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THE USE OF MEDIATION FOR RESOLVING
SALARY DISPUTES IN SPORTS

*Peter B. Kupelian*¹

*Brian R. Salliotte*²

I. INTRODUCTION

A. History of Alternative Dispute Resolution in Sports

Alternative dispute resolution, specifically arbitration, has been inextricably connected with professional sports in recent years.³ In fact, the arbitration terms "baseball" and "night baseball" are used to describe common types of arbitration which were originally derived from procedures used to resolve labor arbitration disputes in the sport.⁴ "Baseball" arbitration involves an arbitrator choosing either one or the other of a specific settlement proposal of a party without the ability to compromise or select aspects of each parties' proposal.⁵ "Night baseball"

¹Peter B. Kupelian is an attorney with the Southfield, Michigan law firm of Kupelian Ormond & Magy, P.C. He specializes in commercial litigation, including employment and insurance coverage, and also has had substantial experience in representing athletes in contract negotiations, endorsements and agent disputes. Mr. Kupelian has served as a mediator in excess of 100 cases for the American Arbitration Association, National Association of Securities Dealers, Michigan Court of Appeals, and various other courts in Michigan.

²Brian Salliotte is an administrator with the Southfield, Michigan regional office of the American Arbitration Association. He has supervised the administration of employment arbitrations, mediations, and commercial disputes. After being drafted into the National Hockey League at age 18, and playing internationally for two years, Mr. Salliotte completed both a B.S. in Political Science and Public Administration from Wayne State University, and an M.B.A. from the University of Detroit-Mercy. The views expressed by Mr. Salliotte are not necessarily those of the American Arbitration Association.

³See Costa Tsiokas, *Independence Days*, ST. PETERSBURG TIMES, Aug. 14, 1998, at 7C, available in 1998 WL 4280000 (summarizing the impact of arbitration rulings on baseball free agency in the 1970's Catfish Hunter and Andy Messersmith-Dave McNally matters).

⁴See *id.*

⁵See 40-MAY RES GESTAE 18; 23 (1997) (stating that in "baseball" the parties select two monetary figures, and the arbitrator is required to select one of them).

arbitration is a similar concept involving an arbitrator drafting a proposed settlement, and selecting the specific party offer which comes closest to that proposal.⁶

By way of further example, the face of baseball, not to mention the rest of professional sports, was altered significantly through the "Messersmith-McNally" arbitration decision following a 1975 hearing.⁷ In his decision, Arbitrator Kevin Seitz ruled in favor of the two pitchers by ending the long reign of the reserve system, and beginning free agency.⁸ This followed years of failed attempts through the civil court system by players challenging the reserve clause and attempting to bring about some form of free agency.⁹

B. Basics of Mediation

Mediation is a form of alternative dispute resolution in which an impartial third party-- a mediator-- facilitates the resolution of a dispute by promoting voluntary agreement by the parties to this dispute.¹⁰ This

⁶See *id.* (contrasting "night" baseball, where the arbitrator does not know the parties' offers when preparing the proposed settlement, with "day" baseball, where the arbitrator is advised of the two figures).

⁷See Tracy Ringolsby, *Two '75 Challenges Unlocked Free Agency*, THE DALLAS MORNING NEWS, Jan. 11, 1987, at 20B, available in 1987 WL 4589507 (highlighting the sacrificial efforts of Andy Messersmith and Dave McNally in challenging baseball's reserve clause).

⁸See Ringolsby, *supra* note 7, at 20B (summarizing the role of Peter Seitz in ruling favorably for Messersmith and McNally in arbitration). See generally *id.* ("The reserve clause was introduced in the fall of 1879 when Arthur Soden, who owned the Boston franchise in the National League, got owners to agree to reserve the rights of five players for only one year.")

⁹See Howard Cosell, *Flood's fight with baseball cost him much, but not his nobility*, STAR-TRIBUNE (MINNEAPOLIS-ST. PAUL), July 17, 1986, at O2D, available in 1986 WL 4787337 (describing the plight of former major league baseball player Curt Flood, and his failed legal challenge of the reserve clause, which went all the way to the United States Supreme Court in 1972). See also *Flood v. Kuhn*, 407 U.S. 258 (1972) (providing the Supreme Court's opinion, which ruled against Curt Flood).

¹⁰See Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 711 (Winter 1994) (noting the importance of the mediator assisting the parties in reaching a voluntarily settlement by themselves).

process is known as "self-determination."¹¹ A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement.¹²

While it is difficult to refute the logic of applying principals of mediation to salary disputes in sports, the major sports leagues in the United States have failed to adopt any form of mediation, voluntary or otherwise. One could postulate as to the many barriers to bringing such a concept to fruition. These include the existence of collective bargaining agreements and delicate union relationships, fear of owners giving up additional control, lack of understanding, and the sheer mystery of what infusion of such process would mean. The purpose of this article, however, is to emphasize the wisdom of mediation in sports and to focus on the unique fit between mediation and sports, especially as related to salary disputes.

II. MEDIATION IN SPORTS DISPUTES

A. Why Mediation is Well-Suited for Sports

Certain unique characteristics of mediation provide remedies for many of the problems plaguing players and management in today's market. Mediation offers a speedy, cost effective means of resolving any type of dispute.¹³ Its confidential nature would promote open communication between the parties, which would preserve, if not enhance,

¹¹See *id.* at 711.

¹²See *id.* at 711-12 (listing some of the mediator's goals as keeping the parties well-informed, narrowing the issues, delineating each parties' rights and needs, and bargaining creatively).

¹³See Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 282 (Oct. 1982) (stating this result would be achieved through same-day advisory decisions, as well as, the eliminated legal costs for transcripts, filing fees, decision writing, and possibly even attorney fees).

their working relationships.¹⁴

Mediation typically has a success rate which alone makes it a worthwhile endeavor.¹⁵ The American Arbitration Association, for example, boasts greater than 80% settlement rates for all cases that participate in its mediation program.¹⁶ Considering the millions of dollars at stake if settlements are not reached quickly, common sense dictates a closer look at what many have already found to be the alternative dispute resolution mechanism of choice.¹⁷

For, example, the recent stalemate between Detroit Red Wings star Sergei Federov and the team's management vividly demonstrates this point. In the beginning of the 1997-98 season, Federov demanded a raise in his salary to bring him "in the neighborhood of \$6- million [sic]" per season.¹⁸ The parties' failure to reach an agreement eventually hurt everyone involved: Federov, the Red Wings, and the National Hockey League.

Though the parties were in "negotiations," no early settlement was reached. Federov ultimately ended up missing 54 regular season games, 12 games more than half the season.¹⁹ Federov stayed active by practicing

¹⁴See Robert A. Baruch Bush, "What Do We Need A Mediator For?": *Mediation's "Value-Added" For Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 36 (1996) (noting that mediation enhanced the quality of decision making by the parties, interparty communication, and the resulting outcomes).

¹⁵See Goldberg, *supra* note 13, at 290-91 (providing data indicating that mediation success rates range from 71 to 88 percent). See also *infra* note 47 and accompanying text.

¹⁶See ROBERT COULSON, BUSINESS ARBITRATION-- WHAT YOU NEED TO KNOW 13 (4th ed. 1991) (stating that more than 80% of mediation disputes are settled).

¹⁷See Tim Kawakami, *NBA Is Facing Hard Labor Pro Basketball: After 35,001 Games Without A Cancellation, League Follows Path Of NFL, NHL, And Baseball With Interrupted Regular Season*, LOS ANGELES TIMES, October 14, 1998, at D1, available in 1998 WL 18883381 (quoting the NBA's deputy commissioner's estimate that one-twelfth of the regular season games lost equates to lost player salaries of \$85,000,000).

¹⁸Gary Joyce, *Red Wings' Federov Tries to Play Both Ways*, ST. LOUIS POST-DISPATCH, Jan. 24, 1998, at 14, available in 1998 WL 3315550 ("That price, originally in the neighborhood of \$6-million a season across a long-term contract, has climbed in the wake of the big-money deals inked by Paul Kariya and Eric Lindros.").

¹⁹See Kevin Allen, *Money Player Detroit's Federov Finds Happiness And \$38 Million*, USA TODAY, May 12, 1998, at 1C.

with the Plymouth Whalers, the Junior A affiliate of the Carolina Hurricanes.²⁰ Federov's practice sessions were a nightly fixture on most of the local sportscasts in the Detroit area, causing concern for the thousands, if not hundreds of thousands of Red Wings fans across the state and the country. While the news coverage may have helped the local sportscasts during sweeps month, nothing was really being accomplished to settle the hold-out.

Rumors were abound about the ultimate fate of arguably the most talented Red Wing and an elite among his NHL peers. Was Federov going to be traded? If a trade does happen, what will the Red Wings get in return? Are the Red Wings working out a deal with the Hurricanes? The questions filled many nights of talk radio and sports television. Fans' and media's predictions on the ultimate resolution of the hold out changed from week to week. However, during all of the attention, the fan support for Federov was diminishing rapidly.

During the Olympic break in February of this year, while Federov was showcasing his talents for the world in Nagano, Japan, and a trade embargo was in place throughout the NHL, the Carolina Hurricanes signed Federov to an offer sheet worth \$38 million over six years.²¹ Carolina had structured the deal to pay Federov \$28 million in the first year with incentives and salary.²² The front-heavy structure of the contract was no doubt designed to lessen the Wings desire to match the offer. Ultimately, facing the prospect of receiving five draft choices from one of the worst teams in the league in return for a former Hart and Selke

²⁰See Joyce, *supra* note 18, at 14 (stating that Federov practiced with the Plymouth Whalers).

²¹See Allen, *supra* note 19, at 1C. See also Jeff Williams, *Wings Are in a Bind*, NEWSDAY, Feb. 22, 1998, at C11, available in 1998 WL 2659767 (describing the offer sheet to include an immediate \$14 million bonus, \$2 million dollars for each of the six seasons, and a possible \$12 million bonus to Federov if the team reached the conference finals of the Stanley Cup playoffs).

²²See Williams, *supra* note 21, at C11 (comparing the Carolina Hurricanes \$12 million conference final reaching bonus to Federov to a "poison pill" since the then-third place Detroit Red Wings would have a very good chance of making the conference finals, whereas Carolina was in 10th place at the time).

trophy winner²³ did not appeal to Red Wings management, and the Red Wings did not hesitate to match the offer; Federov once again donned the "winged wheel" logo of the team.²⁴

The final outcome of the Federov deal was mixed. Because the Detroit Red Wings prevailed in their run for a second Stanley Cup, team management was forced to part with \$28 million to Federov within four months.²⁵ During his negotiations, Federov and his agent were often quoted in the newspapers with various comments to strengthen his bargaining position. Similarly, the Red Wings used the media to place the blame for the hold out away from the franchise. A preferable method to resolving such a dispute would avoid this hostile atmosphere, and media attention, concentrating instead on the negotiations.

Obviously, if an early settlement had been reached, Federov could have offered his services throughout the entire season and the financial blow to the Red Wings' management could have been lessened. Nevertheless, hindsight tells us that the Red Wings were still able to successfully defend their Stanley Cup Championship.²⁶ What if the Red Wings, however, had missed the playoffs by just a few games because of Federov's absence?²⁷ His presence for the remainder of the season and during the playoffs is undeniable.²⁸ In the final analysis, Federov got the money he was seeking. It seems plausible that better negotiation procedures could have enabled a deal allowing the Red Wings more time to stagger his salary, avoiding both the "poison pill" and the missed games. Perhaps mediation could have prevented this "no-win" situation

²³See *Wings Not Breaking Out Bubbly Yet*, STAR-TRIBUNE (MINNEAPOLIS-ST. PAUL), Apr. 16, 1996, at 10C, available in 1996 WL 6909411 (noting that Federov won both the Hart and Selke trophies in the 1993-94 season, meaning he was both the league's most valuable player and best defensive forward).

²⁴See Allen, *supra* note 19, at 1C ("The Red Wings' no-hesitation decision to match might've been as important to his psyche as it was to his bank account.")

²⁵See *Wings Tumultuous Run Mirrors NHL's Changes*, SAN ANTONIO EXPRESS-NEWS, June 18, 1998, at 08D, available in 1998 WL 5097050 (stating that the Detroit Red Wings won the Stanley Cup again in 1998).

²⁶See *id.*

²⁷See Allen, *supra* note 19, at 1C (stating the difficulty in speculating how successful the Red Wings would have been without Federov).

²⁸See *id.* (noting that Federov's line-- Federov, Slava Kozlov, and Tomas Holmstrom-- was Detroit's "best" during the playoffs).

for the Red Wings.

Fans of every major sports league in the United States cannot ignore the obvious eroding trust between players and management this decade. A neutral third party, one who is trained in various mediation techniques, would reduce this distrust, and assist the parties in reaching a speedy settlement. Preserving the constructive communication that is so vital to successful negotiations could be enhanced by a disinterested mediator who has no business or personal agenda in the dispute. In fact, resolving a situation expeditiously is the benchmark of mediation. It would enable the Sergei Federovs to focus more on their game performances, and free management to concentrate on the business and marketing aspects. Settling labor disputes without the rhetoric and black hole of "negotiations" that accompanies hold outs should be the number one priority of every league.

B. *Mechanics of Mediation*

Generally, in a dispute between any parties, including employment related disputes, the parties can submit their dispute to non-binding mediation.²⁹ Filed with an administrative agency like the American Arbitration Association, the parties will be appointed a mediator by the agency and will then schedule a mediation date.³⁰ Prior to the hearing, the parties and mediator sign a confidentiality agreement ensuring that the content of the negotiations, and hopefully settlement, remain between the parties.³¹

Many employers, union and non-union, utilize mediation today as a way of resolving their disputes prior to binding arbitration or litigation.³²

²⁹See COULSON, *supra* note 16, at 16-18 (noting that although parties to a contract may have arbitration or mediation clauses placed within the original contract, any two parties may elect to arbitrate their dispute).

³⁰See *id.* at 18, 138 (listing commercial litigation rules which specify that the mediator shall fix the time and date of the mediation sessions).

³¹See *id.* at 139 (providing the Commercial Mediation Rules which binds the parties to strict confidentiality requirements where applicable, unless modified by agreement).

³²See *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups*, WALL ST. J., June 20, 1997, at B2 (stating that hundreds of companies have mandates that workers sign arbitration agreements since 1991).

Today, millions of workers across the country have agreed to have their disputes mediated, arbitrated, or both.³³ Sports franchises can employ the same tactics as many of the leaders in industry have regarding dispute resolution. In fact, if mediation was an agreed upon method of alternative dispute resolution within the National Hockey League Players Association's collective bargaining agreement, there is no reason why the same positive results cannot be reached.

III. SPECIFIC REASONS WHY MEDIATION IS ESPECIALLY SUITED FOR SPORTS

A. *Unique Public Relations Concerns*

While public relations and overall consumer attitudes are important in any industry, success of sports leagues and teams appear to be especially dependent on public reaction. A professional sport league's inability to gauge the reaction of its supporting public can lead to a spiraling negative effect and must be reversed as early as possible to stop irreparable harm and loss of public interest and confidence. While sports are usually slow in reacting to such public outcries for a variety of complex reasons, the phenomenon of damage caused is easy to document. For example, Major League Baseball's refusal to address various issues, such as length of game and overall lack of interest to some demographic groups, has caused both a missed opportunity to increase its market share, and perhaps even a decline in overall fan interest.

Similarly, the National Basketball Association has been hurt by escalating salaries, frequency of long-term contracts over \$100 million, increasing numbers of draft choices from high schools, battles between star players and the law and public displays of embarrassing conduct. All of these well-documented phenomena are chipping away at the once lofty position of the NBA as a marketing flagship in sports, both in the United States and internationally.

Although individual salary disputes are only part of the puzzle, long and drawn out public negotiations with unreasonable positioning by

³³See *id.* ("The association estimates that more than 3.5 million employees are covered by agreements designating it to administer arbitration proceedings.").

owners, players, and agents through the media impacts negatively on overall public perception. One only needs to listen briefly to any sports radio show to hear complaints about "greedy college age athletes" who make much more than they should, but are still refusing to play for less than a \$100 million contract.

Mediation would offer hope that such disputes could be resolved at an earlier stage with much less public displays of greed and pettiness. Even though mediations may not resolve salary disputes immediately, ground rules could be set for confidentiality during the course of mediations which may be conducted during multiple sessions over a period of time.³⁴ It may be, for example, that even though the mediation process may not resolve the salary issues, certain other agreements may be reached to ensure confidentiality and avoid public statements. As such, the negative public reaction that follows public commentary on professional sports league disputes would be avoided.

B. *Preservation of Working Relationships*

Although working relationships are important in all businesses, bitter negotiations in sports disputes involving the performance of an individual player, such as basketball, can lead to unique problems. This is especially true when the general manager conducting the negotiations also has a role as a coach. Team ownership has a definite interest in the player maintaining his confidence and not hearing comments during negotiations about his weaknesses which are intended solely to deflate the agent's perceived value of his client.

During the mediation process, an experienced mediator can make sure that these goals are implemented through the use of "private caucuses."³⁵ A private caucus occurs when "the mediator talks with each

³⁴See COULSON, *supra* note 16, at 138-39 (noting that the parties shall maintain confidentiality when mediating under the American Arbitration Association's Commercial Mediation Rules). See also DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* § 4.3 99 (1996) (stating that the typical confidentiality provision prevents the disclosure of matters discussed during the mediation process).

³⁵GOLANN, *supra* note 34, at 68.

party and its lawyer confidentially, away from the other participants."³⁶ Usually, these private caucuses will go back and forth until the separated parties can reach an agreement, or "shuttle diplomacy."³⁷ For example, this would permit the mediator to soften the general manager's tone in criticizing the player, and prevent the player hearing such negative commentary directly. Even where joint mediations sessions become emotional, a skilled mediator can monitor the exchanges, maintain civility in the negotiation process, and promote a better working relationship once the agreement is reached.

C. Time Sensitivity and Flexibility of Mediation

Mediation can be altered to meet the timing needs of the parties.³⁸ In fact, a mediation system could be put into place for pre-selection of a mediator, which would create a very quick time frame to allow mediations to take place as needed.³⁹ Many large employers in the United States have initiated similar mediation programs, and even allow the process to take place while employees are still at work and on the clock.⁴⁰ Mediators are even prepared to act during odd hours if that is when disputes are best resolved to assure that problems do not escalate.⁴¹

Mediation also allows flexibility in a variety of other areas, such as allowing privacy to the parties through private caucuses to allow the

³⁶*Id.*

³⁷*Id.* (defining shuttle diplomacy as the repeated use of alternating private caucuses to facilitate a resolution).

³⁸*See* Goldberg, *supra* note 13, at 282 (noting that substantial mediation time could be saved by selecting a mediator in advance).

³⁹*See id.* ("In addition, the parties could schedule mediation on a regular basis, with a mediator selected in advance.")

⁴⁰*See id.* (stating that parties with multiple grievances could benefit further by arranging for a mediator to consider more than one grievance per day, thereby saving additional time and money).

⁴¹*See* Moberly, *supra* note 10, at 709 (stating that mediators are under a general duty to complete the mediation in a timely manner, even to the extent that the mediator's schedule must be rearranged to avoid excessive delays). *But see id.* (cautioning that the mediator must not coerce a settlement or conclusion to facilitate a timely resolution).

mediator to fashion a potential resolution.⁴² As a typical ground rule of mediation, although these vary greatly, a mediator can listen to concerns and issues raised by one party and agree not to divulge any such sensitive information until clearance is received from that party.⁴³ This process could be particularly useful for sensitive financial information about a team or player, health problems of a player, potential transactions, and similar information.⁴⁴ Unless all such information is available to the mediator, he or she cannot propose resolution that fulfills the actual goals, needs, and desires of both the team and player.⁴⁵ Such process and creativity is not possible in a professional sport's dispute when the general manager and player agent are placed in a room or conduct negotiations by phone without the assistance of a neutral third party.

D. Neutral Environment/ Neutral Third Party

Mediators are trained to bring about a resolution by providing an environment of neutrality.⁴⁶ In fact, neutral mediators have experienced significant success in matters involving multiple parties and issues more difficult to grasp than the basic issue of the continued employment of an athlete with a team.⁴⁷ Even disregarding such success rates, the mere infusion of a neutral person into the formula can be all it takes to make a

⁴²*See supra* notes 35-37 and accompanying text (discussing private caucuses, and their relevance to dispute resolution where sensitive athlete performance information must be considered).

⁴³*See id.*

⁴⁴*See id.*

⁴⁵*See id.*

⁴⁶*See* Goldberg, *supra* note 13, at 712 ("A mediator must be impartial, which is defined as freedom from favoritism in word, action, and appearance.")

⁴⁷*See* Tom Arnold, *Why Is ADR the Answer?*, THE COMPUTER LAWYER, July 1998, at 13, 17 (describing the author's personal mediation experiences involving patent infringement, which offered potential savings of nearly 90% of litigation costs, despite the complexity of the subject matter). *See also* Goldberg, *supra* note 13, at 290-91 (providing data indicating that mediation success rates from 71-88% have been reported, and an astounding success rate of 100% for B.F. Goodrich during one implementation period).

difference in resolving such a dispute.⁴⁸

Furthermore, it is common for experienced general managers and agents to have a history in negotiating with each other, and where negative, they might bring this excess baggage with them to the negotiations.⁴⁹ Mediators, however, are trained to deal with the issues, and not the personalities.⁵⁰ For example, they may spend a significant amount of time in private caucuses to prevent deterioration of the negotiations.⁵¹

Similarly, the neutral mediator will take charge in scheduling mediations and assuring that the parties are brought together initially, and follow-up with written or telephonic communications where appropriate.⁵² They will also facilitate communications and assure that the parties are talking,⁵³ which is usually one of the major impediments to resolving disputes.⁵³ Typically, an agent will be representing several other athletes, and the general manager will have many issues and problems to deal with on a daily basis. As such, the neutral mediator can assist in keeping the parties focused in on their dispute by preventing procrastination.⁵⁴

⁴⁸See GOLANN, *supra* note 34, at 28-29 (emphasizing that the perception of neutrality facilitates resolution based on the complex psychologies associated with adversaries within a dispute, and the mediator's ability to make suggestions that will not damage either party's position).

⁴⁹See Moberly, *supra* note 10, at 711 ("This includes not only the obvious, quickly resolved issues, but also an inquiry into the areas that may have precipitated the conflict.").

⁵⁰See *id.* (emphasizing that mediators are experienced at solving the real disputes between parties).

⁵¹See *supra* notes 35-37 and accompanying text (discussing the use of private caucuses to assuage personality conflicts and prevent the deterioration of the future working environment).

⁵²See GOLANN, *supra* note 34, at 44 (advising mediators to schedule the initial block of time, and to be flexible with scheduling future meetings).

⁵³See *id.* at 43 (suggesting that once a mediator has the attention of both parties focused on the dispute, settlement is likely to result).

⁵⁴See *id.* (noting the importance of the mediator in dealing with the parties natural tendency to procrastinate resolution of the dispute).

E. Ability to Retain or Get Back Control

Not surprisingly, when problems arise or communications break down, it can be difficult to get the matter back under control. Mediation, however, offers the parties a set mechanism for getting back together and taking control of the problem.⁵⁵ Depending on the nature of the mediation utilized, the parties will have the right and ability to control the following: (1) the identity of the mediator; (2) timing and scheduling of the sessions; (3) the nature of discussions; and (4) confidentiality of the sessions and related negotiations.⁵⁶

When negotiations have broken down or stalled, as with the Federov dispute, getting the control back can be difficult to accomplish, and the parties are strategically reluctant to make the next contact, preventing the resumption of discussions.⁵⁷ Because a mediator is a neutral party and is trained to deal with these types of situations, the mediator can help break through these "stalemates."⁵⁸

F. The Amount at Stake

In light of the escalating salary levels of athletes, mediation remains a relatively cheap first step at attempting to resolve a dispute that may potentially reach tens of millions of dollars.⁵⁹ A mediator's pay can be analogized to the fee for visiting of psychiatrist, or perhaps preventive investments in a tangible good. If there is a significant danger of needing

⁵⁵See *supra* notes 52-54 and accompanying text (discussing the role of the neutral mediator in administering the sessions, especially as related to avoiding procrastination). See also GOLANN, *supra* note 34, at 26-27 (discussing the role of the mediator in maintaining control over the agenda).

⁵⁶See GOLANN, *supra* note 34, at 98-99 (listing possible aspects of the mediation that could or should be included within the initial mediation agreement). For example, the mediation agreement may control additional aspects of the mediation, such as the "role of the parties," exchanges of data, fees, and termination. *Id.*

⁵⁷See *id.* at 41-44 (discussing the role of procrastination as an obstacle to reaching a timely settlement, and the mediator's beneficial role is eliminating this obstacle).

⁵⁸See *id.*

⁵⁹See Arnold, *supra* note 47, at 17 (highlighting examples of the author's use of mediation to resolve disputes for 10-20% of what it would cost to litigate).

to be institutionalized, it would make sense that an individual first seek the assistance of a professional who can prevent being institutionalized, even though the hourly rate may seem somewhat high. Similarly, the protracted negotiations with the attendant public attention, disruption with other team members, etc. can be compared to being institutionalized and it is difficult to see the downside of attempting resolution prior to going to that drastic next step.

G. Identification of Key Issues

Obviously, some mediations will not directly or immediately lead to a resolution.⁶⁰ Even with such mediations, experience shows that the process, when properly conducted, leads to the identification of key issues that may, in turn, lead to resolution sometime in the near future.⁶¹ Communication and open discussion of issues is absolutely essential to a resolution and may lead to a better working relationship.⁶² Alternatively, it may allow a team and player to more expeditiously conclude that the working relationship should not continue, and that it is better for both to agree to a trade or other player transaction.

IV. WHO SHOULD SERVE AS MEDIATORS?

A. Selection Process

Appointment of a mediator can be a hotly contested issue in mediation. However, if players and management agree to the use of a neutral agency⁶³ to handle administration of the case, the difficulty can be

⁶⁰See Goldberg, *supra* note 13, at 291 (estimating a settlement rate in excess of 70% based on the accumulated evidence).

⁶¹See generally GOLANN, *supra* note 34, at 48-57 (discussing the mediator's role in monitoring the progress of the negotiations, including the identification of hidden issues which are preventing progress).

⁶²See *id.* at 41-44 (emphasizing the importance of communication to the ultimate resolution of the dispute).

⁶³See COULSON, *supra* note 16, at 134 (stating that the American Arbitration Association maintains a list of mediators who are trained for a variety of business negotiations).

minimized. As with a mediation in the corporate world, the agency could administratively appoint a mediator from a list of mediators that have been approved by the players and management.⁶⁴ Upon receipt of the parties' stipulation to mediate, the agency could obtain a date from the parties in which mediation is feasible and appoint a mediator who can accommodate the parties.⁶⁵ Nevertheless, the most important achievement would be that the parties have agreed to try to settle their dispute through a method that has a proven track record of success.⁶⁶

B. Qualifications

Getting the parties to mediate their dispute is the biggest hurdle, although as a voluntary undertaking "neither party has much to lose by entering into such discussions."⁶⁷ Although the parties have the final word on who serves as mediator, the individuals chosen should have more than a cursory understanding of sports law and facilitation techniques, as well as how the two could successfully intertwine.⁶⁸ Similarly, the mediator needs to be versed in sports law and particularly versed in the idiosyncrasies of the sport he or she will serve.⁶⁹ As such, the mediator of a sports dispute should have knowledge of the player market since an understanding of the true worth of the product can only aid in the facilitation process. In the Federov situation, Federov was paid what the market concluded he was worth, demonstrating that management's appraisal of player value may not always be accurate. Necessarily, the mediator with an independent knowledge of player values is better able to determine which party, if any, is taking an unreasonable stance.

The quagmire that is called free agency, however, is not easily

⁶⁴See *id.* ("In general, it is sensible for the parties to select a mediator who is familiar with the issues involved in their dispute.")

⁶⁵See *id.*

⁶⁶See *supra* note 60 and accompanying text (noting mediations success rate is in excess of 70%).

⁶⁷COULSON, *supra* note 16, at 134.

⁶⁸See *id.* See also GOLANN, *supra* note 34, at 36 (noting that a mediator's lack of subject matter knowledge can be an irreparable obstacle to the success of mediation, which has led to mediation specialists within subject matters).

⁶⁹See COULSON, *supra* note 16, at 134. See also GOLANN, *supra* note 34, at 36.

understood by the vast majority. The various contingencies that can occur during free agency should be addressed by both parties, of course with the help of a mediator, to completely understand the current situation. Was the impending Olympic break and subsequent trade embargo fully considered in the Federov situation? The Hurricanes played a trump card during the break that could have cost the Red Wings a franchise player.

Since all major sports leagues are covered by Collective Bargaining Agreements,⁷⁰ mediators must also have a basic understanding of labor laws and the intricacies of labor and management relations. Lack of knowledge of these types could lead to immediate loss of credibility for the mediator in the eyes of both management and the player, which is the death knell to a successful mediation.⁷¹

In today's environment of professional sports, the mediator needs to understand the personalities of the players and the concerns of the owners when working towards a settlement. Typically, it is the above average player who will want to negotiate his contract. Players have egos; some large, some very tender. Small market teams might not be able to pay the kind of salary demanded by a star player. Through creative accounting avenues explored together with a mediator, however, perhaps the small market team may be able to keep its superstar and the player can make the amount of money that he is worth.

Although the logical conclusion from the criteria previously articulated makes attorneys seem like the logical choice for mediators, the

⁷⁰See Amy Rosewater, *Larocque has drive to return*, THE PLAIN DEALER, December 23, 1998, at 2D available in 1998 WL 4170124 (referring to the National Hockey League's Collective Bargaining Agreement). See also Seamus McGraw, *Giants Player Arrested on Drug Charge Stopped For Speeding On GWB*, THE RECORD, November 24, 1998, at L03, available in 1998 WL 5825446 (referring to the National Football League's Collective Bargaining Agreement); Michael A. Lutz, *Clemens Drops Trade Demand, Rips Astros*, THE COLUMBIAN, December 23, 1998, at D5, available in 1998 WL 23231014 (referring to Major League Baseball's Collective Bargaining Agreement); and Mike Wise, *Basketball Notebook: In Bow To Reality*, NBA Allows Talks With Agents, NEW YORK TIMES NEWS SERVICE, January 9, 1999, available in 1999 WL-NYT 9900901401 (referring to the recently negotiated National Basketball Association Collective Bargaining Agreement).

⁷¹See *supra* notes 68-69 and accompanying text (highlighting the importance of the mediator's competency in the dispute's subject matter).

players and management might be served just as well by a non-attorney.⁷² Certainly attorneys will have knowledge of the many legal facets of collective bargaining, contracts, and sports law. The code of professional conduct which binds attorneys to a code of ethics and confidentiality is a selling point for the profession by itself.⁷³ Perhaps the most significant characteristic of an attorney's background that uniquely qualifies them as mediators is that they work on facilitation techniques virtually every day. All of the knowledge in the world will not make a successful mediator if the mediator cannot work towards a settlement. Since the techniques of facilitation are not unique to the legal profession, it makes sense to offer the parties as many options as possible. As long as the mediator is respected by all parties involved and has a sound understanding of the necessary elements of the situation at hand, a mutually beneficial settlement can be reached.

For sports, especially hockey, which seems to be enjoying increased fan base around the country as well as around the world, settling the disputes that turn fans off the sport is paramount. Markets are fickle. Foreign markets are even more challenging. Mediation is about settlement and options. Settling these costly holdouts should be the goal of the players and the league alike. In some case, it could be the biggest goal scored all season.

V. CONCLUSION

The history of sports disputes and their negative effect on fans and team morale vividly demonstrates the need to adopt a speedy and cost effective resolution technique, such as mediation. Mediation is the perfect remedy for sports disputes because it provides a forum for open

⁷²See Moberly, *supra* note 10, at 707 (stating that persons from professions other than attorneys, such as social workers and psychologists, serve as mediators).

⁷³ See generally CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, (2nd ed. 1992) (providing a comprehensive and annotated description of each of the ethical rules which attorneys must abide by to remain in good standing).

communication which is currently missing in many sports negotiations.⁷⁴ It gives both parties a sense of confidentiality which can be used to strengthen their working relationship.⁷⁵ The neutral environment that accompanies mediation has proven to be very helpful in resolving disputes, as well.⁷⁶ In short, the ease and flexibility of the mediation process, the unique qualities of trained mediators and the high success rate of mediation in the past proves that mediation is the perfect answer for resolving various disputes in sports. The adoption of this technique would be financially and emotionally rewarding to everyone involved.

⁷⁴See *supra* notes 52-54 and accompanying text (explaining the role of communication in resolving disputes).

⁷⁵See *supra* notes 34-37 and accompanying text (discussing the role of confidentiality, and its impact on maximizing the potential for preserving the future working relationship).

⁷⁶See *supra* notes 46-54 and accompanying text (explaining the importance of injecting a neutral party into a dispute, even where the subject matter is complex).