Spotlight on Penny Coleman
Principal, Coleman Indian Law / Counsel, Anderson Indian Law

Penny Coleman opened Coleman Indian Law and affiliated with Anderson Indian Law following a federal government career in Indian law. Serving as the chief counsel for many of her 16 years at the National Indian Gaming Commission (NIGC), her litigation, legislation and management experience in gaming is extensive. As lead counsel, she reviewed hundreds of contracts and developed ground breaking analysis on managing without an approved management contract and IGRA's sole proprietary interest requirement, which resulted in millions of savings for tribes. Coleman also served within the Office of the Solicitor within the Department of the Interior (DOI) where she directly advised the Secretary, the Counselor to the Secretary, the Assistant Secretary - Indian Affairs and the Solicitor on Indian gaming matters. She developed new gaming policies and legal theories, reviewed tribal-state gaming compacts, gaming-related contracts, Indian lands issues and environmental documents, mediated disagreements, prepared briefing papers for the President of the United States, and wrote testimony for DOI officials.

Tribes across Indian Country are looking closely at Internet gaming to determine what it could mean for the future and how best to proceed. This month, Indian Gaming magazine interviewed Coleman about the complex issues surrounding I-gaming. Here is what she had to say…

Because the DOJ's January opinion on the Wire Act is not a law passed by Congress, how should tribes view this opinion with regard to planning for future I-gaming operations?

With a lot of enthusiasm and a little reserve. The DOJ opinion opened up I-gaming throughout the United States. By concluding that the Wire Act is limited to wagering on sporting events or contests, the DOJ eliminated the federal barrier to Internet gaming. We now need to look to individual tribal and state laws to determine whether and where I-gaming can be offered. This is quite the opportunity for tribes to get involved in I-gaming. This does not mean, however, that the DOJ will not change its opinion; a U.S. Attorney cannot act independently to pursue an I-gaming case under the Wire Act; or new stealth legislation, passed while the rest of us sleep, could not change the legal landscape.

Internationally, is there a successful model tribes can look to with regard to the relationship between a brick-and-mortar property and a successful online gaming operation?

You need look no further than the World Series of Poker tournaments where poker players qualify online to participate in tournaments at the brick-and-mortar facilities. The online organizer benefits when poker players pay for the opportunity to qualify; and the tournaments bring players and others caught up in the poker game into the brick-and-mortar facility. This concept is so simple and straight forward that it is hard to come up with a better idea.

What are some of the biggest misconceptions/questions you've heard from tribes about I-gaming? What would your clarification to those misconceptions/questions be?

First, many assume that all types of gaming over the wires were considered illegal. However, the NIGC had previously deemed legal 1) proxy play (gaming where an on reservation agent for the bettor plays the game); 2) prepaid pull tabs enjoyed online with slot like graphics; and 3) games played on a dedicated line from one jurisdiction to another.

Second, many seem to believe that they will need an IGRA compact for any kind of I-gaming. Nevertheless, there are good arguments that poker, bingo and pull tabs can all be played online without a traditional IGRA compact. All are traditionally Class II and therefore not subject to regulation under a compact. More importantly, the use of the Internet does not necessarily convert such gaming into Class III. Following a number of court decisions on bingo and pull tab machines, the NIGC concluded in December 2009 that a machine used with certain card games is a Class II technologic aid because the device did not replicate the game by incorporating all of the characteristics of the game. Similarly, computers and Internet lines do not automatically convert Class II

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games into Class III games. Consequently, Class III compacts are not relevant to such Class II games. The more important agreements for tribal nations will be mutual agreements with other jurisdictions similar to the state agreements that authorize the availability of Power Ball and Mega Millions in 44 jurisdictions.

How can a tribe best prepare for I-gaming and not get left behind?

It is extraordinarily important that tribes take all of the necessary steps to make sure that they are fully into I-gaming and that they fully implement all of the lessons learned from the development of brick-and-mortar casinos over the last 25 years. This includes making sure, from the very beginning, that the tribe develops an overall strategy and business plan and retains experienced professionals in regulation, management and technology. Those professionals should review the tribe's internal capabilities including potential staffing, legal codes; business and regulatory entities; and identify experts who can help the tribe (including software and hardware providers, lawyers, lobbyists, investors, security and managers).

Tribal leaders must educate themselves and their membership on the business of I-gaming and how that business will differ from and help the brick-and-mortar business. They must become at least relatively tech savvy and explore various platform providers and European and Canadian poker sites. Further, they should assume that there will only be a handful of really successful I-gaming sites in future years and plan accordingly.

To start online, tribes can take a number of actions that carry relatively low risk. They can develop forms of I-gaming that the NIGC considers legal, such as proxy play and prepaid lotteries; develop a non-gambling site that allows each tribal nation to bring in income and get a head start on I-gaming; and develop a cross-marketing strategy that will work to the advantage of the nation's brick-and-mortar facility.

In the meantime, it is dangerous to ignore the politics of I-gaming. The federal and state governments want to reap maximum benefits from I-gaming. Tribes must decide where they stand on I-gaming and lobby Congress and the states to make sure their interests are represented. A major goal should be to benefit from I-gaming while also identifying and mitigating potential impacts on tribal sovereignty and the tribal government.

Finally, recognizing that most I-gaming players will not reside on Indian lands, tribal nations should aim for a system that works for states and tribes. The Multi-State Lottery Association was formed in 1987 with seven lotteries and is now known nationwide as the provider of Power Ball and Mega Millions in 44 jurisdictions. Tribes can have an equally successful economic consortium of tribes (and possibly states) initially organized by region, state, or diversified areas of the country.

How important is it for tribes to establish themselves in the "free-play" online environment while I-gaming legalities are so uncertain?

Online free play offers a number of advantages. It allows time to get started, make mistakes, identify the best professionals and marketing strategies, and develop infrastructure and player loyalty – all at low risk.

What are some of the most important brick-and-mortar legal issues that may not be getting quite the attention of the hotter I-gaming issue?

The continued fight against tribes seeking trust lands for gaming remains one of the most important issues facing tribal nations. Many tribes do not have a reserve or any trust lands. These landless tribes have little traction in Congress or the DOI. The politicians, lobbyists and gaming interests opposing those land acquisitions have been extremely successful. They rely on fear, misinformation and the Supreme Court decision in Carcieri which limited the Secretary's authority to take land into trust. In addition, other landless tribes, seeking federal recognition, gave up gaming opportunities in their recognition legislation. As a result, the chasm between the gaming haves and have-nots remains wide.

In your opinion, in what hypothetical circumstance would a tribe be allowed unequivocally to participate legally in I-gaming?

I am a lawyer. Consequently, I'm constitutionally incapable of not equivocating. The only way to get an unequivocal response from me is if Congress passes a federal law clearly stating that tribal nations can conduct I-gaming; and even then I cannot promise I would not equivocate. But, based on the present law, it appears likely that tribes could presently enter into agreements with other jurisdictions, including other tribes, states, and international jurisdictions to provide Class II (and possibly Class III) games on the Internet. ♣

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