

KEEPING COMPLIANCE IN CHECK

By Glenn Light, Karl Rutledge and Quinton Singleton

A velvet rope, burly bouncers and long lines of faux and facade. One might imagine this to be just another night at the hottest scene on the Sunset Strip. Rather, this is now just a typical sight at many of the casino resorts on the Las Vegas Strip. Nightclubs have quickly become instrumental for Vegas casino resorts to ensure they continue to attract a younger demographic. Recent events at nightclubs, ultra lounges and pools, however, have revived the question of how much oversight Nevada's gaming statutes and regulations require licensees to provide for non-gaming venues located on their premises.

In February 2006, the Nevada Gaming Control Board (GCB) issued a memorandum to all non-restricted licensees regarding their entertainment and nightclubs.¹ The impetus for the memorandum was events related to nightclub activities and entertainment choices that were reportedly occurring "on or within the property of gaming licensees." These events included excessive inebriation, drug distribution and abuse, violence, presence and serving of minors, and the handling of those individuals who become incapacitated while at nightclubs.

In April of this year, the board again addressed recent indiscretions in an "Industry Letter" and further detailed the licensees' responsibilities for nightclubs, ultra lounges, European pools and similar venues.² The board had received complaints regarding activities at venues located on the premises of various licensees and found in some cases that licensees were "indifferent to the conduct or welfare of patrons." Date rape, extortion/misquoting of service charges, restricting access by law enforcement, lack of coordination with licensee security, and prostitution were a few of the activities reported to have occurred.

The April 2009 Industry Letter acknowledged that licensees are likely to have contracted with a third-party company to operate these venues and the extent of licensee involvement in venue operations varies. Nevertheless, the Industry Letter emphasized that licensees bear ultimate responsibility for ensuring all operations on their premises are conducted "in accordance with all applicable laws and regulations and in a manner that does not reflect badly on the State of Nevada or its gaming industry." Board member Randy Sayre clearly reiterated this point at the board's informational seminar recently held in Las Vegas.³ "We measure results," Sayre said. "You could have the tightest contract on the face of the Earth ... but if the property is not willing to take the necessary steps to enforce their rights, that's an issue (for the board)."⁴

This article speaks to how non-gaming venues are regulated in Nevada and what a venue operator and a licensee must do to ensure non-gaming venues located on the premises of a gaming establishment are compliant with federal, state and local laws.

Venue Oversight

In times past, gaming licensees commonly owned and operated all or most of their non-gaming venues, but nowadays third-party companies regularly operate these venues, including restaurants, nightclubs, ultra lounges and pool venues. The GCB's statutory and regulatory authority applies to venues operated by licensees but generally does not extend to venues operated by third parties. The board, however, can exert indirect control over third-party venue operators in two principal manners: (1) through control of the licensees; and (2) by calling the venue operators forward for findings of suitability.

Licensee Control

Under the Nevada Gaming Control Act, gaming licensees are governed by public policy standards that, in brief, require licensees to conduct all operations on their premises in a manner suitable to protect public health, safety, morals, good order and general welfare.⁵ More specifically, licensees are ultimately responsible for all acts that occur on their premises and may be disciplined for venue operators located on their premises that fail to maintain compliance with all applicable federal, state and local laws.⁶

This is contrary to common contract drafting practices, because licensees cannot rely on the structure of venue ownership and contracts to allocate the responsibility for legal compliance. The board's 2006 and 2009 Industry Letters clearly expressed this point. The 2006 Industry Letter concluded that licensees are expected to perform due diligence and suitability determinations for nightclub owners/operators and for entertainment providers and that ultimately licensees are held accountable for any regulatory violations or foreseeable incidents occurring on their premises. The 2009 Industry Letter further defined this point, stating that a licensee is expected to ensure its contractual and ownership relations established with venue operators are in accord with its regulatory responsibilities and that a licensee should take proactive steps to ensure its venues are operated properly.

Finding of Suitability

As a last resort, during the recent informational seminar Sayre suggested that a finding of suitability can be used to oversee venue operators that are resistant to or are not ensuring statutory and regulatory compliance. Sayre commented: "If [the venue operator does not] cooperate with us when we call [it] forward for licensing then we'll just put [it] on the agenda and deny [it] anyway. Then [the venue operator is] a denied applicant and [it] can't do business with any Nevada licensee."⁷

This level of oversight and use of a suitability finding to vet venue

operators, while not common, is not new to the industry. In fact, this is in line with *State v. Glusman*,⁸ wherein the Nevada Supreme Court found that the public welfare transcends any interest a venue operator may have in continuing its business on licensee premises if it fails to be found suitable. In 1982, the Nevada Gaming Commission ordered the owner of a retail clothing store located on the premises of the Las Vegas Hilton and Stardust hotels to come forward for a finding of suitability. Although the owner filed suit against the commission, challenging its order and the Nevada statutes and regulations upon which the order was based, the Nevada Supreme Court overwhelmingly held in favor of the commission and upholding Nevada law. In short, the court held that (i) it is within the commission's power to subject persons and businesses conducting non-gaming activities on the premises of a licensee to a finding of suitability; (ii) Nevada law was not vague as to which type of conduct is or is not suitable for such persons and businesses; and (iii) the commission may selectively investigate such persons and businesses.⁹

The Nevada Supreme Court went on to assert, however, that it is the responsibility of the state, and not the venue operator, to pay the costs of the investigation. Specifically, the court reasoned that it was "not within the scope or purpose of gaming control to selectively impose on non-gamers the financial burden of gaming enforcement."

If a venue operator is found suitable, then it may continue to associate with the licensee that owns the premises where its venue is located.¹⁰ If, on the other hand, a venue operator is found unsuitable, the venue operator must immediately cease operations on the licensee's premises and terminate its association with the licensee, and any contracts between the venue operator and licensee are subject to termination.¹¹

As a final point to the sternness with which the board views the activities of venue operators on a licensee's premises, the 2009 Industry Letter concluded that a licensee's indifference to illegal acts or unsuitable business practices on its premises may be considered an unsuitable method of operation, which is to say that these types of acts may be sufficient to revoke a gaming license.

Proactive Compliance

The articulated stance of the GCB is that it does not want to punish a licensee for the acts of others; however, a licensee is responsible for taking proactive steps to ensure that operations on its premises are conducted in compliance with laws and regulations. As Anthony Cabot, chairman of the Gaming Practice Group at Lewis & Roca, said: "I think one of the things [regulators] will be looking at is the approach properties take toward monitoring their partners . . . What the casinos can't afford to do is put their heads in the sand."¹²

The licensee need not be perfect, but it must show a proactive and firm commitment to compliance and lawful operations on its premises. This equates to creating a culture that actively discourages non-compliance, as well as taking appropriate action where incidences of non-compliance occur. For example, the licensee should ensure its contract with the venue operator emphasizes that noncompliant and unlawful behavior will not be tolerated. In addition to this, the licensee may interview management at the venue as to their policies, procedures and internal controls regarding, among other things, the handling of incidences such as those that gave rise to the GCB's action.

Moreover, both the licensee and venue operator should adopt compliance programs. These programs should include controls generally applicable to all businesses, such as secret shopper investigations, website testing and tax compliance. Additionally, the legal and regulatory framework applicable to licensees and venue operators requires their compliance programs to affect greater scrutiny in certain situations, such as when gaming is offered, alcohol is served, age restrictions are imposed, credit transactions are offered, and indiscretions have previously occurred. Therefore, although portions of compliance programs can be generally applicable, venue operators and licensees should tailor the programs to their specific businesses.

To conclude, licensees and venue operators must proactively take steps to implement policies and procedures that provide the tools necessary to address compliance issues, because a failure to proactively comply with the law will more than likely result in greater punishment than a solitary mistake. In short, while the board is not in the business of policing morals, it will respond to allegations of unlawful conduct and has the tools to effectuate change.

1 "Industry Letter," Gaming Control Board, Feb. 7, 2006.

2 "Industry Letter," Gaming Control Board, April 9, 2009.

3 Informational Seminars, State of Nevada, Gaming Control Board, Las Vegas, Sept. 16, 2009.

4 Arnold M. Knightly, "Gaming Board Official Offers 'Preventive' Tips," Las Vegas Review Journal, Sept. 17, 2009.

5 N.R.S. §§ 463.0129, 463.148; Nev. Reg. 5.010.

6 "Industry Letter," Gaming Control Board, Feb. 7, 2006 and April 9, 2009; N.R.S. § 463.0148; Nev. Reg. 1.145; 5.011(8).

7 Arnold M. Knightly, "Gaming Board Official Offers 'Preventive' Tips," Las Vegas Review Journal, Sept. 17, 2009.

8 651 P.2d 639, 648-49 (Nev. 1982).

9 *Id.* at 645-649.

10 N.R.S. § 463.167.

11 N.R.S. §§ 463.166, 463.167(3).

12 Richard N. Velotta, "Gaming Lawyers Eye Gray Areas of Casino-based Nightclubs," Las Vegas Sun, Sept. 18, 2009.



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