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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Miller:

Your letter of May 7, 1992, requests an opinion from this office regarding legal issues stemming from a proposed joint venture between the Kootenai Hospital District and two separate private entities. According to your letter, the purpose of this joint venture is to start a radiology clinic near the Kootenai Medical Center. The joint venture will be structured so that the Kootenai Hospital District will own 40% of the business, a physician group will own another 40%, and the remaining 20% will be owned by the person(s) responsible for managing the clinic's business. In light of this proposed business venture, you have raised several issues regarding the legality of the joint venture. I will address each question in turn.

1. Is the joint venture, as proposed, prohibited by Idaho Code § 48-101 as a combination in restraint of trade?

The Idaho Supreme Court has held that Idaho's antitrust laws do not apply to municipal corporations but only to private entities. Alpert v. Boise Water Corporation et al., 118 Idaho 136, 141, 795 P.2d 298, 303 (1990); Denman v. Idaho Falls, 51 Idaho 188, 121-22, 4 P.2d 361, 362 (1931).

Hospital districts organized under title 39, chapter 13, are, in our opinion, municipal corporations. They are authorized, among other things, to levy and collect ad valorem taxes and exercise the power of eminent domain. Idaho Code section 39-1331. They hold elections and engage in other governmental functions. Idaho Code section 39-1330. The Idaho Supreme Court has held that irrigation districts are political subdivisions of the state and, at least for purposes of election laws, are quasi municipal corporations. Pioneer Irrigation District v. Walker, 20 Idaho 605, 613-16, 119 P. 304 (1911). There is no reason to believe that a court would rule differently in determining the status of a hospital district such as the Kootenai Hospital District. Accordingly, Idaho's antitrust laws are not applicable to it. The question remains, however, whether the physician group or the third investor would be violating the law.

Idaho Code section 48-101 is patterned after section 1 of the federal Antitrust Act. While federal precedent is not binding on an Idaho court, it does provide persuasive guidance. Pope v. Intermountain Gas Co., 103 Idaho 217, 223 n.11, 646 P.2d 988 994 n.11 (1982). The United States Supreme Court has established that only unreasonable restraints are prohibited by section 1 of the Sherman Act. Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911). What is unreasonable is determined on a case-by-case approach after a fact-intensive review of the evidence. Justice Brandeis set forth one formulation of the inquiry necessary in a rule of reason analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. United States, 246 U.S. 231, 244 (1918).

Joint venture arrangements are analyzed under the rule of reason doctrine. Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985); National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85 (1984). A violation of section 1 under the rule of reason doctrine requires proof of "either an unlawful purpose or an anticompetitive effect." United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978).

We do not have sufficient information to make an informed judgment here of the validity of the reasons for the joint venture, the possible anticompetitive effects of the venture, and the other relevant factors mentioned. Thus, we voice no conclusion on this issue.

2. Is the joint venture, as proposed, prohibited by Idaho Code § 48-102 - monopolies, attempts to monopolize, and combinations or conspiracies to monopolize?

To establish a monopolization claim, two elements must be established: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a

consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

To establish an attempted monopolization claim, two elements must also be established: "A specific intent by the defendant to monopolize, and (2) overt acts by the defendant which create a dangerous probability that the intended monopoly will be achieved." Pope v. Intermountain Gas Co., 103 Idaho at 224-25, 646 P.2d at 995-96 (citations omitted). Establishing these elements requires proof of a relevant market, that the entity possesses monopoly power, and that this power has been employed so that an actual restraint on trade has occurred. *Id.* at 226-29, 646 P.2d at 997-1000.

Again, there is not sufficient information to make an informed judgment here of monopolization liability.

3. Will the joint venture, as proposed, violate any of the provisions of the Idaho Consumer Protection Act?

The third question is whether the joint venture, as proposed, would violate any provision of the Idaho Consumer Protection Act. The Consumer Protection Act prohibits acts or practices that have the tendency, capacity, or effect of misleading a consumer acting reasonably under the circumstances, IDAPA 04.01.3,1, or that are unconscionable. Idaho Code section 48-603(18). The Act is not violated simply because of the form in which a business chooses to operate.

4. Does Idaho Constitution, art. 12, § 4, prohibit a hospital district from entering into a joint venture with one or more other private entities for the purpose of providing radiological medical services?

It is the opinion of this office that the joint venture as described in your letter would violate art. 12, § 4, of the Idaho Constitution. Art. 12, § 4, states in full:

No county, town, city or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom, its proportion to the whole amount so invested.

(Emphasis added.)

The literal wording of art. 12, § 4, appears to prohibit a municipal corporation such as the Kootenai Hospital District from becoming a business partner or associate with private concerns, regardless of the debt structure. The Idaho Supreme Court addressed a similar situation in School District No. 8 v. Twin Falls County Mutual Fire Insurance Co., 30 Idaho 400, 164 P. 1174 (1917). In that case, a school district joined a mutual fire insurance company which was comprised of private property owners and organized to provide insurance coverage for loss by fire or other natural disaster. The court found that the school district's membership in the company violated art. 12, § 4, of the Idaho Constitution as well as art. 8, § 4. In so finding, the court stated:

The sections of the constitution referred to are self-operative. They are intended to prevent any county, city, town or other municipal corporation from lending credit to or becoming interested in any private enterprise, or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in sec. 4 of art. 12. It is true that sec. 4 of art. 12 does not specifically mention school districts, but when the other provisions of the constitution are taken into consideration, as well as the objects sought to be attained, it must be held that school districts are municipal corporations within the meaning of said sec. 4.

30 Idaho at 404 (emphasis added). The court then concluded:

To permit the school district to become a member of a county mutual fire insurance company would be to indirectly sanction the use of public funds raised by taxation for a private as distinguished from a public purpose.

Id.

In Atkinson v. Board of Commissioners, 18 Idaho 282, 108 P. 1046 (1910), the Idaho Supreme Court declared legislation providing for the formation of railroad districts unconstitutional. The court viewed the formation of railroad districts, which allowed the expenditure of public moneys on track construction, as an improper subsidy to private railroad companies. In reaching its decision, the court quoted an Ohio case that construed a provision of the Ohio Constitution that was similar to art. 12, § 4, of the Idaho Constitution:

The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals or private corporations or associations. *It forbids the union of public and private capital or credit in any enterprise whatever.* In no project originated by

individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of parties interested therein. Though joint-stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person or from several persons associated together.

18 Idaho at 288, quoting Walker v. Cincinnati, 21 Ohio St. 54.

In prior correspondence, this office has concluded that a municipal corporation, such as a school district, cannot create or hold an interest in a private enterprise. I have enclosed a copy of Attorney General Opinion No. 86-13 for your review. Finally, dicta found in Utah Power & Light Company v. Campbell, 108 Idaho 950, 703 P.2d 714 (1985), may indicate the court is moving toward a less strict view of the prohibitions of art. 12, § 4, Idaho Constitution. However, until the earlier line of cases is modified, we remain of the opinion that a hospital district may not enter into a joint business enterprise with private parties.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General