

2004 WL 235411 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 22, 2004

*1 The Honorable Luke A. Rankin
Senator
District No. 33
508 Gressette Building
Columbia, South Carolina 29202

Dear Senator Rankin:

You have raised a question concerning the legality of poker tournaments in South Carolina. You have enclosed a letter to you from William H. Monckton VI of the Monckton Law Firm, P.A. which addresses this issue in some detail. Mr. Monckton's letter states in pertinent part as follows:

... I believe that a Poker Tournament run in a manner as the ones we see on ESPN and the Travel Channels would be legal. The basics of how the tournaments would be run are: 1) Tournament run by a Non-Profit Entity, 2) Entry Fee to play in Tournament and this amount would be used by the Non-Profit for expenses, 3) Buy-in-Amount would be the amount the players would pay to play and there would be 100% payout to the players based upon a schedule on how they place in the tournament. Also this schedule would be posted prior to the start of the tournament.

I believe that everyone would consider Poker a game of skill and by staging it in a format as above it is no different than the fishing tournaments that are held in our State each year. In the fishing tournaments an angler pays an entry fee to fish and then may enter the Calcutta which is usually a tournament within a tournament that guarantees up to 100% payout on the largest or most fish. The poker tournament as proposed above is no different than the numerous fishing events that take place legally in our State each year.

Law / Analysis

In a recent opinion, dated August 29, 2003, we addressed the question of whether "tournaments based upon contests of skill including such things as professional golf tournaments, amateur and professional fishing tournaments" and other such contests violate the gambling laws of South Carolina or the laws against betting and bookmaking. Therein, we referenced the South Carolina Supreme Court decision of [Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 \(1939\)](#) (which held that a lottery is a form of gambling and the three elements thereof are prize, chance and consideration) as well as an opinion, dated August 10, 1990. The 1990 opinion quoted an earlier opinion of March 24, 1986 which had concluded that a golf tournament did not constitute a lottery (or gambling) because one of the necessary elements - chance or luck - was not present. In the 1986 opinion, we stated as follows:

[w]hile two elements of a lottery, a prize and payment of consideration for an opportunity to win the prize, are present, it does not appear that the necessary third element, the awarding of the prize by chance is present.

The 1986 opinion referenced that at least one court has determined that the game of golf is a game of skill and not gambling. It was also noted that the conclusion was based on the understanding that an individual's success in the tournament was based entirely on his skills as a golfer and that no element of pure chance was present.

*2 The recent opinion (August 29, 2003) also addressed the applicability of South Carolina's betting statute, [S.C. Code Ann. Sec. 16-19-130](#), which makes it a crime to record[] or register[] bets or wagers or sell[] pools or make[] books, with or without writing, upon the result of any (a) trial or contest of skill, speed, or power of endurance of man or beast, (b) political nomination, appointment or election or (c) lot, chance, casualty, unknown or contingent event whatsoever

We noted in the opinion that “[c]ourts have generally distinguished between participating in a game of skill and betting, wagering, bookmaking or selling pools on a game of skill.” Thus, we concluded that the betting statute was most probably not violated where the “particular contest is purely one of skill; the entity operating the tournament or contest does not participate in the contest or through representatives; the participants pay an entry fee, but the entry fee does not determine or make up the prize, purse or premium; and the total prize, purse or premium is not based upon the number of persons entering the contest or the amount of the entry fees.” If all of these criteria were met, it was our opinion that the game in question “would likely be held by a court not to violate South Carolina's gambling laws, particularly [§ 16-19-130](#) (betting statute). We cautioned, however, that “each situation would necessarily turn on its own unique facts.”

Based upon this analysis, a threshold issue involved in your question is whether the game of poker constitutes a game of skill or one of chance. While there is a split of authority, several courts have concluded that a live poker game is a game of chance rather than skill.

For example, in [Indoor Recreation Enterprises, Inc. v. Douglas](#), 194 Neb. 715, 235 N.W.2d 398 (1975), the Nebraska Supreme Court held that the evidence supported the trial court's conclusion that poker is predominantly a game of chance. There, the Supreme Court of Nebraska analyzed this issue as follows:

[w]e examine our decisions that have passed upon the question of distinguishing games of skill from games of chance. In [Baedaro v. Caldwell](#), 156 Neb. 489, 56 N.W.2d 706 (1953), this Court stated as follows: ‘The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.’

In [Annotation, Games of Chance or Skill](#),” 135 A.L.R. 104 (1941), the authors state: ‘... games of cards are games of chance even though the element of skill is more or less involved, since the element of chance predominates.’

*3 In [State v. Taylor](#), 111 N.C. 680, 16 S.E. 168 (1892), the following observation was made on games played with cards; ‘It is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamblers engaging in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.’

[235 N.W.2d at 400.](#)

Moreover, in [State v. Schlein](#), 203 Kan. 205, 854 P.2d 296, 305, the Kansas Supreme Court stated the following: [u]sing the facts of this case, however, if one advertises and invites the public to participate in a poker tournament in his or her home, in a school, in a church, in a monastery, or in a nursing home; charges each contestant an entry fee; provides the contestants with the rules of the tournament; and provides prizes - each of these places would be converted into a gambling place and an individual who enters the premises where gambling is occurring, with the intent to participate in the poker tournament, has entered into a gambling place.

In addition, as the Attorney General of Tennessee has recognized in Tenn. Op. Atty. Gen., Op. No. 94-127 (November 1, 1994), “[i]n the context of finding poker tables to be gambling devices, courts have considered poker to be a game of chance.” Citing, State v. Mathis, 105 S.W. 604, 605-6 (Mo. 1907); Ex Parte Hamm, 172 P. 190 (N.M. 1918). That same opinion recognizes, however, that there are some courts which conclude that poker is not predominantly a game of chance, but is a game which involves a substantial amount of skill and judgment. See, Ginsberg v. Centennial Turf Club, 251 P. 2d 926, 929 (Colo. 1952); State v. Coats, 74 P.2d 1102, 1106 (Or. 1938); State ex rel. Evans v. Brotherhood of Friends, 247 P.2d 787, 797 (Wash. 1952).

We have consistently stated that the test of whether a particular game is a game of chance or skill is governed by the so-called “predominance” test. This test was described in a recent opinion, dated May 5, 2003 as follows: [h]istorically, it has been the opinion of this Office, as well as a majority of jurisdictions in this country, that a “game of chance” is one in which the element of chance predominates over any skill involved. On the other hand, a “game of skill” is one in which the element of skill is predominant over the element of chance. See, Ops. S.C. Atty. Gen., August 2, 2001; September 5, 1995; December 5, 1978; Op. No. 3629, supra. While the South Carolina Supreme Court has never squarely adopted this so-called “Dominant Factor” test, the dissent in Johnson v. Collins Entertainment Co., Inc., 333 S.C. 96, 508 S.E.2d 575 (1998) indicates that the Court would accept this rule. In Johnson, Justice Burnett, joined by now Chief Justice Toal, opined:

*4 ... where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is [a game of chance], even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the results of the game, the scheme contains the requisite chance necessary to constitute a [game of chance].

Courts considering whether elements of skill are involved in the playing of a particular game have examined factors such as manual dexterity, hand-eye coordination, reflexes, muscular control or the ability to concentrate. See, U.S. v. 294 Various Gambling Devices, 718 F. Supp. 1236 (W.D.Pa. 1989). Judgment, practice or adroitness are elements to be considered as part of the evaluation. State v. Stroupe, 76 S.E.2d 313 (N.C. 1953). Intellectual abilities are an important factor. In re Allen, 377 P.2d 280 (Cal. 1962).

It is important to remember that the possession of a particular skill in playing the game does not in itself make the game one of skill. Again, the test is whether skill or chance “predominates” in determining the game's outcome. As the North Carolina Supreme Court summarized in State v. Stroupe, supra, “whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment” is controlling. Games have been ruled to be games of chance even when “the skill of the player may increase the player's odds of winning but ultimately the player's skill cannot determine the outcome, regardless of the degree of skill involved.” Op. of the Justices, 795 So.2d 630 (Ala. 2001). As Justice Burnett emphasized in his dissent in Johnson v. Collins, “... skill should be defined in terms of the ability to obtain the desired outcome - a certain [icon, image, point total] - rather than the ability of one player to play more judiciously than another.” 508 S.E.2d at 587.

Based upon this analysis, it is our opinion that a court would most likely conclude that the game of poker is a game of chance.

In addition, this Office has consistently concluded that the game of poker is prohibited as part of a so-called “Monte Carlo night” even where conducted by charitable organizations. Most recently, in an opinion dated May 23, 1997, we quoted from an earlier opinion, S.C. Op. Atty. Gen., Op. No. 84-44 (April 13, 1984), wherein we concluded that games such as poker played at a “Monte Carlo night” violate the various gambling statutes, including § 16-19-40.¹ The 1984 Opinion reasoned as follows:

[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.* 335 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 [City Council of Greenville v. Kemmis](#), 58 S.C. 427, 36 S.E. 727 (1900).

*5 South Carolina's gambling statutes expressly recognize the same analysis as the case authorities referenced above - namely that card games, such as poker are generally games of chance. Thus, as can be seen, such poker tournaments described in your letter would be expressly prohibited by § 16-19-40 as the playing of “any game with cards or dice.”

Conclusion

Based upon the foregoing authorities, it is our opinion that the proposed poker tournament would violate South Carolina's gambling laws. The fact that the proposed tournament would be conducted by a non-profit entity would not change this conclusion. In order for such tournaments to be made legal, legislative amendments would be necessary to exempt such tournaments from the gambling laws prohibitions.

Very Truly Yours,

Robert D. Cook
Assistant Deputy Attorney General

Footnotes

- 1 [S.C. Code Ann. Section 16-19-40](#) prohibits any person playing at “any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field, or open place at (a) any game with cards or dice....” (emphasis added).

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