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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 29, 2003

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You request an opinion "as to legality of tournaments based upon contests of skill, in whatever form, in which a prize, purse, or premium, usually in the form of cash, is offered to contestants who win or place highly in the tournament." By way of background, you state the following:

> These tournaments based upon contests of skill include such things as professional golf tournaments, amateur and professional fishing tournaments, simulated video golf and fishing tournaments, simulated video deer hunting tournaments and many others. Therefore, I would appreciate your opinion as to the legality of tournaments contested in the following fashion:
>
> 1. The contest is purely one of skill;
>
> 2. The entity operating the tournament or contest does not participate in the contest directly or through representatives;
>
> 3. The participants pay an entry fee, but the entry fee does not determine or make up the prize, purse or premium;
>
> 4. The total prize, purse or premium is not based upon the number of persons entering the contest nor the amount of the entry fees.
>
> I would appreciate it if you would provide me with your opinion as to the legality of tournaments awarding cash prizes for contests of skill operated in the above manner. I look forward to your response.

Law / Analysis

Reference is first made to prior opinions of this Office. These opinions, which continue to be the opinion of this Office, are discussed below.

In an opinion, dated August 10, 1990, we determined that a proposed golf tournament hosted by Pawley's Plantation Golf and Country Club did not violate any criminal or gambling statutes. There, we noted that while two elements of a lottery – prize and consideration – were present, the third element, chance, was not. See, Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939) [the three elements of a lottery, which is a form of gambling, are prize, consideration and chance]. The 1990 opinion, quoting an earlier opinion of March 24, 1986, which had concluded that a golf tournament did not constitute a lottery, stated the following:

> [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 opinion referenced that at least one court has determined that the game of golf is a game of skill and not gambling. It was 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.
>
> Similarly, it is my understanding that determining the winner of the tournament you referenced is based entirely on the skills of an individual player and the element of chance is not present. Therefore, as with the tournament described in the referenced opinion, while the elements of prize and consideration are present, the third element necessary for a lottery, chance, is absent.

The fact that a game, consisting entirely of skill is involved, does not fully answer the question, however. Section 16-19-130 must also be considered for purposes of responding to your question. Such provision prohibits engaging in betting at any race track, pool selling, or bookmaking. § 16-19-130(1). Subsection (3) also makes it a crime to

> record[] or register[] bets or wagers or sells pools or makes 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;

Violation of § 16-19-130 is a misdemeanor and carries a penalty of a fine not exceeding or imprisonment not exceeding six months, or both fine and imprisonment, in the discretion of the court.

Courts have generally distinguished between participating in a game of skill and betting, wagering, bookmaking or selling pools on a game of skill. Most authorities conclude that mere participation in the game of skill where a contestant is required to pay an entrance fee, such fee does not specifically make up the purse or premium contested for, and the sponsor of such event is not a participant for a prize, does not constitute a violation of statutes similar to § 16-19-130. As the Supreme Court of Florida wrote in Creash v. State, 179 So. 149, 152 (1938),

> ... [the terms] "stake, bet or wager" are synonymous and refer to the money or other thing of value put up by the parties thereto with the understanding that one or the other gets the whole for nothing but on the turn of a card, the result of a race, or some other trick of magic. If offered by one (who in no way competes for it) to the successful contestant in a fete of mental or physical skill, it is not generally condemned as gambling, while if contested for in a game of cards or other game of chance, it is so considered .... It is also banned as gambling if created by paying admissions to the game ... or otherwise contributing to a fund from which the "purse, prize, or premium" contested for is paid, and wherein the winner gains, and the other contestants lose all.

179 So. at 151.

Similarly, the Supreme Court in Arizona addressed this issue in State v. American Holiday Assn., 151 Ariz. 312, 727 P.2d (1986). The Court first noted that the issue of skill or chance is not controlling with respect to betting, wagering or bookmaking. In the Court's view, "... a bookie accepting bets on the winner of the national spelling bee cannot defend against prosecution [under the bookmaking statute] by arguing that spelling bees are games of skill." Id. at 808. The question is "whether American is accepting bets on the winner of each game or merely charging contestants an entrance fee for the privilege of competing."

Citing Faircloth v. Central Florida Fair, Inc., 202 So.2d 608, 609 (Fla. Dist. Ct. App. 1967), which distinguished the prohibition on betting on games of skill from playing games for prizes, the Court in American Holiday Assoc. commented as follows:

> [t]he distinction seems well taken; an entrance fee does not suddenly become a bet if a prize is awarded. If the combination of an entry fee and a prize equals gambling, then golf tournaments, bridge tournaments, local and State rodeos or fair contests, and even literary or essay competitions are all illegal gambling operations .... It would be "patently absurd" to conclude that these types of contests are gambling operations.
>
> Spelling bees, golf tournaments, and American's word games lack many of the attributes of what we commonly refer to as "gambling." First, such contests are not like most bookmaking operations because prizes are not awarded on the basis of

the outcome of some event involving third parties. The prize offered is paid only to participants and the participants themselves determine the outcome. Second, such contests do not involve bets between participants in a contest; it is known from the start that some nonparticipating party – the sponsor – will award the prize. Finally, such contests are dissimilar to any gambling operation because the amount of the prizes to be awarded is known from the start and does not depend on the bookies' "odds" or the number or amount of entry fees actually received.

The essential significance of these distinctions between typical gambling operations and contests charging entry fees as a condition to the award of prizes is illustrated by the decisions of the New York Court of Appeals and the Nevada Supreme Court in People v. Fallon, 152 N.Y. 12, 46 N.E. 296 (1897), and Las Vegas Hacienda, Inc. v. Gibson, 77 Nev. 25, 359 P.2d 85 (1961), respectively. Fallon involved the propriety of a horse race sponsored by the Westchester Racing Association. Owners of the competing horses paid entrance fees to the association. Those fees were deposited in the association's general treasury. The association then awarded prizes for each race. The prizes were for a definite, guaranteed sum, without regard to the amount of the entrance fees received. Under these facts, the court held that the entrance fees were not illegal wagers:

> There is a plain and obvious distinction between a race for a prize or premium contributed [by the association] and a race where the stake is contributed by the participants alone, and the successful contestant is to have the fund thus created. The latter is a race for a mere bet or wager, while the former is for a prize offered by one not a party to the contest.

152 N.Y. at 19, 46 N.E. at 297.

In Gibson, the owner of a golf course publicly offered $5,000 to any person shooting a hole-in-one while playing golf on his course. The offer was premised on compliance with certain conditions, including payment of a fifty-cent entry fee. Plaintiff shot a hole-in-one and sued for the $5,000. The owner refused to pay, arguing that his offer to pay the $5,000 was an illegal gambling contract. The Nevada Supreme Court enforced the agreement, holding that the payment of an entrance fee "does not specifically make up the purse or premium contested for does not convert the contest into a wager." 77 Nev. At 29, 359 P.2d at 87 (emphasis added).

727 P.2d at 809-810.

Other authorities are in accord. See, Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978) [entrants' fees not divided among contestants as in office pool and participants did not primarily risk fees in making a return on their money is not gambling]; Pompano Horse Club v. State, 111 So. 801, 813 (Fla. 1927); 1990 Fla. Op. Atty. Gen., 179 (July 27, 1990); 1977-78 Va. Op. Atty. Gen., 165 (November 14, 1977) [backgammon tournament where participants required to pay an entry fee and prizes awarded out of the pool of entry fees is illegal betting]; Ark. Op. Atty. Gen., Op. No. 91-167 (July 2, 1991) ["there is general authority for the proposition that the offer of a purse, prize or premium to the successful player in a game or competitor in a contest does not constitute gambling, provided the offer is not a cover for betting and the reward is payable by the person or association making the offer," citing 38 C.J.S. Gaming 81, 152. "But where the stake is contributed by the participants alone, and the winning contestant is to have the fund thus created, this does constitute a bet or wager."]

Conclusion

The assumption of your question is that a 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, pursue or premium is not based upon the number of persons entering the contest nor the amount of the entry fees. Based upon these assumptions, and the authorities referenced above, it is our opinion that a game which meets all of these criteria would likely be held by a court not to violate South Carolina's gambling laws, particularly § 16-19-130 (betting statute).

However, we emphasize that an opinion of the Attorney General cannot determine facts. Op. S.C. Atty. Gen., December 12, 1983. Thus, we cannot and do not comment herein as to the legality of any particular game. As we stated in Op. S.C. Atty. Gen., May 5, 2003, "[t]his Office cannot resolve the question of the legality" of a specific game or video machine. For example, a previous opinion of this Office concluded that pari-mutual betting may be a lottery under the South Carolina Constitution. Op. S.C. Atty. Gen., Op. No. 86-119 (December 1, 1986). Accordingly, each situation would necessarily turn on its own unique facts.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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