



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

January 22, 2008

The Honorable Franklin D. Edmondson
Commissioner of the Revenue for the City of Portsmouth
801 Crawford Street
Portsmouth, Virginia 23704-3870

Dear Mr. Edmondson:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether certain poker tournament activities constitute gambling. You further inquire whether your office should issue business licenses authorizing such activities and whether admissions and other taxes should be assessed and collected in connection therewith.

Response

Your initial question requires a factual determination regarding whether a particular activity constitutes gambling. A factual determination is not a proper function of this Office.¹ Your second question is dependent upon the response to the first question and also requires a factual determination.

Background

You relate that certain poker tournament and related business activities occur in the City of Portsmouth. You state that these activities are open to the public and publicly advertised. Participants must pay a fee to play some variety of poker in public locations, including restaurants and meeting halls. You note that the fees are sometimes described as "admission fees," "voluntary contributions," "charitable contributions," or "cover charges." In return for payment of the fees, you relate that participants are given poker chips to use for play. At the end of the event, participants who lose all their chips receive nothing. Participants who end the tournament with chips receive either cash prizes or items of material financial value proportionate to the number of chips. In some cases, participants may purchase additional chips during the tournament. Finally, you relate situations where the house keeps a portion of the total funds from the "entry" fees, and the winning participant receives the balance.

¹See, e.g., 1991 Op. Va. Att'y Gen. 122.

Applicable Law and Discussion

Section 18.2-325(1) defines “illegal gambling” as

the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth.

Section 18.2-326 provides that “[e]xcept as otherwise provided in [Article 1, Chapter 8 of Title 18.2], any person who illegally gambles ... shall be guilty of a Class 3 misdemeanor.” Section 18.2-328 provides, in part, that:

The operator of an illegal gambling enterprise, activity or operation shall be guilty of a Class 6 felony. However, any such operator who engages in an illegal gambling operation which (i) has been or remains in substantially continuous operation for a period in excess of thirty days or (ii) has gross revenue of \$2,000 or more in any single day shall be fined not more than \$20,000 and imprisoned not less than one year nor more than ten years.

It is well settled in Virginia that an activity constitutes illegal gambling when the elements of “prize,” “chance,” and “consideration” are present together.² In the activities you describe, the elements of prize and chance clearly are present. The game of “poker” is not defined by statute. Absent a statutory definition, the plain and ordinary meaning of the term is controlling.³ The term “poker” means

any of several card games in which a player bets that the value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot.^[4]

You describe a situation where participants in a poker game play for a “prize,”⁵ which goes to the person who by “chance” is holding the highest hand. Thus, whether “consideration” is present is the remaining factor regarding whether the activities you describe constitute illegal gambling.

A prior opinion of the Attorney General looks at the issue of “consideration.” That opinion concludes that the fact that individual participants were required to pay an admission fee to participate did not necessarily mean that subsequent use of play or pretend money was illegal gambling through the use

²See *Maughs v. Porter*, 157 Va. 415, 424, 161 S.E. 242, 245 (1931); 1996 Op. Va. Att’y Gen. 99, 100 and opinions cited therein.

³See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att’y Gen. 10, 11.

⁴MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 897 (10th ed. 2001).

⁵You state that this prize is “money” or “items of significant material financial value.”

of “money or other thing of value.”⁶ When the amount of play money or poker chips won or lost does not depend upon the amount of actual money paid by the participants through their admission fees, such activity would not be a form of illegal gambling and is not prohibited by law.⁷ However, after payment of the initial admission fees, when participants may purchase additional quantities of play money or poker chips, such activity would be prohibited under §§ 18.2-325 through 18.2-340.⁸ The purchase of additional poker chips means that participants are gambling real “money or other thing of value” contrary to Virginia law.⁹

Regardless of whether participants may purchase additional poker chips, in the circumstances you describe the poker chips function as the equivalent of real money since they are redeemable for real money or “significant material financial value.” Therefore, when a participant places a bet or wager, he does so using money or other thing of value, and the element of “consideration” is present.

Prior opinions of the Attorney General have construed liberally what constitutes “consideration” for purposes of defining illegal gambling and have focused upon pecuniary benefit in order to determine the existence of consideration.¹⁰ For example, where participation in a game was limited to persons who had purchased a room at the hotel conducting and hosting the game, the hotel derived pecuniary benefit from conducting the game.¹¹ Thus, the hotel received the consideration necessary to constitute illegal gambling even though no “entry fee” was required to participate in the game.¹² The Supreme Court of Virginia has held that where the object of the defendant in conducting a lottery unquestionably was to attract persons to the premises with the hope of deriving benefit from them, sufficient consideration existed for an illegal gambling conviction.¹³

You describe the “entry fees” as “admission fees,” “voluntary contributions,” “charitable contributions,” or “cover charges.” You also describe situations in which the “house” keeps a portion of the pot created by the entry fees. It is unclear, however, who conducts the tournaments and whether the restaurants and meeting halls derive pecuniary benefit from serving as the host sites. Indeed, it appears the party that conducts the tournaments and derives pecuniary benefit may vary from one event to another. You also do not indicate whether, in addition to the “entry” fees, participants must make additional purchases from the restaurants or meeting halls to be present on the premises. Such factors would be important to determine whether the element of consideration exists and whether such activities constitute illegal gambling.

Ultimately, the determination of whether consideration exists in the activities you describe is a question of fact, and the answer may vary from one tournament to the next. For many years, Attorneys

⁶ See 1976-1977 Op. Va. Att’y Gen. 89, 89.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., 1979-1980 Op. Va. Att’y Gen. 228, 229.

¹¹ *Id.*

¹² *Id.*

¹³ *Maughs*, 157 Va. at 426, 161 S.E. at 245-46.

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General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.¹⁴ Furthermore, prior opinions of the Attorney General have concluded that the application of various elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth's Attorney, the grand jury, and the trier of fact, and is not an appropriate issue on which to render an opinion.¹⁵

Conclusion

Accordingly, your initial question requires a factual determination regarding whether a particular activity constitutes gambling. A factual determination is not a proper function of this Office.¹⁶ Your second question is dependent upon the response to the first question and also requires a factual determination.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive, flowing style with a large, prominent "R" at the beginning.

Robert F. McDonnell

6:1273; 1:941/07-084

¹⁴ See, e.g., 2007 Op. Va. Att'y Gen. No. 07-012, *3 n.14, available at <http://www.vaag.com/OPINIONS/2007opns/07-012-Corbett.pdf>, and opinions cited therein.

¹⁵ See 1996 Op. Va. Att'y Gen., *supra* note 2, at 100 and opinions cited therein.

¹⁶ See *supra* note 1.