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ARTICLES

PLAYER DISCIPLINE IN TEAM SPORTS

JAN STIGLITZ*

I. INTRODUCTION

The purpose of this paper is to briefly outline the issues involved in disciplining athletes in this country's four major team sports: baseball, football, hockey and basketball. As anyone familiar with the industry knows, we live in changing times; only football has a long term labor agreement. This makes it particularly difficult to definitively explicate the disciplinary process. Similarly, one can hardly speak with any authority about the power of the Commissioner of baseball when there isn't one, and the owners have just recently rewritten the rules which define the Commissioner's powers. But there are enough similarities in the historical disciplinary structures of the four leagues to create a framework for analysis and highlight the major problem areas.

This article will first present an overview of the structure of the industry, its disciplinary mechanisms, and the legal issues that are implicated. The article will then outline the specific disciplinary framework which exists (or has recently existed) in each of the four major team sports.

II. INDUSTRY STRUCTURE

A. *"The Players"*

In order to understand the issues involved in athlete discipline in team sports, it is necessary to understand the particular structure of the typical sports league. In this structure, there are a number of individuals and entities who have significant rights and power. Unlike the traditional employment setting, where the "company" is the only source of discipline, in professional team sports, there is an additional source of discipline: the league.

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In team sports, the "company" is the player's club. But athletes in the four major team sports are also subject to discipline by the league, which acts through its president or commissioner. Moreover, in the case of baseball, there is an additional level of disciplinary authority because Major League Baseball is comprised of two, somewhat autonomous leagues. Each league has a President, who exercises a certain amount of disciplinary authority.¹

Another significant "player," in terms of disciplinary authority, is the on the field official. Misconduct on the playing field is a very common basis for discipline. The actions of the umpire or referee, and that official's report of the incident, may ultimately determine whether an athlete is disciplined and what the level of discipline will be. For example, in football, ejection from a game can be the basis of a fine.² Similarly, in hockey, the on-ice officials have the power to suspend a player for up to twenty games.³

B. *The "Rules"*

The relationships between these actors are governed by a set of inter-related documents which need to be reviewed in order to determine who can impose discipline, under what circumstances, subject to what limits, and with what scope of review. Typically there are three basic documents to be considered.

1. The Collective Bargaining Agreement

When all goes well, there is the collective bargaining agreement, entered into between the union and the league, which governs the terms and conditions of employment. The typical collective bargaining agreement will have one or more sections devoted to discipline.⁴ This part of the collective bargaining agreement will be a primary source for the rules determining who can impose discipline and under what circum-

1. See BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF BASEBALL CLUBS AND THE NATIONAL LEAGUE OF BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION of January 1, 1990, Art. XII (A). [Hereinafter "MLB-CBA"].

2. NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000, Art. VIII, Sec. 1 (a). [Hereinafter "NFL-CBA"].

3. See NHL CONSTITUTION, Art's. 2.1 (c) and 11.1.

4. See MLB-CBA Art. XII; NFL-CBA Art. Art's. VII and XI; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION of November 1, 1988, Art. XXVII, § 3 (d), [hereinafter "NBA-CBA"]; MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION — September 16, 1991, to September 15, 1993, Art. IV, § 4.02, [hereinafter "NHL-CBA"].

stances. The collective bargaining agreement will also have a grievance procedure.⁵ In the event of a dispute over the imposition of discipline, the collective bargaining agreement will establish who ultimately decides whether the discipline was appropriate. Finally, the collective bargaining agreement will contain important procedural rules, regarding such issues as notice, time limits, discovery, and representational rights.

For example, the article on discipline in the current collective bargaining agreement in baseball provides that a player can be subjected to discipline for "just cause" by "his Club, League or the Commissioner."⁶ The agreement also provides for notice⁷ and discovery rights.⁸ Finally, the agreement sets out a grievance procedure, which gives the player the right to have most disputes resolved by a neutral arbitrator.⁹

2. The Uniform Player Contract

In the traditional industrial setting, the collective bargaining agreement governs salaries for all covered employees. By tradition, in team sports, the collective bargaining agreement contains the general terms and conditions of employment but only sets forth the minimum salary. Athletes have been allowed to individually negotiate salaries and certain other perks and benefits with their teams, so long as these agreements do not diminish the minimum rights and benefits awarded under the collective bargaining agreement.¹⁰ The vehicle for memorializing and governing this individual player-club agreement is the "Uniform" or "Standard" player contract. This contract may contain provisions which directly affect discipline.

For example, the ultimate discipline is discharge. The Uniform Player's Contract in baseball contains the provisions under which the club can terminate the contract and thus the player's employment.¹¹ Paragraph 7(b)(1) of the Uniform Player's Contract states that the club may terminate the contract if the player shall: "fail, refuse or neglect to

5. MLB-CBA Art. XI; NFL-CBA Art. IX; NBA-CBA Art. XXVIII; NHL-CBA Art. IV.

6. MLB-CBA Art. XII (A).

7. *Id.* at Art. XII (B).

8. *Id.* at Art. XII (C).

9. *Id.* at Art. XI (A)(1). Technically, the arbitration is held before a tripartite panel. But in reality, there is one arbitrator and two party advocates.

10. The collective bargaining agreement will usually have some language which amounts to a "supremacy clause." See, e.g., *id.* at Art. III — UNIFORM PLAYERS' CONTRACT. See also, *id.* at Art. II — Recognition, which allows a player to individually negotiate salary "over and above the minimum requirements" and special covenants which "actually or potentially provide additional benefits to the Player."

11. See *id.* at UNIFORM PLAYER'S CONTRACT, Art. 7.

conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules."

The Uniform Player's Contract in baseball also has "Regulations" which govern a player's conduct and give the clubs the right to discipline the player. Paragraph 5 of the Regulations provides that the club may impose a "reasonable fine" or suspend a player for up to thirty days for a violation of a regulation or provision of the contract.

Additionally, a player's contract may contain special covenants, like a weight clause, or an agreement not to participate in certain other sports. The breach of one of these special covenants might also give rise to discipline by the club.

A special covenant may also be included to more precisely define conduct that could give rise to discipline or termination. For example, one recommended addendum to the Uniform Player Contract in basketball contains a provision under which a player acknowledges that a criminal conviction for a felony would constitute a basis for discharge under the "personal conduct" standards of the contract.¹²

Conversely, special covenants may limit the effect of discipline. In basketball, a player and team may enter into a covenant which guarantees that the player's salary will be paid even if the player's contract is terminated by reason of his personal conduct.¹³

3. The League Constitution and By-Laws

Each league is an entity unto itself, which has been created by certain governing documents. These documents generally call for a chief executive and give that chief executive some plenary power to act in the best interests of the sport. That power can be exercised to discipline league participants including owners, coaches and players.

For example, until the recent debacle involving the firing of Fay Vincent, Major League Baseball gave its commissioner the power to reprimand, fine, suspend or remove any player who engages in conduct "which is deemed by the Commissioner not to be in the best interests of Baseball."¹⁴ Similar disciplinary power is given to the Commissioner of

12. See MARTIN J. GREENBERG, 2 SPORTS LAW PRACTICE 247 (1993).

13. NBA-CBA Art. 1, §§ 3 (d)(ii) and 4 (b).

14. MAJOR LEAGUE AGREEMENT, Art. I, § 3.

the NFL,¹⁵ the Commissioner of the NBA,¹⁶ and the President of the NHL.¹⁷

4. Other Relevant Documents

While the uniform contract, the collective bargaining agreement, and the constitutions are implicated in most discipline cases, there are often other agreements or rules which come into play. For example, one of the most important disciplinary rules in baseball is Rule 21 of the "Major League Rules." Rule 21 proscribes a variety of misconduct, including fixing games or failing to report an attempt to induce a player to fix a game,¹⁸ accepting gifts for defeating a competing club,¹⁹ giving gifts to umpires,²⁰ betting on baseball games,²¹ and attacking another player or an umpire during a game.²² Rule 21 also has a catchall "best interests of Baseball" provision.²³

Similarly, the individual clubs, as employers, may have their own rules which modify or govern the relationship between the player and the club. In basketball, for example, the collective bargaining agreement provides for a set of Standard Club Rules which govern a player's conduct.²⁴

Finally, since discipline frequently arises as a result of on the field conduct, the playing rules of a sport may be relevant.

5. The Interplay of the Rules

Careful attention must always be given to how the various documents relate to each other. While the constitution of a league may purport to give its commissioner unlimited authority to impose discipline, that authority may be curtailed or subject to outside review as a result of the

15. See NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS, Art. VIII, §§ 8.13 and 8.14 (1988).

16. See NATIONAL BASKETBALL ASSOCIATION CONSTITUTION AND BY-LAWS, par. 24 and 35 (1989).

17. See NATIONAL HOCKEY LEAGUE CONSTITUTION AND BY-LAWS, §§ 17 and 18 (1991).

18. MAJOR LEAGUE RULES, Rule 21 (a).

19. *Id.* at Rule 21 (b).

20. *Id.* at Rule 21 (d).

21. *Id.* As the followers of the Pete Rose saga may already know, this rule calls for a one year suspension for any player (or umpire or club or league official) who bets on any game, and a lifetime ban for any player (or umpire or club or league official) who bets on a game in which "he has a duty to perform."

22. *Id.* at Rule 21 (e).

23. *Id.* at Rule 21 (f).

24. NBA-CBA Art. XXIII.

collective bargaining process and provisions incorporated into the collective bargaining agreement.

One illustration of the interplay of these documents is what happened in the early baseball drug cases. Pursuant to the catchall "best interests of baseball" provision of Rule 21, the Commissioner had adopted a rule that "[a]nyone involved in the illegal possession or use of drugs or illegal trafficking with drugs . . . will be subject to discipline." In 1983, four members of the Kansas City Royals were convicted of possessing cocaine and sentenced to jail. As a result of these drug convictions, and under the authority of Rule 21, Commissioner Bowie Kuhn suspended each player for one year.

The players challenged the Commissioner's action. In deciding these cases, the arbitrator ruled that the Commissioner did have a legitimate interest in the problem of drug use and had the right to impose discipline. But the players were successful in arguing that the action of the Commissioner was subject to the grievance procedure and reviewable through binding neutral arbitration.²⁵ Since that time, the Major League Baseball Players Association has successfully challenged the imposition of discipline by the Commissioner in a number of cases and had that discipline reduced.²⁶

C. *The Law*

It is important to remember that the industry doesn't exist in a vacuum or get to create its own legal world. With one notable exception,²⁷ sports are subject to external law. In the context of understanding the disciplinary process, two bodies of substantive law have particular application: labor law and private association law.

25. See *In the Matter of Arbitration Between Major League Players Ass'n (Ferguson Jenkins) and Major League Player Relations Comm. (Commissioner Bowie Kuhn)*, Decision No. 41, Gr. No. 80-25 (1980); *In the Matter of Arbitration Between Bowie K. Kuhn, Commissioner of Baseball and Major League Players Ass'n (Willie Wilson, Jerry Martin)* Panel Decision No. 54, Gr. Nos. 84-1 and 84-2 (April 3, 1984); *In the Matter of Arbitration Between Major League Players Ass'n (Pascual Perez) and Bowie K. Kuhn, Commissioner of Baseball*, Gr. No. 84-0 (April 27, 1984).

26. The most recent illustration of this was the reinstatement of pitcher Steve Howe after his suspension by Commissioner Vincent. See *In the Matter of the Arbitration Between Major League Baseball Players Ass'n. and The Commissioner of Baseball*, Gr. No. 92-7, 1992 (George Nicolou, Ch.).

27. See the infamous decision in *Flood v. Kuhn*, 407 U.S. 258 (1972), which reaffirmed the proposition that baseball was not subject to antitrust law.

1. Labor Law

As indicated, the disciplinary structures in the major team sports have been incorporated into collective agreements, negotiated by the various players associations. These associations are labor unions, which derive their authority from virtue of Section 7 of the National Labor Relations Act.²⁸

One critical feature of labor law is that the union is the exclusive representative of the employees in the bargaining unit.²⁹ As a result, attorneys and player agents can only participate in a collectively bargained grievance procedure if the union consents to such representation. In some cases, the unions have welcomed participation by representatives chosen by the players.³⁰ In other cases, the union is designated as the official representative and the appearance and participation of an agent or attorney is a matter of discretion.³¹

The flip side of the principle of exclusive representation in the union's "duty of fair representation." A union must represent all of its members "fairly, impartially, and in good faith."³² So even if the employee is not allowed to select his own representative, the union is obligated to provide fair representation to all.

Another critical feature of the labor law is that it makes the collective bargaining agreement the supreme governing authority regarding the terms and conditions of employment. It also precludes an employer from changing those terms and conditions without engaging in collective bargaining.³³ This has served to dramatically limit the authority of the commissioners.

For example, in one case, Pete Rozelle was precluded from promulgating a rule regarding players leaving the bench and imposing fines on

28. 29 U.S.C. § 167.

29. See § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a).

30. Art. IX, § 9 of the NFL-CBA allows a player to be represented by an attorney of his own choosing at any disciplinary hearing.

31. Under the Rules of Procedure for grievance arbitration in baseball, (which also govern hearings before the Commissioner and the League Presidents), a player has the right to be represented by the Players Association. Unless an attorney or agent has a "direct interest in the arbitration," his or her attendance appears to be discretionary with whoever is presiding. (See MAJOR LEAGUE RULES, Rules 2 [Attendance at Hearings] and 3 [Conduct of Hearings]). As a matter of practice, however, agents and attorneys have been allowed to be present and participate.

32. *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944).

33. The author recognizes that this is a gross oversimplification and apologizes to any labor law aficionado who is offended by this cursory treatment of a subject fraught with exception and nuance.

players under that rule, because his action was held to be the action of the employer, and constituted a unilateral change in the rights negotiated under the collective bargaining agreement.³⁴ In another case, an arbitrator ruled that Pete Rozelle could not unilaterally impose a new drug program, which included the unscheduled drug testing of players' because that too constituted a unilateral change in the terms and conditions of employment which could only be effectuated through collective bargaining.³⁵

Another important consequence of the fact that the grievance procedure is a creature of and governed by labor law, is the way in which arbitration awards are treated. Under a group of cases known as the Steelworkers Trilogy,³⁶ the courts give great deference to arbitration awards and will almost never overturn them.³⁷ Thus, as a practical matter, once an arbitrator has made a ruling on the propriety of discipline, that ruling is final.

2. Private Association Law

Equally important is an area of law known as private association law. One general principle in private association law is that courts will hesitate to interfere with internal disputes involving members of a private association.³⁸ This principle will have application in any case where a

34. See *National Football League Players Association v. National Labor Relations Board*, 503 F.2d 12 (1974). For a history of football's struggle with the issue of drug testing see David Sisson & Brian Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Player and Management Inevitable?*, 2 MARQ. SPORTS L.J. 1 (1991).

35. See *National Football League Players Association and National Football League Management Council and the National Football League* (Kasher, Arb.)(October 25, 1986). For a history of baseball's struggle over the Commissioner's power to institute drug testing, see, Glenn Wong & Richard Ensor, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779 (1987).

36. *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

37. The most dramatic illustration of this in the sports context relates to free agency in baseball. Free agency was originally the product of a an arbitration award in the so-called Messersmith-McNally case. (In re The Twelve Clubs Comprising National League of Professional Baseball Clubs and Twelve Clubs Comprising American League of Professional Baseball Clubs, Los Angeles and Montreal Clubs and Major League Baseball Players Association, Gr. Nos. 75-27 and 75-23, 66 LAB. ARB. 101 (Seitz, Chairman) (December 23, 1975.)) Although the decision dramatically changed the entire structure of the industry, the courts refused to interfere and overturn it. See *Kansas City Royals Baseball Corp. v. Major League Baseball Players Association*, 532 F.2d 615 (8th Cir. 1976).

38. A most dramatic illustration of this principal occurred in *Carr v. St. John's University*, 17 A.D.2d 632, 231 N.Y.S.2d 410 (1962), where the court refused to interfere with a university's decision to expel Catholic students who had participated in a civil marriage ceremony.

player has been disciplined by a commissioner and seeks to have that decision reviewed by a court.

One famous illustration of this was the case of *Finley v. Kuhn*.³⁹ In 1976, Charles Finley sold the rights to Joe Rudi and Rollie Fingers to the Boston Red Sox and the rights to Vida Blue to the New York Yankees. Commissioner Bowie Kuhn disapproved the assignments as "inconsistent with the best interests of baseball." Finley then sued, challenging Kuhn's authority. The court looked to see whether the Commissioner had acted in good faith. Once the court determined that Kuhn had acted in good faith, it refused to look at whether Kuhn was "right or wrong." That issue was "beyond the competence" of the court. Similarly, most courts would not want to second guess David Stern as to what fine is appropriate when two players get into a fight during a basketball.

But there are other principles of private association law which may give a player a basis for challenging disciplinary action by a commissioner.⁴⁰ First, one can challenge any action that exceeds the legitimate authority granted to the commissioner. In *Atlanta National League Baseball Club & Ted Turner v. Bowie Kuhn*,⁴¹ the Commissioner suspended Ted Turner for one year for tampering with another club's player. Kuhn also took away Atlanta's first round draft pick. Turner sued and the court held that it must not look closely at the reasons advanced for the discipline: "What conduct is 'not in the best interests of baseball' is of course, a question which addresses itself to the Commissioner, not this court." But the court reversed Kuhn as to the forfeiture of the draft pick, finding that such a penalty was not authorized by the Major League Agreement, which was the source of the Kuhn's power. This principle of *ultra vires* was also the basis upon which the Chicago Cubs was able to successfully challenge Fay Vincent's unilateral realignment of the divisions in the National League.⁴²

Finally, a commissioner's actions may be challenged for procedural correctness. While private actors are not subject to the due process clause of the U.S. Constitution, certain principles of procedural fairness

39. 569 F.2d 527 (1978).

40. See generally Matthew Conway, *Sports Commissioners or Judges: Who Should Make the Call When the Game Is Over?*, XXIV *SULFOLK U. L. REV.* 1043 (1990).

41. 432 F. Supp. 1213 (1977).

42. *Chicago National League Ball Club Inc. v. Francis Vincent, Jr.*, No. 92 C 4398 (U.S.D.C., N.D.Ill. 1992) (unreported). See also *Professional Sports, Ltd. v. Virginia Squires Basketball Club Limited Partnership*, 373 F. Supp. 946 (W.D. Tex. 1974) (the court disagreed with a commissioner's broad interpretation of his powers); *Riko Enterprises v. Seattle Super-sonics, Inc.*, 357 F. Supp. 521 (S.D.N.Y. 1993).

are required when discipline is imposed by a private association upon a member or employee. This was the basis of Pete Rose's challenge to the discipline by Bart Giamatti.

Under the Major League Agreement, the Commissioner had the power to both investigate and impose appropriate discipline for gambling.⁴³ The Commissioner was also given the power to promulgate rules of procedure, which rules were to recognize the right of any party to appear and be heard.⁴⁴ When Bart Giamatti heard rumors about gambling by Pete Rose, he hired John Dowd, a Washington D.C. lawyer, to investigate. Dowd's investigation resulted in a lengthy report, which based its conclusions on the accusations and testimony of two key informants: Ron Peters and Paul Janszen.

After receiving the report, but prior to holding any hearing on the Rose matter, Giamatti wrote a letter to a U.S. District Court judge who was about to sentence Peters for drug and income tax related crimes. In that letter, Giamatti stated that Peters had been "candid, forthright and truthful" in providing testimony against Rose.

The judge sent a copy of that letter to Rose's attorney. Rose's attorney then filed an action to enjoin the Commissioner from taking any further disciplinary action against Rose. He argued that the letter showed that Giamatti had literally "pre" judged the matter and that Rose was being denied his right to a proceeding conducted with "due regard for all the principles of natural justice and fair play." Based on this argument, Rose was successful in winning a 10-day restraining order.

The Rose case was ultimately settled, with Rose acceding to discipline by the Commissioner. But the notion that some kind of fundamental fairness and due process is required was, nonetheless, established.⁴⁵

III. CATEGORIES OF DISCIPLINE

The way discipline is imposed, contested and resolved, i.e., the structural mechanism is usually a function of the nature of the discipline and the kind of conduct that is involved. In this regard, it might be helpful to think of discipline as falling into three thematic groups: on the field misconduct, contract related discipline, and integrity related misconduct.

43. MAJOR LEAGUE AGREEMENT, Art. I, § 2 (a) & (b).

44. MAJOR LEAGUE RULES, Art. I, § 2 (d).

45. For a more comprehensive treatment of the Pete Rose saga and the power of commissioners, see, Matthew Pachman, *Limits on the Discretionary Powers of professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409 (1990).

A. On the Field Misconduct

On the field discipline would include actions taken against a player for excessive violence, attacking another player, or misconduct involving an umpire or referee. As a general rule, discipline for on the field misconduct is initiated by a representative of the league (either a game official or someone appointed by the commissioner) and is ultimately resolved by a representative of the league (usually, the commissioner). While it is a frequent source of discipline, the issues are relatively simple. In addition, because the discipline stems from the game itself, the appropriateness of discipline, and the legitimacy of league self-rule, are generally accepted.

Examples of this kind of discipline are legion. In 1991, Ed Balfour of the Chicago Blackhawks was fined \$600 for entering a referees dressing room after a game to dispute a call. Vince Coleman was suspended for seven days and fined an undisclosed amount for arguing with and bumping an umpire. Roger Clemens was suspended for five games and fined \$10,000 for the dispute which led to his ejection in a 1990 American League Play-Off game. Mark Bavaro was fined \$7,500 by Commissioner Tagliabue for a 1990 incident where he made accidentally knocked down an umpire who tried to break up a argument Bavaro was having with another player.⁴⁶

B. Contract Related Discipline

Contract related discipline would involve violations of club rules, or the regulatory provisions of the contract between the player and the club. Contractual discipline is usually initiated by the club, and in most cases, the ultimate authority is a neutral arbitrator. The issues here, e.g., discipline for lateness, violating a weight clause, are ones that are analogous to non-sports settings and the typical labor relations grievance process seems most appropriate.

C. Integrity Related Misconduct

Integrity related discipline would include issues like gambling, drugs, and other off the field conduct which might effect the public's view of the player or the sport. Integrity related discipline is the most difficult area. On the one hand, the leagues have a legitimate interest in ensuring public respect for the product. And historically, giving broad disciplinary

46. MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE 1177 (1993).

power to a commissioner has helped to keep the public's respect.⁴⁷ But from the players' perspective, there are core privacy issues involved in the regulation of off the field behavior. Moreover, the level of discipline implicated in cases of serious off the field misconduct is such that having a neutral decision maker can be of critical importance.

Some examples of the kinds of discipline which fall under the umbrella of integrity related misconduct are well known. Gambling is one important category. Pete Rose was banned for life as a result of gambling.⁴⁸ So too was Jack Molinas, of NBA infamy.⁴⁹ In football, Paul Hornung and Alex Karras were each suspended for one year for gambling on a football game.

Perhaps the largest group of cases under this category relate to drugs. As a result, they will be treated separately. But there is a wide variety of behavior that can come under this heading. For example, Zeke Mowatt and other members of the New England Patriots were fined for sexually harassing Lisa Olson, a female reporter, in the locker room. Vince Coleman's throwing a firecracker towards some fans and the almost daily assortment of police blotter items that involve athletes are also in this category.⁵⁰

D. Drug Related Discipline

An unfortunate number of professional athletes have used drugs and this has created host of special problems. Drug use can tarnish the public's view of a sport, can impair an athlete's ability to perform (and thus destroy a club's investment), and can pose serious health problems for the athlete. From the athlete's perspective, there are some serious privacy issues, especially with regard to the question of testing.⁵¹

Because this is a particularly sensitive area, each league has struggled to come up with a comprehensive program that is acceptable to the players. In some cases agreement has been reached. For example, the NBA has a comprehensive anti-drug program which is incorporated in its collective bargaining agreement with the players. The league offers treat-

47. For example, the general sports public was supportive of Fay Vincent's suspension of Steve Howe and outraged when it was overturned through arbitration.

48. Although Pete Rose was a manager at the time, the lifetime ban is the same for players and managers and in both cases, the Commissioner has the right to impose discipline.

49. See *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961).

50. Just imagine the difficult issue that would face Commissioner Tagliabue if O.J. Simpson were an active player.

51. See Charles Palmer, *Drugs v. Privacy: The New Game In Sports*, 2 MARQ. SPORTS L. J. 175 (1992).

ment for players who seek help but permanently disqualifies a player who does not come forward and gets caught.⁵² But in baseball, the parties have not agreed to a comprehensive drug program. Instead, the Commissioner has promulgated and acted under his own guidelines. In response, the Players Association has accepted some of his decisions and challenged others.⁵³

IV. AN ANALYSIS OF LEAGUE DISCIPLINARY SYSTEMS

This section will examine the specific disciplinary system that is or was recently in place in each of the four major team sports. Although it is organized structurally; discipline by the club, discipline by the commissioner or president, and the applicable grievance procedures, some attempt is made to highlight the "thematic" issues articulated in section III.

A. Major League Baseball

In baseball, discipline may be imposed at three levels: by the club, by the President of the League, and by the Commissioner. But common to all is the rule that discipline may only be imposed for "just cause."⁵⁴ In almost every case, the entity imposing discipline is required to give written notice of such discipline to the player and the Players Association.⁵⁵ Players have the right to discover all documents and evidence "adduced during any investigation."⁵⁶ In addition, when possible, the Players Association must be notified in advance of any disciplinary interview of the player.⁵⁷

1. Discipline by the Club

The club's right to impose discipline is explicitly recognized in the Collective Bargaining Agreement.⁵⁸ The specific power to discipline is contained in the regulations incorporated in the Uniform Player's Contract, which authorizes the club to impose a reasonable fine and/or a suspension not to exceed thirty days, for a violation of any regulation or

52. NBA-CBA Art. XXXIII.

53. For a review of the status of the Commissioner's Drug Policy in baseball see Edward Rippey, *Contractual Freedom Over Substance-Related Issues In Major League Baseball*, 1 SPORTS LAW. J. 143 (1994).

54. MLB-CBA Art. XII (A).

55. *Id.* at Art. XII (B).

56. *Id.* at Art. XII (C).

57. *Id.* at Art. XII (E).

58. *Id.* at Art. XII (A).

provision of the Uniform Player's Contract.⁵⁹ The club also has the right to terminate the contract if the player fails to conform to standards of good conduct or good citizenship, fails to keep himself in good condition, or fails to obey the club's training rules.⁶⁰

2. Discipline by the Commissioner and League Presidents

As indicated previously, the Major League Agreement gave the Commissioner in baseball broad authority to discipline any player for any conduct deemed not to be in the "best interests of baseball."⁶¹ Similar authority to discipline is contained in Rule 21 of the Major League Rules. In each Uniform Player's Contract, the player expressly agrees to abide by the Major League Agreement, the Major League Rules, in addition to League Rules and Professional Baseball Rules, so long as those rules do not conflict with specific provisions of the collective bargaining agreement and the Uniform Player's Contract.⁶²

The collective bargaining agreement generally calls for binding resolution through neutral arbitration for any grievance. But discipline for on the field misconduct and some integrity related misconduct are handled in a different manner.

a. On the Field Misconduct

Where a dispute involves a fine or suspension which has been imposed by the League President or the Commissioner, for conduct on the playing field, the player has no recourse to neutral arbitration.⁶³ Binding "appellate" authority is retained in most cases by the very person who has imposed the discipline.⁶⁴

b. Integrity Issues

Although the Commissioner is given binding authority with respect to action taken which involves "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball,"⁶⁵ this provision is narrowly construed. It was intended to cover disciplinary action for gambling and not for other related discipline such as that for

59. *Id.* at 96, Regulation 5.

60. *Id.* at UNIFORM PLAYERS CONTRACT, para. 7.

61. MAJOR LEAGUE AGREEMENT, Art. I, § 3.

62. MLB-CBA, UNIFORM PLAYERS CONTRACT, para. 9 (a).

63. *Id.* at Art. XI (C).

64. If a League President initially imposes a fine in excess of \$500 or a suspension which exceeds ten days, it may be appealed to the Commissioner. *Id.* at Art. XI (C)(2).

65. *Id.* at Art. XI (A) (1) (b).

drugs.⁶⁶ In baseball, discipline for misconduct like drug use is initiated by the Commissioner, but can be reviewed and modified by a neutral arbitrator.⁶⁷

3. Grievance Procedure

Grievances with regard to discipline may be initiated by the player. Generally, the player is initially required to resolve any dispute with his club. If the matter is not resolved in that manner, step two calls for appeal by the player or the Players Association to the Player Relations Committee (an arm of Major League Baseball) and then to binding arbitration.⁶⁸ But in the case of discipline, the Players Association may only appeal if the player agrees.⁶⁹

B. Football

The new Collective Bargaining Agreement between the National Football League Players Association and the National Football League in May of 1993 has two articles on discipline: one governs discipline by the club⁷⁰, the other governs discipline by the Commissioner⁷¹. While a player can be disciplined by either, he may not be disciplined by both the club and the Commissioner for the same act. When the Commissioner imposes discipline it will supersede or preclude discipline by the club.⁷²

1. Discipline by the Club

With regard to discipline by the club, the collective bargaining agreement itemizes maximum fines for various violations. For example, the maximum fine for reporting overweight is \$50 per lb., per day.⁷³ Each

66. This has been a sensitive issue for baseball. The original language was negotiated while Bowie Kuhn was Commissioner. See MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF BASEBALL'S NEW DEAL* 214-215 (1991). Successive Commissioners have agreed to the original understanding behind and interpretation of that provision. See, e.g., letter from Francis Vincent to Donald M. Fehr, Attachment 4 to the MLB-CBA. In addition, the players have reserved the right to reopen collective bargaining in the event that a Commissioner attempts to exercise authority in a way that is inconsistent with that understanding. (MLB-CBA Art. XI (A)(1)).

67. See *Major League Players Ass'n (Ferguson Jenkins)*, Dec. No. 41, Gr. No. 80-25; *Bowie K. Kuhn*, Panel Dec. No. 54, Gr. No.s 84-1 and 84-2; *Major League Players Ass'n (Pascual Perez)*, Gr. No. 84-0, *supra* note 26.

68. MLB-CBA Art. XII (B).

69. *Id.* at Art. XII (E).

70. NFL-CBA Art. VIII.

71. *Id.* at Art. XI.

72. *Id.* at Art. VIII, § 3.

73. *Id.* at Art. VIII, § 1 (a).

club is required to publish a list of the fines that it will impose for each of the designated violations.⁷⁴ The club is also admonished to impose discipline on a uniform basis but may treat players differently if there are "events which create an escalation of the discipline."⁷⁵

The items covered include conduct which does not take place on the field, such as reporting late, losing equipment, failing to follow a rehabilitation program, and losing a playbook.⁷⁶ It also includes some misconduct on the playing field. For example, it subjects a player to a maximum fine of \$200 for throwing a football into the stands and a maximum fine of \$2,000 if a player is ejected from the game.⁷⁷

The most serious discipline which can be imposed is for "conduct detrimental to the club." For such conduct, the player can be fined up to one week's salary or suspended without pay for up to four weeks.⁷⁸

Finally, the collective bargaining agreement provides that a player may bring a "non-injury" grievance if he disagrees with the discipline.⁷⁹

2. Discipline by the Commissioner

The NFL's Commissioner is given disciplinary authority of two types of matters: conduct on the playing field and conduct which is detrimental to the integrity and public confidence in the game.⁸⁰

a. On the Field Conduct.

With regard to on the field conduct, discipline for "unnecessary roughness or unsportsmanlike conduct" is initially imposed by a person designated by the Commissioner after consultation with a representative of the NFLPA.⁸¹ An appeal from that person's decision may be taken to the Commissioner. Discipline for other on the field conduct is imposed by the Commissioner in the first instance and the player, upon notice of the Commissioner's action, may appeal to the Commissioner.

b. Conduct Detrimental to the Integrity of the Game

The NFL Player Contract created by the collective bargaining agreement has a provision entitled "Integrity of Game" under which the

74. *Id.* at Art. VIII, § 2.

75. *Id.* at Art. VIII, § 3.

76. *Id.*

77. *Id.* at Art. VIII, § 1 (a).

78. *Id.*

79. *Id.* at Art. VIII, § 4.

80. *Id.* at Art. XI, § 1.

81. *Id.* at Art. XI, § 1 (b).

player "recognizes the detriment to the League and professional football that would be result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players."⁸² Under that provision, the player gives the Commissioner the right to fine, suspend or terminate the contract of a player, if he accepts a bribe, agrees to fix a game, fails to report an offer of a bribe, associates with gamblers, uses or provides any players with performance enhancing drugs, or "is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football."⁸³

c. Rights on Appeal

Where a player or the NFLPA disagrees with the decision of the Commissioner or, in the case of on the field conduct, his representative, they may appeal back to the Commissioner. Upon such appeal, a hearing will be held where the player has a right to be represented by counsel of his choice.⁸⁴ But the Commissioner's decision is final and binding.⁸⁵

3. Grievance Procedure

The collective bargaining agreement specifically allows a player to file a grievance, and he need not wait for the union to do so.⁸⁶ The collective bargaining agreement also authorizes a player to be represented by an attorney of his own choosing or the NFLPA at any hearing held.⁸⁷

The collective bargaining agreement provides two different methods resolving grievances. First, it provides for binding arbitration by a neutral arbitrator jointly selected by the NFL and the NFLPA.⁸⁸ It also provides for resolution by a "Grievance Settlement Committee." This committee consists of the Executive Director of the NFLPA and the Executive Vice President for Labor Relations of the NFL. If these two agree on a resolution, that decision will be binding so long as no arbitration hearing on the grievance has been convened.⁸⁹

82. *Id.* at Appendix C: NFL PLAYER CONTRACT, § 15.

83. *Id.*

84. *Id.* at Art. XI, § 3.

85. *Id.* at Art. XI, § 1 (c).

86. *Id.* at Art. IX, § 2.

87. *Id.* at Art. IX, § 10.

88. *Id.* at Art. IX, §§ 6 & 8.

89. *Id.* at Art. IX, § 13.

C. Basketball

As in the other sports, players in basketball can be disciplined at two levels: by their clubs and by the league. Although there is a right to neutral binding arbitration for most grievances, the Commissioner is given certain disciplinary rights with regard to on the field conduct and integrity issues which are not subject to review.

1. Discipline by the Club

The club's right to discipline a player is expressly recognized by both the Uniform Player Contract⁹⁰ and the collective bargaining agreement.⁹¹ Exhibit G to the NBA-CBA contains a set of Standard Club Rules which govern player conduct. Each club may draft its own supplemental rules, but those rules must be reviewed by the Players Association. If the Players Association objects and files a grievance, the rules do not become effective unless they are found to be reasonable by either a Grievance Panel or an Impartial Arbitrator.⁹²

The Standard Rules start out by telling the player that he is expected to conduct himself both on and off the court according to the "highest standards of honesty, morality, fair play and sportsmanship," to conform his personal conduct to "standards of good citizenship," and to refrain from any conduct that might be "detrimental to the best interests of the club or the NBA." If a player does not meet the standards or engages in conduct detrimental to the club or the league, he is subject to fine, suspension or may be held to be in material breach of his contract.⁹³

More specific rules relating to good conduct are also included. These include rules covering discipline for criminal conduct,⁹⁴ gambling,⁹⁵ violence,⁹⁶ and alcohol use.⁹⁷ These rules also deal with less serious conduct and provide for fines for a variety of infractions including the failure to have a proper uniform,⁹⁸ being late to a flight,⁹⁹ missing a practice,¹⁰⁰ and missing a promotional appearance.¹⁰¹

90. NBA-CBA, UNIFORM PLAYER CONTRACT, para. 4.

91. *Id.* at Art. XXVIII, § 3 (f).

92. *Id.* at Art. XXIII. *See also* Art. I, § 5 (f).

93. *Id.* at Exhibit G "Introduction."

94. *Id.* at Exhibit G "Professional Conduct."

95. *Id.* at Exhibit G "Gambling."

96. *Id.* at Exhibit G "Violence."

97. *Id.* at Exhibit G "Alcoholic Beverages."

98. *Id.* at Exhibit G "Equipment."

99. *Id.* at Exhibit G "Travel Arrangements."

100. *Id.* at Exhibit G "Attendance and Punctuality at and for Practices, Meetings and Games."

2. Discipline by the Commissioner and the Board of Governors

Under the collective bargaining agreement and the Uniform Player Contract, basketball players have agreed to subject themselves to discipline by the Commissioner and the Board of Governors in accordance with Rule 35 of the N.B.A. Constitution and By-Laws.¹⁰² Rule 35 calls for dismissal and a lifetime ban for anyone caught fixing a basketball game and gives the Commissioner the power to impose discipline, at his discretion, for gambling on any basketball game.¹⁰³ It also allows the Commissioner to fine a player for any statement he makes or endorses which is prejudicial or detrimental to the best interests of basketball, and to suspend or fine the player for conduct that is detrimental to the NBA.¹⁰⁴ Finally, Rule 35 allows the Commissioner to discipline a player for contract tampering¹⁰⁵ and for conduct during a basketball game.¹⁰⁶

Except where the Commissioner has disciplined a player for gambling, the Commissioner's actions under Rule 35 are subject to review by the Board of Governors.¹⁰⁷

3. Grievance Procedure

Grievances for disciplinary action can be initiated by a player or, with the player's permission, by the Players Association.¹⁰⁸ In all grievances regarding discipline, the issue to be determined is whether there has been "just cause" for the penalty imposed.¹⁰⁹

Grievances that are not resolved by the parties to the grievance can be appealed to a Grievance Panel, consisting of two persons appointed by the NBA and two persons appointed by the Players Association.¹¹⁰ If a majority of the Grievance Panel agrees on a resolution, that resolution is binding.¹¹¹ If the matter is not resolved, it may be heard by the Impartial Arbitrator.¹¹²

101. *Id.* at Exhibit G "Promotional Appearances."

102. *See id.* at Art. I, § 5 (l) and UNIFORM PLAYER CONTRACT, para. 15.

103. NBA CONSTITUTION AND BY-LAWS, Rule 35 (a) & (g). A similar rule found the basis of the discharge in *Molinas*, 190 F.Supp. at 241.

104. NBA CONSTITUTION AND BY-LAWS, Rule 35 (c) and (e).

105. *Id.* at Rule 35 (f).

106. *Id.* at Rule 35 (d).

107. *Id.* at Rule 35 (h).

108. NBA-CBA Art. XXVIII, § 2 (a) (1).

109. *Id.* at Art. XXVIII, § 3 (d).

110. *Id.* at Art. XXVIII, § 2 (c). The parties can agree to skip this step and go directly to the Impartial Arbitrator.

111. *Id.* at Art. XXVIII, § 2 (c) (4).

112. *Id.* at Art. XXVIII, § 2 (c) (5).

The Impartial Arbitrator is given broad power to interpret and determine compliance with the collective bargaining agreement and player contracts, but there are some special limits and procedures with regard to discipline.¹¹³ Any discipline imposed by the Commissioner (or his designee) for conduct on the playing court or "concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball," is not heard by the Impartial Arbitrator and may only be appealed to the Commissioner.¹¹⁴ There is also a kind of minimum "amount in controversy requirement." A player cannot appeal to the Impartial Arbitrator from any suspension which is less than five days and cannot appeal a fine unless it exceeds \$ 500 (if imposed by the club) or \$ 5,000 (if imposed by the Commissioner).¹¹⁵

D. Hockey

The discipline system in hockey is somewhat different than the system in other sports in that a neutral arbitrator may be given jurisdiction over part of a dispute, *i.e.*, determining the underlying facts, but at the same time limited in his or her ability to interpret the operative rules. As a result, careful attention must be paid not just to whether discipline is subject to review by a neutral arbitrator, but also to the scope of power given to the arbitrator.

1. Discipline by the Club

Hockey players may be disciplined by their club for violations of club rules, so long as these rules are reasonable and the players receive proper notice of the rules.¹¹⁶ The only articulated limit on these rules is that a player may not be fined for "indifferent" play.¹¹⁷ Conversely, the collective bargaining agreement specifically authorizes clubs to impose reasonable fines for players who report to work in an "overweight condition."¹¹⁸ Under the Standard Player's Contract, a player is also subject to discipline by the club for "any conduct impairing the thorough and faithful discharge of the duties incumbent upon the Player."¹¹⁹ The

113. *Id.* at Art. XXVIII, § 2 (d) (3).

114. *Id.* at Art. XXVIII, § 2 (f) (2).

115. *Id.* at Art. XXVIII, § 3 (g).

116. NHL-CBA Art. VII, § 7.02. *See also* par. 4 of the STANDARD PLAYER'S CONTRACT (1986 Form; Revised 1988) [hereinafter "NHL-SPC"].

117. NHL-CBA Art. VII, § 7.03

118. *Id.*

119. NHL-SPC para. 4.

normal discipline imposed may be a "reasonable fine" or suspension.¹²⁰ But if the player's conduct amounts to a material breach, the contract may be terminated.¹²¹

2. Discipline by the President

A player can be disciplined by the league in a variety of circumstances. Section 17 of the N.H.L. Constitution and By-Laws contains comprehensive guidelines on the circumstances and conduct which may give rise to discipline, the nature of the discipline, and certain procedures with regard to its implementation. For example, the rules provide for immediate expulsion, at the discretion of the President, for throwing a game or failing to report a solicitation to throw a game.¹²² The President is also given broad power to fine, suspend or expel any player for any act which is "dishonorable, prejudicial to or against the welfare of the League or the game of hockey," whether this act takes place "during or outside the playing season."¹²³ Players may also be disciplined for public statements which are critical of the League, or the League "Officiating Staff."¹²⁴

3. Grievance Procedure

The NHL has an somewhat intricate grievance mechanism which divides disciplinary grievances into two categories. Unresolved disputes as to the facts giving rise to discipline, and disputes concerning an interpretation of club rules or the collective bargaining agreement go to binding arbitration before an independent arbitrator.¹²⁵ While a player may request arbitration when there is a factual dispute, only the club or the NHLPA may seek arbitration where the dispute involves the interpretation of a club rule or the collective bargaining agreement. Disputes regarding the "severity" of discipline or the interpretation of the standard player contract, the NHL Constitution, or By-Laws or league rules, go to

120. *Id.*

121. *Id.* at para. 14 (a).

122. NHL CONSTITUTION AND BY-LAWS, Rule 17.2.

123. *Id.* at Rule 17.3 (a). The President may delegate disciplinary authority that comes under this rule for "incidents arising under the playing rules," i.e., game related misconduct. This appears to supplement the power of on-ice officials to suspend players for up to twenty games for on-ice misconduct.

124. *Id.* at Rule 17.4 (a). With regard to criticism of the officials or of the officiating, the player may be fined up to \$1,000.

125. NHL-CBA Art. 4.01, 4.02, and 4.03. Rule 17.8 of the NHL Constitution and By-Laws also gives the player the right to a suspension reviewed by the President.

the binding arbitration by the league President.¹²⁶ In the case of discipline ordered by the President, there is a right of appeal to the Board of Governors.¹²⁷

The power of the arbitrator is somewhat circumscribed even where the arbitrator does have jurisdiction. For example, an arbitrator is bound by a club's interpretation of its own rules so long as such an interpretation is not "arbitrary and capricious." Moreover, the arbitrator may not find a club's interpretation of a rule to be arbitrary or capricious if there is a "rational basis" for the club's interpretation.¹²⁸

Disputes which involve more than one issue may be the subject of two arbitration proceedings. For example, if there is a factual dispute and a dispute as to the severity of the punishment, the factual issues may be resolved initially by the arbitrator. His or her written decision will be binding as to those facts, but the President will then get to decide on the severity of the penalty.¹²⁹

V. CONCLUSION

This article has focused, primarily, on an analysis of the systems under which discipline may be imposed and challenged. Although there are some complexities, for each sport there should be one or more persons who work for the league or the players association who are familiar with the rules and with relevant precedent. Since the league and the players associations are ultimately responsible for making the collective bargaining relationship work, you should be able to get immediate assistance in the event that you or a client has a question.

In addition, you should recognize that whether an athlete gets disciplined, and the extent of discipline might depend as much on the skills of an advocate, as on the rules. As in most areas of the law, settlement is preferable to litigation. Even if a settlement cannot be reached, the decision of an arbitrator or commissioner will be a product of the case that is presented. The combination of thorough investigation and persuasive presentation is the *sine qua non* of effective advocacy in this field of law.

126. NHL-CBA Art. 4.05.

127. NHL CONSTITUTION AND BY-LAWS, Rule 17.11. This right of appeal does not include action taken by the President for betting on a championship game.

128. NHL-CBA Art. 4.07.

129. *Id.* at Art. 4.06.