Chapter 6

HOT TOPICS IN SPORTS ARBITRATION

Introduction: Jacquelin F. Drucker, NAA Member, New York, New York

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Panelists: Jeffrey L. Kessler, Dewey Ballantine LLP, Outside Counsel to the NFLPA, New York, New York

Daniel L. Nash, Akin Gump Strauss Hauer & Feld LLP, Washington, DC

Michael S. Weiner, General Counsel, Major League Baseball Players Association, New York, New York

Francis X. Coonelly, Senior Vice President and General Counsel-Labor, Major League Baseball, New York, New York

Richard H. McLaren, NAA Member, Ontario, Canada

Drucker: In a departure from conventional approaches at the Academy's annual meeting, our moderator is not a member of the Academy, but an advocate who made history by joining Harry Rissetto in accepting the Academy's invitation to serve as one of the first advocate members of an NAA program committee. In this capacity, George Cohen has contributed in many ways, but this session is a very special aspect of his contribution. George is with the law firm of Bredhoff & Kaiser in Washington, DC. The firm represents unions, but George is making a transition into the neutral role of mediator in certain areas. He has a special expertise in the world of sports arbitration and he will be "arbitrating" this session.

Cohen: To begin, there is a substantial undercurrent within this group out in the lobby inquiring about my back-to-back performances at the Academy's annual meeting. I merely want to fully disclose that I am on a retainer of $1.8 million for the next two days. I hope that answers any questions you may have.

As I look into this sea of arbitral expressions, I sense there is a bit of anticipation in the air. As Phyllis Cohen would say, "Sports,

sports, sports, sports, sports!" In light of all of that, I have re-named this panel presentation as "Vicarious Thrills are Better Than No Thrills at All."

Now for the panel. There will be no introductions. I am merely going to say we have assembled the crème de la crème of professional sports' activists and advocates. All of you have their bios. Three of those bios, perhaps four, are one page or less but there is one that is lengthy. I have had a long-standing, beautiful relationship with Jeff Kessler, who never has appeared to me to be an insecure person. Notwithstanding my observation, there are 11 single-spaced pages devoted to Jeff's career, most of which contained comments from judges favorable to arguments he made throughout his career in courts in the United States and Canada. I leave all of that for you to read at your leisure.

We are starting the program with the world of football; it is a much broader world than what you will hear from the two speakers. All of you have a copy of the Terrell Owens Award, which goes on for some 46 pages, authored by a member of the Academy, Rich Bloch. The issue at hand is quite simple to state. There was a collective bargaining agreement between the National Football League (NFL) and the Players Association. A Roman numeral on top of one page was captioned "maximum discipline" and the next sentence said "for conduct detrimental to the club," the maximum penalty would be "a four-week suspension without pay." Nevertheless, something else happened to Terrell Owens because for 37 of the 45 pages the arbitrator laid out facts relating to disruptive conduct. All of you who are parents may identify with the question—what is child-like, disruptive conduct and what we do about it? That is what the Owens' case was all about. He received the maximum discipline, namely, a four-week suspension without pay. According to his club, he never rehabilitated his child-like, disruptive conduct, which led the club to deactivate him. In practical terms he was told go home, do not come to practice, do not play, until you reform your behavior. The club paid Owens' salary but he was not allowed to participate as an integral part of the team.

The last five pages of the award address the question of whether that action on behalf of the Philadelphia Eagles evidenced a violation of the collective bargaining agreement or, instead, was justified by some notion of managerial authority and discretion.

The arbitrator did not have the benefit of our luncheon speaker's, Mr. Justice Scalia, lengthy defense of textuality and/or textualism. If he had, the arbitrator's opinion may have been different.

Jeff Kessler is now going to address question: Did the arbitrator, in plying his trade as an experienced expert, also in part ply another trade, that of "illusionist," when he issued this award?

Kessler: Thank you, George. I am on a 10-minute leash so I am going to be succinct and focus on what I think is of most interest to the group. In this case, the first thing I have to do is tell you what the actual facts are because if any of you are sports fans, you are victimized by the ESPN view of the world, which means you are getting sound bites and snips and clips, which do not tell you what happened. So it is important to understand what was at issue and what was not at issue.

Terrell Owens is an extraordinary player, maybe the top receiver in the NFL. He joined the Philadelphia Eagles the previous season and led them to the Super Bowl, played extraordinarily well in the Super Bowl after coming off a broken bone in his foot, and carried the team almost to victory. He did not succeed but was hailed by the team and by the fans in Philadelphia—how quickly things can turn around in professional sports!

What happened after that game is that the player, starting in the spring, waged a public dialogue asking for a renegotiation of his contract. He made various appearances, which many people perceived as offensive. He threatened to hold out of training camp, but did not. In fact, he came to training camp on time but made a spectacle by publicly asking for his contract to be renegotiated based on his sense that he was not being paid what he thought he deserved in the marketplace.

The important point is that none of that—which many people saw as unpleasant, distasteful, contrary to their view of what sports should be about—had anything to do with the discipline imposed upon him. This is very important because, in that context, the discipline was not for his public displays before training camp. During the course of training camp, Owens acted in a manner that Coach Reid believed was disruptive and the coach sent Owens home for a week. None of that was at issue either. What we are talking about is the period of time after training camp. What did he do that warranted this discipline and did the club apply it consistent with the collectively bargained system?

The collectively bargained system provides that for a team to discipline a player based on detrimental conduct, the maximum discipline is four weeks without pay and nothing more. All of you have experiences in different collective bargaining agreements and you know that when a union is able to bargain in an agree-

ment upon certain disciplinary limitations, that is an essential part of the bargain.

There were two issues in the proceeding: One, did the conduct warrant the maximum discipline of four weeks under a "just cause" standard? By the way, no team in the NFL had ever imposed the maximum discipline for any offense. Frankly, this issue is the less interesting issue for all of you—except maybe the sports fans—in this very fact-specific case. I believe the arbitrator erred when he concluded that there was just cause for four weeks' discipline.

The second issue, the more interesting issue, has far broader implications, reaching beyond football and other sports. The team not only suspended Owens for four weeks without pay—the maximum discipline—but also the team sent Owens home. It continued to pay him, but he was not considered part of the team. What they did not do is fire him and that is quite significant. Had the team terminated Owens, he could have plied his trade as a professional football player elsewhere. Instead, the Eagles chose to keep him on the team but dictated that he could not be a professional football player. Given the shortness of a sports career, and given the importance of a player actually playing as opposed to clipping annuity coupons to subsist on, this discipline was very severe. What is not discussed in the arbitrator's opinion, which surprised the union, is Coach Reid's response on cross-examination to the question of "why did he deactivate Terrell Owens in addition to the four weeks suspension without pay?" Reid did not say he did this because Owens was not playing well on the field. He did not say it had anything to do with his desire to win. Rather, Reid said Owens was deactivated for conduct detrimental to the team, which is the exact disciplinary test in the contract.

The arbitrator does not discuss that at all. Instead, the arbitrator states that this is not discipline but merely managerial discretion—employer discretion—to keep the morale of the team high and to run the organization. The union's strongly held view is that it was discipline and Coach Reid said it was discipline for conduct detrimental to the team. If anyone thinks that a suspension with pay is not discipline, then they are not thinking of athletes or entertainers or other people who need to ply their profession. In baseball, as Mike Weiner knows, suspensions are generally with pay, but they are still a form of discipline.

This, in effect, was a second suspension because it was in excess of the maximum discipline allowed under the contract. The union found this to be a violation both of the spirit of the collec-

tive bargaining agreement and the language of the collective bargaining agreement. Why does this happen in professional sports? The reason this happens is due to the tendency to identify with the sport as a fan and a fan takes the view sometimes of a player that I, the fan, would play the sport for free so the player should not be complaining about his contract. The difference, however, is that playing the sport is the professional athlete's work and livelihood. For professional football players, their careers are short and violent and many walk around with severe injuries for the rest of their lives. The question is not how they are compensated, but how they are treated. The union and the players deserve that the limits of the team's disciplinary authority, as specified in the collective bargaining agreement, should be enforced, and it was not in this case.

Cohen: Not so fast, Jeff Kessler. Dan Nash is here. His résumé is not available but you can assume, for today, that Dan has authorized me to say that whatever Jeff Mishkin has done in his life, Dan will embrace. Dan was, incidentally, Jeff Kessler's counterpart and one may say the successful litigant in this particular case.

Nash: When George called me last week to ask me to speak today, it did not take long for me to figure out why because this case has followed Jeff and I around for quite some time. Sports arbitration is in many ways very similar to the things that traditional arbitrators do every day. For more than 20 years I have been a traditional labor-law attorney. I have had the benefit of representing the NFL and the NFL teams for some time in arbitrations. I thought about starting with a discussion showing how the sports cases are no different than what traditional arbitration cases that Academy members do on a day-to-day basis. Instead, I am going to deviate a little from that point in addressing some of the things that Jeff said because there are very clear aspects of sports arbitration that you do not normally see.

The traditional issues that you grapple with on a day-to-day basis were present in the Terrell Owens case. As Jeff noted, this was a challenge to discipline. There were questions about whether the club had "just cause," whether the team followed progressive discipline, and whether the discipline was consistent with the terms of the collective bargaining agreement. In that respect, Jeff is right about this case being on trial by ESPN because there was so much discussion of it on that network.

I was the successful litigator because I had the benefit of the overwhelming evidence that we presented during the 11-hour

hearing. Most of the time was spent—which the media did not report—presenting to the arbitrator—and this is obvious in the decision—all of the evidence in the case about the conduct of Mr. Owens and his agent, Drew Rosenhaus. I will leave it for you to read the decision about what that evidence showed, but you probably were familiar with some of it from watching ESPN.

Let me say one thing about the way Jeff characterized the evidence. His view was that the only thing that mattered was what happened after Terrell Owens came back from training camp. The dispute started—and we made this clear in my opening statement—through video clips, some from ESPN, of Mr. Owens, his agent, and their words saying what they were doing and how this dispute arose. They clearly indicated that the behavior, starting in the off-season, continuing through training camp, continuing after training camp and into the regular season, was calculated on this point by Mr. Owens and Mr. Rosenhaus. They developed this strategy to break Owens' contract. The evidence on that point was overwhelming. The team responded as well as it could under those circumstances. Drew Rosenhaus proclaimed in the media that Terrell Owens may come to training camp, he may not come to training camp. This occurred after the team had gone to the Super Bowl and now the team was faced with a major disruption as it prepared for its next season—with a lot of hope. Mr. Owens told Coach Reid that he was not sure whether he was coming to camp. If he did, Owens indicated that Coach Reid would not like Owens' disrupting camp.

One of the first points made at the arbitration about what the evidence would show is that the conduct was intentional. This was not a series of minor disciplinary issues, this was not about parking violations or uniform violations, this was part of an overall scheme. To assess the club's reaction, the arbitrator needed to assess all that evidence and make a judgment, rather than breaking it down as the union wanted to do.

Look at what happened after August 18 when Owens returned from the suspension; he was in his driveway lifting weights and creating a spectacle that was certainly a distraction to the Eagles. The team argued that it was naïve to focus only on what happened after August 18 and it would be ignoring everything that was intended here. We know that because Drew Rosenhaus and Terrell Owens told us that in the spring this is what they were going to do and they did it.

In that respect it was a typical labor arbitration with a four-week suspension issued. The arbitrator's opinion shows that Coach Reid clearly followed progressive discipline. The arbitrator addressed the issue of whether progressive discipline had been followed because the player had not been fined and there was a one-week suspension in the pre-season but that was with pay. Those matters were disposed of simply and accurately. The point of progressive discipline is to put the employee on notice that the behavior is unacceptable and, if it continues, consequences could follow. There is no doubt, based on the letters that are quoted extensively in the opinion, that Owens was on notice of the consequences for his conduct.

The second issue was, as Jeff noted, the deactivation. The team disagreed with the union's argument that deactivation was discipline. We acknowledged, as did the arbitrator, that the facts leading to the four-game suspension and then Coach Reid's decision not to allow Terrell Owens to return because he would be disruptive to the team, as Owens acknowledged, was a much more complicated issue than simply dealing with isolated conduct and discipline imposed for it. The arbitrator was also dealing with the club's contractual rights. Jeff began by highlighting the provision in the contract on maximum discipline, but there is another provision at issue that is sometimes overlooked in arbitration and that is the Management Rights Clause. It required the arbitrator to examine the four-game suspension, and whether the club and Coach Reid's expert judgment in particular, should be second-guessed by the arbitrator about what was best for the Philadelphia Eagles. Simply, should Coach Reid be required to allow Terrell Owens back on the practice field when Owens already had stated that he would disrupt the team as he did throughout the pre-season and during the beginning of the regular season?

Jeff is right that there is no question that Coach Reid testified that all these events were intertwined and that Reid stated he did not want Terrell Owens back because it would be detrimental to the team. Based on that, the players association argued that it must be discipline and, therefore, the team was exceeding the four-game maximum in the contract and the arbitrator acknowledged that it could be in certain circumstances. What jumps out from this opinion is that it is a perfect example of why arbitration is so beneficial, that is, it was based on the evidence of this case with this player and what he did in this contractual situation.

This leads to my final point and that is the benefit of industry expertise in arbitration. I am a tremendous fan of arbitration. I have been a management labor lawyer for a number of years. I have been involved in a lot of arbitrations, which I greatly enjoy. I believe they are tremendously beneficial to both sides even when I do not win, but one of the things that I think is most beneficial is the benefit of industry expertise. The arbitrator in Owens' case was an expert and has been a sports arbitrator for many years; he made the judgment that, following the suspension, Coach Reid had a real problem in terms of what was best for his team and, in this circumstance, the arbitrator concluded that it was not discipline.

Cohen: Jeff, a question that entered my mind having read this opinion would go something as follows: Assume you are correct that the language of the agreement was a maximum discipline of a four-week suspension without pay. That suspension is served and Mr. Owens returns to the team. In the next week Owens tells the coach that he really does not want to talk to him or the quarterback but he really wants to play football as he sees fit. At that point would the club have a right to impose another four weeks of discipline on Mr. Owens?

Kessler: A new offense, after the first discipline, would be subject to analysis under the collective bargaining agreement for the possible imposition of additional discipline. This is not, however, what happened in the Terrell Owens case. I would also like to make a few comments about the issue of employer discretion. First of all, the concept that the arbitrator cannot second-guess the employer is wrong. The employer is limited by the collective bargaining agreement. That is the second guessing. This is no different than a clause in the collective bargaining agreement that says coaches cannot have off-season workouts for more than four days a week for a certain number of weeks and they cannot wear pads or engage in contacts. There are coaches who, if their discretion were not limited, would have off-season workouts 7 days a week, in full pads, for 14 hours a day. The collective bargaining agreement says you cannot do that and the arbitrator's duty is to enforce that even if the coach thinks it will ruin the game of football for the players not to work that hard. It is not an issue of discretion but is limited by the terms of the collective bargaining.

Cohen: Following up on that point, Dan, there is a management rights clause but the management rights clause says "except as expressly limited by the terms of this agreement." Isn't it the

case that where you have a specific provision that, in fact, is captioned "conduct" and that is expressly set forth in the agreement, does not that have some limiting effect on the breadth of what otherwise would be managerial discretion?

Nash: That is why we use arbitration. There is no question that when the parties negotiated the collective bargaining agreement, they could not have anticipated what Terrell Owens did in this case. To accept the argument that Jeff just made, you would have to accept the conclusion that what Coach Reid was trying to accomplish when he deactivated Terrell Owens was discipline. The evidence convinced the arbitrator that was not the case. Jeff talked about what Coach Reid had to say about that. This was not a situation where Coach Reid was trying to impose additional penalties based on the past conduct. He was dealing with what happens when Terrell Owens returns and the most relevant evidence on that point was the testimony of Terrell Owens. I think an arbitrator—if he viewed this as a disciplinary case and had an employee coming before him seeking a reduced suspension—would expect some sign of remorse or some reason why the suspension should be reduced, especially where the employee bears culpability for his actions. Terrell Owens testified he still did not owe Donavan McNabb any apology. He did not think he did anything wrong.

Why does that matter for applying the management rights clause and judging what Coach Reid did in this circumstance? It proved as a matter of evidence that Coach Reid still had a problem and it was not a disciplinary problem. The problem was how is the team going to win on the football field? We can argue back and forth about how you characterize the evidence but we think the evidence on that point was very persuasive and the arbitrator agreed.

Another point to highlight. Coach Reid still may have a problem, because the parties changed the collective bargaining provision as a result of the Terrell Owens decision. This happens sometimes when one of the parties, the union, is extremely dissatisfied with the result and believes it violated the collective bargaining agreement. The new collective bargaining agreement approved by the owners states that the Terrell Owens decision is expressly overruled and that deactivations are subject to the maximum discipline.

Cohen: That is a perfect segue into the second session today, which will be captioned "What happens after the arbitrator's award?" In this case the answer was summary reversal.

Kessler: Correct, summary reversal. I think that is an indication of what we believe the party's intention was all the time. You have to look at this issue from both perspectives. We heard how horrible it was that Terrell Owens and his agent previously made these statements about renegotiating his contract and how disruptive this was. Dan and I are now involved in an arbitration with NFL player Steve McNair, Tennessee Titans. In that case, the club has publicly declared they want McNair to renegotiate his contract. They do not want to live by it and they will not let McNair use the facility to train until he renegotiates. Using the training facility is disruptive to the club? Is that a cause for the total breakdown of team morale such that nobody can function? The clubs do not think so when they are the ones who want to renegotiate a contract.

Cohen: We are moving on to the second group of participants. Six or seven years ago Jackie Drucker called me for the 2006 Academy annual meeting. She asked me whether I could guarantee that something interesting will happen for presentation. I said "Mark my words, something will happen." I called her four years later, which was three years ago, and said "Steroids, steroids, steroids" and she said "Great!" I said "Balco" and she said "Fabulous!" I said "Barry Bonds" and she said "Impossible." I said "Bud Seelig" and she said "Terrific!" I said "Congressman Tom Davis" and she said "I cannot believe it" and I said "Believe it!"

That is why we have before us three distinguished people speaking from different perspectives. We have the usual combatants, which we now refer to as advocates. For the Baseball Players Association, Michael Weiner, who I have known since he was eight years old a few years ago; and Frank Coonelly for the owners ,who was nine years old a few years ago. Also present is Richard McLaren, a fabulous arbitrator from Canada, who will be talking about the Olympic world.

Michael, why don't you start us off with your perspective.

Weiner: Let me thank the Academy, first off, for inviting sports' folks to address the plenary session. I must admit that I would have liked to have heard Rich Trumka talk a little bit more as well. That's unfortunate. I also want to applaud the Academy's decision to include two advocates in the planning of this meeting. That is a wise decision and particularly, as a union-side labor lawyer, I applaud the inspired choice of George Cohen to represent our side of the table. From my perspective, there's no greater ambassador for union-side labor lawyers.

With respect to the hot topic of steroids, I am going to disappoint you because, unlike Jeff and Dan, I am not here to talk about the specifics of any arbitration cases. All of the cases that Frank and I have been involved with are subject to contractual and arbitral confidentiality orders. You won't any get "dirt" from us. I want to talk about—and I know Frank wants to as well—some of the issues related to arbitration that have risen in connection with our drug testing program. The current political and legal environment does not foster rational discourse on the subject of suspicionless drug testing. Regrettably, anyone who raises a question about the propriety of such testing is viewed either as a user or an apologist for a user.

> The most jaw-dropping example of this, in my view, remains a colloquy between Justice Kennedy and Counsel for Lindsay Earls, a high school choir and marching band member who challenged the constitutionality of mandatory drug testing for students who wish to engage in extracurricular activities. At the oral argument Justice Kennedy postulated two hypothetical schools—one that had suspicionless testing and another one that did not. Justice Kennedy graciously referred to the second one that did not have testing as "the druggie school." Then, one of the nine most important jurists in the country stated to Ms. Earls' counsel that no parent would want to send their child to the druggie school "other than, perhaps, your client who wants to go there."

For those of you keeping score at home, those actual words appear at pages 55 and 56 of the official transcript in the case of *Board of Education v. Earls*.[1] Ms. Earls, who at the time of the argument was a freshman at Dartmouth, had to publicly defend herself outside the Supreme Court building against the inference planted by a Supreme Court Justice that she was a "druggie." Why did she have to do that? Because she dared to suggest that the Fourth Amendment might not permit a governmental body to force a high school choir girl to surrender her urine for inspection.

The players association and the major league clubs did not find a much more hospitable environment on this subject when we were in this town, even though our collective bargaining agreement for some time has called for the suspicionless testing that Ms. Earls resisted. The problem, apparently, was the manner in which baseball tried to implement the testing. The way baseball

[1] 536 U.S. 822 (2002).

did it was different than the Olympic model. It is not surprising that it was different because the Olympic testing was not the product of collective bargaining but, instead, was unilaterally imposed by the international bodies that govern athletic competition.

I am not here to relive the collective bargaining rounds that Frank and I have been involved in with respect to steroids or the congressional action that affected it. One time is enough. As David Letterman says, "It's as much fun as one person should be allowed to have."

I would like to foster some rational discourse about drug testing. The challenge is to integrate suspicionless testing, with substantial penalties for positive tests, into a collective bargaining agreement that insists on management establishing "just cause" for discipline.

Olympic testing is based on strict liability. The presence of a banned substance in an athlete's system is the violation and is not based on any misconduct by the athlete. In my view it is wholly foreign to the arbitral concept of "just cause" to discipline an employee without inquiry into or even regard for that individual's conduct. You cannot have random drug testing and discipline associated with that testing if the employer has the burden of demonstrating exactly how and in what manner the banned substance was administered.

The compromise that the parties in baseball reached—and it was, in part, through bargaining and, in part, through a series of arbitrations before our panel chair—is found in our new agreement. The agreement makes plain that a player is not in violation of the contract if the presence of the banned substance in his urine is not due to his fault or negligence. That standard is similar to "just cause." Management still has the burden of proving the violation because it is a discipline case, but we agreed upon a burden-shifting mechanism as a compromise. Management can meet its initial burden of establishing a violation by establishing a positive test result, as defined in our agreement, under a valid test. A player can challenge the "chain of custody" with respect to the way the sample was handled and make challenges to the scientific validity of the test. Under the agreement, management does not have to independently establish intent or fault or negligence on behalf of the player. Rather, management meets the initial burden simply by submitting a valid test.

The arbitration is not over at that point, but the burden shifts to the player to demonstrate an absence of fault or negligence. The

agreement speaks to some extent about how a player can do that and to some extent about how he cannot do that. The agreement states that a denial alone is not enough for the player to satisfy his burden. The denial has to be supported by "objective evidence." The parties have not specified in the agreement what that means. I think it is easiest to envision what "objective evidence" would be with an explanation.

If a player provides "objective evidence" of how the banned substance got into his body, then that is sufficient to support the denial. For example, if a player demonstrates that he took a legally available nutritional supplement that was contaminated or in some fashion caused the result, then he has sufficient objective evidence. Another example would be if he was administered medicine without his knowledge that caused the positive results. It is not an easy burden to meet and from the perspective of the labor lawyer the traditional burden of proving a violation that is on management is now shifted to a burden on the employee to disprove the violation. In other words, the player cannot cheat on the test.

This is inherent in any system that has discipline for suspicionless testing. You cannot avoid it. It is one of the reasons why prior to this last congressional intervention, the collective bargaining parties put severe penalties in for positives but not nearly as severe as the ones that are in the current agreement. The parties recognize there is unfairness in this kind of regime if the penalties are too stiff. Nevertheless, the basic principle that discipline can only take place for misconduct still receives some vindication in our agreement because ours is not a strict liability system as in Olympic drug testing.

The principle of discipline for misconduct is given vindication by the parties in some other specific areas. For example, a player is in violation of our agreement if he "attempts to substitute, dilute, mask, or adulterate a urine specimen." In other words the players cannot cheat the tests, but that finding requires an affirmative demonstration of intent. The presence in an employee's urine of a masking agent or a diuretic, a thinner, alone is not sufficient to prove the violation. Again, misconduct is the basis for discipline.

Another example is that our agreement makes clear that a player cannot be disciplined twice for the same use of a prohibited substance. If a second positive test is produced for the same banned substance, it is not treated as a positive "absent a conclusion to a reasonable certainty"—that is the language in the contract—that

the second test was not from the same use that produced the first positive. The mere presence alone of the substance is not sufficient to prove the violation.

The traditional notions of fairness and "just cause" are operative. As these examples show, simply agreeing that steroids are bad and that random testing is a means to accomplish banning steroids does not answer important, substantive questions about implementing that in a world with "just cause."

There are procedural issues that arise as well. Generally, in arbitration a grievance does not stay the imposition of discipline such as suspension. That general rule is the same in baseball's collective bargaining agreement, but the parties agreed that the first time a player faces a suspension under the drug program there is an automatic stay and there is not a public announcement of the suspension and the club is not notified. Rather, the player is informed that the commissioner has suspended him and the player has a short period of time to file a grievance. If he files a grievance, he continues to play. If the player prevails, there is no announcement. If the grievance is denied, the player is suspended, there is a public announcement, and the world knows that he violated the program.

Why did we do that? Because in this environment the reality is that once someone is accused of having used steroids, it is virtually impossible for him to clear his name.

Cohen: Let's have Frank give management's perspective on this fascinating subject.

Coonelly: As George's opening relived for you, there has been no hotter topic in baseball than steroids over the last several years and there has been no hotter topic than steroids, unfortunately, in the baseball arbitration world.

From the club's perspective, allegations of steroid use strike at the very core of what we sell to the public, which is fair competition. Allegations of our players cheating to gain a performance edge strike at the integrity of the product that we put on to the field, which is why the owners were adamant that we needed to address the issue. Some say that we came to this table a little late in the day, but I can assure you that, once at the table, we are an active participant as evidenced by our negotiating three separate collective bargaining agreements on this topic in a four-year period.

From our perspective random testing is not a civil liberties issue and it is not a constitutional issue. Random testing is an issue of

fair competition on the field, which is the only way to ensure that everybody is playing the game by the same set of rules. In our judgment, this is the only way to ensure the safety and health of the players who play the game, particularly the vast majority of players who would never want to or otherwise think about taking a performance-enhancing substance. As demonstrated throughout all sports, a strong random-testing program is needed.

As I stated, this is not a constitutional issue, whether you believe in a living constitution, an endearing constitution—as Justice Scalia described it—or a dead constitution. There is no state action in major league baseball and, therefore, the privacy protections of the U.S. Constitution do not govern here. The matter is subject to collective bargaining as the National Labor Relations Board made clear long ago. As Michael accurately described, in collective bargaining, both sides get to have a view. Although management has a very strong view of what is necessary to accomplish the fairness of the competition on the field, the union also gets to have a view and on three occasions the union has expressed its view. Once there is a collective bargaining agreement, there is no obligation to reopen that agreement during its term. Notwithstanding that fact, the players association agreed to do so on two separate occasions. The players association has been bashed in the press for many things on this topic, but for agreeing to reopen the agreement, it is rightfully commended.

Baseball negotiations on this issue illustrate my principle that both sides have a right to have a view. Michael described the strict standard of liability under the drug agreement, but it is not the same as the Olympic standard. Michael also indicated that under our collective bargaining agreement, as with most other collective bargaining agreements, the rule is that a player must serve his discipline and grieve later. Despite this general rule, we have agreed, in a limited circumstance, to stay a suspension pending the appeal of the discipline for a player's first positive test. Why did the clubs agree to that? One, it was a strongly held view of the union that a stay was necessary. Two, we recognized as well that although a 50-game suspension for a first-time positive is extraordinarily significant for any employee, baseball player or not, being publicly outed as a cheater in your game is a far more onerous and draconian disciplinary measure.

Before that happens the first time, we were satisfied that we could have an arbitration process, complete it in a manner that would serve that interest, and serve the interest of the clubs, which

do not want to allow someone who has used a performance-enhancing substance to play and benefit from that use. Although agreeing to this stay, the clubs insisted on strict deadlines in an expedited arbitration process, which is roughly 35 to 40 days from the time that we receive the positive test result to the arbitrator's award. That accommodation was the result of the compromises struck at the collective bargaining table.

Unfortunately, our activity in this area has gone beyond the collective bargaining table to include several trips to Washington, DC, for flagging and flogging by members of the U.S. Congress who are—to use another one of Justice Scalia's terms—the people's representatives. From our perspective, the people's representatives involved themselves in a matter of private collective bargaining to an extent and in a manner that is virtually unheard of in this country. Nevertheless, they were active participants, and their activity spurred negotiations and was part of the process that we dealt with at the collective bargaining table. Congressional intervention, fortunately, is a rarity in private collective bargaining in the United States and not something that is welcome by management or labor.

We spent most of last year litigating cases arising under the drug program. That created a strain on the arbitration process because we are a group that uses one impartial arbitrator to hear all of our grievants' disputes, as opposed to a panel of arbitrators. We learned quite a bit through the litigation of those cases. Fortunately, we put our learning to use because we were back at the bargaining table negotiating a new agreement and that new agreement reflects some of the learning that took place during last summer's arbitration hearings, including a provision that requires us to hire alternative arbitration chairs. When our impartial neutral cannot hear a case within the very strict time limits for these arbitrations, we will now move to an alternate arbitrator.

Cohen: Before I introduce the next speaker, we ought to take note of quite a wonderful thing—we've had two advocates speaking on behalf of unions and two on behalf of management. The level of intellect and civility has been at an all-time high in my judgment. That's attributable to those in the audience as well as those on the stage. The other observation I have—I don't want anybody to forget this—there was a term of art that was introduced in the Terrell Owens case that I have never heard before when Agent Drew Rosenhaus said that his client had "out-performed his contract." That is to say that the $47 million for seven years was piddle-

squat compared to the talent of his player and indeed, it's proven to be the case because the Dallas Cowboys have now purchased Mr. Owens. What is the amount of money that Terrell Owens negotiated? As it's a contract with many incentives, only time will tell how much Mr. Owens will be paid.

Moving on and recalling my phone conversation with Jackie Drucker about five years ago for this meeting, she said, "How big a PowerPoint presentation will you be making, George?" I said, "Jackie, we don't make PowerPoint presentations in the world I live in, we just get up and talk or sit down and talk." She was quite disheartened by that. I was forced to call our neighbors from Canada and find a person who is a professor, a distinguished arbitrator, and a PowerPoint presenter. Rest assured that technology has not passed this panel by and I now have the pleasure of introducing professor, arbitrator, mediator, Richard McLaren, and his carefully guarded PowerPoint presentation, which will be our closing. It will be the end—the ultimate, actually, of this entire panel discussion.

McLaren: Thank you, George, for that introduction. I am pleased to have the opportunity to address my colleagues today. I put this PowerPoint presentation together because the rule I am going to talk about is something quite different from the collective bargaining agreement. I want to start with a quick summary of the drug regime—the legal background and then the arbitration framework. I will also talk about a couple of cases to illustrate that, unlike the confidentiality of major league baseball, the doping cases in the international system are all public.

The foundation of the whole international system for arbitration flows from interlocking contracts and those interlocking contracts start with the athlete. The athletes make a contract with the members of the sporting organization in which they are participating. By the terms of that contract, the athlete agrees to the rules of that sport. There are an elaborate set of rules. Part of those rules state that the athlete will not participate in and use a prohibitive substance or engage in using prohibited methods for the purposes of enhancing their performance and gaining an advantage over other competitors. This is a complicated set of sports rules but it is the interlocking set of contracts that lays the foundation for both the legal regime of drug testing and the arbitration regime of drug testing.

The process begins with a lab analytical positive analysis of the urine sample. As Michael Wiener indicated, the concept is one of

strict liability once the International Federation has the positive test result or, in the United States, the United States Anti-Doping Agency (USADA), has that positive result. The positive result is sufficient to establish the doping offense and it is a strict liability notion. However, in effect the process is more like the shifting burdens that were just described a moment ago in the collective bargaining agreement context for baseball.

The athlete has to explain what is going on because the positive drug test is an infraction of the contract, a violation of the doping rules, and that violation leads to a mandatory sanction regime. The World Anti-Doping Agency, or WADA, establishes the sanctions and the world standard that has been agreed upon is a two-year suspension for a first offense. The two-year suspension can be reduced to one year depending on the athlete establishing certain facts before the arbitration panel.

Just as an aside, the picture before the audience is called a weight-lifter's device. The cylinder would be filled with urine, which must pass the lab analytical process. The athlete inserts the cylinder in his or her rectum—and I'll leave it to your imagination what else occurs—to provide the urine sample that is tested.

Here are a couple of cases that illustrate the process of the legal regime. First, there is the American distance runner, Eddy Hellebuyck, who tested positive for a prohibitive substance called erythropoietin (EPO), which is an oxygen expander in your blood. EPO enhances your performance by increasing your endurance. Hellebuyck took his case to the North American Court of Arbitration for Sport, that's the NACAS/AAA panel, and that panel found that a doping offense had occurred.

Here is a quick summary of the process at NACAS/AAA. Under the Ted Stevens Amateur Sports Act, any Olympic sport dispute has to be adjudicated by the AAA. The United States Anti-Doping Agency stated that arbitrators who deal with these cases must have AAA qualification and the qualification of the Court of Arbitration for Sport (CAS). Returning to the Hellebuyck case, the International Association of Athletic Federations (IAAF), which is the governing body for track and field world-wide, did not like the fact that the North American panel started the sanction process. Under the IAAF rules, they have a right to, and so they appealed.

Hellebuyck cross-appealed as he is entitled to do under the Court of Arbitration for Sport—the international body that establishes arbitration rules for international situations—challenging

the validity of the scientific test. There have been many previous arbitrations around the world dealing with EPO, but Hellebuyck-based his challenges on particular things that were going on in Belgium and also in what is called effort urine. These are two recent developments in the area. The international system upheld the positive result that had been found by the North American panel. They also modified the start date, which was the whole reason for the appeal in the first place, and that became a whole second case being heard de novo, which is permitted under the rules.

The sport's rules also preclude using prohibited methods. Tyler Hamilton is the American cyclist who was second in command for a number of years to the very well-known cyclist, Lance Armstrong. Hamilton branched out and started cycling on his own. After the Olympics in Athens, he tested positive for a blood transfusion. His was the first case using the new blood testing technology that had just been developed for application to sport. The technology is a variation of flocytometry—a very common medical practice in terms of arranging or analyzing blood groupings in order to do surgery and other items in medicine. Red blood cells are isolated and the test produces a histogram. The picture before the audience is for someone who has a single population of red blood cells. If you get a histogram that looks like the second picture now before you, then you have two populations of red blood cells. That means that there's been a transfusion or there has to be some other explanation.

The U.S. Anti-Doping Agency panel upheld the validity of the test, which had been challenged by the athlete, rejecting arguments that were raised by the athlete. Thereafter, the athlete appealed to the international Court of Arbitration for Sport, which also upheld the validity of the test. Hellebuyck and Hamilton are two illustrations of a prohibitive substance and a prohibited method. The substance EPO and the blood transfusion are not tested for in professional sport in North America.

One last case involves the American Skeleton Competitor, Zach Lund. He was short of hair for his age and had been using something called finasteride to help increase the amount of healthy hair he had. The substance treats hair loss but finasteride, itself, can act as a masking agent. In the United States it was decided that he should be given a public warning and the World Anti-Doping Agency, which also has a right to appeal cases to the international system, did not like that sanction and appealed it to the Court of Arbitration for Sport at the Turino Olympics in February. CAS

decided that the athlete was not free of fault or negligence and imposed a two-year suspension, which is the world standard.

In closing here are a few conclusions. The international system for Olympic athletes is very different than that for professional sports because it is based on contracts and interlocking relationships. The prohibitive list and the prohibited methods are in the hands of and determined by the World Anti-Doping Agency. The process of adjudication internationally, at least at the appeal level, is administered by the rules of the international arbitration body, the Court of Arbitration for Sport. It is a very different world than the collective bargaining agreement world.

Cohen: A concluding comment. I am sure all of you appreciate these five panelists. They are all extraordinarily busy people and the fact that they have come here today is an attribute and accolade to the Academy. I want to thank you all for your time and attention.