

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 2, 1981

Arthur A. Stilphen, Commissioner
Department of Public Safety
Hospital Street
Augusta, Maine 04333

Re: Legality of "Electronic Poker."

Dear Commissioner Stilphen:

You have asked this office about the legality of the operation of a certain electronic device generally referred to as "electronic poker." You have described this machine as set in motion by the insertion of a coin and as designed to electronically "deal" two hands of draw poker, blackjack, etc., and to display the "cards" on a screen where the player learns of his either having won or lost his competition with the machine. In the case of a win, the player may accumulate either free games or "points." The points do not entitle the player to win anything from the machine. Finally, these machines frequently feature prominently the words "For Amusement Only."

Your inquiry raises two questions. First, it must be determined if the machine thus played is a "game of chance," which cannot be conducted without a license issued by the Maine State Police. Second, if it is such a "game of chance," may it be licensed or is it the type of "machine" or "slot machine" that is ineligible for licensing?

Whether the operation described above constitutes a game of chance depends on whether it comes within the purview of 17 M.R.S.A. § 330(2). That section states that a

"Game of chance" shall mean a game, contest, scheme or device in which a person stakes or risks something

of value for an opportunity to win something of value and in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestant or participant may also be a factor therein. . . .

It is obvious here that the player must risk something of value (i.e., the face value of the coin inserted) in order to play the game. Although the successful player does not win coins, it appears that he does win "something of value," as that term is defined by 17 M.R.S.A. § 330(8).

"Something of value" means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property, or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. (emphasis added)^{1/}

Thus, by winning an opportunity to play at no cost additional games, or "free replays," the player is winning "something of value."

Finally, it is evident that a device which electronically "deals" cards will require a material element of chance to play successfully, even though the experienced player may develop a degree of skill. Because the outcome of the game thus depends to a material degree upon the element of chance, the game is a "game of chance." To operate or conduct such a game without first obtaining a license from the Chief of the State Police is a Class D crime.^{2/} 17 M.R.S.A. §§ 331(1), 346.

^{1/} The identical definition is found in the chapter of the Maine Criminal Code dealing with gambling, 17-A M.R.S.A. § 952(10).

^{2/} We should note that while this same analysis would apply to "pin ball machines," which are separately defined in 8 M.R.S.A. § 442, those machines are licensed by the municipalities under 8 M.R.S.A. § 441, and not by the State Police. Section 442 states:

The term "pin ball machine" shall be only those machines denominated as such which, upon insertion of a coin, slug, token, plate or disc, may be operated by the public generally for use as game, entertainment or amusement, whether or not registering a score, and which is operated for amusement only and does not dispense any form of payoff, prize or reward except free replays.

The second question is whether such a game of chance is eligible for licensing or if it is the type of "machine" or "slot machine" that may not be licensed.

Under 17 M.R.S.A. § 332(3), certain schemes are prohibited as follows: "No license shall be issued for the conduct or operation of any machine, slot machine or roulette, or for the operation of any games commonly known as policy or numbers." (emphasis added) "Machine" is defined by 17 M.R.S.A. § 330(3-A), which states that a

"Machine" shall mean any machine, however operated, the internal mechanism of which when set in motion and by the application of the element of chance may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tickets. (emphasis added)

"Slot machine" is defined by 17 M.R.S.A. § 330(7), which states that a

"Slot machine" shall mean any machine which operates by inserting a coin, token or similar object, setting the internal mechanism of the machine in motion, and by the application of the element of chance may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tickets. (emphasis added)

For purposes of your inquiry, the critical aspect of the above definitions lies in the nature of the reward, namely, "cash, premiums, merchandise or tickets." Only if the device in question delivers or entitles the successful player to one of these rewards does it fall within the category of machines which may not be licensed. These definitions, moreover, must be interpreted and applied in the context of the overall legislative scheme, which reveals that not all machines involving an element of chance and dispensing some form of reward are prohibited. Had the Legislature intended that result, it would have used the broader "something of value" language found in the definition of game of chance rather than enumerating four specific types of prizes.

Turning to the problem at hand, the decisive question is whether free replays constitute cash, premiums, merchandise or tickets. Giving those terms their plain meaning, see Central Maine Power Company v. Public Utilities Commission, 405 A.2d 153, 159 (Me. 1979), we can see no basis for concluding that any of them encompasses free replays. By contrast, the legislative definition of "something of value" specifically includes the "privilege of playing at a game or scheme without charge." If the Legislature wished to incorporate the concept

of free replays into its definition of "machines" and "slot machines," it is reasonable to assume that it would have used either the express language quoted above or the term "something of value."

For these reasons, we conclude that the devices about which you inquired are games of chance but are not "machines" or "slot machines." Accordingly, a license to operate such games may be issued to an eligible non-profit organization. See 17 M.R.S.A. § 332(1).

Our conclusion that "electronic poker" may be licensed necessitates that we address a related question which arises when the person in control of the device provides prizes in addition to the free replays awarded to the successful player by the machine. For example, you have informed us that the proprietor of a diner where one of these games is located gives free meals to the person who achieves the highest point total during the preceding week.

The fact that a gambling device may be licensed serves to except the operation of that device from the prohibition against unlawful gambling under the Criminal Code. Inherent in this exception is the requirement that the activity be within the scope of the license.

Any person licensed by the Chief of the State Police as provided in Title 17, chapter 13-A or chapter 14. . . shall be exempt from the application of the provisions of this chapter insofar as his conduct is within the scope of such license. 17-A M.R.S.A. § 951 (emphasis added)

Accordingly, if the operation of the device exceeds the scope of the license, then it becomes unlawful gambling under 17-A M.R.S.A. § 954 if all of the elements of that offense are otherwise present.

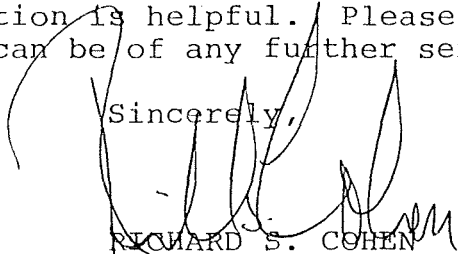
As explained above, "electronic poker" is eligible for licensing because it does not reward the successful player with cash, premiums, merchandise or tickets. In our view, the operation of the device is protected by its license only if none of these prizes are available. It follows logically that if the person controlling the game offers cash, premiums, merchandise or tickets as an additional prize, then the conduct must be viewed under the applicable gambling statutes as if the license did not exist. Unless some other exception applies, the conduct would violate the prohibition against unlawful gambling; this would not

only give rise to the possibility of criminal prosecution, but might also warrant a revocation of the license under the "just cause" provision in 17 M.R.S.A. § 343.

To summarize, the operator of a licensed "electronic poker" game is protected by the license only if he or she does not offer cash, premiums, merchandise or tickets as prizes to the players. Once such prizes are offered, the conduct should be scrutinized in light of the relevant provisions of the Criminal Code, with the probable result being that it will constitute unlawful gambling. While this is the probable result, the determination must be made on a case-by-case basis with the benefit of all the relevant facts. This Office will, of course, be available to assist the State Police in making that determination whenever it appears that an "electronic poker" game is being operated beyond the scope of its license.

I hope this information is helpful. Please feel free to contact this Office if we can be of any further service.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC/ec