

700 E. KLEBERG  
P. O. BOX 1411  
KINGSVILLE, TX. 78364



361-595-8583-CRIMINAL/CIVIL  
361-595-8584-HOT CHECKS  
361-595-4726-FAX

COUNTY of KLEBERG  
KINGSVILLE, TEXAS.  
DELMA RIOS- SALAZAR  
COUNTY ATTORNEY  
October 15, 2004

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OPINION COMMITTEE

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FILE # ML-43981-04  
I.D. # 043981

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

RQ-0279-GA

Re: Request for Opinion regarding the use of the Internet to conduct contests and gift giveaways under the Texas Sweepstakes Act and transfer of cash prizes to the winner.

Dear Ms. Fuller:

The following questions are respectfully submitted for the considered opinion of the Office of the Attorney General of Texas pursuant to section 402.043 of the Texas Government Code regarding the use of the Internet to sweepstakes under the Texas Sweepstakes Acts, TEX. BUSINESS & COMMERCE CODE ANN. §§43.001 *et seq.* (Vernon 2002) (as added by Acts 2001, 77<sup>th</sup> Leg. Ch. 1119, §1; there are three unrelated provisions passed by the 77<sup>th</sup> Texas Legislature as chapter 43).

In specific, this county seeks your guidance on the following questions:

1. Whether the Texas Sweepstakes Act or any other law prohibits the use of the Internet to conduct sweepstakes;
2. Assuming that the Internet is used to conduct a sweepstakes that otherwise complies with all of the provisions of the Texas Sweepstakes Act, is the element of consideration negated if the sweepstakes is conducted using one of the following alternative means of entry without purchasing a product or service:

(a) one that requires the customer to come to the retail location to enter consistent with Tex. Att'y Gen. Op. JC-174 (2000);

(b) one that complies with Texas Alcoholic Beverage Commission Rule 45.106(g) and (h); or

(c) requires that the request for an entry in the sweepstakes without a purchase be requested by mail, that the request be accompanied by a stamped self addressed envelope, with only one request per envelope as used by many companies using sweepstakes promotions.

3. May a company conducting a sweepstakes on the Internet transfer any cash prize won by the contestant to the contestants debit card by electronic transfer?

#### 1.

### SCOPE OF BUSINESS AND COMMERCE CODE CHAPTER 43

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, the county assumes 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.<sup>1</sup>

#### 2.

### MEANS OF CONDUCTING CONTESTS AND GIFT GIVE-AWAYS

The county wishes to know whether the Texas Sweepstakes Act prohibits the use of the Internet to conduct sweepstakes. A Google search of the word sweepstakes on the Internet reveals 1,850,000 hits. The Texas Sweepstakes Act does not contain any type of prohibition on the use of 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 the Internet in the conduct of sweepstakes. Had the legislature intended to exclude the use of the Internet it could

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<sup>1</sup> Section 43.003 expressly excludes sweepstakes that are regulated by other entities.

have and would have done so. 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. The county seeks 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 [14<sup>th</sup> Dist.] 1994, no pet.); *State v. Gambling Device*, 859 S.W.2d 519 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1993, no pet.). The county is 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) would not apply.

### 3. REMOVING CONSIDERATION

Assuming that you conclude that the use of the Internet to conduct sweepstakes complies with all of the provisions of the Texas Sweepstakes Act, the county asks whether consideration is removed when the sweepstakes is conducted with an alternative means of entry that is consistent with Tex. Att’y Gen. Op. JC-174 (2000), Texas Alcoholic Beverage Commission Rule 45.106(g) and (h), or requiring that the request for an entry in the sweepstakes without a purchase be requested by mail, that the request be accompanied by a stamped self addressed envelope, with only one request per envelope as used by many companies using sweepstakes promotions.

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. 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 the county that if a sweepstakes conducted by means of the Internet complied with the Internet 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, conducted 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. (See, Reel Texas Adventures) The only method of entry without purchasing a Texas Parks and Wildlife raffle ticket was by mail. I assume this was a legal alternative method of entry without purchasing a raffle ticket.

4.

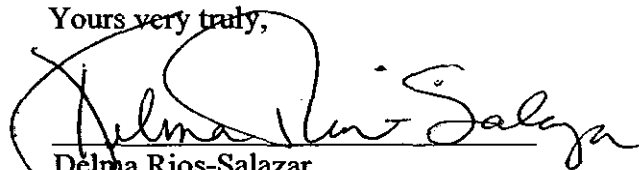
**TRANSFERRING PRIZES TO A DEBIT CARD**

I have found no legal authority which prohibits the transfer of cash prizes awarded in a sweepstakes from being transferred to a debit card rather than awarding the prize in person or by mail.

**CONCLUSION**

The county respectfully requests your expedited opinion on these issues facing the county and facing my office. Please let me know if you need additional information..

Yours very truly,



Delma Rios-Salazar  
Kleberg County Attorney