



HENRY McMASTER
ATTORNEY GENERAL

November 19, 2010

The Honorable Chip Campsen
Senator, District No. 43
360 Concord Street, Suite 201
Charleston, South Carolina 29401

Dear Senator Campsen:

In a letter to this office you requested an opinion on behalf of a constituent regarding whether a contest more clearly explained on the website www.contestforchange.com would constitute a lottery under South Carolina law. The constituent's letter explains as follows:

I write to seek your opinion regarding the legality of conducting a contest/event of skill, quality, creativity and/or other judgeable criteria. The winners of our contest/event selected by the above criteria, who entered a submission and entry fee, will be awarded cash or gift prizes such as houses or ipads. This differs from a lottery scheme because the winner is not chosen by chance or luck.

According to the referenced website, the prize offered is a house. A contestant would pay a \$100.00 dollar entry and write a story to answer the question: "How would winning a home CHANGE your life?" The website further states:

Once the number of entries needed for a contest is achieved, the contest will close and YOUR story will be reviewed by a panel of judges based on who they think will benefit winning the home and writing skills... (emphasis added).

Under the category "Skill Game Contest Guidelines" it is stated:

Each contest is designed and intended to be a "contest of skill." In order to be eligible to win a property, each contestant will pay a \$100 entry fee and tell us your story to answer the question: "How would winning a home CHANGE your life?" Each contestant will need to submit a story answering the question per property. Once the number of entries needed for a contest is achieved, the contest will close and the stories will be reviewed by a panel of judges based upon which contestant will benefit most from winning a house, together with that contestant's writing skills. An individual who enters the Contest(s) multiple times must pay a separate

entry fee for each attempt and must use a different story in the same contest.
(emphasis added).

Under the category “Determination of Winner” it is stated

Winners for a designated Contest will be determined based upon the contents of the story and writing skills. Because this is a “Contest of Skill”, there are no “odds” of a particular contestant being the final winner. Sponsor reasonably anticipates that the Contest prize will be awarded from the total number of contestant entries, once the Sponsor elects to close the Contest. Number of Entries and Odds of Winning are One (1) out of all entries received. (emphasis added).

The website states as to the question of “How is a winner selected?”

There will be (3) independent judges evaluating the contest on who will benefit the most and writing skills. The names of the judges will be kept anonymous. No judges are related in any way to the owner of the home. This is a Contest of “skill”, there are no "odds" of a particular entry being chosen by the judges. Once the required number of entries are received, they will be divided equally between the (3) judges. After that, each judge will pick one winning story, and then there will be a voting between (3) judges to decide which story is the winner. The Judges will not know the identity of entrants when judging the Story's content. The decision of the judges is final. (emphasis added).

“Tips on a well written story” are also set out on the website.

As set forth in an opinion of this office dated September 21, 2007, “...a raffle whereby an individual buys a ticket for the opportunity to win a prize based upon a random drawing is considered a lottery...However, other games or events may also be considered a lottery.” In Darlington Theaters, Inc. v. Coker, et al., 190 S.C. 282, 292, 2 S.E.2d 782, 786 (1939), the State Supreme Court determined that a lottery is

...a species of gaming, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to win a prize.

Consistent with such, the three elements of a lottery are (1) the offering of a prize; (2) the payment of some consideration; and (3) the determination of the winner by chance. All three elements must be present in any scheme in order for it to be considered a lottery.

S.C. Code Ann. § 16-19-10 states that

[w]hoever shall publicly or privately erect, set up, or expose to be played or drawn at or shall cause or procure to be erected, set up, or exposed to be played, drawn, or thrown at any lottery under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever or for money or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets or who shall make, write, print or publish, or cause to be made, written, or published any scheme or proposal for any of the purposes aforesaid is guilty of a misdemeanor and, upon conviction, must be fined one thousand dollars and imprisoned for one year. One-third of the fine imposed shall be paid to the person, if any, who informed law enforcement officials or other appropriate authorities about the violation which led to the conviction. Each violation constitutes a separate offense. (emphasis added).

Article XVII, Section 7 of the State Constitution provides that

[o]nly the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account', and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law.

The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state and county fairs, is not considered a lottery prohibited by this section.

This office cannot in an opinion conclusively determine how a court would construe a particular scheme or promotion as to whether or not such would constitute an illegal lottery. As noted in an opinion of this office dated August 29, 2003,

...we emphasize that an opinion of the Attorney General cannot determine facts...Thus, we cannot and do not comment...as to the legality of any particular game...Accordingly, each situation would necessarily turn on its own unique facts.

Moreover, as noted in an opinion of the North Dakota Attorney General dated September 3, 1998, "...it is often easy for sponsors or promoters to change the product or promotions in a manner

different from than what may have been reviewed by this office.”¹ We can only determine how we think a court would consider a proposal based upon whether we consider the elements of prize, chance and consideration to be included in a particular proposal or scheme.

In the opinion of this office, the scheme addressed by you clearly contains two of the essential elements of a lottery in that there are present the element of a prize, i.e., the house, and the element of consideration, i.e., the \$100.00 payment to enter. The question to be resolved is whether the essay submission constitutes the element of chance.

As noted by your constituent, this office has issued several opinions in which we have concluded that certain contest schemes involve the element of skill so as to not constitute a lottery. In an opinion dated February 2, 2006, we referenced prior opinions of this office in which we concluded that the game of golf predominantly involves skill, not chance, so as not to be considered an illegal lottery. An opinion of this office cited in the 2006 dated March 24, 1986 had stated

[i]nasmuch as the proposed golf tournament appears to be a game of skill, as opposed to a game of chance, such tournament would not constitute a lottery. However...such construction is based upon my understanding that an individual's success is based entirely upon his skills as a golfer.

We noted in the 2006 opinion that chance would predominate in a “hole-in-one” contest so as to render such contests illegal because “the results of which are largely fortuitous.”

An opinion dated July 9, 2008 dealt with a scheme whereby an individual would purchase a ticket for the opportunity to win a house by means of a chance drawing. That opinion concluded that such would constitute a lottery inasmuch as it had the elements of prize, chance and consideration.

Another opinion noted by your constituent dated September 21, 2007 dealt with a promotional game offered by the WeSave discount card program offered to public employees. The opinion concluded that “...while the WeSave promotional game has the elements of a prize and chance, in that the winner will be chosen by a randomly selected membership number, it does not

¹It is noted on the website for the contest at issue that

Sponsor may amend the Official Rules in its sole discretion. Amendments will be posted on the Sponsor Website at www.contestforchange.com . Unless otherwise specified, any amendments will become effective on the day they are posted on the Sponsor's website.

appear that there is the element of consideration in that...there is no requirement of any payment for the opportunity to win the prize.”

My research has revealed opinions of other attorneys general which have dealt with the question of whether certain essay contests presented to them involved the element of chance so as to constitute an illegal lottery. An opinion of the Virginia Attorney General dated September 19, 1996 dealt with a “talent contest” in which each entrant had to pay a \$100.00 fee and submit an essay entitled “Why I Should Be Awarded the Property.” Specific, defined guidelines were established for judging considering each essay. Prizes consisted of such items as a condominium, a diamond necklace and a town house. It was stated that each essay would be evaluated for content and graded on a percentage point system according to appropriateness (20%), creativity (30%), clarity (20%) and sincerity (10%). Students and/or faculty members of an educational institution associated with the contest would judge the essays. That opinion concluded that the element of skill, not chance, was the predominant factor in the contest and, therefore, it was determined that such did not constitute illegal gambling, i.e., a lottery.²

An opinion of the Missouri Attorney General dated July 31, 1978 cited an earlier opinion dated October 21, 1957 which dealt with a contest whereby the participants wrote an essay “on why they liked the sponsor’s product in fifty words or less.” It was concluded that such constituted a lottery inasmuch as “no criteria was specified for evaluating the essays, thus making the determination of the winners a matter of the individual bias and caprice of the judges.”

As to case law, in its decision in Lucky Calendar Co. Inc. v. Cohen, 120 A.2d 107 (N.J. 1956), the New Jersey Supreme Court determined that under the described system for the judging of a jingle contest, the scheme was illegal as “tainted with chance.” The Court stated as follows:

We will deal now with the element of chance...We are told by the plaintiff that “the jingle contest is based entirely upon skill”; that the winners are not determined by chance but by the controlled discretion of the persons judging the entries according to the standards of appropriateness, “originality, neatness, etc.” But is this so?

120 A.2d at 110. The Court explained the process by which the entries were judged and then stated

[w]ith this arrangement for the selection of the winners it is difficult to see how ‘the jingle contest is based entirely upon skill.’ The initial screening is done by employees

²It was noted that while percentages were allocated for grading the essay, it was not set out how the remaining was to be allocated. The opinion stated that “[s]hould the remaining 20% be allocated to a criterion involving the element of chance, rather than skill, the entire “talent contest” would constitute illegal gambling....”

whose qualifications to judge on the basis of the standards used were not deemed important enough to be set forth. The standards they use are different from the one used by the final judge, Dr. Allen. In fact, the standards used by them are different from the ones made known to the “contestants” by way of the calendar. These employees eliminate some of the entries generally by store classification so that it is entirely possible, and indeed probable, that one of the entries selected as one of the six best in a particular store and eliminated because it did not rate final selection as being in one of the 26 stores having the “best” entries, is in fact the best on the basis of originality and would be so in Dr. Allen's judgment. This determination is a matter of pure chance. Whether a superior entry will definitely come before the final judge depends upon whether it is entered in the North Jersey group or the South Jersey group. The important geographical distinction is not made known to the “contestants” in any way; nor is the difference in the mode of selection in both groups advertised. Moreover, as to the North Jersey group, the chance of getting any particular entry before the final judge depends in large part on the quality of the other jingles in the store in which it is entered, a factor absolutely beyond the control, skillful determination or judgment of the entrant. As Mr. Justice Holmes aptly said in Dillingham v. McLaughlin, 264 U.S. 370, 373, 44 S.Ct. 362, 363, 68 L.Ed. 742, 747 (1924):

“What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.”

Furthermore, by using the standard of neatness not used by Dr. Allen, the four employees of Addresses, Inc. might have been eliminating entries which would have been chosen by Dr. Allen as the ‘best’ on the basis of originality. Without the guide of definite and identical standards controlling all the judges, the element of chance plays the leading role in the selection of the winners; for what one judge may exclude by the application of his standards the other judge may choose by the application of his.

That chance is involved is further indicated by the fact that under no circumstances will duplicate prizes be awarded. Thus, in case of a tie between two entries equally neat and equally original, the final decision must be uncontrolled and the selection made by pure chance. It was seriously suggested by the plaintiff on oral argument that there is nothing to indicate that in this eventuality chance selection would be made and that there is nothing to prevent the prize from being awarded to the tied winners jointly. That intent is certainly not evident from the rules of the “contest”, nor do we seriously believe that it would be carried out.

The speciousness of the scheme is apparent. The plaintiff and its customer, American Stores Company, frankly concede that a “contest” in which the winners are chosen on the basis of merit has a great deal less appeal to the participants because of this very fact of competition among the entrants. Indeed, they expressly note that:

it is an interesting insight into the habits of human beings, namely, that they always prefer to have something for nothing rather than compete against other persons in order to win a valuable reward.’

The jingle calendar is clearly a definite effort to take advantage of this insight into one of the weaknesses of human nature to get “something for nothing” by avoiding any clear indication that the entries will be judged on merit, and, by in fact following a procedure of selection which leaves the determination of the winner primarily to chance. From the standpoint of skill, the declaration to the contestants that “everybody has a real chance to win” is false. Only from the standpoint of the vice sought to be controlled—chance—is the representation a true statement. The vice of the jingle scheme is not that it depends wholly on chance but that its determination depends in part on chance. This is sufficient to taint it....,

110 A.2d at 111-112. (emphasis added).

The Court in Lucky Calendar, supra, cited the decision of the Alabama Supreme Court in Minges v. City of Birmingham, 36 So.2d 93 (Ala. 1948), where the Court determined that in the scheme before it that

...there were definite known standards set up for judging the winners; that these standards were known not only to the participants but to the judges as well—factors absent in the case at bar—and that these were sufficient to remove the contest there from the ‘odium of lotteries, gift enterprises, or schemes in the nature of lotteries.’

120 A.2d at 114. (emphasis added). The Court quoted Minges, where it was stated:

[t]he standards set up for judging the monthly contest statements or compositions, as to why Pepsi-Cola hits the spot, are aptness, originality and interest. This can mean but one thing: the most apt, the most original and the most interesting, statement shall be adjudged the winner. The selections are to be made by the application of definitely known standards promulgated and announced for that purpose. That to prepare such a statement or composition requires the exercise of the judgment, skill, discretion and effort of the contestant, cannot be denied. And if the contests are honestly carried on and the best composition selected according to these known standards, the selections

made are not the result of chance... We think that what we have already said in respect to the standards for judging the monthly contests is enough to demonstrate that the standards set up for judging the winners of the family sweepstakes are sufficient under the law, to remove these contests from the odium of lotteries....

36 So.2d at 97.

In Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (E.D.N.Y. 1910), the New York court reviewed a contest "...in which prizes are to be given for the 'best' compositions upon the name of a certain breakfast food." 181 F. at 580. It was asserted that "...the essays are to be judged by three gentlemen of well known and indisputable standing from a literary standpoint." Id. The question before the court was whether such contest constituted a lottery. In determining that a lottery was not involved, the court stated:

[i]t must be held that to offer a prize for the "best" essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word "best" means. But a distinction as to the methods of the judges is academic, for if the contest be honestly carried on (and this is admitted), and the best essay from any definite known standpoint selected, such competition would not seem to be in any sense a lottery. (emphasis added).

181 F. At 582.

In the contest we are asked to review for purposes of this opinion, it is stated that the stories submitted will be reviewed "based on who...(the unnamed judges)...think will benefit winning the home and writing skills." Reference is repeatedly made to the criteria of "which contestant will benefit most from winning and house" and that contestant's "writing skills." Reference is also made to the winner being determined "based upon the contents of the story." At no point is there set forth clearly established criteria for evaluating the essays or the judge's qualifications for reviewing the entries. In the opinion of this office, such lack of specifics results in a determination that the winner would be determined by chance. As stated by the court in Lucky Calendar Co., Inc., supra,

[w]ithout the guide of definite and identical standards controlling all the judges, the element of chance plays the leading role in the selection of the winners; for what one judge may exclude by the application of his standards the other judge may choose by the application of his.

120 A.2d at 112. Inasmuch as in our opinion, the element of chance is present, in the opinion of this office the contest set forth in the website www.contestforchange.com would constitute an illegal lottery.

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With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General



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