THE LAW FOR GAMBLERS

A Legal Guide to the Casino Environment

ROBERT A. NERSESIAN

CONTENTS

PROLOGUE

The saga goes on as casinos, together with the government, continue to browbeat and persecute skilled gamblers.

Nevertheless, some changes in casino and government procedures have occurred since the 2006 publication of my first book, *Beat the Players–Casinos, Cops, and the Game Inside the Game*, and the battle to even the playing field continues.

This book is a standalone work on the subject of advantage play and gaming law, and is neither a sequel nor an update. Rather, while some material from *Beat the Players* is reviewed in the following pages, new concepts and material are the rule, not the exception. The material in this book is also greatly expanded beyond the confines of Nevada, and should prove a valuable resource to those readers parlaying their skills in other jurisdictions.

In addition, the extensive footnotes render this work valuable to legal practitioners and teaching institutions. For litigation involving casinos, this book could prove a relevant and beneficial resource.

My decades of experience on this subject and past errors and omissions from a myriad of cases (while difficult to admit, especially in print) provide an expanse of perils to avoid and perspectives to take in prosecuting the civil cases, and defending the criminal cases, of gamblers. In the obverse, legal professionals representing casinos will find these citations and theories equally worthwhile in addressing and understanding the mindsets of gamblers and others involved in litigation against their clients.

Concerning academia, this book includes a collection of case law and statutory points of view unparalleled in the rapidly expanding area of gaming law. For students in gaming-law courses, no more up-to-date analysis on the subject exists.

But before jumping into the nitty-gritty, for clarity's sake, the terms "advantage gambling" and "advantage gambler" need to be understood. Also referred to as "advantage player" or often "AP," an advantage gambler is one who, in applying the law of large numbers and the characteristics of a given game, plays with a strategy that provides a mathematical advantage over the casino.[1] If you've picked up this book, you may 1) be an advantage gambler, 2) wrongly consider yourself an advantage gambler, 3) hope to become an advantage gambler, or 4) be a legal professional or student seeking to gain insight into a new area. In my years of dealing with the best of the best at casino games, I can say with some certainty that categories 1 and 2 are about evenly split, and if you are in category 2, you have already made bad decisions, jumped in too early, and likely chewed up most of your bankroll. Hopefully, the following will guide you in some of the means toward more profitable ends.

Whatever your skill set, I have endeavored to include enough basics so that anyone from neophyte to advanced can learn from, while enjoying, this book. Indeed, any legal practitioner could well draft entire briefs on complex subjects from these contents. In this respect, I encourage readers to make liberal use of the Table of Contents and, depending on their level of confidence, to jump around, even skipping entire sections. Also included is a Glossary to assist in the terms used in the gambling and legal trades. This should even the playing field for those first stepping into the subject. For legal professionals, or those in trouble or expecting trouble, the comprehensive index and footnotes can make this volume a valuable research tool and resource.

Finally, before we get to the meat of the matter, let me tell you a little bit about my background. My original exposure to gaming

---

[1] Advantage gambling is, perhaps, most succinctly and clearly defined in *Pistor v. Garcia*, CV-12-0786-PHX-FJM, 2014 WL 116391 (D. Ariz. Jan. 13, 2014), where the court stated: "Advantage gambling is a legal method of gambling where players limit their play to games with a statistical advantage favoring the player." *Affd. Pistor v. Garcia*, 791 F.3d 1104, (9th Cir. 2015)

law concerned marker collection in the early 1990s, and in such matters I represented casinos. I worked with their legal departments and became glancingly familiar with their inner workings.

Around 1993, while playing in a friendly poker game, I came across my first case involving the intentional torts of false imprisonment and battery on a patron by a casino. The victim of an attack, the only non-lawyer in the poker game, relayed the circumstances, asking if he had a case. The consensus was, and I quote verbatim, "This here's Nevada." To a man, the local attorneys insisted that no Nevada court would allow a meaningful award on a claim against a casino. This proved false when I took the case and received a verdict of $60,000.

From there, it was off to the races.

A year later, I filed suit against the Maxim Hotel-Casino (now defunct) for the backrooming of a card counter. Again, my contemporaries asserted that this was an allowable practice in Nevada and I was tilting at windmills. Again, this proved false and the settlement offered exceeded five figures. As a settlement rather than a forced verdict, this was the first instance, to my knowledge, of casino legal professionals admitting that their personnel did not have absolute authority over people on their property.

Since that Maxim case, verdicts have skyrocketed. I have been involved in false-imprisonment cases without any appreciable physical injury resulting in verdicts as high as $726,000, and including other verdicts of $599,999, $250,000, and $200,000. Others resulted in confidential settlements exceeding some of these when juries indicated that punitive damages were warranted (i.e., the casino settled after the initial verdict and prior to the determination of the amount of punitive damages).

This litigation has also caused a sea change as to how casinos address advantage gamblers and other patrons. Generally, gone are the days where ejections were effected through plate glass windows. Invitations to the security office of a mandatory nature have become much rarer. Perhaps most importantly, while it still occurs, the arrival of the local constabulary is not necessarily a rub-

ber-stamp for whatever outlandish assertions casino security make against a patron.

As an aside, I am now familiar with no less than three instances where the police have been summoned by casino security personnel on a claimed arrest of a patron for battery, disturbing the peace, or like misdemeanor, and the subsequent investigation resulted in charges not against the patron, but the casino's security personnel for battery. My anecdotal inquiries have turned up only a single instance in which casino personnel were prosecuted for an attack on a patron prior to the claims brought by me, and while a guilty verdict against the casino personnel resulted, the local judge overturned the verdict (allegedly angering the cops in the process).[2] In short, casinos are no longer granted *carte blanche* concerning their treatment of patrons.

Branching off of these intentional tort cases, matters involving gaming debts are now regularly addressed as well. These are administrative proceedings in many states and involve determining whether a casino must pay a jackpot. Historically, casinos resolved such disputes by just keeping or taking the money, and the gambler had little or no recourse. Again, today, the prosecution of a claim for a debt against a casino is no longer a rubber-stamp for the casino. In the last decade, my office has been awarded orders, through the patron dispute process against casinos attempting to avoid payments, to pay various sums ranging from $250 to $2,200,000. Although the records are unattainable due to anti-sunshine laws applicable in gaming investigations, it appears that some regulatory actions may have been taken against the casinos withholding payment as well.

This does not mean that the job is now done or that the playing field has leveled. Policies or practices awaiting the proper case or showing that casinos still stretch the limits arise regularly. For example, it appears that casino drawings, known to have been rigged

---

[2] *Ghosts at the Table*, Des Wilson, p. 142 (DeCapo Press, 2008) (Describing an event concerning Binion's Horseshoe)

in the past,[3] continue to be rigged with a modicum of impunity. The number of prospective clients who have relayed incidents of rigged drawings go beyond the mere anecdotal. Oftentimes, such clients hold close to half the tickets in a drawing drum and the drawing of 10 tickets completely bypasses them. The odds against completing the drawing without a single advantage gambler's winning ticket are less than .01%, but these results get reported time and again. This is akin to shaking a haystack while looking for a needle, and 10 needles fall at your feet. When the proper case with the proper documentation arises, my office will be sure to issue the challenge.

It's likely that other cheating methods on the part of the casino await exposure as well. History shows various gaffs, such as outright machine rigging and allowing a roulette wheel with a bias in favor of the casino to stay in play, continue to occur.[4] Gaming regulations themselves actually granted one system, MindPlay, the potential for cheating by allowing casinos to identify card counters and change play accordingly. Litigation brought by my office was dismissed at the district court level, but on the threat of appeal, resulted in rewritten regulations preventing the offensive use of the system against players. (The system was withdrawn from use shortly thereafter.) My office will continue to protect gamblers and rein in casinos, and I look forward to being of further service.

Finally, while the ongoing battle between casinos and gamblers within the framework of the law endures, there remains a constant between the two: Cheating will not be countenanced. For reasons of credibility and morality, I endeavor to avoid representing cheaters. I also have no particular problem with the ardent prosecution of cheaters within the law.

It's a game. The saga goes on. Hopefully, the philosophy imparted in this book is the following. Like any game, know the

---

[3] *See, e.g., Las Vegas Sun*, July 14, 2004; <lasvegassun.com/news/2004/jul/15/venetian-contest-rigger-lectured-by-regulators/#axzz2UcmOYA2z> Viewed May 12, 2013

[4] *Gaming Agents Yank Licenses in Slot Rigging Probe,* Brendan Riley (Assoc. Press, July 28, 1989)

rules and play within the rules. By all means, play hard and kick your opponent's ass, as long as it's done by the rules. Imprisoning innocents is against the rules. Capping a bet is against the rules. Just keep it clean.

Bob Nersesian
(Las Vegas, 2016)

Chapter 1

A BRIEF HISTORY OF AMERICAN GAMING LAW

Before addressing gambling law specifically, it's necessary to describe what makes up law generally.

Obviously, different societies establish different systems of laws, and here in the United States, the default perspective is defined by the "common law." The common law consists of those principles, maxims, usages, and rules of action that observation and experience have commended to enlightened reason as best calculated for the governing and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time, demanding the application of those principles to particular cases in the administration of justice. Thus, the authority for its rules does not depend on legislative enactment (either positive or negative), but on the principles the rules are designed to enforce—the nature of the subject to which they are to be applied and their tendency to accomplish the ends of justice. It follows that these rules are neither arbitrary in their nature nor invariable in their application; but from their nature, as well as the necessities from which they originate, they are, and must be, susceptible to a modified application suited to the subject upon which that application is to be made."[1] In simple English, the common law essentially gives the norms and mores of society the imprimatur of law and courts seek out, or even dictate, those norms and mores.

The common law is supplemented, or even supplanted, by other sources of law. There is, in fact, an order of laws to be ap-

[1] *Morgan v. King*, 1858 WL 7174, 30 Barb. 9 (N.Y. Gen. Term. 1858) *rev'd on other grounds*, 35 N.Y. 454 (1866) (citations and emphasis omitted).

plied. Believe it or not, the United States Constitution is not the first in this order; rather, a hierarchy of laws applies generally as follows:

Treaties;[2]
United States Constitution;[3]
Federal court rules on matters of procedure;
Federal Statutes;[4]
Federal regulations;
State Constitutions;[5]
State court rules on matters of procedure;
State statutes;
State regulations;
Ordinances; and
Between individuals, those with the bigger gun or biceps.

Due to the special nature of gambling, the laws most commonly applicable are found in category nine, state regulations. That is, where gambling is found, almost invariably, a corollary state agency establishes and enforces regulations under the authority of an enabling statute enacted by the state legislature.

This raises the issue of why gambling holds a special nature. Primarily, this relates to why the laws of the nation and several states don't allow simple contract law to address this area of commerce, rather than enacting and applying a comprehensive regulatory system. A lengthy policy analysis could, at this point, address issues of liberty of contract, liberty in general, nanny-statism, cor-

---

[2] U.S. Const. Art. VI, cl. 2, recognizing that the U.S. Constitution and treaties constitute the "supreme law" of the land on apparently equal footing.

[3] *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464 (D.C. Cir. 1940) aff'd, 311 U.S. 470 (1941) (Showing deference to a treaty and choosing to abstain on political grounds, thus giving a treaty a higher class of enforcement).

[4] *Wadsworth v. Allied Professionals Ins. Co.*, No. 5:10-CV-1566 NAM/TWD, 2012 WL 1048454, at *2 (N.D.N.Y. Mar. 28, 2012) ("[[W]]here a state statute conflicts with, or frustrates, federal law, the former must give way.")

[5] *Proctor v. Kardassilaris*, 873 N.E.2d 872 (Ohio 2007)

rupting influences, morals, degenerate practices, etc. This has been a simple and expedient choice, nonetheless, by Western civilization, of which we are all witnesses to an evolving ethos of burgeoning bureaucracy moving like a tidal wave across America. Truly, no area of law is more fraught with policy arguments, changing perspectives, and evolving and emerging policies and regulations than that of gaming. This is because gaming only recently escaped the chains that had shackled it for nearly 100 years.

Originally, gambling was an integral part of most societies. Early in known history, references to gaming and gambling peppered the texts found important in society. For example, the Atharva Veda, a sacred Hindu text composed three millennia ago and certainly reduced to writing by 200 B.C., contains numerous prayers and incantations asking supernatural intervention in the luck of dice and games. Brock and Loki wagered their own heads in Scandinavian mythology. Jewish scriptures mention gambling.[6] Indeed, in the foundational society that defined the origins of Western civilization, Rome, legal gambling permeated every facet of home and social life.[7] (Nero, contrary to myth, wasn't fiddling while Rome burned; he was shooting dice and losing.)

The power of gambling expanded and contracted countless times through recorded history, generally in a direct converse correlation to the power of religion (which rightly sees gambling as competition). However, in relatively modern times, as the wealth of the European aristocracy began to be depleted by such pastimes, laws evolved to protect the fortunes of the elect.[8]

The most famous and far-reaching of these was the English Statute of Anne.[9] In the 1700s, gambling was again strongly at-

---

[6] Babylonian Talmud: Tractate Shabbath, Folio 31a, Tractate Sanhedrin Folio 25a

[7] *Everyday Life in Ancient Rome*, Lionel Casson, Chap. X (Johns Hopkins University Press, 1998)

[8] Tenn. A.G. Opp. 04-046

[9] Anne c. (Eng.) 14 § 1; 4 Bac. Ab. 456, § 1 (1710), providing in relevant part: "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities shall

tacked by the rulers of society, with its validity as an endeavor undermined; for a long period, it was effectively destroyed as a legal vocation or avocation, in order to protect the wealth of the young aristocrats from the sharps, the cheats, and the shysters.

Still, as with any prohibition of a populist diversion, the state's attempts merely drove the practice underground. We're now living through a departure from that 300-year (give or take) prohibition and the question is, how far will the pendulum swing in the opposite direction this time? Though it seems to be heading for the antipodal extreme, the blowback can be seen in the federal laws restricting Internet gaming. The same original justifications are reiterated as well, with the government's hope and goal of stanching a non-industrious transfer of wealth. Nonetheless, like the repeal of Prohibition or the decriminalization and even legalization of marijuana, it appears safe to assume that the laws restricting gaming will continue to diminish over the foreseeable future.

In the United States, the restrictions on gambling were imported from England. First, the Statute of Anne was incorporated into colonial policy, then later adopted by the new nation and its states.[10] While the statute did not criminalize gaming per se, it did severely restrict any opportunity to treat it as a vocation.

The new nation's earliest gambling cases centered on the prosecution of various aspects of the activity. For example, under the common law, private games were not a crime, but public games

---

be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or, by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

[10] *See e.g. Codman v. Jenkins*, 14 Mass. 93, 94 (1817), recognizing that the Statute of Anne was enacted as an improvement on the common law, and, therefore, was adopted in the states as now part of the common law. While this is antithetical to the very concept of a distinction between the common law and statutory law, it seems to have been near-universally picked up by the states, such that the Statute of Anne, and its restrictions on gambling debts and instruments, are recognized as part of the common law applied in almost all the states.

generally were, as was maintaining a gambling house (casino). At first, attempts to make even private games criminal, through charging them as a nuisance, were unsuccessful. However, many states began to take gambling solely out of the realm of regulation under the common law by enacting statutes assuring that even private games were criminal.[11] Numerous states also imposed a constitutional ban on lotteries, which was extended to many other forms of gambling.

While this was all evolving, at least three exceptions to the broad-based prohibitions on gambling remained. First, in many jurisdictions, forms of horse racing were exempted from the restrictions. The rationale was that horse racing and attendant wagers, unlike other forms or wagering, did not militate against morality, public policy, or decency, or tend to the injury of third persons and form an inducement to a breach of the peace.[12] This rationale, like much of the law, was imported from England, where equestrian contests enhanced the skills needed by soldiers and advanced the breeds also needed for combat—in short, it was based on national security. But this was a fight, not a *fait accompli*, and many states prohibited wagering on horses or even reversed statutory exemptions from illegality.[13] Another reason that horse racing escaped the axe of galloping Victorianism to a degree is its history and backing. It's not called the "Sport of Kings" without reason. Horse racing was a pursuit of the aristocracy with solid roots in England dating to 1605 and formal rulemaking and pedigrees dating to the early 1700s; the aristocratic English Jockey Club came into being about this time.[14] Thus, as laws are wont to do, there was an avoidance of restricting the options of the rich and powerful. This, too, provided the importation of yet another reason for going lightly

---

[11] *See e.g. State v. Brice*, 2, Brev. 66, 4 S.C.L. 66 (S.C. Const. App. 1806)

[12] *See McElroy v. Carmichael*, 6 Tex. 454, 455 (1851), recognizing that even under the Statute of Anne mentioned above, there were certain exemptions for horse racing.

[13] *Irving v. Britton*, 8 Misc. 201, 28 N.Y.S. 529 (Com. Pl. 1894)

[14] "Lost Trousers," *The Times Literary Supplement*, Donald W. Nichol, 26 July 2013, pp. 14-15, citing the frontispiece of a 1709 pamphlet called *The History of the London Clubs*.

on horse racing, even as other forms of gambling became vilified.

A second exception was found, though not universally, in some aspects of the insurance business. It's evident that an insurance contract—especially, for example, a term-life policy—could be viewed as a wager. Some courts found certain insurance agreements to be gambling and verboten,[15] but for the most part, the industry continued unabated and unaffected by restrictions on gambling.

The third area of dispute concerned stock trading. Some transactions, such as futures trading and short selling, have been prohibited at various times. One court described an accepted duality in stock transactions and their possibility for mischief as follows:

> [An] actual transfer of stock between these parties was not contemplated by them. The interesting question to them was the rise or fall of the stock, which, being secured by an adequate "margin" was what they looked to. … These were simply the stakes of the parties on each side, and were at the end of the game, or rather when the contract was out, what the winning party was to take, and what Hollinger did take. …
>
> It is said the form in which this contract appears enters largely into the business of stock brokerage. This is a mistake. … Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizing to the community, no matter by what name it may be called. It is the same whether the promise be to pay on the color of a card, or the fleetness of a horse, and the same numerals indicate how much is lost and won in either case, and the losing party has received just as much for the money parted with in the one case as the other, *viz.*; nothing at all. The lucky winner of course

[15] *See Pritchet v. Ins. Co. of N. Am.*, 3 Yeates 458, 464, 1803 WL 757 (Pa. 1803)

is the gainer, and he will continue so until fickle fortune in due time makes him feel the woes he has inflicted on others.

All gambling is immoral. I apprehend that the losses incident to the practice disclosed in this very case, within the past five years, have contributed more to the failures and embezzlements by public officers, clerks, agents and others acting in fiduciary relations, public and private, than any other known, or perhaps all other, causes; and the worst of it is, that in the train of its evils, there is a vast amount of misery and suffering by persons entirely guiltless of any partition in the cause of it.

Bonâ fide time contracts about subjects of actual purchase and sale of stocks and other property seem from custom necessary in our country, and when they are so, although they may be greatly affected by the rise and fall of the market, yet they are not obnoxious to the objection to this transaction which we are considering, for the losing party has at least something for his money, but the losing gambler has nothing.

That the [stock] transaction in this case assumed the form of a contract about a matter lawful in itself was not conclusive as to its real motive, as the finding shows. That was the form which the South Sea bubble took in England, the tulip speculation in Holland, and the *morus multicaulis* in this country; and the form served only as a thin covering of the most frightful systems of gambling ever known.[16]

So, from the early 19th century forward, gambling as a trade in the U.S. was an illegal, underground activity. The laws surrounding it were effectively limited to prosecuting violators on criminal charges; they also assured that the august civil institution of the

[16] *Appeal of Brua*, 55 Pa. 294, 298-99 (1867)

courts not be tainted by related civil matters. That is, the courts eschewed any attempt to give recourse to the enforcement of gambling contracts.

Then, in March 1931, Nevada broke this logjam, becoming the first state to "legalize" gambling.[17] The quotes are placed around "legalize" because this is arguably a misnomer. Nevada did not "legalize" gambling, but merely exempted it from the standard criminal prohibitions.[18] Indeed, in a sense, gambling remains illegal in Nevada, even today, being offered by those granted a privilege license at odds (so to speak) with the continuing illegality.

The rationale behind this legalization was explained by the Nevada Supreme Court as being based on a swing of public opinion. By 1931, per the court, the past conservatism of Nevada's citizenry had moved toward greater liberality and the legislature recognized this by opening the state to legitimate gambling (along with liberalized divorce laws).[19] The truth is actually more nuanced. The Great Depression struck Nevada with particular force. Mines were closing, ranches were being foreclosed, and a flight of citizens was occurring. There was no work to be found (save, arguably, on the prospective Hoover Dam), and the state found itself in dire straits. The truth of the rationale for passage, together with the passage of the law making Nevada the first no-fault divorce state, was to boost employment, commerce, and tourism. Other states did follow to a degree, boosting economies or raising revenues. In 1964, New Hampshire introduced the first lottery in the U.S. in 70 years; in 1978, New Jersey legalized casinos in Atlantic City. By the early '90s, Nevada's removal of the handcuffs on gambling had stimulated the greatest unlocking of an entire industry ever witnessed in history.

---

[17] Statutes of 1931, 165–169, Secs. 3302–3302.16, (Nev. 1931); N.C.L. Supplement 1931–1941.

[18] *See W. Indies, Inc., v. First Nat. Bank of Nev.*, 67 Nev. 13, 22, 214 P.2d 144, 149 (1950), appearing to adopt a prior court's finding that "the licensing of gambling is merely permissive, and serves to give immunity from criminal prosecution and nothing more."

[19] *Id*, at 23, 149

With gambling exploding across the nation and around the world after centuries of dormancy, the laws through the courts and legislatures are now called upon to address this ever-growing field. They are, truly, feeling their way in the dark and, no doubt, conflicts, different branches of evolution, and a hodgepodge of attempts at socialization will be filtered and adjusted over the upcoming decades.

Some areas of conflict are patently evident, such as: the social burdens gambling presents versus the sources of income it allows; the idea of a contest or game versus an industry operating in commerce; and the balance of the casinos' powers as concerns the player's rights and interests. The following chapters in this book present a snapshot of where this evolution stands in 2016, and, at least for me, a lawyer standing functionally alone on one side of these dichotomies, it looks like it's going to be a hoot.