

September 17, 1993

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

Re: Calcuttas

Dear Fritz:

You have requested an opinion from this office regarding "calcuttas" and whether this type of gaming activity is prohibited by state law. For the reasons set forth below, it is the opinion of this office that "calcutta wagering" on sporting events such as golf tournaments is contrary to the public policy of Idaho as set forth in art. 3, § 20, Idaho Constitution, and is prohibited by Idaho Code § 18-3801.

A "calcutta" or "auction pool" is a form of wagering on the outcome of events such as golf tournaments, horse races, or cock fights. See Kilpatrick v. State, 265 P.2d 978 (N.M. 1953); Matthews v. Powers, 425 P.2d 479 (Okla. 1967); 52 A.L.R. 74. This type of betting has been codified and defined by the Wyoming Legislature:

"Calcutta wagering" means wagering on the outcome of amateur contests, cutter horse racing, professional rodeo events or professional golf tournament[s] in which those who wager bid at auction for the exclusive right to "purchase" or wager upon a particular contestant or entrant in the event and when the outcome of the event has been decided the total wagers comprising the pool, less a percentage "take-out" by the event's sponsor, is distributed to those who "purchased" or wagered upon the winning contestants or entrants.

Wyo. Stat. § 6-7-101.

This definition is consistent with the common usage of the term. For example, with respect to a golf tournament, prior to the tournament an auction is held wherein the right

to wager upon a particular contestant is sold to the highest bidder. The money wagered through the auction is pooled and then divided among the "owners" of the top finishing contestants.

With respect to Idaho law and the legality of calcutta wagering, Idaho's public policy regarding gambling is established in art. 3, § 20 of the Idaho Constitution and title 18, chapter 38, Idaho Code. Art. 3, § 20, sets forth the limited scope of gaming that may be authorized by the legislature. This provision provides in relevant part:

(1) Gambling is contrary to public policy and is strictly prohibited except for the following:

a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and

b. Pari-mutuel betting if conducted in conformity with enabling legislation; and

c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

(2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

Germane to our analysis is art. 3, § 20(1)(b), which does permit a form of "betting" as opposed to a particular gaming activity. It is important to note that pari-mutuel betting is distinguishable from calcutta wagering or auction pools. Pari-mutuel betting allows patrons to select a contestant and place a wager upon that contestant, generally a horse or dog. Rather than one patron bidding against the other for the right to wager on a particular contestant, every patron is allowed to wager on the contestant of choice. The money wagered is pooled and odds are computed based upon the amount of money wagered on one contestant in relation to the other contestants in the race. The odds then determine how much money is paid to successful patrons. See Oneida County Fair Board v. Smiley, 86 Idaho 341, 386 P.2d 374 (1963).

As described above, calcutta wagering is quite different than pari-mutuel wagering. Admittedly, both involve pooling money that has been wagered, but there is no sound basis to ignore the literal language set forth in art. 3, § 20(1)(b), or to construe the provision expansively to include all forms of betting pools. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). Pari-mutuel betting has distinct characteristics that have been recognized by numerous courts, including the Idaho Supreme Court in Oneida County Fair Board. If the legislature intended to permit calcutta wagering, it could have expressly provided for such when it proposed the amendment to art. 3, § 20, in 1992. Thus, in our opinion, calcutta wagering does not come within the scope of art. 3, § 20(1)(b), and the Idaho Legislature cannot enact legislation to permit calcutta wagering.

The next question to be answered is whether the actual gambling prohibitions set forth in title 18, chapter 38, criminalize calcutta wagering. Idaho Code § 18-3801 defines gambling. Idaho Code § 18-3802 provides the criminal penalty for engaging in gambling activity. Idaho Code § 18-3801 provides:

"Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat or keno, but does not include:

(1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or

(2) Bona fide business transactions which are valid under the law of contracts; or

(3) Games that award only additional play; or

(4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law.

(Emphasis added.)

Idaho Code § 18-3802 provides:

(1) A person is guilty of gambling if he:

(a) Participates in gambling; or

(b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.

(2) Gambling is a misdemeanor.

It is clear from the first portion of Idaho Code § 18-3801 that wagering money on a sporting event in order to gain a prize is gambling. This includes calcuttas. There are, however, two exceptions to this prohibition. Neither exception applies to calcutta wagering. The first exception is pari-mutuel betting on horse, dog, or mule races if done in conformity with title 54, chapter 25, Idaho Code. The second exception is "bona fide contests of skill, speed, or endurance in which awards are made only to entrants or the owner of entrants." Idaho Code § 18-3801(2). This provision permits contestants to pay a fee to enter a contest, such as a golf tournament, and gain a prize or award depending on the contestant's performance. This exception clearly encompasses events such as professional golf tournaments or the "buyouts" made by entrants in tournaments referenced in your letter.

This subsection also allows owners of animals to claim purses or awards based upon the performance of their animals. Idaho Code § 18-3801(2) does not extend to someone who "owns" the exclusive right to bet on a contestant through a calcutta auction. Rather, to come within the exemption, one must "own" the entrant. As such, it applies only to prizes awarded, for example, to horse or dog owners or race car owners. In terms of legislative history of Idaho Code § 18-3801, we note that the Senate State Affairs Committee specifically discussed calcuttas and the committee intended that they be prohibited. Further, given our conclusion that the Idaho Legislature is not authorized to legalize calcutta wagering, it follows that Idaho Code § 18-3801(2) must be construed literally to the actual owners of contestants such as racehorses, greyhounds, or race cars.

In conclusion, it is the opinion of this office that calcutta wagering on events such as golf tournaments is not

a permitted exception to Idaho's public policy prohibiting gambling as articulated in art. 3, § 20 of the Idaho Constitution and is prohibited by Idaho Code § 18-3801. Further, betting at a calcutta auction is criminally punishable as a misdemeanor pursuant to Idaho Code § 18-3802.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General