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HALE COUNTY ATTORNEY

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JAMES M. TIREY
COUNTY ATTORNEY

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MAR 15 2005
OPINION COMMITTEE

YVONNE CLARK
ADMINISTRATIVE ASSISTANT

March 8, 2005

FILE # ML-44157-05

I.D. # 044157

The Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
ATTN: Opinion Committee

RQ-0325-GA

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Request for an Attorney General Opinion regarding physician recruitment by a county hospital authority

Dear Sirs and Mesdames:

Pursuant to TEXAS GOVERNMENT CODE §402.043, as County Attorney of Hale County, Texas, acting on behalf of the Hale County Hospital Authority, the undersigned requests an opinion from the Attorney General.

The Hale County Hospital Authority is a County Hospital Authority created by order of the Commissioner's Court of Hale county, Texas, pursuant to a prior version of TEXAS HEALTH AND SAFETY CODE Chapter 264. The Hale County Hospital Authority owns a 100-bed hospital facility that is fully accredited by the Joint Commission of Accreditation of Healthcare Organizations. The facility is leased to, and operated by, Covenant Hospital Plainview, a subsidiary of Covenant Health Systems. The Hale County Hospital Authority currently has no outstanding bonds or other obligations. Its sole source of income is from hospital rentals and donations.

Hale County is a rural, isolated county that is presently experiencing a health care crisis. The county is experiencing an inability to retain physicians to practice in the county. In the past five years, 11 physicians have left practice in the county. Covenant Hospital Plainview reports that the hospital is losing money, at times as much as \$60,000.00 per month. Covenant Hospital Plainview reports that the average daily census at the hospital is significantly down from past years. Health care in Hale County is generally accepted to be in a very threatened situation. If the health care situation in Hale County continues as it

currently exists, the provision of hospital services to the residents served by the Hale County Hospital Authority will be significantly impaired.

The hospital facility owned by the Hale County Hospital Authority is equipped with a state-of-the-art cardiac catheterization laboratory, commonly known as a "cath lab." The cath lab has been unused for some time because of the lack of a cardiologist having privileges at the hospital to use it. Doctors using the hospital in Hale County report that, as a result of the non-use of the cath lab, they have been unable to make use of numerous hospital services because there is no cardiologist to whom to make referrals or to provide cardiology backup services. As a result of the non-use of the cath lab, hospital purposes are not being advanced at the facility owned by the Hale County Hospital Authority.

In the recent past, the Hale County Hospital Authority and Covenant Hospital Plainview have been approached by a well-known and respected cardiologist with over 30 years of experience in that field about locating his practice in Plainview and utilizing the hospital facility owned by the Hale County Hospital Authority for his patients needing hospital care. The cardiologist indicates that a cardiology practice of the scope that he proposes to bring to Hale County has not previously been brought to a rural setting such as Hale County. Hospital services would be made available to the patients utilizing the Hale County Hospital Authority's facility that have not previously been available to anyone in a Texas rural health care setting.

Documentation including *Physician Compensation and Production Surveys* indicate that a similarly situated and credentialed cardiologist could expect to receive in excess of \$780,000.00 per year as compensation. The cardiologist himself values his services at approximately \$1 Million per year, based on his experience and expertise. Similar documentation with regard to income projections for the hospital indicate that, with the addition of the cardiology services that this cardiologist would bring, the hospital could reasonably expect a net increase in annual income of over \$1 Million. This set of facts combines to indicate that the addition of this cardiologist to the staff of the facility owned by the Hale County Hospital Authority has the possibility of both adding numerous valuable hospital services not previously available to the people served by the hospital and increasing the income of the hospital to save it from financial ruin.

The cardiologist in question anticipates a six month setup time to establish his office, set up necessary equipment, and train staff to his satisfaction. During a portion of this initial setup time, the cardiologist anticipates little or no income from the practice of medicine. The cardiologist has made it clear that without a substantial physician recruitment package from the Hale County Hospital Authority, he will not relocate to Hale County. Covenant Hospital Plainview, the tenant, has already proposed a significant recruitment package which must be supplemented by the Hale County Hospital Authority in order to induce the cardiologist to set up his practice in Hale County. Hospital administration indicates that failure to make some major change, such as the addition to the cardiologist to the hospital staff, might be catastrophic to the continued successful existence of the hospital in Hale County.

The income guarantee agreement contemplated would provide that, for a specified period of time, the Hale County Hospital Authority would provide a cash payment in the amount necessary to raise the

physician's income to an agreed amount. The agreement would have a maximum amount to be funded by the hospital authority, the authority being obligated to fund the difference between the agreed amount and the physician's actual income received. In the proposed arrangement with the cardiologist in question, it is conceivable that he could receive up to \$250,000.00 as a income supplement in the first three months of the agreement.

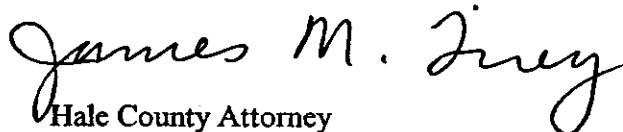
This letter is to request an opinion regarding physician recruitment. On behalf of the Hale County Hospital Authority, I request the answers to several questions: (1) Can the Hale County Hospital Authority enter into an income guarantee agreement to induce physicians, specifically the cardiologist under the facts and circumstances described above, to practice in Hale County using the hospital owned by the Hale County Hospital Authority? (2) Can the Hale County Hospital Authority, under the facts and circumstances described above, legally enter into an income guarantee agreement with a physician, whereby the Hale County Hospital Authority guarantees that the physician would be paid up to one-third of the fair market value of his services for one year, potentially payable in the first three months of the agreement, with no repayment obligation? (The income guarantee would contemplate the utilization of the facility owned by the Hale County Hospital Authority as the primary hospital for referral of his patients, with no item of compensation in any way related to the volume of referrals.) (3) Can the Hale County Hospital Authority legally enter into an income guarantee agreement with a physician, whereby the Hale County Hospital Authority guarantees that the physician would be guaranteed a certain amount of income commensurate with the fair market value of his or her services, with some specified remedy in the event of a breach of the agreement? (4) What are the legal guidelines by which the Hale County Hospital Authority can recruit physicians with which to operate its hospital?

The circumstances described herein that prompt this request for opinion are immediate and critical. Failure to obtain an opinion very soon could result in severe adverse consequences to health care in Hale County. Accordingly, your urgent expedited response is requested.

Thank you for your attention to this matter. With best regards, I am,

Sincerely yours,

JAMES M. TIREY


Hale County Attorney

cc: Mr. Jared Melton (via facsimile transmission)
Attorney General Opinion Request File

Texas Attorney General

RE: Hale County Hospital Authority

BRIEF IN SUPPORT OF REQUEST FOR OPINION

TO THE HONORABLE ATTORNEY GENERAL, STATE OF TEXAS:

COMES NOW, JAMES M. TIREY TIREY, COUNTY ATTORNEY OF HALE COUNTY, TEXAS, ON BEHALF OF THE HALE COUNTY HOSPITAL AUTHORITY, hereinafter called "Requestor" and shows the Attorney General as follows:

I. Facts

Hale County is a rural, isolated county, presently experiencing a health care crisis. The county is experiencing an inability retain physicians in practice in our area. In the past five years, 11 physicians have left practice in our area. Covenant Hospital Plainview reports that the hospital is losing money, often reporting losses in the neighborhood of \$60,000.00 per month. Covenant Hospital Plainview reports that the average daily census at the hospital is significantly down from years past. Health care in Hale County is generally accepted to be in a very threatened situation. If the health care situation in Hale County continues as it currently exists, the provision of hospital services to the residents served by the Hale County Hospital Authority will be significantly impaired.

The hospital facility owned by the Hale County Hospital Authority is equipped with a state of the art cardiac catheterization laboratory, or cath lab, as it is commonly known. The cath lab has been unused for some time due to the lack of a cardiologist with privileges at the hospital to utilize it. Doctors using the hospital in Hale County report that as a result of the non-use of the cath lab, there are numerous hospital services that are not being referred or utilized because there is no cardiologist at the hospital to make the referrals or provide the cardiology backup. As a result of the nonuse of the cath lab, hospital purposes are not being advanced at the facility owned by the Hale County Hospital Authority.

In the recent past, the Hale County Hospital Authority and Covenant Hospital Plainview have been approached by a well known and respected cardiologist with over 30 years of experience about locating his practice in Plainview and utilizing the hospital facility owned by the Hale County Hospital Authority for

his patients needing hospital care. The cardiologist indicates that a cardiology practice of the scope that he proposes to bring to Hale County has not previously been brought to a rural setting such as Hale County. Hospital services would be made available to the patients utilizing the Hale County Hospital Authority's facility that have not previously been available to anyone in a Texas rural health care setting. Documentation including Physician Compensation and Production Surveys indicate that a similarly situated and credentialed cardiologist could expect to receive in excess of \$780,000.00 per year as compensation. The cardiologist himself values his services at approximately \$1 million per year, based on his experience and expertise. Similar documentation with regard to income projections for the hospital indicate that with the addition of the cardiology services that this cardiologist would bring, it would not be unreasonable to expect a net annual income increase to the hospital of over \$1 million. This set of facts combines to indicate that the addition of this cardiologist to the staff of the facility owned by the Hale County Hospital Authority has the possibility of both adding numerous value hospital services not previously available to the people served by the hospital, and of increasing the income of the hospital so as to save it from financial ruin.

The cardiologist in question anticipates a six month setup time to establish his office, set up necessary equipment, and train staff to his satisfaction. During a portion of this initial setup time, the cardiologist anticipates little to no income from the practice of medicine. The cardiologist has made it clear that without a substantial physician recruitment package from the Hale County Hospital Authority, he will not relocate to Hale County. Covenant Hospital Plainview, the tenant, has already proposed a significant recruitment package which must be supplemented by the Hale County Hospital Authority in order to induce the cardiologist to set up his practice in Hale County.

The income guarantee agreement contemplated would provide that for a specified period of time, the Hale County Hospital Authority would provide a cash payment in the amount necessary to escalate the physician's income to an agreed upon level. The agreement would have a maximum amount to be funded by the hospital authority under any circumstances. The agreement would contemplate the physician reporting his income to the hospital authority, and the authority being obligated to fund the difference between the agreed upon amount and the physician's actual income received. In the proposed arrangement with the cardiologist in question, it is conceivable that he could receive up to \$250,000.00 as an income supplement in the first three months of the agreement.

II. Argument and Authorities

Requestor requests the Attorney General to answer in the affirmative the following questions:

1. Can the Hale County Hospital Authority enter into an income guarantee agreement to induce physicians, specifically the cardiologist entering the circumstances described above, to practice in Hale County using the hospital owned by the Hale County Hospital Authority?
2. Can the Hale County Hospital Authority, under the facts and circumstances described above, legally enter into an income guarantee agreement with the cardiologist referenced above, whereby the Hale County Hospital Authority guarantees that the cardiologist would be paid up to 1/3 of the fair market value of his services for one year, potentially payable in the first three months of the agreement, with no repayment obligation?

Requestor submits that it can take the actions requested above. In order to reach the point where such determination is made, it is necessary to examine the potential obstacles to such determination. Requestor is a body politic created by statute to perform the functions listed in TEXAS HEALTH AND SAFETY CODE Chapter 264. Requestor acknowledges that generally, a special purpose district such as a hospital authority may “exercise only such powers as have been expressly delegated to it by the Legislature, or which exist by clear and unquestioned implication.” *Tri-City Fresh Water Supply District No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 946 (Tex. 1940). Implied powers are those that are “indispensable to...the accomplishment of the purposes of the district’s creation.” *Id. at 947*; See also *Atty. Gen. Op. JM-258* (1984). TEXAS CONSTITUTION Art. III, §§51 and 52, generally prohibit the use of public funds for private purposes. In general, the potential obstacles to entering into a physician recruitment agreement are the requirement that the agreement be in keeping with the purpose for which the Hospital Authority was created, and the prohibition against spending public funds for private purposes.

Requestor contends that the recruitment of physicians to operate a hospital is indispensable to the accomplishment of the purposes of its creation. Requestor further contends that spending hospital authority funds recruiting doctors to practice medicine in rural, underserved areas of the state wherein a health care situation such as that currently extant in Hale County, is not “spending public funds for private purposes” and is, in fact, an authorized expenditure of Requestor’s funds.

In addressing the contention that the recruitment of physicians to operate a hospital is indispensable to the accomplishment of the purposes of its creation, the County Hospital Authority Act provides guidance relevant to our inquiry in §264.022. *Acquisition, Operation, and Lease of Hospital*, wherein it states in relevant part that:

(a) The authority may construct, purchase, enlarge, furnish, or equip one or more hospitals located in the county.

(b) The authority may operate and maintain one or more hospitals. The authority shall operate a hospital without the intervention of private profit for the use and benefit of the public unless the authority leases the hospital.

It is clear from § 264.022(b) that the Hale County Hospital Authority is authorized to operate its hospital. It stands to reason that recruiting physicians is an implied power indispensable to the accomplishment of the purposes of its creation. It is impossible to operate a hospital without physicians. It is impossible to operate a hospital's cath lab without a cardiologist. Accordingly, the power to recruit a physician, or in the circumstance here questioned, a cardiologist, must be among the implied powers granted to the Hale County Hospital Authority.

Next, we address the constitutional prohibition against expending public funds for private purposes. Questions regarding a hospital authority are rarely addressed in case law or by the Texas Attorney General. Although the two have differences in various areas, the closest parallel that can be drawn is with hospital districts. Hospital districts are more frequently treated by the Texas Attorney General and in case law than are hospital authorities. Finding a case or Attorney General's opinion regarding income guarantees by a statutory creation such as a hospital authority or hospital district has not been possible. Accordingly, Requestor must resort to drawing parallels from cases utilizing similar principles.

In TEX. ATTY. GEN. Op. No. DM-66, the question was addressed whether a hospital district may construct a building to lease to a private physician. Initially, the Attorney General made the determination that a hospital district had the express authority to lease a hospital building pursuant to its enabling statute. The Attorney General next considered whether the hospital district's plan would serve a "hospital purpose" consistent with the requirements of Art. IX, §9, which charges the hospital district with the purpose of providing medical care, particularly medical care for the needy, and Art. 3, §§51 and 52, which generally

prohibit the use of public funds for private purposes. *See Sullivan v. Andrews County*, 517 S.W. 2d 410 (Tex. Civ. App. - El Paso 1974, *writ ref'd.*). In DM-66, the Val Verde County Attorney had informed the Attorney General's office that a dialysis clinic was proposing to lease a building from the Val Verde County Hospital District in order to provide renal services to patients at a lesser cost than the hospital district, and that the dialysis clinic would serve primarily Medicare and Medicaid patients. Val Verde further stated that it was important to patients that the dialysis clinic be located within walking distance of the hospital and that there was no suitable site near the hospital that the dialysis clinic might purchase to build a facility. Furthermore, Val Verde submitted that the hospital district would receive an adequate quid pro quo for the lease. Under those circumstances, the Attorney General concluded that the construction and leasing of a building for the purpose of providing cost effective dialysis services adjacent to the hospital would serve a "hospital purpose." The Attorney General in DM-66 stated that because the hospital district has express authority to construct buildings and to lease all or part of its buildings and because leasing a building to a dialysis clinic for the purpose of providing renal services adjacent to the hospital would serve a "hospital purpose," the Attorney General concluded that the hospital district's plan to build and lease the facility was permissible.

TEXAS ATTY. GEN. OP. No. 97-068 restates the law previously enunciated which delineates the limitations on the power of a hospital district. ATTY. GEN. OP. No. 97-068 is a continuation of the factual situation outlined in ATTY. GEN. OP. DM-66. In Op. No. 97-068, the Val Verde County Hospital District asked whether the hospital district was authorized to construct a building to lease to private physicians. It also asked whether the hospital district was authorized to lease real property to a private enterprise that would construct a building and lease office space to private physicians. The Attorney General concluded that the enabling statute expressly authorized the hospital district to lease a building on its premises to any person or entity including a private physician, provided that the board of directors determines that the terms and conditions of the lease are in the best interests of the inhabitants of the hospital district. The Attorney General concluded that because the authority to lease undeveloped real property does not appear to be indispensable to operating the hospital district, the Attorney General did not believe that such authority could be implied. The Attorney General then considered whether the plan to construct and lease a physician's office building would serve a "hospital purpose" consistent with the requirements of Art. IX,

§9, which charges the hospital district with the purpose of providing medical care, particularly medical care for the needy and Art. III, §§51 and 52, which generally prohibit the use of public funds for private purposes. See ATTY. GEN. OP. DM-66 (1991) at 3 (citing *Sullivan v. Andrews County*, 517 SW 2d 410 (Tex. Civ. App. - El Paso 1974, writ ref'd., n.r.e.)). The Attorney General concluded that Art. IX, §9 does not authorize a hospital district to lease office space to private physicians unless the lease would procure for the district necessary services, including services for needy patients, that would not otherwise be available. This conclusion is clearly analogous to Hale County's situation wherein the physician recruitment agreement would bring to Hale County necessary hospital services not presently available without the prospective cardiologist.

In making its request, the Val Verde County Hospital District asserted to the Attorney General that Val Verde County was a rural and isolated section of the state, much like Hale County. The county was underserved by physicians, again, similar to Hale County. The district needed to recruit and retain qualified physicians to carry out the district's purposes of operating a hospital and providing medical care for the needy inhabitants of the county. In order to recruit physicians to Val Verde County, there must be facilities for the physicians to occupy. At that time, there was a critical shortage of office facilities for incoming physicians...the availability of strategically located office space would be an incentive for physicians to locate and retain their practice in Val Verde County, Texas. The Attorney General, in rendering its decision, assumed that the plan to build office space and lease it to private physicians was intended to attract or retain physicians who would provide services necessary to the operation of the hospital district. The Attorney General's office asserted that it had never considered a hospital district plan to construct and lease a physician's office building for the purpose of attracting and retaining physicians to practice at a hospital at a rural, underserved area of the state, where no alternative private sites were available near the hospital. The Attorney General stated that it doubted that a hospital district plan to construct and lease a physician's office building under other circumstances would serve a hospital purpose. The Attorney General believed that a hospital district plan with the purpose here, in these very limited circumstances involving a hospital and underserved area of the state where no alternative private sites were available, would serve a hospital purpose within the meaning of Art. IX, §9. The Attorney General stressed that its conclusion was predicated on the statement that the hospital district would require physicians leasing the

building to serve needy patients.

Finally, the Attorney General considered whether the proposed lease would violate Art. III, §§51 and 52 of the TEXAS CONSTITUTION which prohibit a political subdivision from using public funds for private purposes. In order to avoid this prohibition, the Attorney General opined that the proposed lease must serve a public purpose and the hospital district must receive adequate quid pro quo. The Attorney General further required the lease to also include sufficient controls to ensure that the public purpose was accomplished.

The Attorney General asserted that in Val Verde's case, it had identified a valid public purpose for the lease. Although the decision is not entirely on point, we would contend that there are sufficient parallels to be drawn from this decision so that one can utilize the same rationale in arriving at the conclusion that the Hale County physician recruitment package described herein would also serve a valid public purpose. Accordingly, the only principal of law advanced by the Attorney General that has been found to provide guidance to Requestor's issue is that the proposed income guarantee must serve a public purpose and the hospital authority must receive adequate quid pro quo. Requestor would submit that the addition of services through the hospital made possible by the presence of the prospective cardiologist, as well as the anticipated annual income injection brought about by provision of his services through the hospital would, in fact, serve a public purpose. Requestor would further submit that those same factors weigh in favor of a finding that the hospital would receive adequate quid pro quo by the presence and practice of the prospective cardiologist. We would ask that the Attorney General conclude that the referenced expenditure would pass constitutional muster from the standpoint that it was not an expenditure of public funds for private purposes, assuming the correct factual determination of quid pro quo adequacy.

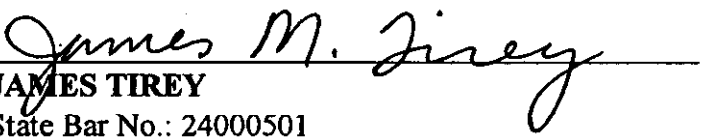
III. Conclusion

The Hale County Hospital Authority is in a state of health care crisis. Assuming it can provide a sufficient income guarantee to motivate the prospective renowned cardiologist to establish his practice in Hale County, the health care crisis may well be averted. In order to legally provide such income guarantee, the expenditure must be for a public purpose and not an expenditure of public funds for private benefit. The anticipated benefits to the hospital and community are sufficient to establish this expenditure as being for a public purpose, and not an expenditure of public funds for private benefit. The situation in Hale

County is immediate and critical, and an expedited response is respectfully requested. Requestor would ask that the Attorney General render an opinion permitting it to enter into an income guarantee agreement with the cardiologist referenced above, whereby the Hale County Hospital Authority guarantees that the cardiologist would be paid up to 1/3 of the fair market value of his services for one year, potentially payable in the first three months of the agreement, with no repayment obligation, and contemplating the utilization of the facility owned by the Hale County Hospital Authority as the primary hospital for referral of his patients and for performance of hospital procedures on such patients. Failing that, Requestor would ask that the Attorney General render an opinion permitting it to enter into an income guarantee agreement with a physician, whereby the Hale County Hospital Authority guarantees that the physician would be guaranteed a certain amount of income commensurate with the fair market value of his or her services, with some specified remedy in the event of breach. Failing that, Requestor would ask that the Attorney General render an opinion setting forth the legal guidelines by which Requestor can recruit physicians with which to operate its hospital.

Respectfully submitted,

JAMES M. TIREY
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By: 
JAMES TIREY
State Bar No.: 24000501