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August 18, 2006

OPINION NO. 2006-06

GAMING: POKER; CONTEST;
GAMBLING

For all the reasons set forth above, it is the opinion of this office that the Event is not a "gambling game" as defined within the Gaming Control Act, and the organizers thereof are not required to be licensed by the Nevada Gaming Commission to present the contest to the public. NRS 463.160(1).

Dennis K. Neilander, Chairman
State Gaming Control Board
1919 East College Parkway
Carson City, Nevada 89706

Dear Chairman Neilander:

You have asked the opinion of this office on the following:

FACTS

A person who does not hold a gaming license issued by the Nevada Gaming Commission (Commission) would like to conduct an event in which contestants compete with one another for a specified and certain cash prize by playing poker (the Event). The contestants will be chosen based upon their play on a free internet poker website. The organizers of the Event, will allow contestants to play the game of poker against each other and not against the Event's organizers. Contestants will not pay any entry fee and no money or other negotiable instruments will be used during the Event. Each contestant will start the Event with the same number of free play chips. The free play chips will not be redeemable for cash or prizes. A specified and certain cash prize, announced prior to the start of play, will be awarded by the organizers of the Event to the winning contestant. The winning contestant will be determined by the play of the contestants. The free play chips will only be used to track the play of the contestants during the Event. The free play chips have no redeemable value, may only be used to track play and may not be used for any other purpose. These facts are assumed to be accurate for purposes of this opinion.

QUESTION

Does the Event expose a “gambling game” to the public for play, such that it requires a nonrestricted gaming license issued by the Nevada Gaming Commission?

ANALYSIS

A. Legal Standard. In the State of Nevada, a person must be licensed by the Commission to expose a “gambling game” to the public for play. See NRS 463.160(1).

A “gambling game” is defined in relevant part as “any game played with cards, dice, equipment or mechanical or electromechanical or electronic device or machine for money, property, checks, credit or any *representative of value*, including . . . poker” NRS 463.0152 (emphasis added).

A “representative of value” is defined as “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash.” NRS 463.01862.

The term “representative of value,” as defined, is inherently ambiguous.¹

The term “instrumentality”² is not defined within the Gaming Control Act (Act) or the regulations of the Commission. However, according to its plain meaning, an

¹ When a statute “is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.” *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. ex rel. County of Clark*, 120 Nev. 575, ___, 97 P.3d 1132, 1135 (2004). Citing *State, Bus & Indust v. Granite Construction*, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002).

Testimony on A.B. 419 before the Senate Committee on Judiciary, 69th Leg. (June 25, 1997) (Statement of Senator Ernest E. Adler). Senator Adler expressed his concern with the definition of “representative of value,” *stating it was so broad he was not sure what it included*. He predicted the Legislature would be back in the future fighting over this bill. Chairman Mark James stated “instrumentality” was in the original bill. Senator Adler replied he knew that, and in his opinion, that was why it was back in the committee. Chairman James stated he did not believe the Gaming Control Board had a problem with “instrumentality.” [Emphasis added.]

² Webster’s defines “instrumentality” as “1: something through which an end is achieved or occurs <damages incurred in a single incident through an *instrumentality* owned by the employer> 2 : something that serves as an intermediary or agent through which one or more functions of a larger controlling entity are carried out : a part or branch esp. of a governing body —compare ALTER EGO.” MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996).

instrumentality, as used in this context, would appear to include any physical or tangible thing.³

Applying an overly broad definition of “representative of value” to the definition of “gambling game,” a person could be criminally charged with conducting a “gambling game,” pursuant to NRS 463.160 and 463.360(3), when individuals play virtually any type of card or dice game using virtually any type of physical or tangible thing.⁴

However, because it is a category B felony,⁵ to engage in gaming without a license issued by the Commission, the expansion of activities that require a license may not be done by implication. See NRS 463.160 and 463.360(3), *see also Anderson v. State*, 95 Nev. 625, 600 P.2d 241 (1979).

Therefore, before applying what may be an overly broad definition of “representative of value,” to proscribe certain conduct as unlawful, we must first consider what the Legislature intended the term “representative of value” to encompass.

The ambiguity, inherent in the Legislature’s use of the term “representative of value,” has far ranging consequences which requires us to turn to the legislative history surrounding the enactment of “representative of value,” to determine if its meaning may be ascertained by reference to the legislative history. See *State v. Washoe County Pub. Defender*, 105 Nev. 299, 775 P.2d 217 (1989).

³ Testimony on A.B. 419 before the Senate Committee on Judiciary, 69th Leg. (June 25, 1997) (Statement of Harvey Whittemore, Attorney for the Nevada Resort Association “NRA”). Mr. Whittemore apologized, and said he assumed the question was whether there could be a definition of “representative of value,” and remarked “instrumentality” was something very specific. He read, under section 3 of A.B. 419, “used by a patron in a game,” and said; i.e., it had to be a game, “whether or not the instrumentality may be redeemed for cash.” He said it was very clear what they were talking about was something that has a physical attribute, it did not have to be redeemable for cash, but *had to be useable in a game*. So it had to be a physical, tangible thing; it could not be an idea. He gave the example of someone saying, everyone who steps up to the table gets \$20 if they just say “Howdy, folks.” He stressed that would not work, it had to be real-that was what instrumentality meant. Chairman James added the critical thing was that *it had to be used by a patron in a game*, which distinguished it from other things which might be given out promotionally. [Emphasis added.]

⁴ Taken to the extreme, playing poker for rocks would, under this overly broad definition of “representative of value,” qualify as a “gambling game.” If this were the intent of the legislature, then NRS 463.0152, defining a “gambling game” should read “any game played with cards, dice, equipment or mechanical or electromechanical or electronic device or machine for money, property, checks, credit or any physical or tangible thing. However, NRS 463.0152 does not say that. Instead, it says “representative of value.”

⁵ Nevada, it is a category B felony to engage in gaming without a license. NRS 463.160 and NRS 463.360(3). The penalty for violation can be imprisonment in the state prison from 1 to 10 years and a fine of up to \$10,000. NRS 463.360(3).

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Further, in deciding what constitutes a gambling transaction, the Nevada Supreme Court has distinguished between transactions in which a wager is present and simple contracts involving a prize.

In *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), a public offer was made to pay \$5,000 to any person having paid 50 cents who shoots a hole in one at a golf course. There, the Nevada Supreme Court held: “[G]enerally . . . the offer of a prize to a contestant who performs a specified act is not invalid as being a gambling transaction.” *Id.* at 27, 359 P.2d at 86. The Court further noted: the offer to pay upon performance of the specified act is a promise and the performance of the requested act constitutes acceptance and consideration that gives rise to a legally enforceable contract. *Id.* at 28, 359 P.2d at 86.

In *Gibson*, the Court held that a prize differs from a wager because, if he abides by the offer, the person offering the prize has no chance to gain back the thing being offered. On the other hand, each party to a wager has a chance of gain and a risk of loss. *Id.*

In *State, Gaming Comm’n v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992), the Nevada Supreme Court revisited its decision in *Gibson* and again held that a wager requires at least two parties, who each have a risk of loss and a chance of gain. *GNLV Corp.*, 108 Nev. at 457-458, 834 P.2d at 412. In so holding, the Court found that 50 cent tickets that were automatically awarded for every 75th dollar wagered were not the result of a legitimate wager. The tickets, which the patrons used to purchase certificates that could, in turn, be redeemed for cash and non-cash items, were merely prizes offered by the casino which it had no chance to win back. The award of tickets, the Court found, was mandated by the terms of the slot club contract and not by the uncertain outcome of the game.

In each of these Nevada Supreme Court holdings, the Court found that a game becomes subject to the Act only if wagers are being made: “In order to find gambling or gambling activity, a wager must be made.” See Op. Nev. Att’y Gen. No. 00-38 (2000).

The Act defines a wager as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.” NRS 463.01962.

The Nevada Legislature has also drawn a distinction between “gambling games” and simple “contests” involving a prize through its enactment of NRS 463.01463. A “contest” being defined in NRS 463.01463 as “a competition among patrons for a prize, whether or not: 1. The prize is a specified amount of money; or 2. Consideration is required to be paid by the patrons to participate in the competition.” NRS 463.01463.

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B. Applicable Rules of Statutory Construction. The general rule of statutory construction is that (the plain meaning of a statute, where clear on its face, controls.) *Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. ex rel. County of Clark*, 120 Nev. 575, ___, 97 P.3d 1132, 1135 (2004).

However, as noted in footnote 1, when a statute “is susceptible to more than one natural or honest interpretation, it is ambiguous, and the plain meaning rule has no application.” *Id.*

Further, “in construing an ambiguous statute, we must give the statute the interpretation that reason and public policy would indicate the legislature intended.” *Id.* at 1135, citing *State, Dep’t Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986).⁶

Given the penal nature of NRS 463.160 and 463.360(3), we must also take into consideration the fact that penal statutes are to be strictly construed and any ambiguity must be resolved against penalization. See *Shrader v. State*, 101 Nev. 499, 706 P.2d 834 (1985), see also *Anderson v. State*, 95 Nev. 625, 600 P.2d 241 (1979).

Statutes with criminal consequences may not be enlarged by implication or intendment beyond the fair meaning of the language used. *Id.*

C. Legislative Enactment of “representative of value.” Prior to 1997, it was well settled in Nevada that a person had to risk a sum of money or something of value to have a “wager.” This was affirmed by the Nevada Supreme Court in *Harrah’s Club v. State*, 99 Nev. 158, 659 P.2d 883 (1983), when the court held that promotional activities, such as free slot play or lucky bucks, etc., did not create wagering transactions, because “[t]he casino patron has no ‘stake’ at risk in these promotional ‘wagers,’ as they cost the patron nothing.” *Id.* at 160, 659 P.2d at 885. Therefore, according to the Court in *Harrah’s*, nonnegotiable items such as chips, tokens or coupons that are given free of charge to the patron to induce gambling, which could not be redeemed for cash, did not create a wager when presented for play. *Id.* Since the patron had not risked anything to play the game, the Supreme Court held that no legitimate wager could be found.

⁶ In FN 3, both Mr. Whittemore (representing the NRA) and Senator Mark James, underscored the fact that an “instrumentality,” in order to qualify as a “representative of value,” had to be “useable in a game.” A game, according to *GNLV Corp. Supra* and Op. Nev. Att’y. Gen 00-38 (2000), requires a wager. And a wager, according to NRS 463.01962, requires a risk of loss and an opportunity for gain on an occurrence for which the outcome is uncertain. Therefore, in order for an “instrumentality” to qualify as a “representative of value,” it must be useable, in a wager which, by definition, involves a risk of loss and an opportunity for gain on an occurrence for which the outcome is uncertain. Further, reason and public policy would indicate that the Legislature did not intend to make it a criminal offense whenever people play any game using any physical or tangible thing – absent a wager.

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In 1995, the Nevada gaming industry (the Industry) sponsored legislation to clarify that gross revenue does not include free and discounted portions of tokens, chips and other representatives of value. Senate Bill 399 (S.B. 399), 1995 Leg., 68th Sess. (May 11, 1995). The purpose and intent of S.B. 399 was to clarify the definition of gross revenue for tax purposes.

At that time, the State Gaming Control Board (the Board) opposed the legislation because of the potential negative impact on gross gaming revenue collected from nonrestricted gaming licensees. *Hearing on S.B. 399 Before the Senate Committee on Judiciary*, 1995 Leg., 68th Sess. (May 11, 1995) (statement of Brian Harris, Board Member opposing the bill), at 6.

The Nevada Legislature chose the Industry's position on the legislation and adopted an amendment indicating that gross revenue would not include any portion of the face value of any chip, token or other representative of value won by a licensee from a patron from which the licensee could demonstrate that it or its affiliate has not received cash. NRS 463.0161(2)(c).

Following the 1995 legislative session, the Board interpreted the changes from S.B. 399 to mean that a nonrestricted gaming licensee could deduct losses, paid out on wagers, only when the wagering instrument used to create the wager was redeemable for cash. It was the Board's position that a wager could not be created by a non-redeemable representative of value, which was sometimes referred to as non-negotiable, because such instrumentalities have no value.⁷

The Industry took the opposite view, believing that S.B. 399 allowed for the deductibility of payouts from wagers that were created from non-redeemable, as well as redeemable, representatives of value.

This disagreement, concerning the tax effect arising out of the use of non-negotiable representatives of value, caused the Board to seek legislative clarification of the issue from the 1997 Nevada Legislature.

Assembly Bill 421 (A.B. 421), sections 3 and 4, provided a new definition for "representative of value" and "specific wager," which the Board believed would clarify the Legislature's 1995 actions in enacting S.B. 399. See A.B. 421 as introduced Nev. 69th Legislative Session (1997).

⁷ The position of the Board, was consistent with the then existing position of the Nevada Supreme Court, as set forth in *Harrah's Club*, 99 Nev. at 158, 659 P.2d at 883, where the Court held that promotional activities, such as free slot play or lucky bucks, etc. did not create wagering transactions because "the casino patron has no 'stake' at risk in these promotional 'wagers' as they cost the patron nothing." *Harrah's Club*, 99 Nev. at 160, 659 P.2d at 885.

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The Industry, through its trade organization the NRA, opposed the Board's interpretation of S.B. 399 and presented testimony to counter the Board's position.

The Industry's position was explained in the Senate Committee on the Judiciary, by Harvey Whittemore, attorney for the NRA, where *Mr. Whittemore stressed that if the casinos have a risk of loss, then the instrumentality used to place the wager must have value and be a representative of value.* Mr. Whittemore made this argument in more tangible form, when he posed the question of whether a person would pay \$5 for a \$1,000 face wagering value non-redeemable chip from a gaming licensee, and asserted that they would do so. *Hearing on A.B. 421 Before the Senate Committee on Judiciary, 1997 Leg., 69th Sess. (June 25, 1997) (emphasis added).* Additional testimony introduced, during the 1997 Legislative Session, also supported this position.⁸

To better understand the Industry position, assume, for purposes of illustration, that a \$100 token (which has no cash redemption value) is given by a casino, to a patron, free of charge. Further assume that this token is freely transferable and permits the holder of the token to make a \$100 wager as if the token were cash. In this example, the token has some objective market value since the token, when used in a wager, creates a contract right to have the wager honored by the casino. Whether it is sold for \$100, \$50 or \$5, it has market value. In addition, once the token is used in a game, i.e., in a wager, both the casino and the patron have a risk of loss. The casino may lose the face value of the token if the patron wins his wager and the patron may lose what would otherwise be the market value of the token, if the casino wins the wager. The token, in this example, has value both to the patron and the casino and would therefore qualify as a "representative of value."⁹

The Industry's position was also explained in the Assembly Committee on the Judiciary, by Robert D. Faiss, attorney for the NRA, where Mr. Faiss, citing examples from the United States Court of Appeals for the Sixth Circuit and the United States Tax

⁸ The instruments given to patrons entitle them to a wager and have mathematically demonstrable value as evidenced by the current market in which people purchase promotional coupons at below wagering value to place wagers. *Hearing on A.B. 419 Before Assm. Com. on Ways and Means, 1997 Leg., 69th Sess. (June 16, 1997) (statement of Mark Lerner, attorney for Alliance Gaming).*

⁹ As it is used in the statutes, and as discussed in the legislative history, a "representative of value" is an "instrumentality" which is used in a game, i.e, used to enter into a wager as one could alternatively enter into a wager with cash, credit, property or checks. Inherent in the definition is that the instrumentality will be used in a game, as part of a wager, in which the instrumentality has value and the patron and the casino each have a risk of loss.

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Court, underscored the negotiable and contractual nature of a “representative of value.”¹⁰

The Legislature eventually agreed with the Industry and adopted the Industry’s definitions of “wager” and “representative of value” which were intended to clarify, that for purposes of determining gross revenue, instrumentalities used to wager, whether they are chips, tokens or other “representatives of value,” have value if they are accepted by the gaming licensee and given value by the licensee in a wagering transaction. The value, as argued by the Industry and adopted by the Legislature, lies in the contract right to have the wager honored by the casino.¹¹

D. Legislative Intent. The underlying axiom of statutory construction is to effectuate the intent of the legislature. *See Harris Associates v. Clark County School Dist.*, 119 Nev. 638, 81 P.3d 532, 534, (2003). Legislative intent may be determined by examining the circumstances which propelled enactment of a statute. *Id.* Moreover, if a statute is doubtful, an agency should adopt the construction least likely to produce mischief. *See Prouse v. Prouse*, 56 Nev. 467, 471, 56 P.2d 147, 148 (1936).

An extensive review of the legislative history surrounding the adoption of S.B. 399 and A.B. 421, reveals that both S.B. 399 and A.B. 421 were intended to address what would and would not be included as gross revenue for tax purposes.

At no point, during either the 1995 Legislative Session or the 1997 Legislative Session, was there any discussion, by the Legislature, the Board or the Industry, concerning any intent, on anyone’s part, to expand the scope of what constitutes

¹⁰ In 1995, the United States Court of Appeals for the Sixth Circuit, in the context of a bankruptcy case, determined that wagers have value because “. . . the placing of a bet gives rise to legally enforceable contract rights.” (*In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995)). The Court analogized a gaming wager to an investment in a futures contract and stated that the investment may turn out badly but “the contractual right to receive payment in the event that it turns out well is obviously worth something.” Likewise, the Internal Revenue Service has determined that instruments representing a chance to win have value. In upholding the IRS’s determination that a sweepstakes ticket has value, the United States Tax Court stated: “[a]n Irish Sweepstakes ticket has but one value – the chance that the horse assigned to it will place in the race. An assignment of the proceeds of a ticket of this nature is an assignment of the right it represents – the right to collect if the horse wins.” *Braunstein v. Commissioner*, T.C. Memo 1962-210 (August 31, 1962). *We submit that whether or not a wagering instrument can be redeemed for cash is irrelevant to whether it has a value. The value, as stated by the courts, is the contract right to have the wager honored by the casino.* Hearing on A.B. 419 Before Assembly Committee on Judiciary (May 20, 1997) (emphasis added) (statement of Robert D. Faiss, Attorney for NRA).

¹¹ This marked a departure from the Nevada Supreme Court’s prior ruling in *Harrah’s*, *supra*, where the Court held that promotional activities such as free slot play or lucky bucks, etc. did not create wagering transactions because “the casino patron has no ‘stake’ at risk in these promotional ‘wagers’ as they cost the patron nothing.” *Harrah’s*, 99 Nev. at 160, 659 P.2d at 885. From 1997 forward, instrumentalities used in a game i.e., as part of a wager, whether they are chips, tokens or other “representatives of value,” have value if they are accepted and given value in a wagering transaction.

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regulated and/or illegal gambling activity in the state of Nevada or to restrict the scope of what constitutes a legal "contest," in the state of Nevada.

Therefore, since there is absolutely no indication that the Nevada Legislature ever intended to modify the scope or reach of the Act, so as to expand the range of illegal "gaming" activity, to include legal contest activity, we may not, by implication, do so here. See *Shrader vs. State, supra*.

Further, it is clear from the legislative history, surrounding the enactment of both S.B. 399 and A.B. 421, that the Legislature did intend to adopt the definition of "representative of value" advanced by the Industry. That definition being, an instrumentality which has value, whether or not it may be redeemable for cash, because it may be used in a game, i.e., used to wager as one could alternatively enter into a wager with cash, credit, property or checks and because its use, in a wager, gives rise to legally enforceable contract rights.

E. "Contests" versus "Gambling games." A contest is defined as "A competition among patrons for a prize whether or not: 1. The prize is a specified amount of money; or 2. Consideration is required to be paid by the patrons to participate in the competition." NRS 463.01463

Here, the Event is "a competition among patrons for a prize." Further, although not required by NRS 463.01463, the prize is a specified amount of money and no consideration is required to be paid by the patron to participate in the competition.

The Event is not a "gambling game" because no "representatives of value" are used in a game, no wagering activity is involved and the awarding of the prize is not uncertain.

As in *Gibson, supra*, if they abide by the offer, the organizers of the Event have no ability to win back any portion of the specified and certain cash prize which must, pursuant to the rules of the Event, be awarded. No risk of loss and opportunity for gain exists. Consequently, no wager exists.

Like the promotion in *Gibson, supra*, the producers have "no chance to gain back the thing being offered." As such, it appears that the specified and certain cash prize, given at the conclusion of the Event, is simply a contest prize.

Finally, the chips have no value and there can never be a secondary market for the chips. Nor can anyone alternatively purchase the opportunity to participate in the contest. The chips are not being used in lieu of cash, credit, property or checks, to enter into a "wager," in which the chips have value and the contestants and/or the promoter have a risk of loss.

Conducting a “contest” does not require a license issued by the Commission. A review of the Event indicates that the Event is a “contest,” among contestants, for a specified and certain cash prize and is not a “gambling game” which requires licensing by the Commission.

F. 2000 Opinion of the Attorney General addressing MGM’s proposed internet gaming activities. The Office of the Attorney General authored a formal published opinion, Op. Nev. Att’y Gen. No. 00-38 (2000) (2000 Opinion), which addressed issues dealing with internet poker. Some of the issues addressed in the 2000 Opinion, appear to be similar to those raised by the Event.

However, the facts currently under review are clearly distinguishable from those analyzed in the 2000 Opinion. There, the free play credits had value to the operator as well as to the player. That is because the determining factor, in whether the player won and received a ticket redeemable for cash or merchandise, as well as whether the MGM had to pay any cash or merchandise to the player, was whether the player or the MGM won each play of the virtual game. As such, the free play credits had value to both parties, as part of wagering transaction, in which the payment of a prize was not certain and both participants had a risk of loss and an opportunity for gain.

Under the facts being reviewed for the Event, the payment of a specified cash prize is absolutely certain. The organizers are required, by the rules of the Event, to pay a specified and certain cash prize. The organizers of the Event have no ability to reduce any portion of the specified and certain cash prize and no risk of having to pay more than the specified and certain cash prize. The risk of loss and opportunity for gain, for both the organizers and the players of the Event, are fixed and definite at the outset of the Event. The players have no risk of loss because they pay nothing to play. The organizers have no opportunity for gain because the award of a fixed prize is certain. Given the facts presented, the Event is a contest and not a wagering event or “gambling game” as discussed in the 2000 Opinion.

Finally, referring to the 1997 legislative change to the term “representative of value,” the 2000 Opinion contains the statement; “No longer did a patron have to risk a sum of money or other thing of value to create a gaming contract, or more accurately, a wager.” This statement, contained in Op. Nev. Att’y Gen. No. 00-38 (2000), warrants clarification:

In enacting A.B. 421, the 1997 Legislature did not intend or decide that a patron no longer had to risk “a thing of value” to create a wager. Instead, what the Legislature intended and decided was that a “representative of value,” regardless of whether or not it could be redeemed for cash, was a “thing of value.”

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The above statement should, therefore, be clarified to read:

“No longer did a patron have to risk a sum of money to create a gaming contract or more accurately, a wager. A wager could now be created so long as a “representative of value” was risked on an occurrence for which the outcome is uncertain. A “representative of value” being, an instrumentality which has value, whether or not it may be redeemable for cash, because it may be used in a game, i.e., used to wager as one could alternatively enter into a wager with cash, credit, property or checks and because its use, in a wager, gives rise to legally enforceable contract rights.

CONCLUSION

In the State of Nevada, a person must be licensed by the Nevada Gaming Commission to expose a “gambling game” to the public for play. NRS 463.160(1). For all the reasons set forth above, it is the opinion of this office that the Event is not a “gambling game” as defined within the Gaming Control Act, and the organizers thereof are not required to be licensed by the Nevada Gaming Commission to present the contest to the public.

Sincere regards,

By:
GEORGE J. CHANOS
Attorney General