

FORWARD

By Ellen Whittimore

Welcome to the 2024 edition of *Nevada Gaming Lawyer* magazine. Each year, I look forward to reading articles from leading regulators, educators, business executives, and gaming experts. I am humbled to have been asked to contribute to this issue and share my thoughts with you.

Nevada is the home of champions: the Vegas Golden Knights – the 2023 NHL Stanley Cup Champions; the Las Vegas Aces – 2023 and 2022 WNBA Champions; the 1990 UNLV Runnin' Rebels – NCAA Basketball Champions; Andre Agassi – 8-time Grand Slam tennis champion and Olympic Gold Medalist; Greg Maddux – the only pitcher in MLB history to win at least 15 games for 17 straight seasons; Colin Kaepernick, former University of Nevada, Reno quarterback who is the only NCAA Division 1 quarterback in history to amass 10,000 passing yards and 4,000 rushing yards; Bowe Becker, 2021 Olympic Gold Medalist in the 4x100 freestyle; Danielle Kang, 2018 Women's PGA champion; Colin Morikawa, 2020 PGA Champion and British Open Champion; and at each Olympic Games, Nevada is well represented by home-grown champions.

Nevada has also produced an equally impressive list of another type of champion -- individuals who have spent their lives championing casino gaming as an enjoyable pastime for guests and a worthwhile occupation for those employed in gaming -- Governor Grant Sawyer; Senator Harry Reid; National Gambling Impact Study Commission members William Bible and J. Terrence Lanni; Reno-born American Gaming Association President Frank J. Fahrenkopf, Jr.; Nevada Resort Association Presidents Richard Bunker and Virginia Valentine; and countless gaming executives who have championed casino gaming at state legislatures, including Phil Satre and Jan Jones Blackhurst. Further, I dare say that many of the readers of this Foreword have been benefitted from the gaming education opportunities afforded to them at the state universities and at the UNLV William S. Boyd School of Law, which would not have been available had there not been academicians championing the study of gaming.

These champions have faced significant obstacles in their quest to legitimize gaming, most obviously the perception that gaming is “shady,” and those who make their living from it are reprobates.

There is no doubt that historically the “mob” ran or was involved in gambling in Nevada. When the federal government began to investigate the mob’s influence over Nevada gaming in the late 1950s, Governor Sawyer launched the modern era of gaming control in Nevada to establish a regulatory apparatus to conduct “[e]xhaustive investigations ...to be as humanly possible that criminal elements, mobs, or syndicates have neither interest nor control of existing businesses.”¹ And having served in the Gaming Division of the Nevada Attorney General’s office at the time and seeing it first hand, it is fair to say that criminal elements continued to try to assert influence over casino operations well into the 1980s.²

But times have changed and so have the individuals who run gaming. Long gone are the days of the likes of Frank “Lefty” Rosenthal having influence over casino operations.³ Today, executives with MBAs from prestigious universities are at the helm of Nevada businesses that employ over 300,000 Nevadans, contribute over 35% of Nevada’s general fund revenue, and whose operations contribute over \$90 billion in economic value to the state.⁴ And it is not just in Nevada that gaming has proven to be an economic boon. In the United States, the gaming industry supports a total economic impact of \$329 billion.⁵ Some form of casino gaming is legal in 47 states.

American Gaming Association President and CEO Bill Miller has noted that before casinos were wide-spread, most Americans’ perceptions of the industry were drawn from TV and movies, a majority of which focused on the mobbed-up origins of casinos in Las Vegas. “Today, as people experience the casino that came to their town—the place their neighbors work, or where they work—they know these are good community partners.”⁶ Nearly nine out of ten (88%) Americans believe casino gaming is acceptable either for themselves or others.⁷ But this wide-spread acceptance of gaming is not borne out in our regulatory system.

The Nevada Gaming Control Act, which was established for all the right reasons at the right time, has not kept pace with the changing gaming landscape and, in my opinion, continues to perpetuate the perception that gaming is still shady. From a Nevada regulatory perspective, we simply have not gotten over the “Casino” days. Although gaming is the lifeblood of our state, our system of gaming control continues to view gaming as suspect and a person engaged in a gaming occupation as someone to treat with more than a healthy dose of cynicism.

The Nevada Gaming Control Act establishes that gaming is a privilege conferred by the State, rather than a matter of right.⁸ The courts have continued to treat gaming as an occupation that is not “useful.”⁹ The decision as to whether to grant a gaming license is vested entirely in the discretion of the Nevada Gaming

Control Board (the “Board”) and Nevada Gaming Commission (the “Commission”).¹⁰ The Supreme Court of Nevada has confirmed that an applicant for a license has no right to judicial review of a decision to deny the license.¹¹ And it is unlikely that the applicant has any federal constitutional protections since gaming has not been identified as an occupation or business that is afforded federal constitutional protection.¹²

Under the Nevada Gaming Control Act, the applicant has the burden of proof in his or her licensing hearing.¹³ This can be problematic, as the applicant is not allowed to see what has been written in the investigative report about him or her.¹⁴ The applicant cannot challenge the veracity of what has been reported, particularly if it is based upon a confidential source. And heaven forbid if a disgruntled former business partner makes allegations against the applicant that he or she cannot disprove. And sometimes the investigative agents just get it wrong. Not often, certainly, but sometimes.

To be fair, the Board has established procedures that require the agents to hold a closing conference in which the applicant is told the results of the investigation. But the applicant does not get to review underlying information included in the report. Nor, is the applicant entitled to challenge the tone or phrase of a sentence in the report which can confer feelings and emotions on the reader (*i.e.*, the members of the Board and Commission). And I dare say that every one of the gaming attorneys reading this have appeared before the Board or Commission with an applicant who is asked a question for which neither the applicant nor the attorney was prepared to answer.



The applicant who has not been able to satisfy the Board finds limited relief before the Commission. If the applicant is recommended for denial by the Board, the Commission may overturn the denial only if it is unanimous in its decision. If the recommendation of the Board is split, there could be a situation in which four Commissioners and a Board member believe the person should be licensed, but they are not because two Board members and a Commissioner do not believe they should be. Since the applicant has no judicial appeal rights, they have no further recourse.

Why should applicants for gaming licenses be afforded so little procedural due process? What is there now about the occupation

of gaming that requires such limited protection? Now that commercial casino gaming is widespread throughout the United States and is the lifeblood of our Nevada economy, isn't it time to for the Nevada legislature to reconsider our approach to gaming licensing?

To be clear, having had the opportunity for over 35 years to represent clients before numerous gaming regulatory agencies and to myself undergo licensing in numerous jurisdictions, I think Nevada gaming regulators are exceptional; but the licensing system under which they operate has not been significantly re-examined in the almost 70 years since gaming was legitimized in the State.

I am not suggesting a dramatic shift in the gaming licensing process – I think applicants should be fully investigated. I think they should be required to open their background to serious scrutiny. They should have to answer for every indiscretion in their background. But I think it is time to consider giving applicants more procedural due process rights – they should be allowed to see what has been written about them,¹⁵ they should be able to challenge the findings in the investigative report, and if they are aggrieved by the decision of the Board, they should not have to convince all of the Commissioners that they should be licensed. Finally, if they are aggrieved by the decision of the Commission to deny a license, they should be given the opportunity to appeal the denial, with rights similar to those afforded individuals who are denied a gaming employee registration.

It is time for our system of gaming control to acknowledge the “usefulness” of a gaming profession, to acknowledge that most individuals seeking licensure are not reprobates and provide those individuals a modicum of procedural due process rights. Such protections, in my opinion, do no harm to the efficacy of Nevada’s regulatory system and help to alleviate the perception that gaming is “shady.” ■



Ellen Whittemore is the Executive Vice President and General Counsel of Wynn Resorts, Limited. She began her career in gaming in 1986 at the Nevada Attorney General’s office where she successfully defended the right of the Gaming Control Board to withhold investigative reports from applicants and where she was involved in some of the landmark judicial decisions related to mob influences in the industry. Currently, Ellen leads the Wynn Resort’s global legal affairs, as well as all of its philanthropic, community relations, government affairs, and sustainability activities. She has been instrumental in the Company’s efforts to enhance its workplace culture, including its corporate ethics and governance, and was instrumental in crafting the Company’s global response to the pandemic. Her legal career spans more than 30 years in gaming and hospitality, during which she has represented many of the industry’s largest companies in noteworthy matters. Ellen also serves as the Chair of the Nevada Resort Association and a member of the Executive Committee of the American Gaming Association, as well as being former board member of the Global Gaming Women. In 2023, she was honored as an inductee into the American Gaming Association Hall of Fame. She has also successfully undergone the licensing investigation process in Nevada. Suggestions offered in this article are personal to Ellen and do not necessarily represent the views of Wynn Resorts, Limited.

¹ Daniel W. Hamilton & Anthony N. Cabot, “Is it Time for Nevada to Reconsider its Two-Agency Approach to Gaming Regulation,” *Nevada Gaming Lawyer* (Sept. 2019) (quoting Grant Sawyer) at 77.

² See, e.g., *Trans-Sterling, Inc. v. Bible*, 804 F. 2d 525 (9th Cir. 1986).

³ To be clear, I am not naïve enough to suggest that criminals do not attempt to use casinos for their purposes, whether it be for human trafficking, money laundering, or loan sharking. It is important that regulators, law enforcement, and the industry remain vigilant to minimize those illicit activities. But those criminals and their activities are not welcomed by the individuals who own and operate casinos and to presume that that they do is a disservice to the men and women of gaming.

⁴ See Nevada Resort Association, “2023 The Facts,” available at <http://www.nevadaresorts.org/factbook/NRA-2023-Factbook.pdf>.

⁵ American Gaming Association, “Gaming by the Numbers,” available at <https://www.americangaming.org>.

⁶ Marjorie Preston, “Social Impacts of Casinos: Facts and Fallacies,” *Global Gaming Business Magazine* (Jan. 27, 2020) (quoting Bill Miller), available at <https://ggbmagazine.com/article/social-impacts-of-casinos-facts-and-fallacies/>.

⁷ American Gaming Association, “American Attitudes Towards Gaming 2023,” (Oct. 9, 2023), available at <https://www.americangaming.org/resources/american-attitudes-2023/>.

⁸ Nev. Rev. Stat. § 463.0129(2).

⁹ *State ex rel. Grimes v. Board*, 53 Nev. 364, 372, 373, 1 P.2d 570,572 (1931); accord *Dunn v. Nevada Tax Comm’n*, 67 Nev. 173, 216 P.2d 985 (1950).

¹⁰ For an interesting take on the responsibilities of these bodies in a licensing process, see Daniel W. Hamilton & Anthony N. Cabot, “Is it Time for Nevada to Reconsider its Two-Agency Approach to Gaming Regulation,” *Nevada Gaming Lawyer* (Sept. 2019).

¹¹ See *State v. Rosenthal*, 93 Nev. 36, 559 P. 2d 830 (1977).

¹² Generally, there has been no federal constitutional right to pursue a particular occupation. See Shannon Bybee, “The Legal Status of Gaming and its Impact on Licensing,” *UNLV Gaming Research & Review Journal*, 2(1) (1995), available at <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1243&context=grj>. But recently, there has been some discussion as to whether there might be more protection for people seeking licenses to participate in a particular occupation. See, e.g., Occupational Licensing Forum, *The Yale Law Journal*, Vol. 126 (2016-17), available at <https://www.yalelawjournal.org/collection/occupational-licensing-1>.

¹³ Nev. Rev. Stat. § 463.170(1).

¹⁴ See *George v. Nevada Gaming Comm’n*, 86 Nev. 374, 468 P.2d 995 (1970); see also *Resnick v. Nevada Gaming Comm’n*, 104 Nev. 60, 752 P. 2d 229 (1988).

¹⁵ I am not suggesting that the confidentiality provisions of the Nevada Gaming Control Act be revised; information submitted to the Board and Commission should remain protected from disclosure to the public. But an applicant should be able to see what has been written about them.

