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OPINION	:	No. 80-1010
	:	
of	:	<u>FEBRUARY 6, 1981</u>
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The Honorable Albert M. Leddy, District Attorney of Kern County, has requested an opinion on the following question:

Does the game of keno in which some players participate without paying anything and others make a “donation” to charity entitling them to greater prizes if they win constitute an unlawful lottery under California law?

CONCLUSION

The game of keno in which some players participate without paying anything and others make a “donation” to charity entitling them to greater prizes if they win constitutes an unlawful lottery under California law.

ANALYSIS

The request for this opinion refers to materials which describe the game of “keno” played in a certain manner and asks whether it may be lawfully played in California. The materials describe the normal play of keno as follows:

“In Keno, prospective players are provided with paper tickets at no charge. Each ticket contains eight rows and ten columns of numerical digits arranged in consecutive numerical digits arranged in consecutive numerical order from row to row. The Keno player marks a randomly selected, stipulated amount of these numerical digits and gives the ticket to a cashier. The cashier validates the ticket, makes a duplicate copy of it, retains the original and gives the duplicate to the player. At the time of giving the ticket to the cashier, the player, in order to participate in the game, also gives the cashier a stated sum of money, or bet. Thereafter a round container filled with numbered balls is rotated by the game operator. Included in the container is a ball to correspond with each of the numbered digits on the Keno ticket. The game operator draws a stipulated amount of balls at random out of the container. If a certain percentage of the numbers on the balls selected match the numbers marked by the player on his ticket, he is declared a winner, and receives a monetary prize greater than his original bet. If, however, the digits marked by the player on his ticket fail to match a sufficient percentage of the numbered balls selected from the container, the player loses the game and his bet.”

In an effort to prevent the proposed game from constituting a lottery proscribed by California law the following change was made to the game described above:

“In Keno, prospective players are provided with paper tickets at no charge. If a player chooses to play a free ticket, he will so state when he goes to the Cashier. The cashier will mark on the ticket FREE. If he chooses to donate then the amount of the donation will be marked on the duplicate copy of the ticket. The cashier will retain the original in either case. The FREE tickets MUST conform with Normal Keno Rules and cannot be set in a group or groups by themselves.”

The sample keno tickets in the descriptive materials indicate that 20 of the 80 numbers will be drawn in each game and that a player may mark from one to fifteen of the 80 numbers on his ticket when he plays. A prize schedule indicated the amount the player wins when he plays a free card without a donation and when he plays the card with a \$1.00, \$3.00 or \$5.00 “donation.” There is a different prize schedule corresponding to the number of

squares marked on the ticket. The amount of the prize increases as the number of matches of numbers marked to numbers drawn increases and also increases as the amount of the donation increases. Thus, the prize schedule for tickets on which five numbers are marked is as follows:

Match	Free	Donate:	\$1.00	\$3.00	\$5.00
3 Pays	.30		1.00	3.00	5.00
4 Pays	.60		9.00	27.00	100.00
5 Pays	1.20		480.00	2400.00	4000.00

The descriptive material submitted with the request indicates that all proceeds from the keno games are to be deposited in a separate account which shall be used solely for contributions to charities except for the following expenses:

(a) "Such proceeds may be used for prizes."

(b) Rental for the hotel space used for the games.

(c) City license fees.

(d) Credit union account handling fee. Article IV, section 19 of the California Constitution provides:

"SEC. 10. (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.

"(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

"(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

Penal Code sections 319 and 320 provide:

"§ 319. Definition

"*Lottery defined.* A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such

property or a portion of it, or for any share or any 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.”

“§ 320. Contriving, preparing or drawing

“Punishment for drawing lottery. Every person who contrives, prepares, sets up, proposes, or draws any lottery, if guilty of a misdemeanor.”

A lottery consists of three elements: (a) a prize, (b) distribution by chance, and (c) consideration paid for the chance to win. (*Cal. Gas. Retailers v. Regal Petroleum Company* (1958) 50 Cal. 2d 844, 851.)

In the game of keno described above, it is clear there are prizes which are distributed by chance and no one disputes this. It has been suggested however that the modification made to the normal play of keno has removed the element of consideration necessary to make the game a lottery. We disagree.

The modification introduces players who pay nothing for the chance to win a modest prize but also provides for much greater prizes where the player makes a “donation” to charity.

With respect to those who play a free ticket without making any donation, there is no lottery because such players have paid no consideration for the chance to win. With respect to those players who make a donation, we must examine whether such “donation” supplies the consideration necessary to make the game a lottery as to such players.

The reference to consideration in the statutory definition of a lottery is distribution of property by chance, among persons who have paid or promise to pay any valuable consideration for the chance of obtaining such property or any portion of it, . . .” (Pen. Code, § 319.) The question of consideration is not to be determined from the standpoint of the sponsor of the game, but from that of the holders of the prize tickets. It is not the benefit flowing to the sponsor, but rather something of value paid or promised from the ticket holders that constitutes the consideration for a lottery. In other words the consideration for a lottery is provided when the ticket holder hazards something of value on the chance to win the prize. (*People v. Cardas* (1933) 137 Cal. App. Supp. 788, 790, 791; *Cal. Gas. Retailers v. Regal*

Petroleum Corp. (1958) 50 Cal. 2d 844, 860.)

By making a donation of one, three or five dollars the ticket holder pays something of value for the chance to win a prize. This provides the consideration necessary to make the game a lottery. It is the payment by the ticket holder, not who benefits therefrom, that determines whether the consideration element of a lottery is present. Thus, it is immaterial that the sponsor does not profit from the game or that a worthy charity is benefited.

It has been argued that a game is not a lottery-under California law unless all of the players who may win a prize have paid a consideration for the chance to win. This argument was fully explored and rejected in *People v. Shira* (1976) 62 Cal. App. 3d 442. The court in *Shira* (at p. 460) quoted the following: language from an Iowa case:

“[T]he game here was a lottery at least as to those who purchased tickets. It did not cease to be a lottery because some were admitted to play without paying for the privilege, so long as others paid for their chances. Presence of the nonpaying participants did not change the status of those who paid. *If it was a lottery as to some who played the game it was nonetheless a lottery.* [¶] Unless we close out eyes to reality the conclusion is justified that in actual operation ticket—perhaps unwittingly—paid for their own chance at prizes axis also for the chance of those who were admitted to the game without paying. Thus presence of the nonpaying participants did not change the essential character of the enterprise. Indeed, as several courts have pointed out, opening a lottery to nonpaying participants is, in a sense, all the more objectionable in that it reduces the chance for the prize of those who pay therefor and would seem to be entitled to it.”

The *Shira* case affirmed the conviction for operating a lottery called “Ringo” in which some players participated without payment of any consideration. The California Supreme Court denied a petition for hearing.

We conclude that the game of keno played in the manner described in which some of the players make the “donation” which increases their prizes constitutes an unlawful lottery in California.
