IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JEFFREY EPSTEIN, CASE NO. 502009CA040800XXXXMBAG

Plaintiff,

vs.

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

Defendant(s).
_____/

INITIAL MEMORANDUM IN OPPOSITION TO DISQUALIFICATION

COMES NOW Fred Haddad, as co-counsel for Jeffrey Epstein, and files his Initial Memorandum in Opposition to Disqualification and would state as follows:

The Court will hear further testimony and obviously argument on Edwards' Motion to Disqualify on November 26. The undersigned will present a short memorandum at this time in support of opposition to Edwards' Motion.

In his Response in opposition to the Motion, the undersigned observed what basically, save the testimony of Edwards, still holds true "[T]he present Motion to Disqualify the undersigned contains no affidavits, no citation to applicable Florida Bar Rule, nor any case law . . ." hence the undersigned is still in essence replying in the blind. Since that October 1 filing Edwards still has not graced the Court nor the opposition with any authority for his postulations.

Coral Reef of Key Biscayne Developers, Inc. V. Lloyds, 911 So.2d 155 (Fla. 3rd DCA 2005), was a situation where the trial court disqualified counsel as that Court determined the "petitioner's counsel acquired useful information and an unfair tactical advantage from privileged documents afforded by a court order, which was subsequently quashed by this court" [the Third District Court of Appeals]. The District Court, however, then quashed the order of disqualification.

The Appellate Court began its opinion decision with the following observation:

> Florida courts have consistently held that disqualification of a party's chosen counsel is an extraordinary remedy. See *Whitener v. First Union Nat'l Bank of Fla.*, 901 So. 2d 366 (Fla. 5th DCA 2005);

Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. 4th DCA 2004); *Cunningham v. Appel*, 831 So. 2d 214 (Fla. 5th DCA 2002); *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994 (Fla. 4th DCA 2002); *Arcara v. Philip M. Warren, P.A.*, 574 So. 2d 325 (Fla. 4th DCA 1991). Moreover, motions for disqualification are viewed with skepticism because disqualification impinges on a party's right to employ a lawyer of choice, and such motions are often brought for tactical purposes. *Alexander*, 881 So. 2d at 609. Since the remedy of disqualification strikes at the heart of one of the most important associational rights, it must be employed only in extremely limited circumstances. *Kusch v. Ballard*, 645 So. 2d 1035 (Fla. 4th DCA 1994). [Emphasis supplied]

Edwards and his co-counsel Scarola alleged the following in his Motion to Disqualify [paragraphs 2, 3, 4 and 5]:

> 2. The subject matter of the representation [Haddad representing Russell Adler] included matters directly related to circumstances at issue in this proceeding, including specifically the legitimacy of the prosecutions against Mr. Epstein and the extent to which members of the RRA firm other than Rothstein knew of and participated in the Ponzi scheme orchestrated by Rothstein.
>
> 3. In the course of Mr. Haddad's representation of Mr. Adler, Mr. Haddad was afforded unrestricted access to the files of RRA including the litigation files generated in the course of prosecuting claims against the counter-defendant, Jeffrey Epstein.
>
> 4. Included among the Epstein files are materials protected by attorney-client and work product privilege. Those privileges have been consistently asserted in the context of this litigation to protect the interests of RRA's former clients who continue to be represented by Mr. Edwards in a currently pending Federal Court action.
>
> 5. Mr. Haddad's access to materials to which he is denied access in the context of this litigation creates an irreconcilable conflict of interest which prejudices the counter-plaintiff and compromises the counter-plaintiffs obligations to preserve the confidences of his clients.

Of course, through the Response the undersigned filed the attached deposition of Adler in this matter and the pleadings of the Receiver in Bankruptcy, and considering as well the recently

filed affidavit of Adler and Edwards own e-mail and Motion to Continue filed in the Epstein cases that "RRA" was handling, which were the subject of inquiry when Edwards testified before this Court [and attached hereto], it is clear, as Adler will testify, Haddad never had any access to any file or materials as alleged in the Motion.

Haddad represented Adler in a "clawback" claim by the "RRA" trustee in Federal Bankruptcy Court and then in certain Florida Bar matters, which, inter alia, concerned the purchase of a New York cooperative apartment. This is ongoing by virtue of the Florida Bar's appeal of the decision of Judge Lucy Chernow Brown. It concerns Edwards or Epstein in no way whatsoever. Thus the claims of Edwards are without merit.

While the undersigned would assert there has been no disclosure of any privilege information, valuing the speculations of Edwards as he testified at hearing, the most that can be asserted is a fear of inadvertent disclosure for some nonexisting reason.

Returning to the *Coral Reef, supra* decision, the Court stated:

> We review whether the trial court departed from the essential requirements of law in disqualifying the petitioner's counsel. See *Schultz v. Schultz*, 783 So. 2d 329, 330 (Fla. 4th DCA 2001). Although the trial court's discretion is limited by applicable legal principles, this court will not disturb the trial court's findings of fact unless those findings are not supported by competent substantial evidence. Id.
>
> Florida courts have squarely addressed the standard for disqualification of counsel due to the receipt of privileged documents through "inadvertent disclosure." See *Sinclair*, 731 So. 2d 845 at 846; *Abamar Housing & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So. 2d 572 (Fla. 3d DCA 1998). In "inadvertent disclosure" cases, disqualification of counsel may result if the attorney receiving the documents gains an unfair tactical advantage by virtue of that disclosure. See *Abamar*, 724 So. 2d at 573. The trial court applied this standard in its order disqualifying the petitioner's attorneys. [Emphasis supplied]

The Court addressed the higher standard when a Court ordered disclosure occurred, but then observed:

> Notably, many courts also emphasize that due to the extraordinary nature of disqualification, even if a lawyer violates a

> disciplinary rule or engages in unethical conduct to retrieve the privileged documents, the party seeking disqualification must demonstrate that the opposing counsel's conduct caused severe prejudice that warrants disqualification. See, e.g., *Nitla*, 92 S.W.3d 419, 45 Tex. Sup. Ct. J. 571; *In Re Bivens*, 2005 WL 980589 (Tex. App. 2005); *Holland v. The Gordy Co.*, 2003 WL 1985800 (Mich. Ct. App. 2003); *Kusch*, 645 So. 2d 1035. [Emphasis supplied]

The Third District concluded:

> Disqualification is a severe measure, and the respondent failed to meet its burden of showing that disqualification is necessary because the trial court lacks any lesser means to alleviate the harm. See *Bowne*, 817 So. 2d at 999; *Swensen's Ice Cream Co. v. Voto, Inc.*, 652 So. 2d 961, 962 (Fla. 4th DCA 1995). Since we are dealing with privileged documents, we decline to set out in this opinion the specific procedures to be implemented to preserve the confidentiality of the information. We leave this to the trial court for determination, noting only that there are various measures that the trial court could employ, such as returning the documents to the respondent, destroying the copies, and/or restricting evidence related to the privileged information.
>
> It bears repeating that we do not face a situation where a lawyer obtained privileged information inadvertently and then utilized it improperly. Undoubtedly, there are some situations when a party's lawyer reviews another party's privileged documents outside the normal course of discovery and, therefore, must be disqualified. See *Abamar*, 724 So. 2d at 574 (finding that the respondent's inadvertent disclosure of documents, followed by the plaintiff's recalcitrance in rectifying the disclosure, warranted disqualification of plaintiff's counsel).

At bench, the undersigned has already, before even presenting Adler's testimony, established that he never had access to any Epstein RRA files in any way.

It need be remembered, also, that in his Answers to Interrogatories in this matter, filed long before the undersigned appeared as trial counsel or the bringing of the Motion to Disqualify the undersigned. Edwards stated under oath that Adler had no actual involvement in the case. Adler's deposition [quoted in the Response] confirms that as does the affidavit filed as part of the record herein. Thus we assert the Motion to Disqualify is "for tactical purposes", that is to not have the

undersigned try the case,

At the recent hearing, Edwards asserted Adler was present at meetings and set out his "new claim" against undersigned counsel since the assertions of the Motion of access to files were baseless as follows:

> A. It was more than just from time to time. Russell Adler knew what was going on with the cases, we had Epstein meetings where myself, former Judge Bill Berger, Russ Adler, other members of the firm would talk about Epstein, talk strategy about Epstein. Our mental impressions were out on the table, so to speak, discovery, strategy was discussed. Not only that, the intimate details of our clients was discussed. Things that all fall into the parameter of work product privilege and attorney-client privilege, and that's just in-person communication.
>
> Q. In addition to in-person communications with Mr. Adler on a regular basis regarding these cases, was there also a computer program at the firm called Q Task?
>
> A. Yes.

He then described Q Task project [testimony, page 6] and stated ". . . every case, I think, had a project within Q Task. Certain people who would give impact or input on cases were invited to the project".

Then, in direct response to a question from his counsel that was phrased "Let's be very specific for Judge Crow. Did the Epstein project have a Q Task project associated with that case?", and he answered "There was an Epstein project".

The Epstein litigation at RRA, from the discovery in the instant case appears to concern three clients. These were the subject of discussion in Edwards' deposition in the instant case taken on March 23, 2010, Edwards describes Q Task [pages 40 - 62] and testified "there was never a project entitled to my recollection E.W. versus Jeffrey Epstein, L.M. versus Jeffrey Epstein, Jane Doe versus Jeffrey Epstein . . . " Edwards further stated "And my answer is no, those titles are not, I don't believe were ever on Qtask" [deposition, page 52, see also pages 49-51].

While there may have been some Q Task entry or entity for Epstein, it did not apparently involve the clients that made up the crux of this litigation.

And, while there was, since RRA was purportedly a "paperless law firm", a file for Epstein, Edwards testified that "Information that I inputted into Qtask was inputted into Qtask by me". When asked did he ever direct anyone else to put any additional information in with regard to those three claims against Epstein he stated "I don't believe so".

With this background, Edwards speculates the undersigned could ask Adler for "any privileged information that Mr. Haddad wants" [testimony of Edwards October 25, 2012], without any basis of what, how or why the undersigned would want such information.

The clients of Edwards have all settled with Epstein under confidential agreements of which the undersigned states as a lawyer before the Court, he has no knowledge. Epstein dismissed his claims against Edwards. Unless Edwards engaged in illegal or disbarable conduct, which he and Adler have vehemently denied, there is nothing to protect. Indeed, the settlements speak for themselves. There is no work product of import that would even be needed to defend Epstein, the actions of Edwards publicly in print and otherwise more than suffice.

Further, as Edwards acknowledges if Adler were to testify in this matter, it would probably be as a character witness for Edwards [hearing, page 13].

Thus, aside from Mr. Edwards' speculation that Adler could possibly provide privileged information [which the Court by Order could prohibit, and which undersigned and Adler will testify has never occurred], there is nothing to support the Motion to Disqualify presently pending.

In *Waldrep v. Waldrep*, 985 So.2d 700 (Fla. 4th DCA 2008), the Fourth District Court of Appeals quashed an order disqualifying counsel for an alleged conflict of interest. In that matter. attorney Cooper was representing certain Defendants against family members and a corporation, and disqualification was sought due to his apparently having represented everyone involved at one time or another.

Since we have not yet received what bar rule or theory Edwards is preceding under if one exists, the undersigned has to extrapolate cases. In *Waldrep*, *supra*, the Court stated:

> Rule 4-1.9 of the Rules Regulating the Florida Bar states:
>
> > A lawyer who has formerly represented a client in a matter shall not thereafter:
> >
> > **(a)** represent another person in the same or a

substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or

(b) use information relating to the representation to the disadvantage of the former client except as *rule 4-1.6* would permit with respect to a client or when the information has become generally known.

The "application of this Bar Rule creates an 'irrefutable presumption that confidences were disclosed' between the client and the attorney." *Health Care & Ret. Corp. of Am., Inc. v. Bradley,* 944 So. 2d 508, 511 (Fla. 4th DCA 2006) (citing *Gaton v. Health Coal., Inc.,* 745 So. 2d 510, 511 (Fla. 3d DCA 1999)).

However, once an attorney-client relationship is shown, the party seeking disqualification must show that the current case involves the **same subject matter** or a **substantially related matter** in which the lawyer previously represented the moving party. *Id.* (quoting *Key Largo Rest., Inc. v. T.H. Old Town Assocs., Ltd.,* 759 So. 2d 690, 693 (Fla. 5th DCA 2000)). As this court has previously stated, "Before a client's former attorney can be disqualified from representing adverse interests, it must be shown that **the matters presently involved are substantially related to the matters in which prior counsel represented the former client**." *Campbell v. Am. Pioneer Sav. Bank,* 565 So. 2d 417, 417 (Fla. 4th DCA 1990) (emphasis added), quoted in *Health Care*, 944 So. 2d at 512

The Court reversed the disqualification of Mr. Cooper stating:

Plaintiff made no showing at the evidentiary hearing that Cooper's representation of her and her husband while they were running the corporation, and his representation of her on personal matters thereafter, was "substantially related" to, or even had anything to do with, the matters that are the subject of the instant lawsuit. There was no testimony indicating Cooper's prior representation of Plaintiff was involved in any way with Plaintiff's allegedly advancing funds toward the construction of Gary and Donna's residence, or with the lease pursuant to which Plaintiff rented her warehouse to the corporation.

"Disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly."

> Singer Island, Ltd. v. Budget Constr. Co., 714 So. 2d 651, 652 (Fla. 4th DCA 1998), *quoted in Health Care,* 944 So. 2d at 511. Based on the evidence presented below, we conclude that disqualification in this case constituted a departure.

The only client the undersigned had was Adler in matters singularly unrelated to Epstein or Rothstein's Ponzi scheme and after "RRA" imploded. Indeed there is no suggestion Epstein or Edwards or Adler had any knowledge of any Ponzi scheme and they certainly nothing to do with the Adler clawback or Bar issues.

Another instructive case, depending upon what theory might ever be advanced by Edwards is *THI Holdings, LLC v. Shattuck,* 37 FLW D1621(b) (Fla. 2nd DCA 2012).

The Court presented the facts:

> THI Holdings' local counsel filed a verified motion seeking to have Balassa admitted pro hac vice in Florida, and Balassa submitted an affidavit in support of the motion. The Estate filed a notice of objection to Balassa's admission. In that notice, the Estate did not contest any of the sworn representations contained in THI Holdings' motion or Balassa's affidavit. Instead, the sole basis for the Estate's objection was its assertion that Balassa had "irreconcilable conflicts of interest." However, the notice did not explain what conflicts the Estate believed existed or how it had standing to raise these alleged conflicts.
>
> At the hearing on THI Holdings' motion to admit Balassa pro hac vice, the Estate argued that Balassa should not be admitted because he had previously represented two different entities who were also defendants in the Estate's action -- Trans Healthcare, Inc., and Trans Health Management, Inc. The Estate admitted that the alleged prior representation was in completely separate matters. Additionally, the Estate did not contend that these prior matters were substantially related to the current case. Moreover, the Estate did not argue that Balassa had ever represented either the Estate or any party related to the Estate in any matter whatsoever. Instead, it argued only that Balassa's prior representation of Trans Healthcare, Inc., and Trans Health Management, Inc., might result in these defendants raising Balassa's alleged conflict of interest at some point during the current litigation and that, if they did so, it would delay justice for the Estate. Notably, the Estate offered no evidence to support its stated concerns and relied solely on the arguments of counsel concerning these alleged potential conflicts of interest. [Footnote Omitted]

> In response, THI Holdings argued that the Estate's concerns did not impact the question of whether Balassa should be admitted pro hac vice. Further, THI Holdings argued that the Estate had no standing to raise alleged conflicts of interest between the various defendants. Nevertheless, the trial court denied THI Holdings' motion to have Balassa admitted pro hac vice. THI Holdings now seeks certiorari review of that order.

The Court first rejected the denial of the pro haec vice admission then addressed the conflict issue:

> Second, even if Balassa's potential conflicts of interest were a relevant consideration when deciding a motion for admission pro hac vice, the Estate in this case did not have standing to raise the alleged conflicts. As a general proposition, a party . . . does not have standing to seek disqualification where, as here, there is no privity of contract between the attorney and the party claiming a conflict of interest." *Cont'l Cas. Co. v. Przewoznik*, 55 So. 3d 690, 691 (Fla. 3d DCA 2011); *see also Anderson Trucking Serv., Inc. v. Gibson*, 884 So. 2d 1046, 1050-51 (Fla. 5th DCA 2004). Here, as a matter of undisputed fact, there is no privity between the Estate and Balassa or his firm. And while there is a limited exception to this standing rule for parties who "stand in the shoes" of a former client, *see State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 632-33 (Fla. 1991), the Estate cannot demonstrate that it has any shoes whatsoever in which to stand to seek disqualification of Balassa. Thus, even if potential conflicts of interest were properly considered by the trial court in making a pro hac vice admission determination, the Estate had no standing to raise those conflicts and thus could not use them as a basis to seek the denial of Balassa's admission.
>
> Third, even if the Estate could convince this court that it had standing to raise the disqualification issue, it cannot establish the legal requirements for disqualification. A party seeking to disqualify opposing counsel based on a conflict of interest must demonstrate that:
>
> > (1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship, and (2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in

which it represented the former client.

> *K.A.W.*, 575 So. 2d at 633; *see also Kaplan v. Divosta Homes, L.P.*, 20 So. 3d 459, 462 (Fla. 2d DCA 2009).

> Here, there is not now and never has been any attorney-client relationship between the Estate and Balassa. Further, none of the Estate's allegations show that the current litigation is "the same or substantially related to" Balassa's prior representation of Trans Healthcare, Inc., or Trans Health Management, Inc. Thus, the Estate has not established either of the two required elements necessary to even attempt to successfully seek disqualification of Balassa.

While this case, obviously is not directly on point, the sentiments, or rationale of the Court in adhering to the abhorrence of disqualification is persuasive.

The Court in *Bon Secours-Maria Manor Nursing Care Ctr. v. Seaman*, 959 So.2d 774 (Fla. 2nd DCA 2007), also reviewed and quashed an order disqualifying counsel. The Court succiently described the issue:

> In 2006, a potential conflict of interest arose when the Santa Lucia & Thomas law firm dissolved and Mr. Santa Lucia became a partner at the Quintairos law firm. Mr. Santa Lucia's move to the Quintairos law firm resulted in a situation where that firm was representing Bon Secours in a matter that was directly adverse to the interests of Ms. Seaman, their new partner's former client. Under these circumstances, a question arose concerning whether Mr. Santa Lucia's move to the Quintairos law firm should disqualify the firm from continuing to represent Bon Secours in the defense of the action brought by Ms. Seaman. This question became ripe for decision when Mr. Dinan-who continued to represent Ms. Seaman--filed a motion on her behalf to disqualify the Quintairos law firm from further representation of Bon Secours.

The pertinent paragraph under the Bar rules was 4-1.10(b). The Court quoted the rule:

> (b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person *and*

> *about whom the lawyer had acquired information protected* by rules 4-1.6 [2] and 4-1.9(b) [3] *that is material to the matter.*

R. Regulating Fla. Bar 4-1.10(b) (emphasis added). The comment to the rule explains:

> Subdivisions (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by rules 4-1.6 and 4-1.9(b). *Thus, if a lawyer while with 1 firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the 2 clients conflict.*

R. Regulating Fla. Bar 4-1.10 comment (emphasis added).

> [2] Rule 4-1.6 concerning "Confidentiality of Information" requires that "[a] lawyer shall not reveal information relating to representation of a client" except as stated in the rule "unless the client gives informed consent."
>
> [3] Rule 4-1.9 concerning "Conflict of Interest; Former Client" "provides that a lawyer who formerly represented a client shall not thereafter 'use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.' " *Scott*, (citing rule 4-1.9(b)).

The undersigned assumes the above is somewhere in the ballpark where Edwards will argue. However, based upon what's before the Court even at this juncture, the showing is insufficient. The Bon Secous Court then stated "the essential requirements of the law" holding:

> In *Scott*, this Court outlined a procedural road map for resolving the type of question presented by the facts of this case:
>
> *[U]nder Fla. R. Bar 4-1.10(b)*, in order to establish a

> prima facie case for disqualification, the moving party must show that the newly associated attorney acquired confidential information in the course of the attorney's prior representation. *Gaton*, 745 So. 2d at 511; *Koulisis*, 730 So. 2d at 292. After the moving party meets this burden, the burden shifts to the firm whose disqualification is sought to show that the newly associated attorney has no knowledge of any material confidential information. [Emphasis supplied]

Edwards has not remotely approached a prima facie case, as Adler's deposition and affidavit attest, and Edwards presentations of "possibilities" confirm, if they were even accurate.

The Court further held:

> Rule 4-1.10 required the circuit court to determine--as a factual matter--whether Mr. Santa Lucia had actual knowledge of client confidences that would be imputed to the Quintairos law firm. *See Nissan Motor Corp. in USA v. Orozco*, 595 So. 2d 240, 243-44 (Fla. 4th DCA 1992), *called into doubt on other grounds by Harpley v. Ducane Indus. (In re Outdoor Prods. Corp.)*, 183 B.R. 645, 650 n.7 (Bankr. M.D. Fla. 1995) (requiring a similar factual finding when a "tainted associate" joined a firm now opposing his former client).

The review of what then occurred, and the holding of the Court mandate denial of Edwards' Motion. The Motion is solely for the tactical reason to not have the undersigned serve as trial counsel, but there is nothing to legally support the Motion. Mr. Adler will testify, it is believed, consistent with his affidavit and deposition and emphasize the fact that the Motion to Disqualify is without merit.

CONCLUSION

Jeffrey Epstein has the ability to retain any lawyer he chooses, and that is conceded. He has retained the undersigned to try the matter before the jury. The undersigned does not and has not participated in the discovery process and reviews the discovery generated by other counsel to put the matter in the trial posture. Mr. Edwards has presented nothing, it is submitted, for the Court to employ the extreme remedy of disqualification of chosen counsel. The Court should also consider the fact that Edwards noticed the matter for trial on September 19, 2012, just after the undersigned appeared as counsel. The attempt to disqualify chosen counsel is a tactical decision due to, it is

submitted, counsel's somewhat extensive trial and Appellate experience.

I HEREBY CERTIFY that a copy of the foregoing was furnished via Email to all counsel listed below, this 13TH day of November, 2012.

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