Opinion No. 69-60

June 16, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III, Assistant Attorney General

TO: Mr. H. Leslie Williams, Assistant District Attorney, Second Judicial District, County Court House, Albuquerque, New Mexico

QUESTIONS

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May a non-charitable organization hold a public dinner, the cost of which is $ 50. per ticket, and at which the organization gives away prizes varying in value from a few cents to several hundred dollars, drawn by lot?

CONCLUSION

No.

OPINION

*{*91}* ANALYSIS

The question posed requires an analysis of the New Mexico gambling laws. Under Section 40A-19-2, N.M.S.A., 1953 Compilation, gambling includes:

"* * * C. conducting a lottery; * * * Whoever commits gambling is guilty of a petty misdemeanor."

Lottery as defined in Section 40A-19-1, N.M.S.A., 1953 Compilation means:

"* * * an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill. As used in this subsection, 'consideration' means anything of pecuniary value required to be paid to the promoter in order to participate in such enterprise."

This office has previously interpreted this definition of consideration, which is a new definition enacted by the 1965 legislature. See Opinion of the Attorney General, No. 65-196, dated October 14, 1965. That opinion dealt with the unique situation of the New Mexico State Fair and would not be applicable to the facts stated in the question herein presented.

Obstensibly, the promoters of this dinner are selling nothing more than tickets to a public dinner. But in analyzing an operation to determine whether or not it is a lottery, the court must look to the substance of the scheme as well as the form. **State ex rel. Dussault v. Fox Missoula Theater Corp.,** 110 Mont. 411, 101 P.2d 1065 (1940). The substance of paying something of pecuniary value *{*92}* in order to participate in the enterprise is that the small sum is hazarded in the hope of winning a larger sum. **City of Roswell v. Jones,** 141 N.M. 258, 67 P.2d 286 (1937). (**City of Roswell v Jones** supra, was overruled by **State v.** Jones, 44 N.M. 623, 107 P.2d 324 (1940), but the earlier case has a good discussion of the interests of the State in controlling illegal lotteries.]

As explained in the 1965 Attorney General Opinion, cited above, the 1965 revision of the definition of lottery was intended to broaden the exclusions for certain types of operations which were not basically an attempt to hazard a sum for the hope of a larger sum. In effect, the pecuniary value must be paid over and above payment for a legal activity before the giving of a door prize at a legal activity is to be considered an illegal lottery. If one pays the normal going rate for a dinner or theater ticket or style show and a prize or prizes are given in conjunction with those legal activities, one has not paid to the promoter anything of pecuniary value in order to participate in the chance at the prize. Compare **State ex rel. Stafford v. Fox-Great Falls Theater Corp.,** 114 Mont. 52, 132 P.2d 689 (1942); **Dumas v. Todd,** 93 Ga. Atl. 540 92 S.E. 2d 265 (1956); **State v. Bussiere,** 154 Atl. 2d 702 (Me. 1959).

Conversely, when the promoter is charging more than the usual price of the innocent activity and is advertising that prizes will be drawn by lot and awarded to the holder of the ticket for the activity then the activity is primarily a lottery. The promoters are inducing the public to hazard what appears to be a nominal sum for the chance of winning much larger sums even though the sums are in the form of prizes. When the primary purpose is a gambling scheme, the activity may not be made legitimate by presenting it in the form of an innocent activity.