

Mayhew-Hite Report

The *Ohio State Journal on Dispute Resolution*, in collaboration with the Moritz College of Law's Program on Dispute Resolution, is pleased to bring you Volume 16, Issue 2, of the *Mayhew-Hite Report on Dispute Resolution and the Courts*.

EDITOR'S CORNER



Welcome to the January issue of the *Mayhew-Hite Report*, we're your editors, Mary Bockstahler and Brooke Mangiarelli. The theme of this issue is dispute resolution and sports. In the past few years especially, disputes in the sporting world have garnered national and international attention. We are currently looking forward to watching the 2018 PyeongChang Winter Olympics, as well as continuing to follow sports-related disputes, including the USA Gymnastics and Michigan State scandal.

This issue presents one feature article: *A Win for Arbitration Process, a Loss for the Cowboys and Ezekiel Elliott*, written by Sarah Cole, Director of Moritz's Program on Dispute Resolution, and John W. Bricker Professor of Law.

The article summary, written by Mary Bockstahler, highlights Maureen Weston's

recent article *Tackling Abuse in Sport Through Dispute System Design*, which originally appeared in the University of St. Thomas Law Journal, Volume 13. Professor Weston directs the Entertainment, Media & Sports Dispute Resolution Project at Pepperdine University School of Law.

Brooke Mangiarelli's case summary presents a brief overview of the Russian doping scandal brought to light after the 2014 Sochi Winter Olympics, wherein the International Olympic Committee imposed lifetime Olympic bans against Russian Olympic athletes, both prohibiting future participation and revoking prior Olympic medals. The summary focuses on the Russian athletes' appeal to the Court of Arbitration for Sport, which recently overturned the athletes' lifetime bans and reinstated their accolades from the 2014 Sochi Olympics, creating a new wave of controversy just a week before the 2018 Winter Olympics in PyeongChang are scheduled to begin.

This edition of the *Mayhew-Hite Report* concludes with news from Mortiz's Program on Dispute Resolution and our featured student note, Alexis Wilder's *Mediation and the NFL: Securing First Amendment Rights for Professional Athletes*.

FEATURED ARTICLE

A win for arbitration process, a loss for the Cowboys and Ezekiel Elliott

Sarah Rudolph Cole*

As a sports fan and a fan of arbitration, I have followed with interest the ongoing battles between the NFL Players Association (NFPLA) and the NFL over the consequences of their unusual arbitration process. It is no surprise to those who follow arbitration that the Fifth Circuit ruled today that the NFLPA's

attempt to circumvent the parties' agreed arbitration process by moving for a preliminary injunction in court was premature. As some may recall, "Arbitrator" Roger Goodell issued a six game suspension to former Buckeye great running back "Zeke" Elliott. According to the parties' agreement, that suspension could be appealed to another arbitrator—in this case, former NFL executive Harold Henderson. After the appeal hearing, but before Henderson issued a ruling, the NFLPA filed a motion seeking a preliminary injunction preventing enforcement of the suspension. On the same day as the preliminary injunction hearing, Henderson issued his decision, upholding the six game suspension. Three days later, the district court issued the injunction. The NFL appealed the preliminary injunction to the Fifth Circuit, which correctly ruled that the court which issued the preliminary injunction did not have subject matter jurisdiction over the complaint because the plaintiff/grievant Elliott had yet to exhaust his remedies under the collective bargaining agreement. The Fifth Circuit noted that there are some exceptions to the obligation to exhaust remedies in the grievance process governed by the CBA, but that none applied in this case.

Although there are still serious questions about the fairness of the underlying NFL arbitration process, the Fifth Circuit is right not to permit the NFLPA's end run around the arbitration process to which they agreed. One presumes the NFLPA will now file another motion for a preliminary injunction since the adverse ruling has been made. Too bad they didn't wait a few days for the ruling in the first place!

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STUDENT SPOTLIGHT

Mediation and the NFL: Securing First Amendment Rights for Professional Athletes

Alexis Wilder*

I. Introduction

"The most critical thing for both management and labor to understand is that they share related needs and concerns. They must work together to put their product on the field. They benefit from each other and need each other. They must not let corporate concerns, individual greed, or any other outside factors destroy the tradition and integrity of the game."^[1]

Professional sports are an integral part of society. Thousands of people tune in multiple nights a week to see their favorite NFL team or athlete perform.

Because these athletes command attention and are regarded as role models, it is natural that the NFL commissioner implement various regulations and rules for athletes to follow. These rules and regulations are negotiated between management (owners and the commissioner) and the player union, forming the Collective Bargaining Agreement (CBA). Those rules and regulations stated in the CBA infringe on athletes' constitutional rights, specifically the First Amendment of freedom of speech, a recently disputed issue. NFL disputes are typically resolved using arbitration, the preferred dispute resolution method. Some athletes' recent protests have sparked a national discussion about free speech rights of athletes, or more accurately, the lack thereof. Although arbitration has been the primary dispute resolution method, history shows that this method is not the most beneficial. This note asserts that mediation should be implemented to help athletes regain their First Amendment right of freedom of speech. This note first traces the development of free speech, then it explores the significance of free speech in the NFL and the impact it has on society as a whole. Lastly, it examines why mediation will be beneficial in helping secure the fundamental rights that athletes have lost while playing in the NFL.

II. The Intersection of Free Speech and the NFL

A. The Development of Freedom of Speech in the United States

Free speech has a complicated history. To trace this history, one has to look first to what rights are afforded to all citizens of the United States. "Congress

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”^[ii] The First Amendment, originally drafted, only applied to the federal government; however, confusion between state and private actors demanded clarification. Thus, the Fourteenth Amendment passed, giving States the same constitutional limitations.^[iii] The First Amendment seems simple on its face; no law shall be made restricting the freedom of speech of the people, however it has been held that “not all expression or communication is included within the ‘freedom of speech.’”^[iv] Private organizations, such as the NCAA, United States Olympic Committee, professional sport organizations, and schools are just some examples of the exceptions to the First and Fourteenth Amendments.^[v] Cases concerning freedom of speech have dealt with either trying to find the state actor requirement or balancing the interests of the two parties in conflict.^[vi]

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ARTICLE SPOTLIGHT

Tackling Abuse in Sport Through Dispute System Design

Competing in competitive sports has many benefits, especially for children and young adults: sports expose individuals to the joy of competition, teamwork, and aid in personal development.^[i] Some of these benefits can be undermined, however, by factors like the pressure to win and reverence given to powerful coaches.

The close nature of the child-coach relationship can unfortunately create an opportunity for abuse.^[ii] In *Tackling Abuse in Sport Through Dispute System Design*, Maureen Weston points out that sports create an environment where children can be abused by coaches or other authority figures.^[iii] Young athletes who compete at elite levels are especially vulnerable to abuse, as they spend a

significant amount of time training and traveling with a coach.[iv] In an effort to protect young athletes, Weston suggests a competent, comprehensive, and accessible process for reporting, investigating, resolving, and preventing sexual abuse in sport.[v]

In 2007, the International Olympic Committee (IOC) adopted a Consensus Statement on Sexual Harassment and Abuse in Sport, which acknowledges the existence of abuse in sport but does not offer a centralized process to ensure safety from abuse.[vi] Rather, the IOC recommended sport governing-bodies develop individual policies and procedures to prevent and remedy abuse.

The U.S. Olympic Committee (USOC), the governing body of the Olympics in the U.S., is empowered to recognize other National Governing Bodies of various sports (NGBs) that administer individual sports in training, competition, and nominating athletes for Olympic competition.[vii] To address abuse, the USOC created a Working Group on Safe Training Environments, which engaged in a process aligned with a Dispute System Design (DSD) approach.[viii] The DSD approach, which was first proposed in *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, emphasizes the effective management of conflict, rather than the avoidance or suppression of it.[ix] The approach provides an analytical framework to address conflict and develop a process for preventing, managing, and resolving recurring problems in a variety of contexts.[x]

Weston notes the DSD approach can assist organizations seeking to address conflict by providing a systematic approach to help identify the program's goals and objectives, inform its stakeholders, create a structure for the process, and help secure needed resources.[xi] Weston's article examines sexual abuse in sport through the construct of DSD, focusing on USOC's efforts to address the problem.[xii]

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CASE SUMMARY

Court of Arbitration for Sport Overturns Russian Lifetime Olympic Bans

Editor's note: this article was finalized on February 7, 2018.

On January 22, 2018, the Court of Arbitration for Sport (CAS) began hearing the appeals of 39 Russian athletes previously banned for life from the Olympics Games due to alleged doping during the 2014 Sochi Winter Olympics.^[i]

Established in 1984, CAS serves as a quasi-judicial body for the arbitration of sports-related disputes of either a commercial or disciplinary nature.^[ii] A large number of CAS' disciplinary cases—which are generally first dealt with by independent sports authorities then later appealed to CAS as a court of last resort—involve doping.^[iii] Generally, cases may only be submitted to CAS if there is an arbitration agreement between the parties specifying recourse to CAS; however, the Olympic Charter also mandates that all disputes related to the Olympic Games be submitted to CAS.^[iv] In 2016, CAS officially replaced the International Olympic Committee ("IOC") as the adjudicator of doping cases at the Olympic Games.^[v]

In May 2016, *60 Minutes* and *The New York Times* reported allegations concerning Russia's efforts to cover-up doping practices during the 2014 Winter Olympics in Sochi.^[vi] The reports cited allegations made by Dr. Grigory Rodchenkov, director of the Moscow Laboratory.^[vii] In response, the World Anti-Doping Agency ("WADA") launched an independent investigation into Russia's alleged doping practices, led by Professor Richard H. McLaren. This investigation ultimately revealed, through combined reports that would become known as the McLaren Report, that a State-sanctioned conspiracy had enabled Russian athletes to engage in doping practices and still compete at the Olympic Games since late 2011. Under State oversight and control, the Moscow and Sochi Laboratories held and tampered with athletes' urine samples to manipulate test results and hide elite athletes' use of doping substances.^[viii]

Pursuant to the McLaren Report, in September 2016 the IOC launched investigations, including forensic analyses and a full inquiry into all Russian athletes who had participated in the 2014 Sochi Winter Olympics, as well as

their coaches, officials, and support staff.[ix] Based on their findings, the IOC Disciplinary Commission first initiated proceedings against a group of 28 Russian athletes in December 2016.[x] Ultimately, the IOC initiated disciplinary proceedings against and sanctioned a number of Russian athletes for anti-doping rule violations due to their involvement in this State-sanctioned scheme.[xi] These sanctions included the loss of all medals, medalist pins, and diplomas from the 2014 Sochi Winter Olympics, as well as lifetime bans for all future Olympic Games, including the upcoming 2018 Winter Olympics in PyeongChang, South Korea.[xii] As of December 22, 2017, the IOC Disciplinary Commission adjudicated the cases of 46 Russian athletes.[xiii]

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HEADLINE NEWS

Divided Community Project to Receive Lawyer as Problem Solver Award

The ABA's Section of Dispute Resolution has named the **Divided Community Project** (DCP) at the Ohio State University Moritz College of Law the recipient of the 2018 institutional Lawyer as Problem Solver Award, which will be presented at the Section's Spring Conference in Washington, DC.

The Divided Community Project, which grew out of an April 2015 meeting of leaders and mediators from throughout the United States with experience dealing with civil unrest in communities, is helping communities transform divisive issues into broad-based, forward-thinking community action. The project utilizes a proactive approach to addressing community division: communities are first asked to focus on the roots of deep community divisions, and then project members take a multi-disciplinary approach to generating ideas to help those communities create plans before divisive incidents erupt.

[Read the full announcement here.](#)

ADR Publications Hot off the Press

Program on Dispute Resolution faculty have published several thought-provoking ADR articles over the past few months. The following publications are an illustrative example of recent work in the field of dispute resolution.

Sarah Cole's *The Lost Promise of Arbitration* is hot off the press in SMU Law Review and is part of a **symposium edition** which re-examines Richard Delgado's 1985 article on prejudice in ADR. Cole's article suggests arbitration fosters a fair and equitable dispute resolution mechanism for those with less bargaining power than their opponents.

Ellen Deason's *Beyond "Managerial Judges": Appropriate Roles in Settlement* is published in the **Ohio State Law Journal** and argues for reform that would prevent judges assigned to a case for pretrial management and trial from serving as the neutral at a settlement conference or judicial mediation.

Both **Josh Stulberg** and **Amy Cohen** contributed chapters to the Negotiator's Desk Reference (eds. Christopher Honeyman & Andrea Kupfer Schneider, 2017). Amy's contribution is titled *Law in the Shadow of Negotiation: On the Jurisprudence of Roger Fisher*. Josh co-authored *The Uses of Mediation* with Lela P. Love.

Nancy H. Rogers published *One Idea for Ameliorating Polarization: Reviving Conversations About an American Spirit* in the Journal of Dispute Resolution. The article suggests some considerations to weigh when identifying an American spirit and a process for going about it.

Moritz Faculty Across the Country

Professor **Amy Cohen** has delivered three recent presentations on a paper draft titled *Negotiating the Value Chain: A Study of Surplus and Distribution in*

Indian Markets for Food in November 2017 at the University of Ottawa's conference "Taking Stock: The State of Food Law and Policy in Canada"; in December 2017 at a faculty workshop at Cornell Law School; and, in January 2018 at a Kings College London symposium titled "Transnational Food Security".

In August 2017, working with the co-editors of her forthcoming book *Discussions in Dispute Resolution*, Professor **Sarah Cole** coordinated a series of panels at the annual Southeastern Law Schools Conference (SEALS) in Boca Raton. At SEALS she delivered a presentation reflecting on Soia Mentschikoff's seminal article *Commercial Arbitration*.

Professor **Ellen Deason** participated on Sarah's panel *Discussions in Dispute Resolution - Public Policy* while at SEALS. Ellen has been busy organizing and moderating *The Appropriate Role of the Judge in Settlement* at the January 2018 AALS conference and participating at the November 2017 American Society of International Law Academic Workshop at Lewis & Clark Law School.

In 2017 Professor **Josh Stulberg** served as a guest faculty member teaching mediation theory and practice workshops at Pepperdine, Central European University (Budapest, Hungary), and Cardozo (2017).

Divided Community Project Director **Grande Lum** and Associate Director **William "Bill" Froehlich** continue to spread the work of the DCP across the country and internationally. In December Grande and Bill traveled to the University of Virginia to participate in the Institute for Environmental Negotiation's **Transforming Community Spaces** Project, which supports communities as they consider what do do about Civil War monuments. In November **Grande** traveled to Hong Kong where he served as a faculty member for "Leadership for Inclusive Futures in Hong Kong," part of the **Salzburg Global Seminar**. October was a busy month for the Divided Community Project:

- Grande participated in the University of Missouri School of Law symposium titled *The First Amendment on Campus: Identifying Principles and Best Practices for Managing and Resolving Disputes*.

- Grande, Bill, and Steering Committee Members Josh Stulberg, Chris Carlson, Craig McEwen and Andrew Thomas traveled to St. Paul, Minnesota to participate in the Dispute Resolution Institute's Symposium, *An Intentional Conversation about Community Engagement: Weaving Threads to Strengthen the Fabric of Our Communities*.
- Grande returned to Minneapolis, Minnesota for the **College of Commercial Arbitrators** panel on police issues where he co-presented with Federal Judge for the Northern District of Ohio Dan Polster, and third-party neutrals Michael Young, Bill Seward, and Stephen Befort.
- Bill headed to Dallas, Texas, where he and Arlington Texas Police Lieutenant Christopher Cook facilitated DCP's *Midland Simulation* for a group of dispute resolution professionals at the **Association for Conflict Resolution's Annual Conference**.
- Grande traveled to the **International Association of Chiefs of Police conference** in Philadelphia, Pennsylvania where he serves on the Human and Civil Rights Committee.
- Bill delivered the **International City / County management Association's annual conference** in San Antonio, Texas where he participated on a panel titled *Keep the Peace: How to Prepare for and Manage Protest*.

Schwartz Lecture with Dwight Golann set for February 22

At noon on February 22, 2018, Suffolk Law Professor **Dwight Golann** will deliver Moritz's **Schwartz Lecture on Dispute Resolution** titled "Grieving over Settlement: The Impact of Loss in Legal Negotiation."

Modern teaching about negotiation emphasizes opportunities for achieving joint gain and the need to measure a settlement proposal against one's alternatives. These are important concepts. But to an extent not often recognized, many disputants still experience settlement as a loss. This triggers strong feelings and places lawyers and mediators in unfamiliar and uncomfortable territory. In this talk Professor Dwight Golann explores why disputants often react to settlement decisions as a loss, and how attorneys and neutrals can respond to

this phenomenon.

The Schwartz Lecture on Dispute Resolution was established in 1992 as a result of the generosity of the late Stanley Schwartz Jr. (a 1947 Moritz College of Law graduate) and the Schwartz family. Each lecture is published in the interdisciplinary Ohio State Journal on Dispute Resolution, in keeping with Mr. Schwartz's interest in the promotion of scholarly publication in the area of dispute resolution.

[Click here to register for the Schwartz Lecture.](#)

Moritz Teams Capture Top-Five Finishes at ABA Competition

In November **Anthony Thompson (19')**, **Chris Stephens (19')**, **Cameron Wright (19')**, and **Nicole Repetto (19')**, competed in the ABA Dispute Resolution Section's Regional Negotiation Competition at Thomas Cooley's Auburn Hills Campus. Both teams proudly represented Moritz, claiming top-five finishes among sixteen teams from Ohio, Michigan, Illinois, and Indiana. Moritz's teams are pictured below with **Coach Bill Froehlich**.



Coach Froehlich - Thompson - Repetto - Wright - Stephens

3L Wins Agricultural Award for DR Project

In spring 2017 **Evin Bachelor (18')** developed a seminar paper focused on agricultural mediation as a student in Ellen Deason's and Bill Froehlich's Mediation Clinic and Seminar. Evin further developed his seminar paper over the summer for the 2018 American Agricultural Law Association symposium where he presented his poster "Ohio: The Midwestern Ag Mediation Holdout" describing the potential for Ohio to become one of the last midwestern states to engage in USDA's Agricultural Mediation Program. Evin took first prize in the student poster competition and teamed up with law students from Houston and Capital University to win a student quiz bowl title. In an email Evin writes "All-in-all, a very successful weekend for Ohio!" A successful weekend indeed! Congratulations Evin! The Paul L. Wright Endowment in Agricultural Law at OSU supported Evin's trip the the AALA symposium.



Evin and his prize-winning poster!

ADR LINKS

Program on Dispute Resolution

Widely regarded as one of the nation's finest programs in the area of

Journal on Dispute Resolution

The *Ohio State Journal on Dispute Resolution* ("*JDR*") is a student-

Alternative Dispute Resolution, the Moritz ADR program was established in recognition of the need for future lawyers to be trained in an array of dispute resolution methods beyond litigation, including negotiation, mediation, and arbitration.

[Learn More](#)

Divided Community Project

The Divided Community Project was developed by persons and institutions committed to the belief that dispute resolution practitioners, policy makers and scholars can make a tangible, constructive contribution to helping leaders and citizens in communities seared by tensions, unrest, and civil discord

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initiated, student-run publication and is the official law journal of the American Bar Association's Section on Dispute Resolution.

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Indisputably

Indisputably is a blog operated by law professors from around the United States concentrating on issues involving dispute resolution.

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Moritz College of Law



The Ohio State University



Mayhew-Hite Report A win for arbitration process, a loss for the Cowboys and Ezekiel Elliott

Sarah Rudolph Cole*

As a sports fan and a fan of arbitration, I have followed with interest the ongoing battles between the NFL Players Association (NFLPA) and the NFL over the consequences of their unusual arbitration process. It is no surprise to those who follow arbitration that the Fifth Circuit ruled today that the NFLPA's attempt to circumvent the parties' agreed arbitration process by moving for a preliminary injunction in court was premature. As some may recall, "Arbitrator" Roger Goodell issued a six game suspension to former Buckeye great running back "Zeke" Elliott. According to the parties' agreement, that suspension could be appealed to another arbitrator—in this case, former NFL executive Harold Henderson. After the appeal hearing, but before Henderson issued a ruling, the NFLPA filed a motion seeking a preliminary injunction preventing enforcement of the suspension. On the same day as the preliminary injunction hearing, Henderson issued his decision, upholding the six game suspension. Three days later, the district court issued the injunction. The NFL appealed the preliminary injunction to the Fifth Circuit, which correctly ruled that the court which issued the preliminary injunction did not have subject matter jurisdiction over the complaint because the plaintiff/grievant Elliott had yet to exhaust his remedies under the collective bargaining agreement. The Fifth Circuit noted that there are some exceptions to the obligation to exhaust remedies in the grievance process governed by the CBA, but that none applied in this case.

Although there are still serious questions about the fairness of the underlying NFL arbitration process, the Fifth Circuit is right not to permit the NFLPA's end run around the arbitration process to which they agreed. One presumes the NFLPA will now file another motion for a preliminary injunction since the adverse ruling has been made. Too bad they didn't wait a few days for the ruling in the first place!

Editor's Note

This article originally appeared in *Indisputably* on October 12, 2017. Since the article was published, Elliott petitioned the New York District Court to grant a temporary restraining order or injunction, which would allow him to continue to play, despite the six-game suspension.^[1] On October 17, 2017, the New York District Court granted Elliott's temporary restraining order, allowing him to play in week seven of the NFL season against the San Francisco 49ers.^[2] Essentially, Elliott and his legal team filed the appeal in New York in order to secure the same relief originally sought in the Eastern District of Texas.^[3] On November 15, 2017, Elliott ultimately dropped the New York case and announced he would serve the remainder of his suspension.^[4]

Zeke's "second bite at the apple" in New York was a result of the NFL filing suit against Elliott in New York in September.^[5] While Elliott was trying to get Harold Henderson's arbitral award overturned in Texas, the NFL was seeking the opposite in the New York court.^[6] The Southern District Court of New York was the ideal venue for the NFL: the Second Circuit's 2016 decision in the Tom Brady case is precedent.^[7] That case substantially limited an NFL players' ability to argue that the NFL deprived him of fundamental fairness in applying Article 46 of the collective bargaining agreement, which governs the procedure of arbitration.^[8]

Like Brady, Elliott alleged he was denied access to investigative notes and related materials throughout the arbitration process, and was denied a chance to question a person who accused him of wrongdoing.^[9] In order to succeed in New York, Elliott's attorney would have had to convince the Judge Katherine Polk Failla that Elliott suffered fundamental unfairness that

exceeds the expansive boundaries of arbitrator deference articulated by Judge Parker in Brady’s case.^[10] Additionally, they would need to establish that Elliott’s missing games constitutes irreparable harm – meaning that monetary damages could not serve as the remedy.^[11] Ultimately, Judge Failla decided the NFLPA had “failed to demonstrate a substantial question warranting the extraordinary remedy of injunctive relief of a balance of hardships that decidedly weighs in its favor.”^[12] Following this decision, the NFLPA filed another appeal, which Elliott ultimately decided to drop in November.^[13]

Footnotes

* Sarah Rudolph Cole is the John W. Bricker Professor of Law and the Director of the Program on Dispute Resolution at The Ohio State University Moritz College of Law

[1] Michael McCann, *Ezekiel Elliott Petitions New York District Court Temporary Restraining Order or Injunction*, Sports Illustrated (October 17, 2017) <https://www.si.com/nfl/2017/10/17/ezekiel-elliott-suspension-new-york-court-hearing>.

[2] Sarah Hardy, *A comprehensive timeline of Ezekiel Elliott’s domestic violence case*, SB Nation (November 30 2017) <https://www.sbnation.com/2017/8/29/16151642/ezekiel-elliott-timeline-domestic-violence-police-report-nfl-suspension-appeal>.

[3] McCann, *supra* note 1.

[4] Hardy, *supra* note 2.

[5] McCann, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*; Jeanna Thomas, *Ezekiel Elliott’s 6-game suspension is back on thanks to decision from federal court*, SB Nation (October 31, 2017) <https://www.sbnation.com/2017/10/30/16505488/ezekiel-elliott-cowboys-nfl-suspension-delayed-court-update>.

[11] McCann, *supra* note 1.

[12] Thomas, *supra* note 10.

[13] Hardy, *supra* note 2.

Mayhew-Hite Report Mediation and the NFL: Securing First Amendment Rights for Professional Athletes

Alexis Wilder*

I. Introduction

“The most critical thing for both management and labor to understand is that they share related needs and concerns. They must work together to put their product on the field. They benefit from each other and need each other. They must not let corporate concerns, individual greed, or any other outside factors destroy the tradition and integrity of the game.”^[i]

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II. The Intersection of Free Speech and the NFL

A. The Development of Freedom of Speech in the United States

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B. State Actor vs. Private Actor: Where Does the NFL Fall?

There are three theories that courts have used to determine that an entity is a state actor: the public function theory, the state

encouragement theory, and the nexus theory. The public function theory turns on whether the conduct of the private entity closely resembles activities that are “traditionally engaged in by the government.”^[vii] The state encouragement theory turns on the quality and quantity of the encouragement, coercion, and direction the government puts on the private entity.^[viii] The nexus theory looks for a “significantly close nexus” between the state and the action of the private entity that could be fairly treated as an action of the state itself.^[ix] Private organizations such as the NCAA, and professional sports leagues, such as the NFL, do not fall into any of the theories because athletics are not traditionally under municipal control nor are they are under the exclusive prerogative of the state. ^[x] Like most organizations, the NFL has regulations that must be followed, but the authorization to conduct their business is not attributed to the state or government.^[xi] Even with those regulations, compared to public utilities, the NFL is minimally regulated.^[xii]

Professional sports are able to maintain their private actor status, therefore are left to establish and enforce their own governing rules, and are only subject to mostly deferential restraints of private association law.^[xiii] These rules encompass limitations on athletes’ First Amendment rights. Viewed as the supreme voice, meaning he knows what is best for the league, Roger Goodell, has great authority to control the actions and activities of athletes under the basis of acting within the “best interest of the sport.”^[xiv] Most issues that arise concerning rights and actions of the athletes have been left up to the commissioner and not the courts, under the assumption that private associations are more fit to govern their own internal operations.^[xv]

When athletes enter into the professional world, they sign contracts such as a Collective Bargaining Agreement.^[xvi] The CBA offers many protections to athletes, however, it is still seen as a serious problem for the frustrated athlete. The rules in the CBA are often known as a “necessary limitation on the freedom of speech right of athletes.”^[xvii] These documents give commissioners the authority to exert control over a great deal of athletes’ actions and activities.^[xviii] The development of the CBA has been anything but smooth. When there are multiple voices attempting to agree there are bound to be issues that hinder the process.

C. Tumultuous History: The Collective Bargaining Agreement

“A collective bargaining agreement is a labor contract between an employer and one or more unions.”^[xix] This agreement contains provisions about pay, benefits, and the conditions of workers.^[xx] The NFL CBA is an agreement between the NFL, comprised of the commissioner and owners of various teams, and the National Football League Players Association (NFLPA), an organized union that represents the interests of the players.^[xxi] The NFLPA was formed in 1956 but not formally recognized until 1958.^[xxii] What makes the NFL different than more labor organizations is that professional athletes are not the typical labor workers, nor is management what most would consider average employers.^[xxiii] Management comprises of wealthy individuals or groups of wealthy individuals, owning NFL teams, with minimal knowledge of the game or the history.^[xxiv] Because of the abnormal status of the NFL’s players and management, disputes frequently arise. “The make-up of the NFL has proven to be a formula for labor turmoil and rancor.”^[xxv]

Work stoppages and labor unrest plagued the early period of the collective bargaining process.^[xxvi] In the late 1960’s, a dispute over pension compensation caused issues; in 1968, players refused to train during training camp; again in the early 1970’s, the players walked out of training camp over a dispute about post season compensation and grievance procedures.^[xxvii] What started as a three-day strike by the players ended up being a seventeen-day lockout by management.^[xxviii]

Mackey v. NFL was the first major litigation that dealt with the CBA. ^[xxix] The focus was on a rule that limited team movement by players, ignoring players’ interests in exploring new opportunities with new teams.^[xxx] During trial, no evidence pointed to any extensive negotiations about the contested rule during any of the discussions of various drafts of the

CBA.[xxxii] Even with extensive discussions during the 1974 negotiations, no agreement formed.[xxxiii] In the early years of the CBA process there was unequal bargaining power between owners and players, resulting in unrest between the parties. Owners controlled athletes like property, being able to release any athlete with little notice, along with restricting movement and how much they were paid. The owners had all of the control and because of this, the players believed their interests were not adequately represented in the CBA.[xxxiv] This trend continued with later CBA negotiations, leading to another players' strike in 1982 with management still opposing the player's interests and concerns.[xxxv] When the NFLPA first organized and collective bargaining became a norm in the NFL, the power struggle between management and the players resulted in various costly litigations and took the focus off the actual football game.[xxxvi] The frequency of strikes and lockouts that plagued the team early on in the collective bargaining process proved the established process to be unworkable. The early process and litigation focused on the rights of management.[xxxvii]

In recent years, negotiations were more civilized and there was a lack of litigation concerning the CBA.[xxxviii] In 2011, a new CBA was negotiated and signed with the aid of federal mediator, George Cohen.[xxxix] The new CBA ended a 136-day lockout, "the longest labor stoppage in league history", and began the journey of NFL "labor peace" for the next ten years.[xl] That CBA continues to bind the NFLPA and NFL now.

The history of the CBA process in the NFL demonstrates that arbitration is not the best method to achieve desirable results. The new long-term CBA, successfully negotiated and resolved through mediation, shows mediation should be the preferred Alternative Dispute Resolution technique. The CBA governs almost every aspect of a professional athlete's career and life and when the interests of the players are not represented, strikes and lockouts occur. The question of how many fundamental rights players receive and to what extent those rights attach, can be successfully negotiated with mediation. Mediation is the best option to get clear and established rules with both parties having their interests and concerns voiced, leading to a compromise with both parties happy.[xli]

Due to the fact that professional sport leagues are free to govern their own rules and athletes, fundamental rights afforded to every United States citizen has not been heavily discussed in the CBA process. Recent incidents involving athletes being disciplined after exercising their right illustrate the need for clear rules be set.

D. Athletes Exercising Their First Amendment Rights

1. Mahmoud Abdul-Raul

Chris Jackson, known now as Mahmoud Abdul-Raul, came into the spotlight as a standout freshman basketball player at Louisiana State University.[xlii] Abdul-Raul was drafted just after his sophomore season as the third overall pick in 1990 by the Denver Nuggets.[xliii] He was a sensational player, dropping thirty-two points against Michael Jordan and the Chicago Bulls during their historic seventy-two win season.[xliv] In 1993, Abdul-Raul converted to Islam, influenced heavily by Malcolm X, and changed his name in honor of his new faith.[xlv] Abdul-Raul came to see the flag as a sign of oppression and racism, and could not see himself standing in support of something he did not believe in.[xlvi] Abdul-Raul chose not to stand during the national anthem as a sign of protest.[xlvii] His protest first went unnoticed, but during the infamous trial of Timothy McVeigh, the Oklahoma City Bomber, attention turned to Abdul-Raul and his perceived lack of patriotism.[xlviii]

On March 12th, 1996 the NBA suspended Abdul-Raul, citing a rule that all players must line up in a "dignified posture" during the national anthem.[xlix] As commissioners have broad authority to discipline athletes based on what is in the "best interest of the game", Commissioner David Stern stated that sitting for the National Anthem showed a lack of patriotism, which was harmful to the NBA. The NBA players' union supported Abdul-Raul and his protest stating that, "Our union respects the free expression rights of any individual and NBA players are no different. We support Abdul and we support the American Flag which symbolizes his rights to take precisely the action he is taking."[l] While many supported him, others called him a

traitor.^[i] In the midst of the tragedy that was the Oklahoma bombing, it is easy to understand why people would react negatively, however, disagreement with what someone does is not a moral nor legitimate reason to take away that person's constitutional right. However, because the NBA falls into the private actor category, the commissioner had every legal right to do so. Eventually, Abdul-Raul and Commissioner David Stern were able to come to a compromise in which Abdul was able to stand and pray with his head down during the national anthem.^[ii] During the 1990's, very few athletes used their position to voice their concerns on social issues, making Abdul-Raul at the time.

2. Marshawn Lynch

There have been many cases of athletes being fined for choosing not to talk to the media, Marshawn Lynch, former running back for the Seattle Seahawks is the most well-known professional athlete to be fined for not speaking to the media.^[iii] Lynch was known as an ultra-reclusive running back who did not like the attention, thus when it came time for team press conferences, he rarely communicated with the media.^[iiii] In 2014, Lynch was fined \$100,000 for "media violations", and since paying those fines Lynch has obliged to the media rule of the NFL, but has not fully participated, showing up in sunglasses and answering each question with a variation of the phrase: "I'm just here so I won't get fined."^[iv] The NFL has clear rules requiring every player to be available to the media following every game and regularly during the practice week.^[v] This rule is incorporated into the collective bargaining agreement with the players' association and in every player contract.^[vi] This is another example of professional sport leagues controlling the rights of the players in ways that commissioners think is in the "best interest" of the game.

3. Colin Kaepernick

Colin Kaepernick is the latest athlete to use his platform as a professional athlete to take a voice his concerns about certain prevalent social issues Kaepernick began his protest during the 2016-2017 NFL preseason.^[vii] "I am not going to stand up and show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football and it would be selfish on my part to look the other way."^[viii] Kaepernick's reasoning echoed those of Mahmoud Abdul-Raul, so it was fitting that he participated in a similar protest. In both of these instances there was controversy and backlash.^[ix] Unlike the protest of Abdul-Raul, Kaepernick's protest started a national movement among athletes on all levels.^[x] At least forty-five NFL players from thirteen different teams have knelt, sat or raised a fist during the national anthem on game day showing their support and solidarity with Kaepernick, and three teams have linked arms or held hands.^[xi] Similar protests have spread beyond the NFL with fourteen WNBA players protesting during their playoffs and Megan Rapinoe, a soccer midfielder in the National Women's Soccer League, taking a knee during the national anthem.^[xii] Protests have even hit the amateur athlete level, occurring in at least thirty-seven high schools, seventeen colleges, and two youth leagues in thirty states across the country.^[xiii] NBA players have also voiced their support and many have stated that they will join once their season starts.^[xiv] Kaepernick has started a national conversation not only on the state of race relations in America, but also on what it means to be patriotic.^[xv]

The free speech rights of athletes have implications beyond kneeling for the national anthem or choosing not to speak to the press. Athletes have a platform that most do not. Fans sometimes love professional athletes almost as much as their own family members and athletes are treated as role models for young children. Athletes influence the communities that they play for and therefore, valuable assets when they become involved in civic concerns.^[xvi]

III. Professional athletes as role models

A resolution of this dispute would not only help the athletes who feel that their voice or concerns are silenced by the NFL but it could benefit society as a whole. Athletes are role models for younger generations; what they say and do has consequences beyond their own lives.

A role model is defined as “a person whose behavior, example, or success is or can be emulated by others, especially younger people.”^[lxvii] Role models can have a big impact on a person’s values, education, and what they aspire to be.^[lxviii] Studies show that female role models can have significant effects on young female students’ self confidence in pursuing careers in the STEM (science, technology, engineering and mathematical) fields.^[lxix] The same effect can happen for young children and sports. The NFL has millions of people who turn on their televisions every Thursday, Sunday and Monday. Some of these people are sports fanatics who only care about if their team is winning or losing, others are impressionable children who look up to the athletes they see on TV, hoping one day to be just like that athlete when they grow up.

Over the years there seems to have been a shift from watching players solely for entertainment to looking at the professional athletes as inspirations.^[lxx] In the nineteenth century, athletes were generally looked at as nothing more than athletes.^[lxxi] Many of the “baseball” heroes had separate lives that the fans either did not know or care about.^[lxxii] Throughout the twentieth century, professional athletes have come to be looked at as more like celebrities.^[lxxiii] The entertainment that they provide put them on the same status as Hollywood stars.^[lxxiv] The media coverage of certain athletes only adds to the perception of athletes as beloved celebrities. ^[lxxv]

The shift in perception forced athletes into a role they may not have asked for. In 1993, Nike launched a TV ad featuring basketball star, Charles Barkley. In the ad, Barkley stated that he was not a role model for kids.^[lxxvi] Although it was supposed to be a cute joke, this caused some backlash.^[lxxvii] Barkley defended his position by saying that just because a person has a sporting ability does not automatically make that person qualified to be a role model.^[lxxviii] In that same year, Dave Winfield, a former baseball player, expressed the opposite sentiment, stating that, “[a]thletes are a key role model for many people, and they can and should be.”^[lxxix] He believed that every athlete can have an influence on a lot of people whether they want to or not.^[lxxx] Donald Fehr, the then head of the baseball players’ union had the same thoughts, “anybody who is in the public eye is foolish if he doesn’t recognize that he or she is paid attention to by other people and by kids if you’re in sports or entertainment.”

Society as a whole has developed a strong dependence on athletes as role models for the children and adolescents.^[lxxxi] Even if these athletes make bad decisions, they can still be considered role models. Poor behavior does not change how these kids can and will perceive them.^[lxxxii] Athletes, especially the ones that the media attaches onto, have an incredible opportunity to spread any message to everyone who watches them.^[lxxxiii] Former heavyweight boxing champ, Lennox Lewis, did just that when he made a Public Service Announcement saying “Real men don’t hit women.”^[lxxxiv] Lewis made a significant contribution to young men and women and their understanding about the “appropriate masculine behavior.”^[lxxxv]

The vast amount of people that professional athletes can reach just by tweeting, using Instagram, or doing an interview with ESPN, shows the importance of free speech. Because of the way our society has put these people on a pedestal, they need to be able to use their voices in constructive ways without the fear of being penalized with a fine or suspension. There is a fine line between speaking with a purpose and speaking just to speak. Colin Kaepernick and Mahumod Abdul-Raul have tried to use their position as a way to start conversations that many athletes shy away from. If athletes had guaranteed rights with clear rules about what they can talk about set out in the CBA, many more athletes might join in those conversations. Children, teenagers, and young professionals might be influenced to engage in those conversations when they see their role models doing the same. This in turn would create a society where tolerance and compromise can come about because no one would be afraid to share their thoughts, beliefs or concerns.

Finding a method that can peacefully incorporate the interests of professional athletes and those who oppose them would be beneficial to countless individuals, and something that society desperately needs.

IV. Alternative Dispute Resolution Techniques

A. Comparing Arbitration and Mediation

The NFL has implemented the use of alternative dispute resolution in various aspects, from negotiation of contracts and collective bargaining agreements to arbitration for disputes.^[xxxvi] Mediation is the one dispute resolution method that has not been used to its full potential in the NFL.^[xxxvii] Alternative dispute resolution (ADR) is the use of extrajudicial means to resolve disputes.^[xxxviii] The primary methods of ADR are arbitration and mediation.^[xxxix] Arbitration is “a contractually agreed upon alternative to litigation . . .”, a process in which parties to a contract each make their case to one or more impartial persons, the arbitrator, for a final and binding decision, usually called the award.^[xc] Mediation is a “self-determinative process, a form of negotiation by which the parties choose how to craft a settlement.”^[xci] Basically with mediation the parties are taking the driver’s seat in choosing how to resolve their dispute. Mediation uses an impartial third party, who does not have authority to make a decision, to help negotiate a settlement of the parties’ own creation.^[xcii] It is an extension of negotiation, with the added element of having an unbiased mediator help with communications.^[xciii] A mediator is usually an expert in the legal area of in which the dispute occurs.^[xciv]

One main difference between arbitration and mediation is that the arbitration settlement decision has a winner and a loser, while in mediation it is a collaborative effort between the parties making them both winners.^[xcv] Another difference is with arbitration, the arbitrator is the decision-maker, listening to both sides and then making the final decision; in mediation, the mediator plays the role of “settlement-facilitator”.^[xcvi] Arbitration, like litigation, focuses on the rights of each party, while mediation focuses on the interests of the parties, and comes to a compromise based on those interests.^[xcvii] Arbitration currently is the preferable course of action in the sports industry because it is efficient, cost-effective, informal, and confidential.^[xcviii] Mediation has those same qualities which makes it a candidate to be just as successful in professional sports.

B. Mediation as the Preferred ADR Method

While arbitration has been the primary method of resolving disputes in the NFL, mediation should be taken into consideration as a better method for various reasons: it maintains privacy, preserves working relationships, avoids any damaging public relations problems, offers neutrality instead of judgement, and avoids the possibility of negotiations stalling resulting in a faster settlement.^[xcix] Mediation is mostly “geared toward future possibilities in an effort to reach a solution instead of asserting fault” toward one party over the other.^[c] There is no right or wrong party, and the agreements are made with both parties’ interests in mind. While there is no guarantee that mediation will yield an agreement, seventy to eighty percent of the time mediation does end in agreement.^[ci] Mediation is the preferred ADR process among Fortune 1,000 companies.^[cii] With results like that, mediation needs to be considered as a method that could end many disputes within professional sports. One thing to keep in mind is that mediation can only work if both parties go into with the commitment to actually resolving the dispute. Mediation is likely to fail if the parties have high levels of conflict, low motivation to reach a solution, low commitment to mediate or significantly unequal bargaining power.^[ciii] For this reason, there are certain disputes for which mediation would not be ideal, however, this dispute in particular, First Amendment rights for professional athletes, would be ideal for mediation.

V. Implementing Mediation into the NFL

For mediation to end in settlement the correct strategy needs to be implemented. This goes to who the mediator is, what attack plan that mediator decides on, the location of all of the discussions, and the willingness of both parties of a dispute to contribute to reach a settlement.^[civ]

A. The Critical Parties

The second step is deciding who the relevant parties are and who will directly participate in the negotiation process.^[cv] If the people who had a part in creating the dispute do not directly participate, the mediation will surely be a waste of time.^[cvi] Settlement can only be accomplished if the interests and opinions of the people directly in conflict are present.^[cvii] Too few people or too many people can also be a hindrance in the hopes of a settlement, so it is crucial that the right people are at the negotiation table.^[cviii]

The relevant parties in this case would be the NFLPA representatives, Colin Kaepernick, and NFL representatives, which would include the commissioner and any owners who may also want to voice their opinion. The owners are relevant because Kaepernick's protest has affected each team and the league as a whole. This dispute is centered on the rights of the athletes but because the CBA rules almost all aspects of player's conduct, it would be wise to include all personnel who usually deal with CBA negotiations.

B. The Impartial Mediator

The first step is to decide on a mediator that is impartial and has the knowledge necessary to effectively negotiate a settlement.^[cix] In many of the past arbitrations concerning NFL disputes, namely the arbitrations with Adrian Peterson and Tom Brady, the decisions lead to more conflicts.^[cx] Although these disputes were outside of the realm that mediation could help, the use of the arbitrator shows why the mediator that is selected is of such importance. In the case of Adrian Peterson, the arbitrator that was chosen was hired by the NFL who did not succeed in his job as an impartial third party.^[cxi] The arbitrator essentially just followed what the NFL commissioner had already given out as a punishment.^[cxii] That arbitrator's decision got appealed, and eventually the decision was overturned.^[cxiii] In the case of Tom Brady, the NFL commissioner himself, Roger Goodell, acted as the arbitrator in the case, which many questioned if he was actually impartial.^[cxiv] The mediator must be impartial and know the legal area in which the dispute is centered on.^[cxv] The mediator must help facilitate communication between the two parties instead of handing out a decision in favor of one party and against the other.^[cxvi] The key is for the mediator to "set the stage for success", meaning that they must create a setting that fosters agreement.^[cxvii]

As stated before, First Amendment rights are a constitutional guarantee given to every citizen in the United States. The other side of the argument is that the NFL is a private organization that can bend those rights to conform to what is in the best interest for the league. Mediation will help both sides of the argument come to an understanding of each other with the help of a mediator who has no ties to either side. Balancing the First Amendment with the NFL does not have a right or wrong answer. Arbitration tries to find the perfect answer, while mediation wants to find a happy medium. Based on this reasoning so far, mediation is the only option.

C. Extensive Discussions

The structure of the discussions is also very critical to successful settlement.^[cxviii] The two most common discussion types are joint meetings and shuttle diplomacy.^[cxix] Joint meetings are discussions in which all parties are present.^[cxx] Joint meetings are beneficial and most constructive when used as a stepping stone to begin.^[cxxi] Because the mediator is unaware of the issues, he can force each side to really sit and listen patiently.^[cxxii] Once the initial joint meeting has concluded, shuttle diplomacy is also very useful.^[cxxiii] Shuttle diplomacy is "an effort by the mediator to operate as an intermediary between groups working in separate caucus rooms."^[cxxiv] This type of meeting is necessary for each party to feel comfortable with sharing information that they would not want to say in front of the other side.^[cxxv] When the parties feel comfortable with sharing, there is more willingness towards concessions, which are crucial in getting to an agreeable settlement.^[cxxvi]

Applying this to the issue at hand, the underlying issues can be tricky in this dispute. Colin Kaepernick and Mahmoud Abdul-Raul started their protests in response to the racial tensions that have been plaguing society.[cxxvii] Their reasoning goes beyond not wanting to participate in the National Anthem. Kaepernick would want to be able to express his concerns in a “safe space” without anyone trying to tell him that his beliefs and concerns are not valid. Roger Goodell, as the commissioner of the NFL, has his own concerns about letting athletes have free range to say and do whatever they feel. As commissioner, Goodell’s job is to make sure that player’s conduct falls within the “best interests of the league”. [cxxviii] He has to worry about the fans watching what his athletes are doing and how it affects them. He also has to keep in mind that owners may feel a certain way and so he has his own concerns about how to best handle this type of situation. He would also like to have a space where he would be able to talk freely without fear of backlash. Shuttle diplomacy can make that possible.

D. The Final Resolution

The most critical role of the mediator and what makes mediation more successful is the ability to work through discussion stalemates.[cxxix] The mediator must create an atmosphere of optimism and confidence that settlement is possible [cxxx] and that both parties need to push through any points that seem near impossible to get through. The parties should not get discouraged if a settlement does not happen overnight.[cxxxii]

The NFL and NFLPA have a long history of collective bargaining negotiations that have been tumultuous. With that history, both sides are aware of the importance of reaching a solution that both can be happy with. Not every dispute needs to result in tensions between each side. Free speech among athletes is a basic right, and with some boundaries can be a useful tool to NFL players. Mediation is an alternative dispute resolution technique that can help both sides achieve what they want. This goes beyond letting athletes say and do whatever they please.

The philosophy and strategy of mediation applies easily to the NFL and free speech, as evidenced above; however, other situations apply just as easily. What makes this dispute in particular perfect for mediation is the nature of the dispute. The underlying issues and the impact it has on society beg for amicable, efficient, and private communications between the owners/commissioner and the athletes.

VI. Mediation is the Logical Answer

The main three reasons why mediation can help athletes gain expanded First Amendment rights are: its privacy, efficiency, and the ability to preserve the working relationship between management and athletes.

A. Privacy

When dealing with high emotions or sensitive matters on both ends, privacy is a huge factor in how negotiations go. Terrell Owens, former NFL wide receiver, said during tense CBA negotiations, “The only thing that happens when you use the media is that you [tick] the team off and embarrass them. By making the negotiations public, the team becomes tougher because they don’t want to look bad in the public eye.” [cxxxii] Litigation and arbitration have the possibility of being in the public eye, and the media coverage could be detrimental. In one of the few mediation attempts between players and the NFL commissioner, the media presence proved to be a hindrance.[cxxxiii] When either side made damaging comments about the negotiations, it only further complicated the discussions, and only aided in causing more issues, because the media was only getting one side of the dispute.[cxxxiv] When mediation is kept between the two parties, the negotiations are able to continue and the focus is just on the task and issues at hand. Along the same lines as privacy, mediation helps avoid any public relations disaster.[cxxxv] Professional sports are dependent on the public and their reactions, if fans get the impression that

any dispute is going bad, they lose faith.[cxxxvi] On the other hand, mediation can offer hope that a dispute can be resolved earlier, and the privacy can also limit each parties' display of greed and pettiness to the public during the negotiations.[cxxxvii]

In the case of expanded First Amendment rights, privacy is a central concern from both sides. Everyone has an opinion on most matters and will pick a side to stand by. In this case some fans may choose the side of the athletes, agreeing that athletes are still citizens of the United States and deserve the rights that are afforded to them. Other fans may choose to side with the NFL stating that professional athletes are paid to play football, not to cause a disturbance with political talk. When negotiation talks are made public, it gives fans the chance to weigh in on matters they are not a part of and has the chance to become a bigger issue than it should be. Mediation allows any negotiations between the relevant parties to stay private, and free of outside commentary.

B. Efficiency

Some disputes can drag on for days or even months when resolved by litigation. With litigation there are many other factors that need to be taken into consideration. The dispute is in the hands of a judge who may not have the full knowledge of the surrounding issues, and the hearings are scheduled based on the judge's availability instead of the two parties. With mediation, the mediator, who would be a legal expert in that field, can foster early engagement, and the parties have the opportunity to take the resolution into their own hands.[cxxxviii] The parties are able to control every aspect of the mediation, including who the mediator is, the timing of the meetings, the nature of the discussions, and how confidential the negotiations are going to be.[cxxxix] Unlike in litigation where the meetings are in the hands of another, when using mediation, each meeting can be altered to meet the timing needs of each party.[cxl] These benefits allow resolution within just a few short days of negotiations. The mediator is trained in facilitating communication between parties with neutrality instead of judgement.[cxli] The mediator can also break through any stalemates that could come up in the course of the discussions.[cxlii] The mediator accomplishes this with private one-on-one conversations with each side, getting a chance to hear the concerns, before conducting a joint meeting between the two.[cxliii] The NFL season is fairly short as it is, so when there is an added element of a lengthy dispute the focus is not on the actual game. Because of the efficient nature of mediation, a quick settlement allows the players to focus on their performance on the field, owners can focus on the best interests of the team, and the commissioner can focus on other important matters.[cxliv]

As mentioned earlier, the mediator can start these discussions early on, resulting in a potentially completed settlement before the NFL season start which decreases the chance for off-field distractions. For example, when Colin Kaepernick first started his protest during the preseason, most news outlets covered the protest instead of the actual game that played. Fans and commentators went back and forth about why he sat during the National Anthem, whether he should be allowed to sit, and the distraction it caused not only from the game playing but also within his own team. If mediation was used to establish clear rules in the CBA concerning free speech, the concern about whether or not Colin Kaepernick is allowed to sit during the National Anthem would have been a moot point. If everyone knows the rules and what athletes are allowed to do, any controversy can be resolved quickly.

C. Preserving the Working Relationship

The last argument for why mediation would be beneficial to NFL disputes is that it can preserve working relationships, which is crucial to maintaining the NFL.[cxlv] As mentioned before, mediation helps facilitate negotiations that may eventually lead to an agreement. In mediation there is no winner or loser, unlike in arbitration, where the arbitrator makes a binding decision in favor of one party over the other. [cxlvi] Mediation features a trained impartial mediator whose sole purpose is to facilitate communication between the two parties.[cxlvii] The mediators are trained to stay impartial throughout all discussions in adherence to their ethics code.[cxlviii] Because of the tense nature of certain disputes, it is not uncommon for the focus of the discussions to shift gears to how one side is wrong, and how this side should concede to the other side, but with the aid of

mediation, the mediator is able to find common ground between both parties' interests. Through these discussions, a mixture of private one-on-one meetings, and also joint meetings, the true goal is fettered out.[cxlix] Identification of the key issues concerning the dispute is essential in creating a resolution that meets the interests and the need of the both parties.[cl] Because the mediator is trained in communication, this leads to each side feeling like their interests are being heard and that they are important, making them willing to talk more.[cli] This scenario decreases the chance of any potential power struggle or one side asserting dominance over the other. The mediator can understand what exactly lead to the dispute in the first place, then determine what can be done to remedy it.[clii] This leads to a compromise that is the product of both parties' interest with both parties end up happy and satisfied with the result, leading to better relations moving forward.[cliii]

Colin Kaepernick started his protest because he felt, like many others in the United States, that the treatment of African Americans had gotten to a point that was unacceptable, citing the recent police shootings involving white officers and African American men. Kaepernick felt that African Americans as a whole were oppressed, and standing for the National Anthem showed support for a country that did not support all of its citizens. This issue is much deeper than just athletes wanting to be able to say whatever they like. Because this is a sensitive issue for Colin Kaepernick, it is important to find a dispute resolution technique that can preserve the relationship between athletes and management. With the nature of mediation focusing on the interests of both, and not just finding who is right, true compromise can happen. This is a chance for both sides to sit down and truly listen to each other with the help of the mediator. Mediation allows the athletes to express their thoughts and interests in expanding their First Amendment rights in a way that is not combative. Arbitration has a connotation of combativeness because the end goal is to find a victor for resolving a dispute, yet with mediation the connotation is one of cooperation. If both parties come into negotiations with that concept in mind, there are better chances for a resolution.

VII. Conclusion

Alternative Dispute Resolution has been proven to be an effective alternative to costly litigation. In the realm of the NFL, arbitration and negotiation have already been utilized in various aspects. Mediation typically has not chosen within the sport league is a highly effective method to achieving the same result but in a much more diplomatic way. Some disputes are not suited for mediation and better resolved through litigation or with an arbitrator. The issue of the limited free speech given to NFL athletes is one such dispute that is best suited for mediation.

NFL players, through the CBA, essentially sign away their free speech rights. The commissioner has set out rules about what each player is allowed to say/act on and off the field. In some cases, that is warranted, in others, it gets to a point where it infringes on the rights afforded to United States citizens. Although similar restrictions may be unconstitutional in a public setting, because the NFL is a private organization, athletes have to conform to these rules in fear of losing a job.

Professional athletes deserve the rights that are afforded to each citizen of the United States, even if they work within a private league with its own rules and regulations. Athletes have a compelling interest in maintaining the fundamental rights. In this day and age, professional athletes are seen as celebrities and have a huge impact and influence on the younger audience that watches them. Professional athletes have a platform that can be used to start conversations concerning the social issues that are plaguing the nation. Athletes are in the unique position where younger generations view them as role models, and as such professional athletes can engage these youths in these conversations, which in turn can lead to more open dialogue by society. The significance of free speech in the NFL goes beyond the football field. If athletes are able to speak up without fear of repercussion, younger generations will be encouraged to do the same.

Mediation is the only logical method to achieve these results because of its efficiency, privacy, and assurance of an amicable working relationship between all.

Footnotes

[*] Alexis Wilder is a third-year student at the Ohio State University Moritz College of Law and member of The Ohio State Journal on Dispute Resolution. *Disclaimer: This article has been reviewed by the Mayhew-Hite Editor. Articles published in the Mayhew-Hite Report do not undergo the same rigorous accuracy check or editing process as articles published in the print edition of the Ohio State Journal on Dispute Resolution.*

[i] C. Peter Goplerud, III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 Jeffery S. Moorad Sports L.J. 13 (1997).

[ii] U.S. Const. amend. I.

[iii] Christopher J. McKinny, Comment: *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 Marq. Sports L. Rev. 223 (2003).

[iv] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[v] *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); See also McKinney, *supra* note 3.

[vi] Jonathan Falk & Brad Eric Scheler, *The Professional Athlete and the First Amendment: A Question of Judicial Intervention*, 4 Hofstra L. Rev. 417, 445.

[vii] McKinney, *supra* note 3 at 6.

[viii] *Id.* at 7.

[ix] *Id.*

[x] *Id.*

[xi] *Id.*

[xii] *Id.*

[xiii] *Id.* at 9.

[xiv] *Id.*

[xv] *Id.*

[xvi] *Id.*

[xvii] Falk & Scheler, *supra* note 6 at 418.

[xviii] *Id.*

[xix] Collective Bargaining Agreements, <http://digitalcommons.ilr.cornell.edu/cba/> (last visited Mar. 29, 2017).

[xx] *Id.*

[xxi] Copleud, *supra* note 1 at 14.

[xxii] *Id.*

[xxiii] *Id.* at 15.

[xxiv] *Id.*

[xxv] *Id.*

[xxvi] *Id.* at 16.

[xxvii] *Id.*

[xxviii] *Id.*

[xxix] *Id.* at 17.

[xxx] *Id.*

[xxxi] *Id.*

[xxxii] *Id.*

[xxxiii] *Id.*

[xxxiv] *Id.*

[xxxv] *Id.*

[xxxvi] *Id.*

[xxxvii] NFL History Since 1968, http://www.espn.com/nfl/news/story?page=nfl_labor_history (last visited Mar. 29, 2017).

[xxxviii] *Id.*

[xxxix] Nate Davis, *NFL, Players Announce New 10-Year Labor Agreement*, <http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.Wlg0IbYrKGQ>.

[xl] Jeremy Corapi, Note, *Huddle Up: Using Mediation to Help Settle the National Football League Labor Dispute*, 21 Fordham Intell. Prop. Media & Ent. L.J. 789 (2011).

[xli] Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, *The Undeclared*, (Oct. 3, 2016, 6:47 PM) <http://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/>.

[xlii] *Id.*

[xliii] *Id.*

[xliv] Robe Wile, *20 Years Before Colin Kaepernick, an NBA Player Refused to Stand for the National Anthem and Paid Dearly*, *Fusion* (Oct. 3, 2016, 6:47 PM) <http://fusion.net/story/341512/mahmoud-abdul-rauf-colin-kaepernick/>

[xlv] Washington, *supra* note 41.

[xlvi] Robe, *supra* note 44.

[xlvii] *Id.*

[xlviii] Washington, *supra* note 41.

[xlix] Robe, *supra* note 44.

[l] *Id.*

[li] Washington, *supra* note 41.

[lii] Zach Buchanan, *Why Marshawn Lynch Hates Talking, and Why That Bugs the NFL*, *AZ Central* (Nov. 7, 2016), <http://www.azcentral.com/story/sports/nfl/super-bowl/2015/01/26/seattle-seahawks-super-bowl-marshawn-lynch-media-day-nfl/22380229/>

[liii] *Id.*

[liv] *Id.*

[lv] *Id.*

[lvi] *Id.*

[lvii] Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, *NFL.com* (Nov. 7, 2016), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>

[lviii] *Id.*

[lix] *Id.*

[lx] Lindsay Gibbs, *Tracking the Kaepernick Effect: The Anthem Protests Are Spreading*, *ThinkProgress* (Oct.3, 2016, 9:41 PM), <https://thinkprogress.org/national-anthem-sports-protest-tracker-kaepernick-284ff1d1ab3e#.3a2wuh7xm>

[lxi] *Id.*

[lxii] *Id.*

[lxiii] *Id.*

[lxiv] *Id.*

[lxv] *Id.*

[lxvi] Falk & Scheler, *supra* note 6 at 428.

[lxvii] Frank L. Smoll, *Are Athletes Good Role Models?*, *Psychology Today*, <https://www.psychologytoday.com/blog/coaching-and-parenting-young-athletes/201504/are-athletes-good-role-models> (Apr. 20, 2015).

[lxviii] *Id.*

[lxix] *Id.*

[lxx] Roger I. Abrams, *The Athlete as Role Model*, *The Huffington Post*, http://www.huffingtonpost.com/roger-i-abrams/the-athlete-as-role-model_b_5870816.html (Nov 23, 2014).

[lxxi] *Id.*

[lxxii] *Id.*

[lxxiii] *Id.*

[lxxiv] *Id.*

[lxxv] *Id.*

[lxxvi] Smoll, *supra* note 67.

[lxxvii] *Id.*

[lxxviii] *Id.*

[lxxix] *Id.*

[lxxx] *Id.*

[lxxxii] *Id.*

[lxxxiii] Smoll, *supra* note 67.

[lxxxiiii] *Id.*

[lxxxv] *Id.*

[lxxxvi] Timothy J. Bucher, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL's Brady Settlement and Its Effectiveness for Future Professional Sports Disputes*, 22 Marq. Sports L. Rev. 211 (2011).

[lxxxvii] *Id.*

[lxxxviii] Corapi, *supra* note 40 at 794.

[lxxxix] Alternative Dispute Resolution, https://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Mar. 29, 2017).

[xc] Corapi, *supra* note 40 at 795.

[xci] Bucher, *supra* notes 86 at 227.

[xcii] Corapi, *supra* note 40 at 795.

[xciii] Bucher, *supra* 86 at 211.

[xciv] *Id.*

[xcv] *Id.*

[xcvi] Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 Harv. J. Sports & Ent. L. 189.

[xcvii] *Id.*

[xcviii] *Id.*

[xcix] *Id.*

[c] Bucher, *supra* note 86 at 213.

[ci] Grabowski, *supra* note 98 at 196.

[cii] *Id.*

[ciii] *Id.*

[civ] Sam Kagel & Kathy Kelly, *The Anatomy of Mediation: What Makes it Work* (1989).

[cv] *Id.* at 110.

[cvi] *Id.*

[cvii] *Id.*

[cviii] *Id.*

[cix] *Id.* at 139.

[cx] *Nat'l Football League Players Assoc. v. Nat'l Football League and Nat'l Football League Mgmt Council*, Civil No. 14-4990 (D. MN. 2015); *Nat'l Football League Mgmt Council and Nat'l Football League. v. Nat'l Football League Players Assoc and Brady*, No. 15-2801 (2d. Cir.).

[cxi] *Id.*

[cxii] *Id.*

[cxiii] *Id.*

[cxiv] *Nationall*, *supra* note 110.

[cxv] Bucher, *supra* note 86 at 212.

[cxvi] Grabowski, *supra* note 96 at 201.

[cxvii] Kagel & Kelly *supra* note 104 at 117.

[cxviii] *Id.* at 114.

[cxix] *Id.*

[cxx] *Id.*

[cxxi] *Id.*

[cxxii] *Id.*

[cxxiii] *Id.* at 115.

[cxxiv] *Id.*

[cxxv] *Id.*

[cxxvi] *Id.*

[cxxvii] Wile, *supra* note 44; Buchanan, *supra* note 52.

[cxxviii] NFL Personal Conduct Policy, <http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy> (last visited Oct. 3, 2016).

[cxxix] *Id.*

[cxxx] *Id.*

[cxxxii] *Id.*

[cxxxiii] Bucher, *supra* note 86 at 224.

[cxxxiv] *Id.*

[cxxxv] Corapi, *supra* note 40 at 826.

[cxxxvi] *Id.*

[cxxxvii] *Id.*

[cxxxviii] *Id.*

[cxxxix] *Id.*

[cxl] Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. Cooley J. Prac. & Clinical L. 383.

[cxli] Grabowski, *supra* note 96 at 205.

[cxlii] *Id.* at 208.

[cxliii] *Id.*

[cxliv] *Id.*

[cxlv] *Id.* at 199.

[cxlvi] *Id.* at 207.

[cxlvii] *Id.*

[cxlviii] *Id.*

[cxlix] *Id.*

[cl] Kupelian & Salliotte, *supra* note 140 at 398.

[cli] *Id.* at 393.

[clii] *Id.*

[cliii] Grabowski, *supra* note 96 at 203.

Mayhew-Hite Report Tackling Abuse in Sport Through Dispute System Design

Competing in competitive sports has many benefits, especially for children and young adults: sports expose individuals to the joy of competition, teamwork, and aid in personal development.^[i] Some of these benefits can be undermined, however, by factors like the pressure to win and reverence given to powerful coaches.

The close nature of the child-coach relationship can unfortunately create an opportunity for abuse.^[ii] In *Tackling Abuse in Sport Through Dispute System Design*, Maureen Weston points out that sports create an environment where children can be abused by coaches or other authority figures.^[iii] Young athletes who compete at elite levels are especially vulnerable to abuse, as they spend a significant amount of time training and traveling with a coach.^[iv] In an effort to protect young athletes, Weston suggests a competent, comprehensive, and accessible process for reporting, investigating, resolving, and preventing sexual abuse in sport.^[v]

In 2007, the International Olympic Committee (IOC) adopted a Consensus Statement on Sexual Harassment and Abuse in Sport, which acknowledges the existence of abuse in sport but does not offer a centralized process to ensure safety from abuse.^[vi] Rather, the IOC recommended sport governing-bodies develop individual policies and procedures to prevent and remedy abuse.

The U.S. Olympic Committee (USOC), the governing body of the Olympics in the U.S., is empowered to recognize other National Governing Bodies of various sports (NGBs) that administer individual sports in training, competition, and nominating athletes for Olympic competition.^[vii] To address abuse, the USOC created a Working Group on Safe Training Environments, which engaged in a process aligned with a Dispute System Design (DSD) approach.^[viii] The DSD approach, which was first proposed in *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, emphasizes the effective management of conflict, rather than the avoidance or suppression of it.^[ix] The approach provides an analytical framework to address conflict and develop a process for preventing, managing, and resolving recurring problems in a variety of contexts.^[x]

Weston notes the DSD approach can assist organizations seeking to address conflict by providing a systematic approach to help identify the program's goals and objectives, inform its stakeholders, create a structure for the process, and help secure needed resources.^[xi] Weston's article examines sexual abuse in sport through the construct of DSD, focusing on USOC's efforts to address the problem.^[xii]

The Problem of Sexual Abuse in Sport

According to the U.S. Department of Justice statistics, a child in America is sexually assaulted every two minutes.^[xiii] Most abuse is not reported and the legal procedure for validating an assault is difficult.^[xiv] Abused athletes fail to report abuse due to trauma, fear of retaliation, and loss of confidence in an environment that protects powerful coaches and administrators.^[xv] Young athletes who have been abused in the sport context face a number of obstacles in attaining redress both in the public justice system and within their sport's governance system.^[xvi] Weston points out that the strict "beyond a reasonable doubt" standard applied in criminal cases is often hard to meet when children do not report abuse or delay doing so, and because the abuse happens in private.^[xvii]

Victims of child abuse may choose to fight abusers through private civil action, and can seek monetary damages.^[xviii] Civil processes still require time and resources, and even if a judgment is reached, the child and family may not recover much

because the coach is uncollectible or lacks insurance for such offenses.[xix] Additionally, holding an athletic governing body vicariously liable for a coach's transgressions is not always a feasible option.[xx] In *McCoy v. American Athletic Union*, a high school track coach was found criminally liable for abusing a student, and the student was awarded \$1.8 million in a civil case against the coach.[xxi] The student also claimed the American Athletic Union (AAU) was negligent in supervising and vetting the coach, however the case was dismissed because the sexual assault was so "outrageous," it was outside the scope of agency relationship with the AAU.[xxii]

Title IX of the Education Act of 1972 prohibits sexual discrimination, including harassment and abuse, and requires institutions receiving federal funds to prevent sexual harassment and abuse.[xxiii] Sport governing bodies are typically private, however, and as such are not subject to Title IX regulations.[xxiv] Without such requirements as Title IX, sport governing body's processes for investigating and preventing sexual abuse are inadequate.[xxv]

In light of these various obstacles abuse victims face in seeking redress, in 2010, the USOC convened a "Working Group" in order to make recommendations to create safer training environments.[xxvi] The Working Group applied the DSD approach and recommended creating the National Center for SafeSport (Center).[xxvii] The goal of the Center was to lead the sport-world in preventing, educating, and adjudicating issues concerning abuse in sport.[xxviii]

The Working Group approached its study in a manner consistent with DSD[xxix]: it convened members with diverse areas of expertise; defined objectives; sought feedback from stakeholder groups; synthesized relevant policies; surveyed best practices; provided recommendations; identified areas for further study; and established a framework for implementation and diffusion.[xxx]

The Working Group had four main objectives: 1) address the level of significance of sexual and physical misconduct in sport; 2) review guidelines and best practices across organizations; 3) assess the needs of athletes, coaches, staff, NGBs, clubs, and other organizations; and 4) provide a set of recommendations to promote a safe training environment.[xxxi]

Ultimately, the Working Group's recommendations stressed two points: 1) increasing awareness of sexual misconduct through education and training; and 2) the importance of a centralized initiative, as opposed to individual and disparate handling of abuse investigations.[xxxii] The Working Group recommended the USOC develop and provide training and education materials focused on sexual abuse and misconduct that could be adopted by all organizations.[xxxiii]

USOC SafeSport Policies and the U.S. Center for SafeSport

The Working Group's report and recommendations provided a framework for the USOC to establish a formal policy as well as to commission a separate agency to serve as the "center" for educating, investigating, and adjudicating all sexual abuse and misconduct related matters.[xxxiv] The USOC's SafeSport policy defines sexual misconduct and bans all sexual relations between coaches and athletes.[xxxv]

The Working Group's report also stressed the need for centralized administration and adjudication by an outside entity.[xxxvi] The existing systems allow NGBs to administer, investigate, and enforce policies.[xxxvii] Such a model raises concerns, as there is a structural conflict of interest to protect the sport and accused coach, which perpetuates fears associated with reporting abuse.[xxxviii]

The USOC designed the Center in part to address concerns arising from this conflict of interest. As an independent entity which oversees education programs; and investigates and adjudicates claims of misconduct in USOC-sponsored

NGBs.^[xxxix] Unlike many NGBs, the Center is a centralized and national source of expertise in abuse-prevention.^[x]

Initial reports on the Center indicate it may be modeled after the U.S. Anti-Doping Agency (USADA), which is an independent, non-profit organization responsible for testing, adjudicating, and investigating alleged doping violations committed by U.S. athletes.^[xli] The USADA eliminates NGBs' involvement in sanctioning their own athletes, and accused athletes have a right to arbitration in accordance with the AAA Rules on Olympic Arbitration.^[xlii] Accused athletes can also choose to have a direct decision through the Court of Arbitration for Sport.^[xliii]

If the Center does fully adopt the USADA model, it would serve as a separate agency responsible for matters related with sexual misconduct and would have exclusive jurisdiction to investigate and prosecute cases.^[xliv] As a result, the NGBs would release their investigative and disciplinary involvement in abuse cases, and accused parties would retain their right to arbitration in accordance with the Amateur Sport Act.^[xlv]

Weston concludes by noting all athletes have the right to engage in sports free from abuse.^[xlvi] The focus of SafeSport is to provide a forum to educate and train athletes, parents, and coaches in preventing, detecting, and reporting violations; in addition to providing adjudication free from conflicts of interest.^[xlvii]

Footnotes

[i] Maureen A. Weston, *Tackling Abuse in Sport Through Dispute Resolution Design*, 13 U. St. Thomas L.J., 434, 435 (2017).

[ii] *Id.* at 436.

[iii] *Id.*

[iv] *Id.*

[v] *Id.*

[vi] *Id.*

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*; see generally, William L. Ury, Jeanne M. Brett, Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1988).

[x] Weston, *supra* note 1, at 436.

[xi] *Id.*

[xii] *Id.*

[xiii] *Id.* at 439 (citing Department of Justice statistics)

[xiv] *Tackling Abuse in Sport* at 437.

[xv] *Id.*

[xvi] *Id.* at 438.

[xvii] *Id.*

[xviii] *Id.*

[xix] *Id.* at 438.

[xx] *Id.*

[xxi] *Id.*

[xxii] *Id.* (McCoy v. Amateur Ath. Union of the United States, Inc., 621 Fed. Appx. 182 (2015)).

[xxiii] *Id.* at 439.

[xxiv] *Id.*

[xxv] *Id.*

[xxvi] *Id.*

[xxvii] *Id.*; <https://safesport.org/>

[xxviii] *Id.*

[xxix] Weston identifies four DSC strategies 1) assessing or diagnosing the current situation; 2) identifying stakeholders affected and involved by the conflict and important to the success of a new system; 3) convening processes and systems to permit input by interested parties; and 4) implementing the designated system with feedback loops and responsive consultation. *Id.*

[xxx] *Id.*

[xxxi] *Id.*

[xxxii] *Id.* at 441

[xxxiii] *Id.*

[xxxiv] *Id.* at 442.

[xxxv] *Id.*

[xxxvi] *Id.*

[xxxvii] *Id.* at 443.

[xxxviii] *Id.*

[xxxix] *Id.*

[xl] *Id.* at 444.

[xli] *Id.*

[xlii] *Id.*

[xliii] *Id.*

[xliv] *Id.*

[xlv] *Id.* at 445

[xlvi] *Id.*

[xlvii] *Id.*

Mayhew-Hite Report Court of Arbitration for Sport Overturns Russian Lifetime Olympic Bans

Editor's note: this article was finalized on February 7, 2018.

On January 22, 2018, the Court of Arbitration for Sport (CAS) began hearing the appeals of 39 Russian athletes previously banned for life from the Olympics Games due to alleged doping during the 2014 Sochi Winter Olympics.^[i]

Established in 1984, CAS serves as a quasi-judicial body for the arbitration of sports-related disputes of either a commercial or disciplinary nature.^[ii] A large number of CAS' disciplinary cases—which are generally first dealt with by independent sports authorities then later appealed to CAS as a court of last resort—involve doping.^[iii] Generally, cases may only be submitted to CAS if there is an arbitration agreement between the parties specifying recourse to CAS; however, the Olympic Charter also mandates that all disputes related to the Olympic Games be submitted to CAS.^[iv] In 2016, CAS officially replaced the International Olympic Committee (“IOC”) as the adjudicator of doping cases at the Olympic Games.^[v]

In May 2016, *60 Minutes* and *The New York Times* reported allegations concerning Russia's efforts to cover-up doping practices during the 2014 Winter Olympics in Sochi.^[vi] The reports cited allegations made by Dr. Grigory Rodchenkov, director of the Moscow Laboratory.^[vii] In response, the World Anti-Doping Agency (“WADA”) launched an independent investigation into Russia's alleged doping practices, led by Professor Richard H. McLaren. This investigation ultimately revealed, through combined reports that would become known as the McLaren Report, that a State-sanctioned conspiracy had enabled Russian athletes to engage in doping practices and still compete at the Olympic Games since late 2011. Under State oversight and control, the Moscow and Sochi Laboratories held and tampered with athletes' urine samples to manipulate test results and hide elite athletes' use of doping substances.^[viii]

Pursuant to the McLaren Report, in September 2016 the IOC launched investigations, including forensic analyses and a full inquiry into all Russian athletes who had participated in the 2014 Sochi Winter Olympics, as well as their coaches, officials, and support staff.^[ix] Based on their findings, the IOC Disciplinary Commission first initiated proceedings against a group of 28 Russian athletes in December 2016.^[x] Ultimately, the IOC initiated disciplinary proceedings against and sanctioned a number of Russian athletes for anti-doping rule violations due to their involvement in this State-sanctioned scheme.^[xi] These sanctions included the loss of all medals, medalist pins, and diplomas from the 2014 Sochi Winter Olympics, as well as lifetime bans for all future Olympic Games, including the upcoming 2018 Winter Olympics in PyeongChang, South Korea.^[xii] As of December 22, 2017, the IOC Disciplinary Commission adjudicated the cases of 46 Russian athletes.^[xiii]

I. The CAS Appeals

On January 17, 2018, CAS issued a press release announcing that it would hear the appeals of 39 of the 42 Russian athletes who have challenged the IOC Disciplinary Commission decisions concerning the 2014 Sochi Olympic Games.^[xiv] The 42 appeals were divided into three groups and involved a number of very well-known Russian athletes, including cross-country skier Nikita Kryukov and biathlete Olga Zaytseva.^[xv] The first group included athletes in bobsled, cross-country skiing, skeleton, and speed skating, some of which have continued to compete in World Cup races not controlled by the IOC.^[xvi] The second group included athletes from bobsled, luge, and women's ice hockey.^[xvii]

Three-judge panels were established for the first two groups of athletes, while the third group's hearings were suspended. CAS announced that the third group's hearings would not be held until after the 2018 Olympic Winter Games.^[xviii] The panel

for the first group, which will hear 28 cases, is comprised of two arbitrators from Germany and one from France.^[xix] The panel for the second group which will hear 11 cases is comprised of two arbitrators from Germany and one from Austria.^[xx]

In its press release, CAS noted that the appeals would be conducted jointly, with a combined hearing taking place from January 22nd through the 27th or 28th. Due to its size, the hearings were held at the International Conference Centre of Geneva and were closed to the public.^[xxi] Dr. Grigory Rodchenkov and Professor Richard McLaren, who were both instrumental in revealing Russia's doping scheme, testified as witnesses.^[xxii]

Final decisions were expected to be announced between January 29, 2018 and February 2, 2018. Many of the 39 athletes hoped to have their names cleared in time to compete in the 2018 Winter Olympic Games in PyeongChang.^[xxiii] Others who have retired from their respective sports, like former biathlete Olga Zaysteva, simply hoped to return their tarnished names and legacies to their former glory.^[xxiv]

II. The CAS Ruling

On February 1, 2018, CAS announced that it had rendered decisions in 39 of the 42 cases filed by Russian athletes appealing the decisions against them concerning the 2014 Sochi Olympics.^[xxv] Of the 39 cases, CAS upheld 28 appeals, annulling the lifetime bans of 28 athletes and reinstating their accolades from the 2014 Sochi Olympic Games.^[xxvi] The remaining 11 appeals were only partially upheld.^[xxvii] Although the full-length decisions have not yet been released, CAS noted that:

“Both CAS panels unanimously found that the evidence put forward by the IOC in relation to this matter did not have the same weight in each individual case. In 28 cases, the evidence collected was found to be insufficient to establish that an anti-doping rule violation (“ADRV”) was committed by the athletes concerned.”^[xxviii]

In 11 cases, the CAS panels found the evidence sufficient to establish individual ADRVs.^[xxix] Although the IOC decisions for these athletes were affirmed by CAS, the Court implemented one modification: rather than a lifetime ban from all Olympic games, the athletes are ineligible for the 2018 Olympic Games in PyeongChang.^[xxx]

Although celebrated by the Russian Olympians, the CAS decisions have disappointed and outraged members of the IOC.^[xxxi] Unusually critical of the CAS ruling, the IOC suggested that the Court failed to appropriately account for evidence of “the proven existence of the systematic manipulation of the anti-doping system” during the 2014 Sochi Winter Olympic Games.^[xxxii] The IOC also criticized the Court's decision as it relates to the future fight against doping, and believes the decisions show an urgent need for reform in the internal structure of CAS.^[xxxiii] Jim Walden, Dr. Grigory Rodchenkov's attorney, also denounced CAS' ruling:

“This panel's unfortunate decision provides a very small measure of punishment for some athletes but a complete ‘get out of jail free card’ for most. Thus, the CAS decision only emboldens cheaters, makes it harder for clean athletes to win, and provides yet another ill-gotten gain for the corrupt Russian doping system generally, and [Vladimir] Putin specifically.”^[xxxiv]

IOC President Thomas Bach has publically stated that, once the full opinions and reasoning of CAS' rulings are released, the IOC will consider whether there is any prospect for appeal.^[xxxv] According to Bach, if there is any chance of success, the IOC will appeal CAS' decisions on the matter.^[xxxvi] The CAS panel's reasoned decision is expected to be released at the end of February.^[xxxvii] In the meantime, the IOC refused a request made by 15 Russian athletes and coaches—whose

names have been cleared by the recent CAS ruling—to attend the 2018 PyeongChang Winter Games.^[xxxviii] IOC President Bach, in announcing the refusal, stated that “the privilege to be invited require[d] more than just the absence of a sanction.”^[xxxix]

III. “Olympic Athletes from Russia”

On December 5, 2017, the IOC Executive Board also issued a decision stating that it would invite individual Russian athletes to compete in the 2018 Winter Olympics, despite the Russian Olympic Committee’s suspension from involvement in any Olympic Games.^[xl] These athletes, however, will participate under the name “Olympic Athlete from Russia,” under the Olympic Flag and with a uniform bearing this name.^[xli]

Athletes will be chosen by a panel chaired by the Chair of the International Testing Agency and including members of the Pre-Games Testing Task Force.^[xlii] The panel will only be allowed to consider athletes who (i) have qualified according to the qualification standards of their respective sport; (ii) must not have been disqualified or declared ineligible for any Anti-Doping Rule Violation; (iii) must have undergone all pre-Games targeted tests recommended by the Pre-Games Testing Task Force; and (iv) must have undergone any other testing requirements specified by the panel to ensure a level playing field.^[xliii]

According to the PyeongChang website, at least 168 Russian athletes will be participating in the 2018 Winter Games.^[xliv] None of the athletes whose bans were overturned by CAS, however, are listed among them.^[xlv]

Footnotes

[i] <https://www.rferl.org/a/court-arbitration-sport-hear-appeals-39-russian-athletes-banned-olympics-doping/28984211.html>

[ii] <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>

[iii] *Id.*

[iv] https://stillmed.olympic.org/Documents/olympic_charter_en.pdf

[v] <https://www.olympic.org/news/ioc-makes-doping-results-management-and-sanctioning-independent>

[vi] IOC Decision Against Olga Zaytseva, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/2017/SML-036-Decision-Disciplinary-Commission-Olga-ZAYTSEVA.pdf#_ga=2.244096261.183298767.1516584536-598544076.1516584536

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*

[x] *Id.*

[xi] <https://www.olympic.org/news/ioc-sanctions-five-russian-athletes-and-publishes-first-full-decision-as-part-of-the-oswald-commission-findings>

[xii]

[xiii] https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/2017/IOC-re-analysis-programme-Sochi-2014-22-december-2017-1.pdf#_ga=2.252706185.183298767.1516584536-598544076.1516584536

[xiv] Media Release, *Anti-Doping—Sochi 2014*, http://www.tas-cas.org/fileadmin/user_upload/Media_Release__hearing_RUS_IOC__FINAL.pdf

[xv] *Id.*

[xvi] https://www.washingtonpost.com/sports/olympics/sports-court-to-start-russian-olympic-doping-appeals-monday/2018/01/17/3114d694-fbba-11e7-9b5d-bbf0da31214d_story.html?utm_term=.672466d51f15

[xvii] *Id.*

[xviii] Media Release, *Anti-Doping–Sochi 2014 (Feb. 1, 2018)*, http://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf

[xix] *Id.*

[xx] *Id.*

[xxi] Media Release, *Anti-Doping–Sochi 2014 (Feb. 1, 2018)*, http://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf

[xxii] *Id.*

[xxiii] *Id.*

[xxiv] <http://edition.cnn.com/2018/01/21/sport/russian-doping-athletes-cas-appeal-olympics/index.html>

[xxv] Media Release, *Anti-Doping–Sochi 2014 (Feb. 1, 2018)*, http://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf

[xxvi] *Id.*

[xxvii] *Id.*

[xxviii] *Id.*

[xxix] *Id.*

[xxx] *Id.*

[xxxi] <http://www.telegraph.co.uk/winter-olympics/2018/02/04/ioc-president-blasts-cas-decision-overturn-28-russian-drug-bans/>

[xxxii] *Id.*

[xxxiii] *Id.*; <https://www.cnn.com/2018/02/05/sport/ioc-russia-winter-olympics/index.html>

[xxxiv] *Id.*

[xxxv] <http://www.telegraph.co.uk/winter-olympics/2018/02/04/ioc-president-blasts-cas-decision-overturn-28-russian-drug-bans/>

[xxxvi] *Id.*

[xxxvii] *Id.*

[xxxviii] <https://www.cnn.com/2018/02/05/sport/ioc-russia-winter-olympics/index.html>

[xxxix] *Id.*

[xl] <https://www.olympic.org/news/ioc-suspends-russian-noc-and-creates-a-path-for-clean-individual-athletes-to-compete-in-pyeongchang-2018-under-the-olympic-flag>

[xli] *Id.*

[xlii] *Id.*

[xliii] *Id.*

[xliv] <https://www.pyeongchang2018.com/en/game-time/results/OWG2018/en/general/athletes.htm>

[xlv] *Supra*, note 38.