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STANDING COMMITTEE ON JUDICIAL ETHICS
AND ELECTION PRACTICES

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PROPRIETY OF A NEVADA JUDGE PARTICIPATING IN A CASE INVOLVING THE VALIDITY OF ANY LAW CHANGING THE RATE FOR THE TAX ON GROSS GAMING REVENUE WHERE THE JUDGE'S NON-PARTY FAMILIAL MEMBERS ARE INVOLVED IN VARIOUS TRANSACTIONS WITH OR HOLD CERTAIN PROPERTY INTERESTS RELATED TO A LICENSED NON-RESTRICTED GAMING LICENSEE.

ISSUE

May a Nevada judge preside in a case involving substantive challenges to the validity of a proposed statute changing or an existing statute prescribing the rate for the tax on gross gaming revenue given the judge is related to persons who are not parties to the litigation but who are involved in certain transactions with or hold certain property interests associated with the operations of a licensed non-restricted gaming licensee?

ANSWER

Yes; unless the judge knows that the affected family member has more than a *de minimis* interest that could be substantially affected by the proceeding.

FACTS

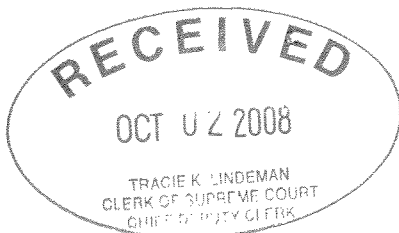
ABC Company owns and operates a licensed non-restricted gaming

establishment (the "Casino Licensee"). A person owns a 50 percent interest in the equity stock of the Casino Licensee and is directly related by marriage or within the third degree of relationship to Judge Smith. This interest we refer to as the "Casino Ownership Interest."

Red and Blue Company owns a parking garage and leases on a month-to-month basis the parking garage to the Casino Licensee. A person who holds a beneficial interest in the equity ownership of Red and Blue Company is directly related by marriage or within the third degree of relationship to Judge Smith. We refer in this opinion to this interest as the "Parking Garage Lessor Interest."

XYZ Company holds a promissory note for a loan payable by the Casino Licensee. Two persons that hold a beneficial interest in the equity ownership of XYZ Company are directly related by marriage or within the third degree of relationship to Judge Smith. In this opinion we refer to these interests as the "Lender Interests."

Judge Smith inquires whether, consistent with Nevada Code of Judicial Conduct Canon 3E(1)(d)(iii), the Parking Garage Lessor Interest, the Lender Interest or the Casino Ownership Interest present circumstances warranting the jurist's disqualification in a case that challenges the validity of a proposed change in statute or an



existing statute prescribing the rate for the tax on gross gaming revenue (the "Gaming Tax Litigation").

DISCUSSION

The Committee is authorized only to render an opinion that evaluates compliance with the requirements of the Nevada Code of Judicial Conduct. *Rule 5(4)(d) Governing the Standing Committee On Judicial Ethics & Election Practices*. Accordingly, this opinion is limited by the authority granted by Rule 5.

Canon 3E(1)(d)(iii) of the Nevada Code of Judicial Conduct states:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person . . . is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding

A financial interest that is disqualifying is one that is "direct, real and certain," and interests that are only contingent "or that may ripen in the future" are insufficient. *See* J. Alfini, S. Lubet, J. Shaman & C. Gegh, *Judicial Conduct & Ethics* § 4.12A, at 4-62 (4th ed. 2007).

We begin our analysis of the specific issue presented here with a review of the tax on gross gaming revenue. That tax is generally set forth in the Nevada Gaming Control Act as follows:

[T]he Commission shall charge and collect from each licensee a license fee based upon all the gross revenue of the licensee as follows:

(a) Three and one-half percent of all the gross revenue of the licensee which does not exceed \$50,000 per calendar month;

(b) Four and one-half percent of all the gross revenue of the licensee which exceeds \$50,000 per calendar month and does not exceed \$134,000 per calendar month; and

(c) Six and three-quarters percent of all the gross revenue of the licensee which exceeds \$134,000 per calendar month.

See Nev. Rev. Stat. § 463.370(1) (2007). Importantly, the Gaming Control Act also provides that:

"Gross revenue" means the total of all:

(a) Cash received as winnings;

(b) Cash received in payment for credit extended by a licensee to a patron for purposes of gaming; and

(c) Compensation received for conducting any game in which the licensee is not party to a wager, \geq less the total of all cash paid out as losses to patrons, those amounts paid to fund periodic payments and any other items made deductible as losses by NRS 463.3715.

See Nev. Rev. Stat. § 463.0161. Accordingly, the tax on gross gaming revenue is one imposed exclusively on the licensee. Moreover, the basis for the tax is not impacted by operating expenses such as payments to lessors of property used in the gaming operation or obligations to persons holding promissory notes as security for loans or other contractual obligations.

Given the incidence and basis of the tax on gross gaming revenue, the Parking Garage Lessor Interest and the Lender Interest, whether *de minimus* or otherwise, cannot be “substantially affected” by the outcome of the Gaming Tax Litigation. An upward increase in the tax on gross gaming revenue of the Casino Licensee would impact neither the Casino Licensee’s obligation to pay the required rent due under the month-to-month lease involved nor the enforceability of the terms under that month-to-month lease. The Casino Licensee will continue to require parking facilities for its patrons regardless of the amount paid in gross revenue taxes. The outcome of the Gaming Tax Litigation, therefore, does not substantially affect the Parking Garage Lessor Interest.

Likewise, based on the facts provided, an increase in the tax on gross gaming revenue of the Casino Licensee does not change the Casino Licensee’s legal obligations under the promissory note that is the basis of the Lender Interest. The Casino Licensee’s contractual payment duty under the promissory note remains legally enforceable by its terms regardless of the rate of the gross gaming revenue tax. The outcome of the Gaming Tax Litigation, therefore, does not substantially affect the Lender Interest.

That a tax rate increase might under certain economic or financial conditions make more difficult the Casino Licensee’s rent or note payments does not mean that the outcome of the Gaming Tax Litigation substantially affects the Parking Garage Lessor Interest or the Lender Interest. The legality and enforceability of those interests remain unchanged. Under such circumstance these interests cannot be “substantively affected” by the outcome of the litigation.

A different analysis, however, is warranted regarding the Casino Ownership Interest. The Casino Ownership Interest will be directly and substantially affected by an increase in the tax on gross gaming revenue of the Casino Licensee given the incidence and basis of this tax. The tax is imposed directly on the Gaming Licensee before operating expenses and immediately reduces the total amount of revenue available for distribution to equity owners. As such, the outcome of the Gaming Tax Litigation undoubtedly could have a material influence on the value of the 50 percent equity ownership in the Casino Licensee. For that reason, and on that basis, disqualification of Judge Smith from participating in rendering a decision on the substantive issues presented by the Gaming Tax Litigation is appropriate.

CONCLUSION

A judge is properly disqualified pursuant to Nevada Code of Judicial Conduct Canon 3E(1)(d)(iii) from participating in a case that challenges a proposed change in statute or an existing statute prescribing the rate for the tax on gross gaming revenue where the jurist has a family member directly related by marriage or within the third degree of relationship who beneficially holds 50 percent of the equity ownership of an entity that owns and operates a licensed non-restricted gaming establishment subject to such tax.

REFERENCES

Rule 5(4)(d) Governing the Standing Committee On Judicial Ethics & Election Practices; Canon 3E(1)(d)(iii); Nev. Rev. Stat. § 463.0161, .370; J. Alfini, S. Lubet, J. Shaman & C. Gekh, Judicial Conduct & Ethics § 4.12A, at 4-62 (4th ed. 2007).

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.

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