

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

CASE NO. 502012CP004391XXXXSB  
CP - Probate

IN RE:

ESTATE OF SIMON L. BERNSTEIN,

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**ORDER ON TED S. BERNSTEIN'S, AS SUCCESSOR TRUSTEE OF THE  
SIMON L. BERNSTEIN TRUST, MOTION TO COMPEL  
ELIOT BERNSTEIN TO COMPLY WITH RULE 1.285**

THIS CAUSE having come before the Court for evidentiary on July 11, 2014, upon Ted S. Bernstein's, as Successor Trustee of the Simon L. Bernstein Trust, Motion To Compel Eliot Bernstein to Comply with Rule 1.285 ("The Motion"), and after being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that

1. Ted S. Bernstein ("Ted") sent an email to Eliot Bernstein ("Eliot") and later claimed that the email was an inadvertent disclosure of privileged materials, invoking the procedures under Florida Rule of Civil Procedure 1.285. Eliot contested the assertion of the privilege, and this Court held an evidentiary hearing on July 11, 2014. Based upon the evidence presented at the evidentiary hearing, the Court makes the following findings of fact and conclusions of law.

2. Ted wrote an email (Eliot's Exhibit 1 for ID only) and actually sent the email to Eliot. The email was sent by Ted to Eliot at 10:12 pm on May 22, 2014.

3. Ted advised his counsel at 10:57 p.m. that the email was sent to Eliot by mistake. Ted's counsel then advised Eliot by email at 11:07 p.m. on May 22, 2014, stating:

You received an email from Ted intended solely for me, and accidentally sent to you by mistake.

The email was sent around 10:12 pm tonight

Please delete the email immediately without reading it and confirm that deletion by email. The communication was attorney-client protected and you are not entitled to read or possess the email due to the accidental transmission.

Thank you in advance, and if you fail to comply with this request we will be forced to take corrective action with the Court.

4. The Court finds that by Ted's counsel so notifying Eliot, Ted invoked the procedures of Rule 1.285. Therefore, under subpart (b), Eliot as the party receiving notice of an assertion of privilege under subdivision (a) shall promptly return, sequester, or destroy the materials specified in the notice, as well as any copies of the material. The party receiving the notice shall also promptly notify any other party, person, or entity to whom it has disclosed the materials of the fact that the notice has been served and of the effect of this rule. That party shall also take reasonable steps to retrieve the materials disclosed.

5. Eliot also challenged the assertion of privilege, claiming that the email was not privileged under section 90.502(4)(a) and (c). That assertion necessitated the evidentiary hearing.

6. The Court finds that Ted did not intend that email to go Eliot, but instead, meant it to go to his lawyer. Indeed, having read the email the Court finds that it is pretty easy to see that the letter was intended to go to Ted's lawyer because (i) in the beginning of the email it says the lawyer's first name, and (ii) the discussion in the letter is clearly directed to that which is part of the subject of the letter, which is this case. Thus, the Court makes a finding of fact that this letter was intended to go to Ted's counsel.

7. The Court also rejects Eliot's argument that the email was not privileged because of Florida Statute 90.502(4)(c), but that subsection does not apply. Likewise, the Court finds that the

crime-fraud exception in 90.504(4)(a) also does not apply. Any language suggesting that Ted wanted his counsel to be aggressive and forceful is not evidence of Ted committing or planning to commit what Ted knew was a crime or fraud. The Court rejects Eliot's assertion that Ted was threatening Eliot with some force or bodily harm, or the like. Having read the email, it is clearly not the case that Ted was threatening Eliot physically, like beating him up.

8. Having determined that the lawyer-client privilege does apply and this email was not requesting perpetration of a crime of assault or battery against Eliot, the next question then becomes whether there remains grounds to challenge the assertion of privilege. The court find that there is not.

9. In light of this Court's finding, the Court orders the following as a remedy:

A. Eliot delete all copies of the email in Eliot's possession or control, including any electronic copies.

B. Eliot shall give prompt notice to every recipient – everybody to whom Eliot sent a copy of the email – of this ruling by sending each such person a copy of this Order and direct that they shall also delete and not transmit. Eliot shall file a proof of compliance with this Court, including a copy of his transmittal letter to each recipient.

C. Eliot shall not, from the time of the Court's oral ruling, forward the email to anybody. If Eliot violates this Order, the Court ~~will~~ <sup>MAF (WTC)</sup> hold him in contempt of court and consider appropriate remedy for such violation.

10. If Eliot appeals this Order, he must obey and follow this Order pending the appeal.

DONE AND ORDERED in Chambers, in Palm Beach County, Florida, this 18 day of July, 2014.



Martin H. Colin  
CIRCUIT COURT JUDGE

cc: All parties on the attached service list

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