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HEALTH FACILITIES &
SERVICES REVIEW BOARD

May 26, 2011

Illinois Health Facilities and Services Review Board
525 W. Jefferson Street
Springfield, Illinois 62761

RE: **LETTER OF OPPOSITION** – Certificate of Exemption **E-001-11** Surgery Center
of Southern Illinois



MARION EYE CENTERS & OPTICAL

Offices - Illinois

Anna
1-618-833-8359

Benton
1-618-439-2020

Carbondale
1-800-654-3562

Carbondale SIU
1-618-549-0615

Carlyle
1-618-594-2220

Carmi
1-618-384-5112

Cartrville
1-618-985-9983

Centralia
1-618-532-1997

Chester
1-618-826-5413

DuQuoin
1-618-542-3812

Eldorado
1-618-273-6220

Fairfield
1-618-842-3228

Flora
1-618-662-3202

Harristburg
1-618-252-5377

Harrin
1-618-942-2900

Marion
1-800-344-7058

McLeansboro
1-618-643-2650

Metropolis
1-800-344-7058

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1-618-244-2777

Murphysboro
1-618-565-1405

Nashville
1-618-327-3900

Pinckneyville
1-618-357-2020

Salem
1-618-548-0100

Sparta
1-618-443-2020

Steeleville
1-618-965-2020

Vandalia
1-618-283-7100

Vienna
1-618-658-2195

West Frankfort
1-618-937-2442

Offices - Missouri

Cape Girardeau
1-573-651-5200

Charleston
1-573-683-2020

Dexter
1-573-624-4584

Poplar Bluff
1-573-686-5866

Sikeston
1-573-472-8181

Staff

Maqbool Ahmad, M.D. • Faisal Ahmad, M.D. • Omar Ahmad, M.D. • Ukeme Umama, M.D. • George Ortiz, M.D. • Meth Linwong, M.D. • Robert Kippenbrock, O.D. • Mark Barlow, O.D. • Michael Billings, O.D. • Dirk Bochner, O.D. • Micah Brasel, O.D. • Dolly Campbell, O.D. • William Fix, O.D. • Lisa Hager, O.D. • Debra Hall, O.D. • Brenda Hutchison, O.D. • Michael Kalaheer, O.D. • Rakhi Patel, O.D. • Mollie Raddatz, O.D. • Emily Schwengel, O.D. • Rachel Shewmake, O.D. • Emily Skibo, O.D. • Emily Smith, O.D. • Robert Smith, O.D. • Geoffrey Sneddon, O.D. • Shella Sneddon, O.D. • Lisa Thatch, O.D. • Keith Tyhurst, O.D. • Eric Weinbauer, O.D. • Beth Westell, O.D.

May 26, 2011

Illinois Health Facilities and Services Review Board
525 West Jefferson Street
Springfield, IL 62761

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

Members of the Board:

I am writing in opposition to the transfer of the ownership of Surgery Center of Southern Illinois, Marion (the "Surgery Center"), to Cirurgia Centro, LLC, a legal entity owned and controlled by attorney Ronald Osman ("Mr. Osman"). For the reasons outlined below, this Board should deny this request for a Change of Ownership Exemption.

My objections are based on the following, a detailed discussion of which follows, below:

- A. Approval of this project will reduce access to healthcare and require patients to travel outside their community to obtain necessary care.
- B. The Exemption is predicated upon the claim that there will be no change in the operations of the Surgery Center. That claim is false. My associates and I, who comprise the Marion Eye Centers, will not continue to perform surgery at this surgery center if this Change of Ownership is granted (this would eliminate 85%- 97% of the procedures historically performed at the facility);
- C. Mr. Osman failed to provide a complete copy of the Purchase Agreement and, therefore, has withheld necessary information related to his agreement with the sellers. Of specific concern is the "Disclosure Letter" referenced at Section 2.8 of Mr. Osman's contract with the Seller;

- D. Ownership, operation, and control of the surgery center constitutes the practice of medicine and violates the Corporate Practice of Medicine Doctrine. I hope you agree with me that extreme caution should be taken in any decision which places control of this Center in the hands of any individual who is not licensed to practice medicine; and
- E. This Surgery Center should not be entrusted to this particular individual. I appreciate the opportunity to clearly explain my objections to the Board. I think it would assist if I were to tell you a little bit about myself and my practice.

I am a board-certified ophthalmologist and have practiced ophthalmological medicine in Southern Illinois for the past 33 years. This Board is aware of my background, having approved my application for a surgery center in Mt. Vernon, Illinois in 2010 (Project No. 07-061). My practice spans all of Southern Illinois from Cairo to the Vandalia-Flora area, and also includes Southeast Missouri.

It is also important you should understand the history of our ophthalmological practice, Marion Eye Centers (the "Practice"). Marion Eye Centers was established in 1978 and has grown into one of the largest ophthalmology practices in the country. My associates include Dr. Umana, Dr. Olk, and Dr. Ortiz, all of whom are on staff at the Marion Surgery Center, and will soon include my two sons, Omar and Faisal Ahmad, both physicians. We have 33 offices in the region, and maintain a presence in all towns with a population over 3000 people.

Our model allows us to ensure quality access to ophthalmological care throughout a primarily rural region. We provide care to over 400,000 active patients, have performed over 100,000 cataract surgeries and have performed over 500,000 total surgical procedures. We employ over 300 employees individuals, including 7 ophthalmologists and 28 optometrists.

We have earned our patients' trust and confidence and developed a deep bond with our patients. When the practice was started, we made a pledge to provide the best surgical and medical care anywhere. We believe that provision of quality medical care is the best business decision a physician can make. Therefore, we make sure that someone is available to our patients 24 hours a day, 7 days a week, 365 days a year. All of our surgeons provide patients their home numbers so that patients can call us at any time.

We do not refuse any patient regardless of their ability to pay. Essentially, we are the only ophthalmological practice in the southern portion of the State who **accepts Medicaid** patients even though we lose money when we see them. We have never refused any Medicaid patient and will never do so. We also accept every Medicare patient and accept assignment. We have many instances where we have provided free service to those who cannot pay, we have reduced charges to those patients who have no insurance, and we already **provide the lowest charges on cataract surgery in the entire state for patients without insurance**, both professional and facility fees. We provide free or reduced service to all diabetics who cannot pay and still continue to bring them back for follow-up exams. This is necessary because the failure to closely monitor all diabetic patients and ensure proper follow up would risk blindness, which we cannot condone. Our model allows us to travel to the patients rather than patients having to travel to us. As necessary, we have always provided free transportation to those patients who needed transportation. Our practice maintains a presence throughout the region to minimize the need for patient travel. We provide comprehensive services so that we never have to refer our patients to big cities due to a lack of expertise or a lack of equipment. Allowing the change of ownership for this surgery center would work against the philosophy we have established and maintained and unnecessarily increase the need for residents of this community to travel to obtain necessary ophthalmological care. This will be a change to the delivery of healthcare that is not in the best interests of the consumers of healthcare.

My staff and I want nothing more than to continue to serve the people of this area which is the **poorest economic area of the state**. A great percentage of our patients are low income families which we have continued to serve for over 30 years.

A. ACCESS TO HEALTHCARE WILL SUFFER

Because of the above unparalleled service we provide and our record of quality care, we have developed an unbreakable bond with our patients. Our practice continues to grow every day. We have pledged not to abandon our patients and we are absolutely sure that our patients will not abandon us either under any circumstances.

It was for that reason we inquired of our patients how our cessation of providing services in Marion would affect them. We invited them to offer comments to the Board if this change of ownership would adversely affect them. The response was overwhelming. Over 2,000 of our patients took the time to personally write the Board and offer their unfiltered comment. These are the

individual consumers of healthcare in this community and these are **not form letters**. These people, our patients, are the ones whose access to healthcare will be hindered if Marion Eye Centers is forced to stop providing care at the Surgery Center of Southern Illinois. Compare their message contained in form letters Mr. Osman presented and the assurances of his business partners that Mr. Osman knows how to make money. We, on the other hand, are about patient care.

Our Practice will cease performing procedures at this Facility if it is controlled by Mr. Osman. Marion Eye Center is important to these patients and to this community. Marion Eye Center performed 97% in 2005, 94% in 2006, 93% in 2007, 94% in 2008, and 85% in 2009 **of all procedures** performed at the Facility. **Despite being a "multi-specialty" surgery center, the vast majority of all procedures are performed by Marion Eye Center's physicians.** Approving this change of ownership will drive out Marion Eye Center, the group that has been the heart of this Surgery Center, and will irrevocably alter the role it has maintained in this community. Approving this Change of Ownership will decrease the access of care in this community.

B. THE APPLICATION SHOULD NO LONGER BE CONSIDERED AS AN EXEMPTION

The Application is misleading. Mr. Osman claims in his Application, and requests that you assume, as well, that the Surgery Center will continue in the future as it has in the past. He claims that there will be no change in the operations. This assumption is false. Now that the Board is aware the representation allowing for an exemption is untrue, it cannot ignore that. Just as the Board would never ignore that the Bond rating of an Applicant changed or the funding for a proposed project fell through, this Board cannot ignore that approval of this Change of Ownership would require **rebuilding the Surgery Center's practice** from the ground up because all but a handful of the procedures historically performed here will be lost.

Osman's claim regarding "no changes to the facility" is false because the physicians of Marion Eye centers will not continue to practice medicine at this surgery center if the Change of Ownership is approved. To understand why requires the Board to understand the relationship between me and Mr. Osman.

As I previously indicated, I began practicing ophthalmology in Southern Illinois in 1978 and have served the people of this area for over 30 years. My colleagues and I desire to continue

our operations at the Surgery Center because we want to serve the people of this region as we have for many years. It would present a moral and ethical conflict for us to do so if Mr. Osman owns and controls the operations of the Surgery Center.

Some years ago, with no evidence to support the claim and with Mr. Osman as the attorney for Dr. Ryll, they filed a False Claim Act case against me. They first, presented their claim to the Office of Inspector General, who denied the claim and chose not to participate. Then, hoping to benefit themselves, they filed their own claim in court. The suit was filed and was eventually dismissed. During the pendency of the suit, federal Judge James Foreman barred Mr. Osman from serving as the attorney in that suit because Mr. Osman had also been my attorney. Not only had he previously represented me, but he had provided me legal advice in the very areas covered by the suit. At the public hearing in this matter in Marion, Illinois on April 5, 2011, Mr. Osman denied that the judge removed him from the case. This is a lie. To make sure there is no misunderstanding about these facts, I have attached a copy of Judge Foreman's Order as Exhibit "A" to my written comments.

Mr. Osman appears to remain bitter about Judge Foreman's decision and has continued, on his own and through his cohorts with whom he previously worked, to interfere with the Surgery Center, the practice of our surgeons, and particularly, me.

We believe that former employees, who worked with Osman in the past, have assisted him in engaging in interference and in disruptive behavior detrimental to the service of our patients. Mr. Osman has a historical relationship with the staff of the surgery center. In fact, four employees used to work for Mr. Osman. My access to surgical rooms, at times, has been limited to one room and I have had instances where the staff's conduct has disrupted my scheduling and affected productivity. Many such occurrences have taken place, and my fellow surgeons and I simply cannot and will not continue to operate in this atmosphere.

Mr. Osman's behavior, however, is not limited to influence with the Surgery Center staff. In the Fall of 2010, Surgical Care Associates ("SCA"), who currently own the Surgery Center, contacted me to discuss the purchase of the Surgery Center from them. Those discussions resulted in negotiations and led to an executed agreement. The agreement was reduced to writing and a Letter of Intent was executed. The Letter of Intent required that Definitive Documents be prepared, which they were. However, at that point Mr. Osman caused a

threatening letter to be sent to SCA falsely claiming that the sale of the Center to me would threaten the practice of other doctors. Subsequently, additional false and threatening claims were made to SCA by or on behalf of Mr. Osman encouraging them to breach their agreement with me. Then, to facilitate that breach, Mr. Osman guaranteed to protect them from their conduct with an indemnification clause and his \$50,000,000.00 in assets. (See Section 2.8 of the Contract between Mr. Osman and SCA.) Interestingly, as mentioned below, that provision of the contract has never been provided to the Board.

My colleagues and I cannot continue to perform medical procedures at this Center if it is under the control of Osman, given the repeated questionable conduct which Mr. Osman has displayed.

I believe it is also reasonable to assume that given Mr. Osman's conduct, other doctors will have problems trusting Mr. Osman and providing surgical procedures at a facility operated by any attorney, and, more importantly, by this attorney. The Center has had difficulty acquiring and retaining physicians in the past. For example, a small list of those doctors who did provide surgical procedures at the facility, but who no longer do, include Dr. Makhdoom, a gastroenterologist, Dr. Gauto, a plastic surgeon, Drs. Adams, Sullivan, Deacon, and Braid, podiatrists, Dr. DeMattei and Dr. Petreikis, surgeons, Dr. Thorpe, an orthopedic surgeon, and Dr. Kies, an ophthalmologist. (Dr. Petreikis and Dr. Thorpe retired, but they stopped their affiliation with the Center prior to retirement).

It is undeniable that the Center had had trouble acquiring and keeping doctors on staff. That problem would be compounded were control transferred to Mr. Osman. While it is, admittedly, difficult to recruit physicians to Southern Illinois, I have been able to recruit excellent doctors in the area of general ophthalmology, corneal specialists, eye plastic surgeons, pediatric ophthalmology, retina specialists, gastroenterologists, urologists, general surgeons and pain management specialists who are prepared to join me in my practice should Mr. Osman's application be denied.

My goal is to ensure that the patients of Marion and the surrounding area continue to receive the very best surgical care possible. It is their interest that must be protected. The addition of several new specialty surgeons which I will be bringing to the Center will increase the region's capacity to serve all of the citizens in Southern Illinois with high level medical care.

C. THE APPLICATION IS INCOMPLETE

I must also raise an objection to the lack of completeness of the Application itself. As referenced above, the Application does not contain the entire agreement between the parties. I am not sure how the Application can be evaluated since the portion of the Agreement that is missing is a notably significant section.

Section 2.8 of the Contract, page 19 of the Application, references a Disclosure Letter. The Contract states that the Disclosure Letter was a **material inducement** for the sale by the Sellers to Mr. Osman. However, that letter which imposes duties upon the Buyer, Mr. Osman, and which clearly affect the purchase price and the potential cost of the entire transaction, has not been produced to the Board. It is my suggestion that **since the entire contract has not been produced, the Application cannot be properly evaluated** and thus, at least at this time, the Application should be denied, or its consideration deferred until such time as all the relevant facts are before you.

D. THE PRACTICE OF MEDICINE BY AN ATTORNEY

It is also my understanding that the operation and control of the Surgery Center would constitute the practice of medicine. The Center hires and directs anesthesiologists, registered nurses, and other licensed healthcare professionals. The staff schedules surgery which in itself can affect the care and treatment of patients as indicated above. I have nothing against attorneys as long as they are practicing law (and do so with integrity). However, I do not believe any attorney, unless he or she is also licensed to practice medicine, should be allowed to practice medicine.

Medical decisions should be made by physicians, not by attorneys or businessmen. Whether the transfer of the facility to an attorney is legal is an issue I do not have the ability to address. However, the public policy issue as to whether medical decisions should be made by healthcare professionals or by businessmen is something I can certainly offer comment upon. It is my explicit opinion, and I believe it is and should remain the public policy of Illinois, that the practice of medicine should be left to those licensed to practice medicine. Decisions should be made based upon what is best for the patient, not what is best for the bottom line. A physician's best "business decision" will always be to provide quality care to the patient. The same cannot be said for someone whose livelihood is not dependent upon their ability to practice medicine.

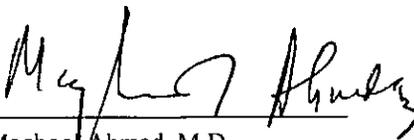
**E. THE SURGERY CENTER SHOULD NOT BE
ENTRUSTED TO THIS PARTICULAR ATTORNEY**

Mr. Osman's historical conduct should be considered by this Board as it relates to his character and fitness and because of its effect on the Center. The finding by Judge Foreman should be considered, as should the Judge's analysis of the situation. I am informed that it is unusual for an attorney to be barred from a particular case. I am not sure if you can ignore that conduct in deciding whether this transfer should be made to him. I am also not sure if you can ignore his conduct related to the very transactions before you. Mr. Osman intentionally interfered in the agreement between SCA and me. He then promised that they could breach their contract with me without fear of retribution because he would utilize his accumulated wealth to indemnify and hold them harmless from their actions. As SCA admitted in the contract, those promises to protect it from wrongful conduct was, in their words, an inducement to break the contract with me and to sign the contract with Mr. Osman.

Thus, it is my opinion, and I am hopeful it will be yours as well, that even if the law allows the transfer of the public trust of the operation of the Surgery Center to an attorney, it should certainly not be this attorney.

Please do not make a decision that obstructs the access to healthcare to an already underserved area rather than maintain that access. Thank you for your kind consideration of my opinions.

Sincerely,


Maqbool Ahmad, M.D.

Attachment

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

UNITED STATES ex. rei.)
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
MAY 15 PM
STUART
CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

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

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.

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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 cas .

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).

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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. ReIns. 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 manO"- 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 American. 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 B. 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.

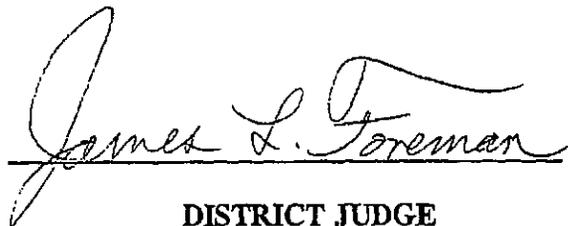
The Court further ENJOINS all members, associates, employees and agents of the Osman law firm from disclosing or using any information that they learned in the course of representing Dr. Ahmad or the Carbondale or Marion Eye Centers, Ltd. To the extent that the law firm retains any documents received 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 CUI 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: - --9


DISTRICT JUDGE