

## Opinion No. 73-31

March 22, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Fred T. Hensley District Attorney Ninth Judicial District Roosevelt County  
Courthouse Portales, New Mexico 88130

### QUESTIONS

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Can a nightclub and package store offer raffle tickets to patrons upon their entry into the premises for a drawing to be held once a week at which prizes, cash or otherwise, will be given away, when such tickets are issued whether or not any purchase of merchandise is made by the individual?

#### CONCLUSION

Yes.

### OPINION

#### {\*53} ANALYSIS

A lottery, other than a permissive one under Section 40A-19-6, NMSA, 1953 Comp. (which is not applicable here), comes within the definition of gambling in Section 40A-19-2, NMSA, 1953 Comp. The same section makes gambling a crime.

As amended in 1965, Section 40A-19-1(B), NMSA, 1953 Comp. defines a lottery as follows:

"'Lottery' 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." (Emphasis added)

In 1963 this office issued a comprehensive Opinion (No. 63-141) explaining what the three elements of a lottery, i.e., "prize," "chance" and "consideration," meant under the then {\*54} existing statute. At that time "consideration was defined as "anything which is a **financial advantage** to the promoter or a disadvantage to any participant." We found that since increased traffic into the place of business constituted a financial advantage to the promoter that even though the participant did not have to part with anything of

value, the scheme, which also contained the other elements of prize and chance, was a lottery and thus prohibited.

Thereafter in 1965, as noted previously, the legislature changed the definition of "consideration" to read as it presently does: "[it] means anything of **pecuniary value** required to be paid to the promoter in order to participate in such enterprise."

Accordingly, so long as an individual may participate in the proposed drawings without the requirement that he purchase something (part with anything of pecuniary value) in order to do so, the element of consideration is absent and the plan does not fall within the statutory definition of a lottery. Thus the proposed plan is not gambling and is not prohibited by Section 40A-19-2, **supra**. See Attorney General Opinion No. 71-109.

In answer to your inquiry whether it makes any difference whether winners must be present at the drawing, please be advised that it does not.

By: Oliver E. Payne

Deputy Attorney General