

ROBB & ROSS

JOSEPH W. ROBB A PROFESSIONAL CORPORATION

PHILIP A. ROBB
ALAN J. TITUS
ANNE C. SLATER †
JOSEPH W. ROBB **
**(1926 - 2019)

591 REDWOOD HIGHWAY, SUITE 2250
MILL VALLEY, CALIFORNIA 94941
TELEPHONE: (415) 332-3831
FAX: (415) 383-2074

STERLING L. ROSS, JR. •
*RETIRED

†CERTIFIED SPECIALIST IN ESTATE
PLANNING, PROBATE AND
TRUST LAW, THE STATE BAR OF
CALIFORNIA BOARD OF
LEGAL SPECIALIZATION

August 19, 2021

California Gambling Control Commission
2399 Gateway Oaks Drive, Suite 220
Sacramento, CA 95833

Re: Incident Report Regulations

Dear Commissioners and Staff:

I write on behalf of Artichoke Joe's with comments on the draft amendments to the Incident Report regulations circulated August 12.

It would be helpful to have some evaluation of how the current regulation is working. How many incident reports are filed each year? How many of each violation are reported? What does the Bureau do with the incident reports? Are there certain types of reports that are more useful than other types?

Comments follow on the specific regulations.

§12395. Security

(a)(1)

A short qualifier is added to the beginning of this paragraph ("Unless otherwise allowed by statute or regulation..."), but I am unaware why this is necessary. Is there a statute or regulation that provides otherwise? The document entitled "Description" does not address this addition. If the language is not necessary, inclusion would be contrary to Govt. Code §11349.1(a)(1).

(a)(1)(A) Limiting access to certain areas

This regulation would require the cardroom to limit access to non-public areas of the gambling establishment which hold "currency or unsecured gambling equipment." The phrase "gambling equipment" is vague and appears to be

overbroad. We would normally expect this term to include felts for the tables, empty chip racks, empty dice cups, and lammers (buttons used on the tables for various purposes), none of which needs to be secured to protect the integrity of the game or the financial health of the business. We suggest that the regulation should state in specific what gambling equipment must be kept secure, for example, playing cards, tiles, dice, and shuffle machines.

The regulation specifically identifies "cages, count rooms, vaults, and security offices" as areas where access must be limited because they hold currency or unsecured gambling equipment. We question why "security offices" are included as at Artichoke Joe's, the security offices store neither currency nor any unsecured gambling equipment.

The draft sets out two options pertaining to granting access to unauthorized persons, one recommended by GPAC and the other by staff. GPAC would require that unauthorized persons be "under the supervision of an authorized cardroom category licensee or holder of a local work permit"; staff would require that unauthorized persons be "escorted and monitored by an authorized cardroom owner type licensee or key employee licensee." These options raise two separate issues, one, the level of supervision, and two, who should supervise. We first question the meaning of the terms used. We understand the phrase "under the supervision of" to mean that the person supervising provides access to the other person, checks on the other person occasionally, and escorts the other person out. We understand the phrase "escort and monitor" to require that the person supervising remains with the other person the whole time. We side with GPAC on the first issue. Regarding the level of supervision, we offer two situations where this comes up. First, the Company's CPA's do a chip count at least once a year, and they need to work in the cage, the count room, and the vault. Second, the Shufflemaster technician comes in weekly to work on the shuffle machines which are held in a back room. These people will always be under surveillance (as would be authorized personnel), but in neither case do these people need to be "escorted and monitored." The MICS are supposed to be "Minimum" standards. Here, to require all unauthorized persons to be constantly escorted and monitored is more than is minimally necessary. As to the second issue, we think that the person providing access to the subject area should be, at a minimum, a key employee or an owner who him or herself has authorized access to the area. However, if the level of supervision required is "escort and monitor," we would need to be able to use a holder of a local work permit.

(a)(1)(B) Limiting access to room for media storage for surveillance

This regulation would limit access to the room for the media storage for surveillance, and as to unauthorized persons would present the same two issues as the prior paragraph with GPAC and staff offering the same positions. At Artichoke Joe's, the software vendor periodically updates the servers, and sometimes must be in the server room for hours. The whole time that the vendor is in the room, the vendor is under video surveillance, but it would be unnecessary and burdensome to require the vendor to be escorted and monitored the whole time. Supervision of the vendor, as suggested by GPAC, is all that is needed. However, as to the second issue, who should perform the supervision, again, we think at a minimum it should be a key employee who has authorized access to that area.

(a)(3) Incident Reports

This amendment would require cardrooms to use a new Incident Report Form to make Incident Reports. We have no comments on the form.

The amendment further would change the standard which triggers the reporting requirement. Currently, the regulation requires an Incident Report to be filed when the police are called on certain specified incidents. This is a clear, sensible, and workable regulation. The current regulation also has a back-up provision that applies when the police are not called but the owner or key employee has knowledge of "any reasonably suspected violation" of statutes referenced. This language is less clear but rarely an issue.

The proposed amendment would delete the clear standard and default to the less certain "reasonably suspected" standard always. Reasonableness raises a factual issue. It does not provide a firm guide, but rather creates a gray line, and for that reason is not a desirable standard for a regulation.

The proposed amendment then complicates the matter by adding another element about "obtaining evidence." It is not clear what this language adds, and it makes it sound like we are no longer talking about reporting on obvious incidents, but now are talking about surreptitious activity that must be investigated and evidence gathered. That is not what incident reports should be about.

The current regulation, in the section that applies the "reasonably suspected" standard, applies this standard to owners and key employees. The proposed

language does not specify at what employee level this is applied and is uncertain in that respect. Who must reasonably suspect the nature of the incident?

The proposed amendment also attempts to define the area covered as not just the cardroom but also "any adjacent space owned, managed, controlled, rented, or utilized by the cardroom..." This language is overbroad. Artichoke Joe's owns a building down the block from the cardroom, and although it uses the back of the building for some offices, the front of the building is rented out to a nail salon. There is also a residential apartment on the second floor of the building that is rented out. These spaces would come under the proposed language, for no reason, and we doubt that is the intent of staff. We also note that the Description says that the current regulation does not define the area covered, but that is not exactly true. The current language applies when an owner or key employee contacts local law enforcement agency pursuant to the provisions of the licensee's security plan, which under section 12372, must pertain to the gambling establishment.

The existing regulation works well, and the proposed amendments would not. We would favor leaving this unchanged. But if the Commission decides to make changes, the problems identified above should all be addressed.

(a)(3)(D) Property Loss Incident

Subparagraphs (a)(3)(A) through (a)(3)(K) identify incidents that must be reported.

Subparagraph (D) would require reporting of an incident "involving a property loss valued at an amount consistent with the dollar amount" in Penal Code section 487(a). The cross-reference to Penal Code 487 is an example of a problem that occurs occasionally throughout the draft, the cross-referencing to a statute or regulation without any description of the import of the referenced material. When that occurs, it means that the regulation is meaningless until one looks up the statute, and so the reader has to go to a secondary source to understand the reference. Here, one has to go to the Penal Code to find out section 487 is the grand larceny statute. This type of cross-referencing is unnecessarily burdensome to the reader, and we suggest such a reference should always include some explanation of the import of the statute referenced.

The proposed language would require the cardroom to value the lost property, and that is problematic. For example, if an iPhone or a bicycle is stolen, how does the cardroom know the value of the property and whether the loss is over \$950 or not?

The Description argues that this language is preferable to the old language because the new language does not require a layperson to make a determination of what specific crime has been committed. That was never a problem. The police were called and they would typically categorize the matter. This new language will require a valuation, and that could be a problem.

According to the Description, the proposed language is intended to cover different types of losses, including embezzlement. That is no longer explicit in the language and was not obvious. It would be more straight forward to identify different common crimes by name, rather to describe a type of loss and challenge cardrooms to realize what all is covered. If incident reports are required upon occurrence of embezzlement, the regulation should say so as the current language does.

(a)(3)(E) Incident Involving Death

This subparagraph would add a requirement to report on any incident involving the death of a person. This language is overbroad. It would apply to death caused by medical condition as well as death caused by a criminal act. Further, this should apply only if the death occurred at the cardroom. If death occurs later, that would be a subsequent event, and the cardroom might not know of it.

(a)(3)(F) Incident Involving Police

This subparagraph would add another reporting requirement, namely on "Any incident involving the on-site presence of police in response to a physical injury of a person." This is too broad. Sometimes when there is a trip and fall, an ambulance is called and the police respond too. That would now trigger the reporting requirement. The trigger should be the calling of the police. Further, sometimes police are called when someone is about to be ejected, and sometimes in performing the ejection either a security officer or the person being ejected, will accidentally suffer a scratch, a sprained finger, or a bruise. It needs to be clear that those incidents are not covered.

(a)(3)(K) Miscellaneous List of Incidents

This subparagraph would cover 24 separate types of violations of the Penal Code, and 14 of these would be new. We have comments on 8 of these:

Section 236.1 (human trafficking). This crime involves depriving someone of "personal liberty ... with the intent to obtain forced labor or services." That involves a long term relationship, not a specific incident that would occur at the club, and that should not be treated as an "incident."

Section 266h (pimping a minor). No one under 21 is allowed on the premises. The chances of this ever occurring seem extremely remote, and adding this language makes it appear to be a regular occurrence.

Section 266i (pandering a minor). No one under 21 is allowed on the premises. The chances of this ever occurring seem extremely remote, and adding this language makes it appear to be a regular occurrence.

Section 286 (criminal sodomy). The chances of this occurring seems remote, and adding this to the list makes it appear to be a regular occurrence.

Section 287 (criminal oral copulation). The chances of this occurring seems remote, and adding this to the list makes it appear to be a regular occurrence.

Section 288 (lewd and lascivious acts on a child). No one under 21 is allowed on the premises. The chances of this ever occurring seem extremely remote, and adding this to the list makes it appear to be a regular occurrence.

Section 347 (poisoning food or drink). The likelihood of this occurring seems extremely remote. Further, it is not likely this would be known at the time of the incident. We also question whether restaurants are subject to similar reporting requirements.

Section 422 (personal threats). This involves threats specifically intended to create a sustained fear of violence. It often is called "terrorist" threat. This is not a crime with which the public, or staff, has much familiarity. A player who is losing can get emotional and in the heat of the moment make a threat. Evaluating whether the threat violates the Penal Code is difficult and staff should not be responsible

for making that kind of determination. It also is not likely to lead to productive reports.

(a)(4) Annual Report

This proposed regulation is internally inconsistent. It would require annual reporting of incidents that “did not have a police investigation or report issued” but it classifies the incidents to be reported by Penal Code section, which is something that would only be known if a police report were issued. Cardroom personnel are not going to know Penal Code references. We believe completion of this form would require an inordinate amount of time and money compared to the benefits.

(a)(6) SARs

This proposed regulation would require forwarding to the Bureau copies of SARs filed with FinCEN pursuant to the Bank Secrecy Act. The BSA contains a general rule prohibiting the disclosure of a SAR (or any information that would reveal the existence of a SAR) 31 CFR 1021.320. The BSA contains an exception for law enforcement agencies and another for regulatory agencies, and it is not clear how the federal law would classify the Bureau. The BSA allows disclosure to a regulatory authority administering a State law that requires the casino to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the casino complies with the Bank Secrecy Act. However, the Description of the proposed regulatory action seems to articulate a different purpose for this regulation. The Description reads, “This is necessary to assist the Bureau in monitoring potential criminal activity taking place within the gambling enterprise in order to ensure the public health, welfare, and general safety.” This requirement is not to ensure compliance with the Bank Secrecy Act, but to monitor potential criminal activity. The Description does not discuss the restriction in federal law or how it applies to the proposed regulation.

Does the purpose of this addition really justify it? As noted, this provision is being added “to assist the Bureau in monitoring potential criminal activity taking place within the [cardroom].” However, SARs very rarely are about criminal activity that took place in the cardroom. In the last 2 ½ years, Artichoke Joe’s has filed 121 SARs, and only two concerned potential criminal activity taking place within the cardroom, one for potential loan sharking and the other for potential counterfeiting. Artichoke Joe’s filed separate Incident Reports with the Bureau on both of those

incidents. So this regulation would be duplicative of existing requirements. We note that about 95% of SARs relate to customers trying to avoid receiving CTRs.

The proposed regulation would also require the cardroom, upon request by the Bureau to provide "any transactions and documents upon which the [SAR] was based." The Description provides no separate explanation for this requirement. Anytime the Bureau requires detailed information on cardroom customers, it raises concerns about the customers' privacy. Any intent to investigate cardroom customers would exceed the role of the Bureau under the GCA. See §19801(g). It would also raise Fourth Amendment concerns. In this regard, section 12396, regarding surveillance, only allows seizure of surveillance with the Bureau Chief's consent, and then prohibits the Bureau from disclosing the surveillance except to enforce provisions of the GCA or regulations thereunder. This regulation should include similar limits and protocols.

(a)(7) Forfeiture of Jackpots

The proposed regulation would include cross-references to two regulations without any explanation what those regulations do. As discussed above, this renders the regulation meaningless until one looks up the unexplained references. It turns out that these regulations govern Self-Excluded and Self-Restricted players, mentioned earlier in the regulation. The regulation should be amended to make that connection clearer.

We do not understand the reason for this regulation. The Description says:

"This provision is necessary to assist the Bureau in monitoring the compliance of gambling enterprises with both their procedures and regulation Sections 12463 and 12464. Without the gambling enterprise providing notice to the Bureau, the Bureau is required to routinely request compliance information from the gambling enterprise."

Under current regulations, there is no requirement that cardrooms provide the Bureau notice of entry of either self-excluded or self-restricted persons (unless law enforcement is called to remove them), let alone of forfeited jackpots. So what are the "routine requests for compliance information" referring to? Artichoke Joe's is not aware of ever receiving such requests.

(a)(9) Denial of Work Permits

This proposed regulation would require an incident report be filed if a local regulator issued any "approval with conditions, denial, suspension, or revocation of a license [or work permit] regarding any associated cardroom endorsee licensee or cardroom employee type licensee." There is confusion in these terms. Cardroom endorsees are owners of licensed entities. Cardroom employee type licensees includes key employees and employees with Commission work permits. The Description says this applies to "any...employees ... having a local city...permit," but that is not our understanding of the terms used. It would not cover employees with local work permits.

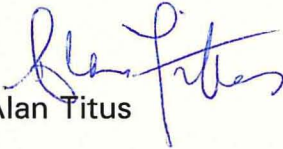
It is not clear from the Description if the intent was to cover denials for job applicants. We would oppose that. If a job applicant is denied a work permit, they are not hired. They never became an employee and never came under the jurisdiction of the Commission or the Bureau.

This proposed regulation contains cross references to sections 19912 and 19857 of the GCA without any summary or explanation of them, and thus the regulation would be meaningless without looking up those cross-references. This language should be amended to summarize the import of those references.

* * *

We appreciate your consideration of all these comments.

Sincerely,


Alan Titus