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OPINION COMMITTEE



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State of Texas
House of Representatives
COMMITTEE ON LICENSING AND ADMINISTRATIVE PROCEDURES

January 11, 2010

RQ-0852-GA

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: Whether a certain charitable gaming concept constitutes gambling under Texas law.

Dear General Abbott:

Pursuant to Government Code Section 402.043, I respectfully request your opinion on the question presented below.

Whether a certain activity, described herein, is considered "gambling" within the scope of Texas law, including the Texas Constitution Article III, Section 47, Texas Penal Code § 47.01-47.10, and Texas Occupations Code §2001-2002, or whether the activities described herein are outside the scope of those restrictions on gambling. The activities in question are a modification of typical games played in office pools, such as squares games and bracket challenges, to be entirely for a charitable purpose. For simplicity of discussion, this example will speak to a squares game in particular. The host will set up an independent 501(c)(3) to collect donations to charity. The host entity will either take no revenue from the total donation pool or only revenue sufficient to cover reasonable operational expenses associated with hosting the event in compliance with Internal Revenue Service rules for non-profit and charitable entities. The donations will be taken and distributed by means of a squares game. A squares game is generally understood to be a large grid where each square represents the predicted final score of a major sporting event, such as the Super Bowl. In purchasing a square, the purchaser will designate a charity, which must be a valid non-profit, charitable organization pursuant to the designations of the Internal Revenue Service. At the end of the event, whichever charity has the winning square will win the total money collected for the purchase of squares. Should no one purchase the winning square, the funds will still go to charity in a method



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to be determined, but likely an equal division of funds between all potentially winning charities. Those people purchasing squares stand to have no gain from the contest, other than designating the charity to win the award. The purchasing system will not allow charities to purchase squares, nor would it allow the principals of charities to purchase squares. Therefore, the pool of donors and the pool of potential winners will be entirely bifurcated.

As noted previously, the relevant statutes are the Texas Penal Code § 47.01-47.10 and Texas Occupations Code §2001-2002. The Occupation Code sections do not apply, as this activity is neither a raffle nor bingo per the definitions in those sections, and the general interpretation of those statutes has been very narrow. This leaves the Penal Code as the most likely source of statutory analysis for this activity. § 47.02 defines gambling as someone who "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;" with similar application to political elections or appointments or activities, or activities including playing and betting for "money or other things of value any game played with cards, dice, balls, or any other gambling device." A bet is defined earlier in § 47.01 as "an agreement to win or lose something of value solely or partially by chance" and excludes insurance, certain contests of skill, and carnival games with low value prizes. A "gambling device" is basically any machine that facilitates a game of chance or a combination of chance and skill. The offence of "gambling" has an affirmative defense if the gambling was in a private place (i.e. a residence, and specifically excluding pubs, taverns, restaurants, etc.), no person received any economic benefit other than personal winnings, and the risk of losing or winning was the same for all participants.

Based on the full text of the Penal Code, it is clear no exemptions directly apply to this concept. However, in expanding the defined terms, the offense of gambling is: "Making an agreement to win or lose something of value solely or partially by chance on the partial or final result of a game or contest or on the performance of a participant in a game or contest." In applying this definition to the activity at hand, none of the participants are winning or losing anything of value; they are all making a conscious donation to a major charity. The charities are making an agreement to potentially win something of value, but none are actually losing anything of value, so long as the bright line is kept between the donors and donees, or the participants and charities.

The Attorney General's Office, both present and past, has issued a number of opinions on charitable gaming, all of which speak to activities in which there exists a direct benefit of value to the participants, such as poker tournaments where chips may be exchanged for



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donated prizes. In general, the analysis present in those Opinions centers on the traditional three factors of gambling: consideration, chance, and prize. In short, this traditional definition is that a participant pay something of value for the chance to win something of value. Without all three elements present, the activity is not gambling within the traditional analysis.

Thank you for your consideration of this request. Please do not hesitate to contact me if I may be of any assistance.

Sincerely,

Edmund Kuempel
Edmund Kuempel

EK:bg