

## Why Gaming Lawyers Are Important

I. Nelson Rose

IT IS SAID THAT THE WORST MISTAKE you can make if you are involved as a party in a lawsuit is to try to handle the case yourself, even if you are a lawyer. But, the second worst mistake you can make if you are involved with legal gaming is to ask your regular (non-gaming) lawyer for advice.

I have told law students for 25 years that all they really need to learn is Civil Procedure and how to do legal research. That is basically true. But if I have a real estate deal, I don't handle it myself. I go to a real estate attorney.

Any competent lawyer should be able—eventually—to figure out what you can and cannot do. Of course, it will take more time for a competent attorney not familiar with that area, and for clients, a lawyer's time really *is* money.

Much more importantly, though, if the lawyer gets it wrong, things could go very wrong indeed.

Take the case of Sandra Milner. In the 1990s, Sandra worked in Texas, helping her father, Richard E. Jones, take telephone sports bets from all over the country. Their companies, Spectrum Inc. and World Sportsbook, took in as much as \$900,000 a week.

Anyone reading this immediately knows that taking sports bets from the U.S., while sitting in Texas, is a sure way to get convicted under the federal Wire Act.<sup>1</sup> So, why did Sandra, and her father, think they could get away with this?

Because bettors' phone calls were forwarded to Jamaica and the Dominican Republic, where bookmaking is legal.

In 1997, when they were convicted, Jones was sentenced to 46 months in prison and fined \$12,500.

The trial judge gave Sandra "only" two years and no fine, because she relied on her father and their lawyer and believed that what they were doing was legal.

Lesson One—get a good *gaming* lawyer. Because saying you relied on the lawyer's advice will almost never work as a defense to a criminal charge (although, if you're lucky, it might get your jail sentence reduced).

This case, called *U.S. v. Truesdale*,<sup>2</sup> contains another example of how even experienced non-gaming lawyers can make fatal mistakes when it comes to gambling law. The prosecutors—U.S. Attorneys who certainly knew the federal criminal code backwards and forward—did not charge the defendants with violating the Wire Act. Instead, they got the conviction under the federal Illegal Gambling Business Act.<sup>3</sup> This was part of the Organized Crime Control Act, making it a federal felony to run a large gambling business that violates state laws.

When Sandra and her father took the case up on appeal, they argued that they were not violating the Texas law on bookmaking. Although much of the operation took place in Texas, including answering 800 numbers for information and depositing checks from bettors, none of the actual bets were made in Texas.

It turns out, they were right. The Texas bookmaking statute was very specific in requiring that the bets be made in Texas, or at least forwarded from Texas. And there was no evidence that Sandra or her father ever did that.

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<sup>1</sup>18 U.S.C. § 1084.

<sup>2</sup>152 F.3d 443 (5th Cir. 1998).

<sup>3</sup>18 U.S.C. § 1955.

The U.S. Attorneys had charged the wrong crime, and had not known the intricacies of Texas gaming law, so all of the convictions were reversed.

Lawyers without gaming law experience are a more common problem in civil cases. The one case I tried to take to the U.S. Supreme Court started when 19-year-old Kirk Erickson, from Arkansas, won \$1,061,812 on a slot machine at Caesars Palace in Las Vegas. Caesars refused to pay, so Kirk's father, Rusty, hired a lawyer.

How do you find an attorney who knows gaming law?

There are three organizations of gaming lawyers in the U.S.: The International Masters of Gaming Law, the International Association of Gaming Advisors, and the Gaming Law Committee of the American Bar Association.

What you don't do—Lesson Two—is hire a lawyer because you see his ad on a billboard.

By the time I was brought in, the Ericksons' lawyer had already filed a Complaint claiming breach of contract for a gambling debt. The only problem was that gambling debts are not enforceable in Nevada: casinos can sue players on unpaid written markers, but players cannot sue casinos—at least not for breach of contract.

I tried to convince the courts that the Complaint could be read as stating a cause of action for fraud, which Nevada courts can hear.

But it was too late.<sup>4</sup>

Lawyers who don't know gaming law seem to be particularly confused when the legal gambling is conducted by an Indian tribe. Take New York, for example.

The State Constitution makes it clear that slot machines are completely prohibited. When Turning Stone opened in the Mohawk Valley, it was one of the largest casinos in the world—without slots.

So, why do New York's tribal casinos now have slots? Because the lawyers for the anti-gambling forces blew the case.

Most people focus on the majority decision from the New York Court of Appeals, written by Judge Carmen Beauchamp Ciparick, which held that the state legislature can authorize video lottery terminals for racetracks. If the video lottery is a lottery, the statute providing for it is constitutional regardless of whether the terminals used to play the lottery also look like, or even meet the penal law definition, of slot machines.

But the case also involved whether tribes could operate gaming devices. The opponents of legal

gambling had filed a lawsuit challenging the compacts the state had made allowing tribes to have slot machines, which were clearly prohibited by the State Constitution.

Indian gaming law can be quite complicated. The Indian Gaming Regulatory Act divides all gambling into three classes, with complex requirements. But the basic rule is easy to state: federally recognized tribes can have any form of gambling permitted by state law.

So, all the anti-gaming lawyers had to do is show that New York law prohibits slot machines.

Instead, they raised the bizarre argument that the state could not enter into compacts with its tribes, because New York prohibits all Class III gaming. The lawyers for the state and tribes pointed out that New York has a state lottery and pari-mutuel betting on horse races, which are indisputably Class III. The judges ruled that since the only question in front of them was whether the state permitted any Class III gaming, they had to rule against the challengers.

Judge Ciparick did not even have to look at all the other forms of Class III gaming allowed under New York law, since the State Constitution expressly allowed casino games (though not slot machines) for charity: since New York allows some form of Class III gaming—for charitable purposes—such gaming may lawfully be conducted on Indian lands, provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact.<sup>5</sup>

The most recent example of experienced lawyers getting their clients burned by not bringing in experts in gaming law are some of the big money loans made to casino tribes. How else can we explain the problems facing Wells Fargo and its \$50 million loan to the Lac du Flambeau Chippewa Tribe?

The loan was made in 2008 through the tribe's Lake of the Torches Economic Development Corporation, to refinance and expand the tribe's Grand Soleil casino project in Natchez, Mississippi. The deal was set up as a trust indenture, and the bank's lawyers put in all the protections they would normally have in the bond documents, such as the right to take over control of the venture if the borrower defaulted.

<sup>4</sup>Erickson v. Desert Palace, 942 F.2d 694 (9th Cir. 1991).

<sup>5</sup>Dalton v. Pataki, 5 N.Y.3d 243, 835 N.E.2d 1180 (2005).

An experienced Indian gaming lawyer would have told them that even something as simple as the right to name the casino manager means the arrangement could be construed as a management contract, and all management contracts for Indian casinos have to be approved by the National Indian Gaming Commission or they are invalid.

When the tribe missed its payments, the bank sued. The tribe's lawyers were faced with an interesting problem: they had an absolute defense—that the arrangement was void *ab initio*—but they could hurt all of Indian gaming if they raised it. Legal ethics probably required them to raise the defense, even though lenders all over the world now might be less willing to finance tribal projects.

In January 2010, U.S. District Judge Rudolph T. Randa dismissed the case, holding that the bonds

are void merely because they were collateral to an unapproved management contract.<sup>6</sup>

Wells Fargo is appealing the decision that its \$50 million in bonds are absolutely worthless. But the major question is *why* didn't the bank run it by a lawyer with experience in Indian gaming law before it closed the deal?

There have been situations which were even worse. When a dispute arises with an Indian tribe, the first thing the gaming lawyer asks is, "What does the waiver of sovereign immunity look like?" It is astonishing to see corporate lawyers involved in multi-hundred-million-dollar deals look at each other and say, "What waiver?"

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<sup>6</sup>Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp., 677 F. Supp. 2d 1056 (W.D.Wis. 2010).

