IN RE TALC-BASED POWDER PRODUCTS LITIGATION	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-000215-24 Civil Action ON APPEAL FROM AN INTERLOCUTORY DECISION OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY Master Docket No. ATL-L-2648-15 MCL Case No. 300 SAT BELOW: Hon. John C. Porto, J.S.C.

DEFENDANTS-APPELLANTS JOHNSON & JOHNSON'S AND LLT MANAGEMENT LLC'S AMENDED BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

In this litigation, lawyers from the Beasley Allen law firm representing the plaintiffs collaborated with former counsel for Johnson & Johnson in a mediation adverse to J&J and attempted to conceal that collaboration. The question before this Court is whether that conduct is permissible under New Jersey ethics rules. That question answers itself. New Jersey's Rules of Professional Conduct unequivocally prohibit what happened here.

This interlocutory appeal arises from *In re: Talc Based Powder Products Litigation*, a multi-county litigation in Atlantic County consisting of claims against J&J for its manufacture of talc-based products. To defend itself, J&J retained an expert legal team. James Conlan was an integral member. As part of that team, Conlan worked on this litigation for nearly two years, billing J&J for 1,600 hours and $2.24 million in legal fees. From that representation, Conlan learned J&J's most sacred confidences—how it valued the claims in the talc litigation both individually and in the aggregate, how it estimated and valued future claims, its settlement strategies, and more.

Then he switched sides. After starting his own business aimed at acquiring mass tort liabilities (like J&J's talc liabilities), Conlan allied himself with co-lead counsel for plaintiffs, Beasley Allen, collaborating with its lawyers in secret on a joint settlement proposal in a mediation adverse to J&J—on the

same matter, same claims, and same issues that he worked on as counsel for J&J. That conduct violated multiple ethical rules.

To start, Beasley Allen violated Rule 5.3(c). The firm "associated" with Conlan by collaborating with him on the mediation; Conlan's conduct, collaborating on a mediation adverse to his former client in the same matter, would have violated Rule 1.9(a) had Conlan been a practicing lawyer at the time; and Beasley Allen ratified that conduct by inviting Conlan to participate in its mediation efforts and approving his participation.

Conlan also shared J&J's confidences with Beasley Allen, in violation of Rule 1.6. He had a clear motive and opportunity to do so. Conlan would make money only if J&J accepted the settlement proposal, so Conlan had every interest in sharing J&J's settlement tolerance and valuation of plaintiffs' claims to ensure Beasley Allen's offer was acceptable. And Conlan's company went back and forth with Beasley Allen for weeks with edits on the joint settlement proposal. To think those edits did not substantively reflect knowledge Conlan acquired from J&J is to blink reality. This evidence confirms the applicability New Jersey's presumption of shared confidences: Where, as here, parties enter into a privileged and confidential relationship, the law presumes they share privileged and confidential information.

Beasley Allen knows it did something wrong; otherwise it would have

been forthright. But in sworn certifications, the firm attempted to conceal its collaboration with Conlan in an effort to avoid disqualification. Beasley Allen's lack of candor independently violated Rules 3.3(a), 8.4(a), and 8.4(d).

The trial court failed to consider J&J's arguments under these rules. And the court's interpretation of Rules 5.3(c) and 1.6 would drain them of force, impairing lawyer-client relationships across this State. For instance, the trial court held that Rule 5.3(c) did not apply because Conlan, who quit the practice of law after representing J&J, could not have violated Rule 1.9(a), an ethics rule applicable only to practicing lawyers. But Rule 5.3(c) is not self-negating. It holds lawyers responsible for a *non-lawyer's conduct* that "would be a violation of the Rules of Professional Conduct if engaged in by a lawyer." That describes Conlan's conduct here.

The trial court's application of Rule 1.6 is also deeply flawed. It ignored the evidence showing Conlan's and Beasley Allen's edits on the settlement proposal. And without any substantive analysis, the trial court pronounced dead New Jersey's presumption of shared confidences. That holding stands alone. Nothing in New Jersey law casts doubt on the vitality of the presumption.

If the decision below is allowed to stand, the confidence in the rule of law and the certainty necessary to do business in this State will be significantly impaired. The decision should be reversed and Beasley Allen disqualified.

PROCEDURAL HISTORY

On December 8, 2023, J&J filed a motion seeking an order to show cause as to why Beasley Allen should not be disqualified from this litigation. *See* J&J Mot. for Order to Show Cause, *In re Talc-Based Powder Prods. Litig.*, No. ATL-L-2648-15 ("MCL") (N.J. Super. Ct. Law Div. Dec. 8, 2023). J&J filed a parallel motion in the related federal multi-district litigation, where the Beasley Allen law firm serves as co-lead counsel for plaintiffs. *See* J&J Mot. for Order to Show Cause, *In re Johnson & Johnson Talcum Powder Prods. Marketing, Sales Practices & Prods. Liab. Litig.*, No. 3:16-md-2738-MAS-RLS ("MDL"), Dkt. 28760 (D.N.J. Dec. 5, 2023). After hearing oral argument, the trial court ordered an evidentiary hearing. *See* Evidentiary Hr'g Order, MCL, Trans. ID LCV2024271848 (N.J. Super. Ct. Law Div. Jan. 31, 2024). Along with the MDL magistrate judge, the trial court presided over a three-day evidentiary hearing that delivered testimony from four witnesses. *See generally* T3-T7. On July 19, 2024, the trial court denied J&J's motion to disqualify Beasley Allen. *See* Da 033. The MDL Court has not yet ruled on the motion.

STATEMENT OF FACTS

A. Conlan Represents J&J In The Talc Litigation And Learns Its Most Important Confidences

1. Conlan represents J&J in the talc litigation. From July 2020 through March 2022, Conlan, then a partner at Faegre Drinker Biddle & Reath LLP,

represented J&J in connection with litigation and attempted resolution of claims alleging injuries from exposure to cosmetic talc products. Da 055-Da 056, ¶¶ 4-5. Those claims were consolidated in an MCL in Atlantic County and an MDL in the District of New Jersey in Trenton. T3, 10:6-9. Beasley Allen, whose mass torts group is led by Andy Birchfield and includes Leigh O'Dell, has served as de facto co-lead counsel in the MCL, *see* Da 061, ¶ 7, and as Court-appointed co-lead counsel for plaintiffs and on the Plaintiffs' Steering Committee in the MDL. MDL Dkt. 73 (D.N.J. Dec. 6, 2016).

For years, the talc claims in the MDL and MCL have been J&J's largest liability, and the Company assembled a team of top legal experts to determine how best to resolve them. *See* T3, 34:7-19. J&J retained Conlan to join that team based on his representations that he was the "premier expert" on restructuring mass tort liabilities. *Id.* at 33:4-35:3, 122:8-20. Conlan quickly became a central figure in, and integral part of, that core outside counsel team. *Id.* at 33:23-34:1.

In that role, Conlan routinely participated in weekly calls with the team regarding all aspects of the litigation and resolution of the talc claims. *Id.* at 12:2-14, 16:7-21. Conlan also participated in "many, many, many individual direct calls with" the highest echelons of J&J's Law Department, including with Erik Haas, J&J's Worldwide Vice President of Litigation. *Id.* at 12:15-21,

34:20-35:25; T5, 8:18-9:11. Conlan exchanged direct emails with Haas and other in-house counsel, *see, e.g.*, DCa 001 (the "In camera letter"), DCa 063 (Ex. D3), DCa 064 (Ex. D4), DCa 095 (Ex. D11), and was "continuously communicating with respect to all aspects of the cases" with Haas throughout his tenure, T3, 12:20-21. And Conlan worked almost daily with Jim Murdica, J&J's lead resolution counsel. *See* T4, 47:6-13, 63:21-24, 67:20-25. Upon joining J&J's outside counsel team, Conlan and Murdica became "the main [two] people running the strategy [and] evaluating the settlement options." *Id.* at 53:10-12; *see id.* at 47:6-13.

All told, Conlan billed nearly 1,600 hours to the talc matter, charging J&J $2.24 million. Da 035, ¶ 5. This included 1,154 hours in 2021 alone, *id.*—an average of 4.5 hours every single workday. Indeed, Conlan billed more to the talc matter than to any other client matter in his time at Faegre. T5, 10:13-17; *see also* Da. 009 (noting counsel for Beasley Allen stipulated that Conlan "billed accurately for the time he spent … representing J&J").

2. Conlan learns J&J's confidences. "[I]t is undisputed that Conlan possessed and still possesses J&J's privileged and confidential information regarding the talc litigation that he learned in the twenty months at Faegre Drinker when he represented J&J." Da 028; *see* Da 008-D009. There is also no dispute that the information Conlan acquired as outside counsel remains some

of the most sensitive information J&J possesses.

Conlan learned J&J's strategic thinking about how to resolve its biggest liability—be it "in the tort system … through litigation," or "other potential ways to resolve matters outside of the bankruptcy system and tort system," including settlements, a divisional merger followed by a spin-off or bankruptcy, and structural optimization and disaffiliation. T3, 15:21-16:21; *see id.* at 18:17-19:3.[1] Each of these topics was "discussed, debated, critiqued, [and] the strengths and benefits of them, the risks of those, the pros and cons of those were debated at great length during the calls that [J&J] had on a weekly basis and individually with Mr. Conl[a]n." *Id*. at 16:22-17:1.

For example, the weekly calls Conlan attended were a place where J&J "would collectively discuss the strategy for litigating and adjudicating the [t]alc [l]itigation." *Id.* at 12:11-13. As a participant in these recurring calls and discussions, Conlan was exposed to "every single different discipline" of expertise relevant to resolving the MDL and MCL talc claims. T5, 68:19-69:6. Thus, Conlan participated in "discussions of the advantages and disadvantages of potential resolution through the tort system compared to other options." T3,

[1] Structural optimization and disaffiliation is the process of consolidating an entity's legal liabilities and then disaffiliating from them. For example, a company might "optimize" its liabilities by housing them in a subsidiary, and then "disaffiliate" from that subsidiary through a sale or spin-off.

17:5-13. And he learned "the strategic issue" of "who do you approach and when" to effectuate a global settlement. *Id.* at 20:1-21:14.

Perhaps most critically, Conlan learned how J&J valued talc plaintiffs' claims. He learned the amount J&J "would be willing to pay to resolve [the talc] claims[,] both on an aggregate basis and a per claim basis." *Id.* at 27:23-28:12. And he learned not only how J&J valued current claims—i.e., claims already asserted in the tort system—but also "the potential value of … future claims," "both at the aggregate level and at the per-claim level and the criteria that go into how [J&J] set [its] per-claim amounts." *Id.* at 38:4-10, *see id.* at 30:18-24.

In short, Conlan learned J&J's strategic and confidential thinking about the right "forum, when, who, aggregate claim amount, per claim amount, factors to consider, how to value future claims … the timing of future claims, [and] what factors go into whether … future claims are going to escalate or de-escalate." *Id.* at 81:21-82:1; *see also* T4, 55:2-8, 56:23-57:3.[2]

[2] At the plenary hearing, Conlan tried to downplay the significance of his 1,600 hours of work for J&J. Although he readily admitted that he was "exposed to" J&J's privileged and confidential information, he insisted that he did not understand the Company's resolution efforts outside the bankruptcy system. *See, e.g.*, T5, 55:2-15, 55:21-56:1, 58:1-17, 65:21-66:2. That is not credible from someone who held himself out as an expert in resolving mass torts inside and outside of bankruptcy, *see, e.g.*, T3, 122:16-20; T4, 49:4-6; and one who shared "strident" opinions on "every issue that would come up" on the weekly outside-counsel group calls—from "the right forum" to "when should [J&J] bring a claim" to "who should [J&J] approach" to "how should [J&J] structure" the bankruptcy. T3, 33:13-22.

3. Conlan works for J&J on tort litigation and bankruptcy. Conlan acquired J&J's confidences while J&J was litigating in the tort system, in the MDL and MCL, and during the pendency of two bankruptcy cases.

Almost immediately after he began representing J&J in the talc litigation, Conlan began working on an "outside of bankruptcy settlement" to resolve the MDL and MCL claims. T4, 57:14-58:1; *see id.* at 63:24-64:8. His work included advising on J&J's negotiations with "Mr. Birchfield for an initial resolution." *Id.* at 49:16-23; *see also* Da. 010 (finding "Birchfield and others at Beasley Allen knew Conlan represented J&J beginning in 2020"). He also began preparing "soup-to-nuts" analyses and recommendations about the strengths and weaknesses of different "[m]echanisms and options" for resolving the claims, including outside of bankruptcy. T5, 87:23-88:5; *see id.* at 88:14-89:5.

In September 2020, J&J pivoted its efforts toward a potential resolution in bankruptcy. The talc claims brought against J&J were also brought against a raw materials supplier, Imerys Talc America, Inc. ("Imerys"), alleging the same harms from the same operative facts—that talc in J&J's products, supplied by Imerys, caused various cancers. T3, 23:20-24:10; T5, 39:9-16; DCa 001 (In camera letter), DCa 073 (Ex. D9), DCa 188 (Ex. D21). Imerys filed for Chapter 11 bankruptcy in February 2019. *See In re: Imerys Talc America, Inc.*, No. 19-10289 (LSS) (Bankr. D. Del.); T3, 24:11-18. As a result, J&J had an interest in

"ensuring that there [was] a fair determination and adjudication of th[e] claims" against Imerys, and J&J participated in that bankruptcy both as an objector and third-party debtor. *Id.*

The Imerys bankruptcy presented an opportunity for J&J to resolve all the MDL and MCL talc claims through what is called a "bolt-on" settlement—"bolt[ing] on a [J&J] reorganization plan to the Imerys plan, in an effort to utilize the Imerys bankruptcy to resolve" all present and future talc claims against J&J. T5, 40:10-41:1; DCa 001 (In camera letter), DCa 010 (Ex. D1). Between fall 2020 and summer 2021, Conlan was "intimately involved" in J&J's extensive confidential and privileged discussions on how best to effectuate this plan. T3, 24:24-25:7; T5, 42:21-25; *see also* T3, 34:15-35:25 (Conlan attended standing weekly calls with in-house and outside counsel); T4, 48:16-24 (Conlan attended regular calls with Murdica; J&J Associate General Counsel Joe Braunreuther; and J&J Global Lead, Product Liability John Kim to "coordinate the high-level strategy on resolution" efforts.); T5, 15:16-16:4, 18:11-24, 20:3-17, 41:2-14, 44:20-47:2, 48:2-22, 53:22-54:13, 54:14-55:18, 60:19-21, 65:5-66:2, 67:8-19, 68:19-69:6, 77:15-23, 80:6-13; DCa 001 (In camera letter), DCa 010 (Ex. D1), DCa 096 (Ex. D12), DCa 097 (Ex. D13) (Conlan was privy to discussions about options for structuring the bolt-on plan, current and future claim values, proposed settlement matrices, outside counsel's negotiations with

plaintiffs, and other factors driving J&J's decision-making); DCa 001 (In camera letter), DCa 101 (Ex. D15) (Conlan was one of only a few outside counsel Murdica emailed to discuss how to value talc claims to achieve requisite 75% support from talc plaintiffs).

In the summer of 2021, efforts to resolve J&J's talc liabilities through the Imerys bankruptcy stalled. T5, 80:6-8. So J&J decided to explore a different approach: filing "[its] own bankruptcy." T3, 40:8-14. Conlan was involved in "all the discussions regarding the potential for bringing a bankruptcy in which [J&J] was the debtor," *id.* at 40:3-20, including discussions with Haas, other senior members of J&J's Law Department, and J&J's core outside counsel team. *Id.* at 40:21-41:6. On October 14, 2021, LTL filed for bankruptcy. *In re: LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.).

B. Conlan Collaborates With Beasley Allen In The Talc Litigation And Shares J&J's Confidences

1. Conlan starts Legacy. Not long after LTL filed for bankruptcy, Conlan left Faegre to start Legacy, T3, 42:2-12, a company whose business model was to acquire or administer liabilities like the talc liabilities Conlan had worked on at J&J—almost as if he had them in mind when he formed his company. Indeed, after leaving Faegre, Conlan approached J&J multiple times to propose that Legacy acquire those exact liabilities. Da 035, ¶ 9; Da 038; *see also* Da 036 ¶ 14, Da 044-Da 049. J&J repeatedly rejected Conlan's proposals, preferring

instead to resolve the talc claims through bankruptcy. *See* T3, 65:24-67:11, 68:4-7; T5, 108:20-25.

2. Conlan teams with Beasley Allen. Although J&J had support from "the vast majority" of claimants for resolving its talc liabilities through the LTL-1 bankruptcy, Beasley Allen led a small minority of law firms to oppose. T3, 42:13-43:16. It is not hard to understand why: Beasley Allen would earn more money, through the MDL common benefit fund,[3] if the talc claims were resolved in litigation as opposed to J&J's bankruptcy plan. MDL, Dkt. 28760-1 at 9-10 (D.N.J. Dec. 5, 2023). Under J&J's plan, Beasley Allen would not earn millions of dollars in common benefit fund fees that it would otherwise share if the talc claims were resolved through litigation. T7, 52:10-17, 53:18-20 (Beasley Allen attorney Andy Birchfield conceding that J&J's bankruptcy proposal "did not provide for common benefit fees").

Conlan sought to take advantage of Beasley Allen's opposition to J&J's preferred resolution through bankruptcy. On January 30, 2023, the Third Circuit ordered that LTL's bankruptcy petition be dismissed. *In re LTL Mgmt., LLC*, 58 F.4th 738 (3d Cir. 2023), *amended and superseded by* 64 F.4th 84 (3d Cir.

[3] Under MDL Case Management Order 7(A) ("CMO 7(A)"), 8-12% of gross talc settlement amounts for clients of participating counsel must be deposited in the common benefit fund. *See* CMO 7(A), MDL, Dkt. 14741 (D.N.J. Sept. 17, 2020). That money is then to be allocated to the firms that performed common benefit work. *See id.*

2023). Just three days later, even before the mandate had issued, Conlan again reached out to J&J in an effort to acquire its talc liabilities. T5, 101:24-102:1; *In re LTL Mgmt., LLC*, No. 22-2003, ECF No. 181 (3d Cir. Mar. 31, 2023). Unsurprisingly given the fallout from the dismissal, J&J did not respond to Conlan's letter.[4] T5, 108:20-25. Preferring to resolve its liabilities through bankruptcy, LTL filed a second bankruptcy petition ("LTL-2") in April 2023. *See In re: LTL Mgmt., LLC*, No. 23-12825-MBK, ECF No. 1 (Bankr. D.N.J. Apr. 4, 2023). This time, J&J filed the petition with the support of more than 60,000 claimants.[5] J&J and other parties to the LTL-2 bankruptcy were referred to mediation the following month. *See In re LTL Mgmt., LLC*, No. 23-1285-MBK, ECF No. 481 (Bankr. D.N.J. May 10, 2023).

Having been rebuffed by J&J, Conlan turned to Beasley Allen. At this point, Conlan's interest in a resolution outside bankruptcy was aligned with Beasley Allen's. If Beasley Allen negotiated a settlement that used Conlan's

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[4] The trial court interpreted this letter as Conlan having "informed Haas and J&J that it reserved the right, in its discretion," to negotiate settlements with interested plaintiffs, and concluded it was thus "critical to the disposition" of J&J's disqualification motion. Da 012. But as Conlan himself acknowledged, a party's silence in response to a proposal does not indicate that party's assent. *See* T5, 109:3-7. To conclude that this letter put J&J on notice that Conlan would approach Beasley Allen on its behalf—let alone that it demonstrates J&J's consent to Conlan's disclosure of its confidences—belies common sense.

[5] Debtor's Statement Regarding Refiling of Chapter 11 Case at 2, *In re LTL Mgmt., LLC*, No. 23-12825-MBK, ECF No. 3 (Bankr. D.N.J. Apr. 4, 2023); T4, 86:15-19, 119:11-16.

company to resolve the talc claims, Conlan would make massive sums. *See* T5, 122:24-124:2. In fact, the only way Conlan would make any money is if J&J accepted Beasley Allen's proposal to settle the talc litigation through Legacy. As the trial court recognized, "[f]rom a business and litigation perspective … Conlan wanted a settlement as did" Beasley Allen. Da 031-Da 032. Conlan thus had both an opportunity and motive to share J&J's confidential information—Conlan needed to ensure that any settlement proposal Beasley Allen offered was within range for J&J, and that entailed disclosing J&J's settlement tolerance and how J&J valued talc claims. Partnering with Beasley Allen let him do just that.

Conlan and Beasley Allen made "first contact" on April 27, 2023, through a call "facilitated" by counsel for the tort claimants' committee. Da 063, ¶ 17. Around that time, Legacy approached Beasley Allen with a proposal. T6, 102:23-103:1, 106:23. Of course, "Legacy is not the only company that acquires and manages mass tort liabilities." *Id*. at 104:19-21. But Beasley Allen did not reach out to any of those companies after Conlan's approach. *Id*. at 104:22-106:17. Instead, as he "explored" teaming with Conlan "on behalf of the Plaintiff Leadership," Birchfield admitted that he saw "an opportunity" and "took advantage." *Id*. at 107:12-108:6.

Their interests aligned, Beasley Allen secretly brought Conlan aboard

plaintiffs' mediation team during the bankruptcy, inviting Conlan to work on the opposite side of the litigation from his former client. *Id.* at 111:13-23, 113:20-25. As Andy Birchfield, the head of Beasley Allen's mass torts group, admitted, he "felt that Mr. Conlan and Legacy had a role to play in the mediation," *id.* at 111:14-18—and authorized them to play it. *Id.* at 110:6-113:25. Soon, Conlan and Birchfield "were working together." T3, 76:3.

3. Conlan collaborates with Beasley Allen on a settlement proposal. Conlan and Birchfield engaged in "[c]lose collaboration and strategy communications regarding how to consider, conduct, participate in, initiate and/or continue to mediate with J&J regarding plaintiffs' proposal." Da 082. That work included "collaborat[ion] on a settlement proposal to J&J," Da 077 n.2, which federal MDL Special Master Schneider, after reviewing plaintiffs' privileged documents, described as "the Legacy/Birchfield proposal," Da 080; *see also* Da 031 (accepting the finding that "Conlan and Birchfield 'collaborated' on a settlement proposal").

To facilitate that proposal, Beasley Allen shared its own privileged and confidential work product with Legacy. Da 081, Da 085 (Special Master Order 21); T6, 93:19-22, 105:17-19, 123:7-13; *see also* Da 068-Da 069, Da 071-Da 076 (Priv. Log Docs. 55, 109, 119, 165, 166, 191, 213, 234, 258, 315, 321, 355, 377, 410). According to the privilege log, Beasley Allen shared:

- An "ovarian cancer claim estimation report methodology presentation; marked 'confidential, no further distribution without consent of TCC,'" authored by Birchfield, Da 069, Da 076 (Priv. Log Doc. Nos. 109, 410);
- An "ovarian cancer leadership memo to Legacy discussing ovarian cancer case values, injuries, and damages analysis," authored by O'Dell, Da 071, Da 074 (Priv. Log Doc. Nos. 165, 166, 191, 321);
- "[D]raft [qualified settlement fund] qualifications for Legacy ovarian cancer proposal," authored by Niall Davies, a Beasley Allen project manager, Da 069, Da 071, Da 074-Da 075 (Priv. Log Doc. Nos. 119, 213, 315, 355);
- A draft document "regarding ovarian cancer claim values," authored by Birchfield, Da 072-Da 073, Da 075 (Priv. Log Doc. Nos. 234, 258, 377); and
- A "document prepared as part of Legacy proposal for ovarian cancer claim resolution," authored by Birchfield, Da 068 (Priv. Log Doc. No. 55).

Beasley Allen's and Conlan's collaboration was not a one-way street. Conlan and Beasley Allen went back and forth for 22 days, from May 16 through June 7, 2023, over edits to a draft term sheet for a settlement with the ovarian cancer claimants.[6] The privilege log entries for these emails include:

- "draft term sheet for Legacy ovarian cancer claim proposal; marked FRE 408 and mediation privilege," Da 067, Da 070-Da 071 (Priv. Log Doc. Nos. 20, 35, 42, 131, 135, 174, 206);
- "email from ovarian cancer counsel forwarding draft ovarian cancer term sheet and protocol for claims handling," Da 069, (Priv. Log Doc. No. 111); *see also id.* (Priv. Log Doc. No. 103 (similar));
- "email from ovarian cancer counsel to Legacy regarding confidential ovarian cancer materials, edits to ovarian cancer proposal draft term

[6] Da 067, Da 069-Da 076 (Priv. Log Doc. Nos. 11, 20, 96, 103, 111, 155, 163, 179, 188, 195, 229, 242, 243, 244, 253, 256, 281, 284, 291, 294, 311, 330, 332, 348, 417).

sheet," Da 071 (Priv. Log Doc. Nos. 188); *see also* Da 072, Da 074 (Priv. Log Doc. Nos. 229, 243, 311 (similar));

- "draft Legacy proposal ovarian cancer term sheet issues, ovarian cancer claims matrix," Da 072 (Priv. Log Doc. No. 231);
- email "referencing discussion with ovarian cancer counsel regarding ovarian cancer claim values, matrix," Da 072 (Priv. Log Doc. No. 244);
- email "discussing ovarian cancer counsel interest in discussing Legacy proposal," Da 074 (Priv. Log Doc. No. 294);
- "discussion of ovarian cancer proposal draft term sheet issues, Legacy concept regarding ovarian cancer claims matrix," Da 075 (Priv. Log Doc. No. 365); and
- "KCIC and Legacy discussion of conversation with ovarian cancer counsel regarding comments on draft ovarian cancer term sheet; discussing additional ovarian cancer resolution proposal details," Da 069 (Priv. Log Doc. No. 118).[7]

The term sheet grew longer as edits came in: on May 12, it was seven pages long; on May 24, eight pages; and on June 7, ten pages. *Compare* Da 075 (Priv. Log Doc. No. 381 (May 12, 2023)), *with* Da 070 (Doc. No. 135 (May 24, 2023)), *and* Da 068 (Doc. No. 45 (June 7, 2023)).[8]

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[7] KCIC is a provider of "logistics, claims and litigation management services" that Conlan described as the "Strategic Logistics Partner" for the Conlan-Beasley Allen plan. Da 047.

[8] Birchfield's attempt to explain away these revisions was thoroughly unconvincing. According to Birchfield, Legacy provided only "grammatical" edits. T6, 118:22-25, 121:8-15. But it does not take more than three weeks and multiple turns to provide grammatical edits. And the document swelled in length, refuting the notion that the edits were only grammatical—just a semi-colon here, a fixed typo there. Clearly, the edits were something more. Further, it is implausible that senior officers at Legacy and Birchfield would review and convene discussions of a term sheet for grammar and punctuation, when that work could have been performed by a first year associate at Beasley Allen and without requiring meetings. Tellingly, Birchfield's "grammar only" excuse was

Although the substance of Conlan's communications with Beasley Allen is cloaked in secrecy because Beasley Allen invoked the mediation privilege, *see* Da 077, the only reasonable inference is that Conlan and Legacy provided substantive feedback on "the Legacy/Birchfield proposal." Da 080. This feedback necessarily would have used and revealed J&J's most important confidences. Any express or implied statement that the joint proposal would be acceptable to or was within range for J&J, for example, would have revealed Conlan's knowledge of the types of offers J&J would be willing to accept. Indeed, it would not have been possible for Conlan to "collaborate" on a settlement proposal with Beasley Allen without revealing, either intentionally or inadvertently, J&J's confidential information, *see* T3, 98:23-99:3, 131:12-19; T4, 81:8-13, especially given his massive financial incentive to ensure the settlement would be acceptable to J&J.

Through all of this, Beasley Allen knew that working with Conlan was improper. As the firm and Conlan both acknowledged, "ethical rules would have prohibited [Conlan] from taking a job with Beasley Allen … to work on the [t]alc [l]itigation," from being "retained by Beasley Allen as an expert witness or as a consultant on the [t]alc [l]itigation," or from joining Beasley Allen "as an attorney or in any other role." T5, 100:19-101:5; *see* T7, 64:1-18. But it

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not corroborated by Conlan.

worked with him anyway. And it did so in secret. *See* Da 014 n.8. Neither Beasley Allen nor Conlan informed J&J during the LTL-2 mediation that they were jointly collaborating on a settlement proposal. Nor did they tell the mediators. All three mediators affirmed under oath that they were never informed that Conlan had previously represented J&J in the same matters. Da 142 4:20-21; Da 122 5:3; Da 111 5:7.

C. The Trial Court Denies J&J's Motion To Disqualify

1. J&J only learned of Beasley Allen's partnership with Conlan when Conlan eventually revealed, nearly six months into the "collaboration," that he was "prepared to meet" J&J alongside Beasley Allen to discuss yet another proposal by Legacy to acquire the talc claims—this time attaching a $19 billion price tag.[9] Da 039; Da 044. By this time, Beasley Allen's opposition had led to the dismissal of LTL-2 bankruptcy, denying recovery to more than 60,000 claimants whose counsel supported the plan.

Even so, not much about the talc litigation had changed. This matter has seen different stages, but they all share a common thread: all have been efforts

[9] Whether J&J's confidences informed Conlan's development of this $19 billion price tag—a figure he conceded needed to be consistent with and account for confidential information like J&J's estimates of current and future claim values, *see* T5, 49:15-50:4—is irrelevant. As explained *infra* at 41 n.17, New Jersey's Rules of Professional Conduct do not require J&J to identify specific confidences that it believes were disclosed.

to resolve the same claims in the MDL and MCL. Conlan himself recognized that bankruptcy proceedings "were efforts to resolve the [t]alc litigation," including "all of the pending claims [in the MCL] here in Atlantic City and all of the pending claims in the MDL in Trenton." T5, 135:9-24. Those bankruptcies simply operated as a "sub-component part" of J&J's greater talc litigation and resolution efforts. *Id.* at 135:13-17. The privileged and confidential information that Conlan learned while representing J&J thus remains "highly pertinent" to J&J's strategy for resolving the talc claims. T3, 81:18-21.

As Haas agreed, "whether it be talking about potential resolution [through] the tort system, resolution through the [Imerys] bankruptcy, [or] resolution through MDL, … those confidential and privileged discussions that [Conlan] was involved in [are] relevant to" the LTL 2 mediation and J&J's continued efforts to achieve a global resolution. *Id.* at 78:7-14, 81:1-9. Every claim value discussion, settlement matrix, future claims assessment, negotiation strategy, and case analysis that Conlan was exposed to "remain[s] relevant," and "all of the insight that [Murdica and Conlan] had back then is as important now as it was then." T4, 58:23-59:4.

2. J&J promptly sought judicial recourse after learning that Beasley Allen, its litigation adversary, had been working with its former lawyer on the

same matter. On December 8, 2023, J&J filed an Order to Show Cause seeking to disqualify Beasley Allen from this litigation. On January 17, 2024, the MCL Court heard oral argument. On January 23, 2024, the court requested supplemental information from both parties, who along with Conlan submitted additional certifications. The court found there were still "significant factual disputes" and ordered a plenary hearing. Da 005. On March 25, April 10, and May 3, 2024, the court conducted a joint hearing with the federal MDL Court.

During the course of these proceedings, discovery revealed the true nature and extent of the collaboration between Beasley Allen and Conlan. In fact, J&J did not know that Beasley Allen had "collaborated" on a settlement proposal in the bankruptcy mediation until the firm invoked the mediation privilege to shield its conversations with Conlan. T3, 53:17-55:11; *see* Da 077 n.2. This revelation stood in stark contrast to Birchfield's sworn certifications—filed before the MCL court ordered a plenary hearing—in which he insisted only that Conlan was never "a member, partner, employee, or counsel at Beasley Allen," Da 052, ¶ 7; that Birchfield's "first contact with anyone at Legacy was on April 27, 2023," Da 063, ¶ 17; and that "[t]he first meeting with Legacy personnel was on May 2, 2023," *id.* ¶ 18. Indeed, Birchfield would later admit "there were a lot of things that [the certification] did not mention." T6, 102:21-22.

3. Despite this record—one in which Beasley Allen collaborated in secret

with J&J's former lawyer on a mediation adverse to J&J and then downplayed that collaboration in sworn certifications—the trial court denied J&J's motion to disqualify Beasley Allen. On September 19, 2024, this Court granted J&J's motion for leave to appeal. As of today, the federal MDL court has not yet ruled.

ARGUMENT

The Rules of Professional Conduct impose "strict[]" requirements on the practice of law in this State. *Dental Health Assocs. S. Jersey P.A. v. RRI Gibbsboro, LLC*, 471 N.J. Super. 184, 193 (2022). Rigorous enforcement of these rules "serves not only a client's interests but also the broader societal interest in the integrity of the trial process itself." *State v. Davis*, 366 N.J. Super. 30, 38 (2004) (quotations and brackets omitted). When considering a motion to disqualify, trial courts must consider not only a client's interest in being represented by chosen counsel, but also "the need to maintain the highest standards of the legal profession." *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 205 (1988) (brackets omitted). It is thus incumbent on trial courts to consider the parties' arguments and engage in a "painstaking analysis of the facts." *Id.*; *cf. Matter of Greenberg*, 155 N.J. 138, 151 (1998) (reaching legal conclusion only after "a careful examination" of argument advanced by the New Jersey State Bar Association). A client's choice of counsel will outweigh the ethical standards of the legal profession "only in extraordinary cases." *Dewey*,

109 N.J. at 220. Ultimately, all doubts "must be resolved in favor of disqualification." *Estate of Kennedy v. Rosenblatt*, 447 N.J. Super. 444, 451 (2016) (quotations omitted).

This Court reviews "de novo" a trial court's decision on a motion for disqualification. *City of Atlantic City v. Trupos*, 201 N.J. 447, 463 (2010). Although findings of fact are afforded deference "to the extent they find support within the record," *Lobiondo v. O'Callaghan*, 357 N.J. Super. 488, 495 (App. Div. 2003), no deference is warranted where the trial court does "not conduct the fact-sensitive analysis required by *Trupos*" or "address" critical facts, *Dental Health Assocs.*, 471 N.J. Super. at 194-95.

Here, Beasley Allen is disqualified under multiple ethical rules. There is no conceivable situation where a "side-switching attorney" like Conlan "or his new firm"—Beasley Allen by association—"would be permitted to continue representation if … the attorney had in fact *actually* represented the former client." *Dewey*, 109 N.J. at 220. The trial court's opinion erred on the law, ignored salient facts, and failed to consider multiple grounds for disqualification. It should be reversed.

I. BEASLEY ALLEN VIOLATED RULE 5.3(c) (DA 032)

Rule 5.3 reflects the common-sense principle that an attorney may not do through a non-lawyer what he could not do through a lawyer. Disqualification

is required under this Rule when three elements are present: (1) the lawyer "associated with" a non-lawyer; (2) the non-lawyer's conduct "would be a violation of the Rules of Professional Conduct if engaged in by a lawyer"; and (3) the lawyer "orders or ratifies" that conduct. RPC 5.3(c)(1). Beasley Allen's collaboration with Conlan on a mediation adverse to J&J easily requires disqualification here.

A. Beasley Allen "Associated With" Conlan

Rule 5.3 applies to non-lawyers "employed," "retained," "or associated with a lawyer." As this text makes clear, the Rule applies to "nonlawyers in the firm and nonlawyers outside the firm who work on firm matters." RPC 5.3, official cmt. (Aug. 1, 2016). Here, Beasley Allen "associated" itself with Conlan to advance their shared goal of a negotiated resolution to the talc cases through Conlan's company.

1. To "associate" means "[t]o join or unite" in "common purpose [or] action." Black's Law Dictionary, *Associate* (12th ed. 2024).[10] The Restatement of the Law Governing Lawyers, to which New Jersey courts frequently look for guidance, is illustrative. *See, e.g.*, *LoBiondo v. Schwartz*, 199 N.J. 62, 110-11

[10] Associate, Oxford English Dictionary, https://www.oed.com/dictionary/associate_adj (last visited October 23, 2024); *see also* Associate, Miriam Webster, https://www.merriam-webster.com/dictionary/associate (last visited October 23, 2024) ("to join or connect together").

(2009) (collecting cases); *Haggerty v. Red Bank Borough Zoning Bd. Of Adjustment*, 385 N.J. Super. 501, 516 (App. Div. 2006) (consulting comment c to Section 123). It explains that lawyers and law firms can "associate" with one another absent a formal employment or principal-agent relationship. For example, lawyers "associate" with one another when they act as co-counsel on the same case. Restatement (Third) of the Law Governing Lawyers § 123, cmt. c(iii). Similarly, "when a lawyer consults with other lawyers in specialized areas of the law," the lawyers have formed "an association for purposes of the matter in question." *Id.*

This principle applies fully to Rule 5.3. The Rule's Framers left no doubt that the Rule sweeps more broadly than the types of paid agency relationships that would satisfy the definition of "employed" or "retained." When a non-lawyer and lawyer join together in common purpose or action, they have "associated" themselves within the meaning of Rule 5.3, and the lawyer can be held responsible for the non-lawyer's conduct provided the other elements of the Rule are satisfied.

There can be no dispute that Beasley Allen "associated" itself with Conlan "for purposes of the matter in question," i.e., the talc litigation. Restatement (Third) of the Law Governing Lawyers § 123, cmt. c(iii). Conlan was an integral part of Beasley Allen's mediation team—so integral, in fact, that the firm

claimed the mediation privilege over its communications with him, *supra* at 18, 21, and sent him "protected work-product," Da 085. *See* Da 153 (*Grant Heilman Photography, Inc. v. McGraw Hill Glob. Educ. Holdings, LLC*, 2018 WL 2065060, at *8 (E.D. Pa. May 2, 2018) (application of Rule 5.3 was "made even clearer by the fact that Plaintiff asserted 'work product protection'" over the lawyer's interactions with the non-lawyer)). And "Conl[a]n and Birchfield collaborated on a settlement proposal to J&J" as part of the plaintiffs' mediation efforts. Da 077 n.2. None of this is disputed. Everyone agrees that Conlan and Birchfield "did work together to come up with a strategy to try and resolve" the talc litigation. T1, 46:5-7; *see also* T6, 105:17-19 (they "worked through … [the] mediation process together").

The collaboration was extensive. "Legacy/Conl[a]n … worked to provide plaintiffs with the information plaintiffs requested and needed for the J&J mediation," Da 084, and engaged in "[c]lose collaboration and strategy communications," Da 082. Although there are numerous companies that offer the same services as Legacy, T6, 104:14-105:7, Beasley Allen did not approach them, *id.* at 105:8-106:17. Instead, Beasley Allen took "advantage of what [Birchfield] saw as an opportunity." *Id.* at 108:4-6.

Beasley Allen and Conlan allied themselves because they shared a common purpose. Beasley Allen wanted to resolve the talc cases in litigation as

opposed to bankruptcy. And Conlan wanted a settlement through his business. Both had a financial motive to collaborate. Beasley Allen would obtain common benefit fees that were not available through J&J's bankruptcy plan if J&J accepted the Birchfield/Legacy proposal. *See* T7, 53:10-55:8. And Conlan would not make anything unless Legacy could close a deal with J&J. T5, 123:21-124:2. Thus, to accomplish their shared goal of orchestrating a settlement through Legacy, Beasley Allen and Conlan collaborated extensively. That is the definition of association—working together towards a common purpose. It is no different than if Beasley Allen had hired Conlan as an expert or consultant, or if Conlan had been Beasley Allen's co-counsel or a non-retained consultant. Beasley Allen "associated with" Conlan for purposes of resolving the talc cases.

2. The trial court's contrary conclusion is wrong. In one part of its opinion, the court appeared to hold that Conlan was not "associated" with Beasley Allen because he "was never employed either as a lawyer or as a non-lawyer by that law firm." Da 028. To the extent the trial court believed an employment relationship was required to trigger Rule 5.3, it was mistaken. By its terms, Rule 5.3 is broader. It applies to a nonlawyer who is "employed or retained by *or associated with* a lawyer." RPC 5.3 (emphasis added). If employment (or retention) was required, the words "associated with" would be

superfluous and Rule 5.3 would contain a gaping loophole. The Court need only apply the Rule as written to reject that result.

The trial court's opinion contains no other analysis of Rule 5.3's text. Rather, the court apparently believed that Conlan and Beasley Allen did not satisfy the plain meaning of "associate"—i.e., joining together in common purpose or action. *See* Da 031-Da 032.[11] But the undisputed evidence the trial court cited compels the exact opposite conclusion. As the trial court recognized, Birchfield and Conlan had a common purpose: they both "wanted a settlement." Da 032. And, as the trial court also recognized, they joined together in common action to achieve that purpose: they "collaborated on a settlement proposal." *Id.* at 30 (quotations omitted); *cf.* Da 014 (acknowledging Birchfield's description of his relationship with Conlan as an "engagement"). That is association under a straightforward application of the term.

The trial court's conclusion that the Conlan/Beasley Allen collaboration was not an "association," by contrast, would render the provision meaningless. Clearly, the Rule's drafters meant for it to apply in cases where the non-lawyer was not "employed" or "retained by" a lawyer. But it is impossible to

[11] The trial court stated that the "most important[]" fact was that "J&J did not accept the Legacy proposal and the litigation continues." Da 032. But it never explained why that mattered. Plainly, it doesn't. Whether or not J&J accepted their joint proposal is irrelevant to the question whether Beasley Allen "associated with" Conlan.

understand how the word "associated" in Rule 5.3 would have any meaning if it does not apply in the circumstances here—where the lawyer and non-lawyer joined forces to collaborate on an aspect of the litigation. If the trial court's decision were correct, lawyers would be able to circumvent Rule 5.3 in every case involving a mutually-beneficial partnership that stops short of formal employment of retention. The framer's use of the broad word "associate" forecloses that result. As does the foundational principle that an attorney cannot "do indirectly that which is prohibited directly." N.J. Ethics Op. 680, 139 N.J.L.J. 202, 1995 WL 33971, at *3 (N.J. Adv. Comm. Prof. Eth. 1995).

Ultimately, the trial court's concern seemed to be that collaborating on a mutually beneficial settlement proposal with a non-lawyer cannot "in and of itself" be "a reason to disqualify a law firm." Da 031. The trial court's concern was misplaced; that would not be the consequence of applying Rule 5.3 as written here. All of the other required elements of Rule 5.3 also have to be satisfied for disqualification to be warranted. Thus, if Beasley Allen had simply partnered with *any of the other companies* that provide structural optimization services, there would have been no problem because the non-lawyer's conduct would not have been a violation of the ethical rules if engaged in by a lawyer. RPC 5.3(c). Or if the firm had collaborated with Conlan on a different, unrelated matter, the same would be true. It is the fact that Beasley Allen knowingly (*see*

Da 010) chose to work with J&J's former lawyer on the same matter that makes the collaboration impermissible, not collaboration "in and of itself."

B. Conlan's Participation In A Mediation Adverse To His Former Client "Would Be A Violation Of The Rules of Professional Conduct If Engaged In By A Lawyer"

The next question is whether Conlan's collaboration on a settlement proposal in a mediation adverse to his former client would have been "a violation of the Rules of Professional Conduct if engaged in by a lawyer." RPC 5.3(c). The answer is clearly yes.

If Conlan had been a practicing lawyer, it would have been a flagrant violation of Rule 1.9(a) for him to collaborate on a mediation against his former client. Conlan represented J&J "in the same … matter"—i.e., the talc litigation. RPC 1.9(a); *see Twenty-First Century Rail Corp. v. N.J. Transit Corp.*, 210 N.J. 264, 278 (2012) (where matters are the same, the lawyer's former client need not identify "any particular confidence having been revealed" to the lawyer); Da 029 (recognizing that this is the "same litigation").[12] And J&J's interests in

[12] Further illustrating the confusion running through its opinion, the trial court elsewhere cited (Da 026) the burden-shifting framework for "substantially related" matters set out in *Trupos*, 201 N.J. 447. That framework has no application, because the matters are the same. Moreover, even *Trupos*'s substantial-relation test is easily satisfied here. The question under that test is whether Conlan received confidential information from J&J. *Trupos*, 201 N.J. at 467. He did: "it is undisputed that Conlan possessed and still possesses J&J's privileged and confidential information regarding the talc litigation." Da 028.

the mediation were "materially adverse" to Conlan's. That would be true regardless of whether Conlan represented talc plaintiffs' interests, Legacy's interests, or both: J&J wanted to resolve the litigation for the lowest possible amount whereas the talc plaintiffs and Legacy wanted to resolve the litigation for the highest possible amount. If Conlan had been acting as a lawyer, his conduct would have fallen within the heartland of Rule 1.9(a).

None of this is disputed. In fact, Beasley Allen and Conlan recognized that Conlan's conduct would have violated Rule 1.9 had Conlan been a lawyer. Beasley Allen's counsel, for example, admitted that Rule 1.9 would have prohibited the firm from hiring Conlan "as an attorney to work on Talc cases" absent a waiver. T1, 47:14-22. Likewise, Conlan admitted "that ethical rules would have prohibited [him] from taking a job with Beasley Allen [during the mediation] to work on the Talc Litigation," whether "as an attorney or in *any other role*." T5, 100:19-101:1 (emphasis added). And Birchfield similarly recognized that "no matter what [Conlan's] role was," he could not have "hire[d] him as a lawyer at Beasley Allen to work on the Talc Litigation." T7, 64:1-6.

The trial court nevertheless held that Rule 5.3 was inapplicable because Conlan was "a non-practicing lawyer" at the time of the mediation, calling that a "fatal" defect. Da 031. Because Conlan was not a lawyer and "did not represent any client(s)," the trial reasoned, he could not have violated Rule

1.9(a), and thus Beasley Allen could not have been held responsible for his conduct under Rule 5.3(c). *Id.* Simply put, the trial court held that Rule 5.3(c) is applicable only when the non-lawyers conduct actually violates an RPC.

That is obviously incorrect. The point of Rule 5.3(c) is that it *assumes* that the non-lawyer was acting as a lawyer. The Rule applies where the non-lawyer's conduct "*would be* a violation of the Rules of Professional Conduct *if* engaged in by a lawyer." RPC 5.3(c) (emphasis added). Thus, it does not matter whether Conlan was actually a lawyer formally representing talc plaintiffs (or Legacy) while a member of their mediation team. What matters is whether Conlan would have violated Rule 1.9(a) if he had been a lawyer. Contrary to Beasley Allen's argument below, this does not "conflate RPC 1.9 with RPC 5.3." Beasley Allen Post-Plenary Hearing Reply Br., MCL, Trans. ID LCV20241328653 at 6 n.2 (N.J. Super. Ct. Law Div. May 24, 2024). It merely reflects Rule 5.3's text (and plain purpose), which instructs the court to ask: If the non-lawyer had been acting as a lawyer, would his conduct have violated an ethical rule? The answer here is yes.

J&J is not aware of any case adopting the trial court's self-defeating interpretation of Rule 5.3(c). That should come as no surprise. If the law were as the trial court imagined it, Rule 5.3(c) would almost never apply.

Case law from New Jersey and other jurisdictions (with similarly worded

rules) is in accord. Consider *In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d 519 (D.N.J. 2002). There, the District of New Jersey held that a lawyer was responsible for a non-lawyer's conduct in contravention of Rule 4.2, even though that Rule—like Rule 1.9 and virtually every other RPC—applies to "a lawyer" who is "representing a client." RPC 4.2; *see also, e.g.*, Da 153-Da 154 (*Grant Heilman Photography*, 2018 2065060, at *9 (finding Rule 5.3(c) violation based on non-lawyer's conduct that would have violated Rule 1.9(a) if engaged in by a lawyer)); *Daines v. Alcatel, S.A.*, 194 F.R.D. 678, 681-82 (E.D. Wash. 2000) (rejecting argument that Rule 1.10 could not be basis for Rule 5.3(c) violation because "RPC 1.10, read in isolation, refers only to 'lawyers'"). So too here. The fact that Conlan was not a practicing lawyer who represented clients when he collaborated with J&J's litigation adversary against his former client does not take his conduct outside Rule 5.3(c).

C. Beasley Allen "Ratified" Conlan's Participation In Mediation Adverse To His Former Client

The final question under Rule 5.3(c)(1) is whether Beasley Allen "ratifie[d] the conduct involved." Here, the conduct involved—i.e., the conduct that would have violated an RPC if Conlan had been a lawyer—is Conlan's collaboration with Beasley Allen on a settlement proposal in a mediation adverse to J&J. Beasley Allen ratified that conduct.

Beasley Allen admitted below that its lawyers "sought to include Legacy

in the mediation process." Beasley Allen Reply Br., MCL, Trans. ID LCV20241328653 at 9 (N.J. Super. Ct. Law Div. May 24, 2024). As Birchfield explained, "[w]e did want Legacy to be part of [the] mediation," T6, 109:21-110:5, and "felt that Mr. Conlan and Legacy had a role to play," *id.* at 111:4-18; *see id.* at 112:2-113:4 (trial court observing Birchfield "said they [i.e., Legacy] did what [Birchfield] wanted them to do"); *see also* Da 081. And Beasley Allen's "collaborat[ion] on a settlement proposal" with Conlan, Da 077 n.2, unquestionably constitutes ratification of Conlan's participation in mediation. If Beasley Allen did not approve of Conlan's participation, it would not have collaborated with him (including sending him Beasley Allen's work product and exchanging draft settlement documents). Conlan was not a stranger to plaintiffs' mediation team; he was an invited guest. Thus, not even the trial court disputed that Beasley Allen ratified the relevant conduct here.

II. BEASLEY ALLEN SHOULD BE DISQUALIFIED FOR CONLAN'S VIOLATION OF RULE 1.6 (DA 030-DA 031)

The trial court made two critical errors in finding no violation of Rule 1.6. It held, without reasoned analysis, that New Jersey's longstanding presumption of shared confidences was abrogated in 2004. And it essentially required direct proof of shared confidences despite an abundance of circumstantial evidence, sufficient under New Jersey law to show a violation of Rule 1.6.

A. The Presumption Of Shared Confidences Applies

There is no dispute that Conlan entered into a relationship with Beasley Allen, where Beasley Allen contends they exchanged privileged and confidential communications, during the LTL-2 mediation. *See* Da 085. In these circumstances, the law "presum[es] that confidential information has been shared." 2 Legal Malpractice § 18:53 (2024 ed.); *see Greig v. Macy's Ne., Inc.*, 1 F. Supp. 2d 397, 402-03 (D.N.J. 1998); *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 583-84 (D.N.J. 1994); *see also Maldonado v. N.J. ex rel. Admin. Off. of the Cts.-Probation*, 225 F.R.D. 120, 137 (D.N.J. 2004). In *Cordy*, for instance, the court applied the presumption to disqualify opposing counsel where an expert switched sides. 156 F.R.D. at 583-84. And in *Greig*, the court applied the presumption where the same firm represented a client's former lawyer in a malpractice action and his adversary in the underlying case. 1 F. Supp. 2d at 402-03.

Yet the trial court held that the presumption of shared confidences no longer exists as a matter of New Jersey law. Da 027-Da 028. In its view, the presumption was eliminated when New Jersey abrogated the "appearance of impropriety" standard formerly codified in Rule 1.7(c). Da 027-Da 028; *see In re Sup. Ct. Advisory Comm. on Prof'l Ethics Op. No. 697*, 188 N.J. 549, 562-63 (2006) (rejecting the appearance of impropriety standard as unduly vague and

ambiguous). To J&J's knowledge, the trial court is the first New Jersey court ever to reach that conclusion. In doing so, the trial court cited no authority, New Jersey or otherwise, and engaged in no analysis to support its conclusion.

Contrary to the trial court's unsupported conclusion, the presumption of shared confidences exists independent of the appearance of impropriety. Presumptions are a standard tool in the law that "require[] the fact-finder, once it finds the existence of one fact, to presume the existence of another." *Ahn v. Kim*, 145 N.J. 423, 438-39 (1996). They often exist for a "combination of reasons"—for example, because of "difficulties inherent in proving that the more probable event in fact occurred" or because experience has shown "that proof of fact B renders the inference of the existence of fact A … probable." 2 McCormick on Evidence § 343 (8th ed. 2022). The presumption of shared confidences rests on these pillars, not the "appearance of impropriety" standard.

First, experience shows it is "probable" that parties in a privileged and confidential relationship share privileged and confidential information. That is common sense, and presumptions across the RPCs reflect this. Rule 1.9's prohibition on side-switching, for example, is based on the presumption that "confidential information has passed between attorney and former client[,]" *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 473 (1980),[13] as is Rule 1.10's

[13] The trial court found that "Conlan is not a so-called side-switching attorney,"

presumption that, absent screening, confidences "are shared among all firm lawyers." Restatement (Third) of the Law Governing Lawyers § 123, reporter's note to cmt. c; *see*, *e.g.*, Da 161-Da 162 (*Harper v. Everson*, 2016 WL 9149652, at *4 (W.D. Ky. May 5, 2016)); *Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines*, 279 P.3d 166, 170 n.2 (Nev. 2012); *cf. Dewey*, 109 N.J. at 217. The law likewise presumes shared confidences where, as here, a person who possesses client confidences switches sides in the litigation, as Conlan did here. *See Cordy*, 156 F.R.D. at 583-84; *Greig*, 1 F. Supp. 2d at 401-03 & n.4; *see Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 467 (Tex. 1994) ("rebuttable presumption that a nonlawyer who switches sides in ongoing litigation … will share the information with members of the new firm"); *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 593 (1991) (similar); *accord De la Cruz v. Virgin Islands Water & Power Auth.*, 597 F. App'x 83, 89 (3d Cir. 2014); Da 156-Da 157 (*Grant Heilman Photography*, 2018 WL 2065060, at *12 & n.9 (collecting cases)).

Second, recognizing the "inherent difficulty in determining, at some later time, whether" confidences were in fact shared between third parties, the

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Da 011, but the prohibition on side-switching is not limited to attorneys. And Rule 5.3 by its plain text prohibits a nonlawyer's conduct where it "would be a violation of the [RPCs] if engaged in by a lawyer." RPC 5.3(c); *see supra* at 30-33.

presumption of shared confidences places the burden on the adversary collaborating with the attorney who switched sides to rebut the presumption of shared confidences. *Cordy*, 156 F.R.D. at 584; *see also, e.g.*, *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1085 (1994) ("presumption is a rule by necessity because the party seeking disqualification will be at a loss to prove what is known by the adversary's attorneys and legal staff" (quotations omitted)); *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 131-32 (Tex. 1996).

Neither of these justifications for the presumption of shared confidences have anything to do with the appearance of impropriety, and New Jersey's move away from the appearance of impropriety did not abrogate it. Indeed, the New Jersey Supreme Court rejected the appearance of impropriety standard for reasons that are unrelated the presumption of shared confidences: The Court concluded the appearance of impropriety standard was simply "too vague to support discipline." *In re Sup. Ct. Advisory Comm. on Prof'l Ethics Op. No. 697*, 188 N.J. at 562 (quotations omitted). But presumptions, including the presumption of shared confidences, are not vague. The presumption of shared confidences can be and has been administered objectively, both in New Jersey after the appearance of impropriety standard was rejected, *see* Da 176-Da 177, Da 179-Da 180 (*Murphy v. Simmons*, 2008 WL 65174, at *14, 18-19 (D.N.J. Jan. 3, 2008) (applying presumption of shared confidences even though

appearance of impropriety has "been eliminated")), and in other states that do not use an appearance of impropriety standard.[14] The trial court's *ipse dixit* that the two rise and fall together stands alone and finds no support.

Conlan and Beasley Allen both have powerful incentives to deny that confidences were shared, but the law requires more than their self-serving denials. *Cordy*, 156 F.R.D. at 584. This case underscores the importance of the presumption of shared confidences, and the Court should apply it in full force.

B. The Record Makes Plain That Conlan Violated Rule 1.6

1. The trial court's conclusion that J&J did not offer "any credible proof that Conlan shared any confidential and privileged [information] of J&J" with Beasley Allen, and that there were no "reasonable inferences" to support that argument, Da 028, is likewise flawed. In ruling on a disqualification motion, "[c]ourts must engage in a 'painstaking analysis of the facts.'" *Dental Health Assocs.*, 471 N.J. Super. at 192 (quoting *Dewey*, 109 N.J. at 218).[15] But here, the trial court's review of the facts was far from painstaking; the trial court's

[14] *See, e.g.*, *Gnaciski v. United Health Care Ins. Co.*, 623 F. Supp. 3d 959, 967, 971-72 (E.D. Wisc. 2022); Da 161-Da 162, Da 164-Da 165 (*Harper*, 2016 WL 9149652, at *4, *8-9); *State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 559 N.W.2d 496, 501-02 (Neb. 1997).

[15] In *Dental Health Associates*, the Court ordered remand where the record was undeveloped. 471 N.J. at 194. Here, the record is fully developed and the only permissible outcome, once the relevant facts are considered, is disqualification. *See Twenty-First Century*, 210 N.J. at 279.

opinion omits analysis of the salient and dispositive facts requiring disqualification of Birchfield and Beasley Allen.

Among the most significant failings, the trial court did not grapple with Conlan's months-long collaboration with Beasley Allen during the LTL-2 mediation—a relationship that Conlan and Birchfield first tried to obscure from the trial court before Beasley Allen then invoked mediation privilege to prevent J&J from seeing Birchfield's communications with Conlan. The trial court, for example, mentioned the term sheet that Conlan and Birchfield spent three weeks revising only briefly in the factual background, noting it "was prepared" before the filing of the LTL-2 bankruptcy, that Birchfield testified Beasley Allen shared it with Conlan and was prepared to present it to J&J, and that it was shielded by the mediation privilege from discovery in these proceedings. *See* Da 015.

The trial court chose instead to focus on the $19 billion proposal and attached settlement matrix that Conlan sent to J&J *after* mediation failed. *See* Da 029-Da 030. To be sure, the trial court's conclusion that the $19 billion Legacy proposal does not reveal J&J's privileged information fails on its own terms.[16] *See* Drb ISO Motion for Leave 6 n.1. But the court's equally significant

[16] Although Conlan initially testified that the $19 billion figure was based on public information, he later conceded that the proposal needed to be consistent with and account for estimates of current and future claim values—information he learned while working for J&J. *See* T6, 49:15-50:5. Birchfield's testimony provided a corroborating concession—namely, that any successful settlement

error is in failing to grapple with the relevant evidence.[17] *See Dental Health Assocs.*, 471 N.J. Super. at 194-95.

2. The court appeared to believe that J&J was proceeding exclusively on the theory that Conlan impliedly disclosed J&J's confidences. The contention that Conlan's conversations with Beasley Allen were "imbued" with privileged information, the trial court believed, was "synonymous with the now overruled appearance of impropriety standard." Da 029. The was wrong twice over.

First, the most reasonable read of the record—from the term sheet to Conlan's motive and opportunity—is that Conlan expressly shared J&J's confidences, most notably J&J's settlement tolerance on a per-claim and aggregate basis, not to mention strategies for presenting the Beasley Allen/Legacy proposal to J&J based on his knowledge of how J&J viewed the

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matrix would need to be consistent with the overall valuation of current and future claims. If the matrix figures, multiplied by the number of claims, exceed the total amount a settling defendant is willing to pay, the matrix is useless. T7, 41:17-42:13. Together, these admissions make clear that Conlan thought the $19 billion proposal reflected information he learned from J&J and from Beasley Allen.

[17] The trial court's discussion of *O Builders and Associates, Inc. v. Yuna Corporation of NJ*, 206 N.J. 109 (2011), illustrates this flaw. It concluded that *Yuna* was similar to this case because the $19 billion (post-mediation) Legacy proposal was not based on J&J's confidential information. Da 030. Putting aside the lack of merit to that conclusion, *see supra* at 19 n.9, this case and its record is a far cry from *Yuna*, where the party seeking disqualification there "vaguely claimed only that information 'concerning pending litigation and business matters' had been disclosed" to counsel during a consultation. 206 N.J. at 129.

litigation and settlement.

Second, the trial court misunderstood the import of J&J's argument. If Conlan's conversations were in fact imbued with J&J's confidences, then those confidences were *actually* shared, and that is a violation of the rules. Impliedly disclosing client confidences is actual impropriety, not apparent impropriety. And sometimes, there is no way to opine on a subject matter without revealing the client's secrets. The record here establishes that J&J's confidences were shared in this way. As both Haas and Murdica explained, it would not have been reasonably possible for Conlan to have these secret discussions with Beasley Allen without sharing J&J's confidences. T3, 127:25-128:4; T4, 81:8-11, 81:12-13. "To believe" that Conlan did "not remember and ultimately use that information, even 'subliminally,' … defies common sense and human nature." *Cordy*, 156 F.R.D. at 584; MDL, Dkt. 32207 at 35-36 (D.N.J. May 17, 2024).

The trial court suggested that incredible view of Conlan's powers of compartmentalization was justified by his ability to keep J&J's confidential information to himself when he represented J&J, before leaving the Faegre firm. Da 030-Da 031. But negotiating with the other side and secretly collaborating with a former adversary are very different. Attorneys usually have at least some authority to share information when negotiating, *see, e.g.*, RPC 1.6(a) (prohibiting lawyers from revealing client confidences unless, among other

scenarios, they are "impliedly authorized" to do so to "carry out the representation"); Conlan here had none. And the motive to share confidences is distinct. Negotiating attorneys have no incentive to share their client's confidences beyond what has been authorized and what will advance the client's interest in a negotiation. But Conlan had an immense financial motive to share J&J's confidences during his secret collaboration with Birchfield and Beasley Allen. Again, he stood to make millions of dollars if he could steer Beasley Allen toward an acceptable settlement figure for J&J. This risk that side-switching attorneys disclose client confidences, intentionally or not, is why the law never allows side-switching and requires ethical screens. If, as the trial court believed, attorneys could always be trusted to keep their former client's confidences, the screening measures in Rule 1.10 would be pointless.

The trial court also credited Conlan's testimony "that he did not need to use J&J confidential information to have discussions with Birchfield and Beasley Allen" about "structural optimization." Da 031. But the evidence shows they discussed more than structural optimization—they collaborated on a settlement proposal, both during and after the LTL-2 mediation. *Supra* at 11-19. And the question is not whether Conlan "needed" to know J&J's confidence, but whether he disclosed them, either intentionally or inadvertently, when working with Beasley Allen to develop a settlement proposal that would be

substantially more likely to benefit him if it reflected his knowledge of J&J's settlement tolerance.

Likewise for the trial court's decision to credit Birchfield's testimony that "he did not need any J&J information based on Beasley Allen's ten years' experience in litigating the ovarian cancer cases." Da 029-Da 030. That testimony is irrelevant because it does not matter what Birchfield needed; what matters is what Conlan did. If Conlan shared J&J's confidences, either expressly or impliedly, then he violated Rule 1.6, regardless of whether Birchfield "needed" that information. And any suggestion that Birchfield would not have benefitted from Conlan's knowledge is impossible to accept. *Cf. Reardon*, 83 N.J. at 476 ("no amount of discovery would be likely to uncover such useful information as the strengths and weaknesses of this corporate client's decision-makers or their attitude towards settlement"). A litigant would always be better off knowing the other side's confidential information—whether claim valuation, preferred settlement pathway, or settlement negotiation strategy—no matter how long they have been litigating. So even accepting Birchfield's insistence that he did not "need" J&J's confidential information—for example, to prepare a settlement offer—there's no reasonable dispute that he would have wanted information to inform his efforts, which presumably is why he chose to work with J&J's former lawyer without considering any of the many other companies

that he admitted offer similar services.

Especially in cases like this one, where the parties collaborate in secret and then invoke evidentiary privileges to shield their communications from view, the law does not—and could not—require the "smoking gun" the trial court demanded. Its construction and application of Rule 1.6 would permit lawyers to circumvent the central tenet of the RPCs—that a lawyer must protect client confidences—so long as the lawyer hid direct evidence of shared confidences from his former client. Under that rule, clients could never be secure in their belief that the privileged and confidential information they share with outside counsel will in fact remain confidential. That is not the law.[18]

III. BEASLEY ALLEN SHOULD BE DISQUALIFIED FOR ITS INDEPENDENT RULES VIOLATIONS (DA 006, DA 020)

Beasley Allen also committed its own serious rules violations, independent of its relationship with Conlan. It attempted to obstruct the trial

[18] Conlan's violations are attributable to Beasley Allen because the firm "knowingly assist[ed] or induc[ed] another" attorney to violate his or her ethical duties. RPC 8.4(a); *see In re Pajerowski*, 156 N.J. 509, 513 (1998). Indeed, Beasley Allen had not disputed that if Conlan shared J&J's confidences during their secret collaboration, it would be responsible for Conlan's violation of Rule 1.6. *See* MDL, Dkt. 32275 at 2. The trial court nevertheless opined that even if Conlan violated Rules 1.6 or 1.9, the other Rules implicated in J&J's motion—including Rule 8.4(a)—"are not necessarily triggered based on the facts as found on this record." Da 032. But the trial court offered no explanation why the record does not support such a finding, and this Court should not adopt that unreasoned conclusion. Nor does it make much sense—the trial court never explained what it meant that these rules were "not necessarily triggered."

court's truth-seeking function by covering up its engagement with Conlan in violation of Rules 3.3(a)(5) and 8.4(c). And its conduct, including its deceptive half-truths, were been prejudicial to the administration of justice, in violation of Rule 8.4(d). Despite acknowledging that J&J moved under these rules, Da 006, Da 020, the trial court never addressed them. That is a glaring omission.

A. Beasley Allen Engaged In Dishonesty And Deceit In Violation Of Rules 3.3(a)(5) And 8.4(c)

Rule 8.4(c) prohibits attorneys from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." The Rule covers a broad range of conduct, from affirmative misrepresentations to failures to disclose material facts. *See, e.g.*, *In re Kivler*, 193 N.J. 332, 341 (2008) (attorney "affirmatively misrepresented" the nature of his work to his client); *In re Forrest*, 158 N.J. 428, 436-38 (1999) ("concealed a material fact from the court and arbitrator").

Rule 3.3(a)(5) imposes a heightened duty of candor to a tribunal. It prohibits a lawyer from knowingly "fail[ing] to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead." Thus, lawyers may not tell half-truths to a tribunal. *Brundage v. Est. of Carambio*, 195 N.J. 575, 598 (2008) ("Partial disclosures may at times result in misrepresentations due to the nondisclosure of material facts." (quotations and alteration omitted)). This duty applies both to "facts that are at issue in the case and facts relating to the management of the case." *In re Seelig*, 180 N.J. 234,

248 (2004) (quotations and alteration omitted).

New Jersey courts have read RPC 3.3(a)(5) broadly. They have found violations where "the attorneys neither affirmatively misrepresented material information to the tribunal, nor evaded a direct question from the tribunal; rather, the attorneys held back the information in order to advance their clients' interests." *In re Seelig*, 180 N.J. at 252; *see, e.g.*, *In re Forrest*, 158 N.J. at 431-32 (statement to arbitrator that husband was "unavailable" when he was actually dead violated Rules 3.3(a)(5) and 8.4(c)); *Matter of Kernan*, 118 N.J. 361, 364 (1990) (attorney in divorce action engaged in material nondisclosure when he failed to inform the court that he had transferred certain property to his mother).

That is the case here. Birchfield told deceptive half-truths in his certifications to advance his own and Beasley Allen's interest in avoiding disqualification. In his first certification, Birchfield stated only that Conlan was never "a member, partner, employee, or counsel at Beasley Allen," Da 052, ¶ 7, but completely omitted any mention of his extensive relationship with Conlan. And in his supplemental certification, he stated only that his "first contact with anyone at Legacy was on April 27, 2023," and that "[t]he first meeting with Legacy personnel was on May 2, 2023." Da 063, ¶ 17-18. But that was far from the whole truth. In reality, Birchfield and Beasley Allen had an ongoing relationship for months, during which they communicated extensively and

secretly collaborated on a settlement proposal. Birchfield disclosed none of that. Indeed, Birchfield admitted on cross-examination that "there were a lot of things that I did not mention in [my] certification[s]." T6, 102:21-22.

Birchfield's certifications about his "first" conversations with "Legacy personnel" were "nothing less than a concealment of the material fact" that he had an extensive relationship with Conlan. *In re Forrest*, 158 N.J. at 435. The nature and number of his communications with Conlan are clearly material to disqualification. And the omission of that information from Birchfield's certifications was reasonably certain to mislead the trial court (and the federal MDL court) about facts that were "crucial to the fair and proper resolution" of J&J's motion. *Id.* at 438. It appears Birchfield intentionally minimized his contacts with Conlan in an effort to avoid disqualification. And if the court below had not ordered a plenary hearing, those extensive contacts might never have been discovered—he almost succeeded in impairing this Court's truth-seeking function. That is precisely the type of dishonesty that warrants disqualification under Rules 3.3(a)(5) and 8.4(c).

Beasley Allen also withheld material facts from the mediators in the LTL-2 mediation. *See In re Forrest*, 158 N.J. at 435 (holding that 3.3(a) applies to arbitration). Not only did Beasley Allen fail to disclose to J&J during the mediation in LTL-2 that it was collaborating with its former counsel, but the

firm never disclosed that critical information to the mediators. *Supra* at 19. It was incumbent on Beasley Allen to speak up, for Beasley Allen and Conlan were the only ones who knew both that Conlan was participating in the mediation and was J&J's former lawyer in the same matter.

This Court should hold on the undisputed record that Beasley Allen violated these RPCs.

B. Beasley Allen's Conduct Has Been Prejudicial To The Administration Of Justice

The same is true of Rule 8.4(d)—J&J raised the issue but the trial court failed to address it. Rule 8.4(d) prohibits conduct "that is prejudicial to the administration of justice." This reflects the well-settled principle that "an attorney may not do indirectly that which is prohibited directly." *See* N.J. Ethics Op. 680, at *3; *accord Maldonado*, 225 F.R.D. at 138.

Throughout these proceedings, that has been Beasley Allen's defense. It has trotted out highly technical arguments for why its conduct and Conlan's did not run afoul of New Jersey's ethical rules. Its core argument has been that although its conduct may have been unscrupulous and *morally* unethical, the trial court was powerless to order disqualification.

The trial court appeared to agree with that proposition, but the argument is clearly wrong. The plain letter of the rules discussed above account for the circumstances here. But on top of those rules violations, there is no question

that Beasley Allen's conduct has been prejudicial to the administration of justice. It is *actually improper* for a lawyer to collaborate with his adversary's former lawyer in the same case and then attempt to hide that fact from his adversary, mediators, and the courts.

CONCLUSION

Once a court finds ethical misconduct, it must "balance competing interests, weighing the need to maintain the highest standards of the profession against a client's right freely to choose his counsel." *Dewey*, 109 N.J. at 218 (quotations omitted). Of course, a client's right to choose counsel is necessarily "limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement." *Id.* (quotations omitted). As the Supreme Court observed in *Dewey*, there is no conceivable "situation in which the side-switching attorney or his new firm would be permitted to continue representation if … the attorney and in fact *actually* represented the former client." *Id.*

That observation applies with full force here. This Court should reverse the trial court's decision and order Beasley Allen disqualified. *See Twenty-First Century Rail Corp.*, 210 N.J. at 279.

Dated: October 25, 2024

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IN RE TALC-BASED POWDER PRODUCTS LITIGATION	Superior Court of New Jersey, Appellate Division Docket No. AM-000635-23/M-006702-23 Sat Below: The Honorable John C. Porto, P.J. Civ. On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division MCL Case No. 300 / Docket No. ATL-L-2648-15

BRIEF OF RESPONDENT BEASLEY ALLEN

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[1] Pursuant to Rule 2:6-1(a)(2), Respondent Beasley Allen includes an excerpt of J&J's brief because there is an issue as to whether J&J raised various issues and RPCs before the trial court.

PRELIMINARY STATEMENT

This Court should affirm the trial court's order and opinion denying Johnson & Johnson's (J&J's) motion to disqualify Beasley Allen. In its rambling appellate brief, J&J provides no evidence that its former counsel Mr. Conlan disseminated J&J's confidential information to Beasley Allen. Notably on January 17, 2024, J&J admitted before Judge Porto, *see* J&J Dec. 8, 2023 Br. at 15 that there is "no Rule of Professional Conduct [that] explicitly speaks to the precise situation here." Now, in a constant morphing ethics attack, J&J alleges multiple unsupported RPC violations. The Trial Court below was correct; there is no evidence of any such violation.

Motions to disqualify are disfavored because they are often used to gain strategic advantage and remove skilled opposing counsel. After all, the Ethics Committee is where ethics complaints are lodged, not before the Superior Court. Motions to disqualify based upon alleged ethical impropriety are normally decided on the papers because the movant has to articulate a specific palpable ethical lapse. Here, the trial court took the unusual step of holding fact hearings, which hearings were rendered more notable because they were held as a joint Federal District Court and State Court hearing. After extensive hearings before Judges Porto of the Superior Court of New Jersey and Judge Singh of the United States Federal District Court (Trenton), Judge Porto found that there was no evidence of an ethical lapse.

RPCs 1.6 and 1.9 do not apply. J&J has not satisfied its heavy burden to

disqualify Beasley Allen under RPC 1.6 because there is no evidence that Mr. Conlan shared J&J confidential information with Beasley Allen. Mr. Conlan represents no talc claimants, nor has he ever done so. Mr. Conlan is not a "side-switching" lawyer adverse to J&J in any sense under RPCs 1.6 and 1.9.

RPC 5.3 does not apply. First, RPC 5.3(a) is irrelevant because Mr. Conlan was indisputably neither "retained" nor "employed" by Beasley Allen. Mr. Conlan and Beasley Allen were adverse (Conlan represents J&J, Birchfield represents talc claimants. Conlan (CEO of Legacy Liability Solutions) stood in the shoes of J&J and would have been adverse to Birchfield and Beasley Allen in their representation of ovarian cancer talc clients.). Conlon and Birchfield are not "associated" under RPC 5.3. Further, RPC 5.3(c) is inapplicable because Legacy (Mr. Conlan) is not a "non-lawyer employee" of Beasley Allen, and Beasley Allen did not "order" anything Legacy or Conlan did.

Third, Beasley Allen (and Mr. Birchfield) did not "ratify" any of Mr. Conlan's conduct, in any sense, let alone within the meaning of RPC 5.3. Further, the $19 billion figure was a Legacy term that included all talc liabilities for all time, for which current ovarian cancer claims were only a portion. Given that there was no misconduct by Mr. Conlan that was known or apparent to Mr. Birchfield or Beasley Allen, no "ratification" could have occurred under RPC 5.3. None of the RPCs cited by J&J (including RPCs 1.6, 1.9, 1.10, 5.3 or 8) apply here.

Worse still, J&J attacks Beasley Allen's invocation of New Jersey's broad mediation privilege (for engaging in the same court-ordered mediation J&J refused to participate in), while at the same time refusing to produce exculpatory evidence under the guise of "privilege." Special Master Schneider upheld Beasley Allen's mediation privilege claims.

After over eight months of hearings before the trial court and despite multiple opportunities to supplement the record, J&J has no evidence that J&J's former attorney Mr. Conlan shared client confidences with Mr. Andy D. Birchfield, Jr., Esq, - there is no evidence because no privileged information was shared. On that basis alone, this Court should affirm the trial court's order and avoid the "severe remedy of disqualification." (Da11). J&J initially admitted that no RPC applies to this case. *See* J&J Dec. 8, 2023 Br. at 15 (admitting there is "no Rule of Professional Conduct [that] explicitly speaks to the precise situation here."). Now, J&J retreats to its debunked prior arguments and debunked claims—which the trial court's order and opinion methodically reviews and rejects. Defendant J&J doubles down on its new theory that ethics violations are *presumed*. J&J is entitled to its own arguments; it is not entitled to its own facts or law. J&J proffers no credible evidence that disclosure of a confidence occurred, and this Court should affirm the trial court's order denying the motion for disqualification.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND RELEVANT FACTS[1]

A. J&J Moves to Disqualify Beasley Allen in Federal and State Court while Admitting No RPCs Apply.

J&J filed nearly identical applications to disqualify Beasley Allen in the Superior Court of New Jersey Law Division and the District of New Jersey. (Da001) (Da78); When J&J initially filed this Order to Show Cause to disqualify Beasley Allen in December 2023, it conceded that "no Rule of Professional Conduct explicitly speaks to the precise situation here[.]"(Ra597). Over the next eight months, J&J has twisted itself in knots in a vain attempt to find any RPC to latch onto. (Da001-33). After conceding that no RPC applies, J&J now invokes non-New Jersey and stale case law to support its claims, including the case *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575 (D.N.J. 1994). Compare (T1 at 15, 16, 18, 24, 27, 33, 37, 43, 50, and 56), with (J&J Brief at 17-20, 21). In multiple hearings before the trial court, J&J cited to *Cordy* (which relied upon the appearance of impropriety) and other outdated federal cases that predate the Supreme Court of New Jersey's explicit decisions overruling the appearance of impropriety standard for attorney disqualification. (T1 at 24 to 27).

B. Mr. Conlan Leaves Faegre Drinker in March 2022 and Becomes a Non-Attorney Businessman

[1] For the convenience of the Court and to avoid repetition, Beasley Allen consolidates the relevant procedural history and statement of facts.

Mr. Conlan served as one of J&J's bankruptcy lawyers until March 2022. (Da55-56). Once Mr. Conlan left Faegre, Mr. Conlan formed Legacy. (T5 at 100). Notably, J&J knew that Mr. Conlan was working for Legacy, J&J negotiated extensively with Mr. Conlan once he formed Legacy, and yet J&J (including Erik Haas) never objected to Mr. Conlan's role at Legacy. (Ra2-Ra3). Mr. Conlan is a non-attorney businessman acting through Legacy who neither practices law nor acts in an attorney capacity for Legacy. (Da10-11); (Da28); (Da32) (discussing undisputed fact that Mr. Conlan was a businessman since 2022, not a lawyer or expert).

Mr. Conlan neither "switch[ed]sic sides" nor acted "in secret." (Ra2-Ra3); (Da10-11); (Da28); (Da32). Instead, Mr. Conlan openly approached plaintiffs' firms like Beasley Allen as early as February 2023. (*Id.*) J&J's feigned outrage was unpersuasive to the trial court. (Da12-13); (Da32) (citing Ra3) ("Specifically. . ., Legacy *i.e.*, Conlan informed Haas and J&J that it reserved the right, in its discretion, to negotiate settlements with interested Asbestos plaintiff law firms . . ." Mr. Conlan's February 2023 proposal for Legacy placed J&J on "notice" "that Legacy reserved the right to work with plaintiffs' firms," and Mr. Conlan only presented a proposal to Beasley Allen after J&J failed to respond. (Da32).

C. Mr. Conlan is not a "Side-Switching Lawyer;" Beasley Allen nor Mr. Birchfield Retained or Hired Mr. Conlan in any Capacity.

Beasley Allen neither hired Mr. Conlan nor made any effort to do so because

he was a third-party businessman that came to Beasley Allen on behalf of Legacy. [2] (T7 at 63 to 64); *see* (T7 at 101 to 102) Beasley Allen never hired Mr. Conlan as an attorney or in any capacity). Beasley Allen never retained Mr. Conlan as an expert or consultant, (T7 at 102 to 103); *see* (T6 at 34 to 35), nor did Beasley Allen associate with Mr. Conlan as legal counsel. (T3 at 131 to 132) (Beasley Allen never sought advice from Mr. Conlan "regarding how to prosecute or pursue [plaintiffs'] claims against J&J." (T7 at 102 to 103).

There was no "alliance" or "association between Beasley Allen and Conlan." (Da28); (Da31) Beasley Allen understood that Mr. Conlan/Legacy would be its adversary if J&J accepted the Legacy Proposal, because Legacy "would be standing in the shoes of J&J" as an adversary. (T7 at 65, 101 to 103) (Mr. Birchfield addressing the scenario of J&J accepting the Legacy Proposal: "Legacy is standing in the shoes of J&J" and becomes Beasley Allen's "adversary every bit as much as J&J is now. They [would] have all the talc liability"); *see* (T5 at 112, 121 to 122) (Mr. Conlan confirming that Legacy never tried to position itself with Beasley Allen against J&J).

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[2] Mr. Conlan served as J&J's "bankruptcy-related" counsel more than two years ago. (T5 at 7). Mr. Conlan was a restructuring lawyer, not a trial lawyer, a plaintiff's lawyer, or a mass torts lawyer. (T5 at 36).

The trial court found that Mr. Conlan was not a "side-switching lawyer" under the RPCs. (Da11-12). Mr. Conlan does not have any current clients or legal "representation"—he works for Legacy and Legacy's financial interests only. (*Id.*); Compare (Da11-12); (Da28); (Da32), with J&J Br. at 16 (invoking decades old case law including *Reardon v. Marlayne, Inc.,* 83 N.J. 460, 473 (1980), which only disqualifies an attorney based upon "successive representation of adverse interests.").

D. Mr. Conlan and Beasley Allen Participated in Court-Ordered Mediation, which J&J Refused to Participate In.

Judge Kaplan of the District of New Jersey Bankruptcy Court ordered Beasley Allen (a member of the Tort Claimant Committee) to mediation in 2023. (Da67-86). J&J was supposed to attend mediation but failed to participate. (Da77-80). Had J&J engaged in mediation as ordered, it would have known the parties in the mediation, including Conlon on behalf of Legacy. (Da67-86). As directed by Judge Kaplan, Beasley Allen had conversations (including in mediation) with Legacy that involved its "proposal of structural optimization and disaffiliation," not any confidences Conlan may have learned as J&J's counsel. (T7 at 67 to 68). Indeed, Mr. Birchfield had never seen the Legacy Proposal (Da44-49) prior to J&J's filing of this motion. (T7 at 91 to 92). Beasley Allen provided a matrix to Legacy but did not negotiate

any settlement matrix with Legacy or Mr. Conlan. (T7 at 95 to 98).[3]

Over a period of four months, the trial court weighed the parties' evidence, assessed the witnesses' credibility, considered the same arguments, and the Trial rendered detailed findings of fact and conclusions of law after multiple rounds of briefing and four days of plenary hearings. (Da1-33); (T1 to T7).

E. In an Unprecedented Joint Federal and State Court Hearing, the Trial Court Considered Witness Credibility and Extensive Oral Argument/Briefing.

J&J filed its initial motion to disqualify Beasley Allen and Mr. Birchfield on December 8, 2023. Fox Rothschild appeared on behalf of Mr. Birchfield and Beasley Allen and filed opposition to J&J's motion on January 9, 2024. J&J submitted further briefing on January 12, 2024. Fox Rothschild submitted further briefing in support of Beasley Allen on January 29 and 30, 2024. The parties submitted over a dozen submissions concerning this matter between March 26, 2024 and May 14, 2024. *Id.*

The trial court paid meticulous attention and got the facts right. The trial court (some jointly with Federal Magistrate Judge Singh) held six separate hearings from January 17, 2024, through May 3, 2024. Although the Supreme Court of New

[3] J&J repeatedly (and improperly) tried to use Beasley Allen's privilege log and New Jersey's sacrosanct mediation privilege as a sword against it in these proceedings. (Da67-86).

Jersey pointedly noted that motions to disqualify are presumptively decided on the written record, *see City of Atlantic City v. Trupos*, Judge Porto wanted live witness testimony specifically to determine witness credibility. *See* (Ra580-593).

The trial court (including U.S. Magistrate Judge Singh) observed live witness testimony on March 25, 2024 (Mr. Haas and Mr. Murdica), as well as April 10, 2024 (Mr. Conlan) and on April 10, 2024, and May 3, 2024 (Mr. Birchfield). (T3 to T7). In addition, the trial court received: (1) 7 exhibits on December 8, 2023; (2) 12 more exhibits on January 9, 2024; (3) 2 additional exhibits on January 25, 2024; (4) 3 additional exhibits on January 29, 2024; and (5) a final exhibit on January 30, 2024. As the trial court's order of January 31, 2024, makes clear, the purpose of the plenary hearings was to hear live witness testimony and consider witness credibility[(Ra593). The trial court found Mr. Birchfield and Mr. Conlan credible, and at the same time, found J&J's witnesses not credible. *See* generally (Da002).

F. The Trial Court Denies J&J's Motion to Disqualify and Rejects Each Of Its RPC Arguments

The trial court held that there was no evidence that Mr. Conlan shared any J&J confidences with Beasley Allen, and he was not a "side-switching" attorney. (Da006;Da011)). Mr. Conlan "credibly testified when confronted with the allegations regarding the violations of the various RPC's. His testimony was consistent and corroborated by the documented record." (Da007). Mr. Conlan had no client in the asbestos claims did not represent any party in the MCL. (Da011).

Mr. Conlan "neither practices law or acts in the capacity of an attorney at Legacy." (Da011) Therefore, the trial court found "that Conlan is not a so-called side-switching attorney; he does not represent any [MCL] Plaintiff and was never hired as an attorney at Beasley Allen." (Da011).

The trial court also concluded that Mr. Conlan put J&J on notice that he would contact plaintiffs' attorneys like Beasley Allen to propose a way for J&J to settle its substantial talc-related liabilities. (Da011-12). For example, in a February 2, 2023 email, Conlan presented to Haas and J&J "a written proposal and outlined to J&J what Legacy intended to do going forward." (Da012); (Ra2). "Specifically, in paragraph 6 of that email, Legacy *i.e*. Conlan informed Haas and J&J that it reserved the right, in its discretion, to negotiate settlements with interested Asbestos plaintiff law firms of some or all of the pending claims filed by such firms, all such settlements to become effective at closing of the Legacy proposal." (Da12-13.)

The trial court accurately summarized binding law and confirmed that the "issue before this court is whether J&J met their burden that an actual conflict of interest occurred and Conlan shared confidential and privileged information belonging to J&J with Birchfield, and if so, should the Beasley Allen law firm be disqualified from this MCL." (Da020). The trial court noted that J&J's motion must be "viewed skeptically in light of their potential abuse to secure tactical advantage," (Da24) and disqualification of a litigation adversary is "harsh discretionary remedy

which must be used sparingly." (Da24). A motion to disqualify cannot be based on "surmise alone" and must be "well-grounded in the written record." (Da27-28) (citing *Trupos* and *Yuna*).

The trial court appropriately rejected the defunct appearance of impropriety standard as applying to lawyers. (Da27-28.) (Da28). *In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697*, 188 N.J. 549, 552 (2006)." Without evidence of any ethical violation, "J&J did not overcome its burden of persuasion and proof that Conlan shared J&J's confidential and privileged information to Birchfield or anyone else at Beasley Allen." (Da28). "This court even considered whether J&J provided any reasonable inferences to support their argument, but this court concludes J&J did not do so and failed to meet their initial burden of production for disqualification." (Da28). "Accordingly, J&J did not produce any credible proof that Conlan shared any confidential and privileged [information] of J&J with Birchfield or any other attorney at Beasley Allen." (Da28-29. "Moreover, the court finds that Conlan, a non-practicing lawyer, does not represent any individual and does not have a client in this MCL and disqualification of Beasley Allen is not warranted." (Da29). In sum, the trial court rejected J&J's novel "imbued" theory of attorney disqualification. (Da28-29).

Beasley Allen violated neither RPCs 1.6, 1.9, nor 1.10 because Mr. Conlan did not represent any talc-plaintiffs, and he "did not advocate on behalf of Beasley

Allen or any of their clients." (Da30-31). "There is absolutely no evidence of any 'association,' as that term is used by J&J, between Conlan and Birchfield other than the fact that Birchfield supported the Legacy proposal." (Da31). The trial court did not accept the theory that Mr. Conlan's conversations were "imbued with privileged information"—a "bald and unsubstantiated assertion as the standard to disqualify an attorney or law firm without any credible evidence to support that assertion." (Da32). Mr. Conlan was a businessman at Legacy in 2022 and 2023, not a lawyer. (Da32). The trial court denied the motion to disqualify since there was no credible evidence that Mr. Conlan and Mr. Birchfield worked against J&J to get the $19 billion number. (Da31-32).

On August 8, 2024, J&J timely appealed the trial court's order and opinion. Beasley Allen timely opposed the Motion because the trial court's order and opinion was well-reasoned and supported by New Jersey law and the RPCs. This Court granted J&J's motion for leave to file an interlocutory appeal by order dated September 20, 2024.

ARGUMENT

POINT I

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER BECAUSE J&J FAILS TO CARRY ITS HEAVY BURDEN THAT BEASLEY ALLEN SHOULD BE DISQUALIFIED FROM THIS LITIGATION UNDER NEW JERSEY LAW.

A. J&J Failed to Prove an Actual Conflict, and Its Contradictory Ethic Theories and Changing Explanations Cannot Support Disqualification Under the RPCs.

J&J fails to identify a single confidence that Mr. Conlan purportedly shared with Mr. Birchfield. J&J's latest brief—replete with speculation, innuendo, and *ad hominem* attacks—is a regurgitation of its prior meritless arguments and an attempt to re-write the RPC's plain terms. J&J mouths the words of an RPC violation but offers no evidence. Having no evidence, J&J does not satisfy its heavy burden to disqualify Beasley Allen under any legal theory or the RPCs.

1. There is no evidence that Beasley Allen violated RPC 1.6.

After six months of briefing, testimony, and argument, there is no evidence that Beasley Allen violated RPC 1.6 because J&J has not identified any J&J confidence Mr. Conlan purportedly shared with Beasley Allen. Despite having no evidence, J&J argues that the Court may "presume" that Mr. Conlan violated his ethics obligations and shared confidential information. Regardless of what Mr. Conlan may know, there is still no evidence that he shared any J&J confidence with Beasley Allen—the sole inquiry here. *See* (T7 at 65, 96 to 97)

When J&J first raised the issue with Mr. Conlan—in the document J&J attempted to conceal— he immediately denied that he shared any J&J confidences. *See* (Ra1). At the hearing, Mr. Conlan again denied that he ever shared with Beasley Allen any confidential information. T6 at 70; (*id.* at 113). The unrebutted testimony

is that: (1) Mr. Conlan never revealed any J&J confidential information to Beasley Allen or Mr. Birchfield; and (2) Mr. Birchfield never received any confidential information. *See* (T7 at 65, 96 to 97); (T5 at 113). Nor has J&J identified any information that Birchfield or Beasley Allen possesses that could have come from a J&J confidence shared by Mr. Conlan. Nothing – not the matrix, not the $19 billion figure, nor any other point of information. Plus, J&J revealed all this information by its own public filings.

When J&J initially accused Mr. Conlan of misconduct, he immediately pushed back on J&J's baseless ethics claims. *See* (Ra1). Two things are particularly telling here because J&J hid them from the Court: (1) Mr. Conlan immediately responded to Mr. Murdica's threats; and (2) Mr. Conlan denied not only the alleged breach of the attorney client privilege but, Mr. Conlan expressly refuted the claim in Mr. Murdica's letter that he recommended the ill-fated J&J Texas Two Step. *See* (Ra1); (T6 at 34, 40 to 43). Mr. Conlan's same day response to J&J is consistent with his testimony at the plenary hearing that he never shared J&J confidential information with Beasley Allen. (*Id.*). Mr. Conlan put J&J on notice in February 2023 that he would "negotiate settlements with interested asbestos-plaintiff law firms . . ." (Ra2). Because the unrebutted evidence demonstrates that Mr. Conlan did not share J&J confidential information, RPC 1.6 cannot support disqualification in this case.

a. The 19 Billion Dollar Legacy Proposal Was Not Derived From J&J Confidential Information.

The 19-billion-dollar number is not J&J's confidential information, and it cannot be the basis for disqualification for three reasons. First, J&J's own experts have issued published opinions that are reasonable value to settle all talc-related claims is between $11 and $21 billion dollars. *See* (Ra6/Ra106)(admitted for identification – J&J expert reports); *Id.* at 4 (**"range from $11 billion to $21 billion (inclusive of government claims)"** is an appropriate settlement number.); (*id.* at 17, 25, 27.). Only when J&J thought it strategically benefited them to express a range of potential recovery, they then produced the expert reports during those bankruptcy proceedings. The reports are not J&J confidences, and J&J's own experts' opinions support the 19-billion-dollar valuation. *See* (Ra6) at 16 to 17 (J&J June 7, 2023 report concluding that the "**total present value of the costs to defend and resolve talc-related claims in the tort system would range from $11 billion to $21 billion (inclusive of government claims**); (Ra106) at 44 ("total costs for defending and resolving talc personal injury claims less than $20 billion.").

Second, neither Beasley Allen nor Mr. Birchfield developed the 19-billion-dollar number. Mr. Birchfield "did not toss out the 19 billion. The $19 billion number is James Conlan and Legacy's number." (T7 at 71 to 73). The 19-billion-dollar number is "not a number for the ovarian cancer claims." (*Id.*). (Beasley Allen only represents ovarian cancer clients.) Instead, the 19-billion-dollar number reflects an

amount at which Legacy would agree to "acquire an entity with all of JJ's talc liability for all time." (T7 at 93 to 94). The 19-billion-dollar number is not a Beasley Allen number. (T6 at 48 to 49). Legacy arrived at the 19 billion number based on several factors, including: (1) the drop in J&J's market capitalization after the Third Circuit's decision; (2) the discount rate used to determine the present value of the liabilities; and (3) interest rate variability. (*Id.*).

Third, and perhaps most telling, the 19-billion-dollar number is a figure made public by J&J. J&J filed the entire Legacy Proposal as an exhibit to the instant motion – not under seal and with no redactions. The 19-billion-dollar number is not a J&J confidence, and it cannot be a basis to disqualify Beasley Allen from this case.

b. The Matrix Attached to the Legacy Proposal Is Beasley Allen's Work Product and Not Derived From J&J Confidential Information.

All parties agree that the Legacy Proposal is not confidential information and cannot serve as the basis for disqualification for three reasons. **First**, J&J conceded in response to the Court's questioning that the data and numbers in the matrix did not come from J&J. (T3 at 84 to 85) (Mr. Haas admitting that "This particular matrix, the numbers here are different than the numbers. The matrix concept is not new to this particular tort."); (*id. T4* at108 to 110) (Mr. Murdica admitting same). Mr. Murdica repeatedly "guessed" about the matrix, and he went further—he had no idea where the matrix came from. (T4 at 108 to 109). *See, e.g.*, (T4 at 104 to 105) (Mr. Murdica: "I can't tell you for certain that this is our [J&J's]sic document."

Second, Mr. Birchfield confirmed that the matrix attached to the Legacy Proposal was supplied by Beasley Allen; it is based on Beasley Allen numbers and analysis developed before ever meeting with or talking to Mr. Conlan or anyone at Legacy. (T7at 77 to 87). The matrix is not a J&J confidence Mr. Conlan shared with Beasley Allen. (T7 at 94 to 96). Beasley Allen created the matrix based on extensive negotiations on behalf of ovarian cancer claimants that began with Mr. Murdica as early as April 2020, with Mr. Birchfield providing to J&J a proposed matrix as early as May 2020. (T7 at 84 to 86). Beasley Allen exchanged "settlement" proposals with J&J between 2020 and Spring 2021 during the Imerys bankruptcy. (T7 at 86 to 90). To foster settlement, parties in mass tort litigation frequently exchange and negotiate settlement proposals in mass tort litigations. (T7 at 95 to 98).

Third, and perhaps most telling, the matrix attached to the Legacy Proposal was made public by J&J. (Da044). J&J filed the entire Legacy Proposal, including the matrix, as an exhibit to the instant motion. (*Id.*). It was not filed under seal, or with redactions. The matrix attached to the Legacy Proposal originated from Beasley Allen and Plaintiffs not J&J. In sum, the matrix attached to the Legacy Proposal is not the product confidential information and cannot be the basis for disqualification.

c. "Structural Optimization" and Related Concepts are not J&J Confidential Information.

Structural optimization and disaffiliation structures, precepts and transactions are similarly not "confidential" J&J information and cannot be the basis for

disqualification. Structural optimization generally—and its application to mass tort defendants like J&J—predate Mr. Conlan's representation of J&J. (Ra306); (T6 at 15:19-20) (structural optimization and disaffiliation is "in no way, shape, or form" a "J&J confidence."). Mr. Conlan's knowledge and expertise in structural optimization did not emanate from J&J in any respect. (*Id.*) While at Sidley Austin, Mr. Conlan structurally optimized numerous entities. (Ra306-307). Jones Day and other firms have structurally optimized other entities. (T6 at 18 to 20, 54 to 55) (Mr. Conlan discussing other public structural optimizations pre-dating his time at J&J).

Structural optimization and disaffiliation is effective because it would not require a talc claimant vote nor require approval by any plaintiff represented by Beasley Allen or any other firm. (T6 at 59 to 61). Mr. Conlan did not share any purported structural optimization-related confidences with Beasley Allen. (April 10 PM Tr. at 15). It would make no sense for Mr. Conlan to do so since Legacy (standing in J&J's shoes) would not "need their vote." (T6 at 59 to 61). For these reasons, the Legacy Proposal (structural optimization) is not a J&J confidence and cannot be a basis to disqualify Beasley Allen.

1. There is no evidence that Beasley Allen violated RPC 1.9 because Mr. Conlan does not represent Plaintiffs, has never been employed or retained by Beasley Allen, and he is not "aligned" with Beasley Allen.

Because Mr. Conlan has never represented a talcum powder plaintiff nor served as a lawyer with the Beasley Allen firm, RPC 1.9 and 1.10 do not apply by

their plain terms. RPC 1.9(a) states "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the former client[.]" *City of Atlantic City v. Trupos*, 201 N.J. 447, 462 (2010).

Mr. Conlan, an independent businessman at Legacy, is not a lawyer, expert, associate, partner, or consultant hired by/working for or representing Plaintiffs (or Beasley Allen) in the talc litigation. *Compare* (T7 at 63 to 64); *see* (T7 at 101 to 102) Beasley Allen never retained Mr. Conlan as an expert. *Id.*; *see* (T6 at 34 to 35) (confirming that Beasley Allen never employed Conlan); (T3. at 131 to 132) (Mr. Haas confirming Conlan never served as a Beasley Allen attorney). Beasley Allen never sought advice from Mr. Conlan "regarding how to prosecute or pursue [Plaintiffs'] claims against J&J." (T7 at 102). RPC 1.9 does not apply because Mr. Conlan is not plaintiffs' counsel. And no conflict may be imputed from Conlan to Beasley Allen under RPC 1.10 or any other RPC because Conlan has never been—and is not now—an attorney at Beasley Allen.

J&J has not rebutted the fact that if J&J accepted the Legacy Proposal, Legacy would step in J&J's shoes and be adverse to Plaintiffs/Beasley Allen. The Legacy Proposal—which would remove all of J&J's talc liability—"would actually be in the best interest of J&J." (T7 at 103). Beasley Allen understood that Mr. Conlan/Legacy would be its adversary because if J&J accepted the Legacy Proposal, Legacy "would

be standing in the shoes of J&J" as an adversary. (T7 at 65, 101 to 103) (Birchfield addressing the scenario of J&J accepting the Legacy Proposal: "Legacy is standing in the shoes of J&J" and becomes Beasley Allen's "adversary every bit as much as J&J is now. They [would] have all the talc liability."); *see* (T5. at 112, 121 to 122) Mr. Conlan is not a "side-switching lawyer" (or any lawyer) like the lawyers in *Twenty-First Century Rail Corporation*. He does not have any current clients—he works for Legacy and Legacy's financial interests only. *See* (T5 at 100) Mr. Conlan's status as a businessman is not a technicality but the reality of how Mr. Conlan has operated since 2022.[4]

Even if there were a "superficial" overlap between Mr. Conlan's prior work for J&J and the current talc litigation, *see Trupos*, 201 N.J. at 467, the factors outlined in *Trupos* and *Twenty-First Century Rail Corporation* are not applicable and cannot be a basis to disqualify Beasley Allen because Mr. Conlan is not Plaintiffs' "lawyer" and does not represent Plaintiffs in any capacity. *See Twenty-First Century Rail Corp. v. N.J. Transit Corp.*, 210 N.J. 264, 273-76 (2012).

Because Mr. Conlan has never been a lawyer at Beasley Allen (or represented any plaintiffs adverse to J&J), the inquiry under RPC 1.9 of whether matters are "the same" or "substantially related" never applies. *Id.* Mr. Haas conceded that Mr.

[4] J&J now tries to conflate RPC 1.9 with RPC 5.3. RPC 5.3 also does not apply here. There is no "de facto" theory of attorney client conflicts or representation.

Conlan is not: (1) a "side-switching" attorney; (2) adverse to J&J; or (3) "aligned" with Beasley Allen. (T4. at 4:17-25). Instead, Mr. Conlan "went to Legacy" and was in "a different role. He opened up a business where he's purporting to go out and pitch the Legacy structured optimization model." (*Id.*). Mr. Haas agreed that Mr. Conlan "went from being a lawyer at Faegre to being a businessman at a company that he formed called Legacy." (*Id.*) J&J not only communicated with Mr. Conlan long after he left Faegre, *see* (Da039, but J&J actually discussed with Mr. Conlan transferring to Legacy all talc claims against J&J. These documents and Mr. Haas' admissions are dispositive. Beasley Allen cannot be disqualified under any novel theory applying the plain terms of RPC 1.6 or 1.9.

2. There is no evidence that Beasley Allen violated RPC 5.3

There is no evidence that Beasley Allen violated any part of RPC 5.3.[5] RPC 5.3(a) states that "With respect to a nonlawyer employed or retained or associated with a lawyer," "every lawyer, law firm or organization" "shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer." (emphasis added). RPC 5.3 plainly applies to lawyer supervision of employee "nonlawyers" including paralegals, legal assistants and other "nonlawyers

[5] RPC 5.3(b) does not apply because there is no claim that Beasley Allen (or any of its attorneys) had "direct supervisory authority" over Mr. Conlan.

retained or employed" by a law firm. *See IMO of Robertelli*, 248 N.J. 293, 320 (2021) (RPC 5.3 non-lawyer provision applies to a lawyer's "surrogates–including investigators or paralegals."). Mr. Conlan (Legacy) is a third-party businessman not Beasley Allen's paralegal, assistant, investigator, or expert.

RPC 5.3(a) is inapplicable. RPC 5.3(a) does not apply because Mr. Conlan was indisputably neither "retained" nor "employed" by Beasley Allen in any capacity. RPC 5.3(a). *See* (T7. at 101 to 103); *see* (T6 at 34 to 35). J&J's own citation to the Restatement (Third) 123, cmt. c(iii) confirms that RPC 5.3 does not apply here. *See* J&J Br. at pg. 47 (explaining that "associate" "with one another" means two individuals "acting as co-counsel on the same case."). Mr. Birchfield and Mr. Conlan were never "acting as co-counsel," and Mr. Conlan was indisputably not "a non-lawyer employee" of Beasley Allen.

RPC 5.3(c) is inapplicable. RPC 5.3(c) states that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:" (1) "the lawyer orders or ratifies the conduct involved." RPC 5.3(c)(1). There is no allegation that Beasley Allen "ordered" Mr. Conlan to do anything. Mr. Conlan worked at Legacy since he left Faegre in 2022. Beasley Allen's 2023 conversations with Legacy were consistent with Judge Kaplan's order and finding a path to finality after the Third Circuit's dismissal of LTL 1—not any nefarious purpose. *See* Civ 23-12825 at Doc. 481.

After being approached by Legacy and learning of an alternative that would provide a non-bankruptcy option for "finality," and after being ordered to mediate, in June 2023, Mr. Birchfield sought to include Legacy in the mediation process – not as part of the "Beasley mediation team" but as a business entity with an option that would give J&J the "finality" it sought while also offering fair and reasonable values to cancer victims on a voluntary basis. Had J&J engaged in the mediation process as ordered by the Court, and as Mr. Birchfield and other members of Plaintiffs' leadership anticipated it would, Legacy's involvement would have been known immediately. Mr. Birchfield communicated with the Court-appointed mediators. It was anticipated that J&J would comply with the Court's order to mediate and a three-way negotiation in mediation would ensue. J&J, however, failed to participate in the mediation process.

J&J was aware of Legacy's interest in acquiring J&J's talc liability long before this time. Legacy (Mr. Conlan) approached J&J in February 2023 about solving J&J's talc liability issues months before he ever spoke to Mr. Birchfield or anyone else at Beasley Allen. Compare (Ra2) (February 2023 letter from Conlan to J&J Board of Directors / Mr. Haas advising that Legacy reserves the right "to negotiate settlements with interested asbestos-plaintiff law firms"), (T4. at 4) (Mr. Haas noting that April 2023 was the first contact between Beasley Allen and Legacy).

Beasley Allen (Mr. Birchfield) never saw the Legacy Proposal before J&J revealed it to the public in these proceedings. (T7 at 91 to 92). Beasley Allen provided the matrix to Legacy but did not negotiate any settlement matrix with Legacy or Conlan. (T7 at 95 to 98). Beasley Allen (and Mr. Birchfield) did not "ratify" any of Mr. Conlan's alleged conduct, including the Legacy Proposal, in any sense, let alone within the meaning of RPC 5.3.[6] *See* Ratification, Black's Law Dictionary ("Confirmation and acceptance of a previous act."). Beasley Allen and Legacy never compromised, "haggled" over or "negotiated the matrix" with Legacy (Conlan). *See* (T7 at 94 to 97). Factually and legally, there was no order or ratification. RPC 5.3(c).

Beasley Allen had conversations (including in mediation) with Legacy that involved its "proposal of structural optimization and disaffiliation," not any confidences Mr. Conlan may have learned as J&J's counsel. (T7 at 67 to 68). Indeed, Mr. Birchfield was not privy to the Legacy Proposal (Da044) prior to J&J's filing of the instant motion. (T7 at 91 to 92). Beasley Allen provided the matrix to Legacy but did not negotiate any settlement matrix with Legacy or Mr. Conlan. (T7 at 95 to 98). Beasley Allen therefore never "associated" with Mr. Conlan or Legacy. Legacy

[6] The remainder of RPC 5.3(c)(2) similarly does not apply because Mr. Birchfield did not have "direct" (or any) "supervisory authority" over Mr. Conlan or Legacy.

and Beasley Allen were dealing at arm's length with Legacy as a business entity offering both J&J and plaintiffs what they sought. Legacy and Beasley Allen were not "allies." (T7 at 65, 101 to 104). There was no "ratification" or "confirmation" by Beasley Allen.

J&J's belated invocation of RPC 5.3 (and the decades old *Cordy, Voigt,* and *Maldonado* cases) is a blatant resurrection of the rejected impropriety standard. J&J repeatedly cites stale case law to support its novel ethics theories. But there is no "shared presumption" of conflicts under current New Jersey law. *Compare Kane Props., LLC v. City of Hoboken,* 214 N.J. 199, 220 (2013) (reaffirming that "appearance of impropriety" standard does not govern alleged attorney conflicts), *with* J&J Brief at pgs. 34-40, 52 ((citing *Maldonado v. New Jersey ex rel. Admin. Off. of Cts., Prob. Div.*, 225 F.R.D. 120, 137 (D.N.J. 2004) (citing appearance of impropriety standard); *Greig v. Macy's Ne., Inc.*, 1 F. Supp. 2d 397 (D.N.J. 1998) (invoking the overturned "appearance of impropriety" standard); *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 583-84 (D.N.J. 1994) (disqualifying firm because of "the appearance of impropriety, as reflected by the ethics rules."))). None of these cases are good law. For these reasons, RPC 5.3(c) does not apply to any of the circumstances here, and the Court should affirm the trial court's order.

B. Beasley Allen's Compliance with Judge Kaplan's Mediation Orders and Its Confirmed Mediation Privilege Claims Cannot Support Disqualification.

This Court should affirm the trial court's order because J&J's attacks on Beasley Allen's participation in court-ordered mediation and its confirmed mediation privilege claims cannot be a basis for disqualification. The mediation privilege applies to communications that "have a clear nexus to the mediation." *Sandoz, Inc. v. United Therapeutics Corp.*, 2021 WL 5122069, at *2-4 (D.N.J. Nov. 2, 2021). The mediation privilege protects communications and originates from Judge Kaplan's May 10, 2023 order, *see* case 23-12825-MBK at Doc. No. 481 (Section 5), D.N.J. L.B.R. 9019-2, and N.J.S.A. 2A:24C-4.b. (Da114).

J&J continues to wield the sacrosanct mediation "privilege" (including Beasley Allen's right to invoke mediation privilege) as a sword to baselessly claim Mr. Conlan shared client confidences with Beasley Allen—and use privilege as a shield, revealing "confidences" selectively to its benefit but withholding context and critical evidence to prevent Beasley Allen from testing J&J's claims. *See Munich Reinsurance Am., Inc. v. Am. Nat. Ins. Co.,* 2011 WL 1466369, at *22 (D.N.J. Apr. 18, 2011) (a litigant cannot "make use of those privileged communications which support his position while hoping to maintain the privilege as those communications which undercut his legal position"); *In re Grand Jury Subpoena*, 389 N.J. Super. 281, 298 (App. Div. 2006) (same).

Special Master Schneider affirmed Beasley Allen's mediation privilege claims. *See* Trans ID: LCV2024883012; ECF Doc. 29999 at 4. Special Master

Schneider noted that the "bulk of the documents on [Beasley Allen's] privilege log were generated while the" LTL 2 mediation order "was in effect." *Id.* Moreover—and contrary to J&J's attempts to mischaracterize the scope and scale of documents identified in the mediation privilege log—"most of the documents involve internal Legacy communications or exchanges between Legacy and KCIC." *Id.* (emphasis added).

J&J's narrative that Legacy and Beasley Allen worked in secret to harm J&J is both: (1) false; and (2) completely unsupported speculation. First, Beasley Allen and, with mediator approval, Legacy, engaged in court-ordered mediation, which J&J refused to participate in, despite repeated court orders and overtures by Beasley Allen and Plaintiffs' leadership to do so. ECF Case 21-30589-MBK at Doc. No. 2317. *See* (T7. at 96 ("J and J really didn't engage in the mediation in LTL-2")). After Judge Kaplan dismissed J&J's second bad faith bankruptcy on August 11, 2023, the Court urged the parties (including J&J) to continue settlement discussions. Case 23-12825-MBK at Doc. No. 1222. J&J again refused to participate. *See* (T7. at 96).

Second, Legacy told J&J in February 2023 it would work with plaintiffs' firms like Beasley Allen. (Ra2). With no other basis to disqualify Beasley Allen, J&J trains its fire on the mediation process and Special Master Schneider, implicitly impugning the Special Master's finding that the mediation privilege applied and warping the

mediation privilege findings as a basis to disqualify Beasley Allen. J&J's efforts to disqualify Beasley Allen based upon validly withheld mediation communications are really an attack on the sanctity of mediation privilege itself and the broad protections conferred by New Jersey state law and reaffirmed by the courts. As Special Master Schneider recognized, J&J's attacks (if successful) would "discourage mediations" and "frank and open discussions during a mediation which would likely lead to less settlements." ECF No. 29999 at 8; Trans ID: LCV2024883012. J&J attacks Beasley Allen (and Legacy) for engaging in the exact conduct Judge Kaplan repeatedly authorized and encouraged.

Special Master Schneider ruled that limited mediation communications between Beasley Allen and Legacy (the same communications J&J now attacks) were privileged. This ruling came after J&J's original motion to disqualify was filed on December 5, 2023. Special Master Schneider found the Beasley Allen/Legacy communications privileged after J&J's pleadings asserted that Mr. Conlan represented it years prior (and sought disqualification). J&J's refusal to participate in court-ordered mediation and its recent feigned surprise that Beasley Allen and Legacy communicated in mediation is not credible, especially in light of Mr. Conlan's February 2023 notice. This Court should affirm the trial court's order and not countenance J&J's continued weaponization of mediation as a sword (and at the same time, using privilege as a shield by repeatedly withholding exculpatory

evidence including Mr. Conlan's February 2023 notice to J&J (Ra2) and his contemporaneous response that he did not share confidences with anyone (Ra1)).

C. This Court Should Affirm the Trial Court's Order - J&J Repeatedly Withheld Relevant Evidence, Which Deprived Beasley Allen Their Right to Due Process.

Despite being asked (and ordered) to do so on multiple occasions, J&J proffered no evidence that Mr. Conlan disclosed a privileged fact or legal theory that belonged to J&J. *See* Transcript Addendum.[7] The Court repeatedly asked J&J to produce relevant evidence. *See, e.g.,* T2 at 18:21-25 to 19:1-7 (Judge Porto noting that to date, "I didn't get anything in camera."). In January, Mr. Haas certified he had reviewed and had access to "Mr. Conlan's billing records." (Da55). J&J refused to produce the "records" for months. Weeks after Mr. Haas and Murdica left the stand, J&J produced heavily redacted and incomprehensible billing records and "timesheets." Incredibly, J&J then tried to call Mr. Haas back to the stand at the end of three days of testimony so he could opine on further issues without confrontation or rebuttal. (T7 at 132 to 137). None of the heavily redacted documents or "timesheets" J&J belatedly provided support its disqualification application.

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[7] Beasley Allen repeatedly objected to J&J's refusal to produce relevant evidence and complete documents. *See, e.g.*, (T3 at 13) (Beasley Allen objecting to Mr. Haas' attempt to testify to "billing entries" not in the record or produced). Moreover, J&J failed to provide any specific evidence to support their claims (even *in camera* or under seal). *See* (T3 Tr. at 52 to 53) (objecting to Mr. Haas speculative testimony without documentary support under Best Evidence Rule and Yuna's Hobson's Choice); (T5 at 11 to 20) (same).

If J&J had evidence that Mr. Conlan disclosed J&J confidences, then J&J would have put that evidence in the record. *See Mosaid Techs. Inc. v. Samsung Elecs. Co.,* 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (factfinder may infer that withheld "evidence might or would have been unfavorable to the position of the offending party"). J&J engaged in the exact conduct and situation the Yuna Court sought to prevent—attorneys accused of ethical misconduct without any meaningful chance to cross-examine their accusers consistent with due process. In re Logan, 70 N.J. 222, 228 (1976). New Jersey law and fundamental fairness obligated J&J to provide specific evidence or forego the chance. J&J failed to do so.

D. Beasley Allen Did Not Commit Any "Independent" RPC Violation Under RPC 3.3 Or RPC 8.4.

Beasley Allen did not violate RPC 3.3. RPC 3.3(a)(5) provides that a lawyer shall not knowingly "fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law." There is no basis to disqualify Beasley Allen based on a lack of candor to the tribunal.

After six months of briefing and hearings, J&J posits that Beasley Allen (and Mr. Birchfield) was less than candid with the Court because of "deceptive half-truths" that were "far from the whole truth." J&J's supposition is unsubstantiated rank speculation. Mr. Birchfield (and other Beasley Allen attorneys) filed

certifications, sat for sworn testimony on multiple dates and answered each question candidly. At no point was Mr. Birchfield's testimony evasive or misleading. Unfortunately (and ironically), J&J is guilty of the exact conduct it now falsely accuses Beasley Allen of engaging in.[8]

First, J&J concealed relevant evidence in this proceeding for months, only at the eleventh hour producing heavily redacted "timesheets," which Beasley Allen was entitled to review from the outset. *See* (T7 at 136 to 137) (objecting to use and reference to heavily redacted timesheets produced after days of testimony ended). J&J's use of privilege as a sword (when convenient) and a shield (when convenient) deprived Beasley Allen of the opportunity to test J&J's assertions.

Second, J&J's personal attacks on the veracity of Mr. Birchfield's certifications are both unfounded and hypocritical. Mr. Murdica's declaration (and later his testimony)— based on hearsay including musings of other people's state of mind—failed to identify a single confidence that Mr. Conlan learned or how (or when) he told Beasley Allen. *See* Murdica Dec. at ¶¶4-7(Ra473-474) (stating generally that Mr. Conlan worked on "legal strategies," "strategy calls"); *id.* at ¶13 (stating what Mr. Conlan "was not-mindful" of); *id.* at ¶14 (same). Consistent with

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[8] Mr. Birchfield provided the first date of contact with Legacy because that date is significant in the timeline of events. No confidences could conceivably have been shared before. At that point, J&J's first effort at bankruptcy had been dismissed and it had filed its second petition.

their testimony, neither Mr. Haas nor Mr. Murdica's declarations provided any specific factual or legal basis to disqualify Beasley Allen as New Jersey law requires. *Id.* Instead, J&J opted to play a shell game with these proceedings, leaking documents after both matters were fully briefed and withholding other documents (like Mr. Conlan's February 2023 notice (Ra2) or his contemporaneous November 5, 2023 disavowal (Ra1)) entirely.

Third, until the Court expressly overruled its privilege objections, J&J successfully concealed Mr. Conlan's November 2023 response to J&J's baseless privilege claims (which J&J did not challenge in November 2023). *See* (Ra1). Mr. Conlan's response should have been produced by J&J in its initial application in December 2023, but J&J concealed it from the Court because it contained Mr. Conlan's contemporaneous reply to J&J's privilege allegations. A litigant "must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *U.S. Bank Nat'l Ass'n v. Curcio*, 444 N.J. Super. 94, 113 (App. Div. 2016). J&J has failed to do so repeatedly since it filed the Motion. RPC 3.3 cannot provide a basis for disqualification.

Beasley Allen did not violate RPC 8.4. RPC 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." None of Beasley Allen's conduct remotely approaches conduct prejudicial to the administration of justice. Beasley Allen and Legacy did

not act "in secret." Mr. Conlan put J&J on notice as far back as February 2023 that Legacy would work with Plaintiffs firms like Beasley Allen to resolve J&J's talcum powder liabilities. *See* (Ra2). Beasley Allen communicated with Legacy in the context of court-ordered mediation, not in some clandestine conspiracy. In 30 plus years of practice,, neither Mr. Birchfield nor Mr. Conlan has ever been accused of any ethical misconduct. Nothing in the record supports the novel ethics accusations made against Beasley Allen now. The order denying the Motion—which was brought to gain an improper litigation advantage and smear Beasley Allen—should be affirmed.

POINT II

THE COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER AND DEFER TO THE SUPPORTED CREDIBILITY FINDINGS.

J&J has offered no evidence—and has none today—that Mr. Conlan disclosed any J&J confidential information to Beasley Allen. Whether RPC 5.3—or any other attorneys ethics rules—requires improvement or "clarification" may be appropriate in another matter, but not here, particularly because Beasley Allen indisputably never retained, worked for, supervised, or associated with Mr. Conlan. Therefore, the Court should deny the Motion.

Appellate courts apply a deferential standard of review to the factual findings of the trial court on appeal from a bench trial. *Rova Farms Resort v. Invs. Ins. Co.,* 65 N.J. 474, 483-84 (1974). A trial judge's findings are binding on appeal when

supported by adequate, substantial, and credible evidence. Id. at 484. These findings will not be disturbed unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. (quoting *Fagliarone v. Twp. of N. Bergen*, 78 N.J. Super. 154, 155 (App. Div. 1963)). However, appellate review of a trial court's legal determination is plenary, *D'Agostino v. Maldonado*, 216 N.J. 168, 182 (2013) (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)).

As this Court is aware, a motion to disqualify is to be determined upon the papers, *Trupos*, 201 N.J. at 462-63, and in those rare circumstances, the Court is to hold a hearing to determine the credibility of the witnesses. This Court is well situated, of course, to review the law, but it is the trial court's role to determine credibility. *See Rova Farms Resort, Inc.,* 65 N.J. at 484 (noting that when an appellate court reviews an order following a bench trial, the court defers to a trial judge's factual findings).

This Court should affirm the trial court's order because an appellate court defers to the trial court's factual findings—here that Mr. Conlan and Beasley Allen did not violate the RPCs. *See, e.g.,* (Da31) (trial court concluding that "Conlan was advocating on behalf of Legacy and there is no credible evidence supporting that Conlan advocated for any interest other than his own or that of Legacy's"); (Da32) (trial court concluding that "there is no credible proof that Conlan violated the RPCs

in promoting a possible resolution or the Legacy proposal."); *(id.)* (trial court concluding that "J&J did not provide any credible evidence that Conlan shared client confidences with Birchfield"); (Da33) (trial court concluding that "To reiterate, this court does not find there is any credible evidence or any credible inferences to support J&J's allegation that Conlan shared confidential and privileged information belonging to J&J to Birchfield or that Conlan violated any of the referenced RPCs."); *see* (Da7), (Da28) (same).

In this case, the trial court's findings were "supported by adequate, substantial and credible evidence" and do not "offend the interests of justice." *Seidman*, 205 N.J. at 169 (citation omitted). Further, "particular deference" attaches to credibility determinations, *RAB Performance Recov., LLC v. George*, 419 N.J. Super. 81, 86 (App. Div. 2011), as the trial judge was in the best position to observe the witnesses and hear them testify. *Cesare v. Cesare*, 154 N.J. 394, 412 (1998) (noting same). This Court should affirm the trial court's order and defer to the trial court's well-reasoned credibility findings that Mr. Conlan never shared any client confidences with Beasley Allen, findings made after three days of plenary hearings and multiple rounds of briefing and pre-trial submissions.

POINT III

THE COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER AND OPINION HOLDING THAT BEASLEY ALLEN DID NOT VIOLATE ANY NEW JERSEY RPC (Da1-34).

A. The Court Should Affirm the Trial Court's Order Because RPC 5.3 Plainly Does Not Apply to Mr. Conlan and The Court Should Not Re-Write the RPCs.

There is no evidence that Beasley Allen violated any part of RPC 5.3, and the trial court did not break new ground in holding that RPC 5.3 does not apply by its plain terms to a non-attorney businessman like Mr. Conlan with no clients or current "representation." The trial court applied well-settled law and found that RPC 5.3(c) is inapplicable because Beasley Allen and Mr. Conlan were not "associated" as contemplated by the RPCs. RPC 5.3 does not require any "clarification" on an interim basis.

RPC 5.3(c) states that "with respect to a nonlawyer employed or retained by or associated with a lawyer," "a lawyer shall be responsible for conduct of such a person that would be a violation of the RPCs if engaged in by a lawyer if: "(1) "the lawyer orders or ratifies the conduct involved." RPC 5.3(c)(1). This Court should not disturb the trial court's well-reasoned findings of facts and conclusions of law concerning RPC 5.3 for three reasons.

First, there is no allegation that Beasley Allen "ordered" Mr. Conlan to do anything. Mr. Conlan has worked at Legacy since he left Faegre in 2022. RPC 5.3(c)(1). Beasley Allen's 2023 conversations with Legacy were consistent with Judge Kaplan's bankruptcy mediation order and finding a path to finality after the Third Circuit's dismissal of LTL 1—not any nefarious purpose. See Civ. A. No. 23-

12825 at ECF Doc. 481. After being approached by Legacy and learning of an alternative that would provide a non-bankruptcy option for "finality," and after being ordered to mediate, in June 2023, Mr. Birchfield sought to include Legacy in the mediation process—not as part of the Beasley Allan "mediation team," but as a third-party business entity with an option that would give J&J the "finality" it sought while also offering fair and reasonable values to cancer victims on a voluntary basis.

J&J's repeated baseless claim that Mr. Conlan was on Beasley Allen's "mediation team" is not supported by anything in the record. Mr. Conlan was never Beasley Allen's investigator, attorney, employee, consultant, or agent within the spirit or letter of RPC 5.3. Compare *In re Complaint of PMD Enters. Inc.,* 215 F.Supp.2d 519, 529 (D.N.J. 2002) (discussing that RPC 5.3 applies to nonlawyer attorney agents and investigators), with Kevin H. Michels, NEW JERSEY ATTORNEY ETHICS: THE LAW OF NEW JERSEY LAWYERING, RPC 5.3 (2024) (confirming that RPC 5.3's "nonlawyer" provision applies to "nonlawyer service providers" like experts, support staff, data technicians, or investigators retained, hired, or directed by nonlawyer). Beasley Allen did not direct or supervise Mr. Conlan in any way. Instead, Mr. Birchfield communicated with the Court-appointed mediators. It was anticipated that J&J would comply with the Court's order to mediate and a three-way negotiation in mediation would ensue. J&J, however, failed to participate in the mediation process.

As the trial court confirmed, J&J was aware of Legacy's interest in acquiring J&J's talc liability for a long time. (Da32). Legacy (Mr. Conlan) approached J&J in February 2023 about solving J&J's talc liability issues months before Mr. Conlan ever spoke to Mr. Birchfield or anyone else at Beasley Allen. (Da12-13) (noting that Mr. Conlan's notice to J&J is "critical to the disposition of this motion"); Compare (Ra2-Ra3) (February 2023 letter from Conlan to J&J Board of Directors as well as Mr. Haas advising that Legacy reserves the right "to negotiate settlements with interested asbestos-plaintiff law firms"), with (T4 at 4) (Mr. Haas noting that April 2023 was the first contact between Beasley Allen and Legacy).

Second, Beasley Allen (Mr. Birchfield) never saw the Legacy Proposal before J&J revealed it to the public in these proceedings so Beasley Allen could not have ordered, ratified, or supervised the Legacy Proposal. (T7 at 91 to 92). Beasley Allen provided the matrix to Legacy but did not negotiate any settlement matrix with Legacy or Conlan. (T7 at 95 to 98). Beasley Allen (and Mr. Birchfield) did not "ratify" any of Mr. Conlan's alleged conduct, including the Legacy Proposal, in any sense, let alone within the meaning of RPC 5.3.[9] Beasley Allen and Legacy never compromised, "haggled" over, or "negotiated the matrix" with Legacy (Conlan). *See*

[9] The remainder of RPC 5.3(c)(2) similarly does not apply because Mr. Birchfield did not have "direct" (or any) "supervisory authority" over Mr. Conlan or Legacy. J&J's brief does not address or attempt to refute this issue.

(T7 at 94 to 97). Factually and legally, there was no order or ratification under RPC 5.3(c).

Third, Beasley Allen had conversations (including in court-ordered mediation) with Legacy that involved its "proposal of structural optimization and disaffiliation," not any confidences Mr. Conlan may have learned as J&J's counsel. (T7 at 67 to 68). Indeed, Mr. Birchfield was not privy to the Legacy Proposal (see Da44-49) prior to J&J's filing of the underlying motion to disqualify. (T7 at 91 to 92). As the trial court found, Beasley Allen provided the matrix to Legacy but did not negotiate any settlement matrix with Legacy or Mr. Conlan. (Da29); (T7 at 95 to 98). Beasley Allen therefore never "associated" with Mr. Conlan or Legacy in any sense. Legacy and Beasley Allen were dealing at arm's length with Legacy as a business entity offering both J&J and plaintiffs what they sought. Legacy and Beasley Allen were not "allies." (T7 at 65, 101 to 104). There was no "ratification," "confirmation" or "association" by Beasley Allen under RPC 5.3. (Id.).

The trial court recognized that J&J's belated invocation of RPC 5.3 is an attempt to resurrect the appearance of impropriety standard. (Da27); (Da32) (The "presumption is no longer valid in New Jersey as an 'presumption' in this context is based on an appearance of impropriety."); (*id.* at 28) ("In fact, this court finds J&J's contention is synonymous with the now overruled appearance of impropriety

standard.").[10] There is no basis for the Court to re-consider this holding now. J&J's brief does not discuss RPC 5.3(c)(1)-(3)'s specific requirements that Beasley Allen must: (1) order or ratify Conlan's conduct; or (2) have "direct supervisory authority" over Conlan. J&J Br. at 4, 20-25. J&J cannot cite half of Rule 5.3 when it suits them and ignore the pertinent sections precluding disqualification here. There is "no evidence of any 'association,' as that term is used by J&J, between Conlan and Birchfield other than the fact that Birchfield supported the Legacy proposal." Compare (Da31), with (J&J Br. at 12-15).

Instead, J&J based this appeal and Motion on a hypothetical—i.e., what ethical implications could be triggered if Beasley Allen hired J&J's experts, paralegals, consultants, and staff. J&J Br. at 13-14. But that indisputably did not happen here, which is why the trial court held that Beasley Allen did not violate RPC 5.3 or any other RPC. For these reasons, RPC 5.3(c) does not apply to any of the circumstances here, and this Court should affirm the trial court's order.

B. The Trial Court Applied Well-Settled New Jersey Ethics Law and Supreme Court Precedent Related to RPCs 1.6 And 1.9.

After eight months of briefing, testimony, and argument, the trial court found

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[10] J&J repeatedly cites stale case law to support its novel ethics theories. But there is no "shared presumption" of conflicts under current New Jersey law. *See Kane Props., LLC v. City of Hoboken,* 214 N.J. 199, 220 (2013) (reaffirming that "appearance of impropriety" standard does not govern alleged attorney conflicts).

no RPC violation (including 1.6, 1.9, and 1.10) because J&J has not identified any J&J confidence Mr. Conlan purportedly shared with Beasley Allen. *See* (Da6). J&J did not satisfy its heavy burden to disqualify Beasley Allen under RPC 1.6 because there is no evidence that Mr. Conlan shared J&J confidential information with Beasley Allen. RPC 1.9 does not apply because Mr. Conlan does not "represent" a talcum powder plaintiff (and has never represented a talcum powder plaintiff) or served as a lawyer, employee, or expert with the Beasley Allen firm. (Da28).

Mr. Conlan is not a "side-switching" lawyer adverse to J&J in any sense under RPCs 1.6 and 1.9. (*Id.*). Legacy is a third-party business entity that—if J&J accepted the Legacy Proposal—would immediately become adverse to Beasley Allen and its clients. The premise behind the Legacy Proposal is that Legacy would—through structural optimization and disaffiliation—acquire J&J's talc liability, current liabilities and future liabilities. If J&J had accepted the Legacy Proposal, all claimants would be either litigating (or settling) talc claims against Legacy, not J&J. The Legacy Proposal was entirely dependent upon J&J voluntarily accepting or negotiating terms with Legacy. Shared confidences cannot be "presumed" under current New Jersey law. RPC 1.6, 1.9 and 1.10 do not apply by their plain terms.[11]

[11] Moreover, even if there were a "superficial" overlap between Mr. Conlan's prior work for J&J and the current talc litigation, *see Trupos*, 201 N.J. at 467, the factors outlined in *Trupos* and *Twenty-First Century Rail Corporation* are not applicable and cannot be a basis to disqualify Beasley Allen because Mr. Conlan is

Despite having no evidence (and without citing applicable case law), J&J argues that the Court may "presume" that Mr. Conlan violated his ethics obligations and shared confidential information. But, after surveying New Jersey case law—including Trupos, Yuna, and Twenty-First Century Rail Corp.—the trial court reaffirmed black letter New Jersey law that conflicts must be "actual" not presumed. Compare (Da28) (trial court reaffirming that "Conflicts must be actual and not merely appearance based.") (citing *State v. Hudson*, 443 N.J. Super. 276, 292 (App. Div. 2015)), with *Trupos*, 201 N.J. at 469 ("surmise alone cannot support an order of disqualification."); *Yuna*, 206 N.J. at 127-29. Ironically, J&J filed the Motion because the RPCs should purportedly be "clarified." But the trial court refused to disqualify Beasley Allen because J&J's claims were "too vague to support discipline." J&J Br. at 19 (citing *In re Sup. Ct. Advisory Comm. on Prof'l Ethics Op. No., 697*, 188 N.J. 549, 562 (2006)).

Regardless of what Mr. Conlan may know, there is no evidence that he shared any J&J confidence with Beasley Allen—the sole RPC inquiry here.[12] Through this Motion, J&J would have this Court adopt a "vague and subjective" new RPC

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not Plaintiffs' "lawyer." (Da28).

[12] J&J repeatedly falls back on the "presumption" of shared confidences—a standard that the trial court rightly held was no longer viable (or applicable here) The trial court properly rejected J&J's continued attempt to re-write the New Jersey RPCs and rely upon out of jurisdiction and stale case law. *See* J&J Br. at 18-20 (citing decades old cases from Kentucky, California, and Texas).

standard—including for RPC 5.3—that would muddy the ethical waters to distort "clear, enforceable standards of behavior for lawyers." *Trupos*, 201 N.J. at 461. This Court should decline the invitation to do so because it is not New Jersey law.

C. This Court Should Affirm the Trial Court's Order because J&J Repeatedly Withheld Material Evidence in This Proceeding

This Court should affirm the trial court's order because if J&J had evidence that Mr. Conlan disclosed J&J confidences, then J&J would have put that evidence in the record—which it repeatedly refused to do—even at the urging of the trial court. The trial court (and the federal court) repeatedly requested all J&J's proofs at the outset of these proceedings. After multiple rounds of briefing, the trial court recognized Beasley Allen's concerns about J&J's efforts to expand the "record" in perpetuity. *See* (T2 at 21:12-16) (trial court noting in February 2024 that "I don't believe I've seen anything than what counsel has seen. I -- I didn't get anything in camera. I got everything that was submitted and I think it was on eCourts.").

Before and during the hearings, Beasley Allen repeatedly objected to J&J's refusal to produce relevant evidence and complete documents. *See, e.g.,* (T3 at 13). Moreover, J&J failed to provide any specific evidence to support their claims (even *in camera* or under seal). *See* (T3 at 52 to 53) (objecting to Mr. Haas speculative testimony without documentary support under Best Evidence Rule and *Yuna*'s

Hobson's Choice); (T5 at 11 to 20) (same).[13]

J&J's unrelenting personal attacks on the veracity of Mr. Birchfield's certifications are not only off base, but hypocritical. For example, Mr. Murdica's declaration (and later his testimony)— based on hearsay, failed to identify a single confidential fact that Mr. Conlan learned or how (or when) he told Beasley Allen. See (Ra473) (stating generally that Mr. Conlan worked on "legal strategies," "strategy calls"); (Ra476) (stating what Mr. Conlan "was not mindful" of); (*id.* at ¶14) (same). Consistent with their testimony, neither Mr. Haas nor Mr. Murdica's declarations provided any specific factual or legal basis to disqualify Beasley Allen as New Jersey law requires. (*Id.*). Instead, J&J leaked documents after both the state and federal matters were fully briefed and withheld other documents (like Mr. Conlan's February 2023 notice (Ra2-Ra3) and his contemporaneous November 5, 2023 disavowal (Ra1)) entirely. (*Id.*). J&J withheld these documents because they were unfavorable to its untenable position. *See Rosenblit v. Zimmerman*, 166 N.J. 391, 401-03 (2001) (discussing spoliation inference and that factfinder may infer that withheld evidence might or would have been unfavorable to the position of the

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[13] *Murphy v. Simmons*, 2008 WL 65174, at *14, 18-19 (D.N.J. Jan. 3, 2008)—like J&J's other authority—is inapposite. (Da 137-49). *Murphy* involved disqualification of attorneys jointly representing a former attorney of the defendant and the opposing party of the same defendant. Unlike the attorney in *Murphy*, Mr. Conlan is not suing J&J (he is not adverse to J&J at all), and he is not representing talc asbestos plaintiffs in any capacity in any venue.

offending party).

J&J's appeal is long on grievances and bereft of substance. J&J may disagree with the Supreme Court of New Jersey's decision to repeal the appearance of impropriety standard for attorney disqualification. J&J is not arguing a logical extension of the law, they are simply choosing to ignore established law. This court has long held that the impropriety does not apply. Mr. Conlan never worked for, was not retained by, and was not associated with Beasley Allen. J&J has no RPC left to stand on. J&J's view of New Jersey attorney ethics rules would upend decades of precedent and contravene the RPC's plain terms.

POINT IV

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S ORDER AND OPINION DENYING THE MOTION TO DISQUALIFY BECAUSE J&J WEAPONIZED THE COURTS TO DISQUALIFY ITS LITIGATION ADVERSARY FOR CYNICAL TACTICAL REASONS.

A. J&J's *Modus Operandi* and Strategy of Attacking Lawyers and Witnesses Against Them Destroys Their Credibility.

J&J's pattern and practice unfortunately has been to personally attack lawyers, doctors, experts, and plaintiffs to deflect from its own misconduct. (Ra285). J&J's counsel was even held in contempt for repeated misconduct and personal attacks against a plaintiffs' expert and their attorneys. *See Barden v. Brennatag* trial, transcripts; *See id.* (Ra440)(the trial court warning J&J's counsel to "not to violate that order [barring inflammatory comments] You will refrain from that . . . during

openings and the entirety of the case"); *id.* (Ra453) (J&J's counsel accusing Plaintiff's counsel of "manufactur[ing]" the litigation). Having had multiple bankruptcy petitions dismissed and as it planned its third bankruptcy attempt, J&J brought this motion to disqualify Beasley Allen because Beasley Allen had successfully and advocated for their clients in defeating J&J's bankruptcies as litigation tactics. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) (expressing concern about the "tactical use of disqualification motions to harass opposing counsel").

The Motion should also be denied because the Plaintiff talc cancer victims have the right to choose their own lawyer. When reviewing a motion to disqualify an attorney, a court must balance competing interests, weighing the "need to maintain the highest standards of the profession" against "a client's right freely to choose his counsel." *Dewey,* 109 N.J. at 218-19; accord *High 5 Games, LLC v. Marks*, 2018 WL 2278103, at *4 (D.N.J. May 18, 2018) ("Clients have a well-established, strongly protected right to choose their own lawyer."). The Motion is simply an impermissible tactic to intimidate Plaintiffs. *See Escobar v. Mazie*, 460 N.J. Super. 520, 526 (App. Div. 2019) (requests to disqualify an opponent's attorney are generally viewed with disfavor given "their potential abuse to secure tactical advantage.") (citations omitted)); *Fragoso v. Piao*, 433 F. Supp. 3d 623, 628 (D.N.J. 2019) ("Courts should take care that parties do not use motions to disqualify counsel

for tactical reasons."). J&J fails to carry its heavy burden that disqualification is warranted. *Escobar*, 460 N.J. Super. at 526. The record is devoid of any evidence to support disqualification, and J&J should not be allowed to choose (i.e. disqualify) Plaintiffs' counsel.[14]

B. The Court Should Affirm the Trial Court's Order and Opinion Because J&J Cannot Choose Its Litigation Adversary.

This Court should affirm the trial court's order and opinion because J&J's motion is the latest example in a long line of smear tactics where J&J has levied personal attacks at lawyers, doctors, experts, and plaintiffs to deflect from their own misconduct. The Third Circuit saw through J&J's sham conduct and dismissed its bad faith bankruptcy petition because it had "no valid bankruptcy purpose" and was filed to "beat back talc litigation in trial courts." *See LTL Mgmt., LLC v. Those Parties Listed on Appendix A To Complaint (In re LTL Mgmt., LLC)*, 58 F.4th 738 n.19 (3d Cir. 2023). Faced with mounting liability and dwindling options, J&J attacked Beasley Allen and Mr. Birchfield, opposing counsel.

J&J also filed this motion because, by disqualifying Beasley Allen, J&J would also disqualify other Beasley Allen attorneys like Mr. Birchfield and Ms. O'Dell in

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[14] J&J filed a nearly identical motion in the District of New Jersey on December 5, 2023. (Ra325). It is apparent that J&J filed these applications to harass Plaintiffs' counsel and as an improper litigation tactic, not for any legitimate purpose. *See Rosenblum v. Borough of Closter*, 333 N.J. Super. 385 (App. Div. 2000) (recognizing inherent authority of the courts to control the filing of frivolous motions and to curtail "harassing and vexatious litigation.").

the federal case, as well as Mr. Meadows, who successfully obtained a reversal in the Appellate Division against J&J. *See Carl v. Johnson & Johnson*, 464 N.J. Super. 446 (App. Div. 2020) (reversing trial court and concluding that plaintiffs' experts' methodologies were sound and there was sufficient evidence to support claims that Baby Powder causes ovarian cancer). It is fair to assume all counsel of record for Plaintiffs in this case and in the other cases nationwide will face similar baseless disqualification motions if their opposition reaches a sufficient level of dissatisfaction to J&J. The Court should not countenance J&J's use of the judicial system to inflict more harm on tort victims and their attorneys.

J&J's pattern, practice, and course of dealing of improper conduct is well-documented. For example:

1. *See* (Ra288) ("Weil Gotshal's Lawyers Tough Tactics Sealed J&J Talc Win," Bill Weichart, Law 360 (Oct. 31, 2018);;

2. *See* (Ra295) ("Johnson & Johnson Uses 'Project Plato' to Potentially Avoid Talcum Power Payouts," Clay Hodges, North Carolina Product Liability Lawyer Blog (Feb. 9, 2022) (stating Step 1 of J&J's strategy is to obtain an automatic stay by filing bankruptcy); and

3. The Third Circuit twice rejected J&J's efforts to dump all of its liabilities into an underfunded Texas entity (LTL). *See In re LTL Mgmt. LLC*, 2024 WL 3540467, at *1 (3d Cir. July 25, 2024); *LTL Mgmt., LLC v. Those Parties Listed on Appendix A To Complaint (In re LTL Mgmt., LLC),* 58 F.4th 738 (3d Cir. 2023);—even though J&J was (and still is) not in demonstrable financial distress.

These are just some examples, but J&J's counsel have moved to disqualify witnesses,[15] to attack counsel, and have been admonished for their overly aggressive tactics against not merely plaintiffs but repeatedly against the plaintiffs' lawyers.[16] For years J&J's strategy has been to attack lawyers and witnesses that stand up against them. J&J's claims are simply not credible. The company was once revered and trusted. Not anymore.

CONCLUSION

J&J clearly articulated that it could identify no ethical violations and floated every ethics trial balloon conceivable. The constantly morphing muck slinging reflects upon the frail remaining credibility J&J has after now three failed bankruptcy efforts. As the trial court found, J&J has no credible evidence to justify the "severe remedy of disqualification." Beasley Allen never represented J&J.

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[15] See Ra303 ("In Talc Defense, Johnson & Johnson Sues 4 Doctors Over Their 'Junk Litigation Opinions,'" Kevin Dunleavy, Pharma, (July 14, 2023) (J&J sues Richard Lawrence Kradin, Theresa Swain Emory, John Coultger Maddox, and Dr. Jacqueline Miriam Moline because they provided opinions adverse to J&J)); *See* Ra308 (Dupuy Orthopaedics (a J&J subsidiary) moved to disqualify Dr. Dana Medlin in North Carolina, *Richard H. Weatherly v. Depuy Orthopaedics*, Case No. 1:23-cv-00134-(LCB)/(JEP) (filed July 20, 2023)); *See* Ra305 ("J&J Subsidiary Sues More Talc Researchers," Rebecca Trager, Chemistry World, (July 18, 2023) (J&J sues pathologists Theresa Emory, John Maddox, and Richard Kardin because they published a scientific study on talc-based cancers that J&J viewed to be adverse to its interests).

[16] In the *Barden v. Brennatag* trial tried before Judge Viscomi), the Court had to admonish J&J's counsel against personally attacking plaintiffs' lawyers in order to prejudice the jury in favor of J&J: Ra430 (5T45:12-13); *See* Ra291

Beasley Allen never retained Mr. Conlan. For over 20 years the Supreme Court of New Jersey has repeatedly rejected the "appearance of impropriety" standard. J&J repeatedly played a shell game with privilege—attacking Beasley Allen for engaging in court-ordered mediation (and necessarily invoking sacrosanct mediation privilege) and at the same time shielding exculpatory documents and evidence based on dubious claims of attorney-client privilege. The Court should affirm the trial court's findings of fact and conclusions because both the law and record support the trial court's order and opinion, and the matter should proceed to trial with Beasley Allen acting as the champion of the clients who chose it.

Respectfully submitted,

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Attorneys for Respondent Beasley Allen

/s/ Jeffrey M. Pollock
Jeffrey M. Pollock

Dated: May 22, 2025

IN RE TALC-BASED POWDER PRODUCTS LITIGATION	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-000215-24 Civil Action ON APPEAL FROM AN INTERLOCUTORY DECISION OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY Master Docket No. ATL-L-2648-15 MCL Case No. 300 SAT BELOW: Hon. John C. Porto, J.S.C.

DEFENDANTS-APPELLANTS JOHNSON & JOHNSON'S AND RED RIVER TALC LLC'S REPLY BRIEF IN SUPPORT OF APPEAL

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INTRODUCTION

This is not a hard case. For nearly two years, Johnson & Johnson was represented in this litigation by James Conlan. From that representation, during which he was part of the core outside counsel team working with J&J and billed 1,600 hours for his time, Conlan learned J&J's most important confidences, including its settlement tolerance and strategies. Eventually, Conlan stopped representing J&J and started his own company whose business model involved acquiring mass tort liabilities. After J&J rebuffed Conlan's efforts to acquire its talc liabilities, Conlan reached out to plaintiffs' counsel. But instead of turning Conlan down—as any reasonable lawyer would do—Andy Birchfield and the Beasley Allen firm (secretly) included Conlan as part of their mediation team—and then "collaborated on a settlement proposal." Da031 (quotations omitted).

None of these facts is disputed. And they self-evidently require disqualification: An attorney for one party cannot later collaborate with the other side in the same matter involving the same claims and issues. As J&J's former lawyer, Conlan had an obvious conflict of interest that should have precluded him from working opposite his former client. And Beasley Allen knew that. It knew Conlan represented J&J, yet it invited him to participate in a mediation adverse to his former client and repeatedly approved that participation. Beasley Allen's conduct violates Rule 5.3(c), which is specifically designed to hold

lawyers accountable for the unethical conduct of nonlawyers. And as J&J demonstrated in its opening brief, that was not the firm's only RPC violation.

Beasley Allen offers no cogent account of how its conduct can be squared with New Jersey's RPCs. In fact, it barely engages with the facts or law. Rather, Beasley Allen's strategy on appeal appears to be twofold: (1) point fingers at J&J; and (2) address conduct that was *not* the basis for J&J's disqualification motion. But there should be no confusion. It is unethical for a lawyer on one side of the "v" to collaborate in the same litigation with lawyers on the other side. Beasley Allen should be disqualified and the decision below reversed.

ARGUMENT

I. BEASLEY ALLEN VIOLATED RULE 5.3(c) (DA032)

As relevant here, Rule 5.3(c) holds a lawyer responsible for the conduct of a nonlawyer where: (1) the lawyer "associated" with the nonlawyer; (2) the nonlawyer engaged in conduct "that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer"; and (3) the lawyer "ratified" the nonlawyer's conduct. RPC 5.3(c). Each element is satisfied. *See* Db23-34.

1. Associated. The word "associate" has a well-settled meaning: It means to join in common purpose or action. *See* Db24-25. The undisputed facts found by the trial court show that Beasley Allen joined in common purpose and action with Conlan by adding him to the talc plaintiffs' mediation team and partnering

with him to develop a settlement proposal from which they all stood to benefit, to the detriment of J&J. *See* Db25-27.

Beasley Allen repeatedly suggests that it did not "associate" with Conlan because their interests were "adverse." Pb2, Pb19, Pb41. Beasley Allen is wrong. Their interests were perfectly aligned. *See* Db13-14, Db26-27; *see also* Da083 (finding Legacy prepared documents "for the benefit of and at the request of" plaintiffs' counsel); Da084 ("Legacy/Conl[a]n … worked to provide plaintiffs with the information plaintiffs requested and needed for the J&J mediation."). Beasley Allen wanted to settle on terms adverse to J&J's preferred resolution in both amount and procedure. So did Conlan. He would only make money by effecting a settlement through his company. *See* Db13-14; Da031. Their interests would "become adverse" *only if* J&J accepted the Legacy/Birchfield settlement proposal (because Conlan's company would then hold J&J's liabilities). Pb41. But that never happened. Beasley Allen and Conlan joined in common purpose and action *during* their collaboration, with their interests aligned adverse to J&J.

For similar reasons, the Court should also reject Beasley Allen's suggestion that it did not "associate" with Conlan because it dealt with him "at arm's length." Pb24-25, Pb39. Parties holding each other at arm's length do not share their privileged and confidential work product—which Beasley Allen indisputably did with Conlan. *See* Db15-16. More important, there is no "arm's

length" exception to Rule 5.3. As the Restatement makes clear, parties can "associate" even when the relationship is strictly professional. *See* Db25. For example, lawyers "associate" when one consults another on a specialized issue. *Id*. That is not materially different than Beasley Allen's suggestion that it consulted Conlan because of his expertise in structural optimization. (That Beasley Allen chose J&J's former lawyer, and not anyone else providing the same service, casts serious doubt on the firm's claim. *See* Db14.)

Finally, the Court can reject out of hand Beasley Allen's argument that it did not "associate" with Conlan because he did not act as the firm's "investigator, attorney, employee, consultant, or agent." Pb37; *see also* Pb21-22. That is not what "associated" means—a principal-agent relationship of that sort is not required. If the Rule's framers wanted to require such a relationship, they would have said so. Beasley Allen's interpretation of "associated," by contrast, would render the term superfluous. Rule 5.3 covers nonlawyers "employed or retained by or associated with a lawyer[.]" The relationships Beasley Allen argues are required for an association are already covered by employment (attorney, employee) and retention (investigator, consultant, agent), so "associated" would do no work.

None of the sources cited by Beasley Allen supports its argument. *In re Complaint of PMD Enterprises, Inc.*, 215 F. Supp. 2d 519, 529 (D.N.J. 2002),

states that an agency relationship is *sufficient* to trigger Rule 5.3; but that does not support Beasley Allen's argument that such a relationship is *necessary*. And the treatise cited by Beasley Allen merely quotes from the official commentary to the Rule, *see* Pb37, which makes clear that it applies to outside vendors. Thus, even accepting if Legacy was merely a vendor offering structural optimization services, Rule 5.3 would still apply. Of course, that contention is impossible to square with the fact that Beasley Allen brought Conlan on board to work as a mediation partner and develop a settlement proposal. Da077 n.2.

2. Conduct that would violate an RPC if engaged in by a lawyer. Like the trial court, Beasley Allen insists that it did no wrong because Conlan did not violate Rule 1.9(a). *See* Pb18-21. Rule 1.9(a), Beasley Allen argues, applies only to lawyers who represent clients, and Conlan was not a lawyer—even though still licensed to practice, Ra281 ¶ 6—when he worked with his former client's adversary, adverse to J&J, on a mediation. Pb19-20. That does not matter, for the obvious reason that Rule 5.3(c) is specifically applicable to "nonlawyer[s]." RPC 5.3; *see* Db30-33.

Thus, J&J was not required to prove that Conlan violated Rule 1.9(a) in his capacity as an "independent businessman." Pb19. It was required to prove that Conlan's conduct would have violated Rule 1.9(a) if Conlan had been a lawyer. RPC 5.3(c). And everyone, including Beasley Allen, agrees that Conlan

would have violated Rule 1.9(a) if he had been a practicing lawyer when collaborating on a settlement proposal in a mediation adverse to his former client. Db18-19, Db30-31. That is true regardless of whether Conlan was acting to further plaintiffs' interests or his business's interests during the mediation, because both sets of interests were "adverse" to J&J at the time: Beasley Allen and Conlan wanted the highest possible settlement figure; J&J wanted the lowest. *See* Db30-31; *supra* at 3.[1]

Beasley Allen suggests that Conlan would not have violated Rule 1.9(a) if he had been acting as a lawyer because he put J&J on "notice" that he would meet with plaintiffs' firms. Pb38. But notice is not "informed consent confirmed in writing," which is what RPC 1.9(a) requires. Besides, it is manifestly unreasonable to construe Conlan's proposal as "notice." *See* Db13 n.4. Conlan's email set forth a "proposal," pursuant to which J&J would agree (among other things) that Legacy could "negotiate settlements with interested asbestos-plaintiff law firms." Ra3; *see also* Da012. But J&J never accepted the proposal.

3. Ratification. Finally, Beasley Allen argues that it did not "ratify" Conlan's conduct. Pb24, Pb38-39. But its argument consists of transparent

[1] Beasley Allen's suggestion that it was okay to collaborate on a settlement with J&J's former lawyer because that settlement, in the firm's opinion, "would actually be in the best interest of J&J," Pb19, is absurd—and revealing. Ethics rules do not give way when one party thinks prohibited conduct would be in the other side's "best interest."

misdirection. The "conduct" that would have violated Rule 1.9(a) if Conlan had been a lawyer—i.e., the conduct that matters for purposes of Rule 5.3(c)—was Conlan's "collaboration" with Beasley Allen in a mediation adverse to his former client. Beasley Allen ratified *that* conduct. As it admits, it invited Conlan to join plaintiffs' mediation efforts and approved his participation. Pb23, Pb37 ("Birchfield sought to include Legacy in the mediation process"); *see* Db33-34.

Beasley Allen responds by pointing to *different* conduct. The firm asserts that it did not violate Rule 5.3(c) because it claims it did not ratify the so-called "Legacy Proposal." Pb38 (arguing Beasley Allen "could not have ordered, ratified, or supervised the Legacy Proposal"). But that is not the basis for J&J's motion. Likewise for the "settlement matrix" that Beasley Allen supposedly shared with Legacy and that Legacy attached to its proposal to J&J. Pb24, Pb38. The Legacy Proposal and attached matrix are simply irrelevant to Rule 5.3(c). That said, the so-called Legacy Proposal was clearly the product of the secret Beasley Allen-Conlan collaboration during the LTL-2 mediation, as evidenced by their work to develop a term sheet, Db13-19, and Conlan's ultimate revelation that he had been working with Birchfield when he offered to bring Birchfield to meet with J&J to walk through the proposal, Da039.

Curiously, Beasley Allen contends that "J&J's brief does not discuss RPC 5.3(c)(1)-(3)'s specific requirements that Beasley Allen must … order or ratify

Conlan's conduct." Pb40. But it did. J&J dedicated an entire Section of its brief to ratification. *See* Db Part I.C. Beasley Allen offers no meaningful response.[2]

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Beasley Allen's brief also raises several tangential issues. Although they are not material to disqualification, J&J is compelled to set the record straight.

First, Beasley Allen repeatedly insinuates (if not argues outright) that it invited Conlan to collaborate in mediation at the direction of Judge Kaplan. *See* Pb7, Pb22. But Judge Kaplan merely ordered the parties to mediate during the LTL-2 bankruptcy. *See In re: LTL Mgmt., LLC*, No. 23-12825-MBK, ECF No. 481 ¶ 3 (Bankr. D.N.J. May 10, 2023) ("referr[ing]" the parties to mediation). Judge Kaplan obviously did not order Beasley Allen to collaborate with J&J's former lawyer. It is disingenuous for Beasley Allen to invoke Judge Kaplan's mediation order as cover for that misconduct. And it is especially disingenuous for Beasley Allen to suggest that the mediators "approv[ed]" of Conlan's participation, Pb27, when Beasley Allen never informed them that Conlan had represented J&J in the talc litigation, *see* Db19.

[2] Beasley Allen asserts that the trial court held that the application of Rule 5.3 would "resurrect the appearance of impropriety standard." Pb25, Pb39-40 (citing Da027-029, Da032). The trial court did no such thing. Violating Rule 5.3 is a violation of the RPCs. What the trial court held was that the "presumption [of shared confidences] is no longer valid in New Jersey" because it was "based on an appearance of impropriety." Da027. The presumption of shared confidences is irrelevant to Rule 5.3; it matters here for purposes of Rule 1.6.

Second, Beasley Allen asserts that J&J "failed to participate in the mediation process." Pb23, Pb37. But Beasley Allen's conduct violated Rule 5.3 regardless of whether J&J participated in mediation. The RPCs forbid Beasley Allen from collaborating with J&J's former lawyer on the same matter—full stop. Beasley Allen suggests that if J&J had mediated, it would have discovered sooner that Beasley Allen was "working together" with Conlan. T3, 76:3. But if J&J had discovered the collaboration sooner, it simply would have moved to disqualify Beasley Allen sooner. *When* J&J discovered that Beasley Allen violated Rule 5.3 is irrelevant to *whether* Beasley Allen violated Rule 5.3.

Because J&J's participation in mediation is not relevant to disqualification, the trial court made no pertinent findings. Nonetheless, it simply is not true that J&J "failed to participate in the mediation process." Pb23; *see* T4, 71:3-72:12, 120:14-121:3; *see also id*. at 19:2-20:2.[3]

Finally, Beasley Allen accuses J&J of wielding the mediation privilege "as a sword." Pb8 n.8, Pb26, Pb28, Pb31. That is doublespeak. The basis for

[3] Beasley Allen cites (Pb7) the Special Master's order finding that Beasley Allen and Conlan collaborated, Da077-080. That order does not remotely suggest J&J failed to participate in mediation. And it undermines Beasley Allen's theory. It shows that Beasley Allen started collaborating with Conlan before mediation was ordered (and continued after), Da079, and rejected "plaintiffs' claims of unsavory J&J conduct a[s] misguided, misplaced and off-base," Da077-078 n.2. Beasley Allen also cites Birchfield's offhand remark that J&J "really didn't engage in the mediation," Pb27, but he never explained what that meant. If he meant J&J failed to participate, his testimony was false.

disqualification is not Beasley Allen's invocation of the mediation privilege. Still, it is patently unfair for Beasley Allen to use the mediation privilege to shield its communications with Conlan, yet at the same time argue that J&J offered insufficient evidence that Conlan communicated J&J's confidences to Beasley Allen. And contrary to Beasley Allen's argument, whether Conlan shared J&J's confidences is not "the sole RPC inquiry here." Pb42. Rule 5.3(c) does not require proof of shared confidences. Neither do Rule 3.3(a)(5), 8.4(c), or 8.4(d). Shared confidences are relevant only to Rule 1.6.

II. BEASLEY ALLEN IS RESPONSIBLE FOR CONLAN'S VIOLATION OF RULE 1.6 (DA030-DA031)

Conlan and Beasley Allen entered into a relationship, which the firm contends is privileged, during the LTL-2 mediation. In these circumstances, the law presumes what the relationship suggests: that confidences were shared. Db35-39. Beasley Allen insists that New Jersey's longstanding presumption of shared confidences was abrogated in 2004 by the elimination of the appearance of impropriety standard from Rule 1.7(c). But neither Beasley Allen nor the trial court has ever explained why that would be so.

As J&J demonstrated, the presumption of shared confidences does not police perceived impropriety or implement the policies embodied in former Rule 1.7(c). Db35-36. Rather, it is an evidentiary presumption grounded in the policies justifying many presumptions—likelihood from fact A (here, a

confidential relationship between a client's former lawyer and the client's adversary) that fact B is true (here, shared confidences), and the practical difficulty of requiring the movant to prove what third parties said to each other behind closed doors—a difficulty particularly acute here, where Beasley Allen has invoked mediation privilege to keep its communications with Conlan from J&J. *See* Db36-37. Likewise, New Jersey's elimination of the appearance of impropriety standard casts no doubt on the presumption. The appearance of impropriety standard fell because it was vague. Presumptions are not—including presumptions currently reflected in the RPCs, like the presumptions embodied in Rules 1.9 and 1.10. Db38-39; *see* Da179-80 (*Murphy v. Simmons*, 2008 WL 65174, at *14, 18-19 (D.N.J. Jan. 3, 2008) (applying presumption after appearance of impropriety was "eliminated")).

Contrary to Beasley Allen's argument, applying the presumption does not mean that the court "presume[s]" an ethics violation. Pb42. The law presumes a *fact*—i.e., that confidences were shared. Whether there is an ethical violation turns on a host of other factors, including whether the presumption was rebutted (it wasn't) and what ethics rule is in play. Under Rule 1.6, for example, sharing confidences is not presumptively unethical. An attorney is allowed to share confidences when necessary (RPC 1.6(b)) or authorized (RPC 1.6(a)). But the presumption is not limited to Rule 1.6 cases precisely because it's a presumption

of fact, not a presumption of a legal violation. *See Reardon v. Marlayne, Inc.*, 83 N.J. 460, 473 (1980) (applying presumption to precursor to Rule 1.9(a)).

Presumption aside, Beasley Allen is wrong about the record. Neither Beasley Allen nor the trial court grappled with the critical facts surrounding the collaboration on the Legacy/Birchfield settlement proposal in the LTL-2 mediation. *See* Db39-41. In that collaboration, Conlan had an opportunity and motive to share J&J's confidences. Again, it is undisputed that he would make money only if Beasley Allen offered a settlement J&J would be willing to accept, so he had every interest in sharing J&J's valuations and settlement tolerance. The circumstantial evidence confirms he followed through. Legacy and Beasley Allen went back and forth on the proposal for weeks, as it swelled in length with edits. Beasley Allen would have this Court believe those edits did not substantively reflect Conlan's knowledge from his representation of J&J. But judges are not required to check their common sense at the door. It would have taken superhuman powers of compartmentalization and self-restraint for Conlan not to reveal J&J's settlement tolerance, where Conlan stood to make millions of dollars only if J&J agreed to settle.

The upshot of Beasley Allen's argument and the trial court's reasoning is that J&J was required to identify the confidences Conlan shared with Beasley Allen. But that is not required and adopting such a novel rule would create an

unworkable standard. The law cannot require proof of what parties said to each other in secret. Here, for instance, it would have been impossible for J&J to pinpoint which confidences Conlan shared because Beasley Allen used the mediation privilege to shield its communications. *Supra* at 10. Equally important, the law does not demand direct evidence. As in all matters, "circumstantial evidence" is sufficient. *Twenty-First Cent. Rail Corp. v. N.J. Transit Corp.*, 419 N.J. Super. 343, 357 (App. Div. 2011), *rev'd on other grounds*, 210 N.J. 264 (2012). And in this case it is powerful. Conlan's and Beasley Allen's conclusory and self-serving denials, by contrast, are not. *See, e.g.*, *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 584 (D.N.J. 1994).

III. BEASLEY ALLEN VIOLATED RULES 3.3 AND 8.4 (DA006, DA020)

The trial court altogether failed to address J&J's arguments for disqualification under Rules 3.3 and 8.4(c)-(d), likely because it was looking for a "'smoking gun' of any disclosure of privileged and confidential information." Da006. But a "smoking gun" is not required under any ethics rule, much less Rules 3.3 and 8.4. Those rules prohibit (among other things) material nondisclosures, like Beasley Allen's failure disclose in sworn certifications that it collaborated with Conlan on a settlement proposal in mediation. Db46-49. The purpose of that nondisclosure is obvious. Beasley Allen was attempting to say

just enough—and no more—to avoid disqualification, in the hopes that no one would ever discover the full extent of its egregious ethical breach.

Beasley Allen says almost nothing in its defense. Its argument consists of one conclusory sentence and a footnote. Beasley Allen states that "[a]t no point was Mr. Birchfield's testimony evasive or misleading." Pb31. Birchfield's sworn certifications speak for themselves. They do not disclose the extent of Beasley Allen's collaboration with Conlan—or even the fact that they collaborated on a settlement proposal during mediation at all.[4] Meanwhile, the footnote argues that Birchfield did not say more because the only "significant" fact was "the first date of contact." Pb31 n.8. Not only is that post-hoc justification unsupported by the certifications, it simply is not true. The full extent of Birchfield's relationship with Conlan is obviously "significant" to disqualification, which is why Birchfield left that information out.

Instead of attempting to justify its deceptive certifications, Beasley Allen accuses J&J of misconduct. For instance, Beasley Allen faults J&J for submitting redacted timesheets and for citing to Beasley Allen's privilege log. Off base as these accusations are, they are completely irrelevant to whether

[4] *See* Da052 ¶ 7 (asserting only that "[a]t no point in time has Mr. Conlan ever been a member, partner, employee, or counsel at Beasley Allen"); Da063 ¶¶ 17-18 (disclosing only that Birchfield's "first contact with anyone at Legacy was on April 27, 2023," and that "[t]he first meeting … was on May 2, 2023").

Beasley Allen told deceptive half-truths to hide its collaboration with Conlan from the court. Likewise, Beasley Allen accuses J&J of "leaking" documents—and then complains that "neither Mr. Haas nor Mr. Murdica's declarations provided any specific factual or legal basis to disqualify Beasley Allen." Pb32. Beasley Allen is wrong. But a point-for-point refutation would be a waste of time. None of this is relevant to whether Beasley Allen was truthful to the court.

* * *

Unable to defend its conduct, Beasley Allen makes much of the fact that J&J stated at the beginning of this case that "no Rule of Professional Conduct explicitly speaks to the precise situation here." Pb1. But Beasley Allen omits that J&J initially moved for a show-cause order because it did not know the full extent of Beasley Allen's engagement with Conlan. At the time, J&J could not, for example, have argued that Beasley Allen's collaboration with Conlan during the LTL-2 mediation violated Rule 5.3(c) because Beasley Allen was still hiding that fact. Discovery has since confirmed *multiple* RPC violations. It was unethical for Beasley Allen to collaborate with J&J's former lawyer in this case—and then attempt to conceal that collaboration in sworn certifications. Beasley Allen should be disqualified.

CONCLUSION

The trial court's decision should be reversed.

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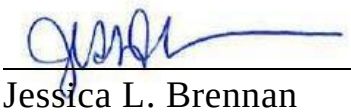

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