

Linda Bickers
Administrator – Surgery Center of Southern Illinois
Support for Project No. E-001-11 - Surgery Center of Southern Illinois

Good morning/afternoon. My name is Linda Bickers. I am a registered nurse and have worked at the Surgery Center of Southern Illinois for 26 years. I have worked in nearly every nursing capacity at the surgery center prior to becoming the administrator in 1995.

I would like to take this opportunity to say a few words about the Surgery Center of Southern Illinois. The Surgery Center of Southern Illinois opened in August of 1985. Ron Osman was instrumental in obtaining the original certificate of need for the surgery center.

Over the years, the ownership structure of the surgery center changed from a sole proprietorship to a limited partnership consisting of a non-physician entity serving as the general partner and physician-investors as limited partners. Through the years, the general partner has changed 3 times. None of these changes of ownership generated the outcry we are seeing with this change of ownership. Importantly, patient care at the surgery center has never suffered as a result of any change of ownership. As with previous changes of ownership, there will be no change in patient care delivery as a result of this change of ownership.

Speaking on behalf of the staff of the Surgery Center, our goal is to continue to provide high quality, cost effective healthcare services to the community. We are accredited by the Accreditation Association for Ambulatory Health Care or AAAHC, the leading accreditation organization for ambulatory surgery centers. Being an AAAHC accredited surgery center means our surgery center meets the highest standards for patient safety, quality and value. As evidence of the high quality provided at the Surgery Center of Southern Illinois, we had no post-operative infections, no post-operative hospital transfers, and 92% patient satisfaction in 2010.

With healthcare reform legislation aimed at reducing costs, it is vital that patients have access high quality, low cost treatment options. Ambulatory surgery centers provide high quality surgical care, excellent outcomes, and high levels of patient satisfaction at a lower cost than hospital outpatient surgery departments. The Surgery Center of Southern Illinois is one of only four surgery centers within 30 minutes of the City of Marion. Importantly, the Surgery Center is not just an eye surgery center. We offer these services and will continue to do so going forward; however, we are only one of two multi-specialty surgery centers in Marion. Specifically, we provide ophthalmology, pain management, podiatry and dental. Therefore, it is critically important that this surgery center is available so all physicians, regardless of specialty, can provide high quality, low cost health care to the residents of Marion and surrounding areas.

Importantly, this change of the general partner will not result in a change the ownership of any of the physician partners. So I am asking both our past patients and members of the community to support this certificate of exemption so the staff of the Surgery Center of Southern Illinois and I can continue to provide to the community high quality healthcare.

In closing, the Surgery Center of Southern Illinois has an open medical staff. Meaning any physician who applies for and meets the requirements for medical staff membership will be allowed to schedule cases at the Surgery Center of Southern Illinois. All patients have the right to choose where they want their surgery performed. The general partner does not make medical care decisions, those decisions are made by physicians on the Medical Executive committee. The general partner only makes business decisions. Like the CEO of a hospital, the general partner will not be performing surgical procedures; it simply ensures that the physicians have the proper equipment and trained staff to safely perform surgical procedures.

This transaction is simply a change of a business partner from a national surgery center change, to a member of this community, who wants each and every one of us to have access to the best healthcare. I respectfully request the Illinois Health Facilities and Services Review Board approve the certificate of exemption for Project No. E-001-11, the change of ownership of the Surgery Center of Southern Illinois.

Linda Bickers B.S.N., R.N.
Administrator
Surgery Center of Southern Illinois

Good morning—

I am Melinda Melvin—a registered nurse—employed at the Surgery Center of Southern Illinois since 2002.

During my employment, there have been two different // managing general partners of the Surgery Center.

Neither of these changes of the // managing general partner has resulted in any interruption of patient care.

I am speaking on behalf of the staff of the Surgery Center of Southern Illinois in support of the certificate of exemption number E-001-11. This exemption allows for the // managing general partner to change.

We are confident in the leadership that Ron Osman offers and hope that none of the attempts to interfere with the transaction will disrupt this process.

Without the transaction, the continued operation of the Surgery Center of Southern Illinois would be in jeopardy. That—in turn—would jeopardize jobs within the community.

On behalf of the staff of the Surgery Center of Southern Illinois—many of whom are here today---

We DO SUPPORT this exemption.

This would allow us —as we have for many years—to continue to offer high quality // cost effective care to the patients and physicians in the community.

Approving the transaction would also allow us to continue to provide access to health care services “within” the community.

We thank you for the opportunity to voice our support for the certificate of exemption number E-001-11 with you today.

Kara Friedman
Attorney for Cirurgia
Support for Project No. E-001-11 - Surgery Center of Southern Illinois

Good Morning. My name is Kara Friedman and I am the attorney for Cirurgia Centro, LLC. A public hearing was requested by counsel for Dr. Maqbool Ahmad, the member-manager of the competing Mt. Vernon Eye Center. I am here today to review how the proposed change of ownership of the Surgery Center of Southern Illinois meets the Illinois Health Facilities and Services Review Board's or State Board requirements for a certification of exemption for the change of ownership for an existing health care facility.

This project is before the State Board because it contemplates the change of ownership of the entity that has operational control of the Surgery Center of Southern Illinois. The proposed transaction is for the sale of one hundred percent of the membership interest of Marion Holdings, LLC, the majority partner of the Surgery Center of Southern Illinois.

An exemption is substantially different from a certificate of need. Specifically, approval of an application for exemption is non-discretionary provided the information required by the State Board's rules is submitted. (20 ILCS 3960/6(b)). To be eligible for a certificate of exemption for a change of ownership of a health care facility, an applicant must:

1. Not substantially change the categories of service for at least 12 months following the change of ownership;
2. Execute a letter of intent, option to purchase, or agreement for lease or sale that includes a contingency that the change of ownership is subject to State Board approval;
3. Be fit and willing and able and have the qualifications, background and character to adequately provide a proper standard of health service to the community;
4. Have sufficient funds to finance the acquisition and operate the facility for 36 months;
5. Intend to maintain ownership and control of the facility for at least three years;

Additionally, the change of ownership must occur no later than 12 months from the date of exemption approval.

The application for the change of ownership of the Surgery Center of Southern Illinois complies with the State Board's requirements for a certificate of exemption and is entitled to an exemption. This was confirmed by State Board staff, who deemed the application complete. Importantly, an application is only deemed complete when all of the required information and required application fee is submitted. (77 Ill. Admin. Code 1130.550). As a result, when State Board staff deems an application for exemption complete, the State Board has no discretion on approval of the exemption.

The State Board's rules provide an opportunity for a public hearing on exemptions. While approval is non-discretionary and the applicant is not required to respond or address comments made at the public hearing, if appropriate, we will consider the comments made today as we move forward.

I would like to address how the applicant meets the State Board's requirements and is entitled to a certificate of exemption.

Scope of Services

There will be no substantial change in the scope or level of services provided as a result of the change of ownership. The Surgery Center of Southern Illinois is an approved multi-specialty ambulatory surgery treatment center providing at least three surgical specialties. After the change of control, the surgery center will continue to offer these services to patients.

Executed Purchase Agreement

On January 27, 2011, Cirurgia Centro executed a membership interest purchase agreement for all of the issued and outstanding membership interest in Marion Holdings, LLC. A copy of that agreement was provided to the HFSRB. The transaction is subject to State Board approval and is projected to close within 30 days of approval of the application for exemption.

Background

Ron Osman, the principal of Cirurgia, has the requisite knowledge and experience in operating surgery centers to adequately provide a proper standard of health service to the community. He is an upstanding member of the community and a successful businessman. Importantly, he was integral in the establishment of the Surgery Center of Southern Illinois.

Moreover, the proposed transaction does not violate the Illinois Corporate Practice of Medicine Doctrine. While the Illinois Corporate Practice of Medicine Doctrine prohibits a person who does not possess a valid medical license from practicing medicine, it does not prohibit non-physician ownership of a surgery center. (225 ILCA 60/49). Importantly, a surgery center merely provides the facilities, equipment and non-physician staff that enables physicians to perform surgery; the owners do not make or influence treatment decisions. Further, the ASTC's qualified consulting committee is comprised entirely of physicians as required by IDPH's licensure rules. Surgery centers are separately licensed and have their own set of IDPH requirements designed to maximize the safety of patients who utilize the surgery center. They do not diagnose or treat physical or mental ailments or conditions or recommend or prescribe treatment.

Financial Resources

Cirurgia provided evidence that it has sufficient financial resource to fund the purchase of the Marion Holdings, LLC.

Ownership or Control for Three Years

As a prudent businessman, Mr. Osman did not enter into this transaction lightly. Mr. Osman's interest in the Surgery Center of Southern Illinois stems from his commitment to the community. Mr. Osman is not looking for a short term gain, but rather wants to ensure the residents of Marion have continued access to high quality, low cost health care. To that end, Mr. Osman is committed to maintain ownership and control of the Surgery Center of Southern Illinois for a minimum of three years.

Importantly, the proposed change of ownership of the surgery center is necessary to ensure the future viability of the surgery center. It will not result in a reduction of the scope or level of services at the surgery center, loss of jobs or revenue to the city, or inconvenience to patients. It will guarantee the residents of Marion continue to have access to high quality, low cost health care services close to home.

Thank you for your time and attention. I respectfully request the Illinois Health Facilities and Services Review Board approve Project No. E-001-11 the change of ownership of the Surgery Center of Southern Illinois.

Paul D. Juergens
Anesthesiologist and Limited Partner of Surgery Center of Southern Illinois
Support for Project No. E-001-11 - Surgery Center of Southern Illinois

Good Morning. My name is Dr. Paul Juergens. I am a board certified in ~~anesthesiology~~ pain management and have been a limited partner in the Surgery Center of Southern Illinois since March 2009. I am here today to express my support for the change of ownership of Marion Holdings, LLC, the majority partner of the Surgery Center of Southern Illinois.

This change of ownership has come about due to ongoing financial losses at the surgery center. Late last year, Surgical Care Associates, LLC, the sole member of Marion Holdings, LLC, decided late last year to sell its majority interest in the surgery center to a third party. On January 27, 2011, Surgical Care Associates signed a purchase agreement to sell its interest in the Surgery Center of Southern Illinois to Cirurgia Centro, LLC, contingent on approval of the Illinois Health Facilities and Services Review Board.

As a physician-investor in the surgery center, I welcome the change of ownership. Cirurgia will provide the surgery center with the firm financial footing that is needed as we seek to add more physicians to our medical staff and expand the scope of services provided to the residents of Marion. Importantly, it will also bring the surgery center under local control and management. Mr. Ronald Osman, the principal of Cirurgia, has been an active member of the Marion community and was instrumental in the development of the Surgery Center of Southern Illinois. He understands the complexities of health care and will implement prudent management strategies while maintaining access to services for the residents of Marion.

This surgery center is needed; it is one of only two multi-specialty surgery centers within 30 minutes of Marion. We provide high quality surgical procedures at significantly lower cost than

hospital outpatient departments. For example, the median charge for insertion of catheter or spinal stimulator and injection in to the spinal canal at the Surgery Center of Southern Illinois is \$1,416.00 compared to \$3,770.38 at Heartland Regional Medical Center. With the cost health care rising exponentially, this surgery center is needed to ensure continued access to low cost, high quality health care to the residents of Marion.

Thank you. I strongly urge the Health Facilities and Services Review Board approve the change of ownership of Marion Holdings, LLC.



JOHN WOMICK

RALPH R. BLOODWORTH III*

*ALSO LICENSED IN MISSOURI

WOMICK
LAW FIRM CHTD.

JILL WOMICK-BLOODWORTH*
CASEY VANWINKLE*

April 5, 2011

Illinois Health Facilities Planning Board
525 West Jefferson St.
Second Floor
Springfield, IL 62761

Re: Application for Exemption for Change of Ownership Pertaining to
Surgery Center of Southern Illinois

Ladies and Gentlemen:

I am the attorney for Dr. Ahmad, Dr. Olk, and Dr. Umana in litigation pending as a result of the breach of the contract by SCA to sell the property to Dr. Ahmad.

On his behalf I want to try to explain why the transactions between Mr. Osman and Dr. Ahmad should affect your consideration of Mr. Osman's application.

In order to understand this you must be aware of the history between the two of them. Dr. Ahmad at one time was represented by Mr. Osman. Mr. Osman thereafter represented Dr. Ryll in a lawsuit against Dr. Ahmad. The result of that was an Order entered by Judge Foreman barring Mr. Osman from that lawsuit. In order to avoid characterization of the Order, it is attached as Exhibit "A" for your consideration.

The next issue I believe that you need to be aware of is Mr. Osman's conduct in acquiring the contract between him and SCA.

The underlying facts are that Dr. Ahmad had entered into an agreement with SCA as indicated by Exhibit "B", a Letter of Intent between SCA and Dr. Ahmad. That document has been redacted so that Dr. Ahmad is not in violation of the

REPLY TO:

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P. O. BOX 1355
CARBONDALE, IL 62903
618-529-2440
FAX 618-457-2680

501 RUSHING DRIVE
HERRIN, IL 62948
618-993-0911
FAX 618-998-9991

216 W. POINTE DR., SUITE A
SWANSEA, IL 62229
1-800-598-2440

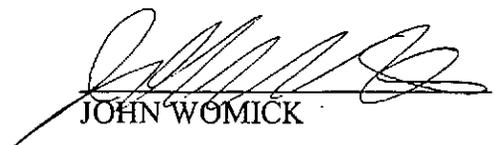
confidentiality terms contained therein. The facts are that Dr. Ahmad had a contract, Mr. Osman became aware of it, and entered into conduct that resulted in his acquiring the contract from SCA instead of Dr. Ahmad. A major reason why SCA signed the contract with Mr. Osman, as stated by SCA, was his agreement to indemnify and hold them harmless from even their own breach of contract. In the contract submitted to you in Mr. Osman's application at Section 2.8 -page 19 of the application, there is reference to a Disclosure Letter. See Exhibit "C". The contract provides that the Disclosure Letter, and of course, its context, was a material inducement for the sale by SCA to Osman, and thus, for the breach of SCA's contract with Dr. Ahmad. However, that letter is not before you. It was not included with the application.

There are three issues which I urge you to consider. First of all, I think you need to consider Mr. Osman's conduct in the *Ryll* case and in acquisition of the contract in this case. Secondly, without regard to how you characterize Mr. Osman's prior conduct, it is clear that neither Dr. Ahmad nor any of his associates would provide surgery services to their patients at a center owned and controlled by Mr. Osman. It is unlikely that they would agree to provide services at a facility owned by any attorney, but certainly not by Mr. Osman. Finally, since the Disclosure Letter is missing, you do not have a complete application.

I would suggest that transferring the Center to Mr. Osman would have an adverse effect upon the Center's ability to function in that is unlikely that Dr. Ahmad, or for that matter, any surgeon would agree to provide surgery there with Mr. Osman as its owner.

Sincerely,

WOMICK LAW FIRM, CHTD.



JOHN WOMICK

JPW/ss
Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES ex. rel.)
DENNIS L. RYLL, M.D.)
)
Plaintiff,)
)
vs.)
)
MAQBOOL AHMAD, M.D., d/b/a)
the CARBONDALE/MARION EYE)
CENTER, LTD.,)
)
Defendants.)

CIVIL NO. 93-4057-JLF

FILED
1995 MAY 15 PM 2:57
STUART J. O'HARE
CLERK OF DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
SPRINGFIELD OFFICE

MEMORANDUM AND ORDER

FOREMAN, District Judge:

This matter is before the Court on defendant Ahmad's Motion to Disqualify Relator's Counsel and for Injunctive Relief to Protect Client Confidences (Document No. 35). The Court also will address Relator's Request that the Court Make an In-Camera Inspection of Certain Documents (Document No. 42) and Relator's Motion for Leave to Modify the Proposed Scheduling and Discovery Order and for An Extension to All Existing Discovery Dates (Document No. 51).

I. MOTION TO DISQUALIFY

Dr. Ahmad has filed a motion to disqualify relator's counsel, Ronald E. Osman, for a conflict of interest. He alleges that disqualification is required either because Dr. Ahmad is a current client of Mr. Osman's law firm and, therefore, dual representation is prohibited under

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Rule 1.7 of the Illinois Rules of Professional Conduct, or because Dr. Ahmad is a former client of the firm and dual representation is prohibited under Rule 1.9(a) because the pending lawsuit is substantially related to the prior representation. The Court conducted an evidentiary hearing on April 25, 1995, and reached the following findings of fact and conclusions of law.

A. Findings of Fact

Defendant Maqbool Ahmad, M.D., is an ophthalmologist with offices in Carbondale and Marion, Illinois. Tr. at 51. During the events at issue in this case, he was a "primary competitor" of plaintiff-relator Dennis Ryll, M.D., who also is an ophthalmologist. *Id.* at 91.

Sometime during 1986 or 1987, Dr. Ryll asked attorney Ronald E. Osman to investigate a flier in which Dr. Ahmad had reportedly advertised "no-cost surgeries" -- i.e., that he would waive the coinsurance and deductible payments for his patients after he received payment from Medicare for its portion of the charges. *Id.* at 91-92; Relator's Ex. 1 (attachment). Mr. Osman stated that this practice would give Dr. Ahmad a competitive advantage because "if the surgeons are of equal quality, the patients will go to the physician that is waiving the copayment instead of the other area physicians." *Id.* at 94-95.

Dr. Ryll asked Mr. Osman to take steps to stop this practice, *id.* at 91, and Mr. Osman sent a letter to Blue Cross-Blue Shield, the Medicare carrier, on May 26, 1987, to inquire about the propriety of Dr. Ahmad's conduct. Relator's Ex. 1. A copy of the letter also was sent to the Office of the Inspector General. *Id.*; Tr. at 92. Mr. Osman testified that he subsequently received a response from the carrier but, as far as he knew, no further action was taken by the carrier or the Inspector General's office. Tr. at 98-99. Instead, as discussed further below, Dr.

Ryll himself brought this pending qui tam action against Ahmad in 1993 under the False Claims Act. At issue in the pending motion to disqualify is Mr. Osman's contacts with Dr. Ahmad between the time that he initiated the Medicare investigation and the time that he brought the qui tam action.

The parties agree that in mid-August 1987, Mr. Osman contacted Dr. Ahmad by telephone and arranged to meet with him at the ophthalmologist's office on August 21, 1987. *Id.* at 17, 52. Mr. Osman and Dr. Ahmad provided conflicting accounts of the stated purpose for the meeting, as well as the nature and scope of the conversation that took place during the meeting. However, there are several general areas in which their testimony is consistent.¹

Mr. Osman testified that he contacted Dr. Ahmad regarding an unrelated legal matter that he was handling for Dr. Ryll. *Id.* at 17-19. He stated that in the early summer of 1987, Dr. Ryll had asked him to investigate whether Dr. Ryll was being underpaid by Medicare for a procedure known as "cataract extraction with intraocular lens implant," which is coded on Medicare forms as procedure number 66984. *Id.* at 18. Mr. Osman stated that he began contacting other area ophthalmologists to determine whether Medicare was being inconsistent in its reimbursement procedures. *Id.* at 90. He testified that he arranged the August 21 meeting to find out from Dr. Ahmad what he was receiving from Medicare for this procedure. *Id.* at 18-

¹ For purposes of this motion, therefore, the Court declines to find either witness's testimony to be more credible. Instead, it appears to the Court that both witnesses sincerely believed in their version of the events and both accounts are equally plausible. Because of the inherent ambiguities in all human conversation, it is not unusual for one person to interpret a particular exchange one way while the other participant in the conversation reaches an entirely opposite conclusion. Thus, the Court finds no evidence that the witnesses are being untruthful, but rather that the discrepancies in their testimony stem from differences in their personal perceptions of their prior communications and interactions.

19, 90-91. However, he further stated that when he contacted Dr. Ahmad by telephone, the ophthalmologist had indicated that he wanted to talk with the lawyer about "other issues" in addition to the 66984 matter. *Id.* at 90-91.

Dr. Ahmad testified that Mr. Osman had called him to offer professional expertise as a Medicare specialist. *Id.* at 53, 81. He stated that Mr. Osman had specifically stated that he was representing Dr. Ryll regarding Medicare payments for the cataract surgery, that Mr. Osman believed that all ophthalmologists in the area were being underpaid, and that if Dr. Ahmad was interested, Mr. Osman would like to represent him on that issue as well. *Id.* at 53. Mr. Osman, however, testified that there was no discussion of Mr. Osman representing Dr. Ahmad until the pair met on August 21, and that it was Dr. Ahmad, rather than Mr. Osman, who asked whether the attorney would represent Dr. Ahmad on the 66984 issue. *Id.* at 19-20, 90.

Mr. Osman testified that he told Dr. Ahmad that he did not see any problem in representing both Dr. Ahmad and Dr. Ryll regarding the 66984 matter but would have to check with Dr. Ryll first. *Id.* at 20, 96-97. It is unclear whether Mr. Osman actually did discuss the matter with Dr. Ryll. However, Mr. Osman subsequently sent a retainer letter to Dr. Ahmad on August 31, 1987, in which Mr. Osman agreed to investigate the 66984 reimbursement issue on Dr. Ahmad's behalf. Def.'s Ex. 2, Relator's Ex. 2.

Both witnesses agreed that other Medicare issues were discussed during the August 21 meeting. One such issue concerned what Mr. Osman called the day-to-day, "nuts and bolts" Medicare billing practices. Tr. at 20, 56-57, 81-82, 97-98. As a result of this discussion, Mr. Osman's August 31, 1987, letter also agreed to arrange for Dallas, Texas, attorney William E. Rose, Jr., to perform a complete audit of Dr. Ahmad's billing procedures. Def.'s Ex. 2,

Relator's Ex. 2. The letter further stated parenthetically that "I will be present at your office to assist Mr. Rose when he performs his office review." *Id.*

Both witnesses further agreed that their conversation included a discussion of Dr. Ahmad's practice regarding the collection of copayments from patients. Mr. Osman stated that the subject was discussed only "very briefly." Tr. at 17. He stated that when Dr. Ahmad raised the issue, "I held my hands up and said, 'Dr. Ahmad, I sent to the government, to the carrier, a copy of your flyer advertising the waiver of coinsurance, and I turned you in and you can't do that.'" *Id.* at 23; *see also id.* at 98.

Mr. Osman testified that he was not pursuing any lawsuits or action against Dr. Ahmad other than the letter that he had sent to Medicare. *Id.* at 99. Mr. Osman also stated that he was unaware of the qui tam statute in 1987, *id.* at 23, and it wasn't until late 1992 that he received information that he believed justified filing such an action against Dr. Ahmad on behalf of Dr. Ryll. *Id.* at 101-02. Therefore, Mr. Osman did not tell Dr. Ahmad that he might later bring suit against the ophthalmologist regarding his copayment waivers. However, he stated that he had informed Dr. Ahmad during the August 21, 1987, meeting that "if Dr. Ryll and he ever had a disagreement, that I was Dr. Ryll's attorney, had been for several years, and that I would be Dr. Ryll's attorney." *Id.* at 24. Mr. Osman stated that Dr. Ahmad then stated that there would be no problems because "Dennis is a big man. I'm a little man." *Id.*

Dr. Ahmad testified that Mr. Osman never suggested during the August 21 meeting that the attorney was representing Dr. Ryll with respect to the copayments issue or that Mr. Osman had sent a letter to Medicare about the matter. *Id.* at 54-55. Dr. Ahmad stated that he described to Mr. Osman his practice with respect to the copayment waiver and regarded the meeting as

one in which he was speaking confidentially to someone who was going to be his lawyer. *Id.* at 54. Mr. Osman contends that any information he obtained about Dr. Ahmad's practice with respect to the waiver of copayments came from the fliers or brochures that the ophthalmologist himself made available to the public; he denied that Dr. Ahmad gave him any information as to how the ophthalmologist handled the copayments. *Id.* at 22. He further denied that he offered to provide any legal advice with respect to those payments. *Id.* at 22.

It is undisputed, however, that on September 29, 1987, Mr. Osman sent Dr. Ahmad a letter that discussed the legality of routine waiver of the copayment. *Id.* at 35; Def.'s Ex. 4; Relator's Ex. 4. Attached to the letter was a form for Dr. Ahmad to use to determine the financial hardship of his patients on a case-by-case basis, as required to grant waivers legally. Def.'s Ex. 5, Relator's Ex. 4. Mr. Osman closed the letter by stating: "If you have any questions on the use of this form or any other items we have discussed please feel free to call." Def.'s Ex. 5, Relator's Ex. 4. Mr. Osman later sent Dr. Ahmad a copy of correspondence from Senator Edward Kennedy to the Department of Health and Human Services or the Office of Inspector General regarding abuses of the copayment waiver. Tr. at 100-01.

Although the first letter provided information about the legality of waiving the copayment, Mr. Osman stated he did not give "legal advice as his [Dr. Ahmad's] attorney." *Id.* at 36. Rather, he testified that he sent the letters "to insure that Dr. Ahmad was not systematically waiving the coinsurance so there would be a level playing field for the competitors and for my client, Dr. Ryll." *Id.* at 100, 101. He did not submit a bill or otherwise charge Dr. Ahmad for the letters. *Id.* at 100; *see also id.* at 69-71, 75-76, 78.

Shortly after the initial meeting with Mr. Osman on August 21, 1987, Dr. Ahmad

received a letter from Mr. Rose to schedule an on-site review of Dr. Ahmad's practice. Def.'s

Ex. 3. As described in the letter, the on-site review was to include:

1. A chart review of patient files.
2. A determination of "non-charging" practices, i.e., services recorded that are billable but not billed to anyone.
3. A determination of "non-billable" practices, i.e., services that are fragmented from other services or just not billable under Medicare or other third party payor guidelines.
4. An itemization of underpayments and/or overpayments from Medicare.
5. An itemization of procedure code errors resulting in underpayments and/or overpayments from Medicare.
6. A "mini-workshop" at the end of the day with you and your office staff to review problems you are encountering with billing and collections.
7. A separate Charge Analysis report including recommendations for possible alterations to your charge structure to achieve "equity" within your charge framework.

Id. Dr. Ahmad was instructed to have available "[c]omplete patient records of 30 patients covering all facets of surgical and medical procedures . . ." and "[a] copy of your Medicare profiles both customary and prevailing." *Id.*

Mr. Osman not only arranged for Mr. Rose to conduct the review, but was also present "as Dr. Ahmad's lawyer" when Mr. Rose conducted an exit conference with Dr. Ahmad at the conclusion of the site visit. Tr. at 26, 33. Mr. Osman testified that during these exit conferences, Mr. Rose generally will discuss his preliminary findings and point out any major problems that he has identified during the review. *Id.* at 33. Mr. Osman denied that there was any discussion of Dr. Ahmad's practices with respect to the copayment waiver at the exit conference he attended. *Id.* at 33-34. Dr. Ahmad, however, stated that he had authorized Mr. Rose to discuss and disclose to Mr. Osman matters that Mr. Rose might learn with respect to the ophthalmologist's billing records and procedures. *Id.* at 57.

Later in 1987, Mr. Osman reviewed, at Dr. Ahmad's request, the ophthalmologist's

practice with respect to billing Medicare for patient histories and physicals. Tr. at 38; Def.'s Ex. 7. He also reviewed two letters that Dr. Ahmad had received from the Medicare carrier regarding the ophthalmologist's charges for certain procedures -- i.e., whether he was exceeding the amount allowed by law for cataract surgery or the maximum allowable actual charge for other procedures. Tr. at 42; Def.'s Exs. 8, 9. Mr. Osman testified that neither of these matters was related to the issue of routine waiver of copayments. Tr. at 112.

In June 1991, Mr. Osman sent a letter to Dr. Ahmad stating that the attorney was still pursuing the issue of reimbursement for 66984 procedures with Medicare. Def.'s Ex. 10. Although the letter indicated that it may be difficult for Dr. Ahmad to prevail in any action for back payments because he had not filed timely requests for the Medicare carrier to reconsider the amount of its reimbursements, Mr. Osman stated that he was "still interested in pursuing the situation." *Id.*

Dr. Ahmad subsequently scheduled a meeting with Mr. Osman in May 1992 to discuss several matters. *Id.* at 57-58. One of the primary reasons for the meeting was to obtain a legal opinion about radio and television advertisements that Dr. Ahmad planned to run. *Id.* at 58, 62-63, 103-04. They also discussed the status of the 66984 reimbursement issue. *Id.* at 58, 104. However, they provided differing accounts as to the results of that discussion.

Mr. Osman testified that he told Dr. Ahmad that the ophthalmologist would not be able to prevail in a challenge to the 66984 underpayments because he had not filed a timely request for the Medicare carrier to reconsider its payments. *Id.* at 104. Mr. Osman stated that he had two other attorneys research the matter for him. *Id.* at 104, 106-11; *see also* Relator's Ex. 13. He stated that based upon their research, he told Dr. Ahmad that he was not going to pursue the

claim. Tr. at 104.

Dr. Ahmad denied that Mr. Osman told him about the other attorneys' research or that Mr. Osman had otherwise indicated that the ophthalmologist would not be completely barred from pursuing the claim because he had not pursued administrative relief. *Id.* at 79. He further stated that Mr. Osman has never indicated that he was no longer pursuing the claim. *Id.* at 59. To the contrary, Dr. Ahmad testified that Mr. Osman told him that he was still pursuing the claim. *Id.* at 58. Thus, Dr. Ahmad stated that to this day, he believes that Mr. Osman is his attorney and he is relying on Mr. Osman to pursue the 66984 claims on Dr. Ahmad's behalf. *Id.* at 72-73.

Dr. Ahmad said that during the 1992 meeting, Mr. Osman also wanted an update of Dr. Ahmad's billing procedures -- specifically his procedures of waiving copayments for Medicare patients. *Id.* at 58, 59. Mr. Osman disputed this fact. He testified that he did not discuss this issue with Dr. Ahmad or anyone from his office or his consultants at any time after Mr. Osman sent the letters to the ophthalmologist in late 1987. *Id.* at 101.

Mr. Osman filed the pending qui tam action against Dr. Ahmad on February 1, 1993. Document No. 1. The complaint was brought under the False Claims Act, 31 U.S.C. §§ 3730 - 3732 (1988), by Dr. Ryll as relator on behalf of the federal government. It alleges that Dr. Ahmad submitted false claims by: (1) submitting claims for Medicare patients without reduction of the actual charge for Dr. Ahmad's systematic waiver of his patients' deductible and coinsurance payments; (2) submitting Medicare claims for upgraded services to consultation; (3) submitting Medicare claims for services with a date of service different from the actual date the service was rendered; and (4) engaging in fraudulent kickbacks to local optometrists.

B. Analysis and Conclusions of Law

Pursuant to Rule 29(d) of the Local Rules for the United States District Court for the Southern District of Illinois, attorneys practicing before this Court shall adhere to the disciplinary rules adopted by the Illinois Supreme Court, as amended by that court from time to time. Effective August 1, 1990, the Illinois Supreme Court adopted the current Illinois Rules of Professional Conduct, two of which have potential application to the case at bar.

If Dr. Ahmad is considered to be a *current* client of Mr. Osman, the motion to disqualify is governed by Rule 1.7, which provides that:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after disclosure.

Illinois Rules of Professional Conduct Rule 1.7 (1990). If Ahmad is considered to be a *former* client of Osman, the motion to disqualify is governed by Rule 1.9, which provides that:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
 - (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or
 - (2) use information relating to the representation to the disadvantage of the former client, unless:
 - (A) such use is permitted by Rule 1.6; or
 - (B) the information has become generally known.

Id. Rule 1.9.

There is no dispute that an attorney-client relationship existed between Mr. Osman and Dr. Ahmad with respect to several matters handled by Mr. Osman from 1987 to 1992. However,

the facts described above present a close question as to whether those matters are substantially related to the pending litigation and whether the representation is continuing to this date with respect to Mr. Osman's investigation of the 66984 issue.

Taking this latter issue first, Mr. Osman states that he told Dr. Ahmad that he was not going to pursue the claim. However, Dr. Ahmad obviously did not understand the conversation in the same way and believes that Mr. Osman is still pursuing the matter on his behalf.

To resolve any issues as to "whether a client-lawyer relationship exists or, having once been established, is continuing . . . [,]" the comment to Rule 1.7 in the Model Rules of Professional Conduct² refers the reader to the comment to Rule 1.3. Model Rules of Professional Conduct Rule 1.7 comment (1992). The comment to Rule 1.3 states:

Unless the [attorney-client] relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period of time in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. *Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.*

Id. Rule 1.3 comment (emphasis added).

In this case, there is evidence that Mr. Osman served Dr. Ahmad during a five-year period in a variety of matters relating to the ophthalmologist's business, including an advertising matter that Mr. Osman handled less than six months before he began contemplating this litigation against Dr. Ahmad. This continuous type of representation establishes an ongoing attorney-client

² The model rule is virtually identical to Rule 1.7 as adopted by Illinois.

relationship regardless of whether the attorney has a specific assignment at the precise time that the adverse representation is undertaken or whether the client pays a retainer to the attorney. See *International Business Mach. Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978); *SWS Financial Fund A v. Salomon Bros., Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992); *Manior-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188, 194 (D.N.J. 1989).

There is no indication that Mr. Osman notified Dr. Ahmad that this continuing relationship had terminated. Mr. Osman stated that he informed Dr. Ahmad in May 1992 that he would not pursue *the 66984 matter* any further. However, even with respect to that one specific issue, it is clear that Dr. Ahmad did not interpret Mr. Osman's statements to be a withdrawal from the representation. To the contrary, Dr. Ahmad's impression was that Mr. Osman was going to continue to pursue the 66984 issue on Dr. Ahmad's behalf. Moreover, the Court finds it significant that Mr. Osman did not put his withdrawal in writing -- particularly when the representation was initiated through a written retainer letter.

The attorney and ophthalmologist also reached contrary conclusions as to whether an attorney-client relationship was established with respect to Dr. Ahmad's systematic waiver of copayments for his Medicare patients. Mr. Osman states that when Dr. Ahmad first raised the issue during their August 21, 1987, meeting, Mr. Osman immediately informed Dr. Ahmad that the practice was improper and that Mr. Osman had reported the ophthalmologist to the Medicare carrier. However, there is no indication that Mr. Osman expressly stated that he could not represent Dr. Ahmad or otherwise provide legal advice about that issue. Therefore, when Mr. Osman subsequently sent Dr. Ahmad a letter that explained that the practice of giving routine waivers was improper and provided a form for Dr. Ahmad to use so that he could legally grant

waivers for cases of demonstrated financial hardship, any reasonable layperson would assume that Mr. Osman was giving legal advice as Dr. Ahmad's attorney. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir.) ("The professional relationship for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'"), *cert. denied*, 439 U.S. 955 (1978).³

Although the evidence suggests that Mr. Osman did not charge a fee for this advice, "[a] professional relationship is not dependent upon the payment of fees . . ." *Id.* at 1317; see also *Allman v. Winkelman*, 106 F.2d 663, 665 (9th Cir. 1939) ("lawyer's advice to his client establishes a professional relationship though it be gratis."), *cert. denied*, 309 U.S. 668 (1940). The Court, therefore, finds that a fiduciary relationship was established with respect to the copayment issue -- albeit inadvertently on Mr. Osman's behalf.⁴

³ There may be some question as to whether Dr. Ahmad made any confidential disclosures during the meeting. Dr. Ahmad states that he did in fact disclose the manner in which he handled the copayments. However, Mr. Osman states that no such disclosure was made; he indicated that he was already aware of Dr. Ahmad's practice as a result of the ophthalmologist's fliers publicly advertising "no cost surgeries."

The Court need not resolve this issue, however, because Rule 1.9's protection of the attorney-client relationship "is not solely concerned with the adverse use of confidential information[]" but also the duty of loyalty to a former client. *In re American Airlines, Inc.*, 972 F.2d 605, 618 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). Thus, the court held that "a lawyer who has given advice in a substantially related matter must be disqualified whether or not he has gained confidences." *Id.* at 619. Moreover, the court rejected the argument that a prior representation cannot be considered substantially related to the present case simply because counsel relied primarily upon public, rather than confidential, information in giving its prior legal advice. *Id.* at 620.

⁴ In a post-hearing brief, the plaintiff-relator argues that the copayment waiver issue was involved in a 1992 case that Dr. Ahmad brought against a Dr. Gillespie. Thus, the plaintiff-relator contends that if Mr. Osman was Dr. Ahmad's attorney on the copayment waiver issue, one would have expected that Mr. Osman would have at least been consulted on the issue.

Furthermore, it is undisputed that an attorney-client relationship existed between Mr. Osman and Dr. Ahmad regarding the Medicare billing audit conducted by Mr. Rose. Although Mr. Rose had primary responsibility for the review, it is clear that Mr. Osman was acting as Dr. Ahmad's attorney in arranging for the audit and was present for the exit conference at the conclusion of the on-site visit. It is also clear from Mr. Rose's letter discussing the scope of the audit (Def.'s Ex. 3) that the review encompassed a wide range of Medicare billing issues. There is no indication as to whether the review included the specific practices at issue in this case. However, the audit gave Mr. Rose access to considerable information concerning Dr. Ahmad's Medicare billing practices, and this information could very well have been shared with Mr. Osman because Dr. Ahmad had authorized Mr. Rose to disclose and discuss the matters with co-counsel Osman.

Mr. Osman contends that he never received any confidential information. However, that is not the test recognized by the Seventh Circuit. Rather, that court has stated that a substantial relationship exists "if the lawyer *could* have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client" *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983) (emphasis added); cf. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th Cir. 1983) (setting forth three-part test requiring

The court transcript, however, does not support this argument. Dr. Ahmad testified that the 1992 case against Dr. Gillespie involved enforcement of a restrictive covenant in an employment contract -- i.e., a non-compete agreement. Tr. at 83. Dr. Ahmad replied affirmatively when relator's counsel asked, "The issue of waiver was involved in that case, was it not?" *Id.* at 84. However, in the context of that dialogue, it would seem logical that the "waiver" counsel was referring to is a waiver of the non-compete agreement. It is a far stretch to infer from that exchange that the copayment waiver was an issue in that case.

trial court to: (1) make factual reconstruction of the scope of the prior representation; (2) determine whether it is reasonable to infer that confidential information would have been disclosed in that matter; and (3) determine whether such information would be relevant to the pending litigation against the former client). Given the breadth of Mr. Rose's audit of Dr. Ahmad's billing practices, coupled with Mr. Osman's role as co-counsel as discussed above, it is certainly conceivable that Mr. Osman could have obtained confidential information that would be relevant in this litigation, which concerns several of Dr. Ahmad's billing practices -- most notably the copayment waivers.

At the very least, the foregoing discussion of the overall circumstances of this case shows that a close question exists as to whether an attorney-client relationship is continuing between Dr. Ahmad and Mr. Osman and/or whether their prior relationship is substantially related to the pending adverse litigation. Any such "[d]oubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification." *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir.), *cert denied*, 439 U.S. 955 (1978). The Court, therefore, finds that disqualification is required in this case.⁵

⁵ The Court is aware of a district court case which suggests that disqualification is not automatically required for a violation of a conflict of interest rule. *SWS Financial Fund A*, 790 F. Supp. 1392 at 1400. However, this opinion appears to be at odds with the Seventh Circuit's *Analytica* decision, as well as the express mandate of Rules 1.7 and 1.9 themselves. See *Analytica*, 708 F.2d at 1260 (acknowledging the growing dissatisfaction with the use of disqualification as a remedy for unethical conduct by lawyers, but finding disqualification appropriate where an attorney attempts to represent the adversary of a former client); Illinois Rules of Professional Conduct 1.7 ("A lawyer *shall not* represent a client if the representation of that client will be directly adverse to another client") (emphasis added); *id.* Rule 1.9 ("A lawyer who has formerly represented a client in a matter *shall not* thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client") (emphasis added).

Even if the Court has discretion to deny a request for disqualification, however, the

Mr. Osman argues that Dr. Ahmad is estopped from seeking disqualification because Dr. Ahmad consented to Mr. Osman's adverse representation. This argument is based upon Mr. Osman's testimony that when Dr. Ahmad first broached the subject of waiving copayments, Mr. Osman indicated that he represented Dr. Ryll, that they had reported Dr. Ahmad to the Medicare authorities, and that if Dr. Ahmad and Dr. Ryll ever had a legal disagreement, that Mr. Osman would be Dr. Ryll's attorney. Dr. Ahmad indicated there would be no problem because "Dennis is a big man. I'm a little man." Therefore, Mr. Osman contends that Dr. Ahmad consented to Mr. Osman's representation of Dr. Ryll in this matter.

It is unclear whether Mr. Osman is relying upon an estoppel or waiver theory.⁶ The Court, therefore, will analyze the case under both.

The American Bar Association has issued a formal opinion which states that "a lawyer may ask for, and a client may give, a waiver of objection to a possible future representation presenting a conflict of interest that in the absence of the waiver the lawyer would be

result in this case would be unchanged. Under the facts of this case, the Court finds disqualification appropriate and, therefore, would exercise its discretion in favor of disqualification.

⁶ The difference between the two has been described as follows:

Waiver and estoppel are legal terms which are frequently used interchangeably. Although the legal consequences of each are often the same, the requisite elements are different. Waiver refers to the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor. On the other hand, estoppel is any conduct, express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. It is grounded not on subjective intent but rather on the objective impression created by the actor's conduct. It is in the area of implied waiver that the two doctrines are closely akin.

Matsuo Yoshia v. Liberty Mutual Ins. Co., 240 F.2d 824, 829 (9th Cir. 1957).

disqualified from undertaking." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 372 (1993). However, the opinion states that in order to comply with the requirements of Rule 1.7, this prospective waiver will be effective only when: (1) the lawyer determines that there is no adverse effect on the first representation from undertaking the second representation; and (2) the particular future conflict of interest as to which the waiver is invoked was reasonably contemplated at the time the waiver was given (i.e., that the client's waiver was based upon proper disclosure or "consultation" that communicates "information reasonably sufficient to permit the client to appreciate the significance of the matter in question."). *Id.* The opinion also states that "any such waiver should be in writing." *Id.*

The goal should be for the client to be able to recognize the legal implications and possible effects of the future representation at the time the waiver is signed. That this involves predictions about the future where prognostication can be difficult only highlights the substantial burden that those seeking enforceable waivers must meet.

Id.

Under the circumstances of this case, the Court is unable to find that the conflict of interest presented in this case was reasonably contemplated by either Dr. Ahmad or Mr. Osman at the time that Mr. Osman contends that Dr. Ahmad gave his waiver. To the contrary, Mr. Osman expressly testified that at the time of his August 21, 1987, meeting with Dr. Ahmad, he had no knowledge whatsoever of the qui tam statute nor had any thoughts whatsoever about bringing an action against Dr. Ahmad with respect to the ophthalmologist's practice of waiving copayments. Although Mr. Osman stated that he had reported Dr. Ahmad to the Medicare carrier, Dr. Ahmad would have no reason to believe that Mr. Osman himself would file a lawsuit against him on that issue. The Court, therefore, finds no evidence that Dr. Ahmad

knowingly and intentionally waived any objections to Mr. Osman's representation of Dr. Ryll in this case.

There are several cases, as well as an informal ABA opinion, which suggest that a client may be estopped from asserting a motion to disqualify. See *American Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F. Supp. 112 (S.D.N.Y. 1986); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 203-04 (N.D. Ohio), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); ABA Comm. on Ethics and Responsibility, Informal Op. 1323 (1975). In each of these cases, however, the client had sought the services of an attorney who had a longstanding relationship with another client and the second client knew that a potential conflict could arise between the two clients at some time in the future.⁷ In fact, in

⁷ In *City of Cleveland*, for example, the city had filed an antitrust action against several electric companies that competed with the city's Municipal Electric Light Plant. The city then attempted to disqualify counsel for one of the defendants on the grounds that counsel had previously represented the city in the sale of revenue bonds for the MELP. The court held that the city was estopped from attempting to disqualify counsel because the city had persuaded -- indeed, virtually drafted -- the law firm to act as bond counsel even though the city knew that the law firm had long represented an electric company that was often an adversary of the MELP and counsel had expressed great reluctance to take on the city's business. The court found that the city was fully cognizant of the scope and depth of any potential conflict of interest that could attach to the law firm's services as bond counsel. 440 F. Supp. at 204. Therefore, when the city persisted in its demands for the law firm to act as bond counsel, the law firm "had every right to believe" that the city intended to waive any ethical obligations that could arise from the law firm's performance as bond counsel. *Id.*

The case presented in the ABA's informal opinion involved two companies, identified only as Company A and Company B, that had contracted for construction of a new plant for Company A. During the course of that construction project, Company B contacted Lawyer X to represent Company B in a dispute with a subcontractor, Company C. Lawyer X and his law firm represented Company A at the time and informed counsel for Company B of this fact. However, Lawyer X stated that the lawyer for Company B assured him that there would be no conflict in Lawyer X's continued representation of Company A. Assuming those facts to be true, the ABA committee opined that "it would be improper for Company B to urge disqualification of Lawyer X now that Company A and Company B have become embroiled in separate litigation."

one case, two parties were already engaged in litigation when one of the parties sought the services of the other party's lawyer regarding unrelated legal issues.⁸

In the case at bar, Mr. Osman states that he informed Dr. Ahmad at their initial meeting that Mr. Osman already represented Dr. Ryll and that he would be Dr. Ryll's lawyer if any dispute arose between the two ophthalmologists in the future. However, there is no indication that Dr. Ahmad knew or should have known that he would be involved in a dispute with Dr. Ryll over the waiver of copayments. Here again, while Mr. Osman told Dr. Ahmad that the Medicare carrier had been alerted to his practice of waiving the copayments, that information suggests that Dr. Ahmad might have future troubles with the carrier or the government but would provide no inkling whatsoever of a lawsuit from Dr. Ryll over the matter. Dr. Ahmad's response -- that there would be no problems because "Dennis is a big man. I'm a little man[]" - further suggests that he did not foresee any future conflicts between himself and Dr. Ryll because Dr. Ahmad would seek to avoid them.

⁸ *American Special Risk Insurance* involved a dispute between two insurance companies, Delta and America. After the lawsuit was initiated, Delta hired the law firm that was representing American in that very action to represent Delta on other unrelated matters. American apparently had not objected to the law firm's representation of Delta on these other matters. In fact, officials of Delta and American asserted that even though American had sued Delta, they never felt Delta's interests were contrary to American's because Delta's reinsurance obligations to American had been assumed by another company. Based upon these facts, the court held that Delta was estopped from later attempting to disqualify the law firm from the lawsuit between American and Delta. "Delta cannot hire its opponent's law firm and then disqualify the firm to protect confidences it may have imparted to the firm's attorneys." 634 F. Supp. at 121. Although the court was troubled by the fact that the law firm was ostensibly suing its own client, in violation of Canon 5 of the ABA Model Code of Professional Responsibility, the court found that Delta had "consented to the representation by [the law firm] with full knowledge of [the firm's] representation of [American] and under the belief that its interests were not adverse to [American.]" *Id.* at 122. Therefore, the law firm "need not be disqualified under Canon 5 for suing its client." *Id.*

In short, Dr. Ahmad's situation is markedly different from that in *Cleveland* and the ABA opinion, where *an attorney* for Client B⁹ agrees to hire a particular lawyer, knowing that the lawyer currently represents Client A and that there is a great potential for a future conflict between Clients A and B. An even greater dissimilarity exists in comparison to *American Special Risk Insurance*, where Client B hired a lawyer knowing not only that there was a potential conflict, but in fact an actual lawsuit already pending between Client B and Client A in which the lawyer represented Client A.

For the foregoing reasons, the Court declines to find that Dr. Ahmad has waived the conflict or should be estopped from seeking Mr. Osman's disqualification. Accordingly, the Court concludes that Dr. Ahmad's motion to disqualify should be **GRANTED** to the extent that it seeks the disqualification of Ronald E. Osman and the law firm of Ronald E. Osman & Associates, Ltd.

The Court further finds that all members, associates, employees and agents of the Osman law firm should be enjoined from disclosing or using any information that they learned in the course of representing Dr. Ahmad or the Carbondale or Marion Eye Centers, Ltd., and to the extent that the law firm retains any documents received from Dr. Ahmad during these prior representations, such documents must be returned to him. Because of the closeness of the disqualification issue, however, the Court finds no evidence of bad faith in the relator's opposition to disqualification. *See Analytica*, 708 F.2d at 1269-70. The Court, therefore, **DENIES** Dr. Ahmad's request for attorney fees and costs for filing the motion to disqualify.

⁹ In *Cleveland*, it was the city's law director.

II. REMAINING MOTIONS

In a motion filed in connection with the motion to disqualify, the relator asked the Court to make an in-camera inspection of certain documents related to Mr. Osman's prior representations of Dr. Ahmad to determine whether those documents contain material covered by the attorney-client privilege. (Document No. 42). As discussed above, however, the Court's disposition of the motion to disqualify did not require the Court to determine whether Dr. Ahmad had in fact given any confidential information or materials to Mr. Osman. The Court, therefore, **DENIES AS MOOT** the relator's motion for an in-camera inspection of those documents and **DIRECTS** the Clerk of the Court to return to Mr. Osman the sealed envelope containing the documents.

Because of the delays caused by the motion to disqualify, the relator also filed a motion to extend the deadlines in the Court's current pre-trial scheduling order. The Court agrees that the original deadlines are no longer feasible and, therefore, **GRANTS** the request to modify the scheduling order. However, the Court notes that further delays are likely in the case because the plaintiff-relator has now filed his own motion to disqualify counsel for the defendant. (Document No. 59). Therefore, the Court will not enter a new scheduling order until after the remaining disqualification order is resolved.

III. SUMMARY

For the foregoing reasons, defendant's Motion to Disqualify Relator's Counsel and for Injunctive Relief to Protect Client Confidences (Document No. 35) is hereby **GRANTED**. Ronald E. Osman and the law firm of Ronald E. Osman & Associates, Ltd., is

DISQUALIFIED from representing the relator or any other party in this matter. The plaintiff-relator has until May 31, 1995, to obtain substitute counsel (and to have such counsel enter an appearance in the case) or to otherwise inform the Court of how he intends to proceed.

The Court further **ENJOINS** all members, associates, employees and agents of the Osman law firm from disclosing or using any information that they learned in the course of representing Dr. Ahmad or the Carbondale or Marion Eye Centers, Ltd. To the extent that the law firm retains any documents received from Dr. Ahmad during these prior representations, such documents shall be returned to him.

The Court **DENIES** Dr. Ahmad's request for attorney fees and costs for filing the motion to disqualify. The Court also **DENIES AS MOOT** the Relator's Request that the Court Make an In-Camera Inspection of Certain Documents (Document No. 42). The Court **DIRECTS** the Clerk of the Court to return to Mr. Osman the sealed envelope containing the documents.

Relator's Motion for Leave to Modify the Proposed Scheduling and Discovery Order and for An Extension to All Existing Discovery Dates (Document No. 51) is **GRANTED**. A new scheduling order will be entered after the Court resolves a second motion to disqualify that is still pending.

IT IS SO ORDERED.

DATED: 5-15-95

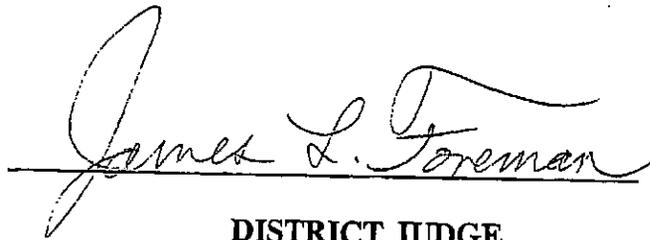

DISTRICT JUDGE

EXHIBIT "B"

LETTER OF INTENT

December 2, 2010

Dr. Maqbool Ahmad
25 Cardinal Drive
Murphysboro, IL 62966

Re: Surgery Center of Southern Illinois

Dear Dr. Ahmad:

The purpose of this letter (this "Letter of Intent") is to describe our preliminary understanding with respect to a proposed transaction (the "Proposed Transaction") whereby Maqbool Ahmad, M.D. ("Buyer") would purchase and Marion Holdings, LLC ("Seller") would sell 51 General Partner Units and 9.5 Limited Partnership Units (the "Transferred Interest") in Marion Surgery Center, Ltd, an Illinois limited partnership (the "Partnership") d/b/a Surgery Center of Southern Illinois (the "Center").

Upon execution and delivery of this Letter of Intent by both Buyer and Seller the parties will proceed to prepare Definitive Agreements (as defined in Paragraph 8 below) reflecting the terms and conditions as set forth herein. The terms and conditions are as follows:

1. The purchase price (the "Purchase Price") for the Transferred Interest shall be determined as described in this paragraph, and shall be payable at Closing. The Transferred Interest constitutes 60.5% of the total outstanding partnership units of the Partnership, therefore the Purchase Price shall be the total valuation (the "Total Valuation") multiplied by 60.5%. The Total Valuation shall be determined as follows as of the date of execution by both parties of the Definitive Agreements:
 - a) Cash – The reconciled balance of cash and cash equivalents.
 - b) Net Accounts Receivable – Total accounts receivable, reduced by a reasonable allowance for uncollectible accounts based on historical collection experience. If necessary, the total accounts receivable will be reduced by accounts considered too old to be considered reasonably collectible.
 - c) Real Property – A Value of \$_____ is being attributed to all the real estate, including improvements, owned by the Partnership.
 - d) Equipment – A value of \$_____ is being attributed to all the equipment, whether medical, office, or otherwise, owned by the Partnership.
 - e) _____

- f) Accounts Payable – The total amount owed to vendors, suppliers, and other parties for assets purchased and expenses incurred but not paid.
- g) Wages Payable – The total amount owed to all employees or contractors for unpaid compensation.
- h) Other Current Liabilities – The total amount of all other liabilities, including accruals, including but not limited to interest, rent, taxes, and insurance.
- i) Certificate of Need – No value is being attributed to the Certificate of Need applicable to the surgery center owned and operated by the Partnership.

The Total Valuation shall be computed as follows:

Add	Cash
Add	Net Accounts Receivable
Add	Real Property
Add	Equipment
Subtract	Loan
Subtract	Accounts Payable
Subtract	Wages Payable
Subtract	Other Current Liabilities
<hr/>	
Equals	Total Valuation

2. ~~_____~~ operating the Center while Buyer seeks to obtain the Required Consent (as defined in Paragraph 3) and as a result the Partnership

~~_____~~ between the date of the Definitive Agreements and Closing. Under the terms of the Definitive Agreements Buyer will remit a nonrefundable deposit in the amount _____ (the "Deposit Fund") to Surgical Care Affiliates, LLC ("SCA").

~~_____~~ as defined in Paragraph 6 below), the Partnership may withdraw an amount from the Deposit Fund necessary to satisfy all expenses of the Partnership

If at any time the balance of the Deposit Fund is less than _____

~~_____~~, Seller may provide Buyer with written notice of its intent to terminate the Definitive Agreements (a "Termination Notice"). Buyer shall have five (5) business days from the date the Termination Notice is delivered to Buyer to deposit an additional sum of money into the Deposit Fund sufficient to bring the available balance of the Deposit Fund _____

If Buyer fails to deposit such sum into the Deposit Fund within such five (5) business day period, Seller may, at its sole option, terminate the Definitive Agreements without incurring any further obligation to Buyer. If

there is a balance remaining in the Deposit Fund at Closing such amount shall be applied to the Purchase Price.

3. The Illinois Department of Health must approve the Proposed Transaction (the "**Required Consent**") prior to Closing (as defined in Paragraph 8). Buyer shall be responsible for obtaining the Required Consent, and Buyer shall bear his expenses and costs related thereto.
4. As part of the Definitive Agreements, SCA and the Partnership shall agree to terminate the management agreement between SCA and the Partnership (the "**Management Agreement**") effective as of the date of Closing.
5. If the Partnership has cash in excess of (the "**Target Cash Amount**") on the day immediately preceding the date of the Definitive Agreements, the Partnership may make a pro rata distribution to the Partners in an amount equal to the excess of the actual cash on hand over the Target Cash Amount (the "**Excess Cash Distribution**"). The aforementioned distribution may be made on the date the Definitive Agreements are executed (the "**Execution Date**") or at any time prior to the expiration of forty-five (45) days from and after the Execution Date. If the Seller receives any distribution from the Partnership after the Execution Date, other than the Excess Cash Distribution, Buyer shall receive a credit toward the Purchase Price in an amount equal to such distribution.
6. _____
7. Buyer shall complete its due diligence review within thirty (30) days from and after the execution and delivery of this Letter of Intent by Buyer.
8. Upon execution and delivery of this Letter of Intent by both parties hereto, Seller shall commence the preparation of agreements customarily executed in connection with similar transactions (the "**Definitive Agreements**"). The parties agree to negotiate in good faith and consistent with the terms of this Letter of Intent with a view toward executing the Definitive Agreements as soon as is reasonably possible; provided, however, it is further understood and agreed that if Buyer or Seller determines for whatever reason not to pursue further negotiations with respect to the Definitive Agreements, then neither party shall have any obligation to the other, except as otherwise expressly set forth in this Letter of Intent. The closing (the "**Closing**") of the Proposed Transaction shall occur within thirty (30) days of the date Buyer obtains the Required Consent. Either party may terminate the Definitive Agreements upon written notice to the other party if the Closing has not occurred by July 31, 2011. In addition to the right of Seller to terminate the Definitive Agreements under Paragraph 2, Seller may terminate the Definitive Agreements if the Partnership has insufficient funds,

including funds available in the Deposit Fund, to pay any amounts due to SCA under the Management Agreement.

9. Except as and to the extent required by law, Buyer will not disclose or use, and will direct its representatives not to disclose or use to the detriment of the Partnership, any Confidential Information (as defined below) with respect to the Partnership furnished, or to be furnished, by either the Partnership, the Seller or SCA or their respective representatives to Buyer or its representatives at any time or in any manner other than in connection with its evaluation of the transaction proposed in this letter. For purposes of this Paragraph, "**Confidential Information**" means any information about the Partnership stamped "confidential" or identified in writing as such to Buyer by the Partnership promptly following its disclosure, unless (a) such information is already known to Buyer or its representatives or to others not bound by a duty of confidentiality at the time of its disclosure or such information becomes publicly available through no fault of Buyer or its representatives; (b) the use of such information is necessary or appropriate in making any filing or obtaining any consent or approval required for the consummation of the Proposed Transaction; or (c) the furnishing or use of such information is required by or necessary or appropriate in connection with legal proceedings. Upon the written request of the Partnership, Buyer will promptly return to the Partnership or destroy any Confidential Information in its possession and certify in writing to the Partnership that it has done so.
10. Except as and to the extent required by law, without the prior written consent of the other party, none of Buyer, the Partnership, or Seller will, and each will direct its representatives not to make, directly or indirectly, any public comment, statement or communication with respect to, or otherwise to disclose or to permit the disclosure of the existence of discussions regarding, the Proposed Transaction or any of the terms, conditions or other aspects of the Proposed Transaction proposed in this Letter of Intent. If a party is required by law to make any such disclosure, it must first provide to the other party the content of the proposed disclosure, the reasons that such disclosure is required by law and the time and place that the disclosure will be made.
11. Except as otherwise specifically contemplated by this Letter of Intent, Buyer and the Seller will be responsible for and bear all of their respective costs and expenses (including any broker's or finder's fees and the expenses of its representatives) incurred at any time in connection with pursuing or consummating the Proposed Transaction.
12. The Binding Provisions (as defined in Paragraph 16) constitute the entire agreement between the parties and supersede all prior oral or written agreements, understandings, representations and warranties and courses of conduct and dealing between the parties on the subject matter thereof. Except as otherwise provided herein, the Binding Provisions may be amended or modified only by a writing executed by both parties.

13. The Binding Provisions will be governed by and construed under the laws of the State of Alabama without regard to conflicts-of-laws principles.
14. This Letter of Intent will terminate and be of no force and effect if not executed and returned to Seller on or before December 9, 2010. If executed and returned by Buyer on or prior to such date, this Letter of Intent shall terminate on the earlier of (i) the Execution Date; or (ii) midnight January 31, 2011. Additionally, either party may unilaterally terminate this Letter of Intent for any reason or no reason, with or without cause, at any time, by providing written notice to the other party, provided, however, that the termination of this Letter of Intent will not affect the liability of a party for breach of any of the Binding Provisions prior to the termination. Upon a termination of this Letter of Intent the parties will have no further obligations hereunder, except as stated in Paragraphs 9, 10, 11, 12 and 13 which will survive any such termination.
15. This Letter of Intent may be executed in one or more counterparts, each of which will be deemed to be an original of this Letter of Intent and all of which, when taken together, will be deemed to constitute one and the same Letter of Intent.
16. The provisions of paragraphs 1 through 6 of this Letter of Intent are intended only as an expression of intent on behalf of Buyer and Seller, are not intended to be legally binding on Buyer or Seller and are expressly subject to the execution of an appropriate Definitive Agreement. Paragraphs 7 through 16 of this Letter of Intent (the "**Binding Provisions**") are the legally binding and enforceable agreements of Buyer and Seller. Moreover, except as expressly provided in paragraphs 7 through 16 (or as expressly provided in any binding written agreement that the parties may enter into in the future), no past or future action, course of conduct or failure to act relating to the Proposed Transaction, or relating to the negotiation of the terms of the Proposed Transaction or any Definitive Agreement, will give rise to or serve as a basis for any obligation or other liability on the part of Buyer or Seller.

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If you are in agreement with the foregoing, please sign and return one copy of this Letter of Intent, which thereupon will constitute our understanding with respect to its subject matter.

Very truly yours,

Marion Holdings, LLC:

By: RLS

Name: Richard L. Sharpe, Jr.

Title: VP

Agreed to as to the Binding Provisions on this the 6th day of Dec, 2010.

Maqbool Ahmad
Maqbool/Ahmad

Exhibit C

14th day of September 2005 between the Partnership and HealthSouth Corporation filed with the Williamson County Illinois County Clerk and Recorder as Mortgage Record 252, Page 455.

2.4 Termination of SCA Agreements. At Closing, SCA and the Partnership shall enter into a Termination Agreement in substantially the form of Exhibit 2.4 under the terms of which the Partnership and SCA shall mutually agree to terminate the SCA Management Agreement and the SCA Employee Lease (collectively the "SCA Services Agreements").

2.5 Deposit Fund. Purchaser acknowledges that the Partnership will likely incur significant expenses operating the Center while Purchaser seeks to obtain the Required Consent (as defined in Section 2.2) and as a result the Partnership may experience a negative cash flow between the date of this Agreement and Closing. Upon execution and delivery of this Agreement, Purchaser shall remit a nonrefundable deposit in the amount of seventy-five thousand and 00/100 dollar (\$75,000.00) (the "Deposit Fund") to SCA. If the Partnership's revenues from operations are insufficient to meet the Center's monthly operating expenses (including but not limited to the current portion of the SCA Loan, as defined in Section 2.3), the Partnership may withdraw an amount from the Deposit Fund necessary to satisfy all expenses of the Partnership that exceed the available cash from operations of the Partnership. If at any time the balance of the Deposit Fund is less than seventy-five thousand and 00/100 dollars (\$75,000.00), Seller may provide Purchaser with written notice of its intent to terminate this Agreement (a "Termination Notice"). Purchaser shall have five (5) business days from the date the Termination Notice is delivered to Purchaser to deposit or cause to be deposited an additional sum of money into the Deposit Fund sufficient to bring the available balance of the Deposit Fund to seventy-five thousand and 00/100 dollars (\$75,000.00). If Purchaser fails to deposit or cause such sum to be deposited into the Deposit Fund within such five (5) business day period, Seller may, at its sole option, terminate this Agreement without incurring any further obligation to Purchaser, and shall be entitled to retain any balance remaining in the Deposit Fund. If there is a balance remaining in the Deposit Fund at Closing, such amount shall applied to the Purchase Price. If this Agreement is terminated for any other reason, the balance of the Deposit Fund shall be retained by SCA.

2.6 Excess Cash Distribution. If the Partnership has cash in excess of two hundred thirty thousand and 00/100 dollars (\$230,000.00) (the "Target Cash Amount") on the day immediately preceding the date of this Agreement, the Partnership shall make a pro rata distribution to the partners of the Partnership in an amount equal to the excess of the actual cash on hand over the Target Cash Amount (the "Excess Cash Distribution"). The aforementioned distribution may be made on the Execution Date or within forty-five (45) days after the Execution Date. If Seller receives any distribution from the Partnership after the Execution Date, other than the Excess Cash Distribution, Purchaser shall receive a credit toward the Purchase Price in an amount equal to such distribution.

2.7 Liquidated Damages. Upon execution of this Agreement, Seller, Purchaser and First Commercial Bank, a division of Synovus Bank, a Georgia banking corporation (the "Escrow Agent") shall enter into an Escrow Agreement in substantially the form of Exhibit 2.7 under the terms of which Purchaser shall deposit the sum of one hundred thousand and 00/100 dollars (\$100,000.00) (the "Escrow Fund") with Escrow Agent. In the event this Agreement is terminated under Section 9.1(b) or 9.1(c) or Purchaser has not obtained the Required Consent on or before the expiration of nine (9) months from and after the Execution Date, Escrow Agent shall distribute the Escrow Fund to Seller. In the event the transactions contemplated by this Agreement are consummated or this Agreement is terminated under Section 9.1(a), Escrow Agent shall distribute the Escrow Fund to Purchaser.

2.8 Indemnification. By letter dated January 27th, 2011 (the "Disclosure Letter"), Seller and SCA notified Osman and Purchaser of certain potential and threatened claims against

SCA, Seller, Marion and the Partnership. As a material inducement for SCA and Seller to enter into this Agreement, Osman and Purchaser hereby jointly and severally agree to defend and indemnify SCA, Seller, Marion and their respective officers, managers, employees and agents with respect to any claim by any of the individuals, entities or classes of individuals or entities referenced in the Disclosure Letter or any exhibits thereto as having threatened a claim, made a claim or which SCA and Seller believe may threaten or file a claim in the future (i) related to, or arising out of or from the transactions contemplated in this Agreement; (ii) in any way related to or arising out of or from SCA's, Seller's or Marion's interest in the Partnership; and/or (iii) any acts or omissions or alleged acts or omissions on the part of SCA, Seller or Marion related to or arising out of or from Marion's position as the general partner of the Partnership or the duties of SCA or its officers, managers, employees or agents under the SCA Services Agreements. Osman and Purchaser acknowledge and agree that the obligation to defend and indemnify under this Section shall survive the termination of this Agreement and/or the Closing. Osman and Purchaser further acknowledge and agree that the obligation to defend and indemnify under this Section shall not be affected by the failure of Osman and/or Purchaser to obtain the Required Consent. Neither Osman nor Purchaser shall have any right, without prior written consent of the party subject to indemnification to (A) compromise or settle any claim on behalf of a person or entity subject to indemnification under this Section unless (i) there is no finding or admission of any violation of a law or any violation of the rights of any such person or entity subject to indemnification; (ii) the sole relief provided is monetary damages that are paid in full by Osman and Purchaser; and (iii) the person or entity subject to indemnification shall have no liability with respect to any compromise or settlement without his, her or its consent or (B) file any counter claim on behalf of any person or entity subject to indemnification without the consent of such person whose consent may not be unreasonably withheld.

3. Closing.

3.1 Closing Date. Subject to the satisfaction or waiver of the Condition to Closing in Section 4 hereof, the closing ("Closing") of the transactions contemplated by this Agreement shall take place on a date and at a location mutually agreeable to the parties within thirty (30) days after Purchaser notifies Seller that Purchaser has received the Required Consent (the "Closing Date"). In the event the parties are unable to mutually agree upon a place and date the Closing shall take place on the thirtieth (30th) day after Purchaser notifies Seller that it has received the Required Consent. Closing shall be effective for accounting and all other purposes as of 12:01 a.m. Central Time on the Closing Date (the "Effective Time").

3.2 Seller's Deliverables. At Closing, Seller shall deliver, or cause to be delivered, to Purchaser the following:

- (a) A copy of the resolutions of the managers or member of Seller authorizing the execution, delivery and performance of this Agreement by Seller;
- (b) An executed Assignment of Seller Interest in favor of Purchaser in substantially the form attached as Exhibit 3.2(b);
- (c) Proof of insurance as required by Section 8.5; and
- (d) Seller's certificate described in Section 10.1.

3.3 Purchaser's Deliverables. At Closing, Purchaser shall deliver, or cause to be delivered, to Seller the following:

- (a) A copy of the resolutions of the Member and Manager of Purchaser authorizing the execution, delivery and performance of this Agreement by Purchaser;