

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

CASE NO.: 502012CP004391XXXXSB

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

Deceased.

ELIOT IVAN BERNSTEIN, PRO SE

Petitioner(s),

vs.

TESCHER & SPALLINA, P.A., (and all
parties associated and of counsel);
ROBERT L. SPALLINA (both personally
and professionally); DONALD R. TESCHER
(both personally and professionally);
THEODORE STUART BERNSTEIN (as alleged
personal representative, trustee, successor
trustee) (both personally and professionally);
et al.,

Respondent(s).

TRANSCRIPT OF PROCEEDINGS BEFORE

HONORABLE MARTIN COLIN

DATE: July 11, 2014

TIME: 1:35 p.m. - 4:22 p.m.

1 APPEARING ON BEHALF OF WILLIAM E. STANSBURY:

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6 PAGE, MRACHEK, FITZGERALD ROSE
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14 JOHN P. MORRISSEY, ESQ.
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WEST PALM BEACH, FL 33401

16 ELIOT I. BERNSTEIN, Pro se

17 ALSO PRESENT: CANDICE BERNSTEIN

18

19 BE IT REMEMBERED, that the following
20 proceedings were taken in the above-styled cause before
21 the Honorable MARTIN COLIN, at the Palm Beach County
22 Courthouse, 200 West Atlantic Avenue, Room 8, in the City
23 of Delray Beach, County of Palm Beach, State of Florida,
24 on July 11, 2014, to wit:

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1 P-R-O-C-E-E-D-I-N-G-S

2 - - - -

3 THE COURT: Okay. Thanks. Be seated.

4 All right. We're on the estate of Simon
5 Bernstein, 2012CP004391. We have a number of
6 people here. After everyone makes their
7 appearances, I'm going to have some preliminary
8 instructions, and then we'll start the
9 hearings.

10 So counsel, and then pro se's, make your
11 appearances. Start that side.

12 MR. PANKAUSKI: Good afternoon, Your Honor,
13 John Pankauski on behalf of Ted Bernstein.

14 MR. ROSE: Alan Rose on behalf of Ted
15 Bernstein.

16 MR. MORRISSEY: John Morrissey here on behalf
17 of Molly Simon, Alexander Bernstein, Eric
18 Bernstein and Michael Bernstein.

19 MR. BROWN: Ben Brown, as curator of the
20 estate.

21 MR. FEAMAN: Peter Feaman and Jeff Royer here
22 on behalf of William Stansbury.

23 MR. ELIOT BERNSTEIN: Eliot Bernstein, pro
24 se.

25 THE COURT: Okay. All right. So last time

1 we were here we went through a list of what we're
2 going to hear today. I think it's probably well
3 known, we're going to start with the motion to
4 disqualify counsel. Here are the following rules.
5 And I'm setting these rules, and these rules will
6 be enforced, because it seemed apparent from the
7 other times you folks were before me, especially
8 on UMC's, which are not structured, and are not
9 evidentiary hearings, that it, at times, got to be
10 a little bit of a free-for-all; people just spoke
11 when they wanted to speak, and they raised matters
12 that were not set for hearing. That has come to
13 an end. If any one of you violates what I say
14 now, I'm going to stop the hearing at the moment I
15 sense a violation, and, hopefully, it's not going
16 to be the case, and then I'm going to deal with
17 the violation right on the spot. So here are the
18 rules: One, the rules of evidence apply to this
19 hearing. If you don't know the rules of evidence,
20 that's too bad. But you have to know them. Okay.
21 If something is said, and you don't like the idea
22 that's said, you have to make the objection. The
23 objection should state objection and the legal
24 grounds. There are no speaking objections allowed
25 unless I tell you you can make a speaking

1 objection. If you don't know what that means, too
2 bad. These are evidentiary hearings. So the
3 moving party will go forward, present their
4 evidence. If the other side wants to object, make
5 an objection, as I've just indicated. Then there
6 can be a response to the moving party's relief.
7 And then there could be rebuttal. Just like it
8 takes place in civil proceedings. There is no
9 free-for-all. There is no just saying whatever
10 you feel like saying no matter what.

11 Okay. I think the first motion is Eliot
12 Bernstein's petition or motion to disqualify
13 counsel.

14 You're up, Mr. Bernstein.

15 MR. ELIOT BERNSTEIN: Okay. Can I make an
16 opening statement?

17 THE COURT: You may.

18 MR. ELIOT BERNSTEIN: Okay. First thing I
19 have, all my, what you would call, evidence has
20 been submitted in pleadings as -- to the court --
21 and served to all the people already. Do you
22 want -- he asked me if I wanted to submit this
23 into evidence. It's up to you. I'm probably only
24 going to use a few things of it.

25 THE COURT: Okay. All right. Because you're

1 pro se, I'll say again, what I think the lawyers
2 understood. Whatever you may have done may or may
3 not comply with the rules of evidence.

4 MR. ELIOT BERNSTEIN: Okay.

5 THE COURT: The hint is, it hasn't.

6 MR. ELIOT BERNSTEIN: Do I --

7 THE COURT: So -- let me finish. I'm not
8 going to give you any advisory opinions on how to
9 proceed with the case because this is a, you know,
10 a very hotly-contested hearing, and, you know,
11 we're all going to be treated the same way by me.
12 So you can't ask me if you have evidence in
13 already -- because we haven't already started the
14 hearing -- so the answer to it is, no. There is
15 no evidence in this hearing yet. We haven't even
16 started yet. We're starting it right now.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: Okay. So evidence can come in
19 the form of a document, or a witness. You have to
20 get it into evidence, though. You have to know
21 how to do that. And so my bailiff is correct, if
22 you want a document to come into evidence, then
23 you need to mark it, stamp it, and then make sure
24 the other side has a copy of it. A pleading is
25 not evidence. Pleadings and evidence are two

1 different things.

2 Okay. Opening statement.

3 MR. ELIOT BERNSTEIN: First, I'd like to
4 state for the record that I, Eliot Bernstein, have
5 never made a representation that I'd like to be
6 the successor PR of the estate and trusts of my
7 mother and father. Mr. Feaman and Mr. Stansbury
8 have endorsed me in one of their pleadings as a
9 candidate due to their perceived integrity of my
10 actions thus far in the matters. And as the only
11 beneficiary who has no involvement in any of the
12 egregious acts of bad faith and violations of law
13 that have taken place and been proven thus far in
14 these matters.

15 And I thank them profusely for their
16 support, but I decline due to, amongst other
17 things, the conflicts of interest that are now
18 inherent between the children of my parents,
19 Ted included, me included, and our children.
20 This is due to the fact that the beneficiaries
21 may either be the children or the
22 grandchildren, depending upon the court's final
23 disposition on the dispositive document and
24 which ones will prevail, that's due to the
25 fraud that's taken place by the former PR,

1 co-trustees, and counsel that have resigned
2 already and been removed, admits the fraud they
3 created.

4 I was advised by counsel Christine Yates
5 at Tripp Scott that I was conflicted in
6 these --

7 MR. ROSE: Objection.

8 THE COURT: Okay. Okay. Stop. Objection is
9 made. You need to stop. Grounds?

10 MR. ROSE: Relevancy in relation to the first
11 motion being heard.

12 THE COURT: Sustained.

13 Okay. Sustained.

14 MR. ELIOT BERNSTEIN: Okay.

15 THE COURT: So, Mr. Bernstein, focus --

16 MR. ELIOT BERNSTEIN: I mean --

17 THE COURT: No. No. Listen. Focus. I'm
18 doing the motion to disqualify.

19 MR. ELIOT BERNSTEIN: Okay. I did this for
20 all of them.

21 THE COURT: Okay. Yeah, but, see, that's not
22 a focus. So get -- it probably would be helpful
23 for you to get your motion in front of you.

24 Remember you have the burden of proof; you need to
25 be able to prove what you plead and have a legal

1 basis for it. And I need -- can someone give me a
2 courtesy copy of the motion to disqualify and any
3 written responses. Because I have a bunch of
4 papers and it will help me from not having to
5 search.

6 MR. ROSE: May I approach?

7 THE COURT: Sure.

8 MR. ROSE: There were two motions, Your
9 Honor. I think this is the second one; says
10 motion to remove Alan B. Rose, Esq. I think the
11 earlier one was an emergency one. I believe
12 that's the correct one.

13 THE COURT: All right. So -- okay.
14 Mr. Bernstein, the motion that counsel handed me
15 is called motion to remove Alan B. Rose, Esq. The
16 certificate of service date is June 24, 2014,
17 twenty-nine pages, plus an attachment. Is that
18 the motion?

19 MR. ELIOT BERNSTEIN: That's one of the two.

20 THE COURT: Okay. And the other one is...

21 MR. ELIOT BERNSTEIN: It's the emergency
22 motion you said you denied there is an emergency
23 to be heard.

24 THE COURT: All right. Let me see that one
25 as well. Do you have an extra copy?

1 MR. ROSE: I thought the one replaced the
2 other, I don't know if I have a copy.

3 THE COURT: He says it didn't, so I'm
4 going --

5 MR. ROSE: I do have a copy of it.

6 THE COURT: Is this a clean copy?

7 MR. ELIOT BERNSTEIN: Did you want that copy?

8 THE COURT: No. No, I mean, if you are using
9 it.

10 MR. ELIOT BERNSTEIN: Yeah, I am. Sorry.

11 THE COURT: Give it back.

12 MR. ROSE: May I approach, Your Honor?

13 THE COURT: Yeah.

14 MR. ROSE: I believe this is the earlier one,
15 the June 23rd.

16 THE COURT: Okay. Which one I denied as an
17 emergency, but I think Mr. Bernstein is correct,
18 it's allowed to proceed on a non-emergency basis,
19 but we're doing now disqualification. Okay. So,
20 Mr. Bernstein, let me -- time is of the essence,
21 we need to accomplish a lot, focus in on the
22 motion to disqualify. You want to -- I'll let you
23 make a clean opening statement on the motion to
24 disqualify.

25 MR. ELIOT BERNSTEIN: Okay. I believe that

1 Alan Rose should be disqualified as counsel
2 because he has worked intimately with the people
3 who he's replacing as counsel in these matters
4 from the beginning and onset to perpetrate a
5 series of frauds that have been discovered on the
6 court to change beneficiaries through a series of
7 documents that were presented to the court, to
8 counsel, Christine Yates, and others, all to
9 advance that fraud. He's been hired and retained
10 by those people. And he now is replacing the
11 people you've let go for the fraud. And it is in
12 everybody's best interests that all remnants of
13 the fraud be removed from the court, and any
14 parties involved in any advancement of such
15 documents, or the actual fraud to change the
16 beneficiaries and make distributions to improper
17 parties. Mr. Rose has been involved, I believe,
18 since day one of Tescher and Spallina that
19 resigned, counsel who resigned for those frauds,
20 et cetera.

21 That's my opening.

22 THE COURT: Okay. All right. I'll go now my
23 right to left. Opening by Stansbury side.

24 MR. FEAMAN: No position on this motion.

25 THE COURT: Okay. Mr. Brown, curator.

1 MR. BROWN: No position on this motion.

2 THE COURT: Mr. Rose or -- and/or
3 Mr. Pankauski, opening.

4 MR. ROSE: I think the motion is legally
5 insufficient and should be denied. And the facts
6 that you've just heard are not accurate. If you
7 want to start with the evidence, I think we should
8 go to the evidentiary part.

9 THE COURT: All right.
10 Opening?

11 MR. MORRISSEY: I have no opening.

12 THE COURT: All right. Your first witness.

13 MR. ELIOT BERNSTEIN: No witnesses.

14 THE COURT: Okay. You're moving into -- any
15 document into evidence?

16 MR. ELIOT BERNSTEIN: I do want to call a
17 witness. Can I call Alan Rose?

18 THE COURT: Yeah. Mr. Rose, come up here.

19 MR. ROSE: Can I have a paper to make a note?

20 THE COURT: Yeah, sure.

21 MR. ROSE: Not that I do, but my memory --

22 THE COURT: Witnesses are allowed to take
23 notes.

24 THEREUPON,

25 ALAN B. ROSE, ESQ.,

1 a witness herein being of lawful age, and being first
2 duly sworn in the above cause, testified on under oath
3 as follows:

4 THE COURT: Okay. Have a seat. Go ahead.

5 DIRECT EXAMINATION

6 BY MR. ELIOT BERNSTEIN

7 Q Mr. Rose, could you tell us when you -- what
8 brought you into this estate of Simon and Shirley, and by
9 who?

10 A In which capacity?

11 Q In all your capacities.

12 A Okay. My first involvement in the matters
13 was -- actually pre-dates any involvement in the
14 estate. I was retained by Ted Bernstein and several
15 companies to represent them in a civil action brought
16 by William Stansbury. I was not directly involved in
17 the estate proceedings at that time. There came a
18 point in time later when there was some minor overlap
19 in issues between the estate proceedings and the
20 representation in the Stansbury litigation, and so I
21 had some limited contact with Mr. Tescher, Mr. Spallina
22 because there were issues that were relevant to the
23 Stansbury litigation. At some point in January 2009 we
24 learned from a discussion that Mr. Tescher had with Ted
25 Bernstein that there had been a problem with some

1 documents. And from that point forward, Ted Bernstein
2 retained me to represent him in connection with these
3 estate proceedings. I think I had attended some estate
4 proceeding hearings, but not as Ted's counsel in these
5 proceedings at the time.

6 THE COURT: Okay. But I'm a little confused.
7 You say in January of 2009 you were hired by Ted
8 in connection with the estate of Simon Bernstein?

9 THE WITNESS: January 2014, Your Honor.

10 THE COURT: Okay. I thought you said January
11 of '09.

12 MR. ROSE: I meant to say January 9th of
13 2014, I'm sorry.

14 THE COURT: Okay. That makes more sense.
15 Go ahead. Next question.

16 BY MR. ELIOT BERNSTEIN

17 Q Did you attend a Palm Beach County Sheriff
18 investigation of Ted Bernstein in January of 2014?

19 A I attended an investigation as counsel for
20 Ted Bernstein. As part of the investigation I went
21 with him --

22 THE COURT: So is the answer yes?

23 THE WITNESS: I guess, yes.

24 BY MR. ELIOT BERNSTEIN

25 Q Did you make statements to the sheriff on that

1 day?

2 A I'm sure we spoke with him.

3 Q Who spoke with him?

4 A We had a -- the sheriff was doing an
5 investigation.

6 THE COURT: Okay. So listen to the question.
7 Answer the question asked. And there is no we
8 directed to you. You're you.

9 MR. ELIOT BERNSTEIN: Thank you, Your Honor.

10 THE WITNESS: Ted and I --

11 THE COURT: You're you. You're not Ted. He
12 asked the question what statements did you make.
13 And you need to listen, Mr. Rose, to the question.
14 This isn't a tricky process if you listen.

15 THE WITNESS: I thought the question was who
16 made the statements.

17 THE COURT: No, what statements did you make
18 to the sheriff?

19 THE WITNESS: I don't recall.

20 BY MR. ELIOT BERNSTEIN

21 Q Do you recall statements to the sheriff being
22 made that your client had taken inappropriate, improper
23 distributions of assets?

24 A No.

25 Q Are you aware that your client made statements

1 that he had never read the dispositive documents he was
2 operating under?

3 A I don't believe that's accurate of what was
4 said.

5 Is this hearsay, I mean?

6 THE COURT: Answer the question. No
7 objection. Go ahead.

8 THE WITNESS: Can I object?

9 THE COURT: You could. Okay. You can
10 object.

11 MR. ELIOT BERNSTEIN: Are you objecting as
12 your own pro se, counsel --

13 THE COURT: Hold on. Hold on. Hold it. I
14 run the objection show, not you, Mr. Bernstein.

15 THE WITNESS: I recalled the discussion where
16 Mr -- I think it was Detective Miller had asked
17 about -- well, see, I think it's --

18 THE COURT: Just answer the question as best
19 as you can, but listen to what the question is.
20 You want the question read back?

21 THE WITNESS: Sure.

22 THE COURT: Hold on. Mr. Reporter, please
23 read the question back.

24 (Record read)

25 THE WITNESS: No.

1 MR. ELIOT BERNSTEIN: Okay. Can I have him
2 read that into the record?

3 THE COURT: Read what into the record?

4 MR. ELIOT BERNSTEIN: Part of the Palm Beach
5 County Sheriff Office report.

6 THE COURT: Right now you're questioning him.

7 MR. ELIOT BERNSTEIN: Can I ask him to read
8 this statement from the sheriff's report?

9 THE COURT: I don't -- since I don't know
10 what you have or what you want to do, I can't
11 really answer you. You can ask him a question.

12 MR. ELIOT BERNSTEIN: Can I --

13 THE COURT: You can approach the witness.

14 MR. ELIOT BERNSTEIN: Okay. Thank you.

15 BY MR. ELIOT BERNSTEIN

16 Q Can you read that?

17 A Objection, hearsay, authenticity,
18 materiality.

19 THE COURT: He can show you a document for
20 the purposes of refreshing your recollection. Why
21 don't you read what -- don't speak about it --
22 read what he's showing you, and then tell me when
23 you're done reading it.

24 THE WITNESS: I've read it, Your Honor.

25 THE COURT: Now, take it back. Now you ask a

1 clean question.

2 BY MR. ELIOT BERNSTEIN

3 Q Did that refresh your memory about making
4 statements to the Palm Beach County Sheriff's?

5 A It refreshed my memory that we made
6 statements.

7 THE COURT: There is no we. You.

8 THE WITNESS: That I made a statement.

9 BY MR. ELIOT BERNSTEIN

10 Q Because it says --

11 THE COURT: Can't read it.

12 MR. ELIOT BERNSTEIN: I can't?

13 THE COURT: No. You can ask him a question,
14 but you just can't read it.

15 BY MR. ELIOT BERNSTEIN

16 Q Okay. Did you read the part where it says --

17 THE COURT: No, you can ask him a question.
18 Can't read the document. It's not in evidence.

19 BY MR. ELIOT BERNSTEIN

20 Q Okay.

21 THE COURT: You can say did you say this.

22 BY MR. ELIOT BERNSTEIN

23 Q Has Eliot Bernstein notified you that he will
24 be filing actions, both civil and criminal, against you?

25 A Eliot Bernstein has sent me a lot of e-mails.

1 He's actually sent e-mails to every single member of my
2 firm, secretary, legal assistant, paralegal,
3 threatening --

4 THE COURT: Okay. Mr. Rose, that's not the
5 question.

6 BY MR. ELIOT BERNSTEIN

7 Q Threatening what?

8 THE COURT: No. No. Stop, you two. You're
9 heading in the wrong direction. Listen to the
10 question. If it's not objected to, answer the
11 question.

12 THE WITNESS: Yes.

13 BY MR. ELIOT BERNSTEIN

14 Q Are you aware that Robert Spallina fabricated
15 documents, trust documents?

16 A I'm aware that Robert Spallina --

17 THE COURT: Yes or no, then you can explain.

18 THE WITNESS: Yes. Robert Spallina
19 fabricated a document. And that document was
20 brought to our attention, and we've taken
21 corrective action immediately with regard to it.

22 BY MR. ELIOT BERNSTEIN

23 Q What corrective actions?

24 A We demanded that Mr -- well, first of all,
25 when we first learned about it was on a Friday

1 afternoon in January. Mr. Bernstein contacted -- Ted
2 Bernstein contacted me. And I met with Ted Bernstein
3 Friday, Saturday, and Sunday. And on Sunday we
4 retained new counsel, Mr. Pankauski. I spoke to
5 Mr. Tescher. I advised him that in light of his
6 revelation they would need to immediately withdraw,
7 that he should put his carrier on notice, and that we
8 were going to be taking action as we deemed appropriate
9 to rectify the problems. I spoke to Mr. Tescher on the
10 Monday morning. Mr. Bernstein and I contacted the
11 Florida Bar and we were advised there was some
12 investigation pending. Since that date, we have had
13 numerous discussions working through with
14 professionals, the malpractice carrier for Tescher &
15 Spallina, to determine if there was a way to resolve
16 issues in the Shirley side of this because everything
17 that happened with them is the Shirley side, not the
18 Simon side.

19 THE COURT: Next question.

20 BY MR. ELIOT BERNSTEIN

21 Q Have you -- from your statements just now, it
22 became apparent that you are claiming that you have
23 worked with Don Tescher, Robert Spallina, and Ted in
24 preparation of their statements for the Palm Beach County
25 Sheriff's investigation?

1 A No.

2 MR. PANKAUSKI: Objection, mischaracterizes
3 his testimony.

4 BY MR. ELIOT BERNSTEIN

5 Q Are you aware --

6 THE COURT: Slow down. Stop. Let me rule.
7 You've got to give me a chance. One, he answered
8 before the objection. But, two, he answered no.
9 Next question.

10 BY MR. ELIOT BERNSTEIN

11 Q Have you worked with Don Tescher and Robert
12 Spallina at all in these matters?

13 A In the Bernstein matters?

14 Q Any of the matters relating to the Bernsteins.

15 A Yes.

16 Q Okay. Have you worked with them regarding the
17 documents that were altered? Have you spoken to them
18 about those documents?

19 A Objection, compound. Two different
20 questions.

21 THE COURT: Okay. Break it down.

22 BY MR. ELIOT BERNSTEIN

23 Q Have you spoken to Robert Spallina or Don
24 Tescher regarding the fraudulent documents?

25 A Absolutely, I have.

1 Q Okay. Good. Have you notified your insurance
2 carrier that you've been -- that allegations of fraud and
3 forgery and your involvement in all that have been made
4 against you?

5 A Objection, relevancy.

6 THE COURT: Sustained. It's not relevant to
7 a motion to disqualify, whether he notified his
8 carrier.

9 MR. ELIOT BERNSTEIN: It isn't? Wouldn't it
10 show his character and fitness to follow the
11 rules?

12 THE COURT: Okay. I ruled. So,
13 Mr. Bernstein, don't question my ruling.

14 MR. ELIOT BERNSTEIN: Got you. No, I'm --

15 THE COURT: Okay. Go ahead.

16 BY MR. ELIOT BERNSTEIN

17 Q Have you notified the beneficiaries of the Bar
18 actions and all these other actions you've taken?

19 MR. PANKAUSKI: Objection to form.

20 THE COURT: Sustained. You need to -- you're
21 vague.

22 MR. ELIOT BERNSTEIN: Who objected?

23 THE COURT: Mr. Pankauski.

24 MR. ELIOT BERNSTEIN: Are you representing
25 him?

1 THE COURT: No. No. Stop. Stop. You
2 violated my instruction. We're taking a recess.
3 I'm going to sanction you. I warned you don't do
4 that.

5 MR. ELIOT BERNSTEIN: Do what?

6 THE COURT: You don't have conversation, only
7 with me. You don't ask him who he represents.

8 MR. ELIOT BERNSTEIN: Okay.

9 THE COURT: That's outside the rules of
10 civility and professionalism, even though you're
11 pro se. You're becoming over the line of what's
12 proper. Okay. Listen to me carefully.
13 Discipline yourself. One more time, you're done.

14 MR. ELIOT BERNSTEIN: Okay.

15 THE COURT: As well as everybody else who
16 violates my rules.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: Okay. Go ahead.

19 MR. ELIOT BERNSTEIN: I didn't understand
20 that, I'm sorry.

21 THE COURT: Okay. Do you understand it now,
22 what the rules are?

23 MR. ELIOT BERNSTEIN: Kind of.

24 THE COURT: Well, you need to.

25 MR. ELIOT BERNSTEIN: Okay. So I can't

1 ask --

2 THE COURT: You can ask questions and they'll
3 answer, but you can't start having dialogue with
4 lawyers. You can ask me, if you want. But
5 they're making an objection, but you can't say --
6 you can't question the person who makes the
7 objection. Let me rule. That's my job.

8 MR. ELIOT BERNSTEIN: Okay.

9 THE COURT: Go ahead.

10 BY MR. ELIOT BERNSTEIN

11 Q Have you spoken to Ted Bernstein about his
12 position --

13 MR. PANKAUSKI: Objection.

14 THE COURT: Hold on. Stop. That's not
15 proper because he has to finish the question in
16 its entirety. So before you answer, though, but,
17 Mr. Bernstein, Eliot, I'm saying Eliot because
18 there is more than one Bernstein, you can finish
19 your question. Go ahead.

20 BY MR. ELIOT BERNSTEIN

21 Q Well, I'll change that question. Are you aware
22 that at the Palm Beach County Sheriff interrogation that
23 your client was claimed as to have taken improper
24 distributions against the advice of his counsel?

25 A Objection, hearsay.

1 THE COURT: You can say yes or no without
2 violating hearsay rules.

3 THE WITNESS: I don't believe that's
4 accurate.

5 THE COURT: Next question.

6 BY MR. ELIOT BERNSTEIN

7 Q Did the altered document change anything with
8 the beneficiaries of the estate and trusts?

9 A That's a question --

10 THE COURT: Let me caution you again. We're
11 only dealing now with motions directed in the
12 Simon Bernstein case. And you're only moving to
13 disqualify him as to the Simon case.

14 MR. ELIOT BERNSTEIN: Well, Simon --

15 THE COURT: No, remember. Okay. No, I'm not
16 inviting dialogue.

17 MR. ELIOT BERNSTEIN: Okay.

18 THE COURT: Your motion is filed in Simon --
19 stop. I talk, you listen. Your motion is filed
20 in Simon's case. And your motion to disqualify
21 Mr. Rose is in Simon's case. Next question.

22 BY MR. ELIOT BERNSTEIN

23 Q Did Simon execute documents that allegedly
24 changed beneficiaries in his wife's estate?

25 A No.

1 Q Did Robert Spallina alter documents for Simon
2 that affected Shirley's estate?

3 A I don't think -- I think the answer to that
4 is, no, but if I can explain --

5 THE COURT: No, is the answer. Next
6 question.

7 BY MR. ELIOT BERNSTEIN

8 Q Are you aware of any documents that try to
9 change the beneficiaries that were made by Simon after
10 Shirley's death?

11 A Can I explain the answer?

12 THE COURT: You can answer if you are aware,
13 and then explain.

14 THE WITNESS: I don't think that's an
15 accurate statement, but if I can explain.

16 THE COURT: Go ahead. You're allowed to.

17 THE WITNESS: So Simon was given a power of
18 appointment in the Shirley trust. Simon exercised
19 that power of appointment in the Shirley trust in
20 a way that was consistent with Simon's wishes. I
21 believe after Simon died, all Simon's documents
22 remained intact and are proper. There is a legal
23 question that someone raised whether Simon had the
24 power to exercise the power of appointment in the
25 manner in which he did, and whether or not -- and

1 that's an issue that's going to have to be decided
2 in a trust construction action.

3 THE COURT: Okay. Next question.

4 BY MR. ELIOT BERNSTEIN

5 Q I notified you that you were respondents and
6 sent you documents with the new docket sheet where we
7 inserted you as a respondent. Are you aware that I've
8 attempted to put you in as a respondent in the Simon
9 estate?

10 A I'm aware that you have done something that I
11 don't understand because it's not a process I'm
12 familiar with legally, but he's tried to make me a
13 respondent in some case, but I'm -- I don't understand.
14 I'm just a lawyer representing a party and I don't
15 think I'm properly a respondent, nor do I think that
16 anything has been done that is of any legal validity.

17 THE COURT: Okay. Next question.

18 BY MR. ELIOT BERNSTEIN

19 Q Are you represented by counsel in those
20 capacities that I listed you as a respondent?

21 A I don't recognize that I'm a respondent in
22 anything, but -- so I can't -- I don't know how to
23 answer the question.

24 Q Would you like to see the court docket? Can I
25 show --

1 THE COURT: The question of whether he's
2 represented by counsel is irrelevant to
3 disqualification of him.

4 BY MR. ELIOT BERNSTEIN

5 Q Okay. So I'm just going to stick with are you
6 a -- you know you're a respondent that's been added to
7 the court docket?

8 A I don't believe I'm a respondent in this
9 case. And, I believe, that you -- may I, Your Honor?

10 THE COURT: You may. You can complete your
11 answer.

12 THE WITNESS: I believe that you have learned
13 that if you try to join people in a case, then you
14 can use it as basis to disqualify them. And I
15 believe you've done that consistently over the
16 years of your long litigation practice.

17 MR. ELIOT BERNSTEIN: Objection. I think
18 it's speculation and --

19 THE COURT: Okay. All right. Stop your
20 answer. Next question.

21 BY MR. ELIOT BERNSTEIN

22 Q Have you knowingly assisted, engaged, in any
23 conduct involving the perpetration of any frauds, deceit,
24 or misrepresentation in these matters?

25 A No.

1 Q Can you tell us about your relationship with
2 Ted Bernstein?

3 MR. PANKAUSKI: Object. Objection,
4 attorney-client privilege. Relevance.

5 BY MR. ELIOT BERNSTEIN

6 Q How did you meet Ted Bernstein?

7 MR. PANKAUSKI: Objection, attorney-client
8 privilege. Relevance.

9 THE COURT: Sustained.

10 MR. ELIOT BERNSTEIN: What's that mean, ask
11 the next question?

12 THE COURT: Yes.

13 BY MR. ELIOT BERNSTEIN

14 Q Okay. Are you -- do you have any business
15 dealings with Ted Bernstein?

16 MR. PANKAUSKI: Objection, attorney-client
17 privilege.

18 BY MR. ELIOT BERNSTEIN

19 Q Other than attorney-client?

20 MR. PANKAUSKI: Relevance.

21 THE COURT: Well, is that a ground for your
22 motion for removal?

23 MR. ELIOT BERNSTEIN: Yes.

24 THE COURT: Is it in the motion?

25 MR. PANKAUSKI: I don't believe business

1 relations are. Okay.

2 THE COURT: Okay. So your motion is long, do
3 you know where it is in the motion?

4 MR. ELIOT BERNSTEIN: Okay. I'll strike the
5 question.

6 THE COURT: Okay. Thanks. Go ahead.

7 MR. ELIOT BERNSTEIN: Okay. I'm done.

8 THE COURT: Okay. All right.

9 CROSS-EXAMINATION

10 BY MR. PANKAUSKI

11 Q Mr. Rose, in the Simon estate, who do you
12 represent?

13 A Within the Simon estate, I represent Ted
14 Bernstein as successor trustee of the Simon Bernstein
15 trust.

16 Q Have you ever represented anybody else?

17 A Not in particular -- I guess in this
18 particular estate I do represent Ted on the Shirley
19 side as well.

20 Q But in the Simon, you've never represented
21 Mr. Spallina?

22 A Absolutely not.

23 Q You've never represented Mr. Tescher?

24 A They're adverse parties. Absolutely not.

25 MR. PANKAUSKI: Okay. Thank you. No further

1 questions, Your Honor.

2 THE COURT: Any redirect on those questions?

3 Doesn't mean you have it, you just have a
4 right to if you think of something.

5 MR. ELIOT BERNSTEIN: No.

6 THE COURT: Anyone else have any questions?

7 Okay. Have a seat. Your next witness.

8 MR. ELIOT BERNSTEIN: None.

9 MR. ROSE: Move for involuntary --

10 THE COURT: Hold on. Wait. Wait.

11 MR. ROSE: Sorry.

12 THE COURT: Okay. Any other evidence you
13 want to submit?

14 MR. ELIOT BERNSTEIN: No, thank you.

15 THE COURT: Motion to disqualify denied.

16 Okay. What's the next motion -- and
17 that's the -- formally the motion to remove
18 Alan Rose, that's the heading of that one. And
19 let me just get to this. It's a long style.
20 It was called emergency motion to remove Alan
21 Rose, et cetera. I'll give you the certificate
22 of services.

23 MR. ROSE: Would you like an order, Your
24 Honor?

25 THE COURT: Hold on. Hold on. Just let me

1 finish. The emergency motion certificate of
2 service, I think, is June 23, 2014. And the other
3 motion to remove is June 24th. So both of those
4 motions are denied. The grounds are, there is
5 insufficient evidence to disqualify Mr. Rose
6 pursuant to the law.

7 Okay. All right. So the next motion is
8 the petition by -- hold on. Help me out,
9 Mr. Bernstein, because I think it's your
10 pleading; deals with the successor PR.

11 MR. ELIOT BERNSTEIN: Okay. Yeah. We can go
12 with that.

13 THE COURT: I was told that is being heard in
14 conjunction with the petition to remove Ted
15 Bernstein as trustee.

16 MR. FEAMAN: There is an order that Your
17 Honor entered --

18 THE COURT: Okay. Can I have that?

19 MR. FEAMAN: -- that specifically sets forth
20 the order and what they are. May I approach?

21 THE COURT: Okay. Good. Thanks. Okay. So
22 now we're dealing with the -- with the motions
23 concerning the appointment of successor PR.

24 MR. FEAMAN: Well, actually --

25 THE COURT: That's number two.

1 MR. FEAMAN: Just so the record is clear,
2 under number one, it also mentions Mr. Pankauski.

3 THE COURT: Well, I denied the motion. The
4 heading is the heading, but the entire motion is
5 denied, whatever --

6 MR. FEAMAN: Good. I mean, thank you.

7 THE COURT: All right. So is it orderly --
8 let me ask a question. It seems like the next
9 motion in line is Eliot's motion, but maybe it's
10 more than just Eliot, to -- for the appointment of
11 a successor PR of the estate. Is that the next
12 one?

13 MR. ELIOT BERNSTEIN: And Ben Brown and --
14 right. All those.

15 THE COURT: Ben Brown is curator.

16 MR. ELIOT BERNSTEIN: He put in a motion for
17 PR, I think.

18 THE COURT: Okay. All right. So --

19 MR. FEAMAN: Actually three motions, all
20 dealing with the same thing, which is to get a
21 successor personal representative.

22 THE COURT: Okay. All right. So Eliot
23 Bernstein has a motion to accomplish that?

24 MR. ELIOT BERNSTEIN: Right.

25 THE COURT: Does Ted Bernstein through you,

1 Mr. Rose?

2 MR. ROSE: Yes, Mr. Bernstein has the first
3 petition to -- he filed a petition to be appointed
4 as the first successor personal representative in
5 his father's estate.

6 THE COURT: Is there -- you said there's
7 three.

8 MR. FEAMAN: Yes, Mr. Stansbury's motion to
9 appoint an independent, non-related party as
10 successor personal representative.

11 THE COURT: Okay. So the three parties, I
12 understand who. The task is to appoint a
13 successor PR. And so let me ask a couple of
14 questions preliminary to this, I'll make a note to
15 myself. Okay. So as we sit here today, am I
16 correct that there's no PR and that Mr. Brown is
17 the curator of the Simon Bernstein estate?

18 MR. FEAMAN: Yes, Your Honor.

19 THE COURT: Okay. True?

20 MR. ELIOT BERNSTEIN: Correct.

21 THE COURT: All right. So in order to
22 probably bring out the issues a little better and
23 actually help you, Eliot, because you're pro se,
24 I'm going to let Mr. Rose start. You'll be able
25 to fully deal with your motion as well.

1 All right. You're up. So let me get a
2 brief opening. Here's what I want to know. On
3 your client, Ted Bernstein's, motion to appoint
4 successor PR, who does he want to have
5 appointed?

6 MR. ROSE: Ted Bernstein would like to be --
7 suggested he was the appropriate candidate to be
8 appointed as successor PR.

9 THE COURT: All right. Mr. Stansbury, who is
10 it that you want -- I mean, Mr. Feaman, on behalf
11 of Mr. Stansbury.

12 MR. FEAMAN: We have put forth in our
13 pleadings, Your Honor, and attached the resumes of
14 Brian O'Connell and Michael Mopsick. I believe
15 Mr. O'Connell is in the courtroom today.

16 THE COURT: All right.

17 MR. MORRISSEY: Judge, for the record, my
18 clients have an objection to their petition. We
19 don't believe that they have standing as a
20 claimant.

21 THE COURT: So now announce who your clients
22 are.

23 MR. MORRISSEY: My clients are three
24 grandchildren; Molly, Simon, Alexander Bernstein,
25 Michael Bernstein and Eric Bernstein.

1 THE COURT: So you say the creditor has no
2 standing.

3 MR. MORRISSEY: He's not a creditor, he's
4 just a claimant.

5 THE COURT: Okay. Got it. And Eliot, who
6 are you seeking to have, in your moving papers, to
7 be the successor PR of Simon's estate?

8 MR. ELIOT BERNSTEIN: I have -- I'm going to
9 possibly join with Peter and I would just
10 recommend anybody like a Ben Brown who's an
11 honest, independent third party.

12 THE COURT: Okay. So you want a non-relative
13 of what we're kind of calling an independent
14 lawyer to be PR, and it could be Brian O'Connell
15 or Mike Mopsick or somebody else that fits that
16 category?

17 MR. ELIOT BERNSTEIN: Anybody other than
18 my --

19 THE COURT: Other than you and Ted?

20 MR. ELIOT BERNSTEIN: -- any of my siblings.

21 MR. ROSE: Just a brief opening?

22 THE COURT: Sure.

23 MR. ROSE: This is a relatively small estate.
24 There's, I think, under a million dollars left in
25 the estate. There are issues and they are

1 relevant to some degree in the Shirley side, which
2 we'll talk briefly about what's going on in the
3 Shirley side. But in the Shirley side of it, Ted
4 was chosen by his mother to be her successor PR,
5 her successor trustee, after her husband passed
6 away. So she died first, although, she was
7 expected to outlive him. In her documents, Ted
8 would have been -- after her husband died, Ted is
9 successor PR. And he's serving in that role and
10 will tell you the job -- what he's doing in that
11 role, although it's difficult.

12 THE COURT: Let me get a question answered.
13 In Simon's estate, he died testate?

14 MR. ROSE: Yes.

15 THE COURT: Okay. So tell me what his will
16 says about PR.

17 MR. ROSE: His will says that Donald Tescher
18 and Robert Spallina are his personal
19 representatives -- co-personal representatives.

20 THE COURT: Hold on.

21 Okay. Go ahead.

22 MR. ROSE: And that was changed in 2012 from
23 William Stansbury; I think was previously named.

24 THE COURT: Okay. So let -- in the last
25 will, who is named in the will as PR sequentially?

1 MR. ROSE: Solely -- there is solely one
2 selection, Robert Spallina, Donald Tescher as
3 co-personal representatives. That's in the last
4 will of Simon L. Bernstein.

5 THE COURT: All right. So does everyone seem
6 to agree, clearly, they're not going to do it,
7 correct?

8 MR. ROSE: Well, they were doing it.

9 THE COURT: Now, though, to be -- I mean,
10 they're not successor, they were the original
11 PR's, correct?

12 MR. ROSE: Correct.

13 THE COURT: Were they ever appointed?

14 MR. ROSE: They were. They were appointed
15 and serving.

16 THE COURT: And removed?

17 MR. ROSE: They resigned as a result of
18 conflict of interest.

19 THE COURT: Is anybody asking that they be
20 reappointed as successor?

21 MR. ROSE: No, sir.

22 THE COURT: All right. So here's my next
23 question. The will then is silent as a
24 replacement?

25 MR. ROSE: Yes, sir.

1 THE COURT: So what statute or rule do I look
2 at that instructs the court as to who becomes the
3 successor PR?

4 MR. PANKAUSKI: You could -- you could
5 consider a majority in interest of the
6 beneficiaries.

7 THE COURT: What's the name of the statute I
8 look at?

9 MR. PANKAUSKI: 733.301.

10 THE COURT: Okay. All right. So this is a
11 testate estate. That statute says that there is
12 an order of preference for the PR or his successor
13 nominated by the will, or pursuant to a power.
14 We're passed that point, is that true? Because
15 it's not going to be Tescher and Spallina.
16 Everyone agree with that?

17 MR. PANKAUSKI: Yes, Your Honor.

18 MR. ELIOT BERNSTEIN: Yes, Your Honor.

19 THE COURT: The next order of preference is a
20 person selected by a majority in interest of the
21 persons entitled to the estate. All right. So to
22 try to move this along a little bit, and I'll
23 start on my left and go to my right. Who does
24 those representing Ted say falls within that
25 category, if anyone?

1 MR. PANKAUSKI: No one falls into that
2 category. They --

3 THE COURT: No. No, I'm not saying why.
4 Okay. What do you say to that -- hold on -- I may
5 have someone on Court Call I didn't know about.

6 MR. ROSE: He's important.

7 THE COURT: Okay. Who's that?

8 MR. ROSE: That's Mr. Bill Glasko. He
9 represents a group of the other beneficiaries.

10 THE COURT: We'll get him on. Irwin Block,
11 who does he represent?

12 MR. ROSE: He represents Tescher and
13 Spallina.

14 THE COURT: I wasn't aware anyone was on
15 Court Call, let's get them.

16 MR. ROSE: He just represents Mr. Tescher,
17 not both of them.

18 THE COURT: Okay.

19 Okay. Mr. Block?

20 MR. BLOCK: Yes, sir.

21 THE COURT: Sorry, didn't know you were on
22 Court Call. And we're in the middle of the second
23 hearing set today, which is the hearing dealing
24 with the appointment of a successor PR of Simon's
25 estate. And so I already ruled on the motion to

1 disqualify, which was denied. And so that's where
2 we are now. Okay. So -- yes.

3 MR. ROSE: I'm sorry.

4 MR. BLOCK: Thank you, Judge.

5 THE COURT: I had asked Mr. Pankauski, do you
6 want to speak on that issue?

7 MR. ROSE: Under the order of preference
8 under 733.301?

9 THE COURT: Yes.

10 MR. ROSE: I think there's no majority in
11 interest that we were aware of at this point.

12 THE COURT: All right. So --

13 MR. ROSE: Under 3, though --

14 THE COURT: Hold on. I'm going to do this
15 one at a time. Okay. Mr. Feaman, do you have a
16 position on whether 733.3011(a) (2) applies?

17 MR. FEAMAN: Agreed, it does not apply.

18 THE COURT: Mr. Bernstein?

19 MR. ELIOT BERNSTEIN: I don't know the
20 statute, one more time on it real quick.

21 THE COURT: The number or what it says?

22 MR. ELIOT BERNSTEIN: What it says.

23 THE COURT: It says that there's a schedule
24 of order of preferences. And the second one is
25 the person selected by a majority in interest of

1 the persons entitled to the estate.

2 MR. ELIOT BERNSTEIN: Okay. Yeah. No.

3 THE COURT: No. Okay. So everyone agrees
4 that doesn't apply.

5 The next order of preference is a devisee
6 under the will. If more than one devisee, the
7 court may select the one best qualified.

8 MR. ROSE: There is one devisee under the
9 will, and the devisee under the will is the Simon
10 Bernstein trust.

11 THE COURT: Okay. Hold on.

12 So can a trust be a PR?

13 MR. ROSE: Well, the personal representative
14 of the trust -- the successor -- I'm sorry, the
15 successor trustee of the Simon Bernstein trust is
16 Ted Bernstein.

17 THE COURT: That's not my question. Can I
18 appoint a trust as a PR?

19 MR. ROSE: No, I think you need to appoint --

20 THE COURT: An individual.

21 MR. ROSE: -- an individual or,
22 theoretically, you might be able to appoint a
23 corporate fiduciary, but we don't have one of
24 those.

25 THE COURT: Okay. So you say number three

1 doesn't apply?

2 MR. ROSE: I say number three, the devisee is
3 the trustee. In fact, the trust is the sole
4 beneficiary of the estate. Even if you go back to
5 number two -- I hadn't thought of it this way.
6 Back up to number two. The only beneficiary of
7 the estate is the trust. And the trustee of the
8 trust is in favor of Ted being the personal
9 representative.

10 THE COURT: So you say that either on two or
11 three grounds under the statute, Ted Bernstein
12 being trustee of the Simon Bernstein trust, should
13 be the PR because that's the Simon Bernstein --
14 the trust is the only devisee under the will?

15 MR. ROSE: The --

16 MR. MORRISSEY: Judge, yeah, Mr. Rose --
17 those are two grounds, a possible third is the
18 following. The beneficiaries of the trust are the
19 ten grandchildren. I represent four of those
20 grandchildren, all four of whom would support
21 Mr. Ted Bernstein.

22 THE COURT: Okay.

23 MR. MORRISSEY: As the personal
24 representative. So we might want to pool the ten
25 grandchildren.

1 THE COURT: All right. I got that part.

2 Mr. Feaman, what do you -- do you say there is a
3 devisee under the will that is eligible for
4 appointment?

5 MR. FEAMAN: The devisee has not applied,
6 that would be the trust. The person that applied
7 is Ted Bernstein in his individual capacity.

8 THE COURT: Okay. Is that factually true?

9 MR. ROSE: I think factually.

10 THE COURT: Go ahead.

11 MR. FEAMAN: In addition, we suggest to the
12 court, that Mr. Bernstein is statutorily not
13 qualified as a result of a conflict of an
14 interest.

15 THE COURT: Okay. We're not at that level.
16 We're only dealing with order of preference.

17 MR. FEAMAN: All right. So, therefore, if
18 (a) (1) (2) or (3) does not apply, then we would
19 default to Subsection 3, Your Honor.

20 THE COURT: Okay. I'll get to there in a
21 second. So do you have a legal position on that?

22 MR. ELIOT BERNSTEIN: I do.

23 THE COURT: What's that?

24 MR. ELIOT BERNSTEIN: We might actually have
25 to go back to (1), the will having a devisee.

1 THE COURT: No. No, that's -- (3) is a
2 devisee.

3 MR. ELIOT BERNSTEIN: Okay.

4 THE COURT: Mr. Rose says the devisee under
5 the will is Simon's trust and Ted Bernstein as
6 trustee.

7 MR. ELIOT BERNSTEIN: No, the named person
8 under the will. The number (1), where it's a
9 named person under the will.

10 THE COURT: The PR nominated by Simon?

11 MR. ELIOT BERNSTEIN: Right, in the document.
12 In the will. The problem I have is that we're
13 working off a document -- this is part of what
14 you're going to have to rule on further. These
15 are 2012 documents my dad allegedly signed.

16 THE COURT: Well, those are the ones -- that
17 right now is what I'm probating. I'm probating
18 that will.

19 MR. ELIOT BERNSTEIN: I just want to put on
20 the record that the Governor Rick Scott's
21 office --

22 THE COURT: No. No. If you start going
23 there, you're done.

24 MR. ELIOT BERNSTEIN: They are improperly
25 notarized.

1 THE COURT: I'm not asking you about that.
2 You can't give me evidence on that, I'm not asking
3 for evidence. I'm asking for your position. You
4 can't tell me about Rick Scott in your position.

5 MR. ELIOT BERNSTEIN: Okay. In the 2008
6 wills and trusts --

7 THE COURT: Okay. But are those being
8 probated?

9 MR. ELIOT BERNSTEIN: They may be.

10 THE COURT: Okay. But they're not. I'm
11 dealing with the 2012. I got your position.

12 MR. ELIOT BERNSTEIN: I got it. Okay.

13 THE COURT: So -- okay. So the 731.201,
14 subparagraph 11, defines a devisee as a person
15 designated in the will to receive a devise. It
16 also says that in the case -- in the case of a
17 devise to an existing trust or trustee, or to a
18 trust or trustee of a trust described in the will,
19 the trust or trustee, rather than the
20 beneficiaries, is the devisee.

21 So if someone published to me the exact
22 wording that you say the will that's subject to
23 probate contains dealing with the subject of
24 who is a devisee under the will. So if someone
25 has to read me word for word what the will

1 says.

2 MR. ROSE: Article I, tangible personal
3 property, says personal property goes in
4 accordance with the separate read memorandum. I
5 don't think that's at issue. Article II is the
6 exercise of power of appointment. Article III
7 says residue of my estate. Make sure I have the
8 right one, Your Honor. I give all the residue of
9 my estate, including my homestead, to the trustee
10 then serving under my revocable trust agreement
11 dated May 20, 2008, as amended and restated from
12 time to time, and on even dates herewith, the
13 existing trust, as trustee without bond, but I
14 don't exercise any powers of appointment held by
15 me, except as provided in Article II above, and in
16 the later paragraph titled death costs. The
17 residue shall be added to and become a part of the
18 existing trust and shall be held under the
19 provisions of said agreement in effect at my
20 death, or if this is not permitted by applicable
21 law, or the existing trust is not then in
22 existence under the provisions of said agreement
23 as existing today, if necessary to give effect to
24 this gift, but not otherwise said agreement as
25 existing today is incorporated herein by

1 reference.

2 THE COURT: Okay. So who is the trustee
3 under that revocable trust?

4 MR. ELIOT BERNSTEIN: Don Tescher.

5 MR. ROSE: Under the amended and restated
6 trust agreement, there were two named trustees,
7 they were to serve together, Donald and Robert,
8 and the document -- Donald Tescher and Robert
9 Spallina -- and the document provides that upon --
10 it does not have a successor named in the Simon
11 trust, and it says that the last serving trustee
12 has the right to appoint the successor trustee.
13 And Donald Tescher is the last serving trustee
14 appointed Ted Bernstein. We've taken
15 Mr. Tescher's deposition, and he can explain to
16 you by deposition the reasons why he appointed Ted
17 as a successor trustee.

18 THE COURT: Okay.

19 MR. ROSE: Sometime, I think, February, Ted
20 has been serving as the successor trustee.

21 MR. ELIOT BERNSTEIN: Since what time?

22 THE COURT: You can repeat what you said.

23 MR. ROSE: There's documents -- they were
24 circulated to all the parties -- I think it was
25 sometime in February of this year.

1 THE COURT: Okay. Let me look at something
2 else. And has Ted Bernstein, in his capacity as
3 trustee or successor trustee of Simon's estate,
4 made an application to be the PR of Simon's
5 estate?

6 MR. ROSE: I believe --

7 THE COURT: That's yes or no. It can't be
8 either one -- those are the only two choices.

9 MR. PANKAUSKI: Hold on one second, Your
10 Honor. That's his petition for appointment as PR.

11 THE COURT: In his capacity as trustee?

12 MR. PANKAUSKI: No. No.

13 THE COURT: Okay. The answer is no?

14 MR. PANKAUSKI: Yeah, Ted Bernstein has asked
15 Your Honor to appoint him as PR. The petition was
16 not filed by Ted Bernstein as trustee of his dad's
17 rev trust.

18 MR. ROSE: The petition does recite, Your
19 Honor, that Ted Bernstein has been appointed to
20 and accepted the appointment to serve as the
21 successor trustee of the Simon Bernstein trust
22 into which the estate's assets pour over.

23 THE COURT: Okay. All right. No. 730 --
24 I'm ruling -- 733.031, subsection (1) (a) is a
25 pecking order of preferences. The only one that

1 could apply, based upon what everyone's told me to
2 the Simon Bernstein estate is if there is a
3 devisee under the will, and the devisee under
4 Simon Bernstein's will is a trustee -- includes a
5 trustee under his revocable trust, it then -- and
6 that trustee in the will is Simon -- I'm sorry,
7 Tescher and Spallina. Subsection (3) says, if no
8 application is made by any of the persons
9 described in subsection (1), the court may appoint
10 a capable person. So the will, four corners of
11 it, only allows, as far as the devisee, which is
12 the trustee under the revocable trust, that is
13 only Spallina's group, Tescher and Spallina, and
14 Ted has made an application only in his individual
15 name. Hold on. Let me look at something else.

16 Okay. I'm going to appoint a capable
17 person. That's my ruling. So if you folks had
18 a position to determine who a capable person
19 would be?

20 MR. PANKAUSKI: No one filed that petition.

21 THE COURT: That could be, but I can still do
22 that --

23 MR. FEAMAN: Excuse me, the petition that was
24 filed by -- the motion filed by Mr. Stansbury
25 specifically references two capable people, and

1 attaches their resumes.

2 THE COURT: All right. So --

3 MR. FEAMAN: That was done weeks ago.

4 MR. ROSE: I think Mr. Ted Bernstein in his
5 petition to be -- he's a capable person.

6 THE COURT: I'm not saying he's not. He
7 could -- everyone -- anyone is open in that
8 category.

9 MR. ROSE: That's fine. That's what we
10 prepared to try today.

11 THE COURT: So here's my question. Listen
12 carefully, and then I'll let you folks tell me
13 whether you think this is fruitful or not. If you
14 all -- the material people here can agree upon who
15 that capable person is, then, you know, you have a
16 good shot of getting me to agree and appoint that
17 person. If you can't agree, then I have to have a
18 hearing to determine between the various potential
19 capable people who to appoint, assuming all those
20 people are qualified. So everyone using their
21 best judgment and thinking hats, and given what I
22 was told, which is only that the estate doesn't
23 have a whole lot of money, do you folks want to
24 litigate over who's going to be the PR of the
25 estate, or you want -- do you think you can spend

1 a few moments and talk to each other and come up
2 with an agreement?

3 MR. ROSE: I mean, we don't want to litigate
4 the issue, but we've seen what's happened with a
5 curator. And I do think that we stand by the
6 position that the most logical person is Ted
7 who --

8 THE COURT: I'm not looking for logic, I'm
9 looking for resolution. Because if you tell me
10 the estate doesn't have a lot of money and you
11 start litigating some of these issues, you wind up
12 in a position that may not be favorable to the
13 estate and the ultimate beneficiaries.

14 So remember that in deciding a capable
15 person, if there is someone who fits that
16 description, I am then allowed to deal with,
17 depending upon who it is, and whether they
18 agree, an issue such as limiting compensation,
19 so that I can preserve more money for the
20 estate and less by way of lawyer fees -- no
21 offense -- and other expenses. So, you know,
22 you all need to make a best interest of the
23 estate decision. The beneficiaries of the
24 estate, you tell me, is the Simon Bernstein
25 trust, of which there is ten grandchildren

1 eligible to receive the money. The more we use
2 up on administrative and legal expenses, the
3 less available to them. Plus, I guess,
4 Mr. Stansbury's a creditor and he probably has
5 something to do with that.

6 MR. FEAMAN: If I could have 60 seconds of
7 the court's time to suggest --

8 THE COURT: Go ahead.

9 MR. FEAMAN: -- why the court -- without even
10 getting into any conduct -- why the court can't
11 even consider Ted Bernstein.

12 THE COURT: Go ahead.

13 MR. FEAMAN: I would like to offer that.
14 Your Honor may recall that you permitted Ben Brown
15 to hire counsel in Chicago to file a motion to
16 intervene in that action on behalf of the estate
17 to attempt to collect life insurance proceeds
18 where the estate was not being represented.
19 Counsel was hired. Mr. Stansbury has fronted the
20 cost for that, as Your Honor said. And he filed a
21 petition to intervene. The plaintiffs in that
22 action then filed an opposition to the estate's
23 motion to intervene. And that opposition, which
24 was filed about a week ago, Your Honor, in
25 opposition -- direct opposition to the estate of

1 Simon Bernstein's motion, was filed by -- comes
2 now the Simon Bernstein Irrevocable Insurance
3 Trust by Ted Bernstein, as trustee. And Ted
4 Bernstein, individually. So he has set himself up
5 in direct conflict with the position that this
6 estate is taking in Chicago. I suggest to the
7 court, that that's the end of the inquiry with
8 regard to Ted Bernstein.

9 THE COURT: Well, it's not the end, it's a
10 part of it. But it's not. I mean, there is no
11 one single thing until I rule that means more than
12 anything else. So I wasn't sure where you were
13 getting at, that's kind of a little bit -- a
14 little bit out of turn because, I mean, it's
15 obvious what I'm trying to suggest. It sounds
16 like it's helpful to this estate, given the amount
17 of litigation -- litigation costs time, effort,
18 animosity, et cetera -- to see if there's areas
19 that we can reach agreements to the benefit of the
20 estate.

21 MR. ELIOT BERNSTEIN: Your Honor --

22 THE COURT: Hold on. I'm not, you know -- I
23 mean, you all know better whether something can
24 happen to get someone's pocket picked. I don't
25 want that to happen.

1 So -- I'll tell you what, I'm going to
2 take a five-minute recess, you'll talk to each
3 other. It's a little easier to talk outside my
4 presence.

5 MR. ELIOT BERNSTEIN: Your Honor --

6 THE COURT: Well, no, we're in recess and you
7 all can talk. Go ahead.

8 (Brief recess)

9 THE COURT: Okay. Keep your seats. Thanks.
10 Okay.

11 MR. ROSE: Can I just -- may be out of
12 order -- can I just say it's not overly -- it
13 won't take long -- but this is our position.

14 THE COURT: Okay.

15 MR. ROSE: We believe -- I believe that in
16 this case with unique circumstances, and we've
17 just lived six months of having a curator who
18 is -- will be in the same role as another neutral.
19 And through the curatorship and the bombarding of
20 the curator by Eliot, we've run up a lot of money
21 in fees. We do not have any ill will toward
22 Eliot. I know when a judge sees people sniping,
23 you think it's mutual. We don't have any ill will
24 towards Eliot. He's done a lot of things that I
25 think are wrong and are meanspirited and harmful,

1 but all we want to do in this is get the case to
2 the finish line.

3 THE COURT: Okay. So, stop. Because here's
4 what I want to know. Simple. You folks have an
5 agreement? If not, I'm going to proceed and let
6 you litigate this. Maybe you'll spend all the
7 money in the estate over this, and maybe you'll be
8 accountable to the beneficiaries once that
9 happens. So do you have an agreement or not?

10 MR. ROSE: And on that point --

11 THE COURT: You either have an agreement or
12 not. Otherwise, we're going to litigate this
13 entire issue. And I'm going to keep track of how
14 much the fees that are spent on this issue.

15 MR. ROSE: Well --

16 THE COURT: So you either have an agreement
17 or you don't. It's up to you. I'm going to rule
18 on it based on the law and facts.

19 MR. ROSE: But my understanding is when we
20 were here, I don't think it's going to be
21 litigated much more.

22 THE COURT: Maybe, yes. If not today, it's
23 next week. If not next week, the next day. We've
24 got to get passed this point. Okay. This is not
25 an exact science and -- but it's a matter of using

1 good judgment.

2 MR. ROSE: I understand. I'm not --

3 THE COURT: And here's the point, candidly.

4 Ted could possibly do a good job as a PR, but he's
5 a hot blood. Okay. The moment Ted serves Eliot
6 and/or others are going to respond a certain way.
7 Okay. So we know that. And so, you know, if you
8 just think of that alone, which obviously I see,
9 one thing you think about is, for the small
10 estate, the simple estate, to get this thing over
11 with, is to put someone who is neutral, and I can
12 deal with the issue of costs. And I can deal with
13 the issue of Eliot, because I'm aware of what that
14 is, and in a way that benefits the estate.
15 Because I can put some control over that. I mean,
16 that's why I started this hearing differently than
17 I allowed perhaps the other UMCs, which I think
18 started to get a little uncomfortable for
19 everybody. I mean, our days of free-for-all are
20 over with. Okay. I'm going to be controlling the
21 UMCs. I'm going to be controlling the pleadings.
22 So -- and I agree with you, you don't want there
23 to be a, what you call, a neutral PR that has to
24 wind up spending a lot of money. But if Ted is
25 PR, Eliot's going to still file stuff until

1 someone stops him from doing that. And, you know,
2 he's going to -- Ted is going to bill as a PR,
3 perhaps, and his lawyers have a right to bill, but
4 this is really doable. Okay.

5 MR. PANKAUSKI: May I?

6 THE COURT: Yes.

7 MR. ROSE: Just have 30 seconds?

8 THE COURT: Sure.

9 (Off the record)

10 MR. ROSE: Okay. We would accept either
11 Mr. Mopsick or Mr. O'Connell. We think you should
12 cap their fees -- we have a cap with Mr. Brown --
13 and we exceeded the cap regularly. You know, I
14 think there should be a cap. And if he needs
15 additional things to be done, come forward. There
16 are some basic estate administration things that
17 probably need to be done as well, which certainly
18 someone should get paid for, or hire an
19 accountant, if there is things that need to be
20 done.

21 THE COURT: Okay. All right. So let's try
22 to make some progress. Only because of the two
23 people -- Mr. O'Connell is here. So
24 Mr. O'Connell, come up.

25 MR. O'CONNELL: Yes, sir.

1 THE COURT: Do you know everybody who's in
2 play here?

3 MR. O'CONNELL: Not everyone, Your Honor. A
4 number of people, yes.

5 THE COURT: So, you know Eliot Bernstein?

6 MR. O'CONNELL: I don't.

7 MR. ELIOT BERNSTEIN: We just shook hands.

8 THE COURT: Okay. All right. So because I
9 think everyone knows Mr. O'Connell, perhaps other
10 than Eliot -- is that true?

11 MR. PANKAUSKI: Yes, Your Honor.

12 MR. ROSE: Yes, sir.

13 THE COURT: You know him?

14 MR. FEAMAN: Yes.

15 THE COURT: All right. All right. So Eliot,
16 he's like Mr. Brown -- who disappeared.

17 MR. BROWN: I'm right here.

18 THE COURT: Sorry. I mean, he's at the top
19 of the list of qualified people. But, you know,
20 if you're willing to do this, that's appreciated,
21 and I think the parties would appreciate it. But
22 you have to do it under a little bit of different
23 circumstance. Part of this is going to be
24 because -- you've probably been sitting here and
25 have heard it's a small estate with a lot of

1 potential activity. And Mr. Brown, as curator,
2 has been telling me a great deal of how he is
3 getting involved, from a curator point of view in
4 the case, under times and circumstances that he's
5 uncomfortable with from a duty and responsibility
6 point of view, but just can't ignore it. And so
7 he comes to me for instructions as to whether to
8 do things or not. But every time someone comes to
9 court it costs money. So if you are willing to
10 take this assignment, and it's going to have to be
11 under some compromised financial circumstances,
12 which you'll either say yes or no to, and it's
13 totally up to you, if you're willing to do it,
14 that will enable us to move along immediately. So
15 why don't you do this. What I'd like is, so I'm
16 not directly involved, I'll again, you know, walk
17 outside for a second, to the extent that the
18 parties would like to reach out to Mr. O'Connell
19 and have him agree to two things: One, would be
20 to a financial program that would be -- you think
21 is fair -- allowing him if something extraordinary
22 comes, to make application to the court. I think
23 you can agree to that. And then I will -- if he's
24 selected, I will empower him as to what to deal
25 with any matters that are outside of what's

1 appropriate in the course of the probate case that
2 could otherwise artificially raise his fees, that
3 we'll make sure it doesn't happen. You willing to
4 entertain that?

5 MR. O'CONNELL: Sure.

6 THE COURT: Okay. Go ahead and talk to them.

7 MR. ELIOT BERNSTEIN: What are we doing?

8 THE COURT: You're going to talk to him about
9 how little to pay him.

10 MR. ROSE: May I ask one question, Your
11 Honor?

12 THE COURT: Yes.

13 MR. ROSE: After we get through this, there
14 are still two other matters.

15 THE COURT: We're going to keep on going.

16 MR. ROSE: Okay. That's what I wanted to
17 know. Thank you, sir.

18 (Brief recess)

19 MR. ROSE: I think the parties are in
20 agreement for Mr. O'Connell to be the -- appointed
21 the PR. He's willing to accept the job. And
22 there was some discussion about his fee
23 arrangement, and I think there's talk about a
24 blended rate that would not exceed maybe 350 an
25 hour, but realizing that his time might be more,

1 his legal assistants might be less, but the
2 blended rate wouldn't exceed 350 an hour. I
3 don't -- I wouldn't envision he would be billing
4 paralegals at 350, just the average blended rate
5 would not exceed 350.

6 THE COURT: Well, usually what I would do
7 is -- and Mr. O'Connell knows -- I allow him a
8 lawyer fee of 350, or less, depending upon who the
9 individuals are, and a paralegal rate of up to
10 125. That's standard, correct?

11 MR. O'CONNELL: Right, that's standard, Your
12 Honor.

13 THE COURT: All right. So you don't need a
14 blended. That would be the rate.

15 MR. ROSE: We have no objection --

16 THE COURT: I just kind of anticipate that --
17 I mean, the way their office works, because I see
18 it because he's, you know, he's frequently here.
19 The paralegal at the 125 does a good deal of the
20 administrative work, saves the money of the lawyer
21 rate, and only if there is something that, you
22 know, he needs to do, is it at the lawyer rate.

23 MR. O'CONNELL: That's correct.

24 THE COURT: That's the way they work it. So
25 it's a little bit of an advantage over having a

1 lawyer/curator who only bills at a lawyer rate,
2 because administrative work is done at the
3 paralegal rate, and he has skilled paralegals.

4 MR. ROSE: We agree. And we appreciate Your
5 Honor looking in with Mr. Brown; I understand
6 we've at least learned a little bit, and,
7 hopefully, we won't run into the same problems.

8 THE COURT: All right. So everyone agree?

9 MR. ELIOT BERNSTEIN: Yes, sir.

10 MR. FEAMAN: Yes, Your Honor.

11 MR. MORRISSEY: Yes.

12 THE COURT: Okay. All right. Okay.

13 Appointed. No bond required. Letters shall
14 issue.

15 All right. And, you know, what I'd like,
16 obviously, is some orderly fashion, you folks
17 don't bombard him, but, you know, give him an
18 idea of what he has to do next.

19 Okay. So -- all right. The next two
20 things that I had for this afternoon that we
21 can hear would be to deal with the request to
22 remove Ted as successor trustee -- or
23 trustee -- of the Simon Bernstein.

24 So everyone thank Mr. Brown, because I do,
25 especially for his services.

1 MR. BROWN: Well, Judge, actually I'm going
2 to go ahead and file an accounting.

3 THE COURT: Sure. You need to wrap it up.

4 MR. BROWN: I will do that. But I had one
5 matter and then I was going to ask you to be
6 excused today.

7 THE COURT: Sure.

8 MR. BROWN: You recall that I had asked
9 that -- to liquidate the IRA?

10 THE COURT: Yes.

11 MR. BROWN: There was some discussion at the
12 hearing that the money should not leave the
13 account, which is 5007 at JP Morgan. JP Morgan,
14 who's -- I won't say that thought. JP Morgan,
15 when I said can you please start liquidating the
16 account, said, okay, but we have to move all of
17 assets over to a new account called 8004. They
18 told me that after the --

19 THE COURT: Just a new number.

20 MR. BROWN: A new number. Actually, it's a
21 new account. So they started moving the money to
22 the new account. So to try to strictly comply
23 with the order, I said, well, let's just amend the
24 order to all the parties and --

25 THE COURT: The answer is yes.

1 MR. BROWN: I sent you a letter --

2 THE COURT: I didn't get it, but the answer
3 is yes. You want an order entered on that?

4 MR. BROWN: I have -- I have the orders.

5 THE COURT: It's just a different account
6 number.

7 MR. ELIOT BERNSTEIN: But we don't have any
8 of the account information.

9 THE COURT: He's going to file an accounting.

10 MR. ELIOT BERNSTEIN: No, but JP Morgan was
11 supposed to have already provided us information,
12 and they're now, all of a sudden -- this could get
13 lost, there's evidence.

14 THE COURT: Now, you have -- Mr. Brown's
15 going to do an accounting.

16 MR. BROWN: I have the account statements.

17 THE COURT: He can have those, yeah. I mean,
18 Eliot, it's not -- let's not go there if we don't
19 have to.

20 MR. ELIOT BERNSTEIN: Okay.

21 MR. BROWN: This is the amended order. This
22 is the -- this is the order that I circulated.

23 MR. ROSE: Are you going to actually
24 liquidate the securities like -- give the order to
25 liquidate the securities?

1 THE COURT: They're already doing it.

2 MR. BROWN: Yeah.

3 MR. ROSE: Rather than wait for

4 Mr. O'Connell --

5 THE COURT: No, we're not missing a beat.

6 MR. ROSE: Thank you, sir. This was delayed

7 a little bit because of the order.

8 THE COURT: Okay. Thanks, Mr. Brown.

9 MR. BROWN: Thank you very much. May I be
10 excused for today?

11 THE COURT: Yes.

12 MR. ROSE: Thanks, Mr. Brown.

13 THE COURT: He still has a little work to do,
14 he's not retiring. He's not going to Cleveland.

15 Okay. So thanks, Mr. Brown. Of the two
16 remaining matters, one dealt with the removal
17 of Ted as trustee and the other one dealt with
18 the inadvertent disclosure issue. Is there --
19 let me get time frames to see which --

20 MR. ELIOT BERNSTEIN: Can I ask to postpone
21 those for a minute? I've -- I've engaged counsel
22 that I've paid to review the files. One is Fowler
23 White & Boggs. I don't know if you know who they
24 are here in Florida. They're a very respectful,
25 old line, Civil War type group of guys. And

1 Buchanan Ingersoll out of Pittsburgh. Both
2 outstanding reputations. They need some time to
3 get their hands around things -- I think now that
4 we've cleared to a PR, a little break here
5 wouldn't hurt any of us, and, you know, give
6 them --

7 THE COURT: When you say you've hired them --

8 MR. ELIOT BERNSTEIN: I engaged them to
9 review the files.

10 THE COURT: For the purpose of potentially
11 making an appearance?

12 MR. ELIOT BERNSTEIN: Yes, sir. And their
13 names -- they told me I could give you his name,
14 you can call him. Robert Olson is the shareholder
15 at Fowler White & Boggs; is the main guy on it.

16 THE COURT: Okay.

17 MR. ELIOT BERNSTEIN: You'll be much happier
18 with me represented.

19 THE COURT: On the inadvertent disclosure
20 issue, who is the purported aggrieved party?

21 MR. PANKAUSKI: Mr. Ted Bernstein and
22 Mr. Rose.

23 THE COURT: Mr. Rose.

24 MR. PANKAUSKI: Speaking about the e-mail,
25 Your Honor?

1 THE COURT: Yeah.

2 MR. PANKAUSKI: Yes, that was an e-mail
3 between Mr. Rose and his client, Ted Bernstein.

4 THE COURT: Okay. But --

5 MR. ELIOT BERNSTEIN: That's untrue, Your
6 Honor.

7 THE COURT: Hold on. Stop. Remember the
8 rules, Eliot? You're not doing that any more.

9 MR. ELIOT BERNSTEIN: Sorry.

10 THE COURT: Okay. Okay. But -- so whatever
11 happened, happened, correct --

12 MR. PANKAUSKI: Yes, Your Honor.

13 THE COURT: -- already? And what is the
14 issue that I would be asked to decide?

15 MR. ROSE: Okay. Briefly, Your Honor. We
16 had inadvertent e-mail, requests to recall it, and
17 then an objection by Mr. Bernstein. So under Rule
18 1.2850 this triggered a need for you to decide
19 whether the e-mail was, in fact, privileged. The
20 only urgency are two-fold: One, Mr. Eliot
21 Bernstein continues to use the e-mail by
22 republishing it in various pleadings. I mean,
23 continuing --

24 THE COURT: Give me one second. Sit down.
25 Go ahead.

1 MR. ROSE: I mean, including the motions to
2 remove people and various motions -- keeps
3 republishing parts of it to all the lawyers, and,
4 you know, all the parties. So, you know, it keeps
5 getting republished and republished. That's my
6 only concern, but...

7 THE COURT: Okay.

8 MR. ROSE: That's the issue.

9 THE COURT: I got that part. That kind of
10 was my recollection. All right. And so --

11 MR. ROSE: May I? Would you mind, sir?

12 THE COURT: Go ahead.

13 MR. ROSE: If you would enter an order -- you
14 have yet to enter an order under Rule 1.285 that
15 orders Mr. Eliot Bernstein to sequester the
16 document. But if you would enter an order and,
17 therefore, if he violated the order, he would be
18 in contempt. I would think it might make sense,
19 if he's having lawyers come in, to defer the issue
20 to when his lawyers come in because his lawyers
21 might look at the issue, decide it's not necessary
22 to have an evidentiary hearing over that issue.
23 But so long as -- the rule does require him to
24 sequester the e-mail and not use it. We have yet
25 to ask you to enter a formal order that would have

1 some teeth behind it.

2 MR. ELIOT BERNSTEIN: Your Honor, can I
3 speak?

4 THE COURT: No, not yet. I'm turning pages.

5 MR. ELIOT BERNSTEIN: I'm sorry.

6 THE COURT: I'm turning pages. Let me just
7 look for the rule.

8 What's the rule number one again?

9 MR. ELIOT BERNSTEIN: 1.285.

10 THE COURT: 285.

11 MR. ELIOT BERNSTEIN: And I think 90.502
12 might apply.

13 THE COURT: No, not yet. Okay. I got it.

14 All right. So because there's been
15 assertion of privilege at a hearing, I would
16 determine, what you tell me is, Eliot Bernstein
17 challenged the assertion of privilege, correct?

18 MR. ROSE: Yes, sir.

19 THE COURT: Okay. And Eliot says I'm having
20 that issue reviewed by some lawyers, is that what
21 you --

22 MR. ELIOT BERNSTEIN: No, I can take that
23 issue myself, I believe.

24 THE COURT: All right. So why don't we do
25 that.

1 MR. ELIOT BERNSTEIN: That's fine.

2 THE COURT: Let's do that hearing and then
3 we'll deal with the other one, if we have time, or
4 defer it.

5 MR. ELIOT BERNSTEIN: Okay.

6 THE COURT: Okay. Same admonition. Rules
7 apply. Okay.

8 MR. ELIOT BERNSTEIN: Who's leading?

9 MR. FEAMAN: Your Honor, in the interests of
10 my client's money, I would request that the court
11 formally, that we do, in fact, postpone the
12 hearing on Eliot's petition, which we have joined
13 in, for removal of Ted Bernstein.

14 THE COURT: As a practical matter, given what
15 Eliot said, given what you're just saying, given
16 the time frame, I think the last thing we'll be
17 able to do today is the privilege issues. So we
18 won't have time on the other one for today. But I
19 have hearing -- next week we have hearing time,
20 true?

21 MR. PANKAUSKI: Next Wednesday.

22 THE COURT: So do we have other things
23 scheduled already for next Wednesday or was it
24 just what we didn't finish today?

25 MR. FEAMAN: Just what we didn't finish

1 today.

2 THE COURT: All right. So let's talk about
3 that real quickly. If we didn't hear the removal
4 of Ted as trustee matter today, do you -- does
5 anyone want to hear that next Wednesday as opposed
6 to today?

7 MR. PANKAUSKI: Yes, Your Honor, we would
8 like to hear it next Wednesday if you don't hear
9 it today, but I think you can dispose of it today.

10 THE COURT: I can only dispose of it if I
11 start to hear it, so...

12 MR. PANKAUSKI: Understood.

13 THE COURT: I mean, we're kind of running out
14 of time and I wanted to do this privilege issue.
15 So -- all right. Well, let's -- I'll tell you
16 what. Mr. Feaman, would you -- you want to
17 just -- would you stay around -- I want to let you
18 know what we're going to do next Wednesday as soon
19 as we're done with this hearing. So just wait
20 around for a little bit.

21 MR. FEAMAN: Okay. Thanks.

22 THE COURT: You're up Eliot.

23 MR. ELIOT BERNSTEIN: Okay. I received an
24 e-mail communication.

25 THE COURT: Do you want to testify now, or

1 not?

2 MR. ELIOT BERNSTEIN: What's that mean?

3 THE COURT: Give evidence.

4 MR. ELIOT BERNSTEIN: No. Can I?

5 THE COURT: Well, yeah, if you want to, I'll
6 put you under oath.

7 MR. ELIOT BERNSTEIN: Can I submit the
8 letter?

9 THE COURT: That's not evidence. You can
10 submit it, but you have to move it into evidence
11 and see if someone objects.

12 MR. ELIOT BERNSTEIN: Can I move this letter
13 into evidence?

14 THE COURT: Any objection, number one, for
15 the hearing?

16 MR. PANKAUSKI: Yes.

17 THE COURT: This is the alleged --

18 MR. ELIOT BERNSTEIN: Privileged document.

19 THE COURT: -- privileged document.

20 MR. ROSE: Well, I think for the purposes --
21 I think he can mark for ID, but, you know, it
22 should not go into the court file if it's
23 privileged if ultimately --

24 THE COURT: Okay. That's the way to do it.
25 ID Number 1. Let me have it. Okay. So we need a

1 stamp here, because I've never seen the document,
2 so. All right. So for ID purposes, I've been
3 given an e-mail from Ted to Eliot. That's the
4 e-mail, correct, Mr. Rose?

5 MR. ROSE: Yes, Your Honor. If you look --
6 it's sent to Eliot Bernstein, but if you look at
7 the first dear, the first word of the e-mail is
8 Dear Alan.

9 THE COURT: Doesn't say Dear Alan, says Alan.

10 MR. ROSE: Okay.

11 THE COURT: So if we can, by way of opening
12 then, this document, which is many pages, but most
13 of them have, you know, certificate of
14 service-type people. It's one -- the essence of
15 the transmission is one page, correct?

16 MR. ROSE: Can I see the actual Exhibit he
17 moved in?

18 THE COURT: Yeah.

19 MR. ROSE: Yes, sir. That's correct.

20 THE COURT: It bears a date of May 22, 2014
21 at 10:52 p.m.

22 Okay. That's the one, correct?

23 MR. ELIOT BERNSTEIN: Correct, Your Honor.

24 THE COURT: And the substantive part of it is
25 one page, the first page?

1 MR. ELIOT BERNSTEIN: Correct, Your Honor.

2 THE COURT: All right. So I think I was told
3 previously that Ted made an assertion that this
4 was an inadvertent disclosure. Correct, Mr. Rose?

5 MR. ROSE: Correct, sir.

6 THE COURT: Okay. All right. And that Eliot
7 was served with a copy of the notice of assertion
8 of privilege and filed a challenge. So,
9 procedurally, is that where we're at?

10 MR. ROSE: Yes, sir.

11 THE COURT: Okay. So I need to see the --
12 did you, Mr. Rose, when you asserted privilege
13 pursuant to subsection (a), did you do so in
14 writing?

15 MR. ROSE: I did by e-mail, Your Honor.

16 THE COURT: Could I see that? And that will
17 be Number 2 for the hearing.

18 MR. ROSE: And that's what I'm trying to
19 find.

20 MR. ELIOT BERNSTEIN: For the hearing?

21 MR. ROSE: Do you have a copy of the e-mail
22 to you?

23 MR. ELIOT BERNSTEIN: I don't. I might.

24 MR. ROSE: I have a lot of papers.

25 Apologize.

1 THE COURT: I'll let you look through it.

2 And then, Mr. Eliot Bernstein, do you have your --

3 MR. ELIOT BERNSTEIN: No.

4 THE COURT: I haven't finished it.

5 MR. ELIOT BERNSTEIN: Sorry. And Alan might
6 have a copy of that, I don't know.

7 THE COURT: Okay. Do you have a writing -- a
8 writing that deals with your assertion of
9 privilege? Did you do it in writing or are you
10 going to tell it to me verbally?

11 MR. ELIOT BERNSTEIN: I objected to the
12 assertion.

13 THE COURT: Right. Right.

14 MR. ELIOT BERNSTEIN: I did and I sent it to
15 Mr. Rose.

16 THE COURT: Do you have a copy of your
17 challenge?

18 MR. ELIOT BERNSTEIN: I don't.

19 MR. ROSE: I would -- I would concede -- I
20 would concede he's made the challenge. He teed up
21 the issue. I cannot find my --

22 THE COURT: All right. So then it says here
23 in the rule the grounds for the challenge may
24 include, but are not limited to, the following:
25 The materials in question are not privileged. Is

1 that -- is that one thing you asserted?

2 MR. ELIOT BERNSTEIN: That's one of my
3 points.

4 THE COURT: Next, the disclosing party lacks
5 standing to assert the privilege. Is that a
6 ground?

7 MR. ELIOT BERNSTEIN: What's that? One more
8 time, the opposing party.

9 THE COURT: They're the one asserting
10 privilege. The question is, do they have standing
11 to do so.

12 MR. ELIOT BERNSTEIN: Under what capacity did
13 they assert privilege? I have to ask him.

14 THE COURT: This is Ted's communication that
15 he said was inadvertently disclosed to you and
16 should have gone to Alan. Alan is his lawyer.
17 Okay. And it's agreed that they timely filed
18 notice.

19 Okay. All right. So your first piece of
20 evidence, Eliot, that either the materials in
21 question are not privileged.

22 MR. ELIOT BERNSTEIN: Right.

23 THE COURT: Or deals with the circumstances
24 surrounding the production or disclosure of the
25 materials, so I can make a determination whether

1 there's been a waiver of an assertion that the
2 material is protected by privilege.

3 Okay. You're up. Do you want to testify?

4 Raise your right hand.

5 THEREUPON,

6 ELIOT BERNSTEIN,

7 a witness herein being of lawful age, and being first
8 duly sworn in the above cause, testified under oath
9 as follows:

10 MR. ELIOT BERNSTEIN: Yes, sir.

11 THE COURT: Go ahead.

12 DIRECT EXAMINATION

13 MR. ELIOT BERNSTEIN: Okay. I testified that
14 I got this e-mail directly from my brother. There
15 were no lawyers copied on it, which was told to
16 you twice now, with the prior hearing and today,
17 that the communication was sent from Ted to his
18 attorney, which it wasn't.

19 THE COURT: Okay. So hold on.

20 MR. ELIOT BERNSTEIN: Yes, sir.

21 THE COURT: Make sure the record is clear.

22 In Exhibit Number 1 for ID only, the written data
23 is one page, but it says notice of service of
24 court documents. Does that mean that the e-mail
25 was sent -- Mr. Rose -- says it's sent by Ted.

1 That's not disputed, correct?

2 MR. ROSE: Yes, sir, Mr. Ted Bernstein sent
3 it.

4 THE COURT: When he sent it, what's on Page
5 2, did the e-mail also have that?

6 MR. ELIOT BERNSTEIN: No, here's what
7 happened. It looks like --

8 THE COURT: This is your document.

9 MR. ELIOT BERNSTEIN: No, it's their
10 document.

11 THE COURT: You moved this into evidence.

12 MR. ELIOT BERNSTEIN: It's Ted's e-mail to
13 me. So Page 2 of Ted's e-mail is this service
14 list. And the reason there is a service list
15 there, was it appears that Ted was responding to
16 my objection to the accounting and replied to me
17 that this whole thing, you know, Dear Alan letter.

18 THE COURT: Let me back up. This is --
19 because this is one document. On Page 2 of
20 Exhibit 1 for ID only, it says May 22, 2014 at
21 5:01 p.m., Eliot Bernstein wrote, and then it has
22 notice of service of court documents.

23 MR. ELIOT BERNSTEIN: I served my objections
24 to the accounting.

25 THE COURT: Okay.

1 MR. ELIOT BERNSTEIN: Ted was the recipient.

2 THE COURT: Okay. You sent that -- among the
3 people that you sent that to, all the people on
4 this list, correct?

5 MR. ELIOT BERNSTEIN: Yeah.

6 THE COURT: All right. Why is that attached
7 to what Ted wrote to you?

8 MR. ELIOT BERNSTEIN: It's a reply. He
9 replied to my service.

10 THE COURT: Okay. I follow you now.

11 MR. ELIOT BERNSTEIN: Okay, sir.

12 THE COURT: Okay. I got it.

13 MR. ELIOT BERNSTEIN: Okay. Thank you.

14 THE COURT: Go ahead.

15 MR. ELIOT BERNSTEIN: Okay. So, you know, I
16 got a letter from my brother directly to me, no
17 other people copied on it, no lawyers copied on
18 it. Nothing. I get a thousand e-mails, as I've
19 told you, that are people's letters to people,
20 start out with Alan, Bob, Dave, or whatever you
21 want. There is no privileged language on it like
22 a lawyer/client, attorney privilege, don't read
23 this if you are not the guy. So I read the
24 letter. And it's got threatening language to me
25 and my family and other people. It threatens the

1 use of force and aggression.

2 THE COURT: You're outside the scope of the
3 rule.

4 We're dealing with the issues
5 of privilege.

6 MR. ELIOT BERNSTEIN: Can you help me there?

7 THE COURT: Dealing with the issues of
8 privilege.

9 MR. ELIOT BERNSTEIN: That's one of the most
10 important rules that I don't know if you touched
11 on, that the Bar rules say that privilege can be
12 broken when there is actual threats of force. I
13 think it's 4.41 --

14 THE COURT: Hold on. Let me see -- try to
15 make common sense out of this. This seems pretty
16 easy to me. Tell me if this is the issue. If
17 this e-mail was intended to go from Ted to Eliot,
18 do you assert that as privileged?

19 MR. ROSE: If the e-mail was intended by Ted
20 to go to Eliot, then we would agree that it would
21 be an e-mail from Ted to Eliot. The reason --

22 THE COURT: No. No. Stop. Stop. I'm
23 taking control. If this e-mail was inadvertently
24 sent to Ted and was intended to be sent to Alan
25 Rose, Ted's lawyer, would you agree that that

1 would be privileged?

2 MR. ELIOT BERNSTEIN: No.

3 THE COURT: And why not?

4 MR. ELIOT BERNSTEIN: Well, it loses its
5 privilege when he sends it to me.

6 THE COURT: No. No. Remember I said if it
7 was inadvertently sent to you and was intended to
8 go --

9 MR. ELIOT BERNSTEIN: Well, that depends on
10 his intent.

11 THE COURT: Okay. All right.

12 MR. ELIOT BERNSTEIN: And his intent is
13 questionable.

14 THE COURT: Okay. All right. There is no
15 factual dispute that this was actually sent to
16 Eliot, true?

17 MR. ROSE: True.

18 THE COURT: And it says that right on the
19 document, to Eliot. All right. So let me look at
20 the way this rule is worded. Okay. So Eliot,
21 you've got to show as part of your challenge where
22 this is -- why this is not privileged. And one
23 reason you say is because it was sent to you.

24 MR. ELIOT BERNSTEIN: Well, under 95.02
25 [sic].

1 THE COURT: 95 what? What's that mean?

2 MR. ELIOT BERNSTEIN: 90 point -- Florida
3 statutes, I believe.

4 THE COURT: Florida statutes.

5 MR. ELIOT BERNSTEIN: 90.502.

6 THE COURT: Okay. Hold on.

7 MR. ELIOT BERNSTEIN: Only --

8 THE COURT: Hold on. If you cite something,
9 I got to get to it.

10 MR. ELIOT BERNSTEIN: I was going to give you
11 the subset.

12 THE COURT: Okay. Lawyer/client privilege.

13 MR. ELIOT BERNSTEIN: 4 (a) and (c)
14 particularly.

15 THE COURT: All right.

16 MR. ELIOT BERNSTEIN: I'm not sure if these
17 are up to date.

18 THE COURT: I read that and see -- all right.
19 But -- all right. I think that the little bit
20 what you're getting at is a little bit of a sub
21 issue because -- or maybe not. Okay. All right.
22 So you are contending that the materials are
23 not -- are not privileged, in essence, even if
24 intended to go to Alan because they violate or --
25 because of 90.502, Subsection (4), that says

1 there's no lawyer/client privilege under the
2 section when, and whatever subsection (a) or (c)
3 says.

4 MR. ELIOT BERNSTEIN: If it were determined
5 somehow it was privileged, yeah, those would apply
6 then.

7 THE COURT: All right. Go ahead. Keep on
8 going.

9 MR. ELIOT BERNSTEIN: I think I'm done.

10 THE COURT: Okay. All right. Any questions?

11 MR. ELIOT BERNSTEIN: Can I call witnesses?

12 THE COURT: Yeah, but they still have a right
13 to question you first. Then when you're done you
14 can call witnesses.

15 MR. ROSE: Can I cross-examine him?

16 THE COURT: Sure. Eliot have a seat up here.

17 MR. ELIOT BERNSTEIN: Sure.

18 CROSS-EXAMINATION

19 BY MR. ROSE

20 Q I'm going to hand him an exhibit, I'll mark it
21 as Exhibit 2.

22 THE COURT: No, it will be your Number 1.
23 Respondent's Number 1.

24 MR. ROSE: Respondent's 1. May I approach?

25 THE COURT: Yeah.

1 BY MR. ROSE

2 Q I've handed you Respondent's 1, which is an
3 e-mail from Alan Rose to I view it at I view it dot pb.

4 Is that your e-mail address?

5 A Yes, it is.

6 Q Did you receive this e-mail on or about
7 Thursday, May 22nd at 11:07 p.m.?

8 A It looks like that according to this copy.

9 THE COURT: Moving it into evidence?

10 MR. ROSE: Move it into evidence.

11 THE COURT: Number 1 for the respondent.

12 BY MR. ROSE

13 Q And that's less than an hour after you received
14 the e-mail from Ted, is that correct?

15 A Well, according to the e-mail I've submitted
16 into evidence, Ted sent me his e-mail at 10:52 and you
17 were right on it -- let's see -- 8 minutes plus 7 is 15
18 minutes --

19 THE COURT: So, Eliot, did you hear the
20 question, it was so simple.

21 THE WITNESS: No, I was just doing the math.

22 THE COURT: He said, is it within an hour?

23 THE WITNESS: Oh, within an hour, was that
24 the question?

25 BY MR. ROSE

1 Q Yes, was it within an hour?

2 A Yeah.

3 Q Okay. And then did you agree -- we had a
4 hearing that day?

5 A I did not receive this e-mail or
6 communicate --

7 THE COURT: Doesn't mean when it was opened,
8 it meant when it was transmitted.

9 THE WITNESS: Okay. Great.

10 BY MR. ROSE

11 Q We had a hearing the next morning, and there is
12 a transcript of the hearing. Did you agree at the
13 hearing to not use the e-mail until the court was able
14 to -- strike that. Did you agree at the hearing not to
15 use the e-mail at all?

16 A I did.

17 Q And then you wrote me an e-mail that said that
18 you got back from the hearing and you would delete and
19 destroy the e-mail in accordance with the law?

20 A I said I would follow the law.

21 Q Okay.

22 A And then I sent you notice that I was
23 objecting.

24 MR. ROSE: Exhibit 2, Respondent's Exhibit 2,
25 Your Honor.

1 THE COURT: Okay.

2 BY MR. ROSE

3 Q Is this an e-mail you sent to me, sir?

4 A I want to clarify. I did actually send to
5 everybody I sent it to a letter stating what you had
6 claimed privileged, and asking them to follow the law.
7 And do as they see fit. I provided them both sections
8 of the law that I could see that were applicable.

9 THE COURT: Okay. Eliot, next question.

10 THE WITNESS: Okay.

11 BY MR. ROSE

12 Q Is this an e-mail you sent to me?

13 A Yes.

14 THE COURT: Number 2 in evidence?

15 MR. ROSE: Number 2 in evidence. Thank you.

16 BY MR. ROSE

17 Q And was one of the people you sent the
18 privileged e-mail to Crystal Cox?

19 A Yes, it is.

20 Q And did she publish the e-mail on the Internet?

21 A I believe so.

22 Q And have you since republished what she's
23 published in papers that you filed with Judge Colin?

24 A I've taken excerpts from her web sites and
25 published them in papers to Judge Colin.

1 Q And did those include parts of the privileged
2 e-mail?

3 A They included parts of the privileged e-mail.
4 They included parts of her web blog. Blog.

5 THE COURT: He answered it. I understand.

6 MR. ROSE: Okay. I have nothing further.

7 Thank you.

8 THE COURT: Okay. All right. Your next
9 witness, Eliot.

10 MR. ELIOT BERNSTEIN: Alan Rose.

11 THE COURT: Okay. Mr. Rose, switch places.

12 THEREUPON,

13 ALAN B. ROSE, ESQ.,

14 a witness herein being of lawful age, and being first
15 duly sworn in the above cause, testified under oath
16 as follows:

17 DIRECT EXAMINATION

18 BY MR. ELIOT BERNSTEIN

19 Q Mr. Rose, you submitted into evidence your
20 letter to me sent at 11:07, 15 minutes after Ted's letter
21 at 11:07 p.m. Are you aware that I talked with you and
22 told you that I did not see this letter till minutes -- I
23 didn't even know this letter existed at the time of the
24 hearing that was had the day of court?

25 A You told me that, yes.

1 Q Okay. And I told you I would go back and do
2 what it was according to law, correct?

3 A You told me outside of the courtroom that you
4 had already sent it to 2,000 people, and you would not
5 retract it. Then we had a hearing. And what happened
6 at the hearing is on the transcript.

7 Q Okay. And so I did inform you that I had sent
8 it to several thousand people?

9 A Yes, sir.

10 Q Okay. Hold on one second. Are you aware that
11 the e-mail was sent from Ted to Eliot only?

12 A Yes, I received an e-mail --

13 THE COURT: Okay. Yes.

14 THE WITNESS: Yes.

15 BY MR. ELIOT BERNSTEIN

16 Q Did you make prior statements to the court that
17 the e-mail was sent to Ted -- or from Ted to Eliot, plus
18 other attorneys?

19 A No, I think I said there was an e-mail that
20 came from Eliot to Ted that had a pleading in it. Ted,
21 while on an airplane, typed a reply -- he didn't type a
22 reply. He typed something to me that accidentally went
23 as a reply to you. And then he told me about it and
24 this is where we are.

25 Q Okay. And from your understanding of the law,

1 I have followed the rules of privilege regarding
2 notifying you that I was challenging this?

3 A Absolutely not. You've not followed the
4 rules.

5 Q I haven't notified you that I was objecting to
6 this because I thought you had admitted that to the court
7 already.

8 A You notified me that you were going to
9 challenge our assertion to privilege, but you didn't
10 comply with the rule.

11 Q Okay. That was the part -- you can make that
12 claim later. But once again, just to get it clear for
13 the record.

14 THE COURT: I got it.

15 MR. ELIOT BERNSTEIN: You do. Okay. Great.

16 BY MR. ELIOT BERNSTEIN

17 Q Okay. Is it typical that you're working at
18 11:07?

19 A It's very typical.

20 Q Okay.

21 A Unfortunately.

22 MR. ELIOT BERNSTEIN: That's all the
23 questions I have.

24 MR. ROSE: No redirect -- or no recross.

25 THE COURT: Next witness, Eliot.

1 MR. ELIOT BERNSTEIN: Ted Bernstein.

2 THE COURT: All right, Ted.

3 THEREUPON,

4 TED BERNSTEIN,

5 a witness herein being of lawful age, and being first
6 duly sworn in the above cause, testified under oath
7 as follows:

8 DIRECT EXAMINATION

9 BY MR. ELIOT BERNSTEIN

10 Q Ted, did you send me, Eliot, a letter on May
11 23 -- or on May 22, 2014?

12 A I believe I did.

13 Q Can you describe what the e-mail you sent
14 was --

15 MR. ROSE: Objection, best evidence.

16 BY MR. ELIOT BERNSTEIN

17 Q -- about?

18 THE COURT: Yeah, best evidence is the
19 e-mail. You can ask him questions about it, but
20 you are asking him to describe it.

21 MR. ELIOT BERNSTEIN: Okay.

22 BY MR. ELIOT BERNSTEIN

23 Q Did you use the words force and aggression
24 to -- to invoke a strategy of force and aggression
25 against Eliot Bernstein?

1 A I don't know. Can I see the e-mail, please?

2 THE COURT: That's fair.

3 MR. ELIOT BERNSTEIN: Sure.

4 THE COURT: He's showing him a document.

5 MR. ROSE: I was just cautioning him not to
6 publish the --

7 THE COURT: It's still ID only. Go ahead.

8 So you've shown him, Eliot, the document. What's
9 your question?

10 BY MR. ELIOT BERNSTEIN

11 Q Did you say you were -- that you suggested
12 using force and aggression with Eliot?

13 MR. ROSE: Object to the form.

14 THE COURT: Overruled.

15 THE WITNESS: No.

16 BY MR. ELIOT BERNSTEIN

17 Q Can you read that section into --

18 MR. ROSE: Objection to him reading it.

19 THE COURT: Well --

20 MR. ROSE: He can read it to himself.

21 THE COURT: Yeah, you can read it to yourself
22 and then ask a question. But you also need to
23 tell me what part you're reading.

24 MR. ELIOT BERNSTEIN: Him being aggressive
25 and forceful.

1 THE COURT: Where -- what paragraph should I
2 read?

3 MR. ELIOT BERNSTEIN: Like the fifth line --
4 the first one, two, three, four --

5 THE COURT: Okay. Let me read it.

6 MR. ELIOT BERNSTEIN: -- sixth line where it
7 starts --

8 THE COURT: Give me a chance. Ted and I will
9 read at the same time.

10 Okay. I read it. Go ahead.

11 THE WITNESS: I've read it too.

12 BY MR. ELIOT BERNSTEIN

13 Q Does that refresh your memory? Did you use --
14 if you used the words --

15 A My answer is still no.

16 Q -- to be forceful and aggressive with Eliot?

17 A You asked if I used the words force and
18 aggression.

19 Q Okay. I'll ask it again. Did you use the
20 words being aggressive and forceful?

21 A Yes, I did.

22 Q Okay. Are you aware of the qualifications of a
23 fiduciary?

24 MR. ROSE: Objection, relevance.

25 THE COURT: What's the relevancy to this

1 issue?

2 MR. ELIOT BERNSTEIN: I was going to ask him
3 if he understood that being aggressive and
4 forceful is contrary to other fiduciary's
5 responsibilities to --

6 THE COURT: Okay. Sustained.

7 MR. ELIOT BERNSTEIN: That's all I have.

8 THE COURT: Any questions?

9 MR. ROSE: Just briefly.

10 THE COURT: Hold on, Ted.

11 MR. ROSE: Just like to move into evidence --

12 CROSS-EXAMINATION

13 BY MR. ROSE

14 Q Did you send me an e-mail after you realized
15 that you had sent the e-mail to Eliot?

16 A Yes.

17 THE COURT: That will be Number 3.

18 MR. ROSE: I don't think it waives the
19 privilege just to have --

20 THE COURT: No, this is a privileged hearing,
21 so...

22 MR. ROSE: This is Number 3.

23 THE COURT: You can show it to him.

24 MR. ELIOT BERNSTEIN: This is a privileged
25 letter we just admitted?

1 MR. ROSE: This is my -- the e-mail from Ted
2 to me. This part is different. You've seen
3 everything else.

4 MR. ELIOT BERNSTEIN: Okay.

5 BY MR. ROSE

6 Q This is Exhibit 3. Do you recognize this as an
7 e-mail you sent to me?

8 A Yes.

9 Q What is -- I move this in evidence.

10 THE COURT: Number 3.

11 BY MR. ROSE

12 Q It says sent to Eliot by mistake. Is that what
13 you wrote to me?

14 A Yes.

15 THE COURT: Let me see it.

16 MR. ROSE: In evidence. I'll give it to you,
17 Your Honor.

18 BY MR. ROSE

19 Q Could you just, very briefly, describe the
20 circumstances for how it came -- you sent the e-mail by
21 mistake?

22 A Yeah, I intended to send you an e-mail when I
23 was flying back home from a trip, and I was using
24 software I was unfamiliar with actually, and instead of
25 hitting opening up an e-mail to you, I hit forward by

1 mistake -- reply by mistake -- and it went to Eliot in
2 reply rather than forwarding to you.

3 Q How long after you discovered that did you send
4 me the e-mail?

5 A I did that immediately. Right away. As soon
6 as I got off the plane.

7 Q Was the e-mail intended solely for me to
8 discuss legal strategy?

9 A Yes.

10 Q Do you have any desire to harm your brother or
11 hurt him?

12 A No, I don't.

13 MR. ROSE: Okay. Nothing further, Your
14 Honor.

15 THE COURT: Okay.

16 MR. ELIOT BERNSTEIN: Can I?

17 THE COURT: Yes, redirect.

18 MR. ELIOT BERNSTEIN: Redirect.

19 REDIRECT EXAMINATION

20 BY MR. ELIOT BERNSTEIN

21 Q Ted, in the letter, did you say if John does
22 not want to tangle with Eliot, remove John immediately?

23 MR. ROSE: Objection, Your Honor.

24 THE COURT: Hold on. So he's just reading
25 something of it, now you have to ask the question.

1 BY MR. ELIOT BERNSTEIN

2 Q Do you recall writing those words?

3 MR. ROSE: Objection, attorney-client

4 privilege.

5 THE COURT: No, it's in Exhibit Number 1

6 that's ID only. Overruled.

7 THE WITNESS: Yes.

8 BY MR. ELIOT BERNSTEIN

9 Q What does the word tangle with Eliot refer to,
10 if you have no hard feelings or animosity?

11 THE COURT: Well, you didn't ask about hard
12 feelings and animosity. You asked whether he
13 wanted to hurt you.

14 BY MR. ELIOT BERNSTEIN

15 Q Well, okay, tangle. What does tangle mean?

16 A Engage.

17 Q Okay. Engage being aggressive and forceful,
18 are those the words?

19 A No.

20 Q You didn't say those words as well in that same
21 sentence, in that same paragraph, tangle with Eliot and
22 then be aggressive and forceful?

23 A I don't understand the question you are
24 asking me.

25 THE COURT: You covered that already. I got

1 it.

2 MR. ELIOT BERNSTEIN: Okay.

3 BY MR. ELIOT BERNSTEIN

4 Q Can you describe what you meant when you said
5 if he -- I believe referring to John -- is not one
6 hundred percent in support of me as trustee, including
7 how I protected myself with trust assets, and will
8 continue doing so as necessary? What were you referring
9 to there?

10 MR. ROSE: Objection, Your Honor. This is
11 beyond --

12 THE COURT: Sustained. Sustained.

13 MR. ELIOT BERNSTEIN: Don't ask him that
14 question?

15 THE COURT: Because I don't need to know his
16 interpretation of what he means. That's not
17 relevant.

18 MR. ELIOT BERNSTEIN: Okay. I'll let it go.
19 I'm done.

20 THE COURT: Okay. Have a seat. Thanks.

21 Next witness, Eliot.

22 MR. ELIOT BERNSTEIN: Nobody. Thank you.

23 THE COURT: Okay.

24 MR. ROSE: No witnesses, Your Honor.

25 THE COURT: Okay.

1 MR. ELIOT BERNSTEIN: Oh, Your Honor.

2 THE COURT: Yes.

3 MR. ELIOT BERNSTEIN: Okay. One of the
4 biggest problems I have is that if you let it be
5 privileged, and then we don't go to the Florida
6 Bar rules, which say contains words like force and
7 aggression against Eliot, yada, yada, yada, that
8 we could be covering a document up here in
9 privilege that I can't --

10 THE COURT: You're arguing now. I'm not even
11 at the argument stage.

12 Okay. I was reading.

13 MR. ELIOT BERNSTEIN: Okay. Sorry.

14 THE COURT: Okay. So all right. I'm going
15 to allow argument and I heard Eliot's argument.
16 So the essence of Eliot's argument is, if I
17 determine that the materials are privileged, the
18 rules say I'm to direct what should be done with
19 the materials and any copies as to preserve all
20 rights of the appellate review. The recipient of
21 the materials shall also give prompt notice of my
22 ruling to everyone else. That's the essence of
23 it. Eliot seems to be raising that if I do that,
24 will that have some impact on a potential
25 administrative proceeding with the Bar, is that

1 what your question is?

2 MR. ELIOT BERNSTEIN: Not just that. I'd
3 like to be submitting this to criminal authorities
4 because I've already alleged extortion that
5 they're doing on me and this fits in nicely with
6 force and aggression threats. And I think we
7 would be covering up a piece of evidence that
8 could lead to me to getting harmed, especially
9 where in this case my brother was already alleging
10 my father was murdered, we haven't determined that
11 all yet. But it's starting to look like the
12 people that are involved in the fraud, and I'm a
13 little nervous, Your Honor, that I can't give this
14 to a police officer.

15 THE COURT: Let me read something in 502 for
16 a second.

17 Okay. All right. Okay. So listen to my
18 ruling.

19 The rule is pretty clear on the procedure.
20 And I think you folks have done substantially
21 what the rule requires. So we're at the point
22 where Eliot has challenged the assertion of
23 privilege. It's uncontradicted that Ted wrote
24 a letter -- an e-mail -- that actually went to
25 Eliot. That's uncontradicted. One issue is

1 did Ted intend that letter to go not to Eliot
2 but to Alan, meaning Alan Rose, his lawyer.
3 That's a finding of fact that I have to make.
4 Ted said yes to that. There is no other
5 testimonial evidence as to whom that letter was
6 intended, but there is documentary evidence by
7 looking at the content of the letter.

8 So I've read the letter and it's pretty
9 easy to see that that letter was intended to go
10 to Ted's lawyer, Alan. In the beginning of the
11 letter it says, Alan. And then the discussion
12 in the letter is clearly directed to that which
13 is part of the subject of the letter, which is
14 this case, it's either the Shirley or the Simon
15 case.

16 So I make a finding of fact that this
17 letter was intended to go to Alan.

18 That finding is supported easily by the
19 fact that shortly before that letter was sent
20 from Eliot -- from Ted to Eliot -- Eliot has
21 sent a letter, or a document, by e-mail, to,
22 among others, Ted. And so Ted's version is
23 instead of sending a clean letter from him to
24 Alan, he hit forward, I think he said, and it
25 wound up -- or reply -- and it wound up getting

1 sent to Eliot. That is the essence of an
2 inadvertent disclosure.

3 So I find that the matters were intended
4 to go from Ted to Alan, his lawyer.

5 Eliot then says, notwithstanding, the
6 materials in question should not be deemed
7 privileged because of Florida Statute 90.502,
8 subsection 4, that basically stands for the
9 proposition that even if there is a
10 communication between a client and a lawyer,
11 the lawyer-client privilege doesn't apply when
12 the services of the lawyer are sought -- that
13 is that Ted is seeking the services of the
14 lawyer -- or obtained to enable or aid anyone
15 to commit or plan to commit what the client --
16 that's Ted in this case -- knew -- knew was a
17 crime or fraud.

18 The other assertion is as to subsection 4
19 (c) that this is -- that a privilege shouldn't
20 apply because it's a communication relevant to
21 an issue of breach of duty by the lawyer to the
22 client. That is that it shouldn't be
23 privileged or not allowed to be privileged
24 because it deals with the subject for another
25 hearing in which Ted would say that his lawyer

1 breached the duty to the client.

2 Okay. So 4 (c) clearly doesn't apply to
3 this letter.

4 So Eliot's assertion is that words within
5 this e-mail, in which Ted writes intended to
6 Alan, that if John -- and I haven't heard who
7 that is, but I assume that's John Pankauski, is
8 his other lawyer -- does not want to tangle
9 with Eliot. It then says he wants, that is
10 Ted, wants John to be aggressive and forceful,
11 if need be, with Eliot and remove him -- and
12 remove him as counsel -- if not, remove him as
13 counsel.

14 So the issue is, in reading that language,
15 either on its four corners or through parol
16 evidence, which I've heard a little bit about,
17 are those words in which Ted is soliciting Alan
18 to commit, or plan to commit, what Ted knew was
19 a crime or fraud.

20 Eliot's assertion is that when Ted seeks
21 of Alan assistance in compelling John, his
22 other lawyer, to tangle with Eliot, as written,
23 and to be aggressive and forceful, is that
24 tantamount of Ted soliciting Alan to try to get
25 Alan to, in essence, commit a crime -- which

1 Eliot says is a crime -- meaning, threatening
2 him with some force or harm, or the like.

3 So the court has to make that decision in
4 the context of the letter. And so when I read
5 this letter, the question is, what do I read --
6 because I have no other evidence about what was
7 intended, other than what I heard so far, which
8 really doesn't speak to this, is language from
9 a client to one lawyer telling that lawyer that
10 he wants to basically remove the other lawyer
11 or consider removing him if that lawyer doesn't
12 want to tangle with Eliot, and be aggressive
13 with him. Does that mean that he is requesting
14 the lawyer that he's writing to to be
15 physically assaultive or batter -- or a
16 batterer -- or is he telling his lawyer -- Ted
17 telling Alan -- that he wants John, John
18 Pankauski, to legally tangle with Eliot. And
19 legally tangle -- legally be aggressive and
20 forceful.

21 I rule it's clearly the latter.

22 I know, Eliot, that throughout many
23 appearances before me -- and I wasn't sure what
24 it was at first -- you've told me that you,
25 your family, and others, are being threatened

1 with bodily harm, and I wasn't sure what the
2 nature of that threat is. But if what is in
3 the Paragraph 1 of Exhibit 1 is deemed by you
4 to fall in that category, there's nothing that
5 I can do about you reading it that way, but
6 it's clearly not the case. I mean, that's --
7 it's not necessarily standard language -- I
8 don't know if there is such a thing as standard
9 language -- but lawyers -- clients directing
10 lawyers to toughen up, be aggressive, be
11 forceful, be willing to tangle with the
12 opponent, is common in litigation. And there
13 is nothing in this writing that seems to
14 indicate that that means physical, like beat
15 you up on the street, because that's not the
16 way this is written. It's clear that this is
17 written in the context of the case.

18 Okay. So I find that the lawyer-client
19 privilege does apply. Because this was not
20 requesting perpetration of a crime of assault
21 or battery against -- against Eliot.

22 So the next question then becomes whether
23 there remains grounds to challenge the
24 assertion of privilege. The court says no.
25 This document was as privileged as could be.

1 And it's intended -- it is -- the court rules
2 that it is allowed to be treated as an
3 inadvertent disclosed document, to which
4 privilege applies pursuant to the rule. And
5 the remedy -- what's the specific remedy
6 Mr. Rose -- because the way the rule reads, if
7 I enter an order determining that the materials
8 are privileged, which I'm finding. I'm not
9 finding that the right to challenge was waived.
10 I don't think Eliot waived it. He asserted it
11 correctly. Then I can direct what shall be
12 done with the materials. So you folks are
13 telling me that things have happened already.
14 What is it that you are seeking in the order I
15 do about the materials, which I assume is this
16 one page -- hold on -- I'm asking Alan first,
17 then I'll entertain you.

18 MR. ELIOT BERNSTEIN: Okay.

19 MR. ROSE: I think you could find that he
20 violated the rule because he did not sequester it.
21 We're not here for that purpose. I would ask you
22 that --

23 THE COURT: I didn't even hear evidence on
24 that yet, so I'm not going there yet.

25 MR. ROSE: I would ask that he delete all

1 copies, notify people --

2 THE COURT: Okay. Slow down. Hold on. Hold
3 on. One -- you got to go slow.

4 One, delete all copies in his possession
5 and control?

6 MR. ROSE: Correct. Including electronic.

7 THE COURT: Well, okay. Hold on. All right.

8 MR. ROSE: He should notify the recipients
9 and then provide us with a copy of his
10 notification to them, and request them --

11 THE COURT: Notify recipients of what?

12 MR. ROSE: The people that he forwarded the
13 e-mail to. He should notify them of Your Honor's
14 ruling and that he's been ordered to have them
15 destroy all copies. And I would ask that he
16 provide -- or file with the court -- proof that
17 he's done that.

18 THE COURT: Okay. Go ahead.

19 MR. ROSE: And then at this point, number
20 three, I would like you to order that he's not to
21 ever use the privileged material, or republish it,
22 even if he's republishing Crystal Cox's web site,
23 where she published this --

24 THE COURT: I got it.

25 MR. ROSE: -- at his request.

1 THE COURT: Okay.

2 MR. ROSE: And then we would reserve ruling
3 on any sanctions and, hopefully, we won't have to
4 come back.

5 And then reserve on fees and sanctions for
6 his violating the order.

7 THE COURT: Where is there a fee provision?

8 MR. ROSE: We would have to file a motion and
9 that would be on the basis of his violating Rule
10 1.285. We have not filed that motion.

11 THE COURT: Where is there a -- where's the
12 rule about fees?

13 MR. ROSE: 1.375. I mean, I don't have my
14 rule book -- the rule on sanctions for discovery
15 violations and also the inherent authority of the
16 court. But we haven't raised that motion yet
17 because Your Honor just today ruled that the
18 document was privileged.

19 THE COURT: Okay. All right. Okay. So do
20 you want to be heard on the scope of the order?

21 MR. ELIOT BERNSTEIN: Yeah.

22 THE COURT: What -- go ahead. First thing is
23 that you be ordered to delete --

24 MR. ELIOT BERNSTEIN: No, I've got all that.

25 THE COURT: Well, that's what I'm getting at.

1 MR. ELIOT BERNSTEIN: Okay. I wanted to
2 oppose that.

3 THE COURT: Okay. All right. That's a
4 purported remedy that I'm being asked to do.

5 MR. ELIOT BERNSTEIN: Okay.

6 THE COURT: So what's your basis for opposing
7 that?

8 MR. ELIOT BERNSTEIN: I appreciate your
9 interpretation of that letter. The word forceful
10 is --

11 THE COURT: Again, you can't re-question --
12 I've already ruled.

13 MR. ELIOT BERNSTEIN: Okay.

14 THE COURT: Here's the question. There's
15 going to be an order entered.

16 MR. ELIOT BERNSTEIN: Okay.

17 THE COURT: The wording of the order, is the
18 way the rule is, is that I have to determine and
19 direct what shall be done with the materials,
20 that's this e-mail. The first thing they want is
21 an order that tells you, you, to delete this
22 e-mail from anything that's -- any document,
23 including any electronic storage place, that's in
24 your possession and control.

25 MR. ELIOT BERNSTEIN: Well, I want to give it

1 to the police departments and --

2 THE COURT: Okay. Well, if you do that --
3 well, okay, so let's --

4 MR. ELIOT BERNSTEIN: I mean, my life's in
5 danger. I know you didn't --

6 THE COURT: All right. So --

7 MR. ELIOT BERNSTEIN: -- read that.

8 THE COURT: Listen to me carefully.

9 MR. ELIOT BERNSTEIN: Okay.

10 THE COURT: I'm going to order you to delete.
11 Okay. I'm going to order you -- this is all
12 appropriate -- to notify the recipient of
13 everybody that you sent this to, of the ruling,
14 meaning you're going to send them a copy of the
15 order, and direct that they shall also delete and
16 not transmit.

17 Listen to me carefully. I order you not
18 to disseminate this document from this moment
19 forward to anybody. If you violate my order,
20 you're going to be in contempt of court.
21 Anybody, any agency, no one, because it's
22 privileged. And there is a rule that says
23 you're not allowed to do that.

24 MR. ELIOT BERNSTEIN: Do I have the right to
25 appeal this decision?

1 THE COURT: Yeah. Sure.

2 MR. ELIOT BERNSTEIN: Okay.

3 THE COURT: But you have to obey my decision
4 pending the appeal.

5 MR. ELIOT BERNSTEIN: Yeah.

6 THE COURT: Sure, you can do that. All
7 right. Write it up.

8 MR. ROSE: Yes, sir.

9 THE COURT: If you want to write that up now
10 you can, or you can get my transcript and write
11 that up.

12 MR. ROSE: I would prefer to get the
13 transcript and write it up from the transcript,
14 Your Honor, for clarity.

15 THE COURT: Mr. Eliot, pending me writing the
16 written order, because electronics move quickly,
17 okay, this order is binding on you as of right
18 now.

19 MR. ELIOT BERNSTEIN: Okay. I got it.

20 THE COURT: So play by the rules.

21 MR. ELIOT BERNSTEIN: I will.

22 THE COURT: Okay. You have a right to
23 appeal. If the appellate court disagrees with me,
24 you and I will both do what they say.

25 MR. ELIOT BERNSTEIN: Okay.

1 THE COURT: All right. Okay. So now for
2 Wednesday, Eliot's request is we defer on having
3 hearings on the issue of Ted as successor trustee
4 and -- so he can talk to his lawyers and see
5 whether there's some way of dealing with that
6 subject. I'll start on this side. What do you
7 say about that?

8 MR. ROSE: We're fine with that, Your Honor.

9 MR. FEAMAN: Yes, Your Honor.

10 THE COURT: Okay. All right. Okay. I'll
11 cancel the hearing in view of that.

12 Okay. Now, what I need you to do is at
13 some point, because, Eliot, the way this is
14 going to be triggered, is no one is going to
15 know what you're doing on your end. You and/or
16 your lawyers should say to the other side, you
17 know, if you hire the lawyer and they engage,
18 they can make an appearance and start to tell
19 them we're the spokespersons for you. Because
20 they either talk to you or they talk to your
21 lawyer, but to make that decision they need a
22 notice of appearance or something from the
23 lawyer. Okay.

24 MR. ELIOT BERNSTEIN: And they've explained
25 that to me.

1 THE COURT: Okay. And so -- but at some
2 point you can have a status check if you need to
3 have this reset.

4 MR. ELIOT BERNSTEIN: Okay.

5 THE COURT: Meaning, if you don't agree upon
6 or work out this issue, just come back in at an
7 8:45, and if you need another hearing, I'll give
8 you another hearing date.

9 MR. ELIOT BERNSTEIN: Okay. Beautiful.
10 Thank you, sir.

11 THE COURT: Hold on. Mr. Feaman gave you --
12 there's something else here.

13 MR. ELIOT BERNSTEIN: Is the court going to
14 retain a copy of this once I destroy it, just in
15 case we are --

16 THE COURT: Okay. So that's a good question.
17 All right. So I have it for ID purposes. All
18 right. And Eliot is correct, to preserve the
19 integrity of this, I'm going to keep it, and I'm
20 going to put it in a sealed envelope in the court
21 file subject to being reopened by the court
22 pursuant to order.

23 MR. ELIOT BERNSTEIN: And I can tell the
24 appeal court that?

25 THE COURT: Yeah.

1 MR. ELIOT BERNSTEIN: Okay. Got it.

2 THE COURT: Yeah, that's fair. Okay. And
3 then this says -- the next thing was status
4 conference to discuss other pending motions and
5 petitions, including Eliot's petition for
6 construction of trust and accounting.

7 Are we going --

8 MR. ELIOT BERNSTEIN: Put it off.

9 THE COURT: -- to defer on that until the
10 lawyers can deal with that?

11 MR. ELIOT BERNSTEIN: Yeah.

12 MR. ROSE: Just as a heads up, we're going to
13 be filing a trust construction action in the
14 Shirley side. He's filed a trust construction on
15 this side, but that will be moot when we file our
16 action and serve it on everybody. That will be
17 its own adversary proceeding.

18 THE COURT: Okay. Fine. I'll wait to sign
19 the order. And no hearing subject to what you
20 folks tell me is going on next. Somebody will
21 send me up orders and letters on Mr. O'Connell.

22 Go ahead.

23 MR. O'CONNELL: I will, Your Honor.

24 MR. ROSE: I have two orders from the
25 first -- the motion to disqualify orders.

1 THE COURT: Okay. I'll deal with those.

2 Go ahead, while I'm signing, you can
3 speak.

4 MR. FEAMAN: I have an order on Ted
5 Bernstein's petition for appointment of successor
6 personal representative. It says denied.

7 MR. ROSE: Technically withdrawn, I think.

8 THE COURT: Hold on. Let me just see.

9 Are these the same that you just gave me?

10 MR. ROSE: One is for Mr. Pankauski and one
11 is from my firm.

12 THE COURT: Let me just do this first. Hold
13 on. I'll make some copies of this. All right.
14 Let me see the order that you want.

15 MR. ROSE: We don't think it was denied, we
16 believe it was withdrawn.

17 THE COURT: It was withdrawn. Because you
18 folks comprised, so I didn't actually make a
19 ruling on the merits. Okay. So that's fair.

20 MR. FEAMAN: Okay. There is envelopes.

21 THE COURT: No, I'm going to make the copies
22 and let you --

23 MR. FEAMAN: All right. Very good. We'll
24 save the stamp.

25 THE COURT: All right. So, folks, final

1 word, you made progress when you cooperated. So
2 use that as a bell weather to try to achieve just
3 what you did. Listen to me, everyone. Eliot, you
4 too. You know, when you go outside here, you did
5 some things that I think are good for the estate.
6 Let's not only wait for you to come to court to be
7 able to do that, accomplish that on your own.
8 Okay. That's the whole idea.

9 Okay. Thanks. Court is in recess. Wait
10 for copies.

11

12 (Thereupon, the proceedings were
13 concluded at 4:22 p.m.)

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C E R T I F I C A T E

THE STATE OF FLORIDA
COUNTY OF PALM BEACH.

I, DAVID L. MARSAA, Professional Reporter,
State of Florida at large, certify that I was
authorized to and did stenographically report the
foregoing proceedings and that the transcript is a
true and complete record of my stenographic notes.

Dated this 21st day of September, 2014.

DAVID L. MARSAA, COURT REPORTER

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