

Opinion No. 38-1989

July 5, 1938

BY: FRANK H. PATTON, Attorney General

TO: Mr. C. R. McIntosh Attorney at Law Santa Fe, New Mexico

{*245} This is in answer to your letter of June 30th wherein you have outlined {*246} the method of a proposed operation of the business of brokering bets on horse races.

It is my understanding as outlined in your letter that this proposed establishment intends to have direct leased wire connections with a legally licensed booking agency in the State of Nevada where betting on horse races is legal. This concern will have a club room furnished with blackboards containing the names of horses, jockeys, weights and other racing data, and parties wishing to place bets on horse races may, for a commission or brokerage charge, make use of the facilities maintained therein.

The broker will accept the sum of money which it is desired to bet from the customer and the bet will be transmitted by wire to Nevada, and in the event the customer wins, Nevada will wire authorization and forward the money to Santa Fe to pay the bet.

The broker here will have no interest in the bet, will not book any bets himself but will be interested only in the collection of his commission for this service. In other words, according to my understanding, he will act as a broker or as the agent of the bettor in forwarding his bet to Nevada and in turn act as the agent of the Nevada agency in making payment of the winning bets.

With your letter you have submitted a copy of a memorandum brief which you state was prepared by former Judge Joseph L. Dailey of Albuquerque, New Mexico.

I have considered your letter and the said brief with great interest and I assure you that the problem presented has caused me a great deal of concern upon the question of its legality.

In the said memorandum brief it is admitted that "betting" or "wagering" is "gambling" and that the placing of bets or wagers is definitely illegal as constituting a gambling device.

Section 35-3801 of the 1929 Compilation, and which is a portion of a 1917 law, provides "that any person who for money or anything of value, conducts or operates any game of chance, by whatsoever name known or howsoever played, or who knowingly permits any such game to be so conducted or operated upon the premises of which he is the owner, lessee, or occupant, upon conviction thereof shall be punished by a fine, etc."

As stated, this was an act passed in 1917 and is cited as Chapter 110 of the 1917 Session Laws and entitled "An Act to Prohibit Gambling."

This section was construed in *Ex Parte Hamm*, 24 N.M. 33, 172 P. 190, as not prohibiting the playing of a game of chance but only prohibiting the conducting or operating of a game of chance for money or anything of value.

This was the state of the law up to 1921 when the Legislature enacted Chapter 86 of the Session Laws of that year entitled "An Act to Prevent and Prohibit Gambling in the State of New Mexico." Section 1 of this act provides "it shall hereafter be unlawful to play at, run or operate any game or games of chance such as keno, faro, monte, passfore, passmonte, twenty-one, roulette, chuck-a-luck, hazard, fan tan, poker, stud poker, red and black, high and low, craps, blackjack or any other game or games of chance played with dice, cards, punch boards, slot machines or any other gaming device by whatsoever name known, for money or anything of value in the State of New Mexico."

In *Grafe vs. Delgado*, 30 N.M. 150, 228 P. 601, it was held in construing this section that the rule of *ejusdem generis* did not apply; that all of the games enumerated and specified in the section were not necessarily and essentially "banking" or "percentage" games so that the general words following the designated list could not be restricted to include games of that particular type only, and that the game of solo therefore constituted an offense and came within the purview of the statute.

Following this reasoning it occurs to me that it would likewise follow that the placing of a bet upon a horse race would constitute an offense also as falling within the term "any other gaming device by whatsoever name known."

I find in Section 58-209 of the 1929 Compilation, which is also a portion of the 1921 law, the provision that "the existence of any gaming house, gambling table, banking game, gaming paraphernalia, gaming devices or any kind of equipment of a gambling house is hereby declared to be a public nuisance, and such house shall be closed and such gambling tables and all other gaming equipment and paraphernalia mentioned in this section may be destroyed by order of the district court upon any hearing for an injunction as provided by the terms of this act."

Provision for such injunction is found in Section 58-206 of the 1929 Compilation and the duty of enforcement of these provisions is vested in the Attorney General and the several district attorneys by virtue of Section 58-207 of said Compilation.

It is my belief that under these sections it was the intention of the Legislature to prohibit all forms of gambling in the State of New Mexico, excepting, however, certain provisions of our lottery statutes in favor of churches, charitable institutions, etc., where a fair is held and where all the proceeds are applied to charity.

Also we find certain liberalization of our gambling statutes through an enactment of Chapter 55 of the Session Laws of 1933 with relation to *pari mutuels* and where such

pari mutuel betting is done at an actual race meet and within the enclosure of such meet.

This act has also been amended by Chapter 203 of the Session Laws of 1937 but the amending has no application to the point in issue.

I realize that the argument presented in the brief you have submitted as to the mutuality of minds and that the bet is not complete until acceptance in the state where the said betting is legal is ingenious, and the argument that the bet is similar to any other contract or agreement and involves a concurrence of wills is persuasive. However, I do not feel that I should assume the responsibility of saying that the procedure outlined by you is outside of the scope of our gambling statutes, knowing as I do the attitude of the courts in holding that gambling is against public policy and good morals and for these reasons and those above quoted I herewith disapprove your proposed plan of operation.

I may add in this connection that as chief law officer of the State, I feel that I should and will take active steps to prevent the operation of this concern in the manner described by you under the theory that such operation constitutes a violation of the gambling statutes of New Mexico.