

**THE MEDIATION PROTOCOL:
THE UNITED STATES OLYMPIC COMMITTEE'S
EXPERIMENTAL TRIAL WITH MEDIATION AS
A FORM OF DOPING-CONTROL DISPUTE
RESOLUTION**

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I. Fact Pattern

Adam Walsh is on the cusp of Olympic glory. Adam is 22 years old, a graduate of Northwestern University, where he studied finance and marketing, and currently swims for the Northwestern Bobcats Club Swim Team. As a collegiate student athlete, Adam had to work tirelessly throughout his career to make his first NCAA qualifying time as a senior. As such, Adam, although a workhorse in practice and a true team leader, had not been a spectacular swimmer during his first three years at Northwestern. In fact, Adam was not recruited by the Northwestern coaching staff as many young men are during their senior year of high school. Instead, Adam applied to Northwestern for its reputable business school and asked the coaching staff, once admitted on his academic merits, if he could walk on to the swim team. Adam's less-than-remarkable collegiate swimming career finished in truly spectacular fashion in 2013; Adam finally achieved his first NCAA qualifying time, and he placed 14th overall at the NCAA Championship Swim Meet.

Although Adam was offered a high-salary job at a nearby marketing firm, Adam thought it was wise to capitalize on his recent swimming success instead. After consulting his parents, Adam turned down the offer, moved home, and began training with his collegiate coaches towards his life long goal of an Olympic berth. It seemed that Adam had finally found his groove. At each meet he attended, Adam recorded personal best times. His performance in the water began to draw the attention of the national team coaches and staff. At national level swim meets, Adam was greeted by likes of Michael Phelps, Ryan Lochte, and Natalie Coughlin, all congratulating him on his stellar performances. Adam was living the dream.

Adam's coaches never questioned the uncannily quick transition from hard working, yet back-of-the-pack swimmer to national-level, rising all-star. The coaches were simply content that Adam's success had not gone to his head; Adam was as humble in his recent success as he was the day the coaches met him. One difference the coaches did notice, however, was the incorporation of a line of nutritional supplement products into Adam's diet around the same time he became a collegiate success. Although the coaches were apprehensive about the correlation between the supplements and Adam's recent success, they never questioned Adam because they had seen many other swimmers using the same product line; it had to both safe and legal.

Fast-forward to August 2015. Adam has had steady and continued success. His performance in his specific event has ranked him 3rd overall in the United States behind only Michael Phelps, who made a comeback after his announced retirement in 2012, and Ryan Lochte. Adam has entered final preparation for the National Championship swim meet, held in the middle of August. USA Swimming, the national governing body of all sanctioned swim meets in the United States, selects the members of the World Championship Swim Team, which will travel to Sydney, Australia, to compete against the best in the world only one year away from the Olympics, from the National Championships. In order to be selected as a team member, a swimmer must meet the qualifying criteria: 1) a swimmer must finish first or second in his or her respective event, 2) a swimmer's first or second place time must meet the FINA qualifying time standard to compete at the World Championships, and 3) a swimmer must pass a USADA sanctioned doping control test immediately following his or her first or second place finish.

In one of the biggest upsets in USA Swimming history, Adam defeated both Michael Phelps and Ryan Lochte, taking first place and far exceeding the FINA qualifying time standard. As per protocol, Adam was instructed that he would have to submit to a doping control test immediately after his finish. He was given time to warm down, change, and accept his medal, of course under USADA Chaperone supervision. Once he had accepted his medal, Adam told the chaperone that he was prepared to check-in to the doping control station, located in the same facility as the

competition pool. Once Adam checked-in, he notified the USADA Official that he was ready to give his sample. Following the USADA procedures, Adam gave his sample, signed the necessary paperwork, and left the doping control station. Outside of doping control, Adam was greeted by a large group consisting of his coaches, family members, and friends, all congratulating him on his success.

Unfortunately, one week before Adam was to depart with Team USA for the World Championship training camp, Adam's doping control sample was reported positive for a banned substance. USADA immediately notified USA Swimming and Adam, at which point USA Swimming named the 3rd place finisher in Adam's event to the World Championship Team, as Adam's replacement. Adam was distraught. His entire career flashed before his eyes. He had no idea how his test had come back positive because he was sure that he had not taken any sort of illegal substance leading up to, or during the competition.

Adam immediately knew that he needed help if he was going to sort this out before the 2016 Olympics in Rio de Janeiro, Brazil. First, Adam turned to his coaches. Sadly, he was met with skepticism, confusion, and a plethora of questions; Adam knew his coaches doubted the sincerity in his claims. Second, Adam turned to his parents. Again, he was met with skepticism; his parents were embarrassed, and they wished he had not cheated. Finally, Adam turned to the USA Swimming Ombudsman, the athlete liaison that gives athletes an incredible amount of assistance in these difficult situations.

The Athlete Ombudsman, Pablo Morales, a graduate of Stanford University and an Olympic gold medalist, knew exactly what to do.¹ Morales was aware of an alternate dispute resolution forum being tested in the Olympic world known as "The Mediation

¹ The Athlete Ombudsman is an appointed position that was created by the United States Olympic Committee. An ombudsman's responsibilities include providing independent advice to athletes on all issues relating to their rights to compete, facilitating communications and assisting in mediation of disputes between athletes and Olympic family organizations, and assisting in the development and implementation of policies to secure and support the rights of elite athletes. This information can be found at <http://www.teamusa.org/For-Athletes/Athlete-Ombudsman>.

Protocol.” According to the US Olympic Committee, the Mediation Protocol is intended to replace the positive drug test appeals procedure. Morales told Adam that his case would qualify to be resolved under mediation. What was special about the Mediation Protocol is that it was not yet the standard appeal process because the Olympic Committee was only in its beta-testing phase, in order to determine the likelihood of the Protocol’s success. As it is still an experimental dispute resolution forum, if Adam did not achieve a desirable result, he could waive the results of the mediation protocol altogether and begin the standard appeals process. However, if Adam elected not to proceed with the Mediation Protocol, and instead went directly with the standard appeals process, he would be unable to later select the option of the Mediation Protocol.

Pablo explained that mediation was an opportunity for Adam to negotiate a less substantial suspension. Further, Pablo informed Adam that this particular mediation process is generally completed, and a settlement agreed upon, within a day. As Adam knew that the standard appeals process could take months, he chose the Mediation Protocol.

II. Selecting a Mediator

Pablo informed Adam that the Mediation Protocol required each party to have legal counsel present. He suggested to hire an attorney that was proficient and well respected in the sports world, but would also serve as an excellent defense attorney. Considering Adam did not know any attorneys, Pablo gave Adam a list of attorneys that work closely with the United States Olympic Committee, and would provide excellent defense. Together, Adam and Pablo decided that Johnnie Cochran would provide the best legal representation for Adam. Once Adam signed a contract with Mr. Cochran, and Pablo paid Mr. Cochran’s retainer, Mr. Cochran went straight to work finding a mediator.

The Mediation Protocol is designed with ease in mind. The USOC compiled a list of outstanding mediators that they thought would provide excellent services to athletes participating in the Mediation Protocol program. When the Board started compiling its list of mediators, it not only reached out to well known mediators

around the country, but also to well known Olympic athletes because of their intimate knowledge of Olympic sports and the doping-control process. Many of the mediators on the preferred list had no experience with mediation. Even so, the Board was primarily concerned with gathering a group of mediators that knew something about the dedication within an Olympic athlete. As such, the Board decided that even if the lawyers and attorneys it reached out to had no experience mediating, it would pay for their certification class. Of course, other obstacles existed that narrowed the Board's pool of available, potential mediators. In all, the final preferred list of mediators had ten names.

The Protocol requires the defendant's counsel to submit a list of three preferred mediators, ranked in order of preference, to the plaintiff's counsel. Plaintiff's counsel then has the opportunity to review each preferred mediator's curriculum vitae before either accepting or denying any one of the three mediators. If, however, plaintiff's counsel does not approve of any of the three mediators selected by defendant's counsel, it is plaintiff's counsel's duty to inform the Board "in an expedient manner," so that the Board can appoint a mediator, which avoids a lengthy exchange between opposing counsel regarding the mediator, all in the interest of time. It did not take Mr. Cochran very long to make his list of three possible mediators to submit to USADA, the plaintiff in the mediation. Johnnie hand-selected, in order of preference, Kicker Vencill, Bob Costas, and Mark Spitz; each mediator was selected for different reasons.

Kicker Vencill graduated from Western Kentucky University. Mr. Vencill swam all four years of his undergraduate career and went on to pursue his Olympic dream, much like Adam. Like Adam, he was stopped short of his dream because of a positive drug test found to be the result of ingesting contaminated multi-vitamins, which were prescribed by his physician. The drug test, and ensuing lawsuit against the nutritional supplement company ended his career. After Mr. Vencill had moved on from swimming, he applied to law school because he was so intrigued by the legal process that he had just experienced. He had a desire to help young athletes in his position regain control of their athletic destiny. He has been a licensed mediator ever since he graduated

law school, and was selected by the USOC because of his experience both as an athlete and a mediator.

Bob Costas is a well-known sports telecaster, best-known for his appearances during Olympic broadcasts in the United States. Although Mr. Costas never swam, he claims to have a healthy respect for swimmers because of the hard work and dedication many of the Olympic team members he has met have demonstrated. Mr. Costas is in awe of Michael Phelps, which gives him a very heavy bias towards swimmers. Although Mr. Costas went to law school, he has never actually practiced law, nor has he ever been a mediator. His career as a broadcast journalist began immediately upon graduation from law school, and he never looked back. Bob was asked to get his license to mediate because of his general knowledge of Olympic sport and his generally savvy business sense. The USOC selected Bob because, although he lacked experience as a mediator, his highly opinionated demeanor and ability to demand control of a room would come to excellent use to him during these mediations.

Finally, we come to Mark Spitz. Mr. Spitz was the US Olympic Swimming Progeny before Michael Phelps came along. Ever since Phelps earned 8 gold medals in the Beijing Olympics in 2008, Spitz has been a recluse. He has shut himself off from the rest of the world, and is never seen leaving his home. He finally emerged in 2014, only to do a Tell-All with Barbara Walters. He alleged that Phelps, and the swimming community at large was cheating, because nobody should be able to do what he was able to do. The USOC was drawn to his antics because they felt that he might provide a balance to their list of athlete friendly mediators. They came to him with an offer to become a licensed mediator and he accepted, claiming, "I'll catch them all."

John Cochran sent his list of chosen mediators to USADA's legal representative, Roy Black. Upon receipt, Roy knew exactly who he was going to agree to allow mediate this dispute. There was no way he was going to choose Bob Costas because of Bob's ties to the Olympic world. He certainly was not going to select Mark Spitz, he had no idea what he was doing; none of the parties that had participated in the program up to this point had chosen him as a mediator. Finally, Mr. Black landed on

Mr. Vencill's name. He knew that Mr. Vencill had a decent reputation as a mediator and that he had a relaxed personality. Seeing as this mediation would be Mr. Black's fifth drug test mediation as part of the Mediation Protocol program in the last 4 months, he needed a mediator with experience that would not let the discussion get out of hand.

Both parties agreed that Kicker Vencill would mediate the dispute between USADA and Adam Walsh.

III. Mediator's Opening Statement

On October 1st, 2015, Adam Walsh, along with his attorney, Johnnie Cochran, met with a USADA representative and her attorney, Roy Black, before a licensed mediator, Kicker Vencill, to resolve the drug testing dispute that arose between the two parties on September 3rd, 2015. The mediation occurred in Fort Lauderdale, Florida, at the International Swimming Hall of Fame. The following is a transcript from Mr. Vencill's opening statement.

Vencill: "Good afternoon everybody. At this time, I would like to make clear that I have not yet had a caucus with either party. This joint session is the first time I have met both parties involved. My name is Kicker Vencill. I am a board certified attorney in California, Colorado, and Florida. I am a licensed mediator, and I have been mediating for twelve years, since I completed law school. I have participated in three of these experimental drug-testing dispute mediations as part of the Mediation Protocol, set forth by the United States Olympic Committee. I have been named one of the "select" mediators, preferred by the USOC, to resolve drug-testing disputes. As far as I know, both parties have chosen me as the designated mediator. If at any time, either party feels that I am no longer suited to mediate the dispute, please say so and I will refer you to the USOC to reschedule mediation and find another mediator.

"At this time, I would like to go around the table and have each person present introduce themselves. Once each person has introduced him or herself, I will proceed with a few ground rules

for today's mediation. As I have stated, my name is Kicker Vencill, and I am your mediator today."

Adam: "My name is Adam Walsh. I am a competitive swimmer, and I am here today to clear my name because I didn't do drugs. I don't cheat."

Cochran: "My name is Johnnie Cochran, you can all call me Johnny. I represent Mr. Walsh here."

Black: "My name is Roy Black. I am lead general counsel for USADA."

USADA Rep: "My name is Stacy Michael-Miller, and I am USADA's designated representative assigned to this dispute. Full disclosure, prior to working for USADA I was a proud member of the USA Swimming support team, and I happen to know Adam on a personal level."

Vencill: "Ms. Michael-Miller, do you have decision making power on behalf of USADA today?"

Miller: "Yes, Mr. Vencill, I do."

Vencill: "Great. And please, you may all refer to me as Kicker, instead of Mr. Vencill. At this time, I would like to make known that I have tested positive for a doping violation in the past. I was suspended from the sport for two years. Upon my re-entry into the sport, I attempted an unsuccessful comeback. During my time away from the sport, I successfully sued a supplement manufacturer for selling me a supplement tainted with a known banned substance. The verdict of the court was for \$500,000.00. I have since made a career out of mediation, and have not returned to the swimming world until recently when I was asked to become a "select" mediator, as I previously explained.

"I understand that what I have just explained may be unsettling to one or both parties present today. I would ask that both parties make their concerns known before mediation begins. Do either of the parties present today take issue with my past experience in doping control disputes?"

Cochran: “No. Please proceed.”

Black: “I suppose my client doesn’t take issue with it. I would like to note that, if, at any time, you show any sort of bias towards the athlete, my client and I will stand up and walk out of the room.”

Vencill: “Mr. Black, please refrain from making threats to either myself or the opposing party. If you have a serious concern, please make it known now, before mediation begins.”

Black: “Like I said, Kicker, stay clean. Oops, I mean, stay neutral.”

As the above dialogue demonstrates, Black is an aggressive attorney. He wasted no time before taking jabs at and making threats to the mediator. It is clear that Black’s history as a high-profile criminal defense attorney has carried over into his new job as USADA’s legal counsel. He takes a more aggressive approach than Cochran.

IV. Ethical Dilemma Arises

The ethical dilemma in this mediation is a clear conflict of interest. The mediator, chosen by one party, and accepted by the other party, has had first-hand, personal experience with doping control disputes. He was suspended from the sport of swimming for two years, essentially ending his professional competitive career. Although he has become a successful mediator, he has only been a mediator in doping control violations three times, previously. In none of those mediations was the participating athlete a swimmer. Therefore, this is the first mediation Vencill has done with close ties to swimming. He mentioned that he had previously mediated three doping control violation disputes as part of the Mediation Protocol program, but he failed to mention that none of those mediations involved a swimmer. This mediation might prove too difficult for Kicker to mediate without injecting his own opinions of cheating athletes and the doping-control organization.

What could potentially be a bias towards the swimmer participating in the mediation, became complicated with news

from Mr. Cochran. The following conversation occurred between Mr. Vencill and Mr. Cochran during a break, in the employee lounge, after the end of the first joint session, and before Mr. Vencill's first caucus with USADA –

Cochran: “So, Kicker, how long do you think we'll be here? I know we have you for the full day, but we made some progress in there right? I mean, Adam is looking good right now isn't he? He might be swimming again by January!”

Vencill: “You know that I don't make the decisions here, Johnny. As for how long this might take, that is entirely up to you and Roy.”

Cochran: “Well, what about all the other swimmers? Did Roy come to their mediations? I find it hard to believe that the Lead General Counsel for USADA is going to these things on a monthly basis... what happened to junior associates? Am I right? Why do you think she is here, is Adam that much more important than all the other swimmers you were a mediator for?”

Vencill: “Well, first of all, I never said that I was a mediator for three swimmers before.”

Cochran: “What? Yes you did, during your whole introductory schpeal thing. You said, ‘blah, blah, blah, I participated in three of these experimental drug-testing dispute mediations as part of the Mediation Protocol, set forth—blah, blah, blah.’”

Vencill: “No Johnny, I didn't say anything about mediating for other swimmers. I was a mediator for different sports, all three times. This will be the fourth sport I mediate for.”

Cochran: “What the hell, Kicker. I thought you were on our side, here. Why do you think I picked you!”

Vencill: “You picked me because I am an excellent neutral third party. Just because you thought my past might make me lean towards the athlete doesn't mean I actually will.”

Cochran: “Well, I suppose it doesn't quite matter does it!”

Vencill: “What do you mean by that?”

Cochran: “Isn’t it obvious? Man, I hate my job. Always representing the bad guy. There are no gloves here, Kicker! All I have to say is, I am very grateful this kid hired me to be his attorney for mediation, the smallest gloves in the world couldn’t get this kid out of the mess he is in.”

Black: “What the hell is going on here?”

Cochran: “Not a thing, Roy! Just getting some coffee, would you like a cup?”

Black: “No thanks, I don’t drink coffee anymore.”

Cochran: “What’s the matter? It’s just a little caffeine! Its not illegal...yet!”

Black: “May we borrow you for caucus now, Kicker? Stacy is all set up in the conference room?”

Vencill: “Of course, I will be right in.”

Just then, Mr. Black turned and walked towards the conference room. Once Mr. Cochran was sure that Mr. Black had turned the corner, and was out of ear-shot, he quickly turned to Mr. Vencill.

Cochran: “Listen, Kicker. What I told you was confidential. No part of our conversation should be shared with Ms. Michael-Miller or her counsel. It is private information that my client does not want to share. Understood?”

Vencill: “Sure, Johnnie. Sure.”

The above dialogue demonstrates that Cochran’s plan is to sit and wait. Clearly, Cochran knows that his client cheated and took performance-enhancing drugs. Before he makes any demands, Cochran prefers to see what the other party proposes and will work from there. Unfortunately, Cochran relied on his selection of a mediator with a bias towards swimmers, but the mediator quashed those expectations when he declared that he had yet to mediate

between USADA and a swimmer. Cochran's sit-and-wait strategy may not have been as effective as he had hoped.

V. Conclusion

A. *Joint Session After Plaintiff Caucus*

During caucus with Mr. Black and Ms. Michael-Miller, Mr. Cochran's words rang through Mr. Vencill's mind. He could not believe that Johnnie Cochran had exposed his client, it was exceptionally un-characteristic. What was Mr. Vencill supposed to do with the information that Johnnie volunteered? Obviously, he could not share the information with Mr. Black or Ms. Michael-Miller, but he felt his impartiality slipping away each time he thought of Cochran's words. The following is an excerpt of the transcript from Vencill's caucus with Ms. Michael-Miller and Mr. Black.

Black "Are there any facts that my client should know before she offers a settlement agreement on behalf of USADA?"

Vencill: "So your intentions are to settle the dispute as quickly as possible?"

Black: "Well, unless you suggest otherwise, Mr. Mediator."

Vencill: "You know that it is beyond my duty to suggest a party's course of action during mediation. That is exactly why you are employed Mr. Black. I am here to facilitate. That being said, are you prepared to offer a settlement agreement?"

Michael-Miller: "He is just a boy. This happens more often than you think! A rising star starts taking all sorts of supplements, at the behest of his parents, trainers, teammates, friends, you name it! The poor kid took a tainted supplement, we don't need to test the product, the odds are high he didn't intentionally cheat."

Vencill: "I take it you won't be calling any experts?"

Black: "Experts! Kicker, are you hearing her? She just wants to settle."

Vencill: “Alright then, are you comfortable going back into joint session and offer your settlement agreement?”

Michael-Miller: “Lets do it.”

Kicker Vencill could not believe that he was facilitating a lesser penalty for a cheater. It weighed too heavily on his past experiences, and he found himself wanting to share the confidential information. The trouble was, Kicker had no idea whether or not Adam did in fact cheat. He could only assume, from the cryptic nature of Cochran’s words, that Adam did in fact take a performance-enhancing drug. Even so, the very thought made Kicker’s blood boil. He knew what he had to do.²

Final Joint Session:

Vencill: “Before I open discussion for our final joint session, I would like to announce my withdrawal from this mediation. I will submit my report to the Mediation Protocol board, and they will handle the matter from there.”

Black: “What do you mean you’re withdrawing? You told us at the start that you had no problems, no issues with impartiality! You just wasted our time! What do we do now? Where do we go from here? I will be filing a complaint!”

Vencill: “Mr. Black, I am terribly sorry, but if you feel the need to filed a complaint, you may do so with the Mediation Protocol Board directly. As for the next step in the process, that is entirely up to the Board, after its review of my report.”

Adam: “Wait, What? What do you mean it is up to the Board, I only have one shot at this whole mediation thing! Am I screwed

² According to the rules for Certified and Court-Appointed Mediators, Rule 10.330 (b), a mediator shall withdraw from mediation if the mediator is no longer impartial. Rule 10.330 (a) defines impartiality as freedom from favoritism or bias in word, action, or appearance, and includes a commitment to assist all parties, as opposed to any one individual. *Rules for Certified and Court Appointed Mediators*, Florida Courts, http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf.

now? Do I have to do the whole arbitration thing? Johnnie, what the hell, you said this wasn't going to happen!"

Vencill: "Mr. Walsh, I am very sorry. I understand your frustration. However, this program is very new and we are still working out the kinks. The Board has not yet determined a protocol for this scenario. It will decide whether or not you will be able to continue with mediation or if you will have to go through the arbitration process."

Adam [to Stacy]: "Stacy, can't we just settle outside of mediation? I mean, why does Kicker have to be here, we can come to an agreement by ourselves, right?"

Michael-Miller: "I don't think so Adam, I'm really sorry. I am a USADA representative, and USADA makes the rules. I am not authorized to settle outside of mediation."

There was a long pause.

Vencill: "Very well. That will conclude our session for today. Mr. Black and Mr. Cochran, please sign this release form, which simply states that no settlement was reached due to mediator withdrawal, not the parties' inability to settle. I will write a report, as an addendum to this release, which will be submitted to the Board within 5-7 business days."

The agreement, signed by both parties, terminates the mediation and binds all parties to confidentiality, including the mediator. Because the parties were unable to reach an agreement before the mediator withdrew, the agreement will not include settlement language. Therefore, Adam still faces a two-year suspension from competition, and unless the Board declares otherwise, he will either have to accept his suspension or proceed through the existing appeals process, which takes considerably longer. Moreover, the agreement provides confidentiality for each party involved, which means that Kicker may explain to the board that he withdrew from the mediation because of impartiality. However, he may not explain the circumstances that led to his impartiality because those circumstances include a privileged conversation between himself and the defendants counsel.

B. Mediator's Considerations Post-Withdrawal

The mediator in this case had multiple factors to consider before announcing his withdrawal from the mediation. First, he might have considered his reputation as a mediator and his position as a preferred USADA mediator. And second, he might have considered the consequences of both continuing mediation and withdrawing from mediation.

Considering how small the list of recommended mediators is for the USADA Mediation Protocol, Kicker Vencill might have thought about his reputation with respect to his position on that list. He was chosen as a preferred mediator, ostensibly because of his expertise as a mediator and his intimate knowledge of the sport. However, it was understood that his past was behind him and he would be able to fulfill his duty as a neutral third party without being partial. His withdrawal from mediation for actual impartiality, not merely the appearance of impartiality, begs the question, was he truly impartial to begin with? The Board might question his judgment and ability to remain impartial. Likewise, his position on the preferred list of mediators might be in danger.

Another, less personal, consideration would have been Adam's future, and the future of the USADA Mediation Protocol. The facts suggest that the Mediation Protocol has been successful up until Adam's mediation, which means that its procedure, as written, has not encountered any obstacles. Upon announcing his withdrawal, Kicker informs both parties that the Protocol lacks procedure for this exact scenario; Adam's future is in the hands of the Mediation Protocol Board. Such a scenario stands to endanger Adam's future in sport, and the Protocol altogether. The obstacle the board will now face in determining the next procedural step might open the door to criticism on the national and international level. The United States Olympic Committee is opposed to exposing itself to national and international criticism, which means that the Mediation Protocol could be terminated.

The factors that Kicker may have considered before announcing his withdrawal are limitless. What was most important to him was maintaining fairness and impartiality. In order to maintain those paramount characteristics to any mediation practice, Kicker's only option was to withdraw.

C. Overall Conclusion

The Purpose of this paper was to explore mediation as an alternative to the formulaic, and highly complex dispute resolution currently practiced in the world of Olympic-sport anti-doping. In this specific mediation, the defendant party chose a mediator based on that mediator's past experience and knowledge of the field. Unfortunately for the defendant, it was the mediator's past experiences that ultimately forced the mediation to its end. Although alternative methods of dispute resolution existed, the parties in this mediation chose to mediate because of their common goals. However, this mediation demonstrates that even in the presence of common goals, neutrality might be difficult to maintain.

Moreover, the presence of bias in one of the preferred mediators might lead to the assumption of bias in the rest of the preferred mediators. Kicker was asked to participate in the Mediation Protocol because of his experience and success as a mediator and also his experience with both swimming and doping-control. It was the latter that ultimately drove him to withdraw from the mediation. Compare Kicker to the other mediators selected. Although the facts do not mention the full list of preferred mediators, at least one other mediator, chosen by Mr. Cochran, was on the preferred list of mediators because of his experience with swimming. It is likely that the Board reached out to other swimmers to join its preferred list. Impartiality might be a common theme among many of the other mediators on the Mediation Protocol Board's Preferred List of Mediators.

Anti doping is an exceptionally complex process, by which the United States Olympic Committee attempts to preserve its own legitimacy. Mediation between the allegedly doping athlete and the anti doping organization might prove to be too simple. Although alternative dispute resolution might be the answer to the concerns of both the USOC and the athlete challenging a positive drug test, but mediation may not be the most appropriate form of dispute resolution to reach a settlement.

APPENDIX 1 – Background Information

USADA

In Florida, mediators are governed by the Florida Rules for Certified and Court-Appointed Mediators. The Florida Rules provide mediators with guidelines meant to maintain the integrity of the profession, and are enforced by the Florida Mediator Ethics Advisory Committee. Much in the same way that the Advisory Committee maintains the integrity of the mediation profession, the United States Anti-Doping Agency maintains the integrity of sports in the United States.

The U.S. Anti-Doping Agency, or USADA, is the national anti-doping organization in the United States for Olympic, Paralympic, Pan American and Parapan American sport.³ USADA began on October 1, 2000 as the result of recommendations made by the United States Olympic Committee’s Select Task Force on Externalization, in an effort to uphold the Olympic ideal of fair play.⁴ Its mission is to “preserve the integrity of competition,” “inspire true sport,” and “protect the rights of U.S. Athletes.”⁵ In an effort to accomplish its mission, USADA works to “systematically identify and sanction those individuals who are engaged in the effort to gain an advantage over athletes who are competing clean. . . .”⁶

Paramount to USADA’s mission is the testing program. The testing program has two branches: in-competition (event) testing and no-advanced-notice out-of-competition testing.⁷ In-competition testing is generally developed through coordination with each sport’s National Governing Body (NGB).⁸ For example, USADA and the track and field NGB might coordinate to test the

³ *About USADA*, United States Anti-Doping Agency, <http://www.usada.org/about> (last visited November 5, 2013).

⁴ *History*, United State Anti-Doping Agency, <http://www.usada.org/history> (last visited November 5, 2013).

⁵ *Mission/Vision*, United States Anti-Doping Agency, <http://www.usada.org/mission-vision> (last visited November 2, 2013).

⁶ *About USADA*, United States Anti-Doping Agency, <http://www.usada.org/about> (last visited November 5, 2013).

⁷ *About USADA’s Anti-Doping Program*, United States Anti-Doping Agency, <http://www.usada.org/program/> (last visited November 2, 2013).

⁸ *Test Distribution Planning*, United States Anti-Doping Agency, <http://www.usada.org/tdp> (last visited November 2, 2013).

top three finishers and randomly selected athletes, such as those finishing 6th, 9th, and 12th. Out-of-competition testing is conducted within a registered testing pool of top-level athletes who are subject to both In-Competition and Out-of-Competition testing as part of a test distribution plan and must provide whereabouts information.⁹ Generally, USADA determines this type of testing by analyzing the number of athletes in the USADA registered testing pool, and also by taking into consideration selection formulas or requests for target selection of particular athletes which are proposed by the United States Olympic Committee or a particular NGB.¹⁰

Athletes chosen for doping control will undergo the sample collection process, which includes both urine and blood testing.¹¹ Athletes must be notified of their selection for testing by a USADA doping control officer or a USADA Chaperone.¹² Once the athlete has been notified of their selection, the athlete will remain under continuous supervision, which is conducted by the doping control officer or the chaperone.¹³ For urine sample collection, once the athlete is ready to provide the sample, he or she will be asked to select a sealed sample collection vessel from a choice of vessels; pull his or her shirt up to mid torso and pants down to mid-thigh to provide a clear view of the sample; provide a urine sample of at least 90 milliliters under direct observation of a doping control officer or chaperone of the same gender; and immediately secure the vessel once the athlete is finished providing the sample.¹⁴

For blood sample collection, an athlete will undergo a slightly more complicated process. Athlete selection and notification does not change.¹⁵ However, once an athlete is ready to provide his or her blood sample, the athlete is instructed to remain in a seated position for a minimum of ten minutes prior to

⁹ *Id.*

¹⁰ *Id.*

¹¹ <http://www.usada.org/collection/> (last visited November 2, 2013).

¹² *Sample Collection Process for Urine Testing*, United States Anti-Doping Agency, <http://www.usada.org/urine/> (last visited November 2, 2013).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Blood Sample Collection Process*, United States Anti-Doping Agency, <http://www.usada.org/blood/> (last visited November 2, 2013).

the blood draw.¹⁶ A blood collection officer will clean the athlete's skin with a sterile disinfectant swab in the location where blood will be drawn, apply a tourniquet to aid in the collection, and begin to draw the blood sample.¹⁷ Although multiple vacutainer tubes of blood could be drawn, less than one tablespoon of blood will be drawn.¹⁸

Upon completing sample collection, either urine or blood, the doping control officer will guide an athlete through the remaining paperwork corresponding to the blood collection session.¹⁹ To protect the athlete and ensure anonymity of the sample, both blood and urine samples collected are sent to the laboratory with an identification number instead of the athlete's name.²⁰

USADA is also responsible for the results management and adjudication process for the anti-doping program in United States Olympic sports.²¹ In the event that an athlete produces a positive sample, any of the following sanctions may apply: disqualification of results in a particular competition or event; forfeiture of any medals, points, and prizes; team disqualification and forfeiture; fines, loss of benefits, grants, awards, employment and training facilities provided by the USOC; an ineligibility period that may vary according to circumstances; and public announcement.²²

Upon the discovery of an adverse analytical finding, the matter proceeds to the USADA independent anti-Doping Review Board, which is a panel drawn from a pool of experts.²³ After its analysis, the review board makes a recommendation to USADA as

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, see also *Sample Collection Process for Urine Testing*, United States Anti-Doping Agency, <http://www.usada.org/urine> (last visited November 2, 2013).

²⁰ See generally *Blood Sample Collection Process*, United States Anti-Doping Agency, <http://www.usada.org/blood/>, *Sample Collection Process for Urine Testing*, United States Anti-Doping Agency, <http://www.usada.org/urine>.

²¹ *Results Management*, United States Anti-Doping Agency, <http://www.usada.org/results/> (last visited November 2, 2013)

²² United States Anti-Doping Agency Athlete Handbook, page 29, found at: <http://www.usada.org/uploads/athletehandbook.pdf>.

²³ *Id.* at 30.

to whether there is sufficient evidence to charge the athlete with an anti-doping rule violation.²⁴ If an athlete is then charged by USADA for an anti-doping rule violation, he or she has the option of either accepting the sanction proposed by USADA or taking the case to a hearing before arbitrators who are members of both the American Arbitration Association and the Court of Arbitration for Sport.²⁵ The arbitral decision may be appealed to the Court of Arbitration for Sport, but the appellate decision issued by the CAS is final and binding on all parties.²⁶

The current procedural system within USADA leaves little room for the gray area between simply accepting sanctions and taking the case to a hearing before a panel of arbitrators. Mediation could provide an excellent, neutral alternative for USADA, the NGB involved, and the athlete. In most cases, USADA and the NGB involved have aligned interests. Both organizations are out to uphold the integrity of sport; USADA's mission casts a broad, multi-sport net, whereas the NGB seeks only to preserve the integrity of its own sport.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

APPENDIX 2 – Why Mediate this Dispute?

WHAT DOES THE SWIMMER [ATHLETE] STAND TO LOSE

In many circumstances, an athlete that is charged with an anti-doping rule violation has everything to lose. The amateur athletes participating in the Olympic sports governed by USADA are held to a much higher standard than many professional sports players.²⁷ Serving a doping-violation suspension in an Olympic sport, such as swimming, is potentially career ending.

According to USA Swimming protocol, if a swimmer tests positive for any banned substance, he or she is subject to a potential two-year competition suspension.²⁸ It could be that a swimmer tests positive within the two years preceding the summer Olympiad, which means that the Olympics would fall squarely within the swimmers suspension. Even if the swimmer tests positive before the two years preceding the Olympic games, Rule 45 of the Federation International Natation Acquatica (FINA) rules mandate that any athlete testing positive prior to an Olympic games forfeits his or her opportunity to compete at the upcoming, and at times, the following Olympic games.²⁹

As such, it is in a swimmer's best interest to serve the shortest possible suspension, if any at all. Elite swimmers may only compete half of a dozen times a year, which means that each and every opportunity to compete is crucial to his or her long-term success. Each swimming competition serves as a "check-up" that informs a swimmer and his or her coach as to what kind of progress has been made towards the swimmer's ultimate goal; namely, making the Olympic team. Imagine a swimmer that is

²⁷ The Major League Baseball Players Association has negotiated a rather lenient discipline procedure for athletes that test positive for banned substances. For example, according to "Major League Baseball's Joint Drug Prevention and Treatment Program," if an athlete tests positive for performance enhancing substances, the first violation will yield a 50-game suspension, the second violation will yield a 100 game suspension, and only after a 3rd suspension will the League permanently suspend the athlete from both Major and Minor League Baseball. Found on page 22, <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

²⁸ See *General Rules*, GR 4.5, http://www.fina.org/H2O/docs/rules/generalrules_20132017_formatted.pdf (last visited November 24, 2013).

²⁹ *Id.*

unable to compete for two years. Such a suspension would have a tremendous impact on a swimmer's motivation to continue training rigorously, especially with no legitimate, sanctioned competition in sight. As a swimmer, simply accepting a two-year suspension bears a high, career-ending risk.

Alternatively, a swimmer might decide to challenge his or her suspension on appeal before a panel of arbitrators. Generally, the arbitration is held before a panel of arbitrators, governed by the rules set forth by the American Arbitration Association.³⁰ Appeals are closed to the public, therefore the procedure, and anything revealed during arbitration, is kept from public record. During an appeal, a swimmer has the opportunity to challenge the suspension, and provide character witnesses, experts, and scientific data to support his or her claim. Upon deliberation, the panel of arbitrators delivers its final opinion, which can then be appealed by any party to the Court of Arbitration for Sport, located in Europe.³¹ Any appeal taken before the CAS is binding on all parties involved.

Appeal is surely in a swimmer's best interest, if he or she expects to reduce a suspension, but an appeal is both timely and costly. Time is a precious commodity that elite-level Olympic athletes cannot spare. As aforementioned, suspension may overlap with an Olympic cycle, prohibiting an athlete from competing for his or her country. Moreover, many elite athletes have sponsorships, but the average elite swimmer surely does not have an income worthy of sustaining two possible appeals. Although an appeal may prove successful, it comes at a cost many athletes are either unwilling or unable to pay.

WHAT DOES USADA STAND TO LOSE

In 2000, USADA was created with a three-pronged goal in mind: preserve the integrity of competition, inspire true sport, and protect the rights of athletes in the Olympic and Paralympic

³⁰ *Adjudication*, United States Anti-Doping Agency, <http://www.usada.org/adjudication/> (last visited November 24, 2013).

³¹ See *Jessica Hardy v. FINA, et. al.*, Hardy's suspension was reduced from a possible four years to one year during the arbitral proceedings. FINA, the international governing body of all aquatic sports, appealed this decision based on the fact that it was made upon a closed-door proceeding. FINA sought to impose the IOC's Rule 45, which would ban Hardy from competing in the subsequent Olympic games.

movement in the United States.³² The United States Olympic Committee was aware that its athletic programs lacked international credibility, and as a result created its Select Task Force on Externalization in order to promote the Olympic ideal of fair play.³³ Aware of its challenge, the task force recommended to the USOC what is now USADA, and beginning October 1st, 2000, USADA “was given full authority to execute a comprehensive national anti-doping program encompassing testing, adjudication, education, and research, and to develop programs, policies, and procedures in each of those areas.”³⁴ USADA’s comprehensive national anti-doping program is the USOC’s strongest line of defense against international criticism claiming that the United States promotes unclean and unfair sporting.

As such, it is in USADA’s best interest to reprimand those athletes with doping violations to the furthest extent possible. Think of USADA as the USOC’s zero-tolerance policy against doping, for the sake of USOC’s international reputation. Suspensions allow the USOC and USADA to use athletes with doping violations as examples of the potentially career-ending impact that a doping violation carries with it. In doing so, USADA sends the message to Olympic athletes across the United States that doping does not fit within the Olympic ideal of fair play, it will not be tolerated, and it will be punished.

³² *About USADA*, United States Anti-Doping Agency, <http://www.usada.org/about> (last visited November 5, 2013).

³³ *History*, United States Anti-Doping Agency, <http://www.usada.org/history> (last visited November 5, 2013).

³⁴ *Id.*

APPENDIX 3 – Players in the Game

Adam Walsh: Adam is a fictional character, imagined solely for the purpose of this paper. However, many athletes in the United States face the dilemma that Adam experiences in this fact pattern. I chose to make Adam a swimmer because I am very familiar with how doping-control is integrated into the swimming world. Through experience, I have been exposed not only to its merits, but also to its flaws. To best represent the class of persons that usually encounters doping-control measures, Adam is described as a young athlete, but rising in terms of performance and success because those characteristics best represent the class of persons normally subjected both to doping-control measures and to the pressures of using performance enhancing drugs.



Pablo Morales: Although Pablo is not an athlete ombudsman he is a real person. For the last thirteen years, Pablo has served as the head coach of the University of Nebraska swim team. Pablo is a graduate of Stanford University (1987), where he an NCAA-record 11 individual titles.³⁵ Morales represented the United state in the 1984 and 1992 Olympic Games, earning three gold and two silver medals.³⁶ Moreover, Morales earned a law degree from Cornell University in June of 1994.³⁷



Johnnie Cochran: Johnnie is a famed celebrity attorney that represented clients like O.J. Simpson and Michael Jackson.³⁸ Cochran earned his Juris Doctor from the Loyola Marymount University School of Law and began his legal career with the city of Los Angeles, serving as a deputy city attorney in the criminal division.³⁹ For purposes of this paper, Cochran did not pass

³⁵ *Pablo Morales*, Nebraska Athletics, <http://www.huskers.com/ViewArticle.dbml?ATCLID=3250> (last visited November 24, 2013).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Johnnie Cochran*, Biography, <http://www.biography.com/people/johnnie-cochran-9542444> (last visited November 24, 2013).

³⁹ *Id.*

away in March 2005. Instead, he reopened his private practice, primarily out of boredom from retirement, but began representing celebrity athletes in both criminal and civil cases. That is how Cochran formed a relationship with Pablo Morales that ultimately led to Cochran representing Adam.

Stacy Michael-Miller: Stacy is a USA swimming employee. She currently serves as staff at USA Swimming headquarters in Colorado Springs, Colorado. Stacy generally serves as the USA Swimming National Team's liaison to USADA. As such, I have had the privilege of making Stacy acquaintance, and forming a friendship with her. However, for the purposes of this paper, Stacy was offered a position with USADA to act as the USADA representative in Mediation Protocol cases involving swimmers. Her intimate knowledge of the USA Swimming National team, and her former position as the doping-control liaison, made her an incredibly attractive candidate for the new position at USADA. Not only did USADA offer an increase in her annual salary, but Stacy also saw this offer as an opportunity to become a swimmer-friendly USADA representative.



Roy Black: Roy graduated from the University of Miami with his bachelor's degree in 1967 and later with his Juris Doctor in 1970.⁴⁰ For purposes of this paper, Roy retired from his position as senior partner at Black, Srebnick, Kornspan & Stumpf, P.A. He felt the need to slow down the pace of his life, and grew tired of representing criminals. Instead, he decided it was time to represent more plaintiffs. As such, he accepted an offer from USADA to become lead counsel in charge of mediation. In his new position, he has the opportunity to catch "cheating bad guys." He has since moved to Colorado, where he can pursue his second favorite hobby behind golf, curling.

⁴⁰ *Roy Black*, Senior Partner, <http://www.royblack.com/attorneys/Roy/Black/> (last visited November 24, 2013).



Kicker Vencill: Kicker is an actual athlete and did graduate from the University of Western Kentucky, but he did not go to law school (only for purposes of this paper did Kicker graduate from law school and become a successful mediator). Kicker tested positive for a banned substance in January 2003, which cost him a shot at the 2004 Olympics.⁴¹ Following his positive test, Kicker sued Ultimate Nutrition of Farmington, Connecticut and in May 2005 an Orange County Superior Court jury ruled unanimously that the multivitamin Kicker took was contaminated with steroid precursors, which resulted in a positive drug test.⁴² The jury awarded him damages of \$578,635.00.⁴³ Kicker is exactly the type of swimmer the Mediation Protocol is meant for. Perhaps, if the Protocol was around in 2003 when Kicker tested positive, he may have been able to participate in the 2004 Olympic Trials.

⁴¹ *Vencill was suspended two years, missed Olympics*, ESPN, <http://sports.espn.go.com/oly/news/story?id=2059714> (last visited November 24, 2013).

⁴² *Id.*

⁴³ *Id.*