



Both Sides Win: Why Using Mediation Would Improve Pro Sports

Mark Grabowski¹
mgrabowski@adelphi.edu

ABSTRACT

Mediation, a type of alternative dispute resolution that utilizes a neutral outsider to facilitate a resolution for a conflict between two parties, is seldom used in American professional sports disputes. But the unique nature of such disputes, along with mediation’s success in ending the 2012-13 National Hockey League labor lockout, indicate that mediation should be used much more often, as opposed to the commonly used resolution methods of arbitration, litigation, and protracted negotiations. Mediation offers a fast, cost-saving method for settling virtually any kind of conflict. Its confidential nature promotes open communication between the parties, which helps preserve, if not enhance, their working relationships. Although mediation will not fix every sports related dispute, it could improve player management relations as well as player performance, thereby bolstering fans’ confidence in pro sports.

TABLE OF CONTENTS

I. INTRODUCTION	190
II. WHY MEDIATION?	193
A. <i>Preserves Working Relationships</i>	198
B. <i>Protects Privacy</i>	200

¹ Mark Grabowski is an assistant professor of communication at Adelphi University in Long Island. He previously worked as a lawyer and a sports journalist. He holds a J.D. from Georgetown Law. The author would like to thank Robert C. Bordone, director of the Harvard Negotiation and Mediation Clinic, in helping to develop this paper.

C. Better for Public Relations	202
D. Offers Neutrality	205
E. Keeps Negotiations Going	208
III. LIMITATIONS OF MEDIATION	210
IV. PROPOSAL	212
V. CONCLUSION	213

I. INTRODUCTION

In January 2013, the National Hockey League (NHL) was on the brink of canceling its entire season due to gridlock between team owners and players over a new collective bargaining agreement (CBA).² Part of the season had already been canceled after team owners, led by NHL commissioner Gary Bettman, declared a lockout of the members of the players' union after an agreement for a new CBA could not be reached before the old CBA expired in September 2012.³ The two sides were nearly \$200 million apart on the proper percentages of revenue sharing and seemed unwilling to even talk with each other.⁴ "[T]he majority of both in-the-know experts and on-the-sidelines fans have lost confidence in the system compromise between these two increasingly bitter foes seems impossible," a media report lamented.⁵ Canceling the entire season would not be unprecedented, as league officials had canceled the 2004-05 season due to a similar dispute, from which "the NHL never really recovered."⁶ Another season cancellation could jeopardize the dwindling fan base, demoting pro hockey from a major American sport to a fringe sport.⁷ Despite this risk, neither side seemed

² See Jeff Z. Klein, *N.H.L. Moves Closer to Canceling Season*, N.Y. TIMES, Dec. 21, 2012, at B14, *archived at* <http://perma.cc/RX98-YCE2>.

³ See Jeff Z. Klein, *As N.H.L. Lockout Begins, So Does a Likely Exodus of Players to Europe*, N.Y. TIMES, Sept. 17, 2012, at D2, *archived at* <http://perma.cc/WGJ2-YZCG>.

⁴ See Kevin Allen, *Answering Pressing Questions About the NHL Lockout*, USA TODAY, Nov. 23, 2012, *archived at* <http://perma.cc/MZ85-2JJG>.

⁵ Mark Jones, *NHL Lockout: How Mediation Could Save the 2012-2013 Season*, BLEACHER REP. (Nov. 29, 2012), <http://bleacherreport.com/articles/1426327-nhl-lockout-how-mediation-could-save-the-2012-2013-season>, *archived at* <http://perma.cc/SDS3-WS4D>.

⁶ Justin A. Cohn, *NHL Mess Has Soured This Season-Ticket Holder*, THE JOURNAL GAZETTE (Sept. 3, 2012, 3:00 AM), <http://www.journalgazette.net/article/20120903/SPORTS0204/309039948/1019/sports0204>, *archived at* <http://perma.cc/FA4U-LKTA>.

⁷ See *id.* (stating that the NHL was "in danger of losing [its] identity or existence because of a collective bargaining agreement.").

willing to budge. After negotiations between both sides broke down for the umpteenth time and with “less than a week to reach a new [CBA] to save” the season from outright cancellation⁸, federal government officials offered to help resolve the conflict.

Owners and players agreed to mediation, a form of alternative dispute resolution (ADR) in which an impartial third party—a mediator—attempts to find common ground between two parties that will end the impasse.⁹ In voluntary mediation such as this, each side must agree to mediation and either side may walk away from the process at any time.¹⁰ The mediator may offer ideas and identify issues that the parties may have overlooked, but settlement ultimately rests with the disputants themselves.¹¹ Hockey fans were skeptical that this approach would work¹²—and for good reason. Mediation is seldom utilized in major American professional sports leagues, voluntarily or otherwise.¹³ But with time running out, Scot L. Beckenbaugh, a mediator from the U.S. Federal Mediation and Conciliation Service (FMCS), quickly made progress. After spending approximately twelve hours shuttling back and forth between the league offices in Manhattan and a nearby players’ union hotel suite, the mediator got representatives from both the team owners and players’ union to meet face-to-face at the union’s hotel suite.¹⁴ Overnight, media reports went from negative to “optimistic” and

⁸ Ira Podell, *NHL Lockout 2012: Mediator Gets League, Union Back Together*, WASH. TIMES, Jan. 5, 2013, archived at <http://perma.cc/V3QL-KU7T>.

⁹ See Richard M. Calkins, *Mediation: A Revolutionary Process That is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 15 (2011).

¹⁰ See *id.* at 6.

¹¹ See Lance K. Tanaka, *AAA Guide to Using ADR to Resolve Collegiate, Professional and Sports-Business Disputes*, AMERICAN ARBITRATION ASSOCIATION (Oct. 21, 2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_020405, archived at <http://perma.cc/LX68-DRD3>.

¹² See Jones, *supra* note 5 (featuring a sidebar with an online poll asking, “Will mediation lead to a CBA?”, and 53 percent of 903 total votes responding “No”).

¹³ See ADAM EPSTEIN, *SPORTS LAW* 262 (2003) (stating “Mediation is not often used by the major professional sport leagues in the United States”); Timothy J. Bucher, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL’s Brady Settlement and its Effectiveness for Future Professional Sports Disputes*, 22 MARQ. SPORTS L. REV. 211, 212 (2011), archived at <http://perma.cc/DW28-QHRP> (stating that “parties in American sporting disputes have utilized mediation on only a few occasions.”).

¹⁴ See Jeff Z. Klein, *N.H.L. Meeting Yields Optimism Even as Players Vote on Whether to Renew a Threat*, N.Y. TIMES, Jan. 5, 2013, archived at <http://perma.cc/K8YB-86NT>.

even “downright giddy.”¹⁵ Following sixteen additional hours of negotiating, players and owners hammered out a deal, thus saving the NHL season.¹⁶

Beckenbaugh was praised by journalists, hockey players, team owners, and federal officials alike for helping the NHL end its 113-day lockout. Journalists bandied about words like “savior” and “hero.”¹⁷ FMCS Director George H. Cohen issued a statement commending the new ten-year labor deal between players and team owners and crediting it to Beckenbaugh’s “herculean assistance of the highest caliber.”¹⁸ NHL players and management were equally thankful.¹⁹ As one sports journalist wrote:

[W]hen everyone looks back on this tenuous time in the history of the game, the name of United States federal mediator Scot L. Beckenbaugh will likely be the one to be remembered most fondly. Acting as the buffer between the two sides through the marathon 16-hour negotiation that began on Saturday, carried through Sunday and ended with a tentative agreement, Beckenbaugh has received a hero’s praise for his involvement in the dispute.²⁰

¹⁵ Travis Hughes, *NHL Lockout Update: Mediator Scot Beckenbaugh Inching Closer to Hero Status*, SB NATION (Jan. 5, 2013, 1:49 PM), <http://www.sbnation.com/nhl/2013/1/5/3839678/nhl-lockout-update-scot-beckenbaugh-mediator-progress>, archived at <http://perma.cc/V58E-E27Z> (citing tweets from various journalists following the situation).

¹⁶ See Ira Podell, *Mediator Turns Final Two Days Into NHL Labor Deal*, ASSOCIATED PRESS (Jan. 6, 2013, 5:33PM), <http://bigstory.ap.org/article/mediator-turns-final-2-days-nhl-labor-deal>, archived at <http://perma.cc/E8UH-78HT>.

¹⁷ See, e.g., Sports Network, *Tentative Deal in Place to End NHL Lockout*, FOX NEWS (Jan. 6, 2013) <http://www.foxnews.com/sports/2013/01/06/tentative-deal-in-place-to-end-nhl-lockout/>, archived at <http://perma.cc/7FM5-L42E> (stating that Beckenbaugh “could be considered the savior for the talks and [a] new CBA.”); Rich Chere, *If NHL Lockout Ends Soon, Mediator Scot Beckenbaugh Will Be the Hero*, NJ.com (Jan. 5, 2013, 8:50 PM), http://www.nj.com/devils/index.ssf/2013/01/if_nhl_lockout_ends_soon_media.html, archived at <http://perma.cc/X35V-2XSV>.

¹⁸ News Release, *Statement by FMCS Director George H. Cohen On NHL-NHLPA Labor Negotiations*, Federal Mediation and Conciliation Service (Jan. 6, 2013), archived at <http://perma.cc/VX52-64R5>.

¹⁹ See Podell, *supra* note 16 (quoting NHL Commissioner Gary Bettman and multiple NHL players on their appreciation for Beckenbaugh).

²⁰ Matt Brigidi, *NHL Lockout Over: Mediator Credited for ‘Extraordinary Contribution’ to New Deal*, SB Nation (Jan. 6, 2013, 7:33 AM), <http://www.sbnation.com/nhl/2013/1/6/3841846/nhl-lockout-over-ends-mediator>, archived at <http://perma.cc/VFJ8-JKP7>.

In light of mediation's success in resolving recent disputes for the NHL and other leagues,²¹ pro sports would be wise to start viewing mediation as a valuable tool in negotiations. As in hundreds of private-sector industries, labor negotiations in pro sports fall under the National Labor Relations Act, a 1935 law which gives private sector employees, including professional athletes, the right to form labor unions, engage in collective bargaining for better contract terms and work conditions, and take collective action such as striking.²² It provides unions and management many options for resolving contract disputes, including mediation.²³ However, "parties in American pro sporting disputes have utilized mediation on only a few occasions," despite the sports world being riddled with opportunities, including labor disputes, disciplinary disputes, and broadcast disputes.²⁴ There are many reasons for the lack of mediation in pro sports, including the existence of CBAs that require negotiations and arbitration, owners' fear of making more concessions, and a lack of understanding of what effects mediation might have on sports.²⁵ The purpose of this paper, however, is to explain the wisdom of using mediation in pro sports employment disputes, as it seems to be a particularly good fit in both CBAs and individual contracts.

II. WHY MEDIATION?

Sports disputes are unique "specifically, [in regards to] how extraneous factors—such as the media, the legal process, and monetary gain—affect the parties' motivations and strategies."²⁶ Cohen, who has mediated opera, aviation and federal worker disputes, agrees that sports confrontations are especially hard to resolve through negotiations.²⁷ He explained:

Among the important differences between sports negotiations and others is you have the two parties, the union and team owners, then you have the commissioner representing the league as a third party. And then, behind

²¹ This paper goes on to explain how mediation has benefited the National Football League, Major League Soccer, New York Yankees, Big 12 Conference, and Western Athletic Conference.

²² See generally, National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012), archived at <http://perma.cc/D2XT-ZG4M> (listing negotiations, labor strikes, lock-outs, mediation and other methods available to parties in contract talks).

²³ See *id.*

²⁴ Bucher, *supra* note 13, at 211.

²⁵ See Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 385 (1999).

²⁶ Bucher, *supra* note 13, at 212.

²⁷ See Steven Greenhouse, *Mediator in N.B.A. Talks Has Strong Sports Pedigree*, N.Y. TIMES, Oct. 20, 2011, at B12, archived at <http://perma.cc/9TSP-3YN5>.

the scenes, you have a fourth party, the agents who are representing individual players, and they have a voice that is being heard in the process. And then there are the interests of the fans.²⁸

Unlike other methods of dispute resolution, the characteristics of mediation provide solutions for many of the problems plaguing players and management today. Mediation is a fast, cost-effective method for resolving many kinds of disputes.²⁹ Its confidential nature promotes open communication between the parties, which preserves, or even enhances, their working relationships.³⁰ It can “save face” for the side that is more reluctant to compromise and help preserve fans’ confidence.³¹ Best of all, mediation allows the parties to have more control over their own fate, rather than put the outcome in the hands of a judge or arbitrator. Depending on the type of mediation used, the parties have the ability to control the following: (1) the selection of a mediator; (2) the scheduling and duration of the sessions; (3) the topics to be discussed; and (4) confidentiality of the sessions and related negotiations, among other things.³² The parties cannot be forced to settle or agree with anything they are uncomfortable with,³³ and they may end the mediation at any time.³⁴

It is true that arbitration, another form of ADR, offers many of these same benefits, including a neutral third party, quick results, and confidentiality.³⁵ All major American pro sports—football, baseball, basketball and

²⁸ *Id.*

²⁹ See Karin S. Hobbs, *Attention Attorneys! How to Achieve the Best Results in Mediation*, 54 DISP. RESOL. J. 43, 43 (1999) (stating that “[m]ediation, in comparison, is less expensive, significantly faster, and provides a solution that both sides agree upon.”).

³⁰ See *id.* at 47 (stating that through mediation, “Personal or professional relationships may be restored, the emotional drain of the lawsuit or the fear of testifying is over, and the participants can move forward with their life.”).

³¹ See Sam Carchidi, *Timing is Key in NHL Mediation, Expert Says*, PHILLY.COM (Nov. 29, 2012) http://articles.philly.com/2012-11-29/sports/35437083_1_mediation-nhl-commissioner-gary-bettman-bettman-and-fehr, archived at <http://perma.cc/B4RD-JREX>.

³² See JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 315–21 (2005).

³³ See Roger J. Peters & Deborah Bovarnick Mastin, *To Mediate or Not To Mediate: That Is the Question*, 62 DISPUTE RESOLUTION JOURNAL 43, 45–46 (May/July 2007), archived at <http://perma.cc/9NLF-KCMY>.

³⁴ ADAM EPSTEIN, SPORTS LAW, 410 (2011) (stating that “[t]he parties in a mediation are virtually in complete control of the process and may walk away at any time.”).

³⁵ See Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, AMERICAN BAR ASSOCIATION, (March 2012), <http://www.americanbar.org/>

hockey—offer arbitration, and they have frequently used it in recent years.³⁶ In fact, the arbitration term “baseball” describes a common type of arbitration that was originally derived from Major League Baseball (MLB).³⁷ Both mediation and arbitration are arguably preferable to the much more public alternatives: protracted negotiations, which often result in work stoppages and fan dissatisfaction, or litigation, which can be an expensive and long process. “Arbitration and mediation are usually more efficient, less costly and more effective than litigation. Mediation is certainly more confidential,” said Adam Epstein, who teaches ADR and sports law courses at Central Michigan University.³⁸ Mediation is preferable to arbitration for a few other reasons as well. In arbitration, as with litigation, it is a win-lose situation, with only one party emerging victorious.³⁹ Mediation, by contrast, is arguably win-win. At the very least, it provides disputants more control over the process and prevents a resolution from being imposed upon the party. “The major difference between arbitration and mediation is that in arbitration an arbitrator is a decision-maker, whereas in a mediation session the mediator plays the role of settlement-facilitator,” explains Epstein.⁴⁰ Participants in mediation control their outcomes, albeit sharing that control with each other, whereas participants in arbitration and litigation are subject to the control and decisions of others, namely arbitrators, judges, or juries.⁴¹ Arbitration decisions often face the risk of appeals, whereas mediation agreements do not.⁴² Another significant distinction is that arbitration

content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf, *archived at* <http://perma.cc/M6YK-S8Z6> (stating that arbitration “has significant advantages over litigation in court, such as party control of the process, typically lower cost and shorter time to resolution, flexibility, privacy, awards which are fair, final and enforceable, decision makers who are selected by the parties on the basis of desired characteristics and experience, and broad user satisfaction.”).

³⁶ See Tanaka, *supra* note 11, at 2.

³⁷ See Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 109, 110 (2009).

³⁸ *Id.* at 424.

³⁹ See Charles Hunt, *Mediate, Arbitrate or Litigate?*, 5 GRAZIADIO BUS. REV., at 3 (2002), *archived at* <http://perma.cc/K47C-MYKW>.

⁴⁰ Epstein, *supra* note 13, at 257.

⁴¹ See Joshua J. Campbell & Rodney A. Max, *Formal Mediation in Professional Sports*, 1 AM. J. MEDIATION 17, 21 (2007), *archived at* <http://perma.cc/PGP9-FPMX>.

⁴² See Sheri Qualters, *Survey Says Corporate Counsel Prefer Mediation*, NAT'L LAW JOURNAL (April 27, 2007), <http://www.cpradr.org/Portals/0/Resources/Articles/Survey%20Says%20Corporate%20Counsel%20Prefer%20Mediation%20%28NLJ>

and litigation focus on the “rights” of the parties, whereas mediation focuses on the “interests” of the parties.⁴³ Finally, going through mediation helps educate parties in avoiding disputes by familiarizing them with the obstacles to resolution, so that they know what to avoid in the future.

Mediation’s success rate alone makes it a worthwhile endeavor. Overall, in disputes ranging from divorce to multi-million dollar contract disputes, “mediations end in agreement 70 to 80 percent of the time,” according to the American Bar Association.⁴⁴ Not surprisingly, a 2011 study found that it is “far and away the preferred ADR process” among Fortune 1,000 companies.⁴⁵ “There were numerous reasons for this preference, most notably perceptions that mediation offered potential cost and time savings, enabled parties to retain control over issue resolution, and was generally more satisfying both in term of process and outcomes,” wrote the study’s authors.⁴⁶ In addition, in recent years mediation has been implemented as a formal process in a majority of state courts, federal district courts, and many appellate court systems, both state and federal.⁴⁷ Mediation has also been implemented as a formal process within state and federal government agencies.⁴⁸ It appears to be paying dividends. The State of California conducted a study of five court-annexed civil mediation programs that operated in California trial courts between 2000 and 2003 and found that attorneys whose cases settled at mediation estimated savings of more than sixty percent in litigant costs, for total estimated savings of nearly fifty million dollars.⁴⁹ A 2006 study of the U.S. Federal District Court of Nebraska found that mediation

%29.pdf, archived at <http://perma.cc/4R4C-DU3K> (stating “For arbitration, both corporate counsel and law firm lawyers . . . both harbored reservations about the quality of the results and the potential for challenges.”).

⁴³ See *What to Do About Personnel Problems*, BUS. & LEGAL REP. (Sep. 2002), <http://www.jamsadr.com/files/Uploads/Documents/Articles/Roscoe-Mediation-Arbitration-2002-09.pdf>, archived at <http://perma.cc/4NFQ-MTAV>.

⁴⁴ Denise A. Davenport & Lisa A. Stegink, *Should You Try Mediation Instead of Filing Suit?*, Comment to *Associations Now*, CENTER FOR ASS’N LEADERSHIP (July 2011), <http://www.asacenter.org/Resources/ANowDetail.cfm?ItemNumber=98679>, archived at <http://perma.cc/BD8H-BNJP>.

⁴⁵ Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, HARV. NEGOT. L. REV. (forthcoming 2014) at 10, Feb. 19, 2013, archived at <http://perma.cc/Q4S9-U66L>.

⁴⁶ *Id.*

⁴⁷ See Campbell, *supra* note 41, at 19–20.

⁴⁸ See *id.* at 20.

⁴⁹ See Heather Anderson & Ron Pi, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS, at xxi (2004), <http://www.courts.ca.gov/documents/empprept.pdf>, archived at <http://perma.cc/98MU-YAWE>.

saved parties an average of almost ninety-five hours of litigation time.⁵⁰ Studies have also shown mediation to be quicker and less expensive than arbitration.⁵¹ For example, a 2012 analysis by the Mediation Research & Education Project, a non-profit organization founded by Northwestern University Law School professor Stephen Goldberg, found mediation costs about one-fifth the price of arbitration.⁵²

Given the millions of dollars of player salaries, broadcasting revenues, and ticket sales at stake in pro sports if settlements are not reached quickly, it is only sensible to seriously consider mediation. Fans of each major American sports league have witnessed an erosion of trust between players and management in recent decades. A mediator who is trained in different mediation strategies could lessen this distrust, and help players and management reach a quick settlement. An objective mediator could also preserve and enhance the constructive communication that is so critical to successful negotiations. A quick settlement would allow pro athletes to focus more on their performances on the field, which is often not possible because they are emotionally involved in the dispute and, in some cases, may even be barred from playing with their team during this time. It would also free management to concentrate on the business and marketing aspects of sports. Resolving labor disputes without strikes or lockouts, and the accompanying rhetoric and breakdown of negotiations, ought to be the top priority for every pro sport.⁵³ The following analysis of the NHL's recent mediation illustrates why mediation is a particularly good fit for pro sports.

⁵⁰ See U.S. DIST. OF NEB., REP. ON MEDIATION, at 13 (2006), <http://www.ned.uscourts.gov/internetDocs/mediation/reports/report-06.pdf>, archived at <http://perma.cc/77VW-PGAS>.

⁵¹ See, e.g., Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12-3 NEGOTIATION JOURNAL 259 (July 1996) (A study of 449 cases administered by four major providers of ADR services showing that mediation costs far less than arbitration, takes less time, and was judged a more satisfactory process than arbitration).

⁵² See Mediation Research and Education Project, 2012 MREP GRIEVANCE MEDIATION REPORT, archived at <http://perma.cc/NC7-X4FZ> (finding that the average cost of mediation in 2010-2011 was approximately \$906 per case, \$453 per party. According to FMCS arbitration statistics, the comparable costs for arbitration during the same period were approximately \$4,430, \$2,215 per party).

⁵³ See Kupelian & Salliotte, *supra* note 25, at 386-89.

A. Preserves Working Relationships

A major benefit of mediation is that it preserves working relationships between players and their teams in individual contract negotiations.⁵⁴ While working relationships are important in all careers, bitter negotiations in sports disputes involving a player's performance can be especially problematic. Nowadays, coaches sometimes double as the general manager and negotiator of contracts—or, if they do not, at least have considerable input in personnel decisions.⁵⁵ Management has an interest in the player maintaining his confidence and not hearing comments about his weaknesses during negotiations or arbitration hearings, which are intended solely to deflate the agent's or arbitrator's perceived value of the athlete.⁵⁶

In this regard, mediation is vastly superior to arbitration. Consider pro baseball arbitration, which the Associated Press has characterized as “the often acrimonious negotiating process that rankles baseball management every winter.”⁵⁷ Due to the fact that a team can refuse to arbitrate, a stand-off is created during the negotiating process. “The take-it-or-leave-it approach causes [teams] to release players for whom they might otherwise be willing to negotiate with more flexibility.”⁵⁸ For example, in 2003, the Atlanta Braves declined an arbitration hearing and instead released star pitcher Greg Maddux, who had amassed a Hall of Fame-caliber record with the

⁵⁴ See SIMON GARDINER, SPORTS LAW 251 (3d ed. 2006).

⁵⁵ See, e.g., Shaun O'Hara, *Bill Belichick Addresses Aaron Hernandez Situation the Right Way*, NFL.COM (July 24, 2013, 3:44 PM), <http://www.nfl.com/news/story/0ap100000220384/article/bill-belichick-addresses-aaron-hernandez-situation-the-right-way>, archived at <http://perma.cc/R7DK-KVSH> (stating that New England Patriots' Head Coach Bill “Belichick took it a step further by acknowledging his accountability in the personnel decisions made by the Patriots”); Brad Wilson, *DeSean Jackson Departure Shows Once and for All Who's Running the Philadelphia Eagles Now: Chip Kelly*, THE EXPRESS-TIMES (April 1, 2014, 12:55 AM), http://www.lehighvalleylive.com/brad-wilson/index.ssf/2014/03/desean_jackson_departure_shows_once_and_for_all_whos_running_the_philadelphia_eagles_now_chip_kelly.html, archived at <http://perma.cc/QTK3-VR3T> (stating that “This is Chip Kelly's show now. Any doubt who was calling the shots for the Philadelphia Eagles on personnel matters disappeared in a terse statement issued today that the Eagles have ‘parted ways’ with explosive but high-maintenance wide receiver DeSean Jackson.”).

⁵⁶ See Kupelian & Salliotte, *supra* note 25, at 391.

⁵⁷ The Associated Press, *Willis Files for Arbitration*, SALT LAKE TRIBUNE (Jan. 14, 2006, 12:55 AM), http://www.sltrib.com/sports/ci_3401828, archived at <http://perma.cc/RX2X-AD29>.

⁵⁸ Campbell, *supra* note 41, at 28.

club.⁵⁹ Maddux seemed stunned, remarking, “You’d think after 11 years . . . to not be offered arbitration or even a contract, I’m a little surprised by it. But it is the nature of the game now.”⁶⁰ The Braves’ general manager at the time, John Schuerholz, said he had no choice, claiming that “[w]ith the economic circumstances we find ourselves in, we just weren’t in position to go to arbitration with these players, because that’s such an uncertain process.”⁶¹ Players and management alike have lamented baseball’s arbitration process because it creates bad blood. As John Coppolella, director of baseball operations for the Atlanta Braves explained:

Anything’s fair game, but here’s the thing: you need to live with that player for the next three years. You need to go through hearings with him. And if you like Johnny Shortstop, and you want to sign him long term, and you bring [criticisms] up in front of a court hearing, that’s not too good. It’s tough, and it’s a fine line to walk. Really, arbitration is a process that is very difficult and very painful for all parties involved, and when you bring stuff up like that, it makes it even worse.⁶²

Indeed, a 2012 analysis by Baseball Prospectus, a media outlet that conducts sabermetric analyses of the MLB, found that players who went through arbitration were less likely to re-sign long-term deals with their teams.⁶³ Further, another study of MLB statistics from 2001-04 found that sixty-two percent of players who went through arbitration performed “worse” or “substantially worse” compared to the previous season. Of those who performed better, many had switched teams. The study’s authors concluded:

While such results can be related to other factors, these statistics certainly do not support the notion that negotiation-to-arbitration is a constructive sequence that produces positive long term results. Certainly, the adversarial process controlled by third party neutrals inherent to arbitration, violates the modern understanding and appreciation of sports psychology.⁶⁴

⁵⁹ See Tim Evaritt, *Atlanta Braves: The Day After the Arbitration Deadline*, THE CHATTANOOGAN (Dec. 9, 2003), <http://www.chattanooga.com/2003/12/9/44316/Atlanta-Braves-The-Day-After-The.aspx>, archived at <http://perma.cc/5SQC-AC8X>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Ben Lindbergh, *Overthinking It: Does Arbitration Drive Players Away?*, BASEBALL PROSPECTUS (July 3, 2012), <http://www.baseballprospectus.com/article.php?articleid=17566>, archived at <http://perma.cc/DC9X-QVF3>.

⁶³ *See id.*

⁶⁴ *Id.* at 31.

Interestingly, in 2013, there were no arbitration hearings.⁶⁵ Perhaps the league is ready for a new approach to salary disputes.

During the mediation process, an experienced mediator can avoid the acrimony common in arbitration through the use of “private caucuses” in which the mediator talks with each party confidentially, away from the other side.⁶⁶ Usually, these caucuses will go back and forth, a process known as “shuttle diplomacy,” until the separated parties can reach an agreement.⁶⁷ This enables the mediator to soften management’s tone in criticizing the player, and prevents the player from directly hearing such negative commentary. Even if joint sessions involving both parties 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.”⁶⁸

During the recent NHL mediation, the mediator shuttled between both sides all day long. Beckenbaugh knew he had to mend fences before he could put both sides in a room together to talk.⁶⁹ ESPN NHL analyst Pierre LeBrun observed that “[i]f anything should have been trending on Friday, it was the Beckenbaugh Shuffle. Talk about a workout: back and forth, back and forth, back and forth, all morning, all afternoon and all night long between the [union’s] hotel and the NHL offices a couple of blocks apart.”⁷⁰ It worked. ESPN reporter Scott Burnside said, “when two sides are as prickly with each other as these two have been in the past . . . this shuttle diplomacy is the only way to move the sides forward.”⁷¹

B. Protects Privacy

The private caucuses also provide confidentiality to the parties and help the mediator fashion a potential resolution. In addition to intra-party pri-

⁶⁵ Tom Van Riper, *Baseball Pitches Arbitration Shutout in 2013*, FORBES (Feb. 21, 2013, 1:05 PM), <http://www.forbes.com/sites/tomvanriper/2013/02/21/baseball-pitches-arbitration-shutout-in-2013/>, archived at <http://perma.cc/W89Q-93TX>.

⁶⁶ See Epstein, *supra* note 34, at 410.

⁶⁷ See *id.*

⁶⁸ Kupelian & Salliotte, *supra* note 25, at 389.

⁶⁹ See Keith Lutz, *Dispute Resolution, NHL Style*, HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION DAILY BLOG (Feb. 12, 2013), <https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-nhl-style/>, archived at <http://perma.cc/KE55-KE3T>.

⁷⁰ Pierre LeBrun & Scott Burnside, *Debate: Will Shuttle Diplomacy Get It Done?*, ESPN (Jan. 4, 2013, 11:44 PM), http://espn.go.com/blog/nhl/post/_id/21135/debate-will-shuttle-diplomacy-get-it-done, archived at <http://perma.cc/G2V8-DVCU>.

⁷¹ *Id.*

vacy, mediation can provide privacy in the proceedings themselves and in subsequent litigation.

First, a mediator can listen to concerns raised by one party and agree not to divulge any sensitive information until permission is received from that party.⁷² This process could be particularly useful for sensitive financial information about a team or player, health problems of a player, or potential transactions involving the player. Knowing such information, a mediator can formulate a resolution that meets the actual goals, needs, and desires of both management and player.⁷³

The law also provides an extra layer of privacy. In order to facilitate frank settlement discussions between the parties, several states have enacted the Uniform Mediation Act, which creates a mediation privilege for most mediation communications and prevents their use in subsequent legal proceedings.⁷⁴ Such process, creativity and protection is not possible in a professional sports dispute when the general manager and player's agent are placed in a room or conduct negotiations by phone without the assistance of a neutral third party.⁷⁵

Instead, all too often, one or both parties will use the media to air their dispute. Even pro sports agent Drew Rosenhaus, who represented National Football League (NFL) star Terrell Owens in his infamous contract dispute with the Philadelphia Eagles, has conceded that this is a bad approach:

The only thing that happens when you use the media is that you [tick] the team off and embarrass them. By making the negotiations public, the team becomes tougher because they don't want to look bad in the public eye. Obviously, I have learned . . . that holding a player out and using the media in negotiations is not a good idea.⁷⁶

Ironically, Rosenhaus made that statement in his book back in 1997—well before the Owens-Philadelphia saga. But, surely, any reasonable outside observer now recognizes that the PR crisis was bad for both the player and the team. Owens demanded a new contract just one year after agreeing to a seven-year, \$49 million dollar deal.⁷⁷ After threatening to sit out the season if a new agreement could not be reached, Owens reported to training camp but brought with him a large chip on his shoulder. The battle between the

⁷² See Kupelian & Salliotte, *supra* note 25, at 393.

⁷³ See *id.*

⁷⁴ See Peters & Mastin, *supra* note 33, at 46.

⁷⁵ See Kupelian & Salliotte, *supra* note 25, at 393.

⁷⁶ DREW ROSENHAUS, *A SHARK NEVER SLEEPS* 8 (1997).

⁷⁷ Chick Ludwig, *Bengals Visit Team Turmoil; Eagles' Soap Opera Filled with Squabbles, Injuries, T.O.'s Antics*, DAYTON DAILY NEWS, Aug. 26, 2005, at C5.

All Pro wideout and the Eagles deteriorated to the point that Owens was released from the team. The Eagles' locker room became divided over the issue and the team missed the playoffs after advancing to the Super Bowl the previous season.⁷⁸ Meanwhile, Owens lost out on millions of dollars in salary⁷⁹ and was scorned by a once-adoring public.⁸⁰

Likewise, during the NHL lockout, owners and players initially made the mistake of airing their grievances in the press. There had been three months of "ugly press release exchanges and mood-dampening news leaks."⁸¹ The mediator put an end to the media circus by implementing "a news blackout on the proceedings, the location of which was kept quiet."⁸² The NHL and players' union complied with the gag order.⁸³ The next time the public received an official update from either side, a settlement had been reached. Now that both sides have learned that attempting to negotiate a new CBA through the media is harmful as opposed to helpful, perhaps they will insist on confidential talks when discussing future agreements.

C. Better for Public Relations

Because mediation enables greater privacy, it could significantly help pro sports leagues protect their reputation and image. Public relations and consumer opinion are important in any business, and pro sports seem especially dependent on it.⁸⁴ A professional league's inability to gauge public

⁷⁸ See *Eagles' McNabb Takes His Chance to Fire Shots Back at Owens*, TUSCALOOSA NEWS, July 22, 2006, at 5C, archived at <http://perma.cc/9Z3K-38XP>.

⁷⁹ *Eagles' Effort to Recover Portion of Bonus Backed by Arbitrator*, ESPN (Jan. 29, 2008, 7:14 PM), <http://sports.espn.go.com/nfl/news/story?id=3220008>, archived at <http://perma.cc/CE38-F6FS> (stating the Eagles withheld about \$1 million in salary from Owens and an arbitrator ordered Owens to forfeit an additional \$1.7 million from his contract signing bonus).

⁸⁰ See Les Bowen, *Expect Eagles Fans to Give T.O. a Raucous Reception*, PHILADELPHIA DAILY NEWS, Oct. 6, 2006, at 4 (in which Eagles' player Jeremiah Trotter assesses Eagles' fans view of Owens as, "When you're on their team, they love you, and when you're off their team, they hate you.").

⁸¹ Jones, *supra* note 5.

⁸² See Kevin Allen, *NHL, Players Meet with Mediators, Plan to Talk Again*, USA TODAY (Nov. 28, 2012, 8:10 PM), available at <http://www.usatoday.com/story/sports/nhl/2012/11/28/nhl-mediation-labor-talks/1731793/>, archived at <http://perma.cc/MMV2-DF2D>.

⁸³ See *id.*

⁸⁴ See, e.g., Jane Summers & Melissa Morgan Johnson, *More Than Just The Media: Considering the Role of Public Relations in The Creation of Sporting Celebrity and the Management of Fan Expectations*, 34-2 PUBLIC RELATIONS REVIEW 176 (2008) (stating, "in the cultural and ideological world of sport, PR has a much more sophisti-

reaction can cause a spiraling negative effect that must be reversed as soon as possible to stop irreparable harm and loss of fans' support. Too often, sports are slow to react to such public outcries. It is easy to document the phenomenon of damage caused. For example, MLB has suffered due to skyrocketing salaries, rampant use of performance enhancing drugs and public displays of embarrassing conduct.⁸⁵ All of these well-documented phenomena are chipping away at the once lofty position of baseball as the national pastime.⁸⁶ Similarly, the NHL's cancellation of its 2004-05 season due to a labor impasse between team owners and the players' union caused both a missed opportunity to increase its popularity and perhaps even a decline in overall fan interest. As a result of the incident, players and team owners both lost a year's worth of income and many fans and corporate sponsors are so disgusted that they may never return.⁸⁷ NHL legend Wayne Gretzky, who is a former managing partner of the Phoenix Coyotes, conceded as much: "In [the Canadian cities of] Toronto, Montreal, Vancouver and in places like that people are going to be mad but eventually they will come back."⁸⁸ He added, "Our project now is in places like Phoenix, Miami and Los Angeles where we've been on the back burner. Where we've worked so hard to build a foundation and we've disappointed a lot of fans and . . . a lot of corporate

cated role to play. In the event of either positive or negative media attention, a sporting celebrity is subjected to unprecedented scrutiny and the increasingly high expectations of fans."); MARIA HOPWOOD ET AL., *SPORT PUBLIC RELATIONS AND COMMUNICATION* 106 (2010) (stating, "Unlike other businesses, for sports organisations public relations (rather than advertising) serves as the central hub for integrated marketing communications. It is not just that sport can be news; it is that sport's significance to its audience depends on it being news. Sports organisations require a high profile – one which suggests not merely that sport is important, but one which demonstrates its ongoing value to people and their communities. This is why successful sports organisations maintain a proactive public relations unit"); Paige Niewerth, *PR's Game Plan for the Sports Industry*, PLATFORM MAGAZINE (Sept. 24, 2010, 9:41 AM) archived at <http://platformmagazine.org/2012/01/prs-game-plan-for-the-sports-industry/> (stating, "Public relations is an essential aspect in the sports industry and has been especially noticeable during the past few years.").

⁸⁵ See Chris Jenkins, *Baseball Starting Off 2005 in Foul Territory*, SAN DIEGO UNION-TRIB., Apr. 3, 2005, at C1, archived at <http://perma.cc/W8JD-E7LU> (stating that MLB suffered "its most turbulent and embarrassing offseason" and listing as examples allegations of steroid use against prominent players, such as Barry Bonds, and unconvincing testimony at a congressional hearing given by record-setting slugger Mark McGwire).

⁸⁶ See, e.g., Peter Barzilai & John Follaco, *What's the Problem with Baseball?*, USA TODAY, Jul. 15, 2003, at 1C, archived at <http://perma.cc/92WG-5PB9>.

⁸⁷ See *NHL Cancels Season Amid Labor Dispute; Last-Minute Talks Fail to Break Impasse*, Facts On File, World News Digest, Feb. 17, 2005.

⁸⁸ *Id.*

sponsorship. Only time will tell how we're going to win those people back."⁸⁹

In those unusual cases where sports disputes, such as salary issues, cannot be solved by mediation quickly, mediation is still of significant value for its ability to keep the dispute out of the public eye. Mediation would offer hope that such disputes could be resolved earlier with much less public display of the greed and pettiness that turns off fans and sponsors. Even though mediation may not solve contract disputes immediately, ground rules would be established for maintaining confidentiality during mediation, which may be conducted during several sessions over a period of time. For instance, although the mediation process may not resolve the salary issues, perhaps an agreement may be made to avoid public statements about the dispute. As a result, the negative public reaction that invariably follows public commentary on pro sports disputes, particularly in this era of social media, would be avoided.⁹⁰

During the 2012-13 NHL dispute, for example, both sides employed a "plethora of PR ploys and press-conference duels."⁹¹ Personal attacks were made by players and owners alike.⁹² The result was that both sides came out looking bad in fans' eyes. A rigorous brand analysis study conducted during the lockout found that the dispute was more damaging to the NHL's brand than the 2010 Gulf of Mexico oil spill was to BP.⁹³ "We found damage at levels we have not seen. It's quite alarming, really," said David Kincaid, head of the firm conducting the study.⁹⁴ Mediation stopped the bleeding by moving the dispute out of the court of public opinion. Both sides no longer needed to engage in posturing that might further alienate fans. Instead, negotiations could take place in private through a neutral third party. With no one else watching the negotiations, the two sides could abandon hard line stances, reach a compromise, and save face. "The mediation-made-me-do-it syndrome can work in their favor," Temple University professor Joseph Fol-

⁸⁹ *Id.*

⁹⁰ See Kupelian & Salliotte, *supra* note 25, at 391.

⁹¹ Jones, *supra* note 5, at 4.

⁹² See Steve Silverman, *NHL Lockout: NHL Puts on More Pressure as Mediation Fails*, BLEACHER REP. (Nov. 29, 2012), <http://bleacherreport.com/articles/1427347-nhl-lockout-nhl-puts-on-more-pressure-as-mediation-fails>, archived at <http://perma.cc/3YYZ-7KZ7>.

⁹³ See Roy MacGregor, *NHL Lockout Doing 'Alarming' Damage to Brand*, THE GLOBE AND MAIL (Dec. 17, 2012, 11:00 PM), <http://www.theglobeandmail.com/sports/hockey/nhl-lockout-doing-alarming-damage-to-brand/article6500907/>, archived at <http://perma.cc/AV2F-B9EK>.

⁹⁴ *Id.*

ger, a mediator who teaches conflict resolution courses, explained.⁹⁵ The party that makes the biggest concessions can “save face by implying it was pressure from the mediator that caused it. It wasn’t that they caved, but they went with something the mediator [suggested].”⁹⁶

In college sports, the Big 12 Conference and Western Athletic Conference used mediation to resolve issues surrounding the departure of member schools—and both achieved a settlement within a month of initiating the process.⁹⁷ Litigating such matters in court would have required significant time and resources. Moreover, mediation provided the conferences and member schools the opportunity to resolve matters quickly and confidentially. By contrast, the Big East Conference recently went through a very messy public breakup that lasted “an arduous four months” and resulted in a \$110 million settlement, according to conference officials.⁹⁸ The road to recovery could be a long one. As one sports columnist cautioned, “[T]he Big East brand has undoubtedly suffered lately due to conference realignment, instability among member institutions and generally bad press.”⁹⁹

D. Offers Neutrality

Mediators help bring about a settlement by providing an environment of neutrality rather than judgment—which is invariably present when disputes are aired through legal proceedings, arbitration, or the court of public opinion. To help ensure fair and impartial proceedings, mediation organizations such as the American Arbitration Association (AAA) require their members to adhere to an ethics code.¹⁰⁰ They are also required to complete mandatory training and continued skills development courses.¹⁰¹ Mediators from the AAA, federal government, and other professional organizations

⁹⁵ Carchidi, *supra* note 31.

⁹⁶ *Id.*

⁹⁷ See Tanaka, *supra* note 11, at 2.

⁹⁸ See Ralph D. Russo, *Big East Completes Football-Basketball Breakup*, ASSOCIATED PRESS (Mar. 8, 2013, 5:52 PM), <http://bigstory.ap.org/article/big-east-completes-football-basketball-breakup>, archived at <http://perma.cc/77FK-N6WM>.

⁹⁹ Nicholas Hall, *The Big East is Dead . . . Long Live the Big East!*, CARTERET COUNTY NEWS-TIMES (March 8, 2013, 11:50 AM), http://www.carolinacoastonline.com/news_times/sports/article_ab0789f6-8806-11e2-9259-001a4bcf887a.html, archived at <http://perma.cc/NW4T-T2NP>.

¹⁰⁰ See generally *Model Standards for Mediation Certification Programs*, ASSOCIATION FOR CONFLICT RESOLUTION (Oct. 10, 2011), <http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsCertification.pdf>, archived at <http://perma.cc/V8H-EZYQ>.

¹⁰¹ See *id.*

have experienced significant success in disputes involving multiple parties and issues much more complex than that of an athlete's continued employment with a team.¹⁰² Even disregarding such successes, the mere addition of a neutral facilitator into the formula can be all it takes to make a difference in resolving such a dispute.¹⁰³ Experienced general managers and players' agents often "have history in negotiating with each other and, [where this history] is negative, they might bring [. . .] excess baggage with them to contract talks."¹⁰⁴ This bitter history can prevent negotiations from progressing or even happening. In the MLB, for example, several teams have bypassed on selecting some highly-regarded prospects in the draft or signing coveted free agent players because they did not want to have to deal with their agent Scott Boras, who has a reputation of being difficult to negotiate with.¹⁰⁵

Mediators, however, are trained to focus on parties' issues and interests, not their personalities and positions.¹⁰⁶ To achieve this focus, they may initially spend considerable time meeting in private caucuses before bringing the parties together to prevent negotiations from deteriorating. Similarly, the mediator will take charge in scheduling meetings and follow-up with letters, phone calls, or e-mails where necessary.¹⁰⁷ They will also facilitate

¹⁰² See Tom Arnold, *Why is ADR the Answer?*, THE COMPUTER LAWYER, July 1998, at 13, 17 (describing the author's own mediation experiences involving patent infringement, which offered significant savings in litigation costs despite the complexity of the subject matter).

¹⁰³ See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 28-29 (1996) (explaining 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).

¹⁰⁴ Kupelian & Salliotte, *supra* note 25, at 394.

¹⁰⁵ Patrick Languzzi, *Is Scott Boras Really Good for Major League Baseball?*, BLEACHER REP. (Jul. 30, 2011), <http://bleacherreport.com/articles/785328-mlb-is-scott-boras-really-good-for-major-league-baseball>, archived at <http://perma.cc/EDE6-3VN4> (stating that "[s]maller market teams often avoid Boras draft clients because of the high-dollar contracts often sought after for players who've never played in the minor leagues."); PON Staff, *Hardball Tactics from a Major Leaguer*, HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION DAILY BLOG (Oct. 25, 2011), <http://www.pon.harvard.edu/daily/business-negotiations/hardball-tactics-from-a-major-leaguer/>, archived at <http://perma.cc/WUY6-S928> (stating that "Some teams, including the Chicago White Sox, dislike Boras's tactics so much that they refuse to negotiate with his clients.").

¹⁰⁶ See *Mediation Skills in Conflict Resolution*, FED. MEDIATION AND CONCILIATION SERVICE at 19, (Oct. 10, 2011), http://www.iafc.org/files/lmiConf11_Mediation-SkillsinConflictResolution.pdf, archived at <http://perma.cc/8VDX-K435> (stating the principles of mediation).

¹⁰⁷ See Kupelian & Salliotte, *supra* note 25, at 394.

communications between the parties and ensure that they are at least talking, which is often one of the biggest impediments to resolving disputes.¹⁰⁸ Typically, a player's agent has several clients and the team's general manager has many personnel issues to deal with on a daily basis. The mediator can help keep the parties' attention on addressing their dispute by preventing procrastination.¹⁰⁹

All of these benefits were demonstrated during the NHL mediation, in which Beckenbaugh skillfully "diffus[ed] a time bomb that could have exploded."¹¹⁰ Neither the players nor the owners had fully "recovered from the poisoned atmosphere caused by the 2004-05 lockout."¹¹¹ Throughout the dispute, "each accused the other of not being serious and acting in bad faith."¹¹² Team owners "complained that the players failed to respond to proposals when they promised to do so" and that they delayed or canceled scheduled meetings.¹¹³ The players' union thought owners were trying to renege on "previously-agreed points when they tabled new proposals with undisclosed changes."¹¹⁴ The mediator stopped the stalling tactics and offered impartial motivation to get a deal done. He helped both sides realize their shared interest of keeping the NHL thriving and abandon self-interest in favor of compromise.

Mediation has even had success in overcoming difficult agents like Boras. In 2007, Boras encountered a stalemate with New York Yankees' owner George Steinbrenner while negotiating a new contract for his client, Yankees baseball player Alex Rodriguez.¹¹⁵ Both sides had issued ultimatums and balked at each other's demands.¹¹⁶ As a result, both sides felt insulted and believed the other side was not interested in maintaining their

¹⁰⁸ See Golann, *supra* note 103, at 43 (suggesting that once a mediator gets both parties focused on the dispute, settlement is likely to result).

¹⁰⁹ See *id.* (noting how parties have a natural tendency to procrastinate).

¹¹⁰ Hughes, *supra* note 15.

¹¹¹ Michael Erdle, *Mediator Saves NHL & Players From Themselves*, SLAW (Feb. 4, 2013), <http://www.slaw.ca/2013/02/04/mediator-saves-nhl-players-from-themselves/>, archived at <http://perma.cc/7AXT-L8W3>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See generally Jack Curry & Tyler Kepner, *For Rodriguez and Yankees, It's All but Over*, N.Y. TIMES, Oct. 29, 2007, archived at <http://perma.cc/6C3M-KU7J>.

¹¹⁶ See Joan Stearns Johnsen, *Alternative "Deal" Resolution: The Facilitated Negotiation of Transactions*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 193, 200-01 (2011), (stating that, "The stalemate arose after Boras demanded that the Yankees begin discussions with an offer of \$350 million, but this was rejected. Steinbrenner had stated that he would not negotiate with Rodriguez were he to exercise [the opt-out provision of his contract and become a free agent].").

relationship.¹¹⁷ Despite indications otherwise, Rodriguez wanted to remain a Yankee because he was a native New Yorker and his wife preferred the city.¹¹⁸ Consequently, he reached out to business magnate Warren Buffet, who suggested using Goldman Sachs managing directors John Mallory and Gerald Cardinale as intermediaries.¹¹⁹ Despite his public position of being prepared to let Rodriguez leave, it turned out that Steinbrenner wanted to keep the All Star slugger, who was on the verge of breaking MLB's homerun record.¹²⁰ The mediators were able to overcome damage that had occurred in the relationship, uncover underlying interests and resurrect a deal.¹²¹ Given this result, perhaps management would be less reluctant to pursue players represented by challenging agents like Boras if their league's CBA required mediation when contract talks broke down.

E. Keeps Negotiations Going

When talks have stalled or broken down, as with the NHL dispute, moving beyond the impasse can be difficult because the parties are strategically reluctant to make the next contact, preventing talks from resuming.¹²² As a neutral party who is trained to deal with these types of situations, the mediator can help break through these stalemates.¹²³

The NHL talks "knew plenty of trouble and breakdowns and mistrust Beckenbaugh was there to fix the holes and get negotiations back on track," the Associated Press reported.¹²⁴ "At times during the final hours of talking, Beckenbaugh waited in the background while the sides continued to work. Negotiations kept going without him, but the bargaining was buoyed because the NHL and the union knew he was there if trouble arose

¹¹⁷ See *id.* (stating that, "There were perceived insults on both sides. Parties did not believe their opens were interested in maintaining their existing relationship.").

¹¹⁸ *Id.*

¹¹⁹ See Danielle Sessa, *Buffet Told Rodriguez to Call Yankees on Contract, Person Says*, BLOOMBERG NEWS (Nov. 18, 2007), <http://bloom.bg/1rSsWVS>, archived at <http://perma.cc/9HFL-6Q9D>.

¹²⁰ See Johnsen, *supra* note 116.

¹²¹ *Id.* (stating that, "In the end, the Third Party Neutrals were able to work past these disagreements to neutralize personal conflicts and hard feelings.").

¹²² See Golann, *supra* note 103, at 41-44 (discussing how procrastination can be an obstacle to reaching a timely settlement and the mediator's role is eliminating this obstacle).

¹²³ See *id.*

¹²⁴ Podell, *supra* note 16.

again.”¹²⁵ As Dan Oldfield, lead negotiator for the Canadian Media Guild, explained it:

You can bet he constantly reminded them how close they were. You can bet he reminded them of what was at stake, what they owed the fans and each other. And you can bet he offered lots and lots of suggestions. But primarily he kept them at the task. When he realized the parties were close to a deal he brought them together and there was no way they were getting out of that room without one.¹²⁶

Winnipeg Jets defenseman Ron Hainsey said:

[The mediator] was in the room and the process continued to move forward. It wasn't a smooth ride. When it got to points where you didn't know what to do next—it might upset the other side—you could go to him, talk to him about it, and there was a way to work your ideas through a third party who was able to really help the process.¹²⁷

Phoenix Coyotes captain Shane Doan agreed: “The mediator . . . kind of kept us going, and that was huge.”¹²⁸

Similarly, a mediator helped get negotiations back on track during NFL's 2011 labor dispute between team owners and players. NFL owners had locked out players after the two sides were unable to agree on a new CBA. The players' union filed suit, seeking to force owners to resume football operations. A court upheld the lockout and mandated both sides to undergo mediation. The first thing the mediator did was huddle NFL commissioner Roger Goodell and NFL Players Association chief DeMaurice Smith together for lunch, away from the microphones and cameras of the nosy press. He found a quiet place for the three of them to grab a bite to eat and they talked about their families and background—everything but football. Goodell and Smith went on to regularly break bread with the mediator, a practice that built trust and eventually led to an agreement.¹²⁹ “Part of the

¹²⁵ *Id.*

¹²⁶ Dan Oldfield, *Oldfield: Mediator Scot Beckenbaugh for NHL MVP?*, CBC SPORTS (Jan. 7, 2013), <http://www.cbc.ca/sports/hockey/nhl/oldfield-mediator-scot-beckenbaugh-for-nhl-mvp-1.1306900>, archived at <http://perma.cc/EGF4-Z9X6>.

¹²⁷ Mark Zwolinski, *NHL Lockout: U.S. Mediator MVP of Final Bargaining Session*, TORONTO STAR, Jan. 6, 2013, archived at <http://perma.cc/ZG4S-RFCS>.

¹²⁸ Steve Zipay, *NHL, Players Reach Tentative Deal; Ratification Would End Lockout*, NEWSDAY (January 6, 2013), <http://www.newsday.com/sports/hockey/nhl-players-reach-tentative-deal-ratification-would-end-lockout-1.4412276>, archived at <http://perma.cc/B2LB-DKZ6>.

¹²⁹ Thomas Lee, *Chief Magistrate Judge Arthur Boylan Broke the NFL Labor Stalemate*, STAR TRIBUNE, Sep. 7, 2013, archived at <http://perma.cc/LH6W-Q6LR>.

whole thing about mediation is finding common ground, even if it's something unrelated. You can find camaraderie in anything," said the mediator, Arthur Boylan.¹³⁰ The two sides eventually worked out an agreement and the NFL lockout ended after 136 days.¹³¹ Although the dispute was ultimately settled through negotiations, mediation provided a framework for the bargaining process to happen. "Eventually, the risk of uncertainty associated with relying too heavily on the courts to 'solve' their differences . . . outweigh[ed] the utility of litigation to improve bargaining position," said mediator Michael Petruzzi, who blogged about the case. "In the final, both sides kn[ew] they [we]re partners in a very profitable enterprise and they [were] forced to bargain with one another to keep it thriving."¹³²

III. LIMITATIONS OF MEDIATION

Mediation does not have a perfect record, of course, and it has been unsuccessful when used in some pro sports disputes. For example, Beckenbaugh unsuccessfully attempted to mediate the NHL's labor dispute during its 2004-05 season.¹³³ During the most recent labor lockout, he initially made an unsuccessful attempt to resolve the dispute in November 2012, before getting it done during a second attempt in January 2013.¹³⁴ Beckenbaugh attributed the earlier failures to the sides being too far apart.¹³⁵ Because there was too significant a gap in demands between the disputants and neither side seemed willing to compromise, mediation was unproductive.¹³⁶

¹³⁰ Mike Halford, *Former NFL Labor Mediator on NHL Lockout: "I'd Volunteer to Do it For Free*, NBC SPORTS (Nov. 15, 2012), <http://prohockeytalk.nbcsports.com/2012/11/15/former-nfl-labor-mediator-on-nhl-lockout-id-volunteer-to-do-it-for-free/>, archived at <http://perma.cc/ZS24-6ZX7>.

¹³¹ *Id.*

¹³² Michael Petruzzi, *NFL Lockout: How Mediation is Helping*, OVAL OPTIONS BLOG (May 2011), <http://ovaloptions.com/blog/2011/05/nfl-lockout-how-mediation-is-helping/>, archived at <http://perma.cc/3PKM-FVB2>.

¹³³ Erdle, *supra* note 111.

¹³⁴ Podell, *supra* note 16.

¹³⁵ *See id.*

¹³⁶ *Cf.* Chris Johnston, *Owners, Players May Go it Alone at Talks*, THE CHRONICLE HERALD (Nov. 30, 2012, 5:16 AM), <http://thechronicleherald.ca/sports/205203-owners-players-may-go-it-alone-at-talks>, archived at <http://perma.cc/TXR7-G2RK> (quoting a statement from NHL deputy commissioner Bill Daly that said "After spending several hours with both sides over two days, the presiding mediators concluded that the parties remained far apart, and that no progress toward a resolution could be made through further mediation at this point in time. We are disappointed that the mediation process was not successful.").

Mediation is likely to fail if the dispute contains high levels of conflict and low commitment to mediate. “ADR is not a perfect system and presumes, especially in mediation, that both parties wish to explore a compromise. [P]articularly in mediation, settlement can only be reached if the parties are sincere in their commitment to reach an agreement,” concedes Professor Epstein.¹³⁷ In contract disputes, the alternative to settling, of course, is that no deal is reached and the player or, perhaps, the entire league does not play. Temple University’s Folger said, “It’s all about the timing when mediation is involved. [It can work i]f both sides are at a place where they realize the alternative is much worse than compromising.”¹³⁸ While that apparently was not the attitude of either side during the 2004-05 NHL dispute, perhaps the unfortunate outcome of that dispute helped both sides realize the need for compromise during the 2013 labor dispute.

Although mediation does not guarantee a settlement, it does increase the probability of reaching a resolution. William B. Gould IV, a former chairman of the National Labor Relations Board and a professor emeritus at Stanford Law School, said, “If the parties [say] they don’t want to go to mediation, that would be downright discouraging. So the fact they’re willing to do it, that they have some things to discuss, is in itself hopeful.”¹³⁹ While mediation may open the door for resolution, it cannot work miracles.¹⁴⁰ “Mediation means nothing without effort” from the conflicting parties, said one hockey reporter who covered the NHL’s labor dispute.¹⁴¹ “The federal mediator can be as skilled as possible, but no mediator can make these sides want to negotiate. Until they want to negotiate, we’ll still be sitting here with no NHL hockey and little hope of seeing any this season.”¹⁴²

Finally, participants should keep in mind that while mediation often speeds up settlement, it nevertheless does require patience on their part. After mediation initially did not result in a quick fix of the most recent NHL dispute, Oldfield said:

There [were] both participants and observers who repeatedly questioned the involvement of a mediator; some even suggesting efforts to mediate

¹³⁷ Epstein, *supra* note 34, at 424.

¹³⁸ Carchidi, *supra* note 31.

¹³⁹ Jeff Z. Klein, *Federal Mediators Will Oversee Negotiations on Lockout*, N.Y. TIMES, Nov. 26, 2012, at B13, *archived at* <http://perma.cc/AJ5Z-R6SS>.

¹⁴⁰ See Bruce Ciskie, *NHL Lockout 2012: Mediation Means Nothing Without Effort*, SB NATION (Nov. 27, 2012, 1:16 PM), <http://www.sbnation.com/nhl/2012/11/27/3697002/nhl-lockout-2012-mediation>, *archived at* <http://perma.cc/NG23-GD35>.

¹⁴¹ *Id.*

¹⁴² *Id.*

had failed. That view is understandable if you assume that success has to be measured against the outcome of every meeting between the parties. But, as I've said before . . . , negotiations are a process—not an event.¹⁴³

Regardless of the outcome, mediation is arguably never a waste of time. By going through the process, if properly conducted, key issues could be identified that, in turn, could eventually lead to a resolution. The communication and open discussion of issues may also lead to a better working relationship. Alternatively, mediation may help both parties realize sooner rather than later that their relationship should be terminated, and that it is better for both sides to agree to a trade, release or other player transaction.¹⁴⁴ Participation in mediation also helps educate parties in avoiding disputes.¹⁴⁵ Namely, parties learn to deal with disputes early, listen to grievances and evaluate their own case weaknesses. Thus, parties gain long-term skills that help prevent disputes—saving future time and cost.

IV. PROPOSAL

Despite all of its benefits and the limited drawbacks, “mediation has not yet been regularly utilized by the NFL, NHL, NBA, MLB, or MLS.”¹⁴⁶ Perhaps that should not be surprising given the language and terms of the existing CBAs in major American pro sports leagues. While the CBAs of the four major American sports all have several pages outlining the use of arbitration, there is no mention of mediation, even though it is a no-obligation, no-pressure option.¹⁴⁷ Mediation in pro sports, thus far, has been only on a rare and informal basis. In the case of the recent NHL dispute, for example, neither side sought mediation. Rather, federal mediators reached out and offered their assistance.¹⁴⁸

Pro sports should be more proactive about seeking mediation. By the time a mediator gets involved it is often too late.¹⁴⁹ Relationships may have

¹⁴³ Oldfield, *supra* note 126.

¹⁴⁴ See Kupelian & Salliotte, *supra* note 25, at 391.

¹⁴⁵ See John P. Madden, *Mediation Saves: Time, Money and Business Relationships*, COM. MEDIATION ASS'N, U. OF DUBLIN 7, Mar. 6, 2009, archived at <http://perma.cc/3DVH-65CC>.

¹⁴⁶ Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J. L. 167, 170 (2013).

¹⁴⁷ See *id.*

¹⁴⁸ See Klein, *supra* note 139.

¹⁴⁹ See Isaac *supra* note 146, at 171 (stating, “. . .it would be more productive to engage in mediation in a timely and proactive manner, as opposed to mere weeks before the expiration of the CBA.”).

soured irreparably and both sides may have become more stubbornly committed to their positions even when it results in self-sabotage. Perhaps this is why fans expected mediation to fail in the recent NHL dispute.¹⁵⁰ As one sports journalist warned when Beckenbaugh initially got involved, “mediation seems to be the last resort that never works.”¹⁵¹ Ideally, mediation should occur in the early stages of a dispute, and not be used as a last-second Hail Mary pass, as is usually the case.¹⁵² For example, Major League Soccer used mediation in 2010 as a preventative measure rather than waiting for a breakdown in negotiations and using it as a reactive measure.¹⁵³ Because a mediator got involved early in the labor negotiations process, team owners and players reached a CBA before any players’ strike occurred.¹⁵⁴

In order to encourage management and players to seek out mediators, future CBAs should integrate a provision for mediation in contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation. Specifically, the clause should send matters not resolved through negotiations to mediation; or, if parties do not wish to negotiate, provide mediation in advance of arbitration. Such a provision neither eliminates nor limits the arbitration processes that have been adopted in all pro sports leagues. Rather, it provides a non-binding alternative that gives the parties the opportunity to have more control over the process before having a conclusion imposed on them.

V. CONCLUSION

America’s long history of pro sports disputes and their negative effect on player morale and public opinion evince the need to adopt a speedy, cost effective and diplomatic resolution technique. Mediation would offer a remedy by establishing a forum for open communication, which is currently missing in many sports negotiations. It would provide both parties with

¹⁵⁰ See Jones, *supra* note 5.

¹⁵¹ Joseph Kuchie, *NHL Lockout 2012: Why Federal Mediators Won’t Help Save the 2012-2013 NHL Season*, BLEACHER REP. (Dec. 11, 2012), <http://bleacherreport.com/articles/1442129-nhl-lockout-2012-why-federal-mediators-wont-help-save-the-2012-2013-nhl-season>, archived at <http://perma.cc/4JB4-FTCM>.

¹⁵² See Isaac, *supra* note 146, at 187 (stating that using mediation as a last resort “tends to result in last minute negotiation processes that are rarely resolved in time and result in lost games and seasons.”).

¹⁵³ See L.E. Eisenmenger, *MLS and Players Union Reach Agreement in Principle, Avert Strike*, EXAMINER (Mar. 20, 2010), <http://www.examiner.com/article/mls-and-players-union-reach-agreement-principle-avert-strike>, archived at <http://perma.cc/3B9N-VGGJ>.

¹⁵⁴ See *id.*

confidentiality, which can be used to strengthen their working relationship and keep problems out of news headlines. The neutral environment that comes with mediation would be very helpful in resolving even contentious disputes. Adopting mediation in CBAs would be financially and emotionally beneficial to athletes and management alike. As a result, public confidence in pro sports could be strengthened.