

Working at Cross Purposes: The Shift in State Oversight of State Lottery Advertising

Thomas Gould

[WJMCR 6:4 September 2003]

Sections:

Introduction|Research Questions|Methodology|Results|Discussion|Conclusions|Appendix

Abstract

Thirty-eight states and the District of Columbia have lotteries. They have \$40 billion in sales annually. What is the role of state attorneys general in regulating lottery advertising. Two surveys of attorneys general show that they have four approaches: (1) represents the lottery commission in legal matters, but not reviewing ads; (2) does not represent the lottery commission or reviews ads; (3) reviews ads and assigns attorney to work with lottery commission; and (4) does not review, but represents lottery commission in legal matters and actively opposes deception in ads. The two surveys—one in 1995 and one in 2003—found that attorneys general are moving away from oversight. Only in Kansas and New Hampshire are attorneys general exercising oversight responsibility. This suggests a need for federal regulation of lottery ads, with the Federal Trade Commission being most suited to carry it out.

Introduction

In one area of commerce—one that generates roughly \$40 billion in sales, and accounts for millions of dollars in advertising—no state has ever brought a civil action against an advertiser, nor has it ever responded to a citizen's complaint by mandating the advertisers change their tactics. That area is the advertising associated with state lotteries.

State lotteries present a unique dilemma for attorneys general. A consumer typically can expect to be protected from deceptive advertising by at least two policy actors: the Federal Trade Commission and state attorney generals. However, advertising by lotteries is a state function not regulated by the Federal Trade Commission.¹

Given that it is the state itself who is conducting the advertising, it is unclear what constitutional restrictions would apply. That is, while in cases of restricting commercial speech the attorney general must show that the

- action advances the government's interest;
- advertising is inaccurate or related to an illegal activity;
- interest of the government is substantial;
- restriction is narrowly crafted.²

It is unclear that these standards would apply to the state itself. It is a conundrum: the state has no constitutional standing when it is the state that is bringing the action against itself.

Consumers might turn to the state's consumer protection agency, which would, in turn, rely on the state attorney general to prosecute the case. But such a prosecution of a state lottery commission by a state attorney general would have to overcome two substantial barriers:

1. Inherent conflicts-of-interest surround such a prosecution. The attorney general may be the legal counsel to the lottery commission. Even if the lottery commission has its own legal staff, the prosecution of a case against a state agency or uniquely licensed state supplier by a state official would be complicated.
2. State-level legal restrictions (or regulations) of lottery advertising probably would be seen as a threat to revenues, an especially sensitive issue in a time when lotteries are an important state revenue source. State advertising of lotteries is seen as highly correlated to lottery sales, which in turn generate much-needed state revenue.³

This article details the shifts in attorney general oversight of state lottery advertising between 1995 and 2003 and the extent to which this shift places attorneys general at conflict with their duties to protect consumers from deception in this significant area of advertising.

Rationale: The Scope of the Issue

In Massachusetts in 1997, state legislators complained about and then killed a promotion by the lottery commission that inserted lottery ticket coupons into daily newspapers.¹⁶

Other state officials have, on occasion, complained about lottery advertising in their states. In 1996, Connecticut Governor John Rowland 's complaints successfully killed lottery advertising that suggested, "You could get even luckier than you did on prom night."¹⁷

In February 1995, the Massachusetts attorney general accused that state's lottery commission of false advertising for stating that lottery proceeds supported athletes participating in the U.S. Olympics. Such an arrangement was true in 1992, but it was discontinued after that time. However, the Massachusetts Lottery continued to use the claim, and Attorney General Scott Harshburger said he was considering legislation to govern lottery advertising if such advertising were not truthful. Lottery officials suggested that lottery participants were aware the Olympic relationship had ceased, so the continued use of the promotion resulted in no harm.¹⁸

In establishing its state lottery, the Wisconsin legislature had specifically prohibited the commission from using "promotional" advertising techniques.¹⁹ In 1991, Wisconsin Attorney General James Doyle reported that an internal state investigation into state lottery advertising practices found that the distinction at that time between "informational" and "promotional" advertising was "so blurred as to be improperly vague."²⁰ Thus, Doyle argued, while there were areas of concern regarding whether state lottery advertising was violating the "no promotion rule," the state act regulating such behavior was so poorly defined as to make prosecution of possible offenses impossible. "A criminal law must define the offense with sufficient specificity so that a person can conform his or her conduct to the law. This law does not allow us to bring a case that can meet the very strict standards for a successful criminal prosecution."

Doyle identified four areas of concern regarding state lottery advertising:

- Poor identification of the odds.
- Use of point of purchase promotions, such as aprons, hats and auto window screens.
- Names of lottery games, such as Megabucks, Supercash and Big Double Moo-La.
- Advertising frequency so high as to be on its face more than information.

Based on this investigation, the attorney general's office developed several recommendations for clarifying the vagueness, including eliminating:

1. Calls to action (such as suggesting purchase)

2. Deceit (making the odds of winning clear)
3. Fantasy
4. Portrayals of winners without also portraying non-winners.

None of these suggestions was ever adopted by the legislature. In addition, by the time that Doyle successfully ran for governor in 2002, issues involving his state's lottery had dropped off his agenda.²¹

Both Congress and special interest groups have, at times, been concerned about state lottery advertising. Concerns about the impact of gambling on the public, and most specifically on those addicted to gambling, have resulted in the formation of groups opposed to state-sponsored lotteries.²² This has generated concern among members of Congress, and has been the subject of several commissions, most notably the previously cited National Gambling Impact Study Commission in 1999.²³

The interest in reining in lottery advertising cited above may have something to do with the rise in state interest in lotteries as a ♦taxless♦ source of revenue.

The rise of state lotteries

In good economic times and bad, states have become more and more reliant on their lotteries and have added new games on a regular basis.²⁴ The field of producing state lottery advertising has grown into a profession of its own, and has generated the apparent need to provide lottery commissions with marketing and other guidance.²⁵ Private research groups are urging state lotteries carefully target younger gamblers: ♦As the population ages, games that historically have been popular will be replaced with games more appealing to Generation X. Marketing will take on a different approach and a different emphasis as products move deeper into technology.♦²⁶ Indeed, even a Senate subcommittee in 1984 offered a model bill for the establishment of a state lottery, an "easy-to-use" outline presumably available to states interested in entering the business.²⁷

State lotteries are enjoying the benefits from an overall increase in the United States in games of chance. Wagering in one form or another is now legal in every state except Hawaii and Utah.²⁸ In addition to lotteries, 23 states allow casinos, several have both horse-racing tracks and off-track betting, and one state ♦Oregon♦ allows betting on sports events. Riverboat casinos dot the Mississippi River. More than 60 Native American tribes have established deals with 19 states to run casino games and other forms of gambling.

With states facing hard economic times, there is interest in new lotteries, as well as maintaining

existing ones. In 1999, church leaders were credited with turning back the establishment of a state lottery in Alabama.²⁹ But a year later, in South Carolina, strong objections from many religious leaders failed to stop the establishment of a lottery, which started operations in 2002.³⁰ In addition,

- In March of 2003, Oklahoma’s legislature voted to establish a state lottery;³¹
- In April of 2003, a lottery was approved by the legislature in North Dakota;³²
- In June of 2003, a lottery bill was approved in Tennessee;³³
- Three more states are reportedly considering establishing lotteries to boost sagging tax receipts.³⁴

Congressional studies of state lotteries and gambling have not focused on lottery advertising. Notably the National Gambling Impact Study Commission Report in 1999 made nine recommendations to Congress, none suggesting any restriction or change in the way states advertise lotteries. Despite citing earlier in the report the “contradictory role of state governments” in both promoting lotteries and regulating the content of such promotions, the word “advertising” does not appear anywhere in the commission’s recommendations.³⁵ It does, however, appear in the text:

[States have] gone into business selling a popular product, and they have carried on with Madison Avenue gusto and an unfettered dedication to the bottom line. The about-face from prohibition to promotion in one state after another is remarkable, to say the least.³⁶

Research Questions

All of these allegations and complaints suggest that a problem may exist, but does not describe how the prime law enforcement officer in each of the states has reacted. Answering three questions may help clarify the situation.

1. What relationship do the attorney generals have with their states lotteries?
2. To what degree has the degree of attorney general involvement in lottery advertising oversight increased or decreased over time?
3. What are the possible options to providing independently reliable oversight?

Method

In October of 1995 and again in late 2002 and early 2003, surveys were sent to all state attorneys general in the 37 states and District of Columbia where lotteries were conducted at the time.³⁷ Of these, 29 (78%) attorneys general responded in 1995; in 2002-2003, all 38 states and the District of Columbia responded. The responses were then compared, and the results are presented here.

In both surveys, the attorneys general were requested to provide information that would clarify the relationship between the attorney general and the lottery commission and the degree of oversight of lottery advertising provided. The survey requested information regarding:

1. If the attorney general supplied legal counsel to the lottery commission;
2. If any consumer complaints had ever been filed concerning lottery advertising;
3. If the attorney general reviewed advertising and, if so, what rules, regulations and official policies did it have regarding the lottery and lottery advertising.

From these questions, it is possible to operationalize four relationships between the lottery commission and state attorney general, with the levels suggesting the degree of consumer protection afforded in each state with regard to potential deceptive advertising as shown in Chart 1.³⁸

Chart 1. Possible oversight of lottery advertising by state attorneys general
Does Not Provide Ad Review Provides Ad Review Represents Lottery Level One Level Three Does Not Represent Lottery Level Two Level Four

Level One. Represents the state lottery commission in all legal actions but does not participate in reviewing advertising materials. This would suggest the lowest level of consumer protection in that the state attorney general would not only not review advertising, but would also not represent consumers in any legal actions regarding possible advertising deception. Level Two. Does not represent the lottery and does not participate in reviewing advertising material. This arrangement leaves the attorney general free to represent the consumer in an action against the lottery commission, but provides no prior oversight of advertising material. Level Three. Reviews advertising content, assigns an attorney to work within the lottery offices, and represents the commission. This would place the attorney general in the loop on advertising material, making it possible that legal standards are being met in ads prior to their placement. However, the attorney general is the legal counsel to the lottery commission and, therefore, could not act on behalf of a consumer in an action against that commission. Level Four. Has a review function, and specifically noted they would represent consumers in legal actions brought against the lottery and have an active interest in preventing deception in lottery advertising. This level of involvement would provide some oversight of advertising activities, if a consumer asked for such a review.

In addition, a search was conducted of all opinions offered by the attorneys general in lottery states in response to official requests regarding the state lottery laws. This effort was intended to determine if there was an internal regulatory structure involving state legislators or lottery commission officials who might be in a position to query their attorney general on matters relevant to lottery advertising. These opinions were broken into categories and are also discussed below.

Results

The results from the research can be presented as a scale running from high involvement in consumer protection (Level 4) to low involvement in consumer protection (Level 1).

Table 2: Results of the 1995 Survey of State Attorney General Involvement in Lottery Advertising

High Protection	Low Protection	Level 4	Level 3	Level 2	Level 1
Colorado	Florida	Illinois	Indiana	Michigan	Missouri
Montana	Nebraska	New York	California	Pennsylvania	Delaware
Arizona	Iowa	Rhode Island	D.C.	Minnesota	Kansas
South Dakota	Idaho	Ohio	Maryland	Virginia	Louisiana
Wisconsin	New Hampshire	West Virginia			

In 1995, as noted above, 29 attorneys general offices responded. One of these refused to answer the questions on the grounds that the office lacked the resources to conduct legal research on behalf of private citizens. 39

Table 3: Results of the 2002-2003 Survey of State Attorney General Involvement in Lottery Advertising

High Protection	Low Protection	Level 4	Level 3	Level 2	Level 1
Connecticut	Delaware	D.C.	Arizona	Georgia	Colorado
Florida	Idaho	Iowa	Illinois	Kentucky	Indiana
Massachusetts	Louisiana	Missouri	Maine	Montana	Maryland
Nebraska	Michigan	New Jersey	Minnesota	New Mexico	New York
Pennsylvania	Ohio	Rhode Island	Oregon	South Carolina	Vermont
South Dakota	Washington	Kansas	Texas	West Virginia	(none)
New Hampshire	Virginia	Wisconsin			

In the 2002-2003 surveys, all of the 39 attorney generals in states with lotteries responded. Of these, California's attorney general suggested that, given that legal service is not provided to individuals. 40 The summary of both years in each area is shown in Table 4.

Table 4: Comparison between 1995 and 2003 Survey Results

1995	2003
% of States	20.7%
Level One (Lowest)	43.6%
Level Two	48.3%
Level Three	48.7%
Level Four (Highest)	20.7%
Level 1 responses represent the lowest level of oversight, while Level 4 represents the highest level of oversight.	5%

*California refused to respond.
 If levels three and four are collapsed, the resulting Chi-Square analysis results in $p < .01$ significance, $df = 2$.

Level 1: Represents the state lottery commission in all legal actions but does not participate in reviewing advertising materials.

In 1995, six state attorneys general (20.7%) responded that they represent their respective state lottery commissions in any legal action: California, Delaware, District of Columbia, Idaho, Louisiana and New Jersey.⁴¹ Responses were typically short and to the point, such as that for Idaho: ♦The Attorney General♦s Office does not oversee lottery advertising in the State of Idaho. However, our office does, in the normal course of business, represent the Idaho State Lottery Commission and provides legal services as needed.♦42

The State of New Jersey did, in 1995, have a deputy attorney general identified as working primarily with the lottery commission. However, Virginia Haines, the executive directory of the lottery commission at the time, indicated that the only duties the attorney general♦s office had with the commission were to ♦represent us at our commission meetings, security hearings and look over any legal documents which may be necessary . . . [and those that] are of a legal nature that may need to be rendered.♦43

Other states among those in Level One were more specific: ♦A full time Assistant Attorney General shall be the legal advisor to the Louisiana Lottery Corporation and shall counsel and advise the corporation and represent it in all legal proceedings.♦44

By 2003, 17 (43.6%)♦more than twice the percentage in 1995♦represented the state lottery agency: Arizona, Colorado, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Minnesota, New York, Ohio, Oregon, Vermont, Washington, West Virginia and Wisconsin.⁴⁵ Most of these states indicated the lottery commission was represented in court by the attorney general, that the attorney general had no oversight of lottery advertising and no knowledge of any cases of consumer complaints filed against the lottery commission in regards to the advertising.

A few states provided details of the regulation of lottery advertising. In Indiana, the attorney general forwards all consumer complaints about the lottery ♦directly to the lottery for response.♦46 In Michigan, ♦The attorney♦s general office would respond to any inquiry on that subject raised by the Bureau of State Lottery or a member of the public.♦ However, ♦In the course of providing legal services to the Bureau of State Lottery, the Department of Attorney General is not always aware of matters not brought to its attention by the Lottery.♦47

Colorado is one of many states in which the attorney general was not counsel to the lottery commission in 1995, but was in 2002.⁴⁸ The cause of this shift is unknown in most cases, but, as in the case of Wisconsin, it could have been associated with a shift of the lottery operations from that of an

independent commission to a department inside of state government.

Advertising of the state lottery in Colorado, according to Maurice Knaizier, deputy attorney general, is specifically exempt from the Colorado Consumer Protection Act and the Sweepstakes Law. In addition, the attorney general's office has no oversight responsibility in the sense that it can overrule a decision of the Lottery Commission. The attorney general does provide the commission with the legal parameters of advertising.⁴⁹

Level 2: Does not represent the lottery and does not participate in reviewing advertising material.

Of the states responding to the request in 1995, 14 (48.3%) indicated they had no oversight of lottery commission activity and did not provide legal counsel to the lottery: Colorado, Florida, Illinois, Indiana, Michigan, Missouri, Montana, Nebraska, New York, Pennsylvania, Rhode Island, South Dakota, Virginia and West Virginia.⁵⁰ Responses were, as in the cases of Level 1, brief, such as that for Rhode Island: The Rhode Island Attorney General does not have jurisdiction over the advertising of state lotteries. This responsibility rests with the Rhode Island Lottery Commission.⁵¹

By 2003 19 (48.7%), roughly the same as in 1995, indicated they had no review of lottery commission advertising and did not provide legal counsel to the lottery: Connecticut, Delaware, District of Columbia, Georgia, Florida, Iowa, Kentucky, Massachusetts, Missouri, Montana, Nebraska, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas and Virginia.⁵²

In general, the other responses in Level 2 were, as was the case in 1995, very similar to Rhode Island's: Our Lottery Commission is a distinct legal entity with its own legal counsel.⁵³ None of the state attorneys general has any regulatory responsibilities over state lotteries. However, one Connecticut indicated that its Consumer Action Center would have oversight, not the attorney general's office.⁵⁴

Level 3. Reviews advertising content, assigns an attorney to work within the lottery offices, and represents the commission.

Of the states responding to the request, four (13.8%) indicated they had some form of oversight of lottery commission advertising activity, provided legal counsel to the lottery, and had assistant attorneys general specifically assigned to the lottery commissions or boards: Iowa, Kansas, Maryland, and New Hampshire.⁵⁵ The degree of involvement varied.

Iowa: In 1995, Iowa assigned one assistant attorney general to the state lottery commission. While the attorney general did not have direct oversight authority regarding the Lottery's advertising, the assistant attorney general was responsible for reviewing all advertising before it was used.⁵⁶ The three areas of particular interest to the assistant attorney general were that the advertising was effective, that it maintained the dignity of the state and that it promoted the general welfare of citizens. This review was conducted as part of the internal oversight committee that worked at the lottery commission. Iowa statute specifies that the form and type of marketing, informational, and educational materials ... shall contain the concept of investing in Iowa's economic development and show the economic development initiatives funded by the lottery revenue.⁵⁷ Iowa's Consumer Protection Division would handle all complaints regarding Lottery advertising, but whether unresolved disputes would then be handled by the attorney general's office was not made clear.

Kansas: In 1995, Kansas state statute required the attorney general to assign an assistant attorney general to work exclusively with the lottery to assist in the enforcement of criminal and civil provisions of the state lottery act.⁵⁸ While there are no specific rules or regulations or official written policy concerning lottery advertising, advertising materials were reviewed by the lottery's advertising manager, the lottery's director of marketing, the lottery executive director, and the assigned assistant attorney general.

Maryland: In 1995, one Maryland assistant attorney general acted as principal counsel to the lottery commission. Maryland required that both the lottery commission marketing department and this office of the Attorney General, generally review the advertising.⁵⁹

New Hampshire: In 1995, interest in regulating advertising of the sweepstakes in New Hampshire ended at the moment the contract to provide such advertising is approved by the state's governor and executive council. Contracts between the New Hampshire Sweepstakes Commission and the various advertising agencies must be approved by this [attorney general] office before taking effect, but our interest in said contracts relates more to their legal sufficiency as opposed to the substance of the proposed advertising.⁶⁰

By 2003, two states (5%) significantly fewer than in 1995 reported to be at this level: Kansas and New Hampshire.

Level 4: No review function, but specifically noted they would represent consumers in legal actions brought against the lottery and have an active interest in preventing deception in lottery advertising.

Of the states in 1995 responding, four (20.7%) indicated they had oversight of lottery commission

activity and did not provide legal counsel to the lottery: Arizona, Minnesota, Ohio and Wisconsin.⁶¹ These states specifically noted that they would represent consumers in any complaint against the lottery commissions. It would be useful to present the degree to which each of these states were involved in regulating their lottery commissions.

Arizona: John D. MacDonald, director of Government Affairs for the Arizona Attorney General, noted in 1995 that states with lotteries have a heavy burden . . . To ensure advertising for this form of gambling is conducted in a manner that does not misrepresent the chances of winning to a public all too eager to find easy money.⁶² While the Arizona Attorney General did not have a specific role in the review of lottery marketing strategies, he clearly has an interest in ensuring the lottery does not engage in misleading or deceptive advertising, MacDonald added.⁶³

He went on to reference a disagreement covered by local media between the state attorney general, Grant Woods, and the lottery commission over advertising that Woods described as misleading and catering to lower incomes and ethnic groups.⁶⁴ The lottery commission agreed to change or withdraw the advertising in question.⁶⁵

Minnesota: In 1995, a clear line existed between the Minnesota Attorney General's office and that state's lottery commission. In Minnesota, the Attorney General's Office did not oversee State Lottery advertising nor does it regularly review such advertising.⁶⁶ However, this apparently left the attorney general free to represent the interests of consumers: Should a consumer or some other entity have a concern that advertising laws are violated and [this concern] is brought to the Attorney General's attention, this Office would take appropriate action.⁶⁷

Clearly, while Minnesota was avoiding a potential conflict of interest by not representing the lottery commission, it also had no oversight responsibility. This differs strikingly from Minnesota's involvement in attempting to curb online scams in and around the same period as this survey. In July of 1995, Minnesota Attorney General Hubert "Skip" Humphrey III circulated a memorandum titled "Warning to All Internet Users and Providers." The warning was not only a notice that those using the Internet for commercial transactions should be wary, but also a notice that the state of Minnesota was prepared to defend its consumers against scam artists, no matter where the perpetrator resided.⁶⁷ By January 1996, several states already were active in tracking down and prosecuting deception and fraud involving advertising on the Internet.⁶⁸ But, Minnesota's rules regarding the state lottery did not provide any role for the attorney general to assure that the lottery board complies with state statutes addressing lottery advertising.⁶⁹

Ohio: In 1995, the line was clear in the State of Ohio: The Attorney General does not oversee the advertising budget or content of the Ohio Lottery Commission's advertising in Ohio. The Attorney General's responsibility is for the enforcement of the Consumer Sales Practices Act, and investigating complaints when consumers feel they have been misled [sic] by advertising.⁷⁰

This was another arrangement where the state was relying on consumer complaints to regulate lottery advertising. The nexus of the phrase "enforcement of the Consumer Sales Practices Act" and the phrase "when consumers feel they have been misled" suggest that latter was the trigger or impetus for the former.

Wisconsin: As noted above, Attorney General Doyle issued a report in 1991 critical of the law creating the lottery on the grounds that it was too vague to be enforceable. In responding to this survey, Doyle was not specific as to any ongoing oversight of the lottery's advertising activity, but suggested that the responsibilities were being shifted away from the lottery commission to the Wisconsin Department of Revenue.⁷¹

By 2003, no attorney general reported being involved at this level of oversight (also a significant decrease).

This summary of the 1995 and 2002-2003 results indicates a distinct shift away from high levels of oversight. However, before discussing this shift and its implications, it would be useful to review what other activity—specifically opinions—may have been offered by state attorneys general regarding lottery advertising.

Attorney General Opinions

In May 2003, a search employing Lexis was conducted of all state attorney general opinions rendered in states that conduct or participate in lotteries.⁷² The search terms used were "state lottery" and "advertising or promotion or advertise." The intent with the first search term was to avoid opinions rendered regarding privately run lotteries or illegal gambling schemes, as opposed to private "games" involving promotional giveaways and sweepstakes, which, if constructed properly, are legal.⁷³ Attorney general opinions of private lotteries are predictable and consistent, and are of little use here. However, it is of interest, that the settlements between state attorneys general and United States Sales Corporation and Reader's Digest both specifically require these companies to include information concerning the odds of winning,⁷⁴ but many states do not require their own lotteries include such statements of odds.

Of the 93 opinions rendered since 1963⁷⁵ dealing with advertising in relationship to the state lottery commission 28 (30.1%) dealt with the legality of the state's lottery, 17 (18.3%) with the legality of private games, 22 (23.7%) merely contained a citation to the state lottery act within an opinion focused on a non-lottery question, 13 (14%) addressed other issues, such as tribal gaming and out-of-state lotteries, and 13 (14%) dealt with questions regarding in-state lottery advertising. These 13 advertising opinions focused on questions that fall into the following categories:

- Co-promotions between the lottery and private businesses (Kansas 198876);
- Use of lottery tickets by non-lottery retailers for private promotions (New Hampshire 198477, and Florida 198878);
- Use of sporting events in lottery advertising (Kansas 199279)
- Use of lottery games to promote an athletic stadium (Maryland 199580)
- Limitations on state lottery advertising (Missouri 198781, and Oregon 198582);
- Limitations on advertising lotteries in another state or out-of-state lotteries within a lottery state (Missouri 197783, and Virginia 196984)
- Use of funds for advertising (Ohio 198685)
- Legality of broadcast advertising for private bingos (Michigan 199086)
- Restrictions on use of minors in lottery advertising (Kansas 199387, and Michigan 199088)

Of these, four dealt with self-regulatory issues outlined by the NASPL89(Michigan 1990, Kansas 1993, Missouri 1989, and Oregon 1985). Only Missouri's attorney general offered an opinion that addressed directly any issue regarding consumer deception.

Missouri Attorney General William L. Webster outlined, on request from a state senator, the legal limitations on advertising the state's lottery. His conclusion noted that lottery advertising, based on Section 313.335, must

- not be false or fraudulent
- contain information regarding how prizes would be paid
- declare that the advertising is for informational and educational purposes and not intended to induce any person to participate in the lottery or purchase a lottery ticket
- include a statement on the odds of winning, average return on the dollar and other details pertaining to the lottery prizes.

Two provisions of this law are of particular importance: the prohibition of advertising that induces play and the requirement that all ads include the odds of winning. While Webster argues in his opinion that induce should refer only to false or fraudulent persuasion, other state lotteries have used the word to mean that lottery advertising can contain only information. For example, Wisconsin, by statute, forbids any advertising that is promotional, that is, likely to induce play.⁹⁰

Notably, the opinion was later withdrawn by the attorney general. In 2000, the Missouri Senate repealed section 313.335 as part of a bill repealing expired provisions of law and sections made obsolete by expired provisions of law. This suggests that sometime after the 1987 Webster opinion, the Missouri Senate passed legislation making the restrictions cited by the attorney general moot. Indeed, in a letter responding to a request for information regarding restrictions on lottery advertising, Missouri Lottery Commission Executive Director James R. Scroggins did not include any reference to a state statute restricting advertising that is likely to induce play or any requirement for an inclusion

of the odds of winning.⁹¹

Discussion

Given the intense interest that government agencies have in regulating sweepstakes and contests by manufacturers, one might assume that a similar concern would lead those agencies to strictly scrutinize state lottery advertising. That is, if the lack of a statement of odds would lead the Federal Trade Commission to file an action against private lotteries,⁹² wouldn't a similar omission lead state attorneys general to intervene to protect consumers? This intervention could only occur, however, if the attorney general

- had some oversight responsibilities
- had some degree of independence from the lottery commission
- and the power to enforce such a guideline.

However, a preliminary analysis of state attorneys general involvement in lottery advertising oversight clearly indicates that the weak attention given to this area of government promotion in 1995 was much weaker by 2002-2003. Every state that exhibited any degree of oversight (Levels 3 and 4), with the exception of Kansas and New Hampshire, had shifted to Level 1 or 2, as shown in Tables One and Two.

With the exception of Kansas and New Hampshire, all responding attorneys general and counsels in 2002-2003 reported that they either represented the lottery commissions or report having no oversight and no involvement in commission oversight. In the first case, the attorneys general would be precluded from either representing a consumer a court action regarding deceptive advertising, given the inherent client-counsel relationship. As noted, in one state, Arizona, should a consumer claim harm resulting from lottery advertising, the attorney general would defend the consumer and the Solicitor General for the state would defend the commission.

In addition to the clear shift in attorney general oversight from 1995 to 2002-2003, only one opinion rendered by an attorney general dealt with state lottery advertising being in violation of state consumer protection rules (Missouri 1989) and that one may have simply resulted in the rules in question being modified to allow the advertising.

The data suggest, that, if anything, the state attorneys general consider either that they have a duty to defend the state lottery commission or no reason to act at all. This places the state lottery, a multi-million dollar advertiser, outside of the purview of the chief legal officer for the state and suggests a serious flaw in the regulatory framework intended to protect consumers from deception and harm.

The significant shift from 1995 to 2003 in attorneys general acting independent and with some oversight of their lotteries is perplexing. It may be the result of budget considerations (staff reductions). It may also be because of a shift in the nature of the lottery commission: from a quasi-independent operation to one of a state department. This sort of shift, figuratively from ♦outside♦ to ♦inside♦ state government, would place the attorney general in the role of legal advisor to the lottery department, much as the attorney general would represent any other state office.⁹³ This shift may have been driven by budget concerns as well, but the result rendered the attorney general's office impotent to regulate lottery advertising in the way that it reported doing in 1995.

It is also possible that pressure on state lotteries to generate revenue may have resulted in equal pressure on the state attorneys general to avoid what might be considered ♦interference♦ with the revenue production components of lottery operations, specifically its advertising.

The lack of an independent agency to oversee lottery advertising raises its own set of concerns. Even in states that have some voluntary guidelines, what assurance is there for consumers that the conflicted attorney general's office are making sure the guidelines are being followed?

Conclusions: Potential Solutions

Two questions need to be addressed if the conflicts of interest that exist within state attorneys general and state lottery commissions are to be avoided.

Question 1. Should the scope of a solution be national or state-by-state?

Scope of regulation: Given that each state's lottery legislation differs slightly in many regards from other states, including in the areas of advertising, it is difficult to imagine that as things now stand, a single set of rules can be developed that would encompass the varying standards. Thus, without a national application of rules, the possibility for an efficiently enforceable code is remote. The difficulty is not in the varying standards: each state sets its own rules regarding a host of issues, from speed limits to taxes. In all other areas outside of advertising, actions brought against a lottery commission would fall within the typical model of an attorney general defending a state concern. The conflict arises when two competing state interests require one state actor to resolve the issues involved. The state has an interest in defending its state lottery (and the revenues it generates), and it has an interest in protecting its citizen-consumers from deception.

The scope of the regulation, if it is to succeed, must be outside of the states, that is, national. While each state could still maintain its own code of practice, the evolved standard, whoever might develop it,

might concede to the national entity the power to set certain rules in the area of consumer protection. This would assure that all lottery advertising conforms to established law regarding consumer protection, laws developed and tested.

Rules might require, at a minimum, that all lottery advertising include a statement of the odds of winning, how prizes will be paid out, and the prohibition of appeals to minors or use of minors in the ads. More extensive standards, such as those in Wisconsin, where, by statute, no promotional advertising may be used, could be applied by the national regulator for advertising within those few states such as anti-promotional provisions. That is, each state could establish additional rules beyond the basic set, but the assurance that these standards are being met would be the responsibility of a national regulator. This is crucial to avoid the possible conflicts of interest inherent in the existing system.

Question 2. Should the regulation be conducted using a self-regulatory model or a government agency?

Who might be the most appropriate national regulator? Here we have two choices, it would seem: self-regulation and federal regulation. Within the self-regulatory option, three existing bodies are possible options, NAAG, NASPL, or the National Advertising Division (NAD) of the Council of Better Business Bureaus.

NAAG, given its national membership, may not be the best choice for two reasons:

First, the national membership includes states not currently operating lotteries. While it is possible that this may change, it is unlikely all states will eventually adopt state lotteries. In the meantime, attorneys general from non-lottery states would participate in lottery oversight, a situation unlikely to be viewed favorably by lottery states. The costs associated with regulating lottery advertising would be borne by all states, another situation unlikely to be viewed favorably by non-lottery states.

Second, state attorneys general, however competent to conduct oversight, already present a conflict of interest. The conflict would merely be shifted from the state level to NAAG, with attorneys general representing their state lottery commissions before other attorneys general within the same membership body.

NASPL may be a more appropriate body to attempt to enforce some set of rules. This body already has an existing set of guidelines that, if nationally applied, would cover the potential areas of concern in consumer protection. Areas not covered in the existing rules, such as method of payment of prizes, could be added. Enforcement, while voluntary, would be made public, with NASPL staff empowered to

respond to complaints and/or questions from the public, as well as conduct its own staff oversight. However, NASPL has no experience in regulation and may consider such activity as contrary to its role as a trade association providing information and support to state lotteries.

A third possibility is the NAD, the largest self-regulatory effort in advertising. Since 1971, the NAD has acted as the main industry self-regulatory body to resolve disputes between advertisers, investigate consumer complaints about advertising claims, and monitor national advertising for deception. Working within a strictly voluntary process, NAD review specialists act as investigators, mediators, and adjudicators of the errors of advertising, focusing solely on the truthfulness of claims and comparisons.

NAD has advantages over NASPL, specifically the advertising oversight expertise and experience of its staff; that the regulatory structure already exists at NAD and has been refined over the past 30-plus years; and the independence the group has exhibited in handling cases. NAD's procedures and professionalism are well-regarded by the Federal Trade Commission, according to FTC staff.⁹⁴

An obvious federal option would be the FTC itself, if federal restrictions on FTC oversight of state lottery advertising were removed. The FTC already has experience in regulating games of chance and sweepstakes. The commission established a Trade Regulation Rule (TRR) on Games of Chance in the Food Retailing and Gasoline Industries in 1969. The FTC, as noted by Commissioner Swindle in 1999,

◆ has a long history of using its authority under Section 5 to challenge deceptive mail promotions. Our most recent efforts in this regard culminated in "Project Mailbox," a joint federal-state initiative focusing on the deceptive use of sweepstakes, prize promotions, premium awards, and other misleading marketing techniques in mail solicitations, unsolicited facsimiles, and unsolicited commercial e-mail.⁹⁵

As noted in a June 2000 FTC press release,

Every day, consumers across the United States lose thousands of dollars to unscrupulous prize promoters. Last year alone, the Federal Trade Commission received more than 10,000 complaints from consumers about gifts, sweepstakes and prize promotions. Many of the consumers received telephone calls or postcards telling them that they◆d won a big prize◆ only to find out that to claim it, they had to buy something or pay as much as \$10,000 in fees or other charges.⁹⁶

This kind of involvement in reviewing claims made in promotional materials makes the FTC significantly experienced in detecting deception, more so than any state attorney general and substantially more than a self-regulatory or trade group.

In addition, a federal agency would have the force of law, which carries with it a more implicit power to regulate. Consumers are more likely to know of the FTC than the NAD, and few, if any, direct conflicts of interest exist between the federal agency and the group it would regulate.

FTC staffers are trained and in place, and could start immediately in applying state lottery advertising to its existing standards of deception and harm previously mentioned. The main issue with the FTC might be staffing, which could be handled through a fee-for-use model funded by the state lottery commissions. This would avoid the imposition of federal tax liability on states that do not have lotteries.

Of these four options, NAAG, NASPL, NAD, and FTC, the latter two seem more likely and appropriate: NAD because it is more likely to be acceptable to the regulated lottery commissions and other stakeholders (such as Congress); FTC because it has the enforcement power lacking at the NAD. Either of these would be a good start to providing consumers some assurance that lottery advertisers abide by national standards for deception, an assurance that state attorneys general cannot provide.

Appendix

The complete set of guidelines, reproduced here, is available at NASPL web site:
<http://www.NASPL.org/nasplad.html>.

Content

1. Advertising should be consistent with principles of dignity, integrity, mission and values of the industry and jurisdictions.

- Advertising should neither contain nor imply lewd or indecent language, images nor actions.
- Advertising should not portray product abuse, excessive play nor a preoccupation with gambling.
- Advertising should not imply nor portray any illegal activity.

2. Advertising should not degrade the image or status of persons of any ethnic, minority, religious group nor protected class.

3. Advertising by lotteries should appropriately recognize diversity in both audience and media, consistent with these standards.

4. Advertising should not encourage people to play excessively nor beyond their means.

- Advertising and marketing materials should include a responsible play message when appropriate.
- Responsible play public service or purchased media messages are appropriate, especially during large jackpot periods.
- Support for compulsive gambling programs, including publications, referrals and employee training is a necessary adjunct to lottery advertising.
- Advertising should not present, directly nor indirectly, any lottery game as a potential means of relieving any person's financial or personal difficulties.
- Advertising should not exhort play as a means of recovering past gambling nor other financial losses.
- Advertising should not knowingly be placed in or adjacent to other media that dramatize or glamorize inappropriate use of the product.

Tone

1. The Lottery should not be promoted in derogation of nor as an alternative to employment, nor as a financial investment nor a way to achieve financial security.

2. Lottery advertisements should not be designed so as to imply urgency, should not make false promises and should not present winning as the probable outcome.

3. Advertising should not denigrate a person who does not buy a lottery ticket nor unduly praise a person who does buy a ticket.

4. Advertising should emphasize the fun and entertainment aspect of playing lottery games and not imply a promise of winning.

5. Advertising should not exhort the public to wager by directly or indirectly misrepresenting a person's chance of winning a prize.

6. Advertising should not imply that lottery games are games of skill.

Minors

1. Persons depicted as lottery players in lottery advertising should not be, nor appear to be, under the legal purchase age.
2. Age restrictions should, at a minimum, be posted at the point of sale.
3. Advertising should not appear in media directed primarily to those under the legal age.
4. Lotteries should not be advertised nor marketed at venues where the audience is reasonably and primarily expected to be below the legal purchase age.
5. Advertising should not contain symbols nor language that are primarily intended to appeal to minors or those under the legal purchase age.

- The use of animation should be monitored to ensure that characters are not associated with animated characters on children's programs.
- Celebrity or other testimonials should not be used which would primarily appeal to persons under the legal purchase age.

Game Information

1. Odds of winning must be readily available to the public and be clearly stated.
2. Advertising should state alternative cash and annuity values where reasonable and appropriate.

Beneficiaries

1. Lotteries should provide information regarding the use of lottery proceeds.
2. Advertising should clearly denote where lottery proceeds go, avoiding statements that could be confusing or misinterpreted.

The author wishes to thank Dr. Thomas Bowers, who co-authored the conference paper that was the basis for this paper. Also, the author thanks Dr. Tom Grimes for his advice and Carol Gould for her significant contributions in the editing of this article.