

Sixth Annual Joint Meeting of HTA and TRA

Wednesday, February 20, 2008

8:30 a.m. – 9:00 a.m.

The Mitchell Report & Racing

- **Bennett Liebman, Albany Law School**

Bennett Liebman: Headstones are truly the caretakers at a cemetery. They're on top of everyone else, but no one will listen to them. That's especially true for a law professor who's a former racing commissioner. You get invited, but the fact of the matter is, nobody is seriously listening to you. Now I've been invited to speak on the implications of the Mitchell Report on horse racing. Here are a few caveats: Lawyers, and certainly law professors, have no greater ability at determining credibility than real people. I don't know if Roger Clemens or Brian McNemy is telling the truth. My expertise, to the extent that it exists at all, is in the law and not in pharmaceuticals. I can't tell you the effect of steroids or human growth hormone on horses or pitchers. I can't even tell you how to effectuate a national policy on steroids. We do however, at Albany Law School at our government law center where I work; we do run the police review board for the city of Albany where we provide mediation of certain issues between the public and police officers. So if you're looking for a mediation proceeding—between Jeff Gural and Joe Faraldo, Joe Faraldo and everyone, Jeff Gural and everyone, the TRA and ARCI, HTA and THA, the HBPA and the RMTC, or any other alphabet organization—then you might ask us for help. But back to the Mitchell Report. The Mitchell Report was issued 2 months ago by former United States Senator George Mitchell. Mitchell conducted an investigation for the commissioner of baseball into the illegal use of steroids and other performance enhancing drugs. The findings by Senator Mitchell were as follows: The use of steroids in major league baseball was widespread, the response by major league baseball was initially slow and ineffective, everyone involved in major league baseball should join in a well-planned, sustained effort to bring the era of steroids to an end, it named 86 names from public records, and existing investigations of the names included 7 MVPs and 31 All-Stars, Roger Clemens, and you see the list. The blaze of the future was to make a fresh start. What were his remedies? Well his recommendations on drug testing, you can see them, independent, transparent, well-funded,

flexible program that protected the legitimate rights of players but allowed for year-round, unannounced drug testing. The Mitchell Report has been subject to considerable scrutiny, quite a bit of criticism, but I think—the criticism has been all over the place—because of the unfocused nature of the criticism the report has basically stood up and delivered a solid bill of goods. My own criticism, for what it's worth, would be that despite the professionalism of the report, other than the details on the individual players, the report looks like it could have been written before the investigation. Those of us who have been in politics call this “writing the report before you name the commission,” and it reads that sort of way. Given the realities, the Report is the absolute best scenario for major league baseball: Everyone is to blame, but the players are more guilty than the others. We know from politics that when everyone is deemed responsible, nobody is actually held responsible. When you start saying “mistakes were made, let's look to the future,” everybody walks. Think of the 9/11 Commission, the Iran Contra Investigation, the early Iraq war efforts—when you start saying that mistakes were made, as in baseball, you end up with a real aurelian effort to avoid responsibility. So where does that leave us, in comparing baseball to horse racing? Narrowly speaking, horse racing isn't mentioned in the Report. Former All-Star catcher Paul LoDuca who is a thoroughbred horse owner is featured prominently in the Report, not only as a client of drug dealer Kurt Radomsky but as a reference for Radomsky in obtaining future steroid clients. Also there's a reference in the report to Operation Equine, which was the FBI's nationwide investigation in the early 1990s into the illegal distribution of steroids. It's mentioned in the Mitchell Report as part of a missed early warning under which an FBI agent told major league baseball representatives in 1995 about Jose Canseco. Operation Equine was simply a code name, it had no connection to racing. So, really there's no manifest mention of horse racing in the Mitchell Report but, delve slightly beneath the surface and a different picture emerges, it's not particularly obscure. Change only a few of the circumstances and horse racing is baseball. Just like baseball, steroid use in horse racing is rampant, there's no question that it is. We wouldn't be talking about it if steroid use wasn't rampant. It's been rampant for years and racing's response, much like baseball, has been slow and initially ineffective. Let me go over the public record from about 1975 to 1990. At that time there were three major beat writers covering racing for probably our three most important papers. There was Steven Crist, writing for the New York Times, there he is writing about the Kentucky Derby winner in 1983 who was training on steroids, and the belief that, in 1990, 80% of fillies

going to breeding farms were on steroids. Here's Bill Christine writing in the Los Angeles Times that before the 1985 Breeders' Cup, the lack of race-day Bute or Lasix in New York would be forcing trainers to be using steroids on their horses. Here is Shug McGaughey in 1988 complaining about the overuse of steroids. Then there's Andy Beyer writing for the Washington Post as far back as 1978, telling us about the regular use of steroids which, at that time, he judges to be relatively benign. Plus there are just a ton of articles from 1990 and before on the regular presence of steroids in racing. Here's the Toronto Star from 1989 telling us that without steroids, geldings would be too wimpish to compete. There's California trainer Roger Stein on the positive effects of steroids. There's Rick Arthur on the use of equivocation. My personal favorite is the bottom one here which is from 1988, basically it's the Maryland state veterinarian saying about steroids, "they use quite a bit. We have not seen any ill effects in horses. It's almost used as a vitamin, as a supplement, to their normal regiment of nutrition. It's not thought of as a stimulant or something extraordinary." It was there. It's always been there. I can tell you that when I was a commissioner I may have been asked, on steroids, on less than a handful of occasions. The first time I was asked was probably in the early 1990s and I went to Dr. George Malin at Cornell who's the source of much of my equine knowledge. While I don't remember exactly what George said, I remember getting a lecture that approximated Jack Nicholson scolding Tom Cruise in *A Few Good Men*, which was basically, "You want the truth about steroids? You can't handle the truth." Simply put, racing needs to put in place a rule requiring licensees to come forward on drug use. We sort of have that on jockeys, they're supposed to report bribes. You may remember that the late jockey Mike Venezia received a six-month suspension in the early 80s for failing to report a bribe. Lawyers are supposed to report unethical conduct. Why shouldn't an obligation be put on licensed professionals in racing to report drug use? We will also need a rationale to establish the therapeutic use of steroids. It's not simply enough to say "the FDA allows it." If we can't establish that steroids are the best vehicle to treat certain equine conditions and that alternative methods of treatment don't work as well, we're simply asking for trouble from everyone: from Congress, animal rights activists, and from racing fans. Racing's rules will look as bad as HGH does in the Mitchell Report. You can just see in the Mitchell Report the writers of the Report simply scoffing at the notion that HGH is simply a therapeutic drug that allows athletes to recover faster from injuries or allows them to train harder. If we're going to argue for a limited use of steroids, that argument faces a truly

difficult smell test. And this same analysis also applies to clenbuterol, which is mentioned several times in the Mitchell Report as a veterinary medication that some athletes have used in an effort to become leaner. Kurt Radomsky admitted to clenbuterol distribution along with distributing steroids and human growth hormone. Clenbuterol was discovered on a 2001 flight by the Cleveland Indians into Toronto. Ross Grimsly used clenbuterol, as did Adam Riggs. Radomsky was quoted as saying that the players increasingly requested water-based anabolic steroids such as linstrol and other drugs such as clenbuterol that cleared the body faster and were less likely to be detected. We know that clenbuterol is in general use for horses and given the effects of the drug, and its reputation as the weight-loss and fat-reduction drug of the moment, we're going to have to demonstrate why it's needed any why other alternatives are not as effective. I became a racing commissioner two decades ago, and when I did I told my friends back then that I didn't know what to expect but at least I'd find out what thoroughbred trainer Oscar Barrera was doing to improve his horses. You may remember Oscar, for a number of years on the NYRA circuit he performed miracles on horses he claimed. For about a month or two these horses were absolute world-beaters, then they stopped winning. It's now 20 years later. We still don't know what Oscar was doing to mow off his horses. This is intolerable. We need to make sure that our testing is transparent and credible. We need to keep faith with our fans and we need to be actively pursuing investigations both on and off the track and not sitting back awaiting the results of drug testing. Lord knows, you don't need another speech from a middle-aged guy bitching about racing. I've been going to these conventions now for nearly 2 decades. I hate the "let's bash racing" speeches that I hear. I hate listening to them and I hate to be in the position of almost delivering one today, but the fact is—Ed Martin of the Association of Racing Commissioners last month said, in different context, that sometimes it's good that racing does not command the front page of USA Today's sports section as often as it should. And that certainly applies to the drug situation described in the Mitchell Report. We can rise above it. We have Scot Waterman. We can put our house in order. It's not all doom and gloom. And I certainly don't want to be seen in the position of complaining about my host in racing while I'm here partaking of their hospitality, but right now we in racing are baseball. Thank you for listening to me this morning.

Stan Bergstein: Thank you Bennett. Does anybody have comments or questions for Bennett Liebman?

Ed Martin: I was curious what you thought Congress would be discussing with Alex Waldrop, his comments seem to think, he had mentioned the quality of testing in racing and other people think it's not going to be quite as optimistic. Do you have a feeling for what they're going to discuss with him?

Bennett Liebman: I'd better not say anything because I'll be far too cynical. Congress—it's not anything different than you'd expect from politicians at any level—if they see an opportunity for good headlines and an easy victim, they'll pursue it more. It depends upon—if they see racing as an area of almost no interest then it'll be a one day story.

Stan Bergstein: Anyone else? If not the logical follow-up to Mr. Liebman is the issue of Medication from people who control it or attempt to control it and the question I guess that the panel should answer is: Is there anything we can do? And if there isn't, what's our future? So to answer that, I'm going to ask the panel, Alan Foreman, Dr. Scot Waterman, Ed Martin, Ben Wallace and Dennis Dowd to come up to the podium and we will go from there.