

March 4, 2003

RECEIVED

MAR 06 2003

OPINION COMMITTEE

FACSIMILE
(512) 472-6538

RQ-0021-GA

Ms. Susan Denmon Gusky
Chair, Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43008-03
I.D. # 043008

Re: Request for Opinion regarding the use of "8-liners" and video via the Internet to conduct contests and gift giveaways under the Texas Sweepstakes Act.

Dear Ms. Gusky:

This is to request your opinion pursuant to Sections 47.01 (4), 47.01 (4) (A) and 47.01 (4) (B) of the Texas Penal Code concerning so-called "8-liners" and section 402.043 of the Texas Government Code regarding the use of video via the Internet to conduct sweepstakes under the Texas Sweepstakes Acts, TEX. BUSINESS & COMMERCE CODE ANN. §§43.001 *et seq.* (Vernon 2002) (as added by Acts 2001, 77th Leg. Ch. 1119, §1; there are three unrelated provisions passed by the 77th Texas Legislature as chapter 43).

I am attaching copies of letters issued by the District Attorney's office in Lubbock. These letters were sent to such businesses as Bob Jordan Amusements, Chuck E. Cheese's, Mr. Gattis Pizza and Veterans of Foreign Wars. These illustrate the confusion among legitimate businesses and charities about what types of games they may operate legally.

In specific, I seek your guidance on the following questions:

1. Does Sec. ^{47.01} ~~41.07~~ (4) (B) prohibit the award of non-cash prizes that have a wholesale value greater than \$5 won on multiple plays of the machine? In other words, if a patron on a single play wins a prize with a wholesale value of \$5 or less that did not exceed 10 times the value of credits played and wins a second prize of similar value with these same limitations, may the patron exchange those two small prizes for a larger prize that does not exceed a wholesale value of \$10?
2. Does Sec. ^{47.01} ~~41.07~~ (4) (B) legitimize the use of machines exclusively to businesses which cater primarily to children?
3. Does Sec. ^{47.01} ~~41.07~~ (4) (B) allow the operation of games exempted by this section only if they are operated as an adjunct to another business, such as a restaurant?
4. Does Sec. ^{47.01} ~~41.07~~ (4) (B) prohibit the transfer of credits from one machine to another?

Ms. Susan Gusky

March 4, 2003

Page 2 of 5

5. Whether the Texas Sweepstakes Act or other Texas law applies to or prohibits not for profit entities using sweepstakes as part of their fundraising efforts;

6. Whether the Texas Sweepstakes Act or other Texas law prohibits the use of video via the Internet to conduct sweepstakes;

7. If the Texas Sweepstakes Act or other law prohibits the use of video via the Internet to conduct sweepstakes, even when no consideration is involved, whether it would be deemed to be an unconstitutional vague application of the law or a prior restraint on the right to exercise speech to solicit donations; and

8. Assuming that the use of video via the Internet to conduct sweepstakes complies with all of the provisions of the Texas Sweepstakes Act is conducted with an alternative means of entry that is consistent with Texas Alcoholic Beverage Commission Rule 45.106(g) and (h), whether it falls outside of Chapter 47 of the Texas Penal Code.

1.

QUESTIONS 1-4

We are unable to find any statutory or case law that specifically addresses the issues related to Sec. 41.07 (4) (B) of the Penal Code.

2.

SCOPE OF BUSINESS AND COMMERCE CODE CHAPTER 43

Chapter 43 does not appear to be limited expressly or implicitly to sweepstakes conducted by "for profit" entities. Although section 43.003(b) provides that Chapter 43 "does not apply to a charitable raffle regulated by Chapter 2002, Occupations Code," that exclusion simply recognizes that gambling in the form of charitable raffles is authorized under the Texas Constitution and regulated under Chapter 2002 of the Occupations Code. Nothing in Chapter 43 prohibits in any way sweepstakes conducted by a charity when the sweepstakes does not involve consideration. If it does, I assume it would have to meet the requirements of Chapter 2002.

Chapter 43 does not expressly limit sweepstakes to situations in which no consideration is paid for the chance to win. That limit, however, is implicit in the definition in section 43.001(7) of a "sweepstakes" as "a contest that awards one or more prizes based on chance or the random selection of entries." This language implicitly excludes any situation involving an exchange of consideration. As a result, I assume that your office would interpret Chapter 43 in a manner consistent with the cases your office discusses in Tex. Att'y Gen. Op. JC-174 (2000). *See also* Tex. Att'y Gen. Op. LO-97-008 (1997).

The problem here is that Chapter 43 does not affirmatively "authorize" the conduct of sweepstakes. Rather, Chapter 43 recognizes that sweepstakes are not *per se* gambling, presumably because of the consideration issue, and therefore are not *per se* illegal unless and

until they are conducted in a manner that violates Chapter 43 or violates other law regulating the particular type of sweepstakes.¹

Charities advertise for donations just as businesses advertise goods and services. It would appear that charities, when seeking donations, are engaged in protected speech that would entitle them to greater rather than lesser freedom than for profit businesses in engaging in promotions. *See generally Village of Schaumburg*, 444 U.S.620 (1980). I seek confirmation, however, that Chapter 43 and other Texas law related to sweepstakes applies equally to for profit and not for profit entities.

3.

MEANS OF CONDUCTING CONTESTS AND GIFT GIVE-AWAYS

I also wish to know whether the Texas Sweepstakes Act prohibits the use of video via the Internet to conduct sweepstakes. The Texas Sweepstakes Act does not contain any type of prohibition on the use of video via the Internet to conduct sweepstakes. The Act contains a number of prohibitions on the manner in which sweepstakes are conducted, particularly in sweepstakes conducted by mail. See §43.002 (1) – (16). No section of Chapter 43, however, prohibits the use of video via the Internet in the conduct of sweepstakes. Had the legislature intended to exclude the use of video via the Internet it could have and would have done so. In fact, the history of the passage of Chapter 40 through the 77th Texas Legislature shows that the legislature defined video sweepstakes, considered and *rejected* a prohibition on the use of video or electronic means to conduct sweepstakes under Chapter 43. The engrossed version of the Bill, dated April 25, 2001, contained the following prohibition of "video sweepstakes", "video sweepstakes means a coin-operated machine with a video interface operated for pleasure that dispenses as a reward for play, money or items redeemable for money or merchandise ... A person may not operate a video sweepstakes in this State." The legislature removed the "video sweepstakes" prohibition, from the Bill as enacted on May 28, 2001 and as signed by the Governor on June 15, 2001. Under applicable precedent this clearly indicates the legislative intent that there is no prohibition of video sweepstakes.

As a result, it would appear that just as sweepstakes are not *per se* gambling, then neither would any means of conducting a sweepstakes be *per se* gambling. I seek your opinion, however, because the county is aware of the Texas case law that focuses on the device, not on how it is used, i.e. with skill versus chance. *See State v. Mendel*, 871 S.W.2d 906 (Tex. App. – Houston [14th Dist.] 1994, no pet.); *State v. Gambling Device*, 859 S.W.2d 519 (Tex. App. – Houston [1st Dist.] 1993, no pet.). I am concerned here, however, because when the element of consideration is removed from the device or from how the device is used, the definition of a gambling device in section 47.01(3) of a gambling device would not apply.

¹ Section 43.003 expressly excludes sweepstakes that are regulated by other entities.

4.

FREE SPEECH IMPLICATIONS

If you conclude that the Texas Sweepstakes Act or other law, such as a provision based on section 47.01(3), prohibits the use of video via the Internet to conduct sweepstakes, even when no consideration is involved, I ask whether it would be deemed to be an unconstitutional vague application of the law or a prior restraint on the right to exercise speech to solicit donations.

This is particularly of concern with regard to charitable sweepstakes because free speech rights are involved. Typically, Texas cases addressing constitutional vagueness challenges focus only on the conduct of the party challenging the definition: "in passing on a vagueness challenge *where no first amendment rights are involved*, the reviewing court should not consider hypothetical situations, but should scrutinize the statute only to determine whether it is impermissibly vague as applied to the challenging party's specific conduct." *State v. Mendel*, 871 S.W.2d 908-909 (emphasis added). Before enforcing the provisions of the Penal Code based in the definitions in section 47.01(3), and particularly before seizing any devices used by a charity to conduct a sweepstakes, it seems to me that law enforcement authorities need your guidance on the appropriate standard that will govern.

The solicitation of charitable contributions is protected speech and attempts of governmental entities to require a license or restrict the fees or activities of charitable organizations soliciting donations have been declared unconstitutional. *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947.

5.

REMOVING CONSIDERATION

Assuming that you conclude that the use of video via the Internet to conduct sweepstakes complies with all of the provisions of the Texas Sweepstakes Act, and other Texas law and does not involve consideration, I ask whether consideration is removed when the sweepstakes is conducted with an alternative means of entry that is consistent with Texas Alcoholic Beverage Commission Rule 45.106(g) and (h).

In Tex. Att'y Gen. Op. JC-174 (2000), your office discussed the current controlling cases in Texas on the subject of consideration, *Bryce v. State*, 242 S.W. 2d 433 (Tex., Crim. App., 1951) and *State v. Socony Mobil Oil Company*, 386 S.W. 2d 169 (1964). See also *Cole v. State*, 112 S.W. 2d 715 (1936); *City of Wink v. Griffith Amusement Corp.*, 100 S. W. 2d 695 (1936). These opinions are consistent with the national trend, which is that sweepstakes do not violate state or federal gambling laws when consumers are able to participate in the chance distribution of prizes without paying a consideration to do so. See e.g., *Glick v. MTV Networks*, 796 Fed.

Ms. Susan Gusky

March 4, 2003

Page 5 of 5

Supp. 743 (S. D. N.Y. 1992). Previous Texas Attorneys General also followed this approach. See Tex. Att'y Gen. Op. M-67 (1967); Tex. Att'y Gen. Op. M-181 (1969); Cf. Tex. Att'y Gen. Op. V-1420 (1952) (random drawing where size of prize based on purchases).

The Texas Alcoholic Beverage Commission (TABC) has addressed the issue of removing consideration in published rules. In 16 TAC §45.106, the TABC has provided, in pertinent part:

(g) No game piece, or other form of instant win device may be packaged with, within, or printed on any packages of alcoholic beverages. All sweepstakes entries are prohibited from requiring a purchase of an alcoholic beverage or the validation of any kind which requires a purchase of any alcoholic beverage.

(h) No sweepstakes entry may be packaged with, within, or printed on any packages or alcoholic beverages unless there is provided at the point of sale identical entries available to the consumer. All sweepstakes entries are prohibited from requiring a purchase of an alcoholic beverage or the validation of any kind which requires a purchase of any alcoholic beverages.

It appears to me that if a sweepstakes conducted by means of a video via the Internet or other electronic machine complied with the machine corollary to these packaging rules of the TABC, the element of consideration would be removed.

We also note that The Parks and Wildlife Foundation of Texas, a non profit corporation just concluded a sweepstakes promotion in partnership with a raffle held by the Texas Parks and Wildlife Department. Raffle tickets could be purchased on the Internet and the purchaser was automatically entered into the sweepstakes conducted by the Foundation. The only method of free entry was by mail.

CONCLUSION

I respectfully request your opinion on these issues facing law enforcement officers, not for profit and for profit corporations, state, county, and city officials, and facing my office. Please let me know if you need additional information or briefing.

If possible, will you please expedite your opinion. Legislative deadlines for filing any remedial legislation are approaching rapidly.

Yours very truly,

A handwritten signature in black ink, appearing to be "Susan Gusky", written in a cursive style.