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LEGAL UPDATE

January 6, 2012

To: **Superintendents/Presidents, Member School Districts (K-12)**

From: **Frank Zotter Jr., Sr. Associate General Counsel** FZ

Subject: **Lotteries, Raffles, and Similar Fundraising Activities**
Memo No. 02-2012

As funding sources have diminished over the past few years, many school districts have looked to other means of raising revenue, whether to augment their general funds or to pay for specific activities. These alternative means of fundraising have included raffles and similar games of chance, and "movie night" fundraising events. This update discusses some issues that districts should take into account when using these means of raising revenue.

Lotteries and Raffles:

With the exception of the California State Lottery, all true raffles were illegal in California until 2000, when Proposition 17 legalized raffles conducted for charity. A true "raffle" is one form of a lottery. Lotteries and raffles share three characteristics:

- the awarding of money or some other prize of value;
- the award being made by chance; and
- the chances of being based on a contestant paying consideration for a draw.

If a game is referred to as a "lottery," the prize usually consists of a portion of the proceeds, often half of the funds collected; such lotteries are referred to as "50/50" games. A "raffle" usually involves the winner receiving a prize instead of money, such as a vehicle, a television, or a paid vacation. Although raffles were often sponsored by charities before 2000, many of them technically violated the California Constitution and Penal Code § 320, both of which prohibit "lotteries."[1]

Prior to 2000, therefore, the only legal way to avoid the prohibition was to make the "purchase" of the tickets a donation instead of the true purchase of a ticket against the chance of winning a portion of the proceeds or a prize. In order to make such a promotion lawful, therefore, the sponsor had to make it clear that "no purchase is necessary" in order to win, because then there

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[1] Prior to 2000, many law enforcement agencies "looked the other way" regarding charity raffles, even if they were not operated using the "donation" structure, and thus were technically unlawful.

is no "required consideration." Participants could still, however, make a donation to the organization in exchange for the ticket, so long as the promotional materials made clear that this was not a requirement and a ticket could be obtained for free.

In 2000, Proposition 17 amended the State Constitution to allow private nonprofit groups to conduct raffles under certain conditions. To qualify, at least 90% of the gross receipts from the raffle must go directly to charitable purposes within California. (Thus, "50/50" games continue to be illegal.) The proposition also provides that any person who receives compensation in connection with the operation of a raffle must be an employee of the organization conducting the raffle. Organizations that sponsor raffles can either pay no more than 10% of the proceeds as a prize (less any expenses, such as ticket printing), or can make a donated item the prize. Another possibility to reduce costs, of course, would be soliciting a local business to underwrite the cost of the ticket printing in exchange for promotional advertising on the tickets.

To implement Proposition 17, the Legislature adopted Penal Code § 320.5, which tracks the terms of the ballot measure. That statute defines which organizations are eligible to conduct raffles and provides for other regulation. The Attorney General's Office has devoted a lengthy portion of its website to this topic, including a Frequently Asked Questions page, which can be found at http://ag.ca.gov/charities/faq.php#raffles.

The Attorney General explains that, "Only eligible private, tax-exempt nonprofit groups qualified to conduct business in California for at least one year prior to conducting the raffle may conduct raffles to raise funds for the organization and charitable or beneficial purposes in California." The website goes on to describe the organizations that can conduct raffles, which are referred to in § 320.5 itself only by reference to other statutes. There are also ordinarily registration and reporting requirements with which sponsoring organization must comply, although the Attorney General notes that, "Nonprofit religious organizations, schools, and hospitals are exempt from the registration and reporting requirements."

Oddly, there is no exemption under § 320.5, nor under the regulations adopted by the Attorney General,[2] for public entities themselves to conduct a true raffle, even though funds raised in this way are certainly going to an appropriate charitable cause. One of the nonprofit organizations described in § 320.5 as eligible to sponsor raffles, however, is an entity organized under Revenue and Taxation Code § 23701d (which describes religious, charitable, or educational nonprofit entities as eligible to conduct a lottery). Therefore, a typical school support foundation, assuming it has existed for at least a year, would be eligible to conduct a raffle.

Districts should keep in mind, however, that they or their foundations do not need to comply with these new legal provisions if they conduct a "raffle" in the same way a lawful pre-2000 "raffle" was operated. Penal Code § 320.5, subdivision (m) has codified that exception: a "raffle" is exempt from the prohibitions of law if it involves "a general and indiscriminate distribution of tickets"—that is, if the tickets "are offered on the same terms and conditions as tickets for which a donation is given." Thus, as before 2000, if participants are not required to pay for a chance to play, the "raffle" does not have to meet the new regulations under § 320.5 et al., and a school district can choose to operate such a "raffle" in that way instead.

"Movie Nights" and Other Public Performances

Another common fundraising activity is for a district to hold a "movie night" or other public performance for which tickets are sold to benefit the organization. Although many

[2] The regulations are found at 11 Cal. Code of Regs. § 410 et seq. The Attorney General provides a link to both Penal Code § 3205. and the regulations at http://ag.ca.gov/charities/statutes.php.

districts are familiar with the requirement that public performances of plays and contemporary musical compositions require that a license be obtained from the copyright holder of those works, many are unaware that a public performance of a motion picture also requires a separate license be obtained.

A "public performance" includes any display of a movie "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and . . . social acquaintances is gathered."[3] Merely renting or even owning a copy of a motion picture on DVD or Blu-Ray does not permit it to be shown to a paying audience.[4]

Indeed, even showing such a copyrighted work to a non-paying audience, if it is sufficiently large, can constitute a copyright violation. The Attorney General, for example, concluded that showing pre-recorded copyrighted motion pictures to prison inmates[5] or to wards in juvenile detention facilities[6] constituted an infringement. As the Attorney General noted, "We conclude . . . it was [an infringement] since (a) the showing was a protected 'public performance' within the meaning of section 106(4) [of the Copyright Act] and (b) it did not amount to a 'fair use' of the material . . . ."[7]

School districts may obtain a public performance license through the movie studio or any of several agencies which are authorized to issue licenses on behalf of the studio. Licenses typically will state a limit on the number of showings, the location of the showings, and audience size and will prohibit the charging an admission fee in excess of costs although—as with pre-2000-style raffles—suggested "donations" may be requested.

"Fair use" mentioned in the quotation from the Attorney General's opinion is an exception to the normal restrictions imposed by copyright. One of those exceptions permits the public performance of copyrighted material without a license if "the performance or display . . . is by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction . . .," provided the showing is by means of an authorized copy of the movie.[8]

The term "classroom or similar place devoted to instruction" is limited to a space "actually used as a classroom for systematic instructional activities." A school assembly, a sporting event, or other gathering where the audience is not limited to the members of a particular class of pupils would not meet the exception. Therefore if a motion picture is shown to such a diverse group, it would require a special license.

If you have any questions, please contact one of the attorneys in our offices.

FZ:pjb

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[3] 17 U.S.C. § 101.
[4] If one reviews the copyright warning at the beginning of commercially pre-recorded videos, the notice typically states that the work is licensed for "private home viewing only."
[5] 65 Ops.Cal.Atty.Gen. 106 (1982)
[6] 71 Ops.Cal.Atty.Gen. 16 (1988).
[7] 71 Ops.Cal.Atty.Gen. at 21.
[8] 17 U.S.C. § 110, subd. (1).