

November 13, 1991

Mr. James W. Phillips
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Conflict of Interest of Hospital Board Member

Dear Mr. Phillips:

By letter dated October 16, 1991, you requested an opinion from this office regarding the legal consequences of a county hospital board member having an interest in a contract made with the county hospital. According to your letter, a recently appointed member of the Blaine County Hospital Board is the spouse of a physician who has hospital privileges with the Blaine County Hospital. The physician leases office space from the county hospital and also has a contract with the county to provide emergency room services for the hospital. In light of this appointment, you have raised four questions. I will address each question in turn.

Question No. 1

Is a person appointed to a hospital board pursuant to I.C. §§ 31-3601, *et seq.*, subject to the provisions of I.C. §§ 59-201 and 59-202?

A county hospital board member appointed pursuant to I.C. § 31-3603 would be an "officer" within the scope of chapter 2, title 59, Idaho Code. I.C. § 59-201 provides:

Members of the legislature, state, county, city, district, and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

Further, I.C. § 59-202 provides:

State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity.

Although the term "officer" is not defined in this chapter, the term "public official" is defined in the Ethics in Government Act of 1990. Chapter 7, title 59, Idaho Code. Given the similarity in subject matter between chapters 2 and 7 of title 59, Idaho Code, the definition provides guidance. Idaho Code § 59-703(10) states:

'Public official' means any person holding public office in the following capacity:

.....

(c) as an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law;

A county hospital board member is formally appointed by the board of county commissioners pursuant to I.C. § 31-3603. The board member also has statutorily defined powers and duties delegated from the board of county commissioners. I.C. § 31-3607(a) provides in part:

The county hospital board shall be charged with the care, custody, upkeep, management and operation of all property belonging to the county and devoted to hospital purposes, and shall be responsible for all moneys received by it, including all revenue from hospital operation, all moneys received by tax levies for hospital operation, and all moneys received from whatever source, by contribution or otherwise, for hospital operation purposes.

I.C. § 31-3610 provides in part:

The county hospital board shall have power to formulate and adopt such rules and regulations for the conduct and operation of the hospital property as it may deem necessary or convenient for the efficient, economical and successful operation thereof, and which rules and regulations when approved by the board of county commissioners shall be in full force and effect. It shall be the duty of the county hospital board to formulate and adopt such changes, additions, modifications and rescissions of the rules and regulations as it may find or deem necessary or convenient for the efficient, economical and successful operation of the hospital property, which changes, additions, modifications and rescissions when approved by the board of county commissioners shall be in full force and effect.

Clearly, an official with these broad discretionary powers must be subject to the restrictions placed upon public officers in I.C. § 59-201.

California has a nearly identical statute to I.C. § 59-201. Deering Codes, Government Code, § 1090. The question as to who was a "public officer" in relation to this contract prohibition was raised in City Council of the City of San Diego v. McKinley, 145 Cal. Rptr. 461, 80 Cal. App. 3d 204 (Cal. App. 1978). The public position in question was an appointed member of the city's parks and recreation board. In determining that the board member was in fact a public officer within the scope of the statute, the court set forth the following criteria:

It is apparent now there are two requirements for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial (*Spreckels v. Graham*, 194 Cal. 516, 530, 228 P. 1040).

145 Cal. Rptr. at 464.

Applying this judicial criteria to county hospital board members, it is again evident that board members are public officers within the scope of chapter 2, title 59, Idaho Code. The creation and organization of a county hospital board is provided by statute and, once formed, it cannot be discontinued without voter approval. I.C. § 31-3605. Members of the board are appointed for a term of three years, and when vacancies occur on the board, the person appointed to fill the vacancy serves the remainder of the unexpired term. I.C. § 31-3604. Further, I.C. § 31-3606 requires that the board meet on a regular basis and adopt a meeting schedule by resolution. Service on a county hospital board is not "transient, occasional or incidental."

As previously noted, the powers and duties of a county hospital board are set forth in I.C. §§ 31-3607 and 31-3610. To a large degree, the board is autonomous from the board of county commissioners. While a county hospital board is not an independent political subdivision of the state, its delegated functions are highly discretionary and not merely ministerial. Thus, a county hospital board member must be considered an "officer" within the scope of I.C. § 59-201.

Question No. 2

Do the prohibitions contained in I.C. §§ 59-201 and 59-202 prohibit a county hospital board from entering into a contract or a lease with the spouse of one of the board members?

The prohibition set forth in I.C. § 59-201 also extends to the spouses of public officers. The basic rule of law in Idaho is that all property acquired after marriage is presumed to be community property. Bolden v. Bolden, 118 Idaho 84, 794 P.2d 1140 (1990); I.C. § 32-906. Income earned by either spouse during marriage is community property, Suter vs. Suter, 97 Idaho 461, 546 P.2d 1169 (1976), and each spouse has a vested interest as equal partners in the community estate. Peterson v. Peterson, 35 Idaho 470, 207 P. 425 (1922); Hansen v. Blevins, 84 Idaho 49, 367 P.2d 758 (1962). This vested interest includes both the benefits and obligations from contracts entered into during marriage. Stanger v. Stanger, 98 Idaho 725, 571 P.2d 1126 (1976). Thus, under Idaho community property law, the county hospital board member has a vested interest in the contracts of her spouse as well as the income earned through these contracts with the county.

The Idaho Supreme Court has had the opportunity to address I.C. § 59-201 in relation to the spouse of a public officer. In Nuckols v. Lyle, 8 Idaho 589, 70 P. 401 (1902), the wife of a school board trustee entered into a contract to teach school with the district served by her husband. The contract was challenged by another member of the school board. In holding that the contract was void, the Idaho Supreme Court stated:

Touching the validity of said contract, only one question is necessary to be determined: Was the husband of Mrs. Young pecuniarily interested in the contract? We think he was. Under the laws of this state the earnings of the wife constitute a part of the community property. The husband has the control and management of the community property, and he may use it and is part owner in it, and hence is pecuniarily interested in it. The said contract was, by the terms of the said statute, null and void. We have other statutes prohibiting contracts of this kind. (*See Rev. Stats. sec. 365-367.*)

8 Idaho at 592 (emphasis added). Although the court was relying primarily upon a statute expressly prohibiting school district trustees from being interested in school district contracts, the court made specific reference to R.S. § 365, a prior enactment of Idaho Code § 59-201, and indicated that the contract would be void under that provision as well. *See also* Clark v. Utah Construction Company, 51 Idaho 587, 8 P.2d 454 (1932).

The cases construing Idaho's community property law in relation to the contractual interest of public officers leave little room for doubt. A county hospital board member

has a pecuniary interest in any contract made by his or her spouse with the hospital under the board's control.

Question No. 3

Do the prohibitions contained in I.C. § 59-201 void a contract entered into with the physician spouse of a subsequently appointed board member?

This issue has never been addressed by an Idaho appellate court. However, the clear language in I.C. § 59-201, "made by them in their official capacity," indicates that the prohibition would not affect existing contracts.

This conclusion is limited to those contracts where the interests of the parties are well established and require no further negotiation or discretionary action by either party. Renegotiation of any provision in an existing contract or exercising any option within a contract would be viewed as "making" a contract within the scope of I.C. § 59-201 and would be prohibited. See City of Imperial Beach v. Bailey, 103 Cal. App. 3d 191, 162 Cal. Rptr. 663 (Cal. App. 1980).

Your letter identifies two prior contracts involving the county hospital board member's spouse as well as an on-going business relationship in practicing medicine in the hospital. You have characterized the privilege to practice medicine in the hospital as a "license." This office lacks sufficient information to adequately analyze these existing contracts and hospital privileges in relation to I.C. § 59-201 and will defer to your judgment in advising your clients.

Question No. 4

If it appears that contract would be in violation of I.C. §§ 59-201 and 59-202, what legal alternatives exist to avoid the violation?

This office's research in this area indicates that there is no means to reconcile the public official's private contractual interests with his or her official duties. Disclosure and non-participation in matters pertaining to prohibited contracts is not sufficient to overcome the prohibitions found in I.C. § 59-201. Ultimately, if the board member faces a conflict prohibited by I.C. § 59-201, the contract cannot be made. If made in violation of I.C. § 59-201, the contract is voidable. I.C. § 59-203.

These conclusions are buttressed by strong policy considerations set forth by the Idaho Supreme Court. In McRoberts v. Hoar, 28 Idaho 163, 174-75, 152 P.1046 (1928), the court stated:

An official's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. . . . There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by consideration of private benefit to himself.

The court stated further:

It is the relation that the law condemns and not the results. It might be that in this particular case public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

See also Nampa Highway District No. 1 v. Graves, 77 Idaho 381, 293 P.2d 269 (1956).

The Idaho case law dealing with I.C. § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification. The case law is long-standing and the Idaho Legislature has found no reason to amend the statute. In fact, in 1990 the Idaho Legislature added a criminal penalty to chapter 2, title 59, Idaho Code, making the violation of I.C. § 59-201 et seq. a misdemeanor punishable by a maximum fine of \$1,000.00 and/or one year incarceration in the county jail. I.C. § 59-208.

If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General