

RECEIVED

NOV 07 2008

OPINION COMMITTEE



KERR COUNTY ATTORNEY

REX EMERSON

COUNTY COURTHOUSE, SUITE BA-103 • 700 MAIN STREET • KERRVILLE, TEXAS 78028

November 1, 2008

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-45902-08
I.D. # 45902

RQ-0761-GA

RE: Whether a non-profit may sponsor a combination dinner/poker tournament.
Whether a community building privately leased qualifies a "private place".

Dear General Abbott:

The H.C.D.J.L.S.A. (charity), a local youth oriented non-profit, was planning to sponsor a fund raising combination dinner and poker tournament. The charity was duplicating a similar scheme alleged to have previously been used in multiple counties. The charity scheme was to host a combination dinner and poker tournament wherein each poker tournament participant was required to purchase a BBQ dinner. The "total donation" was to be \$100, "\$50 for BBQ dinner and \$50 for tournament fee". The ticket stub indicates \$50 charitable donation. The \$50 tournament fee of each person was to be fully entered in a tournament pot to be paid to the top 8 players. The charity would obtain its economic gain from the net profits of the dinner. The charity planned to employ a "poker tournament hosting service" to conduct the tournament. The charity leased the County AG barn to host the tournament and was planning to limit admission to paid invitees.

Texas Penal Code Chapter 47 addresses gambling. Section 47.01 defines the following relevant terms:

- (1) Bet – An agreement to win or lose something of value solely or partially by chance.
- (3) Gambling Place – means any real estate, building, room, tent, vehicle, boat or other property whatsoever, one of the uses of which is the making or settling of bets, bookmaking, or the conducting of a lottery or the playing of gambling devices.
- (6) Gambling Paraphernalia – means any book, instrument, or apparatus by means of which bets have been or may be recorded or registered; any record, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means

MAIN NUMBER (830) 792-2220 • HOT CHECKS (830) 792-2221 • FAX (830) 792-2228

Website: <http://www.co.kerr.tx.us/attorney>

- (8) Private place – means a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, motels, office buildings, transportation facilities, and shops.
- (9) Thing of Value – means any benefit, but does not include an unrecorded and immediate right of replay not exchangeable for value.

Texas Penal Code Section 47.02 defines gambling. (a) A person commits an offense if he:

- (3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device.
- (b) It is a defense to prosecution under this section that:
- (1) the actor engaged in gambling in a private place;
 - (2) no person received any economic benefit other than personal winnings; and
 - (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

The defenses cited in sections (c) and (e) do not apply to our situation.

Texas Penal Code Section 47.03 addresses gambling promotion. (a) A person commits an offense if he intentionally or knowingly does any of the following acts:

- (1) operates or participates in the earnings of a gambling place;
- (3) for gain, becomes a custodian of anything of value bet or offered to be bet;
- (5) for gain, sets up or promotes any lottery or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery.

Texas Penal Code Section 47.04 defines keeping a gambling place. (a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.

- (b) It is an affirmative defense to prosecution under this section that:
- (1) the gambling occurred in a private place;
 - (2) no person received any economic benefit other than personal winnings; and
 - (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

Under the Penal code, the term “person” means an individual, corporation, or association. *See* 1.07(38) The phrase “for gain” means for “profit” or “excess of receipts over expenditures.” *See* Tex. Att’y Gen. Op. No. JC-0480(2002)

It is my opinion that the proposed poker tournament scheme violates the gambling statutes on several levels. The participant’s \$100 total donation paid to the charity establishes that: 1) the participant will place a bet (\$50) and play for money or a thing of value with cards thereby gambling;

- 2) because the participant is required to purchase the BBQ dinner the participant pays the difference between the value of the dinner and the \$50 for the chance to win a cash prize resulting in the charity hosting the gambling for economic benefit/gain.
- 3) the charity will receive economic benefit other than personal winnings(net profit of dinner);
- 4) the charity, for gain(net profit of dinner), becomes a custodian of value bet;
- 5) the charity would keep a gambling place by using real estate under his control to conduct gambling wherein it received economic benefit other than personal winnings.
- 6) the poker hosting service would be conducting a gambling operation.

The promoters argue that because the meal price is noted separate from the tournament fee the charity is not receiving economic benefit directly from the poker tournament nor is the participant paying for a chance to win. In addition, they assert that because 100% of the tournament entry fee is returned to the players there is no economic gain for the charity. Lastly, they assert that because the building is privately leased and entry is limited to paid invitees the real estate for purposes of the statute is a private place.

The Attorney General's office has previously addressed whether a non-profit organization that sponsors a poker run violates gambling statutes. *See* GA-0385 In that situation for each \$10 donation, a participant was entitled to receive a five-card hand at the last stop. The final awards were set amounts that were not dependant on the entries. "Even if all the proceeds were contributed to charity, the game would still be an enterprise undertaken for gain. A gain is no less a gain if it is contributed to charity." *See State v. Amvets Post No. 80*, 541 S.W.2d 481, 483(Tex.Civ.App-Dallas 1976, no writ) It was found that a nonprofit would violate the penal code by sponsoring a poker run.

In Opinion GA-0335(2005) you opined that the plain language of Penal Code section 47.01(1) renders irrelevant the matter of whether poker is predominantly a game of chance or skill. If an element of chance is involved in a particular game, it is embraced within the definition of bet.

In GA -0335 you addressed the issue of whether a business that hosts a poker tournament wherein the business took no cut of the entry fee of each player and the entire prize pool that is generated by the number of players will be paid back to the players violates the "keeping a gambling place" statute. It was determined that a bar or restaurant that hosts a poker tournament would violate the prohibition against keeping a gambling place. The fact that the host did not profit directly from the gambling was irrelevant to whether the host violated Texas Penal Code Section 47.04(a).

The "private place" issue would be best resolved by an answer encompassing the private rental of "banquet halls", church facilities, and county/community buildings.

Thank you for your assistance in clarifying the above charitable gambling scheme.


Rex Emerson