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Practice and Procedure Before Racing Commissions

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Horse racing is a publicly sponsored sport that depends upon legalized betting under the pari-mutuel system for its vitality. The activity is subject to strict control and regulation, under the state police power, by a racing commission or other agency in each of the states that permit pari-mutuel wagering.[1] The principal purpose of legislation that allows betting on horse racing is to generate state revenue.[2] Other purposes behind such legislation include encouragement of the horse breeding industry, protection of the health of the horse, and prevention of schemes to defraud racing's patrons.[3]

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[1] State *ex rel.* Morris v. West Virginia Racing Comm'n, 55 S.E.2d 263, 270 (W.Va. 1949) ("Whatever may be said in favor of horse racing, and much can be said, it must be admitted that great evil attends its practice, such as calls for the intervention of the state, under its police power. . . ."); Tweel v. West Virginia Racing Comm'n, 76 S.E.2d 874 (W.Va. 1953); Lombardo v. DiSandro, 103 A.2d 557, 557 (R.I. 1954) ("It is generally recognized that horse racing for stakes or reward, although permitted by law, is of such a nature as to demand in the public interest strict control. . . ."); O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d 529, 533 (Ohio 1974) ("[H]orse racing is one of those fields subject to extraordinarily broad regulatory powers.") (relying in part on Western Turf Ass'n v. Greenburg, 204 U.S. 359 (1907)).

[2] People *ex rel.* Scott v. Illinois Racing Bd., 301 N.E.2d 285, 288 (Ill. 1973); Hubel v. West Virginia Racing Comm'n, 513 F.2d 240, 243 (4th Cir. 1975); Bay State Harness Horse Racing & Breeding Ass'n, Inc. v. State Racing Comm'n, 184 N.E.2d 38, 39 (Mass. 1962) (in reviewing applications by competitors for racing dates, the commission may consider, as an aspect of the public interest, the comparative size of the pari-mutuel handle and consequent state revenue).

[3] KY. REV. STAT. ANN. § 230.215(1) (Michie/Bobbs-Merrill 1982) [hereinafter K.R.S.]; Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975). Some states permit pari-mutuel wagering on dog or mule racing or jai alai but these are not treated separately.

I. NATURE AND STRUCTURE OF COMMISSIONS

Racing in each state is governed by that state's racing statute, which creates the state's racing commission or agency that regulates racing. The members of the various state racing commissions are political appointees of the governor.[4] In a majority of the racing states, all appointments to the commission are required to have the approval of the state senate. Kentucky does not require such approval.[5]

Most state racing commissions have generally attracted persons who are dedicated to public service without regard for financial compensation. Most commissioners are unsalaried and are paid only token remuneration.[6] Many commissioners have other full-time occupations since their duties as racing commissioners require only part of their time. Only New York and Michigan have full-time racing commissioners.

The membership of the commissions ranges from one commissioner in Michigan to thirteen members of the Kentucky Harness Racing Commission.[7] Illinois, Louisiana, and Minnesota each have nine members. The Kentucky State Racing Commission, which regulates thoroughbred racing, currently has nine members.[8] The typical number of members is three or five.

In March, 1985, the thirty-six-member Governor's Task Force on Horse Racing in Illinois recommended, as a reform measure, that the size of the Illinois Racing Board be reduced from seven members to five.[9] The Illinois legislature, however, increased the membership of the board from seven to nine.[10]

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[4] On July 8, 1981, Louisiana Governor David C. Treen enjoined the Louisiana Racing Commission from holding any meetings until he had named the new members to the commission. This resulted in a delay of hearings on pending appeals, thereby violating several trainers' right to a prompt hearing. *See* Delahoussaye v. Louisiana State Racing Comm'n, 446 So. 2d 490 (La. Ct. App. 1984).

[5] These conclusions are based upon a survey of the various state racing statutes. *See, e.g.*, ILL. ANN. STAT. ch. 8, para. 37-24 (Smith-Hurd 1989); MINN. STAT. ANN. § 201 (West 1989).

[6] *E.g.*, Kentucky pays $50 per day for each meeting attended. K.R.S. § 230.220. Minnesota pays $35 per day spent on commission activities, MINN. STAT. ANN. § 240.02 (West 1989). Oklahoma allows $50 per day. OKLA. STAT. ANN. tit. 3A, § 203D (West 1989).

[7] K.R.S. § 230.622; Roster of National Association of State Racing Commissioners (now Association of Racing Commissioners International) (May 1988) [hereinafter NASRC or ARCI].

[8] K.R.S. § 230.220; MINN. STAT. ANN. § 240.02; ILL. ANN. STAT. ch. 8, para. 37-4.

[9] 13 ILLINOIS RACING NEWS 26-30 (April 1985).

[10] ILL. REV. STAT. ch. 8, para. 37-4 (1989).

Under a 1982 statute, two members of the thoroughbred and harness racing commissions in Kentucky were appointed by the President Pro Tempore of the Kentucky Senate and the Speaker of the Kentucky House.[11] This statute was declared invalid as violative of the separation of powers doctrine.[12]

Most states that permit both thoroughbred and harness racing have commissions with combined jurisdiction over both types of racing. Delaware, Kentucky, and Pennsylvania, however, have separate commissions for each type of racing.[13]

Arizona has both the Department of Racing and the Arizona Racing Commission. Hearing officers for the department conduct administrative hearings and make recommendations as to departmental decisions, which are the ultimate responsibility of the director. Upon request for review, the commission will conduct a hearing on the director's decision.[14] In Florida, the Division of Pari-Mutuel Wagering conducts disciplinary hearings[15] while the allocation of dates is left to the Florida Pari-Mutuel Commission.

Prior to 1965, Illinois had both a thoroughbred and a harness racing commission with separate statutes and regulations.[16] The Illinois Supreme Court, however, considered the two separate legislative acts as integral parts of the state's comprehensive plan for regulation of racing.[17]

A single commission with authority to regulate both thoroughbred and harness racing, under a common racing statute with one set of rules and regulations, enhances the development of a comprehensive racing policy. This structure facilitates uniformity and evenhandedness, but allows for an exception where necessary to reflect significantly disparate industry practices.

The avoidance of an appearance of impropriety, conflict of interest, or preferential treatment is essential to the image of any racing commission. In *Helad Farms v. Pennsylvania State Harness Commission*,[18] the Commonwealth Court of Pennsylvania declared

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[11] K.R.S. §§ 230.220(1), 230.620(2) (Interim Supp. 1982).

[12] Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 915 (Ky. 1984).

[13] NASRC, *supra* note 7; 1988 DIRECTORY OF HARNESS TRACKS OF AMERICA 58-62.

[14] Oliver v. Arizona Dep't of Racing, 708 P.2d 764, 765 (Ariz. Ct. App. 1985).

[15] Solimena v. State Dep't of Bus. Reg., 402 So. 2d 1240 (Fla. App. 1981), *rev. denied*, 412 So. 2d 470 (Fla. 1982).

[16] 1965 ILL. LAWS 1346.

[17] People *ex rel.* Scott v. Illinois Racing Bd., 301 N.E.2d 285, 289 (Ill. 1973).

[18] 470 A.2d 181 (Pa. Commw. Ct. 1984) (commission employee waived the deadline for stakes payments for one horse owner but refused to do so for other owners).

that the overriding purpose of Pennsylvania's racing statute is "to foster an image of horse racing that would make the image of that 'industry' an irreproachable one, even in the eyes of the skeptical public."[19] A racing commissioner who is subject to bias, prejudice, or other partial interest in any matter before the commission ordinarily is disqualified from participation in that matter.[20] As indicated by the court in *Helad Farms*, "[e]venhandedness in the treatment of horseowners by the Commission is an absolute."[21]

All but a few states prohibit racing commissioners from holding any financial interest in any aspect of racing within their state.[22] Many states also prohibit racing commissioners from owning horses that race in their state. Several states, particularly those that have recently legalized pari-mutuel wagering, prohibit commissioners from betting on races in their state.[23] Kentucky, on the other hand, requires its thoroughbred commission to have no fewer than two breeders and two horsemen among its membership. At least one of the nine members must have "no financial interest in the business or industry regulated."[24] Racing commissions generally function best where their membership is balanced, and the public interest is served through broad representation on the commission.

The most important powers granted to the commissions include allocation of racing dates, promulgation of rules and regulations,[25]

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[19] *Id.* at 184.

[20] Wilkey v. Illinois Racing Bd., 449 N.E.2d 843 (Ill. 1983) (trial court remanded case to racing board for new hearing where one board member, who participated in an investigation of the race, also participated in the adjudicatory hearing; appeal to Supreme Court dismissed). *But see Solimena*, 402 So. 2d 1240 (court held the failure of the division director to recuse himself was harmless error where newspapers had reported the director's views on the rule that the trainer allegedly violated); DeGroot v. Arizona Racing Comm'n, 686 P.2d 1301, 1310-1311 (Ariz. Ct. App. 1984) (statement by one commissioner to witness prior to hearing was held not to be a denial of due process).

[21] Helad Farms v. Pennsylvania State Racing Comm'n, 470 A.2d 181, 185 (Pa. Commw. Ct. 1984).

[22] *See, e.g.*, ILL. ANN. STAT. ch. 8, para. 37-6; MINN. STAT. ANN. ch. 240, § 240.02; OKLA. STAT. ANN. tit. 3A, § 202 (West Supp. 1989).

[23] *See, e.g.*, MINN. STAT. ANN. ch. 240, § 240.28(2); N.Y. RACING, PARI-MUTUEL WAGERING AND BREEDING LAW § 104 (McKinney 1984 & Supp. 1989); OKLA. STAT. ANN. tit. 3A § 203.13 (West Supp. 1989); WIS. STAT. ANN. § 562.025(d) (West Supp. 1989). The Commission on the Review of the National Policy Toward Gambling, created by Congress in the Organized Crime Control Act of 1970 in its final report, GAMBLING IN AMERICA (1976), recommended that states prohibit commissioners from betting on races in their state.

[24] K.R.S. § 230.220.

[25] Although each racing state has its own set of rules, there is considerable similarity in the rules adopted by the various states. On April 16, 1986, the NASRC adopted a set of uniform rules for regulation of both thoroughbred and harness racing. These rules, of

licensing of racing participants, and the conduct of disciplinary hearings for those who violate the rules. The commissions have no inherent powers. Their powers come exclusively from the legislature as set forth in the racing statute.[26]

Horse owners, trainers, jockeys, drivers, backstretch personnel and concessionaires are among those usually required to obtain an occupational license and pay the license fee. In the absence of statutory authorization, racing commissions lack the authority to set the price for programs sold at the tracks[27] or to set the fees to be paid to jockeys.[28] However, a racing commission and its members have been held to be immune from antitrust liability where the jockey fee schedule, as authorized by the legislature, reflects a clearly articulated state policy and is actively supervised.[29]

II. THE PRE-COMMISSION STAGES

A. *Stewards and Judges*

In thoroughbred and quarterhorse racing, the chief racing officials at the race track are usually called stewards. In standardbred racing, although the term is somewhat falling out of favor, the stewards are generally referred to as "judges". These are the gentlemen, and lately a few ladies, who decide the outcome of the contest.

The function of stewards varies somewhat from state to state but their most visible duty is to preside over the actual conduct of the race, determining which horse crossed the finish line first, and

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course, are only advisory and are designed for use by the various commissions in drafting their own rules. PROCEEDINGS OF NASRC 74 (1986). In an effort to adopt uniform rules of racing, the ARCI has embarked on a project whereby all current commission rules are being computerized.

[26] McIlmurray v. Michigan Racing Comm'r, 343 N.W.2d 524, 526 (Mich. App. 1983).

[27] Ogden/Fairmount, Inc. v. Illinois Racing Bd., 332 N.E.2d 610, 613 (Ill. App. 1975).

[28] Horsemen's Benevolent & Protective Ass'n v. Illinois Racing Bd., 289 N.E.2d 421, 423 (Ill. 1972). *But see* Gilligan v. Pennsylvania Horse Racing Comm'n, 422 A.2d 487, 491 (Pa. 1980), where the Pennsylvania Supreme Court ruled that the legislature, through their acquiescence, had approved the commission's jockey fee schedule.

[29] Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1022 (1982). The West Virginia Racing Commission has been held to be constitutionally immune from a damage suit by a jockey alleging negligence on the part of the commission in regulating conduct of jockeys at a track. Santiago v. Clark, 444 F. Supp. 1077, 1079 (D.W. Va. 1978). Likewise, stewards in West Virginia were held immune from suit for alleged defamation in regard to their ruling. Porter v. Eyster, 294 F.2d 613, 618 (4th Cir. 1961).

whether the competition was conducted in accordance with the commission's rules. Aided by sophisticated photo finish and video cameras, and often linked by telephone or walkie-talkie to patrol judges or other ground-level officials, the stewards are generally stationed atop the clubhouse or grandstand immediately above the finish line. When the race has concluded, if there has been a photo finish or if one horse interferes with another, the stewards use the camera and telephone to review the race and declare the official order of finish for the purpose of paying pari-mutuel tickets. Where necessary, the stewards may even communicate directly with the jockeys or drivers before declaring the race official.

At all pari-mutuel race tracks, there are three stewards. In most states, two stewards are appointed and employed by the state and the third is appointed by the track and approved by the racing commission.[30] In other states, only one steward is employed by the state and the other two are employed by the track subject to commission approval.[31] In a third variant, all three stewards are employed by the state but their salaries are charged back to the racing associations.[32] In New York, the thoroughbred stewards include one employed by the state, one employed by the track, and one employed by The Jockey Club.[33]

For the thousands of participants in pari-mutuel racing, the stewards have a role far more important than judging the race. By statute,[34] or by rule,[35] the stewards "are charged with the responsibility of enforcing the rules and regulations of the Commission . . . . In a sense, they are the 'policemen' of the Commission."[36] The duties of a steward generally include review of license applications, recommendation to the commission, consideration of rule violations, imposition of penalties, supervision of the entries and carding of races,[37] as well as supervision of other commission personnel at the race track.

Depending on the length of the race meeting and the particular state, stewards' salaries range from a low of $150 per day to a

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[30] *See, e.g.*, ILL. REV. STAT. ch. 8, para. 37-9(i) (1987).

[31] LA. REV. STAT. ANN. § 4:147(2) (West 1987).

[32] CAL. BUS. & PROF. CODE § 19442 (West 1974 & Supp. 1989); N.J. STAT. ANN. § 5:5-37 (West 1973 & Supp. 1988); OKLA. STAT. ANN. tit. 3A, § 203.4 (West Supp. 1989).

[33] N.Y. RACING, PARI-MUTUEL WAGERING & BREEDING LAW § 212 (McKinney 1984).

[34] MINN. STAT. ANN. § 240.16.

[35] LAC 11-6.5, 5.6.

[36] Sider v. Louisiana State Racing Comm'n, 451 So. 2d 1265, 1266 (La. Ct. App. 1984); *see also* Romero v. Stephens, 359 So. 2d 1061, 1065 (La. Ct. App. 1978).

[37] *Cf.* Heavner v. Illinois Racing Bd., 432 N.E.2d 290 (Ill. App. 1982).

high of over $400 per day in California.[38] The qualifications of stewards are generally not set forth by statute[39] although disqualifications generally are.[40] As racing commissions are politically appointed and stewards positions and both visible and well-paid, these jobs are occasionally political footballs.[41] However, several industry groups[42] and at least two universities[43] are working hard to upgrade the quality of racing officials at all levels. As a result, most stewards are appointed on the basis of merit and expertise and these jobs are not merely patronage plums. As might be expected, stewards are generally drawn from the ranks of former racing officials, jockeys, trainers, or trainer-drivers. Only a few stewards have law degrees.

The extent of the power of the stewards to suspend licenses and impose civil penalties is usually limited and varies according to state law and administrative regulation. Thus, the steward's authority to impose a civil penalty may be limited: $200 (Louisiana); $500 (Arizona, Maryland, and Minnesota); $1,000 (Kentucky); $2,000 (California and Wisconsin); or $5,000 (Illinois, Missouri, and New York).[44] The stewards' authority to suspend a license also varies: thirty days in Minnesota; sixty days in Arizona, Florida, New York, and Ohio; the balance of the race meeting plus ten days in Louisiana or plus thirty days in Washington or plus ninety days in Wisconsin; and unlimited authority exists in Illinois, Kentucky, New Jersey, and Pennsylvania.[45] If the stewards believe that discipline in excess of their authority is warranted or if the rules so require, they refer cases to the racing commission for additional consideration. Generally, the power to grant or

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[38] ARCI, *supra* note 7 (unpublished survey).

[39] *But see* OKLA. STAT. ANN. tit. 3A, § 203.5(A), which requires oral examinations, and § 203.5(B)(4), which requires experience in the racing industry.

[40] *E.g.*, OKLA. STAT. ANN. tit. 3A, §§ 202, 203.5(B)(5) (West Supp. 1989). Stewards and their families (spouse and dependent children) may not have a financial interest in a racing association, in a business that does business with a racing association, or in a racehorse participating at a meeting supervised by the commission.

[41] *See* Stokes v. Lecce, 384 F. Supp. 1039 (E.D. Pa. 1974).

[42] The Association of Racing Commissioners, International; the United States Trotting Association; the North American Judges and Stewards Association; and Oak Tree Racing Association.

[43] The University of Arizona, Race Track Industry Program and the University of Louisville, Equine Administration Program.

[44] Survey, 53 NASRC. Bulletin 40, at V.

[45] *See infra* notes 47-95 and accompanying text; *see, e.g.*, WIS. STAT. ANN. § 562.04(1) (West Supp. 1989); LA. REV. STAT. ANN. § 4:172. The remainder of the information was taken from Survey, *supra* note 44.

revoke licenses is reserved by statute to the commission and, on these issues, the stewards merely make recommendations.[46]

B. *Due Process by Stewards*

How much, if any, due process is owed a licensee by stewards is subject to much dispute. A detailed state-by-state analysis of the issue is outside the scope of this Article. Perhaps it is sufficient to note two overriding principles. First, due process is a flexible concept[47] and we must determine what process is due from administrative agencies on a case-by-case basis.[48] Second, in most states, one cannot easily determine whether the "contested case" provisions of state administrative procedure acts apply to a determination by the stewards.[49] This lack of clarity causes confusion for the practitioner and should precipitate much litigation in this area in years to come.

Generally, cases dealing with due process before the board of stewards have focused on the issue of summary suspension[50] and not on the nature of the stewards' hearing. Nonetheless, *Baker v. Illinois Racing Board*[51] held that a licensee received sufficient notice of a stewards' hearing when the written notice set forth the rules allegedly violated and the possible consequences of the hearing,

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[46] *See, e.g.*, Costanzo v. New Jersey Racing Comm'n, 313 A.2d 618, 619 (N.J.A.D. 1974) (commission had no statutory authority to delegate to stewards the power to revoke a license).

[47] Matthews v. Eldridge, 424 U.S. 319 (1976).

[48] *Id.* at 335 (defines a balancing test considering the private and public interests at stake as well as the risk of erroneous deprivation of the private interest in a given administrative context); *see also* the debate between the majority and the concurring opinion in Barry v. Barchi, 435 U.S. 55 (1979); Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

[49] *Sider*, 451 So. 2d at 1267 (holds that the contested case provisions of the Louisiana Administrative Procedure Act do not apply to proceedings at the stewards' level and that the trainers' due process rights were protected by the prompt hearing by the commission and the opportunity for a subsequent appeal). *But cf.* WIS. STAT. ANN. § 562.04(1)(b) (West Supp. 1989) (notice, opportunity to be heard, to present evidence, and to be represented required at stewards' level, but stewards' meeting is not a "contested case" under the applicable Wisconsin statutes).

[50] *See infra* notes 105-06 and accompanying text.

[51] 427 N.E.2d 959 (Ill. App. Ct. 1981). The Pennsylvania Harness Racing Commission has a rule requiring stewards to give written notice of the infraction for which a person is charged and the time and place of the hearing. See 58 PA. CODE § 183.481, cited in Frizalone v. State Harness Racing Comm'n, 533 A.2d 288 (Pa. Commw. Ct. 1987). Illinois has no rule governing stewards' hearings and some stewards currently take the position that written notice is not necessary. The authors believe that this position runs afoul of the Illinois Administrative Procedure Act.

even though the notice did not detail the precise nature of the alleged infractions. Surprisingly, the assistance of counsel may even be an issue at a stewards' hearing.[52]

The actions of the stewards at a race meeting represent the first step in the process to final adjudication. A license that is suspended by a stewards' ruling remains suspended pending a hearing before the racing commission. If no request for a hearing before the commission is filed timely, the license remains suspended as provided by the ruling.[53] Thus, the stewards' adjudication is often the only and final adjudication in the matter.

III. How Cases Originate Before Commissions

The procedures for bringing matters before racing commissions for adjudication and decision are generally less formal than for filing actions in court. Matters usually originate before commissions in one of the following five ways:

1. Application filed by a racing association for the issuance of a license to run a race meeting and an allocation of racing dates;[54]

2. Request filed with the commission for a hearing with respect to a steward's ruling that recommends denial of an application for a racing occupation license, suspends an existing license and/or imposes a civil penalty, excludes a licensee as an undesirable from all tracks in the state, or orders a purse redistribution;[55]

3. Stewards' referral to the commission of an alleged racing violation where there is no request for hearing (or appeal) filed with the commission from the stewards' ruling;[56]

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[52] Berry v. Michigan Racing Comm'r, 321 N.W.2d 880, 885 (Mich. Ct. App. 1982) (due process not denied when stewards told lawyer he could be present but could not participate because licensee was entitled to subsequent de novo hearing).

[53] *See, e.g.*, ILL. ANN. STAT. ch. 8, para. 37-16(b).

[54] Bay State Harness Horse Racing & Breeding Ass'n v. State Racing Comm'n, 184 N.E.2d 38 (Mass. 1962); National Jockey Club v. Illinois Racing Comm'n, 5 N.E.2d 224 (Ill. 1936); Maywood Park Trotting Ass'n, Inc. v. Illinois Harness Racing Comm'n, 155 N.E.2d 626 (Ill. 1959).

[55] Famiglietti v. Pennsylvania State Horse Racing Comm'n, 388 A.2d 752 (Pa. Commw. Ct. 1978) (stewards forwarded application for trainer's license, without action, to commission, which improperly denied license without proper hearing). In Ray v. Illinois Racing Bd., 447 N.E.2d 886 (Ill. App. Ct. 1983) the Illinois board imposed a civil penalty of $6,000 along with a 270 day suspension although stewards imposed only a suspension. Hearings before the racing commissions, on request, are proceedings de novo, which means the matter is tried anew before the commission as though the stewards never held an inquiry or hearing. In a few states, an aggrieved party can appeal from a steward's ruling to the commission. The commission then makes a decision based upon its review of the record made before the board of stewards.

[56] Mabry v. Louisiana State Racing Comm'n, 469 So. 2d 1130 (La. Ct. App. 1985)

4. Request for hearing filed by an occupation licensee, and in some states a patron, who has been excluded from a race track by that track's management;[57]

5. Direct action taken by commission through a procedural device, such as a petition for order to show cause or for issuance of notice of hearing to review stewards' ruling, that provides proper notice to the alleged offender of the nature of the alleged violation and the right to be present and represented at the hearing.[58]

These five avenues for bringing cases before racing commissions can intertwine. Thus, in *Olbrych v. Louisiana Racing Commission*,[59] a trainer was suspended by the stewards after his horse tested positive for prohibited drugs. The trainer did not appeal the ruling but the stewards on their own volition referred the violation to the commission, which after notice and hearing entered its decision affirming the stewards' ruling.

Unlike the practice in Louisiana, the stewards in Illinois do not formally refer violations to the Illinois Racing Board ("IRB"). The IRB treats possession of a goading device as a serious violation warranting a lifetime suspension and the IRB's orders in this regard have been upheld by the courts.[60] When a groom named Coleman received a two-year suspension by the stewards for possession of a goading device, neither the stewards nor IRB staff did anything to bring the matter to the IRB's attention. Coleman did not request a hearing before the IRB but instead pled guilty to a felony charge and received an eighteen-month probated sentence.[61]

(stewards fined trainer the maximum amount within their power and then referred matter to racing commission with recommendation for additional fine); Olbrych v. Louisiana State Racing Comm'n, 451 So. 2d 1253, 1256 (La. Ct. App. 1984); Hanson v. Louisiana State Racing Comm'n, 436 So. 2d 1308 (La. Ct. App. 1983).

[57] Phillips v. Graham, 427 N.E.2d 550 (Ill. 1981) (trainer excluded from race track after being indicted for bribery). Patron exclusions generally are not reviewable either by the racing commission or the courts unless authorized by statute. *See, e.g.*, Rockwell v. Pennsylvania State Horse Racing Comm'n, 327 A.2d 211 (Pa. Commw. Ct. 1974); Epstein v. California Horse Racing Bd., 35 Cal.Rptr. 642 (1963). On the subject of exclusions generally, see Kropp, Landen & Donath, *Exclusions of Patrons and Horsemen from Race Tracks: A Legal, Practical and Constitutional Dilemma*, 74 KY. L.J. 739 (1985-86); and Klein & Klein, *A Legal Survey of Race Track Exclusions*: 1974-1984, monograph published by Harness Tracks of America, 1984 [hereinafter HTA monograph].

[58] Belville v. Illinois Racing Bd., 473 N.E.2d 500 (Ill. App. Ct. 1984) (jockey suspended for life upon board staff's filing of petition for order to show cause, after stewards had exonerated the jockey); Levinson v. Washington Horse Racing Comm'n, 740 P.2d 898 (Wash. Ct. App. 1987) (commission issued notice of hearing to review board of stewards' ruling). *But see* Ballard v. Wyoming Pari-Mutuel Comm'n, 750 P.2d 286, 288 (Wyo. 1988).

[59] 451 So. 2d 1253 (La. Ct. App. 1984).

[60] *See infra* note 249 and accompanying text.

[61] Coleman v. Illinois Racing Board, 529 N.E.2d 520 (Ill. 1988).

At the end of the two-year suspension, Coleman applied to have his groom's license reinstated. The IRB rejected the application and entered an order that permanently barred him from racing. Upon appeal, the Illinois Supreme Court in *Coleman v. Illinois Racing Board*[62] viewed the matter as an attempt by the IRB to correct a disciplinary action by its stewards that the IRB, upon later consideration, found to be too lenient. The IRB, therefore, was ordered to reinstate the groom's license.

Given the industry's interest in the prompt and efficient administration of discipline, the time frame for an appeal of a steward's decision to the commission is often as short as two or three days.[63] Usually, an appeal or request for hearing can be filed merely by lodging a request for hearing at the commission office. However, in some states, commission rules require that the request for hearing be accompanied by an appeal bond. The constitutionality of such a bond requirement was challenged but not decided in recent Louisiana cases.[64] On the other hand, a 1975 New York decision invalidated a rule requiring an appeal bond as being in excess of the statute and a violation of due process.[65]

The practitioner is cautioned to read both the enabling statute *and* the commission's rules to gain a full appreciation of what may be appealed and how appeals are made. The general rule is that all stewards' decisions may be appealed except their decision to make a race official for the purpose of payment of winning parimutuel ticket-holders.[66] In Kentucky, a stewards' decision regarding the finish of a race may not be challenged.[67] Further, there may be prerequisites to an appeal to the commission of a stewards' decision regarding the finish of a race, such as lodging a protest with the stewards before winning wagers are paid.[68]

In *McKenna v. Pennsylvania State Horse Racing Commission*,[69] a letter was mailed by the Commission to an owner of race track stock ordering him to divest himself of the stock and advising him

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[62] *Id.*

[63] OHIO ADMIN. CODE 3769-17-41 (1987); N.J. STAT. ANN. 5:5-52 (West 1973 & Supp. 1988).

[64] Hall v. Louisiana State Racing Comm'n, 505 So. 2d 744 (La. Ct. App. 1987); Barkley v. Louisiana State Racing Comm'n, 506 So. 2d 580 (La. Ct. App. 1987).

[65] MacRae v. New York State Racing & Wagering Bd., 368 N.Y.S.2d 313 (A.D. 1975).

[66] *See, e.g.*, CAL. BUS. & PROF. CODE § 19440 (West 1974 & Supp. 1989).

[67] KENTUCKY RULES OF RACING, R.IV, § 4.

[68] Pinsley v. New York State Racing & Wagering Bd., 428 N.Y.S.2d 527 (A.D. 1980).

[69] 476 A.2d 505 (Pa. Commw. Ct. 1984).

that he had ten days to request a hearing or the order would become final.[70] McKenna did not request a hearing but the matter was twice continued. Thereafter, the commission sent another notice of a hearing to be held in eight days. Service of this notice was received by McKenna the day before the hearing. Without indicating whether McKenna ever received the first letter, or notice of the continuances, or whether he appeared at the hearing, the court held that he received adequate notice in the first letter and that, having failed to request a hearing, had waived his rights.[71]

IV. NATURE AND CONDUCT OF COMMISSION HEARINGS

A. *In General*

All state racing commissions function as civil administrative bodies.[72] Hearings before the commissions, therefore, are not comparable to criminal trials.[73] Racing commissions lack the authority to charge any person with the commission of a crime of any sort. Unlike a criminal trial, all relevant evidence is admissible at a commission hearing, as the goals of a criminal trial differ from the goals of a civil proceeding. The essential goal of a criminal trial is penal while a disciplinary hearing before a racing commission is regulatory.[74]

Due to the civil nature of the proceedings before a racing commission, relevant evidence that would be excluded in a criminal prosecution can be considered by the commission.[75] For example, the New Jersey Supreme Court upheld a decision by the New Jersey Racing Commission based upon evidence improperly obtained by the state police in an illegal entrapment scheme.[76] Also, in *Arkansas State Racing Commission v. Sayler*,[77] the Arkansas commission suspended a jockey indefinitely for possession of a battery but

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[70] *Id.* at 508.

[71] *Id.*

[72] Arrington v. Louisiana State Racing Comm'n, 482 So. 2d 200, 201 (La. Ct. App. 1986).

[73] Giles v. Washington Horse Racing Comm'n, 771 P.2d 1159, 1162 (Wash. Ct. App. 1989); Mabry v. Louisiana State Racing Comm'n, 169 So. 2d 1130, 1132 (La. Ct. App. 1985); Taylor v. Hazel Park Racing Ass'n, 371 N.W.2d 447, 450 (Mich. Ct. App. 1985).

[74] Delguidice v. New Jersey Racing Comm'n, 494 A.2d 1007, 1009 (N.J. 1985).

[75] Pullin v. Louisiana State Racing Comm'n, 477 So. 2d 683, 687 (La. 1985).

[76] *Delguidice*, 494 A.2d at 1009.

[77] 462 S.W.2d 472, 474 (Ark. 1971).

stated in the order that the jockey would be reinstated if he produced a satisfactory polygraph test concerning the incident. Neither the results of a polygraph test nor evidence obtained by entrapment may be admitted in criminal trials.[78]

Hearings before racing commissions are often referred to as "appeals" from the stewards. Actually, the proceeding in most states is a hearing de novo. If the proceeding is technically an appeal, the commission will hear no new evidence but instead will make its decision solely upon the record made before the stewards. On the other hand, a hearing de novo is a new adversarial proceeding that is not dependent upon or limited by the prior stewards' inquiry or hearing.[79]

At a hearing upon request by the licensee, the racing commission is not bound by the length of suspension or civil penalty imposed by the stewards.[80] The commission's decision may impose greater or lesser penalties than those imposed by the stewards, although often the commissions' decisions conform to the stewards' rulings with respect to the severity of the penalty.[81] For this reason, practitioners before racing commissions are sometimes reluctant to request a hearing before the racing commission unless they are convinced that the stewards' ruling is incorrect as a matter of law or that the evidence in their case is strong.

Prior to 1986, the Wyoming racing statute and rules of the Wyoming Pari-Mutuel Commission did not allow the commission to increase the period of suspension imposed by the stewards.[82] This prohibition was changed by legislation effective March 20, 1986.[83] In 1985, the Wyoming Pari-Mutuel Commission increased

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[78] Given the controversial nature of polygraph tests, the authors do not suggest that polygraph test results are or should be admissible evidence before state racing commissions generally.

[79] Ray v. Illinois Racing Bd., 447 N.E.2d 886 (Ill. App. Ct. App. 1983).

[80] *Id.*; Hacker v. Pennsylvania Horse Racing Comm'n, 405 A.2d 1379 (Pa. Commw. Ct. 1979); Poisson v. State Harness Racing Comm'n, 287 A.2d 852 (Pa. Commw. Ct. 1972); Pence v. Idaho State Horse Racing Comm'n, 705 P.2d 1067 (Idaho App. Ct. 1985); *cf.* Ballard v. Wyoming Pari-Mutuel Comm'n, 750 P.2d 286 (Wyo. 1988) (rule at time of suspension did not allow commission to increase period of suspension ordered by stewards).

[81] *See, e.g.*, Edwards v. Illinois Racing Bd., 543 N.E.2d 172 (Ill. App. Ct. 1989) (board reduced stewards' life suspension to nine months for each of fourteen violations for failure to guard); Sanders v. Michigan Racing Comm'n, 390 N.W.2d 206 (Mich. Ct. App. 1986); Belanger v. New York State Racing & Wagering Bd., 494 N.Y.S.2d 451 (App. Div. 1985) (board confirmed suspension imposed by stewards after it was sustained by hearing officer).

[82] WYO. STAT. § 11-25-104(c) (1977); WYOMING RULES OF RACING & PARI-MUTUEL EVENTS ch. 1, § 3(1).

[83] 1986 WYO. SESS. LAWS ch. 117; WYO. STAT. § 11-25-104(j) (1987 Cum. Supp).

the one and one-half month suspension of a trainer to two years and increased the civil penalty as imposed by the stewards, from $100 to $1500. The violation resulted from the finding of prednisolone (a steroid) in a urine sample taken from the trainer's horse. The Wyoming Supreme Court held that the commission had no authority to increase the suspension from what had been imposed by the stewards and that the 1986 legislative change was not retroactive.[84]

In some states, the adjudication process before the commission is bifurcated, with the hearing and decisional phases being handled separately. For example, in some states, an administrative law judge or hearing examiner conducts the hearing and prepares a report for the commission, which then reviews the report, the transcript of testimony, and the exhibits and then renders a decision.[85] Although the adjudication process is bifurcated, the case remains a proceeding de novo.

In California, where the commission hearing is de novo, and in Oklahoma, where the commission hearing is a review of the record made by the stewards, the power of the commission to overrule the stewards is limited. The California Horse Racing Board and the Oklahoma Horse Racing Commission may overrule a stewards' decision if a preponderance of evidence indicates:

> (a) the stewards mistakenly interpreted the law; or
> (b) new evidence of a convincing nature is produced; or
> (c) the best interests of racing and the state may be better served.[86]

A racing commission also may reject its own administrative law judge's report and issue its own findings based on the record before the administrative law judge.[87] The administrative law judge, unlike a steward, serves as the hearing officer in the de novo proceeding before the commission, which is responsible for the final decision by the administrative agency. Where the commission differs from its administrative law judge's report and recommen-

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[84] *Ballard*, 750 P.2d 286.

[85] *See* DeVitis v. New Jersey Racing Comm'n, 495 A 2d 457, 460 (N.J. Super. Ct. App. Div. 1985); Carruthers v. Board of Horse Racing, 700 P.2d 179, 181 (Mont. 1985); Solimena v. Dep't of Bus. Reg., 402 So. 2d 1240 (Fla. Dist. Ct. App. 1981), *rev. denied*, 412 So. 2d 470.

[86] CAL. BUS. & PROF. CODE § 19440 (West 1974 & Supp. 1989); OKLA. STAT. ANN. tit. 3A, § 204(B)(2).

[87] *DeVitis*, 495 A.2d at 461; *Carruthers*, 700 P.2d at 181.

dations, the commission ordinarily must demonstrate it gave appropriate consideration to the report and recommendations and must clearly state its areas of disagreement.[88]

The bifurcation is supposed to reduce some of the possibilities of bias in the quasi-judicial proceedings before the racing commissions, which by statute entail a merger of investigatory, prosecutorial, and adjudicatory functions. However, many of the cases before racing commissions turn upon credibility of the witnesses.[89] The commissioners are responsible for making the final decision for the commission, but the bifurcation prevents the commissioners from personally observing the demeanor of the witnesses. Even though the career of a jockey or a trainer is at stake, the reviewing courts leave the assessment of the credibility of the witnesses to a racing commission that typically has no means of directly observing the witnesses' demeanor.

The racing industry is highly competitive and is, by necessity, subjected to close scrutiny and strict regulation. Commission decisions sometimes appear tough and overly harsh to those in the industry. As an example, the Michigan Racing Commissioner (Michigan has a one-member commission) ordered a redistribution of the winner's purse and fined the trainer where a post-race urinalysis revealed the presence of dimethyl sulfoxide (DMSO) in a horse on race day. This disciplinary action was taken even though the testimony before the commissioner disclosed that DMSO had been used as a leg paint at race tracks for thirty to forty years and that the trainer's veterinarian had been told by the state's veterinarian at the track that topical use of DMSO was permissible.[90]

Strict regulation was also exemplified by the Rhode Island Racing and Athletics Hearing Board's suspension of a trainer whose mare tested positive for vitamin B-1. The trainer's witnesses attempted to show that vitamin B-1 is a food for horses as well as human beings. The commission, however, relied upon the testimony of the state's toxicologist, who was of the opinion that vitamin B-1 is a drug.[91]

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[88] *DeVitis*, 495 A.2d at 461-62.

[89] *See, e.g., Sayler*, 462 S.W.2d 472 (Ark. 1971); Bellville v. Illinois Racing Bd., 473 N.E.2d 500 (Ill. App. Ct. 1984); Feliciano v. Illinois Racing Board, 443 N.E.2d 261 (Ill. App. Ct. 1982). For standards governing the separation between prosecutorial and judicial functions in an administrative agency, see Withrow v. Larkin, 421 U.S. 35 (1975); Wilkey v. Illinois Racing Bd., 449 N.E.2d 843 (Ill. 1983); Famiglietti v. Pennsylvania State Horse Racing Comm'n, 388 A.2d 752 (Pa. Commw. Ct. 1978).

[90] *Sanders*, 390 N.W.2d 206 (court affirmed the racing commissioner's decision).

[91] Brown v. Waldman, 177 A.2d 179 (R.I. 1962) (board decision upheld on appeal).

The failure of a horseman to conform to a commission's procedural niceties may sometimes result in what industry members perceive to be an injustice. For example, a protest against the result of a race ordinarily must be made before winnings are paid. However, in *Pinsley v. New York State Racing & Wagering Board*,[92] the aggrieved horseman resorted to an appeal rather than a protest and, as a result, the New York Board refused to award the horseman the first place purse money because he had used an incorrect procedure. The Board's decision was affirmed on appeal.[93]

B. *Quorum*

Generally, a majority of a racing commission constitutes a quorum and a majority of the quorum may act for the commission. If one or more members of the commission recuse themselves from the proceeding, a legal question may arise as to whether the disqualified members who are physically present should be counted in determining whether a quorum is present.

In *King v. New Jersey Racing Commission*,[94] the stewards suspended a harness driver for six months because he allegedly drove with the intent of losing. The administrative law judge, after hearing the case for the commission, concluded that the driver's license should not be suspended unless the commission modified its interim decision within forty-five days.

At the commission meeting to review the interim decision, the chairman, upon the request of the driver, recused himself from the proceeding but remained physically present. Another member of the then four-member commission was absent. The remaining two members made the final decision reversing the interim decision and reinstating the six months suspension. Upon appeal, the court ruled that the interim decision of no violation was deemed adopted by the commission because there was no quorum at the time the commission attempted to take action and no further action was taken within the forty-five day period.[95]

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[92] 428 N.Y.S.2d 527 (A.D. 1980).

[93] *Id.*

[94] 501 A.2d 173 (N.J. Super. Ct. App. Div. 1985).

[95] *Id.* Under an attorney general's opinion in Illinois, a board member who is disqualified in a proceeding but remains physically present is counted in order to make a quorum. Op. Att'y Gen. No. 5-1452 (1979).

C. *Dates Hearings*

An application for a racing license and an allocation of dates is considered to be an adjudicatory proceeding involving the legal privileges of the applicants that must be determined after opportunity for a commission hearing.[96] The decision following the hearing must set forth a statement of the reasons for the particular dates allotted and include subsidiary findings of fact to support the allocation. The absence of express findings makes the decision questionable.[97]

The broad standards or factors to be applied by the commissions in allocating dates are set forth in the various state racing statutes.[98] These factors are particularly pertinent where two or more applicants seek to race in the same geographical area on the same dates and the same hours or the combined number of days sought by the applicants exceeds the limited number of racing days allowed by statute. Other factors considered are the financial integrity of the applicants, prospective revenues to the state, and the adequacy and suitability of the track facilities.[99]

Hearings concerning the allocation of racing dates, at least in some states, are not typical administrative hearings in that the participation of the applicants or their counsel is restricted to the answering of questions raised by the commission. This procedure has been held not to violate due process requirements because the commission, which must both investigate and decide, is not held to the standard of objectivity of a judicial tribunal.[100]

Testimony at dates allocation hearings is heard from the various applicants, other representatives of the horse racing industry, and the public generally. The voluminous record consists primarily of exhibits and testimony concerning the past and projected performances of the applicants in regard to state revenues generated, their financial integrity, the caliber of their management, and the suitability of the various racing facilities.[101]

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[96] Bay State Harness Horse Racing & Breeding Asssn v. State Racing Comm'n, 175 N.E.2d 244, 249 (Mass. 1961); Maywood Park Trotting Ass'n, Inc. v. Illinois Harness Racing Comm'n, 155 N.E.2d 626, 628 (Ill. 1959).

[97] *Id.*; *see infra* notes 230-41 and accompanying text.

[98] *See, e.g.*, 3A OKLA. STAT. ANN. § 205.2.

[99] *Id.* The fact that a racing organization has previously held a license and acted properly is also a factor that is sometimes considered. *Bay State Harness Ass'n*, 175 N.E.2d 244 (Ill. 1961).

[100] Gillilan v. Illinois Racing Bd., 411 N.E.2d 1374, 1379 (Ill. App. Ct. 1980).

[101] People *ex rel.* Scott v. Illinois Racing Board, 301 N.E.2d 285 (Ill. 1973).

Despite these broad statutory standards, racing commissions do not have arbitrary and unbridled discretion in the allocation of dates. For example, in *People ex. rel. Scott v. Illinois Racing Board*,[102] the Illinois Supreme Court, upon an appeal by the Illinois Attorney General, reversed the 1973 dates allocation to Balmoral Jockey Club and Balmoral Park Trot because the record at the dates hearing established that a stockholder in these racing organizations was then under indictment. Still, appeals from commissions' dates orders usually become moot because the dates as awarded have passed by the time a court reaches its decision.[103]

D. *Right-Privilege Distinction*

Despite some earlier precedents concerning the right-privilege distinction as applied to an occupational license,[104] most courts now hold that a license to pursue an occupation such as jockey or horse trainer is a property interest protected by the due process provisions of the state and federal constitutions.[105] The right versus privilege analysis, which once governed the applicability of procedural due process, lost its vitality when rejected by the U.S. Supreme Court in *Barry v. Barchi*.[106] This case reversed a summary suspension of a trainer for an alleged medication violation because a prompt post-suspension hearing was not held before the commission.[107] It is doubtful that a commission can now validly deny the renewal of an occupational license without notice and hearing.[108]

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[102] *Id.*

[103] Maywood Park Trotting Ass'n, Inc. v. Illinois Harness Racing Comm'n, 155 N.E.2d 626 (Ill. 1959).

[104] *Solimena*, 402 So. 2d at 1246; State Racing Comm'n v. McManus, 476 P.2d 767 (N.M. 1970); Sanderson v. New Mexico Racing Comm'n, 453 P.2d 370 (N.M. 1969); State *ex rel.* Morris v. West Virginia Racing Comm'n, 55 S.E.2d 263, 270 (W.Va. 1949).

[105] Barry v. Barchi, 443 U.S. 55 (1979); *DeVitis*, 495 A.2d at 462; Phillips v. Graham, 427 N.E.2d 550, 555 (Ill. 1981); Olbrych v. Louisiana State Racing Comm'n, 451 So. 2d 1253, 1257 (La. Ct. App. 1984).

[106] 443 U.S. 55 (1979). For cases upholding summary suspensions over due process objections, see Hubel v. West Virginia Racing Comm'n, 513 F.2d 240 (4th Cir. 1975); O'Daniel v. Ohio State Racing Comm'n, 307 N.E.2d 529 (Ohio 1974); *McManus*, 476 P.2d at 772 ("[T]he seven day suspension here might be more comparable to the ruling of an umpire or a referee."); Marohn v. Van Lindt, 473 N.Y.Supp.2d 560 (A.D. 1984). In Simmons v. Division of Pari-Mutuel Wagering, 407 So. 2d 269, 270 n.3 (Fla. Dist. Ct. App. 1981), *aff'd*, 412 So. 2d 357 (Fla. 1982), the court declared the privilege versus right analysis to be outdated.

[107] *Barry*, 443 U.S. 55.

[108] *See, e.g.*, Archilla v. Insular Racing Commission, 72 P.R.R. 397 (1951); ILL. REV.

In *Durham v. Louisiana State Racing Commission*,[109] the 1983-84 trainer license of Fay Durham was suspended because her husband's license as a trainer had been suspended. Upon appeal, the Louisiana Supreme Court ordered that her license be reinstated. Her application for the following year, however, was denied by the commission without notice or hearing because her husband was still suspended. Upon appeal, the Louisiana Supreme Court[110] upheld the commission's denial without notice or hearing on the ground that Ms. Durham held no license for 1984-85 and, therefore, had no protected property interest entitled to due process. The distinction between suspension of the license and renewal of a license for due process purposes seems somewhat tenuous.

The New Mexico Supreme Court in 1969 strongly relied upon the right-privilege distinction to uphold both a rule imposing strict liability as a condition for a horse owner's license and a rule requiring the person in charge of the horse to guard against the administration of drugs.[111] However, in *State Racing Commission v. McManus*,[112] the same court ruled that a jockey's right as a citizen to engage in his chosen profession entitles him to due process protection, even though his jockey's license created no vested right to due process.

In 1960, the Kentucky General Assembly adopted a legislative determination that participation in horse racing, at least in Kentucky, is a privilege and not a personal right.[113] This legislative declaration of state policy concerning the right-privilege distinction, however, should not defeat a licensee's rights in Kentucky to procedural due process under the fourteenth amendment.

E. *Constitutional Challenge*

Many cases that come before state racing commissions involve challenges to the constitutionality of commission rules or provisions

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STAT. ch. 127, para. 1016(c) (1987). *But see* Saumell v. Van Lindt, 481 N.Y.S.2d 759, 760 (A.D. 1984), where the court held that "the New York State Racing and Wagering Board may, in the exercise of their discretion, choose to conduct a hearing on the question of the renewal of plaintiff's license as a jockey." *See also* Durham v. Louisiana State Racing Comm'n, 458 So. 2d 1292 (La. 1985).

[109] 449 So. 2d 475 (La. 1984).

[110] *Durham*, 458 So. 2d 1292.

[111] *Sanderson*, 453 P.2d 370.

[112] 476 P.2d 767, 771 (N.M. 1970).

[113] K.R.S. § 230.215(1), (2).

of the racing statute.[114] Constitutional questions ordinarily should be raised at the first opportunity in order to avoid waiver of the issue. However, a racing commission, like other state agencies, is usually powerless to decide the constitutionality of either its own rules or the state racing statute.[115]

Lawyers who practice before racing commissions face the further hurdle that any statute or regulation exercising police power is presumed to be constitutional and that a reasonable doubt as to its constitutionality must be resolved in favor of the law's validity.[116] In general, however, these challenges have not been widely successful if the regulation in question is perceived to be directly related to the integrity of racing and gambling and, thus, within the state's police power.[117]

The limitations imposed on agency authority applicable to other state boards and commissions are not often interpreted by the courts as applying to racing commissions. The judicial rationale was perhaps best expressed by the Florida Supreme Court in *Hialeah Racing Course, Inc. v. Gulfstream Racing Association:*[118]

> The state has become peculiarly interested in racing because of the revenues from the pari-mutuel betting. Authorized gambling is a matter over which the state may exercise greater control and exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from the enterprises not affected with the public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare.[119]

F. *Warrantless Searches*

Horse racing is usually considered to fall under the pervasive system of regulation exception to the administrative search require-

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[114] *See, e.g., Phillips*, 427 N.E.2d 550; Hansen v. Illinois Racing Bd., 534 N.E.2d 658 (Ill. App. Ct. 1984); *Durham*, 449 So. 2d 475; Gregg v. Oregon Racing Comm'n, 588 P.2d 1290 (Or. Ct. App. 1978).

[115] *Solimena*, 402 So. 2d at 1245.

[116] Tweel v. West Virginia Racing Comm'n, 76 S.E.2d 874, 884 (W.Va. 1953); Fioravanti v. State Racing Comm'n, 375 N.E.2d 722, 726 (Mass. App. Ct. 1978).

[117] Sandstrom v. California Horse Racing Bd., 189 P.2d 17, 21 (Cal. 1948), *cert. denied*, 335 U.S. 814 (1948); Commonwealth v. Webb, 274 A.2d 261, 267 (Pa. Commw. Ct. 1971).

[118] 37 So. 2d 692 (Fla. 1948).

[119] *Id.* 694.

ment. Warrantless searches at race tracks were upheld in *Lanchester v. Pennsylvania State Horse Racing Commission*,[120] *State v. Dolce*,[121] *Federman v. Department of Business Regulation*,[122] and *People v. Strauss*.[123] However, the Illinois rule on warrantless searches was held invalid with respect to searches of on-track dormitory rooms because the racing statute fails to allow for warrantless searches of residences and, therefore, the rule did not properly limit the discretion of the inspecting officers.[124]

G. *Vagueness*

Lawyers unfamiliar with racing find the terms used in racing quite vague and somewhat incomprehensible. Although lawyers understand precisely such concepts as due process and the hypothetical reasonable man, they sometimes have trouble with such terms as "conduct detrimental to the best interests of racing," "injurious to the character of the turf," or "call into question the honesty and integrity of the sport."[125] Lawyers unfamiliar with these terms are inclined, when representing a client before a racing commission, to attack these and other such phrases as being unconstitutionally vague. The vagueness doctrine applies primarily to criminal prosecutions that are penal in nature rather than regulatory. The standards applied to a law or regulation that imposes no criminal sanctions are somewhat less rigorous.[126]

In Pennsylvania, the courts have ruled that racing rules are not defective for vagueness if a person of ordinary intelligence is capable of determining what conduct the rule covers.[127] Thus, disciplinary action against a jockey whose presence was considered

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[120] 325 A.2d 648, 653 (Pa. Commw. Ct. 1974).

[121] 428 A.2d 947, 952 (N.J. Super. Ct. App. Div. 1981).

[122] 414 So. 2d 28 (Fla. Dist. Ct. App. 1982).

[123] 502 N.E.2d 1287 (Ill. App. Ct. 1986).

[124] Serpas v. Schmidt, 827 F.2d 23, 30 (7th Cir. 1987), *cert. denied*, 485 U.S. 904 (1988); *Hansen*, 534 N.E.2d 658 (Illinois rule held to violate fourth amendment with respect to search of trainer's vehicle on track grounds). In Euster v. Pennsylvania State Horse Racing Comm'n, 431 F. Supp. 828 (E.D. Pa. 1977) (civil rights action alleging that commission employee had directed a warrantless search of plaintiff's barn area dismissed for lack of required specificity).

[125] These phrases appear in numerous statutes and commission regulations, *e.g.*, ILL. REV. STAT. ch. 8, para. 37-9(e) (1989).

[126] Jordan v. DeGeorge, 341 U.S. 223, 230 (1951).

[127] Pennsylvania State Harness Racing Comm'n v. Dancer, 33 A.2d 196, 198 (Pa. Commw. Ct. 1975); Pennsylvania State Horse Racing Comm'n v. DiSanto, 372 A.2d 487, 490 (Pa. Commw. Ct. 1977).

"detrimental to the best interests of racing" was upheld.[128] Courts have generally sustained commissions' disciplinary action against claims of vagueness.[129]

H. *Statutory Authority*

Judicial review of the statutory authority for a commission's actions or rules is always an appropriate concern. Thus, some racing statutes have been found not to be reasonably related to the purposes of the act and some regulations have been held to be beyond the commission's authority. For example, even though The Jockey Club is the breed registry for thoroughbred racehorses, New York's highest court invalidated a commission rule delegating the licensing power to The Jockey Club.[130] Similarly, although the United States Trotting Association (U.S.T.A.) is the breed registry for standardbred racehorses, a rule making membership in the U.S.T.A. a prerequisite to licensure has also been invalidated as exceeding the commission's authority.[131]

A statute prohibiting the use of "any substance foreign to the natural horse or dog" was found not "to bear a fair and substantial relationship to the objectives"[132] contained in the articulated reasons for the Florida racing law. The court reasoned that the statute prohibited "everything, the helpful and harmful, the beneficial and the detrimental, the benign and the deleterious."[133] However, confronted with a comparable statute, a Michigan appellate court found that the Michigan Racing Commissioner had the statutory authority to penalize trainers whose horses tested positive for phenothiazine, a worming agent that would not affect the racing condition of a horse, and methanine, a urinary tract disinfectant.[134]

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[128] Daly v. Pennsylvania Horse Racing Comm'n, 391 A.2d 1134 (Pa. Commw. Ct. 1978).

[129] *Gillilan*, 411 N.E.2d at 1377 (Statutory term "financial integrity" as a standard for granting a license to a race track operator is not unconstitutionally vague.); *Pence*, 705 P.2d at 1070 (Term "misconduct" is not unconstitutionally vague.).

[130] Fink v. Cole, 97 N.E.2d 873, 876 (N.Y. 1951).

[131] Costanza v. New Jersey Racing Comm'n, 313 A.2d 618, 620 (N.J. Super. Ct. 1974).

[132] *Simmons*, 407 So. 2d at 272.

[133] *Id.* at 271. In affirming the Appellate Court's decision, the Supreme Court of Florida "adopt[ed] the reasoning expressed" in the Appellate Court's opinion. 412 So. 2d at 359.

[134] McIllmurray v. Michigan Racing Comm'r, 343 N.W.2d 524 (Mich. Ct. App. 1984).

I. *Compliance with State Rule-making Requirements*

State administrative procedure acts (APA's) generally contain formal requirements for the adoption or amendment of an administrative regulation. If the state APA applies to the racing commission,[135] then the commission must comply with these procedures before enacting or amending a rule. State APA's usually require some sort of notice and publication, with opportunity for public input and legislative oversight, prior to enactment of a binding rule. The method and manner of public notice varies widely depending on the precise requirements of the applicable state APA. The impact of these rule-making requirements is demonstrated in three racing cases, two of which invalidated agency action.

In 1981, the Louisiana Racing Commission tackled a sensitive issue and decided that a person who has a direct or indirect financial interest in a race track should not be allowed to own or train a horse that races at that track. A commission rule to this effect was challenged by the owners of the Fair Grounds Corporation.[136] The commission had published notice of its intent to adopt the rule in the Louisiana Register as required by that state's APA.[137] The notice, however, stated only that the text of the rule could be obtained by contacting the commission's office. The notice did not contain the text of the one sentence (thirty-one words) rule nor did the notice describe the substance of the rule.[138]

The Louisiana APA required "substantial compliance" with the Act's notice requirements prior to the enactment of a valid rule.[139] The requirement of notice was that "either the terms or substance of the intended action or a description of the subjects and issues involved" be published.[140] The commission did neither. The Louisiana appellate court found the rule void *ab initio even*

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[135] Determining whether a state APA applies to any particular state agency may not be easy. *See, e.g.*, Comment, *Administrative Adjudications: An Overview of the Existing Models and their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355, 358-60 (1985). However, reference to the state APA may be found in the statute creating the racing commission, or the commission may be defined as an agency within the meaning of the state APA. *See, e.g.*, ILL. REV. STAT. ch. 127, para. 1003.01 (1987); WASH. REV. CODE. ANN. § 34.04.010(1) (West 1965 & Supp. 1989).

[136] Dorignac v. Louisiana State Racing Commission, 436 So. 2d 667 (La. Ct. App. 1983).

[137] *Id.* at 669.

[138] *Id.*

[139] *Id.*

[140] *Id.* at 668.

though those that challenged the rule had actual knowledge of the rule and had participated in racing commission meetings and argued against its adoption.[141]

Failure of the racing commission to underline the text of a proposed amendment was found to be mandatory and a fatal error in *Clark v. Washington Horse Racing Commission*.[142] The commission had sent the agenda of a board meeting and the entire text of a proposed amendment to all interested parties. One part of the amendment was underlined but another portion was not.[143] Despite the error, the amendment was accepted by the official reviewer of agency rules and was published in the Washington State Register.[144] Eighteen months after the rule was officially on the books, the commission applied it to redistribute two purses. Three years after that, the Washington Supreme Court in a seven to two decision reversed the commission's decision because the amendment was not properly adopted.[145]

The interplay between commission action and the rule-making provisions of the Illinois APA was also a central issue in *Ogden-Fairmount, Inc. v. Illinois Racing Board*.[146] In this case, the racing board penalized a race track for filing false documents. Despite the fact that the documents were required by a non-rule, the Illinois Supreme Court sustained the imposition of a $105,000 fine.[147] The case illustrates the broad deference given racing commissions by the courts.

A provision of the Illinois Horse Racing Act creates a Race Track Improvement Fund (RTIF).[148] An account is created with the state treasurer for each racing association from fifty percent of the breakage[149] at each meeting. The purpose of the RTIF is

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[141] *Id.* at 669-70.

[142] 720 P.2d 831 (Wash. 1986).

[143] *Id.* at 833-34.

[144] *Id.* at 836 (Dore, J., dissenting).

[145] The authors are duly impressed that counsel for the horse owners in *Clark* went behind the published text of the rule to find an error in the rule-making procedure.

[146] 518 N.E.2d 120 (Ill. 1988).

[147] The authors used to believe that agencies imposed civil penalties and criminal courts imposed fines. The Illinois Horse Racing Act gives the board the power to impose "civil penalties," ILL. REV. STAT. ch. 8, para. 37-9(l), but since the Illinois Supreme Court used the word "fine" in the *Ogden-Fairmount* decision, the distinction between a civil penalty and a fine is apparently lost, as persistent misuse has made the words synonymous. Ogden-Fairmount, Inc. v. Illinois Racing Bd., 518 N.E.2d 120, 124 (Ill. 1987).

[148] ILL. REV. STAT. ch. 8, para. 37-32 (1985).

[149] Breakage is defined as the "odd cents by which the amount payable on each dollar exceeds a multiple of 10 cents." *Id.* at para. 37-3.02 (1987).

"to aid tracks in improving their facilities."[150] Money from the RTIF is distributed to the track for capital improvements, the purchase of equipment, the amortization of debts and other specified purposes.[151] The legislature mandated that the board adopt "procedural rules and regulations governing information required, deadlines for filing, and types of application forms to be observed by the tracks seeking monies from the [RTIF]."[152]

The board dutifully adopted the procedural rules but in 1979 they went a step further and adopted a "sense of the Board resolution" that an applicant for RTIF money "had to provide at least three competitive bids with each application seeking approval of expenditure from the Fund."[153] In 1984, the racing board learned that Ogden-Fairmount, Inc. had filed nineteen RTIF applications containing spurious bids, not obtained by competitive bidding, but rather obtained by a favored contractor *after* contracts had been awarded to him.[154] The applications were certified by officers of Ogden-Fairmount as being true and correct.[155] The board's staff then initiated proceedings that resulted in the $105,000 fine.

Challenging the board's action, the race track was successful at both the trial and appellate court level. The latter focused on the three bid requirement. Since the sense of the board resolution was not a rule adopted in compliance with the Illinois APA, the appellate court reasoned that "all consequences that flow from a failure to follow [the resolution] also must fail."[156] The Illinois Supreme Court, however, unanimously concluded that the validity of the sense of the board resolution was "irrelevant to the issue of the Board's authority to penalize Ogden-Fairmount."[157] The court relied on the board's broad authority to penalize any action that "is a detriment or impediment to horse racing"[158] and concluded that deliberate lies in certified filings constituted threats to the integrity of racing.[159]

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[150] *Id.* at para. 37-32(c) (1985).

[151] *Id.* at para. 37-32(d) (1985).

[152] *Id.* at para. 37-32(e) (1985).

[153] *Ogden-Fairmount*, 518 N.E.2d at 123.

[154] *Id.* at 123-124.

[155] *Id.* at 123.

[156] Ogden-Fairmount, Inc. v. Illinois Racing Bd., 498 N.E.2d 882, 889 (Ill. App. Ct. 1986), *aff'd in part, rev'd in part*, 518 N.E.2d 120 (Ill. 1987).

[157] *Ogden-Fairmount*, 518 N.E.2d at 125.

[158] ILL. REV. STAT. ch. 8, para. 37-9(b) (1985).

[159] *Ogden-Fairmount*, 518 N.E.2d at 125.

J. *Discovery*

Theoretically, administrative agencies develop expertise in specialized or technical areas and therefore dispense justice more rapidly than the courts. Thus, there is an inherent tendency among regulators to disdain traditional discovery such as depositions and interrogatories as these are viewed as time consuming or dilatory.[160] As a practical matter, discovery at the racing commission level often depends as much upon the goodwill of the commission attorney as it does upon some statutory or regulatory right to depose witnesses, propound interrogatories, or compel the production of documents.

The skillful practitioner confronted with an uncooperative commission will, if possible, make alternative use of the state's freedom of information act. Further, given the reputation of the New York State Racing and Wagering Board (NYSRWB) for not permitting discovery,[161] one may surmise that some of the federal civil rights complaints filed against the NYSRWB are more a desperate turning to the liberal federal discovery rules than a desire to vindicate federally protected rights. When the federal complaint also results in temporary injunctive relief, the counter-productive effect of the NYSRWB's closed book policy becomes apparent.

Frequently, a racing commission investigation commences with an anonymous tip.[162] In *Gregg v. Oregon Racing Commission*,[163] an informant's tip prompted an investigation that led to a license revocation hearing. The licensee argued that he was denied due process when the commission denied him access to the commission investigator's reports of an anonymous telephone call. Since the reports were not a part of the state's case and the licensee had the full opportunity to cross-examine all the witnesses who testified against him, the court rejected the argument.[164]

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[160] In Loftin v. Louisiana State Racing Comm'n, 449 So. 2d 136 (La. Ct. App. 1984), the trainer sought to propound interrogatories to the commission regarding possible irregularities in the drug testing procedure. The commission filed a motion to quash, which was sustained by the appellate court. *Id.* at 138-39.

[161] In both Warner v. New York State Racing & Wagering Bd., 471 N.Y.S.2d 922 (A.D. 1985), and Gleason v. New York State Racing & Wagering Bd., 470 N.Y.S.2d 185 (A.D. 1983), the courts held that in revocation proceedings the licensees should have been provided with prior statements of witnesses against them. Still, failure to provide the statements was harmless error.

[162] *Belville*, 473 N.E.2d 500.

[163] 588 P.2d 1290 (Or. Ct. App. 1979).

[164] *Id.* at 1294.

In Illinois, the authors crafted and the commission adopted a rule requiring the parties to meet in advance of a commission hearing and to stipulate to facts that are "not fairly in dispute."[165] Designed to resemble a federal pre-trial order, the procedure forces commission lawyers to put their cases together and provides the representatives of licensees the opportunity to know in advance the thrust of their opponents' cases. The rule serves the agency's goal of expediting the process and at the same time imparts a sense of fairness to the proceedings.

K. *Evidence*

While courts proclaim that all evidence at an administrative hearing must be on the record and subject to cross-examination, practitioners unfamiliar with administrative agency practice must be extremely wary of the concept of "official notice"[166] and the use of an agency's specialized knowledge and expertise. For example, in *Gregg*, the commission made factual findings that the court determined were not based on any evidence in the record.[167] *Gregg* involved the allegation that the licensee falsified the age of a horse. The commission made findings to the effect that the wagering public relied on accurate program information about the age of horses. Obviously, the licensee had no opportunity to counter these findings. Nonetheless, the court held that these findings fell within the special knowledge of the commission and were not, therefore, reversible error.[168] Only a full-crafted interrogatory or a state statute prohibiting reliance on such non-record facts[169] can prevent such damaging findings in a final commission order.

As with any trial, hearsay is an evidence issue in racing commission cases. While most state statutes provide that the racing

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[165] 11 ILL. ADM. CODE 204.110 (1985).

[166] Official notice generally includes matters subject to judicial notice along with those matters falling within the specialized knowledge and expertise of the agency.

[167] *Gregg*, 588 P.2d at 1293.

[168] *Id.*

[169] *See e.g.*, ILL. REV. STAT. ch. 127, para. 1012(c) (1985), which states:

> Notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

commission is not bound by the technical rules of evidence, hearsay is not a technical rule. Generally, however, the admission of hearsay is not found to be reversible error unless a finding is based solely on hearsay evidence.[170] Thus, the introduction of a laboratory report as the basis for a finding that a horse was drugged, absent live testimony from the chemist, has been held to be reversible error.[171] Many states have a rule providing that a laboratory report of a prohibited drug in a post-race sample is prima facie evidence that the trainer of the horse has violated the rule forbidding the use or presence of such drugs.[172] In Pennsylvania, the rule for thoroughbred racing goes further and makes the laboratory report prima facie correct.[173]

The issue in *Worthington v. Commissioner, Department of Agriculture*,[174] was whether the Pennsylvania State Horse Racing Commission could properly promulgate a rule that, in essence, substituted a presumption for testimony as to the details of the chain of evidence and chemical analysis. The majority noted the urine sampling and testing process and the number of persons involved in that process. The majority then concluded that the testimony of three witnesses plus the presumption embodied in the rule were sufficient to prove the presence of the drug "in the absence of affirmative proof by Worthington of some error or defect in any stage in the process of procuring and testing" the sample.[175]

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[170] Kramer v. New York State Racing & Wagering Bd., 500 N.Y.S.2d 728 (A.D. 1986); *Warner*, 471 N.Y.S.2d 922.

[171] *See* Barkley v. Louisiana State Racing Comm'n, 506 S.2d 580 (La. Ct. App. 1987); Hall v. Louisiana State Racing Comm'n, 505 So. 2d 744 (La. Ct. App. 1987) (in globo introduction of laboratory reports constituted a denial of trainer's rights to confront and cross-examine). In Tufiarello v. Barry, 401 N.Y.S.2d 210 (A.D. 1978), the court reversed a suspension where the only evidence that a horse was drugged was documents admitted without proper foundation. *But see* Laborde v. Louisiana State Racing Comm'n, 506 So. 2d 634, 636 (La. Ct. App. 1987) (Schott, J., concurring), in which the concurring judge argues that the commission had the right to present its documentary evidence and then rest, shifting the burden to the licensee to produce contrary evidence. *See also Miller v. Louisiana State Racing Comm'n, 508 So. 2d 585, 586 (La. Ct. App. 1987) (Ward, J., concurring), in which the author of the concurring opinion argues that the laboratory report was admissible and that the right to cross-examine does not require the agency to produce a witness.*

[172] For a discussion of the rules making the trainer responsible, see Garrison & Klein, *Brennan Revisited: Trainer's Responsibility for Race Horse Drugging*, 70 KY. L.J. 1103 (1981-82).

[173] *See infra* notes 174-75 and accompanying text.

[174] 514 A.2d 311 (Pa. Commw. Ct. 1986).

[175] *Id.* at 314. Although stated as an afterthought, the majority noted that the split sample was verified by an independent laboratory and that Worthington failed to rebut the presumption that he violated the trainer responsibility rule.

The admissibility of laboratory reports from an out of state laboratory has been an issue in several recent cases. In *DeGroot v. Arizona Racing Commission*,[176] *Martinez v. State Racing Commission*,[177] and *Claridge v. New Mexico State Racing Commission*,[178] post-race urine samples were sent out of state for testing at laboratories other than the official laboratory. In all three cases, the courts sustained the admissibility of the evidence, finding that a reference to an official laboratory in agency rules did not preclude evidence from other sources.

Racing commissions generally work closely with investigators who are either their own employees, employees of state police units charged with enforcing state racing statutes, or agents of the Thoroughbred Racing and Protective Bureau. Those relationships have resulted in cases in which the issue was the admission of evidence obtained illegally. Two of these cases resulted from the New Jersey state police's "Operation Glue," which was aimed at jockeys involved in fixing races.[179] In the first of these cases, the New Jersey criminal court dismissed charges against Rudolph Delguidice, Jr., finding that the state police had improperly entrapped him and had manufactured its own criminal enterprise.[180]

Despite the dismissal of the criminal case, the New Jersey Racing Commission (NJRC) refused to relicense Delguidice. Applying the *United States v. Janis*[181] balancing test, the Supreme Court of New Jersey concluded that the evidence illegally obtained by state police was admissible at a hearing before the NJRC because: (1) the two governmental agencies were governed by different statutes;[182] (2) "the record reveals absolutely no connection between the police entrapment and the Racing Commission;"[183] and (3) although the offending officers "could probably foresee the use of the fruits of 'Operation Glue' " by the NJRC, "there is nothing to suggest that the officers were actively motivated—and it is unlikely that they were—to assist the Racing Commission

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[176] 686 P.2d 1301 (Ariz. App. 1984).

[177] 410 N.E.2d 740 (Mass. App. Ct. 1980).

[178] 763 P.2d 66 (N.M. 1988).

[179] *Delguidice*, 494 A.2d 1007; Kelly v. New Hampshire Pari-Mutuel Comm'n, 499 A.2d 994 (N.H. 1985).

[180] *Delguidice*, 494 A.2d at 1008.

[181] 428 U.S. 433 (1976).

[182] *Delguidice*, 494 A.2d at 1010.

[183] *Id.* at 1011.

in its regulatory functions at the expense of forfeiting all criminal indictments."[184]

Thus, the *Delguidice* court concluded that excluding the evidence was unlikely to deter state police from future illegal conduct[185] and that the harm to the racing industry from such exclusion would be enormous.[186] The New Hampshire Supreme Court reached the same conclusion when the results of the Operation Glue investigation were offered into evidence before that state's racing commission.[187] Similarly, the Supreme Court of Louisiana, again employing the *Janis* test, held that evidence unlawfully obtained by the Louisiana State Police Racing Investigations Unit could be admitted and considered by the Louisiana State Racing Commission in an administrative disciplinary hearing.[188]

Two racing commission cases have dealt with the effect of lost evidence. In *DeVitis v. New Jersey Racing Commission*,[189] the videotape of a race was destroyed when Freehold Raceway burned down. The fire occurred after the administrative hearing but before the commission had the opportunity to view the tape. Obviously, there was no showing of bad faith or connivance on the agency's part. DeVitis argued that he suffered manifest prejudice and harm when the tape, which he characterized as objective evidence of the race, was lost. The court, however, was not persuaded because the administrative law judge had seen the videotape[190] and because most of the testimony consisted of "verbatim narration of the videotape."[191]

A trainer whose horse's urine sample tested positive argued that charges against him should be dismissed because the blood sample from his horse was destroyed.[192] Relying on authority from a criminal case and commission rules that made urine testing mandatory, the court reasoned that the missing evidence probably would have been cumulative and that there was no "reasonable

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[184] *Id.*

[185] *Id.* at 1011-12.

[186] *Id.* at 1013.

[187] *Kelly*, 499 A.2d at 997.

[188] *Pullin*, 484 So. 2d 105. *But see* Smith v. Pennsylvania State Horse Racing Comm'n, 501 A.2d 303 (Pa. Commw. Ct. 1985) (entrapment is a defense to an administrative charge of race fixing).

[189] 495 A.2d 457 (N.J. Super. Ct. App. Div. 1985).

[190] The administrative law judge's report was, however, rejected by the commission. *Id.* at 461.

[191] *Id.* at 463.

[192] *Giles*, 771 P.2d 1159.

possibility" that evidence from the blood sample "would have been exculpatory."[193]

Challenging the chain of evidence—from the collection of the urine or the blood sample to the laboratory and through the several stages of testing—is a typical avenue of attack for attorneys defending persons charged with drugging or failing to guard against drugged horses.[194] The most notorious example of all such cases is that of Jerry Graham, who faced ten charges of failing to guard horses that were found to have raced with Sublimaze, a powerful stimulant, in their systems.[195] Graham's attorneys argued that the chain was broken because contrary to the commission's rules, track-employed guards were not present when the urine samples were collected. In addition, the attorneys alleged that betting rule violations by the urine takers tainted the chain of evidence. Using these arguments, Graham delayed serving a suspension for years.[196] Ultimately, however, his defense was unsuccessful because he failed to demonstrate that the problems with the chain amounted to a break in the chain of evidence.[197]

While the subject matter of racing commission hearings may be unique to pari-mutuel racing, aspects of the proceedings are in many respects like any other civil or administrative case. *Worthington*[198] is a splendid example. There the trainer was charged with failure to guard a horse that tested positive for Acepromazine, a tranquilizer. The trainer's only defense against such a charge was testimony by the grooms who attended the horse on the day of the race. Worthington argued that he was prejudiced by the twenty-one-month delay between the date of notice of the violation and the hearing. He argued that the delay made him unable to locate two grooms[199] who had worked for him on the date in question.

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[193] *Id.* at 1161. A contrary result was reached in *Wilkey*, 381 N.E.2d at 1380, when the court reversed a lifetime suspension of a veterinarian charged with drugging horses because of the board's failure to test a referee sample and weaknesses in its chain of evidence. *Id.* at 1384-86.

[194] *See Claridge*, 763 P.2d 66; *Wilkey*, 381 N.E.2d 1380.

[195] Graham v. Illinois Racing Bd., 495 N.E.2d 1013 (Ill. App. Ct. 1986).

[196] *Id.* at 1013.

[197] Only when a commission failed to introduce any testimony linking the horse to the laboratory report has a commission case been overturned on the basis of the chain of evidence. Paoli v. State Horse Racing Comm'n, 473 A.2d 243 (Pa. Commw. Ct. 1984).

[198] Worthington v. Comm'r, Dept of Agriculture, 514 A.2d 311 (Pa. Commw. Ct. 1986).

[199] In the often stratified society, and highly transient world, of thoroughbred racing, the last names of grooms are not well known. The inability to locate a groom after a race meeting ends is real and not at all surprising.

The court, however, brushed this argument aside because Worthington knew of the whereabouts of one of the grooms but made no effort to subpoena him and he had not attempted to locate the other groom.[200]

L. *Penalties*

The obvious purpose of an appeal is the reduction of the fine or suspension imposed by the stewards. Such a result is not always guaranteed. Numerous cases have held that racing commissions, unless barred by their own rules,[201] may increase the penalty imposed either because an increased penalty is permitted by statute,[202] or on the theory that the commission's hearing is de novo.[203] Moreover, the New York Racing and Wagering Board has adopted a policy whereby penalties imposed by the stewards are decreased if no appeal is taken; this policy has twice survived constitutional challenge at intermediate appellate levels.[204]

V. JUDICIAL REVIEW

Statutes defining the scope and nature of judicial review vary from state to state. In Illinois, for example, the record before the reviewing judge is limited to the record made before the administrative agency.[205] In Ohio, however, the statute permits the introduction of newly discovered evidence.[206]

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[200] *Worthington*, 514 A.2d at 313. See also Brennan v. Monaghan, 166 N.Y.S.2d 190, 196 (A.D. 1957), where the applicant for an owner's license failed to make an adequate showing that out of state character witnesses, in their depositions, would have testified as he hoped. Therefore, failure to allow such depositions could not be said to be arbitrary, capricious, or contrary to law.

[201] *See Ballard*, 750 P.2d 286. The Wyoming rule provided that the commission could "rescind or modify any penalty or decision" of the stewards. *Id.* at 291. The Commission, without notice to Ballard, voted to increase a $200 fine and 45 day suspension. Upon being enjoined to conduct a hearing in accordance with the Wyoming APA, they increased the penalty to a two year suspension. The court held that "rescind or modify" did not mean increase, *id.* at 291, and that an amendment to the statute after the original suspension could not be applied retroactively to justify the increased suspension. *Id.* at 291-92.

[202] *Pence*, 705 P.2d 1067, contains a scholarly analysis of the double jeopardy and res judicata claims made in this context; *see also Poisson*, 287 A.2d 852.

[203] *Ray*, 447 N.E.2d 886.

[204] *Belanger*, 494 N.Y.S.2d 451; Crawford v. New York State Racing and Wagering Bd., 473 N.Y.S.2d 601 (A.D. 1984).

[205] ILL. REV. STAT. ch. 110, para. 3-110; *see* also Benefiel v. Illinois Racing Bd., 504 N.E.2d 827 (Ill. App. Ct. 1987); Lamar v. Illinois Racing Bd., 370 N.E.2d 1241 (Ill. App. Ct. 1977).

[206] OHIO REV. CODE ANN. § 2505.31 (Baldwin 1987).

A. *Exhaustion of Administrative Remedies; Preservation of Issues*

1. *Time for Court Review*

Before one can challenge a racing commission decision in court, one must first exhaust administrative remedies. Knowing how to exhaust those remedies can be tricky. In *B.T. Energy Corp. v. Marcus*,[207] for example, a party who lost before the Nebraska Racing Commission filed a motion for rehearing with the commission.[208] The rehearing was held, the motion denied, and the party then sought judicial review under the applicable Nebraska law.[209] The Supreme Court of Nebraska held that the complaint was not timely filed as the applicable law required that the suit be instituted within thirty days of the final decision of the agency. Since the racing statute did not give the commission any power to reconsider a decision, the time started running from the date of the original decision and not from the date on which the motion to reconsider was denied.[210]

On the other hand, an Arizona appellate court has held that where the racing statute permits a licensee to request rehearing or review, the party must avail himself of that right before seeking relief in the courts.[211] The Arizona court noted that the "purpose of this exhaustion of remedies doctrine is twofold: to allow an administrative agency to exercise its expertise over the subject matter and perhaps more importantly, to permit the agency to correct any mistakes or errors that may have occurred during the administrative process."[212]

2. *Injunctions and Other Remedies*

The exhaustion of administrative remedies doctrine also applies where a party seeks injunctive relief in the courts after[213] the

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[207] 382 N.W.2d 616 (Neb. 1986)

[208] *Id.* at 618.

[209] *Id.*

[210] *Id.* at 619

[211] Oliver v. Arizona Dep't of Racing, 708 P.2d 764 (Ariz. Ct. App. 1985).

[212] *Id.* at 767 (citation omitted). Presumably, when the legislature does not grant an agency the opportunity to rehear a matter, the legislature adopts the policy that agencies should not have the luxury of making mistakes at the expense of regulated parties and therefore regulators should take great care before acting.

[213] An injunction prohibiting certain hearings by the Illinois Racing Board and the stewards was reversed on direct appeal to the Illinois Supreme Court in Graham v. Illinois Racing Bd., 394 N.E.2d 1148 (Ill. 1979).

stewards' ruling, but before filing a request for hearing with the commission.[214] In such a case, it has been held that the party must still exhaust his administrative remedies even if, as in the case of a jockey suspension, the suspension is imposed prior to the opportunity for a commission hearing.[215]

In general, the courts are without jurisdiction to review an agency's decision where a party affected by that decision has failed to exhaust administrative remedies.[216] More specifically, the Illinois Supreme Court tackled the issue of injunctions in an exclusion[217] case in which two harness drivers were barred from the grounds of Fairmount Park Race Track by both the Illinois Racing Board's stewards and by track management after the drivers' indictment for race fixing.[218] The court held that where a party seeks injunctive relief on the basis of a statute's unconstitutional application but fails to attack the statute on its face, injunctive relief is not available unless administrative remedies have been exhausted.[219] Obviously, if the racing commission lacks jurisdiction to entertain a matter, a party may proceed directly to court because there are no administrative remedies to exhaust.[220]

3. *Preserving Issues for Appeal*

Generally, a matter not raised at the trial court level may not be raised on appeal. Similarly, a matter not raised before the racing commission generally cannot be raised for the first time on judicial review.[221] This legal principle cuts both ways and, in one case, a

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[214] When racing commissioners grant stays of stewards' suspensions or when appeals to the commission automatically stay the enforcement of a penalty, immediate action in the courts is unnecessary. Commission policy on this issue varies widely. The authors suspect that there is a relation between the number of litigated injunction cases and the refusal of certain commissions to grant stays.

[215] State Racing Comm'n v. McManus, 476 P.2d 767 (N.M. 1970).

[216] *Id.* at 772.

[217] An exclusion is an order by a racing commission, its stewards, or a race track barring a licensee from being physically present on race track property. *See* Kropp, Landen & Donath, *supra* note 57; HTA monograph, *supra* note 57.

[218] Phillips v. Graham, 427 N.E. 2d 550 (Ill. 1981).

[219] *Id.* at 557.

[220] Sobolewski v. Louisville Downs, Inc., 609 S.W.2d 943 (Ky. Ct. App. 1980); *see also* Youst v. Longo, 729 P.2d 728 (Cal. 1987) (California Horse Racing Board does not have statutory authority to award general tort damages, therefore, party need not exhaust administrative remedies by first seeking such relief from the board).

[221] Poisson v. State Harness Racing Comm'n, 287 A.2d 852 (Pa. Commw. Ct. 1972) (licensee may not object in reviewing court to increase by racing commission of penalty imposed by the stewards when issue not raised before the agency); Belville v. Illinois Racing Bd., 473 N.E. 2d 500, 505 (Ill. App. Ct. 1984) (Issue of identity and reliability of informant waived because not raised at hearing).

reviewing court has refused to permit a racing commission to assert a rule as a basis for a license revocation when the rule was neither cited to nor relied upon at the commission hearing.[222] Racing commission decisions, like those of other administrative agencies, are enhanced when accompanied by adequate findings of fact and conclusions of law.[223] The absence of findings on a crucial issue has been characterized as precluding judicial review, resulting in a remand to a racing commission.[224] The goal of explicit findings is meaningful judicial review.[225]

B. *Attorneys' Fees*

Those who practice before state racing commissions should carefully analyze relevant state APAs and judicial review laws. For example, the Illinois APA permits a party who succeeds in invalidating an agency rule "for any reason" to recover "the reasonable expenses of the litigation, including reasonable attorney's fees."[226] Thus, when the Illinois Racing Board's warrantless search rule was successfully challenged, the appellate court confirmed an award of $10,625 in attorney fees and $151.80 in court costs.[227]

The owners who invalidated a Washington Racing Commission rule[228] were not so fortunate. There the court found no statutory authority under Washington's administrative review statute for the award of attorney's fees nor any showing of bad faith by the commission that would justify the award of fees on equitable principles.[229]

C. *Review of Quasi-Judicial Administrative Decisions*

The courts review three aspects of racing commission decisions: (1) review of the agency's findings of fact; (2) review of the

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[222] Smith v. Pennsylvania State Horse Racing Comm'n, 501 A.2d 303, 307 (Pa. Commw. Ct. 1985).

[223] *See infra* notes 230-45 and accompanying text.

[224] Pinsley v. New York State Racing & Wagering Bd., 423 N.Y.S.2d 307 (A.D. 1979).

[225] Norwood v. Pennsylvania State Horse Racing Comm'n, 328 A.2d 198, 204 (Pa. Commw. Ct. 1974) (court admonished racing commission "to be more specific in both its findings [of fact] and conclusions [of law]" but sustained decision).

[226] ILL. REV. STAT. ch. 8, para. 1014(b) (1985).

[227] Hansen v. Illinois Racing Board, 534 N.E.2d 658 (Ill. App. Ct. 1989). After the appellate court decision, Hansen also petitioned for his fees and costs in defending the appeal.

[228] *See supra* notes 142-45 and accompanying text.

[229] Clark v. Washington Horse Racing Comm'n, 720 P.2d 831 (Wash. 1986).

agency's conclusions of law; and (3) review of the agency's exercise of discretion. The standard of review applied depends upon the nature of the particular issue.

1. *Standard of Review for Factual Findings*

The attempt to define with precision the level of proof required at a racing commission hearing may be an acceptable scholarly endeavor, but the effort hardly provides useful guidance for the practitioner. The broad brush definition of the standard of review of factual findings is that the courts will not re-weigh the evidence[230] because the findings of fact of an administrative agency are deemed prima facie true and correct[231] and matters of credibility are reserved for the trier of fact.[232] Reviewing courts, therefore, will sustain an agency's findings of fact if the findings are supported by substantial evidence,[233] substantial credible evidence,[234] sufficient credible evidence,[235] sufficient evidence,[236] legal evidence,[237] reliable, probative, and substantial evidence,[238] competent, material, and substantial evidence,[239] or the manifest weight of the evidence.[240]

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[230] Belanger v. New York State Racing and Wagering Bd., 471 N.Y.S.2d 690, 691 (A.D. 1984); DeGroot v. Arizona Racing Comm'n, 686 P.2d 1301, 1305 (Ariz. App. Ct. 1984).

[231] *Benefiel*, 504 N.E.2d 827, 829; *Belville*, 473 N.E.2d 500, 504.

[232] Warner v. New York State Racing & Wagering Bd., 471 N.Y.S.2d 922, 923 (A.D. 1984).

[233] Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298, 307-09 (Ky. 1972); Solimeno v. State Racing Comm'n, 509 N.E.2d 1167, 1173 (Mass. 1987). In Pennsylvania, see, e.g., Reichard v. State Harness Racing Comm'n, 499 A.2d 727, 728 (Pa. Commw. Ct. 1985); McKenna v. Pennsylvania State Horse Racing Comm'n, 476 A.2d 505, 506 (Pa. Commw. Ct. 1984); *Norwood*, 328 A.2d at 203 ("Substantial evidence is more than a mere scintilla"). In New York, see *Warner*, 421 N.Y.S.2d at 923 ("Since substantial evidence exists to support the Board's determination, it must be sustained irrespective of whether a similar quantum of evidence is available to support another conclusion."); MacRae v. New York State Racing & Wagering Bd., 368 N.Y.S.2d 313, 314 (A.D. 1975). In Oregon, see Gregg v. Oregon Racing Comm'n, 588 P.2d 1290, 1292 (Or. Ct. App. 1979).

[234] Carruthers v. Board of Horse Racing, 700 P.2d 179, 181 (Mont. 1985).

[235] DeVitis v. New Jersey Racing Comm'n, 495 A.2d 457, 460-61 (N.J. Super. A.D. 1985) ("Where there is substantial evidence in the record to support more than one result, it is the agency's choice which governs.").

[236] Hall v. Louisiana State Racing Comm'n, 505 So. 2d 744, 746 (La. App. 4 Cir. 1987).

[237] Lombardo v. DiSandro, 103 A.2d 557, 559 (R.I. 1954).

[238] Dewbre v. Ohio State Racing Comm'n, 476 N.E.2d 667, 669 (Ohio Ct. App. 1984).

[239] Taylor v. Hazel Park Racing Ass'n, 371 N.W.2d 447, 450 (Mich. App. 1985).

[240] *See supra* note 231.

Lawyers may reasonably differ as to the exact meaning of these words but Kentucky's highest court has expressed the following definition:

> The test of substantiality of evidence is whether when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men.[241]

2. *Standard of Review for Conclusions of Law*

The courts do not accord as much deference to an administrative agency's conclusions of law. Agency rules enjoy a presumption of validity[242] and the courts afford substantial weight to the agency's view of its enabling statute when the statute is not clear.[243] However, when the issue in a case is purely legal, reviewing courts do not hesitate to substitute their view for that of the agency.[244] The agency's decision must be in accordance with the law.[245]

3. *Standard of Review: Discretion*

The exercise of a racing commission's discretion with respect to penalties[246] has been challenged on many occasions. In general, the reviewing courts test the wisdom of agency discretion by determining whether or not the discretion has been abused[247] or whether

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[241] *Fuller*, 481 S.W.2d at 308 (citation omitted). The record in *Fuller* consisted of 1,162 pages of proceedings before the stewards and 2,860 pages of proceedings before the Commission. *Id.* at 299. The attorney for Fuller has told one of the authors that his client spent a fortune "to prove that the Kentucky Racing Commission can believe whatever it wants to believe." *But see* Swift v. New York State Racing & Wagering Bd., 473 N.Y.S.2d 632, 633 ("Substantial evidence 'does not rise from bare surmise, conjecture, speculation.' " (citation omitted)). See also Viera v. Illinois Racing Bd., 382 N.E.2d 462 (Ill. App. Ct. 1978) and Pletcher v. Illinois Racing Bd., 372 N.E.2d 1075 (Ill. App. Ct. 1978), which are two rare examples of appellate courts reversing racing commission findings of fact.

[242] Heavner v. Illinois Racing Bd., 432 N.E.2d. 290, 294 (Ill. App. Ct. 1982); *Clark*, 720 P.2d at 833.

[243] *Carruthers*, 700 P.2d at 181.

[244] *See id.*; *Clark*, 720 P.2d at 833.

[245] Brown v. Pennsylvania State Horse Racing Comm'n, 499 A.2d 1132, 1133 (Pa. Commw. Ct. 1985).

[246] The Minnesota legislature has required the Minnesota Racing Commission to establish by rule "a graduated schedule of civil fines." MINN. STAT. ANN. § 240.22 (1990 Supp.).

[247] Pence v. Idaho State Racing Comm'n, 705 P.2d 1067 (Idaho. App. 1985) (one year suspension and $500 fine, reduced by a $300 credit, for possession of electric prodding device not an abuse of discretion); Ogden-Fairmount, Inc. v. Illinois Racing Bd., 518 N.E.2d 120, 128 (Ill. 1987) (15 month exclusion of horse owner who submitted spurious bids for filing with racing board not abuse of discretion); Owens v. La. State Racing

the agency's action has been arbitrary, capricious, or unreasonable.[248]

The severe penalties imposed in recent years by the Illinois Racing Board have prompted several challenges to the Board's discretion. While the lifetime suspensions of two jockeys for possession of electrical goading devices have been sustained,[249] a lifetime suspension of a trainer who failed to guard ten horses against the administration of sublimaze was deemed overly harsh by the court, given the trainer's twenty-seven-year unblemished record and the penalties imposed by the board in other failure-to-guard cases.[250] Recently, an Illinois appellate court explained that "[t]he test . . . is not whether [a reviewing court] would impose a lesser penalty if it were making a decision in the first instance, rather, the test is whether, in view of the circumstances, the agency acted unreasonably or arbitrarily."[251]

None of these terms provide clear guidance to racing commissioners or the parties who appear before them. The guidepost is probably best expressed by a New Jersey court that noted that a penalty may not be "so disproportionate to the offense as to be 'shocking to one's sense of fairness.' "[252] Moreover, "[e]qual protection does not require that each trainer found guilty of the same

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Comm'n, 466 So. 2d 764, 767 (La. Ct. App. 1985) (30 day suspension of trainer for procaine positive testing not an abuse of discretion). Briley v. Louisiana State Racing Comm'n, 410 So. 2d 802 (La. App. Ct. 1982) (three year suspension of trainer with three amphetamine positives and prior record of rule violations, including prior medication violations, sustained).

[248] *Norwood*, 328 A.2d at 204 (permanent license revocation and $5,000 fine warranted where licensee had participated in or had knowledge of administration of prohibited drugs and the switching of urine samples and had personal possession of hypodermic needles).

[249] *Belville*, 473 N.E.2d 500; Feliciano v. Illinois Racing Bd., 443 N.E.2d 261 (Ill. App. Ct. 1982).

[250] *Graham*, 495 N.E.2d 1013. The other cases were Kline v. Illinois Racing Bd., 469 N.E.2d 667 (Ill. App. Ct. 1984) (two concurrent 90 day suspensions for scopolamine positives) and Ray v. Illinois Racing Board, 447 N.E.2d 886 (Ill. App. Ct. 1983) (three consecutive 90 day suspensions for sublimaze positives).

[251] Edwards v. Illinois Racing Bd., 543 N.E.2d 172, 176-77 (Ill. App. Ct. 1989) (fourteen consecutive nine-month suspensions of trainer sustained where 14 post-race samples contained isopyrin, sulindac, and etorphine and trainer had multiple prior violations including violations of medication rules).

[252] King v. New Jersey Racing Comm'n, 501 A.2d 173, 175 (N.J. Super A.D. 1985) (quoting Pella v. Bd. of Education, Etc., 34 N.Y.2d 222, 313 N.E.2d 321 (1974)) (six-month suspension for intentionally driving not to win sustained in light of past record of infractions, but case reversed and remanded on other grounds). In Pennsylvania State Horse Racing Comm'n v. DiSanto, 372 A.2d 487 (Pa. Commw. Ct. 1977) the court concluded that there was mitigating evidence in the record and reduced a five-year license revocation to a two-year suspension because five years was too severe.

offense be given the same penalty, as each case must stand upon its own circumstances."[253]

Unfortunately for licensees, racing commissions rarely bifurcate hearings. In a bifurcated proceeding the commission would first determine whether there was a violation. If a violation is found, the commission would then determine the appropriate penalty. Unless the penalty phase of the proceeding is separated, penalties may be imposed without deliberation[254] because unsuspecting licensees have not yet presented evidence to mitigate the severity of their penalties. The right to be heard in mitigation, after having been found guilty of a violation, is fundamental in our society and the failure of a commission to recognize this right offends the sense of fairness.

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[253] Salicos v. Louisiana State Racing Comm'n, 482 So. 2d 117, 118 (La. App. Ct. 1986), relying on Loftin v. Louisiana State Racing Comm'n, 449 So. 2d 136 (La. App. Ct. 1984).

[254] In *Briley*, 410 So. 2d 802, 807 (La. App. Ct. 1982), the court found no abuse of discretion when the commission imposed sentence without deliberation after hearing the witnesses. The court reasoned that any abuse of discretion could be rectified on appeal.