

**LOTTERIES:
GIFT ENTERPRISES:**

A procedure wherein persons purchase tickets of admission to a theater where they are permitted to participate in a contest which consisted of determining, upon a card furnished by the theater, the correctness of certain statements submitted by the theater to the participants, with a cash prize awarded to the winner, would be a lottery or a gift enterprise, and would therefore be illegal.

September 19, 1952

Honorable Don Kennedy
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"I am confronted soon with the question whether a certain quiz program variation, to be sponsored by a local theatre, is a lottery or gift enterprise and in violation of Sec. 563.430, R.S.Mo. 1949.

"The game is played thus:

"The patron, when he purchases his ticket at the theatre, is presented with a card, such as the one attached hereto, and marked Exhibit 'A'.

"At an intermission, the master of ceremonies asks 10 questions, of which the following, with answers, are samples:

"Q. The color of a horse's tail is the same as that of his eyebrows.

A. No. (A horse has no eyebrows.)

"Q. It is known that there are people living on a planet.

A. Yes. (The earth, of course.)

"Q. Coffee contains a large amount of chicle.

A. No. (Coffee contains chicory.)

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"Q. England produces the only blue roses.
A. No. (There are no blue roses.)

"Q. The bulldog is a native of England.
A. No.

"The questions are of a general nature and are authentic.

"The patron has folded his card at the perforated line. If he wishes to answer the question 'Yes,' he tears out the corresponding tab, or 'ball;' if 'No,' he leaves the ball tab in the card.

"There is a very minute chance of anyone's being able to guess all the answers correctly; however, if he were able, from his general information, to answer 9 questions correctly, he would have a 50-50 chance of guessing the tenth. If he were able to answer 8 questions correctly, from his general information, he would have a 25-75 chance of answering the other two correctly. Etc.

"When the questions are finished, he tears his card in half at the perforated line, turning one card in to the judge, retaining the other, which of course will be a duplicate.

"Only those who have answered all questions correctly are winners. They divide equally a cash prize. In addition, the winners have an opportunity to answer the 'jackpot question.' Those who correctly answer this question are entitled to divide another cash prize, the 'jackpot.' Both prizes, in case there are no winners, are accumulated and offered on the next succeeding program.

"There is no live master of ceremonies; the program is on a tape recorder and is played over a public address system.

"May I have your opinion whether this game is in violation of the above cited statute as interpreted by the Missouri Courts? I call your attention particularly to State ex rel. McKittrick vs. Globe Democrat Publishing Co., 341 Mo. 862, 110 S.W. 2d 705, 113 ALR 1104."

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The question which we have to determine under the state of facts submitted by you is whether the procedure which you have outlined would be in violation of Section 563.430, RSMo. 1949, which section reads 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."

It will be observed that the above section prohibits a "lottery," a "gift enterprise," and a "policy or scheme of drawing in the nature of a lottery." In other words, the specific acts prohibited are "lotteries" and "gift enterprises." We would here point out that while lotteries and gift enterprises are closely related operations that the law does distinguish between them.

In the case of State ex Inf. McKittrick, Atty. Gen., v. Globe-Democrat Publishing Co., 110 S.W. (2d) 705, l.c. 713, the Supreme Court of Missouri stated that: "The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance." We do not find any Missouri cases which define "gift enterprises" but we do find such a definition in the 1942 case of State v. Fox-Great Falls Theatre Corporation, decided by the Supreme Court of Montana, 132 P. (2d) 689, l.c. 694, in which the Court stated:

"By reason of the great diversity of constitutional and statutory provisions relating to the subjects, and because of the great variety of fact situations

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presented to the courts, it is impossible to lay down an absolute rule as to what constitutes the distinction between lotteries and gift enterprises, and what consideration is necessary to constitute the scheme a lottery. However, it seems clear that in general a plan is considered within a statute against gift enterprises if it involves an award by chance without the consideration necessary to constitute the scheme a lottery. *Grimes v. State*, 235 Ala. 192, 178 So. 73; *Russell v. Equitable Loan & Sec. Co.*, 129 Ga. 154, 58 S.E. 881, 12 Ann. Cas. 129. * * *

Under the authority of the *Globe-Democrat* case, supra, if the procedure which you outline is a lottery, then it must contain the elements of prize, consideration, and chance, but if it be a gift enterprise, then under the authority of the *Fox-Great Falls Theatre Corporation* case, supra, it need only contain the elements of award or prize, and chance. We shall not here attempt to determine whether the procedure which you outline is a lottery or gift enterprise since we believe we will be able to demonstrate that it contains the three elements necessary to constitute a lottery, to-wit, prize, consideration, and chance, and since, if it does contain these three elements, it also will contain the two elements necessary to constitute a gift enterprise, to-wit, chance and prize.

It is readily apparent that in the procedure which you outline the element of "prize" is present, since you state that the winners "divide equally a cash prize," and that those who answer the "jackpot question" shall "divide another cash prize."

Let us now turn our attention to the matter of "consideration." In this regard we direct your attention to the 1938 decision of the Missouri Supreme Court in the case of *State v. McEwan*, 120 S.W. (2d) 1098, in which the Court stated, at l.c. 1100:

"* * * Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater.
* * *"

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At l.c. 1102, the Court stated:

"In 38 C.J. 292, Sec. 7, it is said:
'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'

In view of the above, we believe that the element of "consideration" is present in the procedure which you outline to us.

The final question which we have to determine is whether the procedure which you outline contains the element of "chance." This procedure consists of submitting to participants a certain number of statements, i.e., "The bulldog is a native of England," which either are or are not correct. The participant is given a means by which he can indicate the correctness or incorrectness of these statements. The successful determination of the correctness of these statements calls for factual knowledge, and it would seem that the participant possessing the greatest fund of general, factual knowledge would have the best prospect of winning. For a thorough, protracted discussion of this situation, we again direct attention to the Globe-Democrat case, supra. At l.c. 713, et seq., the Court stated:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element--chance-- was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C.J. § 5, p. 291; 17 R.C.L. §10, p. 1223; Waite v. Press Publishing Ass'n, 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill,

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judgment, or research enter therein in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

And further, at 717, the Court stated:

"Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards. As was said in *Coles v. Odhams Press, Ltd.*, supra, 'The competitor is the person to be considered.' In the instant case the public was informed that any one might win; that no special skill, training, or education was required; and that an opportunity was offered to gain some 'easy money.' It is true reference to the possibility of children's winning was omitted from the later advertising, but aside from that hope was held out to the general public. That being true, whether chance or skill was the determining factor in the contest must depend upon the capacity of the general public--not experts--to solve the problems presented."

We concede that the procedure which you outline is not wholly analogous with the procedure discussed by the Court in the *Globe-Democrat* case, supra, but we do believe that there is a sufficient similarity to render that case binding in your situation, and that in your situation, the element of chance is at least the dominant factor. It is obvious that if the procedures which you outline were put into operation that the overwhelming majority of the participants would not be savants and persons with vast learning. Such being the case, it would certainly be a matter of pure chance whether or not participants would know whether the statements were correct or incorrect.

Other courts have held that schemes similar to that set forth in your request are decided by chance. *Hernandez v. Graves*, 148 Fla. 247, 4 So. (2d) 113; *People v. One Slot Machine owned by Telequiz Corp.*, (Ill.) 100 N.E. 788.

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Since we believe that the elements of chance, prize, and consideration are all present in the procedure which you outline, we believe that such procedure would be illegal under Section 563.430, supra, whether such procedure was a "lottery" or a "gift enterprise."

CONCLUSION

It is the opinion of this department that a procedure wherein persons purchase tickets of admission to a theater where they are permitted to participate in a contest which consisted of determining, upon a card furnished by the theater, the correctness of certain statements submitted by the theater to the participants, with a cash prize awarded to the winner, would be a lottery or a gift enterprise, and would therefore be illegal.

Respectfully submitted,

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APPROVED:

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