

# The State of South Carolina



## Office of the Attorney General

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OPINION NO. \_\_\_\_\_

July 11, 1989

**SYLLABUS:** The enclosed letter contains the general law regarding the questions you have raised. However, as with any prosecutorial decision made by the Circuit Solicitor, the judgment call as to whether to prosecute a particular individual remains a matter within your exclusive discretion and jurisdiction.

**TO:** The Honorable Holman C. Gossett, Jr.  
Solicitor, Seventh Judicial Circuit

**FROM:** Charles W. Gambrell, Jr.  
Deputy Attorney General

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The Honorable Holman C. Gossett, Jr.  
Solicitor, Seventh Judicial Circuit  
Spartanburg County Courthouse, Suite 233  
Spartanburg, South Carolina 29301

Dear Solicitor Gossett:

You have asked to be advised as to the law regarding a particular situation so that you may make a decision as Solicitor regarding prosecution. You reference two magazines, Lottery Players Magazine and Lottery Buster, which you indicated are offered at newsstands for sale. You note that, included in these magazines, are advertisements for opportunities to play a lottery. By one ad, featuring the Canadian lottery, an individual may pick six numbers on a form. By that form, he indicates how many weeks he wishes to play. To play five weeks and ten draws, a twenty-five (\$25.00) dollar payment is required. The ad states that, upon receipt of the form in the mail, tickets will be returned to the purchaser. The ad also provides a toll-free telephone number offering the opportunity to play by phone with the use of a credit card. Another ad offers the opportunity to participate in the Australian lottery. The ad states that the lottery ticket, with the numbers the player chooses, is free, but there is a one (\$1.00) dollar fee for the cost of postage and handling.

Because your questions involve potential prosecutorial decisions, I will attempt to outline, generally, the existing law in this area. First, reference should be made to Section 16-19-10, which provides in pertinent part as follows:

(w)hoever shall publicly or privately erect, set up or expose to be played or drawn at or shall cause or procure to be erected, set up or exposed to be played, drawn or thrown at any lottery ... or by any undertaking whatsoever, in the nature of a lottery ... or who shall make, write, print or publish or cause to be made, written or published any scheme or proposal for any of the purposes aforesaid and shall be convicted of any of the offenses aforesaid, on any

The Honorable Holman C. Gossett, Jr.

Page 2

July 11, 1989

indictment for the same, at the court of general sessions, shall forfeit the sum of one thousand dollars, one third thereof to and for the use of this State, one third part thereof to the informer and the other third part thereof to the county in which the offense shall be committed and shall also, for every such offense, be committed by the court to the common jail for the space of twelve months.... (emphasis added).

Moreover, Section 16-19-30 provides:

(i)t shall be unlawful to offer for sale any lottery tickets or to open and keep any office for the sale of lottery tickets ....

Upon conviction, a fine of ten thousand dollars is provided. Additionally, pursuant to Section 16-19-20 of the Code, it is an offense to "... be adventurer in or ... (to) ... in any way contribute unto or upon account of any sales or lotteries...." You should also be aware of the specific provisions of Article XVII, Section 7 of the State Constitution, which provides that "(n)o lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State ...."

Federal statutory law is also relevant to your issue. Federal law prohibits certain conduct in connection with lotteries. 18 U.S.C. § 1301 prohibits the interstate transportation of lottery tickets. 18 U.S.C. § 1302 prohibits mailing material dealing with lotteries, lottery tickets, or payment for the purchase of a lottery ticket. <sup>1/</sup> 18 U.S.C. § 1303 prohibits an employee of the Postal Service from delivering material dealing with lotteries while 18 U.S.C. § 1304 prohibits broadcasting by radio any advertisement or information dealing with a lottery. However, pursuant to 18 U.S.C. § 1307(a) and (b), state-conducted lotteries are exempt from prohibitions. Such provisions state in part:

(a) The provisions of sections 1301, 1302, 1303, and 1304 ... shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law--

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<sup>1/</sup> In a prior opinion dated March 27, 1985 this Office concluded that federal law prohibits residents of this State from playing lotteries by mail unless permitted as set forth by 18 U.S.C. § 1307.

The Honorable Holman C. Gossett, Jr.

Page 3

July 11, 1989

(1) contained in a newspaper published in that State or in an adjacent State which conducts such a lottery, or

(2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

(b) The provisions of sections 1301, 1302, and 1303 ... shall not apply to the transportation or mailing--

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

Therefore, newspapers are authorized to carry advertisements and information dealing with a state-conducted lottery if such newspaper is published in that state or in an adjacent state which also has a state-conducted lottery. Of course, any questions dealing with the applicability of such federal provisions to the situations you addressed should be directed to the United States Attorney.

There are also several cases relating to the advertisement of out-of-state lotteries in a State where a lottery is prohibited, which are relevant to your inquiry. In State ex inf. Danforth v. Reader's Digest, 527 S.W.2d 355 (Mo. 1975), for example, the Missouri Supreme Court held that the determination of postal authorities that a publisher's activities in sending out certain promotional materials did not violate federal lottery laws with the result that the post office would accept and deliver the material would not prevent the enforcement by a state of its own lottery laws. As stated by the Court,

... the enactment of the federal lottery laws ... (did not evidence) ... an intent and purpose to pre-empt state action to enforce lottery laws ... We do not believe that the federal interest in lotteries is so dominant that the federal system will be assumed to preclude enforcement of state laws ....

The Honorable Holman C. Gossett, Jr.

Page 4

July 11, 1989

In State v. Reader's Digest Association, Inc., 501 P.2d 290 (1972), the Washington Supreme Court determined that the fact that a state is not authorized to enjoin the mails does not preclude the state from enjoining a defendant from conducting a sweepstakes determined to be a lottery within the state. The Court determined that a sweepstakes was "designed as an advertising attention getting device" and was "far superior to other forms of advertising. It has not only increased subscriptions to respondent's products, but has caused a corresponding increase in advertising revenues." 501 P.2d 290. Quoting from an earlier decision, the Court reiterated:

The antigambling laws are designed not only to prevent loss but to preclude some kinds of gain to the promoter of a lottery from reaping an unearned harvest at the expense of the players ....

501 P.2d at 298. See also, Minnesota Newspapers Assn. v. Postmaster General, 677 F.Supp. 1400 at 1404 (D. Minn. 1987) ["The regulation of lotteries traditionally has been left to the states."]

Other cases are also pertinent to your inquiry. In State v. Bailey, 183 Ind. 215, 108 N.E. 753, the Court construed a statute very similar to that portion of § 16-19-10 which prohibits one "who shall make, write, print or publish or cause to be made written or published any scheme or proposal for any of the purposes aforesaid ...". There, the Court noted that "the gravamen of the offense ... is the advertising of and giving publicity to a contemplated lottery, gift, enterprise or scheme of chance ...". Similarly, as noted, Article XVII, Section 7 of our Constitution mandates that no lottery shall ever be allowed to be advertised by newspapers or otherwise." Our own Supreme Court, in commenting upon certain portions of § 16-19-10, has noted that the statute is "directed at a special type of vice in the fields of advertising and gift enterprises--the type that has come to be denominated both in the law and common parlance by the word lottery." Darlington Theatres v. Coker, 190 S.C. 282, 290, 2 S.E.2d 782 (1937).

For your further assistance, mention should be made of the use of the term "expose to be played" in Section 16-19-10. The term "expose" generally means to "show publicly; to display; to offer to the public view, as to 'expose' goods for sale." Black's Law Dictionary (5th ed.). The term also means "to point out or to show to ... bystanders ..." or to "lay open" or "place in a situation to be affected or acted on ...." 35 C.J.S., "Expose".

The Honorable Holman C. Gossett, Jr.  
Page 5  
July 11, 1989

In making your prosecutorial decision, you should also be aware of cases which comment upon First Amendment considerations in this area. The United States Supreme Court has previously held that commercial speech is entitled to limited First Amendment protection. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981). As stated by the Court in Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico et al., 478 U.S. 328 at 349-350.

... commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest.

See also, Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).

As to advertisements concerning gambling, the Supreme Court in Posadas upheld the validity of a Puerto Rican statute which restricted advertising related to gambling directed toward residents but authorized such advertising for nonresidents. The Court acknowledged that it was dealing with a First Amendment issue, although limited, in that the advertisement constituted commercial speech, but upheld the restriction in advertising. The Court concluded:

... (i)n our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling ....

478 U.S. at 345. 2/ Compare, Bigelow v. Virginia, 421 U.S. 809 (1975); Carey v. Population Services International, 431 U.S. 678 (1977). See also, Ohralik v. Ohio State Bar Assn. 453 U.S. at 456 ("... the State does not lose its power to regulate

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2/ As referenced in an earlier opinion to you concerning lotteries, the South Carolina Supreme Court in Army Navy Bingo, Garrison # 2196 v. Plowden, 281 S.C. 226, 314 S.E.2d 339 (1984) recognized that there is no fundamental right to gamble protected by the federal Constitution and that the authority of this State to counter gambling is "practically unrestrained."

The Honorable Holman C. Gossett, Jr.  
Page 6  
July 11, 1989

commercial activity deemed harmful to the public whenever speech is component of that activity"; San Jose Country Club Apartments v. County of Santa Clara, 187 Cal. Reprtr. 493 (1982) (there is "... no First Amendment interest when 'the commercial activity itself is illegal.'")

The foregoing legal authorities represent the general law in this area. I must emphasize, however, that this Office can only set forth the general law to you in the abstract. As with any prosecutorial decision made by the Circuit Solicitor, the judgement call as to whether to prosecute a particular individual or whether a specific prosecution is warranted, or is on sound legal ground in an individual case, remains a matter within your exclusive discretion and jurisdiction. Such a decision, of course, requires the weighing of a multitude of factors in addition to the general law in the area. With respect to the many considerations which go into the decision to prosecute or not prosecute, the Court well summarized these considerations in Pugach v. Klein, 193 F.Supp. 630, 634-35 (S. D. N. Y. 1961):

There are a number of elements in the equation, and all of them must be carefully considered. Paramount among them is a determination that a prosecution will promote the ends of justice, instill respect for the law, and advance the cause of ordered liberty ... . Other considerations are the likelihood of a conviction, turning on choice of a strong case to test uncertain law, the degree of criminality, the weight of the evidence, the credibility of witnesses, precedent, policy, the climate of public opinion, timing and the relative gravity of the offense ...

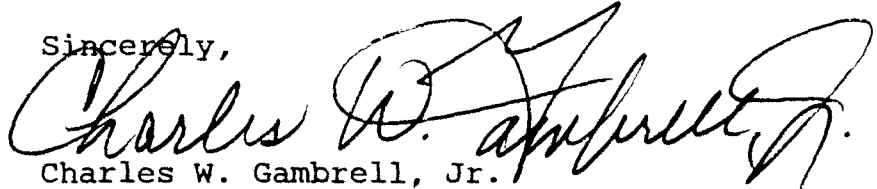
Still other factors are the relative importance of the offense compared with the competing demands of other cases on the time and resources of investigation, prosecution and trial. All of these and numerous other intangible and imponderable factors must be carefully weighed and considered by the ... [local prosecutor] in deciding whether or not to prosecute.

All of these considerations point up the wisdom of vesting broad discretion in the ... [local prosecutor].

The Honorable Holman C. Gossett, Jr.  
Page 7  
July 11, 1989

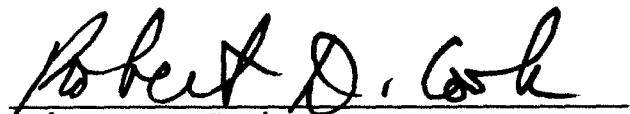
In summary, the questions you have raised are novel. We know of no previous specific instances which are precisely identical to the situation you have presented. However, we have attempted to set forth the relevant statutes, case authorities and state and federal constitutional provisions for your consideration in deciding whether or not prosecutions are warranted in this instance.

Sincerely,

  
Charles W. Gambrell, Jr.  
Deputy Attorney General

CWGJr/an

REVIEWED AND APPROVED BY:

  
Robert D. Cook  
Executive Assistant for Opinions