

**1999 DRAFTING REQUEST**

**Bill**

Received: 10/8/98

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Dan Rossmiller**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact:

Alt. Drafters: **champra**

Subject: **Criminal Law - miscellaneous  
Gambling - miscellaneous**

Extra Copies: **ISR**

**Pre Topic:**

No specific pre topic given

**Topic:**

Coverage of the commercial gambling prohibition

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/P1	olsenje 01/4/99	ygeller 01/4/99	jfrantze 01/5/99	_____	gretskl 01/5/99		
/1	olsenje 03/8/99	ygeller 03/9/99	ismith 03/9/99	_____	lrb_docadmin 03/9/99	lrb_docadmin 03/9/99	

FE Sent For:

*Not Needed*

<END>

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/P1	olsenje 01/4/99	jgeller 01/4/99	jfrantze 01/5/99	_____	gretski 01/5/99		
FE Sent For:		<i>1/2 3/9 jg</i>	<i>IS 3/9/99</i>	<i>IS/CH 3/9/99</i>			
				<END>			

*Jacket "1" for  
Senate*

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*JED*

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Coverage of the commercial gambling prohibition

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See Attached

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1?	olsenje	1/11 1/4 jlg	10/1/98	10/1/98	10/1/98		

FE Sent For:

<END>

*Submit "P" Drafts*  
JEO

0541

State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Legislative Reference Bureau Drafting Attorneys  
FROM: Dan Rossmiller  
DATE: October 5, 1998  
RE: Drafting Request

Senator George recently received a concern from an individual who believes that ordinary individuals who conduct an occasional "office pool" for fun or entertainment might potentially be subject to a felony prosecution/conviction. The Senator asked me to look into having a bill drafted that would clarify that conducting an occasional office pool would be as a misdemeanor offense rather than a felony offense.

While I have not found any case law involving a felony prosecution, from reading the statutes it does appear possible that a person might be charged with (and convicted of) a Class E felony under s. 945.03 (4), Wis. Stats., (relating to commercial gambling) for conducting a typical "office pool" (e.g., pools where participants put up a stake and try to select the winners of NCAA basketball tournament, World Series or Super Bowl, or weekend football pools where participants try to guess the winners or the score of games).

On behalf of Senator George, I would like to request that a bill be drafted to clarify that the conduct of his sort of "office pool" -- if occasional and not part of a broader commercial gambling enterprise -- would be a misdemeanor offense rather than a felony offense.

(I note that s. 945.02 (3), Stats. (relating to gambling), contains language similar to that in s. 945.03 (4) but classifies the activity described as a Class B misdemeanor rather than a Class E felony.)

There are probably several ways to approach this. leave the decision to the drafter but offer some suggestions:

- 1) Perhaps a definition of "office pool" or some other appropriate definition or description of this activity could be created in a new subsection in s. 945.03, Stats., and a limited exception could be created to indicate that conducting this activity occasionally or in moderation is not commercial gambling subject to the felony penalties.
- 2) Most of the subsections of s. 945.03, Stats., use the qualifier "for gain" in describing activities that constitute commercial gambling. Perhaps the lack of personal gain on the part of the person or persons conducting the activity could distinguish "office pool" type activities from more serious gambling activities. Perhaps a clause could be added to the last sentence of the previous paragraph so that the contemplated exception would indicate that conducting this activity occasionally or in moderation is not commercial gambling subject to the felony penalties provided the person responsible for gathering the amounts staked by bettors and paying winning bettors does not do so for gain.
- 3) Perhaps a dollar limitation could be placed on the consideration needed for as a stake for entry to the pool or a dollar limitation could be placed on the prizes awarded as part of the definition of "office pool."

I have found various definition so of "pool" in legal dictionaries. In general, it would seem that an "office pool" would involve a combination of persons related by a common workplace or employer each staking a sum of money based on each person's guess or prediction as to the outcome of a future sporting or other contest (or succession of sporting or other contests) with the sum of the various stakes collected becoming the winnings to be divided among the successful bettors.

Please contact me (6-2500) if you have any questions.

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If an **affirmative defense** permitted to be raised by motion under s. 802.06 (2) is so raised, it need not be set forth in a subsequent pleading.

812.41(1)

(1) If the garnishee fails to pay over funds to which the creditor is entitled under this subchapter within the time required under s. 812.39, the creditor may, upon notice to all of the parties, move the court for judgment against the garnishee in the amount of the unsatisfied judgment plus interest and costs. The garnishee may assert the **affirmative defense** that the amount of the debtor's nonexempt disposable earnings that the creditor should have been paid is less than the amount of the unsatisfied judgment balance. If the garnishee proves that **defense**, the garnishee's liability is limited to the amount the creditor should have been paid or \$100, whichever is greater.

812.41(3)

(3) In any proceeding under sub. (2), the garnishee may assert the **affirmative defense** that the wrongful conduct of the garnishee was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid that error. If the garnishee proves that **defense**, liability of the garnishee is limited to the return to the debtor of any exempt disposable earnings paid to the creditor.

939.44(2)

(2) Adequate provocation is an **affirmative defense** only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide.

940.01(2)

(2) (intro.) **Mitigating circumstances.** The following are **affirmative defenses** to prosecution under this section which mitigate the offense to 2nd-degree intentional homicide under s. 940.05:

940.01(3)

(3) **Burden of proof.** When the existence of an **affirmative defense** under sub. (2) has been placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the **defense** did not exist in order to sustain a finding of guilt under sub. (1).

948.05(3)

(3) It is an **affirmative defense** to prosecution for violation of this section if the defendant had reasonable cause to believe that the child had attained the age of 18 years, and the child exhibited to the defendant, or the defendant's agent or client, a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that the child had attained the age of 18 years. A defendant who raises this **affirmative defense** has the burden of proving this **defense** by a preponderance of the evidence.

948.11(2)(c)

(c) It is an **affirmative defense** to a prosecution for a violation of this section if the defendant had reasonable cause to believe that the child had attained the age of 18 years, and the child exhibited to the defendant a draft card, driver's license, birth certificate or other official or

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apparently official document purporting to establish that the child had attained the age of 18 years. A defendant who raises this **affirmative defense** has the burden of proving this **defense** by a preponderance of the evidence.

948.22(6)

(6) Under this section, **affirmative defenses** include but are not limited to inability to provide child, grandchild or spousal support. A person may not demonstrate inability to provide child, grandchild or spousal support if the person is employable but, without reasonable excuse, either fails to diligently seek employment, terminates employment or reduces his or her earnings or assets. A person who raises an **affirmative defense** has the burden of proving the **defense** by a preponderance of the evidence.

948.31(4)(a)

(a) (intro.) It is an **affirmative defense** to prosecution for violation of this section if the action:

948.31(4)(b)

(b) A defendant who raises an **affirmative defense** has the burden of proving the **defense** by a preponderance of the evidence.

971.15(3)

(3) Mental disease or defect excluding responsibility is an **affirmative defense** which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

29.083(3m)

(3m) **Affirmative defense.** It is an **affirmative defense** to the prosecution for violation of this section if the defendant's conduct is protected by his or her right to freedom of speech under the constitution of this state or of the United States.

111.31(3)

(3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, membership in the national guard, state **defense** force or any other reserve component of the military forces of the United States or this state or use or nonuse of lawful products off the employer's premises during nonworking hours. Nothing in this subsection requires an **affirmative** action program to correct an imbalance in the work force. This subchapter shall be liberally construed for the accomplishment of this purpose.

253.10(7)

(7) **Affirmative defense.** No person is liable under sub. (5) or (6) or under s. 441.07 (1) (f), 448.02 (3) (a) or 457.26 (2) (gm) for failure under sub. (3) (c) 2. d. to provide the printed materials described in sub. (3) (d) to a woman or for failure under sub. (3) (c) 2. d., e., f. or g. to describe the contents of the printed materials if the person has made a reasonably diligent effort to obtain the printed materials under sub. (3) (e) and s. 46.245 and the department and the county department under s. 46.215, 46.22 or 46.23 have not made the printed materials available at the time that the person is required to give them to the woman.

801.14(3)

(3) In any action in which there are unusually large numbers of defendants, the court, upon motion or on its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or **affirmative defense** contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

802.02(3)

(3) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or **affirmative defense** including but not limited to the following: accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of a condition subsequent, failure or want of consideration, failure to mitigate damages, fraud, illegality, immunity, incompetence, *injury by fellow servants*, *laches*, *license*, *payment*, *release*, *res judicata*, statute of frauds, statute of limitations, superseding cause, and waiver. When a party has mistakenly designated a **defense** as a counterclaim or a counterclaim as a **defense**, the court, if justice so requires, shall permit amendment of the pleading to conform to a proper designation.





State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0541/P1  
JEO&RAC:A:...

*P-Note* *Sven*

*JLg*

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

*gen cat*

1 **AN ACT ...; relating to:** an affirmative defense that mitigates the offense of  
2 commercial gambling.

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***Analysis by the Legislative Reference Bureau***

This is a preliminary draft. An analysis will be provided in a later version of the draft.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

- 3 **SECTION 1.** 945.01 (5m)<sup>X</sup> of the statutes is created to read:
- 4 **945.01 (5m) OFFICE POOL.**<sup>✓</sup> An office pool is a lottery to which all of the following
- 5 apply:
- 6 (a) All of the participants of the lottery are employed by the same employer.
- 7 (b) For an opportunity to win a prize, a participant of the lottery provides
- 8 consideration of an amount of money not exceeding \$10.<sup>✓</sup>
- 9 (c) The prize awarded to a winning participant is all or any portion of the money
- 10 provided by the participants as consideration.

1 (d) A prize is awarded based on the results of a sporting event or a series of  
2 related sporting events.

3 (e) The person conducting the lottery is a participant in the lottery and does not  
4 conduct the lottery for gain. For purposes of this paragraph, a person does not  
5 conduct a lottery for gain if he or she is awarded a prize as a result of being a  
6 participant in the lottery.

7 SECTION 2. 945.03 (intro.)<sup>x</sup> of the statutes is amended to read:

8 945.03 **Commercial gambling.** (intro.)<sup>✓</sup> ~~Whoever~~ Except as provided in s.  
9 945.035,<sup>✓</sup> whoever intentionally does any of the following is engaged in commercial  
10 gambling and is guilty of a Class E felony:

11 <sup>History: 1977 c. 173.</sup> SECTION 3. 945.035<sup>x</sup> of the statutes is created to read:

12 945.035 **Commercial gambling; mitigating affirmative defense.** (1) It  
13 is an affirmative defense to a prosecution for a violation of s. 945.03 (4)<sup>✓</sup> if the lottery  
14 being conducted was an office pool. An affirmative defense under this<sup>✓</sup> subsection  
15 mitigates the offense to gambling under s. 945.02 (3).<sup>✓</sup>

16 (2) When the existence of an affirmative defense under sub. (1)<sup>✓</sup> has been placed  
17 in issue by the trial evidence, the state must prove beyond a reasonable doubt that  
18 the facts constituting the defense did not exist in order to sustain a finding of guilt  
19 under s. 945.03 (4).<sup>✓</sup>

20

(END)<sup>✓</sup>

D-NOTE



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0541/P1dn  
JEO & RAC: A:....

JG

Dan Rossmiller:

This is a preliminary attempt to treat so-called "office pools" as misdemeanor gambling offenses instead of felony commercial gambling offenses. Please note the following when reviewing the draft:

1. The draft creates a definition of "office pool" in proposed s. 945.01 (5m).<sup>✓</sup> Please review the definition carefully. Note that it treats an office pool as a "lottery", as that is defined in s. 945.01 (5), stats.

The definition incorporates several of the ideas you proposed in your drafting instructions. Specifically, it requires that all of the participants be coworkers, that the prizes be awarded from the consideration put up by the participants, that the award of prizes be based on the results of sporting events, and that the person "conducting" it be a participant and not profit from conducting the pool (other than collecting a prize he or she wins as a participant).

The definition also puts a dollar limit of \$10 on the consideration (stake or bet or wager) that a participant must put up in order to play. This is a completely arbitrary figure that we supplied for purposes of a preliminary draft, and you may of course decide on a different amount. The definition does *not* put a limit on the value of the prizes, though it could do that as well. (Note that putting a cap on the prizes without a cap on the bet of each individual participant will mean that participants in the office pool of a small business will apparently be able to place bigger bets than participants in the office pool of a large business.)

The draft does not incorporate the concept of an "occasional" office pool because that is too vague. The draft would have to define how often such pools could be conducted (for example, not more than six times each calendar year).

2. The draft provides an affirmative defense to prosecution under s. 945.03 (4), stats., as that appears to be the only commercial gambling prohibition under which a person conducting an office pool, as defined in the draft, would be prosecuted. This is because s. 945.03 (1), (2), (3), (6) and (7),<sup>✓</sup> stats., all have the requirement that the activity be conducted "for gain" (while an office pool cannot be conducted for gain) and s. 945.03 (5),<sup>✓</sup> stats., applies only to gambling machines (which office pools do not involve).

The affirmative defense in this draft operates like the one under s. 940.01 (2),<sup>✓</sup> stats. Once there is any evidence that raises the office pool issue, the state must prove beyond

a reasonable doubt that the lottery being operated was not an office pool. If the state cannot satisfy that burden of proof, the defendant is guilty of conducting a lottery under s. 945.02 (3), stats., which is a misdemeanor rather than a felony. Does this approach effect your intent?

Please let us know if you have any questions or changes.

Jefren E. Olsen  
Legislative Attorney  
266-8906

Richard A. Champagne  
Legislative Attorney  
266-9930

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0541/P1dn  
JEO & RAC:jlg:jf

January 4, 1999

Dan Rossmiller:

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266-9930

# State of Wisconsin



GARY R. GEORGE  
SENATOR

MEMORANDUM

CONFIDENTIAL

TO: Jefren Olsen & Richard Champagne,  
Legislative Reference Bureau Drafting Attorneys

FROM: Dan Rossmiller *DR*

DATE: March 5, 1998

RE: Drafting Request—Clarification (LRB 0541/P1)

Some time ago you sent our office a preliminary draft of a bill that creates a definition of "office pool" and an affirmative defense that mitigates the offense of commercial gambling. If the affirmative defense is successfully presented and the state cannot meet its burden of proof, the offense is a misdemeanor offense rather than a felony offense.

The approach you incorporated in the draft, effects our intent.

In your drafter's notes you asked about how to reflect the concept of an "occasional" office pool. Your suggestion that such pools could be conducted not more than six times per calendar year would seem to effect our intent. Could you please incorporate this into the draft? Thank you.

I would like to have this jacketed for introduction by Wednesday if possible. Could you give me a call and advise about whether that deadline can be met? Thank you. Also, please contact me (6-2500) if you have any questions.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0541/P1dn  
JEO & RAC:jljgjf

January 4, 1999

Dan Rossmiller:

This is a preliminary attempt to treat so-called "office pools" as misdemeanor gambling offenses instead of felony commercial gambling offenses. Please note the following when reviewing the draft:

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The definition also puts a dollar limit of \$10 on the consideration (stake or bet or wager) that a participant must put up in order to play. This is a completely arbitrary figure that we supplied for purposes of a preliminary draft, and you may of course decide on a different amount. The definition does *not* put a limit on the value of the prizes, though it could do that as well. (Note that putting a cap on the prizes without a cap on the bet of each individual participant will mean that participants in the office pool of a small business will apparently be able to place bigger bets than participants in the office pool of a large business.)

The draft does not incorporate the concept of an "occasional" office pool because that is too vague. The draft would have to define how often such pools could be conducted (for example, not more than six times each calendar year).

2. The draft provides an affirmative defense to prosecution under s. 945.03 (4), stats., as that appears to be the only commercial gambling prohibition under which a person conducting an office pool, as defined in the draft, would be prosecuted. This is because s. 945.03 (1), (2), (3), (6) and (7), stats., all have the requirement that the activity be conducted "for gain" (while an office pool cannot be conducted for gain) and s. 945.03 (5), stats., applies only to gambling machines (which office pools do not involve).

The affirmative defense in this draft operates like the one under s. 940.01 (2), stats. Once there is any evidence that raises the office pool issue, the state must prove beyond



a reasonable doubt that the lottery being operated was not an office pool. If the state cannot satisfy that burden of proof, the defendant is guilty of conducting a lottery under s. 945.02 (3), stats., which is a misdemeanor rather than a felony. Does this approach effect your intent?

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Legislative Attorney  
266-8906

Richard A. Champagne  
Legislative Attorney  
266-9930



**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

1     **AN ACT to amend** 945.03 (intro.); and **to create** 945.01 (5m) and 945.035 of the  
2             statutes; **relating to:** an affirmative defense that mitigates the offense of  
3             commercial gambling.

---

***Analysis by the Legislative Reference Bureau***

This is a preliminary draft. An analysis will be provided in a later version of the draft.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

4             **SECTION 1.** 945.01 (5m) of the statutes is created to read:  
5             945.01 (5m) OFFICE POOL. An office pool is a lottery to which all of the following  
6     apply:  
7             (a) All of the participants of the lottery are employed by the same employer.  
8             (b) For an opportunity to win a prize, a participant of the lottery provides  
9     consideration of an amount of money not exceeding \$10.

1 (c) The prize awarded to a winning participant is all or any portion of the money  
2 provided by the participants as consideration.

3 (d) A prize is awarded based on the results of a sporting event or a series of  
4 related sporting events.

5 (e) The person conducting the lottery is a participant in the lottery and does not  
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7 conduct a lottery for gain if he or she is awarded a prize as a result of being a  
8 participant in the lottery.

9 SECTION 2. 945.03 (intro.) of the statutes is amended to read:

10 **945.03 Commercial gambling.** (intro.) ~~Whoever~~ Except as provided in s.  
11 945.035, whoever intentionally does any of the following is engaged in commercial  
12 gambling and is guilty of a Class E felony:

13 SECTION 3. 945.035 of the statutes is created to read:

14 **945.035 Commercial gambling; mitigating affirmative defense.** (1) It  
15 is an affirmative defense to a prosecution for a violation of s. 945.03 (4) if the lottery  
16 being conducted was an office pool. An affirmative defense under this subsection  
17 mitigates the offense to gambling under s. 945.02 (3).

18 (2) When the existence of an affirmative defense under sub. (1) has been placed  
19 in issue by the trial evidence, the state must prove beyond a reasonable doubt that  
20 the facts constituting the defense did not exist in order to sustain a finding of guilt  
21 under s. 945.03 (4).

22

(END)



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0541/V1  
JEO&RAC:jlg:jf

By Web's 3/10 a.m.

redraft  
make  
run

~~PRELIMINARY DRAFT NOT READY FOR INTRODUCTION~~

Regen

1 AN ACT to amend 945.03 (intro.); and to create 945.01 (5m) and 945.035 of the  
2 statutes; relating to: an affirmative defense that mitigates <sup>certains</sup> ~~the offense of~~  
3 commercial gambling. ~~offenses~~

ANALYSIS  
INSERT

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13 SECTION 3. 945.035 of the statutes is created to read:

14 945.035 Commercial gambling; mitigating affirmative defense. (1) It

15 is an affirmative defense to a prosecution for a violation of s. 945.03 (4) if the lottery  
16 being conducted was an office pool. <sup>945.03(2)</sup> An affirmative defense under ~~the provisions of~~  
17 sub. (1) mitigates the offense to gambling under s. 945.02 (3).

18 (2) When the existence of an affirmative defense under sub. (1) has been placed  
19 in issue by the trial evidence, the state must prove beyond a reasonable doubt that  
20 the facts constituting the defense did not exist in order to sustain a finding of guilt  
21 under s. 945.03 (4).

22 (END)

✓  
JAS  
2-16

16

18  
3

945.03(2)

~~the provisions of~~  
Sub. (1) ✓

~~and if the defendant  
conducted or knew  
office pools during the  
12-month period immediately  
preceding~~

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0541/lins  
JEO&RAC:.....

**ANALYSIS INSERT:**

Under current law, a lottery is defined as a type of gambling in which persons are given an opportunity to win a prize and the award of the prize is determined by chance, even though the winning of the award may be accompanied by some skill. A person may participate in the chance to win a lottery prize only by first giving some sort of consideration, which is generally anything of commercial or financial advantage to the promoter of the lottery or a disadvantage to any participant in the lottery. Current law excludes from the definition of lottery an authorized bingo game or raffle, authorized pari-mutuel waging, the state lottery or any authorized multijurisdictional lottery.

Current law prohibits a person from conducting a lottery. Generally, a person who violates this prohibition is guilty of simple gambling and may be fined not more than \$1,000 or imprisoned for not more than 90 days or both. However, current law provides greater penalties for a person who conducts a lottery where both the consideration and the prize are money. A person who conducts one of these lotteries is guilty of commercial gambling and may be fined not more than \$10,000 or imprisoned for not more than two years or both, if the offense occurs before December 31, 1999, or may be fined not more than \$10,000 or imprisoned for not more than five years or both, if the offense occurs on or after December 31, 1999.

This bill creates a defense for a person who is charged with commercial gambling because he or she was conducting a lottery where both the prize and the consideration are money. Under the defense created by the bill, if the lottery being conducted by the person was an office pool and the person had conducted five or fewer office pools during the preceding 12-month period, the person is guilty of simple gambling rather than commercial gambling and is thus subject to the penalties for simple gambling instead of commercial gambling.

For a lottery to be considered an office pool under the bill, all of the following must apply to the lottery: 1) the participants must all be employed by the same employer; 2) the amount of consideration that a person gives to participate cannot exceed ~~ten dollars~~ <sup>\$10</sup>; 3) the prize must consist only of the money collected as consideration by other participants; 4) the prize must be awarded based on the results of a sporting event or a series of sporting events; and 5) the person conducting the lottery must be a participant and may not conduct the lottery for gain (apart from the opportunity to win the prize himself or herself).

**INSERT 2-16:** to

~~NO~~ and if the defendant conducted 5 or fewer office pools during the 12-month period immediately preceding the date of the violation for which the defendant is being prosecuted. For purposes of calculating the time period under this subsection, the

date on which a lottery is conducted is the date on which the prize is awarded or, if a prize is not actually awarded, the date on which the prize was to be awarded.