

LOTTERIES: Taking pictures of patrons and awarding prize to best picture is lottery.

August 22, 1941

Hon. Lynn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

We are in receipt of your request for an official opinion under date of August 11, 1941, as follows:

"It has come to my attention that one of the theaters in Rolla is planning on inaugurating a scheme to attract business by a donation of money or defense stamps, the scheme being about as follows:

"As each individual enters the theater his or her picture will be taken on a moving picture machine and the film showing the picture of each customer on that particular night will be sent in to some concern that will pass judgment as to the best picture; and at some later night, perhaps the next week, the chosen picture will be run on the screen and if that individual is in the audience, he will be called up for a stage appearance and will be paid a certain sum of money or defense stamps for his appearance on the stage. As I understand the plan, there will be no lottery in the sense of any drawing or chance proposition but that the selection of the chosen picture will be intrusted to some moving picture concern, and the chosen individual will simply be given a certain sum of money or defense stamps for his appearance on the stage.
* * * * *

Section 10, Article XIV of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4704, R. S. Mo. 1939, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The word "lottery" has no technical meaning in our law, as said in State ex inf. McKittrick v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705, l. c. 713:

"* * * Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. * * *"

The elements of a lottery are (1) consideration; (2) prize; (3) chance. State ex rel. Home Planners v. Hughes, 299 Mo. 529, 253 S.W. 229; State v. Becker, 248 Mo. 555, 154 S.W. 769. We believe that it is conceded that the first two of these elements are present in the instant case, that is: consideration and prize. See State v. McEwan, 120 S.W. (2d) 1098 (bank night case). The question therefore arises whether, under the present scheme there is chance. From a reading of your request it is seen that a prize is given to the "best picture" of one of the patrons attending the theater. There is no criterion, standard or condition as to what constitutes the "best" picture. The nearest case that we are able to find is that of Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, which involved a contest for a prize for the "best" essay upon the name of a certain breakfast food, in which the court said:

"It 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."

Therefore, unless there are certain definite standards and conditions set up in the rules as to what will constitute

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the "best " picture, we deem this scheme a lottery and a violation of the statutes and Constitution of Missouri.

Furthermore, we call your attention to the statement in State v. McEwan, 121 S.W. (2d) 1098, wherein the Supreme Court said:

"As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful."

Therefore, we would suggest that you scrutinize this scheme closely even though the standard of what is the "best" picture is specific and explicit, in view of the attitude towards lottery as expressed in the McEwan case, supra, and the other cases in this State involving lotteries. See State ex inf. McKittrick v. Globe Democrat Pub. Co., 110 S. W. (2d) 705, supra; State ex rel. v. Hughes, supra; State v. Becker, supra; and State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109.

CONCLUSION.

It is, therefore, the opinion of this department that a scheme whereby each patron of a theater in entering said theater has his picture taken and a prize is given for the "best picture" is a lottery, because there is no standard or criterion of what conditions the judges will take into consideration in determining what constitutes the "best picture."

Respectfully submitted,

APPROVED:

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AO'K:CP