High Stakes: **Balancing Gaming Regulation and Marijuana**

By Terry Johnson

Just over five years ago, and following a voter approved ballot initiative a decade earlier, the Nevada State Legislature enacted provisions allowing for the creation of "medical marijuana establishments" and for the "medical use of marijuana."[1] The following year, and after multiple inquiries from gaming licensees, the Nevada Gaming Control Board ("Board") issued a notice to gaming licensees concerning marijuana.[2] The notice opined that, in light of federal prohibitions against the use, possession or distribution of marijuana, "investment or any other involvement" in a medical marijuana establishment by a gaming licensee was "inconsistent with the effective regulation of gaming."[3] The Board also indicated a concern that the commercial involvement of gaming licensees in the marijuana industry could "reflect or tend to reflect discredit" upon the gaming industry, inconsistent with State regulations.[4] Since the Board's 2014 notice, Nevada voters have also approved the recreational use of marijuana.[5] This was followed by various other marijuana-related legislative enactments by the 2017 Nevada Legislature.[6]

Today, the Board continually finds itself presented with regulatory issues concerning the intersection of gaming regulation and marijuana. Thus, this article will discuss a framework for assessing the suitability of gaming licensees, as well as gaming employees, when issues related to marijuana arise. As discussed below, such a framework should strive to balance the interests of all involved and begin with an analysis of the degree to which the State's public policies concerning gaming would actually be impacted by any potential overlap of gaming and marijuana.

In Nevada, the declared public policy formally recognizes that "the gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants."[7] This is the cornerstone of Nevada's public policy that requires the "strict regulation" of all persons, places, activities, and associations related to the operation of licensed gaming establishments.[8] Accordingly, to be licensed to operate a gaming establishment, a person must be of "good character, honesty and integrity" and "whose prior activities, criminal record, if any, reputation, habits and associations do not pose a threat to the public interest of the State or the effective regulation and control of gaming … ."[9] In recommending a person or entity to the Nevada Gaming Commission ("Commission") for licensure, the Board has "full and absolute power and authority to recommend the denial of any application … for any cause deemed reasonable by the Board."[10] However, if recommended for and granted a license, a gaming licensee must thereafter "continue to meet the applicable standards and qualifications" and "failure to continue to meet such standards and qualifications constitutes grounds for disciplinary action."[11] A licensee may also be disciplined for, amongst other things, "failure to comply with or make provision for compliance with all federal, state and local laws … pertaining to the operations of a licensed gaming establishment … ."[12]

In addition to investigating and recommending approval or denial of persons and entities seeking gaming licensing, to carry out the state's public policies concerning gaming, the Board must also investigate and monitor the gaming employees hired by such licensees. The Board must therefore "[a]scertain and keep itself informed of the identity, prior activities and present location of all gaming employees in the State of Nevada."[13] As a result, no person may be employed as a "gaming employee" unless they are first registered with the Board.[14] However, the Board can suspend or object to a gaming employee's registration "for any cause deemed reasonable by the Board."[15] If the Board does not outright object to or suspend a gaming employee's registration, it may alternatively "limit the period for which the registration is valid, limit the job classifications for which the gaming employee may be employed and establish such individual conditions" for the employee's registration "as the Board deems appropriate," including unscheduled tests for controlled substances.[16]

Along with gaming employees, the Board is also responsible for registering "club venue employees" and various other persons employed or engaged in connection with certain club venues located on the premises of nonrestricted gaming establishments.[17] Following a series of significant fines imposed after Board investigations of employees' illegal activities in some casino nightclubs, including for illegal drug sales and use, the Nevada Legislature added this new requirement in 2015.[18] Testimony offered to the Legislature at the time "support[ed] the Board's efforts to target certain employees that pose a threat to the safe operation of the gaming industry."[19]

Now, in terms of considering applications for gaming licensing where issues related to marijuana also exist, careful consideration should be given to the degree to which the State's public policy interests concerning gaming would be implicated and then balance these interests with the will of Nevada voters who have now twice voted to permit in certain circumstances the medical or recreational use of marijuana. As to the State's gaming regulatory interests, when the Board first issued its 2014 notice regarding marijuana, the regulatory rationale centered on three particular areas of concern: the potential for money laundering; asset forfeiture; and criminal prosecutions of key employees, owners, and other persons responsible for gaming operations. Because marijuana establishments could not participate in the banking industry in light of federal prohibitions, the Board wanted to ensure that casino cages, for example, were not used in any way to process financial transactions for these establishments and thereby invite federal scrutiny. Avoiding financial overlap between the gaming and marijuana industries was especially important given that casinos, like banks, securities brokers, and others, are defined as "financial institutions" under federal law and thereby subject to the Bank Secrecy Act and its requirements.[20] Further, if gaming-related assets or property were commingled with, derived from, or co-located with marijuana-related assets or property, the Board was concerned that, in a worst case scenario, such assets or property could be subjected to seizure and forfeiture actions at the federal level in the event of successful prosecutions under the Controlled Substances Act.[21] As well, the Board sought to avoid scenarios where neither owners of gaming establishments nor their licensed key employees and executives could be subjected to federal prosecution for their involvement in marijuana, thereby removing these critical personnel from the operation of their gaming establishments. Overall, whether the concern related to money laundering, asset forfeiture, or criminal prosecutions, problems in any of these areas with gaming licensees could frustrate the "effective regulation and control of gaming" and otherwise "reflect or tend to reflect discredit upon the State of Nevada or the gaming industry." Given the "vitally important" economic role of gaming in and for the State, and absent a change in federal law, the Board deemed these risks as simply not worth taking.

In seeking to balance gaming regulatory interests with the expressed will of Nevada voters to permit certain marijuana use and possession, efforts should continue to be undertaken in gaming licensing matters to thoroughly examine the nature of the commercial relationships at issue. For example, in May 2018, an applicant sought a license for a gaming establishment to be located on property owned by an entity or individuals that were also involved in commercial marijuana establishments. Could such a relationship amount to "involvement" in the marijuana industry by a gaming licensee? Or amount to questionable business associations by a gaming licensee? Or potentially "discredit" the State's gaming industry? As opposed to issuing an outright recommendation for denial at the mere mention of the words *gaming* and *marijuana* in a gaming licensing context, an analysis was instead undertaken to gauge the potential impacts upon gaming regulation in light of the State's declared public policies and the Board's stated rationale concerning marijuana. Thus, under this framework, the applicant was asked during a public meeting about, amongst other things, the

terms of the lease agreement so as to determine whether it included commercially reasonable terms or whether it was merely a pretext to somehow shield an inappropriate flow of cash between a gaming licensee and marijuana establishment. The applicant was also asked about the chronology of the ownership of the property for the proposed gaming establishment in relation to the already existing marijuana establishments owned by the landlord. The purpose was to ascertain whether the real property was procured with proceeds from a marijuana establishment and thereby subject to potential forfeiture under the federal Controlled Substances Act. Lastly, confirmation was sought of the gaming applicant as to whether they would, in any way, be involved with the operations of the marijuana establishment or, more importantly, whether the operators of the marijuana establishment would in any way be involved with the gaming establishment's operations.

In another example from September 2017, an existing gaming licensee sought to expand their business interests through an additional gaming establishment. During the application process, it was determined that the applicant had obtained a registry identification card for purposes of the medical use of marijuana. Upon confirming their medical use of marijuana, the applicant was first asked whether they had obtained a recommendation for medical marijuana from a physician licensed by the State of Nevada pursuant to either chapter 630 or chapter 633 of the Nevada Revised Statutes.[22] This was followed by questioning as to whether the applicant procured marijuana from an illegal source or from an establishment registered with the State of Nevada.[23] Lastly, and perhaps most importantly, the applicant was asked whether, while at or otherwise in operating their gaming establishment, they had ever used, possessed, or been impaired by

marijuana. Doing so arguably would have been an "unsuitable method of operation" and therefore grounds for disciplinary action for "[f]ailure to comply with … all federal, state and local laws … *pertaining to the operations of a licensed establishment*."[24] This, in turn, could have provided a "reasonable cause" to recommend denial of the additional gaming license sought.

Under the framework employed, in each of the foregoing licensing examples, the gaming applicants provided responses satisfactory to assure regulators that the State's public policies concerning the "strict regulation" of gaming would not be undermined by issues related to voter-approved marijuana. As a result, in each instance the applicants received the unanimous recommendation of the Board for licensure followed by the unanimous approval of the Commission.

In turning to the registration of gaming employees, casino club venue employees, and the like, a similar analytical framework should be employed that balances the State's gaming policy priorities and interests with voter approved marijuana initiatives. Admittedly, doing so in the gaming employment context may present greater challenges in light of existing state laws that are ambiguous or contradictory and have not yet been judicially tested. For example, an employer must generally "attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card."[25] However, an employer is not required to "modify the job or working conditions" of an employee that uses medical marijuana based on the "reasonable business purposes of the employer."[26]

In the case of recreational marijuana, voter enacted initiatives make it "lawful" in Nevada for a person to use or possess certain amounts of marijuana.[27] However, these same provisions would not preclude an employer from "maintaining, enacting and enforcing a workplace policy" that would prohibit or limit such use or possession by an employee.[28] And presumably, any such workplace policy provisions would supersede other Nevada employment laws that prohibit an employer from taking adverse action

against an employee "because the employee engages in the lawful use in this state of any product outside the premises of the employer during the employee's nonworking hours, if that use does not adversely affect the employee's ability to perform his or her job or the safety of other employees."[29]

Ideally, the above provisions regarding employees and marijuana will soon be reviewed and clarified by the courts or the Legislature. In the meantime, a balanced regulatory approach in the gaming context is still achievable. For example, the Board has previously exercised its authority to suspend or object to gaming employee registrations in instances where an employee's marijuana use was coupled with illegal drug sales or other crimes. And given prior regulatory issues concerning the illegal use and sale of drugs in some casino nightclubs, the Board has been especially attentive to prospective gaming and club venue employees with significant criminal histories of drug use or sales.

In other instances, the Board might object to or take other action concerning a gaming employee's marijuana use if there are potential implications for the safety of fellow employees or casino patrons. For example, gaming employees hired as security personnel are required to be registered with the Board.[30] If there is medical or recreational use of marijuana at issue, however, special considerations may be warranted and regardless of whether the security personnel are unarmed or armed.[31] The Board might elect to "limit the job classification for which the gaming employee may be employed" or otherwise condition the employment in a manner deemed appropriate and as statutorily permitted.[32] In some instances, this might entail the employee being hired into a different position instead. In other instances it might include periodic testing by the Board for the use of controlled substances, where warranted by the circumstances.

Lastly, concerning gaming and other employees under its jurisdiction, the Board should take appropriate and balanced steps to protect its policy interests in avoiding "discredit upon the State of Nevada or the gaming industry." Specifically, and at a minimum, it should form the basis of a disciplinary action or an outright objection to gaming employment for an employee to use, possess or be impaired by marijuana while on the premises of a licensed gaming establishment or while on duty.

Going forward, issues related to gaming and marijuana will undoubtedly continue to emerge and regulatory vigilance will therefore remain necessary. For the foreseeable future, the associated challenges will be compounded by the on-going evolution of marijuana policy at the federal level.[33] Nonetheless, working cooperatively with and ensuring federal law enforcement partners of Nevada's commitment to the utmost financial integrity in its gaming industry should be continued priorities.

A regulatory framework that balances the myriad interests by carefully examining whether and to what degree gaming regulatory policy objectives are actually implicated would inure to the benefit of all involved. And protecting the crucial role of gaming to the Nevada economy while respecting the expressed will of Nevada voters need not be mutually exclusive. While not everyone supported passage of the voter-enacted marijuana laws, this writer included, as Justice Kennedy has stated concerning the ballot initiative process, "the essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around."[34]

In sum, a balanced regulatory approach to the challenges presented by gaming and marijuana is the best approach. A system premised on gold-standard gaming regulation should offer no less.

Terry Johnson currently serves on the Nevada Gaming Control Board. He previously served in State level cabinet positions regulating various financial and other industries and as Assistant Director in the Clark County District Attorney's Office. He also served for five years as Nevada's Labor Commissioner.

1 *See* Nev. Rev. Stat. § 453A.200 *et seq.*
2 Industry Notice 2014-39, Gaming Control Board (May 6, 2014).
3 *Id.*
4 *See* Nev. Gaming Comm'n. Reg. 5.011.
5 Nev. Rev. Stat. 453D (2016).
6 *See, e.g.*, AB 422, SB 344, SB 375, and SB 396.
7 *See* Nev. Rev. Stat. § 463.0129.
8 *Id.*
9 *Id.* § 463.170(2).
10 *Id.* § 463.1405(3).
11 *Id*. § 463.170(8).
12 Nev. Gaming Comm'n. Reg. 5.011(8).
13 Nev. Rev. Stat. § 463.335(1)(a).
14 *Id.*
15 Nev. Rev. Stat. § 463.335(12).
16 *Id.* (see flush language).
17 Nev. Rev. Stat. § 463.15999; Nev. Gaming Comm'n. Reg. 5.320.
18 2015 Nev. Stat. 1484.
19 Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-Eighth Session, April 27, 2015.
20 31 C.F.R. § 1010.100(t).
21 21 U.S.C. § 853(a).
22 *See* Nev. Rev. Stat. § 453A.210.
23 *Id.* § 453A.322 et seq.
24 Nev. Gaming Comm'n. Reg. § 5.011(8) (emphasis added).
25 Nev. Rev. Stat. § 453A.800.
26 *Id.*
27 *Id.* § 453D.110.
28 *Id.* § 453D.100(2).
29 *Id.* § 613.333 (italics added).
30 *Id.* § 463.0157(1)(t).
31 It should be noted that both federal and state law prohibit the use or possession of firearms by "an unlawful user of … any controlled substance." [*see* Nev. Rev. Stat. § 202.360 and 18 U.S.C. § 922(g)].
32 Nev. Rev. Stat. § 463.335(12) (flush language).
33 *See e.g.*, Evan Halper, Trump Administration Abandons Crackdown on Legal Marijuana, L.A. Times (Apr. 13, 2018), http://www.latimes.com/politics/la-na-pol-marijuana-trump-20180413-story.html.
34 *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

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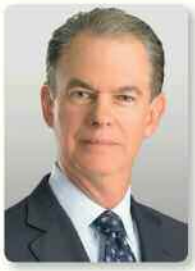

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