

Living with the people who regulate your lives

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Ben Liebman: I'm honored to be invited to speak at the Congress. I'm now on the staff of the Government Law Center of Albany Law School, and I ought to provide you with a nuanced, intellectual, well-researched, politically correct discourse on the differing perspectives, agendas, and missions of racetracks and racing commissions. I can't give you that speech. All I can do is give you my gut feelings on how racetracks and racing commissions really interact, and the short answer is that they don't.

About a decade ago, Tom Meeker, then and now the head of Churchill Downs, gave a speech where he referred to racing commissioners as "gnomes" and "those little cloisters that meet in their own little states, and make these grand and wise decisions." The racing commissioners were outraged - I repeat -outraged that anyone could dare say that about racing commissioners. There was a big fight in the racing press about what was termed Meeker's verbal barrage. And after the criticism, Meeker issued a

bland excuse about his "off-handed and upon reflection very cavalier remarks about racing commissions."

This was about as silly a controversy as ever existed, because everyone should know that Meeker's remarks and his non-denial denial barely scratched the surface of how racetracks truly feel about racing commissions and commissioners.

The fact is that most racetracks believe that racing commissioners are two thirds of the old Perry Mason objection: not necessarily incompetent, but irrelevant and immaterial.

It shouldn't be a secret. Racetracks look at racing commissions the way that I looked as a kid to visiting my least favorite aunt and uncle. I wouldn't say anything publicly, but it was tedious and pointless - it might not be painful, but the point was that the best a visit could be was not painful. It's like a blackjack hand when the dealer has 21. A push is the best you could get. To race tracks, racing commissions are the proverbial bodies at an Irish wake. You need them to conduct racing; but they better not do anything.

Racetracks may not actually believe the traditional negative stereotype of racing commissioners - that commissioners combine the characteristics of W. C. Fields and Captain Hook's assistant Mr. Smee. In short, that commissioners are a blend of officious windbags who pontificate on subjects on which they know nothing and political toadies who didn't have the clout to get a significant government job but took a job with no heavy lifting. But racetracks do look at commissions in the same way that Enron looked at regulation. They just wished that the regulators would go away.

I would be remiss if I didn't point out that the current members of the New York Racing and Wagering Board, Chairman Michael Hoblock and Commissioner Cheryl Buley, do not possess any of these negative characteristics. You won't find better, decent, hard-working people anywhere in racing or in government.

In racing, this attitude towards racing commissions has coalesced into a form of wish fulfillment. OTB's and tracks not only wish that the racing commission would go away, they act as if the commission has gone away. At the Racing Board, we seemed to be regarded as temporary interlopers, just passing through the racing landscape. Very rarely at the Racing Board

did I see tracks or OTB 's try to deal on the merits with the Racing Board. They seemed to have two basic strategies: defiance or avoidance.

These strategies were actually understandable, if not totally rational.

Government agencies are notorious for their lack of follow through, and racing commissions tend to have minimal or no staffs so that followups are even less likely at a racing commission. And racing entities believe that when push comes to shove, a racing commission will not have the political gumption to force an OTB or a racetrack out of business. So since racing commissions are paper tigers, they believe they can defy a commission with impunity.

The defiance strategy was basically practiced by the New York Racing Association under its prior management. If the Board said something on simulcasts, audits, or even the placement of attendants to help track workouts, NYRA's response was to say no and fight. So NYRA would either sue or the Board would have to sue. The suits were generally over matters of minimal consequence. The only beneficiary of NYRA

intransigence was often NYRA's outside counsel. It didn't help the board. It didn't help NYRA, and it certainly didn't help racing.

The avoidance strategy is easy to explain. They just made believe that the Racing Board didn't exist. The first rule of implementing this ducking strategy was to never show up at a Racing Board meeting. My recollection is that during my first six years at the Racing Board, a total of two outside people showed up at our board meetings. We could have held our meetings in the men's room of a takeout Chinese restaurant, and no one would have known the difference. When Mike Hoblock became chairman of the Racing Board in 1997, he believed it was appropriate for the Board to go out to the tracks and the OTB's and hold meetings. Even then, there were times when we held meetings at tracks and at locations adjacent to tracks, when no one from that track bothered to show up.

Several years ago I had a dinner with a retired executive from an OTB corporation. I asked him about his work at OTB. He simply told me, "We didn't pay attention to what the Board said. We disregarded your orders, and if you got back to us, we disregarded them again. There were almost never

any times when there was a third order." For him, the avoidance strategy worked.

But I don't think that these duck or fight strategies ultimately work. They're all premised on the notion that the racing commission is a paper tiger that for administrative and political reasons can't touch you. It's false. Just look at the last decade in New York. The Racing Board brought about an end to Batavia Downs, two total management changes at Vernon Downs, and the removal of the entire leadership of Capital OTB. In 1994, the Racing Board shut down Saratoga Harness for about a month, and it's fair to say that Saratoga Harness has never recovered on track from that suspension.

Even NYRA has been impacted by the board. NYRA had refused to act on the Board's complaints that its audit procedures had given an unwarranted pass to NYRA's money room. Trust me, I thought this was a minor issue, but Executive Director Ed Martin and Mike Hoblock persisted. And they were right. It turned out that there was considerable money laundering activity at NYRA leading to four current arrests and costing NYRA greatly in both legal expenses and public stature. All of this would have been avoided if

NYRA had listened to the Racing Board on day one. You don't need Perry Mason to prove that racing commissions are not paper tigers.

Now once you recognize that racing commissions are not paper tigers, what do you do about it? How do you adjust your strategy? The first thing to realize is that racing commissions are not going to change. Lonny Powell can stand on his head, juggle, tell jokes, and get every model rule on drugs, on wagering, and on claiming in the world enacted, but it's not going to change the nature of racing commissioners. You have to change your approach, and the change is a simple one. Stop dissing the racing commissions.

I have a five-point plan on how to wean yourselves off this dissing. One, start showing up at commission meetings. It's a sign of respect, and even if you don't respect the commission, it's in your best interest. We all know that racing often works in the opposite way of the Godfather, in the Godfather the watchword was that "it's just business; it's not personal." In racing, it's too often personal, not business. It's a lot easier psychologically for a commission to beat up someone whom it doesn't know rather than someone it sees on a regular basis.

Two, provide the racing commissions with information. I think it's fair to say that racing commissions are not a high priority in most states. They don't have much staff, and that staff doesn't have the time or inclination to gather business information. Any information you can furnish the racing commission on the status of your business helps you with the racing commission. If you can set up committees like Alan Foreman has done in some states with the Thoroughbred Horsemen's Association, it works even better.

Three, assign someone knowledgeable to be a regular liaison with the racing commission. Every year at the Racing Board, I found myself commiserating with someone on the Racing Board staff or another commissioner asking simply why don't they get it. We were continually baffled at how infrequently racetracks realized that the Board had to follow its law and rules. The Board can't do whatever a racetrack or OTB asks it to do. A commission can't magically waive its rules to allow more betting entries. It can't look the other way when a racetrack proposes a promotion that violates the state's criminal laws. It can't throw anybody it wants off the track. So, appoint someone on your staff who does get it, who knows the racing

commission, and who talks the same language as the racing commission to deal with the racing commission. It is sure to save you some grief in the long run.

Four, don't scapegoat the racing commission. The old canard that racing's problems are due to the commissions is nonsense. It's like me blaming my parents for not passing on genes that would have allowed me to play centerfield for the Dodgers. When racing was prospering, the commissioners were no better then than they are today, and even when racing was prospering, nobody went around crediting racing commissioners for the success of racing. Nobody stopped going to a racetrack because he or she didn't like the racing commission. This fable really is incompetent, irrelevant, and immaterial.

Five, and sometimes I think that this is foremost: keep politics to a minimum. I think if there is ever a disconnect between the commission and the tracks, this is the issue. The tracks think most of the issues before the commission are political. The fact is that almost none of the issues faced by the racing commission have political implications. I don't think there were more than a dozen issues over the years I was at the Board where the

governor's office had any involvement, and none of these issues involved hearings of licensees. There were two hearings where we thought the governor's office might have been interested. In one instance we decided in the way opposed to the governor and in the other one, we went in what we thought was the governor's way. Looking back at these hearings, it's clear that the governor's office could not have cared less about the Racing and Wagering Board's votes. The few episodes of gubernatorial interest involved policy questions, which is why we elect a governor in the first place. And even then, most of the time all we heard about was a call asking us to make sure that we were doing the right thing. The overwhelming majority of issues faced by a racing commission have no political implications and no political involvement.

And this limited involvement also extends to the legislature. Legislators and governors don't see the racing industry as a big deal. Racing is small potatoes outside of Kentucky. In 1975, New York state received \$183 million from pari-mutuel taxes. That translates into \$602 million in 2001 dollars. Those same taxes today raise \$29 million. State revenue from racing is 5% of what it was a quarter century ago.

Secondly, elected officials see racing and see trouble. Look in New York over the past decade. Two of the last four heads of New York City OTB were found guilty of crimes committed while they were in office. The longtime head of Capital OTB, Davis Etkin, and Davis' son were convicted of crimes. The majority owner of Vernon Downs was convicted of massive frauds, and one of the four general partners of Saratoga Harness was found guilty of insurance fraud. NYRA's pari-mutuel union head and three other clerks stand accused of money laundering. The previous president of Suffolk OTB was forced from office by financial scandals. It's not a pretty picture. There's a high crime rate for a small industry, and it's not an industry that many politicians want to see their names linked with.

Racing also presents some practical problems for politicians. It's often a zero sum game. If you support some group, you're making some other group in racing unhappy. If you support the OTB's on an issue, you make the tracks unhappy and vice versa. It's just not the kind of motherhood and apple pie issue that politicians like. Legislators who are not from districts with a racetrack or breeding farms generally have little concern about racing. We just didn't see a lot of legislators involved in racing matters before the Board.

Given this lack of political involvement in racing, your best bet is to avoid politics in your presentation to the commission. It's embarrassing, and the commissioners are not that stupid. When people told me that I should support them because I was a Democrat or that I should support them because it was a Republican administration, my first thought was they must have a pretty lousy argument on the merits. The commissioners know who you are. When you hire someone because of his or her contacts, they know it, and it just makes them cringe. Don't rub it in their faces. It can backfire. Short of absolutely saving your license, do the politics before the legislature not before the commission.

Let me give you a short Davis Etkin story here as exhibit a on how not to deal with a racing commission.

As many of you know, Davis Etkin ran Capital OTB from its inception in the early 1970's. He was a frequent speaker at industry conventions and was regarded as an innovator among OTB leaders. For more than two and a half decades, he had played the system to perfection. But when he got in trouble, he violated most every precept that I've talked about today. We got a

complaint about OTB in early 1997 from an OTB board member concerning wagering on credit. We sent it to Davis for a response. Counting apparently on the traditional avoidance approach, he didn't respond. We wrote back to him. Again, he ducked. We finally started an investigation, and got total denial from Davis' counsel. He soon realized he was in trouble on the facts, and he started to get political.

He first hired an attorney who used to be with the Racing and Wagering Board and was friendly with Joe Neglia, one of the other commissioners, and me. When that didn't bring him everything he wanted, he hired an attorney whom he believed had close contacts with Ed Martin, the Racing Board's executive director. He was in his own way trying to Enron the racing board. It was blatant, pathetic, and it couldn't work. His hirings just embarrassed everyone and ended up backfiring on him. By playing avoidance, denial, and politics he parlayed a simple complaint into two felony convictions. If you want to play politics, play it with the legislature, not with the racing commission.

I'm not saying that racing commissions are perfect. The Hall of Fame at Goshen isn't recruiting any racing commissioners. I used to say that the

New York Racing and Wagering Board was the state's answer to Garrison Keillor's Lake Wobegone. It was the agency that time forgot and the decades cannot improve. But you can't change the racing commissions, and they're not going to fade away. You've got to change your public attitude towards them.

And if you don't change your attitude, you too could wind up incompetent, irrelevant, and immaterial. Thank you.