



A Common Sense Approach to Interactive Poker

by Dave Vialpando

I can't help but think that twenty years from now we will look back on all of the consternation, conflict, and debate regarding online gaming and wonder what all the fuss was about. I expect that by that time, regulated online gaming will be as commonplace as video games and social media are today. By point of reference, I am not a legal scholar or a life-long gaming industry professional. I am a career law enforcement officer, having dedicated 35 years of my professional life to protecting the citizens of California, the last 27 years spent working for the California Department of Justice. I currently serve as the Chairman of the Santa Ysabel Gaming Commission. In spite of my ten years of experience in gaming regulation, I still consider myself an ardent student of the profession. A couple of caveats at the outset, the views I express in this article are mine alone. They represent neither the opinions or position of my former employer, the California Attorney General's Office, or those of my current employer, the Lipay Nation of Santa Ysabel.

On July 14th, Santa Ysabel Interactive, a business enterprise of the Santa Ysabel Tribal Development Corporation, launched its online poker website, *privatetable.com*, initially in a play money format with an eventual real money launch to follow soon. Those who dismiss the announcement of the intention to offer real money play as political posturing or a marketing ploy by the tribe will soon find themselves mistaken.

This is no last minute scramble to pre-empt state-regulated online gaming, or the last act of a desperate tribe trying hopelessly to regain revenues lost with the closing of their land-based casino. Nothing could be further from the truth. Plans for Santa Ysabel Interactive were set in motion over two years ago. The business decision by the tribe to close the casino was made much more recently in light of a more profitable business opportunity, unrelated to Santa Ysabel Interactive or gaming, which became available to the tribe. Business decisions regarding Santa Ysabel Interactive had nothing to do with business decisions related to the casino. Santa Ysabel Interactive and the casino do have significant similarities in terms of operation and regulatory oversight.

After two years of research, education, planning, and design, a platform customized specifically for Santa Ysabel Interactive was designed, tested, and ultimately, launched in the form of *privatetable.com*. Santa Ysabel Gaming Commission staff consulted with interactive gaming operators, system designers and testing labs, payment processors, and regulators from around the world in crafting a robust set of interactive gaming regulations, the framework of which was also adopted by the State of Delaware, with the implementation of the state's online gaming enterprise.

For those who suggest that tribal regulation of online gaming will not be as reliable as the regulation of brick and mortar gaming operations, I can assure you that this is just not the case. My effectiveness as a tribal regulator in the online environment is significantly enhanced as compared to regulatory oversight in a land-based environment. The inadequacies and frailties of human beings are compensated for in a well-designed iGaming regulatory environment. Every hand ever dealt on *privatetable.com* is retained in perpetuity, reviewable at any time by Gaming Commission staff or any other authorized individual. Contrast this with the maximum fourteen day video retention period most tribal gaming agencies have in place in their brick and mortar facilities. How many times have regulators received complaints by patrons who have felt slighted during the play of a given card game, only to be frustrated by video which failed to capture necessary information or by contradictory statements provided by witnesses to the live game. The Santa Ysabel Gaming Commission required that a patron accessible, game replay feature be built into the interactive poker system, as well as a running visual log of all game activity. A patron need only activate the replay feature for any given game, and each move from beginning to end is displayed. The player can even pause the replay at any time to ensure that all the activity at the table was fair and honest. Any evidence to the contrary can be brought to the Gaming Commission's attention, and the Commission will access the system's data and programming to conduct an investigation.

There are those who would suggest that online gaming facilitates access by individuals who are prone to gambling addiction, and that the 24/7 access to online poker exacerbates this condition. I spent twenty years of my law enforcement career in narcotics enforcement, and I can testify that those with active addictions, be they drugs, sex, alcohol, or gambling, will go to the ends of the earth and engage in some pretty horrendous behavior to satisfy their addiction. While interactive gaming may facilitate access to gambling, the interactive system can be programmed to alert regulatory personnel when a person's game play and betting behavior crosses the line into potential addictive behavior. Unlike in a brick and mortar casino, where such analysis and intervention is left up to the subjective determination of employees in the casino, the gaming commission can take immediate action to suspend an individual's game play and refer them to a wide range of resources and services available to assist them. Again, unlike in a land-based casino, where we rely on casino security and gaming staff to identify excluded patrons who attempt to re-enter the casino, a tenuous expectation at best, the interactive gaming system denies logon to all excluded persons

prohibited from accessing the system. Our hope is that the person will then avail themselves of the many resources listed on our interactive gaming website.

Tribes have conducted and regulated, almost exclusively, Class II games, such as poker, from their reservations since 1999 in California. Many of these tribes negotiated Tribal-State Gaming Compacts with California to offer Class III games, such as house-banked card games and slot machines, in their casinos. The authority of the State to regulate gaming occurring in tribal casinos, as outlined in the compacts, is limited to compact compliance related to Class III gaming only. I cannot recall a single occasion when as a state gaming regulator, anyone from my staff conducted an inquiry regarding any component of a tribe's bingo operation or games played in the casino's poker room. No inspection of machines, gaming resource supplies, review of game play, table lay-outs, dealer activity, or review of any other process related to Class II gaming was undertaken by state gaming regulators. The fact is, the state has no authority to such a review pursuant to the negotiated tribal-state gaming compacts. The day-to-day task of regulating Class II games is the responsibility of tribal gaming regulators, who work for the tribe, not casino operations, and who are charged with maintaining the integrity of the games and the safety of patrons. Therefore, the accumulation of knowledge and experience related to the regulation of Class II games resides with tribal gaming regulators and not state gaming regulators.

Based on my experience working for the State, the California Department of Justice employs the most proficient, dedicated, and passionate law enforcement officers and support staff in the Nation, bar none. That being said, the department is woefully understaffed, and the agents' law enforcement mission unrelated to the regulation of the gaming industry guarantees infrequent and rare visits to tribal casinos, and usually for very short periods of time, even when the purpose is related to the regulation of Class III gaming. In addition to the regulation of Class III gaming conducted in tribal casinos, the California DOJ is also responsible for regulating

California's cardroom industry pursuant to the Gambling Control Act and the Business and Professions Code.

Additional evidence of the challenges confronting state law enforcement has been the State's inability over the past four years to stem the tide on the proliferation throughout California of so-called Internet Cafes, where unregulated, unlicensed, illegal slot-themed games are offered through dozens of personal computers at any given site. These operations attract drug trafficking, assaults, robberies, and other criminal activity to the



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locations and communities where they operate and constitute a significant safety risk to the public. This illegal activity also appears to violate the exclusivity tribes negotiated with the State to offer Class III games in California.

There is also the proliferation of illegal cardrooms, advertised on the Internet, and usually operated out of clandestine locations in commercial properties and private residences throughout the state. These unlicensed, unregulated operations attract card cheats, prostitution, illegal alcohol sales, and the risk of home invasion robberies at the locations where they operate. State law enforcement does not have the much needed staff and resources to combat this significant public safety issue. I suggest that anyone who believes the state has sufficient resources to regulate state-licensed Internet gaming enterprises might ask California DOJ how many agents and regulatory personnel are assigned to DOJ's Los Angeles Regional Office, whose territory extends from Bakersfield, south to San Diego County, and from the Pacific Ocean to the Inland Empire, arguably one of the largest gaming markets in the State (the number is less than the sum of the fingers on your left hand). Perhaps one might inquire as to the number of DOJ agents assigned to the Riverside Office, whose territory includes the largest and most profitable tribal casinos in the nation (about the same number of staff as in Los Angeles).

During my tenure with DOJ, I relied heavily upon the experience and expertise of tribal gaming regulators in understanding and resolving issues related to tribal gaming and compact compliance. I also developed an enormous respect for the dedication, capability, and professionalism of tribal regulatory personnel. That respect has only grown since I've had the privilege of joining the ranks of tribal gaming regulators. We frequently rely on each other to share best practices and improve our regulatory oversight of our tribal casinos. We find ourselves sometimes at odds with casino operations who might be more concerned with revues and customer loyalty. The primary concern of tribal regulators is always with game and operational integrity and patron safety.

The same tribal regulatory personnel who have daily oversight of the games in land-based casinos will be tasked with oversight of interactive gaming, with the same goals and priorities as in their brick and mortar casinos. Taking the above into consideration, how can we expect that state gaming regulators will do a better job or even as proficient a job of regulating interactive Class II gaming than experienced tribal regulatory personnel? As is currently the case in California, state gaming regulators have no authority to regulate tribal Class II gaming, including poker.

Some would suggest that online poker is different from tribal casino poker because of the use of personal computers and the Internet. They suggest that online gaming somehow changes the personal computer into a gaming device. I would disagree with this conclusion in that the use of a personal computer (PC) and the Internet is merely the means and channel of communication between the player and the gaming which is occurring on tribal lands, if the servers containing the system platform

and associated processes are located on tribal lands. The state regulations where online gambling is now legal allude to this conclusion and one state, New Jersey, expressly defines the gaming activity as taking place within the gaming servers. Both legislative proposals now under consideration in California, likewise specify the regulatory requirements related to gaming servers and hubs, but outline no authority granted to the state to audit, inspect, or query the databases of a player's PC when they chose to access a state-licensed online gaming website. If a patron's PC indeed becomes a gambling device when online gaming is accessed, then where is the authority granted to state gaming regulators to inspect and examine these devices, as is currently the case in the state's review of Class III gaming devices (slots) in tribal casinos? Of course, to suggest such regulation would not only be ludicrous, but grossly abuse a citizen's Fourth Amendments rights to privacy, and virtually ensure the demise of the online gaming industry in California before it even gets off the ground.

To suggest that a PC used to access an online poker website is a gambling device is tantamount to stating that a PC used to order a pizza for delivery becomes a restaurant, or a PC used to order computer peripherals becomes an electronics store, or when a customer takes advantage of their bank's online bill pay service that their PC magically turns into a financial institution. Of course, this is not the case. The computer is the communication channel for these goods and services. The same logic should apply to PCs used to access online poker websites. The determining factor should be the level of influence the patron has over the operation of the game. When a person watching Monday Night Football on their television decides to check out Dancing With the Stars and changes the channel, the football game does not stop, it continues unabated. The viewer has no influence or control over the football game. The same thing happens when an online gambler disconnects from the system, the game continues without interruption. As a gaming regulator, I have no control over the power button, keyboard, or any other element of a patron's PC, but I can deny them access to the website at the gaming server located on tribal lands. I can monitor, log, and archive all of a patron's inputs to the system, from player registration to game play to financial transactions at the system's servers located on tribal lands. The regulation of the system and all related processes occurs at the server, wherever the server is located, and not at the customer's PC. There is no way a PC can be defined as a gaming device in an online gaming environment without demanding regulatory access to the actual computer and all of its related systems.

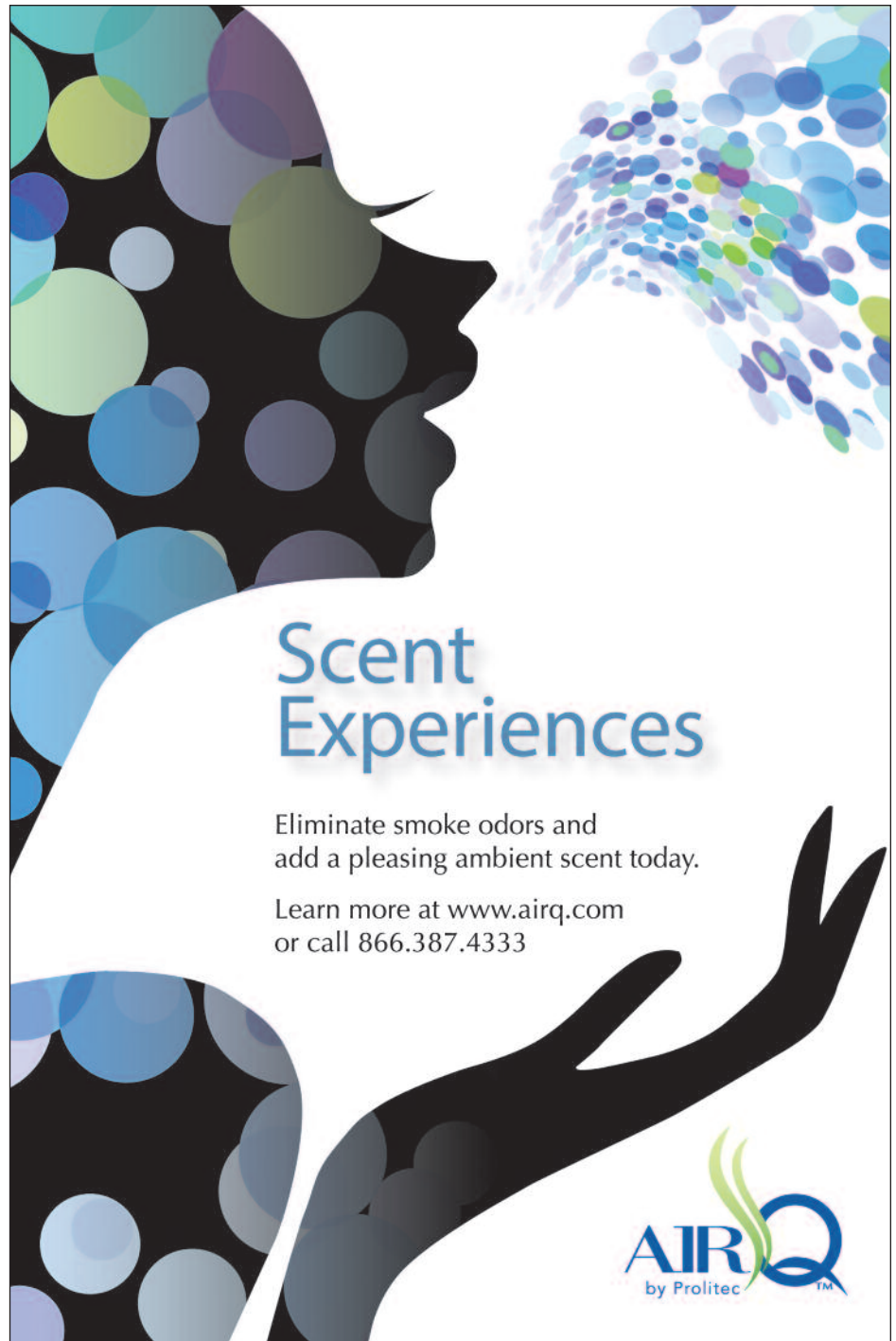
When a consumer executes a command from their PC to their financial institution to pay a bill or transfer funds from one account to another, the transaction actually takes place at the bank's server, wherever that server is located. All of the government regulations related to online banking deal with the financial institution and the institution's digital infrastructure, including servers. The consumer relinquishes none of their constitutional protections against unreasonable government intrusion with regard to their personal computer as a condition of

engaging in online banking. The same theory should apply to financial transactions related to online poker where the servers conducting those transactions are located on tribal lands.

I fully support California's efforts to enact legislation providing state-licensed Internet-based gaming, in the legislation's current format that would be online poker. Unfortunately, as currently drafted, both bills exclude most small to mid-level gaming tribes, many of which have a long-history of well-regulated Class II gaming in their brick and mortar tribal casinos, due to the exorbitant price of admission to a state-regulated online gaming industry. The purported purpose for this high entry fee (\$5 million in the case of one bill and \$10 million as proposed in the other) is to ensure that only those entities with the economic means to craft a reliable iGaming infrastructure will be allowed to participate. Obviously, a state-compacted tribe operating any gaming facility in California has already proven by its very existence that they have the means and the experience to design fully functional and reliable gambling operations. The proposed legislation is designed to further limit the number of tribes that could participate in online poker enterprises. The point being that tribes which have already been guaranteed exclusivity to Class III gaming and which have endured the rigorous process of being approved by the State to operate a Las Vegas style casino for anyone to visit are now being told they are not qualified to operate an online Class II poker game akin to the games they have always operated and regulated themselves. This begs the question, if currently operating gaming tribes in California are not qualified, then who is?

The next major issue with the proposed California legislation is the obvious exclusion of tribal gaming regulatory agencies and the vital role they play in ensuring the integrity of gaming and the safety of patrons. Instead, the legislation, as currently written, grants the state overriding authority over the regulation of online poker in California. Not only does this change the exclusive regulatory authority tribes have historically had over Class II gaming conducted on tribal lands, as outlined in the Indian Gaming Regulatory Act, but it totally ignores the experience, expertise and essential role that tribal regulatory agencies play day-to-day in overseeing tribal gaming


operations. Instead, the legislation relies on state gaming regulators to oversee a state-licensed online poker industry. State gaming agents are already overworked, understaffed, and only occasionally present to monitor gaming activities. Add to this the fact that the Department of Justice is precluded by statute from expending any state funds to educate or prepare their personnel to regulate online gaming before legislation is actually enacted, lest they unduly influence the state legislative process. This means that the learning curve will be huge for state regulators once legislation is enacted. Most of us are all



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too familiar with the challenges of simultaneous on the job training coupled with actual regulation of gaming and related processes.

My hope is that the state will rely on the experience and knowledge of California tribes, tribal gaming commissions, and others across California, in designing legislation which is fair and equitable for all potential stakeholders, which recognizes the essential role that tribal regulatory agencies play in ensuring the integrity of gaming, and which reinforces the need for positive and proactive government-to-government relationships for tribes involved in interactive gaming. While all Tribal-State Gaming Compacts related to Class III gaming contain provisions for a government-to-government dispute resolution process and reliance on a Tribal-State Gaming Association to address issues of mutual concern, no such provisions are contained in the current proposed state-licensed Internet poker legislation.

Some have labeled Santa Ysabel's entry into interactive poker as rogue and insincere. I would point out to Santa Ysabel's detractors that prior to the tribe's business decision to close the tribe's land-based casino, the tribe's last state government compact compliance review resulted in a finding of 100% compliance and the last NIGC gaming inspection found the Gaming Commission in 100% compliance. Santa Ysabel, through the Santa Ysabel Tribal Gaming Commission, has consistently emphasized a steadfast commitment to the integrity of gaming, the resolute safeguarding of assets, and the absolute protection of patrons.

The Santa Ysabel Gaming Commission has crafted a robust and comprehensive set of interactive gaming regulations. Most of these regulations are publicly available as they have been posted on the Commission's website, *sycommission.net*. Those regulations which have not been posted on the website involve internal processes and practices, or contain proprietary and confidential information. The Commission encourages input and constructive suggestions from patrons, industry professionals, tribal gaming regulators, and government regulators to improve regulatory oversight of the tribe's interactive enterprise.

In spite of the apparent consternation

and complexity the subject of Internet gaming has engendered at countless conferences, symposiums, and industry meetings throughout the state and the country, we would do well to apply a little common sense and reduce the associated issues to their lowest common denominator. ♣

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