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

IN RE: CASE NO. 502012CP004391XXXXNBIH

ESTATE OF SIMON L. BERNSTEIN,
_____/

ORDER ON MOTION TO VACATE RETENTION OF COUNSEL [DE 496] AND MOTION TO DISQUALIFY COUNSEL [DE 508] FILED BY WILLIAM STANSBURY

THIS CAUSE came before the Court February 16, 2017, on William Stansbury's *Motion To Vacate In Part The Court's Ruling On September 7, 2016, and/or Any Subsequent Order, Permitting The Estate Of Simon Bernstein To Retain Alan Rose And Page, Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss P.A. As Legal Counsel And Motion for Evidentiary Hearing To Determine Whether Rose And Page, Mrachek Are Disqualified From Representing The Estate Due To An Inherent Conflict Of Interest*, filed October 7, 2010 [DE 496]; and *Motion to Disqualify* etc., filed November 28, 2016 [DE 508] (collectively the "Motions"). The Court, having reviewed the Motions, the record, and the evidence presented at the hearing, ORDERS AND ADJUDGES:

INTRODUCTION

The issues before the Court are whether to disqualify the law firm Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A. ("Mrachek Firm") from representing the Estate, and to deny the appointment of Ted Bernstein to serve as Administrator Ad Litem on behalf of the Estate, ("Administrator"), in connection with an independent action brought by Stansbury.

Brian O'Connell, the Personal Representative, moved for the appointment of the Administrator and the retention of the Mrachek Firm,[1] testifying that he believed that was in the best interest of the Estate and would result in reduced expenses, including avoiding the expense of the Personal Representative for attending Court proceedings and the anticipated trial of the Stansbury action. Everyone supports the Personal Representative, except Eliot Bernstein and William Stansbury.

Movant, Stansbury, opposes the Personal Representative's plan. Stansbury is the plaintiff in an independent action pending in Palm Beach County Circuit Court, in which Stansbury seeks to recover more than $2.5 million from the Estate based upon alleged misconduct of Simon Bernstein. In moving to disqualify the Mrachek Firm, Stansbury has not asserted the Mrachek Firm ever represented Stansbury in any matter; obtained any confidential information from Stansbury or attempted to use any confidential information of Stansbury. Moreover, Stansbury has not asserted that the Mrachek Firm has obtained any information from anyone, including the Estate, which could be used to the prejudice of any current or former client of the Mrachek Firm. Finally, Stansbury has not alleged that the Mrachek Firm's representation of the Estate in the Stansbury litigation would require the Mrachek Firm to take any position antagonistic to any current or former client, nor to attack or undermine any previous work its lawyers have done in connection with the Stansbury matter.

Having reviewed Stansbury's motion and the voluminous materials provided to the Court, and having heard testimony and received evidence during the hearing, the Court finds there is no merit in the motion to disqualify and denies to for the reasons set forth below.

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[1] By Order dated September 7, 2016, this Court approved the retention of the Mrachek Firm ***without any objection from Stansbury or Eliot, or anyone else***, and deferred ruling on the Administrator until the Court could hold an evidentiary hearing on Stansbury's objection.

In addition, given the wide latitude to a personal representative in exercising his business judgment in administrating an estate, the Court grants the request to appoint Ted S. Bernstein as Administrator representing the Estate's interests in defending against Stansbury's claim.

THE PARTIES, THEIR GOALS, POSITIONS, AND STANDING

Stansbury

Stansbury's claims against the Estate arise from his part ownership and employment with LIC Holdings, Inc. ("LIC") and Arbitrage International Management, LLC ("AIM"), two companies founded by Simon and Ted Bernstein. Simon, Ted, and Stansbury were the primary shareholders. In his Second Amended Complaint, Stansbury has asserted claims against Simon's Estate for breach of contract, fraudulent inducement, conspiracy, equitable lien, and constructive trust.

Stansbury is a mere claimant, and is not a creditor of the Estate. This Court previously entered an order that Stansbury lacked standing to seek removal of the Trustee because he is not a beneficiary under Simon's Will or Trust, which have been upheld and validated by this Court in a Final Judgment dated December 16, 2015 (the "Validity Judgment").

As the opposing party in litigation against the Estate, the Court finds Stansbury has standing to bring a motion to disqualify the Estate's counsel. However, the Court notes and finds persuasive the Rules of Professional Conduct, which specifically warn against an opposing party using a disqualification motion against his adversary as a litigation tactic:

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

The Preamble to the Rules addresses their scope:

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

The Court views skeptically Stansbury's true motivation for seeking the disqualification of the Mrachek Firm.

Brian O'Connell as Personal Representative of the Estate

Simon's Will nominated his lawyers as co-Personal Representatives. They resigned in early 2014, and this Court appointed Benjamin Brown, Esq. as Curator. Later, this Court appointed Brian O'Connell as successor Personal Representative. O'Connell is a prominent attorney in Palm Beach County; and testified about his extensive experience dealing in trust and estates matters, having served as a personal representative, trustee, and attorney, in numerous fiduciary and counsel roles.

O'Connell was questioned about the various roles and interests of the parties, and confirmed under oath that despite any possible or potential conflicts of interest arising from there being multiple pieces of litigation ongoing at this time, O'Connell still believes it to be in the best interests of the Estate to grant his motion to appoint Ted Bernstein as Administrator and retain the Mrachek Firm. The Court finds O'Connell's testimony credible and convincing.

Ted S. Bernstein

Ted Bernstein is the oldest child of Simon and Shirley Bernstein. In a separate but related case, this Court has appointed Ted S. Bernstein as successor Personal Representative of Shirley's Estate (as nominated in Shirley's Will) and as successor Trustee of Shirley's Trust (as specified in Shirley's 2008 Trust Agreement). When Simon Bernstein amended his testamentary documents in 2012, he removed Stansbury as his successor trustee/personal representative, and instead nominated his two lawyers. Ted Bernstein was appointed as successor Trustee of Simon's Trust in a writing signed by the last serving trustee, consistent with the terms of the Trust. There has been multiple attempts by Stansbury and Eliot to remove Ted Bernstein as Trustee, all of which have been dismissed by this Court for lack of standing, as neither Stansbury nor Eliot are beneficiaries of Simon's Trust.[2] Ted S. Bernstein also serves as trustee of a different trust, the 1995 Simon Bernstein Irrevocable Life Insurance Trust (the "ILIT"). The ILIT is adverse to the Estate in an Illinois interpleader action seeking to recover life insurance proceeds. Simon anticipated this issue when he amended his Trust in 2012, specifically providing:

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

Thus, Simon's Trust does not disqualify Ted even if he is acting as Trustee of the ILIT. Moreover, regardless of Ted's position in the Illinois litigation, the Estate is represented through O'Connell and Illinois counsel. Nothing that happens in Illinois will impact or in any way materially limit the Mrachek Firm's ability and desire to defend and protect the Estate against

[2] Based on this Validity Judgment, the Court determined that the beneficiaries of Simon's Trust are 10 newly-created trusts, one for each of Simon's grandchildren. Four of Simon's children currently serve as trustees of those trusts, and this Court appointed former probate judge Diana Lewis as Guardian ad Litem ("GAL") to represent the interests of Eliot's children, pending further Court order. No beneficiary of Simon's Trust, including the GAL, opposes Ted serving as Trustee.

Stansbury. Because there is no dispute the Estate is adequately represented in Illinois by separate, independent and competent legal counsel, there is no risk that Ted Bernstein's service as ILIT Trustee or Mrachek's prior and/or ongoing representation of Ted will reduce or impact the Estate's ability to pursue its claim of entitlement to the same monies.

The Court's key determination is what is the best interests of this Estate in Florida. In the Validity Judgment, the Court made the following findings as to Ted's role:

> Based on the evidence presented, the Court finds that Plaintiff, Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents . . . . Ted S. Bernstein played no role in any questioned activities of the law firm Tescher & Spallina, PA, who represented Simon and Shirley while they were alive. There is no evidence to support the assertions of Eliot Bernstein that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided and abetted others in forging or fabricating documents. The evidence shows Ted Bernstein played no role in the preparation of any improper documents; the presentation of any improper documents to the Court; or any other improper act, contrary to the allegations of Eliot Bernstein.

Mrachek Firm and Alan B. Rose, Esquire

The Mrachek Firm is a litigation boutique located in Palm Beach County, Florida. Alan Rose is one of the attorneys in the firm. It is undisputed that Rose was lead counsel to LIC, AIM, Ted and Shirley's Trust when they were defendants in the Stansbury case. Those parties settled in the summer of 2014 at mediation, and each has been dismissed with prejudice by Stansbury. The Curator confirmed in a Motion for Stay that the Mrachek Firm's legal services to the other defendants enabled him to not retain separate counsel, saving the Estate fees. [Case 502012CA0013933 DE 215]

By virtue of the Mrachek Firm's extensive prior involvement and knowledge of the facts and circumstances of the case (research, motion practice, investigation, witness interviews, document review, trial preparation and mediation), the Mrachek Firm has more knowledge than any other lawyers the Estate could hire. There has been no assertion that the Mrachek Firm is

not competent to defend the Estate; will do a poor job; will not represent the interests of the Estate and its beneficiaries to the fullest extent possible; or suffers from any other impediment, except that Stansbury does not want the Mrachek Firm involved in defending against his claims.

As noted above, there is no assertion that the Mrachek Firm ever represented Stansbury or the Estate in any other matter, nor any allegation that the Mrachek Firm possesses some confidential information that could be used to the disadvantage of anyone. Finally, there is no allegation in the motion to disqualify that the Mrachek Firm will be forced to take positions in this lawsuit antagonistic or adverse to any client or position it has taken in any other matter, nor any assertion that the Mrachek Firm will be attacking its prior work as part of its representation of the Estate in this matter.

Eliot Bernstein

Eliot Bernstein is an adult child of Simon Bernstein, and is the father of three of Simon Bernstein's grandchildren. Eliot is not a beneficiary of Simon's Trust, as determined by this Court. Eliot is a named beneficiary with respect to a nominal amount of tangible personal property (furniture and jewelry),[3] so he has some standing to participate in these proceedings. However, the level of Eliot's input and the importance of his criticisms are minimal.

Further, this Court already has made a finding that Eliot's actions are adverse to the best interests of his children, as well as the remaining beneficiaries of the Estate and Trust. Specifically, in order appointing a guardian ad litem, this Court ruled "Eliot's actions were adverse and destructive to the children's interests." Eliot previously has moved to disqualify the

[3] Based on the inventory filed by the Personal Representative, the total appraised value of the furniture and jewelry is approximately $100,000. That means Eliot's 1/5 interest of personal property or cash would be valued at less than $20,000, assuming the assets in the Estate are sufficient to pay administrative expenses and creditor claims.

Mrachek Firm, and made multiple attempts to remove Ted Bernstein as Trustee, all of which failed.[4]

Based on Eliot's limited standing, his lack of involvement in the Stansbury case, and his prior track record of taking actions adverse to the best interests of the Estate, the Court gives no weight to Eliot's arguments in support of the disqualification of the Mrachek Firm in this case.

SUMMARY OF THE CASES

Estate Administration

In this Court, there is ongoing a probate proceeding to administer Simon's Estate. Ted Bernstein as Trustee of Simon's Trust is the sole residuary beneficiary of the Estate. He is represented by Mrachek Firm.

Illinois Interpleader Action

The federal court action in Illinois involves approximately $1.75 million in life insurance proceeds which has been interplead. Certain claims have been made to those funds by Eliot, the ILIT and the Estate.

Eliot made a claim to those funds, but his claim was defeated by a summary judgment order dated January 30, 2017, in evidence as Exhibit 7.

The 1995 ILIT claims entitlement to the proceeds because it is the only named beneficiary under the Policy. The ILIT is represented by the Simon Law Firm in Chicago.

The Estate claims entitlement to the insurance proceeds because, at the time of Simon's death, Simon owned the Policy. If the proponents of the 1995 ILIT cannot meet their burden to

[4] All of Eliot's attempts have been dismissed or denied, including the related case *Eliot Bernstein et al. v. Theodore Stuart Bernstein et al.*, Case 502015CP001162XXXXNBIJ. Eliot's Petition to remove Ted Bernstein was dismissed with prejudice for lack of standing, and Eliot never appealed that order.

establish the existence of the Trust, the proceeds may come to the Estate. The Estate is represented by the firm Stamos & Trucco in Chicago.

The issue in Illinois is simply who is entitled to the insurance proceeds as between the 1995 ILIT (which benefits the five children of Simon Bernstein) and the Estate, which has creditors, claimants, and others seeking monies.

Stansbury Litigation

Stansbury sued the Estate seeking $2.5 million in damages. The issue in the Stansbury case is whether Simon Bernstein breached an oral contract or committed a tortious act causing damages to Stansbury. The insurance proceeds are not part of LIC or AIM, and are not relevant to any dipute between Stansbury and Simon.

The cases are not substantially related and involve no overlap of issues

Based on the evidence presented to this Court, which does not appear to be in dispute, there is no overlap of issues between the Illinois litigation and the Stansbury litigation. The outcome of each case is separate and not interrelated. In other words, the outcome of one does not depend on the outcome of the other. The subject matter of the lawsuits is different. The issues in dispute are different. The only tangential relation between the two actions is the fact that the Estate is involved in both, and the size of the Estate will be impacted by how much, if anything, it recovers from the Illinois lawsuit, and how much, if anything, it is required to pay Stansbury.

Based upon the usage of these terms as set forth in the Rules of Professional Conduct, the Court finds that the Illinois case and the Stansbury litigation are not substantially related.

> Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client.

Comments to Rule 4-1.9

The Specific Challenges to the Mrachek Firm

Stansbury has asserted that because the Mrachek Firm represented Ted Bernstein at his deposition in the Illinois case, that is the same as the Mrachek Firm being adverse to the Estate in the Illinois litigation. The Court has reviewed the allegations in the motion and reviewed the exhibits placed into evidence without objection by Stansbury. Among those exhibits is a deposition transcript of Ted Bernstein being examined in Illinois by the Estate's counsel (who was clearly aligned with Stansbury in the Illinois litigation) and Eliot Bernstein (who at the time was also claiming entitlement to the interpleaded funds). Based on the transcript in evidence as Exhibit 6, both Eliot Bernstein and Stansbury were present at the deposition of Ted Bernstein, and was examined extensively by the Chicago counsel for the Estate, and by Eliot Bernstein. During his deposition, Rose objected once to the form of a question, and three or four times to raise question of privilege.

Considering that this deposition was taken only a few months before the Validity Trial of December 15, 2015, in which the Estate and Ted Bernstein were fully aligned (O'Connell agreed to not attend the trial to save money, and to abide by the outcome), it makes sense to this Court that Ted Bernstein requested his counsel to be present at the deposition to protect against any waiver of attorney-client privilege or any other harm to his position in connection with the matters before this Court. Although Ted Bernstein was being deposed in connection with the Illinois action, his testimony could have been used against him in the Validity Trial. Moreover, if Ted Bernstein had waived his privilege during that deposition, it would be waived for all.

The Court does not find it troublesome Rose attended the deposition on behalf of Ted as Simon's Trustee and even individually, or spoke on four occasions to protect his client. The

Court further finds that there is no adversity, antagonism or unprofessionalism evident from the highlighted transcript put into evidence by Stansbury's counsel. There is no allegation or proof that the judge overseeing the Illinois case was asked to overrule any of Rose's objections or compel Ted Bernstein to answer any questions, which suggests to this Court that no one believed the objections were improperly raised.

Analysis Under Rule 4-1.9

To the extent the deposition is concluded, and given that all parties in Illinois are represented by counsel other than Mrachek Firm, the Court believes the analysis of this matter should come under Rule 4-1.9 governing former representations. A review of that Rule demonstrates there is absolutely no merit to the suggestion that Stansbury can disqualify the Mrachek Firm. Specifically, the protections of Rule 4-1.9 exist solely for the former client, to protect the former client from representation in a substantially related matter; to protect the former client from the use of confidential information against him or her; and to protect the former client from any disclosure of confidential information. Moreover, there is no doubt in this case that there is a waiver of any potential conflict.

Analysis Under Rule 4-1.7

There is no assertion that Mrachek Firm appeared as counsel in the Illinois case. A number of court filings have been introduced into evidence as Exhibits 1-5 and 7, but the Mrachek Firm does not appear as counsel of record or on the service lists of any of those pleadings. Indeed, other than Rose's appearance at the deposition, there does not appear to be any involvement by the Mrachek Firm in the Illinois case.

However, assuming there was involvement by the Mrachek Firm in rendering advice to Ted Bernstein or otherwise, and assuming that involvement was sufficient to trigger the

provisions of Rule 4-1.7 governing representation of a current client adverse to the Estate, the Court nevertheless finds there is no basis for disqualification under Rule 4-1.7.

There are two prongs to Rule 4-1.7. First, the Court would have to find there is an actual conflict of interest. As explained above, the Court has determined that the Illinois case and the Stansbury case are not substantially related. Again, there is no overlap of issues, or antagonism in the positions taken by Mrachek Firm in the two cases. Moreover, the Court determines that Mrachek Firm is not directly adverse to the Estate, because both the Estate and the ILIT are represented by separate, independent counsel in Illinois, and the 1995 Trust is represented by independent counsel in Illinois. Regardless of any involvement by the Mrachek Firm, those counsel are vigorously representing their respective clients in direct adversity to each other. Thus, the concerns of Rule 4-1.7(a)(1) are not met.

Likewise, the protections of Rule 4-1.7(a)(2) are not met because there is no allegation, evidence or suggestion that the Mrachek Firm's representation of the Estate in the Stansbury litigation, if this Court permits it to continue, will be materially limited by their duties to another client. To the contrary, and as confirmed by the O'Connell, the Mrachek Firm is proposing to defend the Estate against Stansbury's claim to reduce the defense cost and increase the chances of a successful defense verdict or judgment, with the full knowledge, support, and approval of everyone involved in these proceedings with the exception of Stansbury and Eliot Bernstein.

Eliot's adversity to the Estate, including to O'Connell (in his capacity as Personal Representative), and his adversity to his brother Ted (Simon's Trustee), are well-documented and are evident by his court filings and his conduct at various hearings before this Court.

As for Stansbury, there is no one more adverse to the Estate, both in connection with his filing of an independent action, as well as his general participation in theses proceedings.

Stansbury's interests are clearly antagonistic and directly adverse to the Estate, the Trust and the Mrachek Firm, and its client, Ted Bernstein. Thus, because the protections and provisions of Rule 4-1.7(a) have not been triggered based on the allegations in evidence before this Court, the Court finds there is no present conflict of interest between Mrachek Firm and the Estate which would warrant disqualification.

The Personal Representative Knowingly, Intelligently, and Voluntarily Waived Any Actual or Potential Conflict of Interest, Both on the Record and in Writing

Assuming Stansbury could establish a basis for disqualification or conflict of interest under the applicable rules, which this Court has rejected, any such conflict nevertheless could be waived by the affected client or clients. In this case, both Ted Bernstein and O'Connell have clearly indicated a waiver of any such conflict of interest. In particular, after the motion to vacate and the motion to disqualify were filed, O'Connell signed a three-page written statement (Trustee's hearing Exhibit "1") confirming his belief there is no conflict and affirmatively waiving, in writing, any such conflict. Moreover, O'Connell testified at the evidentiary hearing before this Court. On direct examination he was asked about the potential conflict and confirmed his belief that there was no conflict, and stated his view the best interests of the Estate would be served by appointing Ted Bernstein as Administrator and the Mrachek Firm as counsel. That would provide the Estate with the best chance of prevailing in the Stansbury litigation and, at the same time, reduces the Estate's expenses. Stansbury's counsel questioned O'Connell about potential conflict of interest situations, but failed to establish in the Court's view the existence of any actual or potential conflict that could warrant disqualification.

On cross-examination by Rose, O'Connell acknowledged that notwithstanding any potential involvement of the Mrachek Firm as counsel for Ted Bernstein in the Illinois case, O'Connell believes it's in Estate's best interests for the Mrachek Firm to defend it. Further,

O'Connell confirmed under oath and on the record that he carefully reviewed and edited his written statement, and in doing so waived any conflict of interest.

The Court notes that the written waiver was provided to Stansbury's counsel in late December, 2016, with the suggestion that Stansbury reconsider his motion in light of the written waiver of conflict. Within four minutes, Stansbury's counsel responded that his motion was well-founded and that his position would remain unchanged. In the Court's view, four minutes is not sufficient time to review a three-page written statement waiving conflicts of interest, discuss it with one's client, and give any meaningful consideration to the new information.

Any Conflict Would be Waivable

Stansbury's final argument is that any conflict could not be waived because such would violate Florida law. Under the disqualification case law, this would mean the particular conflict in this case was not waviable by the parties. There are examples under Florida law of conflicts which are not waivable, situations in which counsel appears in the same proceeding for two different parties with adverse interests; counsel appears in different actions representing parties whose interests are directly adverse; or where counsel would be required in the second proceeding to take positions antagonistic or adverse to positions taken in the first litigation. These situations are rare, and the cases cited by Stansbury are nowhere close to the facts of this case.[5]

[5] *Anheuser-Busch Companies, Inc. v. Staples*, 125 So. 3d 309 (Fla. 1st DCA 2013)(lawyer appeared in one case for two different clients, and would be taking two different positions – arguing on behalf of defendant there was no negligence, and on behalf of lienor that there was negligence. In a 2-1 decision, the court ruled this was a nonwaivable and disqualifying conflict); *Bedoya v. Aventura Limousine & Transportation Service, Inc.*, No. 11-24432-CIV, 2012 WL 1534488 (S.D. Fla. Apr. 30, 2012)(the lawyer, who had successfully represented a group of plaintiffs against the limousine company, was disqualified because the lawyer learned confidential information from those plaintiffs, the lawyer proposed to represent the limousine company defending against the claims of others – the conflict was the lawyer using his former clients' confidential information and being forced to attack his previous work.); *Milton Carpter*

Again, the notes to Rule 4-1.7 provide guidance. Under the heading "**Conflicts in litigation**," the notes state that "an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." None of these issues are present here. However, the notes acknowledge "there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an ***unrelated matter*** if doing so will ***not adversely affect the lawyer's relationship with the enterprise or conduct of the suit*** and if ***both clients consent upon consultation***."

Based upon the foregoing detailed analysis of the issues raised by the motion, the Court finds there is no conflict of interest under Rule 4-1.9 or Rule 4-1.7. Further, to the extent there is any actual or potential conflict of interest in connection with the Mrachek Firm's involvement representing Ted Bernstein, such conflict has been waived on the record at a hearing and in writing. Accordingly, the motion to vacate is DENIED and the motion to disqualify Mrachek Firm is DENIED.

APPOINTMENT OF TED S. BERNSTEIN AS ADMINISTRATOR AD LITEM

Under the Florida Probate Code, the Court can appoint an Administrator to represent the interests of the Estate when doing so is in the best interests of the Estate and its beneficiaries. Here, the Personal Representative has requested the appointment of Ted S. Bernstein as

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Center, Inc. v. Cincinnati Ins. Co., Case No. 3:13cv624/MCR/CJK, 2014 WL 12482616 (N.D. Fla. May 5, 2014)(party required to designate a neutral appraiser, instead chose its own lawyer as the appraiser – "An attorney owes a duty of loyalty to a client, and cannot serve when he must be both loyal to a client and also impartial at the same time.") None of these extreme situations is present here.

Administrator to represent the Estate's interests while defending the Stansbury case. O'Connell's position makes common sense to the Court for at least two critical reasons. First, Ted Bernstein has agreed to serve as Administrator for no additional fee. In contrast, O'Connell as Personal Representative would be charging the Estate $350 per hour for every hour he spent working on the Stansbury matter, including attending depositions, hearings, and the trial. Given the complexity of the Stansbury litigation, it is conceivable that this savings alone could amount to tens of thousands of dollars. Each trial day would cost the Estate at least $3,500 - $4,000 extra, just for O'Connell's time.

Second, O'Connell has no personal knowledge of the facts or circumstances surrounding the Stansbury litigation. He was not involved in the insurance business or the two companies, LIC or AIM. O'Connell never met Simon Bernstein. He was never involved in the underlying issues, nor involved in discussions between Simon or Ted Bernstein, or any discussions involving Stansbury. To the extent there is a trial, it is unclear whether Ted Bernstein would be able to sit through the trial considering he would be a material witness, unless he was designated as representative of the Estate. Indeed, irrespective of this Court's determination of the appointment of an Administrator, the Estate and its counsel should be free to designate who represents the Estate at trial. O'Connell, not his adversary Stansbury, should decide what best serves the interests of the Estate. This Court agrees it should be extremely reluctant to infringe upon that decision.

Despite the obvious animosity that Stansbury feels towards Ted Bernstein, that is no reason to prohibit the relief sought by the Personal Representative. The only suggestion by Stansbury at the evidentiary hearing was the idea that he could not settle his claim if Ted Bernstein was the Administrator. However, any settlement would need to be approved by

O'Connell as Personal Representative, and by this Court on motion and notice to interested persons. The parties have attempted to settle the matter, including at a mediation conducted last July, and were not successful. The subjective fear of Stansbury, if it is genuine, is insufficient to prohibit the Personal Representative from taking action he believes is in the best interests of the Estate.

Accordingly, the Court hereby appoints Ted S. Bernstein as Administrator ad Litem to handle the Estate's defense of the Stansbury claim. Bernstein should communicate regularly with O'Connell, including upon request by O'Connell, and is authorized to retain the Mrachek Firm to represent the Estate in connection with Stansbury's case.

CONCLUSION

Based upon the Court's review and analysis of the pending motions as explained in detail above, the Court DENIES Stansbury's motions seeking to vacate the retention order of September 7, 2016, and to disqualify the Mrachek Firm, and OVERRULES Stansbury's objections to the service of Ted S. Bernstein as Administrator.

The Court is aware that an amended motion for sanctions under section 57.105 of the Florida Statutes has been filed against Stansbury, and will set that motion for hearing by separate order.

DONE AND ORDERED in Chambers, North County Courthouse on _____, 2017.

_____
HONORABLE ROSEMARIE SCHER

cc: All parties on the attached service list

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