

Cyber Café's and Sweepstakes in Colorado 11/1/2014

The following report sums up the cyber café controversy as it is currently. For those municipalities, district attorneys, and other law enforcement officials considering enforcement of the Colorado Attorney General's opinion No. 14-03. The history in Colorado, as well as the other States cited in the Attorney General's opinion, should be carefully considered. In fact, the very opinion itself should be carefully weighed against the facts.

What Defines a Sweepstakes?

Webster's Dictionary defines a sweepstakes as "A promotional drawing in which prizes are given away at no charge to the participants." Colorado defines sweepstakes under C.R.S. 6-1-802(10) as "any competition, giveaway, drawing, plan, or other selection process or other enterprise or promotion in which anything of value is awarded to participants by chance or random selection that is not otherwise unlawful under other provisions of law; except that "sweepstakes" shall not be construed to include any activity of licensees regulated under article 9 or article 47.1 of title 12, C.R.S., or part 2 of article 35 of title 24, C.R.S." The end of this statute states clearly that sweepstakes cannot be construed to include gambling activities. Colorado's laws governing sweepstakes (C.R.S. 6-1-801 through 6-1-804) were written and passed in the year 2000 and have had only minor updating as the internet and technology have progressed substantially since then. Cyber Café's currently operating in Colorado goes above and beyond the requirements for a legal sweepstakes in Colorado by current statutes.

Many companies such as Publisher's Clearing House, Coca-Cola, McDonalds, and others utilize sweepstakes as a promotion for the products they are selling. All legal sweepstakes have a way for participants to enter without being required to purchase anything. Most require you to mail in for your free entry. Cyber Café's are no different. In fact, participants at Cyber Café's are usually not required to mail in anything and can receive their free entries every day by simply asking for them. The general rule of "no purchase necessary" is essentially made easier for participants by cyber café's than the larger companies that utilize sweepstakes promotions.

How Does a Cyber Café Sweepstakes Work?

Internet café's have been in existence since the internet has gained popularity throughout the country. As the cost of internet access and computers have become more affordable, and other companies such as Starbuck's give away free Wifi service, internet café's have been finding different ways to remain a viable business. Many of the customers that frequent cyber café's cannot afford high speed internet service and/or a computer. Many computers at cyber café's offer access to programs such as WORD, EXCEL, and POWERPOINT which many people can't afford even if they can afford a computer and internet service. Of

course cyber café's do not want to limit their customer base so they promote the sale of their products and services with a sweepstakes, and create an atmosphere that people enjoy being in.

Sweepstakes software that most café's utilize are independently certified, independently administered, and are nothing more than a video game animation designed to be entertaining for patrons to reveal their sweepstakes entries. As with all sweepstakes, patrons cannot buy sweepstakes entries and there is no purchase necessary to participate. Patrons typically get their own account assigned to them with a personalized login ID so that when they purchase internet time or workstation usage, their information is privately stored and unique to the individual patron. Once a patron has their own account, they can simply receive free entries into the sweepstakes every day. No purchase is ever required. If a patron chooses, they may purchase a product in which they will receive additional free sweepstakes entries with the purchase of a product. This is inherent in all sweepstakes. It is important to note that while a patron is revealing their entries, the product they purchased is not being utilized. For instance, a patron purchases ten minutes of internet time and receives 100 free sweepstakes entries. The patron can choose to reveal the entries instantly, which will not use any of their purchased internet time and requires no game play either. Or a patron can choose to utilize the "fun reveal" which will use the simulated video game to reveal their entries. The patron's purchased internet time is not being utilized while sweepstakes entries are being revealed either way.

Independent certification labs such as NMI Metrology & Gaming and Nick Farley and Associates are laboratories which evaluate sweepstakes software for compliance. These independent labs go through the software coding to ensure that the sweepstakes software has no random generation features, that game play does not determine the outcome of the entry, that there is a finite pool of entries, that the number of winning entries, odds of winning and rules of the sweepstakes are readily accessible before entry into the sweepstakes, and to ensure that the purchased product is not being used to reveal the sweepstakes entries. These certification labs also ensure that there is a way to reveal entries without the use of a simulated game and that these entries are treated the same way as any other entries.

Independent administration ensures that the Café owner has no control over the sweepstakes, cannot manipulate the sweepstakes, cannot view the actual order of winning entries, and that the software complies with all federal, state and local regulations.

The games themselves, while simulating popular games such as slots, keno, cards and others are nothing more than a video game and/or entertaining display. The games have no influence on whether the patron wins and are independently verified as such. The workstations are nothing more than standard desktop computers which are readily available for purchase at any retail venue that sells such items. It is not uncommon for these types of games to be utilized to reveal sweepstakes entries. Publishers Clearing House uses roulette, bingo, slots, and lottery on its websites as an entertaining way for patrons to reveal their sweepstakes entries. Those can be viewed at the following links: lotto.pch.com/ slots.pch.com/ games.pch.com/token-games/roulette bingo.pch.com/

Historical Facts in Colorado

In July of 2013 the Colorado Bureau of Investigation had initially issued a cease and desist order to a bar that was utilizing an internet access totem, which was promoted with sweepstakes software. Attorney Charles E. Humphrey Jr. Colorado Bar# 12112 and operator of www.gambling-law-us.com issued a response to CBI in August of 2013. It is important to note that Mr. Humphrey is one of the most knowledgeable gaming attorneys in the country. In his response to CBI he stated "Sweepstakes prizes are specifically exempt from Colorado's anti-gambling laws. The Colorado sweepstakes enabling statutes are at C.R.S 6-1-801 through 803. A careful review of the methodology of the System as set forth in the NFA Report will document complete compliance with the requirements of those statutes. Several alternative means of free entry are provided. The user is presented with screens of information setting forth the rules, terms and conditions before being able to use the System machines. That there is an alternative means of free entry is prominently displayed." CBI met with the parties involved and after careful review of the sweepstakes software, realized that there was no justification under the current Colorado statutes to keep the cease and desist order in place. It was demonstrated at this time to CBI, and CBI determined that the devices did not constitute an illegal gambling device. The meeting was video recorded by CBI agents.

In early April 2014, the AG's office, CBI, Lakewood Police Department reps, and State Liquor Enforcement reps met with a two software vendors, two café and kiosk owners, and a consultant firm to discuss the issue further. The meeting was video recorded by the AG's office. All of law enforcement's questions are answered without objection and most are receptive except for a liquor enforcement representative, Patrick Maroney. Mr. Maroney insists that "he doesn't care what anyone says, his mind is made up that they are gambling devices." Mr. Maroney previously worked in the gaming division. Mr. Maroney is adamant that kiosks are not placed in retail liquor stores, to which all parties agree to not place kiosks in retail liquor stores to appease Mr. Maroney. At no time did any other law enforcement official object to the business model or determine that it was illegal.

In late April of 2014, the Colorado legislature fast tracked a bill at the behest of Colorado's gaming industry and lobbyists. HB14-1392 was introduced on April 24th, 2014 and the committee first read it on April 29th, 2014. Very little time was given for any opposition to react as the bill was passed by the full house by May 1st, 2014. During committee testimony several lawyers for the gaming industry and others testified that the existing statutes have not kept up with technology and that this new legislation was needed to close down Cyber Café's utilizing sweepstakes software. The full testimony can be heard at this link. http://coloradoga.granicus.com/MediaPlayer.php?view_id=17&clip_id=5904 The bill was tabled indefinitely in the senate committee once enough information had come to light demonstrating that sweepstakes software is not the same as gambling.

Nevertheless, the liquor enforcement division under the direction of Mr. Maroney begins issuing cease and desist orders to Elks clubs and bars under threat of losing their liquor licenses.

In October of 2014 Colorado State Attorney General John Suthers issued opinion #14-03 classifying sweepstakes software utilized at cyber café's as illegal gambling. This is clearly and overstepping of authority as the legislature had already considered legislation and chose not to pass it. Furthermore, it is known that John Suthers will be running for Mayor of Colorado Springs and likely issued the opinion so late in his term to garner support for his campaign from the gaming industry.

Historical Facts in Other States

Sweepstakes software has been present in other States for over 10 years. In Florida, North Carolina, and Georgia, one of the pioneering companies known as Allied Veterans utilized a sweepstakes software to promote internet sales. The company flourished and raised money for various veterans' organizations. Members of the Florida legislature were investors or partners including a former lieutenant governor. When it was discovered that Allied Veterans was not contributing as much money to the veterans' organizations as advertised, it quickly turned into a legal battle which took down some politicians that were involved as well as the lieutenant governor. When politicians realized they could use the issue to hurt their opponents politically, it turned into a full blown circus. The Florida legislature as well as other States took action to close Allied Veterans and any other similarly operated businesses under their states' gaming laws. It is important to note that there was never a question of legality until Allied Veterans had misrepresented what it was doing for veteran organizations.

Many court cases brought by Florida state against other legally operated businesses were lost or thrown out of court altogether. It is true that many have been won at the appellate court level. However, in all of the cases presented in the Colorado AG's opinion where the business operator decided to remain in business, their software was changed to comply with the court ruling and/or legislation and they remain open to this day. In other states such as North Carolina and Ohio, the state legislature's passed broadly sweeping legislation. Florida's legislature eventually did the same after wasting hundreds of thousands in tax payer funds fighting court cases. Other states that followed suit were Alabama, Mississippi, Georgia, South Carolina, and California. In all of the States that have written legislation, the software companies simply change their programming to comply with the new law. Or, owners change there business model to comply with the new laws.

The fact is, in every state where the legislature and/or executive branch has tried to prohibit "sweepstakes café's", these types of businesses still operate in all of those states today. The states that have tried the hardest to close them down have written numerous laws, wasted countless law enforcement resources, and spent millions of tax payer dollars to no avail. History teaches us that prohibition does not work and other states such as Texas, Michigan, and even North Carolina are now abandoning the prohibition approach and leaving regulation to local control.

Problems within the Colorado Attorney General's Opinion

First of all, as stated earlier, the Colorado legislature has already considered a bill that would have banned sweepstakes at cyber café's and chose not to pass it. Also, several attorneys testified to the house committee that a new law would be necessary to prohibit existing cyber cafés' since the current statutes do not warrant such actions. The AG's office does not have the authority to circumvent the state legislature and any law enforcement agency that acts on the AG's opinion risks countersuits, injunctions, and the wasting of their local resources and tax payer funds.

Second, the AG's answer to question 1 (Do the games offered for play at sweepstakes café's in Colorado comply with Colorado's legal requirements for sweepstakes?) states that the sweepstakes games offered at sweepstakes café's do not comply with the existing sweepstakes statutes "Because games offered for play at sweepstakes café's constitute illegal gambling activity, they do not qualify as sweepstakes by definition." It has been discussed earlier that there is no purchase necessary and the games are free, so by definition the patrons do not risk anything by entering the sweepstakes. Furthermore, if a patron chooses to purchase a product such as internet time, they are purchasing a valid product and cannot purchase sweepstake entries. Internet time sales and/or selling the usage of a computer are not illegal in the state of Colorado. Playing a video game simulation, whether it be stealing a car or murdering someone such as the simulations in the video game Grand Theft Auto, or simulating a slot style game such as Publishers Clearing House slot games do not constitute a real crime or illegal gambling activity respectively. The AG has stretched the language in the statute which states "sweepstakes to exclude any activity that is otherwise unlawful under other provisions of the law" to conclude that simulated slots are the same as real slots. If the AG interprets the law this way, and the law is to be applied evenly, then the State government should immediately ban all access to the Publisher's Clearing House websites from any computer with internet access in the State. Notably in the summary section of the opinion, the AG conveniently left off the last part of the statute which states loosely that sweepstakes are not to be construed as gambling activity.

Third, the AG's answer to question 2 (Do the games offered for play at sweepstakes cafés in Colorado constitute illegal gambling?) states that "Yes. Under Colorado law gambling activity is defined as risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event...over which the person taking a risk has no control...". He admits that Colorado courts have not directly considered if the activity offered at sweepstakes café's would meet the standard and then proceeds to comment that "every state court that has directly considered this question has found that, under comparable definitions, the activity offered at sweepstakes cafes constitutes illegal gambling." The first thing wrong with this comment is that it is patently false. He writes that "every state court...has found that...sweepstakes cafes constitute illegal gambling" when in fact there have been numerous state courts that have found sweepstakes café's to be in full compliance with their respective States' laws. Including one of the cases he selectively sites in his opinion. The second thing wrong is that he does not acknowledge that patrons are not required to purchase anything to enter a sweepstakes

at any sweepstakes café currently operating in Colorado. This eliminates the element of consideration or risk which is required to constitute gambling by Colorado statutes. The third thing wrong with this answer is that the AG's job is to enforce law based on Colorado's statutes, not what other States have done or what their laws are. The United States does not convict its businesses or citizens of crimes if they broke the law of another country while operating in the United States. The same should hold true for Colorado businesses and citizens with regards to another's States laws.

Fourth, the AG has perverted what a cyber café does to construe it as illegal gambling. Selling internet time and/or computer workstation time is not illegal gambling and is not an illegal activity. Allowing someone to enter a contest for free is not illegal gambling and is not illegal activity. Using a standard desktop computer is not an illegal gambling device. Simulating a slot or other game is simply playing a video game and is not illegal gambling and is not an illegal activity.

Fifth, throughout all the selective citations from other State's court cases (which we previously discussed should have no bearing on Colorado) the individual business models targeted do not resemble the cyber café's in Colorado. For instance, not one of the businesses in the cases and/or laws cited from the other States was an independently certified sweepstakes. Not one of the businesses in the cases and/or laws cited from the other States was an independently administered sweepstakes.

Sixth, a case selectively cited for one excerpt at the beginning of page 4 in the AG's opinion, specifically the case of *G2, inc. v. Midwest Gaming, Inc.* As cited in *The History of Internet Cafés And The Current Approach to Their Regulation* By M.W. Dunbar and D.R. Russell "the United States District Court for the Western District of Texas considered the legality of an Internet cafe operation nearly identical to the Alabama operation.⁷⁵ Although the court ultimately dismissed the case for lack of jurisdiction, it presented legal arguments under Texas and federal statutes worthy of consideration in this Article.⁷⁶ Like other states, the Texas Penal Code criminalizes possession of gambling devices.⁷⁷ As both the chance and prize requirements were readily apparent to the court,⁷⁸ the only element at issue was the consideration element.⁷⁹ The court looked at Texas case law as well as case law from other states and ultimately agreed with the operator that the element of consideration was missing from the sweepstakes operated by the Internet cafe.⁸⁰ In reaching this conclusion, the court looked at the basic case law definition of "consideration," which is defined as "a present exchange bargained for, in return for a promise."⁸¹ The court stated that in the context of a lottery or gift enterprise, "consideration has been found where participants were, in essence, required to purchase a theater ticket in order to hear whether said participant had won and in order to respond in time to claim the prize."

As the facts would have it, Colorado cyber café's resemble closest to this court's decision where they essentially determined that, due to the conflicting nature of the existing state laws presented, and that no clear statute concerning the current technology involved in sweepstakes software exists, the court had no law to make a determination on, and a basic interpretation of consideration had to be used.

Seventh, the AG's opinion never classifies "sweepstakes café's as illegal gambling houses. Instead, he claims that illegal gambling is occurring in sweepstakes cafes. It is true that any sweepstakes could be misused

by and individual just as any businesses products could be misused. For instance, a hunting rifle manufacturer makes their products for game hunting and is not held responsible if a customer accidentally shoots themselves with one of their products unless the product malfunctioned. McDonald's is not held responsible for a patron gaining weight for consuming too many of their higher calorie foods. There have been documented cases relating to all sweepstakes where patrons purchased excessive products to continue participating in the sweepstakes. This does not automatically classify a business promoting products through a promotional sweepstakes as running an illegal gambling operation. To the contrary, courts have found that as long as the business complies with existing sweepstakes laws, it is the Patron's personal responsibility to utilize a sweepstakes in accordance with the terms and conditions set forth in the rules. Noticeably absent in the controversy surrounding Colorado's cyber cafes is the lack of consumer complaints. Most cases where patron's purchased excessive products, the patrons blamed the business for misleading advertising or mailers that claimed they were a guaranteed winner. Colorado's cyber cafes have no logged complaints whatsoever from any patron's.

Conclusion

Given the facts surrounding the cyber café controversy in Colorado, it would be premature for any law enforcement division and/or municipality to act on the opinion of the outgoing Attorney General. After all, it is an opinion which attempts to circumvent the legislative process, shrouded with faults, and likely put together at the behest of the gaming industry in exchange for political favors.

It is known that the gaming industry will be putting forth another bill during the next legislative session. It would be wise for local municipalities and law enforcement to let the legislative process work to solve the controversy rather than expend local tax payer funds, cause the layoffs of numerous employees and jeopardizing the well being of Colorado families, and expend limited resources on an issue that will likely be determined properly in the next few months.

History shows us that acting on this opinion now could open the door to costly lawsuits filed by café owners that would last beyond the time it will take the legislature to write a clear law during the next session. In addition, any injunction filed by café owners would likely be upheld given the current circumstances and facts surrounding the issue.