

## OFFICE MEMORANDUM

DATE: October 9, 1997

FROM: Dale L. McDonnell  
Legal Counsel

SUBJECT: Legal Issues/Casinos/Gambling



Proceeds Benefit Our Natural and Economic Environments.

The Minnesota Constitution contains two provisions relating to gambling, one relating to lotteries (Article XIII, Section 5) and the other to pari-mutual betting on horse racing (Article X, Section 8). Article XIII, Section 5 states as follows:

Section 5. Lotteries. The legislature shall not authorize any lottery or the sale of lottery tickets, *other than authorizing a lottery and sale of lottery tickets for a lottery operated by the state.* [italicized language reflects 1988 amendment]

The Minnesota Constitution does not include a general prohibition against gambling or betting on games of chance. As quoted above, there does exist a constitutional prohibition relating to lotteries (with the exception of a state operated lottery) and a provision authorizing on-track pari-mutual betting on horse racing. Therefore, the legislature may authorize gambling that is not a lottery without any restriction as to whether it was operated by the state and it may authorize the conducting of on-track pari-mutual betting on horse racing (the Minnesota Supreme Court ruled in 1992 that the constitutional amendment relating to on-track pari-mutual wagering on horse racing precluded the legislative authorization of off-track pari-mutual wagering, *Rice v. Connolly*, 488 N.W.2d 241 (MN 1992)).

Since the legislature may not authorize gambling that is considered a lottery, unless it is operated by the state, it is important to analyze what constitutes a "lottery" and what constitutes "operated by the state". As more fully analyzed below, the answer to the question of what constitutes a "lottery" is quite broad. The reasonable conclusion from the cases that have been litigated is that any game which consideration is provided, a prize can be won, and which the winner(s) are chosen primarily by chance, is a lottery. A lottery includes all of the games traditionally run by state lotteries, instant scratch tickets, lotto and numbers games. A lottery also includes other gambling games traditionally found in casinos where chance predominates (little or no element of skill or choice is involved), this would include slot machines, bingo, roulette, and keno. Casino gambling games where a significant element of skill is involved, such as poker and blackjack would not be considered a lottery. For other casino games that involve pure chance in part of the game, but also involve skill, it is an open question as to whether those games are a lottery; those games include craps, baccarat, video poker, and video blackjack.

Pursuant to Article XIII, section 5 of the Minnesota Constitution, lotteries or lottery games can only be authorized by the legislature if they are operated by the state. Therefore, casino games which fall under the definition of a lottery must be operated by

Pursuant to Article XIII, section 5 of the Minnesota Constitution, lotteries or lottery games can only be authorized by the legislature if they are operated by the state. Therefore, casino games which fall under the definition of a lottery must be operated by the state. Since casino gaming primarily exists of slot machines and other similar type of lottery games, under the Minnesota Constitution, casino gaming (that includes those games) must be operated by the state.

To operate generally means to manage or control the affairs of (American Heritage Dictionary), so what must be directly operated by the state and what can be contracted to third parties is somewhat problematic and should be examined on a case by case basis. Clearly having a private individual or corporation own and manage a casino subject to regulation by the state would not be considered to be "operated by the state" and would not be permitted. On the other hand, some of the operation can be subcontracted to third parties, i.e. equipment (including slot machines) could be leased rather than bought, the maintenance of the slot machines could be conducted by third parties, experts consultants could be retained to advise the state regarding management of the operation, and other non-gambling facets of a casino operation could be conducted by third parties. Further, a facilities management arrangement would be permitted wherein a private party would own the equipment, maintain the equipment, and operate the computer system that oversees the operation so long as the state still manages the gaming operation and maintains direct control of the operation. The more of the operation that is not conducted by the state, the more the operation could be seen as not "operated by the state", and subject to successfully litigation in the courts.

### Definition of "Lottery"

The term "lottery" is not defined in the Minnesota Constitution, but it is defined in Minnesota Statutes, section 609.75, subdivision 1, clause (a) as:

"A lottery is a plan which provides for the distribution of money, property, or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected..."

The Advisory Committee' comments (Advisory Committee regarding the 1963 revision of the Minnesota criminal code) state that gambling generally falls into three general categories: (1) betting, (2) lotteries, and (3) gambling machines. Gambling machines, by definition, clearly include slot machines and video lottery terminals (see Minnesota Statutes, section 609.75, subdivision 4). Also, the games conducted on a slot machine or a video lottery terminal could easily be argued to be within the definition of a lottery since the machines or games in effect involve "a plan to distribute money to persons selected by chance from among participants who have given consideration to play the game."

While the Minnesota Supreme Court has not recently had to interpret the phrase "lottery", it has stated in *State v. Moren*, 48 Minn. 555 (1892), that:

"The term 'lottery' has no technical meaning, but under the statute it must be construed in a popular sense, and with the view to remedy the mischief intended to be prevented. The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented; and the courts will tolerate no evasions for the continuance of the mischief."

Further, the Minnesota Supreme Court stated in a case in 1927 that when there is a distribution of property by chance, and consideration is involved, a "lottery" exists. *State v. Powell*, 212 N.W. 169, 170 Minn. 239 (1927). This is a fairly universal holding of what constitutes a lottery in the United States.

The meaning of the term "lottery" has been litigated more recently in a number of states. The Missouri Supreme Court in 1994 in a case challenging the legality of riverboat gambling interpreted "lottery" to include "any form of gambling in which consideration was paid for the opportunity for a prize, where skill was absent or only nominally present, and where no player's choice or will had any part in the game's result, nor could human reason, foresight, sagacity or design enable a player to affect the game." *Harris v. Missouri Gaming Commission*, 869 S.W.2d 58 (Mo. 1994). The court in that case stated that a game escaped the constitutional prohibition against lotteries, if skill was predominant in the game. The court held that bingo, keno, pull-tabs, numbers tickets, jar tickets and slot machines were lotteries (it also stated that almost all state courts have held slot machines to be lotteries); poker and blackjack were not lotteries, and that a fact question existed as to other casino games as to whether the games had sufficient elements of skill to not be considered a lottery (Missouri later amended its constitution to permit riverboat casinos to conduct lottery type games).

In 1994, the Kansas Supreme Court held that the term "lottery" is practically synonymous with the term "gambling" and that the term "lottery" means "any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes." *Kansas v. Finney*, 867 P.2d 1034 (Kan.1994). Also, a New York court held that the game of "keno" was a "lottery" since the game contained the three required elements of a lottery (prize, chance, and consideration), despite the contention that the game went beyond the type of lottery contemplated by the constitution. *Trump v. Perlee*, 644 N.Y.S.2d 270 (App. Div. 1996).

Where the constitution of a state is different, contrary rulings have been made. For instance, where most state constitutions (including Minnesota's) prohibit only lotteries, the South Dakota Constitution prohibits the legislature from authorizing games of chance, lotteries, and gift enterprises, except for lotteries owned and operated by the state. The South Dakota Supreme Court held in 1994 that video poker was a game of chance rather than a lottery. *Poppen v. Walker*, 520 N.W.2d 238 (S.D.1994). The court in that case stated that when both terms are used (lottery and games of chance), the term "lottery" has a narrower meaning, and ruled that since video poker involved some element of skill or choice on the part of a player, it was a game of chance rather than a lottery, and the state's constitution did not permit the lottery to operate a game of chance (South Dakota later amended its constitution to permit the state to operate games of chance).

#### Definition of "Operated by State"

The exception in the Minnesota Constitution regarding lotteries (Article XIII, section 5) requires that a lottery may be authorized if it is "operated by the state." Operation is not defined in either the Minnesota Constitution or in Minnesota statutes. The American Heritage Dictionary defines "operate" as "to run or control the functioning of: *operate a machine*" or "to conduct the affairs of; manage: *operate a business*". The Kansas attorney general issued an opinion in 1994 that the phrase "state-owned and operated" as used in the Kansas Constitution as applied to the requirement for the lottery, requires that the lottery must be owned, as well as directed, controlled, and managed by the state. *Attorney General of Kansas, Opinion No. 94-26 (1994)*.

The legislative intent concerning the 1988 amendment to Article XIII, section 5, provides some insight into the meaning of the provision. Early versions of the constitutional amendment were a repeal of Article XIII, section 5. There was also some discussion at that time regarding authorizing a private lottery that would be regulated by the state (similar to charitable gambling and pari-mutual betting on horse racing). But the prevailing view was that any lottery should be state run to insure its integrity and to avoid any problems with federal law. Federal law prohibits the advertising of lottery, the use of mails, banks, etc. to further a lottery, but provides an exception for "lotteries conducted by a state". See 18 U.S.C. section 1301-1307. Further, all previously authorized lotteries in the United States (32 states authorized lotteries prior to Minnesota) were directed and managed by the state. So to ensure that any lottery authorized by the legislature would be in compliance with federal law and in line with the manner in which other states were conducting lotteries, the constitutional provision included the requirement that the lottery be "operated by the state."

Similar constitutional provisions relating to "operated by the state" have been litigated in South Dakota. *See, Poppen v. Walker, supra.* South Dakota had authorized the operation of video lottery terminals through a system whereby the South Dakota lottery purchased the overall operating system which the terminals were connected, but the terminals were either purchased or leased by bars from private distributors, and bars and distributors determined which type of machines and how many were located in each establishment, subject to limits established by the South Dakota Lottery. Both the bars, distributors, and manufacturers were licensed and regulated by the South Dakota lottery. In a challenge to the constitutionality of South Dakota's Video Lottery law, one of the allegations was that video lottery in South Dakota was not owned and operated by the state as required by the South Dakota Constitution. The state argued that by owning and operating the overall system was sufficient "operation" to meet the constitutional requirement. The South Dakota Supreme Court did not rule on this issue since as stated above it ruled that video lottery in South Dakota as unconstitutional based on the fact that it wasn't a lottery (South Dakota has since amended its constitution to permit the state to operate the video lottery system in cooperation with other persons).