

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 abuse¹.” Pursuant to the CSA, 21 U.S.C. § 802, marijuana² 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.



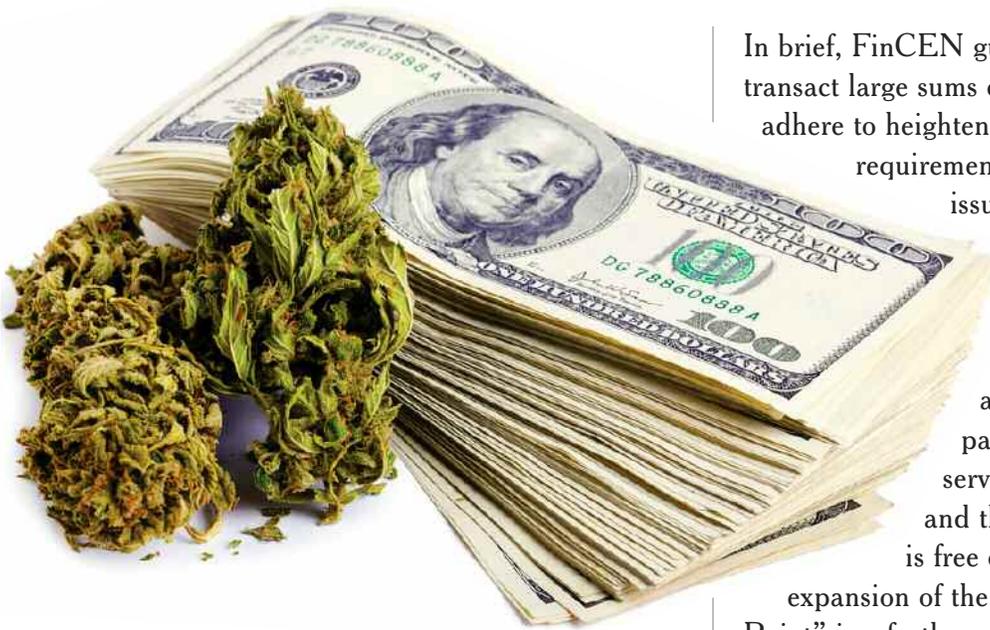
The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "superior to that of the States to provide for the welfare or necessities of their inhabitants," however legitimate 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 NGCB 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***.

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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