

# Texas Department of Transportation

MOTOR VEHICLE DIVISION, ADMINISTRATION  
P.O. BOX 2293 • AUSTIN, TEXAS 78768 • (512) 416-4800 • FAX (512) 416-4890

August 24, 1999

FILE # ML-4026-99  
I.D. # 40956

Ms. Elizabeth Robinson  
Chair, Opinion Committee  
Office of the Attorney General  
P. O. Box 12548  
Austin, Texas 78711-2548

RECEIVED RQ-0106-AC  
AUG 26 1999

Re: Request for Opinion **Opinion Committee**

Dear Ms. Robinson:

Attached is a copy of Karen Coffey's (general counsel for the Texas Automobile Dealers Association) letter to me concerning a recent request for an opinion about test drives. As you will recall, your office determined that the director of the Texas Motor Vehicle Board/ Motor Vehicle Division, is not qualified under the Government Code to make a request for a written legal opinion. We request that you review Ms. Coffey's letter and determine if this new information leads your office to any different conclusions. Thank you for your consideration.

Sincerely yours,

Brett Bray  
Division Director

BB/ga

cc: Richard Monroe  
Karen Coffey



# Texas Department of Transportation

MOTOR VEHICLE DIVISION

P.O. Box 2293 • Austin, Texas 78768 • (512)416-4800 • FAX (512)416-4890

June 8, 1999

The Honorable John Cornyn  
Attorney General  
Supreme Court Building  
Austin, Texas 78701

Dear General Cornyn:

This is a request for an opinion on whether requiring the public to participate in a test drive, as an essential condition to entering a contest and winning a prize, is permissible. Attached is a letter from Karen Coffey, Chief Counsel for the Texas Automobile Dealers Association to the undersigned about this matter. As you can see, she writes on behalf of her association and the Texas Association of Broadcasters. The Texas Motor Vehicle Commission Code and the Motor Vehicle Board's rules provide a means for issuing both formal and informal opinions when so requested. However, it has been a fairly consistent precedent to limit those opinions to regulations directly related to the motor vehicle distribution industry. While the aspect of vehicle test drives is a part of this inquiry, portions of the penal code and other laws appear to be involved in the analysis and take the matter beyond what we are comfortable examining.

Along with the associations referenced above, we are vitally interested in the answer because we occasionally deal with issues relating to lotteries and prize give-aways as promotional activity conducted by car dealerships. Rather than repeat the information provided by Ms. Coffey, we have chosen to attach her letter. If, however, we can provide any additional information or assistance, we will be happy to do so.

Sincerely yours,

Brett Bray  
Division Director

BB/ga

cc: Ms. Karen Coffey

# Texas Automobile Dealers Association

1108 Lavaca P.O. Box 1028  
Austin, Texas 78767-1028  
(512) 476-2686  
Fax: (512) 476-2179  
E-mail: Info@tada.org

Gene Fondren  
President

RECEIVED  
MAR 24 1999  
TEXAS DEPARTMENT OF TRANSPORTATION  
MOTOR VEHICLES DIVISION

March 23, 1999



Mr. Brett Bray  
Director  
Motor Vehicle Division  
Texas Department of Transportation  
P. O. Box 2293  
Austin, Texas 78768-2293

Re: Test Drives and Contests

Dear Mr. Bray:

In the past, dealerships have attempted to advertise a promotion which includes a test drive as a requirement to entering a contest and winning a prize. Generally, inherent in the contest is that only one winner will receive the prize. The question frequently asked by members of TADA (Texas Automobile Dealers Association) and TAB (Texas Association of Broadcasters) is whether a test drive by an entrant can be a condition to the entering and winning of the prize.

As you know, Penal Code § 47.01(7) defines a lottery to mean a scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised **consideration** for a chance to win anything of value, whether the scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name. (emphasis added)

According to Penal Code § 47.03(a)(5): "A person commits an offense if he intentionally or knowingly does any of the following acts: (5) for gain, sets up or promotes any **lottery** or sells or offers to sell or knowingly possesses for transfer, or transfers any card, stub, ticket, check, or other device designed to serve as evidence of participation in any lottery." (emphasis added)

Mr. Brett Bray  
March 23, 1999  
page 2

In addition, § 40.062, Business and Commerce Code states: "An offeror may not notify a person that the person has won a prize, will receive a prize, or has a chance to win or receive a prize, a condition of receipt of which requires the person to pay **consideration** of any kind or a charge or expense to a person for the prize except for: (1) expenses incurred for travel to and from the sales location; or (2) a refundable deposit authorized under Section 40.007." (emphasis added)

In the past, according to the Texas Association of Broadcasters (TAB), the Federal Communications Commission has said that a test drive is consideration and a promotion that requires a test drive is a "lottery" (see enclosed February 11, 1999, *TABgram*).

A general prohibition against broadcasting lottery information is found in 18 U.S.C. § 1304:

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any **lottery**, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.  
(emphasis added)

Exceptions relating to certain advertisements and other information can be found in 18 U.S.C. § 1307(a)(2)(B):

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to--

(2) an advertisement, list of prizes, or other information concerning a **lottery**, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is--

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization. (emphasis added)

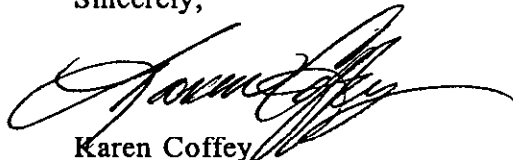
Mr. Brett Bray  
March 23, 1999  
page 3

Under the above exception, Federal law does not preclude a business conducting a lottery or contest and giving away a prize if the lottery is occasional and ancillary to its primary business, such as a dealership.

The issue that TADA and TAB would appreciate receiving clarification regarding is whether under state law, a test drive is consideration. If a test drive is not consideration, then there is no lottery. If it is consideration, then neither a dealer nor a member of TAB may advertise a promotion which requires a test drive.

In order to resolve this question, you may consider it necessary to request an Attorney General opinion. If TADA or TAB can provide any additional information regarding this issue, please contact me at 476-2686 or Ann Arnold with TAB at 322-9944.

Sincerely,



Karen Coffey  
Chief Counsel

Enclosure

c: Ann Arnold  
Fax: 322-0522