LAW OFFICES OF GEOFFREY D. MUELLER, LLC
Geoffrey D. Mueller, Esq. (Attorney ID No.: 035262006)
366 Kinderkamack Road
Westwood, New Jersey 07675
Phone: (201) 569-2533
Attorneys for Appellants/Interested Parties, Frank Cicerale and Vally Cicerale, individually and as Co-Executors of the Estate of Agueda Medeiros Mesce, deceased

In the Matter of the Estate of AGUEDA MEDEIROS MESCE, Deceased.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3454-23 CIVIL ACTION ON LEAVE TO APPEAL FROM MAY 31, 2024 ORDER DISQUALIFYING COUNSEL SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART SUSSEX COUNTY DOCKET NO.: SSX- P-176-23 Sat Below: Hon. Frank J. DeAngelis, P.J.Ch.

BRIEF AND SUPPLEMENTAL APPENDIX IN SUPPORT OF APPELLANTS/ INTERESTED PARTIES' APPEAL OF INTERLOCUTORY ORDER

Geoffrey D. Mueller, Esq.
gmueller@gdm-law.com
Of Counsel and on the Brief

Peter E. Mueller, Esq.
ID No. 027671981
pmueller@gdm-law.com
On the Brief

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PRELIMINARY STATEMENT

Facing the prospect of having not to only overturn one Will, but two, petitioners (respondents on appeal), John Karn, Joan Karn, Janis Knoll, Joseph Karn, Jeffrey Karn, Thomas J.A. Mesce, Lidia Quental, Richard Tavares, Christine Hammell, George Tavares, Roberto Amaral Jorge, Mary Rubino, Carolyn Mesce, and James M. Mesce (collectively, "petitioners") turned to a desperate and disfavored tactic: moving to disqualify The Law Offices of Geoffrey D. Mueller, LLC ("Mueller Firm") as counsel for Interested Parties, Frank Cicerale and Vally Cicerale, individually and as Co-Executors of the Estate of Augeda Medeiros Mesce, deceased (collectively, "appellants"). Specifically, petitioners sought to invalidate the Last Will and Testament of Augeda Medeiros Mesce ("decedent"), dated October 11, 2022 (the "October 2022 Will") in favor decedent's Last Will and Testament dated August 8, 2018 (the "August 2018 Will"). Their Complaint made no mention of an interceding Will executed by decedent on January 6, 2022 (the "January 2022 Will"). Indeed, whether they were aware of the January 2022 Will when Janis Knoll and Joseph Karn preliminarily consulted with Geoffrey Mueller ("Mueller") is an open question. It is clear that they did not tell Mueller about the January 2022 Will.

The trial court granted petitioners' motion, finding an alleged conflict under RPC 1.18(d). The "evidence" upon which the trial court relied was and remains unknown to appellants and the Mueller Firm. Petitioners have also shared their

evidence, which having not been considered by the trial court, does not appear to be part of the record below, with this court. According to the trial court's decision, the Certification of Janis Knoll was *not* considered and thus should not be considered – particularly *in camera* – if it was not considered below. At the same time, while purporting not to consider the Knoll Certification, the decision referenced emails, which could only be authenticated if they were appended to allegedly ignored Certification. Appellants never had the chance to compare what the court reviewed with the emails the Mueller Firm could locate. Thus, movants had no opportunity to address the emails, which are the only "evidence" on which the lower court based its conclusion. And in opposing the motion for leave to appeal, petitioners admitted that the emails did not detail any prejudicial information!

It is petitioners' burden to show that the Mueller Firm had in fact, acquired significantly harmful information from Janis Knoll and Joseph Karn, the only petitioners with whom Mueller had had contact. And respectfully, it is appellants' right to know what that "evidence" is in order to contest it. As petitioners now admit, the emails between the Mueller Firm and petitioners do *not* discuss settlement positions or strategy. And settlement positions and strategy necessarily change when one has to invalidate not one, but two Wills. Simply put, and consistent with what was set forth in the Certification of Geoffrey D. Mueller ("Mueller Certification") opposing the motion to disqualify, Mueller is not in receipt of such information. In the emails that

the Mueller Firm can verify, petitioners provided the Mueller Firm with only non-confidential documents. Those emails do not discuss strategy of any sort.

The lower court noted that an email reflected the Mueller Firm's advice, apparently in response to petitioners' concern about the timeliness of filing a complaint seeking to set aside probate, and that non-probate assets might not be subject to the 4-month limitation of *R*. 4:85-1. There are also indications the Mueller Firm suggested petitioners attempt to enlist potential foreign challengers, to extend the contestability period for an additional 2 months. That free legal advice is not harmful. Petitioners advised Mueller they could not persuade others from California to join the challenge. That is also not true, since petitioners hail not only from California, but from New York, Florida, Brazil and Portugal. The Mueller Firm was not retained.

In the Mueller Certification, Mueller denied knowing anything harmful to petitioners. But rather than hold a plenary hearing to resolve the parties' disparate factual positions, the lower court removed the Mueller Firm from the case. Based on the facts of record – and those known to appellants and the Mueller Firm, the trial court disqualified the Mueller Firm without legal or factual basis. Essentially, the trial court not only reversed the burden of proof, but required the Mueller Firm to prove a negative: that it had not received significantly harmful information. New Jersey law strongly disfavors both requiring a party to prove a negative and disqualification. The order of disqualification should be reversed.

STATEMENT OF PROCEDURAL HISTORY

The October 2022 Will was probated on April 3, 2023. On October 2, 2023, petitioners filed their Order to Show Cause Verified Complaint, which seeks to set aside probate of the October 2022 Will in favor of an earlier, 2018 Will. Pa11-125.[1]

The Mueller Firm entered an appearance on behalf of appellants on November 14, 2023. Pa168-69. The court entered a non-dissipation order on consent on December 8, 2023. Pa170-71. On January 2. 2024, petitioners filed the motion to disqualify. Pa126-147. By letter dated January 5, 2024, the Mueller Firm wrote the court to advise that petitioners had not supplied the alleged disqualifying communications. Petitioners had also twice objected to appellants' subpoenas to the scrivener of the Wills. Pa148-49. The trial court was further informed of the existence of the January 2022 Will, and requested that the motion be carried pending a court conference and resolution of the receipt of the scrivener's file. *Ibid*.

Thereafter, on February 20, 2024, appellants filed opposition to the motion to disqualify. Pa150-167. Remote oral argument was scheduled (and later heard on March 6, 2024.) Petitioners submitted a reply brief on March 4, 2024. The court issued an order and Statement of Reasons granting the motion on May 31, 2024. Pa1-10. The Statement of Reasons explicitly sets forth that the trial court:

did not rely on the disputed Certification of Janis Knolls [sic] **but**

[1] "Pa" means appellants' appendix. "T" means the March 6, 2024 transcript of oral argument on the motion to disqualify counsel.

> **rather the email communications between Petitioner and Counsel** [Mueller], to which Counsel has available. As the Court has not considered the Knolls [sic] Certification, **Petitioners' request to seal the Certification is denied as moot**. [Pa10 (emphasis added).]

Petitioners' opposition to the motion for leave to appeal strips the trial court's rationale of any credibility or validity. **Petitioners admit that the emails** the trial court considered "**did not detail any prejudicial information**." Pa180 n. 14 (emphasis added). That being the case, the only possible basis for granting disqualification was the Knoll Certification, which the trial court expressly denied considering. Moreover, petitioners contend that the Certification was indeed part of the record, "regardless of whether the Trial Court considered it nor not." *Id.* If that is the case, the denial of the motion to seal places that document in the public domain.

Appellants requested the transcript on June 11, 2024 (Pa172-73) and moved for leave to appeal on June 20, 2024. Petitioners opposed on July 3, 2024. Leave to appeal was granted on July 9, 2024. Pa174-75.

STATEMENT OF FACTS

In late July 2023, the Mueller Firm was contacted by petitioner Janis Knoll. Over the next few days, there were also contacts with petitioner Joseph Karn, who emailed the following non-confidential documents to the Mueller Firm:[2]

[2] Movants are unable to cite record support, due to the trial court's failure to base its decision on evidence that was in the record. These documents are what the Mueller Firm can verify actually receiving from petitioners and will be produced upon request.

- the Last Will and Testament of Anthony Mesce (decedent's deceased husband), dated August 8, 2018,
- a Codicil to that Will,
- a Renunciation of Executrix under the Anthony Mesce Will,
- two Qualifications of Executor, under the Anthony Mesce Will,
- Application for Probate of Will of Agueda Mesce, dated October 11, 2022,
- Qualification of Executor under that Will,
- Judgment admitting the October 2022 Will to probate, dated April 3, 2023,
- Letters Testamentary, Estate of Agueda Mesce, dated April 3, 2023,
- March 2, 2023 death certificate of Agueda Mesce,
- January 6, 2022 Power of Attorney of Agueda Mesce, and
- Deed for sale of condominium, formerly owned by Agueda Mesce and Anthony Mesce.

Petitioners now admit that none of these documents – or the emails to which they were attached – contain any information that could justify disqualification as inherently harmful. Pa180 n. 14.

Given petitioners' admission that – despite the trial court's holding – the emails contain nothing prejudicial, there is only one sworn or certified statement that was considered: the Certification of Geoffrey D. Mueller ("Mueller Certification"). Pa151-54. That Certification is not equivocal. T7. It flatly denies knowledge or

recollection of petitioners' settlement position:

> 5. I have no recollection of discussing settlement or ultimate resolution of the matter as this was a preliminary consultation and I was seeking to get general information about the matter. [Pa152.]

One having no recollection of settlement or "substantive strategies for litigation of the matter" (*id*. at ¶6), is not admitting that anything of the sort was discussed. It is clear that no such information was retained. One who does not recall an alleged event does not admit that the alleged event occurred. Lack of recollection certainly cannot be substantive evidence that the event occurred.

More importantly, that a statement may be clear, unequivocal and definite does not make it true. Life experience (and especially litigation) is, unfortunately, replete with false statements that were clear and unequivocal. But that does not make them true. The same is true of petitioners' clear and unequivocal assertions in the Complaint – which Janis Knoll verified.

A particularly misleading example necessarily casts doubt upon the veracity of petitioners. Attempting to cast shade upon appellants, petitioners assert that the scrivener of the October 2022 Will is (or was) counsel for appellants. Pa17 at ¶38 (h). **Petitioners omit to mention that that same law firm, Salny, Redbord & Rinaldi, drafted the 2018 Will that petitioners seek to reinstate**. *See* Pa73 (signature pages of October 2022 Will) and Pa51-2, those of the August 2018 Wills. In other words, appellants did not steer decedent to their lawyer, who would draft a

document favoring appellants. Rather, this was the same lawyer decedent (and her husband) had used years prior for estate planning. This misdirection is both clear and unequivocal, but it does not present the true picture. It shows that petitioners (including Janis Knoll) can twist the facts when it is believed to be to their benefit. If anything, the willingness to resort to such tactics should make any court chary of relying on a Certification, particularly one whose contents are undisclosed and not subject to the crucible of cross-examination.

It strains credulity for Janis Knoll to assert that between Friday, July 28, 2023 and August 1, 2023, when the real concern was filing suit by August 3, that there were substantive discussions about and how much she would take to settle. Plus, any alleged strategy became moot in light of the fact a second Will had to be invalidated for petitioners to take from decedent's Estate.

Indeed, Mueller cannot not squarely rebut Knoll's undisclosed assertions (at least to the satisfaction of petitioners' counsel) if only because he did not know what they were. In short, Mueller's assertion that he remembers nothing and has "no information which [he] may use to Petitioners' detriment" (Pa152, ¶¶10), is direct and unequivocal. It has not been, and cannot be, controverted. Janis Knoll apparently says she told Mueller damaging information. But one cannot use information that cannot be recalled.

Mueller told petitioners more than they told him – but what he told them was

inherently helpful, not harmful:

> 7. I did advise of the applicable Statute of Limitations for residents of the State of New Jersey to challenge probate of a Last Will and Testament.
>
> 8. I further advised that, in the event that there were out-of-state challenges to a Will, the Statute of Limitations for challenging probate of a Last Will and Testament for a non-New Jersey resident was longer. [Pa152.]

Neither petitioners nor the trial court have cited any evidence to contradict the Mueller Certification.

It strains credulity to assert that Janis Knoll discussed litigation strategy and her settlement position when she did not advise Mueller of even the most basic facts. At the time, the four-month limitation found in *R*. 4:85-1 was the utmost concern. Mueller advised that if non-New Jersey residents joined in the contest, that limitation would no longer be a concern. Pa7. But neither Janis Knoll nor Joseph Karn advised that petitioner, John Karn, lived in Larchmont, New York and that petitioner Joan Karn lived in Manhattan. That information would have relieved the immediate time pressure. Instead, they advised of a potential claimant from California. Pa10. Having failed to provide this most basic information, there cannot even be an inference that Knoll and Karn would have told the Mueller Firm anything significantly harmful to their case before retaining the firm. Time, not settlement strategy or the *bona fides* of the case was the essence of these discussions. When they spoke to Mueller, they had mere days to file a summary action, pursuant to *R*. 4:85-1. They did not; instead,

petitioners advised Mueller that the Firm was not retained. Thereafter, having enlisted out-of-state petitioners, the Verified Complaint was filed on October 2.

LEGAL ARGUMENT

I. THE RECORD IS BEREFT OF PROOF THAT THE MUELLER FIRM ACQUIRED ANY "SIGNIFICANTLY HARMFUL" INFORMATION FROM PETITIONERS (Pa151-52)

Motions to disqualify legal counsel 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). Courts have long recognized the paramount importance of "a client's right freely to choose his counsel." *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201 (1988) (quoting *Gov't of India v. Cook Indus., Inc.*, 569 F. 2d. 737, 739 (2d Cir. 1978)). The determination of whether counsel should be disqualified is, as an issue of law, subject to *de novo* plenary appellate review. *City of Atlantic City v. Trupos*, 201 N.J. 447, 463 (2010). The lower court's findings are not entitled to any deference.

Disqualification of counsel based on a consultation with a former prospective client will occur only when the movant, in a manner 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. *O Builders & Associates, Inc. v. Yuna Corp. of N.J.*,

206 N.J. 109, 114 (2011) (emphasis added.) Appellants do not contest the applicability of the first prong. The issue before the court is whether the Mueller Firm has information "significantly harmful" to petitioners.

O Builders defined "significantly harmful":

> in order for information to be deemed "significantly harmful" within the context of RPC 1.18, disclosure of that information **cannot be simply detrimental in general** to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a **determination that is exquisitely fact-sensitive and specific**. [*Id*. at 126 (emphasis added).]

The trial court's decision was not at all "fact-sensitive." The trial court based its decision on the emails apparently appended to the Knoll Certification and documents appended to those emails:

> **Based on the email exchange between Petitioners and Counsel prior to the matter being initiated, there is evidence to indicate that Counsel and Petitioners had communications involving Petitioners potential claims which also involved Petitioners providing to Counsel documents regarding their claims.** In one of the emails. Counsel informed Petitioners that "to the extent there are non-probate assets ... there is a strong argument the 4 month window does not apply." Counsel also indicated that he and Petitioners had a telephone conversation regarding "a potential claim from California." The Court finds that based on such, the information provided to Counsel by Petitioners **may be prejudicial** to Petitioners in the matter. Therefore, the Court finds that RPC 1.18 applies to justify the removal of Respondent's counsel pursuant [sic]. **The Court** also notes that in making its decision, it **did not rely on the disputed Certification of Janis Knolls [sic] but rather the email communications between Petitioners and Counsel…** [Pa9-10 (emphasis added).]

A. The Trial Court Employed an Improper Standard (Pa10)

The trial court did not find that the "information" **was** prejudicial to petitioners, only that it "**may be** prejudicial." Pa10 (emphasis added). This is insufficient under *O Builders*. That something "may be prejudicial is insufficient as a matter of law to support disqualification. Moreover, even something that is prejudicial is also insufficient: the information must be "significantly harmful." Information that is simply detrimental in general is insufficient.

Neither *O Builders* nor *Trupos* allow disqualification because the information allegedly imparted "**may be**" prejudicial. Actual prejudice, **actual significant harm must be found.** Petitioners' "evidence" did not meet that standard. The trial court's disregard of the Knoll Certification leaves only the denials set forth in the Mueller Certification, petitioners having conceded that the emails are anything but "smoking guns."

Having applied the wrong standard, the trial court should be reversed.

B. Petitioners have – but have not Sustained – the Burden of Production and Persuasion (Pa6)

The burdens of production and persuasion rested with petitioners:

> the initial burden of going forward or of production – that is, that the two matters are the same or substantially related and that the information imparted in the consultation is significantly harmful to the former prospective client – rests on the party seeking disqualification. If that burden is satisfied, the lawyer for whom disqualification is sought may seek to rebut those allegations. In the end, however, the burden of persuasion and proof remains on the party seeking disqualification.

O Builders, 206 N.J. at 114; *see also Trupos*, 201 N.J. at 462-63 (the burden of persuasion on all elements remains with the moving party, as it bears the burden of proving that disqualification is justified). The trial court's only mention of burden was in its recitation of appellants' position. Pa6. The trial court never stated that petitioners sustained their burden – his finding that the communications "may be" prejudicial perforce suggests they did not. The court also set forth no reason for not crediting the rebuttal set forth in the Mueller Certification.

O Builders requires disqualification to be "well-grounded in the written record…" 206 N.J. at 127. In *O Builders*, where the Court upheld the denial of the disqualification motion, the record contained evidence that the attorney and prospective client had discussed business and legal matters for three hours. *Id*. at 116. The prospective client filed a Certification addressing her alleged contacts with the attorney. The attorney responded, largely denying those contentions. In contrast, in the instant matter, the record contains evidence of a phone call on July 28, 2023 and an unspecified number of unidentified, but admittedly innocuous, emails.

Just as the trial court mistakenly applied the wrong standards in deciding the motion, petitioners now admit that the court's purported reliance on the emails petitioners provided was insufficient to justify disqualifying the Mueller Firm. In opposing the motion for leave to appeal, petitioners expressly conceded that those emails "d[o] not specifically detail any prejudicial information." Rather, "[t]hey were

supplied to provide full context to Janis Knoll's discussions with Mr. Mueller." Pa180 n.14. Thus, petitioners here admitted that these communications were neither prejudicial nor more importantly, significantly harmful. Accordingly, by petitioners' admission, the only "evidence" on which the trial court supposedly relied does not support the relief granted.

Petitioners will likely claim that the fact that the Trial Court did not consider Janis Knoll's Certification does not mean Petitioners have not satisfied their burden. But petitioners cite no facts or law in support of this claim. The fact is the only "evidence" the trial court possibly considered are the Mueller Certification and the unspecified emails, which petitioners admit prove nothing. The trial court's claim that it did not rely on the Janis Knoll Certification means that petitioners could not and did not sustain their burden as a matter of law.

C. The Factual Record before the Trial Court does not Support Disqualification (Pa7; T8-9)

The content of the Knoll Certification remains unknown to appellants. But petitioners claim that unsupported references in their brief are sufficient. Pa177-78. Besides being improper, *see, e.g., R.* 1:6-6, appellants respectfully question the truth of what petitioners' briefs (and inferentially, the Knoll Certification) assert.

It strains credulity to claim that petitioners knew, much less advised Mueller, "in depth" of their claims, settlement positions and amounts, and decedent's testamentary intent on an initial phone call. Pa178. Indeed, at that point, they did not

know of the January 2022 Will, and apparently could and/or did not then even identify non-New Jersey potential petitioners. One cannot set forth one's settlement position without knowing how many people would potentially take under any of the three Wills (much less the value of the estate). "The specific details of those communications are contained in the Certification of Janis Knoll…" *Ibid*. But the trial court did not consider that Certification.

In makeweight arguments, petitioners contend that since "Mueller had the disqualifying conversations with the Affiant [sic]… he should have been able to respond to Petitioners' motion without Ms. Knoll's Certification." *Id*. at 3. "Mr. Mueller was a participant in the conferences with Ms. Knoll and should know full well what was discussed." *Id*. at 12 n.13. But Mueller's position is and always has been he had no such conversations – or at worst, has no recollection of such conversations. Petitioners necessarily assumes that they occurred – an assumption that appellants do not accept and this Court should not accept.

Petitioners necessarily admit that the trial court did not consider the Knoll Certification. But that admission is belied by their continuing, if oblique, references to it. Ms. Knoll's Certification was of no consequence to the trial court, so there is no reason to highlight it before this court. They do so in order to obfuscate the reality that otherwise, the only information before the trial court did consider was the Mueller Certification and the now-admittedly benign emails.

Similarly, petitioners' assertions that disclosure of the Knoll Certification could harm their case is counterintuitive. If the Mueller Firm was *already* in possession of such detrimental information, there could be no possible harm in requiring petitioners to disclose to the Mueller Firm that which it already allegedly knew, subject, if necessary, to a protective order to limit any further disclosure.

O Builders reached this same conclusion:

> We are not unmindful of the theoretical quandary… that, in order to sustain its burden seeking disqualification, [former prospective client] Mrs. Kang must disclose the very confidential information she claims not only deserves protection, but also triggers counsel's disqualification. In practice, however, we reject that notion as rationally inconsistent. Defendant asserts that the reason for disqualification is that Mrs. Kang already disclosed confidential information to Attorney Lee; therefore, those disclosures now, at least in respect of Attorney Lee, are– if defendant is to be believed– nothing more than repetition and, more importantly, not the initial disclosure of confidential information. In other words, defendant cannot have it both ways: Mrs. Kang cannot claim that she has disclosed confidential information to Attorney Lee yet refuse to make those disclosures to the court for fear of disclosing confidential information to Attorney Lee. Either the claimed confidential information has been disclosed or it has not; the logical tightrope defendant has sought to walk leaves any court with nothing of substance on which to base its decision. [206 N.J. at 128.]

Petitioners could have, but did not, move for a protective order. Nor have they explained how repeating information Mueller allegedly knew already could be significantly harmful.

Petitioners also seek to wield "privilege" as a sword, more than as a shield. Although the trial court eschewed any reliance upon it, petitioners include assumed

snippets of the Knoll Certification in their briefs, setting forth quotations without any attribution or citation. *See, e.g.,* Pa179:

> During such consultation, Janis Knoll discussed on behalf of the [then unidentified] Petitioners "the assessment of Decedent's estate, their understanding of Decedent's testamentary intentions, the relative strengths and weaknesses of their position and specific settlement posture."

Some of these assertions are hardly prejudicial – assuming they were even communicated. Moreover, they were based on an incomplete understanding. Janis Knoll's "assessment of Decedent's estate" is at most, an uninformed opinion. Her assessment was and is of no moment unless and until it was verified (or discounted) in discovery. Her "understanding of Decedent's testamentary intentions" is similarly irrelevant: Knoll did not even know about the January 2022 Will. Her understanding is largely irrelevant and again, the real intent would also be fleshed out in discovery. Finally, whatever she thought of the strength or weakness of her position and settlement posture, both changed because of the January 2022 Will, which added potential beneficiaries to the mix.

Due process mandates that parties be aware of – and be given the opportunity to rebut – the allegations made against them. To the extent this court is not inclined to outright reverse the order below, it should at least vacate it, compel production of petitioners' "facts" and remand so that appellants will know what the allegations are and have the opportunity for a plenary hearing to test the credibility of the dueling

Certifications.

D. It was Reversible Error for the Lower Court to Disqualify Counsel Without Holding an Evidentiary Hearing (not raised below)

The trial court recognized appellants' disagreement with what they thought petitioners were claiming:

> Respondents [Appellants] argue that Petitioners fail to demonstrate that the information Counsel allegedly received during the consultation is significantly harmful to Petitioners. Respondents contend that Counsel discussed procedural matters with Petitioners and the proprietary [sic] of engaging in litigation to resolve the dispute amongst family members. Respondents assert that Counsel did not discuss settlement of the matter nor did Counsel provide an analysis of the merits of any affirmative claims or defenses in the matter. Additionally, Respondents contend that the only relevant information exchanged is in connection with the statute of limitations. Respondents assert that he advised Petitioners that the statute of limitations was close to running. [Pa7.]

However, rather than credit this account – purportedly the only account the trial court considered – the court disregarded it entirely on the basis of emails that disclosed nothing prejudicial to petitioners.

Indeed, the unidentified and unauthenticated emails, now acknowledged by petitioners to be non-prejudicial, apparently only "prove" that Mueller had contact with Knoll. The trial court did not consider any sworn testimony. Nothing the court considered shows petitioners shared any prejudicial facts with the Mueller Firm. This demonstrates petitioners' failure to carry their burden of production and persuasion. The motion should have been denied on this basis alone.

But rather than base its decision on (or even cite to) the Mueller Certification,

the court instead endeavored to interpret unidentified emails:

> Based on the email exchange between Petitioners and Counsel prior to the matter being initiated, there is evidence to indicate that Counsel and Petitioners had communications involving Petitioners' potential claims which also involved Petitioners providing to Counsel documents regarding their claims. [Pa9-10.]

The only evidence of what those communications were is in the Mueller Cert. It is unknown what the "documents relating to their claims" were – or if the trial court considered those (unauthenticated) documents. Again, the only documents provided by petitioner to the Mueller Firm are those outlined in the Statement of Facts. None is confidential. With the possible exception of the Power of Attorney, all were public records.

Nevertheless, the trial court continued:

> In one of the emails, Counsel informed Petitioners that "to the extent there are non-probate assets ... there is a strong argument the 4 month window does not apply." [Pa10.]

This is hardly detrimental to petitioners. Mueller provided free legal advice. That advice was general. It does not indicate consideration (or even receipt) of privileged information. It does not even indicate that petitioners had advised that there were non-probate assets, much less that this potential information was somehow prejudicial. Advising prospective clients that non-probate assets might not be subject to the time limits of *R*. 4:85-1, and petitioners might not be under such a time crunch, is neither a confidential communication nor detrimental to petitioners.

> The court then went even farther afield:
>
> > Counsel also indicated that he and Petitioners had a telephone conversation regarding "a potential claim from California." The Court finds that based on such, the information provided to Counsel by Petitioners may be prejudicial to Petitioners in the matter. [*Ibid.*]

The presence and identity of out-of-state petitioners is not and was not confidential. However, their presence, as advised by Mueller, would trigger the six-month time limit of *R*. 4:85-1 and remove the time crunch altogether. It would be anything but prejudicial to petitioners. Indeed, it appears petitioners used that advice, by enlisting many non-New Jersey residents and extending the time to file by two months.

In the absence of the Knoll Certification, there were no disputed issues of fact. But if the trial court, despite its disclaimer, did consider that Certification, then at the very least, it should have held a plenary hearing to resolve any contested issues of fact. While New Jersey courts prefer deciding motions to disqualify on the documentary record, *Dewey v. R. J. Reynolds Tobacco Co.*, 109 N.J. 201, 222 (1988), sets forth the proper procedure when "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." In particular, where, as here, there are issues of fact that require credibility determinations, disqualification cannot be granted or denied absent a plenary hearing. *Trupos*, 201 N.J. at 463. *See also Comando v. Nugiel*, 436 N.J. Super. 203, 208 (App. Div. 2014) (record was far too limited; factual disputes meant that the

extent and nature of the law firm's prior involvement could only be determined following an evidentiary hearing).

In short, the record here was far more barren than in *O Builders* and *Comando.* The admitted three-hour in-person meeting in *O Builders*, which addressed the prospective client's business history and pending legal disputes, was insufficient to support a disqualification. Similarly, the phone call(s), documents of public record and innocuous emails at issue here cannot either. Simply put, Mueller contested the veracity of what he believed to be Knoll's claims. The trial court purported not to consider the Knoll Certification. Its decision did not address the Mueller Certification, but rested on emails – which petitioners now concede revealed nothing privileged or confidential. It was improper to disqualify counsel based on this sparse record – whose breadth is still unknown to appellants.

E. The Trial Court's Conclusory Assertion that the Communications "may be prejudicial" Lacks Support in the Record (Pa7-10)

The trial court did not – because it could not – specify how the Mueller Firm's communications with petitioners were significantly harmful to petitioners. Advising them to engage additional, out-of-state challengers inured only to petitioners' benefit. It is unclear if the trial court examined the public record documents supplied by petitioners. However, these documents are not significantly harmful to petitioners – in fact, some underpin their claims for relief. And of course, the trial court could not have been aware that petitioners would take their present position, *i.e.,* the emails they

submitted to the trial court did not set forth any prejudicial information.

Our Supreme Court has ordered trial courts to engage in a "painstaking analysis of the facts" when they decide a motion to disqualify. *Dewey, supra,* 109 N.J. at 205; *see also* Trupos, 201 N.J. at 463. No such analysis was done here, if only because there were precious few "facts" in the record. Moreover, appellate courts (and the parties) cannot function without some understanding of why a judge has rendered a particular ruling. *See, e.g., Dental v. Finneran,* 83 N.J. 563, 569-70 (1980) (trial court required to clearly state its factual findings and correlate them with legal conclusions).

The record in *O Builders* was much more comprehensive than that here, including a 3 hour in-person consultation, but was insufficient to merit disqualification. Instructive is the case the Court cited that did demonstrate significant harm: *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W.3d 740, 742 (2006) (disqualifying wife's lawyer in custody matter because husband had consulted with member of lawyer's firm and disclosed extensive confidential information directly at issue in custody case concerning the children and his concerns about his former wife). *See* 206 N.J. at 126. This case is no *Sturdivant*. Providing public documents, discussing time limitations and domiciles of potential additional claimants does not remotely approach the conduct in *O Builders,* much less that in *Sturdivant.* And petitioners' unsupported claims that settlement and strategy were discussed lack credibility, given the state of petitioners' (and Mueller's) knowledge at the time.

F. Appellants are not Required to Prove a Negative (not raised below)

Despite the fact that petitioners bear the burden of production and persuasion, the trial court (tacitly) and petitioners (explicitly) would require appellants to prove a negative. For example, petitioners note "Mr. Mueller has failed to show that he did not have confidential and prejudicial communications with Janis Knoll." Pa179. On many occasions, our Supreme Court has expressed "its inherent reluctance to place the burden of proving a negative fact on a litigant." *Carter-Wallace, Inc. v. Admiral Ins. Co.,* 154 N.J. 312, 330-31, citing *Barbato v. Alsan Masonry & Concrete, Inc.*, 64 N.J. 514, 531 n.2 (1974); *see also Williams v. Topps Appliance City*, 239 N.J. Super. 528, 532-33 (App. Div. 1989) (the burden of establishing negative is "something the law rarely, if ever, imposes").

Thus, it remains petitioners' burden to prove that the appellants possess information significantly harmful and prejudicial to their case. It is not appellants' burden to prove the lack of such information. And again, since the trial court could only have considered emails, which "did not specifically detail any prejudicial information," and the Mueller Certification, and expressly did not consider the Knoll Certification, it is beyond peradventure that petitioners have failed to sustain their burden. The result below can be affirmed only if the burden to prove a negative is placed on the Mueller Firm and the Mueller Certification is disregarded.

G. The Trial Court's Order cannot be Sustained without an Analysis of Petitioner's Likelihood of Success (Pa153; T8)

Petitioners have pointed out that appellants cite no case law regarding the likelihood of success itself is an element to consider on a motion to disqualify. But they miss the point: one cannot determine whether something is in fact "significantly harmful" without considering the context in which the alleged information was imparted. One's settlement position – and litigation strategy – are necessarily different when success depends upon the invalidation of two Wills, not one. The communications with Karn and Knoll – and indeed the Verified Complaint – turn on petitioners' attempt to have the October 2022 Will invalidated and have the August 2018 Will probated in its place. Between July 28 and August 2, 2023, the Mueller Firm knew nothing about the January 2022 Will. Petitioners must also succeed in invalidating that Will, before the August 2018 Will can be probated. Moreover, petitioners' claims that appellants "steered" decedent to their attorney make no sense. All three Wills, the August 2018 Will, the January 2022 Will and the October 2022 Will, were drafted by the same law firm. That firm presumably knows more about decedent's testamentary intent than does Janis Knoll.

The January 2022 Will and the October 2022 Will are almost identical. The latter will omits two specific bequests: $50,000 to "St. Vincents DePaolo" and $50,000 to St. Lucy's Church. Compare Pa157 (decedent's January 2022 Will) to Pa68 (decedent's October 2022 Will). However, in **both** of those Wills, appellants were to

receive 50% of the residuary. *Ibid.* To invalidate the January 2022 Will, petitioners have to invalidate bequests to two charitable beneficiaries, who each had been bequeathed a significant sum of money. Assuming that petitioners had in fact discussed "Plan A" with Mueller, which has not been established, facts learned since render that alleged plan nugatory.

CONCLUSION

As a matter of law, petitioners have failed to meet their heavy burdens under New Jersey law that the Law Offices of Geoffrey D. Mueller, LLC should be disqualified. The decision of the trial court to the contrary should be reversed.

Respectfully submitted,

Law Offices of Geoffrey D. Mueller, LLC

By: */s/Geoffrey D. Mueller*
Geoffrey D. Mueller, Esq.
Attorney ID No. 035262006

Dated: September 3, 2024

John M. Loalbo, Esq. (036511986)
SCHUMANN HANLON MARGULIES, LLC
30 Montgomery Street, Suite 990
Jersey City, New Jersey 07302
(201) 451-1400 / (201) 432-3103/fax
Email: jloalbo@shdlaw.com
Attorneys for Petitioners
John Karn, Joan Karn, Janis Knoll, Joseph Karn,
Jeffrey Karn, Thomas J.A. Mesce, Lidia Quental,
Richard Tavares, Christine Hammell,
George Tavares, Roberto Amaral Jorge,
Mary Rubino, Carolyn Mesce, and James M. Mesce

In the Matter of the Estate of AGUEDA MEDEIROS MESCE, Deceased	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003454-23 CIVIL ACTION ON INTERLOCUTORY APPEAL FROM OPINION AND ORDER OF MAY 31, 2024 **SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART SUSSEX COUNTY** **DOCKET NO.: SSX-P-176-23** **Sat Below:** **Hon. Frank J. DeAngelis, P.J.Ch.** **Submitted: October 7, 2024**

PETITIONERS' OPPOSITION BRIEF TO APPELLANTS/RESPONDENTS' APPEAL

John M. Loalbo, Esq.
Of Counsel and On the Brief

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PRELIMINARY STATEMENT

This matter emanates from the Verified Complaint and Order to Show Cause filed by the Petitioners on or about October 2, 2023, asserting that Appellants, Respondents below ("Respondents"), unduly influenced the Decedent, Agueda Medeiros Mesce ("Decedent"), in the creation of a Last Will and Testament dated October 11, 2022 ("2022 Will") leaving almost the entirety of her Estate, which is anticipated to be valued in excess of $4,000,000, to the Respondents, two unrelated individuals. After the action was filed, Respondents hired Geoffrey D. Mueller, Esq. ("Mr. Mueller") to represent them in this matter.

Mr. Mueller has an irreconcilable conflict of interest arising from his prior consultation with the Petitioners, *in the exact same matter at which time Petitioners shared prejudicial confidential information.*

Briefly summarized, before filing this action, two of the Petitioners, Janis Knoll ("Ms. Knoll") and Joseph Karn, communicated with Respondents' counsel, Mr. Mueller, on or about July 28, 2023 and consulted with him in-depth with respect to the substance of the Petitioners' claims against Respondents and potential resolution of the claims, including settlement positions and amounts. While the Petitioners ultimately chose not to retain Mr. Mueller to represent them, litigation, the consultation included the sharing of highly prejudicial confidential and harmful

information, including their assessment of the Decedent's estate, their understanding of the Decedent's testamentary intentions, the relative strengths and weaknesses of their case, and specific potential settlement posture.

Subsequently, without notice to, or consent of, the Petitioners, Mr. Mueller met with and was retained by the other side in this matter, the exact litigation for which Petitioners had consulted with Mr. Mueller. The specific details of those communications are contained in the Certification of Ms. Knoll which was properly submitted for *in camera* review to both the Trial Court and this Court (via email as instructed by the Court) and which is part of the record in this case.

In reaching its conclusion to disqualify Mr. Mueller and his law firm, the Trial Court found it was not necessary to review Ms. Knoll's Certification.

The Trial Court did refer to "the relative strengths and weaknesses of [Petitioners'] position, and specific potential settlement posture" at page one of its May 31, 2024 Opinion and Order.

Knowing the relative strengths and weaknesses of Petitioners' position and their specific settlement posture would surely be prejudicial to Petitioners. Therefore, the Trial Court's decision is based on more than sufficient information to disqualify Respondents' Counsel. In any event, Petitioners have submitted to this

Court Ms. Knoll's Certification for *in camera* review, which goes into specific detail the communications she had with Mr. Mueller.

Respondents' Appeal should be denied for the following reasons: First, Respondents have failed to show their right to choice of counsel outweighs the need for disqualification. Mr. Mueller performed little, if any, substantive work on the file (no opposition was due up to that point nor is any still due).

Second, despite Ms. Knoll's specific recall of her conversation with Mr. Mueller, Mr. Mueller has failed to show that he did not have confidential and prejudicial communications with Ms. Knoll. Mr. Mueller's submission to this Court is now suddenly imbued with almost perfect recall in his unsworn statements to this Court regarding his conversations with Ms. Knoll, while his statements made under oath below were equivocal and uncertain. In contrast, Ms. Knoll's statements, made under oath both here and in the Trial Court, has made statements that are unequivocal and clear.

Third, Mr. Mueller has failed to demonstrate why Ms. Knoll's Certification should not have been submitted to the Trial Court, *in camera*. Case law and New Jersey Court Rules provide the authority for this procedure used by Petitioners.

Therefore, Respondents' appeal in this matter should be denied. The Trial Court's disqualification of Respondents' Counsel was proper.

STATEMENT OF PROCEDURAL HISTORY AND STATEMENT OF FACTS[1] [2]

On or about July 28, 2023, one of the Petitioners, Ms. Knoll, consulted with Mr. Mueller regarding the instant matter. During such consultations, Ms. Knoll discussed on behalf of the Petitioners "the assessment of Decedent's estate, their understanding of Decedent's testamentary intentions, the relative strengths and weaknesses of their position, and specific settlement posture." PPa82.[3] Joseph Karn authored the emails exchanged with Mr. Mueller submitted to the Trial Court by Petitioners. RB5-6.[4]

Petitioners did not retain Mr. Mueller.

On or about October 3, 2023, Petitioners filed an Order to Show Cause and Verified Complaint alleging undue influence by the Respondents. Pa4.[5]

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[1] Because the Procedural History and Facts of this matter are inextricably intertwined, Petitioners have combined them for the sake of clarity.

[2] Respondents attempt to argue their position regarding the case in chief, which is inappropriate in the Respondents' Statement of Procedural History and Statement of Facts, and also irrelevant to the resolution of this Appeal.

[3] PPa refers to Petitioners' Appendix.

[4] RB refers to Respondents' Appellate Brief.

[5] Pa refers to Respondents' Appendix.

On or about November 14, 2023, Mr. Mueller filed a Notice of Appearance in the matter. Pa168.

On or about November 15, 2023 at the Order to Show Cause hearing, counsel for Petitioners immediately brought the potential conflict to the Trial Court's attention.[6]

On or about January 2, 2024, Petitioners filed the Motion to Disqualify Mr. Mueller and his law firm. Pa126. As part of their filing, Petitioners submitted correspondence to the Trial Court, on which Mr. Mueller was copied, stating ". . . please note that given the sensitive nature of the subject motion, the Certification of Janis Knoll is being provided to the Court only for *in camera* review." PPa79. Further, Petitioners' letter brief submitted to the Trial Court, on which Mr. Mueller was also copied, stated, regarding the substantially harmful information imparted to Mr. Mueller and contained in Ms. Knoll's Certification, "The specific details of these communications are contained within the Certification of Janis Knoll which is being submitted herewith for ex parte *in camera* review by the Court." PPa79.

[6] It appears that the November 15, 2023 transcript was not ordered by Respondents.

On February 20, 2024, Respondents filed opposition to Petitioners' Motion to Disqualify.[7] Pa150.

On March 4, 2024, Petitioners filed a reply brief to such opposition. [Omitted.]

On March 6, 2024, the Trial Court held oral argument on the Motion to Disqualify. T3:1-12:16.[8]

On May 31, 2024, the Trial Court issued its decision disqualifying Mr. Mueller and his law firm. Pa1.

On June 20, 2024, Respondents filed a Motion for Leave to Appeal. PPa88.

On July 3, 2024, Petitioners filed opposition to Respondents' Motion for Leave to Appeal, PPa91, and on the same date submitted Ms. Knoll's Certification via email to the Court for *in camera* review pursuant to the Court's instructions. PPa92.

On July 9, 2024, the Court granted Respondents' Motion for Leave to Appeal. Pa174.

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[7] Petitioners are submitting the January 2, 2024 letter brief to support their compliance with *O Builders & Assocs., Inc. v. Yuna Corp. of N.J.*, 206 N.J. 109 (2011) and Rule 4:10-2(e)(1).

[8] T3:1-12:16 refers to the Motion hearing of March 6, 2024, page 3, line 1, through page 12, line 16.

On September 9, 2024, Respondents filed their Brief and Appendix in support of their Interlocutory Appeal.

Notably, Mr. Mueller, in his Certification to the Trial Court in opposition to Petitioners' Motion to Disqualify, dated February 20, 2024, stated:

a. At paragraph 5:

> I have no recollection of discussing settlement or ultimate resolution of the matter as this was a preliminary consultation and I was seeking to get general information about the matter. It appears we exchanged emails through August 2, 2023. The Firm was not retained.

b. At paragraph 6:

> I do not believe I discussed substantive strategies for litigation of the matter with Petitioners. I do not believe I received any confidential information from Petitioners.[9]

Pa152.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN DISQUALIFYING MR. MUELLER AND THE LAW OFFICES OF GEOFFREY D. MUELLER, LLC DUE TO AN IRRECONCILABLE CONFLICT OF

[9] Paragraph 6 of the certified statement from Mr. Mueller submitted to the Trial Court is not included in Respondents' Appeal and Statement of Facts.

INTEREST UNDER RULE OF PROFESSIONAL CONDUCT 1.18 (T3:1-12:16)

A. Standard of Review

New Jersey Rule of Professional Conduct 1.16(c) governs withdrawal of counsel:

> A lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> 1) the representation will result in violation of the Rules of Professional Conduct or other law;
>
> 2) the lawyers physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> 3) the lawyer is discharged.

B. Disqualification under Rules of Professional Conduct 1.18

Rules of Professional Conduct 1.18 governs conflicts stemming from communications with prospective clients. That Rule states as follows:

> A lawyer who has had communications in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
>
> 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).

> If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.
>
> A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

To justify disqualification, two "factors must coalesce: 1) the information disclosed in the consultation must be the same or substantially related to the present lawsuit; and 2) the disclosed information must be significantly harmful to the former client in the present lawsuit." *O Builders & Assocs., Inc. v. Yuna Corp. of N.J.*, 206 N.J. 109, 113-14 (2011).

In *O Builders*, a case in which Mrs. Kang, a restaurant owner, sought to disqualify Attorney Lee from representing O Builders & Associates, Inc., Mrs. Kang based her arguments on the fact that at one point she had consulted with Attorney Lee seeking his representation the week before trial in a matter involving Koryeo Corp. She later became involved in a lawsuit involving O Builders, a company

Attorney Lee was representing and sought unsuccessfully to disqualify him. The Supreme Court found the following facts:

> On February 4, 2008[2][10], at the request of a then-client, Dr. Dong Hyun Lee (Dr. Lee), Attorney Lee met with Mrs. Kang and Dr. Lee at Mrs. Kang s restaurant, the Baden Baden, in Palisades Park; since the death of Mrs. Kang's husband, Dr. Lee had acted as her unofficial business affairs advisor. According to Mrs. Kang, she consulted Attorney Lee concerning pending litigation and business matters. She explained that [t]here were several litigation matters left behind by my late husband, James Park, relating to two restaurants operating under the Baden Baden trade name. She noted that one of the restaurants, located in Fort Lee, had closed in 2006, and that she met Attorney Lee at the remaining Palisades Park restaurant, in one of the lower level party rooms. Her entire description of the substance of that consultation was scant: At that time, we discussed extensively about my business history and the pending legal disputes. . . We discussed various aspects of the Baden Baden business, including its history and its then-present state of affairs, confidentially.
>
> Attorney Lee recalls that consultation differently. He states that Mrs. Kang, Dr. Lee and [he] met at [Mrs. Kang's Palisades Park restaurant] to be introduced for the first time and discuss problems she was then having with present defense counsel, Michael S. Kimm, Esq., in connection with his handling of and representation in [a specific

---

10 [2] Mrs. Kang initially claimed that this meeting occurred [i]n approximately March 2007[,] while Attorney Lee states that the meeting occurred on February 4, 2008. Attorney Lee's certification contains correspondence that corroborates February 4, 2008 as the date of his meeting with Mrs. Kang. When confronted with those proofs, Mrs. Kang later conceded that the consultation in fact occurred in February 2008, eleven months after the date she originally certified. We have adopted Attorney Lee s date as the correct one. [footnote in original]

matter, titled the Koryeo Corp. case]. According to Attorney Lee, Mrs. Kang asked that he substitute for Kimm as her counsel in the Koryeo Corp. case, which was scheduled for trial in the Superior Court in one week. Attorney Lee insisted that [he] could not make any decision until [he] reviewed the files and the [c]ourt adjourned the trial date for at least 30 days. He adamantly asserts that, at the February 4, 2008 meeting, Mrs. Kang shared no privileged or confidential information with [him] concerning her or defendant's business history, other pending legal disputes, financial information or then-present state of affairs[.] He reasons that the limitations on their discussions were perhaps because all communications admittedly took place in the presence of our mutual friend and third-party, Dr. Lee, and the purpose of our meeting -- my representation of M[r]s. Kang in the [Koryeo Corp. case] -- did not require such information. After describing how and when he came to review the file in the Koryeo Corp. case, the very next day, on February 5, 2008, Attorney Lee wrote to Mrs. Kang and declined to represent her in the Koryeo Corp. case for three distinct reasons: (1) the trial was scheduled for February 11, 2008 and already had been adjourned twice, rendering a third adjournment unlikely; (2) although the lawsuit was more than a year old, no discovery -- which he described as essential in a litigant's timely and efficient preparation for trial -- had been conducted; and (3) there was a fundamental deficiency in the complaint, as all available causes of action had not been pled. As part of his response to Mrs. Kang's assertions, Attorney Lee also produced documents that corroborated his representations.

In response, Mrs. Kang certified generally that [a]t [the February 4, 2008] consultation, we discussed extensively my business history and several pending legal disputes for approximately three hours. She asserted that she disclosed business, financial and legal information related to Yuna [C]orp. and other matters to [Attorney Lee] and [that she]

> believe[d] to be related to the current law suit brought by O Builders, including discussion of [two then-pending cases, including the Koryeo Corp. case] and other general information about the circumstances of [her] business and legal affairs. She insisted that [i]t remains [her] belief that the current suit will implicate portions of the information discussed with [Attorney Lee] previously when he was consulted for legal representation.
>
> Dr. Lee also weighed in on Mrs. Kang's behalf. In his certification, he confirmed that, since the death of Mrs. Kang's husband, he had served as advisor to [Mrs.] Kang on legal and business affairs, including several litigation cases related to her businesses and personal life. According to Dr. Lee, he arranged and attended a consultation between [Mrs.] Kang and [Attorney] Lee around February, 2008, to arrange for [Attorney] Lee to represent [Mrs.] Kang and her business. He explained that [w]e met in a basement karaoke room at the Baden Baden Restaurant in Palisades Park, owned by M[r]s. Kang, and discussed [Mrs.] Kang's business, pending legal disputes, finances, and other confidential matters for several hours. Other than relating those general topics, his certification contains no specifics as to what was said or discussed.
>
> In short, although Attorney Lee, Mrs. Kang and Dr. Lee all agree that they met and discussed whether Attorney Lee would assume the representation on behalf of Mrs. Kang in the Koryeo Corp. lawsuit -- a representation Attorney Lee declined the very next day -- Attorney Lee denies anything further of substance was discussed, while Mrs. Kang and Dr. Lee claim that matters concerning Mrs. Kang's business, pending legal disputes, finances, and other confidential matters were discussed, albeit without providing any details, specificity or corroboration thereof.

O Builders at 115-17.

In rendering its opinion, the Court found:

> That failure of proof forecloses the relief sought by defendant. Defendant, as movant, was required to bear the burden of production and persuasion in the request to disqualify Attorney Lee. Yet, defendant's submissions vaguely claimed only that information concerning pending litigation and business matters had been disclosed to Attorney Lee during the February 2008 consultation. And, Mrs. Kang's bald and unsubstantiated assertions that she disclosed business, financial and legal information related to Yuna [C]orp. and other matters to [Attorney Lee that she] believe[d] to be related to the current law suit brought by *O Builders*, including discussion of [two then-pending cases, including the Koryeo Corp. case] and other general information about the circumstances of [her] business and legal affairs cannot suffice to satisfy defendant s burden. In stark contrast, Attorney Lee provided a detailed recitation of the matters discussed, accompanied by corroborating, contemporaneous documents, none of which were challenged by defendant. And, the fact that Attorney Lee's post-consultation services were limited exclusively to his consideration of whether he would assume the representation of Mrs. Kang in the Koryeo Corp. case -- and those services terminated once Attorney Lee rejected that representation belies Mrs. Kang's assertion that anything other than that case was discussed during their February 4, 2008 consultation.
>
> In sum, defendant has not demonstrated that the matters disclosed during the February 2008 consultation were either the same or substantially related to the subject matter of the lawsuit. Furthermore, defendant has not shown that the information disclosed during that consultation was harmful -- much less, significantly harmful -- to defendant, in this lawsuit. In those circumstances, defendant s motion to disqualify Attorney Lee rightly was denied. We add the following. When

> pressed, although defendant conceded that the disclosures made in the consultation may not be substantially related to the underlying lawsuit, defendant sporadically asserted that those disclosures may well become relevant should plaintiff succeed in the lawsuit, secure a judgment against defendant, and then seek to enforce that judgment. Given the inherently theoretical and speculative nature of those concerns, we reject them as illusory and premature. . . . In that setting, and because [d]isqualification of counsel is a harsh discretionary remedy which must be used sparingly[,] *Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000) (citing Dewey, supra)*, defendant's application must be subject to careful scrutiny. Against that necessarily high standard, defendant's motion to disqualify counsel perforce must fail.

O Builders at 129-31. (Emphasis added).

The Court in *O Builders* found that Mrs. Kang's description of the events that occurred were "scant," "vague," and failed to show that "the information disclosed during [the] conversation was harmful – much less, significantly harmful," to her. Also, a certification submitted by another on her behalf contained "no specifics as to what was said or discussed and that no details, specificity or corroboration thereof" was provided. In contrast, Attorney Lee's description of events was "detailed" wherein he "adamantly" asserted that Mrs. Kang "showed no privileged or confidential information," reasoning that the discussions "did not require such information." The Court also stated that the attorney denied "anything further of

substance was discussed." Also, the Court found that the matters were not the same or substantially related. *O Builders* at 129-31.

In *Greebel v. Lensak*, 467 N.J. Super. 251 (App. Div. 2021), a case consonant with the subject litigation, the Appellate Division addressed RPC 1.18 and the circumstances wherein disqualification is required. In *Greebel*, the plaintiff met with Celli, an attorney, in 2005 "about her right to financial support from defendant [boyfriend] if the parties ever ended their relationship without marrying." Id. at 252. The plaintiff revealed various details and concerns about the parties' relationship, finances, assets, and lifestyles. Ibid. In 2014, using a different attorney, the plaintiff filed a palimony complaint against the defendant, leading the defendant to hire Celli as his attorney. Ibid. The Appellate Division affirmed the disqualification of the boyfriend's counsel and found a violation of Rules of Professional Conduct 1.18, concluding that the plaintiff's 2014 palimony suit was a substantially related matter to the plaintiff's 2005 consultation with Celli. *Greebel* at 258-59.

Further, regarding the Rules of Professional Conduct 1.18, the *Greebel* Court cited *O Builders* and explained that:

> the former client must make more than "bald and unsubstantiated assertions" that she disclosed "business, financial and legal information" that the client believes might be related to the present matter. Id. at 129, 19 A.3d

> 966. Matters are "substantially related" if "the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client" or the "facts relevant to the prior representation are both relevant and material to the subsequent representation." Id. at 125, 19 A.3d 966 (quoting Trupos, 201 N.J. at 451-52, 992 A.2d 762). Information is "significantly harmful" if "prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought[.]" Id. at 126, 19 A.3d 966.

Greebel, N.J. Super. at 258.

Despite Respondents' contention that the record is "much more comprehensive [in *O Builders*] than herein," the facts of the instant matter are even more compelling. Ms. Knoll's consultation with Mr. Mueller only shortly preceded the *exact litigation* that was ultimately filed. Further, as outlined in the Certification of Ms. Knoll, in her consultation with Mr. Mueller, and as generally set forth in Petitioners' pleadings, she provided similarly harmful confidential information to Mr. Mueller including disclosure of specific settlement positions and views on what the Respondents may or may not be entitled to under Decedent's Will.

Ms. Knoll's personal thoughts, which Respondents would not otherwise have access to, could be used against Petitioners by Respondents in defending this case or in future settlement negotiations, and will necessarily inform Mr. Mueller's views of the case and advice to his clients. This has created actual significant harm to

Petitioners because knowing their settlement position would substantially prejudice them.[11]

Accordingly, in line with the Appellate Division's holding in *O Builders* and *Greebel,* the Trial Court was correct in disqualifying Mr. Mueller and his firm in accordance with Rules of Professional Conduct 1.18(b). Further, Mr. Mueller is necessarily barred from disclosing any information shared by Ms. Knoll in accordance with Rules of Professional Conduct 1.18(a) ("A lawyer who has had communications in consultation with a prospective client *shall not use or reveal information acquired in the consultation*, even when no client-lawyer relationship ensues, except as Rules of Professional Conduct 1.9 would permit in respect of information of a former client") (emphasis added).

POINT II

PETITIONERS SATISFIED THEIR BURDEN OF PROOF (T3:1-12:16)

City of Atlantic City v. Trupos, 201 N.J. 443 (2010) provides that a movant seeking disqualification has the burden of persuasion as follows:

> ("In the event a motion is brought to disqualify an attorney because of his or her alleged representation of conflicting interests in the same or substantially related matters, the former

[11] Respondents state that Petitioners "assume" the information discussed with Mr. Mueller actually took place. RB15. There is no "assumption"; Ms. Knoll's Certification clearly states in detail the contents of such conversations.

> client should have the initial burden of proving that by application of RPC 1.9 it previously had been represented by the attorney whose disqualification is sought.") If that burden of production or going-forward is met, the burden shifts to the attorney(s) 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. *Avocent Redmond Corp. v. Rose Elecs*., 491 F. Supp. 2d 1000, 1007 (W.D. Wash. 2007) (holding that "party opposing [attorney]'s disqualification [has] the burden to show that the matters are not substantially related"). That said, the 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." *N.J. Div. of Youth Family Servs v. V.J.,* 386 N.J. Super. 71, 75 (Ch. Div. 2004) (internal quotations and citations omitted).

City of Atlantic City, 201 N.J. at 462-63 (2010).

A. The Matter Consulted with Mr. Mueller by Petitioners and the Instant Action are the Same

It is undisputed, and conceded by Respondents, that the matter about which Ms. Knoll consulted on with Mr. Mueller is, in fact, the instant matter. T9:1-3; 10:2-5

B. The Information Imparted by Petitioners to Mr. Mueller is Significantly Harmful to the Petitioners

Pursuant to the specific information contained in Ms. Knoll's Certification, submitted to the Trial Court and this Court, *in camera*, in which was generally summarized in Petitioners' Trial Court pleadings – that Ms. Knoll disclosed the strengths and weaknesses of Petitioners' position and specific potential settlement

posture - has established that significant harm would befall Petitioners if Mr. Mueller and his law firm were to remain in the case. Such information is well-grounded in the record.

Mr. Mueller fails to recognize that the burden has been shifted to him to prove that he did not have confidential and prejudicial communications with Ms. Knoll. As set forth infra and supra, he has failed to do so.

Therefore, Petitioners have satisfied their burden of persuasion and proof in the disqualification of Mr. Mueller and his law firm.[12]

POINT III

O BUILDERS AND ASSOCIATES V. YUNA CORP., 206 N.J. 109 (2011) AND RULE 4:10-2(e)(1) AUTHORIZED PETITIONERS' SUBMISSION OF MS. KNOLL'S CERTIFICATION IN SUPPORT OF THE MOTION TO DISQUALIFY FOR *IN CAMERA* REVIEW (T3:1-12:16)

A. O Builders & Associates

In *O Builders & Associates, Inc. v. Yuna, Corp*, 206 N.J. 109 (2011) our Supreme Court stated:

> We are not unmindful of the theoretical quandry defendant has asserted: that, in order to sustain its burden seeking disqualification, Mrs. Kang must disclose the very confidential

[12] The fact that the Trial Court did not consider Ms. Knoll's Certification does not mean that Petitioners have not satisfied their burden.

> information she claims not only deserves protection, but also triggers counsel's disqualification.
> . . .
>
> To be sure, a movant seeking disqualification of opposing counsel always is presented with a Hobson's choice in respect of the disclosure of confidential information. In those instances where the disclosure of confidential information must be made so that the court can grapple fairly with the issues, the parties may protect the confidentiality of their information by, among other means, requesting that the record be subject to a protective order, see Rule 3:13-3(f) (criminal); Rule 4:10-3 (civil), and the movant may further request that the application be considered *in camera*. See generally Pressler Verniero, supra, comments 2.2 and 2.3 to Rule 1:2-1.

O Builders, 206 N.J. at 120-21. (Emphasis added.)[13]

Therefore, our Supreme Court has expressly sanctioned the same device used by Petitioners to shield harmful and confidential information from coming into Respondents' hands.[14]

B. Rule 4:10-2(e)(1)

R. 4:10-2(e)(1) provides as follows:

> (e) Claims of Privilege or Protection of Trial Preparation Materials.

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[13] Respondents, when citing to *O Builders*, failed to include this very important paragraph in their Brief in an apparent attempt to mislead the Court.

[14] Despite Respondents' claim that they should have access to Ms. Knoll's Certification, in contradiction to *O Builders* they cite to no authority for such claim. RB16-17.

> (1) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or other things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Here, Petitioners made their submission of Ms. Knoll's Certification for *in camera* review in accordance with Rule 4:10-2(e)(1).

First, Petitioners made their claim expressly and described the name of the document not disclosed in a manner to allow Respondents to assess the applicability of the protection of as follows: (1) Petitioners submitted correspondence to the Trial Court, on which Mr. Mueller was copied, stating ". . . please note that given the sensitive nature of the subject motion, the Certification of Janis Knoll is being provided to the Court only for *in camera* review." Pa126.

Second, Petitioners' letter brief submitted to the Trial Court, on which Mr. Mueller was also copied, stated regarding the substantially harmful information imparted to Mr. Mueller and contained in Ms. Knoll's Certification, "The specific details of these communications are contained within the Certification of Janis Knoll which is being submitted herewith for *ex parte in camera* review by the Court." Such letter brief also generally summarized the contents of Ms. Knoll's Certification

and warned of its prejudicial nature. PPa81. In addition, such Certification provided Respondents with more than sufficient information to respond appropriately. In any event, Mr. Mueller was a participant in the conversations with Ms. Knoll and knows full well what was discussed.

In accordance with Rule 4:10-2(e)(1), Petitioners expressly advised Respondents in their Trial Court correspondence and pleadings the nature of the document submitted *in camera*, in a manner not revealing the protected information itself, which allowed Mr. Mueller to assess the applicability of the privilege or protection. That document is Ms. Knoll's Certification.[15]

Ms. Knoll's Certification provided specific information regarding her conversations with Mr. Mueller. The information contained in Ms. Knoll's Certification clearly evidenced that the information disclosed would be significantly harmful to Petitioners in Respondents' hands.

In generally summarizing the contents of Ms. Knoll's Certification, Petitioners not only complied with *O Builders* and Rule 4:10-2(e)(1), they provided Respondents more than sufficient information to respond appropriately to

[15] As conceded by Respondents, emails annexed as exhibits to Ms. Knoll's Certification were already in the possession of Mr. Mueller. RB5-6.

Petitioners' Motion to Disqualify.[16] PPa81.

Based on *O Builders* and Rule 4:10-2(e)(1), the Petitioners satisfied their obligation on how the confidential information was to be submitted to the Trial Court.

POINT IV

NO EVIDENTIARY HEARING IS NECESSARY BECAUSE THERE IS SUFFICIENT INFORMATION CONTAINED IN THE RECORD TO DISQUALIFY MR. MUELLER (NOT RAISED BELOW)

Respondents are incorrect in stating that Ms. Knoll's Certification was not part of the record. The submission to the Trial Court for *in camera* review was sanctioned by *O Builders* and Rule 4:10-2(e)(1) and therefore became part of the record regardless of whether the Trial Court considered it or not.[17]

In *City of Atlantic City v. Trupos,* 201 NJ 442, 463 (2010), the Supreme Court expressed a preference for deciding motions to disqualify on the documented record:

> [A]n evidentiary hearing should only be held when the Court cannot with confidence decide the issue on the basis

[16] Mr. Mueller was a participant in the conferences with Ms. Knoll and should know full well what was discussed.

[17] Any emails attached to Ms. Knoll's Certification did not specifically detail any prejudicial information. They were supplied to provide full context to Ms. Knoll's discussions with Mr. Mueller. Petitioners at no time took the position that such emails contained prejudicial information.

> of information contained in those papers, as, for instance, when despite that information there remains gaps that must be filled before a factfinder can with a sense of assurance render a determination, or when their looms a question of witness credibility.

No gaps need to be filled here by an evidentiary hearing. Ms. Knoll's Certification unequivocally states that Mr. Mueller knew Petitioners' settlement position and what Petitioners thought Respondents may or may not be entitled to.[18] On the other hand, Mr. Mueller, in his Certification, only supplied equivocal details of such consultations. Further, there would be no credibility issue or nothing unusual about a former prospective client's statements that she discussed "settlement posture" and the "strengths and weaknesses" of her case with a prospective attorney at the initial consultation.

In Mr. Mueller's Trial Court Certification, dated February 20, 2024 at paragraphs 5 and 6, he states[19]:

> 5. *I have no recollection of discussing settlement or ultimate resolution of the matter* as this was a preliminary consultation and I was seeking to get general information about the matter. It appears we exchanged emails through August 2, 2023. The Firm was not retained.

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[18] Any attorney would be thrilled to know their adversary's settlement posture at any time during the case, especially prior to its inception.

[19] Respondents' Appeal Brief does not accurately track the language in Mr. Mueller's sworn Certification. RB5-10.

> 6. *I do not believe I discussed substantive strategies for litigation of the matter with Petitioners. I do not believe I received any confidential information from Petitioners.*

Pa152. (Emphasis added.)

Mr. Mueller now states that his Certification was unequivocal by stating (not under oath), "that he remembers nothing and has 'no information, which [he] may use to Petitioners' detriment'." Also, Mr. Mueller now leaves out the important words contained in his Trial Court Certification, "**I do not believe,"** from his statement made under oath to the Trial Court, Pa150. (Emphasis added.)

Mr. Mueller, who had the conversations with Ms. Knoll, states in his Trial Court Certification that he has "No recollection of settlement or ultimate resolution" and he does not "believe" he "discussed substantive strategies for litigation." The use of the words, "I have no recollection" and "I do not believe," like those of Mrs. Kang, the losing party in *O Builders,* are equivocal, uncertain and indefinite, while the statements in Ms. Knoll's Certification were clear and unequivocal in laying out the confidential and privileged communications she had with Mr. Mueller, like Attorney Lee, the prevailing party in *O Builders.*

Further, Petitioners' Trial Court brief, which generally summarized the contents of Ms. Knoll's Certification, provided enough information ("[Petitioners']

assessment of the Decedent's estate, their understanding of the Decedent's testamentary intentions, PPa82, the *relative strengths and weaknesses of their position, and specific potential settlement posture*.") (emphasis added) for Mr. Mueller to properly respond. Pa3. In any event, here and in the Trial Court, Mr. Mueller *has responded* to the claims that he learned the "potential strengths and weaknesses of Janis Knoll's position and potential settlement position." His complaints regarding his inability to properly address Ms. Knoll's motion to disqualify are therefore unfounded.

Respondents' reference to *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W. 3d 740 (2006), which was cited in *O Builders,* is misplaced. RB22. There, the wife's lawyer was disqualified because husband consulted with a member of wife's lawyer's firm and discussed extensive information directly at issue in that case. That is exactly what happened here.

Knowing a party's "litigation strategies and weaknesses" and "specific settlement postures" would clearly cause significant harm to a litigant's case.

Further, Mr. Mueller wants this Court, despite his equivocal statements made in his Certification to the Trial Court under oath, to now believe that he somehow has perfect recall of those conversations he had with Ms. Knoll. All of a sudden, he "flatly denies knowledge or recollection of Petitioners' settlement position," RB6-

7, when his Certification, submitted to the Trial Court, stated, "I do not believe I received any confidential information from Plaintiffs," Pa152; RB7. Unlike the attorney in *O Builders*, Mr. Mueller, in his Trial Court Certification, was not "adamant" about his conversations with Ms. Knoll, and did not fully provide "a detailed recitation of the matters discussed." *O Builders* at 115-17, 129-31.

Ms. Knoll's Certification, on the other hand, was quite specific about the conversations with Mr. Mueller. She set forth not only the confidential prejudicial information she imparted to Mr. Mueller, but also specific details of the conversation recounted by Mr. Mueller as follows: (1) she provided documentation to Mr. Mueller; (2) the date of the conversation; (3) the relevant statute of limitations; (4) potential extension of the filing date; and (5) the inclusion of family in California as potential petitioners.

Mr. Mueller then attempts to argue that knowing the "strategy or weakness of [Ms. Knoll's] position and settlement posture" would not be privileged and substantially harmful because "both changed because of the January 2022 Will, which added potential beneficiaries to the mix."

On August 8, 2018, Decedent executed a Will leaving her entire estate to family members, including Petitioners, the natural objects of her bounty. Pa43.

The January 2022 Will, executed four months after Decedent's husband's death was the first will that left the Respondents the lion's share of the Decedent's Estate. Pa155. So how could it have "added potential beneficiaries to the mix," RB17, if the number of takers under that Will was actually reduced from the number of beneficiaries included in the Will executed on August 8, 2018. Pa43. Further, the October 2022 Will only increased Respondents' share in Decedent's Estate. Pa66. In any event, Mr. Mueller knew Petitioners' settlement position regarding a Will that gave Respondents $100,000 more than the January 2022 Will (unknown to all parties at the time). In an Estate anticipated to be worth over $4,000,000, a $100,000 bequest might only cause a de minimus change, if any at all, to Petitioners' settlement position.

Finally, an evidentiary hearing only would provide no more than what is contained in Ms. Knoll's Certification. And such hearing would have to be held, *in camera*, without Mr. Mueller, so as not to disclose the confidential and prejudicial information to him.

Therefore, because there was sufficient information contained in the record to disqualify Mr. Mueller, no evidentiary hearing is necessary and the Trial Court's ruling disqualifying Mr. Mueller should stand.

POINT V

RESPONDENTS MADE SEVERAL FACTUALLY INACCURATE STATEMENTS AND ATTEMPT TO MALIGN PETITIONERS (NOT RAISED BELOW)

Mr. Mueller incredibly questions the "truth" of what Petitioners' brief and what Ms. Knoll's Certification asserts.

He states:

> It strains credulity to claim that petitioners knew, much less advised Mueller, "in depth" of their claims, settlement positions and amounts, and decedent's testamentary intent on an initial phone call. Pa178. Indeed, at that point, they did not know of the January 2022 Will, and apparently could and/or did not then even identify non-New Jersey potential petitioners. One cannot set forth one's settlement position without knowing how many people would potentially take under any of the three Wills (much less the value of the estate). "The specific details of those communications are contained in the Certification of Janis Knoll. . ." *Ibid.* But the trial court did not consider that Certification.

RB14-15.

This is nonsensical. The January 2022 Will, Pa155, which, as admitted to by Respondents, is identical to the October 2022 Will, Pa66, except the October Will eliminates $100,000 in charitable bequests in favor of Respondents. This would not materially change Petitioners' settlement position. Further, the number of litigants seeking to overturn the Will(s) also would have no bearing on Petitioners' settlement

position.

Additionally, Mr. Mueller accused Petitioners of "misleading" by stating, "Petitioners assert that the scrivener of the October 2022 Will is (or was) counsel for Appellants." Such statement by Petitioners is totally correct. Mr. Redbord, who drafted the October 2022 Will, id., prepared a deed for one of the Respondents, Vally Cicerale, on February 7, 2005. PPa46. Additionally, Mr. Mueller states that such claim regarding Vally Cicerale's counsel somehow shows that Petitioners' "can twist the facts when it is believed to be to their benefit" and implies that Ms. Knoll is being untruthful in her Certification," RB8, and indeed states Mr. "Mueller contested [in the Trial Court] the veracity of what he believed to be Knoll's claims." RB21.

Further, Mr. Mueller called Petitioners' disqualification of him a "desperate and disfavored tactic," because Petitioners would have to overturn two Wills instead of one. RB1. *Mr. Mueller's disqualification was sought because he had obtained confidential, prejudicial and substantially harmful information from Petitioners. Nothing more, nothing less.*

In any event, the disqualification of Mr. Mueller does not allow for Petitioners' action to go unchallenged – the Respondents would just obtain new

counsel. It is not like Mr. Mueller performed any high-level work for Respondents in this matter and is therefore, irreplaceable.

In fact, Mr. Mueller filed no opposition, no motions or any other substantive documents - the only "substantive" act he performed was to subpoena the file of the scrivener of Decedent's Will,[20] an act that could have been performed by any attorney retained by Respondents. Therefore, Mr. Mueller's statements that this is a "desperate" "tactic," RB1, by Petitioners has no basis in law or fact.

POINT VI

THE TRIAL COURT'S DECISION NOT TO PUBLISH MS. KNOLL'S CERTIFICATION IS NOT REVERSIBLE ERROR (T3:1-12:16)

As set forth above, *O Builders* and Rule 4:10-2(e)(1) specifically authorized the procedure to submit Ms. Knoll's Certification *in camera*.

Further, Respondents were provided the general contents of Janis Knoll's Certification, that is, the relative strengths and weaknesses of Petitioners' position and Petitioners' settlement posture.[21]

---

[20] Mr. Mueller's subpoena of the scrivener's file was served during the time after the motion to disqualify him was filed. [Omitted]

[21] In addition to Ms. Knoll's personal thoughts on the matter.

This information is more than enough for Respondents to have responded to same. In fact, they did in Mr. Mueller's Certification wherein he claims, albeit equivocally, that he had "no recollection" and he did "not believe" he discussed substantive strategy with Ms. Knoll, and that he "did not believe he received any confidential information from Janis Knoll." Pa151. On the other hand, Ms. Knoll's Certification was unequivocal in providing the specifics of Petitioners' settlement position and what Respondents should or should not receive from the Estate.

Therefore, because *O Builders* and Rule 4:10-2(e) sanctioned the procedure to submit Ms. Knoll's Certification for *in camera* review and Respondents had sufficient information to respond to Petitioners' Motion to Disqualify, the Trial Court was correct in not publishing Ms. Knoll's Certification.

POINT VII

RESPONDENTS' POSITION THAT MR. MUELLER SHOULD NOT BE DISQUALIFIED BECAUSE HIS CLIENTS HAVE THE RIGHT TO HAVE COUNSEL OF THEIR OWN CHOOSING, SHOULD BE DISMISSED OUT OF HAND (Pa151)

Mr. Mueller's tenure in this matter has been short, without the filing of any substantive pleadings and without any substantive court appearances. Mr. Mueller cites to *Dewey v R.J. Reynolds Tobacco Company*, 109 N.J. 201 (1988) for the

proposition, rarely invoked, that courts have recognized the "paramount importance of 'a client's' right to freely choose his counsel."

That principal is not without limitations. In *Dewey,* the court stated in reference to such proposition:

> We recognize 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." *Reardon v. Marlayne, Inc., supra*, 83 N.J. at 477; *State v. Lucarello,* 135 N.J. Super. 347 , 353 (App.Div.), aff'd o.b., 69 N.J. 31 (1975). . . . The complaint in this matter was filed by Budd, Larner in 1982. Wilentz, Goldman became co-counsel in 1983. As of September 1986 that firm's attorneys and paralegals had expended more than 1,800 hours preparing this case for trial. They have undoubtedly expended many hundreds more since that time. By that September 1986 date thirty-nine witnesses had been deposed, and Wilentz, Goldman attorneys had attended all but three of those depositions. Other depositions were scheduled to be taken after that date. Alan Darnell, the Wilentz, Goldman attorney charged with responsibility for this case, filed an affidavit below indicating that, as one might expect in complex litigation, plaintiff's co-counsel have allocated different aspects of the case between themselves. Darnell properly questions whether at this late date, with trial fast approaching, another attorney could effectively master the complicated technical aspects of the case entrusted to him, or whether another attorney could develop the knowledge of and personal relationship with the various witnesses and with the plaintiff herself.
>
> As already indicated, had Brown Williamson's appeal reached us at an earlier juncture, we unquestionably would have upheld the disqualification of the Wilentz,

> Goldman firm for the reasons set forth above. We believe, however, that an order disqualifying counsel on the eve of trial would do more to erode the confidence of the public in the legal profession and the judicial process than would an order allowing the firm to continue its representation of the plaintiff. We therefore conclude that the Wilentz, Goldman firm should continue that representation.

Dewey, 109 N.J. at 218-19.

In addition, the Supreme Court imposed severe monetary sanctions on Wilentz, Goldman, including that further services of Wilentz be continued without charge and that any contingency amount be reduced. Further, the totality of all fees charged had to be reviewed by the Court. Id. At 220.

Here, because Mr. Mueller has done little, if any, substantive work on this matter, coupled with the facts presented, disqualification is proper, Respondents' argument regarding a client's choice of counsel was properly disregarded by the Trial Court.

POINT VIII

THERE IS NO REQUREMENT THAT IN ANALYZING MR. MUELLER'S DISQUALIFICATION, THERE BE AN ANALYSIS OF PETITIONERS' LIKELIHOOD OF SUCCESS ON THE MERITS (T3:1-12:16)

Respondents cite to no controlling law regarding whether a party seeking to disqualify counsel in a matter must show a likelihood of success on the merits. In

any event, it would make no sense that counsel should not be disqualified because he might win the case. As discussed supra, the invalidation of the two wills, as opposed to one in this case, where both wills are almost identical (as also admitted by Respondents), leaving the bulk of Decedent's Estate to Respondents, would have little, if any, effect on Petitioners' ability to prevail.[22]

Therefore, Respondents' claim that an analysis of Petitioners' likelihood of success on the merits regarding Petitioners' Motion to Disqualify is totally devoid of merit and should be given no consideration.

CONCLUSION

By virtue of the foregoing arguments and authorities, Petitioners respectfully submit that the Trial Court was correct in disqualifying Mr. Mueller and The Law Offices of Geoffrey D. Mueller, LLC due to an irreconcilable conflict of interest. Because of the conversations Ms. Knoll previously had with Mr. Mueller, Respondents received prejudicial confidential information substantially harmful to Petitioners and directly relating to the same litigation. Rules of Professional Conduct 1.18 compels disqualification and bars disclosure of all such information. Ms.

[22] It is incredible that Mr. Mueller would state that Ms. Knoll would have to "invalidate bequests to two charitable beneficiaries," when based on the October 2022 Will, his clients are alleged to have caused the invalidation of those two bequests, when such invalidation inured to the benefit of the Respondents. RB2, Pa66, Pa155.

Knoll's Certification has been presented to this Court, as it was in the Trial Court, for *in camera* review.

Accordingly, it is respectfully submitted that Respondents' Appeal be denied.

SCHUMANN HANLON MARGULIES LLC
ATTORNEYS FOR RESPONDENTS

By: *JOHN M. LOALBO*
JOHN M. LOALBO

Dated: October 7, 2024

LAW OFFICES OF GEOFFREY D. MUELLER, LLC
Geoffrey D. Mueller, Esq. (Attorney ID No.: 035262006)
366 Kinderkamack Road
Westwood, New Jersey 07675
Phone: (201) 569-2533
Attorneys for Appellants/Interested Parties, Frank Cicerale and Vally Cicerale, individually and as Co-Executors of the Estate of Agueda Medeiros Mesce, deceased

In the Matter of the Estate of AGUEDA MEDEIROS MESCE, Deceased.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3454-23 CIVIL ACTION ON LEAVE TO APPEAL FROM MAY 31, 2024 ORDER DISQUALIFYING COUNSEL SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: PROBATE PART SUSSEX COUNTY DOCKET NO.: SSX- P-176-23 Sat Below: Hon. Frank J. DeAngelis, P.J.Ch.

APPELLANTS' BRIEF IN REPLY TO RESPONDENTS' BRIEF AND APPENDIX

Geoffrey D. Mueller, Esq.
gmueller@gdm-law.com
Of Counsel and on the Brief

Peter E. Mueller, Esq.
ID No. 027671981
pmueller@gdm-law.com
On the Brief

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PRELIMINARY STATEMENT

When the trial court disqualified the Law Offices of Geoffrey D. Mueller ("Mueller Firm"), it specifically stated that it did **not** consider the Certification of Janis Knoll ("Knoll Cert."). Its decision was based on emails that were attached to that Certification – emails that are neither privileged nor probative. Thus, the question before this court is whether the disqualification, underpinned only by admittedly innocuous emails, can stand. The answer is that it cannot.

Petitioners (respondents on appeal), John Karn, Joan Karn, Janis Knoll, Joseph Karn, Jeffrey Karn, Thomas J.A. Mesce, Lidia Quental, Richard Tavares, Christine Hammell, George Tavares, Roberto Amaral Jorge, Mary Rubino, Carolyn Mesce, and James M. Mesce (collectively, "petitioners"), ignore this. They spend page after page placing their spin on the not-considered Knoll Cert. and attempt to justify their thus far successful attempt to litigate in secret.

Moreover, petitioners take umbrage at the suggestion that the still-unknown and untested contents of the disregarded Knoll Cert. may not be the gospel truth. Appellants are not casting aspersions; rather, they question how and why a prospective client, whose primary concern was challenging a Will in the next couple of days instead spent (an unknown amount of) time musing about decedent's testamentary intent and what she would accept to settle the then-nascent case. They fail to explain how Ms. Knoll's alleged and uninformed musings about settlement

are at all relevant, much less significantly harmful. After all, she was unable to identify out of state petitioners. She could not even identify all those would be taking under the (two of three) Wills she was aware of. Petitioners' opposition brief does not answer these questions.

Despite their misplaced dudgeon, petitioners have no compunction about impugning the credibility of Geoffrey Mueller, who has certified that he is not in possession of any information inimical to the success of petitioners' case. He does not remember Janis Knoll telling him anything about settlement strategy or her view of the weaknesses and strength of petitioners' case. Indeed, that is usually what the attorney tells the prospective client, not the other way around. And it is difficult, if not impossible, to provide a specific denial of allegations when one does not know the specific allegations.

This case is governed by RPC 1.18. As petitioners point out, RPC 1.18(a) provides, "A lawyer who has had communications in consultation with a prospective client *shall not use or reveal information acquired in the consultation*, even when no client-lawyer relationship ensues…" But a lawyer who was either not told of, or has no recollection of supposedly prejudicial information perforce cannot use or reveal that information. Thus, petitioners' bald accusations that Mueller's denial of recollection should not be credited necessarily fails.

At best, petitioners' motion to disqualify is a classic case of credibility. It is hornbook law that credibility cannot be assessed on the basis of competing certifications – especially when one of those certifications was allegedly not considered. Moreover, while the value of the Estate was never properly of record below, petitioners' opposition brief and appendix show that petitioners have between 4,000,000 and 8,000,000 reasons (*i.e.,* dollars) to try to tilt the playing field in their favor, by disqualifying their adversaries' counsel.

Accordingly, Appellants, Frank Cicerale and Vally Cicerale, individually and as Co-Executors of the Estate of Augeda Medeiros Mesce, deceased (collectively, "appellants") respectfully submit that the trial court's order should be reversed and vacated, and that The Law Offices of Geoffrey D. Mueller, LLC ("Mueller Firm") should be restored as counsel for appellants.

LEGAL ARGUMENT

I. PETITIONERS HAVE FAILED TO CARRY THEIR BURDENS OF PRODUCTION AND PERSUASION

Appellants pointed out that the trial court used the wrong standard, disqualifying counsel by finding that the information allegedly imparted by Knoll "may be" prejudicial. Petitioners have not denied that the wrong standard was used. Nor do they deny that the trial court did not consider the Knoll Cert. Nevertheless, they blithely assert:

> The fact that the Trial Court did not consider Ms. Knoll's Certification does not mean Petitioners have not satisfied their burden. [Rb19 n.12.[1]]

This is factually and legally unsupportable. The trial court's decision was "[b]ased on the email exchange between Petitioners and Counsel prior to the matter being initiated." Pa9. Petitioners concede those emails are innocuous. The only other possible basis was the Certification of Geoffrey D. Mueller ("Mueller Cert.), opposing the motion. Even under the erroneous "may be" standard applied by the trial court, neither can sustain petitioners' burden and they have not have satisfied their burden.

Petitioners spend multiple pages, Rb10-14, block-quoting *O Builders v. Associates, Inc. v. Yuna Corp. of N.J.*, 206 N.J. 109 (2011). Again, petitioners ignore the fact that the trial court considered only the emails, not the Knoll Cert. Thus, the trial court considered even less than what was considered inadequate in *O Builders*. One infers that petitioners feel that the disregarded Knoll Cert. was more persuasive than Mrs. Kang's certifications and testimony in *O Builders*, and that the Mueller Cert. should have been more detailed. But in *O Builders*, the parties were recounting a four-hour meeting, not a couple of phone calls. One would certainly expect more

[1] "Pb" and "Pa" respectively refer to Brief in Support of Appellants/Interested Parties' Appeal of Interlocutory Order and the accompanying appellants' appendix. "Rb" refers to Respondents' brief in opposition to the appeal, styled as "Petitioners' Opposition Brief to Appellants/Respondents' Appeal. "Ra" refers to Respondents' Appendix, styled as "Petitioners' Appendix in Opposition to Appellants/Respondents' Appeal."

detail from both the movant and the attorney. However, in this case, not a single email following those phone calls contains any significantly harmful information. One would think that if such things as testamentary intent, litigation strategy (on a case not yet filed) and settlement postures were discussed, the ensuing emails would at least tangentially mention them. They do not.

Petitioners' discussion of *City of Atlantic City v. Trupos*, 201 N.J. 447 (2010), Rb17-18 is inapposite. *Trupos* indeed holds that the burden can shift to the attorney. However, *Trupos* was not addressing the burden of whether the attorney was aware of significantly harmful information. Rather, the Court was referring to the issue of whether the matters were "substantially related." For that element, "the burden shifts to the attorney(s) 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…"). *Id.* at 463. This is not an issue here. And the burden does **not** shift to the attorney to disprove receipt or knowledge of "significantly harmful" information. That burden stays with the movant, *i.e.,* petitioners. In fact, after discussing the shifting burden on the "same or substantially the same" issue, *Trupos* specifically holds: "That said, the 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." *Ibid*. (internal quotation and citation omitted). The

attorney is not required to prove a negative, and petitioners' claim that the burden has shifted, Rb18-19, is contradicted by the very case they cite.

Petitioners' lengthy citations to *O Builders* notably does not include what constitutes "significantly harmful" information. That information "cannot simply be detrimental in general." 206 N.J. at 126. From petitioners' briefs, we learn that Knoll allegedly discussed:

- Her assessment of decedent's Estate (Rb2);
- Her assessment of decedent's testamentary intentions (Rb2);
- Strengths and weaknesses of the case (Rb2)
- Specific settlement positions (Rb2);
- Her views on what petitioners may be entitled to under decedent's will (Rb16)

Assuming she actually had such a communication, which again is a big if, Knoll's assessment of the Estate, decedent's testamentary intentions and view on what she might be entitled to under decedent's (unspecified) will are not "harmful," much less significantly harmful.

Moreover, Knoll's alleged ruminations about decedent's testamentary intent are likely not even admissible, much less harmful. Assuming decedent's alleged statements form the basis for Knoll's "knowledge" of testamentary intent, she would

have to overcome hearsay objections and N.J.S.A. 2A:81-2, which requires clear and convincing proof.

Similarly, Knoll's statements regarding what she would settle for are both uninformed and beside the point. Simply put, one's settlement posture and litigation strategy cannot be determined before discovery is taken, much less before the lawsuit is filed. If Knoll is a prescient as petitioners posit, they would not need any discovery.

Finally, assuming the trial court in fact relied upon the Knoll Cert., it was improper to make credibility determinations or resolve genuine factual issues based on conflicting certifications. *See, e.g., Conforti v. Guliadis*, 245 N.J. Super. 561, 565, (App. Div. 1991), *aff'd as modified,* 128 N.J. 318 (1992):

> a holding which authorizes a trial court to decide contested issues of material fact on the basis of conflicting affidavits, without considering the demeanor of witnesses, is contrary to fundamental principles of our legal system.

Where "there looms a question of witness credibility," a plenary hearing should have been held to justify the extreme remedy of disqualifying counsel. *Dewey v. R. J. Reynolds Tobacco Co.*, 109 N.J. 201, 222 (1988); *Trupos*, 201 N.J. at 463.

II. APPELLANTS CORRECTLY RAISE QUESTIONS REGARDING THE VERACITY OF PETITIONERS' ASSERTIONS

While professing indignation that appellants question their veracity, petitioners accuse appellants of being less than forthright. Rb29-31. However,

petitioners' brief reveals the opposite. It confirms petitioners' continued efforts to obfuscate.

Petitioners *are* correct that the lawyer who drafted the Will in question had also done legal work for appellants. But to say such a statement is "totally correct," Rb30, is again misleading. First, appellants have never denied that Mr. Redbord had done legal work for them. But petitioners do not address what appellants pointed out: that Mr. Redbord had drafted three Wills for decedent, including the one that respondents hope to probate. Pb7. Mr. Redbord was no stranger to decedent; the implication that appellants steered decedent to him is unsupported.

Similarly, petitioners never explain why it would *not* strain credulity for Ms. Knoll to lay out her entire case when, at that point, she had a much more immediate concern: timely filing a challenge. There were only a couple of days left to file a challenge to the probate. At that point, she could neither identify nor recruit any out of state potential beneficiaries, which would extend the time to challenge. That was the primary focus: stopping the clock. Coincidentally, that is exactly what is reflected in the emails the trial court cited: locating non-New Jersey challengers and whether non-probate assets were subject to the four-month limitation set forth in *R.* 4:85-1. Pa10. Those emails (which petitioners still have not produced) do not mention anything regarding strategy, settlement posture, testamentary intent, how much was in decedent's estate or what petitioners may be entitled to under the Wills.

Cf. Rb2, 16. Certainly, if they had, petitioners would be featuring them front and center.

Finally, petitioners continue to prate about the allegedly equivocal nature of the Mueller Certification. The statement "I do not recall" is unequivocal. Unequivocal does not mean truthful – many unequivocal statements are untrue. As an example, on January 26, 1998, William Jefferson Clinton unequivocally stated, "I did not have sexual relations with that woman." That statement was proven false. Again, the purpose of RPC 1.18 is to prevent a lawyer who has consulted with a prospective from using or revealing information acquired in the consultation. The contents of the Mueller Certification show that no such information can be used or revealed, because no such information is recalled.

Finally, petitioners continue to prate about the allegedly equivocal nature of the Mueller Certification. To certify, "I do not recall" is unequivocal. Petitioners would have this Court conflate recall and veracity. It is understandable given the paucity of evidence in support of their motion. This is especially so against the backdrop of Petitioners' attempts to keep the interceding will from being produced.

RPC 1.18 is, understandably, designed to prevent a lawyer who has consulted with a prospective client from using or revealing damaging information acquired in that consultation. The Mueller Certification confirms that no such information might

be compromised, because no such information is recalled, if in fact, it ever was revealed. The order below should be reversed.

CONCLUSION

For the reasons above, and those set forth in appellants' principal brief, it is respectfully submitted that the trial court's order should be reversed and the Law Offices of Geoffrey D. Mueller, LLC be permitted to represent appellants in this litigation.

Respectfully submitted,

Law Offices of Geoffrey D. Mueller, LLC

By: */s* *Geoffrey D. Mueller*
Geoffrey D. Mueller, Esq.
Attorney ID No. 035262006

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