

# Inside the Huddle: Analyzing the Mediation Efforts in the NFL's *Brady* Settlement and its Effectiveness for Future Professional Sports Disputes

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### Repository Citation

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 (2011)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol22/iss1/8>

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## COMMENTS

# INSIDE THE HUDDLE: ANALYZING THE MEDIATION EFFORTS IN THE NFL'S *BRADY* SETTLEMENT AND ITS EFFECTIVENESS FOR FUTURE PROFESSIONAL SPORTS DISPUTES

### I. INTRODUCTION

Alternative dispute resolution (ADR) is ubiquitous throughout professional sports disputes.<sup>1</sup> Teams negotiate—a form of ADR—with players over contracts. Professional sports leagues send disputes to arbitration—also a form of ADR.<sup>2</sup> Still, leagues have yet to readily utilize one of the fastest developing forms of ADR, mediation.<sup>3</sup> Although the sports world is riddled with opportunities—labor disputes, disciplinary disputes, broadcast disputes—parties in American sporting disputes have utilized mediation on only a few occasions.<sup>4</sup> Recently, the number of issues surrounding the National Football League's (NFL) labor dispute proved too contentious for the parties to negotiate themselves. With the looming expiration of the league's collective bargaining agreement (CBA)—the

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1. See generally Thomas A. Baker, III & Dan Connaughton, *The Role of Arbitrability in Disciplinary Decisions in Professional Sports*, 16 MARQ. SPORTS L. REV. 123 (2005); David Sirotkin, Note, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 CARDOZO J. CONFLICT RESOL. 289 (2009).

2. Sirotkin, *supra* note 1, at 291.

3. See IAN S. BLACKSHAW, SPORT, MEDIATION AND ARBITRATION 18–19 (2009); William K. Slate II, The Growth of Mediation and Mediation in Sports Disputes in the US, Presented at the CAS Symposium on Mediation in Lausanne, Switzerland (Nov. 4, 2000), in BLACKSHAW, *supra* note 3, at 67–68.

4. Major League Baseball (MLB) utilized mediation during the 1994 MLB labor dispute between team owners and the MLB Players' Association (MLBPA). During the MLBPA's strike, the Federal Mediation and Conciliation Service (FMCS) unsuccessfully intervened in an attempt to facilitate an agreement between the players and team owners. James R. Devine, *The Legacy of Albert Spalding, the Holdouts of Ty Cobb, Joe DiMaggio, and Sandy Koufax/Don Drysdale, and the 1994–95 Strike: Baseball's Labor Disputes are as Linear as the Game*, 31 AKRON L. REV. 1, 65 n.285, 66–67 (1997).

league's governing document that sets forth nearly every aspect of the league's operating procedures—the parties chose to utilize mediation. Though the first two attempts were unsuccessful, the parties ultimately reached an agreement.

Because mediation is seldom utilized in professional sports disputes, the NFL's use of mediation is an interesting test subject. If sports-related disputants find mediation effective, it may lead to a new forum by which professional sports leagues solve labor disputes and, consequently, an abandonment of traditional resolution mechanisms, such as the legal system. Determining the effectiveness of mediation in professional sports disputes requires an analysis of the relevant factors, circumstances, and occurrences that ultimately led to the settlement of the NFL's labor dispute. An analysis of each of the NFL's mediation attempts will reveal the unique nature of a professional sports dispute; specifically, how extraneous factors—such as the media, the legal process, and monetary gain—affect the parties' motivations and strategies and, in turn, the success of mediation.

This Comment will undertake an analysis of such factors throughout the NFL's mediation process and will conclude how parties, specifically professional sports teams and players associations embroiled in a labor dispute, can utilize mediation to settle their dispute. Part II serves as an introduction to mediation, discussing its role and effectiveness in sports. Part III discusses the background of mediation efforts throughout the recent NFL labor dispute. Part IV dissects and analyzes the causal factors behind the two failed mediations and the successful third mediation. Part IV's analysis will demonstrate how certain dynamics may influence the success of mediating a professional sports labor dispute. Finally, based on the success of mediation in the NFL's labor dispute, Part V will suggest how mediation may be utilized in future labor disputes in professional sports.

## II. MEDIATION IN SPORTS

Mediation is a “voluntary, non-binding, ‘without prejudice’ process that uses a neutral third-party (mediator) to assist the parties in dispute to reach a mutually agreed settlement without having to resort to a court.”<sup>5</sup> As an extension of negotiation, mediation allows the parties to create their own solutions with the help of an unbiased mediator.<sup>6</sup> Though allowing the parties to wield significant influence over the resolution of their dispute, professional sports leagues have yet to utilize mediation on a consistent basis.

There may be some underlying reasons that owners and players rarely

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5. BLACKSHAW, *supra* note 3, at 19.

6. *Id.*

employ mediation.<sup>7</sup> Some sports-related issues require time-limited arbitration, instead of mediation, in order to produce a quick result, specifically with issues that relate to individual athlete participation.<sup>8</sup> Additionally, mediation may not be appropriate for some types of sports disputes.<sup>9</sup> Mediation is likely to fail if the dispute contains high levels of conflict, low motivation to reach a solution, low commitment to mediate, a shortage of resources, or involves parties with significantly unequal bargaining power.<sup>10</sup>

Still, business issues that surround professional sports, such as contract disputes that are typically settled through negotiation, may also be appropriate for mediation.<sup>11</sup> The personal nature of mediation can allow for sports disputes to be resolved while preserving personal and business relationships.<sup>12</sup> Unlike settling a dispute via the courts, mediation is geared toward future possibilities in an effort to reach a solution, instead of asserting fault toward another party.<sup>13</sup> In an attempt to find an amicable solution, mediation may allow the parties to circumvent a harmful impasse by cooperatively reestablishing communication and reaching a solution.<sup>14</sup> Yet, mediation still requires willingness on behalf of the parties.

Some disputes may be ripe for mediation as a result of the dispute's underlying issues. Still, even if all signs point to mediation, it is essential that the parties are "willing to utilize the mediation process to its fullest extent with the primary goal being to resolve the dispute to the mutual satisfaction of those involved."<sup>15</sup> If parties do not enter mediation with that mindset, talks will undoubtedly fail, evidenced by the NFL's first two mediation attempts.

### III. MEDIATION AND THE NFL LABOR DISPUTE

Over the course of the NFL's labor dispute, there were three separate mediation sessions. Each session contained varying circumstances and

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7. See Slate, *supra* note 3, at 68.

8. *Id.*

9. See BLACKSHAW, *supra* note 3, at 132 (This includes, among others, matters where parties may seek to employ legal precedent, want the mediator to enjoin a party, want to use mediation as a punishment mechanism, or want the mediation and dispute to be highly publicized).

10. *Id.* at 133 (citing KENNETH KRESSEL, *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* (2000)).

11. Slate, *supra* note 3, at 68.

12. BLACKSHAW, *supra* note 3, at 129.

13. *Id.*

14. *Id.*

15. Bob Wallace, *Mediation in Professional Sports Disputes*, *PROF. SPORTS AND THE L.*, July–Aug. 2011, at 5.

occurred in a unique context. The first mediation occurred two weeks prior to the expiration of the NFL's CBA. In the midst of contentious negotiations, the NFL Players Association (NFLPA) and NFL team owners voluntarily submitted to mediation.<sup>16</sup> The parties employed the services of an independent government agency—Federal Mediation and Conciliation Services (FMCS)—to act as a neutral, third-party mediator.<sup>17</sup> After nearly a week of mediation, mediator George Cohen stated, “some progress was made, . . . but very strong differences remain[ed] on the all-important core issues that separate the parties.”<sup>18</sup> Throughout the initial mediation, “sides [talked] both in full groups and in smaller subcommittee meetings.”<sup>19</sup> However, after meeting for a sixteenth day, the parties decided that they had enough.<sup>20</sup> The owners locked out the players to force concessions at the bargaining table, and the NFLPA disclaimed its interest in acting as the players' collective bargaining representative as a means to bring an antitrust suit against the owners.<sup>21</sup>

With a lockout in place, the players were unable to play football;<sup>22</sup> thus, the players<sup>23</sup> brought a class action suit in federal district court against the league in *Brady v. National Football League*.<sup>24</sup> The suit challenged the lockout on antitrust grounds and sought injunctive relief.<sup>25</sup> At the same time, several retired players, along with a few amateur players,<sup>26</sup> filed a similar suit against the NFL in federal district court, arguing that the lockout could harm their retirement benefits, which are subsidized by the NFL.<sup>27</sup> The court reassigned the retired players' suit against the NFL to the judge presiding over

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16. *NFL, NFLPA Agree to Enter Mediation*, ESPN NFL (Feb. 18, 2011), <http://sports.espn.go.com/nfl/news/story?id=6132690>.

17. *Id.*

18. *Mediator Says NFL, Union Make 'Some Progress'*, SPORTING NEWS, <http://aol.sportingnews.com/nfl/feed/2010-09/nfl-labor-talks/story/mediator-says-nfl-union-make-some-progress> (last visited Nov. 18, 2011).

19. *Id.*

20. See Mark Maske & Amy Shipley, *NFL Shuts Down After Talks Stall*, WASH. POST, Mar. 12, 2011, at A4.

21. See Complaint, *Brady v. NFL*, No. 11-CV-639, ¶¶ 57, 63 (D. Minn. Mar. 11, 2011); Maske & Shipley, *supra* note 20.

22. See Maske & Shipley, *supra* note 20.

23. The plaintiffs to the suit were made up of current and former NFL players as well as college football players, but when this Comment discusses the lawsuit in *Brady v. NFL*, it will collectively refer to the plaintiffs as “the players.”

24. See generally Complaint, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Mar. 11, 2011).

25. See *id.* at 39, 41, 42, 49.

26. Collectively referred to throughout this Comment as “the retired players.”

27. See Complaint ¶ 111, *Eller v. NFL*, No. 11-CV-748 (D. Minn. Mar. 28, 2011).

the players' injunction hearing<sup>28</sup>—United States District Judge Susan Richard Nelson—and ultimately consolidated both the retired players' and the players' cases.<sup>29</sup>

Although the first mediation failed and resulted in player-filed suits against the NFL, the owners and players surprisingly agreed to pursue a second mediation.<sup>30</sup> Still, like the hostile and contentious nature of the talks that derailed the first mediation, the parties had strong, contradictory opinions as to where the second mediation should take place.<sup>31</sup> The players desired court-annexed mediation that would occur under the supervision of the district court in Minnesota, while the NFL proposed that the mediation occur back in Washington D.C. with FMCS mediator George Cohen, the mediator who presided over the first mediation.<sup>32</sup> The NFL suggested Cohen because he “‘kn[e]w the issues . . . [and] the parties . . . [and was] effective at getting both sides to look openly at each other's positions and try to find solutions.’”<sup>33</sup> But the players' attorneys declined the proposal to resume mediation with Cohen, stating, “‘collective bargaining between the NFLPA and the NFL is over.’”<sup>34</sup> With the parties in disagreement as to where to hold the second mediation, Judge Nelson stepped in.

Although hearing the parties' arguments at an injunction hearing, Judge Nelson refrained from making an immediate ruling.<sup>35</sup> Instead, Judge Nelson mandated that the parties participate in court-supervised mediation to discuss settling the players' antitrust suit.<sup>36</sup> Judge Nelson appointed federal Chief Magistrate Judge Arthur Boylan to serve as the mediator.<sup>37</sup> Prior to the mediation, Boylan—who had significant experience as a mediator<sup>38</sup>—met

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28. See generally Order for Reassignment of Related Cases, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Mar. 29, 2011).

29. See generally Order for Consolidation, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Apr. 11, 2011).

30. *NFL, Players Want to Talk*, ESPN NFL (Apr. 8, 2011), <http://sports.espn.go.com/nfl/news/story?id=6304671>.

31. *Id.*

32. *Id.*

33. *Id.* The letter continued to discuss the players' concerns that the owners would use the players' agreement to mediate as a violation of labor laws; however, the owners stated that it would give the players “‘reasonable and appropriate assurances . . . .’” *Id.*

34. *Id.*

35. *Id.*

36. See Mark Maske, *Judge Orders NFL Players, Owners to Begin Mediation Thursday*, WASH. POST, Apr. 12, 2011, at D3; see generally Mediation Order, *Brady v. NFL*, No. 11-CV-639 (D. Minn. Apr. 11, 2011).

37. Mediation Order at 2, *Brady*, No. 11-CV-639.

38. *NFLPA Lawyers to Talk with Judge*, ESPN NFL (Apr. 12, 2011), <http://sports.espn.go.com/>

with both parties to discuss the issues and engage in a “brokering” process,<sup>39</sup> which involves the mediator reaching out in an effort to get to know the parties and their respective issues. However, like the first mediation attempt, the court-ordered mediation proved unsuccessful.<sup>40</sup> Officially termed by Boylan as an “extended break,” after only four days of discussion, Boylan ended the mediation and instructed the parties to reconvene nearly one month later.<sup>41</sup>

Although the parties were beginning to lose sight of their end goal—settling the lawsuit and agreeing to a new CBA—Commissioner Roger Goodell still had a grasp on the direction needed to end the dispute. Goodell stated, “the players want solutions and I think the teams want solutions. That’s why we have to be working at it in negotiations and figuring out how to get to that point.”<sup>42</sup> However, the parties’ ability to reach solutions would be hampered by the legal process, which took hold of the dispute following the end of the second mediation session.

Immediately following the failed talks, the district court sided with the players and enjoined the lockout.<sup>43</sup> As a result, the owners appealed the ruling to the Eighth Circuit Court of Appeals,<sup>44</sup> and the Eighth Circuit issued a temporary stay of the district court’s ruling.<sup>45</sup> As each court handed down its respective rulings, the date to renew the second mediation approached, and it was uncertain whether the parties would reconvene or allow the legal process to play itself out.

Ultimately, the parties chose to continue the second mediation in Minnesota on May 16, 2011;<sup>46</sup> however, on the same day, the Eighth Circuit granted the owners a permanent stay of the district court’s injunction that lifted the lockout.<sup>47</sup> The Eighth Circuit’s ruling meant that the lockout would

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nfl/news/story?id=6336516. In 2007, Boylan had mediated a \$195 million settlement of a class action suit for malfunctioning defibrillators and pacemakers. *Id.*

39. See Jon Krawczynski, *Attorneys Meeting with Mediator Prior to Negotiations*, STAR-LEDGER (Newark, N.J.), April 13, 2011, at 43.

40. *NFL Talks Adjourn Until May 16*, ESPN NFL (Apr. 21, 2011), <http://sports.espn.go.com/nfl/news/story?id=6395141>.

41. *NFL, Players Wrap Up Mediation, May Not Meet Again Until May 16*, SI.COM (Apr. 21, 2011), <http://sportsillustrated.cnn.com/2011/football/nfl/04/20/mediation.ap/index.html?eref=sihp>.

42. *NFL Talks Adjourn Until May 16*, *supra* note 40.

43. See generally *Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. 2011).

44. See generally *Defendants’ Notice of Appeal, Brady v. NFL*, No. 11-1898 (8th Cir. Apr. 29, 2011).

45. See generally *Brady v. NFL*, 638 F.3d 1004 (8th Cir. 2011).

46. For the purpose of this Comment, the reconvenence of mediation on May 16 will be considered part of the “second mediation attempt.”

47. See *Brady v. NFL*, 640 F.3d 785, 787 (8th Cir. 2011); Joe Reedy, *NFL Lockout Remains in*

stay in place until the court heard the owners' appeal on June 3, 2011, intensifying, with reason, the belief that mediated talks prior to the oral arguments would yield no result.<sup>48</sup> This was evidenced by the statements of Drew Brees, New Orleans Saints quarterback and executive of the NFLPA, who told reporters that the parties were "still pretty far apart" in their discussions.<sup>49</sup> With such a wide gap in the talks and the June 3 hearing looming, the parties finished their second unsuccessful mediation attempt.<sup>50</sup> The parties then made plans to engage in a third mediation attempt following a hearing in front of the Eighth Circuit on June 3, 2011.<sup>51</sup>

Although the parties agreed to set aside talks while each prepared its oral arguments, on the eve of the June 3 hearing, the parties joined Boylan in Chicago for discussions.<sup>52</sup> Most notably absent from the talks were both sides' legal counsel—Bob Batterman and Jeff Pash for the NFL and Jeff Kessler and Jim Quinn for the players.<sup>53</sup> Instead, the NFL was represented by Commissioner Goodell and five team owners, and the players were represented by Executive Director DeMaurice Smith and current and former players Kevin Mawae, Mike Vrabel, Jeff Saturday, Domonique Foxworth, and Tony Richardson.<sup>54</sup> The discussions—the parties' third attempt to mediate the dispute—were, as the parties indicated in a joint statement, "confidential discussions" with Boylan "pursuant to court[-ordered] mediation."<sup>55</sup>

The impromptu discussions, referred to by the media as "secret," would continue sporadically over several weeks.<sup>56</sup> Initially, although details of the talks were to remain confidential per a court order, an anonymous source told the media that the talks were yielding progress and that the parties were to

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*Place Until Full Appeal is Heard*, CINCINNATI ENQUIRER, May 17, 2011, at C3.

48. See Bob Glauber, *NFL Lockout: Back to the Table, But Will They Talk?*, NEWSDAY (N.Y.), May 15, 2011, at A71.

49. James Varney, *Hazy Overtones; Fans Showed Up to Watch the Saints in a Charity Softball Game, But It Was Overshadowed by the NFL's Continued Lockout*, TIMES-PICAYUNE (New Orleans), May 18, 2011, at D1.

50. Dave Campbell, *Mediation Over Till June 7; But NFL Owners Want Traditional Negotiations*, CHI. SUN-TIMES, May 18, 2011, at 58.

51. *Id.*

52. Jarrett Bell, *Lawyers Left Out of NFL Talks*, USA TODAY, June 3, 2011, at 1C.

53. Greg A. Bedard, *Secret NFL Talks Bode Well; Without Lawyers, Key Figures Met for Two Days*, BOS. GLOBE, June 3, 2011, at Sports, 2.

54. *Id.*

55. Joe Reedy, *Sides Quiet After Talks*, CINCINNATI ENQUIRER, June 3, 2011, at D1.

56. Tom Rock, *NFL Owners Meet Again with Players*, NEWSDAY (N.Y.), June 8, 2011, at A55; *Pats Owner: 'Good News is, We're Talking' About New Deal*, USA TODAY, June 10, 2011, at 8C; *Report: NFL, Players Talk Again; Latest Round Set to Last Several Days*, USA TODAY, June 8, 2011, at 9C.

meet “often . . . [and] in the near future . . .”<sup>57</sup> However, the talks reportedly ended almost as quickly as they resurfaced when the parties’ lawyers—presumably Batterman, Pash, Kessler, and Quinn—were brought back into the process but asked to “stand down” after they became involved in a heated exchange with one another.<sup>58</sup> Nonetheless, due to its progress, the “secret” discussions carried over into July 2011, as the parties eventually moved the talks from Chicago and New York back to Minnesota, which at times exceeded fifteen hours per meeting.<sup>59</sup>

Amidst these lengthy mediation sessions, two legal developments occurred that had the potential to bring an abrupt end to the parties’ settlement discussions. On July 4, 2011, retired NFL players filed a second class-action complaint against the players and owners in the District Court of Minnesota, arguing that by negotiating settlement terms that involved the retired players, the players and owners had violated antitrust laws.<sup>60</sup> Moreover, on July 8, 2011, while the parties were engaged in their third mediation attempt and seemingly making progress, the Eighth Circuit overturned the district court’s finding that the lockout was a violation of antitrust law.<sup>61</sup> It initially appeared that any progress made in the discussions would be immediately threatened. Because Judge Nelson scheduled the hearing for the retired players’ complaint for early August 2011, the immediate effect of the retired players’ attempt to intervene in the mediations was unclear, but the Eighth Circuit’s ruling did have the potential to instantly impact the mediation. It was reasonable to believe that the ruling would tip the scales in favor of the owners; however, in a move of solidarity, the parties issued a joint statement: “[The] ruling does not change our mutual recognition that this matter must be resolved through negotiation. We are committed to our current discussions and reaching a fair agreement . . .”<sup>62</sup> Although the parties sought to reassure the public that discussions were yielding progress, another ill-timed occurrence took the

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57. Barry Wilner, *Productive Discussions Leading to Labor Optimism*, STAR-LEDGER (Newark, N.J.), June 9, 2011, at 49.

58. *Report: A Near Blow-Up*, CHI. TRIB., June 16, 2011, at C7.

59. Bart Hubbuch, *NFL Talks Look Promising Again*, N.Y. POST, July 2, 2011, at 53.

60. Motion for Leave to File Second Amended Complaint and Crossclaim, *Eller v. NFL*, 11-CV-639 (D. Minn. July 4, 2011); Amended Motion for Leave to File Second Amended Complaint and Crossclaim, *Eller v. NFL*, 11-CV-639 (D. Minn. July 13, 2011); *Retirees File Complaint*, GRAND RAPIDS PRESS (Mich.), July 5, 2011, at C1.

61. See generally *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011); Maury Brown, *Eighth Circuit Court of Appeals Upholds NFL’s Lockout, League and Players Respond*, THE BIZ OF FOOTBALL (July 8, 2011), [http://bizofffootball.com/index.php?option=com\\_content&view=article&id=851:eighth-circuit-court-of-appeals-upholds-nfls-lockout-league-and-players-respond&catid=54:nfl-labor-news&Itemid=79](http://bizofffootball.com/index.php?option=com_content&view=article&id=851:eighth-circuit-court-of-appeals-upholds-nfls-lockout-league-and-players-respond&catid=54:nfl-labor-news&Itemid=79).

62. Brown, *supra* note 61.

proverbial wind out of the parties' sails.

With the NFL's season looming in the balance, and on the heels of the court's ruling and the parties' statements, Boylan postponed the mediation until July 19, 2011, while he went on vacation.<sup>63</sup> Without a mediator, the parties were left to negotiate on their own. Though Boylan would be absent at a highly critical time of the talks, prior to leaving, he instructed the parties to continue their own discussions "in an effort to define and narrow the differences between their respective settlement positions."<sup>64</sup> Following the series of unfortunate events, the parties were faced with immense pressure and a growing sense of urgency to reach an agreement.

A surprise to many, without a mediator, the parties began to make significant strides toward a settlement.<sup>65</sup> The negotiation sessions, which at the time bore the most progress to date, went on at times for fifteen hours.<sup>66</sup> As strides were being made, Boylan ended his vacation and returned to lead the discussions, which had moved to New York.<sup>67</sup> Amidst these developments, the parties engaged in a symbolic gesture of cooperation by inviting the retired players to join them in the discussions.<sup>68</sup> This was significant because inviting the retired players—a party with a new landscape of issues—could potentially impede the parties' progress.<sup>69</sup> But following the invite, the retired players' attorney stated that "the retiree issues [we]re not an impediment to a resolution,"<sup>70</sup> and thus the talks continued. For the next few days, talks progressed; on July 25, 2011, the parties settled the *Brady* lawsuit and agreed in principle to a new CBA.<sup>71</sup> After a four and a half-month lockout, NFL football was back.<sup>72</sup>

Although the parties began their discussions as polar opposites, they eventually came to a resolution. Though the effectiveness of mediation was

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63. *NFL Still Working Through Labor Deal; Owners, Player's Union Will Meet as Judge Takes a Vacation*, GRAND RAPIDS PRESS (Mich.), July 10, 2011, at C8.

64. *Id.*

65. *More Success at Labor Talks; Club Option Key to Rookie Pacts*, BOS. GLOBE, July 15, 2011, at Sports, 7.

66. *Id.*

67. *Mediator Set to Rejoin Talks; NFL*, BALT. SUN, July 18, 2011, at 2D.

68. Jarrett Bell, *Hopeful Retirees to Rejoin Talks; League Seeking 'Global Settlement'*, USA TODAY, July 19, 2011, at 8C.

69. *See id.*

70. Mark Maske, *NFL Players Expected to Receive, Review Draft of Virtual Deal*, WASH. POST, July 20, 2011, at D3.

71. Bob Glauber, *At Long Last, NFL Opens Doors; Players Approve Deal, So Football is Back After 4 1/2-Month Lockout*, NEWSDAY (N.Y.), July 26, 2011, at A58.

72. *Id.*

unclear during the dispute, by its end, mediation had helped the parties frame the important issues and move toward a settlement. With several professional sports labor disputes on the horizon,<sup>73</sup> it would behoove each respective league and players' association to consider utilizing mediation. Using the NFL's labor dispute and mediation attempts for guidance, other leagues may look to the factors, circumstances, and occurrences that may cause mediation to fail, as well as succeed, as a catalyst toward a resolution.

#### IV. THE FAILURES AND TRIUMPHS OF MEDIATION DURING THE *BRADY* SETTLEMENT TALKS

The three mediation attempts were surrounded by some similar factors; however, each session was impacted by its own nuanced circumstances. Moreover, as an attorney representing the retired players put it, the mediation and the entire dispute centered on “the structure of the game and the relationship between the rookies, the active players, the retirees, with each other and the league.”<sup>74</sup> The parties' initial failure to properly consider and protect those relationships, in addition to other contributing factors, led to two unsuccessful mediation attempts. Yet, in the end, the parties reached an agreement. To truly understand how mediation affected the NFL's labor dispute and how to utilize the process for future professional sports labor disputes, it is important to analyze the factors and circumstances surrounding each mediation attempt.

##### A. *Why the First Mediation Failed*

The first mediation attempt, which occurred under the guise of CBA negotiations, failed as a result of—among other factors—the structure of the talks, the public nature of the dispute, and the parties' underlying motivations. This section will discuss the aforementioned factors in detail and how they adversely affected the initial mediation.

##### 1. Lack of Face-to-Face Dialogue

When mediating, the mediator must choose whether to employ joint

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73. The National Basketball Association locked out its players following the 2010–2011 season. Brian Mahoney, *First Effect of Lockout: No Show of Free Agents: Work Stoppage Shows No Sign of Reversing Course Amid NBA Labor Dispute*, LEWISTON MORNING TRIB. (Idaho), July 2, 2011. Additionally, MLB's CBA expires in December 2011, and the National Hockey League's CBA expires in Summer 2012. *Id.*

74. *NFL Mediation Wraps Third Day of Talks*, ESPN NFL (Apr. 19, 2011), <http://sports.espn.go.com/nfl/news/story?id=6388965>.

meetings or to engage in “shuttle diplomacy.”<sup>75</sup> A joint meeting puts the parties in the same room for most of the session so they may discuss and explore underlying issues and potential solutions face-to-face.<sup>76</sup> Shuttle diplomacy, on the other hand, puts the parties in separate caucus rooms with the mediator acting as an intermediary.<sup>77</sup>

The type of mediation a mediator will conduct will be determined by the issues surrounding the dispute and how well the mediator can gauge the parties’ emotions and motivations. “[P]arties [may be] preoccupied with discussion of economic issues in their prior negotiations,” and as a result, they may have “exchanged very little information about the concerns that led to proposals on noneconomic topics.”<sup>78</sup> To that extent, joint meetings “have utility as a starting point” to focus the parties’ attention on many underlying issues regardless of the length of previous discussions.<sup>79</sup> Opting to utilize shuttle diplomacy may present obstacles for both the mediator and the respective parties.<sup>80</sup> The mediator bears the burden of getting each party to be fully candid,<sup>81</sup> the back-and-forth process can be frustrating for the parties.

Based on the players’ comments and frustrations surrounding the initial mediation, it appears as though Cohen chose to utilize shuttle diplomacy more heavily than joint meetings, which resulted in few face-to-face meetings. Arizona Cardinals’ kicker Jay Feely described the players’ frustrations from his experience of two days of mediation:

I sat up there [for two days], all day and I spent thirty minutes total in front of the owners. So we’re spending all day up there yet not having the dialogue, not having the communication with the owners. We’re up there for . . . 17 days or so[.] [I]n the total mediation process we may have spent an aggregate total of twenty hours in front of the owners in that entire time.<sup>82</sup>

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75. SAM KAGEL & KATHY KELLY, *THE ANATOMY OF MEDIATION: WHAT MAKES IT WORK* 114 (1989).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*

82. Posting of Mike Florio, *Jay Feely Interview Transcript*, PFT (Mar. 14, 2011, 10:04 PM EST), <http://profootballtalk.nbcsports.com/2011/03/14/jay-feely-interview-transcript/>. NFLPA President and former player Kevin Mawae made similar claims, stating that the players sat in mediation “for 16 hours . . . [but] met face-to-face [with the owners] a total of [only] 30 minutes.” *NFL Capsules: Lead Negotiator Says NFL Proposed 10-year CBA*, BROWNSVILLE HERALD, Mar. 14, 2011, <http://www.brownsvilleherald.com/sports/nfl-123936-proposed-capsules.html>.

Feely continued to express his frustration that the initial mediation was void of direct dialogue between the parties and would have benefited from more face-to-face meetings.<sup>83</sup> Additionally, according to some players, when the parties actually met face-to-face, it was the owners' attorneys who engaged in most of the discussions.<sup>84</sup>

Although it is a party's prerogative to choose to defer representation and bargaining power to an attorney, doing so may create or exacerbate frustrations. Because of the salient, monetary issues underlying the dispute, it is understandable that the parties entrusted a significant amount of authority to their respective attorneys. However, engaging in more face-to-face, intimate discussion may move the parties away from positional bargaining and toward interest-based bargaining, by which the parties explore mutual gains and a win-win result instead of individual gains and a win-lose result. Engaging in such face-to-face discussions to develop interest-based bargaining requires the attendance and earnest participation of the parties central to the dispute—here, the owners and players—with decision-making authority.

## 2. Lack of Proper Participation

Because mediation has the ability to change the parties' perceptions of the issues and of each other, it is imperative that those directly impacted by the dispute, those who represent and influence the viewpoints of a respective party, and those with the actual authority to make decisions are present for each session.<sup>85</sup> Failure to include such necessary persons in the mediation can have gross negative effects. For one, the absence of those with actual control over a respective party's bargaining position means that the negotiation efforts within mediation are all for naught. A mediator cannot be expected to facilitate discussion and explore the parties' interests when a party to the mediation cannot accurately represent or bargain for those interests.<sup>86</sup> Moreover, the other party may perceive the absence of vested persons at mediation as a severe lack of respect, which only further distances a possible settlement.

Evident from the reactions to the initial mediation, it appears that both parties failed to send the necessary representatives. At the initial mediation, the owners were represented by a ten-member Management Council Executive

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83. *Jay Feely Interview Transcript*, *supra* note 82.

84. Posting of Ken, *NFL Network's Rich Eisen Talks with Colts Center Jeff Saturday About Lockout*, FANG'S BITES (Mar. 28, 2011), <http://fangsbites.com/2011/03/nfl-networks-rich-eisen-talks-with-colts-center-jeff-saturday-about-lockout/>.

85. See KAGEL & KELLY, *supra* note 75, at 110.

86. See *id.*

Committee, while the players were represented by an eleven-member executive committee.<sup>87</sup> Although each party present at mediation represented a large number of individuals—thirty-two owners and thousands of players—as well as a variety of opinions that accompany such large member-based entities, it stymies mediation if each representative, as well as the principals to the dispute, are not present throughout the process. In the first mediation, several representatives and high-profile disputants were not in attendance.

During the first seven days of mediation with Cohen, the players sent nine members of their eleven-person executive committee.<sup>88</sup> Still, noticeably absent throughout the first mediation were two of the most well-known plaintiffs to the suit, Indianapolis Colts quarterback Peyton Manning and New England Patriots quarterback Tom Brady.<sup>89</sup> Similarly, the owners had not sent a single owner to the first seven days of mediation; instead, Commissioner Goodell, lead negotiator Jeff Pash, and attorney Bob Batterman represented the owners at mediation.<sup>90</sup> By the twelfth mediation session with Cohen, the owners' contingency had remained small, represented only by Goodell, Pash, Batterman, and just one owner, New York Giants co-owner John Mara.<sup>91</sup> Even on the day the CBA was set to expire, several key members of the owners' executive committee chose not to attend the session.<sup>92</sup> It was not until the ninth session, a little over twenty-four hours before the mediation was abruptly halted by the NFLPA's disclaimer of interest, that the owners sent nine of their ten committee members to the mediation, with one participating via telephone.<sup>93</sup>

One player attested to the owners' representatives at mediation, stating that

“[e]very single player on the executive committee was at the

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87. See Albert Breer, *Owners Receive Update on CBA Mediation from NFL Officials*, NFL (Feb. 26, 2011), <http://www.nfl.com/news/story/09000d5d81e7e87e/article/owners-receive-update-on-cba-mediation-from-nfl-officials>; Bob Glauber, *Lockout Looms at Midnight; No Progress in Talks Between NFL Owners, Union; Without Unexpected Breakthrough, Stoppage Likely*, NEWSDAY (N.Y.), Mar. 3, 2011, at A54.

88. Breer, *Owners Receive Update on CBA Mediation from NFL Officials*, *supra* note 87.

89. Posting of Mike Florio, *Brees Says He Likely Will Attend Future Mediation Sessions*, PFT (Apr. 16, 2011, 11:33 AM EST), <http://profootballtalk.nbcsports.com/2011/04/16/brees-says-he-likely-will-attend-future-mediation-sessions/>.

90. Breer, *Owners Receive Update on CBA Mediation from NFL Officials*, *supra* note 87.

91. Gary Myers, *NFL Back on Clock as Talks Resume*, DAILY NEWS (N.Y.), Mar. 8, 2011, at 60.

92. See Glauber, *Lockout Looms at Midnight; No Progress in Talks Between NFL Owners, Union; Without Unexpected Breakthrough, Stoppage Likely*, *supra* note 87.

93. Sam Farmer, *Players Ready for Next Step; Deadline Looms Friday for New CBA; Decertification Likely*, CHI. TRIB., Mar. 11, 2011, at C4.

mediation every single day. We always had people with influence there. They had nobody with decision-making capabilities . . . . Most of the time, most of the owners weren't even there. . . . Any proposal we made, they'd have to leave the room to make a million phone calls."<sup>94</sup>

Regardless of whether the owners did in fact fail to send a contingency with the proper authority, the perception that such persons were absent clearly harmed the parties' relationship.

### 3. Presence of Media Coverage

Another potential factor as to why the initial mediation attempt failed is the highly publicized nature of the dispute. Due to the popularity of the NFL, the dispute between the players and team owners was of great national interest and was reported on by nearly every news outlet. Both sides fed the media firestorm by granting interviews and publicly sharing confidential information.<sup>95</sup> Mediated discussions are "never helped if the parties try to carry on a media campaign with the press."<sup>96</sup> A mediation where the parties publicly comment about the process and the other party while the process is ongoing creates "a danger that only part of the story will be reported," which causes further difficulties for the parties in settling the dispute.<sup>97</sup>

Although Cohen encouraged both sides to keep discussions confidential,<sup>98</sup> his desires did not stop the parties from talking to media outlets. During the first mediation, NFLPA executive DeMaurice Smith publicly shared the owners' proposals, calling them "utterly meaningless" as each side continued to criticize the other's bargaining position.<sup>99</sup> Moreover, throughout the process, anonymous "person[s] familiar with the negotiations" continually reported to the media the state of the mediation and the displeasures of each party.<sup>100</sup> Such disregard for the mediator's request for confidentiality worked to undermine the process. Every detail of mediation that was leaked to the

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94. Ken Murray, *Cornerbacks Have the Lockout Covered; Foxworth Updates Ravens; Carr Learns Pre-Law Lessons*, BALT. SUN, Mar. 25, 2011, at 1D.

95. See Posting of Mike Florio, *First Day of Mediation Includes "Tough" Talks, "Fence-Mending"*, PFT (Apr. 14, 2011, 9:53 PM EST), <http://profootballtalk.nbcsports.com/2011/04/14/first-day-of-mediation-includes-tough-talks-fence-mending/>.

96. KAGEL & KELLY, *supra* note 75, at 9.

97. *Id.* at 10.

98. Gary Mihoces, *Cohen Keeps Talks on Track; NFL, Union Give Credit to Mediator for Week-Long Extension*, USA TODAY, Mar. 7, 2011, at 6C.

99. Howard Fendrich, *Owners Give a Little; Players Unimpressed*, BOS. GLOBE, Mar. 10, 2011, at Sports, 3.

100. *Id.*

public attached a considerable amount of tension and pressure to the parties.

#### 4. Lack of Transparency

A key to successful mediation and negotiation is transparency on the key issues underlying a dispute. That is not to say that this requires a party to share all of its information and relinquish its bargaining advantage; instead, to appease the other party's concerns and to reduce high transaction costs in pursuit of a mutually beneficial solution, parties will have to share at least some basic information. For instance, throughout the NFL labor dispute, one of the key issues was how to distribute \$9 billion of revenue.<sup>101</sup> Because the monetary distribution involved so much money, one of the players' biggest concerns was receiving assurances from the owners that the players would receive ten years of the teams' audited financial information.<sup>102</sup>

The owners initially balked at the idea of sharing such a large quantity of team financial information.<sup>103</sup> But ultimately, the owners relented and offered to disclose five years of audited profitability information, stressing the fact that the owners themselves were not privy to any of it.<sup>104</sup> Reportedly, the players turned down the offer, instead wanting a complete look at the clubs' books.<sup>105</sup> In characterizing the discussions between the players and owners, DeMaurice Smith explained, "[t]he last 14 days, the National Football League has said, 'Trust us.' But when it came time for verification, they told us it was none of our business."<sup>106</sup> Whether the owners should have disclosed a complete record of team finances is not within the scope of this analysis. However, the owners' reticence and lack of transparency clearly had an adverse impact on the initial mediation. The players were unwilling to continue while the owners were content with the breadth of information they had provided to the players. As the deadline for the expiration of the CBA approached and with neither party willing to bend, it started to become quite clear that the mediation efforts were not going to succeed.

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101. Howard Fendrich, *A Lockout is Imposed by Owners; Dispute Spirals into Court as Players Decertify, Sue*, STAR-LEDGER (Newark, N.J.), Mar. 12, 2011, at 27.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Sam Farmer, *NFL; NFL Owners Believe Their Offer Was Fair*, L.A. TIMES, Mar. 13, 2011, at C5.

## 5. Imposition of a Deadline

Throughout the first mediation, the players and owners were constantly facing deadlines. The first mediation began only two weeks prior to the expiration of the NFL's CBA.<sup>107</sup> Although the parties twice extended the deadline,<sup>108</sup> the looming threat of a lockout by the owners and a subsequent disclaimer of interest by the players' union may have jeopardized discussions. It may seem that a deadline for such actions would move the parties towards settlement; however, such tactical methods may have instead hardened the parties' positions. The parties may have entrenched their bargaining positions due to the fact that each had a means to exit mediation; specifically, the owners could institute a lockout and the players could choose to decertify or have the union disclaim. Further, it is likely that each party's alternatives caused much hostility during the mediation, as neither party believed the other had engaged in genuine discussions.<sup>109</sup>

Overall, each of the aforementioned factors had a role in derailing the parties' first mediation attempt. The contentious nature of the talks made it unlikely that the parties would again seek to utilize mediation during the dispute. However, approximately one month after the failed mediation attempt, Judge Nelson ordered the parties back to mediation. Because the factors surrounding the failed first mediation were never addressed and the parties allowed new issues to surface, logic would dictate that the second attempt would fail as well.

### *B. Why the Second Mediation Failed*

Because the NFLPA disclaimed its interest in representing the players in collective bargaining in order to bring an antitrust suit against the owners, they were forced to operate as a trade association, which lacks the protection of federal labor law—namely, the statutory or nonstatutory labor exemptions.<sup>110</sup> Now outside of the collective bargaining context, any concerted activity conducted by either party could potentially be construed as a violation of antitrust laws.<sup>111</sup> As a result, the parties had to exercise caution in their

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107. *NFL, NFLPA Agree to Enter Mediation*, ESPN NFL (Feb. 18, 2011), <http://sports.espn.go.com/nfl/news/story?id=6132690>.

108. Mark Maske, *NFL Talks Extended Again*, WASH. POST, Mar. 5, 2011, at D1.

109. *See NFL, NFLPA Agree to Enter Mediation*, *supra* note 107. This notion is evidenced by the owners' decision to file an unfair labor practice with the National Labor Relations Board against the players prior to the initial mediation, alleging the players' lack of good faith bargaining. *Id.*

110. *See* MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 437–39 (2d ed. 2009).

111. *See id.*; David A. Donohoe & Maiysha R. Branch, *Can a Litigation Settlement Violate the*

discussions, which largely impacted the success of the second mediation attempt. The analysis that follows explores exactly why the second mediation was unsuccessful.

### 1. The Looming Legal Process

Mediation is a self-determinative process, a form of negotiation by which the parties choose how to craft a settlement.<sup>112</sup> The process keeps all dispositive decisions in the parties' hands and away from a judge or arbitrator. However, in the NFL labor dispute, the parties' blending of mediation with the court system, specifically the players' and retired players' respective suits in Minnesota and their unfolding legal circumstances, worked to undermine a mediated solution. The parties' failure to reach a timely settlement according to Judge Nelson's timetable allowed the court to grant the players' claim for injunctive relief.<sup>113</sup> This set in motion a series of legal proceedings, as the owners appealed to the Eighth Circuit,<sup>114</sup> and the Eighth Circuit stayed the district court's ruling.<sup>115</sup> By allowing a neutral third-party to issue a binding decision while the parties were still involved in mediation, the parties may have doomed the talks from the start. In particular, immersing the dispute in both mediation and the courts may have caused the parties to approach discussions without settlement as a realistic objective but instead with a focus on gaining the most leverage.<sup>116</sup> Because "[b]oth sides [thought] they [could] win in court, . . . neither want[ed] to do anything in mediation that might [have] damage[d] their chances. Thus mediation [was] a song and dance . . . done to satisfy Judge Susan Nelson and football fans . . ." <sup>117</sup> Attorney Jeff Pash, lead negotiator for the NFL, credited Boylan but blamed the looming legal process for the failed talks, saying that the parties' attempt at mediation has been "artificial . . . [and] all within the context of ongoing court cases."<sup>118</sup> These legal issues undoubtedly had an adverse effect on the

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*Antitrust Laws?*, METROPOLITAN CORP. COUNS., Dec. 2000, available at <http://www.akingump.com/files/Publication/84d11dce-c9cf-488e-ba46-8f97bd2b1b30/Presentation/PublicationAttachment/960f444a-41cc-493e-913b-488c3e5c26b/311.pdf>.

112. See BLACKSHAW, *supra* note 3, at 18–19.

113. See generally *Brady*, 779 F.Supp. 2d 992 (D. Minn. 2011).

114. See generally *Defendants' Notice of Appeal, Brady v. NFL*, No. 11-1898 (8th Cir. Apr. 29, 2011).

115. See generally *Brady*, 640 F.3d 785 (8th Cir. 2011).

116. See Judy Battista, *N.F.L. Talks are Stalled; Sides Await Judge's Ruling*, N.Y. TIMES, Apr. 21, 2011, at B14.

117. Mike Freeman, *Second Round of Mediation Mostly for Show*, CBSSPORTS.COM (Apr. 17, 2011), <http://www.cbssports.com/#!/nfl/story/14958810/second-round-of-mediation-mostly-for-show>.

118. Judy Battista, *Uncertainty as Owners Convene*, N.Y. TIMES, May 24, 2011, at B15.

parties' underlying motivations throughout the second mediation.

## 2. Lack of Proper Participation

Unlike the failed mediation efforts in Washington D.C., the court-supervised mediation was reportedly conducted through joint meetings, with the parties regularly meeting face-to-face,<sup>119</sup> and with the presence of persons from both sides with proper decision-making authority.<sup>120</sup> In advance of the talks, Judge Nelson specifically requested that both parties send representatives with such authority<sup>121</sup> so that if the parties did come to agreeable terms, they could immediately hash out a deal. On the first day of the mediation, the owners were represented by team owners Robert Kraft of the New England Patriots, Jerry Richardson of the Carolina Panthers, Clark Hunt of the Kansas City Chiefs, Art Rooney of the Pittsburgh Steelers, Atlanta Falcons President Rich McKay, Commissioner Goodell, and lead negotiator Attorney Jeff Pash.<sup>122</sup> The players were represented by then-Kansas City Chiefs linebacker Mike Vrabel, then-free agent linebacker Ben Leber, NFLPA Executive Director DeMaurice Smith, outside counsel Attorney Jeffrey Kessler, retired player Carl Eller, and the retired players' lead counsel Attorney Michael Hausfeld.<sup>123</sup>

Still, several key members of the players' contingency were absent. Drew Brees, a vocal member of the players' executive committee and party to the lawsuit, failed to attend several sessions.<sup>124</sup> Also absent were seven other named plaintiffs to the suit—most notably Peyton Manning and Tom Brady, both of whom were also absent at the first mediation.<sup>125</sup> Moreover, neither DeMaurice Smith nor the players' attorney Jeffrey Kessler attended all of the sessions during the second mediation.<sup>126</sup>

The owners had similar representation issues, continually rotating owners to attend the sessions.<sup>127</sup> Take for instance the failed May 16 discussions.

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119. Sean Jensen, *NFL Lockout; Agreement Could Be Far Off Still*, CHI. SUN-TIMES, Apr. 16, 2011, at 43.

120. Albert Breer, *Round 2 of NFL-Player Mediation Begins with 'Fence-Mending'*, NFL (Apr. 14, 2011), <http://www.nfl.com/news/story/09000d5d81f3f553/article/mediation-20-nfl-players-at-negotiating-table-again>.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Brees Says He Likely Will Attend Future Mediation Sessions*, *supra* note 89.

125. *Id.*

126. *NFL Mediation Wraps Third Day of Talks*, *supra* note 74.

127. Posting of Mike Florio, *Three New Owners Will Attend Mediation on Tuesday*, PFT (Apr. 18, 2011, 10:31 PM EST), <http://profootballtalk.nbcsports.com/2011/04/18/three-ne-owners-will->

Like the first mediation, the owners failed to send all ten members of their labor committee.<sup>128</sup> It is difficult for serious progress to be made when any decision must get approval from all committee members and then all thirty-two owners, especially when representatives are continually subbed out. Moreover, without intimate knowledge of the potential progress or developing rapport, which would be available only to those who have continually spent time meeting with the other party, alternating representatives miss out on imperative details of the previous discussions or have to start from scratch. The absence of those who make up part of the dispute's identity, including the parties' strong vocal supporters or high-profile members, both of which existed in this particular dispute, serves to undermine the negotiating process. Their absence is a strong symbol for apathy. At the very least, if either side lacks full representation, it behooves both parties to agree on a respective, uniform negotiation strategy and to detail its reservation points and "Best Alternative[s] To a Negotiated Agreement"<sup>129</sup> to demonstrate a commitment toward settlement.

### 3. Presence of Media Coverage

During the second mediation efforts, Judges Nelson and Boylan directed the parties to keep the mediation process confidential.<sup>130</sup> As a player representative noted, "[a]nyone that characterizes [details of the mediation] publicly violates that confidentiality."<sup>131</sup> Even with the court's gag order, because the NFL is such a high-grossing, popular sport, media coverage of the dispute was tremendous. The pressures of keeping the process confidential, combined with the incessant prodding of the media, certainly affected the relationship of the parties. For example, in his comments following one of the court-ordered sessions, Drew Brees was quick to criticize and blame the owners for stalling the process.<sup>132</sup> Similarly, plaintiff Mike Vrabel questioned whether the owners had "any sense of urgency" to settle the matter.<sup>133</sup> On the owners' side, New York Giants co-owner John Mara made headlines after he published an essay detailing his personal frustration with the discussions on the Giants' and NFL's websites only a few days following the failed

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attend-mediation-on-tuesday/.

128. Reedy, *NFL Lockout Remains in Place Until Full Appeal is Heard*, *supra* note 47.

129. See Ruth D. Raisfeld, *ADR: A User's Guide*, 31 WESTCHESTER B. J. 71, 78 (2004).

130. Bob Glauber, *NFL: League Cuts Employees' Pay*, NEWSDAY (N.Y.), Apr. 23, 2011, at A30.

131. *Id.*

132. See Varney, *supra* note 49.

133. *NFL's Jeff Pash: Progress Made in Talks*, ESPN (May 17, 2011), <http://sports.espn.go.com/nfl/news/story?id=6559848>.

mediation.<sup>134</sup> In any context, a party's decision to publicly speak out against the other side only works to antagonize and, in turn, significantly jeopardize the parties' relationship and motivation to cooperate. Among other factors, the lack of any type of public censure during the third mediation likely contributed to its success.

### C. *Why the Third Mediation Succeeded*

Because of the failures of the first two mediation attempts, commentators had little hope for the third attempt when it was reported that the parties had again sought to utilize mediation. As former NFL executive Andrew Brandt stated, “the timing of this mediation does not lend well to concessions from either side. . . . [The parties] will do enough to make Boylan feel that they are engaged and active while being reluctant to make any substantive moves with [the Eighth Circuit oral arguments] around the corner.”<sup>135</sup> As the two failed mediations demonstrated, external factors could impair the parties' bargaining relationship and impinge settlement. The third mediation attempt was filled with factors similar to the previous two attempts; however, the third mediation also contained many unique factors that ultimately helped the parties reach an agreement. This section will discuss those particular factors and the role each played throughout the third mediation attempt.

#### 1. Presence of Media Coverage

As the parties indicated in a joint statement, their third attempt to mediate the dispute consisted of confidential meetings with Boylan that were convened “pursuant to court[-ordered] mediation.”<sup>136</sup> Although both parties had previously ignored the court's initial gag order, the parties' joint statement and reticence to speak to the media indicated their commitment to keeping the details of the mediation confidential. Because of the lack of details leaked during the third mediation, the media dubbed the talks “secret,” a revealing statement considering that, based on the court's gag order, the talks were always meant to remain confidential. Some rightfully believed that the lack of details and updates was a sign of the parties' progress.<sup>137</sup> Ultimately, the parties' continued refusal to comment on the third mediation made a positive impact on the talks, as it kept all finger-pointing and disclosure of the parties'

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134. Gary Myers, *Giants' Mara Warns of Chaos*, DAILY NEWS (N.Y.), May 20, 2011, at 72.

135. Glauber, *NFL Lockout: Back to the Table, But Will They Talk?*, *supra* note 48.

136. Reedy, *Sides Quiet After Talks*, *supra* note 55.

137. See *Sides Meet Well Into the Night; Owners, Players Talk 13-Plus Hours*, BOS. GLOBE, July 1, 2011, at Sports, 8.

bargaining positions private.

## 2. Proper Participation

Like the previous mediation attempts, both parties failed to send every member of their respective committees to the third mediation.<sup>138</sup> Though the absence of all relevant persons was initially a big concern in the previous mediations, the parties still made progress throughout the third session with some key parties absent.<sup>139</sup>

In particular, the absence of each party's legal counsel—Bob Batterman and Jeff Pash for the NFL and Jeff Kessler and Jim Quinn for the players—during a period of the third mediation attempt served as an important development.<sup>140</sup> It may have been pure coincidence, but it was at that time that the parties began to make significant strides toward a settlement. When the parties did invite their lawyers back to mediation—presumably signaling a readiness to discuss terms of a settlement—emotions ran high, causing some notable conflict.<sup>141</sup> Ultimately, however, as progress continued, the parties' counsel gathered their composure and took on an important role closing the deal as the talks wound down.<sup>142</sup>

Additionally, as talks continued, the owners and players invited the retired players to join the discussions.<sup>143</sup> This, too, was an important development in the talks, as it signaled cooperation among all those involved and quelled, at least for the time being, the retired players' concerns.<sup>144</sup>

## 3. The Looming Legal Process

Unlike the other mediation attempts, the parties—whether truthful or not—attested that the legal process did not affect the talks.<sup>145</sup> At the time the

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138. See Bell, *Lawyers Left Out of NFL Talks*, *supra* note 52.

139. See *id.* Though some speculated that the absence of the lawyers was not necessarily a sign of progress, its overall effect on the mediation proved this speculation to be inaccurate. *Id.*

140. *Report: NFL, Players Talk Again; Latest Round Set to Last Several Days*, *supra* note 56; Rock, *supra* note 56; *Pats Owner: 'Good News is, We're Talking' About New Deal*, *supra* note 56.

141. See *Report: A Near Blow-Up*, *supra* note 58.

142. Howard Fendrich, *NFL Lockout: Owners Could Ratify Deal on Thursday*, CHI. SUN-TIMES, July 19, 2011, at 42; Barry Wilner, *NFL's Talks Take 2; Sides Hope Plan Leads to New Deal*, BOS. GLOBE, July 6, 2011, at Sports, 6.

143. Bell, *Hopeful Retirees to Rejoin Talks; League seeking 'Global Settlement'*, *supra* note 68.

144. The retired players ultimately filed suit against the NFLPA, arguing that the NFLPA lacked the authority to negotiate with the NFL for retired players' benefits. See Class Action Complaint ¶ 134, *Eller v. NFLPA*, 11-CV-2623 (D. Minn. Sept. 13, 2011).

145. See Brown, *supra* note 61.

discussions began, the Eighth Circuit had yet to issue its final ruling; but, based on its stay of the district court and its business-friendly jurisprudence, it was evident to many that the court would side with the owners.<sup>146</sup> To the parties' credit, when the Eighth Circuit ultimately found for the owners, there were no signs that the ruling was a surprise for either side, as the parties issued a joint statement to the effect that the parties would continue their discussions and work to reach a fair agreement for both.<sup>147</sup>

#### 4. The Financial Consequences

Perhaps the biggest impetus for an agreement between the parties was the financial consequences of not settling the lawsuit. Though the prospect of losing significant revenue always threatened to end the NFL's work stoppage, each day that passed led to concerns that the league would have to cancel preseason games. Reportedly, each week of the preseason generated approximately \$200 million in revenue for the league.<sup>148</sup> As lawyer and player agent Ralph Cindrich put it, "[i]t is now that time when pressure has to be put on both sides . . . . This is just too strong of a business not to find a solution" and "to mess with this successful business will have a devastating effect."<sup>149</sup> Because the owners and the players, through the split of league revenue, stood to lose a significant amount of money if the lockout continued into the season, the parties became more motivated to find ways to end the dispute. The time constraints may have impacted the previous mediations in a sense that the parties were willing to wait out the dispute; however, once the parties entered their third separate mediation session, the timetable had significantly narrowed.

#### 5. Face-to-Face Dialogue

Finally, in addition to the aforementioned factors, a significant reason the parties were able to reach an agreement was their face-to-face dialogue. As previously mentioned, joint discussions, which occur in-person, can be more effective than any form of shuttle diplomacy. Though Boylan conducted joint sessions throughout the third mediation, the most progress seemed to occur when the parties were left to negotiate face-to-face by themselves. When

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146. Brad Biggs, *Settle it Yourself, Judge Advises; NFL Labor; 8th Circuit Panelist Warns Neither Side is Likely to be Happy with Court's Ruling*, BALT. SUN, June 4, 2011, at 1D.

147. See Brown, *supra* note 61.

148. Mark Maske, *NFL Owners, Players Repair Rift Before Halting Negotiations for the Weekend*, WASH. POST, July 3, 2011, at D1.

149. Barry Wilner, *Sides Picking Up Pace in NFL; Goodell, Smith Set to Negotiate Today*, BOS. GLOBE, July 7, 2011, at Sports, 6.

Boylan left for vacation, he instructed the parties to continue their discussions and work to find the differences between their positions.<sup>150</sup> The parties responded by conducting marathon negotiation sessions and closed the gap on several key issues.<sup>151</sup> When Boylan returned, the parties had fewer issues to resolve, and, with the help of Boylan, they reached a settlement.<sup>152</sup> Though Boylan was absent for parts of the discussions, which thus caused the talks to be characterized as negotiation instead of mediation, the impact of mediation was significant. The relative success of mediation in the NFL's labor dispute leaves open the prospect that other professional sports leagues may utilize this process in future labor disputes.

#### V. LOOKING FORWARD

The use of mediation in the NFL's labor dispute reveals the unique nature of a professional sports dispute. Parties' traditional, strategic approaches to such disputes have led to an increased reliance on the court system after initial negotiations fail. Once a professional sports dispute enters the courts, it faces a heightened public scrutiny, which puts a great deal of pressure on the court to impose a resolution. As the NFL's labor dispute demonstrated, the court system does not always provide an adequate remedy for the parties. Instead, as was the case with the NFL's labor dispute, putting the ultimate solution in the hands of the parties allows a mutual agreement. However, as the NFL's labor dispute also demonstrated, the parties' failure to remain fully committed to mediating a dispute will derail the process. As a result, if professional sports leagues are to mediate their labor disputes, parties to the dispute must enter the process voluntarily and remain committed for its duration.

To ensure parties' commitment to mediating a professional sports labor dispute, it would be beneficial for the process to be memorialized in a league's CBA. Similar to how a league's CBA contains provisions subjecting certain disputes to arbitration,<sup>153</sup> mediation would be the default resolution mechanism for labor disputes. However, the parties would have to explicitly provide that the provision survives the expiration of the CBA's substantive terms. By including such a "survival" provision in the CBA, the parties will voluntarily submit themselves to mediation and remain committed to utilizing

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150. *NFL Still Working Through Labor Deal; Owners, Player's Union Will Meet as Judge Takes a Vacation*, *supra* note 63.

151. *More Success at Labor Talks; Club Option Key to Rookie Pacts*, *supra* note 65.

152. *See* Glauber, *At Long Last, NFL Opens Doors; Players Approve Deal, So Football is Back After 4 1/2-Month Lockout*, *supra* note 71.

153. *See, e.g.*, NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, arts. XV, XVI, XLIII (Aug. 4, 2011).

the process even after the CBA has expired. Contractual enforcement of the provision would ensure that the parties undertake mediation in good faith and avoid taking labor disputes through the court system as a default. The NFL's labor dispute portrayed the negative effects of such tactics, but also revealed the positive effects of mediation, which may make the use of mediation in professional sports labor disputes viable.

## VI. CONCLUSION

Traditionally, within professional sports labor disputes, the parties engage in drawn-out negotiations where each side tries to gain leverage at the bargaining table. As evidenced by the NFL's labor dispute, this leverage may be achieved through the courts or, in other disputes, through an arbitrator. The courts and arbitration, which both make binding rulings, are fraught with uncertainty, tension, and dissatisfaction. With mediation, however, the solution is self-determinative, and the parties take the reins in choosing how to resolve their dispute.

As demonstrated from the failures and ultimate success of the mediation efforts within the NFL's labor dispute, mediation can help the parties communicate, draw out the emotions, frame the issues, and maintain workable relationships upon reaching an agreement. Though neither the mediator nor the parties perfectly effectuated the mediation process by its end, each party's efforts reflect the efficacy of utilizing mediation in professional sports disputes. The parties' initial unwillingness to utilize the benefits of the mediation process was evident by their conflicting strategic objectives.<sup>154</sup> Yet, though coupled with financial and legal considerations, once the mediator was able to frame the issues and focus the parties on interest-based bargaining, talks progressed and the parties reached a settlement. The dynamics at play throughout the NFL's labor dispute mediation, both adverse and effective toward a resolution, provide invaluable guidance for other professional sports leagues as they move toward impending labor disputes and pressures as to how to settle each matter. Mediation is an emerging and effective dispute resolution mechanism that all professional sports leagues and players associations would be well-served to utilize.

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154. See Wallace, *supra* note 15, at 5.