

## **BLACKJACK COMPUTERS: YOUR TICKET TO THE BIG HOUSE (PART I)**

**By Thomas B. Duffy, Attorney at Law**

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[Ed. note: Seventeen years ago, concealable blackjack computers were legal and growing in popularity. Then, Nevada outlawed them. New Jersey followed suit, passing laws against them, albeit with less harsh penalties. As more states legalized casino gambling, these computers were on the rise again. As we have stated in *Blackjack Forum* in the past, we believe these anti-computer laws are unconstitutional. That provides little comfort to the blackjack player, however, who may be caught using one of these devices. The cost of getting such a case into the federal courts would be substantial. In 1994, I asked New Jersey attorney Tom Duffy, who specializes in representing professional gamblers, to provide an update on the computer blackjack laws. Since then, California has made use of a concealable gambling computer a misdemeanor. However, some foreign countries still have no cheating statute regarding these devices. Before even considering play with a concealable computer, make sure to get reliable advice on the current legal situation where you are thinking of playing. — Arnold Snyder]

The recent flurry of states seeking to legalize casino gambling presents much opportunity for the skillful player. There is, however, also much risk as the political, legislative and judicial infrastructure of these states must acclimate themselves to the rather unique legal questions posed by legalized gambling. A case in point that has recently come to my attention is some recent Mississippi legislation.

Mississippi passed rather comprehensive anti-cheating statutes on April 20, 1993 (Laws 1993, ch. 488, formerly H.B. 507). For the most part, these statutes were badly needed. Apparently, Mississippi had been charging gambling cheats with ill-suited crimes such as theft and larceny which gave defendants too many avenues to wiggle out of the charges against them. Unfortunately for the readers of this magazine, this backlash includes a new law which relates to the use of computers at blackjack and other games. Additionally, the wording of these statutes calls into question the legality of practices long held to be legal in New Jersey and Nevada.

I will begin with this last point. Paragraph 2(b) of the new law (codified at Miss. Stat. Ann. §75-76-301(b) states, "It is unlawful for any person [t]o place, increase or decrease a bet or to determine the course of play after acquiring knowledge, *not available to all players*, of the outcome of the game or any event that affects the outcome of the game...." This paragraph, like all of §301, was taken word for word from Nevada §465.070 titled "Fraudulent Acts." Obviously, the meaning of this section turns on the word "available." I assume that this provision was not meant to outlaw card counting; in fact, one could make a good case that the highlighted words were inserted to save card counting, and similar strategies such as handicapping, from being illegal. However, §465.070(2) is extremely inappropriate for wholesale importation to Mississippi. First, in Nevada, this section was mainly meant to address the "fixing" of pari-mutual and sports betting events. Neither of these bets is legal in a Mississippi casino. Second, a 1989 amendment added the words "increase or decrease" and "to determine the course of play" to the Nevada statute. These amendments, while also covering other crimes, were primarily aimed at "spooking" at blackjack. Once again, spooking is not possible in the Mississippi casinos — hole cards cannot be checked by hand.

We must look at the general cheating statute to get a true idea of the havoc §301(b) might wreak. Both Mississippi §75-75-307 and Nevada §465.083, as amended in 1981, provide, "It is unlawful for any person, whether he is an owner or employee of or player in an establishment, to cheat at any gambling game." "Cheat" is defined in both statutory schemes as meaning "to alter the selection of criteria which determine: (a) The result of a game; or (b) The amount or frequency of payment in a game." While it is not clear exactly what conduct this does cover, it is clear that there are some cheating schemes not covered by this general statute. That is exactly why there is a more specific statute. There is a theory of statutory construction, especially applicable to more specific statutes such as §301, that every word must have been put there by the legislature to effect some purpose. Many of the issues, however, addressed in §301(b) are inapplicable to Mississippi gaming. What is a judge to do? Tell the truth — that the legislature was asleep at the switch when they pilfered this particular paragraph from Nevada — or give the paragraph some meaning. Most judges will, obviously, choose the latter course of action.

Giving meaning to §301(b) in a casino environment without pari-mutuel and sports wagering broadens the inquiry concerning usually unavailable information about the outcome of a *casino* game from whether such information was acquired by conspiracy (e.g., spooking) or "by any trick or sleight of hand performance or by fraud or fraudulent scheme" (to quote the New Jersey cheating statute §5.12-113) to whether such information is available to all — an irrelevant inquiry where, as in blackjack, the players do not compete against each other. Furthermore, this inquiry can also be irrelevant where the players do compete against each other: all poker players base their play of the game on their "hole" cards — which are unknown to the other players. A broad interpretation of §301(b), in addition to outlawing poker as we know it, would also call into question practices which are legal in Nevada, such as front loading or even adjusting one's play to take advantage of a card the dealer exposed in error. (I assume these irregularities cannot be seen from all player positions.)

The "device" section, §75-76-303, was lifted, word for word, from Nevada §465.075, and is likewise over inclusive of unintended activities. It states:

It is unlawful for any person at a licensed gaming establishment to use, or possess with the intent to use, any device to assist:

- a. in projecting the outcome of the game;
- b. in keeping track of the cards played;
- c. in analyzing the probability of the occurrence of an event relating to the game; or
- d. in analyzing the strategy for playing or betting to be used in the game, except as permitted by the commission.

The problem here centers around the use of the words "any device." The New Jersey "device" statute reads "an electronic, electrical or mechanical device." The word "device" is undefined in both the Nevada and Mississippi statutes. "Gaming device" is defined and encompasses "any ... contrivance, component or machine." *Webster's*, on the other hand, uses the definition, "that which is planned out or designed; contrivance; stratagem." Card counting is a "device" within the Webster's definition but it is not *if* the Mississippi courts read the "contrivance ... or machine" definition into the "device" statute.

The defendant in *Sheriff of Clark County v. Anderson*, 746 P.2d 643 (Nev. 1987), argued that this lack of a definition of a critical word in the statute made the entire statute constitutionally unenforceable. The trial judge agreed and dismissed the charges against Anderson. The prosecution appealed to the Nevada Supreme Court which considered the case for two years. The court held that, while the statute would be unconstitutionally vague as applied to some hypothetical defendants, it was not vague with regard to Anderson's conduct of using "computer shoes" at blackjack. Having won a theoretical victory, the prosecutor wisely decided not to proceed with the case against Anderson.

Had Anderson been convicted, it is doubtful the statute could have withstood either direct or collateral attack in the Federal Courts. The Nevada Supreme Court's analysis was arguably correct on the issue of vagueness. The problem is that statute is so vague it is also "overbroad": a special legal term meaning it infringes on the exercise of expressive and associational rights. These "device" statutes, especially when read with companion legislation making manufacturing, selling or distributing "devices" intended to be used to violate the law, violate the First Amendment right to disseminate information.

As I have stated, *Webster's* includes "stratagem" (such as counting) within the definition of "device." As such, anyone using a strategy is theoretically at risk for prosecution. Furthermore, anyone who intentionally assisted in preparing the strategist for his or her bout with the casino could be liable under the companion legislation. Is Sega at risk if the strategist learned how to count from using a video game it *manufactured*? Probably not. Is Peter Griffin at risk for *distributing* the effects of removal — to two decimal places — in his book *The Theory of Blackjack*? Quite possibly, especially when one considers the argument that these indices must have been *intended* to be fed into a "device" such as a computer because they are so complicated no human could cope with them. Finally, I leave the question of whether Arnold Snyder could be prosecuted for *selling* Griffin's book to the reader to ponder.

Such an overbroad law "hangs over [people's] heads like a Sword of Damocles." Obviously, "the value of a Sword of Damocles is that it hangs — not that it drops. See *Arnett v. Kennedy*, 416 U.S. 134, 231 (U.S. Supreme Court 1972). Such a law has a "chilling effect" on Professor Griffin and Book Seller Snyder, who are both within a class of persons classically protected by the First Amendment. If this chilling effect is substantial, the law is "facially invalid." Facial invalidity can be argued by any defendant, even someone like Mr. Anderson who was engaged in an activity that clearly could be prohibited if the statute had been properly drafted. The courts use the blunt instrument of declaring laws facially invalid to force legislatures to carefully draft laws to avoid constitutional conflicts. This tool is not significantly different from the "exclusionary rule" which forces the police to obtain evidence through legal means. In sum, I believe that the Federal courts would invalidate the Mississippi and Nevada "device" statutes because the word "device" is overbroad and, at the same time, central to the meaning of the statute — eliminating any possibility the word could be overlooked to save the statute from validity. Still, the prudent course of action, obviously, would be to avoid any activity that might come within these statutes.

I also caution players from taking too much solace from the "except as permitted by the commission" language in §303. I assume the commission has absolved our pad and pencil carrying brethren at baccarat and roulette from any liability under this statute. Given the draconian penalties for violating this section (see below), I cannot make any such assumption about card counting. This is especially true given the counter's persona non grata status in most,

if not all, casinos.

For the entrepreneurs among us, as mentioned above, I note that §75-76-309 and Nevada § 465.085(1) state, "It is unlawful to manufacture, sell or distribute any cards, chips, dice, game or *device* that is intended to be used to violate any provision of this chapter." The above analysis notwithstanding, it would be extremely unwise to sell computer devices in or mail them to either Mississippi or Nevada. The standard disclaimers on the sale of these devices that they are "just for fun" and "for scientific research" provide no relief. The more powerful, expensive and stealthy a device is, the harder it becomes to deny that it was not "intended" to violate the law. Furthermore, given the harsh penalties involved, no lawyer, myself included, could overlook the possibility of having his or her client testify against the manufacturer in return for a lighter sentence.

Finally, the penalties exacted for violating any of the above sections are extremely harsh. Under §75-76-311(a), first offenders can be sentenced to up to 2 years in the State Penitentiary. Subsection (b) throws the book at recidivists: sentences can run up to 10 years. Both sections provide for fines of not more than \$10,000 per offense. The Nevada penalty statute is similarly bifurcated. A first offender can be sentenced to "not less than 1 year nor more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment." A recidivist loses the benefit of the disjunctive clause and must be sentenced to at least one year in the state prison and may also be fined up to \$10,000.

Compare these penalties to the New Jersey "device" statute which provides for a maximum sentence of 90 days and a \$500 fine for each offense — with a presumption against incarceration for those without prior criminal records. Perhaps most importantly, the New Jersey sentence, if any, would be served in the Atlantic County jail — a reasonably pleasant facility populated by pimps, petty thieves and more serious offenders who can afford good lawyers who keep them out of state prison. The Nevada state prison may provide a slightly more interesting environment. I hear the population is just about evenly divided between death row inmates and gambling cheats. The imagination runs wild thinking about the *Mississippi State Penitentiary* — maybe John Grisham will enlighten us about it in his next novel. Until these laws regarding blackjack computers and other devices are clarified, either by amendment or judicial interpretation, I highly recommend that one of his stories be as close as any player of even moderate skill come to the Magnolia State.

[Ed. note: Nevada's anti-device statute has also been copied into Illinois' and Iowa's lawbooks.] ♠

Note: Part I also available in HTML at  
<http://www.blackjackforumonline.com/content/bighouse.htm>.

## **BLACKJACK COMPUTERS: YOUR TICKET TO THE BIG HOUSE (PART II)**

**By Thomas B. Duffy, Attorney at Law**

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In the first part of this article, I discussed the laws of Nevada, Mississippi (which are verbatim from the Nevada Statute) and, to a lesser extent, New Jersey on the topic of playing blackjack with the assistance of a computer. In all three states, it is illegal. In Nevada and Mississippi, though, the statute's use of the word "device" without any descriptive adjectives or definition causes the law to suffer from two serious constitutional infirmities: vagueness and overbreadth. The law affecting blackjack computers is vague because it fails to put a person of reasonable intelligence on notice about *exactly* what is prohibited. (Recall *Webster's* includes "stratagem," like Basic Strategy, within the definition of "device.") It is also overbroad because it could possibly apply to activities protected by the First Amendment like publishing information and books about blackjack strategies.

To refresh, let's take another look at Miss. §75-76-303 and Nevada §465.075 (hereinafter "Nevada-type statute" will be used to describe this law):

It is unlawful for any person at a licensed gaming establishment to use, or possess with the intent to use, any device to assist:

- a. In projecting the outcome of the game;
- b. In keeping track of the cards played;
- c. In analyzing the probability of the occurrence of an event relating to the game; or
- d. In analyzing the strategy for playing or betting to be used in the game, except as permitted by the commission.

The New Jersey Statute §5:12-113.1, which is not constitutionally infirm, reads:

- A person commits a disorderly persons offense if, in playing a game in a licensed casino or simulcasting facility, the person uses, or assists another in the use of, an electronic, electrical or mechanical device which is designed, constructed, or programmed specifically for use in obtaining an advantage at playing any game in a licensed casino or simulcasting facility. A device used by any person in violation of this section shall be subject to forfeiture pursuant to the provisions of N.J.S. 2C:64-1 et seq.

Each casino licensee shall post notice of this prohibition and the penalties of this section in a manner determined by the commission.

The differences are easy to see. First, the New Jersey Statute describes the kinds of devices that are prohibited. Using your brain seems to be "O.K." Second, the device must also be "specifically" designed for "obtaining an advantage." So using the calculator in your watch or a pad and pencil will not land you in the county jail. Third, a warning must be posted to warn potential device users of their possible criminal liability. This is especially critical in a state, like New Jersey, where there was no law against devices until about three years ago. Fourth, the user

must be "playing a game" to offend the statute. Fifth, in a related vein, mere possession of a device, even with intent to use it, is not an offense. Finally, there is a serious question, probably unintended by the drafter, of whether the state must prove the device could actually have gained the user "an advantage."

At roulette and baccarat, the casinos seem only too happy to have the players use pad and pencil to play fallacious systems. Many casinos even use electronic devices that display the last 50 to 100 numbers at the roulette table so players can find a "pattern." If a device were programmed with one of these fallacious systems, it would seem to be outside the statute. (In fact, if it were my casino, I would supply free batteries for these devices at the tables.) Based on this open acceptance of some "devices," it seems only fair that the state should have to prove that the algorithm used had a statistical edge over the house.

### **Selected Other States**

The statutes from the states not covered in Part I, unfortunately for them, follow the Nevada-type statute. Colorado §12-47.1-824 is another exact duplicate. Illinois §230-10/18(d)(3) and Indiana §4-33-10-2(3) substitute the word "a" for "any" before "device." Still, these two statutes are virtually identical to the Nevada statute. Iowa §99F.15(4)(c) begins, "Uses a device to assist in any of the following ...." and then lists the identical four subsections. This change is probably not as significant as it might seem. Possession with intent to use is very difficult to prove. As a practical matter, even under the "possession with intent" statutes, the state would probably not initiate prosecution unless they could also prove the defendant used the device. Still, the Iowa law gives defense attorneys more room to maneuver.

Furthermore, all of these Nevada-type statutes fail to define the word "device." Although they do usually define "gambling device," that definition is clearly inappropriate, having been meant to apply to slot machines, dealing shoes, playing cards and the like. The easiest way for these states to repair these constitutionally infirm statutes would be to define "device" using some of the New Jersey wording.

The penalties under these statutes are the only differences between them. Colorado imposes a 6-18 month term of imprisonment or \$500- \$5000 fine or both. The Illinois law carries a term of 1-3 years. Indiana imposes a sentence of at least 1 year and a fine of up to double the gain from the offense. Iowa imposes up to 5 years in prison and a fine of up to \$7500 or both.

I am not admitted to practice in any of these states so I am only attempting to give you a general idea of the time you might face for using a computer in these jurisdictions. Most states have a presumption against incarceration for first offenders so you may be able to pay a (large) fine and the sentence will be suspended. Conversely, most states also have repeat offender statutes which, in a worst case scenario, allow for life imprisonment given sufficient offenses. While not going that far, most of these statutes do have harsher penalties which are reserved for repeat offenders.

In case the reader believes that constitutional issues these Nevada-type statutes raise are the legal equivalent of 15th Century discussions about the number of angels on the head of a pin, at least one Illinois casino seems to instruct its dealers to tell players to put away basic strategy cards. (I note that, under the plain words of all these Nevada-type statutes except for Iowa's, putting away the card does not end the player's liability. He or she still "possesses" the card and has demonstrated an "intent" to use it. Even if the player is allowed a warning, refreshing one's

recollection of the card in the bathroom or the restaurant could lead to liability because the player is still "using" the device "to assist" him or her while "at a licensed gaming establishment.")

This situation came to my attention via the following letter written by a subscriber to this magazine:

"[My wife] was using a basic strategy card. A dealer told her she could look at the card while he shuffled, but if she looked at it while playing she would be committing a felony.... I wonder what would happen if she wore one of those basic strategy chart T-shirts on the boat.:"

Indeed, I guess the casino would confiscate the young lady's shirt, lending new meaning to the term "lose your shirt." Mainly, I think this shows how stupid these vague and overbroad laws are. If it were my casino, I'd hand out (accurate) basic strategy cards at the door and at every table. Most players don't mind losing, they just don't want the other players laughing (or shouting) at them for not knowing how to play.

This kind of rude treatment of novice players is just plain bad business. Even a new player who eventually memorizes the Basic Strategy probably has a 1% (at most) chance of becoming a winning card counter, a 75%-85% chance of becoming a recreational losing player and a 10%-20% of becoming a compulsive gambler who will lose his or her life's savings, house, car, etc. to the casino. These are odds a card counter would take any day of the week — yet the casinos chase away the player with a strategy card. At the same time, the casinos moan and groan that young people don't gamble as much as their parents or grandparents. Well, they've got to get their feet wet somewhere and, barring the outbreak of World War III, I doubt young people are going to get interested in gambling in the armed services, as prior generations did.

### **Louisiana and Other Foreign Places**

Louisiana does not have an *explicit* statutory provision prohibiting the use of devices. La. §4:559 (for riverboats) and §4:664 (land casino), however, do contain the cheating statute, virtually identical to N.J. §5:12-113, prohibiting the use of a "fraudulent device" to win or attempt to win money. I do not believe that Louisiana has a prayer of convicting a device user under this statute. After all, this provision was pilfered from New Jersey which had to pass the much more explicit §113.1, above, to outlaw devices. Furthermore, all of its sister states have passed specific, albeit defective, statutes in an attempt to outlaw devices. Given this great weight of authority, a general cheating statute cannot be used against predictive devices.

With all due respect to the residents of Louisiana, the state does have a reputation for putting politics before justice. I predict the political influence of the casinos in Louisiana will surpass the influence the casinos enjoy in Nevada in the near future. If the casinos want you convicted, you will probably be convicted. Adding to this uncertainty is that "fraudulent" may not have the same meaning in Louisiana as in the other 49 states because its system of law is based on the French civil code. Still, their courts have to follow the U.S. Supreme Court and including a merely *predictive* device within the meaning of "fraudulent" is too vague to pass constitutional muster.

The main risk of being arrested under a general cheating or fraud statute (when there is no "device" statute), then, would be in foreign countries. While this risk would be less pronounced in a Common Law jurisdiction (any place such as the U.S., Canada, The Bahamas and Australia

that follows the English system of law which is based on cases rather than civil codes), I have heard of players being charged with "fraud" for using computers in Common Law jurisdictions. Under the Common Law, fraud or deceit had 5 elements: 1) a false representation; 2) knowingly made by the defendant; 3) intended to induce reliance on the part of the victim; 4) reasonable reliance on the falsity by the victim; 5) loss to the victim from the reliance. For a criminal conviction, all 5 elements must be proven beyond a reasonable doubt.

Although a good argument could be waged for the defendant on all 5 elements, Elements 2, 3 & 5 will be conceded: the player knows about the use of the computer; such use is intended to create the impression, given the unusual plays computers often make, that the player is a sucker and not a winning player; if the player wins, the casino has lost money. On Element 1, the state will claim that the player walks up to the table and presents himself as a human being when he is, in fact, a virtual automaton. This argument would carry some weight if the casino had the player sign a statement that he or she was unaided. Posting a sign that computers were prohibited by house rules would not help because disregarding unilaterally imposed rules does not create a "false representation." On Element 4, the state faces a very uphill fight. The casinos know about the existence of computers that can beat their games. Further, they know these devices can be concealed so that it is virtually impossible to tell a person is wearing one. Given these facts, it is not reasonable for the casino to assume that every person who sits down at a table is unaided by a device.

Be warned, though, that any jurisdiction, including Common Law jurisdictions, could have different elements for this offense. Under other systems of law, these elements could be totally different or the prosecutor may not have to prove the case beyond a reasonable doubt. Frequent variations are the elimination of reasonable reliance on the part of the victim or substituting a negligence standard for the knowledge requirement in Element 2. The former variation is particularly significant because I have identified it as the best argument for the device user in the above analysis.

### **The Indian Reservations**

I make no representation about being expert about Indian law. I have read a (large) book on the subject in which the author kept emphasizing how confusing and uncertain the law in this area is. If I recall, the U.S. Supreme Court has made three major flip-flops about the extent of Native American jurisdiction on their reservations. What I can tell you is that the Federal Indian Gaming Act does not prohibit such devices, but then it does not prohibit cheating at the games either. This messy area of jurisdiction over the games was left to be ironed out in gaming compacts between the Native American Tribes and the state in which their casino is located. My impression is that all the tribes turn cheats over to the state for prosecution under state law.

Most, if not all, of these states have *not* passed anti-cheating statutes, like N.J. §5:12-113, let alone anti-device statutes. As a result, the state would probably charge the device user with theft by deception (which does not include Element 4, above) or some other fraud analog. I believe most prosecutors and judges would laugh this charge out of court. They would ask: Where's the misrepresentation? Did the casino at least put a sign up that computers were prohibited? (On this point, I would like to hear from readers about any such signing at Indian casinos.) Still, there is a risk of prosecution and conviction, mainly due to political factors à la Louisiana.

### **Caveat**

I have tried to put most of the applicable *caveats* in the body of this article. The main issue I wish to warn the reader about is that I have not studied the casino regulatory body's rules for any of the jurisdictions above with the exception of New Jersey, Nevada and Mississippi. These rules (as opposed to laws) can have the force of law if the legislature so chooses. It is possible the legislature has granted regulators the power to define some offenses in these rules. *See, e.g.*, Colorado § 12-47.1-302(g) (can define "[a]ctivities which constitute fraud, cheating, or illegal or criminal activities"). I can tell you that in the three states I have studied, the regulators have no such power to define criminal offenses.

As for using "devices" on Indian reservations and in foreign countries, there are just so many possibilities no general rule could apply. I highly recommend a consultation with a gaming attorney who is familiar with these issues. If you go to a general practitioner, you will end up paying hundreds of dollars for attorney's time just to get the attorney up to speed. Even if a gaming attorney is not familiar with the jurisdiction in question, he or she will be able to direct a research attorney from that jurisdiction to relevant sources of law, saving time and money. Furthermore, the research attorney will typically do the work at a professional courtesy rate (yes, I've heard all the shark jokes), saving the client additional money. If you would like me to provide such a consultation, feel free to call me at (609) 646-4100.

If you do not play for high enough stakes to make such a consultation worthwhile, my best advice is to leave the blackjack or other type of gambling computer at home when abroad. First, you can still play with your brain and win a goodly fraction of what you could win with the computer. Second, you will be free from risk of arrest and prosecution, allowing you to enjoy your vacation. Third, you won't have the nosy customs people thinking the computer contains accounting information for the Colombian Drug Cartel. In any case, good luck with or without a "device."

Thomas Duffy is a New Jersey attorney who specializes in representing players versus casinos. ♠

Note: Part II also available in HTML at  
<http://www.blackjackforumonline.com/content/duffyii.htm>.