

**Mediation before Arbitration:** why professional sports leagues should expand the role of mediation beyond collective bargaining negotiations to individual player grievances.

Jimmy McEntee

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## **I. Introduction**

In professional sports, management and professional athletes turn to alternative dispute resolution methods to resolve their disputes. The parties often rely on mediators to help facilitate their conversations when negotiating collective bargaining agreements. Nonetheless, when dealing with individual grievance disputes that arise from the collective bargaining agreements, the parties instead use arbitration to resolve their disputes. For a while, arbitration appeared to adequately address the needs of both management and the athletes. However, despite the intention for arbitration to be fast, inexpensive, and informal, it often fails to achieve any of these goals.<sup>1</sup>

While much has been written on the use of mediation in collective bargaining agreements for sports,<sup>2</sup> little has been written on the use of mediation for individual sports grievance disputes. This paper will examine the handling of grievance disputes in professional sports, with a particular focus on the National Football League, and argue for broader implementation of mediation in dealing with such disputes.

## **II. Mediation in Labor and Employment Contexts**

Because of the numerous and varied disputes that arise in the employment context, employers and employees alike have turned to alternative dispute resolution models to resolve their disputes.<sup>3</sup> One area of labor law that has historically utilized mediators is the negotiation of collective bargaining agreements. Almost all collective bargaining agreements contain grievance and arbitration procedures designed to resolve disputes about the interpretation and application

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<sup>1</sup> Stephen B. Goldberg, *The Mediation of Grievances under A Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982).

<sup>2</sup> See, e.g., Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189 (2014).

<sup>3</sup> See DAVID A. HOFFMAN, *MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS* 1-9 (Massachusetts Continuing Legal Education 2013).

of the agreement.<sup>4</sup> There are a number of benefits to resolving the dispute through arbitration as compared to litigation: the costs are much lower, disputes are resolved more promptly, and parties benefit from the finality of the decision.<sup>5</sup> Yet over time arbitration has looked more and more similar to litigation, the process that all parties were trying to avoid.

Increasingly, employers in a number of different industries are starting to realize that engaging in informal discussions with a neutral third-party before reaching arbitration makes “good business sense.”<sup>6</sup> Evidence suggests that, on average, mediation may resolve a higher proportion of the grievances more promptly and less expensively than conventional arbitration, without a substantial decrease in the settlement rate.<sup>7</sup> Yet despite the potential success of mediation programs for resolving grievances, mediation is not incorporated in grievance-dispute procedures in professional sports.<sup>8</sup>

### **III. Dispute Resolution in Professional Sports**

As in many industries, professional sports fall under the National Labor Relations Act for labor relations, which gives professional athletes the right to form labor unions, engage in collective bargaining for better contract terms and work conditions, and take collective action such as striking.<sup>9</sup> Despite the successful utilization of mediators in bargaining, leagues and player associations have not utilized mediators to assist with grievance disputes.<sup>10</sup> While all of

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<sup>4</sup> See Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 383 (2004).

<sup>5</sup> Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J.L. 167, 170 (2013).

<sup>6</sup> Lamont E. Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, DISP. RESO. J. 35, 84 (Apr. 2001).

<sup>7</sup> Stephen B. Goldberg & Jeanne M. Brett, *An Experiment in the Mediation of Grievances*, 106 MONTHLY LAB. REV. 23 (Mar. 1983).

<sup>8</sup> Hodges, *supra* note 4 at 366 (citing Peter Feuille, *Grievance Mediation*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 187, 190-92 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999)).

<sup>9</sup> Grabowski, *supra* note 2 at 193.

<sup>10</sup> Rodney A. Max & Joshua J. Campbell, *Formal Mediation in Professional Sports*, 1 AM. J. MED. 27, 32 (2007).

the professional leagues in the United States have similar arbitration procedures, this section will focus on the grievance procedure in the National Football League as a case-study because of the recent frustrations with a number of high-profile grievances.

The NFL collective bargaining agreement sets out the procedures that the NFL and NFL Players Association must follow for grievance disputes.<sup>11</sup> Each type of dispute, whether injury-grievances, non-injury grievances, or grievances under player conduct policy all contain similar processes for resolution.<sup>12</sup> If the parties are not able to reach a resolution on their own terms, the dispute is then presented to an arbitration appeal to review the grievance. For specific matters deemed detrimental to the integrity of, and public confidence in, the game of professional football, Article 46 provides the Commissioner with the power to appoint the arbitrator unilaterally.<sup>13</sup>

While these polices were mutually agreed upon by management and the players association during bargaining, they establish a highly adversarial system for resolving grievance disputes. In recent cases, players that have been disciplined under the system have taken their dispute to federal court even after the appeal was finalized under the NFL's grievance procedure. While some federal district courts have overturned the arbitration decisions, to date all federal appellate courts have reinstated or affirmed the arbitration decisions pursuant to the collective bargaining agreement.

Over time, arbitration in the NFL has developed qualities that closely track the litigation process, and thus similarly deteriorate the relationship much like litigation. Discovery in some of

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<sup>11</sup> See NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, *Collective Bargaining Agreement* (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>12</sup> See *id.* at Articles 43-46.

<sup>13</sup> *Id.*

these arbitration cases can take months on end.<sup>14</sup> Expert witnesses are hired and consulted throughout the grievance process.<sup>15</sup> Parties are often represented by the most expensive lawyers in the world.<sup>16</sup> The following cases highlight these flaws, and demonstrate how the current system for resolving disputes under the NFL collective bargaining agreement is no longer in the best interests of all parties.

### *Colin Kaepernick Collusion Grievance*

One of the highest-profile grievances in the National Football League today relates to NFL players' decisions to kneel during the National Anthem. Colin Kaepernick, former quarterback for the San Francisco 49ers, was the first athlete to take a knee during the national anthem. When the season ended, Kaepernick's contract expired but Kaepernick was not signed by any NFL team, despite the fact that most commentators agree he is more talented than many quarterbacks on NFL team active rosters.<sup>17</sup> In response, Kaepernick filed a collusion grievance against the league, arguing that the owners colluded together to exclude him from signing with a team due to his decision to take a knee during the anthem.<sup>18</sup> While the grievance against the

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<sup>14</sup> See, e.g., NAT'L FOOTBALL LEAGUE, *Ezekiel Elliott Discipline Letter* (Aug. 11, 2017), [http://www.espn.com/pdf/2017/0811/Ezekiel-Elliott-Discipline%20Letter\\_8-11-17.pdf](http://www.espn.com/pdf/2017/0811/Ezekiel-Elliott-Discipline%20Letter_8-11-17.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Braden Campbell, *Meet Jeffrey Kessler, the lawyer backing Tom Brady*, BOSTON.COM (May 18, 2015), <https://www.boston.com/sports/new-england-patriots/2015/05/18/meet-jeffrey-kessler-the-lawyer-backing-tom-brady>.

<sup>17</sup> See Neil Greenberg, *Colin Kaepernick is statistically superior to half of the NFL's backups and deserves a job*, WASH. POST (May 16, 2017), [https://www.washingtonpost.com/news/fancy-stats/wp/2017/05/16/colin-kaepernick-is-statistically-superior-to-half-of-the-nfls-backups-and-deserves-a-job/?utm\\_term=.b6b5b7e7a6ad](https://www.washingtonpost.com/news/fancy-stats/wp/2017/05/16/colin-kaepernick-is-statistically-superior-to-half-of-the-nfls-backups-and-deserves-a-job/?utm_term=.b6b5b7e7a6ad).

<sup>18</sup> Jason La Canfora, *Colin Kaepernick's collusion grievance against NFL moving forward*, CBS SPORTS (Oct. 22, 2017), <https://www.cbssports.com/nfl/news/colin-kaepernicks-collusion-grievance-against-nfl-moving-forward/>.

league is still pending, the league has emphasized that they will not participate in mediation with Kaepernick.<sup>19</sup>

#### *Tom Brady's Grievance under Article 46 of the Collective Bargaining Agreement*

In 2015, Commissioner Goodell suspended Brady for four games under the “conduct detrimental to the league” language of Article 46 of the Collective Bargaining Agreement.<sup>20</sup> The NFL conducted an investigation into whether Tom Brady had knowledge of a scheme to illegally take air out of footballs before a playoff football game. Commissioner Goodell was the hearing officer for the arbitration appeal, and issued a lengthy opinion confirming the suspension.<sup>21</sup>

After losing his appeal to Commissioner Goodell, Brady filed suit in federal court.<sup>22</sup> A federal judge vacated Goodell’s four game suspension, but ultimately the Second Circuit reinstated the suspension on appeal.<sup>23</sup> The process lasted over two years, with parties arguing in arbitration, federal district courts, and federal appellate courts. The parties never sought assistance from a mediator to facilitate the conversation and resolve the dispute.

#### *Ezekiel Elliott's Grievance under the Personal Conduct Policy*

In July 2016, Ezekiel Elliott, Dallas Cowboys’ star running back, was accused of a number of acts of domestic abuse.<sup>24</sup> The NFL conducted a thirteen-month investigation, which concluded in 160-page report by NFL investigators. The NFL determined following the

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<sup>19</sup> See Sean Wagner-McGough, *Colin Kaepernick's attorney: NFL rejected meeting with Kaepernick, Goodell, mediator*, CBS SPORTS (Nov. 8, 2017), <https://www.cbssports.com/nfl/news/colin-kaepernicks-attorney-nfl-rejected-meeting-with-kaepernick-goodell-mediator/>.

<sup>20</sup> See Gregg Rosenthal, *Tom Brady suspended 4 games, plans to appeal*, NAT'L FOOTBALL LEAGUE (May 11, 2015), <http://www.nfl.com/news/story/0ap3000000492185/article/tom-brady-suspended-4-games-patriots-forfeit-2016-first-round-2017-fourth-round>.

<sup>21</sup> Roger Goodell, *Final Decision on Article 46 Appeal of Tom Brady*, NAT'L FOOTBALL LEAGUE (Jul. 28, 2015), <http://static.nfl.com/static/content/public/photo/2015/07/28/0ap3000000504265.pdf>.

<sup>22</sup> *Tom Brady suspension case timeline*, NAT'L FOOTBALL LEAGUE (Jul. 15, 2016), <http://www.nfl.com/news/story/0ap3000000492189/article/tom-brady-suspension-case-timeline>.

<sup>23</sup> *Id.*

<sup>24</sup> See Jeanna Thomas, *Ezekiel Elliott's suspension and appeal, explained*, SBINATION (Dec. 17, 2017), <https://www.sbnation.com/2017/8/18/16141526/ezekiel-elliott-suspension-appeal-explained-nfl-domestic-violence>.

investigation that Elliott had committed acts of domestic violence, despite the lack of charges in the criminal justice system.<sup>25</sup>

Under the personal conduct policy, Commissioner Goodell suspended Elliott for the mandatory six games suspension.<sup>26</sup> Elliott's hearing officer in arbitration was Harold Henderson, selected by the same individual who decided his punishment, Commissioner Goodell.<sup>27</sup> After Henderson affirmed the suspension, Elliott filed suit in federal court, arguing that the process was fundamentally unfair.<sup>28</sup> The litigation in federal court last several months, with the United States Court of Appeals for the Second Circuit ultimately denying an emergency injunction that would have delayed the suspension.<sup>29</sup> Like the above cases, the parties never mediated their dispute.

#### **IV. The NFL Should Include Mediation in Grievance Procedures**

The NFL and NFL Players Association should consider including mediation as part of the dispute resolution procedure. In order to change the process for resolving disputes, both NFL management and the players association would need to renegotiate those provisions in the collective bargaining agreement. While the players are seemingly more frustrated with the process than management, the adversarial nature is not working for anyone.

Mediation presents both parties with the opportunity to resolve their dispute in a forum that is voluntary before ever needing to reach arbitration. While mediation would not replace arbitration, mediation could be included as a middle step between initial negotiations over the

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Daniel Rapaport, *Ezekiel Elliott's Preliminary Injunction Denied, Suspension Back in Place*, SPORTS ILLUSTRATED (Nov. 9, 2017), <https://www.si.com/nfl/2017/11/09/ezekiel-elliott-suspension-news-preliminary-injunction-court-case>.

grievance and final, binding arbitration. Including mediation as a step in the process would be a welcome improvement over the current system for the following four reasons:

*Preserves Working Relationship between the NFL and the Employee*

A major benefit of mediation is that mediation preserves working relationships between team management and players.<sup>30</sup> No matter the outcome of the grievance dispute, in most cases the player will continue to be employed in the National Football League. The current procedure for resolving disputes does not promote a healthy continued relationship between the two sides of the grievance. Instead, the arbitration model has become highly adversarial.

Mediation allows the parties opportunities to resolve their disputes with a continued working relationship in mind by focusing on respect for the other party.<sup>31</sup> In arbitration, incentives exist for the parties to speak ill about the other party in hopes the arbitrator will take their side. When management speaks poorly about the player/employee in an arbitration grievance dispute, the player is forced to sit in the room and listen to those points. In mediation, however, mediators can limit the negative interactions and heated exchanges between the parties by meeting with parties separately in private caucuses and setting a positive, respectful tone focused on mutual gains when parties are together in joint session.

*Finality*

One of the intended benefits of arbitration was that disputes could be resolved quickly with the understanding that decisions were final. However, many of the recent grievance disputes between NFL players and management have found their way to federal court, with players seeking a vacator of the arbitration award. In mediation, parties typically seem more satisfied and feel committed to decisions reached by them as opposed to decisions imposed upon them in

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<sup>30</sup> See Grabowski, *supra* note 2 at 198 (citing SIMON GARDINER, SPORTS LAW 251 (3d. ed. 2006)).

<sup>31</sup> See Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOT. J. 17, 19 (Jan. 1989).



adjudication and arbitration.<sup>32</sup> By resolving some of these disputes in mediation, the number of agreements that will be challenged in federal court will decrease.

### *Flexibility in Settlement Agreements*

Mediation allows parties to create an agreement that tailors the terms to their own situation and incorporates terms beyond those that an arbitrator could order. For grievance disputes in sports, the arbitrator has limited flexibility in determining what type of punishment should be applied to the employee's case. The arbitration model often leaves two options on the table- what the player wants and what the team wants. The arbitrator's role is more focused on finding whether the player engaged in the prohibited behavior under the collective bargaining agreement, and if so, the arbitrator must apply the punishment scheme as required by the collective bargaining agreement. If parties instead use a mediator, the parties can participate in more creative option-generation that may have better addressed the needs of all parties involved by focusing on interests.

### *Confidentiality*

Confidential resolution of disputes is not possible under the current system in the National Football League. The arbitrator issues an opinion that becomes available for the public. In mediation, however, the parties determine how much of the outcome will be in the public record, if any at all.<sup>33</sup> Because these disputes are not filed in court, there is no need for a public record of any kind. While there may be some cases that the league wishes to be public, a number of smaller grievances can stay within the confines of the league office if the parties so desire.

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<sup>32</sup> STEPHEN B. GOLDBERG ET. AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 147–148 (5th ed.).

<sup>33</sup> See Hoffman, *supra* note 3 at 1-19.

Furthermore, athletes may not want to damage their reputation in front of other teams.<sup>34</sup> Even if the athlete does not have a continued working relationship with his own team following the dispute, he benefits from keeping the grievance private.

Moreover, many mediation models require the parties to agree to refrain from disclosing information learned in mediation. This duty is typically created by provisions in an agreement to mediate. For example, the Court of Arbitration for Sport, which oversees the vast majority of international sports disputes, requires parties to agree in mediation that the admissions made during mediation cannot be used as evidence in any other subsequent arbitral or judicial proceedings.<sup>35</sup> Because the information shared in mediation sessions is private, parties can speak candidly and share their views in mediation without worrying that their admissions can be used as evidence against them if they are unable to reach an agreement.

#### *Limitations to mediation*

While there a number of reasons why the NFL and other sports leagues should consider incorporating mediation for resolving grievance disputes, there are some limitations that must be considered.

First, one important consideration is time. Some grievance disputes in professional sports require quick resolutions. This is particularly true in grievances that relate to athlete participation, or grievances that could result in missed games if not decided promptly.<sup>36</sup> While one of the benefits to mediation is the speed with which disputes are resolved, there is something to be said about how quickly arbitration can lead to a final decision for a number of disputes.

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<sup>34</sup> Despina Mavromati, *Mediation of sports-related disputes: facts, statistics and prospects for CAS mediation procedures*, in CAS BULLETIN 25, 26 (2015), [http://www.tas-cas.org/fileadmin/user\\_upload/Bulletin\\_2015\\_2\\_internet\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Bulletin_2015_2_internet_.pdf).

<sup>35</sup> *See id.*

<sup>36</sup> *See* 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, 213 (2011).

One way to alleviate this concern is to limit the scope of grievances that can utilize mediation to grievances that are not time sensitive in nature.

A second concern that is common in mediation is that power imbalances will lead to unfair outcomes.<sup>37</sup> The NFL's management is a more sophisticated party than the individual player, and their repeat experience in mediation may give them a leg up. This concern may be even heightened if mediation was mandatory for parties.<sup>38</sup> However, this concern is not as grave in sports disputes, at least in American professional sports, because the players' association provides counsel to the players, in addition to any representation from the players' agents.

A third concern is whether mandatory mediation possesses the same benefits as voluntary mediation. If the NFL players and NFL management wish to include mediation as part of their procedure for resolving disputes, it would likely have to be required. There are mixed opinions as to whether mandatory mediation is effective. One of the primary concerns is that mandated participation may incorporate parties that do not wish to mediate, resulting in wasted time, effort, and cost.<sup>39</sup> However, in the aggregate the benefits to mediation greatly outweigh any wasted time and effort that encourages the parties to communicate with each other.

## **V. Conclusion**

In professional sports, parties frequently turn to arbitration to resolve individual player grievances. While intended to be to be fast, inexpensive, and informal, arbitration in sports often fails to achieve any of these goals.<sup>40</sup> For the reasons mentioned in this paper, sports leagues such as the National Football League should include mediation as a required step before reaching arbitration.

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<sup>37</sup> See, e.g., JAMES J. ALFINI ET. AL., *MEDIATION THEORY AND PRACTICE* 357 (2013).

<sup>38</sup> See Goldberg, *supra* note 32 at 402.

<sup>39</sup> See *id.* at 404.

<sup>40</sup> Stephen B. Goldberg, *The Mediation of Grievances under A Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982).