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October 12, 2010

**VIA FACSIMILE (609) 826-7117**

William V. Roeder  
Executive Director  
New Jersey State Board of Medical Examiners  
P.O. Box 183  
140 East Front Street, 2nd Floor  
Trenton, New Jersey 08625-0183

Re: I/M/O Steven C. Brigham, M.D.  
Our File No.: AME444-260333

Dear Mr. Roeder:

Enclosed for filing please find an original and one copy of the following documents:

1. Notice of Motion to Exclude the Expert Report of Gary Brickner, M.D.; and
2. Letter Brief.

By copy of this letter, I am serving a copy of these documents on Deputy Attorney General Warhaftig and Deputy Attorney General Flanzman.

Respectfully submitted,



Joseph M. Gorrell

JMG/bjm  
Enclosures

cc: Jeri L. Warhaftig, D.A.G. (w/encl.) (via email)  
Steven Flanzman, D.A.G. (w/encl.) (via email)

**BRACH EICHLER L.L.C.**  
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Roseland, New Jersey 07068-1067  
(973) 228-5700  
Attorneys for Steven C. Brigham, M.D.

IN THE MATTER OF THE  
SUSPENSION OR REVOCATION OF  
THE LICENSE OF

**STEVEN C. BRIGHAM, M.D.,**

TO PRACTICE MEDICINE AND  
SURGERY IN THE STATE OF  
NEW JERSEY

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
STATE BOARD OF MEDICAL EXAMINERS

Administrative Action

**NOTICE OF MOTION TO EXCLUDE THE  
EXPERT TESTIMONY OF  
GARY BRICKNER, M.D.**

TO: Jeri Warhaftig, D.A.G.  
Division of Law  
Hughes Justice Complex  
25 Market Street  
P.O. Box 903  
Trenton, New Jersey 08625-0093

**PLEASE TAKE NOTICE** that Respondent, Steven Brigham, M.D., hereby makes application before the New Jersey State Board of Medical Examiners at 11:00 on October 13, 2010 for an Order excluding the expert report and testimony of Gary Brickner, M.D.

**PLEASE TAKE FURTHER NOTICE** that in support of the within Motion, reliance shall be placed upon the letter brief enclosed herewith.

BRACH EICHLER, L.L.C.  
Attorneys for Respondent  
Steven C. Brigham, M.D.

By:   
JOSEPH M. GORRELL, ESQ.

DATED: October 12, 2010

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Re: I/M/O Steven C. Brigham, M.D.  
Our File No.: AME444-260333

Dear Mr. Roeder:

Please accept this Letter Brief in support of Respondent's motion to exclude the report and testimony of Gary R. Brickner, M.D. The facts regarding this motion are not in dispute. As indicated on Dr. Brickner's Curriculum Vitae, he served a member of the New Jersey State Board of Medical Examiners between 1996 and 1999. During Dr. Brickner's tenure as a member of this Board, he sat on the case brought by the Attorney General of New Jersey against Dr. Brickner, which was decided by this Board in August 1996. Dr. Brickner also served on the Board at the time that a letter was written by the Board approving the insertion of laminaria in an office preparatory to the performance of an abortion in a licensed or otherwise approved facility.

Dr. Brickner has rendered an expert report, dated September 21, 2010, in this case, opining on issues that were considered by and decided by this Board when Dr. Brickner was a member. Indeed, Dr. Brickner has rendered an opinion that the insertion of laminaria prior to the

performance of an abortion constitutes the performance of an abortion in violation of the Board regulations\ (N.J.A.C. 13:35-4.2) which regulates the performance of abortions in New Jersey, if the abortion is performed in an office beyond fourteen weeks LMP.

While there is no case that we are aware of directly on point, various precedents indicate that Dr. Brickner has a conflict of interest which precludes him from providing an expert opinion before this Board in this case. For example, the Rules of Professional Conduct for attorneys provide that "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third party neutral or law clerk to such a person, unless all parties to the proceeding have given consent confirmed in writing." RPC 1.12(a). Here, Dr. Brickner ruled on a case involving the same issues as are involved in this case, essentially sitting as "a judge or other adjudicative officer," in 1996, and has now turned around and taken a position opposite to the decision rendered by this Board as an expert witness against respondent. Otherwise, stated, Dr. Brickner acted as a neutral party in judging Respondent in 1996, and now has taken an advocacy position against Respondent with respect to the same issues in a subsequent case. He should not be permitted to do so.

See In Re: Advisory Opinion On Professional Ethics No. 361, 77 N.J. 199 (1978) (a former prosecutor with prior knowledge and responsibility in a criminal matter may not participate in any civil proceeding related to that matter at a later date).

Similarly, the law is clear that an expert hired by a party in a lawsuit may not turn around and represent the adverse party in that same lawsuit, even if the expert has been terminated by the first party. Cordy v. The Sherwin-Williams Co., 156 F.R.D. 575 (D.N.J. 1994). Conforti &

Eisele, Inc. v. Division of Building and Construction, 170 N.J. Super. 64 (Law Div. 1979) (engineering firm that had been consulted by the Division of Building and Construction was barred from serving as an expert witness by the adverse party).

There is no less reason to disqualify Dr. Brickner from participating as an expert witness in this matter. It is a conflict of interest and improper for a member of this Board to sit in judgment of a licensee and then turn around and take an adverse position against such licensee, particularly under the circumstances of this case, where the issues are and in a fundamental sense identical.

The members of this Board act as guardians of the public and it is essential that they provide assurance to the public that in carrying out their adjudicative function they are fair and impartial. That is no different then the duty imposed under the rules of professional conduct for lawyers requiring that if they act in an adjudicative capacity, they may not act as an advocate regarding the same party upon whom they have sat in judgment. That should be no less true of physicians and public members sitting on this Board.

In conclusion, it is apparent that Dr. Brickner, having once served as a member of this Board in judging Respondent, should be precluded from judging Respondent with respect to the same issues. Consequently, Dr. Brickner should be disqualified as a witness in this matter.

Respectfully submitted,

Brach Eichler LLC  
Attorneys for Respondent

By:

  
Joseph M. Gorrell

cc: Jeri L. Warhaftig, D.A.G. (via email)  
Steven Flanzman, D.A.G. (via email)