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

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

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

Defendant,
_____/

DEFENDANT/COUNTER-PLAINTIFF'S RESPONSE IN OPPOSITION TO EPSTEIN'S MOTION FOR PROTECTIVE ORDER TO PRECLUDE EXTRA-JUDICIAL STATEMENTS AND COMMENTARY TO THE MEDIA

Defendant/Counter-Plaintiff, Bradley J. Edwards, files this Response and Supporting Legal Authorities in Opposition to Plaintiff/Counter-Defendant, Jeffrey Epstein's Motion for Protective Order to Preclude Opposing Counsel and Defendant/Counter-Plaintiff From Making Extra-Judicial Statements and Commentary to the Media.

Epstein in his Motion for Protective Order complains of two articles in the British press which quote the undersigned and urges this Court to impose a gag order to ensure that he receives a fair trial. The focus of the British press' attention on Epstein is a result of public statements of one of Epstein's child victims who lives in Australia. Her mention of Epstein's relationship with Prince Andrew ignited the British press and they have been contacting the undersigned. Neither the undersigned nor his client had any involvement in initiating public comment by the Australian victim who came forward. All of the undersigned's comments have

been restricted to matters of public record and have been motivated by a desire to develop additional sources of relevant information in the pending proceedings. Press attention has, in fact, assisted the undersigned and his client in developing potential new witnesses and evidence. Additionally, the undersigned is hopeful that the focus of public attention on Mr. Epstein will help to deter his further abuse of children and will encourage other victims and witnesses to his past criminal activity to continue to come forward and assist not only in the pending civil litigation but also in any further criminal investigation that may be conducted. For these reasons, the undersigned and his client oppose any attempt to restrict their First Amendment Right to make such statements.

Contrary to Epstein's position, a restraint on speech is simply not necessary to ensure that Mr. Epstein receives a fair trial. This case is not yet set for trial and it is highly unlikely that prospective Palm beach County jurors would have even been exposed to articles in the British press. Plaintiff/Counter-Defendant's Motion should be denied because he has failed to meet his burden of establishing a substantial and imminent threat to his ability to receive a fair trial. Additionally, he has asked this Court to enter a blanket order prohibiting all communication, which is constitutionally impermissible. (See Motion For Protective Order at ¶ 5 stating "all statements and comments by Mr. Scarola to the press and media must therefore stop immediately").

1. The Court should not enter any order restraining the speech of any party or person. As the Court is undoubtedly aware:

Any form of prior restraint of expression comes to a reviewing court bearing a heavy presumption against its constitutional validity; therefore, the party who seeks to have such a restraint upheld carries a heavy burden of showing justification for the imposition of such a restraint. . . . [T]o justify a prior restraint, the activity restrained must pose a clear and present danger or a serious or imminent threat to a protected competing interest and that such a restraint cannot be upheld if reasonable alternatives are available. State ex. rel. Miami Herald Publishing Co. v. McIntosh, 340 So. 2d 904, 908 (Fla. 1977).

Indeed, the United States Supreme Court has held that Nevada's application of its analog to Rule 4-3.6(a) of the Rules Regulating the Florida Bar was unconstitutional when used to discipline a lawyer who made public statements concerning a criminal case six months before a trial. Its analysis of the Rule gives important insights into the constitutional limitations necessarily inherent in any such restriction of First Amendment rights:

Model Rule 3.6's requirement of substantial likelihood of material prejudice is not necessarily flawed. Interpreted in a proper and narrow manner, for instance, to prevent an attorney of record from releasing information of grave prejudice on the eve of jury selection, the phrase substantial likelihood of material prejudice might punish only speech that creates a danger of imminent and substantial harm.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 2725 (1991) ("Gentile") (emphasis added). Repeated throughout the Supreme Court's opinion in Gentile is the concept that any restraint of a lawyer's speech must be based on an imminent threat to the integrity of

judicial proceedings. See id. at 2725 (Model Rule 3.6 incorporates a "clear and present danger" standard).

To emphasize just how "imminent" a threat must be before a court can constitutionally curtail protected speech, the Supreme Court cited its own decision in Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899 (1991), which it described this way:

There, the community had been subject to a barrage of publicity prior to Mu'Min's trial for capital murder. News stories appeared over a course of several months and included, in addition to details of the crime itself, numerous items of prejudicial information inadmissible at trial. Eight of the twelve individuals seated on Mu'Min's jury admitted some exposure to pretrial publicity. We held that the publicity did not rise even to a level requiring questioning of individual jurors about the content of publicity. In light of that holding, the Nevada court's conclusion that petitioner's abbreviated, general comments six months before trial created a "substantial likelihood of materially prejudicing" the proceeding is, to say the least, most unconvincing. 111 S.Ct. at 2727.

Thus, in Gentile, the Supreme Court found Nevada's application of Rule 3.6 unconstitutional, despite the fact that the subject trial followed intense pretrial publicity, a press conference by the disciplined lawyer, and at least 17 articles in the major local newspapers. This was also despite the fact that the disciplined lawyer's admitted purpose in his public statements was to rebut press accounts that tended to exonerate other suspects of the crime with which the lawyer's client was charged. See id. at 2728. Gentile is important and instructive because the Supreme Court recognized that a lawyer has a legitimate right to make extrajudicial statements to

advance the interests of his client for a variety of purposes, including countering public opinion, protecting the client's business interests or defending the position and reputation of his client. Id. at 2728-29.

The Court also noted that:

Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. . . . Voir dire can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence present at trial. All of these factors weight in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections. (emphasis added) Id. at 2734.

Florida's Rule 4-3.6 is not contrary to these important constitutional principles. The Rule contains several safeguards that prevent unconstitutional application. There is no violation unless the lawyer knows or should know that a statement "will have a substantial likelihood of materially prejudicing" a case "due to its creation of an imminent and substantial detrimental effect on that proceeding." As the Comment to the Rule explains, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject

matter of legal proceedings is often of direct significance in debate and deliberation of public policy. (emphasis added)

It cannot be argued that the issues presented in this case do not implicate a threat to public safety. The public's intense interest and scrutiny speaks volumes about the scope of the public's concern over the issues raised.

Rodriguez v. Feinstein, 734 So. 2d 1162 (Fla. 3d DCA 1999) fully supports Defendant/Counter-Plaintiff's reading of Gentile. Of the Supreme Court's decision in Gentile, the Third District said, "The Court held that the 'substantial likelihood of material prejudice standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." Thus, in Rodriguez, the Third District overturned a gag order that precluded communications between a plaintiff's attorney and the press in a medical negligence case. Of course, this is the precise remedy sought by Epstein in this case. As the court held, in the absence of evidence of a "substantial and imminent threat to a fair trial," such prohibitions are simply unconstitutional. Id. at 1165.

2. Gag orders in civil cases are unconstitutional unless there is a showing of prejudice and unless other alternatives are demonstrably unworkable. Gag orders aimed at participants in criminal trials have been found to be constitutionally permissible where the injury to any First Amendment right is outweighed by the Sixth Amendment right to a fair trial. See, e.g., Dow Jones & Co v. Simon, 842 F.2d 603, 609 (2d Cir. 1988); Radio & Television News Ass'n v. United States District Court, 781 F.2d 1443, 1446 (9th Cir.1986). See also News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512-15 (11th Cir. 1991). Relying on the Seventh

Amendment, the Third Circuit has found that the same analysis governs in civil cases. See Bailey v. Systems Innovation, Inc., 852 F.2d 93, 97-98 (3d Cir.1988). Other circuits have stated that civil trials, because of their nature and relatively longer duration, "do not as readily justify a restriction on speech" as criminal trials. Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257-58 (7th Cir.1975). Accord, Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir.1979). It is not necessary, however, for the Court to determine whether greater incursions on freedom of speech are constitutionally justifiable in a criminal context than in a civil context because Epstein could never satisfy even the less demanding standard arguably applicable to criminal trials.

Prior to enjoining the speech of trial participants, a trial court must specifically find, based on the available evidence, that the fairness of the trial is seriously threatened by publicity and that nothing short of a gag order will suffice to protect the litigants' right to a fair trial. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-65, 96 S.Ct. 2791 (1976); Dow Jones, 842 F.2d at 611; Radio & Television News Ass'n, 781 F.2d at 1448 (Nelson, J., concurring). As the Third District Court of Appeal said in Miami Herald Publishing Co. v. Morphonios, 467 So. 2d 1026, 1030 (Fla. 3d DCA 1985), "Trial courts must set out, in detail, findings that substantial prejudice to the defendant will result from the pretrial publicity, that no less restrictive alternatives (e.g., a thorough and sensitive voir dire or the careful exercise of peremptory challenges) are available that restraint is the only effective method of protecting legitimate and compelling interests." The evidence submitted by Epstein in support of his motion serves merely to chronicle statements made or attributed to Plaintiff's counsel in two articles in the British

press. There exists not a shred of evidence tending to prove the decisive issue, that being the statements in some way effect Epstein's ability to receive a fair trial.

3. Gag Orders must be narrowly tailored to achieve the objective sought or they are constitutionally impermissible. In Rodriguez, supra, the Third District overturned a blanket gag order that precluded all communications between a plaintiff's attorney and the press in a medical negligence case. The Rodriguez Court noted that the Order was not narrowly tailored to achieve the objective sought, and therefore was constitutionally impermissible. 734 So. 2d at 1165. The Rodriguez Court noted that following Gentile, both federal and state courts have found that gag orders are only proper if the restraint on speech is narrowly tailored. Id. In this case it appears that Epstein may indeed be seeking a blanket order prohibiting all communications, which is simply not permitted. In his motion he clearly states in ¶ 5 that "all statements and comments by Mr. Scarola to the press and media must therefore stop."

Wherefore, the Defendant/Counter-Plaintiff, Bradley J. Edwards respectfully requests this Court to enter an Order denying Plaintiff/Counter-Defendant, Jeffrey Epstein's Motion for Protective Order to Preclude Opposing Counsel and Defendant/Counter-Plaintiff From Making Extra-Judicial Statements and Commentary to the Media.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Fax and U.S. Mail to all counsel on the attached list, this 4th day of April, 2011.

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