

FILED

JAN 31 2024

PREPARED BY THE COURT

JOHN C. PORTO, P.J.Cv.

IN RE TALC BASED POWDER PRODUCTS
LITIGATIONSUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ATLANTIC
COUNTYDocket No. ATL-L-2648-15
Case No.: 300

CIVIL ACTION

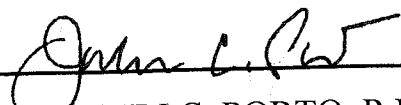
**INITIAL ORDER FOR AN
EVIDENTIARY HEARING**

THIS MATTER being opened to the Court by Susan M. Sharko, Esq., of Faegre Drinker Biddle & Reath LLP, attorneys for Defendant, Johnson & Johnson, for an Order granting Defendants Motion for Order to Show Cause Why Beasley Allen Should Not Be Disqualified from this Litigation, and for the reasons stated in the accompanying Memorandum of Decision;

IT IS, on this 31st day of January, 2024, **ORDERED**:

1. An evidentiary hearing is required to determine if the Defendants met their burden regarding the disqualification of Beasley Allen.
2. All counsel are directed to meet and confer regarding the availability and scheduling for the plenary hearing including all necessary witnesses.
3. A conference via ZOOM regarding the logistics and further scheduling of the evidentiary hearing is scheduled for the week of February 12, 2024.

IT IS FURTHER ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts.


HON. JOHN C. PORTO, P.J.Cv.

PREPARED BY THE COURT

IN RE TALC BASED POWDER
PRODUCTS LITIGATION

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
LAW DIVISION

Consolidated Docket No.: ATL-L-2648-15

MCL Case No.: 300

Civil Action

Initial Decision for Evidentiary Hearing

Decided on: January 31, 2024

Stephen D. Brody, Esquire, Pro Hac Vice
Attorney for Johnson & Johnson and LTL Management, LLC
O'Melveny & Myers, LLP

Susan M. Sharko, Esquire
Attorney for Johnson & Johnson and LTL Management, LLC
Faegre, Drinker, Biddle & Reath, LLC

Jeffery M. Pollock, Esquire
Michael W. Sabo, Esquire
Attorneys for Andy Birchfield and Beasley Allen
Fox Rothschild, LLP

Porto, P.J.Cv.

On December 8, 2023, Defendants', Johnson & Johnson's ("J&J") and LTL Management LLC (collectively, "Defendants") filed an Order to Show Cause seeking the disqualification of the law firm Beasley Allen Crow Methvin Portis & Miles, P.C. ("Beasley Allen") from this litigation.¹ This issue arises within the

¹ This court was informed by counsel that an identical motion was also filed in the United States District Court for the District of New Jersey.

context of the Multicounty Litigation (“MCL”) matter before this court where the cases are centered on allegations that ovarian cancer was allegedly caused by J&J’s talcum powder products. Beasley Allen represents a number of Plaintiffs in this MCL against the Defendants. Beasley Allen also opposed the Defendants’ bankruptcy filing in the federal courts.

In their brief, Defendants focus on a former J&J attorney, James F. Conlan (“Conlan”²), and outline certain actions purportedly taken after Conlan stopped his representation of J&J as a partner with the Faegre Drinker law firm (“Faegre Drinker”). While a partner at Faegre Drinker, Conlan worked with a team of other J&J attorneys and possesses confidential and privileged information of J&J. Based on purported post J&J actions, as described below, the Defendants argue the disqualification of Beasley Allen is warranted in this MCL litigation. Notably, according to Conlan, those post J&J activities do not include him acting in the capacity of an attorney, but Conlan remains authorized to practice law.

After leaving Faegre Drinker in 2022, Conlan co-founded a business venture called Legacy Liability Solutions LLC (“Legacy”) serving as Chief Executive Officer. In that capacity, Conlan contends he is not acting as an attorney or practicing law.³ However, according to the Defendants, Conlan “partnered” or “allied himself” with “the primary opponent of the LTL bankruptcy plan,” Beasley Allen, through one of their partners, Andy Birchfield, Esquire (“Birchfield”), to promote a proposed settlement of all talc claims that is adverse to J&J. According to the Defendants’ attorney, “[i]n Conlan, Birchfield sees a windfall for Beasley Allen—an opportunity

² The court’s use of the last names is for ease of reference only; no disrespect or familiarity is intended.

³ Conlan certified he “became a non-practicing lawyer. I am active and authorized to practice law, but I do not practice law and have no clients.”

to join forces with a lawyer who spent 1,600 hours representing J&J in the exact matter for which Birchfield seeks to undermine J&J's preferred resolution." Defendants further stated at oral argument they have no information that Beasley Allen put in place any types of screening or other measures to keep J&J's client confidences from being shared with attorneys that are working on this litigation.

Defendants' attorney argues "there is no question that Conlan possesses J&J's client confidences" and since Conlan is "working closely" with "J&J's current adversary" and "that action requires the disqualification of Beasley Allen from the talc litigation." According to Defendants, Beasley Allen now has access to J&J's "client confidences" that "will impact every aspect of the proceedings going forward...." In support of their motion to disqualify that law firm, Defendants cite RPC 4.4(b), RPC 1.9(b) and (c), RPC 1.10(b), RPC 1.18(b) and New Jersey Supreme Court Advisory Committee on Professional Ethics Opinion 680.⁴

On January 9, 2024, Beasley Allen filed their opposition and asserted a number of arguments disputing any basis for their disqualification. Specifically, Beasley Allen argued J&J failed to carry its "heavy burden" that Beasley Allen should be disqualified as a matter of law because in addition to there being no evidence that the law firm ever obtained J&J's confidential or privileged client information, Conlan is concededly not (and was never) an attorney at Beasley Allen. Beasley Allen's attorney posits the possible basis for J&J's motion is because Beasley Allen successfully fought for their clients in the Third Circuit regarding the bankruptcy dismissal.

⁴ At oral argument on January 17, 2024, Defendants' counsel stated in those cases where Beasley Allen is listed as counsel, plaintiffs are also represented by three other law firms.

In this MCL, Beasley Allen is involved with pending litigation representing many plaintiffs against J&J involving their talc products and the law firm has an economic interest and a client interest in this litigation. Beasley Allen's attorney argues Birchfield "has not received, disseminated or shared confidential information, including trial strategy, litigation strategies, settlement practices or proprietary information belonging to J&J." In that respect, Conlan "has never shared privileged or confidential information he obtained from any of his former clients (including J&J) with Mr. Birchfield or his firm Beasley Allen." Beasley Allen's attorney also addressed the relevant provisions of RPC 1.6, RPC 1.9, RPC 1.10 and RPC 4.4 and argued "there is zero evidence in this record that Mr. Conlan shared anything with Beasley Allen" and no basis for disqualification. Counsel further noted, since the "appearance of impropriety" is no longer the law, counsel argues the Defendants' argument must fail. Beasley Allen's attorney also contends that even J&J "doesn't believe that Mr. Conlan has acted inappropriately because they haven't pursued him here." "[T]hey have done nothing to prove that Mr. Conlan violated RPC 1.9, represents a party, [or] breached any confidentiality."

This court conducted oral argument on January 17, 2024, but also left the record open in case the court required any additional information or certifications needed for the disposition. On January 23, 2024, the court requested supplemental information from the Defendants and provided Beasley Allen with an opportunity to address any supplemental filing. Both parties provided supplemental information by way of additional certifications as did Conlan.

Discussion and Analysis

RPC's

The parties raised the following Rules of Professional conduct in their briefs and arguments in relevant part and as noted.

RPC 1.6 Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).

RPC 1.9 (b)(c) Duties to former clients.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person;
and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

RPC 1.10 Imputation of conflicts of interest: general rule.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

RPC 1.18 Prospective Client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).

RPC 4.4(b) Respect for Rights of Third Persons.

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

In 2006, the so-called “appearance of impropriety” was eliminated from the Rules of Professional Conduct. The New Jersey Supreme Court held, “the appearance of impropriety standard no longer retains any continued validity.” In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549, 552 (2006). An actual conflict must be found to exist and the burden is on the Defendants to establish the existence of an actual conflict.

The initial issue before this court is: whether the Defendants met their burden for the disqualification of Beasley Allen in this MCL based on an actual conflict.

In reviewing a motion for the disqualification of counsel for an adversary, based on the RPCs, courts are required to “balance competing interests, weighing the need to maintain the highest standards of the profession against a client’s right freely to choose his counsel.” Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 273-74 (2012) (quoting Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 218 (1988)). “[T]o strike that balance fairly, courts are required to recognize and to consider that ‘a person’s right to retain counsel of his or her choice is limited in that there is no right to demand to be represented by an attorney disqualified because of an ethical requirement.’” Id. at 274 (citations omitted). “Disqualification of counsel is a harsh discretionary remedy which must be used sparingly.” Dental Health Assocs. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 192

(App. Div. 2022). Additionally, disqualification motions are “viewed skeptically in light of their potential abuse to secure tactical advantage.” Escobar v. Mazie, 460 N.J. Super. 520, 526 (App. Div. 2019) (citing Dewey, 109 N.J. at 218).

The New Jersey Supreme Court in City of Atlantic City v. Trupos, 201 N.J. 447 (2010) provided the analytical framework for courts confronted with addressing the issue of whether to disqualify attorneys pursuant to RPC 1.9. In writing for the Court, Justice Rivera-Soto stated, “the initial burden of production” for disqualification “must be borne by the party seeking disqualification.” Id. at 462 (citations omitted). “If that burden of production or of going-forward is met, the burden shifts to the attorneys sought to be disqualified to demonstrate that the matter or matters in which he or they represented the former client are not the same or substantially related to the controversy in which the disqualification motion is brought.” Id. at 462-63. (citations omitted.). “[T]he burden of persuasion on all elements under RPC 1.9(a) remains with the moving party, as it ‘bears the burden of proving that disqualification is justified.’” Id. at 463. (citations omitted.). The Court further stated:

In practice, [s]uch a motion should ordinarily be decided on the affidavits and documentary evidence submitted, and an evidentiary hearing should be held only when the court cannot with confidence decide the issue on the basis of the information contained in those papers, as, for instance, when despite that information there remain gaps that must be filled before a factfinder can with a sense of assurance render a determination, or when there looms a question of witness credibility. (Emphasis added.)
[Id. at 463 quoting Dewey, 109 N.J. at 222]

Additionally, this process was reaffirmed in O Builders & Associates, Inc. v. Yuna Corp. of NJ, 206 N.J. 109 (2011). There, the Court held

[D]isqualification of counsel . . . will occur only when the movant, generally well-grounded in the written record, satisfies its burden of proving that the matter of the consultation and the matter then adverse are “the same or substantially related” and . . . that the information the lawyer received during the consultation is “significantly harmful” to the former prospective client in the now adverse matter.

[Id. at 127-28.]

The former client must make more than “bald and unsubstantiated assertions” that confidential information will be used. Id. at 129.

Based on this case law, an evidentiary hearing is not forbidden, but it should be the last resort.

To date, in an effort to avoid the need for an evidentiary hearing, this court followed the framework set forth in Trupos. The court received Declarations and Certifications from the Defendants and from Beasley Allen regarding their respective positions as well as from Conlan. Last week, this court received supplemental Certifications from the Defendants, on January 29, 2024, this court received a supplemental brief and supplemental Certification from Beasley Allen. Today, the court also received an additional Certification from Conlan.

In brief and for context only, the court highlights a few of the material factual disputes excerpted from the certifications filed.

The Defendants focus on Conlan and his work as an attorney for J&J up through his departure from Faegre Drinker in or about February 2022, that included Conlan’s participation as an attorney for J&J “in strategic discussions... evaluat[ing] the following options for resolving this litigation...:”

- (1) “structural optimization” for resolution of claims through the tort system; (2) an asbestos trust; (3) use of a

settlement class action procedure; (4) inventory settlements with individual plaintiffs' attorneys; (5) settlement through the Imerys bankruptcy; and (6) a bankruptcy filing by LTL Management LLC. As counsel for J&J, Mr. Conlan participated in the evaluation of the strengths and weaknesses of all of these options as potential strategies for resolution of present and future talc liabilities, including the claims in this New Jersey proceeding.

[Certification of Erik Haas, pg. 4 1/25/24]

Defendants also assert the following:

Notably, in the Spring of 2021, Mr. Conlan provided extensive advice to me and my colleagues, and engaged in negotiations on our behalf, with respect to a settlement proposal advanced by Mr. Birchfield. As Mr. Birchfield testified in his deposition taken in the LTL bankruptcy, that settlement contemplated the resolution of the ovarian talc claims for \$4.2 billion. Mr. Conlan conferred with us regarding the strengths and weaknesses of utilizing a "structural optimization" strategy in lieu of the settlement format Mr. Birchfield proposed at that time.

[Ibid.]

Since Conlan is now CEO of Legacy, the Defendants argue Conlan still possesses confidential and privileged J&J information and shared that information with Birchfield to come up with a current settlement strategy for the talc ovarian cancer cases.

So, according to the Defendants, their allegations of the RPC violations arise out of the same case, but unlike in the facts in Trupos, and Twenty-First Century Rail, Conlan is not undertaking the representation of any adverse party or as an

attorney in the MCL or otherwise engaging in successive representation. See also, Twenty-First Century Rail Corp., 210 N.J. 264.

Beasley Allen addressed the Defendants' contentions in Birchfield's initial and supplemental Certifications. In the recent Certification, Birchfield details his efforts as the "point person for the ovarian cancer leadership team" in the Bankruptcy case that was involved in the "estimated liability process"⁵. Birchfield also certified after the Third Circuit's dismissal of LTL's Bankruptcy case, he "along with the plaintiff leadership team, prepared a settlement proposal substantially similar to the proposal that is discussed as part of the Legacy proposal that J&J provided to the Court. Legacy had no involvement in the development of the settlement proposal"⁶. Birchfield certified his "first contact with anyone at Legacy [was]... on April 27, 2023 and that was a call..."⁷ His first meeting "with Legacy personnel was on May 2, 2023"⁸. Birchfield also certified to having an "interaction with Conlan"⁹ after May 2, 2023. Birchfield certified,

[he], along with [his] partners at Beasley Allen, had extensive knowledge regarding the talc claims, the strengths and weaknesses of claims, the values of claims, J&J approaches to settlement and J&J strategies. This knowledge did not come from inside information but years of experience in every aspect of the litigation.

[Certification of Andy D. Birchfield, pg. 4, 1/29/24]

According to Birchfield's Certifications, Conlan was "neither retained by Beasley Allen in any capacity"¹⁰. Birchfield also certified to not having any "personal

⁵ Certification of Andy D. Birchfield, pg. 3, 1/29/24.

⁶ Ibid.

⁷ Id. at pg. 4.

⁸ Ibid.

⁹ Id. at pg. 5.

¹⁰ Id. at pg. 6.

knowledge of Mr. Conlan's work with or on behalf of J&J. He has never confided in either me or Beasley Allen about his work, advice or legal analysis from his work with J&J¹¹." Birchfield also denies all other contentions or accusations leveled by the Defendants in both of his Certifications filed in connection with this Order to show Cause. In Birchfield's most recent Certification, he also stated, "[t]he arc of the litigation has advanced substantially and the landscape is materially different from the time Mr. Conlan ceased work for J&J¹²."

In Conlan's Certification, he details his professional experience and that "[he] pioneered structural optimization during [his] thirty-two-year career at Sidley Austin, and long before [he] represented J&J¹³." Conlan certified, "structural optimization and disaffiliation structures, precedents and transactions, are 'not' confidential, predate substantially [his] representation of J&J, and [his] knowledge of same did not emanate in any respect from J&J¹⁴." Conlan also provided an explanation of how the Legacy proposal would work in in the talc liability cases¹⁵.

An aspect that is integral to the disposition of this motion is the fact that although Conlan is not representing any client, he remains authorized to practice law. "A lawyer shall not reveal information relating to the representation of a client...." See RPC 1.6(a). "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known...." See RPC 1.9(2)(c).

¹¹ Id. at pg. 5.

¹² Ibid.

¹³ Certification of James F. Conlan, pgs. 1-2, dated 1/29/24.

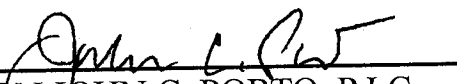
¹⁴ Id. at pg. 2.

¹⁵ Id. at pg. 4.

In addition to the analytical framework outlined by the Supreme Court in Trupos, fundamentally, this court finds there are genuine and bona fide facts that are disputed in the Certifications. Based on the conflicting factual information provided by all parties, this court finds that it cannot confidently decide this issue on the basis of the information contained in the papers. Therefore, the court finds that an evidentiary hearing is necessary to determine witness credibility and if the Defendants met their burden regarding disqualification of Beasley Allen.

This court acknowledges that an attorney's disqualification "is a harsh discretionary remedy" and it "must be used sparingly." Dental Health Assocs., 471 N.J. Super. at 192. Therefore, in order for this court to discharge its responsibility under the case law, an evidentiary hearing is required and, at a minimum, the testimony of Mr. Conlan and Mr. Birchfield is required. However, the court will explore with counsel if the testimony of anyone else is necessary for the disposition of this motion.

All counsel are directed to meet and confer regarding the availability and scheduling for the plenary hearing. If all counsel agrees, the plenary hearing may be conducted via ZOOM. The court finds that a conference should be scheduled and is looking at the week of February 12, 2024 for counsel's availability.


HON JOHN C. PORTO, P.J.Cv.

Date: January 31, 2024