

INTERNET GAMBLING AND THE LAW

Remarks by I. Nelson Rose, B.A., J.D.¹

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INTRODUCTION BY PROFESSOR MELANIE HOLLOWAY²

Today, we have Professor Nelson Rose, a professor of law at Whittier Law School. Professor Rose is an internationally known scholar, writer and public speaker, and is recognized as one of the world's leading authorities on gaming law. A Harvard Law School graduate, he's taught gaming law to the FBI and at Whittier Law School, the University of Nevada Reno, University of Macau, and at colleges in China, Spain and France.

Professor Rose is the co-author of *Internet Gaming Law and Gaming Law: Cases and Materials*. He is co-Editor-in-Chief of the *Gaming Law Review*. He is best known for his columns in the landmark 1986 book, *Gambling and the Law*. He also has a registered trademark on "Gambling and the Law." Professor Rose has testified as an expert witness and acted as a consultant to government and industry. He has a website, which is gamblingandthelaw.com. So, it is my pleasure to introduce Professor I. Nelson Rose.

REMARKS BY PROFESSOR I. NELSON ROSE

Thank you so much. Thanks for the introduction and also thank you for inviting me. I flew out from Los Angeles yesterday. I'm still on west coast time. So I will be waking up in a couple of hours, but this will go OK. I do actually write a monthly column. In fact, it now is running more than once a month, called "Gambling and the Law," and if anybody who wants to be in my mailing list, just send me an email. I do updates and I used to do a report on every single state, but I have given up. There's just too much going on. The other thing I

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want to put a plug in for is the *Gaming Law Review*. I am co-Editor-in-Chief and we are always looking for manuscripts dealing with gambling, especially from law students and practicing lawyers. You do not need many footnotes and it does not have to be long. Check it out. It's the *Gaming Law Review*.

What I want to do today is to figure out why we are even dealing with Internet gambling and where it is going to go. I'm going to go back three hundred years or so, bring it up to today, and make some actual, firm predictions of where I think we are going to go in the future. We need to start with where we began so we can figure out where we're going. One way to look at the law is simply to look at the history.

We are in what I call the third wave of legal gambling. This is the third time in American history that gambling has spread everywhere. It was easier to buy a lottery ticket in George Washington's time than it is to buy a state lottery ticket today. It all came crashing down in scandal and ruin in the 1820s and 1830s. The scandal was that the people who were running the lotteries tended to never have the drawings. Although, when George Washington had a lottery, he did have the drawing. But a lot of other people just kept selling tickets until they had enough money, and then left. They cut out. The ruin seems to cycle, and the crash comes when you have widespread scandal and some sort of reawakened morality. In the 1820s and 1830s, it was Andrew Jackson - Jacksonian morality. Although President Andrew Jackson himself was a big poker player, a gambler, there was a feeling - sweep out the rich and corrupt, and bring in the common man. It got to the point that by the beginning of the Civil War, all of the casinos had been outlawed by statute, all of the lotteries had been outlawed. Only horse racing remained.

Then came the second wave. The South was devastated by the Civil War and looked for an easy way to raise money. They had Reconstruction Constitutions so that they could bring in lotteries again. In regards to the Western Frontier, whenever you have a frontier society, you have gambling. Sometimes the gambling is simply tolerated, sometimes it's legalized. Then came the crash again, and by the way, look at the legal debris. The feeling against lotteries was so strong with the crash of the first wave, that they said we will never have lotteries again, and they wrote it in the Constitutions, which is as strong as you can get. These constitutional changes occurred both on the East Coast and the West Coast. The constitutions of Wisconsin, Texas, Nevada, and California say there will never be a lottery. Now the question becomes: What does that mean 150 or 200 years later?

Then came the crash of the second wave. The scandal was the Louisiana lottery scandal of the 1890s. This was a legal lottery. They had bought the Louisiana legislature fair and square, and were selling

tickets everywhere. States like New York had passed statutes, still on the books, which said that it's a crime to sell a lottery ticket in New York, even if the lottery is legal where the drawing is being held. But they couldn't stop it. The states called on the federal government for the first time to get help. That's why we have federal laws on the books, for example, that prevent someone in Virginia from sending a lottery ticket to someone in Nevada. You would be committing a federal misdemeanor because you are sending a lottery ticket through the United States mail, and we don't want the people of Nevada to hear about the evil gambling in Virginia.

The crash was so great that by 1909, the territories of Arizona and New Mexico were told that if they wanted to become states, they had to close their casinos. Nevada closed its casinos. There were no casinos in the United States. All the of state lotteries were gone. There were only three places with large commercial gambling, which was racing in New York, Maryland, and Kentucky. And in 1910, New York outlawed betting on horse racing.

The third wave started with the repeal of the Prohibition. We had a complete prohibition on gambling, and a lot of the other Victorian era laws were written into statute. My favorite is actually the Harrison Drug Act, which is the death penalty for first time users. But the Depression hit and the Prohibition started to be repealed. Unlike the prohibition on alcohol, it wasn't a Federal Constitutional amendment; it was by the various states. Gambling comes under the police powers of the states, so the repeal is going to be state by state. Before I show you what the third wave that we are in right now looks like, remember in the 1840s, there were constitutional prohibitions on what it meant to be a lottery. Mississippi legalized charity bingo. It goes up to the Supreme Court and the question is: you have a state constitutional prohibition on lotteries, how can you legalize charity bingo? The question is, is bingo a lottery? And the Supreme Court taking a very progressive view said, we have a living modern Constitution, and basically, let's ask people. Nobody thinks that when they are playing bingo that they are playing lotteries; therefore you can have charity bingo. The next year they put in casinos. They still don't have a lottery, by the way.

A completely different result occurred in Missouri. Here, the question again was, can you legalize gambling with a state-wide constitutional prohibition on lotteries? It actually was riverboat casinos, but in the statute, one of the games they could play was bingo. So the Supreme Court of Missouri says bingo is a lottery. Their definition is any game that is 100% chance is a lottery. So therefore, you can't have bingo and you can't have slot machines. Therefore in Missouri, they could not have riverboat casinos. They finally amended the Missouri Constitution so they could finally bring them in. What we are dealing

with is this legal debris: how do we interpret something that happened 150 years ago?

This is the third wave. The third wave started with the Depression. Nevada re-legalized casinos. We are going to see that New Hampshire rediscovered the state lottery and then New Jersey starts bringing in casinos. But let's start with 1961. The major barrier to Internet gambling is the Wire Act. It was passed in 1961, literally to cut the wire. The wire was a telegraph wire that illegal bookies used so that they would know the results of horse races. That's the major anti-Internet gambling statute that still is on the books. At the time, there were no state lotteries in the United States. There was basically no commercial gambling in the United States. New Hampshire rediscovered the state lottery in 1963, and they thought they would be able to eliminate having to impose a personal income tax. It was a failure. New York was the second because eighty percent of the New Hampshire lottery users were from New York, Massachusetts and Connecticut. New York was a failure. New Jersey, the third state, did it right. The drawings were, instead of once a year, once a week, once a day, every five minutes, every instant.

Notice that when you have a breakthrough, like when Florida became the first southern state get a lottery, the neighboring states realize how much of their money is going across state lines. So, the second southern state was Louisiana, then Texas, then the other states followed. By the way, I gave this same talk to the National Science Foundation and I realized it also looks like a plague.

In 1996, they created a National Gambling Impact Study Commission. One of the things it said was we should have a complete moratorium. Georgia was very much in favor of it because they were getting all that money from all the other southern states. In 1998, there was a Republican sweep. The only two incumbent Republican Governors who lost were the Governors of South Carolina and Alabama, and Democrats said that we needed to bring in the state lottery for education. And the Republicans lost and the Democrats were elected. So we thought we knew, of course, what would happen. Well, it didn't happen. In a special election the next year, Alabama voted against bringing in a state lottery. It was a terrible, nasty fight. The churches led it and it was all about the evils of bringing in the state lottery, the evils of legal gambling, funded by the casinos in Mississippi. Then the trend reemerged. South Carolina and Tennessee voted in a state lottery.

One of the things you should notice, when you look at the map, is that it is a little light. Yes, the few states without state lotteries would be very happy if they could get them, and their neighbors would be very unhappy. But look who doesn't have a state lottery: Nevada. Nevada actually had a proposal to bring in a state lottery. Guess

where you would have to go to buy a lottery ticket? The casinos said that even forcing people to come in to buy a lottery ticket would still be competition. Looking at the big trends, the manifestation of large social movements occurred in the third wave.

One of the things that happened is this change in what *is* gambling. Three hundred years ago, gambling was seen as a sin that you literally could not discuss in polite society. There were no books on how to gamble, for example, just like there are no books today on how to run a legal brothel in the state of Nevada. There are legal questions regarding brothels: are the working prostitutes employees or independent contractors? Presumptively, they're independent contractors, but there are no textbooks on that. Then, about three hundred years ago, it changed and the view became that gambling is a vice, not a sin. The implications for the law are great because instead of just prohibiting it, we can put in on a mountain top, we can put it on a boat and surround it by holy water. We can basically legalize it.

An emerging view, though not the emerging view of the law, which was led by state lotteries, was that gambling is merely another form of entertainment. If this was true, this would mean that there could be gambling advertisements, and debts could be enforced in the courts of law. In Nevada today, still, gambling debts are not enforceable in courts of law.

Another manifestation that we are seeing is the slower forms being wiped out by the faster forms. For half a century, the tracks had a monopoly, now of course we're talking about Internet gambling where it's entering the homes. But all of the various forms are being faster and less skilled. Poker is the one exception. We have a consolidation of gambling. Sixty percent of the casinos on the Las Vegas strip are now owned by three companies. The interesting thing that seems different with gambling from, say, other forms of consolidation going on, is that at some points, it actually becomes an issue. The National Gambling Impact Study Commission was actually just a political ploy by people we call the "antis," the anti-gambling activists. They gave it two million dollars, just enough to have some nasty televised hearings. When it got to the floor of Congress, a lot of Congressmen said, "You know, we do have a lot of gambling. We ought to do a serious study." And so they actually funded it. Unfortunately, it turned into a political joke, but that's a separate issue.

Then we got the Unlawful Internet Gambling Enforcement Act. There's a lot about this statute that is important. First of all, the movie was right that the statute was rammed through with not only no studies or hearings, but with nobody *reading* it. Senator Lautenberg, who was the Senator from New Jersey that had an interest in gambling statutes said, "Can we get a copy on it before we vote on it?" He was told by Bill Frist, who was the majority leader, "No, you

can't." Senator Lautenberg responded by asking, "Can you have somebody come down and at least tell us what it does?" Frist replied, "No, if you don't like it, vote in favor of terrorism."

This statute is really a piece of junk. From what we can tell, it does not make it illegal to transfer money, which is the main reason it was passed. It makes it illegal to be in a gambling business and accept money for unlawful Internet gambling transactions. The problem is, what is the definition of an unlawful transaction? It means you are already violating some other federal or state law. So all it does is add one more felony to the charge. The criminal complaint that is filed was twenty-seven pages long. Now it is forty-eight pages long. It did scare the publicly traded companies to the point where they just said "We're outta here." The other thing it does was require the Treasury and the Federal Reserve, with input from the Attorney General, to make regulations. The proposed regulations have been promulgated, the comments are bad, and everybody hates them because they are trying to enforce this statute. The federal government agencies said that we do not have the necessary resources to be able to tell when a transaction, an Internet gambling transaction, is unlawful. Therefore the banks have to do it. The banks of course wrote back and said, if you can't do it, how are we supposed to be able to do it? And, in fact, it literally can't be done.

Let's take the Interstate Horseracing Act, which is at the heart of the World Trade Organization fight between Antigua and the United States. The statute is called the Interstate Horseracing Act. It was amended in December 2000 by Congress to allow people to bet from their homes or computers on horse racing. Everyone thinks that is the law. The question is whether you can it do cross border or not. Everyone who has the read the statute, except for the Department of Justice, says yes: if you are in a state where it is legal to make the bet and you are in a state where it is legal to accept the bet, then you can make a bet from your home on horse racing. Twenty-two states have opted in. The Department of Justice, because of this World Trade Organization case, has taken the position that you can bet from your home, and you can bet on a horse race from another state, but you have to bet with the horse book that is physically in your own state. So if you are a bank, I am sitting at my home in Encino, California and I want to bet on a race that is taking place in Pennsylvania with an operator who is in Oregon. Is that a legal bet or illegal? The answer is yes. Let's make it easy. I take my laptop, and I go to Utah. I have my bank account with Bank of America in California, and I tell them to wire money to a California person, but I am sitting in Utah, so that is clearly illegal. How is a bank supposed to know where I was and if my bet was illegal?

Actually my favorite one is fantasy sports books. The statute has a carved out exception for fantasy sports books. Fantasy sports books are legal as long as you do various things. The fantasy sports team can't have the exact same membership as a real world sports team. That means the bank would have to check every week to see who is on your sports team. Understand that the banks don't even know what the transaction is, let alone where you were or what it was for. It's all so bizarre. I mean, the banks have now been told that they have to identify and block unlawful gambling transactions. But they don't have to block selling heroin to children. But this is what we want to make sure is protected. The banks want a safe harbor, but there are no safe harbors. There is no way to make safe harbors, and even the Department of Justice says that an illegal sports book occasionally makes legal bets. So what is going to happen? Well, if you are a bank and you accept an unlawful transaction, you can get in trouble. If you deny a lawful transaction, then all you can do is lose a little business. So lawyers we will tell the banks to block anything that looks like its gambling, because that is the safe way out.

So does that mean gambling is going to go away? Well, of course not. Foreign banks are going to offer their credit cards to United States gamblers. If the Democrats stay in control of the House of Representatives and the Senate and we have a Democratic president, there will be a study by Congress. In fact they may not even need a study. One of the interesting things is that the American Gaming Association now wants a study because they know what the study is going to say. Yes, we can keep it safe and we can protect children from compulsive gamblers, but it has to be a state issue. Therefore, the licensed operators, meaning the casinos, should be the ones to run it. The interesting thing is there hasn't been a study because the new Majority Leader of the Senate is Harry Reid, the senator from Nevada. Why would he do a study? I have been talking to people and apparently they are so convinced that they are going to win next year that they think they can do without a study. But I think for political coverage, they are going to have a nice, thorough study.

What the study will say is that it is a state issue. In fact, it's not only a state issue, but it's got to be changed. For example, the Interstate Horseracing Act: Congress said that the states are competent to decide whether people can bet from their home on horse races, but the states are not competent to decide whether people can bet from their homes on dog races. The only reason I can figure out is that horses are honest and dogs cheat. I don't understand. There will be, assuming this is the way normal statutes are done, an opt-in method for states by 2010. For example, let's say that California, Nevada, New Jersey, and Antigua decide that they will take bets online with players from each other. Why should the federal government care? In fact,

the federal government has already said that it is OK with horse racing. It's going to still going to take some time for the law to be changed.

Meanwhile, that statute has some interesting explicit exceptions. The first is if it's not gambling, it's not covered. So if it is truly a game of skill, and there are fights on poker going on, or if it's free, meaning there's a free alternative means of entry, you can have it. And there are sites now that are running poker tournaments, that I have given legal opinions for, that are taking players, with free alternative means of entry, from a lot of the states of the United States. The interesting one, from where I am, is that there is a specific *intra-state* exception. There is now a bill pending in California to allow a person who is physically in California to play poker online. I just was looking at the Commerce Clause issue on this, by the way, and I don't think that Congress has the power to prevent it. It would be unconstitutional if California has intrastate poker, Nevada has intrastate poker, and they decide that they want to make a compact between the two, I think that the statute violates the Constitution. I think the states have the right to set their policy that way. Now, the big question is of course, why do we care? Why are we putting in all these restrictions on internet gambling? Well the main federal statute was a political ploy, by a guy Bill Frist who wanted to be the President but now isn't even in the Senate. But there really are some questions about, particularly with foreign gambling, where we don't know who these people are, because on the Internet nobody knows who you are. Who are these people? We want to make sure that we end up with states and countries licensing and sharing their information, so that in the long run we protect the players.

I guess at about this point I want to first thank you and open the floor for questions.