2022 Gaming Law Conference

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Avoiding Ethical Trapdoors or Finding Your Way Out of Tunnels in Gaming Law: Exploring Real World Scenarios with UNLV Law Professors Cabot and Stempel

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Hypothetical One

Potential Conflicts Problems If An Attorney Serves On The Compliance Committee Of A Client Company

Assume:

You are an outside gaming lawyer (GL) for a licensed company. The company now wants also to engage you to serve as a voting member of the regulatory compliance committee the regulatory agency requires the company to have.

May you?

Should you?

What Precautions are In Order?

The Scenario

The compliance committee recommends that the company not hire or do business with Person X. After the meeting, GL tells the CEO privately that this is just a recommendation.

GL reports that the company does not need to follow the Committee's recommendation and explains why GL believes its conclusion is flawed, illogical, or unnecessary.

GL also says the company can hire/do business with Person X regardless of the Committee's recommendation, though the regulator may criticize the decision.

Based on GL's recommendation, the CEO opts to hire/do business with X.

Regulator gets the Committee's report, sees the recommendation, sees that the company is doing business with X -- and wonders why Casino is not following the Committee recommendation, prompting an investigation.

GL's advice becomes a focus of the investigation. CEO claims she decided on the advice of counsel. The regulator asks the attorney about the advice.

Issues

If the GL is a committee member, does the attorney have a duty of candor to the regulator?

If so, is this in conflict with the attorney-client privilege?

Even without the regulators' inquiry, does the conflict exist?

Is Casino in trouble?

Is CEO in trouble?

Is GL in trouble?

What exactly do we mean by "trouble"?

Considerations and Additional Issues

The Committee learns that the company is still doing business with X and asks the CEO why? CEO responds his action was on the advice of counsel.

Now the Committee looks to the attorney and asks, why didn't you tell your fellow committee members that you disagreed with the decision?

Does the attorney then claim: "I can't tell the committee what I advised or why because of privilege?"

Maybe the attorney voiced disagreement to the Committee but was outvoted (if they even vote; committees may operate on consensus, though the minutes may imply unanimity).

Other committee members, particularly independent members, may view the attorney with suspicion.

"What is the attorney saying to the company that the attorney is not telling the Committee concerning issues within the Committee's purview?

Why is a committee member privately undermining the Committee's position?"

Hypothetical Two
Client Nondisclosure

GL represents a company applying for a gaming license. GL handles the applications of the company and all its executives and others who must file and be licensed/found suitable. GL makes it clear to the individual applicants that GL represents the company, not them individually.

In preparing the applications, GL comes across an issue for one of the individuals that is potentially problematic or at least an area that will be subject to questions.

During the initial interview, attended by GL, the gaming investigators questioned the applicant on the issue. The applicant's answer to the question is either: (i) not true, (ii) not entirely true, (iii) incomplete, or (iv) misleading.

GL knows this based on discussions with the applicant in preparing the application and in preparing for the interview. GL believes the applicant may be, or is, lying or obfuscating.

Issues

What should the GL do?

Interject?

Pause the interview and advise the applicant to go back and provide a true and complete answer?

Call the company's in-house lawyer or another senior executive with the applicant after the interview and discuss the problem?

Advise the applicant to get his own lawyer?

Something else?

Further Considerations

Do things change if you learn of it at the hearing?

While waiting for her matter to be heard at a licensing hearing, the applicant client tells the GL she has an old arrest that she did not disclose on her application or to you and that the investigation did not uncover. So now they're calling your matter for hearing.

What should you do?

What if the charges were dismissed?

Expunged?

During the regulators' investigation of the CEO, they come across prior criminal arrests/convictions that CEO didn't disclose on her application or to company. As a result, the CEO asks GL to continue representing her through the licensing matter and asks that the criminal case not be disclosed to the company.

What’s should GL do now?

Hypothetical Three

Obligations to the Regulators

The CEO asks GC at a public gaming company regarding "regulatory concerns" concerning the company's upcoming vendor appreciation golf tournament.

GC states there should be no regulatory concerns.

CEO provides further information that the event will have women at the various holes handing out gifts. GC again stated there should be no regulatory issues provided there is no illegal or lewd behavior. CFO laughed and said, "of course not."

After the event, employees informed the GC that the event was probably, at best, "R-rated" with scantily clad women, including strippers.

Regulators never knew or inquired.

Issues

Can GC let bad enough alone?

Or is some remedial work required?

Should GC be taking steps regarding protocol for future such events?

Hypothetical Four

Sneaky but not necessarily violating any specific gaming laws/regulations

In response to a document request from the gaming regulator, GL sees correspondence between the CEO of Manufacturer A and the casino manager at Casino X.

Casino X has agreed to be the field-testing site for Manufacturer A's machines. However, the emails indicate that the CEO is paying the Casino Manager a fixed sizable sum to secure Casino X as the field-testing location.

In addition, Casino Manager will get an additional fixed payment if the field tests are successful. The communication indicates that the payments are direct to the casino manager, not Casino X.

GL asks CEO about the communications. The CEO confirms that Casino Manager is assisting the company with the field trial and will assist in making connections to other casino managers to adopt Manufacturer A's machines in Nevada. The CEO confirms that there is no written agreement with the Casino Manager, but CEO fully intends to compensate the Casino Manager as outlined in the emails.

CEO believes that Casio Manager will use his influence at Casino X to ensure that Casino X purchases enough machines to make the Nevada licensing endeavor worthwhile. CEO then questions the relevancy of showing his emails to gaming and requests that GL find a way to make the correspondence privileged to prevent their disclosure.

Issues

Does this present a disclosure obligation for GL? Or can he "let it slide" for the CEO?

Does the analysis change if GL suspects but is not certain that the Casino Manager will be entitled to a commission as a percentage of the first six months of slot machine sales in Nevada, which requires F to be found suitable to share in the gaming revenue?

What if the emails show the illegal revenue-sharing agreement? And are we sure it's illegal?

If the GL refuses and is fired and the Manufacturer hires an attorney with fewer ethical concerns, does GL have any obligation to inform the regulators of the illegal arrangement? What if the regulators come asking?

Hypothetical Five

Sneaky but not necessarily violating any specific gaming laws/regulations ll

GL represents manufacturer A. Manufacturer A has engaged GL to assist in the Nevada licensing application for its primary shareholder, select board members, the company, and its executives. During the representation, GL learns that the primary shareholder has a significant interest in a Russian casino and a substantial interest in a bank in Cyprus.

The primary shareholder informs GL that his interest in the bank is confidential and that he cannot and will not disclose it to gaming.

The CEO of Manufacturer A suggests that the Primary shareholder can transfer his interest in the Russian casino and Cypriot bank to a relative.

The primary shareholder also thinks this is a good idea and wants GL's firm to draw up the transfer and assignment agreement.

Both the CEO and primary shareholder know that the relative is a Greek citizen and that she will refuse to provide any information about her finances, citing EU privacy laws and her independence from the activities of the CEO or primary shareholder.

Issues

Should GL accept this representation of this client?

For sure? Not on your life? Perhaps with some caveats and guardrails? How?

What other actions should GL take or avoid?

Hypothetical Six

General Counsel's Obligations

The general counsel of a casino company finds out that the Company's CEO and majority shareholder fired an employee in charge of marketing when he found out the employee was gay. As if this wasn't bad enough, the firing was accompanied by a homophobic tirade.

The employee hired an attorney who sent a letter to the CEO threatening to sue. The CEO never informed the GC, but brought the matter to outside counsel, who detailed the prospective monetary liability and the potential impact on a license pending in another jurisdiction.

The CEO and outside counsel agreed to pay the demand, but to avoid the investigators in the other jurisdiction from discovering the transgression, they created a dummy corporation that will pay the settlement and obtained a nondisclosure agreement from the former employee.

The GC was assisting in producing documents at the request of the investigators in the foreign jurisdiction and was looking to ensure that attorney-client privileged company email were not included. This was done without the knowledge of the gaming investigators.

During this document production, GC discovers a cryptic message from the CEO to the GL outside counsel regarding the matter. With some investigation, GC now knows of the entire sordid affair and confronts the CEO.

GC confronts the CEO, who is unapologetic, and asks GC whose team he is on.

Issues

What should the GC do?

About disclosure to regulators?

About disclosure to the Board of Directors?

About GC's position in the company?

Hypothetical Seven

Multi-jurisdictional Opinion Writing

A foreign or domestic company may ask a gaming attorney to advise on U.S. law, including the application of the various states' laws to an activity conducted on an international or intrastate basis.

Issues

Can a firm provide a 50-state survey of how sweepstakes laws may impact a company's planned national sweepstakes promotion?

Can advice be given from Nevada, for example, to an Illinois marketing company, about the legal risks under state or federal law regarding a business relationship with a foreign online gaming company?

Must the advice relate only to federal/constitutional law?

What if Federal law is based on first finding a predicate violation of state law?

Can the lawyer advise on contract issues?

Does the choice of law/venue provision in the contract control?

In the new global economy, does it make sense to continue restricting the advice lawyers can give in ways that developed when lawyers typically only advised clients in their local community?

Hypothetical Eight

Social Media

The increased use of social media like LinkedIn often beckons gaming attorneys to comment on current regulatory events.

Issues

Are there ethical dangers lurking?

Can lawyers provide a general discussion of the law?

Should lawyers answer specific legal questions?

How do conflicts generally affect the attorney as a commentator?

Hypothetical Nine

A wanton disregard of Social Responsibility

GC is approached by a Manufacturer's marketing and player engagement teams when they want to use player behavioral data to re-target or keep play going on and on.

This slot machine enhancement impacts problem gamblers and significantly contributes to their disease.

The proposal displays a wanton disregard for social responsibility and would bring disrepute on the company and industry if publicly disclosed but is not explicitly prohibited by law or regulation.

Issues

What, if anything, should the GC do?

Just say no?

Report the vendor(s)?

Hypothetical Ten

The rub between attorney-client privilege and the GCB's right to immediate access

Gaming Control Board agents show up (without forewarning, of course) at your client's licensed place of business and demand to copy all the emails from the company's storage.

The GC understands that the emails have privileged attorney-client and accountant-client information and may expose non-business matters of its employees that may use the company email for private communications.

The GCB agents point out that the failure to immediately turn over the emails is a regulatory violation and state that a complaint was filed on the same point against another licensee.

Issues:

Does the GC dare recommend non-cooperation?

Why or why not?

Because privilege is waived as a condition of seeking a license, does the problem of protecting privilege go away?

Is that an informal or internal means of obtaining a review of agent discretion in the field?