UNLIKELY CONSEQUENCES: HOW MEDICAL MARIJUANA IS AFFECTING NEVADA’S GAMING INDUSTRY

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“I don’t think anyone could have contemplated the connections that medical marijuana would have to gaming . . . . I don’t think anyone realized that it would hit the gaming community the way it has.”

— A.G. Burnett, Chairman, Nevada Gaming Control Board

I. INTRODUCTION

In 2000, Nevada voters passed a ballot question that allowed for an amendment to the state’s constitution legalizing the use of medical marijuana. However, the state only recently enacted regulations to allow people to legally open these marijuana businesses. Medical marijuana has created a myriad of issues in unlikely areas—of concern to this note are issues in the gaming industry. An unexpected consequence of legalizing medical marijuana in Nevada is how it will interfere with the gaming industry, not only with license and suitability issues before Nevada gaming regulators, but also in regards to

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potential lawsuits at gaming properties.

This note analyzes and discusses the consequences medical marijuana has had and will continue to have on the Nevada gaming industry. First, this note will give a brief history of medical marijuana in Nevada, including the requirements for obtaining a license to operate a medical marijuana establishment. Specifically, it will detail the great monetary investment involved in obtaining a license. Second, this note will give a brief overview of the federal government’s stance on medical marijuana. Specifically, it will discuss the three memoranda released by the U.S. Department of Justice regarding medical marijuana use, and an interesting piece of legislation that was passed at the end of 2014.

Next this note will discuss the Nevada gaming regulatory body’s stance on medical marijuana in relation to gaming licensees and others. This section will also include fallout from the Nevada gaming regulators’ stance on medical marijuana establishments in relation to gaming licensees, potential gaming licensee conflicts, and how the Nevada Gaming Control Board has already changed its application process to address medical marijuana involvement.

This note will then address some potential issues casinos may face in the coming years due to the legalization of medical marijuana. This section will highlight potential litigation concerns from employees and guests of casinos and also potential federal involvement and federal prosecution due to money laundering concerns. Next, this note will discuss how other jurisdictions have dealt with marijuana and gaming. Specifically, this section will discuss Native American reservations, Arizona, and Colorado. Finally, this note will present some potential solutions.

II. HISTORY OF MEDICAL MARIJUANA IN NEVADA AND HOW TO OBTAIN A LICENSE

Nevada voters legalized medical marijuana in 2000.5 However, it was not until recently that regulations were put in place to control the medical marijuana industry in Nevada.6 In 2013, Senate Bill 374 was signed into law,7 and codified as Nevada Revised Statute Chapter 453A.8 Senate Bill 374 was intended to establish the framework to make medical marijuana available to patients.9 The Bill requires the Health Division of the Department of Health and Human Services (now known as the Division of Public and Behavioral Health) (the “Division”)10 to adopt regulations on medical marijuana use.11

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5 See Marijuana Ballot Questions, supra note 2.
6 See S.B. 374, supra note 3.
7 Id.
9 S.B. 374, supra note 3.
10 See Division of Public and Behavioral Health Overview, DEPT’ OF HEALTH & HUM. SERVICES: NEV. DIV. OF PUB. & BEHAVIORAL HEALTH, http://dpbh.nv.gov/
Nevada Revised Statute Section 453A.322 details what is required of each medical marijuana establishment seeking licensure by the State. The statute defines a “medical marijuana establishment” as:

1. An independent testing laboratory;
2. A cultivation facility;
3. A facility for the production of edible marijuana products or marijuana-infused products;
4. A medical marijuana dispensary; or
5. A business that has registered with the Division and paid the requisite fees to act as more than one of the types of businesses listed in subsections 2, 3 and 4.

The medical marijuana establishment, as well as each individual who wishes to operate said establishment, must register with the Division. Applicants must pay a “one-time, nonrefundable application fee of $5,000.” If selected for one of the few licenses available, applicants are then required to pay a maximum of $30,000 for the “initial issuance of a medical marijuana establishment registration certificate for a medical marijuana dispensary.” Subsequent renewals of the registration certification range from $1,000 to $5,000.

Some other notable requirements include detailed background checks for proposed owners, directors, and officers of the medical marijuana establishment (including fingerprinting) and “evidence that the applicant controls not less than $250,000 in liquid assets to cover the initial expenses of opening the proposed medical marijuana establishment[s]. . .” Nevada Revised Statute Section 453A also sets forth merit-based criteria to be used in determining whether a registration certificate should be issued, which includes financial solvency, experience running businesses, knowledge of medical marijuana, and financial contributions to the state and its political subdivisions.

The licensing requirements for those interested in being involved in the medical marijuana industry in Nevada are fairly stringent; a lot of capital is required to participate in the medical marijuana industry, much like the gaming industry. It would appear that many of those already involved in the gaming industry are also interested in participating in the medical marijuana industry. As of June 25, 2015, the Division had received 519 medical marijuana establishment applications with 66 of those applications approved.
for provisional licenses.22

III. FEDERAL GOVERNMENT’S STANCE ON MEDICAL MARIJUANA

The United States Department of Justice, Office of the Deputy Attorney General has issued three memoranda regarding medical marijuana use. On October 19, 2009, the first memorandum regarding the “Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana” (the “Ogden Memorandum”) was issued.23 The Ogden Memorandum states that the “Department of Justice is committed to the enforcement of the Controlled Substances Act in all States.”24 However, it goes on to say:

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.25

The Ogden Memorandum goes on to reiterate that “no State can authorize violations of federal law” and “[t]his guidance . . . does not ‘legalize’ marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter.”26

On June 29, 2011, the second memorandum, “Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use” (the “2011 Memorandum”) was issued.27 The 2011 Memorandum reiterated the Ogden Memo’s position:

The Ogden Memorandum was never intended to shield such activities from

22 See MME Applications Received, DEP’T HEALTH & HUM. SERV.; NEV. DIVISION PUB. & BEHAVIORAL HEALTH, http://mhds.nv.gov/MedicalMarijuana/MMEMsByJurisdiction.pdf (last visited Aug. 19, 2015).
24 Id. at 1.
25 Id. at 1–2.
26 Id. at 2.
federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.28

On August 29, 2013, the third and final memorandum offering “Guidance Regarding Marijuana Enforcement” (the “2013 Memorandum”) was issued.29 The 2013 Memorandum again reiterated, “marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.”30 Next, the 2013 Memorandum goes on to list eight federal law enforcement priorities where the Department of Justice will focus its limited investigative and prosecutorial resources in all states:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.31

The 2013 Memorandum further stated, “[T]he federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of

28 Id. at 2.
30 Id. at 1.
31 Id. at 1–2.
their own narcotics laws. . . . [T]he Department has left such . . . localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.\textsuperscript{32}

The 2013 Memorandum then went on to reverse the position the DOJ took in the 2011 Memorandum:

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. . . . In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

. . . .

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system, may allay the threat that an operation’s size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. . . . The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.\textsuperscript{33}

The 2013 Memorandum finally went on to say “[t]his memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law.”\textsuperscript{34}

Based on the 2013 Memorandum released by the federal government, it would seem that although the Controlled Substances Act will continue to be enforced against the states, federal enforcement and investigations will focus

\textsuperscript{32} Id. at 2.
\textsuperscript{33} Id. at 3. \textit{Compare} 2011 Memorandum, \textit{supra} note 27, at 2 (stating the Department of Justice’s firm stance on the illegality of marijuana, regardless of its legality under state law), \textit{with} 2013 Memorandum, \textit{supra} note 29, at 3 (stating an enforcement policy toward marijuana that is somewhat more deferential to a state’s respective laws concerning the substance).
\textsuperscript{34} 2013 Memorandum, \textit{supra} note 29, at 4.
more on illicit marijuana activities, and less so on those involving legalized and state regulated medical marijuana operations. In spite of the eight priorities listed in the 2013 Memorandum, the Drug Enforcement Administration (DEA) raided two legal, Los Angeles medical marijuana dispensaries in October 2014. These medical marijuana dispensaries were supposedly in full compliance with state laws. Although the DEA would not comment on the reason for the raid, U.S. Deputy Attorney General James Cole said in an unrelated remark that “if California medical marijuana shops want to avoid federal action taken against them, the state needs to get its ‘regulatory act together.’” However, just two months later in December 2014, Congress approved a federal spending measure, which included “a provision that effectively end[ed] the federal government’s prohibition on medical marijuana.” Section 538 of the Consolidated and Further Continuing Appropriations Act of 2015, states:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

This bill seems to codify the 2013 Memorandum’s intention of leaving states to regulate medical marijuana, but still prosecuting illicit marijuana activities. While there may be some comfort that the federal government may not interfere with the States who have legalized medical marijuana, if the federal government determines that any sort of illicit activity, such as distribution of marijuana to minors, is occurring, there may be potential interference.

While the intentions of this provision are good, it is likely that the only way to ensure protection from federal criminal and civil prosecution is through a federal legalization of marijuana. Again, it is important to note that none of

35 See id. at 3–4.
37 Id.
38 Id.
41 See id.; 2013 Memorandum, supra note 29, at 3.
42 Id.
the Department of Justice’s memoranda or this Act decriminalize or legalize marijuana. All forms of marijuana, including medical marijuana, are still very much illegal under federal law.

IV. NEVADA GAMING REGULATOR’S STANCE ON MEDICAL MARIJUANA

“For me, the issue is very simple. This is a federal crime. End of story. The analysis for me as a gaming regulator stops there. Our licensees cannot undertake a federal criminal activity.”

In 1931, the State of Nevada legalized gaming. It was not until 1955 that “the Legislature organized the State Gaming Control Board to regulate the industry,” with the creation of the Nevada Gaming Commission coming next in 1959. The regulation of gaming in Nevada has been vital to its success. The legislature has adopted various laws that strictly control gaming, the primary authority being the Nevada Gaming Control Act, codified in Nevada Revised Statute Chapter 463. The Nevada Gaming Control Act addresses “ownership, operation, licensing, financing, financial practices, penalties, fees, and taxes of gaming establishments.” The granting of a gaming license in Nevada is considered a revocable privilege and “[n]o applicant for a license . . . has any right to a license or the granting of the approval sought.” Additionally, the Nevada gaming regulation system is considered the “gold standard” in the industry. This should be kept in mind when considering why the Nevada Gaming Control Board and Nevada Gaming Commission ruled the way they did on gaming licensee involvement in medical marijuana establishments as explained below.

43 Ogden Memorandum, supra note 23, at 2; 2011 Memorandum, supra note 27; 2013 Memorandum, supra note 29, at 4.
47 Id. at 3.
48 Id.
49 Id.
50 Id.; see also Nev. Gaming Control Act, NEV. REV. STAT. § 463 (2015).
51 LEGIS. COUNS. BUREAU, supra note 46, at 3-4.
52 NEV. REV. STAT. § 463.0129(2) (2015).
A. *Nevada Gaming Control Board’s Industry Notice on Medical Marijuana Establishments*

On May 6, 2014, the Nevada Gaming Control Board released a statement regarding medical marijuana establishments in relation to gaming licensees.54 The statement authored by Nevada Gaming Control Board member Terry Johnson explicitly states that “the Board does not believe investment or any other involvement in a medical marijuana facility or establishment by a person who has received a gaming approval or has applied for a gaming approval is consistent with the effective regulation of gaming.”55 The Board reasons that “[w]hile the Nevada Legislature has made certain medical marijuana establishments legal, the Controlled Substances Act makes it illegal under federal law to manufacture, distribute, dispense or possess marijuana.”56 Additionally, the federal government has made it clear that illegal marijuana enterprises are “serious crimes that provide a significant source of revenue to criminal enterprises.”57 Finally, the statement goes on to say, “unless the federal law is changed, the Board does not believe investment or any other involvement in a medical marijuana facility or establishment by a person who has . . . applied for a gaming approval is consistent with the effective regulation of gaming.”58

The Nevada Gaming Control Board ultimately based its decision on the fact that marijuana is illegal under federal law.59 However, there seems to be some additional factors underlying their decision than what is stated in the published notice. As previously noted, gaming regulation is taken very seriously in the state of Nevada—there are many different regulations and statutes that those involved in the gaming industry must follow.60 One such statute, Nevada Revised Statute Section 463.0129, explicitly states “[t]he gaming industry is vitally important to the economy of the State and the general welfare of the inhabitants.”61 The statute goes on to say that

The continued growth and success of gaming is dependent upon public confidence and trust that licensed gaming . . . [is] conducted honestly and competitively, that establishments . . . where gaming is conducted . . . do not unduly impact the quality of life enjoyed by residents of the surrounding

55 Id.
56 Id.; see also, 21 U.S.C. §§ 801(2), 802(6), 812(c)(Schedule I)(c)(17).
57 GCB Notice, *supra* note 54.
58 Id.
59 See id.
neighborhoods... and that gaming is free from criminal and corruptive elements.\textsuperscript{62}

Next, the statute states that “[p]ublic confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments, the manufacture, sale or distribution of gaming devices and associated equipment and the operation of inter-casino linked systems.”\textsuperscript{63} It is clear after reading portions of this statute that anyone involved in the gaming industry in Nevada will be strictly regulated in order to maintain the legitimacy that the Nevada gaming system is expected to maintain.\textsuperscript{64} Therefore, it seems to follow that the prohibition on gaming licensees’ participation in the emerging Nevada medical marijuana industry is a direct consequence of this strict regulation mandated by the Legislature.

Another regulatory policy that seems to be underlying the Nevada Gaming Control Board’s decision regarding medical marijuana is Nevada Gaming Commission Regulation 5.\textsuperscript{65} Of particular relevance is Regulation 5.011, which states that the

The board and the commission deem any activity on the part of any licensee, his agents or employees... that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission.”\textsuperscript{66}

The regulation then goes on to list “acts or omissions [that] may be determined to be unsuitable methods of operation” and thus grounds for disciplinary action.\textsuperscript{67} The “act or omission” that seems to be at issue here is the “[f]ailure to comply with or make provision for compliance with all federal, state and local laws and regulations and will all commission approved conditions and limitations pertaining to the operations of a licensed establishment.”\textsuperscript{68}

Because the gaming industry in Nevada needs to be strictly regulated and gaming licensees need to be in strict compliance with all laws, it makes complete sense why the Nevada Gaming Control Board made the decision it did. However, even though the stance of the Nevada Gaming Control Board regarding medical marijuana establishments seemed very straightforward, there were still many questions from gaming licensees and their attorneys.

\textsuperscript{62} Id. § 463.0129(1)(b).
\textsuperscript{63} Id. § 463.0129(1)(c).
\textsuperscript{64} Id.
\textsuperscript{66} Id. § 5.011.
\textsuperscript{67} Id.
\textsuperscript{68} Id. § 5.011.8 (emphasis added).
B. Nevada Gaming Commission Affirms Nevada Gaming Control Board

Shortly after the Nevada Gaming Control Board released its notice, the Nevada Gaming Commission affirmed the Board’s firm stance against medical marijuana comingling with gaming businesses.69 Interestingly, while the decision of the Commission was unanimous, “three of the five [Commission] members — all attorneys — recused themselves because their law firms represented medical marijuana applicants.”70 Before affirming the Nevada Gaming Control Board’s industry notice, medical doctor and Commission Chairman Tony Alamo stated, “I am not making a strict determination on what we do with the circumstances of tenant, landlord, brother, sister, son, daughter, wife, husband, and I think it just needs to be stopped at that point and everyone needs to make their decision.”71

During the hearing, proponents of allowing individuals to hold both gaming and medical marijuana licenses said “the gaming industry in Nevada is highly regulated and licensees are best suited to handle the complex regulations of medical marijuana.”72 Opponents of the dual licensure mirrored the Nevada Gaming Control Board’s position that because federal law makes marijuana illegal, gaming licensees should not be involved.73 Also during the hearing, Clark County Commission Chairman Steve Sisolak asked for county guidance from Nevada gaming regulators “pointing out that many marijuana license applicants have some connection to the gaming business.”74

Not only did the hearing allow the Nevada Gaming Commission to reaffirm the stance of the Nevada Gaming Control Board, but it also allowed the Board to further address the issue. Hearing attendees wanted clarity on who could and could not be involved in the medical marijuana industry and specifically how the Nevada Gaming Control Board would discipline those involved.75 In response, Nevada Gaming Control Board Chairman A.G. Burnett read a statement from an email he had previously sent to Chairman Sisolak:

Whether specific activity by a specific licensee would violate state gaming laws and regulations, federal laws or implicate the policy considerations of the

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70 Id.
71 May 2014 Agenda, supra note 45, at 272, 276.
73 Id.
74 Id.
75 See May 2014 Agenda, supra note 45, at 261–62.
Board and Commission can only be determined following an investigation of the facts on a case-by-case basis along with uncountable variables dictated by how the case presents itself. Further, the Board and the Nevada Gaming Commission may act on these issues in various ways ranging from disciplinary actions to refusals to grant applications. Additionally, Chairman Burnett went on to discuss his planned interaction with the new director of the Financial Crimes Enforcement Network (FinCEN), Jennifer Shasky Calvery. Specifically he stated that he intended to explain the nature of gaming regulation in Nevada, “that it is highly regulated, that our gaming licensees are not criminals, they are not money launderers, they are not drug traffickers, as some out there in the world may want to believe.” He further stated that Nevada gaming regulators work very hard to “alleviate our federal colleagues of these potential notions” and that he “want[s] to take medical marijuana for gaming licensees off the table in that discussion.” Governor Brian Sandoval, who signed Senate Bill 374 into law, supports the gaming regulators’ position on the matter. Spokesman Tyler Klimas stated that “[t]he governor has confidence in the Gaming Control Board’s ability to properly regulate the gaming industry in Nevada.”

C. Fallout from Nevada Gaming Regulator’s Stance on Medical Marijuana

Since the release of the Nevada Gaming Control Board’s statement on medical marijuana and the Nevada Gaming Commission’s endorsement of that statement, there have already been issues within the gaming community. The Board sanctioned its first gaming licensee, slot machine route operator Nevada Gaming Partners, after it sought to provide slot machines to a Las Vegas restaurant named Crab Corner. GB Sciences Nevada LLC is a business that “was awarded one of 18 medical marijuana dispensary licenses by the Clark County Commission”—and is also eight percent owned by Sarah Familian, who happens to be the spouse of Nevada Gaming Partners’ owner. Due to Nevada Gaming Partners’ ties to medical marijuana through Sarah Familian, the Control Board forbade it from serving as a route operator for Crab Corner. Chairman Burnett said splitting the two business interests between husband and

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76 Id. at 262-63.
77 Id. at 244–45.
78 Id. at 245.
79 Id.
80 Id., supra note 69.
81 Id.
83 Id.
84 Id.
85 Id.
wife was not enough separation to satisfy the industry notice. Board Member Johnson also commented that while splitting the businesses may meet legal requirements, it “falls short of the agency’s ruling.” Familian is expected to sell her eight percent stake in GB Sciences Nevada LLC following the Gaming Control Board’s decision. The Board’s decision regarding Nevada Gaming Partners was the first time regulators ruled on a licensing matter concerning a gaming business in relation to the medical marijuana industry. Chairman Burnett said the ruling on Nevada Gaming Partners was intended to “send a message” to Nevada’s gaming industry.

It is currently unclear what this ruling means for Nevada Gaming Partners’ 40 other route operations. “Las Vegas gaming attorney Jennifer Roberts, who represents Nevada Gaming Partners, said GB Sciences [Nevada LLC] does not yet have a license for a dispensary and has not conducted any medical marijuana sales.” Roberts told the Control Board, “‘I hope this wouldn’t affect this gaming license,’ . . . ‘[n]o business has been conducted and nothing illegal has taken place.’”

1. Other Potential Gaming Licensee Conflicts

“Several of the [other] 18 dispensary licenses awarded by Clark County have owners with ties to the casino industry.” For example, Troy Herbst is a 10 percent owner of dispensary license recipient Clinic Nevada D1 LLC, as well as a former partner in the slot machine route operator JETT Gaming. Herbst, whose father and brothers own JETT Gaming, forfeited his role with the company because he wanted to instead focus on his partial stake in Clinic Nevada D1 LLC. Brian Greenspun, the owner of the Las Vegas Sun, sold his shares of Greenspun Gaming LLC and G.C. Investments—partial owners of various Las Vegas casino properties—to family members.” It appears the reason for this sale is Greenspun’s role with Integral Associates, which is

86 Id.
87 Id.
88 Gaming Board Pot Stance, supra note 69.
90 Slot Operator Sanctioning, supra note 82.
91 Id.; Gaming Board Pot Stance, supra note 69.
92 Slot Operator Sanctioning, supra note 82.
93 Id.
94 Id.; see also Gaming Board Pot Stance, supra note 69.
95 Gaming Board Pot Stance, supra note 69.
97 Gaming Board Pot Stance, supra note 69.
seeking to establish a dispensary in Henderson. Additionally, Barry Moore, “who has restricted gaming licenses for several taverns... may sell the businesses so his wife can hold onto her ownership in GB Sciences.” The Nevada Gaming Control Board and the Nevada Gaming Commission have not yet issued any disciplinary action against any of these companies and it is unclear if they intend to do so.

D. Changes to Gaming Licensee Application Process

In order to weed out gaming licensee applicants who are involved in the medical marijuana industry and to avoid potential conflicts, such as those described above, the Nevada Gaming Control Board has amended part of its license application process. In February 2015, the Board revised its “Personal History Record” to include questions on medical marijuana involvement. The “Personal History Record” is a form that every applicant, including corporate officers, directors, members and equity holders, must fill out to begin the licensing application process. The revised “Personal History Record” asks the three following questions:

Have you or your spouse ever made an application for, or held, any Marijuana related license, permit or certification, in any jurisdiction, including but not limited to the following: dispensaries, cultivation, production, laboratories, retail, product manufacture or any other type of marijuana related approvals? If you or your spouse ever applied and the application was granted, denied, returned by the licensing agency for any reason, withdrawn or is currently pending answer Yes to this question.

Have any of the Marijuana related licenses, permits or certifications applied for, or held by you or your spouse, as identified in the previous question ever been denied, suspended, revoked or subject to any conditions in any jurisdiction?

Have you or your spouse ever made any loan which was used to finance a Marijuana related operation, license, permit or certification, in any jurisdiction?

It is clear from these new additions to the “Personal History Record” that the

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98 Id.
99 Id.
100 No pun intended.
103 Form 4: Personal History Record, supra note 101.
Nevada Gaming Control Board is standing firm on their position concerning gaming licensee involvement in medical marijuana. These questions should also give gaming licensees a bit more guidance as to what is allowed when it comes to medical marijuana involvement by gaming licensees. For example, whereas the Nevada Gaming Control Board’s May 6, 2014 notice only addressed persons who have applied or received a gaming license these new questions now appear to explicitly affirm that involvement by one’s spouse in a medical marijuana establishment may also be grounds for license denial. It can be argued, however, that based on the Nevada Gaming Partners decision discussed above, all gaming licensees should have already been aware of the implications of spousal involvement in a medical marijuana establishment.

V. POTENTIAL ISSUES FOR CASINOS

As discussed above, one of the most obvious issues medical marijuana is causing in the gaming industry is in regards to licensing and suitability. However, it can be expected that casinos will likely face other issues as a result of legalized medical marijuana. Some of these other potential controversies may concern licensees’ employees and guests, as well as the federal government.

A. Employee Issues

Nevada Gaming Regulators have made clear that gaming licensees should not be involved with medical marijuana, but they have not yet addressed if licensees’ employees may have any involvement, either directly with medical marijuana establishments or as users of medical marijuana. In 2012, 170,206 Nevadans were employed in casinos with gross gaming revenues in excess of $1 million. Currently, there are 8,055 medical marijuana cardholders in Nevada and that number is expected to reach 50,000 by the end of 2015. It seems that if one of the 170,206 casino employees does not already have a

104 See id.; supra Part IV.A.
105 See GCB Notice, supra note 54.
106 See Form 4: Personal History Record, supra note 101.
107 Supra Part IV.C–D.
109 Id.
110 See supra Part IV.A–B.
medical marijuana card, it is only a matter of time before they do.

But what are casinos supposed to do about employees with medical marijuana cards? Because marijuana is still illegal under federal law, one option may be for casinos to completely bar marijuana use by its employees. While this seems like a fairly straightforward option on first glance, this may not be the case. Some attorneys believe that a full ban on medical marijuana, even for those who are legally authorized by the state to use it, could lead to potential wrongful discrimination lawsuits arising from termination of employees, particularly those who only use marijuana outside of work hours. However, many gaming attorneys believe this type of lawsuit would face difficulty getting traction because as Mark A. Clayton, a gaming shareholder with Lionel Sawyer & Collins, points out “the Nevada Supreme Court has consistently held for the Nevada Gaming Commission’s discretion.” It seems likely that gaming regulators will take the same stance on employees that they have taken with licensee involvement in the marijuana industry.

This will undoubtedly be a large concern for not only the casino industry, but for employers of all types. Jacquelyn Leleu, a Nevada-based employment law partner with McDonald Carano Wilson LLP, addressed this area in the November 2014 edition of Nevada Lawyer magazine. In her article *Dazed and Confused: An Employer’s Perspective on the Not-Entirely-Cut-and-Dried Rules of Medical Marijuana in the Workplace*, Leleu asserts that under NRS 453A.800(2), employers are “not required to allow the medical use of marijuana in the workplace.” The article then goes on to interpret NRS 453A.800(3), which states that an employer is not required to:

modify the job or working conditions of a person who engages in the medical use of marijuana that are based upon the reasonable business purposes of the employer but the employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card, provided that such reasonable accommodation would not: (a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or (b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.

How medical marijuana will affect the workplace is still up in the air—this is an area that has not yet been addressed by courts, leaving many different “what

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114 Id.
115 Id.
117 Id.
if?” scenarios. As the article points out, casinos, and employers generally, should

review their policies and practices relating to drug testing and medical marijuana, and train their supervisors and other management personnel to recognize potential issues. Furthermore, if an employer wants to take adverse action against an employee because of his or her off-duty marijuana use, and the employee has a valid medical marijuana registry card, the employer should tread lightly and immediately seek counsel . . . .119

However, given the Nevada gaming regulators “no means no” attitude towards gaming licensees’ involvement with medical marijuana, it seems this will be the case with employees of gaming licensees as well. Therefore, until these issues are more fully addressed by gaming regulators and the courts, it seems wise to take the more conservative approach of prohibiting marijuana use by employees.

B. Guest Issues

Another area of concern for casinos is the potential for litigation resulting from denying guests the right to use medical marijuana on casino grounds. Such a suit has already been filed in New Jersey state court after a New Jersey casino, the Revel Casino Hotel, refused to allow a medical marijuana cardholder to use marijuana at their establishment.120 The plaintiff claimed that when he was denied public accommodation, the Revel Casino Hotel violated New Jersey’s Compassionate Use Medical Marijuana Act and New Jersey’s Law Against Discrimination121 The plaintiff further argued “that there [was] no legal prohibition against smoking medical marijuana in . . . New Jersey casino[s],” specifically noting that “casinos are exempt from New Jersey’s Smoke-Free Air Act, which specifically allows for the smoking of tobacco and ‘any other matter that can be smoked’ on casino premises.”122 Many attorneys agree “guests’ alleged rights to light up or ingest medical marijuana on casino premises is among the dicier matters that casinos and regulators must grapple with.”123

Upon first glance it appears this same issue may arise in Nevada because like New Jersey, Nevada’s Clean Indoor Air Act does not apply to gaming areas of casinos, meaning that smoking is allowed in these areas.124 However, unlike New Jersey’s statute that applies to “any . . . matter that can be be

120 Rodriguez, supra note 108.
121 Id.
122 Id.
123 Id.
smoked,” the Nevada Clean Indoor Air Act applies only to tobacco products and does not address marijuana let alone other products. Additionally, it appears that under Nevada’s Medical Use of Marijuana statute, anyone who possesses marijuana in “[a]ny public place or in any place open to the public or exposed to public view” will not be exempt from state prosecution. This may avoid problems like the ones experienced in New Jersey, but this does not address whether medical marijuana would be allowed in other areas of casinos such as private hotel rooms inside casinos. So while this matter has not yet been directly addressed, it appears Nevada casinos have less to worry about than New Jersey casinos. Nonetheless, this should still be an area of concern all gaming establishments are made aware of.

C. Federal Government Involvement and Money-laundering

One huge issue facing the medical marijuana industry is what to do with all the cash they take in each week. While this may seem like a problem with an obvious solution—just take the money to a bank—the answer is not that simple. States are finding that nearly all of the nation’s banks will not accept money from marijuana sales for fear that federal authorities will shut the banks down. Since marijuana is still a Schedule I drug, any money even indirectly associated with the sale of marijuana being accepted by a bank could result in that banking institution being shut down for violating money laundering laws. Even though the Justice Department no longer seems to have the authority to interfere with medical marijuana businesses operating legitimately under state law, those in the banking industry say “nothing short of Congress removing marijuana from the controlled substances list or providing states a safe haven from the Controlled Substances Act will remove bankers’ fears.”

Essentially, until the federal law changes, banks want no part in medical marijuana, a sentiment that seems to mirror that of Nevada gaming regulators. At the Bank Secrecy Act Conference held in Las Vegas in June 2014, federal regulators addressed the gaming industry about medical marijuana concerns. The Bank Secrecy Act “requires U.S. financial institutions to

125 See Rodriguez, supra note 108.
128 Jeffrey Stinson, States Find You Can’t Take Legal Marijuana Money to the Bank, HUFFINGTON POST (Jan. 5, 2015, 10:59 AM), http://www.huffingtonpost.com/2015/01/05/marijuana-money_n_6416678.html.
129 Id.
130 Id.
131 See 2013 Memorandum, supra note 29, at 3.
132 Id.; supra note 128.
133 See id.; supra Part IV.B–C.
134 Nathan Halverson, Feds Warn Casinos to Turn Away Gamblers with Medical
assist U.S. government agencies to detect and prevent money laundering.”¹³⁵
At the Conference, federal regulators indicated that “U.S. casinos . . . cannot
accept bets from people working in the medical marijuana industry — unless
these gamblers pass an extensive background check and have their bets
regularly monitored by the federal government.”¹³⁶ This means that casinos are
either required to turn these gamblers away or “implement highly invasive and
expensive procedures to monitor these gamblers.”¹³⁷ These procedures are the
same ones the banking industry is directed to use that cause the banks to
especially blacklist anyone involved in the medical marijuana business from
using their services.¹³⁸ Those in the banking industry believe that even if they
strictly comply with these guidelines they are still open to both criminal and
civil prosecution for working with a business in the marijuana industry.¹³⁹
Since banks and casinos are required to comply with the same guidelines, it
only makes sense that casinos would react the same way banks have—by
turning away people who work in the state-sanctioned marijuana industry.¹⁴₀

VI. HOW OTHER JURISDICTIONS HAVE DEALT WITH MEDICAL MARIJUANA AND
GAMING

Currently, 23 states, Washington D.C., and Guam have legalized
comprehensive medical marijuana programs and an additional 17 states allow
for the “use of ‘low THC, high cannabidiol (CBD)’ products for medical
reasons in limited situations or as a legal defense.”¹⁴¹ Additionally, Colorado,
Washington, Oregon, Alaska, and Washington D.C. have also legalized
marijuana for recreational use.¹⁴² Of the states with some form of legalized
marijuana, all but Hawaii and Utah have legalized gambling.¹⁴³ Therefore, it
will not be long before the marijuana and gaming industries collide in many

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¹³⁶ Halverson, supra note 134.
¹³⁷ Id.
¹³⁸ Id.
¹³⁹ Id.
¹⁴⁰ Id.
states across the United States.

It should be noted, however, that many consider Nevada’s gaming regulation system to be the best in the world. Thus, if and when gaming and marijuana intersect in other jurisdictions, gaming regulators from those jurisdictions would likely look to how Nevada regulators have dealt with the issue. It should also be noted and kept in mind that the gaming industry in Nevada is the largest in the nation, bringing in $10.860 billion in gross casino gaming revenue and $868.60 million in gaming tax revenue in 2012. Therefore, there is even more at stake in Nevada than in other jurisdictions because gaming is the primary source of revenue for the state. That being said, it is still a useful exercise to examine how other jurisdictions have dealt with the challenges Nevada is currently facing.

A. Native American Reservations

A very interesting realm in which gaming and marijuana have intersected is on Native American reservations. On October 28, 2014, the United States Department of Justice, Executive Office for United States Attorneys, issued a memorandum titled, “Policy Statement Regarding Marijuana Issues in Indian Country” (the “2014 Memorandum”). The 2014 Memorandum was written in response to tribes’ request for guidance on the United States Attorneys’ offices’ enforcement of the Controlled Substance Act on tribal lands. The 2014 Memorandum reiterated the eight priorities of federal law enforcement listed in the 2013 Memorandum. The 2014 Memorandum states:

Indian Country includes numerous reservations and tribal lands with diverse sovereign governments, many of which traverse state borders and federal districts. Given this, the United States Attorneys recognize that effective federal law enforcement in Indian Country, including marijuana enforcement, requires consultation with our tribal partners in the districts and flexibility to confront the particular, yet sometimes divergent, public safety issues that can exist on any single reservation.

Nothing in the Cole Memorandum [2013 Memorandum] alters the authority or jurisdiction of the United States to enforce federal law in Indian Country. Each

148 Id. at 1–2.
149 Id. at 2; see also 2013 Memorandum, supra note 29, at 1–2.
United States Attorney must assess all of the threats present in his or her district, including those in Indian Country, and focus enforcement efforts based on that district-specific assessment. The eight priorities in the Cole Memorandum will guide United States Attorneys’ marijuana enforcement efforts in Indian Country, including in the event that sovereign Indian Nations seek to legalize the cultivation or use of marijuana in Indian Country.\footnote{2014 Memorandum, supra note 147, at 2.}

The 2014 Memorandum seems to imply that as long as tribes steer clear of the eight activities federal law enforcement is primarily concerned with, such as the distribution of marijuana to minors and marijuana possession or use on federal property,\footnote{Id.; see also 2013 Memorandum, supra note 29, at 1–2.} the federal government will likely avoid interfering with a reservation or tribe’s decision to legalize the cultivation or use of marijuana.\footnote{See 2014 Memorandum, supra note 147, at 2.} Therefore, tribal lands that choose to legalize marijuana will be treated much like the states that have done so.\footnote{See Julie Bykowicz, Native Americans Perplexed by Obama’s Latest Marijuana Gift, BLOOMBERG POLITICS (Dec. 22, 2014, 2:50 AM), http://www.bloomberg.com/politics/articles/2014-12-22/native-americans-perplexed-by-obamas-latest-marijuana-gift.}

Although it is unclear if any tribes will be legalizing marijuana, there is speculation that it will happen and will be “a potential source of revenue, similar to . . . casino gambling, which ha[s] brought a financial boon to reservations across the country.”\footnote{Phelps, supra note 146.} One of the few tribes that have publicly expressed interest in legalizing marijuana, the Mohegan Indian Tribe of Connecticut, was also a pioneer in the gaming industry.\footnote{Bykowicz, supra note 153.} Although the Mohegan tribe is a sovereign nation and generally not subject to state laws, the federal government required the tribe to sign a compact with the State of Connecticut regarding their casinos.\footnote{Matthew Sturdevant, Mohegans Review Pot as Economic Opportunity, HARTFORD COURANT (Dec. 11, 2014, 7:26 PM), http://www.courant.com/health/hc-casino-mairjuana-tribes-announcement-20141211-story.html.} “As a result, the gaming enterprises for [the] tribe are subject to some Connecticut laws, such as the times when alcohol can be served.”\footnote{Id.} If the tribes decide to incorporate marijuana in their casinos, it seems likely that the federal or state government might be more inclined to interfere with these operations. Again, it remains unclear how marijuana will affect tribal gaming, but it seems evident that at some point it will.

\section*{B. Arizona}

In 2010, Arizona voters legalized medical marijuana.\footnote{NAT’L CONF. OF ST. LEGISLATURES, supra note 141.} The Arizona Department of Health Services estimated that marijuana sales yielded estimated
gross revenue of about $110 million in 2014.159 Currently, Arizona does not have statewide-legalized gaming, but it does have tribal casinos.160 In 2014, Arizona Indian casinos reported gross gaming revenue of over $1.8 billion.161 Arizona tribal gaming regulators have taken a similar stance to Nevada gaming regulators regarding their gaming licensees’ involvement in the medical marijuana industry.162 According to Heidi McNeil Staudenmaier, a Phoenix-based gambling law partner with Snell & Wilmer LLP, the tribal gaming regulators stance “essentially boils down to: ‘[i]f you’re going to have any involvement with [a medical marijuana business], we’re not going to look very favorable on you as a licensee.’”163

C. Colorado

Not only is medical marijuana legal in Colorado, but as of 2012, so is its recreational use.164 According to some estimates, Colorado can expect around $50 million annually in marijuana sales revenue.165 By comparison, in 2012 the State of Colorado earned $766.25 million in gross casino gaming revenue and $104.26 million in gaming tax revenue.166 Interestingly, the divisions responsible for regulating gaming and marijuana in Colorado both fall under the purview of the same umbrella authority: the Department of Revenue’s Enforcement Division.167 So not only is the same agency in charge of regulating both gaming and marijuana, but the same division is as well.168

So far it does not appear that medical marijuana has had a direct impact on the gaming industry. However, some Colorado towns have decided to turn their attention away from gambling to focus on marijuana instead.169 DeBeque,  

162 Rodriguez, supra note 108.
163 Id. (alteration in original).
164 See State Recreational Marijuana, supra note 142.
166 State of the States, supra note 111, at 11.
168 See id.
Colorado became one of the first Colorado municipalities to approve recreational marijuana after Colorado lawmakers refused to allow gambling in the town. DeBeque was trying to bring a casino to its community, but the State legislature denied adding the town to the list of approved gaming municipalities. The Mayor of DeBeque “said that while the town moves ahead on marijuana, it is still going to pursue gambling.”

VII. POTENTIAL SOLUTIONS

The ultimate solution to the problems and challenges outlined in this note would be the legalization of marijuana at the federal level, but that is very unlikely to happen anytime soon. However, another more obvious solution may be the federal decriminalization of marijuana. In March 2015, during an interview with Vice Media, President Barack Obama said Congress might change federal laws that continue to make marijuana illegal if enough states reform their own marijuana laws. Currently marijuana is classified as a Schedule I drug, which is defined as a drug “with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence.” In early March 2015, Senators Cory Booker, Democrat of New Jersey; Rand Paul, Republican of Kentucky; and Kristen Gillibrand, Democrat of New York; introduced a bill—The Compassionate Access, Research Expansion and Respect States (CARERS) Act—which would reclassify marijuana from a Schedule I to a Schedule II drug. Schedule II drugs are defined as “drugs with a high potential for abuse, less abuse potential than Schedule I drugs, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous.” In addition to changing the classification of marijuana, the bill also aims to give

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170 Id.
171 Id.
172 Id.
173 Id.
176 Obama’s Stance on Marijuana, supra note 174; Matt Ferner, Senate Bill Would Effectively End the Federal War on Medical Marijuana, HUFFINGTON POST (Mar. 11, 2015, 1:59 AM) http://www.huffingtonpost.com/2015/03/10/end-federal-war-on-medical-marijuana_n_6836482.html [hereinafter Senate Marijuana Bill].
177 Drug Scheduling, supra note 175.
protection from federal prosecution.\textsuperscript{178} Under this law, patients, doctors, and businesses will be allowed to participate in their states’ medical marijuana programs without fear of being charged with a federal crime.\textsuperscript{179}

Under this new legislation, the Controlled Substances Act would be amended so that states can set their own medical marijuana policies. It would make clear much of the legal gray area that exists between federal guidance, congressional intent and state laws on medical marijuana—not by forcing states to legalize medical marijuana, but by protecting the states that do decide to legalize.

Despite the programs currently in place in states that have legalized marijuana in some form—the sale, possession, production and distribution of marijuana all remain illegal under federal law. For years, the states that have legalized marijuana have seen an aggressive crackdown under the Obama administration, with hundreds of raids on dispensaries in places such as California and Colorado, many of which were operating in compliance with state law. The states that have legalized have only been able to do so because of federal guidance urging prosecutors to refrain from targeting state-legal marijuana operations.\textsuperscript{180}

A day after the bill was introduced to the Senate, Dean Heller, Republican of Nevada signed on to support the bill and was later joined by Senator Barbara Boxer, Democrat of California.\textsuperscript{181}

Another solution would be if Congress could remove the criminal stigma of medical marijuana.\textsuperscript{182} Nevada Representative Dina Titus is co-sponsoring an amendment to a resolution “that halts Justice Department interference when states implement medical marijuana laws.”\textsuperscript{183} Titus said, “[m]y feeling is the state has allowed it and I think any legitimate businessman should be eligible to be part of the industry . . . . ‘Who is more vetted than anyone in gaming?’”\textsuperscript{184} Proponents of allowing people to hold both gaming and medical marijuana licenses mirror this sentiment.\textsuperscript{185}

Whatever the future may hold, Nevada gaming regulators have made themselves very clear when it comes to gaming licensee involvement in the medical marijuana industry. As long as marijuana is illegal under federal law, there will be no involvement by gaming licensees; no means no. Despite the very clear direction from Nevada gaming regulators, the gaming industry wants continued guidance on how to proceed with other potential “involvement” with

\textsuperscript{178} Senate Marijuana Bill, supra note 176.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{182} Gaming Board Pot Stance, supra note 69.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} See Lopardi, supra note 72.
medical marijuana.

The final stance can be summarized as this: many questions will arise and be addressed on a case-by-case basis as licensees and regulators tread this unfamiliar territory, but, at the end of the day, a gaming licensee has a duty to abide by all federal, state, and local laws. As long as marijuana is illegal there should be no involvement. If and when gaming licensees have questions about involvement with medical marijuana they should keep in mind that having a gaming license in Nevada is a privilege and not a right. If licensees want to jeopardize their gaming license for a chance to compete in a new and emerging field, they should proceed with caution; Nevada gaming regulators will not be changing their minds about marijuana until the federal government has done the same.