") and the law firm of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. ("Mrachek Fitzgerald") from representing the Personal Representative of the Estate of Simon L. Bernstein, and the Court, having heard argument of counsel, considered the evidence and reviewed the pertinent Court files,

IT IS ORDERED AND ADJUDGED as follows:

1. This Motion is governed by Rule 4-1.7 of the Rules Regulating the Florida Bar, and prevailing Florida law.

2. There are currently two related legal proceedings arising out of the Estate of Simon Bernstein:

A. *William E. Stansbury v. the Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida);

B. *Simon Bernstein Irrevocable Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation").

Findings of Fact

Pending Florida lawsuit against the Estate of Simon Bernstein

3. In the case styled *William E. Stansbury v. Estate of Simon Bernstein, et al.,* Case No. 50 2012 CA 013933 MB AA (Circuit Court, Palm Beach County, Florida), Stansbury is seeking to recover money damages against the Estate of Simon Bernstein arising out of a business relationship between Stansbury, Simon Bernstein, Ted Bernstein and others. The damages Stansbury claims are in excess of $2.5 million. This action was pending at the time of Simon Bernstein's death. Thereafter, the Personal Representative of the Estate of Simon Bernstein was substituted as the real party in interest, and the case is pending.

Pending Illinois lawsuit against the Estate of Simon Bernstein (the "Insurance Litigation")

4. The case styled *Simon Bernstein Irrevocable Insurance Trust Dtd. 6/21/95, Ted Bernstein, et al. v. Heritage Union Life Insurance Company, et al.,* Case No. 13 CV 3643, United States District Court for the Northern District of Illinois (the "Insurance Litigation"), was commenced after Simon Bernstein's death and seeks to have the Court determine who are the rightful owners of Simon Bernstein's $1.7 Million Dollar life insurance death benefit proceeds.

5. Ted Bernstein, individually, and as an alleged Trustee of a purported lost trust document, and others, as Plaintiffs, seek to recover the $1.7 Million Dollar life insurance proceeds for the ultimate benefit of Simon Bernstein's adult children.

6. The Estate of Simon Bernstein has intervened in the Insurance Litigation and seeks to recover the same $1.7 Million Dollar life insurance proceeds. Simon Bernstein's adult children are not monetary beneficiaries of the Estate.

7. In the Insurance Litigation, Ted Bernstein takes the position that a 1995 Insurance Trust existed, that the beneficiaries of that alleged Insurance Trust are Ted Bernstein and his siblings, Lisa Sue Friedstein, Pamela Beth Simon, Jill Iantoni and Eliot Bernstein (the "Bernstein Children").

8. In the Insurance Litigation, the Estate of Simon Bernstein, through Brian O'Connell, also seeks to recover the insurance proceeds for the Estate of Simon Bernstein on the grounds that no insurance trust exists, no trust document has been produced, and that the Estate of Simon Bernstein is the rightful beneficiary of the insurance proceeds.

9. This probate matter will remain pending, at least until the two above-mentioned Florida and Illinois cases are resolved.

Conclusions of Law

Alan Rose and the Mrachek Fitzgerald law firm represent Ted Bernstein, individually and in other capacities. Such representation by Rose and the Mrachek Fitzgerald law firm is in direct conflict with the interests of the Estate of Simon Bernstein.

10. Alan Rose and the Mrachek Fitzgerald law firm represent Ted Bernstein as Trustee of the Simon Trust, the sole residuary beneficiary of the Estate of Simon Bernstein. Additionally, Alan Rose also represents Ted Bernstein as his personal counsel in the Insurance Litigation in Illinois. He made an appearance on behalf of Ted Bernstein at the deposition of Mr. Bernstein taken on May 6, 2015, and made objections of record. Therefore, Alan Rose is representing a Party directly adverse to the Estate of Simon Bernstein.

11. Rule 4-1.7 of the Florida Rules of Professional Conduct governs conflicts of interest involving current clients. Currently, Rose and his law firm represent:

A. Ted Bernstein, individually, in the Insurance Litigation;

B. Ted Bernstein as Trustee of the Simon Bernstein Trust; and
C. The Personal Representative of the Estate of Simon Bernstein.

12. It is clear by the evidence in the record that under Rule 4-1.7(a), a lawyer must not represent a client, in this case the Estate of Simon Bernstein, if the representation of that client will be directly adverse to another client, in this case Ted Bernstein, in the Insurance Litigation. The allegations of the Illinois complaint and other pleadings there and the testimony of Brian O'Connell, Personal Representative of the Estate of Simon L. Bernstein, clearly put Ted Bernstein adverse to the Estate of Simon Bernstein. Therefore, Ted Bernstein's lawyers are disqualified from representing the Estate of Simon Bernstein under Rule 4-1.7.

Rose and his law firm's conflict of interest cannot be waived.

13. The conflict of interest between Alan Rose and his law firm and their representation of Ted Bernstein, and simultaneously, the interests of the Estate of Simon Bernstein cannot be waived. It is unreasonable for Rose and his firm to believe that they can provide the Estate of Simon Bernstein with competent and diligent representation while they are maintaining a position directly adverse to the Estate in the Illinois proceeding. *See, Anheuser-Busch Companies, Inc. v. Staples,* 125 So. 3d 309, 311 (Fla. 1st DCA 2013); *See also, Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010).

Stansbury has standing and the Court has inherent authority to disqualify counsel.

14. Stansbury is an interested party as he is a creditor of the Estate. Even if Stansbury lacked standing, this Court is obligated to disqualify counsel when a clear conflict of interest presents itself. *See, Kolb v. Levy*, 104 So. 2d 874 (Fla. 3d DCA 1958).

IT IS THEREFORE ORDERED AND ADJUDGED that for all of the foregoing reasons, Stanbury's Motion to Disqualify is hereby GRANTED. Alan Rose and the law firm of Mrachek,

Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. are hereby disqualified from further representation of the Estate of Simon Bernstein in the case styled *William E. Stansbury v. Ted Bernstein, et al,* Case. No. 50 2012 CA 013933 MB AA, Palm Beach County, Florida, or in any matter involving representation of the Estate.

DONE AND ORDERED in Palm Beach Gardens, Palm Beach County, Florida this ___ day of _____, 2017.

_____
ROSEMARIE SCHER, Probate Judge

Copies to:

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