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August 5, 1987

The Honorable James J. Sossaman
The Honorable Alan Stephens
The Honorable Tony West
Arizona State Senators
State Capitol - Senate Wing
Phoenix, Arizona 85007

Re: I87-101 (R87-092)

Dear Senators Sossaman, West and Stephens:

You have each asked questions regarding the legality of certain gaming activities under the recently enacted comprehensive revision of the state's criminal gambling laws Laws 1987 (1st Reg. Sess.) Ch. 7.^{1/} We have taken the liberty of consolidating your separate requests in order to analyze the new statutes in one opinion. Essentially your letters raise three questions which we summarize as follows:

1. Under what circumstances, if any, and in what manner may a charitable organization raise money for charitable purposes through the operation of a "casino night" without violating the statutes?
2. Under what circumstances, if any, and in what manner may the player of a gambling device receive a free play of the device without violating the statutes?
3. Under what circumstances, if any, and in what manner may the player of a gambling device receive a prize, or tickets redeemable for a prize, after his play without violating the statutes?

^{1/}The references in this opinion to statutes in Title 13, Chap. 33, unless otherwise specifically noted, will be to those statutes enacted by Laws 1987 (1st Reg. Sess.) Ch. 71, which will become effective on August 18, 1987.

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In the first question, we understand by the reference to "casino night" that you mean a fundraising event which involves the giving of a fixed or minimum donation for the right to attend the event and receive chips or script used to play a variety of casino-style games, typically blackjack, roulette, craps, etc. In order to continue playing these games, the player must buy more chips or script if he runs out. At the end of the evening donated prizes are auctioned and the items are purchased by the bidders with their gambling winnings, or cash, or both. The chips or script are never redeemable for cash. See Ariz. Atty. Gen. Op. 76-17.

According to the provisions of A.R.S. § 13-3303 a person^{2/} commits "Promotion of Gambling," a class 5 felony, if he knowingly and for a benefit^{3/} conducts, organizes, manages, directs, supervises or finances gambling, or if he furnishes advice or assistance for any of those activities. A.R.S. § 13-3304 makes it a class 1 misdemeanor for a person to knowingly obtain any benefit from gambling. For both statutes the law provides an exclusion or exception for "amusement," "regulated," or "social" gambling, and for raffles conducted by certain nonprofit organizations. A.R.S. § 13-3302.

In order to resolve the "casino night" question in light of these provisions, it is first necessary to determine whether the involved conduct is "gambling" and next whether, or under what circumstances, any of the exclusions might apply.

^{2/}According to A.R.S. § 13-105(23) "'Person' means a human being and, as the context requires, an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property." A.R.S. § 13-305 defines the circumstances in which an "enterprise" may be held liable for the commission of an offense.

^{3/}A.R.S. § 13-105(2) defines "Benefit" to mean "anything of value or advantage, present or prospective."

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"Gambling" is defined in A.R.S. § 13-3301(2) to mean an act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event but does not include bona fide business transactions which are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee and life, health or accident insurance.

In applying this definition, the legislature has directed that the "act be liberally construed to effectuate its penal and remedial purposes." Laws 1987 (1st Reg. Sess.) Ch. 71, § 1. Applying these elements to the subject activity, a person (including a charity) who, among other things, "conducts" or "organizes" "games of chance" (casino games) involving players who must "risk or give something of value" (the required donation entitling the player to obtain chips or script) "for the opportunity to obtain a benefit" (either the opportunity to win chips or script to be used in the auction or to use those winnings to bid on and purchase prizes) would be guilty of a class 5 felony. Any person who "obtained a benefit" from such "gambling" would be guilty of a class 1 misdemeanor, unless one of the statutory exclusions applies.

If, on the other hand, the element of risking or giving something of value is not present, then "gambling" does not occur. Accordingly, one method for a charity to hold a lawful "casino night" is for the charity to resolve to give away the chips or script to anyone who requests them without requiring a donation or any other consideration. The element of value is not present. Without the value element required to establish the criminal offenses involving gambling, the "casino night" would not violate the gambling statutes.

A second method for a charity to conduct a "casino night" involves one of the four separate exclusions or exceptions from criminal liability that would otherwise attach to "gambling" conduct.

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The first exemption is "amusement gambling" which applies only if the only benefit received by the player is an "immediate and unrecorded right to replay which is not exchangeable for value." A.R.S. § 13-3301(1)(d)(i). Because the "casino night" players receive other, different benefits, the exclusion does not apply.

The second exclusion is for "regulated gambling" which requires that the gambling be "operated and controlled in accordance with a statute, rule or order of this state or of the United States." A.R.S. § 13-3301(4). Because there is no statute, rule or order which controls the operation of casino games, this exclusion is also inapplicable.

The third exclusion is for "social gambling" and requires that no person other than a player be entitled to receive any benefit from the gambling. A.R.S. § 13-3301(5)(b). When the charity receives a benefit from the gambling, even though arguably indirectly, this exclusion as well becomes inapplicable.

The final exclusion is found at A.R.S. § 13-3302(B) and allows an organization which has qualified for an exemption from income taxation under A.R.S. § 43-1201, paragraphs 1, 2, 4, 5, 6, 7, 10, or 11 to conduct a raffle subject to certain restrictions. No definition of "raffle" is provided by the statutes.

In the absence of a specific statutory definition, the courts have defined raffle as

a form of lottery in which each participant buys a ticket for valuable consideration in order to be eligible for a random drawing to win a prize or prizes.

37 Gambling Devices (Cheyenne Elks) v. State, 694 P.2d 711, 718 (Wyo.1985); See also United States v. Baker, 364 F.2d 107, 111 (3rd Cir. 1966). The exact method adopted for the application of chance to the distribution of prizes is immaterial. Video Consultants of Nebraska v. Douglas, 367 N.W.2d 697, 701 (Neb. 1985); see also Forke v. U.S., 88 F.2d 612 (D.C. 1936).

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Nothing in A.R.S. § 13-3302 specifies how the raffle itself must be conducted. The exclusion merely requires: 1) that the nonprofit organization have been in existence for five years immediately before conducting the raffle; 2) that no member, director, officer, employee, or agent be eligible to receive any direct or indirect pecuniary benefit from the raffle other than being able to participate on an equal basis to all other players; and 3) that only members of the organization may participate in the management, sale, or operation of the raffle. Assuming the charity complies with these restrictions we find no reason why the charity could not conduct its "casino night" by selling raffle tickets instead of chips or script and then allow the players to use their tickets as the medium for their play. The games merely serve to distribute and redistribute the chances of winning the raffle among the players. At the end of the evening the organization may raffle prizes using ticket numbers corresponding to those held by the players.

Based on the foregoing analysis, we conclude that charitable organizations may raise money for charitable purposes through the operation of a "casino night" either by: 1) not requiring the exchange of any consideration or value for the receipt of the chips or script to be used to play the games; or 2) allowing the players to play with raffle tickets and conducting a raffle at the end of the evening.

In the first case, the more that the organization separates the receipt of the donation required to attend the event from the giving of the chips or script, the less likely it is that the value element will be present. This means that the charity may not request a donation for the chips or script, even from those willing to give it. In the second situation, the organization must take care that it qualifies under the exemptions of A.R.S. § 43-1201, paragraphs 1, 2, 4, 5, 6, 7, 10, or 11 and that it adheres to the other limitations imposed by A.R.S. § 13-3302(B)(1)-(3) noted above in order to qualify to lawfully conduct a raffle.

Your second and third questions, involving the types of prizes or rewards that may be awarded for the successful playing of machine games, require a reference to A.R.S. § 13-3306 as well as a detailed analysis of the "amusement" gambling exclusion.

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Pursuant to the relevant portion of A.R.S. § 13-3306 a person commits a class 1 misdemeanor if he knowingly possesses any implement, machine, paraphernalia, equipment, or other thing which he knows or has reason to know is used or intended to be used to violate the gambling statutes. Accordingly, absent an applicable exemption, any person who possesses a device which is used or intended to be used to allow a player, after risking or giving something of value, to have the opportunity to obtain a benefit from a game or contest of chance or skill is violating the law. The person who benefits from the gambling would be guilty of a class 1 misdemeanor as well, and the person who organizes the gambling would be guilty of a class 5 felony. The elements are defined broadly and must be interpreted liberally. By its literal terms, the statute criminalizes the possession for use of any amusement device which returns to the player any benefit. Absent a relevant exclusion, the pinball machine or video game for example, played for a quarter, which returns, only after a certain score is reached, the right to play additional games without paying additional consideration would be criminal. However, the legislature provided a narrowly tailored exclusion in A.R.S. § 13-3302(A)(1) for "amusement gambling." "Amusement gambling" is defined in A.R.S. § 13-3301(1) to mean gambling

involving a device, game, or contest which is played for entertainment if all of the following apply:

(a) The player or players actively participate in the game or contest or with the device.

(b) The outcome is not in the control to any material degree of any person other than the player or players.

(c) The prizes are not offered as a lure to separate the player or players from their money.

(d) Either of the following:

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(i) No benefit is given to the player or players other than an immediate and unrecorded right to replay which is not exchangeable for value.

(ii) The gambling is an athletic event and no person other than the player or players derives a profit or chance of a profit from the money paid to gamble by the player or players.

To qualify for this exemption, each element must be satisfied. We will analyze each element of the exemption in sequence as they apply to game machines.

The player of a game machine actively participates in the play of an amusement device, and, assuming the device is not manipulated by another person, the outcome of the game is not in the control to any material degree of another person. The first two elements set out in A.R.S. § 13-3301(1)(a) and (b) would be satisfied.

The third element requires that the prize not be "offered as a lure to separate the player or players from their money." A.R.S. § 13-3301(1)(c). You note in your letters that some amusement devices award prizes, either directly to the successful player, as in the case of the "Skill Crane" games, or through the award of tickets which are redeemable for prizes, as in the case of the "Competition Basketball" or "Skee Ball" games. If the prizes offered are a "lure" which "separate[s] the player or players from their money" then this element of the amusement exemption to the gambling statute would not be satisfied. The legislature adopted the language for this element from the opinion of the Court of Appeals, Division 1, in State v. American Holiday Association, Inc., 151 Ariz. 309, 311 727 P.2d 804, 806 (App. 1985), vacated 151 Ariz. 312, 727 P.2d 807 (1986). See also Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978). The Court of Appeals stated as follows:

the automobile was not offered by the defendant as a lure to separate individuals from their money because the defendant's gain and the sum total of the entrance fees was not

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divided among the contestants as in an office pool. The participants were not primarily risking their fees in the hope of making a return on their money as in a wagering transaction, but were paying the fees for the privilege of participating in the tournament.

151 Ariz. at 311, 727 P.2d at 806 (emphasis added.)
Consequently, we understand that by choosing this language, the legislature meant that the potential winning of the prize must not be the primary motivation for the player to play the game. The more skill involved in a game, the more likely it is that the player gives his consideration primarily for the privilege of playing and demonstrating his skill rather than for winning the prize. Therefore, we do not believe that the offering of prizes of minimal value awarded on the basis of the scores achieved for playing games of skill would be a "lure" which separates the player from his money. Of course, if the value of the prizes were anything more than minimal, our conclusion would be the opposite.

However, our analysis does not end here because all conditions of the statutory exclusion must be satisfied for there to be an exemption. The final condition required to meet the "amusement gambling" exclusion requires either that the player be given "no benefit" other than "an immediate and unrecorded right to replay which is not exchangeable for value," or there must be an athletic event and no person other than the players may derive a profit or chance of profit from the money paid to gamble by the players. A.R.S. § 13-3301(1)(d).

While some games might arguably involve some degree of athletic skill, we do not believe the common meaning of "athletic event," as used in the statute, encompasses the playing of gambling machines or games. Moreover, there would be no exclusion pursuant to this section if any person other than the player derives a profit or chance of profit from money paid for the playing of the game. A.R.S. § 13-3301(d)(ii).

We also believe that the requirement that players receive no benefit "other than an immediate and unrecorded right to replay which is not exchangeable for value" prohibits the awarding of any prizes, regardless of value, resulting from the

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play. The prize, while perhaps not the "lure which separates the player from his money" is nonetheless a "benefit" which is not exempted by the statute. Of course, if the player receives any benefit based merely on the number of times he plays the device or game, regardless of the score he achieves, then the element of chance or skill required for "gambling" would be missing and no violation would occur. Based solely on the number of plays, a device or game may award free plays or prizes, just as any other business might offer its customers free merchandise to encourage their repeat business.

To summarize, we conclude that the statutes would be violated if the device or game offers any prize, regardless of value, based on the score achieved, but would not be violated if the "prize" was merely an immediate and unrecorded right to replay not exchangeable for value, or was awarded not on the score achieved but rather the number of times the game is played.

Sincerely,



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