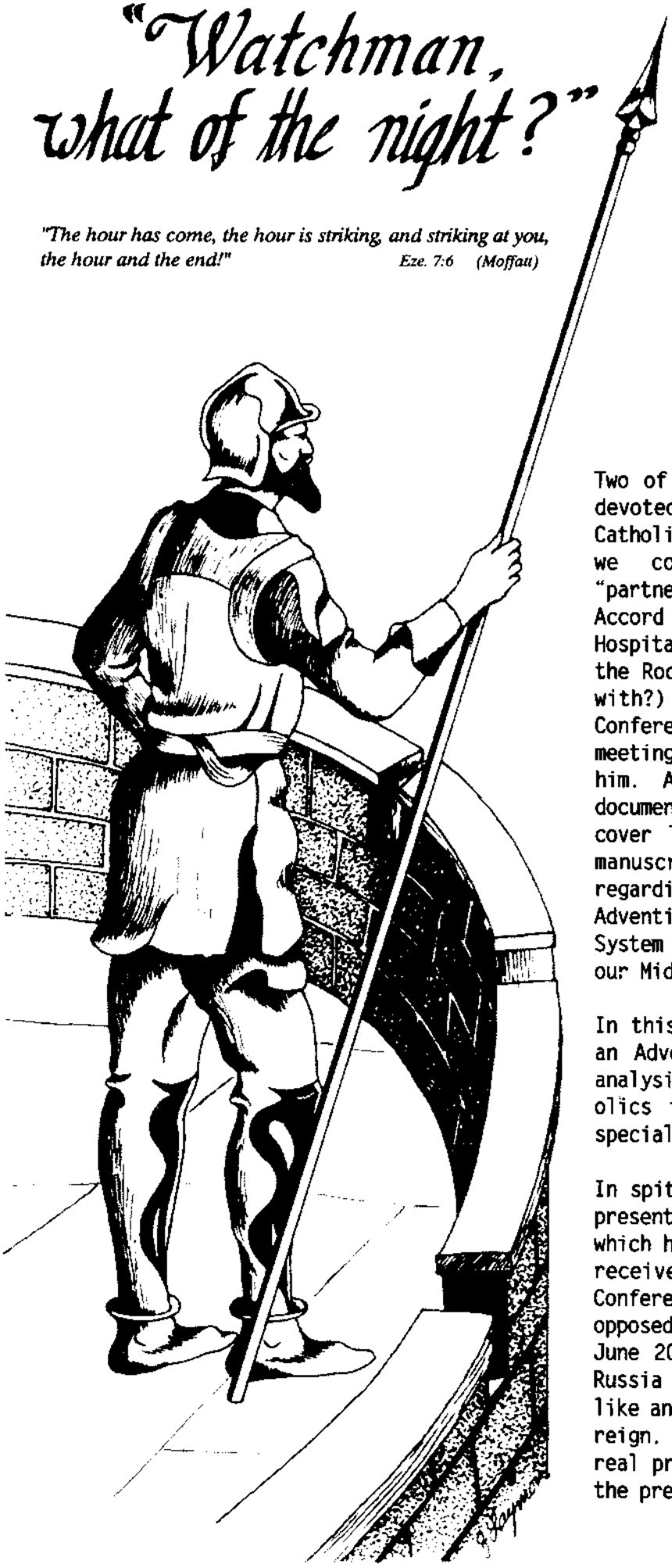
"Watchman, what of the night?"

"The hour has come, the hour is striking, and striking at you, the hour and the end!" *Eze. 7:6 (Moffatt)*



A LEGAL OPINION

Re: Centura Health Agreement

Editor's Preface

Two of the last three Special Issues of WWN have been devoted to information regarding the Adventist-Roman Catholic Hospital Accord in Colorado. With this issue we conclude our reporting of this so-called "partnership." After completing the ground work for this Accord between PorterCare and the Sisters of Charity Hospitals in Colorado, Charles Sandefur, president of the Rocky Mountain Conference was elevated to (rewarded with?) the presidency of the Mid-American Union Conference. However, he was soon to face a constituency meeting. The Colorado Accord became a major issue facing him. A delegate from Minnesota prepared a manuscript of documents which was distributed to the delegates. A cover letter dated April 18, 1996 indicated that this manuscript was "to share information and opinions regarding the recent merger that took place between our Adventist Health Care System and the Catholic Health Care System in Denver. This merger was promoted and lead by our Mid-American Union leadership."

In this Manuscript of documents was a legal opinion by an Adventist lawyer from Iowa, Donald G. Juhl. His analysis of the Agreement signed with the Roman Catholics is outstanding. We have reproduced it in this special issue of WWN.

In spite of the opposition, and the documented evidence presented, Charles Sandefur was elected to the office which he had held by committee appointment. Information received was that the president of the Minnesota Conference, Elder C. Lee Huff, was the choice of those opposed to the Colorado Accord. The Adventist Review, June 20, 1996, reports that Elder Huff will now go to Russia as president of the Euro-Asia Division. It looks like an "exile to Siberia" so that Sandefur can have free reign. On the surface it appears to be a promotion. The real promotion in the report is Neal C. Wilson's son to the presidency of the R & H Publishing Association.

A LEGAL OPINION

Re: Centura Health Agreement

(A letter to Mr. Garwin McNeilus from Donald G. Juhl, P.C., dated April 17, 1996.)

At your request, I have examined the following documents for the purpose of summarizing their respective salient features:

1) A November 16, 1995 draft of a proposed agreement between PorterCare Adventist Health Care and Sisters of Charity Health Services Colorado consisting of 55 pages; and

2) A memo dated February 12, 1996, from Charles Sandefur, President, Mid-America Union, directed to "Church Leaders, North America Division," consisting of an attached two page letter and an additional four page attached document captioned "Questions and Answers about the PorterCare Partnership."

You have asked that I review the draft of the Agreement and, initially, compare the Agreement with the interpretation and explanation published by President Sandefur and secondly, point-out any additional legal concerns that I might have regarding any provisions of the Agreement.

I am compelled to say at this juncture that all of my comments are referenced to a draft of the document dated November 16, 1995, which I am advised was not the final draft that was actually executed by the parties, but which was modified only slightly prior to its execution, according to information furnished me.

Throughout this letter, I will refer to PorterCare Adventist Health Care and PorterCare Facilities as "PorterCare" and Sisters of Charity Health Services Colorado and Sisters of Charity Health Services Colorado Facilities as "Sisters of Charity."

The draft document dated November 16, 1995 will be referred to as the "Agreement" and the corporation created by the Agreement, known as Centura Health, will be referred to as "Centura."

I have intentionally omitted any comments on the Agreement from a Biblical or E. G. White perspective, as I do not purport to possess any specialized knowledge in that area, over and above any other church member. I might say in passing, however, that the Agreement gives a whole new slant to Paul's admonition that we should not be <u>unequally</u> yoked together!

Perhaps the best way to organize this writing is to refer to President Sandefur's comments first, then to the Agreement for a discussion of whether or not his comments are supported by the actual terms of the Agreement.

At the outset, however, I want to point your attention to President Sandefur's prolific use of the word "Partner" or "Partnership" in his document captioned "Questions and Answers about the PorterCare Partnership." In the first three pages of the four page document, President Sandefur uses the word "partner" or "partnership" no less than twenty-five (25) times.

While accountants and lawyers may know that a large number of partnerships might consist of any number of partners, each possibly owning unequal shares, I respectfully submit that the vast majority of lay-persons in our Church – or any other segment of society – would automatically assume that a "partnership" consists of <u>two</u> individuals or entities, <u>each</u> owning an <u>equal</u> 50 percent of the assets, <u>each</u> sharing the profits and losses <u>equally</u>, and <u>each</u> having an <u>equal</u> voice in management decisions. Furthermore, I believe that most lay-persons believe that anyone involved in a partnership can dissolve the partnership at any time and go their separate way.

I have serious concerns regarding President Sandefur's repeated characterization of Centura as a "partnership," as the Agreement does not create an entity that even remotely resembles a partnership as that term is used by the vast majority of lay-persons, nor does the Agreement create any type of legal partnership that I recognize.

The Agreement creates a perpetual (lasting forever) non-profit corporation under the laws of Colorado which can only be terminated pursuant to Article XIV of the Agreement which will be discussed later. The Agreement obligates PorterCare to remain a participant for as long as the perpetual corporation exists. (Sec. 2.1, p. 8; Sec. 2.3(b), p. 9)

Furthermore, as alluded to above, this "partnership" is anything but equal. Centura's initial division of assets and division of cash flow is 70/30 - 70% to Sisters of Charity, 30% to PorterCare. (Sec. 1.366, p. 7; Sec. 7.2, p. 29). An additional provision allows Sisters of Charity - and <u>only</u> Sisters of Charity - to unilaterally increase their ownership interest by bringing in other Catholic

hospitals and health care facilities which could dilute PorterCare's interest to a minimum level of 20 percent. Any increase in capitalization by PorterCare can only be made if both parties agree. (Sec. 7.3, p. 30).

Of even greater concern is the unequal balance of power that exists with the body that controls Centura, the Board of Trustees.

The Agreement provides that Centura's business and affairs shall be managed by a Board of Trustees consisting of 17 members: 12 appointed by Sisters of Charity and 5 by PorterCare. Moreover, the Agreement states that the President and Chief Executive Officer (CEO) of Centura shall be an ex-officio member of the Board with voting rights, but the senior Adventist executive shall be an ex-efficio member without voting rights. (Sec. 3.4, p.14-15).

Furthermore there is a provision which allows the Board to designate as few as 3 board members as an Executive Committee which will have all authority and all powers normally exercised by the full Board, unless otherwise reserved for the full Board by the Agreement or state law. Only one member of the Executive Committee must be a PorterCare Trustee. A majority of the Executive Committee (any 2 of the 3 trustees) constitutes a quorum for the conduct of business. In other words, 2 non-PorterCare trustees can essentially "run" the entire system. (Sec. 3.4 (d)(1), pp. 15-16).

A quorum exists for the full Board if only 50% of the members attend - 9 out of 17 - and only 1 of the 9 must be a PorterCare trustee. The Agreement further contains the rather unusual provision that if the Board has attempted to meet on 3 previous occasions, but was unable to obtain a quorum because no PorterCare Board members showed up, the 9 Sisters of Charity Board members would constitute a quorum for the conduct of business and a majority vote would be sufficient to pass any measures, resolutions or take other action. (Sec. 3.4 (i), p.18).

Turning now to President Sandefur's February 13, 1996 letter, I note that paragraph two begins with these words: "PorterCare is still a completely Adventist health-care system....." the fundamental purpose of the Agreement, however, is the creation of an "Integrated Delivery System" or "IDS". This is defined in Section 1.26 of the Agreement as "...the integrated health care delivery system to be formed by the Parties, their respective IDS Participants, operating units and programs for the development and operation of IDS Activities, which IDS will be vertically and horizontally integrated, able to assume financial risk for a defined population and will offer a comprehensive spectrum of community health services."

Centura will be the organization that totally manages and directs the health care facilities owned by Sisters of Charity and PorterCare. Centura will be in charge of the finances, the marketing of services, the decision of which facility will be used for what services, the formulation and marketing of any Health Maintenance Organizations that may now or in the future be owned by the parties or affiliated with Centura, and all dealings and transactions with physicians, clinics and health insurance companies. "Porter Hospital" may still be the name over the door and PorterCare will still have a separate, all Adventist Board of Directors, but the only meaningful activity of the PorterCare Board will be the election of the 5 of 17 members of the Centura Board that will actually run the new integrated system. True, PorterCare will still hold legal title to the existing assets, but it will retain no control over how those assets are utilized. It will, of course, continue to remain responsible for all existing PorterCare debt.

The document does provide that each party and its facilities may retain its particular religious orientation, which, I presume would forbid the installation of a statue of the Madonna in the lobby of Porter Hospital. However, the statement that Portercare is still a completely Adventist Health Care system is 180 degrees from the stated purpose of Integrated Delivery System created by the Agreement and the new management company, Centura.

Much of the language used by President Sandefur to justify the "partnership" - as he calls it - with Sisters of Charity in lieu of a non-church related health care system is the statement that both PorterCare and Sisters of Charity are mission oriented, mission motivated and mission driven, as opposed to profit motivated.

True, the Agreement pays lip service to the historic medical mission of both the Catholic and SDA Churches. However, the driving force of Centura and the wide ranging powers of the management corporation are aimed squarely at improving the financial performance and economic viability of the institu tions governed by it.

The visions and goals of the IDS as stated in Sec. 2.2 of the Agreement are definitely economic in nature, with the last two stated objectives being

nity and enhancement of the historical commitment of both churches to care for the whole person through pastoral care, charity care, community education and care of the indigent. (As a practical matter, I am not aware of any hospital, public, private, profit or not for profit, that does not address these concerns to a greater or lesser degree.)

Section 4.4 however, leaves no doubt that financial performance is central to the Agreement. It sets forth precise financial performance expectations that will be measured by various financial indexes published by Standard and Poors and Moody's, which are used to measure and evaluate a hospital's financial performance. The Agreement further sets forth the corrective action that will be taken, and the powers of Centura to take that action, as well as the consequences of non-performance.

Moreover, Section 7.12 deals with "Removal of Distressed Assets" and states as follows: "(a) If the board determines in its reasonable discretion that any IDS Health Care Facility cannot be operated as part of the IDS in a cost effective manner, CMC [Centura] shall be entitled to direct that such IDS Health Care Facility cease its operations, upon the expiration of a reasonable period of time..." (emphasis supplied) The party whose institution is not "cost effective" does have the right to remove the failing institution from Centura management, without penalty, but its survival on its own would certainly be questionable if it could not make it under the Integrated Management System to begin with.

While Mr. Sandefur states in his letter that "each system will retain...its assets," that statement does not completely address the entire ownership issue, as Sec. 7.8 of the Agreement states that, unless modified by mutual agreement of the parties, any assets funded by Centura after the qualification date will be titled in the name of Centura, not PorterCare or Sisters of Charity. The new asset would then be owned in the 70/30 ratio.

President Sandefur's letter concludes with the statement that "The President of PorterCare will always be a Seventh-Day Adventist, as well the on-sight managers of the PorterCare institutions." In my opinion, I do not believe that the agreement requires this result, or even promotes this result.

Section 3.6 (a), Management, first states that the President of Centura shall be the CEO of Centura and the initial individual to hold that position shall be the present head of Sisters of Charity, Mr. Gary Susnara. Any replacement shall be recommended by a search committee, with no particular specified qualifications or religious affiliation.

Section 3.6 (b) goes on to state that the Centura CEO shall appoint a (meaning "one") PorterCare nominee as an executive officer of Centura with senior level operating responsibility, which individual shall be acceptable to both the CEO and the PorterCare Board. All executive officers of Centura shall serve at the pleasure of the CEO, in other words, he or she has sole discretion to hire and fire at will. The 17 member Board of Centura and its 12 to 5 composition selects the CEO and the CEO in turn selects the senior executives responsible for operations. Sub-section (c) states that the CEO has the authority to select the "senior executives responsible for the PorterCare Facilities after consultation with and subject to approval by PorterCare." I find no language whatsoever in the Agreement that requires all senior executives of PorterCare facilities to be members of the Seventh-Day Adventist Church.

The question and answer sheet published by President Sandefur is more significant for what it fails to state than what it does state. His answer to the question "Is this a merger?" states correctly that the Centura Board is appointed by the respective existing Boards, but fails to mention the 12 to 5 ratio of the Board or the 70/30 ownership ratio of newly acquired assets and distribution of cash flow.

The second question relating to mission and identity includes, among other things, a statement that PorterCare will retain "Adventist Management." A later answer on page 2 of the President's Questions and Answers also states that "the on-sight managers of the PorterCare institutions are all Seventh-Day Adventist, and these positions will always be held by Seventh-Day Adventists." (emphasis supplied). As set forth in the above discussion, the terms of the Centura agreement simply do not require this or guarantee this. Indeed, the President and all the Board members of PorterCare (not Centura) may always be Seventh-Day Adventists, but as stated previously, this Board is now devoid of management powers and its only meaningful function is to elect its 5 members of Centura's 17 member Board and rubber stamp the executives named by Centura's CEO to run the PorterCare facilities. I choose the phrase "rubber-stamp" with caution but with confidence. To do anything else would "gridlock" the entire system and thwart its underlying purposes.

Another one of the President's comments states that

"a unique feature of this Agreement is that a portion of Centura Health's net gain each year will return to the separate sponsoring Boards as 'tithe and offerings' for additional ministry activities." I find no such provision for a return of "tithe and Offerings" in the Agreement.

Several comments made by President Sandefur indicate that if PorterCare is unhappy with the "partnership," or if it just "doesn't work out," PorterCare can simply walk away from it all and go back to its previous form of management. The final remark in the President's document does in fact mention that if PorterCare withdraws "not for cause," it would be assessed a penalty. No amount is mentioned by the President, or even alluded to.

Section 14.2 (b) governs termination without cause and is, in my opinion, absolutely shocking from a legal and economic standpoint, without mentioning any religious, moral or ethical concerns.

I quote the provision:

"(2) If PorterCare terminates this Agreement without cause S.C. Health Services Colo. [Sisters of Charity] in its sole discretion, may elect one of the following options:

(i) To require PorterCare to pay liquidated damages of twenty-five ($25m) million dollars and grant a right of first refusal to [Sister of Charity] to purchase PorterCare's Denver assets at a value to be established as of the date this Agreement terminates if PorterCare enters into an affiliation with any other person within five (5) years following the date of termination.

(ii) To sell S.C. Health Services Colo.'s [Sisters of Charity's Denver assets] to PorterCare at a premium." (emphasis supplied)

While I am not intimately familiar with PorterCare's present financial position, other than President Sandefur's comments that economic survival requires the "partnership," I believe I can predict with a reasonable degree of certainty that withdrawal without cause would bankrupt PorterCare forthwith. Moreover, if PorterCare attempted to withdraw for cause because of an alleged breach by Sisters of Charity, the legal fees and other costs of litigation would probably produce the same result.

Point (c) of the General Conference's guidelines for affiliations such as this, as set forth in the conclusion of President Sandefur's communique, requires "Control and governance of material balance sheet assets by Church recognised entities, including the ability to withdraw." The language used by our G.C. makes no distinction between cause and non-cause withdrawals and certainly the intent of the provision is to provide for withdrawal for any reason. I cannot believe our G.C. guidelines embrace payment of a 25 million dollar penalty or the purchase of all the Catholic hospitals and nursing homes in the Denver area at a premium, as the price that must be paid for severing the unequal yoke.

Furthermore, the G.C. comments on retained control of material assets does not mesh with Sec. 4.9 of the Agreement which forbids sale, transfer or disposal of material assets of PorterCare without Centura approval. If you can't sell it, you don't control it.

An interesting provision allowing termination for cause is contained in Sec. 14.2 (a). This allows Sisters of Charity to terminate the Agreement at any time, without penalty, if Sisters of Charity or any of its assets are later determined by the Catholic Church to be subject to Canon Law. Canon Law is defined in Section 1.6 as "...the universal law of the Catholic Church as found in the 1983 Code of Canon Law, as amended from time to time, or any successor Code of Canon Law."

Assuming the obvious, that the Catholic Church and its hierarchy is the ultimate interpreter of its own law, anytime the Catholic Church may choose to state that its hospitals are subject to its Canon Law, Sisters of Charity may terminate the Agreement and go its separate way without penalty.

The Agreement does not contain a similar provision that PorterCare may terminate if the G.C. or Mid-American Union later determines that the Agreement violates guidelines or that the PorterCare assets are subject to our "Church Law," whatever that might be, now or in the future.

Not only does President Sandefur's communique neglect to mention the cost of "getting out," it conspicuously fails to mention the cost of "getting in."

Sec. 7.3 of the Agreement requires each party to contribute their pro-rata share (70% for Sisters of Charity, 30% for PorterCare) of the start-up capital required to fund Centura and, presumably, get it off to a "running start." This contribution must be in cash and must be paid on the date that Centura qualifies as a tax exempt organization. The actual amount shall be the smaller of the following: (a) an amount later agreed to by the parties, (b) an amount that does not adversely affect the credit rating of either party or exceed an amount autho-

rised by any mortgage holder or creditor of either party who has a right to object, or (c) $100,000,000. That's One Hundred Million Dollars. PorterCare's share would be $30m.

Of course, I have no idea what the eventual figure was or will be, and because of the final provision I shall address, neither you nor I will probably ever learn, unless the amount is so nominal that it precludes embarrassment or criticism by the laity.

As a practicing attorney, citizen of the United States and member of the Seventh-Day Adventist Church, I have long believed that any business arrangements we enter into with anyone, when that arrangement involves the use and management of assets or funds that have been placed with us to oversee, the entire arrangement should be open to public scrutiny, or at least the scrutiny of the individuals who are members of the organization. Porter Hospital and the other Denver area facilities did not just descend down from Heaven. They exist solely because thousands of loyal church members, as well as other benefactors and the organised SDA Church, cared enough to sacrifice and provide the funds to get the facilities out of the ground and running. It would seem only fair that the present day church members should have the right and privilege to know the details of the legal and financial arrangements–the yoke, if you please–that now binds SDA and Catholic health care facilities together in the Denver area.

Unfortunately, the Agreement speaks directly to this point as well. Sec. 11.7 states in part as follows:

"Confidentiality. Each IDS participant shall hold in confidence terms and conditions of this Agreement....."

In other words, each party is <u>legally bound</u> by the Agreement itself to keep its provisions secret! What better excuse can anyone have for keeping the terms of the Agreement from the general church membership than the response: "I'm sorry, I cannot disclose that information because to do so would be a definite breach of the Agreement itself and subject us to the possibility of severe sanctions."

This provision is probably the most unfortunate of all. It's price tag cannot be calculated, as it breeds mistrust and suspicion - with or without good reason - it encourages criticism of our church leaders - with or without just cause - and it fosters discouragement and discontent among the loyal brothers and sisters of our church family. Finally and hopefully least important of all, it provides a fertile environment for those very few opportunists who may or may not be in our ranks, to promote their own financial interests at the expense of PorterCare, the Mid-American Union and the Seventh-Day Adventist Church and its members. I sincerely hope and pray this will not happen.

To summarize, the Centura Agreement

- is <u>not</u> a partnership;
- <u>is</u> a perpetual corporation that the Roman Catholic Church can withdraw its assets from without penalty if the Church decides the assets are subject to its own church law;
- does <u>not</u> contain a similar provision for withdrawing SDA assets;
- does <u>not</u> allow the SDA member to withdraw for a non-cause without a devastating penalty;
- requires an apparently substantial cash start-up contribution from PorterCare that could be as high as $30m;
- provides for a minority ownership share of the new management corporation and all assets it may acquire in the future - 30 percent with the provision that the Sisters of Charity can unilaterally force it down to 20 percent by bringing in other Catholic health care assets;
- provides for minority representation on the Board of Trustees (Board of Directors) - 5 to 12, and 1 of 3 on the executive committee that will, in all probability, make most of the critical management decisions;
- provides that the CEO, who is elected by the Centura 12 to 5 Board, has authority to appoint <u>all</u> other managers and executives with the additional requirement that executives of PorterCare be subject to approval of the PorterCare Board;
- does <u>not</u> provide that all future managers and executives of SDA facilities must be SDA church members;
- makes numerous references to the requirement that all Catholic activities will strictly conform to Catholic Canon Law and Directives, which is a detailed body of written law similar to government statutes, while the similar provisions for PorterCare only make reference to the "mission and vision of Adventist Health Systems" and the "values of the Mid-America Union of the Seventh-Day Adventist Church and the Adventist Health System" - whatever that amorphous definition might entail from time to time;
- results in total, 100 percent surrender of all management functions to Centura, including the right to dispose of existing assets;
- provides that Centura will hold legal title to all new assets acquired with Centura funds;
- is primarily performance and profit driven; and
- <u>requires</u> all individuals employed by or

involved with the Centura organization, to keep the terms and provisions of the Agreement confidential. That means secret.

Finally, it is my opinion that the Agreement that I have examined does not legally satisfy the third requirement of the SDA Church's guideline for affiliations such as this, namely, that the Agreement provide for "Control and governance of material balance sheet assets by Church recognized entities, including the ability to withdraw."

I would be happy to re-evaluate my opinion if I were furnished a true, attested copy of the final draft copy that was actually executed by the parties. Of course, I will be happy to re-examine my position on the document I have reviewed if I have overlooked or mis-interpreted some provision and my error can be pointed out to me.

In closing, I cannot resist the temptation to do a little crystal ball gazing and engage myself in my own question and answer session regarding this unprecedented arrangement.

(Q) Will the arrangement be economically successful?

(A) Of course it will. The vast majority of Catholic hospitals are well managed, well funded institutions. Their management expertise can only benefit PorterCare.

(Q) Will the Sisters of Charity try to impose their Roman Catholic religion on the management, staff and patients of PorterCare?

(A) Of course not. No one has ever accused priests and nuns of being stupid. Any attempt of the Catholics to impose their religious views on PorterCare would, in fact, be a definite breach of the Agreement and would allow PorterCare to escape without penalty. No, the Madonna will never grace the lobby of Porter Hospital.

(Q) Will Adventists continue to hold responsible positions within Centura and PorterCare?

(A) Maybe, but probably not many. Only those managers and executives who can demonstrate superior management skills will survive. Their religious affiliation will have no bearing—Catholic or SDA.

(Q) Will the Sisters of Charity ever attempt to get out of the Agreement?

(A) Never. The very name they have chosen - Centura - is from the Latin word meaning "century." But that's not the real reason. There are too many advantages for them. Catholic controlled hospitals and clinics - PorterCare - can now perform abortions, tubal ligations, vasectomies and whatever else the Pope has declared illegal. Just send them over to Porter.

But perhaps the greatest advantage to our "partners" will not be seen for a few years—but it will happen. It's a Biblical imperative. Some day we will hear this compelling invitation: "Come now, my Protestant children, be reasonable. Look at how well we have gotten along with the Seventh-Day Adventists in Denver. Why, it was only a few years ago they were accusing me of being the Beast of Daniel and Revelation! Certainly if we can get along with the SDA's, we can get along with anybody! Don't be afraid. There is nothing to fear. We can all be one big happy family of Christians."

And so a mighty arrow is added to the ecumenical quiver. #

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Erratum: WWN 7(96), p. 7. Last sentence of quotation from Sketches from the Life of Paul should have read - "But no such interest was manifested in behalf of him who was looked upon as an apostate from Moses, a teacher of dangerous doctrines."

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