

## Formal Mediation In Professional Sports

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### Introduction

The outlook wasn't brilliant for the Mudville nine that day:  
The score stood four to two, with but one inning more to play,  
And then when Cooney died at first, and Barrows did the same,  
A pall-like silence fell upon the patrons of the game.

A straggling few got up to go in deep despair. The rest  
Clung to that hope which springs eternal in the human breast;  
They thought, "If only Casey could but get a whack at that—  
We'd put up even money now, with Casey at the bat.

But Flynn preceded Casey, as did also Jimmy Blake,  
And the former was a hoodoo, while the latter was a cake;  
So upon that stricken multitude grim melancholy sat,  
For there seemed but little chance of Casey getting to the bat.

But Flynn let drive a single, to the wonderment of all,  
And Blake, the much despised, tore the cover off the ball;  
And when the dust had lifted, and men saw what had occurred,  
There was Jimmy safe at second and Flynn a-hugging third.

Then from five thousand throats and more there rose a lusty yell;  
It rumbled through the valley, it rattled in the dell;  
It pounded on the mountain and recoiled upon the flat,  
For Casey, mighty Casey, was advancing to the bat.<sup>1</sup>

Now with the need to perform at his maximum capacity, where is Casey mentally? What is his commitment? What is the commitment of his team—not his teammates, but his management? As discussed below, sports are over 50% mental. “Attitude is everything”. What may have transpired between Casey and management since last season as to issues or disputes involving salary and/or discipline will certainly impact on performance. Give me a player who is

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<sup>1</sup> Ernest Lawrence Thayer, Casey at the Bat

“anointed” with the confidence of his club and I will give you a champion. To take away that confidence makes for a very long season.

While the author does not tell us of Casey’s player-management relationship, we do know that with the first pitch “Casey stood a-watching” and declared “That ain’t my style” and the umpire said. “Strike One!”<sup>2</sup> We further observe that...

“With a smile of Christian charity great Casey's visage shone;  
He stilled the rising tumult; he bade the game go on;  
He signaled to the pitcher, and once more the dun sphere flew;  
But Casey still ignored it and the umpire said, "Strike two!"<sup>3</sup>

But now “where is Casey’s head” as he is left with one more opportunity for success for his team (not to speak of himself—and next year’s negotiation/arbitration). Certainly, Casey played prior to the advent of collective bargaining agreements; but nonetheless, the relationship between player and management is as critical to a successful season as is the relationship between the bat and ball to a successful hit. While the formula for team success may be as elusive as a knuckle ball, the win—lose philosophy must remain between teams, not within them (the latter must be and remain win—win).

Who knows what was going through Casey’s head after strike two, but what we do know is

Oh, somewhere in this favored land the sun is shining bright,  
The band is playing somewhere, and somewhere hearts are light;  
And somewhere men are laughing, and somewhere children shout,  
But there is no joy in Mudville—mighty Casey has struck out.<sup>4</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

This article analyzes the opportunity of formal mediation in professional sports to enhance the opportunity of Casey's success. As discussed below, mediation is an incredible process of win—win that is presently missing in professional baseball, basketball, football, and hockey. No, mediation will not guarantee Casey's plight would be different. It can only guarantee the opportunity to preserve and promote the relationship between player and management so as to maximize the opportunity of their mutual success. It is the purpose of this article to examine the existing dispute resolution processes without mediation, and to ultimately suggest that the formal adoption and utilization of mediation would be mutually beneficial to both players and management of all professional sports.

### **Formal Mediation Definition and Growth**

“Formal mediation” is the mediation process as prescribed by statute, rule, regulation, collective bargaining or other written agreement. This is to be distinguished from “informal mediation” selected by agreement of the parties as the dispute arises. The processes may actually be the same, but the prescription of the process prior to the initiation of the conflict is what separates formal from informal mediation. In other words, in anticipation of future disputes organizations have decided it is in their best interests to promulgate a set of mediation guidelines to be followed if a dispute arises.

Historically, arbitration was the “go-to” alternative dispute resolution (ADR) procedure. Accordingly, both the labor and the construction industries developed the use of formal “negotiation to arbitration” procedures without the initial inclusion of mediation. Coincidentally, both industries now incorporate formal mediation into their ADR procedures. As a formal process, mediation is a “late bloomer.” In the last 15 years, mediation has been implemented as a formal process in a majority of the state courts, the federal district courts, and many appellate

court systems, both state and federal. Mediation has also been implemented as a formal process within numerous corporations and public sector agencies in federal and state government. Organizations such as International Institute for Conflict Prevention and Resolution (CPR), American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) have more recently collaborated with conflicting parties in business settings to encourage the use of formal mediation, and as stated below<sup>5</sup> it has been well received.

### **Distinctions Between Negotiation, Arbitration, and Mediation**

In negotiation, two sides come together to attempt to reach an agreement (each side takes a position and attempts to negotiate toward their respective goals). If their goals are the same, an agreement can be reached and resolution is achieved. If the parties cannot reach an agreement, the negotiation fails and the parties may look to some third party to make the decision for them (be it litigation or arbitration).

Arbitration has been designated in each sport as the chosen alternative to a failed negotiation<sup>6</sup>. In arbitration, the parties present their positions to a neutral person (arbitrator or panel of arbitrators), who after listening to all admissible evidence, will make a decision for the conflicting parties. The difference between arbitration and litigation is that in the former the arbitrator's(s') decision/award is final without the usual rights of appeal, and it is generally not a matter of public record. The arbitration process is more time-sensitive, and it is less formal or structured. In litigation the judgment is appealable, and it is a matter of public record. The

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<sup>5</sup>See supra at 14-16

<sup>6</sup>See, supra at 5-11.

litigation process generally takes much more time and is very formal, being structured around rules of substance and procedure.

The key similarity between litigation and arbitration is win—lose. One party emerges from both processes as a winner, while the other party is deemed the loser. The key distinction between either of these processes and mediation is that the latter is win—win. The participants in mediation control their outcome—shared as it is, while the participants in arbitration (as in litigation) are subject to the control and/or decisions of others, whether arbitrators, judges, or juries. Another prominent distinction is that arbitration (and litigation) focuses on the “rights” of the parties, whereas, mediation focuses on the “interests” of the parties.

The key distinction between negotiation and mediation is that in the former there is no one to hold the dialogue together in the event the goals of the parties are not fortuitously the same. In mediation the mediator is present to facilitate the dialogue beyond the differing goals. The parties control the opportunity and dynamics of their resolution.

So why is formal mediation conspicuously absent from professional sports? Are the win—lose results of arbitration in the best interests of the conflicting parties? Is timely finality so necessary from a failed negotiation to the entry into arbitration, that mediation should not be explored for a limited amount of time? Does the after-taste of an arbitrator’s decision promote enhanced performance so as to ignore the possibilities of a mediated resolution of the parties? Does the certainty of an arbitrator’s “baseball” or other arbitration award promote the desired “long term” result for the player and his team so as to justify the absence of a jointly created resolution through mediation?

### **ADR In Professional Sports**

Most professional sports have collective bargaining agreements establishing rules of engagement relative to the resolution of disputes. Such collective bargaining agreements (CBA's) exist in (1) Major League Baseball (2003-2006 Basic Agreement Between Major League Clubs and Major League Baseball Players Association, hereinafter referred to as "2003-2006 Baseball CBA"); (2) the National Basketball Association (National Basketball Association Collective Bargaining Agreement, hereinafter referred to as "NBA/CBA"); (3) the National Football League Collective Bargaining Agreement Between The NFL Management Council and The NFL Player's Association, hereinafter referred to as "NFL/CBA"); and (4) the National Hockey League (National Hockey League Collective Bargaining Agreement, hereinafter referred to as "NHL/CBA). Each has some formal alternative dispute resolution (ADR) mechanism to resolve disputes/grievances related to salaries, discipline and/or injuries. None of them contain a single reference to mediation.

(1) MAJOR LEAGUE BASEBALL

In the 2003-2006 Baseball CBA, both negotiation and arbitration are recognized means of resolving salary and grievance issues. Article IV sets forth "Negotiation and Approval of Contract" parameters for Players and Clubs to agree on salary terms.<sup>7</sup> Article IV prescribes the following:

A Player, if he so desires, may designate an agent to conduct on his behalf, or to assist him in, the negotiation of an individual salary and/or Special Covenant to be included in his Uniform Players Contract with any Club, provided such agent has been certified to the Clubs by the Association as authorized to act as a Player Agent for such purposes. If the Association has notified the Office of the Commissioner that a Player has designated a certified Player Agent or Agent to act on his behalf for the purposes described in this Article IV, no Club may negotiate or attempt to negotiate an individual

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<sup>7</sup> 2003-2006 Basic Agreement between Major League Clubs and Major League Baseball Players' Association at Article IV.

salary and/or Special Covenant to be included in a Uniform Player's Contract with any Player Agent(s) other than such Player Agent(s).<sup>8</sup>

Should the negotiation fail, Article VI A(7) defines the mechanism for resolving an outstanding salary dispute:

In the event of a dispute regarding a contract tender, signing or renewal with respect to any form of additional compensation..., either the Player or Club may file a Grievance in order to obtain a determination with respect thereto as the exclusive means of resolving such dispute, and both parties shall be bound by the resulting decision. (Emphasis added)

The "determination" is defined in Article VI F as salary arbitration. Article VI proceeds to set forth various other process terms of the arbitration, to include the submission of salary figures by the Player and the Club.<sup>9</sup> Therein the concept of "baseball arbitration" is codified: "The arbitration panel shall be limited to awarding only one or the other of the two baseball arbitration figures submitted. There shall be no opinion."<sup>10</sup> Such arbitration process encourages the parties to negotiate to their "best" position, to be either accepted or rejected by the arbitrator(s).

Article XI of The 2003-2006 Baseball CBA establishes another grievance procedure for other disputes which again limits resolution procedures to another form of negotiation and arbitration.<sup>11</sup> It defines this "Grievance" to be:

A complaint which involves the existence or interpretation of, or compliance with, any Agreement, or any provision of any Agreement, between the Association and the Clubs or any of them, or between a Player and Club, except that disputes relating to [benefit plan or dues check-off] shall not be the subject Grievance Procedure....<sup>12</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at Article VI (2) – (14)

<sup>10</sup> *Id.* at Article VI, F (5)

<sup>11</sup> *Id.* at Article XI

<sup>12</sup> *Id.* at Article XI, A (1)(a)

The mechanism of resolving such other disputes includes a two step process: Under Step 1 a Player shall first “discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it.”<sup>13</sup> Under Step 2 the grievance is submitted to a representative of the Labor Relations Department (LRD) of the Club for further discussion.<sup>14</sup> Should resolution not be achieved pursuant to Step 1 or 2, arbitration is prescribed for the “full, final and complete disposition of the Grievance”.<sup>15</sup>

The 2003-2006 Baseball CBA fails to provide any role for mediation between negotiation and arbitration.

(2) NATIONAL BASKETBALL ASSOCIATION

The NBA/CBA similarly utilizes the negotiation-to-arbitration processes as to grievances involving discipline and systems disputes.<sup>16</sup> The negotiation process is defined as follows:

The term “negotiate” means, with respect to a player or his representatives on the one hand, and a Team or its representatives on the other hand, to engage in any written or oral communication relating to the possible employment, or terms of employment, of such player by such Team as a basketball player, regardless of who initiates such communication.<sup>17</sup>

If negotiations fail, a Grievance Arbitrator is established to decide the issue(s):

[T]he Grievance Arbitrator shall have exclusive jurisdiction to determine . . . any and all disputes involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including a dispute concerning the validity of a Player Contract.<sup>18</sup>

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<sup>13</sup>*Id.* at Article XI, B, Step 1

<sup>14</sup>*Id.* at Article XI, B, Step 2

<sup>15</sup>*Id.* at Article XI, B, “Arbitration”

<sup>16</sup>National Basketball Association Collective Bargaining Agreement at Article XXXI: Grievance and Arbitration Procedures; and Article XXXII: System Arbitration

<sup>17</sup>*Id.* at Article I (jj)

<sup>18</sup>*Id.* at Article XXXI, Sect. 1(a)(i)



After the arbitrator hears the grievance, a final and binding decision is made: "[t]he Award shall constitute full, final and complete disposition of the Grievance, and shall be binding upon the player(s) and Team(s) involved and the parties to this Agreement." <sup>19</sup>

Any disputes that do not fall within Grievance Arbitration will be handled by "System Arbitration." System Arbitration, although a broad term, typically addresses disputes involving the league policies and structures (i.e., draft eligibility and the permissibility of expansion teams).<sup>20</sup> Like the Grievance Arbitrator, the System Arbitrator has broad jurisdiction and decisional authority: "[t]he NBA and the Players Association shall agree upon a System Arbitrator, who shall have exclusive jurisdiction to determine any and all disputes."<sup>21</sup>

Whether it is "Grievance Arbitration" or "System Arbitration", all disputes are handled through binding arbitration. Mediation is not recognized as a permissible alternative to dispute resolution in professional basketball although it is a proven method for positive and harmonious dispute resolution.

### (3) THE NATIONAL FOOTBALL LEAGUE

The NFL/CBA establishes arbitration as "the exclusive method of resolving disputes".<sup>22</sup> The NFL/CBA subdivides the use of arbitration through a Non-Injury Grievance process<sup>23</sup> and an Injury Grievance process.<sup>24</sup> The Non-Injury Grievance arbitration process establishes procedures for "initiation" of the grievance<sup>25</sup> by the filing of a written notice to a Management

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<sup>19</sup> *Id.* at Article XXXI, Section 5(a)

<sup>20</sup> *Id.* at Article XXXII

<sup>21</sup> *Id.* at Section 1

<sup>22</sup> Collective Bargaining Agreement between the NFL Management Counsel and the NFL Players' Association at Article III, Section 2

<sup>23</sup> *Id.* at Article IX

<sup>24</sup> *Id.* at Article X.

<sup>25</sup> *Id.* at Article IX, Section 2

Counsel<sup>26</sup>, which will attempt to resolve the dispute. Thereafter, it shall be appealed to an arbitrator or panel of arbitrators<sup>27</sup> for a hearing<sup>28</sup> and ultimately a decision which “will constitute full, final, and complete disposition of the agreements, and will be binding upon [all].”<sup>29</sup>

Under the Injury Grievance process, a written “filing” initiates the process<sup>30</sup>, and after an answer is filed<sup>31</sup> a neutral physician is identified<sup>32</sup> to assist the parties in “facilitat[ing] settlement.” If resolution is not achieved, an arbitration panel is selected<sup>33</sup> and a hearing is conducted<sup>34</sup> whereby the “decision will be final and binding”.

The NFL/CBA also makes provision for an Impartial Arbitrator<sup>35</sup> “who shall have exclusive jurisdiction to determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the expressed terms of [the] Agreement.”<sup>36</sup> While the scope of the Impartial Arbitrator’s authority is not specifically prescribed,<sup>37</sup> the effect of the Impartial Arbitrator’s ruling shall “be final and binding on all parties, except as expressly specified under the Agreement or as expressly agreed to among all parties.”<sup>38</sup>

The NFL/CBA does not identify mediation in the resolution of any of its disputes. Instead, with the exception of a neutral physician, it adheres to the negotiation-to- arbitration process.

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<sup>26</sup>*Id.* at Section 3

<sup>27</sup>*Id.* at Section 6

<sup>28</sup>*Id.* at Section 7

<sup>29</sup>*Id.* at Section 8

<sup>30</sup>*Id.* at Article X, Section 2

<sup>31</sup>*Id.* at Section 3

<sup>32</sup>*Id.* at Section 4

<sup>33</sup>*Id.* at Section 7

<sup>34</sup>*Id.* at Section 8

<sup>35</sup>*Id.* at Article XXVII

<sup>36</sup>*Id.* at Section 1

<sup>37</sup>*Id.* at Section 2

<sup>38</sup>*Id.* at Section 3

(4) NATIONAL HOCKEY LEAGUE

Finally, the NHL/CBA defines its ADR processes through negotiation-to-arbitration procedures for salary arbitration and grievance disputes. The NHL/CBA establishes a criteria for who is eligible for salary arbitration.<sup>39</sup> This model is based upon the player's age and years of professional experience.<sup>40</sup> Both sides in salary arbitration present an affirmative case, a rebuttal, and then the player or Club may, under certain circumstances, present a "surrebuttal" (rebuttal to the other party's rebuttal).<sup>41</sup> However, the arbitration decision does not irrevocably bind the team or player immediately after it is made as it does in the other sports discussed. The Club has "walk-away rights" wherein it can refuse to contract with the player at the amount awarded by the arbitrator, thereby walking away, dropping the player from the team.<sup>42</sup> If the player is then made an offer from another team that is less than 80 percent of the arbitration award, the original club who had walked rights away may elect to match the other team's offer.<sup>43</sup>

General grievances are handled by a Grievance Committee.<sup>44</sup> If the committee does not resolve the issue, then an arbitration panel decides it.<sup>45</sup> The arbitration panel is the final authority on the matter: "[t]he decision of the Impartial Arbitrator will constitute full, final and complete disposition of the grievance, as the case may be, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement."<sup>46</sup>

Curiously, none of these ADR procedures of any of the professional sports include any mention of "mediation" as a means of resolving disputes. Have the results of the existing formal

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<sup>39</sup>National Hockey League Collective Bargaining Agreement at Article 12.1(A)

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at Article 12.5(j)

<sup>42</sup>*Id.* at Article 12.6.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at Article 17.1(A)

<sup>45</sup>*Id.* at Article 17.5.

<sup>46</sup>*Id.* at Article 17.8

ADR processes been mutually beneficial? Each sport has examples of results that have either been win—lose or lose—lose. Such examples include the Terrell Owens-Philadelphia Eagles discipline in the NFL; the discipline of NBA and teams who have interacted with spectators; and the loss of the entire 2005 hockey season in the NHL. However, it is professional baseball where the statistics and commentary are more complete for analysis.

### **Statistics and Commentary—Major League Baseball**

To measure the success of the existing ADR processes in professional sports, one must look to both the commentary on the process and the results of the performance of the players. From 1990 to 2004, players in Major League Baseball filed 1,469 cases, but only 182 or 12 percent went to arbitration.<sup>47</sup> Players and clubs in significant numbers have avoided arbitration. James Dworkin, a baseball analyst, has stated, “Players feel it necessary to have the threat of going to arbitration in order to force their teams to negotiate with them in good faith.”<sup>48</sup> The Miami Herald characterized arbitration as “the often acrimonious negotiating process that rankles baseball management every winter.”<sup>49</sup>

Due to the fact that a team can refuse to arbitrate, a standoff is created during the negotiating process. The take-it-or-leave-it approach causes clubs to release players for whom they would otherwise be willing to negotiate with more flexibility. For example, the Atlanta Braves had to release one of their best players, Gary Sheffield, who they offered 30 million dollars for 3 years, because the threat of losing an arbitration to him would destabilize the team’s

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<sup>47</sup> FizeL, John L., *Play Ball Baseball Arbitration After 20 Years* (49—JUN Disp. Resol. J. 42) (1994).

<sup>48</sup> Dworkin, James, “Salary Arbitration in Baseball: An Impartial Assessment After Ten Years,” *Arbitration Journal* 41 (March 1986) pp. 65.

<sup>49</sup>The Miami Herald, January 14, 2006, at 8D

budget. In other words, an unnecessary strain is put on the negotiation process because of the threat and dangers posed by arbitration.

Greg Maddux, after amassing a remarkable record with the Atlanta Braves—the only pitcher to ever win 15 or more games in 16 consecutive seasons and who won a CY Young award with the Braves—was released after being denied an arbitration hearing. Stunned, Maddux said, “You’d think after 11 years...to not be offered arbitration or even a contract, I’m a little surprised by it. But it’s the nature of the game now.”<sup>50</sup> John Schuerholz, General Manager of the Braves, commented about the unfortunate situation saying. “With the economic circumstances we find ourselves in, we just weren’t in position to go to arbitration with these players, because that’s such an uncertain process.”<sup>51</sup> Al Rosen, who has been a President of the Yankees and the Astros, and a President and General Manager of the Giants, said the following about arbitration: “Arbitration is destructive to the team and the player. It’s a negative, you have to tell the player he’s something less than expected.”<sup>52</sup>

Kim Ng, Assistant General Manager for the Los Angeles Dodgers, spoke poignantly about what really can/does happen under the current ADR model: “A team can lose by winning an arbitration battle if a valuable player goes away with a bruised ego and a bitter taste in his mouth. I’m not a big fan of [arbitration], because it can create hard feelings.”<sup>53</sup> Ng described the flaws with the arbitration process with the following illustration:

“Just imagine sitting there and someone telling you for hours that you’re not very good at this, you’re not very good at that. I mean, the mentality that

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<sup>50</sup> Tim Evaritt, The Chattanooga, *Atlanta Braves: The Day After the Arbitration Deadline, Greg Maddux Disappointed in Braves*. (Dec. 9, 2003).

<sup>51</sup> *Id.*

<sup>52</sup> Jerome Holtzman, The Last Resort, <http://www.mlb.com> (February 15, 2001).

<sup>53</sup> Chris Tucker, Heavy Hitter, *American Way* at 30 (October 15, 2005).

makes an athlete great has a lot to do with how he views himself, his confidence. It's an incredibly difficult process".<sup>54</sup>

Are these opinions supported by statistical results? How does a player's performance the year before an arbitration award/experience compare to the year following such award/experience?

A review of MLB statistics from 2001-2004 shows a trend of diminished performance the year following salary arbitration. In 2001, only 14 players went through the gauntlet of salary arbitration.<sup>55</sup> In the following 2002 season, 8 of those players performed "worse"<sup>56</sup> with 3 performing "substantially worse".<sup>57</sup> In 2002, only 5 players went to arbitration, and 4 of those players "lost" their arbitration (lost meaning not getting the salary award they requested).<sup>58</sup> The following 2003 season, 3 of those players performed worse with 2 of them performing substantially worse. One of the two players who performed better, Neifi Perez, performed better for the Giants, a different team than the Rockies, the Club with whom he arbitrated. In 2003, 7 players arbitrated with 5 of the 7 players losing their arbitration.<sup>59</sup> In the following 2004 year, 4 of the 5 players who lost their arbitration performed worse. Although, 3 players performed

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<sup>54</sup> *Id.*

<sup>55</sup> The Business of Baseball, Society for American Baseball Research, Arbitration Results.

<sup>56</sup> The term "worse" is defined by assessing the following statistics: (1) The number of games played; (2) The earned run average (ERA) per game; (3) the number of wins and loses for the season; and (4) the number of strikeouts for the season. For an outfielder, the term worse is analyzed with the following statistics: (1) batting average; (2) slugging percentage; (3) on base average; (4) runs batted in; (5) homeruns; (6) strike outs; (7) stolen bases; (8) fielding percentage; and (9) games played.

<sup>57</sup> The term "substantially worse" is defined by observing a noticeable decline in those statistics used to define the term "worse". For example, a pitcher whose ERA increased from 2.00 to 4.00 and whose win-loss record was inverted from the previous year (e.g. 5 wins and 2 loses in the prior year, and 2 wins and 5 loses in the subsequent year) would be "substantially worse". Further, a position player whose batting average dropped 100 points or whose homerun production dropped in half would be considered "substantially worse."

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

better, 2 of the 3 performed better for different teams (Vladimir Nunez transferred to the Rockies and Bruce Chen transferred to the Orioles.) In 2004, 7 players arbitrated with 5 players losing at their arbitration hearings.<sup>60</sup> In the following season, 4 of the 7 players performed worse and 2 players who performed better, performed better for different teams (David. Ecstein transferred to the Cardinals and Nick Johnson transferred to the Nationals).

While such results can be related to other factors, these statistics certainly do not support the notion that negotiation-to-arbitration is a constructive sequence that produces positive long term results. Certainly, the adversarial process controlled by third party neutrals inherent to arbitration, violates the modern understanding and appreciation of sports psychology. A potential example may be Eric Gagne, named The Sporting News' National League Pitcher & Reliever of the Year in 2003 & 2004, who received the Player's Choice Award in 2003 as the National League's outstanding pitcher. In 2005, Gagne lost his arbitration by not only losing (or not getting) the 3 million dollars for which he was asking; but also, it seems he lost his respect and affection for his club. During the hearings the club discussed his failings, especially his first two seasons as a struggling starting pitcher.<sup>61</sup> Regarding the hearings, Gagne said, "it's the business said, but I don't like it. It's not fun. You never hear anybody say it's a lot of fun. If you have to go, you go...they talked about the negative. I thought our case was pretty strong. We lost."<sup>62</sup> Manager Jim Tracy gave Gagne a few days to calm his emotions before showing up to practice, letting him skip the beginning sessions of the team's practice schedule. Gagne and others commented that despite not practicing, he would be mentally and physically ready for the

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<sup>60</sup> *Id.*

<sup>61</sup> Ken Gurnick, Gagne Joins Dodgers at Camp, <http://www.mlb.com> (Feb. 23, 2004).

<sup>62</sup> *Id.*

season and not get hurt due to lack of preparation.<sup>63</sup> Gagne's record is an interesting one to review. In 2004, he had 7 wins and 3 losses, 114 strike outs, an E.R.A. of 2.19 and pitched 70 games. In 2005, he had 1 win and 0 losses, a 2.70 E.R.A. and only pitched 14 games with 22 strike outs.

The juxtaposition of the statistics and commentary in professional baseball leaves little room for doubt that the existing formal negotiation-to-arbitration procedure needs the timely inclusion of a more "user friendly" process. The absence of such statistics and commentary in professional basketball, football, and hockey does not preclude a similar conclusion. What does the corporate world say about the inclusion of formal mediation?

#### **Mediation—The Preferred ADR Process Among Fortune 1000 Companies**

In 1997 Cornell University conducted a study<sup>64</sup> of Fortune 1000 companies to determine their views on ADR, generally, and mediation and arbitration, specifically. The results were published in *The Use of Alternative Dispute Resolution (ADR) in Maryland Business: A Benchmarking Study* Copyright 2004 and commentary on the results was published in *Business Law Today*, ABA Section of Business Law (March/April, 1999).

Of 530 U.S. corporations surveyed, 88 percent reported that they preferred mediation over any other dispute resolution process. These corporate respondents also indicated they would increase their future use of ADR, with a preference for mediation. "Mediation was the most popular form of ADR that was used in the last three years."<sup>65</sup> While both mediation and arbitration were preferred to litigation, over 84 percent indicated that future use of mediation was

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<sup>63</sup> *Id.*

<sup>64</sup> *DavId. B. Lipsky and Ronald L. Seeber, The Appropriate Resolution of corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, cornell/PERC Institute on Conflict Resolution (Cornell University 1998).

<sup>65</sup> *The Use of Alternative Dispute Resoluion (ADR) in Maryland Business: A Benchmarking Study* Copyright 2004. Maryland Mediation and Conflict Resolution Office at 12.



likely, whereas only 69 percent forecasted the future use of arbitration.<sup>66</sup> Based on these statistics, the study concluded that corporations preferred mediation (or other non-binding techniques) to arbitration. The commentary observed that “significantly, mediation is preferred to arbitration in all types of disputes.”<sup>67</sup> The commentary continued by stating:

More than 80 percent of the respondents said that mediation saves money, and a slightly smaller number that arbitration does so. Likewise, 80 percent reported that mediation is quicker, again with a slightly smaller number reporting that arbitration saved time.<sup>68</sup>

More recently, the Federal Mediation and Conciliation Service (FMCS), a United States government agency responsible for mediating collective bargaining agreements reported numerous findings favoring the use of mediation.<sup>69</sup>

“The study, commissioned by the FMCS to assess the impact of mediation on collective bargaining negotiations was conducted by the Employment Policy Foundation (EPF), a nonprofit nonpartisan public policy research foundation that focuses on workplace trends.”<sup>70</sup>

The study produced the following conclusions:

1. “Mediation makes good sense for both sides in a [labor] dispute.”<sup>71</sup>
2. Early involvement “reduces the duration of any work stoppage that does occur.”<sup>72</sup>
3. Mediation saved 9 billion dollars in workers’ wages and company profits.”<sup>73</sup>

Why should professional sports not have the option of the preferred ADR process through formal mediation?

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<sup>66</sup> Robert S. Glenn, Jr., Corporate Use of ADR in Georgia, <http://www.huntermaclean.com> at 1 (December 1, 1998) (citing Lipinsky, see footnote 66).

<sup>67</sup> Business Law Today—ABA Section of Business Law (March/April 1999) at 2.

<sup>68</sup> *Id.* at 2

<sup>69</sup> Federal Mediation and Conciliation Service, Study Shows that Federal Mediation Makes Good Business Sense for Labor and Management in collective Bargaining (Release Date: 11/16/2005)

<sup>70</sup> *Id.* at 1

<sup>71</sup> *Id.* at 1

<sup>72</sup> *Id.* at 1

<sup>73</sup> *Id.* at 1

### **Proposal For Formal Mediation In Professional Sports**

Indeed the opportunity for a formal mediation option can be simply stated. In each of the CBA's provisions cited above consideration should be given to the addition of the following formal mediation proposal:

Said dispute/grievance shall, following a failed negotiation as stated above, but before the exercise of an arbitration process set forth below, be mediated. The mediation shall be initiated by either or parties advising \_\_\_\_\_ of the failure of their negotiation efforts. "Initiation" occurs upon the selection of the mediator, the date, and the location of the mediation. Said mediation shall be initiated within \_\_\_ days from the date of failure of the negotiated resolution. Said mediation shall be completed within \_\_\_\_\_ days of the initiation of the mediation process. The parties shall select a mediator by mutual agreement, or if agreement can not be reached then by designation by \_\_\_\_\_. Said mediation shall take place at a mutually agreeable time and place (and if unable to reach such an agreement, as designated by the mediator). All parties to the mediation shall be physically present, unless mutually agreed upon by all parties otherwise. All communications related to and arising out of the mediation shall be and remain strictly confidential (unless an agreement otherwise is reached, at which time all parties and their representatives shall publish to \_\_\_\_\_ a joint but limited communication Identifying the result of the mediation). The mediator shall report to \_\_\_\_\_ either resolution or impasse. If the former, then the mediator (or upon mutual agreement, the parties) shall deliver the joint communication of the parties as set forth above to \_\_\_\_\_. If the latter, then the mediator shall terminate the mediation process and report only impasse to \_\_\_\_\_. The costs of the mediation shall be borne equally by all parties to the mediation, unless agreed upon said parties otherwise.

This provision neither eliminates nor limits the arbitration processes that have been adopted in all professional sports. It is a means of providing a non-binding alternative that give the parties the opportunity to control their resolution before having one imposed on them. The presence of a facilitator/mediator gives the mediated negotiation the real opportunity for success. The mediator (1) keeps the dialogue alive;

(2) can be a source for re-evaluation; and (3) may be a vehicle of providing a resolution that would not otherwise emerge between the parties.

The language required to incorporate formal mediation is simple, straightforward, yet critical to its implementation.

## **Conclusion**

Formal mediation has proven itself an effective ADR mechanism in the corporate as well as the litigation worlds. Its implementation in the world of professional sports could certainly lend to the betterment of relations and performance by players and the team management they serve. Mediation is a dispute resolution process designed to protect the intangible sense of dignity and respect between parties upon which teamwork and championships are built. It has earned the right to be formally implemented into the dispute resolution processes of all professional sports.