

IGBA Poker NY Law Excerpt from
ANALYSIS OF THE ILLEGAL GAMBLING BUSINESSES ACT
-- New York State Gambling Law

Under New York law, “[a] person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.”¹⁴ “A person ‘advances gambling activity’ when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity.”¹⁵ “A person ‘profits from gambling activity’ when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.”¹⁶ “‘Unlawful’ means not specifically authorized by law.”¹⁷ “And it is gambling when a person ‘stakes or risks something of value upon the outcome of a contest of chance...upon an agreement or understanding that he will receive something of value in the event of a certain outcome.’”¹⁸ “‘Contest of chance’ means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”¹⁹

In summary, if poker contains a material degree of chance, then it is gambling, and since it is not specifically authorized by state law, it would be illegal gambling. Although gambling itself is not a crime, materially aiding or profiting from any form of illegal gambling activity, other than as a player, constitutes the crime of penal promoting gambling in the second degree.²⁰

There are numerous cases and Attorney General opinions concluding that poker is a game in which chance is a material factor.²¹ However, these all involved video poker machines and video poker games are far different from live poker games because they lack many of the skill elements of table poker such as:

¹² *United States v. \$734,57.82*, 286 F.3d 641 (3rd Cir. 2002).

¹³ *Id.* at 649.

¹⁴ N.Y. PENAL LAW § 225.05 (2007).

¹⁵ N.Y. PENAL LAW § 225.00(4) (2007).

¹⁶ N.Y. PENAL LAW § 225.00(5) (2007).

¹⁷ N.Y. PENAL LAW § 225.00(12) (2007).

¹⁸ N.Y. PENAL LAW § 225.00(2) (2007).

¹⁹ N.Y. PENAL LAW § 225.00(1) (2007).

²⁰ It may be significant at some time to note that penal promoting gambling in the second degree is a Class A misdemeanor, punishable by imprisonment for no more than one year (N.Y. Penal Law §§ 225.05 and 55.10), and therefore does not constitute a “specified unlawful activity” under the U.S. money laundering and RICO statutes, which only apply to crime punishable by sentences exceeding one year (18 U.S.C. §§ 1956 and 1961).

²¹ *United States v. Gotti*, 469 F.3d 296, 342 (2nd Cir. 2006); *People v. Turner*, 629 N.Y.S.2d 222 (1995); *Matter of PJP Tavern v. N.Y. St. Liquor Auth.* 152 A.D. 578 (2nd Dept 1989); *Matter of Cos Dei San v. N.Y. St. Liq. Auth.* 147 A.D.2d 370 (1st Dept. 1989); N.Y. Op. Att’y Gen. 85-12 (1985), 84-F1 (1984), 1981-68 (1981).

Reading other players,
Raising, folding or calling
strategies, Raising to get
more money in the pot,
Getting more money in the pot by
not raising, Raising to drive out
opponents,
Raising as a means of cutting down
opponents' odds, Raising to bluff or semi-
bluff,
Raising to get a free card, and
Raising to gain information.

Though the New York statute uses slightly different language than the classic “predominance test” for assessing chance and skill used in other States, it employs essentially the same dominance factor test. *See, e.g.*, N.Y. Penal Law § 225.00(1) (McKinney 2008) (“[A] ‘[c]ontest of chance’ [is] any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”); *see also New York v. Hua*, 2009 WL 1575188, *3 (N.Y.C. Crim. Ct. Queens County June 5, 2009) (dismissing case because there was “no support given for the claim that mahjong is a game of chance”). As the *Hua* court explained:

[W]hile some games may involve both an element of skill and chance, if “the outcome depends in a material degree upon an element of chance,”

the game will be deemed a contest of chance. “The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the ***dominating element*** that determines the result of the game?” It follows then that wagering on the outcome of a game of skill is therefore not gambling as it falls outside the ambit of the statute.

Id. at *2 (emphasis added) (citations omitted).