Epstein August 3, 2012 Discovery Hearing Notes

Introduction:

On May 7, 2012 this Court granted Epstein's Motion to Compel and Ordered Edwards to **file a more complete privilege log within thirty (30) days**. To date, no such log has been provided. On April 10, 2012, this Court also entered an Order on a separate Motion and Ordered Edwards to **provide several communications or file a privilege log**. The discovery was not completely responded to, and to date no privilege log has been provided.

Accordingly, Epstein requests that this Court find that Edwards waived any alleged privileges he was claiming, and award sanctions. The failure to supply a privilege log that complies with Florida law results in the waiver of a privilege under Florida law. *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339, 341 (Fla. 4th DCA 2001) ("Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establishing the applicability of the privilege."). The *TIG* court noted that Rule 1.280 "uses mandatory language, and federal courts have found waiver where the federal rule was violated." *Id.* This is the case cited by this Court in its Order.

Specifics from the Original Motion to Compel re: Privilege Log:

First, Edwards' log made one hundred and ninety-one (191) attempts to shield documents from or to an unnamed "confidential source," especially for documents described as "Litigation Strategy." Second, Edwards' log provided approximately one hundred (100) log entries in the "to" and "from" categories of the generic terms "attorney and staff," "litigation," "RRA personnel," and "unknown staff attorneys at RRA." Third, Edwards' privilege log fails to indicate whether the documents were copied or distributed to third parties, or whether blind copies were sent to third parties, which the Special Master specifically required long before the Court issued its Order. Fourth, the privilege log fails to indicate whether the materials contain attachments. Fifth, the attorney-client privilege does not apply to communications between an attorney and a third party, or a person who is not a client. Also, the attorney-client privilege is waived if the client voluntarily discloses the substance of the communication. (Press conferences and communications with the press by the girls and by Edwards)- see argument below.

Communications with the Press (no privilege):

Specifically, litigation privilege is only afforded to actions that are "functionally tied to the litigation process." *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606 (1993). Holding that a prosecutor was not entitled the protection of litigation privilege, the Court reasoned that litigation privilege only applies when the prosecutor is "functioning as an advocate." *Id.* Specifically, the Court explained that: "comments to the media have no functional tie to the judicial process just because they are made by the prosecutor….The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case

in court, or actions prepatory to these functions." *Id*. at 277, 2618. As such, an attorney who makes statements to the press that are not functionally tied to the judicial process is not entitled to hide behind the litigation privilege to escape liability for those statements.

In *Ball v. D'Lites Enterprises, Inc*, "[t]he issue presented in this case is whether the statements by a party on its commercial website constituted a statement made in connection with judicial proceedings. We hold that it does not." *Ball v. D'Lites Enterprises, Inc.,* 65 So.3d 637, 638 (Fla. 4th DCA 2011). The Defendants posted the defamatory statements on their website after Plaintiffs filed their lawsuit against defendants. Thereafter Plaintiffs amended their complaint to add a count in defamation alleging that the statements made on the website were false. To reach its decision, the court "analogize[d] the publication of statements on the internet to calling a press conference with the media or otherwise publishing defamatory information to the newspapers or other media." *Ball v. D'Lites Enterprises, Inc.,* 65 So.3d 637, 639 (Fla. 4th DCA 2011). The Fourth DCA makes it clear that where statements are made, even during litigation, that has no relation to or is not functionally tied to the judicial process, there is no protection from the litigation privilege.

Specifics from Motion to Compel April 10 Order:

Edwards was Ordered to Produce "[a]ll e-mails, data, correspondence, and similar documents dated April 1, 2008 through August 1, 2010 by and between Bradley J. Edwards. Scott W. Rothstein, Marc, Nurik, Cara Holmes, Mike Fisten and any on of he following regarding or mentioning Jeffrey Epstein in any way: (a) the U.S. Attorney's Office, (b) the State Attorney's Office, (c) the Federal Bureau of Investigation, (d) [redacted] and (e) any other news employees or reporters," or file a privilege log as to any non-produced items. To date, incomplete response and no privilege log.

Sanctions Argument:

The actual prejudice to Epstein by Edwards' willful and continued non-compliance is palpable. Epstein has been prejudiced because he has not been able to conduct critical discovery necessary for the prosecution of his claims, necessary for opposition to Edwards' summary judgment motion, and, as repeatedly demanded by Scarola, evaluation of his claims against Edwards.

When a party fails to comply with a pretrial order, a court has broad discretion in determining sanctions. *First Republic Corp. of America v. Hayes*, 431 So. 2d 624 (Fla. 3d DCA 1983). The integrity of the civil litigation process depends on the truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. *Robinson v. Weiland*, 988 So. 2d 1110, 1113 (Fla. 5th DCA 2008), *quoting Cox v.Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998). *Channel Components, Inc. v. America II Electronics, Inc*., 915 So.2d 1278 (Fla. 2d DCA 2005)(affirming a fine of $2,500 per day against parties who had failed to comply with several discovery deadlines as a "coercive civil contempt sanction arising from the violation of the discovery orders." *Id*. at 1283-84.)