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AUSTIN

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Honorable Andrew Patton
District Attorney
Dallas County
Dallas, Texas

Dear Sir: Attention: Hon. Earl Street, Assistant

Opinion No. 0-1789

Re: Whether a theatre program featuring the "Doctor I. Q." radio broadcast over a network is a violation of the lottery statutes of this State

This will acknowledge receipt of your request for our opinion as to whether the "Doctor I. Q." radio program which is broadcast over a network each week is in violation of the lottery statutes of Texas.

Permit us to express our appreciation for your complete fact statement and your brief which comply with the provisions of Article 4399, Revised Civil Statutes. We quote from portions of the brief submitted:

"The Dr. I. Q. program is presented over the radio each week for a half hour period by a commercial sponsor. The program emanates from a motion picture theatre.

"During an intermission between pictures, an announcer appears on the stage of the theatre. Speaking into a microphone he advises the radio and picture show audience that he has several assistants, each with a portable microphone, among the members of the audience. The

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announcer requests one of his assistants to choose a member of the audience who is willing to answer a question about to be propounded. The announcer then propounds the question, advising the person chosen that if he can answer the question he will be paid a stated sum of money. In the event the correct answer is given, the money is there paid to the member of the audience who thus assisted in the work, and the assistant announcers pass on through the audience choosing other people with whom the process is repeated. In the event that the person chosen cannot answer the question, or gives the wrong answer, the assistant announcer, nevertheless, compensates him for his efforts by presenting him with a box of merchandise on behalf of the sponsor of the program.

"As an illustration of the questions actually propounded, some that have been used are:

"Who won the 1939 National League pennant?"

"Is it possible to make fresh water out of salt water?"

"In 1914, in what nation was the city of Warsaw?"

"For the correct answer to the first question, \$9.00 was paid; for the second question \$5.00; and for the third question \$8.00. In the event that any one of the questions was not answered correctly, the sponsors gave the person who had volunteered to try to answer the question a box of merchandise. There is no contest between the various members of the audience, since if the first person chosen does not properly answer the question, the announcer on the stage advises all of the audience what the correct answer is, and an entirely different question is presented to the next per-

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son who volunteers. The members of the audience who volunteer to try to answer the questions propounded, remain at their places in the theatre and speak through a portable microphone.

"No member of the audience is compelled or urged to participate, but any member of the audience who wishes to do so may have an opportunity to try to answer a question.

"In addition to that portion of the program hereinabove outlined, awards are made by those who present the show to persons who send in questions that are chosen for propounding; and other awards are made to those members of the audience who can correctly answer a list of questions which the announcer states. Each member of the audience has a tally card upon which he may check as right or wrong each statement included in this list. Usually, there are nine or ten such statements, such as: 'A latchet is a shoestring.' Every member of the audience has an equal opportunity to answer the questions, and each of those who correctly answer all of the questions is paid an equal amount for his contribution of his talent to the evening's entertainment. There is no drawing, no 'lucky number', nor prize, to be decided by lot, luck or chance. Instead, each person who participates is paid for his participation in direct proportion to the value of his services."

Section 47 of Article III of the Constitution of Texas reads:

"The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this state, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principal, established or existing, in other states."

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Fursuant to such command the Legislature passed Article 634 of the Penal Code, which reads as follows:

"If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than One Hundred (\$100) Dollars nor more than One Thousand (\$1,000) Dollars; or if any person shall sell, offer for sale or keep for sale any tickets or part tickets in any lottery, he shall be fined not less than Ten (\$10) Dollars nor more than Fifty (\$50) Dollars."

In *City of Wink vs. Griffith Amusement Company*, 100 S. W. (2d) 695, (Tex. Sup. Ct.), the court said:

"The State Penal Code does not define a lottery, but our courts have interpreted it in accordance with public usage, to mean a scheme or plan which provides for a distribution of prizes by chance among those who have paid, or agreed to pay, a consideration for the right to participate thereon. 28 Tex. Jur. p. 409, Sec. 2, and cases cited in the notes."

The Federal Circuit Court of Appeals in the case of *Peck vs. United States*, 61 F. (2d) 973, has given the following definition of a lottery:

"A scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agree to pay a valuable consideration for the chance to obtain a prize. And again: A scheme by which a result is reached by some action or means taken, in which result man's choice or will has no part, nor can human reason, . . . sagacity or design enable him to know or determine . . . until the same has been accomplished."

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Under your statement of the facts as quoted by us, two of the elements of a lottery are clearly discernible, i. e., a prize in money or thing of value, and payment of a consideration for the chance to participate in the program through attendance at the theatre, paying an admission price therefor. Whether the element of chance is sufficiently established is a more perplexing problem .

In the case of Boatwright v. State, 118 Tex. Cr. R. 381, 38 S. W. (2d) 87, the Court of Criminal Appeals held that a punch board wherein were placed different checker problems, the same to be completed by the participant after paying a fee for the privilege of playing, did not constitute a lottery, even though prizes were awarded those working out the best solution. We quote from the opinion:

"Any scheme for the distribution of prizes by chance, under our statute, is a lottery. Queen v. State, 93 Tex. Cr. R. 173, 246 S. W. 384; Stanger v. State, 107 Tex. Cr. R. 574, 298 S. W. 906. The phrase 'game of chance' is defined in 27 Corpus Juris at page 968, as follows: 'It is a game determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance; a game in which hazard entirely predominates.'

"Without approving in its entirety the foregoing definition when considered in connection with our statute denouncing lotteries, it is observed that the success of the player in the game under consideration depends upon practice, experience, or skill. Other than the ordinary chance or contingency which is involved in practically every human endeavor, the element of chance is not present. The prize is drawn as a reward for the skill of the player, and not by chance. The predominant element in the game is one of skill. . ."

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See also *McFae v. State*, 46 Tex. Cr. R. 489, 81 S. W. 741; *Hoff v. Daily Graphic*, 230 N. Y. S. 360, 103 A. L. R. 870.

From a careful study of the decisions as applied to the facts presented by you, we conclude that the radio program does not violate the lottery laws of this State.

Trusting that we have satisfactorily answered your inquiry, we are,

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Benjamin Woodall*
Benjamin Woodall
Assistant

BW:LF

DEC 22, 1939

Gerrit G. Mann
ATTORNEY GENERAL OF TEXAS

