

May 11, 2018

The Honorable Michael C. O'Malley  
Cuyahoga County Prosecuting Attorney  
1200 Ontario Street, 9th Floor  
Cleveland, Ohio 44113

SYLLABUS:

2018-012

A Queen of Hearts game comprising multiple rounds during which prizes are awarded to multiple participants, is a "pool not conducted for profit" as defined in R.C. 2915.01(XX), so long as (1) the operator of the game has prepared and planned the game in a thoughtful, meticulous way, (2) the game is played in accordance with a defined set of rules, (3) the game is one in which a participant gives a valuable consideration for a chance to win a prize, and (4) the total amount of consideration wagered by participants during the game is distributed to a participant or participants by the end of the game's final round.



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OPINION NO. 2018-012

The Honorable Michael C. O'Malley  
Cuyahoga County Prosecuting Attorney  
1200 Ontario Street, 9th Floor  
Cleveland, Ohio 44113

Dear Prosecutor O'Malley:

We have received your request regarding the operation of a Queen of Hearts game. R.C. 2915.02(A)(2) prohibits a person from operating, among other things, a “scheme of chance.” *See also* R.C. 2915.03(A)(1), (2) (prohibiting an owner of a premises from using the premises for gambling in violation of R.C. 2915.02 or from recklessly permitting the premises to be used for such purposes); R.C. 2915.04(A) (prohibiting a person from playing a scheme of chance while at a variety of establishments, including a restaurant or tavern). “Whoever violates [R.C. 2915.02(A)(2)] is guilty of gambling, a misdemeanor of the first degree.” R.C. 2915.02(K).

R.C. 2915.01(C) defines a “scheme of chance” to include “a slot machine,” a “lottery,” a “numbers game, pool conducted for profit, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.”<sup>1</sup> A “scheme of chance” does not include a “pool not conducted for profit.” R.C. 2915.01(C). R.C. 2915.01(XX) defines a “pool not conducted for profit” to mean “a scheme in which a participant gives a valuable consideration for a chance to win a prize and the total amount of consideration wagered is distributed to a participant or participants.” You ask whether a Queen of Hearts game operated by a local tavern is a “pool not conducted for profit,” as that phrase is defined in R.C. 2915.01(XX) and used in R.C. 2915.01(C).

Queen of Hearts is a popular wagering game that may be played in accordance with a variation of rules. For the purpose of this opinion, we consider whether a Queen of Hearts game operated pursuant to the rules described in your letter is a “pool not conducted for profit,” as defined in R.C. 2915.01(XX).<sup>2</sup> We do not express an opinion as to whether a Queen of Hearts

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<sup>1</sup> A slot machine and a lottery are not schemes of chance if authorized by R.C. Chapters 3772 and 3770, respectively. R.C. 2915.02(C).

<sup>2</sup> Legal counsel for the tavern that operates the Queen of Hearts game at issue provided us a description of the game that differs slightly from the description in your letter. The Ohio

game operated in accordance with a set of rules that differs from the rules described in your letter, is a “pool not conducted for profit” under the statute.

In the situation you describe, the tavern places all the cards from a standard deck of playing cards face-down on a board and assigns each card a number from one to fifty-two.<sup>3</sup> The tavern writes the assigned numbers on the backs of the cards. The assigned numbers, not the faces of the cards, are visible to those in view of the board. No two cards are assigned the same number. The object of the game is to guess the location of the queen of hearts.

A person participates in the tavern’s Queen of Hearts game by purchasing one or more tickets from the tavern at a price of \$1.00 per ticket. The participant records his name on the ticket and the number of the card he believes to be the queen of hearts. The tavern draws a ticket each week. Upon drawing a ticket, the tavern reveals the face of the card that was assigned the number written on the selected ticket. The drawing continues each week until the tavern draws a ticket that correctly guesses the number assigned to the queen of hearts (the “winning ticket”). The tavern continues to sell tickets until the winning ticket is drawn. The participant who submitted the winning ticket (the “winning participant”) is awarded a prize consisting of the proceeds of the tavern’s ticket sales.

You explain that recently, upon drawing a winning ticket, the tavern awarded the winning participant only 90% of the proceeds from the tavern’s ticket sales. The tavern used the remaining 10% of the proceeds to fund a new pot of prize money for another Queen of Hearts game. You question whether the tavern’s Queen of Hearts game, under these circumstances, is a prohibited “scheme of chance.”

The tavern states that its Queen of Hearts game consists of four rounds, and that therefore, its Queen of Hearts game is not complete until the queen of hearts has been revealed four times. A round begins when the tavern places all fifty-two cards of the deck face-down on the board with their assigned numbers, and ends when a winning ticket is drawn. The tavern explains that at the end of the first round, the winning participant receives 90% of the proceeds from the tavern’s ticket sales. The tavern uses the remaining 10% of the proceeds to fund a

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Attorney General is not a finder of fact. *See* 2006 Op. Att’y Gen. No. 2006-006, at 2-61 n.6 (determinations that “require[] findings of fact ... exceed the capacity of the opinions function”). Accordingly, for the purpose of addressing your inquiry, we rely upon the description of the Queen of Hearts game in your letter. We note, however, that the differences between the two descriptions are not material to the conclusion in this opinion.

<sup>3</sup> A standard deck of playing cards contains a total of fifty-two cards that together represent four suits: spades, diamonds, clubs, and hearts. *See* Courtney Taylor, *The Features of a Standard Deck of Cards*, THOUGHTCO., available at <https://www.thoughtco.com/standard-deck-of-cards-3126599> (last visited May 9, 2018). There are thirteen cards in each suit, consisting of numbers two through ten, a jack, a queen, a king, and an ace. *Id.*

portion of the prize money for the next round. The same method is used to compensate the winning participants of the second and third rounds. The winning participant of the fourth and final round receives 100% of what remains of the proceeds of the tavern's ticket sales. Thus, it is the tavern's position that its Queen of Hearts game is a lawful "pool not conducted for profit" as set forth in R.C. 2915.01(XX).

R.C. 2915.01(XX) defines a "pool not conducted for profit" to mean "a scheme in which a participant gives a valuable consideration for a chance to win a prize and the total amount of consideration wagered is distributed to a participant or participants." The tavern's Queen of Hearts game is a scheme in which a participant gives a valuable consideration for a chance to win a prize, whether the game comprises one or multiple rounds. Each participant gives money (the consideration) to purchase a ticket on which the participant guesses the location of the queen of hearts. The participant's submission of the ticket affords the participant the possibility (the chance) of winning at least a portion of the proceeds from the tavern's ticket sales (the prize). The question, therefore, is whether the tavern's Queen of Hearts game, as so structured, is "a scheme in which ... the total amount of consideration wagered is distributed to a participant or participants," within the meaning of R.C. 2915.01(XX).

You question whether the tavern's practice of awarding only 90% of the proceeds from the tavern's ticket sales to the winning participants of rounds one, two, and three violates R.C. 2915.02(A)(2)'s prohibition against schemes of chance. In one respect, each of the tavern's four rounds of its Queen of Hearts game could constitute a separate "scheme," as that term is used in R.C. 2915.01(XX). Thus, to constitute a "pool not conducted for profit," the total amount of consideration wagered each round would have to be distributed to a participant or participants at the end of that round. Alternatively, the tavern views the operation of the four rounds as one Queen of Hearts game, or one "scheme." Thus, when the total amount of the proceeds remaining from the tavern's ticket sales are awarded to the fourth and final winning participant, the total amount of consideration wagered is distributed to participants within the meaning of R.C. 2915.01(XX).

R.C. 2915.01(XX) does not define the term "scheme," nor is the term defined elsewhere in the Revised Code. "Words and phrases" used in a statute, but not defined therein "shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42. *Webster's New World College Dictionary* 1299 (5th ed. 2014) defines "scheme" to mean "a carefully arranged and systematic program of action for attaining some object or end." Accordingly, a "scheme," within the meaning of R.C. 2915.01(XX), is a carefully arranged and systematic program of action for attaining some object or end. In considering whether a Queen of Hearts game is a "scheme" within the meaning of R.C. 2915.01(XX), we recognize the well-established axiom that criminal statutes shall "be strictly construed against the state and liberally construed in favor of an accused." 1985 Op. Att'y Gen. No. 85-001, at 2-3.

A "program" is "a plan or procedure for dealing with some matter." *Webster's New World College Dictionary* at 1162. A Queen of Hearts game is a plan or procedure that is operated for the purpose of awarding a participant whose drawn ticket correctly guesses the

location of the queen of hearts. Therefore, a Queen of Hearts game is a “program of action for attaining some object or end.”

A Queen of Hearts game is “systematic” if it is “made or arranged according to a system, method, or plan.” *Id.* at 1472. A Queen of Hearts game is made or arranged according to a system, method, or plan, if it is played in accordance with a set of defined rules. If a Queen of Hearts game is defined to include multiple rounds, the rounds are part of that system, method, or plan. Therefore, a Queen of Hearts game that is played in accordance with a set of defined rules, whether comprising one or multiple rounds, is a systematic program.

A Queen of Hearts game is “carefully arranged” when it is prepared and planned in a thoughtful, meticulous way. *See id.* at 79, 226 (defining “arrange” to mean “to make ready; prepare or plan” and defining “careful” to mean “acting or working in a thoughtful, painstaking way”). A Queen of Hearts game is prepared in a thoughtful, meticulous way if the game’s rules are developed and outlined prior to the game’s operation. Accordingly, a Queen of Hearts game that is played in accordance with a set of defined rules that have been developed and communicated to participants prior to the game’s operation, is a carefully arranged and systematic program of action for attaining some object or end, and therefore a “scheme” within the meaning of R.C. 2915.01(XX).

The number of rounds that comprise the tavern’s Queen of Hearts game does not determine whether the game is a “scheme” within the meaning of R.C. 2915.01(XX). Rather, whether a Queen of Hearts game is a “scheme” depends upon whether the game is a carefully arranged and systematic program. Whether the tavern’s Queen of Hearts game, in this instance, is a carefully arranged and systematic program is a question of fact, not appropriate for determination by an opinion of the Attorney General. *See* 2006 Op. Att’y Gen. No. 2006-006, at 2-61 n.6. However, if the tavern prepared and planned its Queen of Hearts game in a thoughtful, meticulous way by developing and communicating to participants a set of defined rules prior to the game’s operation, the tavern’s Queen of Hearts game is a “scheme” within the meaning of R.C. 2915.01(XX). If the tavern’s rules provided for its Queen of Hearts game to include four rounds, the four-round game is a “scheme” under R.C. 2915.01(XX).

Under R.C. 2915.01(XX), the General Assembly defines a “pool not conducted for profit” to include any scheme in which (1) a participant gives a valuable consideration for a chance to win a prize, and (2) the total amount of consideration wagered is distributed to a participant or participants. In leaving the term “scheme” undefined, the General Assembly has conferred a certain amount of discretion upon the operator of a scheme to structure the scheme in whatever manner the operator desires. In this instance, the tavern has structured its Queen of Hearts game to include four rounds, during which participants give a valuable consideration for a chance to win a prize. At the end of the fourth and final round, the winning participant is awarded the remaining proceeds from the tavern’s ticket sales. If the tavern developed and communicated the rules of its Queen of Hearts game to participants prior to the game’s operation, the game, as structured by the tavern, is a “pool not conducted for profit,” as defined in R.C. 2915.01(XX).

Accordingly, we conclude that a Queen of Hearts game comprising multiple rounds during which prizes are awarded to multiple participants, is a “pool not conducted for profit” as defined in R.C. 2915.01(XX), so long as (1) the operator of the game has prepared and planned the game in a thoughtful, meticulous way, (2) the game is played in accordance with a defined set of rules, (3) the game is one in which a participant gives a valuable consideration for a chance to win a prize, and (4) the total amount of consideration wagered by participants during the game is distributed to a participant or participants by the end of the game’s final round.<sup>4</sup>

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<sup>4</sup> To date, no court has considered the constitutionality of R.C. 2915.01(XX). Article XV, Section 6 of the Ohio Constitution prohibits “lotteries, and the sale of lottery tickets, for any purpose whatever.” Divisions (A) through (C) of Ohio Const. art. XV, § 6 except from its prohibition the operation of a state lottery, the operation of bingo by charitable organizations, and casino gaming. For over a century, Ohio courts and opinions of Attorneys General have read the term “lottery” to mean a gambling scheme in which a participant gives a consideration for a chance to win a prize, and “the determination as to who gets a prize or how much of a prize he gets” is “dependent at least predominately upon the element of chance.” *Westerhaus Co. v. Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956) (syllabus, paragraph 8); *see also State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 55 Ohio App. 2d 96, 379 N.E.2d 242 (Summit County 1977) (syllabus, paragraph 1) (“[a] ‘lottery’ is a scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance”); 1967 Op. Att’y Gen. No. 67-064, at 2-111 (“[u]nder the Constitutional provision ... and [statutes in R.C. Chapter 2915] it is settled in Ohio, and in virtually all jurisdictions under varying statutes, that three elements are necessary to constitute a lottery. These elements are recognized to be (1) the payment of a *price or consideration* for (2) a *chance* to (3) gain a *prize*”).

The Queen of Hearts game described in your letter is a scheme in which a participant gives a consideration for a chance to win a prize. The recipients of the prizes, in the circumstances you describe, are determined predominately upon the element of chance. The Ohio Supreme Court has recognized that “[b]y reason of the provisions of Section 6, Article XV of the Ohio Constitution, the General Assembly is without power to legalize, either directly or indirectly, ‘lotteries, and the sale of lottery tickets, for any purpose’” (other than those delineated in Ohio Const. art. XV, § 6(A)-(C)). *Columbus v. Barr*, 160 Ohio St. 209, 115 N.E.2d 391 (1953) (syllabus, paragraph 1); *see also* 1988 Op. Att’y Gen. No. 88-002, at 2-7 (“Article XV, § 6 of the Ohio Constitution is a self-executing declarative limitation upon the plenary power of the General Assembly with respect to lotteries”). Therefore, it is possible that a court may find that the exception carved out by the General Assembly for a “pool not conducted for profit” is an unconstitutional exercise of legislative power. *But see* 1975 Op. Att’y Gen. No. 75-005, at 2-20 (“[i]n enacting R.C. Chapter 2915, the General Assembly has exempted certain types of gambling from the penalties imposed. The language of this chapter does not affirmatively authorize lotteries”). Nevertheless, absent a court decision to the contrary, we presume for the purpose of this opinion that the statutes considered herein are constitutional.

**Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that a Queen of Hearts game comprising multiple rounds during which prizes are awarded to multiple participants, is a "pool not conducted for profit" as defined in R.C. 2915.01(XX), so long as (1) the operator of the game has prepared and planned the game in a thoughtful, meticulous way, (2) the game is played in accordance with a defined set of rules, (3) the game is one in which a participant gives a valuable consideration for a chance to win a prize, and (4) the total amount of consideration wagered by participants during the game is distributed to a participant or participants by the end of the game's final round.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General