Huddle Up: Using Mediation to Help Settle the National Football League Labor Dispute

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Cover Page Footnote
J.D. Candidate, Fordham University School of Law, New York, NY, 2012; B.S., Sports Management, New York University, 2009. Special thanks to Professor Jacqueline M. Nolan-Haley of Fordham University School of Law for her guidance and assistance with this Note.
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Jeremy Corapi*

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INTRODUCTION

Almost three years ago, the National Football League (“NFL” or “League”) team owners voted unanimously to opt out of the current NFL collective bargaining agreement (“CBA”)\(^1\) between the NFL’s management\(^2\) and the NFL’s players\(^3\) following the 2010 season.\(^4\) The opt-out has created the need for negotiation of a new CBA between the NFL’s management and the NFL’s players.

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\(^1\) A Collective Bargaining Agreement (“CBA”) is a trade agreement between an employer and the representative(s) of a unit of employees (usually a union), that governs hiring, work, pay and dispute resolution. See J.I. Case Co. v. Labor Bd., 321 U.S. 332, 334–35 (1944).

\(^2\) The NFL’s management includes the NFL team owners, the NFL commissioner, and other NFL executives.

\(^3\) The NFL players include the individual NFL players and the NFL players’ union, the National Football League Players Association (“NFLPA”).

and has set the stage for a labor dispute that has threatened the League’s first work stoppage since 1987. On September 30, 2010, the Associated Press received a copy of a letter sent by the president of the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”), Richard Trumka, to the NFL commissioner, Roger Goodell, and the executive director of the National Football League Players Association (“NFLPA” or “Union”), DeMaurice Smith. In this letter, Trumka offered on behalf of the AFL-CIO to mediate the NFL’s CBA negotiations in the hope that it would help bring about a resolution to the ongoing labor dispute between the NFL’s management and players.

The NFL’s management rejected Trumka’s offer, citing the potential for unfair bias against the NFL’s management in any AFL-CIO conducted mediation. The Union took a different position. NFLPA spokesman, George Atallah, wrote in an e-mail, “We welcome the AFL-CIO’s initiative and accept Mr. Trumka’s invitation.”

While the current CBA is set to expire in March 2011, the two sides remain far apart in reaching a new CBA. The crucial sticking point in reaching a new CBA is the revenue percentage that the League should distribute to the players at the end of each

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5 A work stoppage occurs when there is either a lockout or a strike. Labor Pains, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/baseball/news/2002/05/25/work_stoppages (last visited Nov. 12, 2010). A lockout occurs when, during labor negotiations, an employer attempts to put economic pressure on employees by refusing to allow them to work. Robert H. Lattinville, et al., Labor Pain: The Effect of a Work Stoppages in the NFL on its Coaches, 20 MARQ. SPORTS L. REV. 335, 337 (2010). A strike occurs when employees refuse to perform work for their employer in support of a bargaining position or in protest of some aspect of a previous labor agreement. Id.

6 See Silver, supra note 4.


8 See id.

9 Id.

10 Id. (explaining that the NFLPA is a member of the AFL-CIO and that Mr. Smith sits on the AFL-CIO’s board).

11 See id.

12 Id.

season.14 Under the most recent CBA, which was implemented in 2006, the players received 59.6% of designated League revenues.15 League owners say that if the League wants to remain profitable, that number must be decreased.16 The Union has refused to consider negotiating this decrease without proof of the League’s financial hardship—something the League has been unwilling to offer.17 Labor talks have also been made more difficult because Goodell and Smith are conducting their first CBA negotiations as leaders of their respective organizations.18

The current NFL labor dispute and potential work stoppage could delay, or even worse, result in the cancellation of the 2011–2012 NFL season.19 A season-long work stoppage could “cost thousands of Americans their jobs and cities more than $140 million in revenue.”20 It could also cost the League $1 billion in lost revenue.21 As the NFL labor dispute highlights, labor disputes can be detrimental not only to professional sports leagues, but to national economies as well.

This Note uses the current labor dispute between the NFL’s management and the NFL’s players as an example of how properly conducted mediation can help to resolve labor disputes between management and players in professional sports leagues. A collaborative approach to resolving this labor dispute is essential for NFL players and owners, who depend on one another for financial success. The NFL should be capable of resolving this dispute efficiently, effectively, and in a manner that strengthens relationships amongst the players, the owners, the League’s business partners, and the NFL’s fans.

14 Silver, supra note 4.
15 Id.
16 AFL-CIO Prez, supra note 7 (stating that huge debts from building stadiums and starting the NFL television network make it impossible to stay profitable).
17 Id.
19 See AFL-CIO Prez, supra note 7.
20 Id.
Part I of this Note defines alternative dispute resolution ("ADR") and discusses how ADR has been utilized to resolve labor disputes in professional sports. Part II of this Note covers the legal and factual background behind the NFL dispute. It discusses the history of labor relations within the four major United States professional sports leagues, with an emphasis on the evolution of labor relations and collective bargaining between the NFL’s management and the NFLPA. Part III summarizes the current NFL labor dispute, with a breakdown of the NFL management’s and the NFLPA’s respective positions on the critical components of the next NFL CBA. Part IV of this Note explains the ways in which mediation can help resolve the labor clash between the NFL’s management and the NFLPA so that a new CBA can be agreed upon before a work stoppage occurs. Lastly, Part V proposes specific mediation guidelines that could help these parties, and potentially other professional sports leagues with similar disputes, reach an agreement on a new CBA. This proposal recognizes “the significance of the bargaining history between the parties as well as the unique nature of the professional sports industry.”

I. THE OPENING KICK: ALTERNATIVE DISPUTE RESOLUTION IN SPORTS

Alternative dispute resolution is a method of using extrajudicial means, including arbitration and mediation, to resolve disputes. It has been successfully used to resolve conflicts in a wide range of fields.


25 These include disputes involving employment, intellectual property, consumer, technology, health care, financial services, construction, and international trade conflicts.
Arbitration is a contractually agreed upon alternative to litigation in the event of a legal dispute.\textsuperscript{26} It is a process whereby the parties to a contract present their side of a legal dispute to “one or more impartial persons—“arbitrators”—for a final and binding decision, known as an ‘award.’\textsuperscript{27} Awards are issued through written decision by an arbitrator and are prohibitively difficult to overturn.\textsuperscript{28} The reasons contracting parties normally prefer arbitration to litigation is that it is time-effective, cost-effective, informal, confidential, and binding.\textsuperscript{29}

Mediation occurs when two or more disputing parties have been unable to resolve a conflict.\textsuperscript{30} The parties use an impartial third party—a “mediator”—who lacks authority to force a settlement, to help them negotiate a settlement of their own creation.\textsuperscript{31} The mediator is often an expert in the legal area or industry in which the dispute occurs.\textsuperscript{32} Mediation is ideal for those who want to participate in “determining the outcome of a dispute because it provides an opportunity for parties . . . to work through issues with the assistance of an impartial third person trained to facilitate resolution.”\textsuperscript{33} Similar to arbitration, mediation is often preferable to litigation because it is time-effective, cost-effective,
informal, and confidential.\textsuperscript{34} It is also important to note that “mediation is prospective rather than retrospective”;\textsuperscript{35} instead of analyzing the parties’ past relationship, mediation tries to resolve how the parties can work together in the future to achieve common gains.\textsuperscript{36}

Given the unique characteristics of the twenty-first century sports industry, it is not surprising that alternative dispute resolution has become the predominant mechanism by which disputes get resolved within professional sports leagues.\textsuperscript{37} Whereas the litigation process usually becomes protracted, in sports business, disputes must often be resolved quickly.\textsuperscript{38} Alternative dispute resolution provides the sports industry with an effective means for fast and reliable dispute resolution. Moreover, because of the confidential nature of alternative dispute resolution, very little information is communicated to the public regarding the dispute.\textsuperscript{39} “This is particularly valuable to an industry which on the one hand, is very conscious of its public image and, on the other hand, is subjected to the constant probing of the news media.”\textsuperscript{40}

Today, most CBAs between a professional sports league and a players’ union include a provision mandating arbitration in the case of certain types of disputes.\textsuperscript{41} Such disputes typically involve issues such as “injury grievances, employment grievances, and players’ salary arbitration.”\textsuperscript{42} Arbitration has also been used to resolve disputes over sports facility leases and the administration of “franchise, joint-venture, and partnership disputes . . . such as

\textsuperscript{34} See Benefits of Mediation, MEDIATE, http://www.mediate.com/articles/benefits.cfm (last visited Nov. 8, 2010).
\textsuperscript{35} What is Mediation?, supra note 30.
\textsuperscript{36} Id.
\textsuperscript{37} See Greenberg, Sports Facility Leases, supra note 28, at 100 (quoting MARTIN J. GREENBERG, THE STADIUM GAME 532 (2d ed. 2000) [hereinafter GREENBERG, STADIUM GAME]).
\textsuperscript{38} See id. at 101.
\textsuperscript{39} See id. at 101–02.
\textsuperscript{40} See id. at 102 (quoting MARTIN J. GREENBERG, SPORTS LAW PRACTICE 73 (1993) [hereinafter GREENBERG, SPORTS LAW]).
\textsuperscript{41} See id. at 100 (quoting Sports Arbitration Including Olympic Athlete Disputes, AM. ARBITRATION ASS’N, http://www.adr.org/sp.asp?id=22022 (last visited Nov. 14, 2005)).
\textsuperscript{42} Id.
disputes over partnership proceeds, termination of sports executives, the sale of a franchise, and payments under executive or partnership agreements. 43

Mediation has also played a crucial role in resolving major disputes in professional sports. Cases have involved conflicts regarding facility cost, 44 coach compensation, 45 league television broadcast rights, 46 and team ownership rights. 47 Mediation has been integral in helping leagues and player unions reach agreements during the collective bargaining process as well. 48

II. PLAYING BALL: LABOR RELATIONS IN UNITED STATES PROFESSIONAL SPORTS LEAGUES

Labor relations in the four major United States professional sports leagues have been notoriously contentious since the creation of the first of the four major professional sports leagues during the “Robber Barron” era. 49 Starting with the inception of professional

43 Id. (internal quotation marks omitted).
baseball in 1871 when the National Association of Professional Base Ball Players was formed, professional baseball was initially a player-controlled enterprise. However, this changed when the National League of Professional Baseball Clubs (“National League”) was founded in 1876. The founders of the National League considered it to be a “league of ball club owners, to whom the players were only employees.”

To help implement their vision of organized professional baseball, National League team owners created the “reserve clause” system. This clause quickly became a part of every player contract that each individual player signed when joining a team and stated that upon the expiration of any player’s contract, the rights to the player were retained by the team to which he signed. Essentially, this meant that although both the player’s obligation to play for the team and the team’s obligation to pay the player had ended, the player could never enter a contract with another team. Thus, the player was forced to negotiate a new contract with the same team, request a trade, or quit playing professional baseball. If the player refused to honor his existing contract due to the contract’s terms, he was blacklisted. The reserve clause system represented an act of collusion by the owners and laid the ground work for a monopoly. Professional baseball
players did not have a strong union during the nineteenth century, and as a result, did little to challenge the clause.\textsuperscript{60}

As professional baseball entered the twentieth century, National League owners increasingly imposed their will on National League players. Team owners had complete financial control over the players on their respective teams, with no realistic possibility of competition for player services from elsewhere.\textsuperscript{61} Whatever competition for signing players existed from other leagues was thwarted by the National League, either by way of crushing it with superior financial might or by merger.\textsuperscript{62} This was most evident in 1903 when the American League merged with the National League to form what eventually became Major League Baseball ("MLB").\textsuperscript{63} This agreement also tied independent contracts (those contracts that were not previously National League contracts) to the National League reserve clause system.\textsuperscript{64}

\textbf{A. Changing the Rules of the Game: Antitrust Law}

While team owners consolidated power over the players, important legislation was making its way through Congress that would not only severely impact labor relations in professional baseball, but ultimately, labor relations in the remainder of the four major United States professional sports leagues.

In response to the "Robber Baron" era, Congress developed antitrust law to promote competition between companies involved in interstate commerce. The Sherman Antitrust Act of 1890 (the "Sherman Act") "preserves ‘free and unfettered competition’ in the marketplace, which ‘will yield the best allocation of economic

\textsuperscript{60} See History of the Major League Baseball Players Association, MLBPLAYERS.COM, http://mlbplayers.mlb.com/pa/info/history.jsp (last visited Nov. 5, 2010) ("Opposed to baseball’s reserve clause and a growing movement led by Albert Spalding to cap players’ salaries, John Montgomery Ward and eight other players in 1885 formed the first players union in baseball—the Brotherhood of Professional Base Ball Players. . . . None of those efforts proved sufficient in bringing an end to the reserve clause, which bound players to their respective clubs.").

\textsuperscript{61} Id.

\textsuperscript{62} See Haupert, supra note 51 (discussing the National League’s buyout deal with the Player’s League and merger with the American Association).

\textsuperscript{63} See id.

\textsuperscript{64} See Goldberg, supra note 55, at 41.
resources of the country, the lowest prices, the highest quality and
greatest material progress." 65  Section 1 of the Sherman Act is
designed to prohibit contracts, combinations or conspiracies that
unreasonably restrain trade.66  Section 2 prohibits
monopolization.67

Violations of Section 1 have been found to include horizontal
price fixing,68  market allocations,69  and group boycotts.70  These
Section 1 violations are deemed per se illegal under the Sherman
Act because “their pernicious effect on competition and lack of any
redeeming value are conclusively presumed to be unreasonable.”71
Other restraints of trade are analyzed under the “Supreme Court’s
‘rule of reason’ [test], which weighs the procompetitive benefits
and the anticompetitive effects of an agreement in order to
determine whether it should survive antitrust scrutiny.”72

In order to commit a Section 2 violation, an entity must both
possess monopoly power and engage in anticompetitive conduct.73

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1, 4 (1958) (internal quotation marks omitted)).
67 See id. § 2 (“Every person who shall monopolize, or attempt to monopolize, or
combine or conspire with any other person or persons, to monopolize any part of the
trade or commerce among the several States, or with foreign nations, shall be deemed
guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding
$100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment
not exceeding 10 years, or by both said punishments, in the discretion of the court.”).
68 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940).  Horizontal
Price Fixing refers to an agreement between two or more parties, generally considered to
be competitors, to set, maintain, and charge a specified price for a particular product. See
id. at 213.
are agreements in which competitors divide markets among themselves either by types of
customers, products, or territories. See id.
E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600, 609–11 (1914)).
A group boycott is a type of boycott in which two or more competitors in a relevant
market refuse to conduct business with a firm. See id. at 461.
1, 5 (1958)).
72 Id. (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984)).
73 See Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973) (“Use of
monopoly power ‘to destroy threatened competition’ is a violation of the ‘attempt to
monopolize’ clause of § 2 of the Sherman Act.  So are agreements not to compete, with
the aim of preserving or extending a monopoly.” (citations omitted)).
Monopoly power is often demonstrated by showing that the challenged entity has significant market share and has engaged in exclusionary behavior without a valid business reason.\textsuperscript{74}

\subsection*{B. Antitrust Law and its Impact on the Four Major United States Professional Sports Leagues}

Initially, MLB was granted an antitrust exemption.\textsuperscript{75} In \textit{American League Baseball Club of Chicago v. Chase},\textsuperscript{76} the New York State Supreme Court held:

\begin{quote}
It is apparent from the analysis already set forth . . . that a monopoly of baseball as a business has been ingeniously devised and created in so far as a monopoly can be created among free men; but I cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act.\textsuperscript{77}
\end{quote}

The United States Supreme Court reinforced the New York Supreme Court’s holding when in \textit{Federal Base Ball Club of Baltimore, Inc. v. National League},\textsuperscript{78} it held that the National League was not subject to the Sherman Act “because major league baseball was not interstate commerce.”\textsuperscript{79} The Court stated that “the ‘business of giving exhibitions’ was ‘purely state affairs,’ and thus not interstate in nature.”\textsuperscript{80}

The United States Supreme Court revisited the \textit{Federal Base Ball Club} precedent in 1953.\textsuperscript{81} In \textit{Toolson v. New York Yankees},\textsuperscript{82}

\begin{flushright}
\textsuperscript{74} Id. at 377, 388.
\textsuperscript{75} See Goldberg, supra note 55, at 29 (explaining that “baseball avoided antitrust liability because courts held that the business of baseball was not interstate commerce” (quoting Am. League Baseball Club of Chi. v. Chase, 149 N.Y.S. 6, 16 (N.Y. Sup. Ct. 1914))).
\textsuperscript{76} 149 N.Y.S. 6, 16 (N.Y. Sup. Ct. 1914).
\textsuperscript{77} See Goldberg, supra note 55, at 29 (quoting \textit{Am. League Baseball Club of Chi.}, 149 N.Y.S. at 16).
\textsuperscript{78} 259 U.S. 200, 208 (1922).
\textsuperscript{80} Id. (quoting \textit{Fed. Base Ball Club of Balt.}, 259 U.S. at 208).
\end{flushright}
the Court found that because Congress had not acted during the thirty years since *Federal Base Ball Club* to make professional baseball subject to antitrust law, Congress implicitly agreed with the Supreme Court’s earlier finding that antitrust law does not apply to the business of professional baseball. Accordingly, the court held, reserve clauses in player contracts were valid, regardless of their monopolistic tendencies.

In 1972, MLB’s antitrust exemption was once again challenged in *Flood v. Kuhn*. After reviewing both *Federal Base Ball Club* and *Toolson*, the Court held that baseball’s reserve clause system enjoyed exemption from antitrust law, which made it “an exception and an anomaly.” However, while the Court recognized the incongruity of this past precedent with federal antitrust law, it refused to disturb its precedent, leaving it for Congress to remedy the situation. Congress eventually did so in 1988 with the passage of the Curt Flood Act which significantly limited MLB’s antitrust exemption.

To this day, no other major United States professional sports league has ever received a federal antitrust exemption. In *Radovich v. NFL*, a professional football player brought an antitrust suit against the NFL alleging violations of Sections 1 and 2 of the Sherman Act. The NFL argued that because professional baseball was exempt from federal antitrust law, professional football should be exempt as well. The Supreme Court, however, decided to limit the exemption to organized professional

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83 See id. at 357.
84 Id.; see supra notes 48–56 and accompanying text.
87 See id.
91 Id. at 449–50.
baseball. Following the Radovich precedent, district courts went on to hold that the National Hockey League (“NHL”) and the National Basketball Association (“NBA”) were subject to federal antitrust law. The holding of Radovich was recently reinforced when the Supreme Court found that the NFL’s licensing activities are not exempt from antitrust scrutiny under Section 1 of the Sherman Act.

C. Labor Law, Labor Unions, and the Labor Exemption

Unlike MLB, the players in the NFL, the NBA, and the NHL have always been able to challenge the reserve system and other anticompetitive league practices under federal antitrust law. However, an important subsequent development has effectively allowed for league exemption from antitrust liability in most cases. This has occurred because players in all four of the major United States professional sports leagues “unionize[d] and designate[d] representatives of the players associations to negotiate with team owners.”

The National Labor Relations Act grants employees the right to self-organize and to bargain collectively with their employer. If employees elect a labor union to represent them, they lose their right to bargain individually. By joining their economic strength and acting through a labor union, employees have the best chance of bargaining for improvements in wages, hours and working

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92 See id. at 451–52 (confining the scope of the antitrust exemption because the business of baseball fell “outside the scope of the [Sherman] Act” and not other businesses as well).
95 See Goldberg, supra note 55, at 31.
97 Id. at 199.
conditions. However, as discussed above, Section 1 of the Sherman Act prohibits certain agreements which restrain trade in interstate commerce. Labor unions, by their very nature, often engage in trade restriction when they make agreements with management for better working conditions. Therefore, to shield unions from antitrust liability, a statutory “labor exemption” was created under the Clayton Act and the Norris-LaGuardia Act.

This statutory labor exemption was later expanded by the addition of a nonstatutory labor exemption. The nonstatutory labor exemption is a judicially derived expansion of the statutory labor exemption that protects good faith union-management interaction from antitrust scrutiny. Thus, the Supreme Court has explained that any term of a league-player union agreement that is the product of arm’s-length negotiation (e.g., the terms of a league CBA) will receive protection from antitrust law, regardless of the agreement’s collusive or anticompetitive nature.

D. The NFL

The NFL began operating in 1920 and is an unincorporated association comprised of member clubs which own and operate professional football teams. Mainstream America began to follow the NFL during Bert Bell’s tenure as League Commissioner. However, “professional football truly began to make strides with the rise of Commissioner Pete Rozelle.”

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100 See id. at 8 (quoting NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967)).
102 See generally Goldberg, supra note 55, at 32 (“Labor and antitrust laws are in conflict, as one promotes and the other discourages combinations . . . .”).
103 See Hoffmeyer, supra note 96, at 195–96.
104 Id. at 196 (citing United States v. Hutcheson, 312 U.S. 219 (1941)).
105 See id.
106 See Brown v. Prof’l Football, Inc., 518 U.S. 231, 235 (1996) (holding that the nonstatutory exemption is applicable to good-faith bargaining between the NFL and NFL players).
107 See Mackey v. NFL, 543 F.2d 606, 610 (8th Cir. 1976).
108 See id.
110 Id.
Commissioner Rozelle developed the concept of “league think,” an initiative aimed at convincing large market owners to “forego lucrative local television contracts in favor of a deal that equally benefited every franchise.”\footnote{See id.} Over time, national television contracts with NBC and CBS provided financial security for member franchises.\footnote{Id.} They also facilitated a business model that allowed the NFL to promote “economic and competitive parity amongst its clubs.”\footnote{Id.} However, it was the NFL’s strongest business competitor, the American Football League (“AFL”), that first demonstrated the economic effectiveness of a cooperative television plan for professional football.\footnote{See id. at 1427.}

Interleague tensions peaked in 1966. After former AFL Commissioner and current Oakland Raiders owner, Al Davis, actively recruited players from NFL teams, the two leagues spent a combined $7 million to sign their 1966 college draft choices.\footnote{See NFL, The Official 2010 National Football League Record and Fact Book 359 (2010) [hereinafter NFL], available at http://static.nfl.com/static/content/public/image/history/pdfs/History/Chronology.pdf (stating that Al Davis became Commissioner of the AFL in 1966 after the resignation of Commissioner Joe Foss); see also B. Duane Cross, The AFL: A Football Legacy, CNN SPORTS ILLUSTRATED (Jan. 22, 2001, 2:57 PM), http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_2.} While Davis and other members of AFL management intended to enhance interleague competition, some AFL and NFL owners saw this volatile situation as detrimental to both leagues.\footnote{See Michael Schulze, How Al Davis Just Saved the NFL—Again, BLEACHER RPT. (Feb. 27, 2009), http://bleacherreport.com/articles/131186-al-davis-just-saved-the-nfl-again.} As a result, after a series of secret meetings between both sides, the AFL merged to become a part of the NFL on June 8, 1966.\footnote{See NFL, supra note 115, at 359.} Congress approved the merger, passing legislation exempting the agreement from antitrust scrutiny on October twenty-first of the same year.\footnote{Id.} With that, the modern day NFL was born.
E. The NFLPA: The Blitz on Ownership Begins

The formation of the NFLPA began at a meeting before the start of the 1956 NFL Championship game. Annoyed that the owners had rejected a player proposal that included a minimum yearly player salary, a player per diem, and a rule requiring payment of salary to injured players, the NFL players sought out Creighton Miller to become their legal counsel. Eventually players signed authorization cards which allowed Miller to become their leader in 1956. For the first time in history, the NFL players formed a united labor front, calling their organization the “NFLPA.”

NFL ownership initially refused to acknowledge the new association. However, in 1957, Detroit Lions lineman Bill Radovich brought suit under the Sherman Act, and as discussed above, the Supreme Court held professional football to be subject to antitrust law. As a result of the legal leverage that the players gained over the owners from this decision, the owners had no choice but to acknowledge the NFLPA and to agree to several of the players’ earlier proposals.

While the Radovich decision signaled a major victory for the NFL players, the NFLPA remained in a precarious position due to the 1966 merger of the AFL with the NFL. The NFLPA represented the sixteen NFL teams that were a part of the NFL

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119 See Goldberg, supra note 55, at 39.
120 Creighton Miller was the first general manager for the Cleveland Browns, a former University of Notre Dame football player, and an attorney. See History: The Beginning—1956, NFL PLAYERS ASS’N, http://www.nflplayers.com/About-us/History (last visited Nov. 7, 2010).
121 See id.
122 See id.
123 See id. (“Their first meeting took place at the Waldorf-Astoria Hotel in New York in November of 1956 . . . .”).
124 See id.
126 See History: The Beginning—1956, supra note 120.
127 See Levine & Maravent, supra note 109, at 1432 (stating that player solidarity became a significant issue of concern for the Union in 1956).
prior to the merger. However, after the merger, the ten additional AFL teams that joined the NFL continued to be represented by the American Football League Players Association ("AFLPA") rather than the NFLPA. Player unity became a significant cause of concern.

As the NFL players’ lack of harmony weakened their ability to negotiate with the League, players sought help from the AFL-CIO in creating a formal labor union. Although the AFL-CIO was not interested in helping, the Teamsters Union was and wanted to represent the players in collective bargaining with the League. Nevertheless, Creighton Miller refused to consider it. As a result, a split occurred between the AFLPA and the NFLPA which would significantly hurt the players, as it enabled the league to pit one group against the other in its negotiation strategy.

The NFL’s management refused to negotiate with the divided players and also orchestrated an ownership lockout in 1968. This resulted in a short work stoppage. While this incident ultimately produced the first NFL management-NFLPA CBA, it was clear that the players’ lack of unity left them with less than they had hoped for from the NFL’s management.

The NFLPA turned a corner in 1970. After years of fighting amongst the players, the AFLPA and the NFLPA merged, as

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129 Id.
130 Id.
131 Id.
132 See History: The 1960’s, supra note 128.
133 See id. ("Bernie Parrish of the Cleveland Browns asked George Meany of the AFL-CIO to help form a union of professional athletes.").
134 Id.
135 See id.
136 Levine & Maravent, supra note 109, at 11.
137 History: The 1960’s, supra note 128.
138 Id.
139 Id.
collective bargaining with the NFL owners loomed. Owners were willing to negotiate a new collective bargaining agreement with the newly formed union, but only if several conditions were met. Among those conditions was that no NFLPA or NFL lawyers, other than each party’s respective General Counsel, be present at the negotiations. Despite the potential for abuse of such a condition, the negotiations were held. When Mackey arrived at the negotiations, he was greeted by nine NFL attorneys. Mackey’s own attorney then proceeded to advise Mackey to sign a document that would have resulted in the NFLPA being bound to the owners’ offer “in perpetuity.”

Realizing that he was being ambushed (and poorly counseled), Mackey briefly suspended negotiations and sought the help of the labor law firm, Lindquist & Vennum. The firm advised the players to file a petition with the National Labor Relations Board (“NLRB”) to become a recognized union. Player representatives ultimately agreed and the NLRB granted certification to the NFLPA.

In addition to recommending that the players petition the NLRB, Lindquist & Vennum assigned Ed Garvey to work with Mackey. Strengthened by the newly formed union, the players opted to challenge the most controversial labor issue between the players and owners: the Rozelle Rule.

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141 Levine & Maravent, supra note 109, at 1433.
142 See History: The 1970’s, supra note 140.
143 See id.
144 See id.
145 See id.
146 Levine & Maravent, supra note 109, at 1433.
147 See id. He also fired his attorney. Id.
148 See History: The 1970’s, supra note 140.
149 Id.
150 Levine & Maravent, supra note 109, at 1433. Garvey ultimately left the firm and became the Union’s first Executive Director. Id.
F. "No Freedom, No Football": The Rozelle Rule and Mackey v. NFL

The Rozelle Rule “allowed a player to change teams at the conclusion of his contract if he could negotiate a new deal with a new club; however, the new club was required to compensate the old club for the loss of the player.” The two teams involved in the player transaction were to determine the terms of compensation, either in the form of players or cash. “If the teams could not reach an agreement, the compensation was to be set by [Commissioner Rozelle].” The apparent purpose and effect of this rule was to limit free agency and player movement. Commissioner Rozelle believed that “if players were given complete freedom to negotiate their services, the League would be dominated by a few rich teams and would eventually lose both fan interest and revenue.”

As a result of the Rozelle Rule, the first major NFL work stoppage occurred in 1974. Outraged by the restrictions that the Rozelle Rule placed on player services, the players went on a strike that lasted forty-four days. However, the strike left the union sharply divided, underfunded and unable to defeat the League’s implementation of the Rozelle Rule. After another failed strike attempt in 1975, the Union sought help from the court. The result was Mackey v. NFL.

In Mackey, Mackey and several other NFL players filed suit against the League, claiming that the Rozelle Rule was an

152 "No Freedom, No Football" was the NFL players’ rallying cry as collective bargaining with the owners began in 1974. See History: The 1970’s, supra note 140.
153 Goplerud, supra note 151, at 16.
154 Id.
155 Id.
157 Goplerud, supra note 151, at 16.
158 Id.
159 Id.
160 Id.
161 Id.
162 Levine & Maravent, supra note 109, at 1435.
163 Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).
unreasonable restraint of trade and thus violated Section 1 of the Sherman Act.\(^{164}\) Given the Supreme Court’s establishment of the nonstatutory labor exemption, the Eighth Circuit used a three-part test to determine when a management-player union agreement would be granted a nonstatutory labor exemption from antitrust scrutiny:

First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is a product of bona fide arm’s-length bargaining.\(^{165}\)

In applying this test, the court found for Mackey.\(^{166}\) The court found that the provision passed parts one and two of its test, but that it failed part three.\(^{167}\) The court reasoned that the Rozelle Rule had “not been the subject of bona fide arm’s-length bargaining for either the 1968 or the 1970 [collective bargaining] agreement, because the provision imposed significant restrictions on the players to which they would never have agreed in good faith bargaining.”\(^{168}\) This meant that “the Rozelle Rule did not fall within the non-statutory labor exemption and was therefore, subject to antitrust review.”\(^{169}\)

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164 Id. at 609.
165 Id. at 614.
166 Id. at 614 (citing Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1935)).
167 Id. at 616.
168 Jessica Cohen, Sharing the Wealth: Don’t Call Us, We’ll Call You: Why Revenue Sharing is a Permissive Subject and Therefore the Labor Exemption Does Not Apply, 12 FORDHAM INT’L. PROP. MEDIA & ENT. L.J. 609, 626 (2002).
169 Id.
Mackey was a significant win for free agency and signaled a crucial gain for the NFLPA against the League’s management. However, the Union was still far from strong and proceeded to bargain away most of what it had gained from Mackey. As the new collective bargaining agreement took shape in 1977, instead of unlimited free agency, the two sides agreed to a system whereby a right of first refusal was coupled with compensation for players lost to another team. Much would have to change before the League’s management considered the NFLPA a force to be reckoned with.

G. Trying to Gain Yardage: The Growth of the NFLPA

In 1982, the 1977 collective bargaining agreement was set to expire and the relationship between the NFL’s management and the NFLPA was tense. A work stoppage was imminent. After several failed CBA negotiations, the players went on strike on September 21, 1982.

Several issues divided the owners and the players. Following an NFLPA convention in Albuquerque, New Mexico, the players adopted a proposal that “called for players to be paid 55% of the clubs’ league-wide revenues.” The revenues were then to be divided among the players “based on years of service, playtime and individual and team performance.” Outraged by the terms of this proposal, the owners refused to accept the players’ offer. The other sticking point was free agency. The owners vehemently opposed free agency, as they viewed it as “destructive” to league competition.

170 Goplerud, supra note 151, at 23.
171 Id. at 24.
172 See id.
173 Id.
174 See id.
176 Id.
177 Id.
178 Goplerud, supra note 151, at 24.
179 Id. (noting that the league owners were particularly mindful of the “destructive consequences” of free agency).
The strike continued for almost two months. Owners resisted any modification to the first refusal scheme. Eventually, however, the players and owners would settle as both realized “the season would be canceled unless regular season games resumed in early November.” As part of the settlement, the owners agreed to a guaranteed player salary/benefit package “worth at least $1.28 billion over the 1983–1987 seasons.” Ultimately, the owners got the better end of the bargain in the new agreement. The agreement “did not include free agency, but rather it merely fine tuned the right of first refusal system.” Moreover, this proved to be the beginning of the end of Ed Garvey’s tenure as NFLPA executive director.

In 1983, following Garvey’s departure from his post as executive director, the NFLPA unanimously elected Gene Upshaw to fill the position. Upshaw’s first objective was to meet with the players and find out what they wanted from management when the 1982 CBA expired in 1987. Most agreed that free agency was of the utmost importance. Unmoved by the Union’s persistence, the owners rejected the players’ demands for free agency when collective bargaining for the 1987 CBA began. The players ultimately responded by going on strike again during the 1987 season. However, instead of continuing negotiations during the strike, the owners sought out and hired replacement players to fill their empty roster spots.

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180 Id.
181 Id.
182 History: The 1980’s, supra note 175.
183 Id.
184 Goplerud, supra note 151, at 25.
185 Id.
186 Levine & Maravent, supra note 109.
187 History: The 1980’s, supra note 175. Upshaw was NFLPA President during the 1982 CBA negotiations and Strike. Id.
188 Goplerud, supra note 151, at 25.
189 See History: The 1980’s, supra note 175.
190 Id.
191 Id.
192 Id.
193 Id. The replacement players were mostly comprised of players already cut during the 1987 preseason. Id.
194 Levine & Maravent, supra note 109.
Additionally, some veteran players crossed the picket line due to financial concerns and a lack of belief in the free agent system.\textsuperscript{195} It was clear to the Union that a strike would not work if the owners were willing to replace the NFL players with second-class talent and if some Union members continued to play in NFL games. Thus, the Union ended the strike on October 15, 1987.\textsuperscript{196} Refusing to give up its fight completely, however, the Union also filed an antitrust suit against the NFL challenging the League’s right of first refusal system.\textsuperscript{197} The lawsuit was \textit{Powell v. NFL}.\textsuperscript{198}

In \textit{Powell}, the district court ruled in favor of the players in January 1988.\textsuperscript{199} The court held that the 1987 collective bargaining impasse ended the nonstatutory labor exemption that the owners and Union otherwise enjoyed while the 1987 CBA was in effect.\textsuperscript{200} As a result, the court found that the first refusal system was subject to antitrust scrutiny and did in fact violate antitrust law.\textsuperscript{201}

The owners appealed the ruling, hoping for a reversal of the decision.\textsuperscript{202} However, as a precaution, the owners also executed “Plan B,” a system which released players at the bottom of the roster from the first refusal system.\textsuperscript{203} Under the “Plan B” system, each club could restrict the free agency movement of thirty-seven players from their respective rosters and continue to subject them to the first refusal system.\textsuperscript{204} “Players who were not restricted

\textsuperscript{195} History: The 1980’s, supra note 175.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988). The named plaintiff was NFLPA President, Marvin Powell. Id.
\textsuperscript{199} Id. at 789.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989).
\textsuperscript{203} As a precaution, the owners implemented “Plan B,” which freed players at the bottom of the roster from the first refusal/compensation system. Under the Plan B system, which was implemented in 1989, clubs could restrict thirty-seven players and continue to subject them to the first refusal system. Players who were not restricted could sign with other clubs between February 1 and April 1 without restriction. See Ari Nissim, \textit{The Trading Game: NFL Free Agency, the Salary Cap, and a Proposal for Greater Trading Flexibility}, 11 SPORTS LAW J. 257, 260 (2004).
\textsuperscript{204} Powell, 930 F.2d at 1304.
could sign with other clubs between February 1 and April 1 without restriction.\textsuperscript{205}

On November 1, 1989, the owners got what they were looking for on appeal: the Eighth Circuit reversed the district court’s holding.\textsuperscript{206} The circuit court found that the nonstatutory labor exemption protected the owners beyond impasse and that as a result, the Union could not bring an antitrust suit against the owners for implementation of a rule that was the product of good faith bargaining.\textsuperscript{207} The Eighth Circuit’s holding sent the Union back to the drawing board.

\textbf{H. Calling an Audible: Decertifying the Union}

While the Union had little to show for its latest legal battle with the League’s management, it took notice of Judge Gerald Heaney’s dissent, which suggested a brave move: break up the Union so that the nonstatutory labor exemption no longer applies.\textsuperscript{208} Realizing that Judge Heaney’s advice might be the only way to prevent the League’s management from continuing to restrict free agency, the Union formally disbanded on December 5, 1989.\textsuperscript{209} In place of the Union, the players formed the NFLPA as a professional association.\textsuperscript{210} The goal of the new organization was to pursue litigation on behalf of individual players and challenge the “Plan B” system.\textsuperscript{211}

In 1990, a lawsuit was filed on behalf of New York Jets Running Back Freeman McNeil. In this case, \textit{McNeil v. NFL},\textsuperscript{212} McNeil argued that “Plan B” rules restricting free agency violated antitrust law and that the “Plan B” system was not immune from antitrust scrutiny.\textsuperscript{213} After the district court found that the

\begin{itemize}
\item \textsuperscript{205} History: The 1980’s, supra note 175.
\item \textsuperscript{206} Powell, 930 F.2d at 1293.
\item \textsuperscript{207} Id. at 1304.
\item \textsuperscript{208} Id. at 1304–07 (Heaney, J., dissenting).
\item \textsuperscript{209} History: The 1980’s, supra note 175.
\item \textsuperscript{210} History: 1990’s—The Growth of the Union, NFL PLAYERS ASS’N, http://www.nflplayers.com/About-us/History (last visited Nov. 7, 2010) [hereinafter History: The 1990’s].
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. 1992).
\item \textsuperscript{213} See Goplerud, supra note 151, at 30.
\end{itemize}
NFLPA’s change in status meant that the owners were no longer exempt from antitrust law, a jury trial ensued. The players finally got the result they were looking for. The jury found that the “Plan B” system violated antitrust law in that it: “(1) had a substantially harmful effect on competition, (2) significantly contributed to competitive balance in the NFL, (3) [was] more restrictive than necessary to achieve competitive balance in the NFL, and (4) the players would be economically damaged as a direct result of ‘Plan B.’”

Having dealt a heavy blow to the League’s management in *McNeil v. NFL*, the players sought a restraining order to stop the NFL’s management from enforcing the “Plan B” system. In *Jackson v. National Football League*, the court found that “Plan B” prevented the players from becoming free agents and that as a result, they were likely to suffer irreparable harm. Accordingly, the court granted the injunction against the League management’s enforcement of “Plan B,” signaling a turning point in the players’ relationship with the NFL’s management.

I. Keeping the Drive Alive: From Reggie White to the Current CBA

With the owners’ antitrust protection greatly diminished, the players intensified their attack. The NFLPA’s leaders filed yet another lawsuit in 1992, *White v. NFL*, seeking true free agency and monetary relief. Realizing that the players had obtained increased bargaining leverage from *McNeil* and *Jackson*, the owners began settlement talks with the players involved in *White*. Ultimately, a settlement was reached in 1993 after both sides compromised. This settlement would shape the foundation

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214 See id.


218 *Jackson*, 802 F. Supp. at 228.

219 836 F. Supp. 1458 (D. Minn. 1993), aff’d, 41 F.3d 402 (8th Cir. 1994).

220 Id.

221 Levine & Maravent, supra note 109, at 1445.

222 Id.
of the 1993 CBA as the players and owners came to a consensus on a league-wide salary cap, free agency, revenue sharing, and the rookie pool system. Having achieved labor peace, the NFLPA became a certified union once again.225

Between 1993 and 2010, the NFLPA and the NFL’s management have extended their 1993 CBA five times. During this time period, the NFL was the only league of the four major United States professional sports leagues not to experience a work stoppage due to a labor dispute. Most recently, a CBA extension took place in March 2006 when both sides voted to extend the CBA through the 2011 season.227

However on May 20, 2008, League owners unanimously voted to opt out of this agreement. At the time, the reasons given for the early termination included high labor costs, cost problems with the rookie system, and the owners’ inability to recoup the bonuses of players who subsequently breached their contracts or refused to perform. Under the terms of the 2006 CBA, the 2010 season operated as the agreement’s final year because the NFL’s management had opted out.

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223 The salary cap is an adjustable calculation that sets a team’s maximum payroll for a league year. Redding & Peterson, supra note 18, at 98.
225 See History: The 1990’s, supra note 210.
226 Levine & Maravent, supra note 109, at 1446.
227 Id.
230 See NFL, NFL Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, Art. LVIII § 3(a) (Mar. 8, 2006).
III. DELAY OF GAME: THE CURRENT LABOR DISPUTE BETWEEN THE NFL’S MANAGEMENT AND THE NFL PLAYERS

During the current NFL labor dispute, the NFL’s management and the NFLPA have continuously tried to negotiate toward a new CBA. However, the parties face numerous obstacles that may prevent them from reaching an agreement. The primary issue between the two bargaining parties relates to the current revenue split between players and owners. Secondary issues include decreasing the cost of rookie salaries through a rookie wage scale, changing the length of the regular season from sixteen to eighteen games, the NFL Personal Conduct Policy (the “Policy”), and the League’s policy regarding player discipline for on-field actions.

A. The Revenue Dispute

The biggest issue separating the NFL’s management and the NFLPA is the revenue split between the players and the owners. Under the current CBA, the players receive almost 60% of total league revenue, leaving owners with the remaining roughly 40%. The owners want to amend the revenue split agreed to in the 2006 CBA by increasing their allocation of revenue. The NFL team owners argue that the current distribution is unsatisfactory because they are “losing money per game due to the increased

231 See NFL, Union to Discuss New CBA Today as Sides Remain Far Apart, STREET & SMITH’S SPORTS BUS. DAILY (Jan. 5, 2010), http://www.sportsbusinessdaily.com/article/135943
232 See Levine & Maravent, supra note 109, at 1475.
234 Redding & Peterson, supra note 18, at 100–01.
236 See Redding & Peterson, supra note 18, at 98–100.
237 See id. at 98.
238 Id.
expenses of operating a franchise\textsuperscript{239} (e.g., stadium development).\textsuperscript{240}

Conversely, “the NFLPA claims that the owners are not only earning a profit each year, but that the values of the NFL franchises are increasing at a rapid rate.”\textsuperscript{241} In support of this point, it has been pointed out that “the NFL’s revenue has increased 43 percent since 2006 to $9.3 billion.”\textsuperscript{242} Complicating matters is the fact that the League will not release any related financial information, arguing that the NFLPA knows the League’s financial situation and is aware that the NFL’s largest costs are player salaries.\textsuperscript{243}

In response to the League’s unwillingness to reveal its financial data, many players have begun giving the NFLPA their backing to decertify the Union in the event of a labor lockout.\textsuperscript{244} By disbanding the Union, the labor exemption to antitrust law would no longer apply to the NFL owners and the NFL players could sue the League under antitrust law, arguing that the labor lockout constituted a group boycott by the owners.\textsuperscript{245}

Public scrutiny and pressure have also intensified the negotiation process. On August 6, 2010, two senators weighed in on the labor dispute, urging the NFL’s management and the NFLPA to come to some sort of resolution before a work stoppage

\textsuperscript{239} In recent years, “the cost of building stadiums for professional sports franchises has increased beyond the ability for owners or even public entities to pay for them alone.” See Cost of Building Sports Stadiums Skyrockets, SAN DIEGO 6, http://www.sandiego6.com/news/local/story/Cost-of-Building-Sports-Stadiums-Skyrockets/InsCySsu10CXMnKv5JT6g.cspx.

\textsuperscript{240} Redding & Peterson, supra note 18.

\textsuperscript{241} Id.

\textsuperscript{242} Sally Jones, NFL Owners Want Guarantees that no Other Business Provides, WASH. POST (Feb. 17, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/16/AR2011021603846.html.

\textsuperscript{243} See Levine & Maravent, supra note 109, at 1475 (“The NFL is not going to provide any financial information to the Union because it is not claiming an inability to pay.”).

\textsuperscript{244} See, e.g., Steelers Players Vote to Decertify the Union if Needed, YAHOO!SPORTS (Oct. 6, 2010, 4:48 PM), http://sports.yahoo.com/nfl/news?slug=txsteelfsnflpa (explaining that the Steelers are at least the tenth group of players to vote to decertify if necessary, joining players from the Packers, Bengals, Bills, Colts, Cowboys, Saints, Eagles, Redskins and Giants).

occurs. Senator George LeMieux (R-FL) argued that the country cannot afford the more than 125,000 layoffs that would come with an NFL lockout. A spokesman for the Union responded that the “[p]layers recognize that the business of the NFL impacts the businesses of America in a profound way. A lockout puts jobs at risk. We continue to work diligently to prevent a lockout.” While several NFL owners and executives finally expressed hope this past October that the CBA could be renewed before expiring, the actions of the NFL and the NFLPA tell a different story. For example, the NFL’s management is building a nearly $900 million lockout fund financed from its savings. Similarly, the NFLPA is building its own reserves to cope with the effects of any future work stoppage.

B. Rookie Salaries

While player contracts in other United States professional sports leagues are guaranteed, the NFL’s player contracts traditionally have not been. This trend, however, has recently changed, especially for top NFL rookies. “While the top five draft picks in 2002 secured an average of twenty-seven percent of their compensation guaranteed, the top five picks in 2010 got fifty-

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247 Id.
248 Id.
250 Id.
251 Id.
252 When a contract is “guaranteed,” it means that regardless of whether the player performs well or gets injured during the course of the contract and cannot perform, he still receives the full value of his contract. Rachel Bachman, Trend in Guaranteed Money in NFL Contracts Pays Big for Ndamukong Suh, Other Potential Stars, OR. LIVE (Aug. 6, 2010, 10:30 AM) http://blog.oregonlive.com/nfl/2010/08/trend_in_guaranteed_money_in_n.html.
253 Id.
254 Id. (explaining that when news of 2010 NFL draft pick Ndamukong Suh’s contract broke, the most important part of it was not the total compensation of the contract ($68 million) but that $40 million of the contract was guaranteed).
Reining in inflated rookie salaries is one of the issues on which both the League and the NFLPA can come to an agreement.

The owners would like to see rookie salaries capped or reduced in some way due to the unprecedented cost that owners are incurring to obtain top college talent. Veteran players, making up a large portion of the NFLPA, would also like to see rookie salaries managed in a more cost-effective way out of respect for seasoned NFL players. Nevertheless, the League and the Union remain apart on what should be done to remedy this problem.

“The League is proposing that a rookie wage scale and a mechanism that credits against NFL club owners’ expenses be implemented into the new CBA. Under this proposal, these expenses will be deducted from revenues that determine the NFL salary cap, thereby providing cost savings.” Alternatively, “the NFLPA has put forth the idea of a ‘Proven Performance Plan,’ which would shorten the duration of standard rookie contracts from four years to three,” but would make rookies unrestricted free agents after their contracts expire. The League argues that the unrestricted free agent provision would render the NFLPA’s proposal ineffectve because although rookie salary costs would be reduced due to shorter contracts, unrestricted free agency would destroy the League’s “competitive balance.”

255 Id.
256 See Mawae: Big Rookie Contracts Like Ryan’s ‘Disheartening,’ ESPN (May 21, 2008, 4:43 PM), http://sports.espn.go.com/nfl/news/story?id=3406508&source=NFLHeadlines (quoting NFLPA President Kevin Mawae as saying that Matt Ryan’s six-year, $72 million rookie contract with the Atlanta Falcons was “a little disheartening” because a “young guy” who had never stepped on a NFL football field was getting “paid that kind of money”).
257 Id.
258 Id. NFLPA president Kevin Mawae explaining that “[a]s a guy who has been in the league for 14 now going on 15 years and being around other veteran guys, for a young guy to get paid that kind of money and never steps foot on an NFL football field, it’s a little disheartening to think of.” Id.
261 Id.
Augmenting the divide is the fact that many NFL fans across the country have become incensed that as most Americans continue to suffer through the worst recession in decades, NFL rookie contracts and player contracts in general have continued to inflate. While the press has criticized both the NFL’s management and NFLPA for this phenomenon, both parties have publicly placed the blame on each other. This has only made negotiations more difficult.

C. The Eighteen Game Season

The NFL’s management would like to increase the number of regular season NFL games from sixteen to eighteen. This is because the addition of two regular season games would allow the NFL team owners to generate more revenue over the course of a season from ticket sales, merchandise, etc. To implement this plan, owners propose keeping the season at its current twenty-week length, but “reducing the number of preseason games from four to two” and adding two of those games to the regular season schedule.

Across the League, however, “many players question the wisdom of making an already grueling season even longer,” while also limiting regular season preparation time. Players propose that an eighteen-game regular season should include “changes in the rules governing injured players” and “an extra bye week” to deal with the added hardship of a longer regular season. The players feel that while the season would still be twenty weeks long, additional regular season games pose a greater risk of injury.

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262 Id.
263 Owners Want 18 Games, supra note 233.
264 See id. (quoting Bob Kraft, owner of the New England Patriots, as saying, “I think it’s a win-win all around”).
265 Id.
266 Id.
267 A “bye week” is a week during which a team does not have to play a game. Tom Stryker, Inside Look at NFL Bye Weeks, SPREAD, http://www.thespread.com/forum/topic/Inside-Look-at-NFL-Bye-Weeks/74233/?p=214345 (last visited Jan. 31, 2011). Currently, each team is given one bye week over the course of an NFL regular season. Id.
268 Id.
because regular season games are more competitive than preseason games.269

In response to the players’ proposal, Miami Dolphins owner, Stephen Ross, publicly defended the League’s eighteen-game plan:

[T]he studies [on additional regular season games] show [that it] will not really increase injuries. We’re still playing 20 games. We’re eliminating two preseason games and adding two regular season games, which is really what helps with the revenues, and make[s] the fans a lot happier and those games will be a lot more meaningful. But in terms of the players, they’re still playing 20 games.270

The NFLPA quickly fired back on Twitter saying, “this is the kind of statement that drives players crazy. Every game is a risk of injury . . .”271

Critically, New England Patriots owner Robert Kraft explained, “I really think going to an 18-game season is critical to us getting a labor deal. There’s not a lot [of] ways in this economic environment we can generate incremental revenues. That’s the best way.”272

D. The NFL Personal Conduct Policy

The NFL Personal Conduct Policy states that “[a]ll persons associated with the NFL are required to avoid “conduct detrimental to the integrity of and public confidence in the National Football League.”273 This requirement applies to players, coaches, other

271 Id.
272 Owners Want 18 Games, supra note 233.
team employees, owners, game officials, and all others working for the NFL. 274 The Policy gives the NFL’s Commissioner the ultimate authority to discipline any violator of the Policy and the power to review any appeal. 275 The Commissioner’s authority to discipline players flows directly from the CBA, the NFL Player Contract, and the NFL Constitution and Bylaws. 276

In 2007, the Policy underwent a massive overhaul when Commissioner Goodell extended it to include players’ off-the-field conduct. 277 In defending this change, Commissioner Goodell stated, “We hold ourselves to higher standards of responsible conduct because of what it means to be part of the National Football League . . . this policy is a further step in ensuring that everyone who is part of the NFL meets that standard.” 278

However, Commissioner Goodell’s implementation of the new conduct policy was arguably a “unilateral change in employment terms and conditions” of the CBA because the Union did not have the opportunity to negotiate or engage in collective bargaining with the League over the Policy’s changes. 279 Thus, the Policy has become a sticking point for the players. The Union and its leaders believe that Commissioner Goodell’s implementation of the Policy reaches too far and “provide[s] no guidelines in the application of fines and/or suspensions due to off-field behavior.” 280 The NFLPA would also like to have an independent arbitrator hear appeals of League discipline. 281

Complicating negotiations, Commissioner Goodell’s decision to extend the Policy to off-the-field conduct has been largely vindicated by several players’ high profile off-the-field

274 Id.
275 Id. at 170–71.
276 Id. at 175.
277 See Redding & Peterson, supra note 18, at 100.
279 Henderson, supra note 273, at 185–86.
281 Id.
transgressions. Since the Policy’s extension, Commissioner Goodell has suspended players such as Marshawn Lynch for three games for carrying a concealed firearm, punished Michael Vick for his role in a dog fighting operation for up to six regular season games, suspended Donte Stallworth indefinitely for killing a man while driving intoxicated, and suspended Ben Roethlisberger for four games after a twenty-year-old female college student accused him of sexually assaulting her in a Georgia nightclub.

One of the more interesting facets of this issue is that team owners are caught somewhere in between Commissioner Goodell’s policy extension and the players’ respective positions. Owners do not want to see their players get suspended, but they also do not want team patrons to think that they condone crude and sometimes criminal behavior. For this reason, some team owners have advocated for the greater use of a team-enforced, rather than league-enforced, personal conduct policy.

E. Player Discipline for Illegal Hits

An emerging issue between the League and the players has been the League’s cracking down on what constitutes an illegal hit during the course of a football game. Following a series of devastating plays in games played on October 17, 2010, that left multiple players seriously hurt with head, neck, and other related

282 Redding & Peterson, supra note 18, at 100–01.
283 Id. at 100.
284 Id.
285 Id.
...injuries,\(^288\) the League ramped up its regulation of helmet-to-helmet hits.\(^289\)

Commissioner Goodell explained:

One of our most important priorities is protecting our players from needless injury. In recent years, we have emphasized minimizing contact to the head and neck, especially where a defenseless player is involved. It is clear to me that further action is required to emphasize the importance of teaching safe and controlled techniques, and of playing within the rules. It is incumbent on all of us to support the rules we have in place to protect players.\(^290\)

Following Commissioner Goodell’s statement, the League imposed a $75,000 fine and three $50,000 fines on four players who committed fouls under the revamped discipline system.\(^291\)

Many NFL players believe they should have a greater voice in handing out fines and suspensions for illegal hits.\(^292\) Currently, all plays are reviewed by the League’s officiating and operations offices.\(^293\) The players are interested in making sure that some of those reviewers are their peers.\(^294\) Commissioner Goodell said the League is opposed to player reviewers, emphasizing that he is not part of the fines process; appeals are heard and decided by Hall of Fame player Art Shell and former NFL coach Ted Cottrell.\(^295\) The


\(^{289}\) Id. A helmet-to-helmet hit occurs when the defensive player leads with his helmet to strike the offensive player’s helmet in the course of making a tackle on the offensive player. Id.


\(^{291}\) Wilner, Football Big Hits, supra note 235.

\(^{292}\) Id.

\(^{293}\) Id.

\(^{294}\) Id.

\(^{295}\) Id.
NFL’s management and the NFLPA jointly pay their salaries. Nevertheless, players have expressed concern about the subjective nature of the appeals system.

Buffalo Bills safety George Wilson views all of these issues as intertwined with negotiations for a new CBA. Wilson explained: “It’s imperative for the [U]nion to feel like they have a voice in the disciplinary process, at least have a voice at the table. I know that can come in a lot of capacities and aspects, but guys just want to feel like their voices are heard.”

IV. TOUCHDOWN: USING MEDIATION TO REACH A NEW CBA

Positive working relationships are vital in all businesses, including professional sports. Thus, “bitter negotiations in sports labor disputes can lead to unique problems.” This is especially true when the labor dispute involves collective bargaining.

While both the NFL’s management and the NFLPA have a mutual interest in each other’s success and should work together to reach a new CBA, parties involved in these types of labor disputes often become entrenched in their positions and publicly fight caustic and financially draining labor battles. Indeed, NFL team owners have already declared that the players should not receive as much revenue as they are currently receiving. In retaliation, the players have publicly questioned the integrity of the owners’ claims that they are financially strapped, threatened to decertify the Union, and threatened to sue the League in the event of a

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296 Id.
297 Id.
298 Id.
299 Id.
301 Id.
302 Id.
303 See Redding & Peterson, supra note 18, at 98–100.
lockout. The effect of these actions is that two parties that otherwise need each other to thrive have publicly humiliated one another, alienated their fan base, and made it harder to work together toward reaching a new CBA.

Mediation is an ideal remedy for resolving labor disputes in professional sports and helping the NFL’s management and the NFL players reach a new CBA. It provides the best forum for open communication, which can be used to preserve and advance the parties’ working relationship, it offers an expedited and financially rewarding way to come to a resolution, and it offers both parties a sense of privacy.

A. Mediation Can Preserve and Foster Working Relationships

Mediation takes into consideration the human toll of conflict and fosters healthier communication between disputants. It also allows for the parties’ collaboration in the decision making process and mutual satisfaction in the outcome. This is critical for resolving the NFL labor dispute because as Buffalo Bills safety George Wilson explained, “Guys just want to feel like their voices are heard.”

The ability to foster positive outcomes and mutual decision making can be realized through the use of a mediator. This person, chosen by both parties, is trained to bring about collaborative resolution by providing an environment of neutrality. Therefore, given the NFL management’s view that AFL-CIO President, Richard Trumka, could not provide for a
neutral environment as mediator, Trumka’s offer to mediate the NFL CBA negotiations was flawed in a critical respect.

However, while Trumka might not be the ideal candidate to mediate this dispute, he has the right idea. The infusion of a neutral mediator into a hostile labor dispute can make a great difference in the dispute’s outcome. This is especially true when the parties have a long and tumultuous negotiation history, as the NFL’s management and the NFLPA do. The mediator can help identify and address each party’s key issues and goals, while keeping each party focused on building a brighter future, rather than focusing on a bitter past.311

The mediator can also encourage positive working relationships by engaging each party in private discussions during the mediation.312 During the course of a negotiation, disputants do not always feel comfortable sharing their private issues and/or negotiation goals with one another. Typically when this occurs, negotiations will either stall or reach an impasse.313 However, in the mediation setting, the mediator can call a private caucus to prevent this from happening.314 A private caucus occurs when the mediator talks with each party and its lawyers in confidence.315 During the private caucus, the mediator will listen to each side’s concerns and agree not to divulge any of this information until clearance is received from each party.316 In the meantime, this information can help the mediator shape negotiations and encourage good-faith bargaining aimed at creating a resolution that meets both parties’ needs.317

Here, caucusing could assist with the production of critical NFL financial information relating to the League’s profitability.318

311 Id.
312 Id.
313 Id.
314 Id.
315 Id.
316 Id.
317 Id.
318 See AFL-CIO Prez, supra note 7.
This, in turn, would be an enormous step toward helping the parties reconcile their differences and reaching a new CBA.319

B. Mediation Can Expedite a Resolution and Save Money

Not surprisingly, when high-profile disputes arise and communications begin to break down, it can be difficult to get negotiations back on track.320 Rather than working together, parties will often resort to insulting each other in the media, stockpiling assets to fund a protracted conflict, and adopting a wait-and-see approach to negotiations.321 The conflict drags on and reaches a juncture where multiple egos become involved in the dispute, making a joint resolution unlikely.322 The time and money spent on defending each party’s position also becomes significant and irretrievable.323

The NFL labor dispute has already begun to resemble this unproductive model of conflict resolution.324 As this conflict continues, the likelihood of both parties suffering through long, costly, and publicly bitter litigation greatly increases.325 It also increases the likelihood of both parties experiencing enormous financial losses due to game cancellations.326

What both parties need to realize is that not only will mediation be far more sensible in resolving their dispute, it will also be faster and cheaper.327 These are crucial benefits as the current CBA ends in March 2011 and the tentative start of the 2011–2012 season is less than a year away.

319 Id.
320 Kupelian, supra note 300.
322 See Wallace, supra note 306, at 64.
323 See id.
324 See Kaplan, NFL Pools $900M for Labor Fight, supra note 249.
326 Wilner, Lockout, supra note 21.
327 Wallace, supra note 306, at 64.
Mediation offers the parties a set mechanism for early engagement with one another and an opportunity to take control of their problems before they become unsolvable. The parties can elect to have the right and ability to control the identity of the mediator, the timing and scheduling of the sessions, the nature of discussions, and the confidentiality of the negotiations.\textsuperscript{328} In addition, the cost of having to pay a mediator is negligible in comparison to the cost the parties would incur if the 2011 season were cancelled and/or this dispute were to be litigated.\textsuperscript{329}

For the NFL’s management, the reduced expenditure on labor negotiations increases funds available to support other League initiatives and promote the game of football. For the players, the increased time and money allows for better offseason training and a greater focus on the upcoming season.

C. Mediation Can Help Prevent a Public Relations Disaster

Public relations are important in any industry. However, professional sports leagues are especially dependent on public reaction.\textsuperscript{330} A professional sports league’s inability to gauge public reaction can lead to negative effects on business and must be reversed as early as possible to stop irreparable harm and loss of public confidence.\textsuperscript{331} While many professional sports leagues have traditionally been sluggish in reacting to public outcry and negative publicity, the NFL has been quite adept in the past at responding to its fans’ demands and promulgating socially responsible initiatives and policies.\textsuperscript{332} These include NFL Play 60,\textsuperscript{333} the NFL and United Way Hometown Huddle,\textsuperscript{334} and

\begin{footnotesize}
\begin{enumerate}
\item Kupelian, \textit{ supra} note 300.
\item \textit{Id.}
\item See Greenberg, \textit{Sports Facility Leases, supra} note 28, at 101–02.
\item Kupelian, \textit{ supra} note 300 (explaining that both MLB and the NBA have suffered for failing to take fan interest and public concern into account).
\item See, e.g., Goodell Issues Memo Enforcing Player Safety Rules, \textit{ supra} note 278 (“[A]n employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the league is based, and is lawful.”).
\item NFLRUSH, http://www.nflrush.com/play60 (last visited Jan. 31, 2011). NFL PLAY 60 is a national youth health and fitness campaign focused on increasing the wellness of young fans by encouraging them to be active for at least sixty minutes a day. \textit{Id.}
\end{enumerate}
\end{footnotesize}
League-enforced sanctions against teams for employee misconduct.\(^{335}\)

Although labor disputes are only a part of the public relations puzzle, long and drawn out public CBA negotiations between the NFL owners and the players will negatively impact the NFL’s overall public perception, and ultimately, its business.\(^{336}\) This is especially the case when during a national recession, the majority of the parties’ negotiations center on which party should receive the greater share of billions of dollars in revenue.\(^{337}\) Further adding to the public relations concern is that if the parties do not come to a resolution and a work stoppage does occur, many American cities will lose millions of dollars and thousands of jobs.\(^{338}\)

Mediation will offer the public hope that this dispute could be resolved at an earlier stage, while also limiting the parties’ public display of greed and pettiness during negotiations.\(^{339}\) Even though mediation may not resolve the dispute immediately, ground rules could be established requiring confidentiality during the course of, and in between mediation sessions. This would minimize adverse media commentary on the NFL labor dispute’s status and thereby limit negative public reaction. It would also prevent either party from misrepresenting the other’s proposals in the press and from using the court of public opinion to try hotly contested labor issues, which only fuels interparty animosity and makes negotiating a new CBA nearly impossible.\(^{340}\)

\(^{334}\text{NFL and United Way, UNITED WAY CAPITAL AREA, http://unitedwaycapitalarea.org/partners/nfl_and_united_way.php (last visited Jan. 31, 2011). Hometown Huddle is a national day of community service, during which NFL players and representatives from each of the thirty-two NFL teams lend aid and assistance to members of their communities. Id.}

\(^{335}\text{See Goodell Issues Memo Enforcing Player Safety Rules, supra note 278 (explaining that as a result of negative league publicity stemming from player incidents, NFL teams will be disciplined when their employees, including players, violate the league’s personal conduct policy).}

\(^{336}\text{Kupelian, supra note 300.}

\(^{337}\text{AFL-CIO Prez, supra note 7.}

\(^{338}\text{Id.}

\(^{339}\text{Kupelian, supra note 300.}

\(^{340}\text{Farrar, Rookie Wage Scale, supra note 260.}
Ultimately, nothing can limit the public relations headache that the NFL will experience if there is a work stoppage next season. However, mediation can help put a cap on the negative publicity that the NFL’s management and the NFLPA receive as labor negotiations continue and can increase the likelihood that the public relations nightmare of an NFL work stoppage never materializes.

V. INSIDE THE HUDDLE: CONDUCTING THE MEDIATION

Having realized the benefits that mediation affords the parties, the NFL’s management and the NFLPA agreed to enter into mediation on February 17, 2011. Choosing mediation is an important step toward saving the 2011–2012 NFL season and avoiding the significant job and money losses that could occur in the event of a work stoppage. However, now that the NFL’s management and the NFLPA have opted for mediation, the mediation sessions must be structured and conducted in a way that will encourage consensus between the parties. Otherwise, any mediation session that the parties hold will prove futile in resolving this labor dispute.

A. Picking a Referee: The Mediator

As the NFL’s management correctly states in its response to Richard Trumka’s September 30, 2010, letter, any mediator that is going to mediate the NFL’s CBA negotiations must be a mutually agreed upon neutral third party. For several reasons, this is a fundamental precept of mediation that both the NFL’s management and the NFLPA have followed in appointing the Federal Mediation and Conciliation Service (“FMCS”), an independent United States government agency, to oversee the

342 See AFL-CIO Prez, supra note 7.
343 Id.
344 See What is Mediation?, supra note 30.
mediation.\footnote{See NFL, Players Union Agree to Mediation, supra note 341.} FMCS director George H. Cohen\footnote{George H. Cohen has extensive sports labor relations experience having been involved in the NBA’s, the NHL’s, MLB’s and Major League Soccer’s past CBA negotiations. See id.} will be the mediator.\footnote{Id.}

First, having a mutually agreed upon mediator makes both the NFL’s management and the NFLPA responsible for the role that the mediator plays in conducting the mediation and gives each party an equal stake in how the mediation process is managed.\footnote{\textsc{Robert Fisher \\& William Ury}, \textit{Getting to Yes: Negotiating Agreement Without Giving In} 27 (Bruce Patton ed., 2d ed. 1991).} This assures both parties’ interest and commitment to having a productive mediation.\footnote{Id.} Furthermore, agreement over the mediator can often be symbolic of a change in tone between disputing parties and signal the first of several compromises to come.\footnote{Jeff Carlisle, \textit{A Glimmer of Hope in the CBA Talks}, ESPN, http://soccer.espn.go.com/columns/story?id=751412&sec=mls&root=mls&cc=5901 (last visited Feb. 9, 2011).} This would be particularly true in the case of this labor dispute as both the NFL’s management and the NFLPA have refused to concede any ground on all key labor issues and continue to have vitriolic exchanges.\footnote{Jim Corbett, \textit{Analyst Sees Way to Avert Stoppage}, USA Today, Jan. 31, 2011, at 7C.} Lastly, having a neutral third party mediator is the primary way to ensure that both the NFL’s management and the NFLPA trust each other and the mediation process.\footnote{Kupelian, supra note 300.} This is crucial because successful mediation hinges on the parties being comfortable with exchanging their respective bargaining positions and willingness to work together to achieve mutual gains.\footnote{See \textsc{Jacqueline M. Nolan-Haley}, \textit{Alternative Dispute Resolution in a Nutshell} 74–75 (3d ed. 2008).} The parties will not do this if they do not trust each other or if the mediator is being coercive and fails to protect the parties’ interests adequately and equally.\footnote{See AFL-CIO Prez, supra note 7.}

Given the unique nature of the professional sports industry and this labor dispute, it is also important that the mediator have
significant experience mediating comparable types of labor negotiations. Having a mediator with professional sports league labor relations expertise, such as George H. Cohen, provides many advantages that would not otherwise be afforded to the NFL’s management and the NFLPA.

First, a mediator with this type of experience is likely to already comprehend the extensive labor relations history and current struggle between the parties. This will allow the mediation process to move swiftly and efficiently which is vital because the parties do not have long before the current CBA expires. Second, as often is the case with professional sports league CBA negotiations, here, the parties to the dispute are large organizations, with sizable labor relations teams made up of attorneys, businesspeople, and former players. A mediator with Cohen’s experience understands how to manage the different personalities and egos that will inevitably accompany any mediation session(s) and that would otherwise threaten the productivity of the mediation process. Third, the consequences of failing to reach a new CBA could be devastating. This will likely create a pressure-packed atmosphere during mediation and as negotiations move forward. A mediator such as Cohen, who has been in this position before, is in the best position to handle this hostile atmosphere and can exert a calming influence over the

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355 Kupelian, supra note 300.
357 Kupelian, supra note 300.
360 See AFL-CIO Prez, supra note 7 (explaining that a lockout could cost thousands of Americans their jobs and cities more than $140 million in revenue).
361 Doug Farrar, Ochocinco Grills Goodell During Commissioner’s Press Conference, Y AHOO!SPORTS (Feb. 5, 2001, 9:09 AM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Video-Ochocinco-grills-Goodell-during-Commissionio?urn=nfl-317260 (explaining that player anxiety is only going to grow as the deadline date for the expiration of the current Collective Bargaining Agreement gets closer)[hereinafter Farrar, Ochocinco].
already anxious parties by laying out a framework for how mediation should proceed.362

B. Officiating the Game: The Mediator’s Role

Ultimately, Cohen cannot force the NFL’s management and the NFLPA to agree on a new CBA.363 However, the role that he plays will have a profound impact on the outcome of this dispute. It will be up to Cohen to “[interpret] concerns, [relay] information between the parties, [frame] the issues, and [refocus] the problems.”364

As previously stated, the anxiety level at any mediation session that occurs between the NFL’s management and the NFLPA has to be high.365 With so much riding on the negotiations, the pressure is going to mount with each successive session.366 For this reason, Cohen must remain a composed third party that can control the negotiations when necessary.367 In particular, Cohen should do three things during the course of the mediation process to help ensure that mediation is as successful as possible.

First, Cohen should obtain an understanding of what each party’s view of the situation is from the outset of mediation.368 By understanding each party’s position and goals, Cohen can determine how each mediation session should proceed.369 To do this, it would be wise for Cohen to conduct separate meetings with both the NFL’s management and the NFLPA before any joint mediation sessions begin.370 This would prevent the parties’ hostilities from getting in the way of Cohen’s comprehension of the key issues.371

362 See Nolan-Haley, supra note 353, at 82.
363 Id. at 70 (explaining that in mediation, the mediator cannot impose a decision on the parties).
364 Id. at 85.
365 See Farrar, Ochocinco, supra note 361.
366 Id.
367 See Nolan-Haley, supra note 353, at 82.
368 Id. at 75.
369 Id.
370 Id.
371 Id.
Next, Cohen should confer with the parties at the outset of mediation to determine what the mediation schedule is going to be.372 Setting out a schedule at the beginning of mediation helps the NFL’s management and the NFLPA establish a concrete meeting plan and steady dialogue. This would be of particular help in the case of this dispute as the parties have been unable to maintain consistent dialogue regarding CBA negotiations since labor talks first began in June 2009. Once mediation starts, the sessions will become contentious at times.373 Either party could desire to walk away from mediation.374 However, having a previously agreed upon schedule is an effective prophylactic to this type of problem because it is a constant reminder from the outset that both parties are dedicated to seeing the mediation process through to the end and reaching an agreement.

Finally, Cohen will have to know when to call a “timeout.” If it appears that a resolution may be difficult to achieve during a joint session, Cohen should request to meet separately with the NFL’s management and the NFLPA in private caucuses.375 This will allow each party to confidentially share sensitive information and any concerns it has with how negotiations are proceeding. Moreover, if the NFL’s management is unwilling in a joint session to produce the League financial data that the NFLPA has requested, Cohen should urge the NFL’s management to produce this information during its private caucus. Cohen would then have the opportunity to review the data and interpret its meaning. After considering the financial information, Cohen could make an objective recommendation during the next joint session as to how League revenue should be divided in the new CBA. So long as the NFLPA is informed of the fact that Cohen’s recommendation is based on the NFL management’s full financial disclosure during the private caucus, the NFLPA would have little reason to object to Cohen’s proposal and the NFL’s management would not have to

372 Id.
375 See Nolan-Haley, supra note 353, at 83.
reveal the contents of its financial data to the NFLPA. This compromise, in turn, would be a monumental step toward resolving this labor dispute as it would significantly alleviate tensions over the revenue split, the primary issue separating the parties.

C. The NFL’s Management and The NFLPA: What Must Happen

While Cohen can significantly influence the outcome of mediation, it will be up to the NFL’s management and the NFLPA whether to agree on a new CBA. Given that the NFL’s management and the NFLPA have already had negotiations regarding a new CBA, both parties have an understanding of what the other is seeking. Thus, the parties should view mediation as an opportunity to compromise on outstanding labor issues so that a new CBA is reached. However, for the mediation process to be successful, several things must happen between the parties during the course of mediation.

First, the mediation process will only work if the parties are willing to bargain in good faith. The parties have to be honest with one another and must actually desire a resolution of this dispute for mediation to be effective. With such a great deal of animosity built up between the parties, this could prove difficult. However, it will be up to the parties to put their emotions aside and realize that working together to reach an agreement is the only way to stave off disaster.

Next, assuming that the parties are willing to bargain in good faith, the NFL’s management must be more forthcoming with financial information. So far, the NFL’s management has refused to disclose financial statements to the NFLPA in support of their position that teams are losing money. However, production of this information is essential for a successful negotiation between the parties because it is the only way to demonstrate to the NFLPA

376 Id. at 75.
377 Mortensen, NFL-Union Talks Canceled, supra note 374.
378 See Nolan-Haley, supra note 353, at 100.
379 See Mortensen & Schefter, Sides Could Talk, supra note 373.
380 See AFL-CIO Prez, supra note 7.
that the owners’ position regarding the revenue split is justified.\footnote{Id.} Failure to produce this information only lessens the NFL management’s credibility and makes it less likely that a compromise over the distribution of league revenue will be reached. As this is the pivotal point of contention between the NFL’s management and the NFLPA, resolution of this issue is essential to reaching a new CBA.\footnote{Id.}

Last, the parties need to agree to keep confidential the substance of each mediation session. To their detriment, both the NFL’s management and the NFLPA have roused public concern over this labor dispute by using the media to vilify one another and gain support for their respective positions.\footnote{Mortensen, NFL-Union Talks Canceled, supra note 374.} As previously stated, this has only heightened tensions between the parties and made agreement more difficult.\footnote{Id.}

For good faith bargaining to occur and for mediation to be effective, the parties must be able to engage in the mediation process without having to worry that their words will be used against them or misconstrued.\footnote{See NOLAN-HALEY, supra note 353, at 117.} Agreeing that the content of the mediation sessions will be kept confidential virtually guarantees that this will happen and allows the parties to have open and honest negotiations.\footnote{Id.} This, in turn, makes reaching a new CBA far more likely.

\section*{CONCLUSION: THE POST GAME SHOW}

It is time for the NFL’s management and the NFLPA to demonstrate their commitment to reaching a new CBA. Properly conducted mediation “promotes dignity and respect for [parties’] interests, addresses the root cause of conflict, and allows for resolutions that satisfy the interests of all parties. It is efficient,
strengthens relationships of trust and respect, . . . and controls unnecessary expenditure of resources.”

In an organization where positive relationships are necessary for owners and players to achieve success, conflict can be costly. Properly conducted mediation “creates the opportunity for conflict to bring about productive outcomes,” and therefore, should play an integral part in the NFL management’s and the NFLPA’s collective bargaining process and in future labor disputes between management and players in professional sports leagues. It is time to huddle up.

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388 Id.
389 Id.