

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

CASE NO. 502009CA040800XXXXMB

JEFFREY EPSTEIN,

Plaintiff/Counter-
Defendant,

JUDGE: HAFELE

v.

SCOTT ROTHSTEIN, individually and
BRADLEY J. EDWARDS, individually,

Defendant/Counter-
Plaintiffs.

**PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MEMORANDUM
OF LAW REGARDING ETHICAL ISSUES RAISED BY
DEFENDANT/COUNTER-PLAINTIFF BRADLEY EDWARDS REGARDING
ACCEPTANCE OF EPSTEIN'S PROPOSAL FOR SETTLEMENT**

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), by and through his undersigned counsel and pursuant to this Court's request on December 6, 2014, hereby files this Memorandum of Law regarding Defendant/Counter-Plaintiff Bradley Edwards's ("Edwards") Opposition to Epstein's Motion for Attorneys' Fees and Costs on the issue of "Ethical grounds" and states:

INTRODUCTION

On June 2, 2014, Epstein filed his Motion for Attorneys' Fees and Costs pursuant to §768.79 of the *Florida Statutes* and Rule 1.442 of the *Florida Rules of Civil Procedure* ("Epstein's Motion"). On June 26, 2014, Edwards filed his Response in Opposition to Epstein's Motion for Attorneys' Fees and Costs, incorrectly asserting therein that Epstein's Proposal for Settlement (the "Proposal") failed to comply with the requisites

delineated in both §768.79 of the *Florida Statutes* and Rule 1.442 of the *Florida Rules of Civil Procedure*. (“Edwards’s Opposition”) Specifically, in Edwards’s Opposition, Edwards posed two wholly specious arguments to support his assertion that Epstein’s Proposal was invalid; to wit: “[t]he Proposal is invalid because Epstein failed to explain material terms of the confidentiality clause, and its implications;” and that Epstein “cannot prove he has beaten or even equaled his Proposal.” See *Edwards’s Response in Opposition to Plaintiff/Counter-Defendant’s Motion for Fees and Costs* (hereinafter “Edwards’s Opposition”), pp. 5- 6. Epstein handily disposed of both arguments in his written reply, aptly demonstrating that the Proposal fully complied with all requirements of both the Florida Statutes and the Florida Rules of Civil Procedure, and that Edwards sought to apply an inapplicable standard under the Federal Rules of Civil Procedure, which, even if it did apply, was incontrovertibly satisfied by the express terms of the Proposal. See *Plaintiff/Counter-Defendant Jeffrey Epstein’s Reply to Defendant/Counter-Plaintiff Bradley Edwards’s Response in Opposition to Plaintiff/Counter-Defendant’s Motion for Attorney’s Fees and Costs* (“Epstein’s Reply”).

At the hearing on this matter on December 6, 2014, perhaps recognizing that Edwards’s Opposition was entirely without merit and as tactic of Edwards that is all too familiar in this case, without any prior notice or discussion in his written brief, Edwards attempted to persuade the Court that “the circumstances under which this proposal for settlement were made made it absolutely unethical for Brad Edwards to have accepted this proposal for settlement.” See *Transcript of Hearing on Epstein’s Motion for Fees and Costs*, p. 14; line 24-p. 14; line 2 (hereinafter “Transcript”)¹. Edwards argued that he

¹ Edwards also raised the issue of Edwards’s pending appeal of the summary judgment ordered in the instant case, which is premised on *Wolfe v. Foreman*. 128 So. 3d 67 (Fla. 3d DCA 2013). However, as the

ethically could not sign the Settlement Agreement and Release attached to the Proposal (the “Release”) because it contained a confidentiality provision, which, according to Edwards, “would have been imposing an unethical restriction upon his legal obligations to existing clients.” *Transcript*, p. 17; lines 7-10.

Edwards’s oral argument is as flimsy as those already disposed of in Epstein’s Reply and is an obvious sham. As Edwards’s own counsel confirmed at the December 6, 2014 hearing, that Edwards rejected the Proposal, not because of some concocted ethical conundrum, but because he felt that the \$300,000 offered was unacceptable. Indeed, as confirmed by Mr. Scarola at the hearing, Edwards characterized that amount as “nominal” and refused to settle for that amount because “this case was proceeding on the basis of both compensatory and punitive damages against a billionaire . . .” *Transcript*, p. 24, lines 18-23. As more fully explained below, Edwards’s assertion of an ethical obligation was contrary to clear ethical guidance from the Florida State Bar, provides no legal basis for his opposition to Epstein’s motion, and is simply a last ditch effort by Edwards to invalidate the Proposal after he gambled and lost, causing the needless waste of judicial resources, fees and costs in the process. As practical matter, if Edwards felt the amount of money was agreeable, but the Release terms were not, he surely would have contacted Epstein to reach agreement on mutually acceptable Release language. So, to the contrary, it was not “Ethical Grounds”, but simple greed that motivated Edwards. Such motivations should not be permitted to defeat the award of fees and costs to Epstein mandated by the Florida Statutes and Florida Rules of Civil Procedure.

Court noted, Edwards has made no motion to stay this matter pending his appeal. Moreover, on October 28, 2014, the First District Court of Appeal in the case of *Steinberg v. Steinberg*, in a decision also premised upon *Wolfe v. Foreman*, affirmed the trial court’s decision that the litigation privilege precludes a civil claim for malicious prosecution, 2014 WL 5460437, rendering the merits of Edwards’s appeal questionable at best.

MEMORANDUM OF LAW

The clients to whom Edwards purports to owe the ethical obligations claimed in the instant case are two plaintiffs in the matter of *Doe v. United States*, 08-80736-CIV-MARRA (the “CVRA case”). At the hearing on December 6, 2014, Edwards asserted that Edwards could not accept the Proposal because it required him to sign and comply with a release containing a confidentiality provision, which would create conflicts of interest in his representation of these clients. This is simply untrue.

As more fully explained below, express guidance from the Florida Bar State Bar Association establishes that accepting the Proposal would have created no such conflicts of interest. Furthermore, by his own countersuit, filed at least a year and a half prior to the date he received the Proposal, Edwards himself created the very circumstances giving rise to any purported conflict, and at the time of filing had the opportunity and obligation to make full disclosure to his clients regarding the same, including the possibility of his receiving substantial compensation in settlement of his countersuit. Had such disclosure been made, subsequent disclosure after acceptance of the Proposal of the fact of the settlement, which disclosure is permitted by the confidentiality provision, would have been more than sufficient to dispel any concerns Edwards claims to have had. In addition, Edwards had every opportunity to make full disclosure of the amount of the settlement prior to his acceptance of the Proposal, and nothing provided in the confidentiality provision could be interpreted to have prevented such disclosure. Finally, by the very terms of the confidentiality provision, Edwards could always receive court authority to make such disclosure at any time he felt it necessary to avoid a conflict of

interest. Under the circumstances Edwards's purported conflict of interest is in reality a complete fiction and provides no basis for him to invalidate the Proposal.

I. An Ethical Issue Does not Exist With Regard to the Confidentiality Agreement

Edwards first raises the claim that he could not ethically accept the Proposal because the Release contained a confidentiality provision compliance with which, according to Edwards, would violate his ethical duty to disclose this settlement to his clients in the CVRA case. While there is no case directly on point, and indeed Edwards cites to none in support of his argument, there is an ethics opinion from the Florida State Bar Association Committee on Professional Ethics that clearly rejects any such purported ethical violation. In FL. ETH. OP. 04-2, 2005 WL 4692972 (Jan. 21, 2005), a member of The Florida Bar requested an advisory opinion regarding a provision that the opposing party in a securities litigation wanted to include in a settlement agreement. The relevant portion of the provision at issue in the ethics opinion provided:

Other than discussions between the parties, their immediate families, their respective attorneys, accountants, government officials, and self-regulatory bodies such as the NASD, all parties and their attorneys and agents agree, acknowledge and consent that they shall not in any method or manner discuss, publish, or disseminate any information concerning the settlement or the terms of this Release with any other party not specifically authorized by this Release to receive such information.

Id. at *1. The inquiring attorney asked for “a formal opinion as to whether he may ethically enter into an agreement containing this provision.” *Id.* at *2. ²

The Bar stated that Rule 4-5.6 of the *Rules Regulating the Florida Bar* was

² If Edwards genuinely had any ethical concerns, like the attorney in this ethics opinion, Edwards also could have sought an advisory opinion within the time permitted to accept or reject the Proposal.

applicable. That Rule states in pertinent part that “[a] lawyer shall not participate in offering or making: (b) an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy.” R.REG. FLA. BAR 4-5.6. The Bar stated: “[t]o the extent this clause is **merely a confidentiality agreement as to the terms of the settlement it does not pose an ethical problem**, provide[d] there is no legal prohibition against confidentiality of a particular settlement. **The clause at issue makes only the terms of the settlement and release itself confidential. Such confidentiality clauses have typically been determined not to violate ethics rules.**” *Id.* at *6. See also *Lee v. Florida Dep’t of Ins. & Treasurer*, 586 So. 2d 1185 (Fla. 1st DCA 1991) (stating that to use this Rule for the purpose of invalidating a private contractual provision is beyond its scope and purpose and constitutes error).³

Similarly, in the case at hand, Epstein’s confidentiality clause provided that Edwards “agree[s] not to disclose the **details of this release** in settlement of all claims, **including the nature or the amount paid and the reasons for the payment**, to any person other than my lawyer, accountant, income tax preparer, or by valid order of a Court with competent jurisdiction whether directly or indirectly.” See *Plaintiff/Counter-Defendant Jeffrey Epstein’s Proposal for Settlement to Defendant/Counter-Plaintiff Bradley J. Edwards, Individually*, attached to Epstein’s Motion as *Exhibit A* (emphasis added). Just as the confidentiality clause in FL. ETH. OP. 04-2, 2005 WL 4692972 (Jan. 21, 2005), Epstein’s confidentiality clause was “**merely a confidentiality agreement as to the terms of the settlement**” and made “**only the terms of the settlement . . . confidential.**” *Id.* at *6. Accordingly, the confidentiality provision in the Release “does

³ Regarding the reference in this quotation to a legal prohibition against confidentiality, see, e.g.; [Fla. Stat. 69.081](#) (Sunshine in Litigation Act which prohibits judgments, agreements and contracts that have the effect of concealing a public hazard).

not pose an ethical problem” as established under the Rules Regulating the Florida Bar. *Id.* at *6.

Furthermore, to the extent that Edwards claims a conflict of interest prevented him from accepting the Proposal, Edwards’s execution of the Proposal would not have created that conflict of interest. Rule 4-1.7 of the *Rules Regulating the Florida Bar* governs conflicts of interest and states in pertinent part that “a lawyer must **not represent a client** if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person **or by a personal interest of the lawyer.**” R.REG. FLA. BAR. 4-1.7 (emphasis added). Accordingly, under this rule, any ethical consideration arose at such time as there was a substantial risk that Edwards’s representation of his clients would be materially limited due to his personal interest in his own case against Epstein. Indisputably, such a potential conflict, if it existed at all, was not created by the valid confidentiality clause contained in the Release, but rather by Edwards, himself, more a year and a half earlier, when Edwards countersued Epstein while still representing his clients in the CVRA case.

If Edwards did not want to create an appearance of impropriety with his clients, he could have waited to sue Epstein until the conclusion of his representation in the CVRA case. If Edwards wished to proceed against Epstein, it was incumbent on him under the Rules Regulating the Florida Bar to explain to his clients in the CVRA case at the outset any potential conflict issues that could be caused thereby, including disclosure of the possibility of Edwards receiving substantial consideration from Epstein in the settlement of his countersuit. *See* R.REG. FLA. BAR. 4-1.7. Had Edwards done so, the

actual amount of the settlement ultimately received would be of little importance. Disclosure of the fact of the settlement would be sufficient to dispel any ethical considerations Edwards might claim to have. As stated previously, the confidentiality provisions in the Release preclude disclosure of the “details” the Release, but not disclosure of the fact that the settlement occurred.

Moreover, had Edwards felt ethically constrained to disclose the terms of the settlement to his clients, he could have done so at any time during the thirty (30) days within which he had to accept or reject the Proposal and its terms. The express terms of the confidentiality provisions do not operate to prohibit disclosure until after the Release is signed and the settlement contemplated by the Proposal is consummated. For example, the confidentiality provisions prohibit disclosure of the “the nature or the amount **paid.**” *See Plaintiff/Counter-Defendant Jeffrey Epstein’s Proposal for Settlement to Defendant/Counter-Plaintiff Bradley J. Edwards, Individually*, attached to Epstein’s Motion as *Exhibit A*. Thus, by the express terms of the Release, disclosure is not prohibited until after the settlement money has been “paid”. There is nothing in the Release or the confidentiality provisions that would construe prior disclosure by Edwards as a violation of the terms of the Release.

Although he received the Proposal on August 25, 2011, Edwards failed to raise any potential ethical issues until three years later when he is now using them in an attempt to defeat Epstein’s Motion. As stated in the preamble to Rule 4-5.6 of the *Rules Regulating the Florida Bar*, “[t]he purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.” *Lee v. Florida Dep’t of Ins. & Treasurer*, 586 So. 2d 1185, 1188 (Fla. 1st DCA 1991). The rules are designed to

provide guidance to lawyers and may not be invoked by parties as procedural weapons. *Id.* (citing R.REG. FLA. BAR 4-5.6 preamble). As such, Edwards cannot now use the Rules Regulating the Florida Bar as a procedural weapon to protect him from having to pay the costs and fees associated with his own failure to accept Epstein's valid Proposal for Settlement.⁴

Furthermore, even if Edwards believed he had an ethical duty to disclose the terms and conditions of any settlement with Epstein to his clients, the clear language of the confidentiality provisions in the Release allows Edwards the option of seeking permission from the Court to do so. The unambiguous and plain language of the Release remedies Edwards's purported issue altogether, providing that Edwards would be permitted to make disclosures permitted "**by valid order of a Court of competent jurisdiction.**" See *Plaintiff/Counter-Defendant Jeffrey Epstein's Proposal for Settlement to Defendant/Counter-Plaintiff Bradley J. Edwards, Individually*, attached to Epstein's Motion as *Exhibit A*.

In further support of his argument regarding the conflicts and ethical prohibitions associated with accepting the Proposal, Edwards espoused concerns about his inability to make statements about the settlement to the International Press:

What I am saying is if it is in Mr. Edwards' client's interest to make statements about the status of this case, **the reasons for the settlement, why Mr. Epstein paid and how much he paid, if that's in his clients' interest and he has entered into a contract that prohibits him from doing that, he has entered into an unethical contract because he can no longer take that strategic step. He has for his own purposes that is, to put \$300,000 into his own pocket he sold away the strategic ability**

⁴ Within the time for Edwards to accept or reject the proposal, he certainly could have raised his ethical concerns with Epstein's counsel to negotiate an acceptable confidentiality provision. He chose not to, and should not now be permitted to use them as a weapon to invalidate the Proposal.

to be able to advance his client's interests in that manner. He can't do that. He cannot sell away that strategic option. He's ethically prohibited from doing it.

Transcript, p. 23; lines 10-24 (emphasis added). Edwards's argument is without merit. Although the Release provided that Edwards agreed "not to disclose the **details of this release** in settlement of all claims, **including** the nature or the amount and **the reasons for the payment,**" it also provided the following: "I understand that this settlement is the **compromise of a doubtful and disputed claim**, and that payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and that Releasees deny liability therefor and intend merely to avoid litigation and to buy peace." See *Plaintiff/Counter-Defendant Jeffrey Epstein's Proposal for Settlement to Defendant/Counter-Plaintiff Bradley J. Edwards, Individually*, attached to Epstein's Motion as *Exhibit A* (Emphasis added). Accordingly, even if Edwards were permitted to disclose the reasons for settlement as expressly provided in the Release, truthful disclosure of the settlement by Epstein as a "compromise of a doubtful and disputed claim" and a payment "that is not to be construed as an admission of liability" under circumstances where Epstein denied any liability and settled to "avoid litigation", presumably would not advance the interest of Edwards's clients. Thus a provision prohibiting him from disclosing the same to the International Press or other members of the media poses no ethical conflict for Edwards, and Edwards' claim of a conflict on this basis is pure fiction.

II. Edwards's Alleged Ethical Conflict Provision Does Not Render the Proposal for Settlement Invalid

As stated in Epstein's Motion for Attorney's Fees and Costs and Epstein's Reply, the Proposal is valid on its face and complies with the particularity requisites as

delineated in Rule 1.442(B) of the *Florida Rules of Civil Procedure*. The confidentiality clause was clear and unambiguous and satisfied both Rule 1.442 and the case law applicable to it. See *State Farm Mut. Auto Ins. Co. v. Nichols*, 932 So. 2d 1067 (Fla. 2006). Two Florida cases have discussed the validity of confidentiality provisions contained in proposals for settlement and denied attorneys' fees and costs because of them. Each case, however, is factually distinguishable and inapposite to the instant case. As previously cited by both parties, in *Swartsel v. Publix Super Markets, Inc.*, 882 So. 2d 449 (Fla. 4th DCA 2004), the court affirmed the denial of a motion for attorney's fees **not** because the proposal contained a confidentiality clause, but because the offeror **failed to either include the terms of the settlement agreement in the proposal or attach a copy of the agreement to the proposal**, violating the particularity requirement of Rule 1.442 of the *Florida Rules of Civil Procedure*. *Id.* The second is *Jamieson v. Kurland*, 819 So. 2d 267 (Fla. 2d DCA 2002), in which the court reversed an order granting fees based on a proposal requiring the plaintiff to execute a confidentiality agreement. The court was not troubled by the inclusion of a confidentiality requirement, but rather by the **lack of particularity** with which it was stated. Paragraph three of the proposal in *Jamieson* listed certain conditions to the proposal, including that the plaintiff execute a general release and that a confidentiality agreement be part of the release. However, the proposal also stated in the very next paragraph that "[t]here are **no non-monetary [sic] terms of the Proposal for Settlement.**" *Id.* (emphasis added). Undeniably, neither situation is present in the instant case.

Consequently, Epstein's Proposal for Settlement, and all of its terms and conditions, were in compliance with Rule 1.442(B) of the *Florida Rules of Civil*

Procedure, §768.79 of the *Florida Statutes*, and prevailing case law. The fact that Edwards now for the first time in more than three years asserts that his acceptance of the Proposal would have been “absolutely unethical” has no bearing on the fact that Epstein properly served Edwards with a Proposal for Settlement that met all of the requisites, and that Epstein is entitled to recovery of his attorney’s fees and costs as a matter of law.

CONCLUSION

In sum, Edwards’s assertion of ethical violations and conflicts of interest as a basis for invalidating the Proposal is pure fiction concocted in the final hour to avoid paying the price for a gamble that he lost when he rejected a reasonable and valid offer of settlement from Epstein. Clear guidance from the Florida State Bar establishes that there were no potential ethical violations or conflicts of interest created by Epstein’s Proposal and the accompanying confidentiality clause contained in the Release. At all times that the Proposal remained open for acceptance by Edwards and, should it have been accepted, even after acceptance, Edwards had and would have had ample opportunity to make adequate disclosure to his clients to dispel any claimed ethical concerns. Edwards has not until today, more than three years after receiving the Proposal, asserted any purported ethical justifications for his rejection of the Proposal. Edwards may not now, at the 11th hour, attempt to “invoke the rules as [a] procedural weapon” because he is faced with the consequences of his imprudent gamble. *Lee v. Florida Dep’t of Ins. & Treasurer*, 586 So. 2d 1185, 1188 (Fla. 1st DCA 1991) (citing R.REG. FLA. BAR 4-5.6 preamble). For these reasons, and in reliance upon the law cited herein, Epstein respectfully requests that this Court grant his Motion for Attorneys’ Fees and Costs.

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all

counsel on the attached service list, via electronic service, this December 22, 2014.

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