



Charles McIntyre

Executive Director of the New Hampshire Lottery; Co-Chair of the NASPL Government Relations Committee

PGRI Introduction: Charles McIntyre's experience in this industry did not begin with his appointment to head the NH Lottery in June of 2010. Previously, he served as Assistant Executive Director and General Counsel at the Massachusetts Lottery. Before joining the Massachusetts Lottery in 2003, Director McIntyre was a senior prosecutor with the Norfolk District Attorney's office, specializing in drug enforcement, organized crime, and gambling. A member of the International Masters of Gaming Law, he has thankfully given a lot of attention to issues currently facing U.S. lotteries. He testified before Congress, is co-chair of the NASPL Government Relations Committee, and his ideas are informed by an extensive knowledge of the history of our industry.

It is interesting that so much of the coverage refers to the U.S. Department of Justice (DoJ) letter as being a change in direction or even reversing previous positions. The fact is that the DoJ position was never clarified and this letter actually just confirms what many thought has always been the intention of UIGEA, and the proper interpretation of precedent, previous DoJ statements, and things like the Wire Act. As outspoken as Director McIntyre is, though, he encourages a public posture that is informed but tempered with the confidence that when given the objective facts of a situation (like who should regulate i-gaming), lawmakers will make the right decisions and protect the interests of their constituents.

Paul Jason, Public Gaming: *Lotteries have transmitted data across state lines for decades, practically from the inception of the modern lottery in the early 1970's. (With the start and end points both being in-state.) The notion that the Wire Act should be interpreted to mean that data can't spend a nano-second in the virtual world en route to its final destination within the same jurisdiction has always seemed a ridiculous notion.*

Charles McIntyre: The U.S. DoJ letter does serve a vital purpose by removing any ambiguity. Now, state attorneys general can assert to their legislatures and the governors' offices that they will not be sued by the U.S. DoJ for implementing an intrastate i-gaming and internet distribution of lottery products, or any kind of i-gaming except for sports-betting.

Some state lotteries, including New Hampshire, had already been selling lottery products over the internet for years without being sued by the U.S. DoJ. How does this letter change things?

C. McIntyre: Very much, actually. It is true that some states like NH have already been selling subscriptions over the internet. Now, if the states want to, they can sell them in real-time just like it's done in a land-based store. Your question is apt in the sense that the only material difference between real-time and subscription sales is speed of delivery. There do not seem to be federal laws or anything within the wording of the Wire Act that makes that distinction in a way that would render internet sales legal or illegal based on speed of deliver. That just leads us back to the point that Bill Murray (Deputy Di-

rector and Legal Counsel, NY Lottery) has been trying to impress upon the U.S. DoJ for years which finally seems to have gotten through. The DoJ letter is important because it acknowledges this fact and confirms that the law should be interpreted as applying only to sports-betting as long as the point of transmission and receipt are both within the state borders. Without this clarification, states did not know with certainty that the highest law enforcement agency in the land might not decide to sue them. Even if we thought that we would be protected by the 10th Amendment, the fact remained that nobody wanted to be sued by the DoJ. It's not likely that the DoJ would prosecute a state for things that the states have been doing for years, like selling lottery tickets over the internet within their own state, or for anything else in regards to

the electronic transmission of data that begins and ends within the state. But even the possibility of that happening would cause lottery directors to be reluctant to risk it; and state attorney general's to be reluctant to green-light it.

Still, I find it peculiar that so much of the press refers to this U.S. DoJ statement as a "reversal" of its previous position, when in fact there was no clear statement of what the previous position was.

C. McIntyre: The gambling industry did want to cast it as a reversal of sorts because they were, and still are, trying to convince lawmakers that this statement is not consistent with previous positions. This DoJ position does not say anything that is inconsistent with precedent. It just clarifies things so that the ambiguity and the uncertainty are removed. I believe the casino interests were, and still are, trying to convince Congress that legislative action was needed because the laws were confusing and ambiguous. The likelihood of Congressional action is hopefully diminished now that the DoJ position is made so clear. Moreover, a very forceful letter from the National Council of State Legislators was just released that implored the U.S. Congress to not change the meaning and impact of the U.S. DoJ position on these issues.

It would seem that removal of ambiguity would open the door not just for real-time internet sales of existing lottery products, but also to more innovation in the fundamental game concepts and designs.

C. McIntyre: Sure. It is huge for us to know that we have the stamp of approval from the highest agency of law enforcement in the U.S. to sell products over the internet in real-time. The first step might be to think of the internet as just another channel to promote and sell existing products. But the next stage would be to think about how we can evolve the games to make even better use of the medium. The internet enables consumer groups with common interests to be massively networked on demand. Facebook gave rise to social games like Farmville.

How do you determine what whether a game change is significant enough to require new legislation or not?

C. McIntyre: The internet is a channel for distribution. In that sense, it does

not of necessity require any change in the game. It is also a medium for communication and in that sense can become a part of the product. Paper is a medium that is used to print scratch-offs and the properties of that medium, paper, become integral to the product itself. Likewise, the internet is a medium rich with unique properties that can become part of the product. The audio and visual capabilities alone open up a whole new world of content development possibilities. Likewise the ability to form new social groups and connect instantly with thousands would seem to have potential game design implications. This might create some regulatory questions for state legislators, and we would seek their input – as well as that of the Governor – before moving forward. At what point does the integration of new attributes alter the essential nature of the game such that new enabling legislation is required? On one end of the spectrum, enabling the consumer to simply purchase a lotto ticket on the internet in real time certainly does not seem to alter the essential nature of the game itself. I would not think that would typically require any kind of legislative action. On the other end of the spectrum would be games that might combine elements of poker and lotto and turn it into an extended-game format.

Historically, this business has relied on innovation to spur growth. I would think that is true for all industries. There were sweepstakes games in the sixties, then scratch tickets in the 70s. Then, what we used to call online sales but now call terminal sales or draw games in the 80s. Multi-state games in the 90s. Beginning with Cross-sell and "More, Bigger, Better" Powerball, we're changing the landscape of multi-jurisdictional games and hope to continue to do so. And with the internet, a whole new world of possibilities is opening up.

Of course, I think all lottery directors keep their commissions and legislative oversight committees informed of all matters of substance. Even using the internet to distribute the existing product would be something that most or all of us would present to our oversight groups to make sure they are supportive.

But now it is strictly a state regulatory issue, not federal.

C. McIntyre: Gambling and games of chance have always been regulated at the

state level. The advocates for federalizing internet poker are conflating the adaptation of an existing game with the use of a distribution channel to create the appearance that we have something that falls outside of the traditional framework for regulating and taxing this industry. It's a ridiculous argument that is conjured up to create a way for out-of-state interests to have access to state markets without complying with state regulatory and taxation requirements. The ability to play poker on the internet is no more a national right than is playing slot machines. Just as with slot machines and casinos, it may or may not be an activity that a state chooses to legalize and regulate. But the notion that people who want to play poker on the internet are somehow entitled to that as a national right is as silly as the notion that people who want to play slot machines have the right to do so in their own hometown.

I wonder how Nevada would feel if the framework for regulating and taxing the casino industry were federalized?

C. McIntyre: Exactly. We have a tried and true system for regulating and taxing the gambling industry and it is all done at the state level, and that precedent dates back hundreds of years

One of their arguments is that poker is a game that requires scale, a population base that most states do not have to support. So for internet poker to be feasible at all, it has to be offered on a multi-state basis.

C. McIntyre: First, refer back to our last answer. The ability to play poker on the internet is not some kind of national right any more than playing slot machines. There are people who probably would like to have a casino with slot machines closer to their home. Does that mean the federal government should take over the regulation and taxation of the casino gambling industry in order to make that happen? Like you just said, try asking the casino interests what they would think about that idea. Second, the whole argument that i-poker needs to be federalized because you need scale, a bigger player base that depends on a bigger population, is a silly red herring. States can work together as they choose to create a multi-state platform that provides that. There is no legal or logical reason why states could not potentially collaborate on internet games

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just like they do on lottery games now. This liquidity issue was faced right here in New England back in 1985. Vermont, Maine, and New Hampshire wanted to do a jackpot game, didn't have the body count in each individual state, so they joined together. States are already enabling multi-state progressives in the electronic games space. The fact that all gambling and lottery is regulated and conducted on an intra-state basis does not prevent states from agreeing to collaborate on the games. The federal government recognizes that as long as no state laws are being violated, then there is no crime. If two or more states come to an agreement on how to implement a game together, then the games are conducted on a multi-state basis with no laws being broken. We have been doing this in the lottery industry for years with multi-state games. And there is no reason it could not be done in other games, like internet poker.

I would think that is what the casino interests would be especially fearful of.

C. McIntyre: Maybe. But their concerns should not drive a reshaping of state and federal laws that govern this industry; or cause the federal government to take unprecedented action to force states to change the way they regulate and tax this industry.

Even a lay-persons' reading of the proposed federal bills reveals that the opt-in and opt-out options are a manipulative ruse to mislead us to think that the states have a choice. The terms and conditions are all dictated by the federal government, so the choice is to agree to terms that favor the casino gambling industry or be prohibited from offering internet gaming. It reminds me of the Henry Ford line about the Model-T: "The customer can have whatever color he wants, as long as it's black." A compulsion on the way internet gambling is to be handled, is not the exercise of 10th Amendment freedom, it is the absence of it.

How can lottery directors get that message across to the stakeholders?

C. McIntyre: I can't speak for others, but as a lottery director, I am not charged with the job of influencing the direction of public policy. That is the job of state legislators and the governor's office. I am,

though, obligated to inform our commission and legislators about anything that materially impacts the business of lottery. State legislators do want to know about anything that might impact the operations of the lottery and also gaming and gambling within the state. First, there is the matter of the lottery itself which is a valuable state asset that generates huge funds for worthy causes. In our state and many others, lottery proceeds support education in a material way. In other states, lottery proceeds may go to the general fund – and all lotteries support a worthy cause of some kind. Whoever the beneficiary is, the state wants to protect its interests. Second, there is the protection of the integrity of the industry, the players, and the general public. Third, there is the collection of taxes that should accrue to the state and not other entities like the federal government. All three of those rely on the preservation of the exclusive rights of states to control and regulate the lottery and gambling industry. My legislators would expect me to inform them of events that would impact any of those three factors. The proposed federal legislation would impact those factors and so therefore it is my obligation to inform our legislators of those facts. It is totally up to them what they want to do with that information. And in fact, in my capacity as a resource for helping legislators understand how events might impact the broader state public policy objectives, it is my duty to impart all of the information objectively as a citizen of the state and not to advocate for a particular interest group like lottery.

So, while lottery directors should not take a position on matters of public policy, you are obligated to communicate facts that legislators need in order to come to informed decisions and formulate public policy.

C. McIntyre: That is the way my legislators look at it. Again, I can't speak for other states. My legislators and the governor expect me to request a meeting to keep them informed about important events impacting the industry and the people of our state. And so I do, and am frequently addressing committees and the legislature. When asked, I proffer an assessment of the situation. Otherwise, I just explain the situation and leave it for the elected officials to assess the im-

pact on states' interests and to make those public policy decisions.

As regards the federalization of i-gaming, the facts pretty much speak for themselves.

C. McIntyre: I hope I always let the facts speak for themselves. But I would agree that state legislators do not want to see their revenue sources impacted negatively and so if a situation threatens to do that, then they would know that and the facts here seem to speak for themselves.

The attempt to insert the federalization of i-gaming into the Payroll Tax bill was defeated. But that's not necessarily the end of it, is it?

C. McIntyre: Definitely not. I think we can expect that there will be similar attempts to attach them to bills in the future. Moreover, I think we can expect them to tweak it in ways that make it easier to pass. It would still likely impact states in a negative way, but be modified to make it less disagreeable to other members of Congress. The good news is that as this whole situation unfolds, more and more legislators, at both the federal and state levels, are understanding the implications of these proposed bills and questioning them.

If some states were to move forward quickly with i-gaming initiatives, wouldn't it be difficult for the federal government to enact a law that overturns what a state had already implemented?

C. McIntyre: Yes. But in the category of tweaking the bill to make it more passable, they could insert a PASPA-like grandfather clause which could exempt those states and impose onerous restrictions on all the states that did not have i-gaming already in place.

The Alderney Gaming Commission was one of the most respected in the world before the indictment of Full-Tilt Poker for massive consumer fraud. Shouldn't states be concerned that turning regulatory authority over to others might leave their citizens exposed to similar risk?

C. McIntyre: Absolutely. For one thing, most states require a level of transparency that could not possibly exist outside of our state. Everything we do, every bill that is proposed, is a matter of public record. If a citizen of my state has a concern, they

can literally call me up. States do have the right to say that they may not be comfortable with the level of transparency and oversight accorded to a Nevada casino operator. The states' ability to protect the interests of its citizens is materially compromised by being forced to turn control over to others, or to comply with terms, conditions, and enforcement mechanisms determined by others. For federal legislators to attempt to do that is a violation of the 10th Amendment, as well as being contrary to all logic and precedent. As a recovering attorney, I see major problems with that proposition. Unfortunately, in the real world, anomalies can happen.

As co-chair of the NASPL government affairs committee, is there anything you can tell us about NASPL's ability to assert political influence or strategies to at least communicate with and inform our legislative leaders about the i-Gaming issues?

C. McIntyre: I would actually refer back to a previous answer in which I explained the role that my legislators expect me to perform. NASPL is fundamentally a resource for gathering and disseminating information. I do not envision NASPL as an agency for lobbying or even promoting a specific policy position. But as you said, the facts speak for themselves. And so, in the capacity of information resource, NASPL can serve a valuable service to its members by making sure that everyone is informed of the issues, or at least ensure that the information is organized in a fashion that makes it super easy for the members to share with their constituents and stakeholders as they see fit.

NASPL did take an outspoken position late 2010 when NASPL president Ed Trees sent a letter protesting the first iteration of the Harry Reid bill. Why couldn't NASPL just do a lot more of that kind of thing?

C. McIntyre: Even that example does not change the primary mission and purpose of NASPL. There may be circumstances when the threat is so pressing and the position of the members aligned such that NASPL can express the will of its members in that way. But the heavy lifting needs to be done at the state level and NASPL can serve its members best as an invaluable resource

and support function. There may be similarities between the different states when it comes to public policy positions. But as a rule, there is very rarely perfect alignment between all member states. And the association consists of lotteries which are not typically invited by their states to take outspoken positions on matters of public policy. I know I'm not. In the end, our political constituents are in-state. Whatever political influence we have should be exercised with our own in-state constituents. Our legislators have far more influence on Capitol Hill than we have, even when speaking with one voice through our unified association. We need to make sure they are informed so they make the best decisions in the interest of the state.

You testified before the U.S. Congress last November on these very issues.

C. McIntyre: Yes and my impression is that we are making a difference because shapers of public policy on both the federal and the state level can see that our mission really is to serve the people. We are public servants with no ulterior motive other than to support the interests of our state. I believe our lack of affiliation with the community of special interest lobbyists contributes to our credibility and commands attention.

I was just talking to the executive director of the World Lottery Association, Jean Jorgensen, and he said the same thing: That our credibility and legitimacy is based on the confidence that our political constituents have in our integrity; in their confidence that we genuinely embrace the interests of the state and the people; and that we always need to align our messaging with that in mind. He was cautioning me to not be too strident in my criticism of ideas and interest groups that are not on what I call Team Lottery. And instead of promoting lottery per se, we promote public policy that serves the interest of the state.

C. McIntyre: I agree. We are all inclined to be protective of lottery because we all know how much good it does for worthy causes. But Jean is right in that our public statements retain credibility if they stay focused on the bigger picture, provide in-

formation, and not advocate for a particular course but to try to stay objective. For that matter, I avoid public statements other than to address the facts and leave it to others to assess the pros and cons. State legislators should be able to depend on their lottery directors to be the experts in the area of gaming, gambling, and lottery, to know the facts and communicate the facts without ulterior motive or agenda.

But couldn't we all agree that the right to determine regulation and taxation policy belongs exclusively to the state and therefore couldn't we all support an aggressive advocacy campaign on behalf of that position?

C. McIntyre: I agree with the first part but not the second. I do think we can all agree that the industry should be taxed and regulated exclusively by the states. But not all states agree on precisely what that means and even if they did, it is not the role of the lottery directors and the association representing lotteries to take a public policy advocacy position. And even if you overcame those two hurdles, the clarifying of the position, messaging, and action strategy would be yet another obstacle. And lastly, go back to what Jean Jorgensen said about not compromising our credibility by asserting a proactive public policy position. That is not the basic charter of NASPL and it would be misguided to try to reshape NASPL into an agent for political action.

Are U.S. lotteries on a track to do more, bigger, better multi-state games?

C. McIntyre: I believe that necessity is the mother of invention. Multi-state games have excellent potential to drive growth of lottery revenues. We are hopeful that \$2 Powerball, and the differentiation of the multi-state games, will be a source for growth for some time to come. Lottery is fundamentally a market of math. To keep it interesting, to keep the consumers engaged and the business growing, we need to continue to find new ways to market the math with innovative game content and formats. And so yes, I do think we are on a track to expand the multi-state portfolio of games, create new and better ways to market them, and increase revenues for worthy causes. ♦