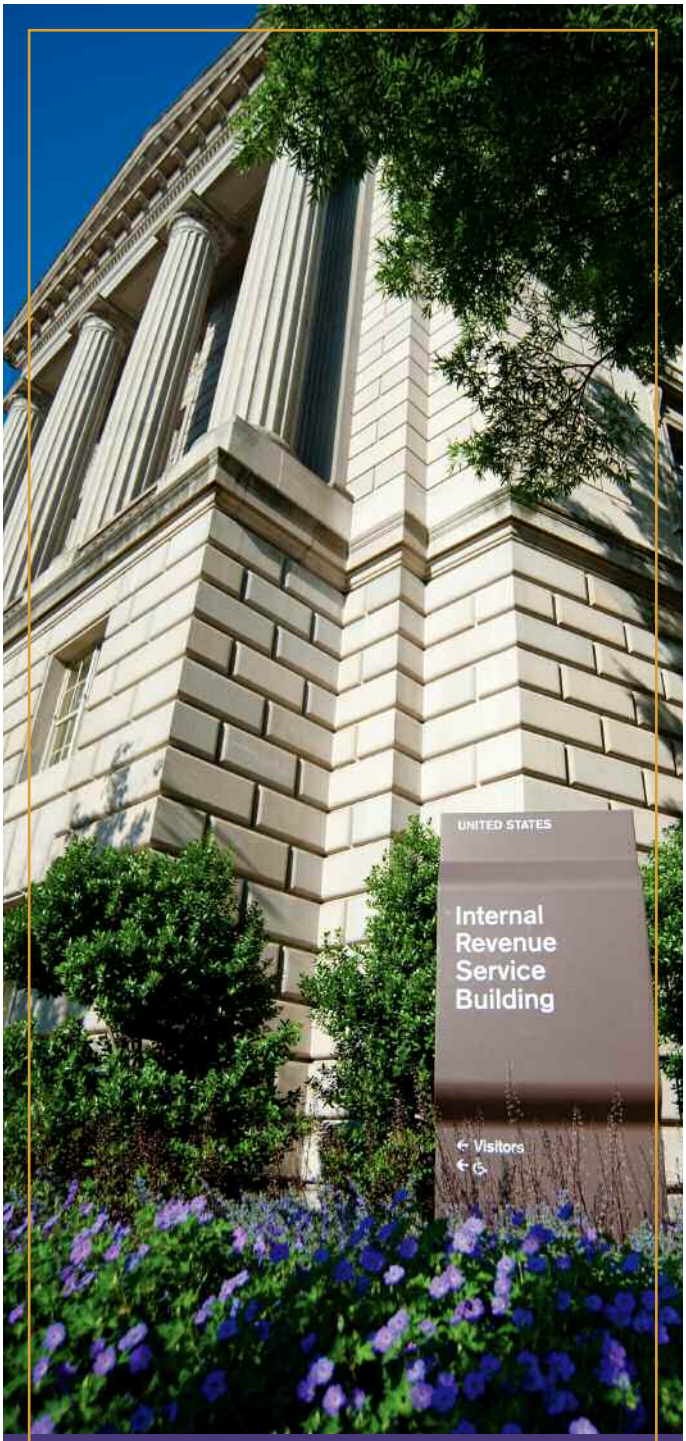


The **Taxation** of **Individual Gambling Winnings** and the **Proposed IRS Amendments** to **Reporting Thresholds**

By Mark Lerner

The Internal Revenue Service ("IRS") is proposing to increase the number of reports of the amounts won by individuals gambling at a casino. The IRS might be better asking whether individual gambling winnings should be taxed at all.

Under current IRS regulations, casinos are required to collect and submit, on a Form W-2G, customers' names, addresses, social security numbers, and signatures for each slot machine payout of $1,200 or more and each keno or bingo payout in excess of $1,500. Amendments proposed by the IRS would lower the thresholds for reporting slot machine, keno, and bingo winnings to $600.

These changes would significantly increase the reporting burden on casino operators and customers without significantly benefiting the national treasury. The changes may even reduce the amount of taxes properly collected.

Reporting individual gambling winnings is incredibly complicated. You cannot simply net your losses against your winnings at the end of the year and report any positive difference. An individual must report winnings and losses separately, reporting winnings as "other" income and claiming losses (up to the amount of winnings) as an itemized deduction.

To be deducted, losses must be documented with meticulous specificity. The IRS expects gamblers to produce records that not only include just the amounts won or lost, but the dates and types of gambling, including slot machine and table game numbers, the names and addresses of the gambling establishments, the names of other persons present, and so on.

Record keeping is complicated by the fact that winnings and losses are determined on a session-by-session basis. Sessions begin when a player buys in and end when the player cashes out. The proposed amendment would also end any session and begin a new one at the end of each calendar day. The session concept does not simplify record keeping; it adds yet another factor of which the casual gambler must keep track. Under the proposed amendment, it would become even more complicated whenever an individual's gambling straddles midnight—hardly an unusual occurrence among gamblers in 24-hour casinos with busy swing and graveyard shifts. These are not records likely to be kept by casual, recreational gamblers. While someone who scores a W-2G-worthy win early in the year may be able to document offsetting losses later in the year, those who have a major win near the end of the year may not.

The result is people owing tax even though they don't end up winning any money to pay it. Furthermore, people who do not itemize deductions can only report winning sessions and, therefore, are more likely to owe taxes on their "winnings" even though they have a net loss for the year. Since lower-income taxpayers are much less likely to itemize deductions than higher-income taxpayers, the result is not just a tax on non-existent gambling income but a regressive tax that affects lower-income people disproportionately. The regression would only worsen under the proposed amendments as the amounts reported are halved and affect more people.

All of this is an incentive not to report winnings and, if winnings result in a Form W-2G, to be creative about documentation of offsetting losses. And for what? Taken as a group, individual gamblers show a net loss every year. Taken individually, the overwhelming majority of gamblers show a net loss every year. Those who do manage to show a win as of the end of the year mostly win very little, and those who continue to gamble are likely to lose it back the following year. In theory, the amount of individual gambling winnings available for taxation is zero. For individual gamblers, casino gambling is a less than zero-sum game. On average, gamblers show a net loss for the year. That's why there are casinos.

So how much money can the treasury possibly net each year in taxes on individual gambling winnings? How much would that amount change if the proposed amendments go into effect? To answer these questions, we need to know how much money the IRS actually collects and how much the IRS should accurately collect in these taxes and how much it spends to collect them. Whatever the IRS spends administering the tax, the amount would increase under the proposed amendments as the IRS works to process twice as many W-2Gs. At the same time, the amount likely to be collected will not increase in proportion. Not only are the amounts in question smaller, but the lower reporting threshold makes it more certain that winnings will be offset by actual losses during the year and that taxes will not actually be owed.

We also need to know how much tax revenue from tax-paying casinos is lost when the casinos shut down games and players to issue W-2Gs? Whatever that amount is now, it has to increase under the proposed amendments, since the number of W-2Gs would presumably double. Taxes on casino income are also reduced through increased payroll and other business expenses as casinos process more W-2Gs, not to mention the enormous cost of refitting slot machines and keno and bingo systems to lock up at the lower amounts. The taxes paid by casinos are not insubstantial. The total amount of taxes collected by all U.S. jurisdictions in 2013 totaled $38 billion; the total amount of federal taxes collected was $17.3 billion. Thus, even a small dip in taxable casino

income caused by increased numbers of W-2Gs and other associated expenses is likely to have a significant effect on tax collections. Furthermore, from the tax collector's point of view, compared to the complexities of administering taxes on the small amounts individual gamblers contend with, taxation of casinos is relatively simple. Most are taxed, audited, and heavily regulated by local jurisdictions, so most of the work needed for federal tax purposes is already being done at no federal expense.

It just doesn't seem likely that the lowered thresholds would yield enough additional tax revenue to justify the added burden on the individuals, casinos, and the IRS. Even with the thresholds at their current levels, the return doesn't appear to justify the investment.

Most countries, it seems, have sensibly concluded that taxing individual winnings from casinos does not make sense, economically or as a matter of policy. It appears that most other countries do not tax individual winnings from casinos; this includes most European Union countries, the United Kingdom, Canada, and Australia.

The IRS shouldn't be lowering the reporting thresholds. It should be eliminating the individual tax and the reporting altogether and focusing on the relatively easy money to be collected from the only real winners, casinos. Unfortunately, eliminating the tax on individual gambling winnings cannot be done by regulation; it seems a statutory change—literally, an act of Congress—is required. But until that happy day, the IRS should not exacerbate the inequities of the current system by decreasing the reporting thresholds.

[1] Form W-2G, http://www.irs.gov/pub/irs-pdf/fw2g.pdf.

[2] INTERNAL REVENUE SERVICE, *2015 Instructions for Forms W-2G and 5754*, at 4, http://www.irs.gov/pub/irs-pdf/iw2g.pdf.

[3] Howard Stutz, *IRS Suggests Dropping Casino Winnings Threshold To $600*, LAS VEGAS REVIEW-JOURNAL, Mar. 5, 2015 (http://www.reviewjournal.com/business/casinos-gaming/irs-suggests-dropping-casino-winnings-threshold-600); *Information Returns; Winnings From Bingo, Keno, and Slot Machines*, 80 Fed. Reg. 11600 (2015) (to be codified at 26 C.F.R. 1, 26) (proposed Mar. 4, 2015).

[4] IRS Publication 529 (http://www.irs.gov/publications/p529/ar02.html#en_US_2014_publink100027002).

[5] IRS Publication 529 (http://www.irs.gov/publications/p529/ar02.html#en_US_2014_publink100027002).

[6] Memorandum AM2008–11, Office of Chief Counsel, Internal Revenue Service (Dec. 12, 2008); Park v. Commissioner, 2013 U.S. App. LEXIS 13785 (D.C. Cir. July 9, 2013); Shollenberger v. Commissioner, 98 T.C.M. (CCH) 667, 2009 WL 5103973 (Tax Ct. 2009).

[7] CONGRESSIONAL RESEARCH SERVICE, *Itemized Tax Deductions for Individuals: Data Analysis*, http://fas.org/sgp/crs/misc/R43012.pdf (Feb. 12, 2014).

[8] Assuming the machines and systems can be refitted at all. Reprogramming the hundreds of thousands of slot machines located in the U.S. would be a monumental task, involving dozens of manufacturers, hundreds or even thousands of different code sets, and visits to each individual slot machine to install the new programs (online updating is not typically an available option for slot machines or casino gaming systems).

[9] AMERICAN GAMING ASSOCIATION, *Gaming's Quarter of a Trillion Dollar Impact on the U.S. Economy* (2014)(http://www.gettoknowgaming.org/sites/default/files/AGA_G2KG_Fact-Sheet_0.pdf).

[10] CASA, *Taxation of Gambling Winnings in European Countries* (Newsletter No. 23, June 2011) (http://www.casasa.org.za/CASA_Newsletter_Issue_23.pdf).

[11] TIM WORSTALL, *The Reason The UK Doesn't Tax Betting Is Because It Wouldn't Produce Any Revenue*, FORBES, Nov. 29, 2013 (http://www.forbes.com/sites/timworstall/2013/11/29/the-reason-the-uk-doesnt-tax-betting-is-because-it-wouldnt-produce-any-revenue/); Do I Have To Pay Taxes On Online Gambling Winnings?, http://www.cheekypunter.com/faq/do-i-have-to-pay-taxes-on-online-gambling-winnings/

[12] *Do I Have To Pay Taxes On Online Gambling Winnings*, http://www.cheekypunter.com/currency/canadian-dollar/.

[13] *Is Gambling Taxed In Australia?*, http://www.onlinepokiesaustralia.com.au/faq/is-gambling-taxed-in-australia.html.

[14] *See 26* U.S.C. § 61 (taxable income includes all income not expressly exempted); 26 U.S.C. § 165(d) ("Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.")

HOTEL SAFE-DEPOSIT BOXES AND UNCLAIMED PROPERTY

A CHANGE IN NEVADA'S APPROACH

By Andrew Moore and Jennifer Carleton

Nevada laws related to public accommodation liability are generally very favorable to hotels. Hotel[1] operators are exempt from liability for any property that a guest fails to deposit for safekeeping with the hotel unless the gross neglect of the hotel can be established, with the burden of proof resting upon the guest. In order for this exemption to apply, the hotel must provide a fireproof safe or vault in which guests may deposit property for safekeeping and give notice of this service either by telling the guest of the service or by posting notice in the office and the guest's room.[2] The hotel is not obligated to receive property exceeding $750, unless the hotel consents to do so in a written agreement in which the guest specifies the value of the property.[3]

Bailment and Safes in Hotel Rooms

A "bailment" is created when a hotel receives something of value on behalf of a patron and agrees to keep it for the patron. In *Kula v. Karat*,[4] a patron deposited $18,300 with a cashier in the casino at the Stardust Hotel. The Nevada Supreme Court found that "[w]here a bailee, either for hire or gratuitously, is entrusted with care and custody of goods, it becomes his duty at the end of the bailment to return the goods or show that their loss occurred without negligence on his part. Failing in this, there arises a presumption that the goods have been converted by him, or lost as a result of his negligence, and he is accountable to the owner for them."[5] If a hotel provides a safe in which guests may deposit property for safekeeping and the hotel accepts the property and deposits it on behalf of the patron, a bailment is created and the patron may demand return of his or her property at any time.

The Kula case did not address the situation in which a patron deposits his or her property in a personal safe located in a hotel room. With a personal safe in the guest's room, the hotel is not directly

receiving goods from the guest. The guest is depositing the goods directly in the safe and the hotel is not entrusted with care or custody of the goods while the guest is staying at the hotel. The hotel does not have access to the safe because the key is held by, or the digital access code is only known to, the guest. In the event that a hotel guest leaves the hotel without retrieving goods that he or she has deposited directly into the safe in the hotel room, those goods are deemed left by the guest and may be sold by the hotel.[6]

If a guest owes money to the hotel at the time of departure, any of the guest's property left at the hotel may be sold by the hotel after 60 days. "All baggage or property of whatever description left at a hotel, inn, motel, motor court, boardinghouse or lodging house for the period of 60 days may be sold at public auction by the proprietor or proprietors thereof as provided in NRS 108.500."[7] If a hotel elects to sell such goods, sale of such goods must be by public auction after notice, which includes (a) a description of the property to be sold, (b) the time and place of the sale, (c) the name of the hotel at which the property or baggage was left, (d) the name of the owner of the property, if known and (e) the signature of the person conducting the sale. If the residence of the owner of the property is known, a copy of the notice should be sent to the owner.[8]

Abandoned Property

In Nevada, property is considered abandoned when there has been no activity or contact with an owner for a specific period of time. The property type will determine the abandonment period; however, it is typically three years. "When a holder's attempts to locate the rightful owner have been unsuccessful, the assets must be 'escheated' to the Nevada State Treasurer's Office, which, in turn, holds the assets in perpetuity. The law requires the state to advertise the rightful owners' names in an effort to return the assets. Once the assets are reported to the state, the holder is released from any liability."[9]

Some resort hotels in Nevada offer their guests safe-deposit boxes that guests may use during their stay,

in addition to the safes provided in guest rooms. Prior to the adoption of AB 419 in the 2015 Nevada legislative session, Nevada's unclaimed property statute would have prevented a hotel from selling the property left in a safe-deposit box or the safe in the guest room. NRS 120A.510 provides that "tangible property held in a safe-deposit box or other safekeeping depository in this State in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law are presumed abandoned if the property remains unclaimed by the owner for more than 3 years after expiration of the lease or rental period on the box or other depository." The Nevada Treasurer's manual related to unclaimed property notes that gaming establishments are subject to the same escheatment laws as any other business in Nevada. Guidance published by the Nevada State Treasurer related to safe-deposit boxes notes that such guidance applies to banks, other financial institutions, and casinos and details that the property left in safe-deposit boxes would need to be inventoried on forms provided by the Nevada Treasurer. Under the applicable provisions in NRS 120A, the property in the safe-deposit box would need to be held for three years by the hotel and if the owner never claimed the property, the property would be provided to the State Treasurer as abandoned property. "Front Money (cash deposited with a casino that the owner withdraws for gambling), hotel safe deposit boxes (with or without rental payments), registered hotel in-room safekeeping, boxes and property, are subject to escheatment to Nevada Unclaimed Property."[10]

AB 419, however, added the following section to Chapter 120A – "The provisions of this chapter do not apply to tangible property held in a safe-deposit box or other safekeeping depository which is not maintained by: (1) A bank or other financial institution; or (2) A safe-deposit company." The explanation of the purpose of the bill reads: "This bill clarifies that the provisions of the Uniform Unclaimed Property Act do not apply to tangible property held in a safe-deposit box or other safekeeping depository, which is not maintained by a bank or other financial institution." The Nevada Resort Association ("NRA") amended the bill after it was originally introduced to include subsection (2) which provides that the unclaimed property provisions apply to safe-deposit companies in addition to banks. The NRA noted that this provision was necessary because Nevada statutes refer to "safe-deposit companies." In its explanation for the amendment, the NRA noted that its intent "is to include companies that are in the business of providing for safe-deposit [boxes], and not include entities that are not in the business of leasing safe-deposit boxes, such as hotels." Lorne Malkiewich of the Nevada Resort Association testified before the Nevada Senate Judiciary Committee on May 12, 2015, regarding the effect of AB 419 and the question of whether a safe in a hotel room is considered a safe-deposit box or other safekeeping depository: "The statute provides that property in a safe deposit box is presumed abandoned if it remains unclaimed for more than 3 years after the expiration of the lease or rental period. The concept 'lease or rental fee' makes no sense applied to a safe in a hotel room. A presumption of abandonment after 3 years makes perfect sense for safe deposit boxes but would be insane applied to a hotel safe. For example, if a family stayed in a hotel and Junior thinks it would be interesting to put his teddy bear in the safe, the hotel would be required to keep the teddy bear for 3 years and then turn it over to the Unclaimed Property Division." AB 419 was signed by Governor Sandoval into law on May 21, 2015 and became effective on July 1, 2015.

Resort Casino Safe-Deposit Boxes

It is clear that after the Nevada Legislature amended Chapter 120A, the property that is left by a patron in a hotel room safe is no longer subject to the unclaimed property provisions of the Nevada code. However, it is not as clear whether a resort casino that provides a safe-deposit box to a patron is a "financial institution" subject to those same provisions. AB 419 did not define the term "financial institution." Even though casinos are defined as a financial institution under the Bank Secrecy Act (31 U.S.C. § 5312(a)(2)(X)), the various definitions of "financial institution" under Nevada law do not include casinos in the definitions. The following provisions in the NRS define "financial institution": NRS 363A.050, 111.711, 600.045, 239A.040, 657.160. The only one of these various definitions in Nevada law that could arguably include a casino is NRS 657.160 because it defines financial institution with reference to a depository institution. But the definition of depository institution in NRS 657.037 requires that the institution be chartered as a financial institution in Nevada, in another state or by the federal government. Therefore, it does not apply to casinos and resort hotels.

Given AB 419's effective date of July 1, 2015, all property that has been housed in safe-deposit boxes at a Nevada hotel for a period of three years or longer, as of July 1, 2015 should be escheated to the State of Nevada as unclaimed property. For property that has been left in a safe-deposit box or a hotel safe for a period less than three years (as of July 1, 2015), Nevada hotels can now dispose of the property because AB 419 clarified that Nevada's unclaimed property requirements do not apply to safe-deposit boxes or any other safekeeping depository provided to guests in Nevada hotels.

Andy Moore is a shareholder in the Las Vegas office of Brownstein Hyatt Farber Schreck. Andy is experienced in assisting clients with gaming regulatory matters before the Nevada Gaming Commission and Nevada Gaming Control Board. Additionally, he has assisted clients with numerous and varied liquor and other business licensing matters in local jurisdictions throughout Nevada, including matters in Clark County, Las Vegas and Henderson.

Jennifer Carleton is a shareholder in the Las Vegas office of Brownstein Hyatt Farber Schreck. She has spent the last 18 years of her career in gaming, first as in-house counsel for an Indian casino and now as an adviser to the premier public and private gaming companies in the United States. She has developed a unique multi-jurisdictional gaming practice, assisting clients with casino operations in numerous U.S. states, advising investors in gaming companies that hold licenses worldwide, and facilitating negotiations with Indian gaming operators.

[1] While the term "hotel" is used in this article, the same analysis applies to inns, motels, motor courts, boardinghouses or lodging houses under NRS 651.010.

[2] NRS 651.010(2).

[3] NRS 651.010(3-4).

[4] 91 Nev. 100 (1975).

[5] *Id.* at 104, citing *Mills v. Continental Parking Corp.*, 86 Nev. 724, 475 P.2d 673 (1970); *Alamo Airways, Inc. v. Benum*, 78 Nev. 384, 374 P.2d 684 (1962). Cf. *Traynor v. Carter*, 87 Nev. 281, 485 P.2d 966 (1971); *Donlan v. Clark*, 23 Nev. 203, 45 P. 1 (1896).

[6] See NRS 108.490.

[7] NRS 108.490.

[8] NRS 108.500.

[9] State of Nevada Office of the Treasurer, Unclaimed Property Holder Reporting Manual (Rev. 05/2015).

[10] *Id.*

Gaming Law Education Advances:

THE FIRST LL.M. IN GAMING

By Ngai Pindell, Vice Dean and Professor of Law, and Jennifer Roberts, Adjunct Professor

The William S. Boyd School of Law at UNLV (Boyd School of Law) will enroll the first class of students in a new LL.M. in Gaming Law and Regulation this fall. The LL.M. builds on the fourteen years of gaming instruction in the JD curriculum; long-standing, cross-campus partnerships with the William F. Harrah College of Hotel Administration; the International Gaming Institute; the Center for Gaming Research in the Lied Library; and Las Vegas' position as a global leader in gaming and gaming regulation.

Many law schools offer a large, general LL.M. especially popular with students and lawyers from outside of the U.S. In contrast, the LL.M. in gaming will be specialized and narrowly tailored, similar to other specialty LL.M. programs in tax, intellectual property, and health law to name a few examples. Students may complete the LL.M. program in one year as a full-time student or in two years as a part-time student.

The Boyd School of Law already provides the most extensive curriculum in gaming law and regulation courses in the country. As early as 2001, the law school offered students an overview of the world of regulated gaming with Introduction to Gaming Law. Now, fourteen years later, students learn more than the basics. They also receive instruction in Indian gaming law, laws affecting gaming resort properties,

the federal government's role in gaming, and the policy issues that affect the gaming industry. Students learn the breadth of the field, the cutting-edge debates that shape the industry, and have an opportunity to participate directly in creating gaming law and policy. During the 2015 Nevada state legislative session, for example, students created an amendment to charitable gaming laws, introduced it before the Nevada Gaming Control Board and the Nevada Gaming Commission, and testified before both the Assembly and the Senate. The bill was signed into law by Governor Brian Sandoval and continues the school's successful streak of student-led gaming legislation. The gaming law curriculum has a long tradition of combining high quality classroom instruction with hands-on experiences and "real-world" insights. Casino owners and operators, general counsels, regulators, and gaming law practitioners regularly guest lecture in classes to provide first-hand, inside perspectives about this regulated world. The LL.M. program will build on this long-standing tradition.

LL.M. students will be required to take the Introduction to Gaming Law course as well as a new course called Casino Operations and Management, a blend of the business and legal issues central to the internal workings of a gaming operation. Students will also be required to take a course on either federal gaming law or comparative gaming law, in addition to completing a drafting project or externship. Gaming specific electives include a course covering the laws and policies affecting gaming manufacturers and a course on technology and innovation. Non-gaming specific electives include courses in intellectual property, labor and employment, entertainment, international business transactions, and federal Indian law, among others. As gaming law practitioners fully understand, successful gaming attorneys must also be familiar with the many ways in which gaming intersects with other areas of law. The LL.M. curriculum is designed to allow students to dive deeply into gaming-specific courses while also having the opportunity to place gaming law and regulation within other legal frameworks.

LL.M. graduates will have a competitive advantage in the hiring market. Gaming companies and law firms will benefit from candidates who know the history of this regulated industry and the issues facing the gaming world today. Graduates will be able to "hit the ground running" and save employers the time and expense of teaching them the gaming business. Because regulated gaming is a global business that continues to see growth, there are many opportunities for students to work in new gaming markets - helping to develop gaming regulation and policy and adding immediate value to regulatory agencies, operators, law firms, and related industries.

Ngai Pindell earned his J.D. degree in 1996 from Harvard University, where he served as executive editor of the Harvard Black Letter Journal. After graduation, Vice-Dean and Professor Pindell practiced community development law in a nonprofit law firm in Baltimore, Maryland. He was later a Fellow and Visiting Assistant Professor at the University of Baltimore School of Law, where he taught the Community Development Clinic. Professor Pindell joined the Boyd School of Law in 2000. His research interests are in economic development and housing and he teaches Property, Land Use Regulation, Local Government Law, and Wills and Trusts & Estates.

Jennifer Roberts is a Partner in the Las Vegas office of the international law firm, Duane Morris. She practices in the areas of gaming licensing and compliance, alcohol licensing and control, land use and zoning, and other areas of administrative and regulatory law. She serves as counsel to gaming compliance committees and assists clients with liquor licensing and compliance issues at the federal, state, and local levels. Jennifer is an adjunct professor at the William S. Boyd School of Law, University of Nevada, where she teaches Introduction to Gaming Law, Gaming Law Policy, and Resort Hotel Casino Law courses. She was previously a Shareholder in the Gaming & Regulatory Department of Lionel Sawyer & Collins. She is a 2002 graduate of the University of Utah S.J. Quinney College of Law.

GLS AWARDS SCHOLARSHIP FOR NEW LL.M IN GAMING LAW AND REGULATION AT UNLV

In June, the GLS Executive Committee awarded the first "Gaming Law Section Scholarship" to Jordan Scot Flynn Hollander. Jordan is a member of the inaugural class of the LL.M. program in Gaming Law and Regulation at the William S. Boyd School of Law at UNLV. The $5,000 scholarship will become, as funds permit, an annual scholarship awarded by the Executive Committee to a student it selects from the new LL.M. program.

Jordan Hollander graduated from Rutgers University School of Law in Camden, New Jersey, summa cum laude, in May 2014 and is admitted to practice in both New Jersey and New York. After graduation, he clerked for the Honorable Francis J. Vernoia, Presiding Criminal Judge, in the New Jersey Superior Court, Monmouth County Vicinage. During law school, he completed an externship with the New Jersey Office of the Attorney General, Division of Gaming Enforcement in Trenton and Atlantic City, New Jersey. He has also published two articles in the Gaming Law Review and Economics journal – one on New Jersey's efforts to implement sports gambling and the constitutionality of the Professional Amateur Sports Protection Act and another on internet gambling and the United States' obligations to the World Trade Organization (republished in the Rutgers Journal of Law and Public Policy).

Blurred Lines or Bright Line Between Gaming and Medical Marijuana

By Kimberly Maxson-Rushton

Last year, when the song "Blurred Lines" blasted over the airways, no one, including the recording artists (at least they claimed) realized that lines had been blurred between the popular hit song and a song titled "Got to Give It Up" written by music sensation Marvin Gaye. However, as determined by a jury earlier this year, recording artists Robin Thicke, Pharrell Williams, and T.I. did in fact blur the lines when they produced their hit single without securing the legal rights to the song.

Interestingly, in 2014, Nevada experienced its own form of *blurred lines* relative to the anticipated approval and operation of medical marijuana establishments and gaming. By way of background, Nevada legalized gaming in 1931 and since that time its success has been largely attributable to the regulatory oversight of the industry, coupled with the obligation to ensure that gaming is free of criminal elements. NRS 463.0129. The policy that the Nevada gaming industry remain free from criminal elements isn't limited to those individuals included in Nevada's Black Book or to applicants with transgressions in their background, but instead it contemplates gaming licensees operating lawfully – meaning that they will not engage in business practices that are contrary to state and/or federal law. NRS 463.1405, NRS 463.151, 463.170 and 463.200.

In 1970, President Nixon amended the Public Health Service Act to create what is now known as the Controlled Substance Act (the "CSA"). The intent was to "provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse[1]." Pursuant to the CSA, 21 U.S.C. § 802, marijuana[2] is identified as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any

part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." Marijuana is further identified as a Schedule I substance despite the efforts of numerous cannabis groups to have it reclassified.

> [W]hen it comes to a drug that is currently listed in schedule I, if it is undisputed that such drug has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision, and it is further undisputed that the drug has at least some potential for abuse sufficient to warrant control under the CSA, the drug must remain in schedule I. In such circumstances, placement of the drug in schedules II through V would conflict with the CSA since such drug would not meet the criterion of "a currently accepted medical use in treatment in the United States." 21 USC 812(b).

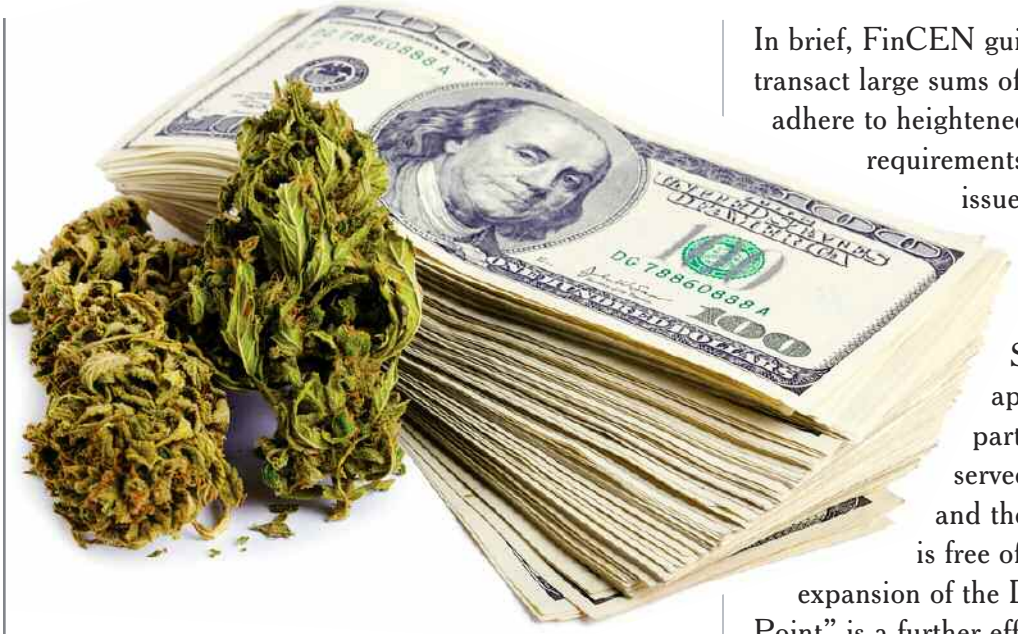
Drug Enforcement Administration, *Notice of denial of petition to reschedule marijuana* (2001).

However, with the proliferation of acceptance and approval of medical marijuana in twenty-three (23) states and the District of Columbia, the federal government has begun to relax its stance on marijuana when used for medicinal purposes. First, through the Department of Justice ("DOJ"), United States Attorney Eric Holder issued an opinion in October 2009 wherein he stated, "It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana, but we will not tolerate drug traffickers who hide behind claims of compliance with state law to mask activities that are clearly illegal." Thereafter, the U.S. Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued "Banking Guidelines" in February 2014 regarding the federal government's expectations, under the Bank Secrecy Act, for financial institutions seeking to provide services to marijuana-related businesses. These guidelines expand and enhance financial services which can be offered to marijuana related businesses. Interested observers could construe this as a sign of the federal government's willingness to consider the medicinal benefits of marijuana, thereby providing a further opportunity to have it removed from the Schedule I category. It could also be a signal to Congress that their exercise of power, through the DEA and FDA, over marijuana treads close to the Tenth Amendment and the sovereignty of the states' rights to protect and govern its citizens. The latter is not likely considering the Supreme Court's holding in *Gonzales v. Raich*, 545 US 1 (2005), wherein the Court addressed whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" included the power to prohibit local cultivation and use of marijuana in compliance with California law.

> The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate or dire those necessities may be. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968)(quoting Sanitary Dist. of Chicago v. United States, 266 U. S. 405, 426 (1925)).

The CSA still identifies marijuana, in any form and regardless of the intended use, as a Schedule I controlled substance. So where does that leave gaming? In jurisdictions such as Colorado, New Jersey, and California, the two industries and the respective licensees may coexist without prohibitions or restrictions on dual ownership/operations. Not so in Nevada. The Nevada Gaming Control Board ("NGCB"), pursuant to industry notice 2014–39, unequivocally stated that gaming and medical marijuana shall remain separate. This interpretation of the applicable provisions of the Nevada Gaming Control Act (NRS Chapter 463) was confirmed by the Nevada Gaming Commission ("NGC") and now stands as the bright line policy in Nevada. The NGCB's interpretation and the NGC's position were not surprising to members of the gaming industry and gaming practitioners as it is consistent with the position of the NGCB and NGC regarding internet gaming. As many in the gaming industry will recall, Nevada gaming officials clearly had the knowledge and tools to establish a regulatory scheme to oversee the licensure and operation of intrastate on-line gaming; however, until 2011, when the DOJ reversed its long-held interpretation of the Federal Wire Act,[3] the more prudent action was for Nevada gaming officials to continue to "study internet gaming." Thereafter, following the DOJ's opinion, Nevada, New Jersey, and Delaware quickly passed laws enabling internet gaming in each respective jurisdiction.

The decision by the NGC, as recommended by the NGCB, to prohibit gaming licensees from holding an interest in a licensed medical marijuana establishment falls squarely in line with the provisions of the Nevada Gaming Control Act and the legislative intent that gaming remain free of criminal elements. Considering that all aspects of gaming must be conducted in a lawful manner, involvement in the field of medical marijuana must be permitted by, and not contrary to, both state and federal law. Accordingly, the NGCB construes the violation of federal law, even if the activity complies with state law, to be unlawful under the ordinary meaning of the term. Thus, irrespective of whether Nevada authorizes medical marijuana, the federal government doesn't…..end of story!



Recognizing that the option of dual licensure/participation in both industries is prohibited, the question becomes just how far does that prohibition extend? Inquiries have been made by conscientious licensees as well as local officials; however, to many people those lines remain blurred. Accordingly, the intent of this article is to provide guidance to licensees and their counsel.

Starting first with the easy questions, may a gaming licensee transfer their interest in a medical marijuana establishment to a spouse, and thereafter continue to hold a gaming license? The answer, as previously held by the NGCB and NGC, is no. May a private equity or financial group, which holds a gaming license invest (not control) in a medical marijuana establishment? Ill advised. According to Gaming Control Board Member, Terry Johnson, ***"I would certainly caution against such an investment. The industry notice expressly opined that a gaming licensee's investment in a medical marijuana establishment was not 'consistent with the effective regulation of gaming.'"***

In addition to the enumerated concerns by the NGCB and NGC relative to marijuana, there are concurrent issues specific to how gaming and medical marijuana establishment's maintain oversight of cash transactions.

In brief, FinCEN guidelines require businesses that transact large sums of currency on a regular basis to adhere to heightened record keeping and reporting requirements. In February 2014, FinCEN issued guidelines specifically intended to assist the marijuana and banking industries in handling cash. Similarly stringent guidelines applicable to gaming and in particular internet gaming have served as a valuable tool to regulators and their efforts to ensure that gaming is free of corrupt elements. An expansion of the DOJ's "Operation Choke Point" is a further effort by the government to strangle providers of financial services in targeted industries in order to "choke off" the money needed for certain industries to survive. Now applicable to gaming, banks are not just required to know how casinos are getting their money but also how casinos customers are getting their money. Based on the spotlight the federal government has placed on financial transactions and the source of funds it is clear why the NGCB and NGC would have concerns with the relationship between casinos and marijuana businesses.

Considering the potential negative impact a federal investigation could have on a licensee as well as the state, the NGCB and NGC's clarification on the ability of gaming licensees being able to own and/or operate a medical marijuana establishment becomes crystal clear.

But what about the gaming licensee that owns separate property that will be used as a medical marijuana establishment, is the licensee subject to a call forward? According to Gaming Control Board Member, Terry Johnson, ***"Most definitely, a licensee in this scenario would be subject to a call forward under NRS 463.162(5). The Board examines, on a case-by-case basis, whether particular circumstances implicate the Board's interests in maintaining appropriate***

separation between gaming and medical marijuana and if so, whether to call a person forward." Are gaming establishments prohibited from employing an individual who has an ownership interest in a medical marijuana establishment? What if the individual is an officer, director or key employee? Considering that many officers and directors of licensed gaming entities are required to file an application for a finding of suitability, the NGCB's position that no gaming licensee be involved in an activity that would be a violation of the CSA would likewise suggest that such individuals are prohibited from holding any interest in a medical marijuana establishment. What if a gaming license has a business partner (in a non-gaming business/venture) who also has an interest in a medical marijuana establishment, should the licensee terminate the business relationship to avoid a call forward from the NGCB? NRS 463.167. Lastly, even though Nevada law does not require an employer to modify an employee's job or work conditions, the employer must attempt to make reasonable accommodations for employees who engage in marijuana for medicinal purposes.[4] So, may a gaming licensee allow an employee to work in a non-gaming capacity following verification that the employee holds a valid patient registration card, and confirmation that the employee's use of medical marijuana will not impact their work nor present any safety related issues? The law provides further coverage for gaming employers by clarifying that if the employee's use of medical marijuana imposes an undue hardship on the employer, then reasonable accommodations are not required. Additional guidance for employers can be found in *Coats v. Dish Network, LLC*, Colorado Supreme Court (June 15, 2015). In *Coats*, the Court held that it was not an unfair, discriminatory labor practice to discharge an employee based on the employee's "lawful" use of medical marijuana (outside of work) as the activity/use is "unlawful" under federal law.

The questions posed herein are but a handful of the potential issues gaming licensees may be confronted with as Nevada's newest industry gets set to launch. However, in reality the line between gaming and medical marijuana isn't all that blurry. Gaming licensees are expected to know their obligations as a privileged license holder and should a question arise whether an act may subject the individual or company to disciplinary action by the NGCB, the expectation is that the licensee will seek clarification from the NGCB. Thus, while the prudent action is for the gaming licensee to separate/divest their involvement with medical marijuana, there is no foul in bringing the matter to the NGCB and asking for clarification or an advisory opinion.[5] Understanding the basis for the NGBC and NGC's position on this topic provides both licensees and practitioners with a road map for navigating where the respective industries will or will not be able to co-operate in Nevada. Further issues regarding these two industries will arise as Nevada prepares for medical marijuana establishments to open and begin operating. However, the line between the gaming and marijuana industries must remain distinct, with no ***blurred lines***.

Kimberly Maxson-Rushton is the managing partner of Cooper Levenson's Las Vegas office where she specializes in Administrative Law matters. Prior to joining Cooper Levenson Kimberly served under Governor Kenny C. Guinn as the Chairman of the Nevada Transportation Authority. Additionally, Kimberly was a criminal prosecutor and Special Assistant to the Clark County District Attorney, as well as the Chief of the Las Vegas Nevada Attorney General's office where she was also served as legal counsel to the Nevada Gaming Control Board and Nevada Gaming Commission. Kimberly is a member of the International Association of Gaming Advisors. She is also a member of the Board and Past Chairman of the Law Related Education Committee of the State Bar of Nevada.

[1] Controlled Substance Act of 1970 – Long Title

[2] The federal Controlled Substance Act refers to cannabis as "marihuana" however, in this article the more frequently used spelling of the term "marijuana" is used.

[i] FinCEN's mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities. For additional guidance, see BSA Expectations Regarding Marijuana-Related Businesses, FIN-2014-G001 (February 14, 2014)

[3] "[W]e conclude that interstate transmissions of wire communication that do not relate to a 'sporting event or contest, 18 U.S.C. 1084(a), fall outside of the reach of the Wire Act." Memorandum from Virginia Seitz, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel (September 20, 2011).

[4] NRS 453A.800

[5] NGC Regulation 2A

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P. Gregory Giordano, Partner, McDonald Carano Wilson LLP (Moderator)

(1 hour) Gaming Enforcement Issues
Shawn Reid, Member, Nevada Gaming Control Board
Karl Bennison, Chief, Enforcement, Nevada Gaming Control Board

(1 hour) 2015 Legislative Update on Gaming
Greg Brower, Nevada State Senate (R-15)
Mark Lipparelli, Nevada State Senate (R-6)

(1 hour) Information Risk Management: Providing Effective Counsel to Your Company
Kevin D. Leitão, Of Counsel, Ballard Spahr, LLP

(2 hours/Ethics) The Fear Factor: How Good Lawyers Get Into Bad Trouble
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