



IS IT TIME FOR NEVADA TO RECONSIDER ITS TWO-AGENCY APPROACH TO GAMING REGULATION?

Nevada has a two-tiered regulatory system consisting of the Nevada Gaming Control Board (the “Board”) and the Nevada Gaming Commission (the “Commission”).

By Daniel W. Hamilton & Anthony N. Cabot

The Board is a full-time agency that administers the Nevada Gaming Control Act and its corresponding regulations adopted by the Commission. The Board, through its 400 agents, serves as investigator, law enforcement and tax auditor and collector over the regulated gaming industry. The Board investigates the qualifications of each applicant before the Commission

deliberates and issues a license. After completing an investigation, the Board recommends the Commission deny, limit, condition, restrict, or approve any license. In disciplinary matters, the Board serves as both the investigator and the prosecutor. Unlike most other law enforcement or tax agencies, the Board has three persons in charge with substantially equal authority.¹

The Commission has two primary functions. As the state's final administrative authority, the Commission may accept, deny, modify or reject the recommendation of the Board on a license application.²⁻³ The Commission also enacts regulations that implement the statutory mandates related to gaming operations.⁴ The Commission has five part-time members appointed for staggered terms by the Governor. The Commission does not have its own staff.

Nevada's two-tiered multi-member agency structure was more the result of political expediency than of reasoned policymaking. Its creation was mainly in response to pressures by the Federal government that Nevada eliminate organized crime involvement in the casino industry or face the prospect of Federal legislation outlawing all casinos. Senator Estes Kefauver of Tennessee in 1950 chaired a U.S. Senate Committee, commonly known as the Kefauver Committee, to investigate organized crime's influence in America. The Kefauver Committee report was critical of the Nevada regulatory apparatus. "The licensing system which is in effect in the state has not resulted in excluding the undesirables from the state," the Committee wrote, "but has merely served to give their activities a seeming cloak of respectability." The Committee concluded that many casino owners were members of organized crime or "had histories of close associations with underworld characters who operate those syndicates."

While Nevada's powerful Senator Pat McCarran staved off federal efforts to legislate gaming out of existence, the state took on the task of ridding the industry of its undesirables. Before 1955, Nevada engaged in very little regulatory control over the casinos. Because the primary interest was to raise tax revenues and not regulate, the Tax Commission then had central authority over the casinos. A full-time administrative agency, the Board, was created in 1955. The Board would serve as the investigative and enforcement arm of

the Tax Commission. While the Gaming Control Act of 1949 gave the Tax Commission authority to consider the suitability of applicants for gaming licenses, little was done. Before 1955, the Commission adopted just five pages of regulations. In 1958, Grant Sawyer's first act as Governor was to sign a bill taking control of gaming from the Tax Commission and giving it to a new, independent agency, the Commission. Sawyer's first appointments included two FBI agents and a former U.S. Attorney. Sawyer had a strong mandate for the new Commission. "Exhaustive investigations (must) be made as to present licensees in order to be as certain as humanly possible that criminal elements, mobs, or syndicates have neither interests nor control of existing businesses," he said. While the Board continued to conduct investigations and administer gaming regulations, it had more autonomy than it had under the Tax Commission. Previously, the Board Chairman served as Secretary to the Commission. Under Sawyer's Bill, the Commission and Board were independent agencies. Sawyer appointed a former assistant to FBI Director J. Edgar Hoover as the new Board Chairman and doubled the agency's budget. His revisions launched the modern era of gaming control in Nevada.



While the two-tier multimember system helped keep the Federal government at bay, its utility as the most effective and efficient regulatory organization has not been reexamined in a meaningful way since its introduction in 1958.

Organizing a regulatory system to have separate investigators and decision-makers, as in Nevada, is a common form of organization. It provides that one regulatory agency will conduct the



investigation and present the results to another agency that has the responsibility to determine whether to grant the license.

A single agency structure has both advantages and disadvantages. A significant advantage of a single gaming agency is that it can avoid regulatory duplication. For example, if one agency investigates an applicant, and another decides whether to grant the license, both agencies should become familiar with the applicant's qualifications. This can be avoided if the same agency conducts the investigation and grants the license.

Another advantage of a single agency is the prospect of better coordination of functions. A single agency can better define priorities and use the various functions best to accomplish those priorities. For example, suppose the agency decides that the casinos are being too lax on assuring that all gaming device meter readings are done promptly and accurately. The agency can direct its audit and enforcement teams to review compliance. If a casino is not complying, the agency can quickly implement disciplinary action, and fine the casino. With multiple agencies, the agency performing the audits, the agency in charge of enforcement, and the agency that disciplines licensees may have different priorities. Moreover, having a separate investigator and decision-maker is more expensive.

Single agencies, however, have disadvantages. One critic argues that corruption has the highest potential in systems where the same agency has diverse functions.⁵ She argues that regulators face significant pressure to expand gaming. These pressures may be *legal*, e.g., lobbying, or *illegal*, e.g., bribery.⁶ Segregating the investigative, enforcement, and accounting functions help relieve these pressures. Also, the corruption of one person or agency cannot taint the entire process, and multiple responsibilities create a system of checks and balances. Another problem with having only a single agency is

the influence of biases and favoritism. A basic tenet of fair decision-making is to be unbiased. Some biases involve the decisionmaker's interest; for example, if the decision-maker stands to gain or lose based on the decision, or if he holds a personal view, distinct from his regulatory role, that prevents him from acting impartially.

Biases are problematic in licensing. An effective system requires the agency to adopt a neutral position to the gathering of evidence, and then make a suitability determination based on the evidence gathered. Problems occur in a fact-finding system, however, if the regulators or their agents cannot maintain neutrality. Investigators or regulators may have difficulty distinguishing between obtaining and assessing the evidence that proves the applicant's unsuitability as opposed to his suitability. This may be particularly true when the investigator has a prosecutorial or law enforcement background.

Many other reasons exist for segregating the functions of the investigator and decision-maker in disciplinary matters. First is to avoid the potential exposure to the judicial challenge when the regulatory body decides to discipline a licensee. Second, regulatory systems work best when everyone perceives it as fair. A party that is subject to disciplinary action may feel persecuted unfairly. Allowing the party to present the evidence to a third party provides the person with a perception that the system is fair. Third, segregating functions is fairer. An investigator may develop an attitude that the person being investigated is guilty despite the evidence. Investigators may have the mindset that they are successful only with the denial of a license, or in the case of disciplinary action, by a fine or license revocation.⁷

Given the advantages and disadvantage of single versus multiple agencies, Nevada's two-tiered structure is more than defensible and is probably preferable. As the



U.S. Supreme Court noted, “The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be done by the same persons. No single answer has been reached. . . .”⁸ A problem, however, is that Nevada blurs the line between the functionality of the different agencies. In licensing matters, the Board is much more than a neutral investigator that provides evidence to the Commission regarding the applicant’s suitability. The system as initially conceived was for the Board to effectively decide the applicant’s suitability and the Commission was there solely as a check and balance against egregious decisions. Hence, the requirement that if the Board recommends denial, the Commission must unanimously overrule the Board; a mere majority vote is insufficient. The practical effect is that the licensing decisions of the Board are very rarely challenged. This system does not achieve the full benefits of having a clear segregation of responsibilities between investigation and decision making.



Moreover, the current procedure of having two separate hearings on each application, one before the Board and the second before the Commission, should be reexamined for several reasons. First, a Board hearing confuses the responsibility of the Board. Is it primarily a neutral investigative agency that will present both the positive and negative attributes of the applicant, or is it an arbitrator of those attributes so that the Commission is merely debating conclusions? Second, having two separate hearings is time-consuming and expensive. The cost of having applicants and attorneys appear twice in a given month to appear before both the Board and then two weeks later before the Commission is duplicitous in both time and cost. Nevada is the only jurisdiction that has two mandated hearings on each application. In the several preceding decades, the number of times that the

Commission has decided to license a party that the Board has recommended denial, or vice versa, can be counted on one hand. If functionality is repeated between investigations, then Nevada can reduce the number of hearings to a single hearing before the Commission.



Additionally, because the Commission is part-time, the legislature has delegated several adjudicatory functions to the Board, including the initial determination of patron disputes and occupational licenses for casino workers. This again blurs the line of responsibility between investigation and adjudicatory functions. The Commission, like the courts, should handle all adjudicatory functions. To adequately do this, Commissioner members should be full time and should have to have substantial gaming law experience, such as private counsel, in-house counsel or as a government attorney. We do not appoint judges to the bankruptcy court who have no bankruptcy experience so why entrust gaming oversight to persons with no gaming regulatory expertise. Moreover, having part-time commissioners means that they almost certainly have other employment that can lead to conflicts of interest.

With fulltime professional commissioners, however, the need for five members is diminished. A panel of three highly experienced Commissioners is preferable to a panel of five lay commissioners. Like other adjudicatory bodies, the Commission should have an independent legal staff. Moreover, for its quasi-legislative function in creating regulation, the Commission should have policy advisors on staff.

Lastly, few advantages exist for a law enforcement agency to have three leaders. While this does bring different perspectives to the agency, having three leaders presents multiple problems. For example, a three headed agency can create silos and factions within the agency as employees are conflicted as



between three bosses with equal power. Licensees and their outside counsel can have difficulties in obtaining definitive answers to relatively simple inquiries as no one member may have the authority to provide the answers. Moreover, the policy and direction of the agency can be confusing or even contradictory. No other jurisdiction has a gaming law enforcement agency that has multiple heads.

In summary, Nevada should consider the following proposals:

1. Maintain both the Board and Commission
2. Organize the Board under a single full-time executive director who has final authority and accountability for all aspects of the Board's responsibility.
3. Reduce the number of members of the Commission to three persons.
4. Make the members of the Commission full-time state employees and require the commissioners have prior gaming regulatory experience.
5. Shift all adjudicatory responsibilities to the Commission, including work cards disputes and patron disputes.
6. Reduce license application hearings to a single hearing before the Commission.
7. Provide the Commission with a full-time staff relevant to their functions as both adjudicators (like law clerks or administrative judges) and to the creation of regulations (such as policy advisors).



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- ¹ The Board Chairman must have five years of administrative experience in public or business administration. Another member must be a certified public accountant with five years' experience or an expert in the fields of corporate finance and auditing, general finance, gaming, or economics. A third member must have experience in investigations, law enforcement, law, or gaming.
- ² Nev. Rev. Stat. § 463.1405(3).
- ³ Nev. Rev. Stat. § 463.220.
- ⁴ Nev. Rev. Stat. § 463.150.
- ⁵ Margaret E. Beare, Current Law Enforcement Issues in Gambling in Canada: Golden Goose or Trojan Horse 177, 189, in *GAMBLING IN CANADA: GOLDEN GOOSE OR TROJAN HORSE, PROCEEDS OF THE FIRST NATIONAL SYMPOSIUM ON LOTTERIES & GAMBLING*.
- ⁶ Id.
- ⁷ For example, § 4-214 of the Model State Administrative Procedure Act provides:
 - (a) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.
 - (b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.Model State Administrative Procedure Act §4-214
- ⁸ Whether such a situation arises to the level of a denial of constitutional due process depends on the facts. Compare, e.g., *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988) and *Antonio v. SEC*, 877 F.2d 721 (8th Cir. 1989).