



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 23, 1997

The Honorable Scott Beck
Member, House of Representatives
416A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Beck:

You have asked for an opinion regarding raffles and "casino nights." You note that it is your understanding that "casino nights" are not "allowed under South Carolina law even if the proceeds go to charity and the 'gamblers' only receive merchandise in lieu of winnings." Thus, your concern is that you are "at a loss as to the rationale which prohibits quasi-gambling for charity, but allows video poker style gambling."

This Office has issued a number of opinions concerning these games. In Op. Atty. Gen., Op. No. 84-44 (April 13, 1984), this Office addressed the question of whether a proposed "Monte Carlo night" of the manufacturers' council of the Greater Columbia Chamber of Commerce was illegal pursuant to the lottery laws and the gambling statutes. It was argued to this Office that the proposed game was legal for the following reasons:

1. The event is a private affair for members of the Manufacturers' Council and their spouses or guests.
2. The price of \$20.00 per person is being charged to underwrite the cost of the reception and dinner; it is in no way a fund raiser, but simply a break-even event.
3. Everyone in attendance will be provided the same amount of play money for the games, i.e., blackjack,

The Honorable Scott Beck

Page 2

May 23, 1997

poker, and has an equal chance of increasing his winnings for the auction.

4. Prizes for the auction are being donated by members of the Manufacturers' Council; none of the registration revenue will be utilized to purchase prizes.

Notwithstanding these facts, we concluded that these "factors do not alter our prior conclusion that such functions are illegal." Therein, we stated:

[t]he fact that the event is a private affair does not affect this conclusion. Holliday v. Governor of the State of South Carolina et al., 78 F.Supp. 918 (1948), affd. 35 U.S. 803 (1948), recognizes that it is the public policy of the State of South Carolina to suppress gambling and that gambling in all forms is illegal in South Carolina. South Carolina's many statutes and laws which prohibit lotteries and other forms of gambling generally make no distinction between gambling in public places or in private locations. See i.e., Secs. 16-19-10, 16-19-40, 52-15-10 and 61-9-410 CODE OF LAWS OF SOUTH CAROLINA, 1976 (1983 Cum. Supp.); City Council of Greenville v. Kemmis, 58 S.C. 427, 36 S.E. 727 (1900) This office has previously concluded that most of the games played at casino nights are prohibited by these code provisions.

As to the proposition that the \$20.00 fee does not cover the cost of the prizes that the successful gamblers may win, this is likewise insignificant. While consideration is an element of gambling, the consideration may either be direct or indirect. Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939). In Darlington, the Court condemned the linking of the sale of merchandise with the giving of prizes of money,

[w]here no price is paid for tickets, but in order to win a person must purchase something else, this would be included in the definition of a nature of a lottery.

2 S.E.2d at 785. Although in the scheme presented the prizes may be donated, and if as asserted, the entry fee is allocable only to the dinner and cocktails; the payment of a fee is still a requisite for the opportunity to participate in the various games and thus in the opportunity to win a prize. Consideration is clearly present in the scheme under review. Moreover, certain South Carolina statutes addressed to gaming or gaming devices may be violated without the necessity of showing the presence of consideration or betting. See, i.e., Secs. 61-9-410(3), 52-15-10.

In addition, we fail to see the significance of the fact that all participants receive the same amount of play money in return for their consideration. Play money is the medium of exchange to be used in the participation of the games. This format is of course present in most 'casino night' situations. By participating in the games the play money may be increased and thus the more successful participant enhances his opportunity to win.

Thus, Op. No. 84-44 reaffirmed previous opinions of this Office dealing with casino gambling and so-called "Monte Carlo" nights. In particular, an opinion dated September 26, 1980 found that a "Monte Carlo" night constituted gambling which is defined "as the risking of any money credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device." With respect to the "Monte Carlo" games, we concluded in that opinion that

[t]herefore, Sec. 61-9-410(3) and Title 16, Chapter 19, Sec. 16-19-10 et seq. should be read in harmony. Sec. 16-19-10 forbids the setting up of lotteries, which have been defined as having the following three elements: (1) the offering of a prize, (2) by a method involving chance and (3) for consideration paid by the participants for the opportunity to win the prize. Darlington Theatres, Inc. v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939); 29 A.L.R.2d 888 Annot. 'Gambling Laws-Promotional Scheme'. The elements of a lottery appear to be present in the scheme described. Additionally, Sec. 16-19-40 makes unlawful the playing of 'any game with cards or dice' at any location used for the retailing of spirituous

The Honorable Scott Beck
Page 4
May 23, 1997

liquors. The described activities would be unlawful under these sections as well

You ask what is the rationale that prohibits the aforementioned forms of gambling, but allows "video poker style gambling." I refer you in this regard to an Informal Opinion dated January 14, 1997, which discusses at some length the Supreme Court's decision in Martin v. Condon, Op. No. 24518 (November 4, 1996). As you know, this decision declared unconstitutional S.C. Code Ann. §§ 12-21-2806 and -2808 of the Video Games Machine Act. Section 12-21-2806 had provided for a referendum vote held on a county-by-county basis to determine the legality of non-machine cash payouts from coin-operated video games machines. As a result of the statutory referenda, such payments had been made illegal in twelve of the forty-six counties in South Carolina.

As we noted in the referenced Informal Opinion, State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991) is the Supreme Court decision which first recognized that cash payouts from video poker machines was legal in South Carolina. In Blackmon, supra, the Court focuses upon Section 16-19-60 which provides that "[n]othing in [Section] 16-19-40 ... shall extend to coin-operated nonpayment machines with a free play feature; provided, that nothing herein shall authorize the licensing, possession, or operation of any machine which disburses money to the player." (emphasis in original).

The Court found that under "the plain language of Section 16-19-60," the payment of non-machine payouts as the result of the playing of video poker machines "does not constitute unlawful gambling as the machines themselves do not disburse money to the player, but rather, a person does." 270 S.C. at 273. The Court fully recognized the inconsistency of the Legislature's approach in this area but concluded that any remedy was completely within the Legislature's discretion:

[h]ere Section 16-19-60 plainly states that coin-operated nonpayment machines with free play features are exempt from the reach of Section 16-19-40 as long as the machines themselves do not disburse money to the player. Since the poker machines involved in this case fall within this specific statutory exemption, Blackmon cannot be indicted under Section 16-19-40. Although this result appears anomalous, as it allows activity which seems to be unlawful to go unpunished, it is nonetheless clear that this outcome reflects the intent of the legislature.

The Honorable Scott Beck
Page 5
May 23, 1997

304 S.C. at 273-274. Of course, as stated above, the General Assembly following Blackmon attempted to remedy this "anomalous situation" described by the Court by virtue of the enactment of the Video Games Machine Act, providing for a statewide local option referendum as to the legality of video poker payouts in each county, but the Court struck the measure down as unconstitutional. This is discussed fully in the referenced Informal Opinion of January 14, 1997. However, while I do not agree, the Court has made it clear that the distinction between video poker payouts and other forms of gambling is one solely a matter of legislative discretion.

Notwithstanding this discretion, however, the State Constitution imposes certain limitations upon the General Assembly in this area. Art. XVII, § 7 of the Constitution provides that "[n]o lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State." Op. Atty. Gen., Op. No. 93-19 (March 22, 1993), this Office concluded that "a cash payoff from playing coin-operated video poker games constitutes a lottery, and thus is in violation of the South Carolina Constitution." In South Carolina, a lottery contains three elements -- prize, chance and consideration. See, Darlington Theatres v. Coker, supra.

Thus, our 1993 opinion found that

[w]e further agree with ... [the] assessment that State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991), does not undermine the prior opinions of this Office that cash payoffs for pinball machines constitute an illegal lottery. In Blackmon, the Court interpreted the statutory exemption contained in Section 16-19-60 supra as exempting coin-operated, non-payment machines with free play features from the reach of Section 16-19-40 as long as these machines do not disburse money to the player. In reaching this conclusion, the Court chose to follow a literal interpretation of the Section 16-19-60 exemption; thus, it appears that the Court would construe the exemption contained in Section 16-19-60 to apply only to South Carolina Code Sections 16-19-40 and 16-19-50 and not to other statutory criminal provisions since, again, that is the provision's literal import. Interestingly, the Court in dicta realized that cash payoffs from free games won on coin-operated video machines with free play features "seems to be unlawful gambling ...," 403 S.E.2d, at 662. Thus, it is our opinion that the Court in Blackmon agreed with our earlier

The Honorable Scott Beck
Page 6
May 23, 1997

opinions and the suggestion in Powell v. Red Carpet Lounge that gambling upon these machines constitutes a lottery

The Tennessee Attorney General has also concluded that payoffs from video poker machines constitute a lottery. Tenn. Op. Atty. Gen. No. 94-127, 1994 WL 630530. There, it was stated:

[t]he type of video poker machine described above requires much less skill than does live poker. The outcome of a live poker game can be significantly affected by a player's betting decisions. See Commonwealth v. Club Caravan, Inc., 571 N.E.2d 405, 406 (Mass. Ct. App. 1991); Commonwealth v. Two Electronic Poker Game Machines, 465 A.2d 973, 978 (Pa. 1983) (video poker machine's outcome deemed predominately chance and skill involved is not the same as can indeed determine the outcome of a poker game among humans, involving holding, folding, bluffing, and raising). A player may fold a poor hand, bet a strong hand, or bet so as to deceive other players into thinking that a hand is stronger or weaker than it actually is. In video poker the only betting decision is the initial decision of how much to bet. Knowledge of the odds is helpful when deciding what cards to discard, Primages, 501 N.W.2d at 270 ("the decision regarding which cards to discard and which to keep in an attempt to draw a winning poker hand does involve an element of skill") Club Caravan, 571 N.E.2d at 406 (FBI witness attributing skill involved in choosing discards at less than 25% of the game), but the difference between a skilled player and an average player is likely to be minimal.

For these reasons, we agree with those courts that have found video poker or other casino/card video games to be predominately games of chance.

Likewise, other recent decisions in other jurisdictions have found video poker machines to be games of chance. See, Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Commission, 117 N.C. App. 405, 451 S.E.2d 306 (1994); U.S. v. Marder, 48 F.3d 564 (1st Cir. 1995). In the latter case, the Court held that sufficient evidence was presented for the jury to find that chance predominated over skill in playing video poker, thus rendering it a lottery.

The Honorable Scott Beck

Page 7

May 23, 1997

While it is my opinion that video poker payoffs constitute a lottery, thus far, our Supreme Court has not addressed the lottery issue. Only recently, in Ardis v. Ward, 321 S.C. 65, 467 S.E.2d 742 (1996) and Montjoy v. One Stop of Abbeville, Inc., _____ 478 S.E.2d 683 (1996), the Court declined to address this question. I understand another case raising this question has been recently filed. Thus, until this issue is answered with finality, there is still the possibility that the type of disparate treatment between forms of gambling with which you are concerned may be subject to the constitutional limitation of constituting a lottery which I have discussed above.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an