# Clarification on the GCB's Monitoring of Civil Litigation

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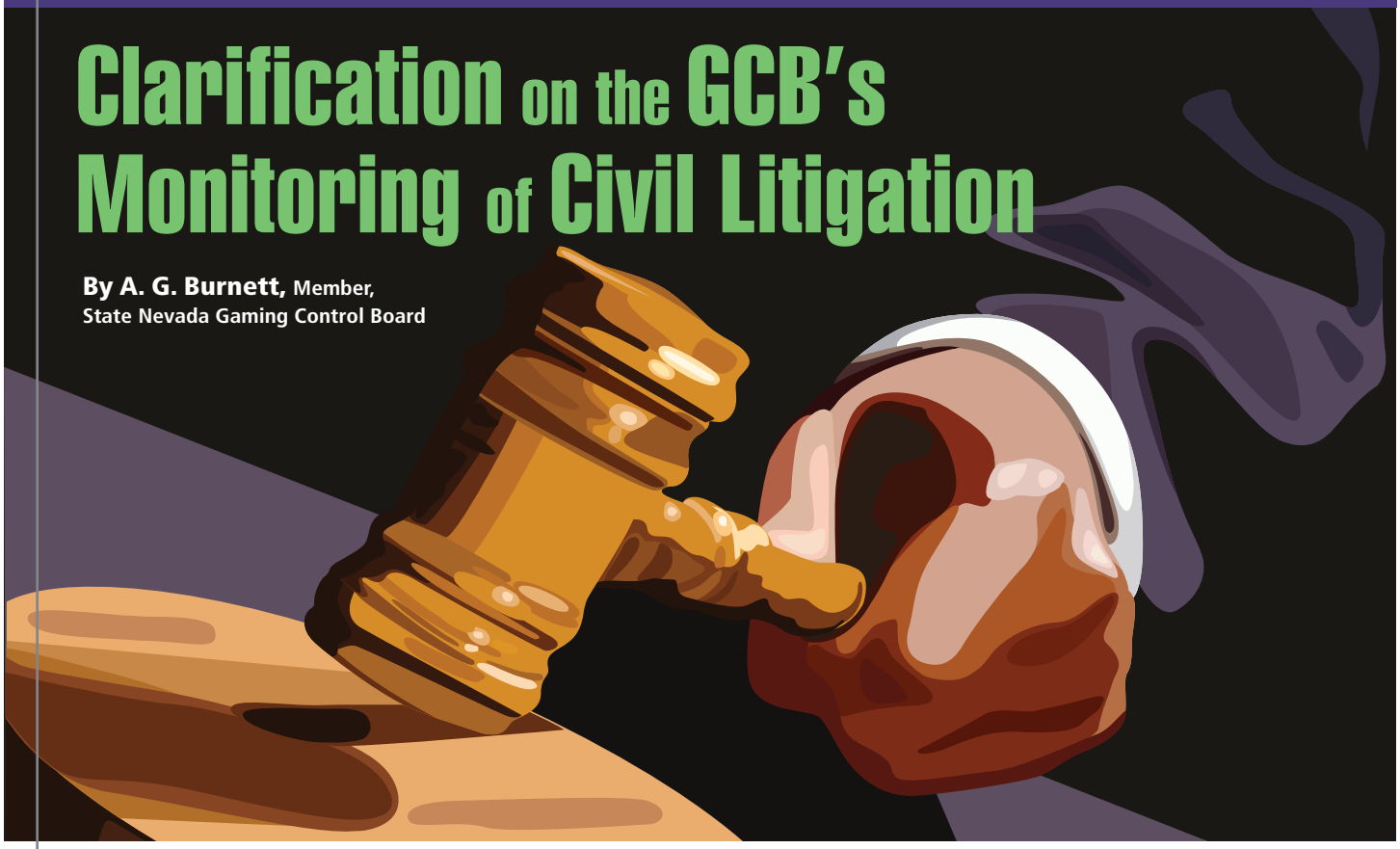


Over the last year, there have been several civil lawsuits filed in various jurisdictions by and between Nevada gaming licensees and their related entities. While these lawsuits are sometimes viewed as routine and may fall within the general scope of doing business in the United States, several of the lawsuits have gained notorious exposure in the media because of the public figures involved and because of the allegations made in the pleadings.

This article is intended to give a brief synopsis of the approach taken by the State Gaming Control Board (GCB) as to such litigation and to dispel any myths or misperceptions about whether, and to what extent, the GCB may interject itself into such litigation and our court system.

In short, outside observers would likely never see the GCB interject itself into litigation. The GCB gives great deference and respect to our courts and the court system. In fact, the GCB has historically maintained the careful approach of giving such deference to our courts and not attempting in any way to influence the rulings of a judge or jury on any level. This does not mean, however, that the GCB turns a blind eye toward lawsuits.

At times, the GCB and the Nevada Gaming Commission (NGC) have each been mentioned in many of the suits, and the press has picked up on the notion that while the litigation winds its course through the court system, Nevada regulators keep a watchful eye on the allegations made. Questions have arisen as to what extent, if any, Nevada regulators should intervene or get involved in litigation between private parties, and indeed, attorneys have at times attempted to either force the GCB or NGC to intervene, or at a minimum, take notice of the proceedings and related allegations.

Civil litigation can take many forms and be used for many purposes. In recent memory we have seen class action and shareholder lawsuits aimed at public companies and we have watched motions for temporary injunctions and requests for restraining orders regarding gaming licensees with care. We have had attorneys inform us privately of litigation shortly to be filed and the reasons therefor, and we have had discussions in public meetings regarding current litigation and its standing in the discovery process.

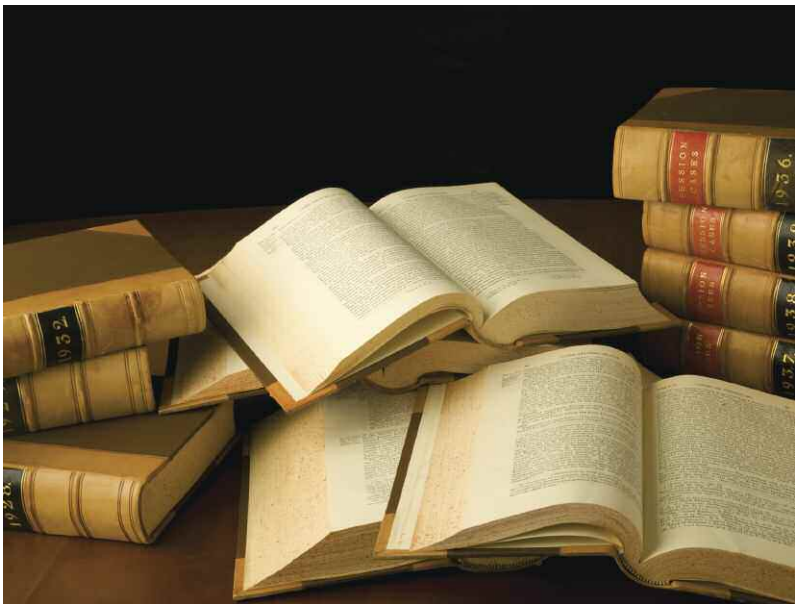
It is common knowledge that in civil proceedings, allegations contained in complaints can take many forms and indeed, nearly anything can be alleged.

The Board has taken note of this, and immediately upon receipt of notice of litigation, Board agents are routinely given the assignment of following the case or independently pursuing the elements of a case when justified. This does not mean that agents will sit in on depositions, or get noticed when motions are filed (the notable exception here is bankruptcy actions, where motion practice is heavy and agents must be constantly up to date). It does mean, however, that agents may call counsel for either side to request copies of pleadings and updates on the status of the litigation. This is especially true when an applicant for a gaming license or similar approval is nearing an agenda date, and the GCB and NGC must be up to speed on the litigation.

The provision by litigants of copies of complaints, answers, and dispositive motions or orders relevant to the case is of great value to the GCB; indeed, under many circumstances, such items are required to be provided to the GCB by licensees. Counsel to litigants who are not licensed by the GCB and NGC are sometimes under the impression that delivering pleadings and motions may sway the GCB into disciplinary action against the licensed opposing party. This is not the case and such an expectation is unwarranted. The GCB is always mindful of the fact that allegations contained in litigation may have merit and warrant observation and follow-up by Board agents, while in other cases such allegations prove to be marginal or of little substance. This does not mean that the GCB is taking a side, however, and should not be construed as such. This merely means that the GCB is monitoring the case and analyzing the use of its resources to best ascertain a proper course of action. It is important to note that over the years it has become axiomatic that the best finder of fact in private, commercial or other civil litigation is the judge or jury, as the case may be. Allegations in complaints, counterclaims, and cross-claims can be vicious and wounding to the parties, and while the press may make these allegations resound as nearly true, the GCB takes an objective, analytical approach to them. Once the case is filed, several things may occur.

It can generally be assumed by litigants that once the GCB receives a copy of the complaint or relevant pleading, it will analyze the information and perhaps assign an agent to monitor the case. In more serious circumstances, an agent or even a team of agents will be tasked with continually monitoring, and even investigating, the case. Depending on the nature of the allegations, while the case winds its way through the discovery process, the GCB may or may not assign agents to conduct their own investigation into the matter. The Board keeps paramount the need to ascertain what allegations directly impact an applicant or a licensee's suitability.

Pursuant to NRS 463.120, any of the information obtained or generated by the GCB's agents remains confidential and is only used internally for the GCB's monitoring functions. This includes any documents or other items generated through discovery and later obtained by GCB agents. It is important to note for non-gaming counsel that the GCB generally can obtain any information it wishes, on its own, without requesting such from litigation counsel.



As the litigation continues, the GCB may or may not have its own internal investigation ongoing in concurrent fashion. This will not be known to the parties, unless requests have been made to any gaming licensee on the matter, in which case the parties may suspect that GCB monitoring is taking place. Any litigator knows that the number of cases filed versus those that actually end up decided by a court or jury is vastly different; indeed, most cases filed never reach a judge or jury and are instead settled out of court. Further, all litigators know that cases are not usually decided within a short period of their filing; what may be a "hot topic" right after a case is filed generally ends up, after many months or even years, becoming almost a stale afterthought, recalling bitter allegations and mud thrown between parties. Rest assured, however, that the GCB remains vigilant in its monitoring, and indeed, the Board

continues to monitor litigation no matter how long it takes to eventually be resolved.

The GCB may request information on such settlements, and is extremely careful in not being intrusive on the process of arbitration, mediation, or settlement. Instead, the GCB will seek to obtain any information relevant to its own duties, i.e., whether there were any admissions of guilt or liability, or the like, and whether or not a settlement's terms or conditions may materially affect a licensee. A review of NRS 463.339 and NRS 463.0129, as well as similar statutes, makes this apparent. Again, this information is treated as confidential by the GCB, and is only used or reviewed in light of the GCB's ongoing duties as enumerated in NRS Chapter 463.

If a ruling is eventually made, the GCB, in most cases, gives great deference to the courts and to juries. Further deference is given to the actual process: Litigation encompasses discovery that can be far reaching and intrusive; courts and juries are beholden to the rules of evidence and to the current law. As the true finder of fact in a lawsuit, a ruling that affects a licensee adversely may be used by the GCB and NGC as a basis for disciplinary action against the licensee. For an administrative body to rule on the subject matter contained in a lawsuit prior to that finder of fact's decision is to insult and perhaps injure the court system. Where a finder of fact has analyzed the evidence and made a determination that a Nevada licensee has acted wrongly or in a fashion violative of Nevada gaming law and/or the regulations, the GCB may take action. Such action would include obtaining relevant evidence and proceeding accordingly vis-à-vis an Order to Show Cause and/or Disciplinary Complaint. Similarly, where the ruling does not indicate a violation of gaming law has occurred, disciplinary action may not be taken.

The GCB and NGC have each been served subpoenas by litigants seeking to gain advantageous information. Here, the policy is simple: The GCB and NGC routinely move to quash or move for protective orders in response to such subpoenas, in keeping with the confidentiality requirements contained in NRS 463.120. Also, the GCB and NGC have cited protections afforded by executive privilege, which grants agencies such as the Board the ability to deny disclosure if the public interest may be affected. See Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980), and State ex rel. Tidvall v. Eighth Jud. Dist. Ct., 91 Nev. 520, 539 P.2d 456 (1975). The non-gaming attorney should also familiarize himself with NRS 463.341 (order of court for release of confidential information) and NRS 463.3407 (treatment of confidential communications). Motions to quash such subpoenas have been extremely successful, and absent such success, the Board at a minimum would move for in camera review only of any confidential information.

The fact that the GCB and NGC will go to these great lengths should demonstrate to counsel, gaming or otherwise, how protective and concerned these agencies are in maintaining confidentiality while conducting mandatory due diligence on gaming litigants.

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A.G. was appointed to the Board by former Governor Jim Gibbons from January 1, 2011, to January 30, 2011, and then was reappointed by Governor Brian Sandoval to serve a four-year term, beginning January 31, 2011. Before being appointed to the Board, he was the Deputy Chief of the then-Corporate Securities Division (the "Division") for the Board. Prior to his time at the Board, A.G. served as Senior Deputy Attorney General in the Gaming Division of the Nevada Attorney General's Office, representing the Board, the Nevada Gaming Commission, and the Nevada Commission on Sports. In addition, he served as a member of the Executive Committee of the Nevada State Bar's Gaming Law Section from 2000-2006. A.G. was also appointed by the Nevada State Bar Board of Governors to serve a three-year term on the Nevada State Bar's Committee on Functional Equivalency from 2001 and 2004. He received his J.D. from Gonzaga University School of Law in 1996, and his B.A. in International Affairs and Political Science from the University of Nevada, Reno in 1992.