

Harness Racing Congress
Thursday, February 9, 2006
General Session

8:30-9 a.m. Where Things Stand Now

- **I. Nelson Rose, Law Professor and Author, Internet Gaming Law**

Stan Bergstein: Professor Nelson Rose is recognized as one of the world's leading experts on gambling law. Many of you, who are fortunate enough get his Internet releases, know that he covers a full spectrum of that subject matter. He is a tenured full professor at Whittier Law School in Costa Mesa, California, and he is also an internationally known scholar, author, and public speaker. I am happy to welcome him back today. The interval has been far too long.

He is best known for his internationally syndicated column, *Gambling and the Law*. He is going to talk to us this morning, and we will have handouts for you, on gambling and the law and the US ignoring the April deadline on the World Trade Organization. Most recently he is the author of *Internet Gaming Law*. Since it is a subject that everyone in this room either is aware of or is going to be painfully aware of, I think that *Internet Gaming Law* is something that all of us will enjoy reading, and if you want to order your copies afterwards, I am sure that Professor Rose would not be adverse to it. He first spoke to HTA at the Arizona Biltmore 15 or so years ago. Here is Nelson Rose.

I. Nelson Rose: Thank you, Stan. Thank you very much. I realized from last night that I first met Stan when he had been in the business only 40 years, and the son who was with me he was talking about, who was five years old at the time, is now in college somewhere. I think he is in London. He writes every now and then for money. I want to thank Stan and all the organizations for inviting me, and we do have copies of the handout.

First, if you would like to get the newsletters, which are basically copies of my column, *Gambling and the Law*, just send me an email to gamblingandthelaw.com and say "add to mailing list." I do cover everything. Right now I am putting together a summary of what is going on in every single state. I recently wrote about the laws that affect when Indian tribes buy

casinos, and I did a couple of columns on the wonderful lawsuits that went on in New York to bring VLTs to the racetracks.

I want to focus on Internet gaming today. I am going to talk mainly about two topics—the pending bills in Congress, what I see happening, and the World Trade Organization—and I am also going to leave time for questions.

There is a basic explanation for what is going on with the law of Internet gambling, which is that the government, especially the federal government, simply doesn't take gambling seriously. It doesn't even take gambling seriously enough to outlaw it. They just keep getting hit with surprises. Now this can be very good. It can be good news for the racing business, which managed in December of 2000 to get an amendment to the Interstate Horse Racing Act to expressly allow all operators, anyone who can get licensed, to do advanced deposit wagering to allow people to bet from their homes by computer or by telephone, as long as it is legal in the state where the bettor is and legal where it is being picked up. The way the law reads, you have to be in the United States, so that is going to be the World Trade Organization problem. That got through Congress partly because Congress did not care.

On the other hand, if you are interested in outlawing Internet gambling, Congress does not care about that either. Senator Jon Kyl of Arizona is now on his tenth attempt to get a bill through the Senate. There is another one pending in the House of Representatives now, and they just can't get enough interest. In fact, one of the three people running in the House of Representatives for Majority Leader, John Shadegg actually said, "We need to make the following reforms." He had a very short list. One was transparency in Indian gaming, and outlaw Internet gaming. Nobody cared. It did not get picked up by anybody. It is just not an issue yet. That may be bad news for opponents, on the other hand it could be good news, depending on which side of the issue you are on.

You may have seen the articles over the last several months, starting since June about Ruth Parasol. Well, I have worked with Ruthie for more than ten years, long before she invented Internet poker. She created Party Poker and now, in June, went public with partygaming.com and is worth \$1.8 billion. Not a bad business, particularly if you have somewhat of a monopoly because people in the United States can't run it.

What is happening with the pending legislation is it is not going to go through unless somebody pushes it and they can get support from all the potential opponents. They are finally

neutralizing the opponents. Racing is now happy, and the American Gaming Association has pretty much come over. The Indian tribes still are the ones that are left, but when Kyl proposed it in the Senate a few years ago, he got a 90 to 10 vote in favor of prohibiting Internet gambling. When it went through the House of Representatives once, it went unanimously. There were less than 30 people on the floor at the time, but it shows you what will happen. I was just talking to Gene Christiansen, who is going to be on a panel after me, and I said, "You know, nine years ago, four years ago, I said it is just not going to pass." I think now it is going to pass, not this session, but within the next couple of years, Congress will pass a law making it clear that Internet gambling of all types, other than the special exclusions like the Interstate Horse Racing Act, is illegal. The way they are going to do it is by focusing on the money. They are going to require the United States Treasury to make regulations to say no one can transmit money electronically in any form to any outlet which then even forwards it to an Internet gambling site. It will take a couple of years to get the regulations, and for a short time, it will put a damper on the industry. Even I can figure out how to get around this. What you do is you set up a site that sells gold, so people buy gold using their credit card, and then you have a little link that says, "Do you want to sell your gold?" Now you have e-cash. There are going to be ways around it, but still it will definitely put a damper on it. I did not hear Terry Lanni's speech, but definitely Congress is not looking at legalizing and regulating. They can't even get a proposal passed to do a study on it. They are looking at outlawing it.

The other thing that is pending is the World Trade Organization. My handout is called "US Ignoring April Deadline in WTO" because the World Trade Organization gave the United States until April 3 to fix up its prohibition on outlawing Antigua bookies from taking bets on horse races. It is a firm decision and they are just ignoring the deadline. The way it happened is, again, because the federal government doesn't take gambling seriously. When it was negotiating the treaty for the WTO, which is GATS, General Agreement on Trades and Services, what you do as a country is you make a list, and you can say, "I want to include these services. I want to exclude these services." What the United States did is there is enter a big category which deals with entertainment. It deals with everything from gambling to circuses to newspapers, which is kind of interesting. The United States said, "We let in everything. We do not care. Everybody can come in. Any foreign country that is a member of the WTO can sell their services in the United States, other than sporting." I believe that was done to keep out professional sports teams

from other countries from simply being able to move to the United States and set up. Well, they left gambling off the list. Other countries specifically said, “We will not let in foreign illegal gambling.” The United States just left it off the list. Antigua files a formal complaint, saying, “You have agreed to let in gambling. It is not on the list of excluded products and services, and the WTO says they agree.” The United States was trying to argue sporting means gambling, looking at British dictionaries from the 17th century. It did not fly. It did not work, so the United States has agreed by treaty to let in all foreign gambling, which obviously means the Internet, anyone who is a member of the WTO, and country or state.

The only thing that saved the US, and the reason they are not taking the deadline on April 3 seriously, is there is an out. Even if you agree to let something in, you can still keep it out if you can show it will undermine the country’s morality and public order, and the United States won. They were able to show remote wagering has special dangers that face-to-face gambling does not, and therefore they are worried about children and compulsive gambling. Therefore, the WTO said, “Okay, you can keep out legal gambling, unless, of course, you allow it yourself.” Then they said, “You can keep everything out. Now let’s look at that Interstate Horse Racing Act.” The Interstate Horse Racing Act specifically says Internet gambling on horse races is legal in the United States and the WTO said there is absolutely no excuse for discriminating against Antigua bookies, so therefore you have until April 3 to change the law to allow international horse racing bets to Antigua. Americans have to be allowed to bet with Antigua. I have somewhat of a radical solution, and by the way, the US is ignoring that. There are no bills in Congress to change the Wire Act or amend the Interstate Horse Racing Act. There are no proposals that I know of to amend the treaty, the GATS treaty, to put gambling on the list. Twenty-nine state attorney generals have said to put gambling on the excluded list. The federal government is just blowing them off. It is the states that are worried. The state that is most worried, or should be most worried, is Nevada, because Nevada, by statute, allows Internet gambling. They have a statute that specifically says any licensee, like Bellagio, can take bets on casino games online. There are no regulations. They are not doing it, but they are allowed by law. They are taking sports bets as long as you are physically within the state of Nevada, and I don’t see any way that Nevada would be able to justify allowing its licensed operators to take sports bets from people in Nevada and preventing people in Nevada from betting with licensed sports books in other countries. So Nevada is in trouble, but even Utah signed a letter saying to

change this list and put gambling on the excluded list because the federal law overrules state law. If the WTO treaties are the supreme law of the land, and the WTO says you have to let in all gambling, then Utah has to let in all gambling. At least that is what their fear is and it is a justified fear.

What is going to happen? Well, first of all, the US is blowing off the WTO, which is really a bad thing to do. I taught international gaming law in China two years ago. I was there for six weeks, and the US had spent years bringing China into the WTO, and they finally signed up and agreed, and now we are ignoring a decision of the WTO. Imagine it was China that decided they were not going to let in any foreign products, such as cars, that are manufactured in the US. WTO tells them, "You have to let them in." China says, "We can ignore it. The US ignores it." So it is bad politically. Monetarily, it is not too good either, because what will happen is the WTO is going to impose money sanctions on the US. Antigua is busy issuing licenses, by the way, all over the place, so they are going to claim that the US is costing Antigua billions. They have already said that. It is not going to be billions. Tens of millions, yes. Hundreds of millions, probably not, but it is going to be at least in tens of millions of dollars. The next formal complaints will be filed by the United Kingdom and Australia, where we are not going to be talking about tens of millions. We will be getting into the billions. Where is that money going to come from? Well, you guys know the way Congress works. They have to figure out a way to raise the money if they are going to spend the money, and they are going to say, and I am predicting this, I am the first person to ever predict this that I know of, and I have put it in writing, Congress is going to say, "Okay, we are going to blow off the WTO, Antigua can't take bets from horse races from the United States and then we will worry about England and Australia later. We do have to pay the fines, but where are we going to get the money." Well, who benefits from preventing Antigua from taking bets on horse races from the Americans? Racetracks, OTB operations, and casinos, and I will expect that there will be a proposal in Congress to raise taxes on racetracks, OTB operations, and casinos because they have to come up with the money somewhere. I have what may seem to be a radical solution, which is that I think the racing industry should push to get the law changed so that Antigua can take bets from the United States. It first of all would prevent somebody from coming up with the idea of raising taxes. It will slow down people like Australia and England. In fact, you can even say that any country can take bets from Americans on horse races. Then push real hard to try and get that treaty changed. You are

not just going to allow Americans to bet with foreign bookies. You have to put some requirements in there, so I came up with three. First of all, it has to be a licensed operator in a country that allows Americans to bet on their races. It basically expands the market for the off-track betting, advance deposit wagering for the racing industry of the United States. Now Americans would legally do what they are doing anyway. They could bet on races in Hong Kong and France and Antigua. Number two, the statute is a federal statute and it could be limited to only those states that are allowing advance deposit wagering. Racing states that have not yet accepted the idea that people can bet from their homes and offices do not have to open the door to anybody. I think that would stand. The third one, which I came up with a couple of days ago, which I am really kind of proud of, is that the only people who can take bets are those who are licensed and meet United States standards, one of which is, you cannot ever have been involved in illegal gambling, such as taking bets from the United States right now. All the operators who are up and operating and taking bets from the United States can't take bets from the United States, which I think is pretty cool.

Now I am going to end so I can leave time for questions, but I am sure a lot of thoughts are going through your minds. Do we really want to do this? Do we really want instant competition? Think a moment. Think of your own patrons. If you are in a state that allows advance deposit wagering, you have people who are making bets with your operation right now. They know you, and you can publicize all over the place. Are you going to lose those people, are they going to suddenly start making bets with some unknown person in Antigua? I just can't see that. If anything, they might kind of like the idea that they can get more action, and maybe now we can bet on races in Australia, Canada, Mexico, Antigua, Hong Kong, so that you can take bets at midnight and have basically a 24 hour a day off-track betting operation. I think it is kind of a good idea. It is only my idea.

Does anybody have any questions at all? It does not have to be on Internet gambling.

(Inaudible question)

I. Nelson Rose: Yeah, it is difficult. If it was easy to change the treaty, everybody would do it. You would lose a decision in the WTO, and then you would just say that you meant to have gambling on the excluded list, and therefore we will add it to the list. Also, it is politically

difficult to do because these negotiations on GATS take years. If the United States wants to change its list and put gambling on, they have to give up something, and the federal government does not care enough about gambling to even exclude it. Yeah, you are right. That is why I think the immediate solution is to get a law through Congress and then figure we will do GATS. It is going to take three or four years easily.

Charles Geffen: I am an attorney and I find this thing rather muddled and confusing at best, maybe at worst. I do not know which it is. I would like, if you would, to ask to you to give a brief discussion on the recent announcement of the sporting news resolution through the Eastern District of Missouri US Attorneys office, and what, if any, impact you think that is going to have going forward on dampening the interest of some of the media companies in taking ads and promoting Internet gambling.

I. Nelson Rose: That is a good question. The main federal statute that the Department of Justice is using to go after Internet gambling sites is the Wire Act. This was passed in 1961 as part of Bobby Kennedy's war on crime because at the time the states felt they needed help and they could not control illegal bookmakers who were taking bets on racing and on sports events. The statute is written poorly. The Department of Justice says it covers all forms of gambling. These were cases involving patrons who had bet online and lost credit cards, they sued Mastercard, class actions, one was a consolidated federal case from all over the United States, so these are big decisions. The three courts that have looked at this said, "No, the Wire Act is limited only to bets on races and sports events." Now sporting bet takes bets on sports, so that is easy, but things like party poker probably do not fall under the Wire Act. They do fall under state laws probably, but the Department of Justice just is ignoring the decisions. You have a law that is not quite as good as it could be, and there are a lot of other legal issues. These are licensed operators from other countries, there is a sovereignty issue. We don't want other countries to say that what we do is illegal, so there are some issues like that. What the Department of Justice has decided to do, and I will say it even though it is being recorded, is basically run a campaign of intimidation. Back in July of 2004, the Eastern District of Missouri US Attorney sent out Grand Jury subpoenas to every media outlet, anybody who was advertising Internet gambling, all forms of Internet gambling or linking on the Internet. Yahoo!, for example, immediately dropped its ads.

You can still do a search, but you will not see any pop-ups for Internet gambling. Google still does it. I have talked to publishers who said they responded to the subpoena, in fact we have to because we will go out of business. I mean, imagine you have a magazine called "Internet Gaming Magazine." Ninety-nine percent of your ads are Internet gaming ads, so what the US attorneys are doing is that they are very selectively going after people basically to scare them. *Esquire Magazine* ran a big advertising campaign in about April of last year, and it was actually all Internet poker. The Department of Justice sends them a cease and desist letter, they say, "We are *Esquire*, we can't take the chance. We will not run this again." They announced publicly that they lost a million dollars. It was a million dollar ad campaign from one site. Sporting-Bet now has given in, a couple of radio stations, which happen to be in Missouri, also have given in. I think what happened is the US Attorney was running around and had her car radio on, and she heard these commercials and decided to go after the local stations. What is interesting is nobody is being arrested. None of these cases are going to court. I think what is happening is that the Department of Justice is afraid they are going to lose. If you just say no, if you are an Internet sports betting site from another country, if you can find somebody to take your ads, who is willing to stand up to the Department of Justice, I am not sure they will arrest you, particularly if it is not sports. I think they are afraid if they lose, they have no statute at all, and Congress still has not acted to make a new one. What the operators are doing, by the way, the smart ones are figuring out, you know, we can't advertise a lot of places, at least we can't advertise gambling, well let's advertise non-gambling. Instead of having partypoker.com, let's create partypoker.net. It will be an education site where you literally cannot bet money. There is no way on partypoker.net that you can bet money, but you can play poker, and if you happen to type it in wrong, and say partypoker.com, all of a sudden you are on a gambling site. They now, in fact, are linking. You go to the .net sites and they have ads for the .com sites. Canada is looking to outlaw that. I do not know how you write a statute that says it is illegal to advertise non-gambling, but maybe they will figure out some way in Canada to do that.

Stan Bergstein: Are there any more questions? If not, he still remains, as you can very readily see, the outstanding authority on the subject. You can consult him at Whittier, you can read his release that he has here today (we will put them on the front table), or you can buy his book, which he will not be adverse to you doing. It is called *Internet Gaming Law*.

I. Nelson Rose: You can actually buy it from the publisher. You can link through from my site, gamblingandthelaw.com, and I actually have a couple of other books that could be of interest. I co-authored the first case book on gaming law, which is being used in business schools and law schools, and I did the chapters on Indian gaming and on the Internet. We have pari-mutuel, not completely pulled out, it is more scattered throughout the book on various questions like the right to exclude people from your site, so we put that for both casinos and racetracks. That is also the case book. I think I have a flyer on it. I actually have to teach a class this afternoon, so I am flying back, so I will not be here later to answer questions, but again, if you do want to contact me, my Web-site is the best way—www.gamblingandthelaw.com. I want to thank you very much. It is always great to be here Stan.

Stan Bergstein: We would like to thank Professor Rose for taking time from his classes to come up here.