UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENEZ BALTHAZAR,	:	
Plaintiff,	:	**CIVIL ACTION NO. 02-cv-1136 (SMO)**
vs.	:	
ATLANTIC CITY MEDICAL CENTER, ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES, et al.,	:	
	:	**NOTICE OF MOTION**
Defendants		

TO: Frank D. Branella, Esquire
Suite 501
1500 Walnut Street
Philadelphia, PA 19102

PLEASE TAKE NOTICE, that on Friday, March 7, 2003, at 9:00 a.m., or as soon thereafter as the Court will order, Moving Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, by and through their attorneys, Gold, Butkovitz & Robins, P.C., will move before this Honorable Court for an order granting their Motion for Disqualification of Plaintiff's Counsel in the above-captioned matter. Your response hereto is due within the applicable time period provided by the Federal Rules of Civil Procedure.

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: _____
ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services

7837 Old York Road
Elkins Park, PA 19027
(215) 635-2000

DATE: January 30, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENEZ BALTHAZAR,	:	
Plaintiff,	:	**CIVIL ACTION NO. 02-cv-1136 (SMO)**
vs.	:	
ATLANTIC CITY MEDICAL CENTER, ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES, et al.,	:	
Defendants	:	

MOTION OF DEFENDANTS, ATLANTIC CITY MEDICAL CENTER AND ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES FOR DISQUALIFICATION OF PLAINTIFF'S COUNSEL

Moving defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, by and through their attorneys, Gold, Butkovitz & Robins, P.C., hereby move before this Honorable Court, for the entry of an order disqualifying counsel for the Plaintiff, Frank D. Branella, Esquire, Anne P. Cataline, Esquire, and the Law offices of Frank D. Branella, P.C. ("Plaintiff's Counsel") in their representation of the Plaintiff, Enez Balthazar, in this matter.

In support of their Motion for Disqualification, moving defendants hereby rely upon and incorporate by reference, the accompanying Memorandum of Law in Support of Motion for Disqualification and Exhibits thereto, which are being filed and served contemporaneous with this Motion.

WHEREFORE, moving defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, respectfully request that this Honorable Court grant their Motion for Disqualification of Plaintiff's Counsel, and enter the accompanying Order disqualifying, Frank D. Branella, Esquire, Anne P. Cataline, Esquire and the Law Offices of

Frank D. Branella, P.C., from the further represenation of the Plaintiff, Enez Balthazar, in this matter.

Respectfully submitted,

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: _____

ALAN S. GOLD
SEAN ROBINS
Attorneys for Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services

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UNITED STATES DISTRICT COURT
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Plaintiff,	**:**	**CIVIL ACTION NO. 02-cv-1136 (SMO)**
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Defendants	**:**	

O R D E R

This matter having come before the Court upon the motion of defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, for the disqualification of Plaintiff's counsel, Frank D. Branella, Esquire, Anne P. Cataline, Esquire, and the Law Offices of Frank D. Branella, P.C. in their representation of the Plaintiff, Enez Balthazar, in this matter; and the Court having considered the submissions in support of the Motion; and having also considered the submissions in opposition to the motion; and for good cause shown;

IT IS THIS _____ day of _____, 2003, hereby ORDERED, that the motion for disqualification of Plaintiff's counsel in this matter is GRANTED. Plaintiff's counsel, Frank D. Branella, Esquire, Anne P. Cataline, Esquire, and the Law Offices of Frank D. Branella, P.C., are hereby disqualified from the further representation of the Plaintiff in this matter, effective immediately. Counsel are directed to serve a copy of this Order upon the Plaintiff. Further proceedings in this matter are hereby stayed for a period of thirty (30) days so that the Plaintiff may obtain new counsel. Proceedings in this matter shall continue at the expiration of 30 days, or upon the entry of appearance of new counsel for the Plaintiff, whichever comes first.

BY THE COURT:

J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENEZ BALTHAZAR,	**:**	
Plaintiff,	**:**	**CIVIL ACTION NO. 02-cv-1136 (SMO)**
vs.	**:**	
ATLANTIC CITY MEDICAL CENTER, ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES, et al.,	**:**	
Defendants	**:**	

EXHIBITS OF DEFENDANTS, ATLANTIC CITY MEDICAL CENTER AND ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES IN SUPPORT OF MOTION FOR DISQUALIFICATION OF PLAINTIFF'S COUNSEL

Exhibit "A": Plaintiff's federal court Complaint, Balthazar v. Atlantic City Medical Center, et al., D.N.J., No. 02-cv-1136.

Exhibit "B": Plaintiff's state court Complaint, Balthazar v. Atlantic City Medical Center, et al., N.J.Super. Law Division, No. CAM-L-4527-99.

Exhibit "C": May 14, 2001 Order of the Hon. Carol E. Higbee.

Exhibit "D": Transcript of May 14, 2001 proceedings before the Hon. Carol E. Higbee.

Exhibit "E": Transcript of September 3, 2002 case management conference before Magistrate Judge Kugler.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the Motion of Defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, for the Disqualification of Plaintiff's Counsel, along with the accompanying Memorandum of Law in Support thereof; Exhibits; and proposed form of Order; were served on this date, via U.S. Mail, First Class, postage pre-paid, to the following:

Frank D. Branella, Esquire
Suite 501
1500 Walnut Street
Philadelphia, PA 19102

John A. Talvacchia, Esquire
Sharon F. Galpern, Esquire
STAHL & DELAURENTIS, P.C.
1000 Atrium Way, Suite 400
Mt. Laurel, NJ 08054

Thomas F. Marshall, Esquire
MARSHALL & CARB
The Washington House
100 High Street, Suite 103
Mount Holly, NJ 08060

Joseph A. Martin, Esquire
ARCHER & GREINER
One Centennial Square
Haddonfield, NJ 08033

GOLD, BUTKOVITZ & ROBINS, P.C.

BY: _____
SEAN ROBINS

DATE:_____

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ENEZ BALTHAZAR,	**:**	
Plaintiff,	**:**	**CIVIL ACTION NO. 02-cv-1136 (SMO)**
vs.	**:**	
ATLANTIC CITY MEDICAL CENTER, ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES, et al.,	**:**	
Defendants		

MEMORANDUM OF LAW IN SUPPORT OF
MOTION OF DEFENDANTS, ATLANTIC CITY MEDICAL CENTER
AND ATLANTIC CITY MEDICAL CENTER COMMUNITY HEALTH SERVICES
FOR DISQUALIFICATION OF PLAINTIFF'S COUNSEL

TABLE OF CITATIONS

CASELAW

STATUTES

RULES

I. STATEMENT OF THE FACTS

This matter was commenced in the United States District Court for the District of New Jersey with the filing of a Complaint, on or about March 14, 2002. (A true and correct copy of the Plaintiff's Complaint in this matter is attached hereto as Ex. "A") The Complaint was filed by Frank D. Branella, Esquire, on behalf of Plaintiff, Enez Balthazar, and is signed by Mr. Branella.

The Plaintiff is represented in this matter by Mr. Branella and his associate, Anne P. Cataline, Esquire, and the Law Firm of Frank D. Branella, P.C.

The Complaint in the instant matter ("the federal action") asserts claims against various defendants, including moving defendants, alleging violations of various sections of the federal Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, et seq., as well as claims under 42 U.S.C. §1985 alleging deprivation of due process and equal protection based upon race, and state law claims for forgery and fraudulent practices, falsification of documents, and so on.

The claims in the federal action are based in allegations regarding the conduct of the defendants in the litigation of the state court action, Balthazar v. Atlantic City Medical Center, et al., Docket No. CAM-L-4527-99, filed in the Superior Court of New Jersey, Law Division, Camden County ("the state court action"). (A true and correct copy of the Plaintiff's state court Complaint is attached hereto as Ex. "B") The state court action was filed on or about June 21, 1999.

The state court action revolved about claims of medical malpractice pertaining to the treatment and surgery provided to the Plaintiff, Balthazar, by the defendants in that matter. (The defendants in both the federal and state court actions are essentially the same.)

In the instant, federal action, Plaintiff alleges that the defendants' actions during the discovery of the state court action constituted a "scheme to prevent Plaintiff from prosecution of

her claims" which resulted in the dismissal, upon motions for summary judgment, of her claims. The essence of Plaintiff's claim is that due to the allegedly wrongful actions of the defendants during the discovery of the state court action, summary judgment was granted and her claims against all of the defendants dismissed with prejudice by the state court.

The dismissal of Plaintiff's state court action is presently the subject of an appeal by the Plaintiff in the Superior Court of New Jersey, Appellate Division, in Balthazar v. Atlantic City Medical Center, et al., No. A-5661-00T3.

Plaintiff's state court action as against the defendants, including ACMC, was dismissed with prejudice upon motions for summary judgment by Order of the Court dated May 14, 2001, and in the oral opinion given on the record on that date by the Hon. Carol E. Higbee, Judge of the Superior Court, Camden County. (See copy of the May 14, 2001 Order, attached hereto as Ex. "C", and copy of the transcript of the proceedings before Judge Higbee on that date, attached hereto as Ex. "D")

Judge Higbee, in her on the record oral opinion regarding the granting of the motions for summary judgment, makes it crystal clear that the Plaintiff's claims in the state court action would have gone to trial had it not been for the failure of Plaintiff and counsel to file an affidavit of merit timely. Judge Higbee explained:

> Plaintiff argues that they couldn't have filed an affidavit of merit on the ligation, on the actual cutting of the ureter, but that's not what's required in an affidavit of merit. An affidavit of merit is required to be specific as to the people or persons who have committed malpractice, but not as to the specifics of malpractice.
>
> An affidavit of merit can generally say, and can be very general, simply saying that the person believes that malpractice has been committed. The specifics in the malpractice don't even have to be identified and whether it's the stitching that's improper or the cutting that's improper, the affidavit of merit didn't have to identify either one specifically, it simply had to identify that it appeared there had been malpractice.
>
> **Plaintiff had the information that he needed to do that in a timely fashion and failed to do so. The affidavit should have been filed. It wasn't filed. The cases were therefore properly**

> **dismissed against those defendants, I believe.** . . .
>
> But when you get back to the fact that **you had the affidavit of merit information that you needed**, even if they did those acts, it's still negligence. If we're talking about gross negligence or serious negligence or bad negligence, they're all still negligence. They still all require an affidavit of merit. . . .
>
> The other claim that in fact there should be or could be some type of spoliation of evidence type of claim here, again, when you have no claim because you failed to file an affidavit of merit, then you don't have a spoliation claim. **Nothing that they did would have prevented you from filing the affidavit of merit and having a claim.** (emphasis added)

Oral Opinion of Hon. Carol E. Higbee, May 14, 2001 (Ex. "D", at 13-14).

Judge Higbee made it clear in her oral opinion that she was dismissing the Plaintiff's Complaint solely because of the failure to timely file the required affidavit of merit in support of Plaintiff's medical malpractice claims. Further, Judge Higbee determined that Plaintiff's counsel possessed the information necessary to have filed the appropriate affidavit of merit in a timely manner. Judge Higbee also stated clearly that nothing done by any of the defendants during the course of discovery in the state court action prevented Plaintiff's counsel from filing the required affidavit of merit. (See Ex. "D", at 13-14)

Plaintiff's counsel, in the federal complaint, asserts that it was not possible for him to have provided an affidavit of merit in the state court action because of the defendants' alleged fraudulent actions during the state action discovery, and that, an affidavit of merit cannot be based upon a fraudulent medical record. (See Ex. "A")

These same assertions were made concerning the affidavit of merit in argument before the state court on summary judgment and were rejected by Judge Higbee, who found that nothing the defendants did during discovery prevented Plaintiff's counsel from filing the affidavit of merit, and that he possessed the information necessary to have done so timely.

At a case management conference in the federal action, conducted by Magistrate Judge Kugler, on the record on September 3, 2002, Plaintiff's counsel was questioned concerning the

state court action, and the reasons for the dismissal of Plaintiff's complaint therein on summary judgment. Judge Kugler specifically asked Plaintiff's counsel why the Plaintiff had failed to provide the requisite Affidavit of Merit:

> THE COURT: Now, I'm still not clear, when you got this motion in the state court case from the defendants attacking your lack of an affidavit of merit, what was your response to the court, why didn't you have an affidavit of merit?
>
> MR. BRANELLA: Oversight, to be quite candid.
>
> THE COURT: Oversight. You didn't realize there was a statute that required it?
>
> MR. BRANELLA: We actually had the expert report, we just didn't send it within the period time. And based on those records, it turned out those records are fraudulent.
>
> THE COURT: Well, I guess you still didn't answer my question. Did you realize there was a New Jersey statute that required that you serve the affidavit of merit?
>
> MR. BRANELLA: Yes. We had the expert report before I even prepared the complaint.
>
> THE COURT: Did you serve that?
>
> MR. BRANELLA: The complaint?
>
> THE COURT: No, the expert report.
>
> MR. BRANELLA: Not during the required period of time, sir.
>
> THE COURT: Why not?
>
> MR. BRANELLA: It was an oversight, sir.
>
> THE COURT: It's a problem, isn't it?
>
> MR. BRANELLA: Well, it's a problem if the records were legitimate, but subsequently found they're not, so it doesn't –
>
> THE COURT: Well, even before you got to that stage, that's a problem that you didn't serve an expert report and affidavit of merit, isn't it?
>
> MR. BRANELLA: Oh, yes, sir.
>
> THE COURT: Does your client know that she had other recourse because of that?

MR. BRANELLA: Yes, sir.

See transcript of the September 3, 2002 case management conference, attached hereto as Ex. "E", at 13-14.

Therefore, according to Plaintiff's counsel, Branella, he was in the possession of an expert report pertaining to the alleged medical practice "before I even prepared the complaint" in the state court action.

When asked specifically by Judge Kugler why he had neither filed the required affidavit of merit timely, or served the expert report which he had prior to initiating suit, Plaintiff's counsel, Branella, stated that he had failed to do so through "[o]versight, to be quite candid." Stated Branella: "We actually had the expert report, we just didn't send it within the period time." (Ex. "E")

Accordingly, Plaintiff's counsel in the federal action, who was also counsel for the Plaintiff in the state court action, has admitted, to the Court in the federal action, that the reason the affidavit of merit (as well as the expert report) was not timely served in the state court action, was because of his own "oversight." The sole reason Plaintiff's state court action was dismissed, the sole basis for Judge Higbee's grant of summary judgment, was the failure of Plaintiff's counsel to timely file an affidavit of merit. And not only did Judge Higbee determine on May 14, 2001 that counsel had the necessary information to have prepared and filed the affidavit of merit, but counsel admitted also that he had an expert report to support an affidavit of merit prior to initiating suit in the state court.

The inescapable conclusion from these simple facts is that the affidavit of merit was not timely served, and the Plaintiff's state court action dismissed with prejudice, because of the legal malpractice of Plaintiff's counsel.

Plaintiff's counsel, in opposition to the dismissal of Plaintiff's state court action, in the

appeal of that dismissal (presently pending before the Appellate Division), and in the context of the federal action, had desperately urged the courts to find that he was precluded from filing an affidavit of merit due to the alleged wrongful actions of the defendants during discovery in the state court action. In making this argument, counsel asserts that because of the actions of the defendants in discovery of the state court action, the Plaintiff was misled as to the actual cause of her medical injuries, and that there existed more than one operative report that were inconsistent.

In rejecting this line of argument, Judge Higbee reviewed the content of a later expert report obtained by the Plaintiff's counsel prior to arguments on the motion for summary judgment, and noted that:

> In this particular case there's no question in reviewing Dr. Crane's (Plaintiff's expert) report itself that at the time that the affidavit of merit was due plaintiff had sufficient information to file an affidavit of merit. Plaintiff had the operative reports even though there were more than one, even though they may have been re-dictated, even though they may not have completed – been complete, even though they may have concealed some information. Plaintiff had enough in those operative reports as they existed to file an affidavit of merit.
>
> Dr. Crane himself says, the above deviations required the patient to have certain treatments and he says one of the above deviations could not have been reasonably discovered until the deposition of Dr. Kimmel, that is the fact that the ureter was cut. Up till then it was believed simply that the ureter had been improperly stitched and closed and them damaged. But there was no question that the ureter was damaged during the procedure. There was no question that the patient had been closed without the ureter being properly identified and – without the ureter being properly identified, without it being properly repaired. At least from a plaintiff's point of view there is no question about that and there was sufficient evidence there and sufficient record and they could have filed an affidavit of merit.
>
> Plaintiff argues that they couldn't have filed an affidavit of merit on the litigation, on the actual cutting of the ureter, but that's not what's required in an affidavit of merit. An affidavit of merit is required to be specific as to the people or persons who have committed malpractice, but not as to the specifics of malpractice.
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> An affidavit of merit can generally say, and can be very general, simply saying that the person believes that malpractice has been committed. The specifics in the malpractice don't even have to be identified whether it's the stitching that's improper or the cutting

> that's improper, the affidavit of merit didn't have to identify either one specifically, it simply had to identify that it appeared there had been malpractice.
>
> Plaintiff had the information that he needed to do that in a timely fashion and failed to do so. The affidavit should have been filed. It wasn't filed. The cases were properly dismissed against those defendants, I believe.

(Ex. "D", at 11-12)

It is clear, from Judge Higbee's own words, that even if the Plaintiff is correct, that due to alleged actions of the defendants in preparing the operative reports, or during the course of discovery, the Plaintiff was mislead into believing that she had been injured because her ureter had been improperly stitched during the surgery, rather than because it had been cut and then stitched back together, there existed no impediment to Plaintiff's counsel's properly and timely filing the required affidavit of merit.

It any event, it is clear that Plaintiff's counsel failed to timely file the required affidavit of merit, and it was because of this failure to file the affidavit of merit that the Plaintiff's state law claims were dismissed on May 14, 2001. Plaintiff's counsel's failure to file timely the affidavit of merit constitutes legal malpractice. Plaintiff's claims were dismissed with prejudice on May 14, 2001 because of the legal malpractice of Plaintiff's counsel. Mr. Branella stated on September 3, 2002 to Judge Kugler that he failed to file the affidavit of merit through an "oversight," in other words, unintentionally. This constitutes legal malpractice. Whether, in fact, the failure to file the affidavit of merit was unintentional on the part of Plaintiff's counsel, as he suggested on September 3, 2002, or it was intentional, as suggested by counsel on May 14, 2001, in that counsel chose not to file an affidavit of merit because they were not 100% certain about the details of the surgery, counsel's failure to file the affidavit of merit constitutes legal malpractice.

Given the foregoing facts concerning the cause of Plaintiff's injuries in this matter (i.e., the dismissal of her state court medical malpractice action), Plaintiff, Enez Balthazar, has an unquestionably strong claim against her present counsel, Mr. Branella and his firm, for legal

malpractice. There can be but little question that the genesis of the present federal RICO action lies with Plaintiff's counsel, and not with the Plaintiff herself; there can be little doubt that the present action came about upon the advice of Plaintiff's counsel. Strong and compelling arguments have been and are being made in this matter (through a variety of pending and soon-to-be-filed motions) that the instant federal action is without any basis. Despite counsel's attempts to characterize the facts otherwise, there is little serious dispute but that the Plaintiff's state court action was dismissed due to her counsel's failure to file the affidavit of merit, and was dismissed by a state court judge who based her decision solely upon that failure, while also finding that Plaintiff's counsel had all the information necessary to have filed the affidavit timely.

II. PLAINTIFF'S COUNSEL SHOULD BE DISQUALIFIED AS THEIR CONTINUED REPRESENTATION OF MS. BALTHAZAR CONSTITUTES AN ACTUAL CONFLICT OF INTEREST UNDER NEW JERSEY R.P.C. 1.7(b)

Moving defendants herein seek the disqualification of Plaintiff's counsel in this matter, Frank D. Branella, Esquire, Anne P. Cataline, Esquire, and the Law offices of Frank D. Branella, P.C. in their representation of Plaintiff, Enez Balthazar, on the ground that their actions in the state court case place them in a direct and unavoidable conflict of interest with their client. The current federal court action, filed by Plaintiff's counsel, seeks to place responsibility for the dismissal of Plaintiff's state court action upon the defendants, rather than where it legitimately belongs, on Plaintiff's counsel's own doorstep. In addition, both Mr. Branella and Ms. Cataline are primary factual witnesses with regard to the claims alleged in the federal action.

Plaintiff's counsel, Mr. Branella and his firm, find themselves in the conflicted position of representing Ms. Balthazar in the pursuit of a claim, allegedly deriving from the dismissal of the state court action, while acting under the cloud of a highly potential, and highly colorable, legal malpractice suit which would have at its basis the same dismissal of Plaintiff's state court action. The pursuit of the federal court action in this matter is, in essence, a defensive move by Mr. Branella and his firm, asserting that the dismissal of the state court action was not his fault, but it was someone else's fault. Such a position is irretrievable untenable from an ethical standpoint, and requires the disqualification of Mr. Branella, his associate, Ms. Cataline, and his law firm from the representation of Enez Balthazar.

New Jersey Rule of Professional Conduct ("RPC") 1.7 sets forth the standard applicable to a New Jersey attorney respecting conflicts of interest and a client, which states in relevant part:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client of to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after a full disclosure of the circumstances and consultation with the client, . . .
> (c) This rule shall not alter the effect of case law or ethics opinions

> to the effect that:
>
> (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial, . . .

New Jersey RPC 1.7.

In the instant case, there can be little doubt but that the representation of Ms. Balthazar by Mr. Branella, Ms. Cataline and their firm is "materially limited" by their own interests. There exists the very real possibility that suit can, will or should be filed against Plaintiff's counsel for legal malpractice in the dismissal with prejudice of Plaintiff's state court action.

The undisputed and undisputable basis upon which the state court judge granted summary judgment was the failure of counsel to file timely the required affidavit of merit, although, as Judge Higbee also found, Plaintiff's counsel had the necessary information to have done so. Judge Higbee found that, as a matter of law, the information that Plaintiff's counsel and their expert in the state court action possessed pertaining the alleged medical malpractice was adequate to have prepared and filed the affidavit of merit. Judge Higbee also found that the distinction which Plaintiff's counsel attempted to make therein (and attempts to make in the federal action), that they believed the malpractice consisted of a damaged or mis-sewn ureter, rather than a transected (or cut) ureter, posed no impediment to the timely filing of an appropriate affidavit of merit. Plaintiff's counsel's own failure to file the affidavit of merit, where Judge Higbee specifically found that counsel could have and should have based upon the information available at the time to counsel, was the sole cause of the dismissal of Plaintiff's state court action. Judge Higbee also specifically determined that nothing that the defendants did or failed to do in discovery in any way prevented Plaintiff's counsel from preparing and filing the affidavit of merit. Further, Plaintiff's counsel has admitted on the record in the federal action that the failure to file the affidavit of merit was due to his own "oversight." The affidavit of merit requirement in New Jersey stands second only to the statute of limitations in terms of procedural "bogeymen" of which all counsel representing such claimants must be ever vigilant. There exists no excuse, absent legal malpractice, for permitting a client's (otherwise timely and legitimate)

claims to be dismissed on either of these grounds.

Plaintiff's counsel has argued, both in the state court action and the federal action that he could not have legitimately filed an affidavit of merit because the information available concerning the detailed particulars of the alleged medical error (i.e., that the ureter was actually cut rather than improperly sutured) would have rendered the affidavit of merit invalid. The state trial court judge rejected this argument in granting summary judgment, finding that the information which is required to be placed in the affidavit of merit need not be so specific, detailed or accurate. Further, from a chronological point of view, it appears that Plaintiff's counsel was already in default in the filing of the affidavit of merit (which must be filed within 60 days of the filing of the complaint) by the time, according to counsel, he discovered the "real" medical error in question (again, that the ureter had been cut rather than improperly sutured).

Regardless of whether Ms. Balthazar at this time intends to bring suit against her counsel for their legal malpractice in failing to timely file the affidavit of merit, until the statute of limitations expires on such a claim, a claim which based upon the undisputable facts before this Court is a substantial, well-founded claim, counsel's ability to properly represent the interests of Ms. Balthazar is "materially limited" by counsel's own interests. Ms. Balthazar is already being harmed by this "conflict" between her interests and the interests of her counsel.

Here, her interest, in view of the dismissal of her medical claims by the state court on summary judgment, is in obtaining compensation, if available, for medical malpractice that (presumably) she believes occurred. Counsel's own interests clearly include avoiding being the subject of a suit for legal malpractice. One means of fulfilling Ms. Balthazar's interest in obtaining compensation for her medical malpractice claim, in view of the summary judgment dismissal, is to initiate suit again her counsel for legal malpractice in failing to file timely the required affidavit of merit. Such a claim would be well-founded and stand a high likelihood of

success.

Another means, evidently in the view of Plaintiff's counsel, of recovering from the summary judgment dismissal of Ms. Balthazar's state law claims, is to initiate suit in federal court against the same group of defendants as in the state action, and allege RICO claims founded upon allegations that their actions in discovery of the state court case prevented Plaintiff's counsel from filing an affidavit of merit. For the reasons discussed above, these claims are poorly-founded and poorly-pled (as moving defendants' still-pending Motion to Dismiss in this matter discussed in detail), and stand an extremely low likelihood of surviving until trial, let alone obtaining a jury verdict. This is particularly so when viewed in comparison to Ms. Balthazar's other alternative, suing her attorney's for their legal malpractice. Plaintiff's counsel has chosen to follow this second course of action as both a "sword" and a "shield": A "sword" attempting to recover damages for a medical malpractice action dismissed because of the lack of an affidavit of merit; and a "shield" against the legal malpractice claim that Plaintiff's counsel may very well be subjected to (both in terms of defending themselves against a claim of malpractice by pointing the finger at someone other than themselves, and as a means of diverting Ms. Balthazar's attention away from her own counsel's actions).

Regardless of what may actually lie in the minds of Plaintiff's counsel regarding their own responsibility for the dismissal of their client's state court action because of the failure to timely file an affidavit of merit (and again, Mr. Branella's statement to the Court on September 3, 2002, stands as a clear admission by counsel), the conflict between their own, personal interests and the interest of Ms. Balthazar is abundantly clear. That conflict of interest has already resulted in the perpetuation of baseless federal RICO action in the place of a well-founded legal malpractice action. That conflict has resulted in pursuit of a poor claim to the exclusion of a strong claim. That conflict has resulted in (potentially) the passage of a substantial portion of the two-year statute of limitations on Plaintiff's as-yet-unfiled legal malpractice action.

Where, as in this case, a party's counsel continues to represent them (particularly in a

related matter), where counsel is operating under the cloud of a yet-to-be-filed although highly potential legal malpractice claim, disqualification of counsel is proper. New Jersey RPC 1.7(b) clearly requires that Mr. Branella, Ms. Cataline and their firm be disqualified in the representation of Ms. Balthazar. Ms. Balthazar is entitled to objective, "un-conflicted" legal advice as to her rights against her present counsel for their actions in failing to file the affidavit of merit. Plaintiff's current counsel cannot fulfill this function. Neither can they continue to adequately represent her interests (whatever those interests may be) in the present forum, pursuing sham RICO claims as a means of deflecting their own liability.

The Court in Lease v. Rubacky, 987 F.Supp. 406 (E.D.Pa. 1997), for example, considered one such circumstance in detail. In Lease, a law firm and its client sued a medical expert retained by them in an underlying medical malpractice action for breach of contract when the expert, who had allegedly agreed to provide an opinion supporting plaintiff's claims subsequently refused to do so. Id, 987 F.Supp. at 407. Plaintiffs claimed that because of this breach of the expert's agreement to provide an opinion resulted in their being forced to withdraw their medical malpractice action. Id. The defendant-expert in Lease moved for the disqualification of counsel in the breach of contract action alleging that plaintiff's counsel's interests were directly adverse to the plaintiff's interests as they were "directly liable to Lease for the failure of her underlying claim against [plaintiff's doctor]." Id. 987 F.Supp. at 408. In an analysis that is applicable to the instant matter, Judge Joyner, in granting the motion to disqualify Plaintiff's counsel, explained:

> Defendant claims that the interests of [Plaintiff's counsel] are directly adverse to the interests of Ramona Lease [the Plaintiff] given that [Plaintiff's counsel] stand directly liable to Lease for the failure of her underlying claim against [her physician]; the same claims from which Lease now seeks compensation from Rubacky. Defendant will assert at trial that [Plaintiff's counsel] alone are responsible for any injury Lease may have suffered due to their malpractice in failing to obtain an expert for trial after the alleged breach by [defendant-expert].
>
> The potential latent claims Lease has against [her counsel] present directly adverse interests. (citation omitted) For example, Lease's theoretical settlement opportunities are adversely affected by joint representation. If Lease does not receive full, or even any,

> recovery from [the defendant], she can assert a claim against [her attorneys]. However, the interests of [Plaintiff's counsel] are best protected by fully pursuing the litigation with [the defendant] because if Lease receives full recovery from [the defendant], she will be less likely to assert her potential claims against them. Thus, in any potential settlement discussions with [the defendant], [Plaintiff's counsel's] interests will be directly adverse to Lease's.
>
> Further, [Plaintiff's counsel] will not likely advise Lease to pursue her claims against them in an effort to recover for her injury. Thus, Lease's avenues of obtaining recovery are adversely affected by [her counsel's] representation of her.

Id. 987 F.Supp. at 409.

In the instant situation, while it is true that Ms. Balthazar's counsel are not co-plaintiff's with her, the analysis, and the problems remain the same. Here, as in Lease, this subsequent action seeks an alternative avenue for compensation of the plaintiff where the actions of her counsel in the underlying medical malpractice action resulted in the failure of her claims. In Lease, the strength of the assertion that plaintiff's counsel had committed legal malpractice which resulted in the failure of her claims is not nearly as strong and as clear as Ms. Balthazar's potential claims for malpractice against Mr. Branella and his firm for the dismissal of her state court action for failing to file an affidavit of merit. In Lease, the "remedial" action, so to speak, the breach of contract action against the expert, was not as clearly baseless as the RICO claims in this matter. Here, also as in Lease, should this matter end up at trial, the finger of responsibility will point directly as Plaintiff's counsel, and Plaintiff's counsel will be called to defend themselves against charges of legal malpractice (albeit leveled by the defendants, and not by Plaintiff herself). If there is any slight doubt but that there exists a conflict in the continued representation of the Plaintiff by her counsel, the Third Circuit has held that such a doubt "should be resolved in favor of disqualification." International Business Machines Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978). Accordingly, RPC 1.7(b) and applicable case law require that Plaintiff's counsel be disqualified from her representation.

III. PLAINTIFF'S COUNSEL SHOULD BE DISQUALIFIED IN THEIR REPRESENTATION OF THE PLAINTIFF

BECAUSE THEY WILL BE NECESSARY FACT WITNESS IN THE TRIAL OF THIS MATTER

Also here, as in Lease, Plaintiff's counsel will be called as witnesses. Essential to Ms. Balthazar's RICO claims in this matter are allegations concerning the actions of the defendants (and their counsel) during the discovery of the state court action. These are assertions made upon the personal knowledge of Plaintiff's counsel. The only persons with knowledge of many of the factual averments made in an effort to support Plaintiff's RICO claims are Plaintiff's own counsel. If Plaintiff's counsel fail to take the stand in their own case, many or all of Plaintiff's RICO claims (again, if this matter makes it to trial) will likely fall under their own weight at the close of Plaintiff's case. Should this matter go to trial, and should trial reach the defense phase, the defendants will be calling Plaintiff's counsel, both Mr. Branella and Ms. Cataline, as witnesses. Even before trial is reached, should discovery in this matter proceed, the depositions of both Mr. Branella and Ms. Cataline will be taken.

New Jersey Rule of Professional Conduct 3.7 addresses the question of whether an attorney may represent a party in a matter in which that attorney will be a necessary witness:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

New Jersey RPC 3.7(a). The Court in Lease likewise stated that it would also grant disqualification on the grounds that one of Plaintiff's counsel would be a necessary fact witness to events pertaining to the breach of contract claim against the defendant-expert.[1] Here, based on the Plaintiff's assertions in support of her RICO claims, both Mr. Branella and Ms. Cataline will be essential fact witnesses to the alleged wrongful conduct of the defendants and/or their counsel

[1] Although the District Court in Lease was applying the Pennsylvania Rules of Professional Conduct, the rules at issue are essentially the same as their equivalent New Jersey rules.

in the state court action.[2] RPC 3.7(a) provides for the mandatory (as opposed to permissive) disqualification of counsel absent one of the enumerated exceptions. Clearly the issues involved in the testimony would be contested; the testimony is not related to the value of the legal services rendered by counsel, as in a fee dispute; and there is not basis for believing that substitute counsel could not suitably represent Ms. Balthazar's interests in this matter. In fact, the entire thrust of the discussion herein in quite the opposite: new counsel for Ms. Balthazar would better protect her interests than those whose actions resulted in the dismissal of her state court action. RPC 3.7(a) requires that Plaintiff's counsel be disqualified from her representation.

IV. PLAINTIFF'S COUNSEL SHOULD BE DISQUALIFIED IN THEIR CONTINUED REPRESENTATION BECAUSE OF THE EXISTENCE OF THE APPEARANCE OF IMPROPRIETY

New Jersey is one of the few states to retain the "appearance of impropriety" rule with regard to attorney conflicts of interest, and the eschew the less stringent approach to disqualification advocated by the American Bar Association. In re Petition for Review of Opinion No. 569, 103 N.J. 325, 330, 511 A.2d 119, 122 (1986). In State v. Needham, 298 N.J.Super. 100, 688 A.2d 1135 (Law Div. 1996), the Superior Court disqualified an attorney in the representation of a criminal defendant, where that attorney had previously represented the chief prosecution witness in a completely unrelated matter. That court held that "such representation would create an appearance of impropriety and that the defense attorney should be disqualified." Id. 298 N.J.Super at 1135-36, 688 A.2d at 102. The Court's in New Jersey have

[2] One recent example that Plaintiff's counsel provided for the Court during status conferences before Magistrate Judge Rosen, in the assertion, based solely upon the personal knowledge and belief of Mr. Branella, that a certain defendant in the state court action, when presented for deposition in that action, was not whom he claimed to be, and that a "phony" had been substituted for the real defendant. Many of the assertions of Plaintiff's counsel regarding the alleged conduct in the state court action likewise will rely upon counsel's own testimony for establishment.

repeatedly held that "where there exists an appearance of impropriety in an attorney's representation of a client, the representation must cease." State v. Catanoso, 222 N.J.Super. 641, 644, 537 A.2d 794 (Law Div. 1987), citing State v. Morelli, 152 N.J.Super 67, 70, 377 A.2d 774 (App.Div. 1977). The Supreme Court found that "[w]hen an attorney's former client is the State's chief witness, it is beyond dispute that an appearance of impropriety is created, requiring the attorney be disqualified." Needham, 298 N.J.Super. at 103, 688 A.2d at 1136, citing Catanoso, supra; Morelli, supra. Whether there exists an "appearance of impropriety" is to be judged from the "viewpoint of the public." Opinion 569, 103 N.J. at 331, 511 A.2d 119. Even in the absence of an actual conflict of interest, "[a]ppearances too are a matter of ethical concern,

for the public has an interest in the repute of the legal profession." In re Abrams, 56 N.J. 271, 277, 266 A.2d 275 (1970).

In the instant matter, even if the existence of an actual conflict of interest were not so patently clear (see the discussion above), the appearance of impropriety that is inherent in the continued representation of a client by counsel in this federal action, where counsel is operating under the very real and substantial potential that their client will bring suit against her counsel for legal malpractice in the underlying and related state matter, is overwhelming

In this federal action, Plaintiff's counsel in essence seeks redress for his client for what he asserts are the wrongful actions of the defendants in the conduct of discovery of the state court action, which counsel alleges in the federal suit resulted in the dismissal of the state court action. At that same time, the same counsel had admitted, on the record in this federal action, that the state court action was dismissed through his own actions, through, as Mr. Branella has characterized, his own "oversight." Even if these facts did not "shout" "conflict of interest," any reasonable person viewing these circumstances would be justified in believing that something improper was occurring.

The state courts of New Jersey, interpreting their own rules and case law would require the disqualification of Mr. Branella, Ms. Cataline and their firm from the representation of the Plaintiff in this federal matter.

V. CONCLUSIONS

For the reasons discussed herein, and in the Motion for Disqualification, moving defendants, Atlantic City Medical Center and Atlantic City Medical Center Community Health Services, respectfully request that this Honorable Court grant their Motion for Disqualification, and disqualify Plaintiff's counsel, Frank D. Branella, Esquire, Anne P. Cataline, Esquire, and the Law Firm of Frank D. Branella, P.C., from the representation of Plaintiff, Enez Balthazar, in this matter.

Respectfully submitted,

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BY: _____

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