

LETTER OPINION
98-L-132

September 3, 1998

Honorable Andrew G. Maragos
State Representative
PO Box 505
Minot, ND 58702-0505

Dear Representative Maragos:

Thank you for your letter asking why a physique transformation contest sponsored by Experimental and Applied Sciences of Golden, Colorado (Sponsor), may violate North Dakota law.

This office's Consumer Protection Division received a telephone call on June 23, 1998, from a North Dakota resident who was upset that a certain physique development contest was not permitted in North Dakota. Although notes were not kept of the name of the company sponsoring the contest, I believe it is very likely that the person was asking about the same contest to which you refer in your letter. This office suggested that the person call the sponsor of the contest to learn the legal basis for its determination that the contest was not permitted under North Dakota law. A short time later, an attorney representing the sponsor called the same staff person, who suggested that the attorney contact the sponsor's consultant to determine why the consultant advised the sponsor that the contest was not permitted under North Dakota law. This office did not receive any further communication from the North Dakota resident, the sponsor of the contest, or its consultant.

You may be aware that the Office of Attorney General generally does not approve specific products, promotions, or services since it is often easy for sponsors or promoters to change the product or promotion in a manner different than what may have been reviewed by this office. Therefore, while I can describe the general legal requirements for this type of contest in North Dakota, this letter is not intended as approval or disapproval of this particular contest.

You note that the Sponsor has indicated in its contest material that because a product purchase is required, the contest is prohibited in North Dakota and Vermont. Without a further explanation by the

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Sponsor, it is difficult to identify the legal justification for this conclusion, in part because this is an area in which there is some overlap between state laws pertaining to gambling and to consumer protection from sham contests.

We have had discussions and correspondence relating to North Dakota gambling laws and certain promotions which require the purchase of a product or the payment of a fee to enter the contest. A primary element of any potential gambling offense chargeable under N.D.C.C. ch. 12.1-28 is that there be consideration given by a participant in a contest for the chance to win a prize. If any one of these three elements, consideration, chance, and prize, is not present in the contest, there will be no violation of our gambling laws. This office has consistently recognized that if someone has to buy or pay something for the chance to win a prize, the contest involves "gambling" or a "lottery" which would be subject to the gambling provisions in N.D.C.C. chs. 12.1-28 and 53-06.1.

This contest might not involve the element of chance, making the issue of consideration irrelevant. Apparently, to participate in this contest you must not only purchase supplements, but you also must submit body composition reports, before and after photographs, and a 700 word essay explaining why the participant should be one of the champions. Selection of the winners will be made by a panel of ten judges with 50 percent of the score based on overall level of improvements and 50 percent based upon the essay. If chance is not involved in winning this contest, the contest would not be within the scope of the gambling laws even if an entry fee or other consideration or thing of value must be paid to participate.

Each contest, however, must be looked at individually to determine whether North Dakota law would be violated by participating in or promoting that contest. If the Sponsor refers to North Dakota in its material because it actually selects winners by chance, then the contest would pose additional legal issues based not only upon the gambling laws, but also on possible material misrepresentations in the manner in which the contest would be run.

North Dakota gambling laws do not prohibit contests which require payment of an entry fee or purchase of a product to participate if the prizes are based on a skill or achievement.

One way to change North Dakota law to legally permit individuals to pay for the chance to win a prize or participate in a contest in which prizes are awarded on the basis of chance would be to amend the North Dakota Constitution to repeal the prohibitions against

gambling. Another option, which has been discussed within this office, would be to specify by statute that a person does not pay consideration for a chance to win a prize when the chance is provided free to someone who purchases a product. However, this option presents numerous problems because of the likelihood of sham transactions in which something of a purported "value" would be provided to a person who was actually purchasing a chance to win a prize. Since something of value was obtained, however nominal, the participant or contest sponsor could argue that gambling did not occur. Enforcing criminal laws that attempt to distinguish between real and sham purchases could be difficult.

As a side issue, the Sponsor requires that a rather large copy of the participant's driver's license or birth certificate be included in the contest materials. Considering the identity theft and fraud which is occurring in this country, I do not understand why any prudent person would send such information to an unknown recipient. Once the company receives the information, it is unknown into whose hands this information will fall. The application also would contain a signature of the participant, which could be copied or forged by a person who has obtained access to identifying information disclosed in the driver's license or birth certificate. Identity theft and fraud is an issue which may be raised in the next legislative session.

Laws enacted to protect consumers from sham contests may also apply in this situation. It appears that the Sponsor falls within the definition of "sponsor" in N.D.C.C. § 53-11-01(3):

"Sponsor" means a person that requires another person in this state to pay money as a condition of awarding the person a prize, or as a condition of allowing the person to receive, use, compete for, or obtain information about a prize, or that creates the reasonable impression that such a payment is required.

Because the Sponsor requires the purchase of products sold by that sponsor, the contest requires the payment of money in order to compete for a prize.

N.D.C.C. ch. 53-11 was enacted in 1995 to protect consumers from sham contests. 1995 N.D. Sess. Laws ch. 488. This chapter was patterned after laws in Minnesota and Iowa, both of which allow a sponsor to require a person to purchase a product or pay money as a condition of being awarded a prize, if the sponsor provides the person a written notice identifying the contest sponsor and providing certain details

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regarding the contest. Iowa Code § 714B.2; Minn. Stat. § 325F.755. However, the comparable statute in North Dakota states:

A sponsor may not require a person to pay the sponsor money as a condition of awarding the person a prize, or as a condition of allowing the person to receive, use, compete for, or obtain information about a prize. A sponsor may not use a solicitation that creates the reasonable impression that a payment is required, unless the sponsor first has delivered to the person written prize notice containing the following information

N.D.C.C. § 53-11-02(1). As you can see, this provision is less clear and may have led the Sponsor, its consultant, or attorney to believe that the contest was prohibited under this section even if a written notice was provided.

If you wish to authorize contests such as the one described in your letter, the simplest method would be to amend N.D.C.C. § 53-11-02 to clarify that sponsors may require a person to purchase a product or pay money as a condition of being awarded a prize if sufficient notice is given. This section could also be amended to delete requirements for disclosures in N.D.C.C. § 53-11-02 that you believe contest sponsors should not be required to make. If you embark on such legislative changes, you might be interested to know that N.D.C.C. ch. 53-11 was enacted in 1995 as House Bill 1199, which passed as amended without any recorded vote in opposition in either house of our Legislature.

I hope that this information is helpful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk