

No. 184

**LOTTERY—THEATRES—SERIALGRAM PROGRAM
CLUBS—LOTTERY—GAMBLING**

Held: A Serialgram Program Club—promoting an advertising plan whereby awards are offered to a person holding a certain certified Serialgram Program number—is a lottery.

July 24, 1941.

Mr. John M. Lexcen
County Attorney
Richland County
Sidney, Montana

Dear Mr. Lexcen:

You have submitted the following facts upon which you desire an opinion of this office:

“Your letter of April 11th received, and an investigation made of the local situation and the use of what is known as the ‘serialgram.’

“As far as I can learn, the serialgram is a program club and is an advertising plan used by the Princess and Roxy Theatres of Sidney, Montana, which theatres are both owned by the same person.

“A serialgram is a weekly numbered theatre program of coming attractions to be presented at the two local theatres for the coming

week. That is, the programs for both theatres for the coming week are set forth in the program. The serialgrams are given free to anyone wishing them, and they are placed in leading business places in town, as well as at the doors of the homes throughout the town, and also are given out at the theatres a week preceding the club meetings. There is no charge for these programs.

"A serialgram program member is any party who has a membership Serialgram which has been certified. On Wednesday nights, there is a meeting of the serialgram program club at the meeting places, that is, the Princess and Roxy theatres, at which time the Club members bring their Serialgrams and have them certified, and then proceed to enjoy the entertainment the club manager has arranged for the evening, which in this case is a motion picture. After the picture, or entertainment, is over, the Club proceeds to award at least one or more of the members with a cash award. There is at least one award each week.

"For the Serialgram drawing, there are two forms of drawing cards used. One is the award card with fifty lines, each with a number from one to fifty and opposite each line is a program number—these being the membership numbers on Serialgrams. The other card is the line card, there being forty of these cards, each with a number from one to forty.

"The entire drawing is handled by club members. One member draws the line card and another member draws the program card. For instance, if the line card says 'line 23,' they then look opposite the line 23 on the program card and find there the number 365. The holder of Serialgram program No. 365 would receive the club award for holding that number."

The facts and circumstances detailed here, while not couched in the same language, are very similar indeed to those presented in *State v. Fox Missoula Corporation*, 110 Mont. 441, 101 Pac. (2nd) 1065. In fact, all three of the elements of a lottery are as prominent here as in the *Fox Missoula* case:

The offer of a prize, its award by chance and the giving of consideration for an opportunity to win the prize.

I, therefore, refer you to Attorney General's Opinions No. 57 and 141 in Volume 19, as well as *State v. Fox Missoula Corporation*, supra, which covers very thoroughly the main question (**consideration**) raised here.

The recent work of Williams on Lotteries, in Section 185, page 115, has this to say about consideration:

"With respect to its office or function, this term may denote the element of a consideration in a specific contract such as the purchase price in the buying of a lottery ticket. This is the narrow, technical use of the word. Or, it may have a wider meaning and refer to all or a portion of the element of consideration in the entire scheme or device. Here it may include all or a part of the consideration involved in all or a part of the contracts between the operator and the players. As to kinds of consideration, there are many, such as money or property paid or promised, time given, labor performed, services rendered, benefits conferred, losses sustained, and detriments endured."

A further analysis of the question of consideration is found in Williams on lotteries, supra, at page 132, which is pertinent to the problem before us:

"The Athens theatre has a show to exploit and seats to sell. It makes offers to the public upon certain terms and conditions which contemplate two classes of chances and the members of the public accept these terms and conditions without change. It is the theatre's game and the players have to accept the offers as they are made, if they accept at all,

“It is respectfully suggested that this scheme discloses six kinds of consideration connected with and included in the theatre’s offer and the corresponding acceptance of the offer, namely:

“(a) The registrant’s time, trouble and expense in going to and from the lobby of the theatre in order to register and receive his option number.

“(b) The registrant’s subjection in the lobby to sales appeal of the theatre program by the flaming posters suggesting beautiful scenery, charming women, handsome men and thrilling music—a thing of value to the theatre.

“(c) The addition of registrant’s name and address to the theatre’s mailing list, a list which is of value and would cost considerable if made in some other manner.

“(d) The registrant’s time, trouble and expense in going to and from the theatre in order to participate in the drawing at nine o’clock on “bank night.”

“(e) The registrant’s service to the theatre in “broadcasting” notice of the scheme to his kin, comrades and acquaintances—a very valuable service since the use of the mails and radio is denied to “bank night.”

“(f) The admission fee, which, in most cases, is paid by the registrant in order to see the drawing as it actually occurs and to participate most comfortably and advantageously in the distribution, if, as, and when it takes place.

“In view of this analysis several things are obvious, namely:

“(a) That there are two prerequisites for participation in the distribution of prizes: (1) Registration of name and address in a book in the theatre lobby, and (2) attendance at the theater, either in or out, at nine o’clock sharp on “bank night,” and that one of these prerequisites is absolutely worthless without the other.

“(b) That there is only one way for the registrant to see the drawing and get first hand information and thereby participate fully in what is done, and this way, this opportunity for visual participation, this chance de luxe, is sold to him in a 25 cent admission fee and all the hocus pocus that “bank night” promoters can muster cannot obscure the fact.

“(c) That while consideration is present in the scheme in all the kinds and aspects shown in the foregoing analysis, that part which is made up of the stimulated admission fees actually and undoubtedly received by the theatre, is, in itself, sufficient to constitute the consideration comprehended by the anti-lottery statutes in any state in the Union.

“(d) That another kind of consideration involved in the acceptance which is in and of itself sufficient to supply the element of consideration in a lottery, is the presence of the registrants at the theatre, even on the outside, in response to the operator’s offer.

“(e) That the plan of drawing from all registration numbers has the effect of playing the total registration against the attendance and thereby increasing the odds against the award and in favor of passing the prize for addition to the prize for the next Monday night. This, of course, increases the prize without increasing the admission and in so doing accelerates the gambling spirit. Here there is an increase in prize from \$35.00 to \$210.00 without any award at all. Thus there is no limit to the prize in the “bank night” scheme and consequently no height to which the gambling fever may not rise under it.”

In Section 11149 of the Revised Codes of Montana, 1935, a lottery is defined as:

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have made or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

In *State v. Hahn*, 105 Mont. 270, 72 Pac. (2nd) 459, the Montana court set out three requisites of a lottery as the offer of a prize, its award by chance and the giving of a consideration for an opportunity to win the prize.

In *State v. Fox Missoula Corporation*, supra, our Court said:

"In describing a lottery our statute, supra, in conclusion used these words: 'Whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.'

"Apparently the legislature foresaw clever plans to evade the plain meaning of the law and confuse or befuddle the courts. As was done by this court in *State v. Hahn*, supra, we must here look to the substance as well as the form.

"The scheme is admittedly arranged for the purpose of attracting money to the theatre by offering a prize to a chance winner, even though the prize might occasionally be drawn by one who has purchased no ticket. It is in effect a spawning ground for more unrestrained forms of gambling, appealing to juveniles as well as adults. That the scheme is artful and difficult of judicial capture is evidenced by the fact that sixteen jurisdictions have classified it as a lottery, and about nine have allowed it to depart with judicial blessing."

According to your inquiry, the Serialgram is a program club and is an advertising plan used by the theatres. Our Supreme Court in *State v. Fox Missoula Corporation*, supra, said:

"Defendants, when they argue that the money put up by them for the gifts would otherwise be spent for advertising, step into their own deadfall. Why, then, do they not spend it for advertising? If spent for advertising the attraction for attending the show, and the appeal of the advertisement would be the picture shown, and not the gift offered. The purpose of the gift is a strong factor in determining the nature of the scheme. It would seem that on bank night the remote chance of a smile from lady luck or dame fortune is a greater attraction than the winsome ways of other stars."

Therefore, it is my opinion a Serialgram Program Club—promoting an advertising plan whereby awards are offered to a person holding a certified Serialgram Program number—is a lottery.

Sincerely yours,

JOHN W. BONNER
Attorney General