GAMING & HOSPITALITY LEGAL NEWS

NEVADA'S GAMING POLICY COMMITTEE CONVENES TO DISCUSS MARIJUANA AND THE GAMING INDUSTRY

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How far do Nevada's casinos need to go to police marijuana use by their customers? Can a casino resort allow a marijuana industry conference to utilize its convention facilities? What practices do casinos need to follow regarding customers that may be gambling with funds acquired through participation in the state-legal marijuana industry?

Nevada's gaming licensees and regulators have been grappling with these questions, and more, since the state legalized both medical and recreational marijuana sales and use. As discussed in our article "Marijuana and the Gaming Industry in Nevada: Just Say No," the Nevada Gaming Commission ("Commission") kicked off the public discussion on these topics this past August. But this discussion really left more questions than answers. Therefore, Nevada Governor Brian Sandoval signed an Executive Order reconvening the state's Gaming Policy Committee ("Committee") to gather information, engage in discussion, and provide recommendations on policies related to the potential interactions between Nevada's gaming industry and the marijuana industry.

The Gaming Policy Committee is a special advisory board designated to weigh in on touchy or novel regulatory matters, and the Committee members include elected legislative officials, a tribal gaming representative, an educator, the Chairmen of both the Nevada Gaming Control Board and Nevada Gaming Commission, and "industry representatives" (Jim Murren, CEO and Chairman of MGM, Keith Smith, President of Boyd Corporation, and Blake Sartini, Chairman and CEO of Golden Gaming, among others).

The Gaming Policy Committee met on November 29, 2017, to discuss the following issues:

1. The propriety of events that cater to or promote the use, sale, and cultivation or distribution of marijuana on the premises of a licensed gaming establishment;

2. The propriety of a licensee contracting with or maintaining a business relationship with an individual or entity engaged in the sale, cultivation, or distribution of marijuana;

December 4, 2017 | Volume 10, Number 11

3. The propriety of a licensee receiving financing from or providing financing to an individual, entity, or establishment that sells, cultivates, or distributes marijuana; and

4. Any other matter as directed and determined necessary by the Chair.

After more than four hours of testimony and deliberations by the Committee, the Governor signed an order stating that the Committee would take the matter under advisement and would deliver its recommendations on or before March 31, 2018. The intent of the Governor would be to schedule another Committee meeting by the end of February 2018.

As discussed below, although there were no recommendations at this session, the audience heard an inkling of what might lie ahead on the subject of gaming's tenuous relationship with the marijuana industry.

The agenda for the meeting included a variety of topics ranging from a report on the current status of the Nevada Gaming regulators' perspectives on marijuana businesses and the persons involved who might seek Nevada gaming licenses. This was followed by a summary of existing federal laws, financial relationships and obligations under anti-money laundering ("AML") laws, and the burgeoning convention and meeting market for marijuana businesses. The convention business component was bolstered by a report from the Nevada Department of Taxation on potential revenues that could be lost if marijuana-related conclaves were excluded from holding their events at the Nevada resort properties.

By way of background, Control Board Chairman A.G. Burnett summarized the position taken by the Board on associations or involvement by licensees with the marijuana industry. That advice has remained static since the Board released a memo drafted by Board Member Terry Johnson in 2014. The memo formed the basis for gaming policy on the subject, which guidance has been affirmed by the Nevada Gaming Commission on at least two separate occasions, under two Chairmen, including the latest pronouncement on August 24, 2017, by current Commission Chairman, Tony Alamo, MD.

The position can best be summarized by the statement: "So long as it is illegal under federal law, gaming licensees must not have any involvement with or participation in the marijuana industry, because doing so would violate the requirement for licensees to obey all laws, including federal laws." Such involvement, however remote from the actual marijuana business operation, could reflect discredit on the gaming industry thereby tarnishing the "gold standard" of gaming regulation.

In describing those federal laws, Brian Barnes, an attorney from Colorado, provided a summary of federal statutes, referencing the Constitution's Supremacy Clause in which state laws are trumped by federal laws (a matter which will likely be the subject of the arguments before the U.S. Supreme Court in *Christie v. NCAA* involving PASPA and limitations on sports wagering).

Mr. Barnes also provided an overview of the pertinent provisions of the Controlled Substances Act (1970) 21 U.S.C. Section 801 *et seq*. ("CSA"). His message for the panel was that so long as marijuana is listed as a Schedule 1 drug (the same list includes heroin), federal law prohibits virtually every aspect of marijuana businesses, including providers, financial institutions, landlords, and consultants from supplying, aiding, or advising them. The only "savings clause" for marijuana in the CSA, short of an amendment by Congress, is a provision in the current law that allows the Attorney General to make a finding that marijuana has scientific or medical evidence to prove that its removal was warranted. (Don't wait on this one!)

Mr. Barnes has been involved in two separate Colorado actions in which he has employed civil RICO arguments to attack marijuana businesses on behalf of private objectors. The first involved a Holiday Inn that claimed its business was adversely affected by an adjacent marijuana dispensary. That case was eventually settled before verdict but not before the various ancillary individuals, including the accountant advising the marijuana business and the insurance company providing a bond required by that state's marijuana laws, jointly agreed to pay a settlement of $70,000.

Civil RICO would be in addition to criminal sanctions that might be sought by the Department of Justice ("DOJ"). It allows a private action seeking treble damages and attorneys' fees against a criminal enterprise. Given the potential awards, this may become the next powerful tool to be employed by plaintiffs' counsel.

The second case, *Safe Streets v. Hickenlooper*, 859 F.3rd 865 is still pending before Federal District Court in Colorado after a

remand from the Tenth Circuit Court of Appeals, which reversed the prior decision of the lower court that had dismissed the case. The lawsuit had been brought against a marijuana cultivation facility that was emitting strong cannabis odors, which neighbors argued were objectionable and lowered their property values. The decision from the 10th Circuit Court is notable because it contains an outline of required proofs necessary to meet civil RICO standards.

The Policy Committee also heard from AML and banking experts who reiterated that casinos are "financial institutions" within the Bank Secrecy Act, 18 U.S.C. 1957, which requires a continuing obligation to "know your customer" (KYC). That means casinos should not accept sums over $10,000, for casino play or payments for other purposes, from individuals who were known (or after investigation should have been identified) as individuals engaged in the marijuana industry. At the very least, SARs (Suspicious Activity Reports - Casinos) identifying these persons should be sent to FinCEN. The general advice, however, from AML consultants would be to eschew any relationship with these customers unless it can be assured that their funds came from sources unrelated to marijuana.

Finally, the Committee heard from Cassandra Farrington, the CEO of Marijuana Business Daily, a company which produces MJBIZCON, a large marijuana industry event held in Las Vegas, bringing together Business to Business ("B2B") participants to learn more about their industry and the nuances of successfully operating in a legal environment. It was evident that presentation was the "gray area" that the Gaming Policy Committee was interested in addressing. Bolstered by estimates by the Nevada Department of Taxation about conventioneers' spending and the tax revenue to be derived from hosting such events, the Committee became focused upon whether there could be some reasonably congruent approach that would allow marijuana and gaming proscriptions to co-exist during the seemingly endless period of silence from the DOJ on enforcement of the CSA against marijuana businesses and their aiders and abettors.

In their informal "deliberations," Governor Sandoval noted that there have been no prior enforcement actions by the DOJ on ancillary or supportive businesses. Chairman Alamo appeared to soften his initial perspective, saying that there may be a way for gaming licensees to host B2B events.

Both Jim Murren and Keith Smith voiced concerns about companies operating in multiple jurisdictions, stating that although there are 29 states embracing some form of legal marijuana distribution (medical and recreational), there are likely different tolerances within gaming regulations in those jurisdictions, and the most conservative approach expressed by Brian Barnes' recitation of "black letter law" should not necessarily end the discussion of the gaming industry accepting marijuana-related business meetings and conventions.

Finally, Chairman Burnett summarized his thoughts by stating that Nevada should consider the "reasonableness" approach suggested by another presenter, former Clark County Sheriff Bill Young. If there is a gray area that is truly a gray area, he mused that licensees might be able to enter it, but it would be at their own risk. In other words, if a licensee accepted a marijuana convention and on that basis the Attorney General cited them for a violation of the CSA, it would be their risk.

In the interim, the debate will continue as the industry awaits the Committee's non-binding recommendations. As with any "risk management approach," before becoming blinded by the revenue potential of a marijuana-related opportunity, it would always be advisable to contact your legal advisor or a member of the Gaming and Hospitality Group at Dickinson Wright.