

# Why Gaming Law Should Be Tested On The Nevada Bar

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## I. Introduction

Most Nevadans are well aware of the influence of gaming in the business structure of their state. Few, including their attorneys, understand how gaming law influences their own relationship with that structure. This lack of awareness is a threat to both client and attorney.

This has been a problem for decades. It was publicly recognized as far back as the mid-80s, when Chairman Barton Jacka of the Nevada Gaming Control Board, sent this open letter to attorneys:

The first rule of the ABA Model Rules of Professional Conduct is: 'A lawyer shall provide competent representation to a client.' The Board has encountered several recent instances in which this solemn obligation was violated by counsel representing gaming clients. In those cases, the clients were either misadvised or left ignorant of fundamental provisions of statutes or regulations affecting those clients.

At least one client was caused to be in violation of the law as a result of faulty legal advice.

We hope the Nevada legal profession will undertake to make sure all its members recognize there are unique provisions of Nevada gaming law, some contrary to general laws that govern other businesses, and that no gaming representation should be undertaken until an attorney is satisfied he is aware of all the

requirements the law places upon his gaming client.<sup>1</sup>

The situation hasn't improved over the ensuing quarter century. The current Nevada Board has experienced a number of attorneys who do not know how to deal with gaming law issues. Mark Clayton, a Member of the Nevada Board and a long-time gaming law attorney, says he has seen attorneys and their clients appear with apparently a complete ignorance of gaming statutes and regulations.

This problem is why it is necessary that Nevada attorneys have, at the very least, a fundamental understanding of the gaming statutes and regulations that may apply to a client matter. Including gaming issues on the Nevada Bar would require applicants to prepare for the subject and develop a basic understanding of the issues and differences that surround gaming law.

## II. Gaming in Nevada has exploded in growth, and affects virtually all people who reside in Nevada

**A. Nevada's gaming laws have made possible a positive source of REVENUE that employs more people, pays more taxes and generates more capital investments then in any other state.**

Nevada has a long history dealing with gambling and gaming issues. Thirty years ago, Nevada was the only state that had legal casinos.<sup>2</sup> Nevada and its leaders have worked hard to establish a state where not only is gaming legal but is beneficial to its citizens and our society. Nevada became a state in 1864.<sup>3</sup> The state's first legislature attempted to legalize and regulate gambling, but failed.<sup>4</sup> In 1869, the Nevada State Legislature decriminalized specific forms of gambling.<sup>5</sup> However, in 1909 legislation

was passed which banned nearly all games of chance in Nevada.<sup>6</sup> Finally, in 1919, as the country entered the Great Depression, Assembly Bill 98 was introduced, which would allow for wide-open gambling.<sup>7</sup> On March 19, 1931, Assembly Bill 98 was signed into law.<sup>8</sup> By 1959 the template, by which all other gaming jurisdictions would follow was introduced.<sup>9</sup> "Nevada's gaming regulatory system has been an integral part of Nevada's success and has become the standard upon which all other national and international gaming regulatory

significant part of our economy that it touches many areas throughout the legal arena. Gaming legal issues can be found among Constitutional rights, taxation, real estate transactions, trusts, stock transfers, formation of a business entity, federal maritime law, private placements and public offerings, loans, stock pledges and negative covenants, bankruptcy, and even family law.<sup>18</sup> For example, many jurisdictions require gaming licensees to report any loans that they receive.<sup>19</sup> This would require that loan transactions involving



agencies are based."<sup>10</sup> Making sure that members of the Nevada Bar are competent in gaming laws will ensure that our system continues to run properly and other gaming jurisdictions will continue to follow our lead.

The gaming industry has exploded in growth across the United States, with Nevada catching a significant portion of the increase.<sup>11</sup> In 1960 the state reported a gross gaming revenue just above \$200 million. Today, "Nevada has grown into the world's largest gaming and tourism economy employing more people, paying more taxes and generating more capital investment...than anywhere else in the United States or abroad."<sup>12</sup> In fact, 1/3 of the total state budget is generated off of gaming revenue.<sup>13</sup> The resort-industry remains to be the single largest employer in Nevada.<sup>14</sup> As of December 2006 the total number of licensed gaming operations was<sup>15</sup> 2,975. Gaming, in 2006, contributed \$838 million in State general fund revenues.<sup>16</sup> This was the largest "industry-specific levy imposed in Nevada."<sup>17</sup>

**B. Because gaming is such a significant part of Nevada's economy, many SIMPLE areas of law can become complicated when gaming issues are involved.**

Attorneys who practice in Nevada cannot ignore gaming legal issues. Gaming has become such a

gaming enterprises have specific language and provisions in the contract to address the reporting requirements of the jurisdiction.<sup>20</sup> In Nevada, specifically, the gaming regulatory agencies reserve the right to rescind the loan if the company has not followed the proper procedures.<sup>21</sup> Furthermore, in most states stock pledges and negative covenants must have prior approval by the gaming regulatory agencies before they can be enforceable. Again, it would be worthwhile for the attorney who is drawing up the contract to know that provisions and language regarding the parties' cooperation and acknowledgment should be included.<sup>22</sup>

The most frequent transaction that results in disciplinary action by the Nevada Commission involves unauthorized transfers of ownership interests.<sup>23</sup> In most cases, "all persons who own an interest in a business that involves the conduct of gaming or where it is proposed that gaming will be present must be licensed by the Nevada Commission before participation in gaming operations occurs."<sup>24</sup> This mistake occurs most commonly among divorces, sales of business interests between partners, transfers for estate planning purposes, transfers upon death, and sales of businesses to outsiders.<sup>25</sup> For many practicing attorneys in Nevada, divorces are a profitable source of business. "As accustomed as most lawyers



are to the presence and influence of the gaming industry in our State, there are invariably a number of divorce settlements arranged by lawyers who fail to take into consideration the regulations controlling transfers of gaming interest between spouses.<sup>26</sup> A common example is when a married couple owns a bar, restaurant, or convenience store and they want to get divorced.<sup>27</sup> Generally, there is no problem when the business is liquidated through sale to another party.<sup>28</sup> However, many times the ownership is continued by one of the spouses with the other spouse selling their interest.<sup>29</sup> This type of transfer requires prior Nevada Commission approval.<sup>30</sup> Mistakes like these can cause embarrassment to lawyers and substantial penalties for their clients. Allowing them to happen slowly chips away at the system that Nevada works hard to create and maintain. "Nevada's concept of pre-approval by the licensing authority is fundamental to its system of gaming control, and has been copied by virtually every other American jurisdiction that has legalized gaming activities."<sup>31</sup>

Gaming legal issues can often also affect bankruptcy and probate attorneys practicing in Nevada. There are requirements codified in NGC Reg. § 9 that deal with the death, disability, insolvency, or bankruptcy of a licensee. For example, an attorney who represents a licensee needs to know that when the licensee dies, the representative is required to report the death to the Board immediately and to file an application for approval as the successor within thirty (30) days after the death.<sup>32</sup> "Failure to comply with these regulations can result in fines, revocation of existing licenses, and delays in the distribution, sale or liquidation of the gaming interest as the Board and Commission investigate and prosecute the violation."<sup>33</sup>

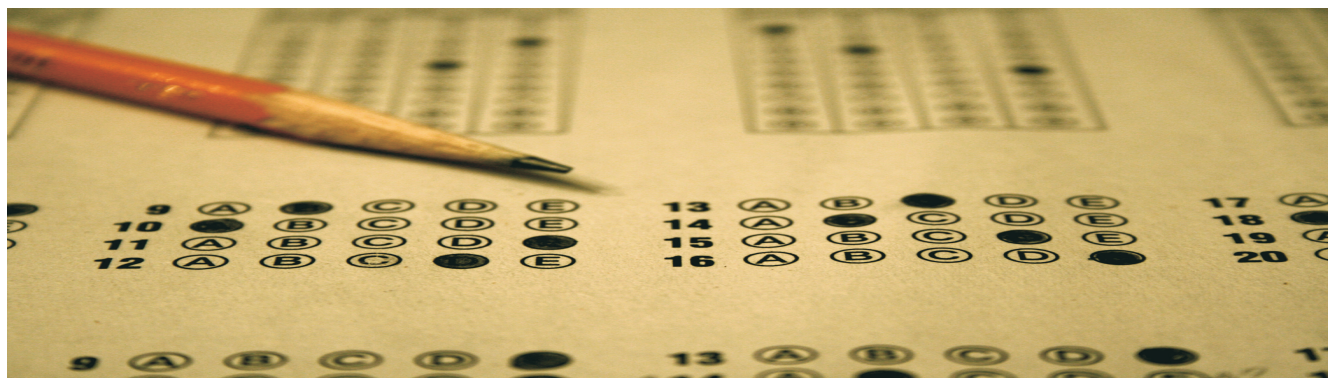
Attorneys practicing in Nevada who are ignorant of the unique statutes and regulations in gaming law could cause their clients to be fined, be subjected to civil liability and to lose a gaming license. These attorneys may also find themselves in a situation where there are claims of malpractice against them or they may lose the right to practice before the gaming control agencies.<sup>34</sup> Gaming law, although

rooted in business type transactions, can be very different from normal everyday dealings. A unique regulation among gaming law is the requirement of prior approval for public offerings.<sup>35</sup> Taking a public gaming company private is also very different than taking a non-gaming company private and requires investigation and approval by the gaming control agencies.<sup>36</sup> Finally, a lender cannot enforce a secured interest on gaming collateral unless the lender applies for and receives a license.<sup>37</sup> This process is incredibly invasive, lengthy, and difficult. Attorneys for lenders should be aware that it is easier to prepare for a debtor-in-possession while working toward an auction or sale.<sup>38</sup>

Along side the unique provisions of gaming law comes a different sort of demeanor and role among the legal process. A gaming attorney is not like a criminal-defense attorney.<sup>39</sup> One of the purposes of a successful criminal attorney is to keep out any incriminating evidence.<sup>40</sup> However, as a gaming attorney, in order for the process to work, it is the attorney's job to assist the applicant in bringing out all pertinent evidence.<sup>41</sup> "A gaming attorney has a duty to the gaming control system, of which the attorney is part, as well as to the client."<sup>42</sup> Any attorney who appears in front of the Nevada Board, for any reason, becomes an enrolled person. Enrolled persons have an obligation to "(1) be truthful (2) not interfere with an effort by the Board or Commission to obtain information (3) exercise due diligence in preparing documentation (4) monitor the accuracy and completeness of information submitted, and (5) supplement or correct information."<sup>43</sup> One can begin to see the differences among the goals, demeanor, and procedure of a gaming attorney. It is also clear to see that someone who is ignorant of these provisions could do a lot of damage, not only to their client, but to themselves and to the entire system.

### III. Testing Gaming issues on the Nevada bar will assure that attorneys, practicing in Nevada, have at least a fundamental understanding of gaming provisions

Nevada should require that the attorneys practicing in Nevada should be competent enough,



within the issues of gaming laws, to recognize when they need to consider those laws or consult with a specialist in them. Without this competence Nevada will have attorneys who are harming their clients and compromising the standard of regulation that the rest of the world strives to model. Requiring law students to familiarize themselves with gaming law enough so they are able to spot a gaming issue on the bar exam will teach them that in practice issues that involve gaming require an attorney to look to the gaming regulations and statutes or consult with a gaming attorney.

**A. It is a REQUIREMENT of the state bar examination to produce competent attorneys.**

“The recent explosion of gaming has resulted in the need for attorneys knowledgeable in gaming law and its many laborious regulations.”<sup>44</sup> Article 2 of the State Bar of Nevada Bylaws states that the purpose of the State Bar Examination is to improve the administration of justice, uphold the honor, integrity, professionalism and dignity of the profession of law, to enhance professional competence, to improve the availability of competent legal services to all segments of the community and to encourage higher and better education for members of the profession.<sup>45</sup> The State Bar of Nevada is not following its own bylaws by allowing attorneys to practice law in Nevada without even a fundamental understanding of gaming provisions. The State Bar of Nevada is not improving the administration of justice or upholding the integrity of the profession of law when it continues to allow attorneys to be ignorant of the law. An attorney proves to be ignorant of the law when he or she allow a client to transfer an interest of ownership in a grocery store that has gaming devices without following the required steps established by the Nevada Board.

In most areas of the law an attorney can recognize when they should consult special regulations or a specialized attorney. With gaming, however, many attorneys do not even recognize that there is a separate issue. Allowing attorneys to continue to practice in Nevada without that knowledge does not provide for competent legal services to the community.<sup>46</sup> As explored above, it would be unlikely for an attorney to spend a career practicing in Nevada and to never encounter a gaming issue. Many members of the community are affected by the gaming statutes and regulations. “Certainly someone practicing in Nevada should have knowledge [of gaming issues].”<sup>47</sup>

**B. Testing a gaming issue on the Nevada bar will require law students to become**

**familiar enough with gaming to be able to spot an issue.**

“Why wouldn't they (State Bar of Nevada) test on gaming law?”<sup>48</sup> Law students learn each subject that is tested on the bar. If there was an expectation that a gaming issue would be tested on the bar, in preparation for the test the students would learn gaming law. The State Bar of Nevada would be able to solve the problem of incompetency within gaming issues if attorneys were able to spot a gaming issue and know when they need help. Many attorneys do not realize that the gaming statutes and regulations require them to do more when it comes to transactions that involve gaming devices.<sup>49</sup> If gaming was tested on the bar attorneys would remember, in practice, that gaming law requires additional vigilance.

The passing of the bar examination is regarded as proof that an individual is competent to practice law in that state. The State Bar of Nevada should produce attorneys who are skilled to serve the



community, our community. By testing gaming on the Nevada bar, “they (test takers) will learn something, they will see red flag or issues when in relation to gaming law.”<sup>50</sup> Testing on gaming law, in addition, will further highlight the importance of the gaming regulations and statutes to the everyday practitioner.<sup>51</sup> “Hopefully [testing gaming on the bar] will sensitize a lawyer to how encompassing gaming law can be and how complex it can be, and the importance of seeking a gaming expert.”<sup>52</sup>

**C. The process to get the state bar of Nevada to test gaming issues on the bar examination is simple and can be done.**

The Board of Bar Examiners has the authority to recommend to the Supreme Court the rejection of applicants who fail to meet the requirements and to recommend to the Supreme Court changes in qualifications for admissions.<sup>53</sup> It would be



necessary to start lobbying with the Board of Bar Examiners and the Board of Governors in order to encourage them to recommend to the Supreme Court that the Nevada Bar should test on a gaming issue. However, the Supreme Court makes the final decision. The Supreme Court has added and subtracted topics tested on the exam in the past. It would be important to express to the decision makers that gaming affects virtually all areas of law and a competent attorney should be educated to



recognize potential gaming issues.

Some express caution is considering whether the Nevada Bar should test on gaming issues. Sam Lionel, a partner at Lionel Sawyer and Collins, has expressed that there are already too many topics tested on the bar and several important ones not tested on the bar.<sup>54</sup> Michael Wilson, the chief deputy attorney general representing the Nevada Board and Commission, believes that gaming laws are unique and difficult to understand and that few attorneys will actually ever practice gaming law.<sup>55</sup> The extent of gaming on the Nevada bar should be limited. It is an area of the law that few attorneys will actually practice. However, there is a need to teach law students that it is a unique area and that they should be aware of the sometimes contradictory provisions and regulations. On the bar, gaming law should not be a separate question but simply an issue added into a topic that is already being tested. Incorporating a gaming issue into the test, will help to ensure that students are able to spot the issues and realize that a transfer of interest of a bar with slot machines is affected by gaming regulations and statutes.

Others, opposing the addition of gaming law on the Nevada Bar, might argue that it is unrealistic for

a student who does not attend the William S. Boyd School of Law in Las Vegas to learn gaming law. This would be a misconception. Some form of gaming is currently in forty-eight of the fifty states.<sup>56</sup> Furthermore, gaming classes are being taught in law schools all over the country.<sup>57</sup> Lexis Nexis has published the first case book specifically designed to be used in law school gaming classes in 2003.<sup>58</sup> In 2007, Carolina Academic Press published the first casebook on Indian gaming law and announced plans to release a second one by year's end.<sup>59</sup> In law schools without a gaming law class, "the growth of gaming is reshaping the curriculum," gaming topics are being discussed in Admiralty, Computer law, Federal Indian law, Nonprofit Organizations, Sports law, and Criminal law classes.<sup>60</sup>

Finally, testing gaming on the Nevada Bar can be compared to Washington's and New Mexico's addition of American Indian law on their state bar examination. Attorneys in Washington recognized that with 29 federally recognized American Indian tribes and nations in their state a lawyer can expect to deal with some aspect of American Indian law in his or her career.<sup>61</sup> Gabriel Galanda and Rion Ramirez of the Northwest Indian Bar Association said "American Indian law is becoming complex as tribes and nations become more influential economically, legally and politically. Their own laws are starting to impact the areas in which they are involved: real estate development, banking and finance, telecommunications, wholesale and retail trade and tourism."<sup>62</sup> Comparatively, gaming law impacts virtually all areas of law in Nevada, including constitutional rights, taxation, real estate transactions, stock transfers, a formation of a business entity, federal maritime law, private placements and public offerings, loans, stock pledges and negative covenants, bankruptcy, trusts and even family law.<sup>63</sup> In addition, gaming law attorneys in Washington and New Mexico need not fail to recognize that a case has Native American issues.<sup>64</sup> "If required to have a basic understanding of Indian law on the bar exam, lawyers would know enough to at least recognize a tribal issue and get more help with it, reasoned state officials."<sup>65</sup>

#### IV. Conclusion

"To practice in Nevada and not have some exposure to gaming law is negligent."<sup>66</sup> According to the National Conference of Bar Examiners and the ABA Section of Legal Education and Admission to the Bar:

The bar examination should test the ability of an applicant to identify legal issues...such as

may be encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles.

Including gaming law on the bar exam will produce new attorneys who can spot issues and competently represent their clients. In order for

<sup>13</sup>Interview with Mark Clayton, Member of the Nevada Gaming Control Board, in Las Vegas, NV (April 7, 2008).

<sup>14</sup>Id. at 6.

<sup>15</sup>Id. at 5.



the State Bar of Nevada to uphold its stated purpose gaming law should be tested on the bar examination. It is necessary that Nevada attorneys have, at the very least, a fundamental understanding of the gaming statutes and regulations so they can adequately represent their clients. Including gaming issues on the Nevada bar would require students to prepare for the subject and develop a basic understanding of the issues and differences that surround gaming law. [NGL](#)

<sup>1</sup>Lionel Sawyer and Collins, Nevada Gaming Law 243-244 (Trace Publications ed., 3rd ed. 2000).

<sup>2</sup>Sean McGuinness, They Call it Gaming...and you can bet it's changed a lot, 15 AUG Business Law Today, July/Aug 2006 at 34, 34.

<sup>3</sup>Nevada Resort Association, 2007 Nevada Gaming Fact Book 2 (2007).

<sup>4</sup>Id.

<sup>5</sup>Id.

<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>Id.

<sup>9</sup>Id.

<sup>10</sup>Id.

<sup>11</sup>Id. at 5.

<sup>12</sup>Id.

<sup>16</sup>Id. at 14-15.

<sup>17</sup>Id. at 15.

<sup>18</sup>Lucas J. Tucker, A REASON TO BE PROUD: AN INTRODUCTION TO THE GAMING LAW COURSES OFFERED AT THE BOYD SCHOOL OF LAW IN 2008 COMMUNIQUÉ. See also Sean McGuinness, They Call it Gaming...and you can bet it's changed a lot, 15 AUG Business Law Today, July/Aug 2006 at 34, 41-42. See also A.J. "Bud" Hicks, Common Mistakes Lawyers Make in Gaming Matters, 3 FEB Nev. Law, 14, 15 (1995).

<sup>19</sup>Id. at 42.

<sup>20</sup>Id.

<sup>21</sup>Id.

<sup>22</sup>Id.

<sup>23</sup>A.J. "Bud" Hicks, Common Mistakes Lawyers Make in Gaming Matters, 3 FEB Nev. Law, 14, 15 (1995).

<sup>24</sup>Id.

<sup>25</sup>Id.

<sup>26</sup>Id.

<sup>27</sup>Id.

<sup>28</sup>Id.

<sup>29</sup>Id.

<sup>30</sup>Id.

<sup>31</sup>Id.



<sup>32</sup>Id.

<sup>33</sup>Id.

<sup>34</sup>A.J. "Bud" Hicks, Common Mistakes Lawyers Make in Gaming Matters, 3 FEB Nev. Law, 14, 15 (1995).

<sup>35</sup>Sean McGuinness, They Call it Gaming...and you can bet it's changed a lot, 15 AUG Business Law Today, July/Aug 2006 at 34, 41-42.

<sup>36</sup>Id.

<sup>37</sup>Id.

<sup>38</sup>Id.

<sup>39</sup>Interview by Dwayne Kling with Robert D. Faiss, University of Nevada Oral History Program, in Reno, NV. 56 (2006).

<sup>40</sup>Id.

<sup>41</sup>Id.

<sup>42</sup>Id.

<sup>43</sup>NGC Reg. 10.090-.100.

<sup>44</sup>Martha D. Moore, The Ethical Duty of Competence, 3 Casino Lawyer 11 (No. 2, Spring 2007).

<sup>45</sup>State Bar of Nevada Bylaws, Article 2(a, c, e, g, h, & k).

<sup>46</sup>Interview with Mark Clayton, Member of the Nevada Gaming Control Board, in Las Vegas, NV (April 7, 2008).

<sup>47</sup>Interview with Sam Lionel, Partner at Lionel Sawyer and Collins, in Las Vegas, NV (April 2, 2008).

<sup>48</sup>Interview with Rob Goldstein, president and chief operating officer of The Venetian, in Las Vegas, NV (March 26, 2008). Response when asked whether he thought that gaming law should be tested on the Nevada Bar.

<sup>49</sup>Interview with Mark Clayton, Member of the Nevada Gaming Control Board, in Las Vegas, NV (April 7, 2008).

<sup>50</sup>Interview with Sam Lionel, Partner at Lionel Sawyer and Collins, in Las Vegas, NV (April 2, 2008).

<sup>51</sup>Interview with Mark Clayton, Member of the Nevada Gaming Control Board, in Las Vegas, NV (April 7, 2008).

<sup>52</sup>Interview with Mark Clayton, Member of the Nevada Gaming Control Board, in Las Vegas, NV (April 7, 2008).

<sup>53</sup>Rule 49(6), Board of governors of state bar to govern admission to practice law; fees; board of bar examiners.

<sup>54</sup>Interview with Sam Lionel, Partner at Lionel Sawyer and Collins, in Las Vegas, NV (April 2, 2008).

<sup>55</sup>Telephone interview with Mike Wilson, chief deputy attorney general representing the Nevada Gaming Control Board and Commission, in Las Vegas, NV (April 2, 2008).

<sup>56</sup>Nevada Resort Association, 2007 Nevada Gaming Fact Book 2 (2007).

<sup>57</sup>Robert M. Jarvis, A Survey of Law School Gaming Courses, 11 Gaming L. Rev. 211.

<sup>58</sup>Id. at 215.

<sup>59</sup>Id.

<sup>60</sup>Id.

<sup>61</sup>Richard Walker, Lawyers want Indian Law Added to Bar, Indian Country Today (2003).

<sup>62</sup>Id.

<sup>63</sup>Lucas J. Tucker, A REASON TO BE PROUD: AN INTRODUCTION TO THE GAMING LAW COURSES OFFERED AT THE BOYD SCHOOL OF LAW IN 2008 COMMUNIQUE. See also Sean McGuinness, They Call it Gaming...and you can bet it's changed a lot, 15 AUG Business Law Today, July/Aug 2006 at 34, 41-42. See also A.J. "Bud" Hicks, Common Mistakes Lawyers Make in Gaming Matters, 3 FEB Nev. Law, 14, 15 (1995).

<sup>64</sup>Richard Walker, Lawyers want Indian Law Added to Bar, Indian Country Today (2003).

<sup>65</sup>Id.

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