79-168

STATE OF MAINE

Inter-Departmental Memorandum Date September 12, 1979

To Arthur A. Stilphen, Commissioner Dept. Public Safety

From Michael G. Messerschmidt, Assistant Attorney General Dept. Attorney General

Subject Electronically activated slot machines - status after September 14, 1979

BACKGROUND: Recently enacted P.L. 1979, c.271 prohibits the licensing of gaming machines that are activated by a remote electronic device.[1] Numerous organizations licensed to operate these machines have requested guidance from the State Police, the agency that originally licensed them, with respect to the lawful retention of these machines after September 14, when the new law becomes effective.

QUESTION: After September 14, to what extent will the possession of these machines be lawful?

ANSWER: The fact that an organization can no longer be licensed to "conduct or operate" one of these machines does not render illegal the mere possession of that machine by an individual or an orgnization.[2]

The crime of possession of gambling devices, 17-A M.R.S.A. §956, requires that the offending party know that the device will be used in the advancement of unlawful gambling activity. Advancing gambling activity involves engaging "in conduct that materially aids any form of gambling activity." 17-A M.R.S.A. §952(1).

Virtually every use of these machines for gambling purposes will be illegal after September 14th.[3] Consequently, if the machine is used for gambling purposes, the owner of the machine may well be criminally liable for possession of gambling devices, and the person in charge of the premises might be criminally liable for

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[1]Chapter 271 distinguishes these "machines" from the already prohibited "slot machines," which were defined narrowly as machines the internal mechanisms of which were set directly in motion by the insertion of a "coin, token, or similar object". 17 M.R.S.A. §330(7).

[2]Seitzinger, "Gambling," 28 Me.L.Rev. 37, 54 (1976). It was clear under pre-Criminal Code law that one could not possess a coin-activated slot machine. 17 M.R.S.A. §1811, repealed P.L. 1975, c.499, §9. Notwithstanding the fact that the Legislature quite clearly decided not to license them under any circumstances, they may now be present in the state, provided they are not used for gambling purposes.

[3]The sole exception involves the use of these machines for "social gambling," discussed infra.

unlawful gambling, 17-A M.R.S.A. §954.[4] Certain actions on the part of owners are more likely than are others to lead to the inference that the owner is knowingly advancing gambling activity. These circumstances require some elaboration.

If the owner were to crate its machine or place it in a storage area of its premises or of the premises where it had been operated, there likely would be insufficient evidence to support any allegation of knowledge that the device was being used for gambling purposes or that the licensee was materially aiding any form of gambling activity. If the machine were in fact subsequently used by other persons, it may well be impossible to impute the owner with knowledge of such activity.

An owner is not bound by the law to take such steps to insure that the machine is not used. It is not unlawful simply to leave the machine were it is presently located pursuant to its license, as long as the machine is not used. Leaving the machine accessible to an eager public may nonetheless be an unwise course of action. If an owner does nothing more than unplug the electric current leading to the machine, knowing that little effort would be required to set the machine back into full operation, and the machine is in fact used, then the owner may very likely be imputed to have had knowledge that the machine would be used in the advancement of unlawful gambling activity. If the machine had been placed in an establishment, such as a bar, not belonging to the non-profit organization, the owner or managers of that bar may similarly be criminally responsible if the machine is used. Thus, multiple criminal liability may attach in those matters involving machines currently licensed for off-premises operation. Individuals associated with either the non-profit organization (the present licensee) or with the restaurant/bar/hotel where the machine is being operated may be defendants.

Some private clubs have suggested to the State Police that their use of these machines constitutes "social gambling," which is

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[4] 17-A M.R.S.A. §954(1) reads: "A person is guilty of unlawful gambling if he intentionally or knowingly advances or profits from unlawful gambling activity."

17-A M.R.S.A. §952(1) reads, in part: "A person also advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue, or makes no effort to prevent its occurrence or continuation."

not prohibited by any statute.[5] However, use of the machines in private clubs does not appear to satisfy the definition of social gambling.

Strictly speaking, social gambling may be conducted only in premises where (1) no fee or remuneration is derived, directly or indirectly to any person or organization from use of the premises, (2) no refreshments or entertainment are supplied for profit to participants, players or spectators, and (3) the person in control of the premises (or a member of that person's family if the activity is conducted in a residence) is a participant in the game. Thus, as long as the person in charge of the premises is participating as a player in the game, and as long as the first two qualifications are met, the person in control of the premises is acting lawfully. However, when a person in control of the premises does not participate in social gambling conducted on the premises, but is aware that the activity is being conducted, that person "advances gambling activity" and may be subject to prosecution.

Gambling with such a machine within the confines of a private club is clearly not social gambling. The organization itself can never be a player. It receives a benefit, directly or indirectly, from such things as membership fees, earnings from the machines, or from the sale of refreshments. Therefore, the club member in charge of the premises, and perhaps the organization also would be guilty of unlawful gambling.[6]

While it is clear that mere possession of these machines is not criminal, possession may result in liquor license violations

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[5] 17-A M.R.S.A. §952(8) defines social gambling as "gambling, or a contest of chance, in which the only participants are players and from which no person or organization receives or becomes entitled to receive something of value or any profit whatsoever, directly or indirectly, other than as a player, from any source, fee, remuneration connected with said gambling, or such activity as arrangements or facilitation of the game, or permitting the use of premises, or selling or supplying for profit refreshments, food, drink service or entertainment to participants, players or spectators..."

The subsection also defines player as "a person who engages in social gambling solely as a contestant or bettor on equal terms with the other participants therein without receiving or becoming entitled to receive something of value or any profit therefrom other than his personal gambling winnings."

[6] See Opinion of the Attorney General, April 21, 1977, for a similar analysis with respect to card playing at private clubs which have liquor licenses.

against the owner or the premises renting space to the organization for its machine. Liquor Commission Rule and Regulation No. 1.5(A) reads as follows:

> "No licensee shall have or permit on his licensed premises any gaming devices...punchboard or any mechanism which dispenses money or other valuable thing which is redeemable or exchangeable for money or other valuable thing..." The Administrative Court, upon a finding of such a violation, can suspend or revoke a liquor license and/or assess fines up to $1500 per violation.

Although the language "permit on his licensed premises" is very broad, it may not reach the machine placed in storage or boxed up on the licensed premises. It does, however, make mere possession a license violation, without any evidence of the machine actually being used.

The fact that the machine was placed in a certain location pursuant to a State license issued prior to September 14 does not give the machine's owner any special claim of right to keep the machine in that location once the license has ceased to exist. Analytically, the keeping of a machine at its unlicensed location is the same as placing it anew in an unlicensed location.

SUMMARY:

A. While mere possession of these electronically activated gaming machines is not illegal, organizations that wish to retain the machines after September 14th would be well-advised to take every precaution to insure that the machines are not used. Unlawful gambling and possession of gambling devices are Class D crimes.

B. Organizations retaining the machines may put them in storage, but leaving the machines in an area accessible to the public or simply to club members in general may subject the owner of the premises, the person temporarily in charge of the premises, and any person responsible for leaving the machine there, criminally responsible for knowingly advancing gambling activity if the machines are used.

C. The use of these machines in private clubs is not "social gambling".

D. Liquor licensees must remove any machine from its premises once that machine is no longer licensed. A violation could lead to a fine of up to $1500 and/or a loss of the liquor license.

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