

Broadcasting and the Law: 2017

Advertising Lotteries and Games of Chance

A Basic Sourcebook

2017 The New York State Broadcasters Association

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Overview

Where does the law on advertising lotteries and games of chance come from?

These laws are derived from both federal and state sources. There are federal criminal provisions dealing with dissemination of gambling information, and the Federal Communication Commission has a rule governing the broadcast of lottery information. On the state level, the laws authorizing games of chance, bingo and horse racing contain some restrictions on the broadcasting of gambling information.

Quickly, what basic facts do I need to know?

While there has traditionally been a broad federal ban against broadcasting advertisements and information on lotteries, that ban has been reduced significantly in scope over the past few years. You may broadcast information and advertisements on State lotteries that are legal in the State into which you broadcast, lawful Indian gaming activities, and truthful advertisements for private casino gambling. Thus, you can broadcast advertisements from legal casino gaming operators in Atlantic City, the Indian casinos in New York and Connecticut, and from the authorized Canadian casinos. On the other hand, the federal Department of Justice has recently suggested that it is impermissible to take advertisements from Internet casino gambling operators and Internet operators of sports books. The Department of Justice believes that these Internet gambling operations are in violation of certain federal criminal laws, and the Department has suggested that broadcasters that take advertisements from such gambling sites may be aiding or abetting in the commission of a crime. While it could be argued that the federal government cannot, under the First Amendment, block a truthful advertisement, you may be placing yourself at considerable risk if you take advertisements from an Internet casino operator, an Internet poker site, or an Internet sports book.

General Gambling Issues

What does the federal criminal law governing broadcasting of lotteries do?

Federal law, with certain significant exceptions, generally bans broadcasters from taking advertisements from lotteries or broadcasting information on lotteries.

What is a lottery?

A lottery under federal penal law is made up of three elements: prize, chance, and consideration. All of these words have distinct legal meanings not necessarily identical to their common English meanings. All three elements must be present, however, for an event, contest, or advertisement of a contest to be considered a lottery. If any one of the three is missing, there is no lottery. This definition of a lottery is very broad and consists of most gambling activity.

What is a prize and does it depend on the dollar amount involved?

Prizes have been defined to include such things as promising a greater amount of money in return for the investment of a smaller one. A broad definition of prize includes anything of value (money, tapes, records, CDs, T-shirts, etc.), including reductions in price or discount coupons, offered to contestants. Generally, a prize is a prize regardless of value.

What is meant by "chance"?

The legal definition of a "contest of chance" is any contest or game in which the outcome depends to a material degree upon an element of chance, notwithstanding that skill of the contestants may be part of the contest. The skill level is important in determining whether a game involves chance, if the level of skill is greater than the level of chance, the game will not be considered a contest of chance. For example, if you have a chess game contest where the players are matched based on a random assignment, chance plays a role in the contest, but the skill of the contestants in playing chess outweighs the element of chance. Considering that, regardless of the match-ups for the games, the best player should win the contest. Thus, the chance element does not effect the outcome. On the other hand, if in the same contest a random drawing results in players losing pieces from ongoing games, the chance element might very well outweigh the skill element. Such a contest would likely be considered an illegal game of chance.

What is "consideration"?

Consideration is something you give or receive in exchange for something else. Federal regulations say consideration exists when you have to pay money or give something valuable, or have a particular sponsor's product in your possession, before you are eligible to play (and win) a contest. Even expending time or effort may qualify as consideration, as can holding a savings account with a particular bank or institution.

The Federal Communications Commission (FCC) has, however, noted that some things are not viewed as consideration. According to the Commission, consideration does not exist in the following circumstances:

- placing postage on postcards to enter a contest
 - time spent watching a program in order to answer questions asked of viewers who are randomly selected and called
- giving up a prize in order to have the opportunity to win more prizes
 - writing to obtain tickets to a program in order to attend and become an audience contestant participant
- travel costs, mileage, or parking fees for traveling to become a contestant
- traveling to a store or other establishment in order to register to become a contestant

Also, it is important to recognize that the FCC requires that for something to be consideration, the thing of value must "flow to the sponsor." Simply put, this means that requiring something that does not benefit the contest sponsor will not be seen as consideration. In order to invoke this "exception" to consideration, however, there must be no benefit to the sponsor at all. The FCC will take a very hard look at any attempts to by-pass lottery regulations by using requirements which allegedly do not benefit the sponsor. Thus, if a station requires listeners or viewers to bring a can of "X-Brand Car Washing Fluid" to the station in order to register for a contest, even though "X-Brand Car Washing Fluid" may not be a station sponsor, if local retailers who sell the product are sponsors, the consideration may still be viewed as flowing to the station.

Can the element of consideration be eliminated by including the words "no purchase necessary" in the advertisement?

The words "no purchase necessary" alone will not determine whether there is consideration. The FCC has determined that to avoid a finding that consideration exists, the promotion must be even, ensuring equal

opportunity between purchasers and non-purchasers. The FCC requires that three elements must be present to be used to avoid penalties for unlawful broadcasting of a lottery.

What is "value added" and how does it work in terms of the definition of a lottery?

Value added promotions can be considered a "gray area" in terms of lotteries. In value added promotions, a person buys the product, and the purchase of the product enters the purchaser in a contest. Remember that a lottery has three elements: prize, chance, and consideration. Consideration is the element which is in question in "value added" promotions. The idea of "value added" is that the added prize is not the focus of the product or service purchased, but rather is seen as adding value to the product or service. This is not a clear area of law, and any attempts to utilize this exemption to the gambling prohibitions contained in state law should be considered very carefully before being undertaken. One example used to illustrate the value added concept is that of a soda bottler who puts numbers on the bottoms of his cans of soda; if such number appears, the can be redeemed for the amount shown. Under the value added theory, people do not buy the soda to play the game, but rather to drink the soda. Thus, consideration for playing the game does not exist, and the promotion would not be a lottery. Another example is the "snowfall contest." In this contest, all the people who purchased a product from a certain retailer would receive their money back if it snowed more than three inches on New Year's evening. This is most likely a value added situation, because people would not likely buy the product just to get it free; instead, they bought the product, and if it later turned out to be free, that would add to its value to the purchasers. Before advertising a "value added" promotion, you should contact an attorney.

What lotteries can be advertised on radio or television?

While lotteries in general cannot be advertised, there are now important exceptions to this general rule. Thus, the State lottery in New York can be advertised. The Indian casinos in New York can be advertised, and lawful casino gambling in other states can be advertised. Legal charitable gaming can also be broadcast under federal law, but there are some restrictions under State law. A fishing contest is not considered a lottery.

What types of activities qualify as "fishing contests"?

Fishing contests are when people go to a lake, river or reservoir, and compete, usually within a certain period of time, to catch the largest fish or a fish with a certain tag on it. Because fishing is a skill, and the skill outweighs the element of chance, fishing contests are not considered lotteries or games of chance

The New York State Lottery

Can you broadcast advertisements and/or supply information on State lottery games such as Pick 3, Win 4, Lotto and Mega Millions?

Yes. You may broadcast information and advertisements on all State-operated lotteries that are legal in the State into which you broadcast.

Can you advertise video lottery terminals operated at the State's racetracks? Yes. These are part of the New York State lottery, and can be advertised.

Can a radio or television station give away New York State lottery tickets or subscriptions?

As the "state sponsored lottery game," New York lottery tickets may be lawfully advertised on radio or television. Promotions involving New York's state sponsored lottery are also allowed.

What about advertisements of State lotteries from other states such as Vermont or Pennsylvania?

A long as you broadcast into those states where the lottery is validly held, you can take advertisements on another state's lottery game.

Games of Chance

What games are "authorized" as games of chance by New York State?

New York State Law contains a listing of games that may be conducted by authorized entities such as charitable, not-for-profits and religious organizations. While they are often referred to as "Las Vegas Nights," authorized games of chance also include raffles and bell jar tickets [pull tabs]. Additionally, these organizations can only conduct games of chance if the organization is located in a municipality that has passed a local law or ordinance authorizing games of chance and has received a valid identification number from the New York State Racing and Wagering Board.

Can non-for-profits advertise games of chance on radio and television?

The law that controls the operation of "authorized" games in New York allows advertising of the conduct of these games of chance *only* by "means of newspaper, circular, handbill, and poster, and by one sign not exceeding sixty square feet in area . . ." Thus, while federal law would allow broadcast advertising for authorized not-for-profit entities conducting authorized games of chance, New York law does not allow such advertising.

Are raffles legal?

Authorized not-for-profit religious, charitable, and civic organizations are able to hold raffles and other games of chance with no single prize exceeding \$100,000. In order for a game to be legally operated, the municipality in which the organization is located must pass a local law authorizing games of chance, and the organization must meet the qualifications and take the steps outlined in the law. These filing requirements are reduced for those organizations which derive less than \$30,000 per occasion from the sale of raffles. However, since raffles are authorized under the games of chance law, legal raffle games may not be advertised on radio or television.

Some illegal raffles may still be run openly in the community by charities or other groups. Can the station accept advertising for them?

Broadcasting announcements or advertisements for illegal raffles is prohibited.

Along the same line, if raffles once were generally illegal, why did they appear so commonly throughout local newspapers?

Again, the reason is largely political; prosecuting these types of offenses is not popular with the public or with those responsible for prosecutions. Also, keep in mind that newspapers do not have any organization that wields licensing authority over them, whereas the Federal Communications

Commission directly regulates broadcasters. Just because local authorities may not want to prosecute a lottery appearing in the local daily paper does not mean the FCC will not initiate a forfeiture proceeding against a broadcaster that runs an ad for the same (illegal) lottery.

What is a pull-tab? Can pull-tabs be advertised on radio or television?

A pull-tab is a ticket or card based game where covered numbers, symbols or colors are uncovered to reveal a winning number, color, or symbol (or combination thereof). In New York a pull-tab is referred to by law as a bell jar ticket. Pull tabs run by not-for-profits cannot be advertised on radio or television since these games fall within the State's game of chance laws. However, gambling on pull tabs at Indian gaming facilities can be advertised on television and radio.

Poker

Can poker be considered a game of chance?

No. Poker is not an authorized game of chance under New York law. Under New York law, games of chance cannot include games where the players play against each other. Since the players in poker play against each other, they cannot be engaged in an authorized game of chance. (Additionally, even if poker could ever be considered an authorized game of chance, New York State law does not allow a broadcaster to accept advertising on any game of chance.) So, you cannot accept any advertisements for Texas-Hold-Em-Poker or any kind of poker.

Can you accept advertising on a poker game run by a not-for-profit organization? For example if a charity is conducting a Texas Hold'Em tournament, can you advertise this game?

No. Even if the proceeds go to charity, it is not a permissible game and would be considered an illegal lottery under federal law.

What about poker played at an Indian casino?

Poker at an Indian casino would be considered a legal form of Class II gambling. A broadcaster could take advertising from an authorized Indian casino for poker.

What about poker played legally at a commercial casino outside New York State?

Such advertisements would be permissible under the United States Supreme Court decision authorizing truthful advertisements at legal casinos. Thus, the casinos in Atlantic City could advertise their poker games.

Can a private game of poker ever be legal in New York?

Social games of poker are not criminal in New York, but anyone advancing or profiting from an unlawful poker game is guilty of the crime of "promoting gambling."

What about Internet poker?

The Federal Department of Justice considers these games to be illegal, and it claims that broadcasters that accept advertising from such sites are aiding and abetting in the commission of criminal acts.

Bingo

Can bingo games run by not-for-profit organizations advertise on radio or television?

Bingo is controlled by law in New York State at both the state and local level. State law allows for authorized not-for-profit run bingo games to advertise on radio, but not on television. Thus, television advertisements or announcements about legal bingo games are not allowed.

What types of steps must be taken to run a radio or television bingo or "bingo-like" game? What types of games are considered to be Bingo games?

Bingo and bingo type games are strictly regulated by state law. While radio advertisements placed by licensed bingo game operators are allowed, advertisements of unauthorized bingo games are not allowed. When then, is a game considered bingo and subject to the state's Bingo Licensing Law? Bingo is defined in state law to include games of chance in which prizes are awarded based on numbers or symbols on a card matching randomly selected numbers or symbols. This definition includes games where money is charged to play as well as games where cards are distributed free of charge. Thus, "free" bingo is still bingo, and subject to state control.

What if the game is not called "bingo," and/or uses a card that does not look like bingo (ie, where a player has to get the numbers in the four corners of the card, instead of in a line)?

Changing the name of the games does not take it out of the State's regulations on Bingo. New York's Attorney General has stated that the name of the game does not matter, and does not determine whether a game is bingo or not. Whether the game fits within the definition of bingo or not. Whether the game fits within the definition of bingo (whether it has a card with numbers and winning is determined by random drawing) is the only factor that will make a game subject to state control as bingo. Thus, use of a card that does not "look" like bingo will not prevent the game from being considered bingo (and so subject to state control), so long as a random choice of numbers or symbols on the cards yields winners.

So can the name Bingo ever be used for a game at the station, even if it does not work like a real bingo game?

According to opinions of New York's Attorney General, the use of the name bingo does not in and of itself make something a bingo game subject to state control. A game may use the name bingo without being a bingo game, so long as the other elements of bingo are not present.

How do the Bingo regulations fit together?

One example of how these requirements can be applied was addressed by the Attorney General in an opinion based on a game that was to be run by television stations in New York. The proposed games were to be televised versions of bingo, called "Bingo USA" or "All American Bingo." The Attorney General stated that simply calling the games bingo did not bring them within the Bingo License Law requirements. However, each had a home participation component where viewers could win prizes from cards matching elements of the programs. The Attorney General feared that this participation component could deceive New Yorkers into thinking that they were playing a state-sanctioned bingo game, and so this brought it within the bingo requirements. It is

important to note that neither one of the proposed games involved a cost to the viewer to play. Thus, they were not "lotteries" under state criminal law, but rather would have been subject to the bingo licensing law.

What requirements, if any, exist for promotional games or contests run by a radio or television station, as opposed to the advertising or promoting of someone else's contest?

As with many of the things we have talked about so far, the nature and specifics of the contest in question will determine whether anything is required before or during the running of a game or contest by a station. For example, "bingo" type games (even without cost to play), contests with total prizes over \$5,000, and any games that might arguably involve "consideration" all involve specific requirements or prohibitions. Any contest that falls within these types must be carefully run so that all requirements are met.

Contests and Sweepstakes

Are there any requirements for contests run by my station which are not lotteries and are not Bingo or Bingo-like?

Any person or organization which runs a contest or game of chance with prizes equal to or over \$5,000 must register the contest with the Secretary of State. Failure to register your contest is a class B misdemeanor. It also may lead to action by the Attorney General's office to enjoin the operation of the game. Keep in mind, you cannot register a lottery (where you may require payment or consideration to play the game), but you must register any game of chance with prizes equal to or greater than \$5,000.

How is the prize amount determined?

The prize amount for purposes of registration is determined by looking at the entire contest and adding prize amounts together. A contest which gives away \$200 each day for thirty days (for a total of \$6,000) would be required to be registered, even though each individual award is less than \$5,000. Separate contests are considered separately. Thus, if a station is running two separate promotions at the same time (i.e., one to give away a trip to Bermuda and one to win a car), the value of each promotion would be separate. While in some circumstances this may preclude the need to register (if each separate contest is valued at less than \$5,000), it may lead to the need to register each contest individually (and so to pay the registration fee for each contest).

How is the registration requirement enforced?

The registration requirement is enforced by the New York State Attorney General, often on the complaint of a third party, and not as commonly on the Attorney General's own initiative, although that is possible. In one case in upstate New York, a station hired an attorney to investigate whether contests being run by competitors in the market were registered with the Department of State, he complained (by letter) to the Attorney General. The Attorney General's office then contacted the stations to enforce the requirement.

Is there anything else to worry about when a station is running a contest?

In addition to the bingo and registration issues discussed above, it is important to make certain that any type of consideration that might be seen in any of the requirements of the contest not be to the

benefit of the station. As noted in lottery questions above, a game will not be considered a lottery, because there is no "consideration," where the thing required or payment required contestants to buy a pair of jeans before they could participate in a soda company sponsored contest, so long as the soda company had no interest in the jeans or the jean company, the consideration would not benefit the contest sponsor and the contest would not be a lottery. If a station attempts to use this exemption, say by requiring the purchase of a particular record or tee shirt, care should be taken to make certain that no benefit to the station results (such as advertising or other sponsorship from the program benefitted). The "no benefit" exemption to lottery rules is a hard one to meet, and most (if not all) times, the best bet is to stay away from requiring anything that might be viewed as consideration.

Commercial Casinos

Can radio and television stations in New York accept advertising for in-state commercial casinos, Atlantic City or Las Vegas casinos?

Yes. After the United States Supreme Court decision allowing truthful advertising about legal gambling games, it is acceptable to take advertisements from legally operating casinos. These advertisements could advertise legal poker games and tournaments. Such advertisements are legal, according to the FCC regardless of whether the state in which the broadcaster is located permits casino gambling.

Can radio and television stations in New York accept advertising from casinos in Canada and from "cruises to nowhere?"

Yes. You can accept advertisement from all entities operating legal casinos.

If a station accepts advertising for a casino, can the word "casino" be used in the advertisement?

Yes. Truthful advertisements for lawful casino gambling are now allowed.

What about Internet casino operators?

The United States Department of Justice has stated that Internet casino operations are in violation of federal penal laws. The Department of Justice has suggested that broadcasters who take advertisements from Internet casino operators may be aiding and abetting in these operations. To date, the Department of Justice has subpoenaed the records of some media outlets that have accepted advertisements from online gambling sites seeking detailed information on the purchase and placement of such ads.

Indian Gaming

How is the Indian Gaming Regulatory Act set up?

The Indian Gaming Regulatory Act divides up gambling into three classes. Class I involves traditional Indian games. Class II includes bingo, pull tabs, and certain non-banked card games. Class III gaming includes all other forms of gambling including slot machines, most table games, and pari-mutuel wagering. Class III gaming is only allowed if there is a tribal ordinance in place authorizing the game, the game can legally be authorized in the State where the tribe is located, and there is a compact approved by the Secretary of the Interior between the State and the tribe.

What are the rules for advertising gambling on Indian reservations or lands?

The Federal Communications Commission has stated that broadcasters can accept advertising on gambling conducted by an Indian tribe pursuant to the Indian Gaming Regulatory Act.

How does this differentiate advertisements on Indian gambling from other charitable gambling?

Broadcasters can accept all advertisements from authorized Indian casinos. This would include advertisements on poker games and pull tabs. The games of chance laws in New York prohibit broadcasters from airing commercials from not-for-profit organizations that offer wagering on pull tabs. Additionally, since poker is not considered an authorized game of chance in New York, a broadcaster cannot accept advertising from a not-for-profit organization that is sponsoring poker games.

Sports Betting

Sports betting is always a difficult area. Can a New York radio or television station broadcast a program giving or mentioning the "odds" on various professional or college sporting events?

Betting on sports events is not considered a lottery, but federal law prohibits the use of radio and television stations for the transmission of bets and wagers on sports events or contests, or information that assists in the placing of bets or wagers. It is permissible to run news reports of sporting events. While it has been a controversial area, broadcasting point spreads or giving an assessment of the odds of success of sports participants is not treated as improper conduct. Transmitting information to assist in the placement of bets or wagers in states where sports betting is legal is specifically allowed which means that showing odds in horse racing is clearly authorized in New York. The gray area would come where an otherwise legal discussion of the "odds" or point spreads is sponsored by an organization that may be involved in offering bets on these sporting contests or offering consulting advice for a fee on which teams or individuals can bet on in sporting contests.

Can a television or radio station take advertisements from Internet sports books?

Much like the discussion of Internet casinos, the United States Department of Justice has stated that Internet sports books operations are in violation of federal penal laws. The Department of Justice has suggested that broadcasters who take advertisements from Internet sports books may be aiding and abetting in a violation of the Federal Wire Act. To date, the Department of Justice has subpoenaed the records of some media outlets that have accepted advertisements from online sports betting seeking detailed information on the purchase and placement of such ads.

Horse Racing

Horse racing advertising also seems to raise some interesting questions in terms of advertising. What rules relate to broadcasting of horse racing related information?

There were at one time severe restrictions on the ability of broadcast stations to broadcast information related to horse racing. Those restrictions are no longer part of FCC regulation of the content of broadcast, having been eliminated in an FCC rulemaking entitled, appropriately enough: "In the Matter of

the Elimination of Unnecessary Broadcast Regulation." Thus, broadcasting information concerning state sanctioned horse racing such as that authorized in New York is allowed.

Given that background, can a broadcaster broadcast:

A) Race results from local tracks?

Yes, broadcasters may air race results.

B) Odds" of a full race program prior to the race?

Yes, odds of a race or race program may be aired prior to the race.

C) Race results immediately following the race?

Yes, race results may be broadcast.

D) An ad for a racetrack that clearly and aggressively promotes gambling at a specific track?

While some people would certainly question the level of responsibility of a broadcaster who airs ads that aggressively promote gambling, there does not appear to be a prohibition on this type of advertisement.

E) Actually showing the audio or video of a live horse race?

There are no restrictions on an audio broadcast of a live race, and there are no restrictions on showing a videotape of a race on television. There is, however, a provision in the State Racing Law that requires consent of the local off-track betting corporation before a racetrack can be allowed to televise a race. Under this law, a racetrack is, however, allowed televise its races on an irregular basis for marketing and promotional purposes. Thus, televising stakes races or a card of races on a major race day would appear to be for marketing and promotional purposes and should be legal in New York. This restriction would likely appear to come into play only where a television station regularly broadcasts all the races from a racetrack.

Enforcement

What could happen if a station violates the lottery provisions of the law and who enforces the various laws?

The agency or authority most likely to have jurisdiction in matters relating to broadcasting and lotteries varies depending on the particular violation. The FCC could begin a forfeiture proceeding, which could ultimately result in a monetary "fine" being imposed or your broadcast license being revoked or suspended. Also, violations of state law often begin at the state level with the New York State Racing and Wagering Board, which could refer the matter to the local District Attorney for criminal prosecution. Indian gaming comes within the purview of the Bureau of Indian Affairs within the U.S. Department of the Interior and the National Indian Gaming Commission.

Do broadcasters have the responsibility to look into the facts behind a particular advertisement or promotion, or does running the ad according to the facts given to them by the advertiser prevent liability on the part of the broadcasters?

The FCC requires that broadcasters use reasonable diligence to ensure that broadcast promotions and advertisements are not unlawful lotteries. The licensee cannot rely solely on the wording of a proposed ad, or the word of the advertiser alone, but must check the situation independently to avoid

any possibility of a later finding of a violation. While it may be tempting to rely on the advertiser, especially because it is the advertiser that pays you, remembering that your license (and therefore your livelihood) is at stake is one way to keep the situation in perspective.

Is there someone I can call if I have a question regarding Indian Nation Advertising?

Whenever you have any Indian Nation Advertising questions, always start with the New York State Broadcasters Office in Albany (518) 456-8888. Indian gaming falls within the purview of the Bureau of Indian Affairs within the U.S. Department of the Interior and the National Indian Gaming Commission. The Bureau of Indian Affairs can be contacted at (202) 208-3710. The telephone number of the National Indian Gaming Commission is (202) 632-7003.

What if I have a question regarding lotteries or lottery related items? Who in New York should I call?

Whenever you have any lottery-related questions, always start with the New York State Broadcasters Office in Albany (518) 456-8888. Other than the New York State Broadcasters Association, most not-for-profit gambling type questions, Indian gaming, and horse racing would be handled by the New York State Racing and Wagering Board at (518) 453-8460.