Symposium on Sports Law and Alternative Dispute Resolution

Presented by The Cardozo Journal of Conflict Resolution in conjunction with The Cardozo Tennis Society

In this symposium, practitioners in the field of sports law discuss current and future uses of alternative dispute resolution ("ADR") processes in the sports industry. Panelists examine how ADR is frequently used to settle salary disputes and injury cases in professional football, baseball, basketball, hockey, and the Olympic games. Further, the practitioners compare the similarities of ADR procedures in each of the sports industries as well as highlight the differences.

MS. CYNTHIA DEVASIA: Good evening, everyone. Thank you for coming to tonight's event. My name is Cynthia Devasia, and as the Editor-in-Chief of Cardozo Online Journal of Conflict Resolution, it is my pleasure to welcome you as we, in association with the Cardozo Tennis Society, present our symposium on Sports Law and Alternative Dispute Resolution.

A man who was no stranger to conflict himself, Abraham Lincoln once said: Discourage litigation –the lawyer, as a peacemaker, is in the powerful position to become a good man. Whenever possible, encourage your neighbors to resolve conflict and compromise.

It is with a similar mission that the Online Journal continues to strive to articulate and aggregate interest in the field of conflict resolution. Since our inception over three years ago, we have continued to achieve our goal of publishing notes, articles and commentaries about the field of conflict resolution. As part of this enterprise, we are also committed to hosting cutting edge symposia, and so tonight we have with us a wonderful and distinguished panel of practitioners who join us to share their experiences as the wide world of sports and the world of ADR unite. But, before we get to our presentation, I would like to invite Professor Lela Love, who is the Director of Cardozo's distinguished Kukin Program of Conflict Resolution, to say a few words of welcome.

PROFESSOR LOVE: This is a wonderful turnout particularly of students, and I must say it must be the sports that are bringing you here – though dispute resolution is pretty popular too.

I wanted to just say one word about teaching and coaching. If you have taught or coached, you know how thrilling it is to see students succeed. The editor of the On-line Journal, Cynthia Devasia, the symposium editor who you'll meet in a moment, Ziva Cohen, and all the students of the On-line Journal have done a phenomenal job pulling this symposium together with this remarkable and illustrious panel, on what I'm sure is going to be a very exciting topic.

I wanted to make a few comments about the convergence of sports and ADR, or alternative dispute resolution. First, a historical [friend], sports and conflict resolution converged in the first Olympic games in 776 BC. The Delphic Oracle was consulted and said the games in Olympia would resolve the devastating wars that were happening in Greece at that time. Thereafter, for 1,000 years, every fourth year there were Olympic games at Olympia. Victors were given a crown of olives, a wreath of olives and an olive branch. Ever since then that symbol has symbolized peace, and as we know Greek civilization flourished.

Second to the frame for this event is that there are certain themes that connect, at least in my mind, sports and conflict resolution. The first one is that we love sports, I think, in part because of the fierce competition of what we all like to see and some of us like to participate in. The drive for the olive wreath, the blue ribbon, the gold, or the roses is something that motivates everybody either as a spectator or participant. The paradigm of competition is that somebody wins, others lose, and there are rules of the game that make the contest fair, engaging, and appropriate for all those involved,[in the case of sports where the athletes for the owners, for the agents, and, of course, the fans are involved as well.] Similarly in conflict resolution, many of the dispute resolution processes are based on a competitive or adversarial paradigm, where the parties are pitted against each other and a neutral in the middle makes the decision, resolving the matter. Litigation and arbitration are examples of that model.

However, and I think we think less about this facet of sports, there is a collaborative paradigm imbedded in sports that I think is as powerful as the competitive one. Teams have to function fluidly, whether the team is a baseball team or — this is my sport, a horse and rider, or an individual athlete and a coach. Collaboration is important and the team of course, if you think of it in expanded way, doesn't just include the players and the coach. Important to the successful function of a team is the agent, the lawyers, the owners, the investors, and everyone who revolves around the enterprise. And, of course, I should mention, the fans as well. In order to break the record, to go where no one has gone before, takes collaboration, it takes that combined effort of people. If we carry this into dispute resolution processes, negotiation and mediation hold out the promise of a collaborative model where problem solving and decision making can take the game, if we think of the game as something larger than just any one event, to another level. And consequently, those models hold out their promise of arriving at solutions, where each side or all sides can come out winners– can come out ahead.

I look forward tonight, I hope we hear tonight both about competitive models, adjudicated models and consensual models that is mediation, negotiation or dispute resolution in the sports arena. Just a couple of more tidbits. The motto of the Olympic games, and I just discovered this last night, but I like it, was Sidius Algius and Portius (phonetic spelling) which means, Swifter, Higher, and Stronger. As we search in the dispute resolution universe for better, more appropriate, more responsive ways to resolve dispute in sports, among our goals should be a faster resolution, so that the game can proceed, and so that no individual athlete loses that window of opportunity to compete. Also important is fairness, so that everyone can get back to business without the distraction of feeling that some injustice was done. User-friendly processes that are convenient, low cost and with attention to feeling and relationship, which are so important in performance situations. So as Nike says, "let's get on with it, let's just do it."

Ziva Cohen is going to introduce the panel. Thank you.

MS. COHEN: I want to thank you all for coming here tonight. We are very excited about our event. We have a distinguished panel, all of whom have extensive experience in alternative dispute resolution in the sports arena. They come to us from many different areas in the field. I'd like to briefly introduce our guests, but please look at our brochures for more extensive biographies.

First, we have Carol Wittenberg joining us from ADR Associates. Carol arbitrates football injury cases as well as baseball and hockey salary disputes. She will also be able to give us a perspective about what is unique about the ADR arena.

Next, we have Frank Coonelly who is joining us from the Baseball Commissioner's Office. Frank will be talking about a variety of disputes in the baseball arena as well as baseball salary arbitration. Frank will also

be able to offer us the management perspective on dispute resolution.

We also have Hal Biagas joining us from the NBA Players Association. Hal will be talking about the NBA system of dispute resolution including collective bargaining agreements and administration of the salary cap. He also will be to able to give us the athlete perspective in resolving sports arena disputes.

Lisa Lazarus joins us from the NFL Management Counsel. Lisa will be talking about the NFL system of dispute resolution. She will be talking about her experience in contract negotiations, collective bargaining agreements, as well as other disputes.

Ed Williams joins us from Holland & Knight. Ed is a former Olympic athlete in the biathlon. He has also been active in implementing legislation to protect amateur athletes and now he represents a number of Olympic athletes.

Finally, David Feher will be moderating this evening. David is a sports law attorney at Weil, Gotshal & Manges and adjunct professor of sport law here at Cardozo. David also has extensive experience in ADR with the NBA and NFL.

I just want to say a word about the format. Each of our panelists will be talking for about fifteen minutes or however long they wish. I think you know there is a lot of experience here and we are anxious to hear what the panelists have to say.

After that we will have a chance for questions and answers, and I hope that you will all join us for the reception after the event, with that I turn it over to David Feher.

PROFESSOR FEHER: Thank you very much. Before we start with Carol, I just want to speak for just a couple of minutes about an overall framework for what we all do here, because when you hear alternative dispute resolutions and arbitrations, it comes from a certain starting point.

In law school, you learned about the Federal Rules of Civil Procedure, all the procedures that govern when you're in federal court. That's all set-up, a package of rules are set by Congress. Then pursuant to the authority delegated by Congress, and it's a very extensive and complicated detailed procedure. If you're in federal court, you can't go to your opponent and say, "Okay, we don't like these rules, let's change them every time we have a dispute. We should short-circuit them."

If you file a lawsuit in federal court, you get the package of all the procedures, rights and remedies by statute under the rules. With arbitration, it's a more indirect process and a much more consensual process with the various arbitration procedures and other means of resolving disputes being agreed upon by parties.

Hal Biagas from the Players Association has been kind enough to bring a copy of the collective bargaining agreement from the NBA. First off, you will notice that these things are written by the participants on each side. So when we talk about alternative dispute resolutions, even before you get to an arbitration where you're arguing about a particular dispute and a player or what should be done with them, generally, every three, four, five or how many years, the parties have to sit down and negotiate the terms of their umbrella deal, either in collective bargaining or for anti-trust litigation, in terms of an anti-trust settlement agreement.

In each of these deals, and in each of those agreements, there are general arbitration provisions that set forth what the rules are going to be, who the arbitrators are going to be, what the rules will be, how the proceedings will be governed in terms of witnesses and every part of that has to be agreed upon by each of the parties. Now, it was probably more difficult the first time the procedures were negotiated, when these various agreements started off in their history, because generally, when negotiations come every so often, people will be arguing more about the money. While the procedures are surviving from deal to deal to deal. From time to time, arbitration procedures change, and if the parties want to change something, they can, and they have.

The other thing is that we have a number of different books here, and in each industry the procedures are similar, but they're also different in various ways. Baseball has salary arbitration, which is its own animal, which is different. And in the NFL, there are different arbitrators. There is an arbitrator that has jurisdiction over matters related to free agency, and there is a separate arbitration procedure related to injury grievances and matters like that. And so there are different systems across the sports.

The Olympics are a different animal than the organized league sports. I don't know quite how to phrase this, in a sense, the Olympics are kind of their own being. When I was speaking with the Olympic official there in the mid 1990s, the attorney representing the Olympic official said, "Well David you have to understand we're a supra-national organization."

The Olympics extend over many countries, and as such, there are different demands on dispute resolutions because you have athletes from many different countries who are participating in one event. They are now developing things like the court of arbitration for sport, which is based in Switzerland.

There are rules that are set forth in statutes, which Congress has passed, governing particular aspects, because in order to be uniform Congress has seen it fit to step in and say, "Okay, there are not going to be by agreement, but we will set these things down in the statute books." So there are different stories in different sports, but there are common things with them. Perhaps the most common is also the times when, intermittently, you're fighting in court over an antitrust suit or you're fighting before the National Labor Relations Board or before a federal judge who's dealing with the National Labor Relations Board order.

Almost always the disputes are outside of the courtroom. If you look at proportions, the vast majority of disputes are resolved outside of the courts and through these various alternative procedures. It's not only decided outside of those contexts, it's generally decided not by a judge of lifetime tenure, but by professional arbitration decision makers, people like Carol, who, make a living with arbitration. Some arbitrators are deans of law schools and arbitrate in their spare time. In either case, the arbitrator can make a good living.

I'd like to segue, now that I've talked about the general structure, into Carol because Carol really is the judge and jury in the arbitration proceedings. She is also a judge and jury who is hired by both sides, which is also a little bit different than a federal judge, whose salary isn't paid by both sides. So with that little bit of introduction — Carol.

MS. WITTENBERG: I have the most experience doing football arbitration. I have been doing football injury cases for six years. I have done hockey salary arbitrations for three. I've done baseball salary arbitration once, and I had only one case, just to give you an idea — I don't want you to think that I have more experienced in one area than I'm telling you, I've also done a couple of arena football cases in the past year.

What I'm going to try to do is give you my overall impression of how sports arbitration differs from traditional labor arbitration, and then take a little bit about the comparison between hockey and baseball arbitration, because I think it's interesting. And if you think it's all the same, it's not really. The message really is that as an arbitrator, I perform a lot of different roles. What David was talking about when he pointed to the collective bargaining agreement, is very pertinent. In my role as an arbitrator I am, I hate to use the word, but the truth is, the creature of the parties, that means, that parties sit down and negotiate the way they want arbitration to proceed. It may range from the very informal to the very formal, but it's the arbitrator who adapts to the parties process. So, when I explain arbitration to you, whether I explain salary arbitration or sports injury arbitration, that's unique to that sport and those parties, and it may be very different elsewhere.

Leila talked about mediation and consensual dispute resolution. I do a tremendous amount of mediation, and in my labor arbitration practice, I also do a lot of mediation even where I'm called in as an arbitrator, not in sports. I'll try to explain why I think that is.

What's unique about sports arbitration? Well, first of all, you're dealing with individuals who are the best in their field. They are talented, they are unique, and they have to be recognized as such. A lot of the cases

have high visibility, and that means that on occasion what you do as an arbitrator is reported in the newspapers. Worse than that, it is commented on by other arbitrators who are your colleagues. So, it's very possible to be trashed in the newspapers, as Frank will attest to, and not be fired.

Whereas, in other areas in arbitration, if you issue an unpopular decision, chances are you will be fired. What is slightly unique about sports is you're dealing with a number of different clubs and you are dealing with a league and a Players Association and a particular club or a particular player may be unhappy with you, but that doesn't mean that the League and the Association is necessarily unhappy with the results.

There's a lot of money at stake, particularly in salary arbitration, so there's a high risk in going forward with arbitration. In a lot of cases you're dealing not just with the League and the Players Association, you're dealing with the player's agent and/or attorney. That is another party to the process, different from traditional arbitration.

I find that there is a high degree of professionalism in sports arbitration. Attorneys who try cases, sports cases, come in extremely well prepared. The case tends to move forward quickly, it's tried, they try it in a day, which is getting to be very unusual. Other types of arbitration cases take days to be tried and often extend over months. Sports cases are generally tried in one day, they're well tried, the parties know one another, they respect one another and the process works.

Arbitrators are rarely asked to mediate in these cases. These parties know each other very well, they work together all the time, they know how to settle cases, and they do settle cases. At most, as an arbitrator, I have said to the parties, have you talked. That means it might be a good idea to talk about settlement. Or in the middle of a case, maybe you should talk again. But, by my experience, the attorneys do not want the arbitrator to be a party to the mediation, because if the mediation fails, the arbitrator is going to hear and decide that case. The parties do not want you to know, if settlement should fail, how they are going to resolve a case.

Injury cases are probably the most difficult cases that I decide. There is a lot of medical evidence. The cases are highly technical, however, there's nothing boring about sports arbitration. It's probably the sexiest kind of arbitration that one can do. Sports use a permanent panel. What I find most interesting is that, at least in both hockey and in football, there is great continuity in the panel. People are not fired with frequency, and that means, there's a tremendous amount of precedent. When I joined the NFL panel I was sent books of prior arbitrator's award. The same thing is true in hockey. Prior arbitrators tend to establish standards, which those of us who've come on more recently, tend to follow. I think I have used up my time, and on questions, I'm happy to talk about either salary arbitration between hockey and baseball or the injury cases, but I don't want to take more time.

PROFESSOR DAVID FEHER: Carol, can you give us a sense as to what skills you think are really necessary to bring to the table if you're going to be a good arbitrator and how you use those skills in the context of any particular arbitration?

MS. WITTENBERG: Well, in order to arbitrate in a labor context, I think you have to have an idea of what goes on in collective bargaining. Because, if you don't understand what goes on at the bargaining table, the forces of give and take are what happens, and when I call the "eleventh hour," then you don't understand, and you're not going to understand, why there are contract interpretation problems, why there are difficulties over language or why sometimes language is purposefully ambiguous. So, I think you need to understand collective bargaining. You obviously need to know how to run a hearing. In my view, running the hearing is one of the most important parts of being an arbitrator. I think it's important to give people a feeling that they have a fair opportunity to tell their story, no matter how formal the process, and to me that's what it's about. It's not so much, and I will separate salary arbitration from this, but in general, it's not so much about the attorneys trying the case. In general, arbitration is about individuals from each side who need to feel that they have been able to tell their story and have a fair hearing. And then, you have to be able to be able to write in a fairly articulate manner.

PROFESSOR FEHER: One thing before we leave. I know that often when arbitrators are discussed, there are issues, I think on both sides of the table as to where an arbitrator is someone who will stick to the letter of the agreement or someone who is trying to seek justice, not regardless of what the letter of the agreement is, but seeking justice in the sense of you have a difficult situation often before you, and I think as decision makers there's almost an inherent wish to try and reach a just outcome. Now, given that you're dealing with an agreement that has certain restrictions and limitations that the parties agreed on, how do you deal with that tension, and what have you experienced in that realm?

MS. CAROL WITTENBERG: I think it's the parties' agreement, the arbitrator is the reader of the parties' agreement. If you agreed to something in bargaining, that I may or may not think is fair or just, I don't think it's my job to decide what I think is best. I try to mediate in some of those cases, to see if perhaps a just decision or a fair decision can be reached. But, in the end the arbitrator has to decide based on what the parties intended and what is in the collective bargaining agreement.

PROFESSOR FEHER: Before we move on to Frank, I just want to make a general point, because in these arbitration proceedings what you find in the collective bargaining agreements or anti-trust settlements, you have to keep in mind there's already a product of the parties respective leverage and bargaining positions that they have just gone through. Sometimes it won't split down the middle. In terms of being equally fair to one side or the other. They have just gone through a strike or lockout or litigation, where one side won a lot more than the other. And in terms of when it came time to do the deal, one side may have gotten more than the other. And I'm sure that both sides have different views as to who won more and who won less. But at the same time when an arbitrator is facing what is the appropriate outcome, it's not just the procedures that are in the collective bargaining agreements. It's also enforcing the substantive deal and the allocation of economic rewards that's reflected in the collective bargaining agreement. And if so, that agreement has resulted from a process where one side has done better than the other, then there is this issue, I mean in terms of if you're going to follow the agreement, you can't push it back to 50/50, because if one of the sides has already gotten 60/40, then that's where it is. And so I did at least like to put that in context.

Do you have any further thoughts on that before we move onto Frank?

MS. WITTENBERG: It goes back to the collective bargaining agreement. The arbitration is just an extension of the collective bargaining agreement. Arbitration doesn't stand alone. It's a reflection of that agreement. So, whatever the parties decided to do substantively or in terms of their arbitration process, that's what they have to live with. If they want it changed, they've got to wait to go back to the bargaining table to get it changed.

PROFESSOR FEHER: Frank?

MR. FRANK COONELLY: Thank you, David. Before explaining who I am and what I do, I just want to clarify, Carol. You were saying that arbitrating in sports is unique because you're dealing with talented and unique individuals, you were talking about the lawyers that represent, as opposed to the athletes themselves?

With that clarification, I'm the general labor counsel at the office of the commissioner of baseball, representing the 30 major league clubs, at least as far as today is concerned we still have 30, within the office of the commissioner there is a labor relations department. We handle all of the labor relations for the clubs, centrally, and those are dealing with most high profile with the players, but also with the umpires as well. The umpires used to be employees of the two leagues, but a couple of years ago, the commissioner's office took over the employment of all Major League umpires. Now we handle the labor relations of both players and umpires, and it's a whole different ball game, not only because players and umpires have a different role to play on the field and there are different work rules that apply to them, but it's a whole different type of collective bargaining relationship.

With the players you have the relationship that most of the individuals up here are familiar with, and that is the negotiation of an overall collective bargaining agreement which sets forth many terms and conditions of employment, including an arbitration provision, but it also sets forth a framework within which there are

individual player negotiations with clubs, which we all hear about, which result many times with those highly unique and talented athletes to very high salaries.

Whereas in the umpire situation you have a far more traditional labor agreement, where you negotiate the salaries for the individuals and you negotiate a wage scale for umpires, and they come in as a zero year umpire, and they're at the low point of the wage scale and they move all the way up through a 20 year umpire at the upper end. So it provides us with some diversity within our practice area, which is nice because we get to deal with more traditional labor issues in the umpire situation than in the players, where we get to deal with the more unique situation. And there's nothing more challenging, I have found as a labor lawyer, first as a partner at Morgan Lewis and Bacheus, in Washington, who did a lot of work as outside counsel for major league baseball. And, since I've taken the inside position with baseball in 1998, there's nothing more challenging than the legal issues that are created as a result of the overall collective bargaining agreement, and the individual player contract. And which of those two agreements takes precedent and how the two merge together and how the labor law principles that we're all taught in law school, apply when you're dealing with that what is truly a unique situation in labor parlance.

Let me get to the arbitration that we deal with in Major League baseball, as David, and I think Carol, have said, we deal with traditional grievance arbitration. When there is a dispute over an interpretation of a collective bargaining agreement or a particular discipline that was meted out against an umpire or a player, the employee has a right to bring a grievance under the collective bargaining agreement and to have that grievance heard by an arbitrator.

Secondly, we have salary arbitration, as the NHL does in hockey and baseball, in which there is a group of players that have their salaries determined, with at least the backdrop of an arbitrator making a final decision. With respect to traditional grievance arbitration, one point I'd like to stress is a point that is not often understood by those that don't practice in labor law, is that unlike the commercial setting, the arbitration is not simply an alternative to litigation.

As David said in his opening comments, when you're dealing with a collective bargaining relationship, whether professional sports or otherwise, you are typically litigating your dispute before an arbitrator as opposed to a federal judge. At times you go to the NLRB, but typically, your disputes are before an arbitrator.

Unlike the commercial setting where arbitration is an alternative to court, that's not really why we have arbitration in the labor context. In the labor context, arbitration is really the substitute for economic warfare. In the old days, before there was arbitration in collective bargaining agreements, if the employees didn't like something that management was doing, there was a dispute, it may have involved just one employee. The employees would walk off the job, and then management would have to come in and talk to the union, and somehow resolve the dispute, and get the workers back to work so the plant could continue to operate. So, it was really management that wanted to introduce the concept of, this doesn't make a lot of sense, we're losing productivity, we would rather resolve these disputes that we have on a day-to-day basis in the work force in another setting, and that setting has been arbitration. So the labor arbitrators at least — yes, they are a substitute for players and management litigating their disputes in court, but really it started long before arbitration was as popular as it is today for commercial arbitration.

In terms of salary arbitration, there's a group of players typically known as the middle group of players. Players with at least three years of service, not yet six years of service, who don't have enough service yet to become a free agent, who are allowed to have their salary set by an arbitrator. And I'd like to engage Carol in some discussion about the differences between our system and the NFL system, because they are quite different in several respects. Some of which, quite frankly, I think we've got the better approach, others of which I think the NFL has the better approach. We've never quite been able to get the better points of their system. I'm not sure whether they have tried to get some of those that I think are better for our system. But, as Carol said, it's a high risk venture, and so most of the time both clubs and players want to avoid actually going to an arbitrator, because at least in baseball, this is one of the principal differences between baseball and hockey. In baseball we have final offer arbitration, which means that the arbitrator cannot select a middle

ground. The player submits a number, the club submits a number, and the arbitrator must select one of those two numbers.

So, often times, particularly with the high profile players, the difference between those two numbers can be two million, two and a half million dollars, or even three million dollars spread. That represents a significant litigation and the case will be heard in three hours and decided within 24 hours. There are a lot of lawyers that go to court and litigate cases for months, if not years and have discovery for months, if not years, and have a difference or potential remedies of less than three million dollars, salary arbitration cases are tried in three hours, and at least in baseball, without any pre-hearing exchange of any materials whatsoever, and then decided by the arbitrator within 24 hours. But, I'd like to gave you the principal differences between our system and the NHL system, and then ask Carol, if she doesn't mind, to give her opinion as to which system she thinks works better from an arbitrator's perspective. First, as I said, the baseball system is known as final offer arbitration. In the NHL, the player and the club both submit a number as well. But the arbitrator can select either number or any number in-between, so the arbitrator can as we referred to as in labor, split the baby, whereas in our case, they cannot.

Carol, which system do you think makes more sense from an arbitrator's perspective?

MS. CAROL WITTENBERG: I think that the final offer system, theoretically, I don't know if it's true, should result in more settlement. Arbitrators obviously prefer the hockey system, because we have an opportunity to make the decision as to what salary is actually fairer or more appropriate. What I like about hockey is that 48 hours before the hearing, I get a pre-hearing brief of four to five hundred pages, so I know who the player is and which players are comparable. I'm prepared when I walk into the hearing. On the other hand I walked into baseball salary arbitration last February, I didn't know who the player was, I didn't know anything about the arguments, and the parties had an hour each to present the entire case.

In hockey, I have 48 hours to write a full opinion and award. In baseball, somebody writes a number on a piece of paper. Obviously, I prefer this part of the baseball system.

MR. FRANK COONELLY: Who pays you more?

MS. CAROL WITTENBERG: Hockey.

MR. FRANK COONELLY: Well deserved. Those are the principal differences. From my perspective, I think we have the better system with respect to the final offers issue. The high risk involved means that a very low percentage of potential cases actually go to a hearing. In a typical year, we have 200 potential cases. In each of the last three or four years, we have had anywhere from ten to thirteen cases actually go to hearing. Thus only a small percentage of potential cases go to hearing. The reason for this is that both sides understand that it's do-or-die in that hearing room and the arbitrator can't save you. If you've got the worst number by just a little bit, you're going to lose a lot of money and the arbitrator can't come out somewhere in the middle, where you belong.

PROFESSOR DAVID FEHER: I know you like the job as moderator, but I do have to jump back in.

Could you talk a little bit about shifting alliances in the arbitration context because I know quite often — and the press is portrayed as management and players? But, I know from having gone through it — quite often, teams are on the side of players in one case but in other cases teams may be on the side of management in salary arbitration.

MR. FRANK COONELLY: I think as a general point, the one thing that makes arbitration or labor arbitration different than litigation, I think this goes to your point, David, is the fact that the parties have to live with one another after this particular piece of litigation. So, unlike federal court, where you may be fighting against either opposing counsel and it goes before the judge. Lawyers that work on these matters and the parties themselves, you have to live with that union next year. You have to negotiate a collective bargaining

agreement with that union. Although you are typically opposed to the union, you've got to live with them. Therefore, you act different as litigants in the arbitration setting than as lawyers. You are practicing less sharply, hopefully. With respect to the shifting alliances and salary arbitration, it is one of the principal reasons why many clubs don't like to go to salary arbitration. Because we hold our hearings in February, and a player reports to spring training in the middle of February. There could literally be – we have players who leave spring training camp, come into a salary arbitration hearing, get trashed for three hours by the club representative, and then are told to go back to spring training and get ready to have a great year for us. That's a little bit disconcerting. Players handle it differently. Some players are just great. They'll sit back there. We have had some hearings that get quite nasty — never from me I'm sure, right, Carol? We have had some hearings in which the club representative is pointing out the shortcomings of the player, in a demonstrative way, through statistics, trying to explain how other players are superior to this player, and the player doesn't like to hear it. Some players take it fine; they sit there with a smile on their face. Shawn Casey, a case Carol heard last year, is a perfect example. Shawn Casey is the nicest guy in the world. He'd sit back there and the club lawyer was lobbing shots at him and nothing was bothering him. Other players get very angry. We have had several players who have almost come across the table at the club representatives. Typically, though not as big as Lisa's guys, some of these baseball players are quite athletic.

In terms of the grievance hearings, most of the times, it is the players against the club, and our office is representing the club. We have had some situations in which the central office and the club have not been on the same page. We had one hearing in which the central office sided with the union, and the club was on the other side of the table, which is highly unusual. We do, however, on virtually every discipline case, have a separate arbitration procedure in baseball for on-field discipline. The brawls, for instance, where a pitcher throws at the batter, the batter comes out, and you have a fight, and they get suspended for five games. Those are handled separately from the normal grievance arbitration procedures. The union represents the player, as he argues for a more lenient sentence, and our office represents the disciplinarian.

In all of those cases, the club and the club's lawyer come into the hearing supporting their player, saying that the discipline is too severe, so that the player can get out and get back onto the playing field.

PROFESSOR DAVID FEHER: Since time is limited, I'd like to move to Hal Biagas. After you go through that Hal, if you can comment a little bit about how teams in arbitration and the NBA quite often are on the same side because of the salary cap. Both the NFL and NBA have salary caps, and a team will want to get a particular player, and fight against the League's interest. Sometimes the Players Association and the teams, to enforce a salary cap, are actually directly aligned to try and have a transaction of approval so that the guy can go to the team.

MR. HAL BIAGAS: I'm Hal Biagas, I'm Deputy Counsel with the National Basketball Players Association. Among my responsibilities are arbitrating cases that arise in some of the various contexts that come up out of our collective bargaining agreement.

David initially touched on the different arbitration systems in basketball. We rely heavily on alternative dispute resolution as a means to resolve most of our issues, because unfortunately, the Players Association and the NBA have a fundamental inability to agree on a lot of things. We find that ADR is very beneficial. In fact, to illustrate how strong our inability to agree on things is, we have arbitrators and alternative dispute resolution methodologies for virtually every possible thing you can imagine. We have four jointly retained arbitrators. We have one independently retained arbitrator that we use exclusively for player-agent disputes and we, of course, have the Commissioner, who arbitrates on court matters. He is — for matters of less than a thousand dollars — the sole person empowered to hear disputes that occur or discipline that occurs as a result of on-court conduct by a player. (Some of the other systems that we have use a grievance arbitrator). That grievance arbitrator is primarily charged with hearing matters related to off-court discipline, matters that arise out of the uniform player's contract and matters that are above 25 thousand dollars.

If we are unhappy with the Commissioner's resolution in the matter, we also have a system arbitrator, who we're currently in the process of trying to select a new one. We have interviews, in fact, tomorrow, with a couple of potential candidates. Unfortunately, we have to go through the process of selecting somebody. Just

to illustrate how difficult the process can be, Ms. Wittenberg was interviewed over a year ago for our grievance arbitrator. We still have not selected a grievance arbitrator on the WNBA side, so it can be an extremely long and arduous process, as I am sure it is also in baseball and football.

Often times, the parties are seeking somebody who is going to at least lean their way on the thing, and obviously, the other side wants somebody who's going to lean their way. So, we end up usually picking somebody who we have no idea what their leanings are going to be, because that's the only way you can get somebody who both sides are going to agree on. As I said, we're in the process of selecting our system arbitrator. The system arbitrator handles the bigger issues. He or she is the person that typically hears matters related to salary cap disputes, which are the most common disputes. I would say he or she also hears matters on the draft, free agency, circumvention, and collusion. Now, while these matters to individual players might not seem so important, these typically are the matters that have the greatest impact on the players collectively. Therefore, we feel these are probably the most important. So selecting a system arbitrator is particularly difficult because of the impact the individual can now have on how the C.B.A. is interpreted and treated.

We also have an independent expert for drug-testing. We have a new anti-drug agreement in this collective bargaining agreement, which has been in effect for three years now. Pursuant to that anti- drug agreement, there is a provision for reasonable cause testing of an individual, and the system provides for that reasonable cause to be determined by an independent expert jointly selected by the parties that has not yet been utilized. We also have a basketball expert. This is an individual, again, someone we have never been able to agree about with the NBA. But theoretically, the basketball expert, it's less pressing because we have never had a case where we haven't been able to resolve internally. That person is charged with resolving disputes that arise out of how bonuses are treated and used for salary cap purposes. I could spend about five minutes on that in detail, but it probably is not necessary.

Finally, we have an independent physician. This is an individual who's charged in certain instances with resolving a dispute between a player and the club as to how that player was treated, and following a waiver, whether or not he is entitled to receive salary. As a result of that, is the question of whether or not the injury occurred while he was performing for the team, or the severity of the injury. Injury grievances do not arise very often in the NBA because most of our players play under a guaranteed contract. So, regardless of whether they are waived or for whatever reason they're waived, they'll continue to receive their salary for the length of the contract. It's something that I think Lisa will talk about, which happens quite frequently in the NFL and also happens in greater frequency in hockey.

That's a quick overview of the different arbitrations we have, and the different disputes that are subject to their various jurisdiction. As I said before, the commissioner also hears some matters that arise based on discipline that occurs on the court. We also have an arbitrator that we use internally on player disputes. Those are actually the cases that arise most frequently, as you can imagine. Typically, those arise out of whether or not an agent has acted properly in his treatment of the player, or whether or not there is a dispute as to the fee that is charged by the agent and/or despite as to whether or not the fees have actually been paid by the players to the agent. The arbitrator is retained solely by us. The hearings are conducted in our office and are usually fairly brief, but often times quite contentious.

PROFESSOR DAVID FEHER: Can you talk to us, for a little bit, about the practice and consequences of shifting alliances in terms of working, not just with the lead lawyers; how often and what context you're working with individual team counsel?

MR. HAL BIAGAS: I think that the case that you're probably alluding to, that is most prominent in our mind. There was a dispute a couple of years ago, with regard to Chris Dudley coming for the Knicks. That was a case where a trade had been worked out and the league — without getting too deep into it — had vetoed the trade. The Knicks greatly wanted Chris Dudley. In hindsight, most of you maybe ask why, but the Knicks at that time greatly wanted Chris Dudley, and Portland, to some extent, wanted the trade to happen. The league was adamantly opposed to the trade, so we ended up having a hearing. (When we are, ourselves, the Players' Association, we are represented by Weil Gotshal also at that hearing, it was the player, the Players'

Association, our outside counsel and the Knicks on one side of the hearing table. The league is on the other side of the table with Portland sitting on their side, but leaning both ways throughout the hearing of this matter, which actually went through the system arbitration.) We did a hearing before the system arbitrator. He ruled, and then his ruling was appealed to an appeal's panel of three attorneys, who also heard the matter, and ultimately resolved in favor of the Knicks and the Players' Association. Dudley became a Knick, for better or worse, and the league, as a result — there was a change in the collective bargaining agreement as a result of the decision in the hearing that was negotiated about a year later. That was one of the prominent issues that the league wanted to address in that hearing.

It doesn't arise very often when we aligned with the team, but it does happen occasionally. Another context that it happens in outside of the alternative dispute resolution system is when a team files for an injury grievance. You may have seen in the last couple of months, Larry Johnson, Luc Longley and Matt Geiger all retired due to injuries. And the team, in each of those instances, sought what was called an "injury exception", which allows the team to use a portion of that player's salary to go out and sign a new player. Briefly, we have a salary cap system, which purportedly limits the amount of money teams can spend. In actuality, that system is also circumvented because of the large and enormous exception that exists in the collective bargaining agreement.

One of the exceptions is an injury exception. Teams, often times, place a great value on injury exception, because it gives them an additional exception to go out and sign a player that they may not otherwise be able to afford, and therefore, it helps the team. So, there will be instances where the team seeks an injury exception. The league is disinclined to grant it for whatever reason because they feel it didn't meet their requirement as reflected in collective bargaining agreement. The team will, often times, contact us and ask us if there's anything that we can do, and we can perhaps show them some guidance from the collective bargaining agreement, the rules that they might not be aware of, that might allow them to petition the league or to bring the additional arguments in support of their position.

PROFESSOR DAVID FEHER: I'd like to ask one question. Since you are the Players' Association person here, what it's like and what do you experience in terms of interacting with the players and their agents, because quite often newspaper will portray players as stars? What's it like in real life in preparing for these arbitrations and disputes?

MR. HAL BIAGAS: For the most part, I have had fantastic experiences with virtually every player that I have had to deal with. There are a couple of players that are less than your ideal client, but for the most part, I think the media greatly exaggerates both the negative, and occasionally, the positive aspects of players. For instance, Latrell Sprewell was probably, at least in the media, portrayed as the most heinous and difficult, horrific individual in professional athletics.

MR. COONELLY: John Rocker.

MR. BIAGAS: That's true; John did come along and change that. Latrell was public enemy number one. That, I think, was mostly due to the media's attacks. Basically, that was happening against Latrell — every time you turned on the TV, there was a picture of Latrell running down the court, snarling, growling, or dunking, then staring menacingly at the camera or the crowd. Latrell is probably one of the nicest, quietest, mellow people you would ever meet. It's unbelievable how different he is than what his public perception was at that time. I think Latrell has come a long way in addressing the misperception that was out there, at least in New York. Arguably, next to Derek Jeter, he is the most beloved New York athlete. He has managed to do that. He didn't try to do that, it just happened by force of his personality. He has been extremely accessible to the media. The New York media now loves him. I remember Peter Vecsey, who literally killed Latrell every opportunity he had, he called him everything except a murderer and a scumbag. (He wrote a piece, halfway through Latrell's first season, saying how – he must have misjudged Latrell because he was nothing like the person that he thought he was). He is now one of Vescey's favorite players and one of his favorite interviewees. He was just a terrific person. We were all shocked, not the least of all Latrell. Out of all people, Peter Vecsey wanted to correct the misperception that was out there.

I tend to find that the players, their public image is often one that derives from how they're treated, and what they have to go through on a daily basis. When you're a six five or taller individual and you're playing your game on national TV, you don't wear a helmet or a hat or glasses or anything that is going to cause anybody to have difficulty to recognize you. I may have some dispute here from the other people at this table, but I believe basketball players are probably the most recognized players in the world as a whole. As a result of that, they are subject to tremendous pressures and demands all the time, can't go anywhere without being approached by fans, and often times, people who are not fans, and either ask for a autograph or ask to pose for a picture or ask to spend some time talking to their kid or being yelled at by somebody — I hate you, I can't believe you missed that jumper against the Heat last week, I lost a $1,000. I have seen this in person often times. I have never seen anything that can be compared to what Michael Jordan goes through. I have seen Michael walk into a meeting with other NBA players and owners, they all gravitate to him immediately. I can't imagine how crazy it is when he goes out, god forbid, to a mall or a movie. I don't know how a lot of these people do anything that the rest of us consider a normal activity. Because of this, they have this image of aloofness. To me, it's perfectly understandable, once you've been up close and seen what they go through on a daily basis. Typically, once they know you and trust you and recognize you're not out to get anything from them, they are as wonderful as anyone else. Moving to the other side, Lisa Lazarus comes at this from the ownership side. I'm not sure if that's equal in rock star power. But, if you could talk a little bit about what you do, and also, because the NFL, I think, has had a deserved reputation in terms of preserving and maintaining a good public reputation in all sorts of ways, but often you don't see what goes on inside that office, inside the league office. If you could talk a little bit about that in terms of maintaining what in the NFL has been publicly viewed as very good ownership relations.

MS. LISA LAZARUS: First of all, I'll just start off by saying I am Labor Relations Counsel to the NFL Management Council. The NFL Management Council represents the 32 teams of the NFL in collective bargaining with the union, and in any relationship with the union. Essentially, we are the corollary to what Hal is at the NBA. Obviously, the focus today of our conversation is arbitration. We have numerous arbitration provisions and arbitrators in our system. I will go through those a little bit, in a minute or two. But essentially, the choice of ADR over traditional litigation in sports represent to some extent the fact that we want our issues to be resolved by people who understand our sport, understand what we do and who understand what our agreement says, like Carol, who of course, is beloved in the NFL, by both sides. We want our arbitrators to read our agreements and make a decision based on what's in the agreement, what the parties negotiated, because there's what the parties hired the arbitrator to do). I think arbitrators who have departed from that concept have been the ones with difficulty staying with the league or with the sport. I will say that in the NFL we actually do have a very good relationship with the union. We have had labor peace since the 1987 strike, which is longer than any other professional sport, and there is a reason for that. The reason is that we have been able to resolve the big issues amongst ourselves.

We have a dispute resolution process in place and we frequently use it. But, I would say that we settle the vast majority of our cases. That's because there's really an understanding on the both sides about what our rules are, when our rules are violated and when they're not, and what a fair resolution is. So, I think we are deserving of the public's perception that in the NFL, we do get along. There is a good relationship between ownership and the Players Association, which is not to say that we don't have our disputes, of course we do. We frequently do at times go through the entire arbitration process to a decision, but those are the ones that you hear about. The vast majority are resolved, and not through a formal mediation process, but through a discussion process between myself or someone else who has my position in the NFL, and a Players Association attorney.

I think what I'm going to do is take a little bit of a different approach here, and just give you a sense of, from a more practical perspective, what I do and what representing a team in arbitration really entails. One thing about arbitration and sort of the quid pro quo is that, unlike big litigation, we have a huge number of arbitration cases or grievances, as we would call them, in the NFL, and we don't have the luxury of spending a tremendous amount of time on each individual case. There's economies of scale here and you've got to, obviously, devote as much time as is necessary, but we have a large number of cases to get through each season. I guess the best way to explain it is that in our system, our grievances are divided between primarily injury grievances and non-injury grievances — and the injuries are, because in the NFL player contracts are

not guaranteed. What that means is that an NFL club can terminate the contract of a NFL player for any reason whatsoever except injury.

One of the things I'd like to point out, because I think this is a misperception of the media, is that when you hear in the NFL that some player got some 50 million dollar contract, ten million a year for four years and ten million signing bonus: The only money in that package that really matters is the signing bonus money. That's the only money that's guaranteed. That player can sign a contract, go to training camp, not perform very well, and be released and not earn the rest of that salary. He could keep the signing bonus money, but nothing else as long has he adheres to all the terms of his contract. There are somewhere between 85 and 90 players who attend each club's training camp, but only 53 make it. So there is obviously significant cutdown period, there are various cutdown dates throughout the training camp, and frequently players are obviously released during training camp. Some of them believe that or in some cases may actually be injured, and consequently, they will file a grievance for their salary, notwithstanding the fact that their contract was terminated. Those cases, as Carol mentioned, they're very medically intensive. Essentially what we're arguing about is whether or not the player's shoulder subluxation or, you know, meniscal tear is healed enough by the time he was released from the team, so that he could actually play football. From a practical perspective, essentially what happens is that during the season we schedule all our cases on Tuesday because that's the players' day off. I will basically have a case scheduled for every Tuesday in the season. A few weeks before I will look through the case and I will examine all the documents. Ten days before the actual hearing, the parties exchange discovery. So basically, what we'll do is, we will give each other all the relevant documents ten days before we go through the case.

There are three attorneys that represent the players on the other side. Obviously, I know them very well, I've been doing this for a while. I call them up and we will talk about the case. This is the part that is helpful to understand; this is really where the settlement, the mediation, aspect comes into play. We will talk about the case. You know, the thing that is beneficial about this kind of system is that there's not a whole lot of fooling or posturing that you can really employ at that point in time. Because I've done a lot of these cases, they've done a ton of these cases, we basically both know what the results should be. You know, if it's situation where the club really is right, and there shouldn't be any kind of compensation, then those cases sometimes are hard to settle. On the other side, it's hard for us to settle if a player has a very strong case. But, if it's something in the middle, we can usually agree pretty quickly after a little bit of back and forth about what that middle should be. Of course, that's when I go back to the team, who is really the client in this situation here. I will say, "Here we are, this is what I think, based on my experience." Sometimes, I will say a little bit about the arbitrator, it can come into play as to how the arbitrator has ruled in the past. I will give them an assessment as to what I think would be a good resolution for the Club. Very frequently, in those situations, the Players' Association lawyer will go back to the player and tell the player the same thing.

If both parties trust their counsel, and understand the process, we can usually come to an agreement. If that doesn't happen, what basically will occur is– I will go down to the team, all of our arbitrations take place at the team facility. I'll go down to the team facility. I'll meet with all of the witnesses, usually the day before, although I'll have spoken to them on the phone before that. Usually, the only face-to-face meeting that I have with the Club about this particular arbitration is the day before the hearing. We go down, we review the testimony, we may make a couple of other attempts at settlement. Then, the Tuesday morning, 9:30, we start the hearing. The arbitrator shows up. Everyone usually has some sort of boardroom at the team facility. And again, usually at that point, that's sort of the last attempt at settlement. Frequently, cases will settle once the parties see each other.

Obviously, in injury grievances, what's interesting is that by definition, the player's contract has been terminated, so there is no ongoing relationship between the team and the player at that time. The player has been gone from the team for a while by the time the case actually reaches arbitration. So there isn't that understanding I referred to earlier, between the player and the club that we are going to have to work together down the road, so we should probably resolve our dispute on our term. And although, usually it's very amicable, and the player usually for the most part, is not all that unhappy to see the Club. But, there isn't an ongoing employment relationship. The non-injury grievances, those are our contract disputes, are where we disagree about how something in the collective bargaining agreement is worded or how it should be applied. Non-injuries also involve any kind of fine, Club-imposed fine, disputes over signing bonuses,

workout bonuses, or reporting bonuses. In those situations, the player is frequently still with the team, and that does have a different dynamic.

The last thing I will say before passing on the baton, is that we in the NFL, we also have a number of programs. As I'm sure most of you are aware, we have a substance abuse program, we have a personal conduct program, we have a steroid program. All of those programs, for the most part, are set up as treatment and are really there to help players. Actually, I'm not sure if this is widely known or not, but in the NFL drug program, it's very rare that you'll ever hear about a player's participation in the program. By the time a player is suspended it's public. He has had several violations under the program that have not been made public. So essentially, if a player has one violation or something that brings him into the program, that's confidential. Even the team doesn't know about it. They get help from psychiatrists, doctors, whatever appears to be necessary. It's only after being in the program, depending on the circumstances, that they actually become suspended or that it would become public. Any disputes under those programs go to the Commissioner for final and binding arbitration (or to his designee). Those are also arbitrations, but they are not conducted by outside arbitrators, but by the Commissioner's office.

We have five arbitrators on the non-injury panel and five on the injury panel. We currently have only four on each, with one vacancy on each panel. We actually have been mutually able to select arbitrators with the Union. We each give each other several suggestions, and we sort of strike until we are left with one or two. We also have what we call a special master, who decides free agency and salary cap disputes. That's currently Dean Fridenthal, of George Washington School of Law. Fine disputes, decided internally, are League-imposed fines decided by a League designee and the players are represented by counsel from the Players' Association and also from management counsel. So, we have a tremendous number. Also, if a Club employee has a dispute with his or her Club, like, for example, Wade Phillips, who was the coach of the Buffalo Bills last year, filed a grievance against his team for his salary, because he was released and had a guaranteed contract. Conversely, the Club was arguing he was released for insubordination that would have taken him outside of the guarantee, and that went to final and binding arbitration to the Commissioner's designee. We also have, obviously, a Referee Official Association that we have a collective bargaining agreement with. If there are grievances filed by referees, those also go to final binding arbitration. So I guess the moral of the story, there's a very wide range of topics and wide range of issues that are arbitrated in our system.

PROFESSOR DAVID FEHER: Before moving to Ed who operates in an entirely different context, I want to note that there are obviously different things going on in each of the leagues. Some of it is a product of the collective bargaining agreement, but some of it is also the product of the relationship that has just gone on over the years between the players and the owners. I will say that things were not always so rosy in the NFL. In the late 1980s, very early 90s, the relationship was very adversarial. Having been a part of the anti-trust trials that resulted in free agency, I prepared a number of witnesses. There were a lot of player management issues that were on a very low level in terms of respect. A lot of the adversarial nature– I'm not saying all of it is gone, but in terms of relationships between the players, the Players Association and the League, the NFL has moved onto a different space. The other leagues, I think have tried, from to time to time, to move into those different spaces with varying degrees of success, and the baseball owners and players are facing that challenge now. But, I at least want to give the NFL experience as the possibility of hope; where there really was nearly a fight to the death in the late 80s, where it was very, very adversarial, and it's not in that place anymore. So, to the extent that people think there's no hope. At least in some sports, Lisa and I are on opposite sides of the table at the NFL all the time, but, we're in a sense a family together. Moving onto Ed, you also have a lot of experience with the Olympics, which is a supra-national effort. It's statutory. It cuts across a lot of countries, if you can talk about your own experience.

MR. ED WILLIAMS: I'm going to stand up too, so I can see who is falling asleep, and then I'll know when to stop. I have a handout, it might help. I'm going to refer to it from time to time. If you don't have it, you might wish to get a copy from Eric. Let me take you back to 25 years ago, maybe some of you weren't born, to New Haven, Connecticut. More particularly, to Yale College. Now if you can believe it, Yale's basketball team is in the NCAA quarter-finals, hard to believe. They have this wonderful, talented — I'm over 50, so I forgot his name — six foot eight center at Yale. They're going to go to the quarter-finals in the NCAA tournament. It is also the year of the Maccabean Games. And guess what? The six-foot-eight center at Yale was invited to go

to the Maccabean Games, which are going to take place at the same time as the quarter-finals at the NCAA. He goes to his coach, it's Yale College. What do you think the coach says? He says, "Go to it, have a good time, we will miss you, but it's the Maccabean games, you're only going to get a change to do this once, go." What do you think the NCAA says? "Yale, if you let him go, we're going to put you on probation. Not only are we going to put the Yale basketball team on probation, we are going to put the entire school on probation for all sports." Guess what happened? Yale went on probation; the six-foot-eight center went to the Maccabean Games. He did superbly. And that was the genesis, one of the genesis, of the Amateur Sports Act of 1978, because Congress says, "this can't be." There was a big dispute, I won't go into details, between the NCAA and the AAU. For example, if you were competing in the AAU and the college school committee said you can't compete there, vice-versa; so, the Amateur Sports Act of 1978 was born under the sponsorship of Senator Ted Stevens of Alaska. It provides, if you have the handout, you can find it at Title 36 US Code. You can also find it at http://www.usoc.org/. What it provides for purposes of this evening, is that the Olympic Committee shall have as one of it's purposes, an obligation to protect the opportunity of an amateur athlete, (amateur' is sort of a quaint term these days) the right to participate in amateur athletic competition. Also, the Sports Act mandated that the USOC shall establish a mechanism to resolve disputes swiftly and equitably. It also provides for the various sports governing bodies, you know, each sport is governed by a sport governing body. For example, USA track and field, Olympic swimming, so on, that in order to be a member of USOC, and be a recognized sport governing body, the governing body must provide and agree to arbitrate disputes. That's why we're here tonight. So instead of having those big rulebooks, we just use the commercial rules in the Triple A, including the opportunity of an amateur athlete to participate in a particular competition, which essentially means the Olympics, Pan American Games, World Championships, other competitions of that nature. Finally, a governing body must provide "fair notice" and an opportunity for a hearing, "before" being the operative word, before declaring an athlete ineligible to compete.

Now, we are going to have the Olympics in Salt Lake City in a few months. I can just think about a number of issues that might come up. We have big security issues in Salt Lake City. We also have a lot of very talented athletes. I'm going to use the example of a summer athlete. Carl Lewis, six-time Olympian. We have an Olympic Village. Carl Lewis has been to the Olympics six times: Is he going to want to go to the Olympic Village? He is looking at four, five gold medals. Or Marian Jones, maybe he or she would like to stay in a separate and private facility. But, maybe the governing body says "Look, security is tight, we're going to make you stay in the Village." Carl Lewis, Marion Jones, or whatever hockey player says, "Look, I don't win a gold medal if I stay in the Village, I'd like to be in a private facility." And the governing body says, "We're not going to let you participate in the Olympic Games unless you stay in the Village. Is that a denial of an opportunity to compete? It could be. That's the type of dispute that's then resolved by arbitration for the Triple A. Very quickly, I want to emphasize because, there's been a lot of, litigation, a lot of arbitration, a lot of controversy about what the word "before," declaring an individual ineligible means. Now, you would think the word "before" means in front of, but as recent as 1976, the governing body was suspending athletes, I use the word "suspend," before having a hearing. And they would suspend athletes for life. The statute says "declared ineligible." Their argument was: "We're not declaring an athlete ineligible to compete, we're merely suspending them for life. So therefore, we don't have to give them a hearing before." Only a lawyer could possibly think of that. But, you know, that's the type of thing that we would litigate, as recently as five or six years ago.

What does fair notice and opportunity for a hearing mean? Now, you can go to your library, you can go to your bookshelves. You will not find a book that says — you can't pull a book off the shelf that says — you can go to the 14th Amendment, I suppose, and see how the courts have interpreted the due process clause of the 14th Amendment. But, for purposes of the Sports Act, it's not the 14th Amendment. It's statutory. You would have to look at how the Olympic Committee has interpreted it. In my neat handout, you will find a due process checklist. I won't go through it here, but I urge you to just go through it. It's a very nice, very basic, elementary list of due process items that the US Olympic Committee has now mandated that national governing bodies provide when they provide a hearing. For example, the right to have a hearing conducted at such a time and place as to make it practicable for the athlete to attend; that is the Tonya Harding provision. The governing body of figure skating said, "We will give you a hearing, Tanya, we know you live in Oregon, by the way, the hearing is going to be in Lillihammer, Norway in two days." That didn't make it. But over a period of time, this due process checklist has been developed and it's quite good.

The other one I'm going to refer to is the burden of proof. The burden of proof is on the proponent of the charge. The standard will be a preponderance of the evidence, at a minimum, unless the governing bodies provide for a higher standard. For example, beyond a reasonable doubt. This one case that I referred to, where the athlete was suspended, it was overturned by an arbitrator who now sits on the Fourth Circuit Court of Appeals. Very high quality arbitrators come out of the Triple A. For example, this Ronald Lee Gilman. — In that case, the governing body, in its' hearing, placed the burden on the athlete to show why there was no reason out there, why he didn't test positive. Obviously, it's an impossible burden. The arbitrator reversed that and sent it back and said you have to have a fair hearing.

I have given you here in the handout, and you can refer to in the USOC website, the USOC "Constitution," in which the applicable provision is Article 9. Article 9 provides the specifics as to the mechanics of how to go to the Triple A, its commercial rules. You can read it yourself, if you're interested. You apply to any regional office. The fees are written in the commercial rules. They're minimal, relatively minimal for the high stakes that are involved. The one thing I'm going to point out to you specifically is in Section 5 of Article 9 of the USOC Constitution. Field of play decisions are not arbitable. If a wrestling referee says you're counted out at three counts or the person is safe or out at first base, those are not arbitable. There was some controversy for a period of time how far the Act would extend, but the USOC has clarified that recently and field of play decisions are no longer arbitable. You may recall the wrestling dispute in the last Olympics in Sydney. There was a great controversy over who won and whether the referee was right or wrong. It did go to arbitration, unfortunately, and the USOC has now tightened its rules to take those types of decisions and make them non-arbitable. That's an overview.

PROFESSOR DAVID FEHER: Before we go to the questions from the audience, I have one question, which is on a global basis. Do you think it's getting better in terms of transparency of due process or not?

MR. ED WILLIAMS: It's getting better because the governing bodies are getting smarter. They understand that there are people like me that are going to go to arbitration, unless they shape up and follow due process, and have published trial procedures, published twelve months in advance. Happily, I'm happy to say: I have been retained by two governing bodies to help them comply with the Sports Act. There's more money in management than on the athletes' side. But, yes, I do think it's getting better. I think the number of disputes have lessened. I think the Olympic Commission has done a remarkable job in educating the governing bodies, particularly through the due process checklist, and mandating that trial procedures must be published in advance, twelve months prior to the tryouts. Can you imagine? Back when I competed, you showed up for the tryouts and when you got to the tryouts, you were told what the competition would be. You wouldn't know in advance. Sometimes there would be something called a "selection committee." You would do all the races and then the selection committee would decide who won. Well, things have changed.

PROFESSOR FEHER: What I'd like to do is turn this over to the audience for any questions and also panelists who want to ask each other questions.

(Whereupon, there was a question and answer period.)

PROFESSOR FEHER: It is running late, I want to thank you all for coming.

(Time noted: 8:00 p.m.)