

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division**

In re:

ROTHSTEIN ROSENFELDT
ADLER, P.A.,

Case No.: 09-34791-RBR

Chapter 11 Case

Debtor.

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Fowler White Burnett, P.A.'s Opening Statement

This proceeding stems from an Agreed Order [D.E. 1194] that cancelled a hearing on a discovery issue in this bankruptcy action. The issue before the Court in 2010 was a state court subpoena issued to the Rothstein bankruptcy Trustee for the production of documents to Jeffrey Epstein. Bradley Edwards and L.M. claimed the documents were protected by the Attorney-Client Privilege among other potential privileges. As a result of these privilege claims and Edwards' complaints concerning the cost of printing the documents produced by the Trustee, a procedure was set forth in the Agreed Order that dealt with the production of these documents consisting of emails on the Rothstein firm's server sent while Bradley Edwards was employed as an attorney at that firm.

Nearly eight years has elapsed from the date the Agreed Order was entered and now before the Court is an Order to Show Cause why Fowler White should not be held in contempt for violation of the November 30, 2010 Agreed Order. As will be more fully developed, Fowler White should not be held in contempt because

there was no violation of the Agreed Order. Fowler White's investigation has revealed that the documents and all original discs were sent to Farmer Jaffe and Special Master Robert Carney in December 2010 as agreed. There is no evidence that Fowler White retained the documents or a disc with all of the bates numbered documents in December 2010. The firm continues to believe that the subject disc was returned to Fowler White after 2010 either by Farmer Jaffe or by Special Master Carney, but the Firm has been unable to confirm this in large part due to its inability to have the original disc analyzed. Even if the Court were to determine that there was not complete compliance with the Agreed Order, the evidence will show that Fowler White substantially complied with the Order in a good faith effort at compliance. There is no evidence that anyone at Fowler White was aware of the disc being its files, and there is nothing suggesting that any of the items on the amended privilege log were used at any time until documents were filed in the State Court by Link & Rokenbach in March 2018.

As the Court is aware, the Movants rely on two facts to establish a violation of the Agreed Order.

First, a CD of documents was located in Fowler White's files that were reviewed by Epstein's current attorneys, Link & Rockenbach, in January of 2018. In his opening, Mr. Scarola states that his investigation revealed that the CD was last "modified" on December 8, 2010. This fact cannot be verified or tested as

Fowler White has not been provided with an opportunity to inspect the CD at issue, but the evidence will show that “modification” between December 8 and December 10 was inevitable.

Second, Movants allege that Fowler White retained hard copies of documents that were the subject of the Agreed Order. In preparation for the deposition of Fowler White on October 19, 2018, Mr. Hurley of Fowler White discovered certain electronic documents in his private folder that was inaccessible by anyone other than Mr. Hurley. In 2018, Link & Rockenbach reviewed Fowler White’s files and selected certain documents for copying, apparently including the disc 31 pages of documents. The documents have been in Link & Rockenbach’s possession since February 1, 2018. Mr. Hurley did not review these documents as he explained in his deposition; rather, he immediately provided them to counsel and deleted them from his system. Fowler White’s counsel produced these documents at the deposition and was informed that some of the documents may have appeared on Edwards’ February 2011 privilege log.

Based on these two facts, Movants contend that sanctions for contempt are warranted against Fowler White.

As Mr. Scarola states in his opening and as will be testified to at the hearing, Fowler White did not “retain” copies of any documents, nor of the CD’s and did

not “retain” any images of the documents on its copier. Thus, Fowler White fully complied with the Agreed Order in December, 2010.

Fowler White does not dispute that a CD and approximately 31 pages of documents were contained in its files. What Fowler White has been unable to determine, despite investigation, is the origination of the CD and the documents or when the CD and documents came into the firm’s possession.

Ultimately, it is the burden of the Movants to establish by clear and convincing evidence that Fowler White violated the Agreed Order. To date, there is no evidence that Fowler White violated the Court Order in 2010.

Mr. Scarola makes the assumption that “Fowler White retained a copy of the disc and ... hard copies of selected documents.” Fowler White disputes that it retained these two items in December 2010. It is undisputed that Fowler White sent the hard copies of the documents to Mr. Edwards and the discs to Special Master Carney; therefore, there was nothing to retain. Mr. Scarola then states that sanctions are warranted for this “flagrant violation.” Again, it is undisputed that even though this CD and certain documents were in Fowler White’s possession, they were never viewed by Fowler White or used by any attorney in connection with any litigation until used by Epstein’s new lawyers at Link & Rockenbach in 2018. The disc was actually used in litigation only when Epstein, though his

current counsel, filed certain documents in the State Court. Until this time, the documents were located in a box in an Iron Mountain storage facility.

For these reasons, sanctions are not warranted against Fowler White.