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GENERAL COUNSEL DIVISION

January 22, 2010

Lieutenant Glenn Chastain  
Oregon State Lottery/Security Division  
500 Airport Road SE  
Salem, OR 97301

Re: Opinion Request OP-2010-1

Dear Lieutenant Chastain:

Gambling is unlawful in Oregon unless the legislature specifically authorizes it. *See* ORS 167.122 (participating in unlawful gambling as a player is a Class A misdemeanor); ORS 167.127 (promoting or profiting from unlawful gambling is a Class C felony); ORS 167.117(24) ("unlawful" means "not specifically authorized by law"). For these purposes, gambling does not include "social games." ORS 167.117(7)(c).

To qualify as a "social game," a game must be "between players" and must not have any "house player," "house bank," "house odds," or "house income." ORS 167.117(21). But the legislature did not define any of those terms except "player." This raises questions as to whether certain games qualify as social games. You ask us to interpret several key terms in the definition to clarify the circumstances in which a game will meet the criteria for the social-game exception. Below, we set out your specific questions and our short answers, followed by a discussion.

**QUESTIONS AND SHORT ANSWERS**

As used in ORS 167.117(21)'s definition of "social games," what do the following mean:

Question 1: The requirement that the "game" be "between players?"

The requirement that a social game be "between players" means that any person betting in a social game must qualify as a "player" under ORS 167.117(16).

Question 2: "House?"

As used in the definition of "social games," "house" means: (1) all private businesses, private clubs, and places of public accommodation where social games occur, including their owners, managers and employees; and, (2) any person who operates what would otherwise be a social game for profit rather than for social purposes. "Operates" for those purposes includes any action described in ORS 167.117(18) that materially aids the game.

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Exhibit 3A  
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"Social game" is defined by ORS 167.117(21) to mean:

(a) A game, other than a lottery, between players in a private home where no house player, house bank or house odds exist and there is no house income from the operation of the social game; and,

(b) If authorized pursuant to ORS 167.121, a game, other than a lottery, between players in a private business, private club or place of public accommodation where no house player, house bank or house odds exist and there is no house income from the operation of the social game.

ORS 167.121 permits cities and counties to authorize social games in private businesses, private clubs or places of public accommodation.<sup>17</sup> The requirements for social games are the same in those places and private homes. You ask us to clarify the requirement that the game be "between players" and the prohibitions on "house" activity.

### "BETWEEN PLAYERS" REQUIREMENT

#### 1. Statutory interpretation

In interpreting the phrase "between players" (as well as the other terms about which you inquire), we follow the statutory interpretation method set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), and subsequently refined in *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009). The first step is an examination of the statute's text and context. *PGE*, 317 Or at 610-11. In doing so, we apply statutory and judicial rules for reading the text and context, including giving terms of common usage their plain meanings. *Id.* The second step is to consider legislative history where it appears useful to the analysis of the statute. *Gaines*, 346 Or at 171-172. The third and final step is resort to general maxims of statutory construction to aid in resolving any uncertainty as to the legislature's intent that remains "after examining text, context, and legislative history." *Id.*

#### 2. Defined

##### a. "Between"

While the statutory definition of "social games" was initially enacted in 1973 and amended in 1974 (as discussed at length later in this opinion), the "between players" statutory language predates that definition and was enacted in 1971. When we consider the plain meaning of a statute's text under the interpretational method described in *PGE* and *Gaines*, we are directed to consult dictionaries in existence around the time of the enactment of the statute. *See, e.g., State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003). Accordingly, we consult the 1961 edition of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED), but note that the pertinent definitions in the 1961 edition are identical to those in the most current edition published in 2002. Beginning with "between," the most apt plain meaning is "involving the

We conclude that, for purposes of ORS 167.117(21)'s definition of "social game," the legislature likely intended "gambling," as used in ORS 167.117(16)'s definition of "player" to mean gambling as defined by ORS 167.117(7), excluding the social game exception in subsection (7)(c). Applying that definition, a "player" in a social game must stake or risk something of value upon the outcome of the contest, *i.e.*, bet, in the game.

A "player" must engage in gambling "solely as a contestant or bettor." That means, first, that the person may not receive or become entitled to receive "any profit therefrom other than personal gambling winnings." That requirement distinguishes a "player" from one who "profits from unlawful gambling," which is defined as when:

*\* \* \** a person, *acting other than solely as a player*, accepts or receives money or other property pursuant to an agreement or understanding with another person whereby the person participates or is to participate in the proceeds of unlawful gambling.

ORS 167.117(17) (emphasis added).

(2) **No material assistance**

The second requirement for a person to engage in gambling "solely as a contestant or bettor" is that the person not "render[] any material assistance to the establishment, conduct or operation of the particular gambling activity." That requirement distinguishes a player from a person who "promotes unlawful gambling," which is defined as:

*\* \* \** a person, *acting other than solely as a player*, engages in conduct that materially aids any form of unlawful gambling. Conduct of this nature includes, but is not limited to, conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases or toward any other phase of its operation. A person promotes unlawful gambling if, having control or right of control over premises being used with the knowledge of the person for purposes of unlawful gambling, the person permits the unlawful gambling to occur or continue or makes no effort to prevent its occurrence or continuation.

ORS 167.117(18) (emphasis added).

A "person who gambles at a social game of chance on equal terms with the other participants" does not "render material assistance" by arranging or facilitating the game, such as by "inviting persons to play, permitting the use of [their] premises," or "supplying cards or other equipment" to be used in the game as long as they do so for free. The requirement that such

Consequently, if a group of friends gathers to play and one does not want to bet in the game, but offers to deal the cards, the game would qualify as a social game if all other requirements are met. But as discussed further below, such a dealer may not receive a tip or any fee, due to language in the definitions of "player" and "social games" (*i.e.*, the "house" prohibitions) that forbid anyone from dealing cards for a fee or remuneration.

**b. Bankrolled players**

A second issue arising from the "between players" requirement is whether a social game may have a player who is not betting their own money but is "bankrolled" (who plays with capital supplied in whole or part by someone else who shares any winnings). We addressed that issue in a previous opinion and concluded that a social game may not have any bankrolled players; we adhere to that conclusion. 38 Op Atty Gen 1455, 1457-1460 (1977). Although not expressly stated in the prior opinion, the conclusion rests implicitly – at least in part – on the rationale that only the people who play in the social game may stand to win or lose any money from the game. To qualify as a "player" a person must engage in gambling (risk something of value) solely as a contestant or bettor without receiving or becoming entitled to receive any profit other than "personal" gambling winnings. "Personal" means "of or relating to a particular person." WEBSTER'S at 1686 (emphasis added). There is no question that the "particular person" referred to in the definition of player is the contestant or bettor, not a third party. A bankrolled player does not risk his or her own funds (at least to the extent of the "bankroll"). Moreover, the presence of a bankrolled player makes the game take on a professional, rather than social, flavor. 38 Op Atty Gen at 1457-60.

**c. Fee or advantage by person arranging or facilitating game**

Finally, the "between players" requirements makes clear that if a person who gambles in a social game receives any fee or remuneration for arranging or facilitating a game, the game is not a social game because the person would no longer qualify "solely as a player," and the game would not be "between players." Similarly, if one who arranges or facilitates the game has some advantage in the game, he or she is not playing on equal terms with other players, and the game is not social.

We interpret "facilitating" the game to include dealing the cards. The "player" definition exempts from prosecution for materially assisting unlawful gambling (*i.e.*, promoting) persons who perform "acts directed toward the arrangement or facilitation of the game" if they gamble in social games on equal terms with other players and receive no fee or remuneration for facilitating or arranging the game. Although dealing the cards is not one of the listed examples of arranging or facilitating the game, as discussed above, "conduct[ing] the playing phases" is listed as an act that "materially aids unlawful gambling" under ORS 167.117(18), and dealing the cards is part of conducting the playing phase of the game. Consequently, a person who gambles in a social game and also deals the cards must not have any advantage in the game or receive any fee or remuneration for dealing. This means that for games like blackjack where the dealer has an inherent advantage, no player may hold the deal; rather the deal *must* rotate. It is not enough for

this context is a "gambling house," which is "a place where gambling is carried on or allowed as a business[.]" WEBSTER'S at 932. Obviously all of those definitions are closely related, differing only in whether they refer to the personnel of a gambling establishment, the place itself, or both. "House" in the sense of "operator of a gambling game," differs from those definitions in that the "house" is not tied to any particular place, but includes any person who operates a game for profit.

It is not readily apparent whether the legislature intended "house" to encompass all of those plain meaning senses or not. The context suggests that *none* of those definitions are completely satisfactory. Specifically, ORS 167.117(21) expressly prohibits the "house" from receiving *any* income from operating a social game, but in *all* relevant definitions, a "house" operates the game for profit. In other words, ORS 167.117(21)'s requirement that the "house" not receive any income from operating a social game effectively prevents there from being a "house" – as Webster's would define it – in a social game.

The legislature may have intended "house" to mean any private business, private club or place of public accommodation where a social game occurs even if the place makes no income from the game. That interpretation would stretch the plain meaning of "house" to include any business where social games occur, rather than only places that operate gambling games as a business. It is true that those places operate for a profit and, if they allow social games, do so from a profit motive (e.g., the sale of food and drink) even if they derive no income directly from the game. Although that interpretation solves the problem of reconciling the definition of "house" with the prohibition on "house" income, it gives no effect to the "house" prohibitions that apply to games in private homes pursuant to ORS 167.117(21)(a).

Alternatively, the legislature may have intended "house" very broadly to include any place where a social game occurs, including a private home. Although that interpretation gives effect to the house prohibitions in ORS 167.117(21)(a), it creates other problems. First, that definition does not fall within any of the plain meanings. Second, subsection (a) prohibits a "house player" in games in private homes and interpreting "house" to include any place where a social game occurs to mean that the person who invited friends into his or her home to play a "social game" could not play. That interpretation would conflict with the definition of "player" which, understandably, recognizes that a person who hosts a social game in his or her home may play.

Finally, the legislature may have intended "house" to include any business establishment where a social game occurs (including the owners, managers and employees of the place) and any person who operates a game for profit rather than for social purposes. That interpretation gives effect to the house prohibitions, both in business establishments and private homes, and reconciles the prohibition on a house player in a private home and the definition of "player" because only a person who sought to make a profit in a private home would be prohibited from playing. But that definition continues to have a rather nonsensical application to the house income prohibition, because that prohibition would literally mean that anyone who operates a game for profit cannot make any income from operating the game. No potential definition of "house" that gives effect to all prohibitions remedies that problem. Because the legislature's

food and beverages sold in card rooms. *See, e.g., Minutes, Senate and Federal Affairs Committee (SB 803), May 10, 1973, at 5-6.*

Some opposed the amendment, arguing that allowing social games in public places would encourage professional gambling. *Id.* at 6. But John Runstein, the president of a private social club, testified that “[c]ard room owners thin[k] that if these social games are permitted on their premises and a reasonable service charge is required for the use of the premises and for the labor involved of not more than 25% of the total income of the overall operation of the complete premises, that anything like professional gambling would be eliminated.” *Id.* at 5.

The legislature agreed. It retained the “social game” language in the definition of player, amended the gambling laws to exclude social games from the definition of “gambling,” and provided the following definition of “social games,” which allowed social games in public places:

[a social game is] a game, other than a lottery, between players in a private home or private business, private club or in a place of public accommodation where no house player, house bank, or house odds exist and the gross income from the operation of the social game does not exceed 25 percent of the gross income of the private business, private club or public accommodation.

Or Laws 1973, ch 788, § 1 (emphasis added).<sup>41</sup>

That definition was somewhat ambiguous about whether the “house” prohibitions applied to games in private homes or only to business establishments. The income limitation, at least, expressly applied only to private businesses, private clubs, and places of public accommodation. The legislature did not discuss whether the prohibitions applied to games in private homes. Nor did it discuss the meaning of “house.” But when the legislature first used the term “house,” public places expressly *could* make income from operating a social game as long as that income was a small percentage of their overall business. Thus, in 1973, “house” could have referred to a place that operates a social game for profit.

The reason given for limiting the income that those places derived from social games was to prevent professional gambling in Oregon. Unfortunately, that purpose was not achieved. In the 1974 special legislative session, House Speaker Eymann told the House Rules Committee that the 1973 legislation had allowed large stakes professional gambling to take place in Oregon and that the Attorney General had received numerous requests for corrective legislation. Minutes, House Rules Committee (LC 283), February 7, 1974 at 7; Minutes, House Rules Committee (LC 283), February 11, 1974 at 5; and Minutes, House Committee on Judiciary Special Session (LC 283), February 11, 1974 at 2. Phil Roberts, representing the District Attorneys Association, stated that enforcement of the 1973 legislation’s income limitations had been difficult “because of the various ways a house may collect money, such as charging to enter an establishment or charging an amount per hour for use of a table. Accounting of funds collected in such ways would be almost impossible.” *Id.* at 3.

without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefore and supplying cards or other equipment.

ORS 167.117(16). Assuming, however unlikely, that the house could ever qualify *solely* as a player, it is expressly prohibited from doing so. Thus, in addition to being prevented from making any income from *operation* of a social game, the house is prohibited from betting and becoming entitled to receive gambling winnings from competing in the game.

That prohibition prevents games where players bet against the house from qualifying as social games. For example, a bar, restaurant, hotel, private club, or any person who attempts to operate a game for profit could not supply a dealer in a blackjack game, because the house would be competing to receive gambling winnings. More broadly, the prohibition on a house player prevents the house from betting in any social game, even games where players bet against each other, rather than the house, because the house may never compete for gambling winnings.

#### 4. "House bank"

Next, a social game may have no "house bank." Webster's contains several definitions of "bank" that specifically apply in the gambling context: (1) "GAMBLING HOUSE" [which, as discussed above, is a place where gambling is carried on or allowed as a business]; (2) "a person or persons conducting a gambling house or game; *specif*: DEALER"; (3) "the sum of money in certain gambling games (as chemin de fer) that is deposited or stated by the dealer as a fund from which to pay his losses"; and, (4) "the whole supply of chips available for purchase and use by players in a game played with chips (as poker)." WEBSTER'S at 172.

In addition, the verb "bank" in the gambling context means "to act as banker for (as a gambling game)." *Id.* And, "banker" in the gambling context has three meanings: (1) "the player who keeps, sells, and redeems the supply of chips used in a game – compare BANK (referring to the meaning of the whole supply of chips available for purchase and use by players in a game played with chips (as poker)); (2) "the person who agrees to cover the bets of all players up to a certain limit established as the bank"; and, (3) "a dealer (as in blackjack) or a gambling house or its representative against whom all bets must be placed." *Id.*

The most natural meaning of "house bank" in this context is the house acting as the banker for a game. Some prohibitions on activities that the house might do as the banker are duplicative of other prohibitions. For example, the house player prohibition prevents the house from competing in a social game, thus, bets may not be placed against a house dealer. And covering bets or selling chips to the extent that the house would make a profit from doing so is precluded by the prohibition on house income. But we construe the house bank prohibition to go further and *to preclude the house from having any involvement in the financial aspects of a social game*, even if the house makes no profit from its involvement. This construction gives the house bank prohibition some independent meaning. For example, the house could not keep, sell or redeem chips in a social game, even if the house makes no profit from doing so. On the other hand, the house does not appear to be prohibited from simply supplying chips that the players

- A person who invites friends in for a social game in the person's home may bet in the game as long as the person is not operating the game for profit and may arrange the game and provide the necessary equipment as long as the person receives no fee or remuneration for doing so and plays on equal terms with the other players;
- Any social game players who deal in a game where the dealer has an inherent advantage, such as blackjack, must pass the deal and receive no fee or remuneration for dealing; and,
- All persons who bet in a social game must stand to gain only their own personal gambling winnings and no other profit from the game.

Sincerely,

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<sup>1/</sup> ORS 167.121 provides that "[c]ounties and cities may, by ordinance, authorize the playing or conducting of a social game in a private business, private club or in a place of public accommodation. Such ordinances may provide for regulation or licensing of the social games authorized."

<sup>2/</sup> Obviously, if no participants in a game are betting, the game does not meet the general definition of "gambling" and requires no legislative exemption or authorization to be lawful.

<sup>3/</sup> We also recognize that we have answered this question differently before. See Letter of Advice dated September 17, 1982, to Polk County District Attorney Doug Dawson (OP-5409) at 3-4 (rejecting that notion that a "dealer does not participate because he handles the cards, supervises and \* \* \* inevitably works for tips"); Letter of Advice dated April 14, 1983, to Senator Fred Heard (OP-5460) at 5 (concluding that providing a role for anyone other than "players" – in that case dealers – "takes the activity out of the social gaming exception"). Those opinions were issued prior to *PGE* and *Gaines* and did not examine the issue using their methodology. To the extent that the opinions are inconsistent with this opinion, we overrule them.

<sup>4/</sup> Changes in statutory text over time are considered part of the context of the statute. *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994). We discuss the change in statutory text in our discussion of legislative history, because the statutory change alone does not eliminate ambiguity and it makes more sense to do so.

<sup>5/</sup> Several gambling websites do discuss "house odds." A typical website explains "house odds" this way:



