



Reframe the Game: A Winning Paradigm for Mediating Sports Cases

By Hon. Nancy Holtz (Ret.)

“My ego demands — for myself — the success of my team.”¹ — Bill Russell

I had the opportunity to mediate a high value business dispute a few years back. The CEO of one of the parties, a globally recognized sports business, attended with his key people. He was quite engaged throughout the mediation, providing context, background information, and suggestions for the negotiation itself, including proposing possible areas of compromise. Far from letting his attorney speak for him, the CEO was front and center in the negotiations. He was very intense, intelligent, and was clearly a very successful businessman. However, what I remember most about him was his determination to get the case settled at mediation. As the mediation day wore on into the evening, when everyone else was tired and ready to call it quits, the CEO spoke up. He told us, “I’ll stay as late as it takes. Just me and the mediator, and we’ll stay and keep working with the other side.”

I look back now and realize that he was drawing on his background. Before building his international company, he was a high performing athlete. With

that came qualities of determination, endurance, and a thirst to win. When I spoke at the joint session earlier that day — telling the parties that the goal of the mediation was not to demonstrate who had the stronger case, but rather the goal was to settle the case — he understood. He came to win. To settle the case meant winning. And he was not going to let his side — his team — down.

I wondered then if this sports ethic was a source of strength which could be tapped into during mediations.

Could a mediation be viewed by the participants as a contest to be “won” with a settlement? To understand how this can be done requires an appreciation for what the business of sports entails.

Sports disputes beyond the stadium

An athlete can see years of training and hard work evaporate in an instant. A dispute relating to eligibility, doping charges, or some claim of wrongdoing can kill an athlete’s career in a blink of an eye. There is no doubt that many “on the field of play” type disputes do not lend themselves to mediation. But what happens on the field is only the beginning of what we call the “business of sports.”

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It's not just about the athletes. Sports is a multi-billion-dollar industry. Globally, sports represents more than 3% of world trade.² In the last edition of *Entertainment and Sports Lawyer*, Jeremy Evans notes that Fox pays \$500 million per year to air Major League Baseball games, ESPN pays \$1.9 billion per year to air Monday Night Football games, and SkySports pays \$1.22 billion per year to air Premier League soccer games. That is not to mention that in 2014, the total merchandise sales figure from purchases by sports fans was \$12.8 billion. And as Evans points out, this does not include other royalty and licensing agreements. These estimates also do not capture revenue from special events like All Star Games, Super Bowls, concerts and conventions; nor does this include third party revenue, such as advertising and sponsorships, as well as naming rights for a stadium.³

So, when thinking about “sports disputes,” these disputes are not limited to simply those related to eligibility questions, doping charges, suspension and fines, or grievances arising out of the league rules or collective bargaining agreement. Sports disputes can involve ticket sales, venues, broadcasting rights, merchandising, video games, fantasy leagues, sponsorships, and endorsements. With increased television coverage, as well as an increase in leisure time, the numbers keep growing — including salaries. The athletes themselves have become celebrities, making sports now part of the world-wide entertainment industry.⁴

As for how and where these disputes get resolved, they are not always contained within the confines of an arbitration mandated by the terms of a collective bargaining agreement between players and the league owners, e.g. the NFL, the NHL. Other institutions also have arbitration provisions, such as the Court of Arbitration for Sport (CAS), United States Olympic Committee (USOC), and Federation Internationale de Football Association (FIFA). But sports cases are not always arbitrated in the low key confidential venue of an arbitration room. There are claims of breach of contract, rights of publicity, trademark infringement or dilution, defamation, and a host of other claims between and among any number of stakeholders in the sports

industry: the players, the leagues, the owners, the venues, the concessions, the broadcasters, the sponsors, and even the fans. These types of disputes, in the very public forum of the court system, can be splashed across the headlines of the local, national, and even international media. On top of that, a case can live on with social media, such as Facebook, Twitter, and any number of blogs. When a sports dispute arises, the level of media interest can be unpredictable and even a relatively small dispute can captivate the public's attention.

Given the high dollar value of some of the disputes, high public interest in all things sports, as well as the high pressure nature of sports, disputes are inevitable.

For many disputes, mediation can offer a path to resolution.

A fair number of disputes are governed by the terms of a dispute resolution clause, contained in a collective bargaining agreement or in some other contract between the parties. Many dispute resolution clauses provide for arbitration as the means to resolve, although some simply identify a choice of law and venue for litigation purposes. Most dispute resolution clauses do not typically include a requirement to engage in mediation. In light of the many benefits of mediation, more than one scholarly review has suggested that, in order to encourage the parties in a sports dispute to use mediation, future collective bargaining agreements should integrate a mediation step in dispute resolution clauses as a precondition to arbitration or suit.⁵

For many field of play cases and similar disputes requiring an immediate — and unequivocal — decision, a quick arbitral decision is the only practical route.

Regardless of the type of dispute and venue of the dispute, most attorneys appreciate the benefits of mediation and are well familiar with its features. When any legal dispute arises, it is standard fare for most attorneys at some point — whether early on or well into the process, right up to the eve of

an arbitration or trial—to suggest mediation. The culture of litigators is to consider the mediation avenue — regardless of whether it is mandated by contractual fiat. Attorneys will typically advise their clients about the benefits of settling rather than going all the way, looking for a win. To get that settlement, attorneys have long recognized that for their clients, mediation is a great tool. Estimates vary, but it can fairly be said that mediations end in settlement about 70 — 80% of the time, according to the American Bar Association.⁶ A study of Fortune 1000 companies revealed that mediation was the preferred method of dispute resolution above all others. The reasons given focused on time and cost savings, control over the issues to be resolved, the process and general satisfaction.⁷

Almost all litigants find the legal process to be difficult, intrusive, and fraught with risk and uncertainty. Beyond the benefits of time, cost savings, and speed of resolution, mediation offers many other intangible benefits, like closure and finality.

Some of the advantages of mediation are particularly appealing in a sports case. A quick resolution can be invaluable to the shared financial interests of all the parties. For example, during the NFL lockout in 2011, as the season approached, both sides saw a loss of shared revenue looming. It was estimated that the revenue for each week of the preseason was approximately \$200 million. With that much on the line, there was huge pressure and motivation to settle.⁸

Another advantage of a mediated settlement well suited to sports disputes is confidentiality. Many disputes spill out into the press resulting in both sides exchanging damaging barbs. This damage is not restricted to the relationship between the parties. Given the huge public interest when there is a dispute, such as a lockout, a confidential resolution can be very appealing. A mediated settlement kept confidential is a much better choice when facing potentially negative publicity arising out of messy battle. The cloak of confidentiality is strengthened by the fact that, in a mediation, the specific conditions of the mediation process require that the parties agree to the confidentiality. Far from the

public eye, the parties are free to negotiate without feeling the need to posture. And the team — with its brand — is spared paying the heavy toll which comes with an ugly fight. Sometimes the dispute itself may not be noteworthy, but for the identity of the parties themselves. I mediated a case in which a young man filed suit against a well-known sports apparel company. He was claiming that his image had been misappropriated by the company for commercial use. Had the case gone forward, the company would not likely have had to face a large damages verdict. However, given the David and Goliath nature of the case, it would likely have garnered attention, win or lose, had it been tried before a jury.

Although, not yet a staple of sports disputes as it is in other business cases, mediation is nonetheless gaining a toehold in sports. Most would agree that it is an emerging and effective method for many sports and sports related disputes. In the words of the late Judge Keba Mbaye, former President of the International Council for Arbitration for Sport and the Court of Arbitration for Sport, “[M]ediation can be used successfully in a wide range of sports disputes, including an increasing number of commercial and financial ones.”⁹

The parties need to understand the rules of the game. Mediation is, above all, a voluntary process in which all participating parties must agree to the result. For it to be successful, both sides need to focus not on their positions, regardless of how firmly held. Rather, the parties must focus on their interests. And to serve those interests, for example, getting back to playing, all participants to a mediation must settle for less than the total victory everyone desires.

So, when agreeing to mediate a case, you need to convince your sports client steeped in a culture of excellence and winning, to settle for something less than a win. To take second best. From the Olympic Gold Medal to the World Cup, from the Super Bowl to the World Series, athletes — and all those in the sports world — know there is only one goal: winning. It is worth observing that this strong desire to win is not limited to active athletes. The

business of sports itself is imbued with a culture of winning. Therefore, most of the stakeholders in a typical sports dispute, even if not athletes themselves, frequently harbor the same desire to win.

Your sports client will have no difficulty whatsoever absorbing the culture of litigation. The parties do battle, preparing ahead of time, gathering up ammunition for the big fight through discovery, and culminating in the big game, the arbitration or trial.

In sports, at the end of the game, we all know who the winner is. It's right there on the scoreboard.

But what about mediation. How can we expect someone in the sports world to come to a mediation and give in? The cornerstone of mediation is compromise — settling for something less than a complete win. To those who live in the sports world, settling a case can feel like quitting, accepting second place — apostasy. Unlike looking up at the scoreboard to see who won, when a mediation is nearing an end, the attorneys can find themselves attempting to convince the client that settling at mediation — quitting before the big game — is a good thing.

There are certainly those bromides about a successful mediation being a “win-win.” But try to tell that to anyone who has spent time in competitive sports. There are two winners? Everyone gets a trophy? Athletes who take second place sometimes describe themselves as being “first place among the losers.” With a mindset like this, how can you possibly hope to have a successful mediation of a sports dispute?

Instead of trying to convince your client that going to mediation and settling the case is second place in lieu of winning in an arbitration or trial, you need to **reframe the game**.

Reframe the Game. Mediation is not about giving up before the big game. Your client needs to see the mediation day as Game Day. Settling the case at mediation is the win.

Reframing the game is about applying the familiar sports paradigm of working together to win to the mediation. Too much time and effort gets spent by attorneys trying to convince their clients — especially sports clients — that settling for less is a bitter reality the client has to accept. Instead, when you reframe the game, you are telling your client that settling the case during the mediation is the sought after goal.

Why should you reframe the game? When you reframe the approach to mediation, you are tapping into the very DNA of your sports client: a drive to win. You are bringing them into familiar space. If you can set a specific goal for your client in anticipation of the mediation, you can motivate your client. If you do not reframe the game, it is inevitable that your client will view the mediation as a precursor to the big game.

Clients should be counseled that the game needs to be won at mediation because the benefits are great and the price of losing the mediation — not settling — can be heavy.

- Sports clients need to remain focused to be successful in their endeavors, whether those endeavors are on the field of play or in the boardroom. Having a competing focus — a legal dispute — is distracting.
- By resolving the dispute, your client will be better able to maintain good relationships into the future— with players, management, the league, sponsors. For example, it will hardly benefit an athlete to remain in litigation with a valuable sponsor to the bitter end. Better to resolve the dispute quickly and work together toward future lucrative deals.
- Fans are a fickle customer base. Strikes, lock-outs and litigation swirling around a sport do little to improve the fan experience. To the contrary, these disputes can potentially erode fan enthusiasm. It has been suggested that when league officials cancelled the 2004 – 2005 season due to a dispute with the players, the NHL never really recovered.¹⁰

- Going through to an arbitration rather than settling a dispute can have a deleterious effect on a player. A 2012 report done by Baseball Prospectus, a media outlet that conducted an analysis of the MLB, found that players who went through arbitration were less likely to re-sign long-term deals with their teams.¹¹ Another study of MLB statistics from 2001 – 2004 found that 62% 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.¹²
- The harm is not just limited to a particular player. In the wake of a hail of personal attacks made by both sides during the 2012 – 2013 NHL contract dispute, both the players and owners were harmed. But the damage went further than those particular parties in the dispute. In fact, a brand analysis study was conducted on this very point. The results were, in the words of the head of the firm conducting the study, “quite alarming.” The damage to the NHL brand was found to be at a level greater than that suffered by BP from the 2010 Gulf of Mexico oil spill.¹³

Therefore, your client should realize that keeping a dispute alive, and going forward to an arbitration or trial can come at a steep cost — even when you win.

How do you reframe the game? Those in the sports world understand the value of preparation. Certainly, preparation should include spending time learning the facts and legal arguments which support a position. But a successful mediation is not simply about both sides advocating their positions. So, preparation must be more than just knowing your own case. Much has been written about confirmation bias and the refusal of either or both sides to recognize strengths in the other side’s case or weakness in your own. Preparation, which includes a hard assessment of any weaknesses in the case, is crucial. Preparation, which includes a recognition of the strengths in the other’s sides position, is similarly necessary. It is important that your client be engaged in this preparation process.

A prepared client, like a prepared athlete, will perform better.

Do it for the team. If working together toward a shared goal sounds familiar, it is because that is what sports is about. When Bill Russell spoke of his ego demanding a victory for his team, it reflected the source of a team’s true greatness: the legends in sports have always sought victory not for simply for themselves. Rather, they do so because they want victory for their team. Teamwork is not just about working together, it is about working in a way to help fellow teammates. The group effort dynamic at work reveals that when people think others are counting on them, they work harder.

Experiments done relating to this group effort dynamic have yielded very interesting results. For example, in studies done of a group of people all pulling a rope together, the individual effort of each one participating in the group effort is less than when that person is pulling alone. Researchers have called this “social loafing.” Similar experiments involving test subjects shouting, demonstrated that those shouting as part of a group did not shout as loudly as when they shouted alone. The conclusion is that when people are anonymous in a group, they do not work as hard. However, there was one exception to this phenomenon of social loafing. That exception was when the experiment utilized just a pair of people. For example, given the information that the fellow shouter was a “high effort performer,” the other shouter suddenly shouted even louder than when shouting alone. This has led researchers to the conclusion that when armed with the knowledge that someone else is counting on a fellow participant, a team member will give more of himself.¹⁴ I believe that this group effort dynamic, at work in successful sports teams, such as the Boston Celtics who won eleven NBA championships in thirteen seasons, can be mobilized when at mediation.

Make your client feel that coming to the mediation is being part of a team. Your client will not want to let down the team. Instead, your client should enter a mediation determined to be part of the

team and wanting to make the effort to get the case settled.

The team takes the field in the new game. In this newly reframed game, your client comes to the mediation understanding that by working together, victory can be achieved: the case can get settled.

In a mediation, the team obviously consists of the attorney, client, and others such as an agent, spouse, the CEO or CFO, or inside counsel. The shared goal is not to simply advocate the team's position. Rather the effort should include acknowledging weaknesses, asking questions, and suggesting areas of compromise.

Too many attorneys bring their clients to mediations to serve simply as props. The clients sit there, saying nothing, while the attorney makes the presentation and responds to the mediator's questions or comments. To have buy-in for a settlement, the client needs to be engaged and to be heard. The "day in court" which is necessary for clients to get closure will not be experienced if the client simply sits by and listens to the attorney speak. It is healthy and helpful for clients to say their piece. Your client cannot feel like part of the team without getting into the game. In 2011, just before the current collective bargaining agreement was set to expire, the NFL and the NFL Players Association, began what was to be a series of three mediations. Set among a host of legal proceedings, the level of suspicion and hostility between and among the various stakeholders was high. Two mediations failed to achieve a settlement. But after months of contentious negotiations, the last mediation resulted in a signed contract. One of the factors which made the difference was no doubt the increased use of face-to-face dialogue. In the earlier mediations, there were many private caucus sessions, with the mediator engaging in shuttle diplomacy. While the practice of shuttle diplomacy is certainly a staple of any mediation, this practice does not always permit the level of engagement a sports client needs and wants. One of the players who participated in the NFL mediation, expressed his frustration at having minimal contact and interaction with the other side, stating that even

though the players were there for about 17 days, they spent an aggregate total during the mediation of about twenty hours in front of the owners."¹⁵

But it is not enough to simply be face-to-face with the other side. It is about being an active part of the team dynamic. Because the players further complained that when there were face-to-face discussions, just the attorneys spoke.¹⁶ To have your client invested in the result, your client needs to be in the game. Do not sideline your client for fear they will say something wrong. Their active participation will be worth the risk because they will be invested in getting the settlement, getting the win.

A new team roster. This is the hard part. When you are at a mediation, the goal of a mutually agreeable resolution is obviously shared with the other side. An unusual paradigm for those in sports: working with the opponent. But to get a case settled, this must be done. Each side must try to see the other's side perspective, and must be willing to offer concessions: "What if we did this ... would that help?" or "We do not absolutely have to have that. So, what if we compromise on this item?" These are exchanges that get cases settled. And that can most likely happen if your sports client is part of the group effort dynamic, actively working toward success.

Once both sides understand the value of working together, negotiations can be more fruitful. Looking at the successful third round of the NFL mediation in 2011 is instructive on this point. In the earlier rounds of mediations, various members of both sides spoke to the press regarding their side's views and the status of the negotiations. However, in the third mediation several months later, the parties working together, maintained a united front in responding to the press. They issued joint statements during the pendency of the mediation and the parties refrained from talking to the press separately. In other words, the parties began acting together as a team. Once they all determined that together they could tackle the problem — how to resolve the dispute — a signed collective bargaining agreement was not far behind.

Teamwork requires that no one quit. When parties end a mediation by walking out or announcing that it looks hopeless after a long day and that the two sides are too far apart to justify further effort, this is exactly when your sports client can shine. The mediation day is the opportunity for the parties to be asked to meet the challenge of a difficult dispute. They do not quit on the field or pitch, on the ice, or on the court. If they are reminded that the goal of the day is to win — that is settle — the case, they will not quit.

Win the Mediation. Sports disputes usually involve people steeped in the culture of sports. A culture of not quitting, a culture of winning. These people know that if they quit, they will let down their teammates. They do not want to take second best. So, ensure that your client understands the huge benefits of settling at mediation, so they can appreciate that a settlement is not second best, but rather a big win. Ensure that your client is prepared to work hard by cooperating and compromising. Ensure that your client knows the risks ahead if the case does not settle. If you do these things, your client is more likely to arrive at a mediation ready to be part of the winning team.

When you reframe the game, mediation day is Game Day.

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NOTES

1. SAM WALKER, *THE CAPTAIN CLASS THE HIDDEN FORCE THAT CREATES THE WORLD'S GREATEST TEAMS* (Random House 2017), quoting Bill Russell.
2. IAN BLACKSHAW, *MEDIATING SPORTS DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES* (T.M.C. Asser Press 2002).
3. Jeremy M. Evans, *We Have Come Full Circle: Where Sports Franchises Derive Their Revenue*, ENT. & SPORTS LAW., Summer 2017, 33-4 at 12.
4. BLACKSHAW, *supra* note 2, at 1.
5. Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189, 213 (2014).
6. 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)(citing the ABA study), <http://www.asacenter.org/Resources/ANowDetail.cfm?Item-Number=98679>, archived at <http://perma.cc/BD8H-BNJP>.
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8. 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, 232 (2011).
9. 14 BLACKSHAW, *supra* note 2, at v.
10. Grabowski, *supra* note 5, at 203. In the words of hockey great, Wayne Gretzky, “. . . only time will tell how we're going to win those people back.”
11. *Id.* at 199.
12. *Id.*
13. *Id.* at 204.
14. WALKER, *supra* note 1, at 106 - 7.
15. Bucher, *supra* note 8, at 221.
16. *Id.* at 222.