**State of New York** **Supreme Court**
**County of Steuben**

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**GEORGE M. FAWCETT and JANICE FAWCETT as ADMINISTRATORS of the ESTATE of FRANCIS K. FAWCETT, DECEASED,**

**Plaintiffs,**

**DECISION**

**vs.**

**Index No. 89,520**

**ST. JAMES MERCY HOSPITAL, ADRIAN ASHDOWN, MD and PANKAJLAL SHAH, MD**

**Defendants.**

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*Appearances:* *Williams & Powell LLP,* Rochester (by *Tracy A. Powell*, of counsel) for Plaintiffs

*Damon & Morey LLP,* Buffalo (by Julie M. Bargnesi, of counsel) for Defendants

This matter comes before the Court on defendants' motion for an order disqualifying plaintiffs' attorney, Tracy Powell (Powell), based on defendants' claim that Powell violated several disciplinary rules, obstructed justice, and will likely be called as a fact witness during the course of the medical malpractice trial. Powell denied the allegations. Counsel appeared and argued the motion after which the Court reserved decision.

The underlying action which gives rise to this matter is a medical malpractice lawsuit in which plaintiffs claim that defendants negligently failed to diagnose and treat an acute myocardial infarction, thereby causing the death of plaintiffs'

decedent. As part of the discovery process, Laura Prete, the decedent's fiancee, was deposed at the request of defendants. Although Powell did not represent Ms. Prete, Powell met with Ms. Prete prior to the deposition. After the deposition Ms. Prete called Linda G. Blauers, the Director of Marketing and Public Relations for St. James Mercy Health System, one of the defendants, to advise Ms. Blauers that she, Ms. Prete, was uncomfortable with her testimony at the deposition. According to Ms. Blauers, Ms. Prete claimed that Powell had instructed Ms. Prete not to raise certain issues and not to tell everything to the attorney representing the hospital. After this conversation between Ms. Blauers and Ms. Prete came to light, defendants filed the instant motion seeking disqualification of Powell based on their claim that Powell engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (DR 1-102[A][4]), created evidence when she knew, or it was obvious, that the evidence was false (DR 7-102 [A][6]), and that Powell may be called as witness on a significant issue other than on behalf of her client (DR 5-102[D]). Powell asserts that she did none of the things alleged and that she merely counseled Ms. Prete, as Powell would any witness, not to volunteer information that was not asked. Defendants argue that, regardless of what was said by Powell, it will become an issue in the trial and will require Powell to testify.

The decision whether or not to disqualify an attorney is within the discretion of the trial court (*Bentvena v. Edelman*, 47 AD3d 651 [2nd Dept. 2008]). In determining whether to grant a motion to disqualify, the court's function is to ensure

that the parties are properly represented and that litigation is conducted fairly *(Solomon v. New York Property Ins. Underwriting Ass'n*, 118 AD2d 695 [2nd Dept. 1986]). The court must take into account not only a party's significant right to be represented by counsel of its own choosing, but also the fairness and effect of granting disqualification (*S&S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 440-441 [1987]).

The party bringing a motion to disqualify an attorney must make a clear showing that disqualification is warranted (*Unger v. Unger*, 15 AD3d 389, 390 [2nd Dept. 2005]). Disqualification based on DR 5-102[D], also known as the advocate-witness rule, can be justified where the party moving for disqualification can show that 1) the testimony of the opposing party's counsel is necessary to their case, and 2) that such testimony is or may be prejudicial to opposing counsel's client *(Goldberger v. Eisner*, 21 AD3d 401 [2nd Dept. 2005]). However, the advocate-witness disqualification rules do not mandate disqualification but provide guidance for courts to use in determining a disqualification motion made by an adversary *(S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 440 [1987]). Disqualification under this rule is granted "where it is likely" that the attorney will be called as a witness, but only if the attorney's testimony is considered necessary (*Matter of Dudley*, 46 AD3d 1461 [4th Dept. 2007]; *Broadwhite Associates v. Truong*, 237 AD2d 162,163 [1st Dept. 1997]). "A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and

availability of other evidence" *(S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 NY2d 437, 446 [1981]). "Whether an opposing party *intends* to call the attorney as a witness is not dispositive of whether the attorney *ought* to be called" *(Burdett Radiology Consultants v. Samaritan Hosp.*, 158 AD2d 132, 134 [3rd Dept. 1990]).

In this case, defendants allege that plaintiffs' counsel must be disqualified based on her interaction with Ms. Prete prior to the deposition. Ms. Prete, although not a party to these proceeding, is an important fact witness who will most likely be called by one side or the other to testify about decedent's discharge and interaction with Dr. Shah. It appears that Ms. Prete may be the only other person present during that exchange. Defendants argue that, at the deposition, Ms. Prete denied knowledge of any instructions by Dr. Shah but later in her conversation with Blauers acknowledged instructions were given to decedent. Ms. Prete told Blauers that Powell advised Ms. Prete to not tell the whole truth during her deposition. Defendants claim that, when Ms. Prete's credibility is attacked, which it certainly will be, Ms. Prete will say that Powell told her to lie during the deposition and Powell will have to testify to refute these allegations.

The burden of proving that Powell is a necessary witness is on defendants (*Bentvena v. Edelman*, 47 AD3d 651[2nd Dept. 2008]). Although defendants set forth a possible scenario in which Powell might be a witness at trial, it is just as likely that she will not be a witness. During her deposition, Ms. Prete initially indicated that

she did not know whether decedent was given any instructions upon his discharge and she denied speaking to Dr. Shah. However, later in her deposition Ms. Prete stated that decedent was told to follow up with his physician. Therefore, her statements to Blauers are not totally inconsistent with her deposition testimony. If Ms. Prete testifies at trial that Dr. Shah did not tell decedent to contact his primary care physician, defendants can impeach her credibility with her statements at the EBT that such instructions were given. If Ms. Prete indicates that she does not recall whether Dr. Shah gave any instructions, then defendants may refresh her recollection through the EBT testimony or the transcript of her telephone conversation with Ms. Blauers. If Ms. Prete testifies that Dr. Shah did tell decedent to follow up with his primary care physician, as the medical records indicate, defendants will have no need to impeach her or to call Powell as their witness.

If Powell elects to impeach Ms. Prete as a result of testimony adverse to Powell's client, it is foreseeable that Powell could do so through effective cross-examination of Ms. Prete, without Powell having to take the witness stand herself. Powell's testimony is not necessary to prove the claim of malpractice, but is only potentially admissible to impeach Ms. Prete's credibility, should she testify on a material issue adverse to plaintiffs. Whether Powell's testimony is necessary, or even admissible, is far from clear at this juncture.

Plaintiffs' counsel acknowledged her obligation to withdraw as counsel, should plaintiff decide that Powell will testify at trial regarding a disputed issue of fact (DR

§5-102[c]). If plaintiffs, after full and frank discussions with counsel choose to forego calling Powell as a witness in order to continue representation by her, the Court should not substitute its judgment and require disqualification at an adversary's urging (*S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d 437, 445 [1987]). For these reasons, the current record does not support a finding that the testimony of plaintiffs' attorney is necessary and disqualification warranted (*Bentvena v. Edelman*, 47 AD3d 651 [2nd Dept. 2008]; *Broadwhite Associates v. Truong*, 237 AD2d 162 [1st Dept. 1997]).

Defendants' application to disqualify plaintiffs' counsel for alleged breaches of the other disciplinary rules is also denied. Based only on an accusation of impropriety without any finding that Powell did anything improper in her discussions with the witness, the Court does not believe disqualification is warranted (*S & S Hotel Ventures Limited Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]).

Based upon the above, defendants' motion to disqualify plaintiffs' counsel is denied.

Plaintiffs' counsel to submit Order.

Dated: October 27, 2008.

ENTER:

Hon. Marianne Furfure
Acting Supreme Court Justice